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

In the Matter of	)	
	)	
RAY AUSTIN	)	OAH No. 20-0616-SEC
	)	Agency No. 2019-00092

NOTICE TRANSMITTING FINAL DECISION

Attached is the administrative law judge's decision in this matter, which became the final agency decision on April 23, 2021 by operation of AS 44.64.060(f).

Judicial review of the 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: April 30, 2021.

By: Patricia Sullivan
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Certificate of Service: I certify that on April 30, 2021, a true and correct copy of this document was distributed to the following: Ray Austin (by email and mail); Robert Schmidt (by email); Dep't of Law central email (by email).

By: Patricia Sullivan
Office of Administrative Hearings

BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE DEPARTMENT OF COMMERCE, COMMUNITY AND ECONOMIC DEVELOPEMENT

In the Matter of	)	
	)	
RAY AUSTIN	)	OAH No. 20-0616-SEC
	)	Agency No. 2019-00092

DECISION AND ORDER

I. Introduction

Ray Austin published a series of statements on a Facebook page related to the activities of an Alaska Native Corporation (ANC) of which he was a shareholder. The Alaska Department of Commerce, Community and Economic Development, Division of Banking and Securities (Division) investigated and determined that Mr. Austin's Facebook posts amounted to proxy statements and solicitations, one of his posts contained material misrepresentations, and Mr. Ray had not complied with Division regulations regarding filing and disclosure. The Division issued a "cease and desist order" to Mr. Ray containing its findings and proposed penalties. Mr. Ray challenged the Division's order and requested an administrative hearing.

The evidentiary hearing took place September 15-16, 2020. Because the hearing involved a claim by Mr. Ray that the First Amendment prohibited regulation of his Facebook postings by the Division, this decision has been delayed in expectation of a ruling by the Alaska supreme court on that issue. Based on the evidence presented at the hearing, this Decision concludes that many of Mr. Ray's Facebook posts were proxy statements and solicitations that should have been contemporaneously submitted to the Division. As applied, the statutes and regulations requiring he do so are narrowly tailored to promote compelling government interests and do not violate his constitutional right to free speech. Accordingly, the Division's cease and desist order is therefore affirmed as to that finding of violation.

However, this Decision also concludes that the single Facebook post identified by the Division as containing material misrepresentations does not do so. The Division's cease and desist order is therefore reversed as to that finding of violation.

II. Facts[1]

A. Historical Background and the Investigation

Goldbelt Native Corporation (Goldbelt) is an Alaska business corporation formed under AS 10.05. Goldbelt represents almost 4,000 shareholders. Those shareholders own 32,000 acres of land in the Juneau area and 272,000 shares of Goldbelt stock, representing assets of over $100 million.[2] Goldbelt is run by a nine-member board of directors elected by its shareholders to staggered terms. Three directors are elected at each annual meeting.[3]

Goldbelt is designated to receive benefits as a regional corporation under the Alaska Native Claims Settlement Act (ANCS), 43 U.S.C. ss 1601-1628. It is exempt from the Federal Securities Acts of 1933 and the Securities Exchange Act of 1934.[4] However, because Goldbelt has 500 or more shareholders and total assets exceeding $1,000,000,[7] Goldbelt and its shareholders are required to comply with the Alaska Securities Act, AS 45-55.139-160, as well at the proxy solicitation regulations of Title 3 of the Alaska Administrative Code, 3 AAC 08.305-365.[5]

Voting for the board of directors takes place during the annual meeting. Goldbelt's 2018 annual meeting was held July 14, 2018. The 2019 annual meeting was scheduled for July 11, 2019.[6]

Ray Austin is a Goldbelt shareholder with a long history of active shareholder participation.[7] Prior to 2017 he established the Goldbelt Shareholders Facebook homepage to act as a private community message board where Goldbelt shareholders could exchange information and express concerns regarding corporate actions. The site had approximately 500 members in 2019.[8]

In 2019 the Division received two requests from the same Goldbelt incumbent director that it investigate Ray Austin for potential violations of Alaska securities law and associated regulations.[9] The requests alleged that numerous Facebook postings made by

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1 These facts were established by a preponderance of the evidence at the hearing.
2 https://www.goldbelt.com/about.
3 *Id.*
4 The exemption is set forth in 43 U.S.C. 1625 (Supp. 1978).
5 3 AAC 08.305. *Meidinger v. Koniag, Inc*, 31 P.3d 77, 82-83 (Alaska 2002).*See also, Sierra v. Goldbelt, Inc.*, 25 P.3d 697 (Alaska 2001).
6 Testimony of A. Marks; Testimony of R. Austin.
7 DIV. 000030-100. Testimony of R. Austin.
8 Testimony of R. Austin.
9 DIV. 000101-121; 000120-180. Testimony of A. Marks.

Mr. Austin on the Goldbelt Shareholder page in 2019 constituted proxy statements and solicitations and at least one contained false and misleading statements regarding a member of the current Board of Directors.[10] The requests for investigation specified only the 2019 Goldbelt shareholder vote as the subject of dispute.[11]

Alan Marks, a Financial Examiner for the Division, investigated the complaints. He reviewed the relevant Goldbelt Shareholders Facebook Homepage. He found an extensive number of Facebook postings by Mr. Austin from 2017 to 2019. He concluded 35 of those postings constituted proxy solicitations which had not been concurrently filed with the Division. These posts are contained in the record at DIV 000143-180. A list identifying them by number was submitted to the Office of Administrative Hearings (OAH) in a filing dated September 13, 2020. Those numbers are used throughout this decision to designate specific posts.

The posts fall within three broad categories. The first, hereinafter referred to as the Candidate posts, directly address Mr. Austin's prior campaign for election to the Goldbelt board of Directors in 2018, identify his platform, and urge readers to vote for him. These posts include photographs of Mr. Austin, his family and friends, and his political memorabilia. They contain slogans like "Vote for Ray" and "Time for Change." Post 1 is a representative example.[12] Of the 35 postings identified as unfiled proxy solicitations by Mr. Marks, 14 are distinctive Candidate posts.[13] However, of the 14 posts identified by the Division only three were republished for the 2019 shareholders' vote.[14]

The second category, hereinafter referred to as the Shareholder Comment posts, contain information on how Goldbelt is budgeting money and question on-going expenditures such a pay increase to the board of directors. These posts urge other

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10 *Id.*

11 DIV. 000103 and 123.

12 "In my other life, I drove 35/50-ton rock trucks on the pipeline for 2 years. Then off to school to learn RPG & COBOL programming in the 70's. In the 80' I was a programmer on Unisys and IBM mainframes. Then off to deploy lAN/WANs from the 90's. Vote for me to help restore integrity, ethics and to increase revenue to our shareholders and corporation."

13 Div. 000143-180.

14 *Id.* The Candidate posts were identified as numbers 1-8, 10-12, 17-18, and 20. Posts 10, 11, and 20 are duplicates of a picture of Mr. Austin as a candidate. Posts 1 and 17 are also duplicates containing summaries of Mr. Austin's candidate platform. Importantly, all the Candidate posts were originally published in regard to the 2018 annual meeting. Only three candidate posts (5, 8, and the triplicate at 10,11, and 20) were republished in May and June 2019 prior to the 2019 shareholders' vote.

shareholders to examine Goldbelt's financial management and carefully review travel and other expenditures listed in the annual report. Several of the posts contain charts and graphs outlining Goldbelt expenditures and income or explain and identify corporate by-laws.[15] Others request explanations from incumbent board members or chastise certain ethical decisions such as to vote to eliminate the Goldbelt ethics committee or campaign while on corporate-paid trips. Of the 35 postings identified as unfiled proxy solicitations by Mr. Marks, 17 are categorized as Shareholder Comment posts.[16] However, only three of those posts were published regarding the 2019 shareholders' vote: 13, 23, and 28.[17]

The final category, hereinafter referred to as the Criticism posts, contain comments or opinions that directly accuse current and former members of the Goldbelt board of directors of financial or other mismanagement. The Division identified 4 Criticism posts it considered unfiled proxy solicitations. In post 25, dated May 23, 2018, Mr. Austin reposted a Facebook message from shareholder J. Kahklen that criticized board members by name for cancelling a beloved mother's day charity brunch at the same time they voted to increase their compensation.[18] In post 31, dated June 16, 2019, Mr. Austin suggested that a recently elected incumbent board member was misusing ANC money by purchasing $400.00-$1,200.00 Mont Blanc pens[19] In post 33, date unknown, Mr. Austin questioned the propriety of a particular board member campaigning while on travel paid for by Goldbelt.[20]

The Division took particular note of Criticism post 35, dated May 29, 2019, approximately six weeks before the July 13, 2019 annual meeting in Juneau.[21] In pertinent part this post read:

> In 2018 I filed a Banking and Securities (B&S) complaint about Mr. Rick Beasley for false and misleading information by omitting information about being a paid contractor for the tram, and failed to disclose this on his 2018 campaign proxy statement (intentionally omitting information is considered to be false and misleading).

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15 Div. 000143-180. The Division did not allege that any of Mr. Austin's factual representations regarding these issues were inaccurate.

16 Div. 000143-180.

17 *Id.* The Shareholder Comment posts were identified as numbers 13-16, 19-23, 25-30, 32, and 34.

18 DIV. 000169.

19 DIV. 000176 This is the posting that prompted the one of the complaints to the Division. The incumbent subsequently acknowledged she was using Mont Blanc pens, but claimed they were personal rather than corporate expenditures. Testimony of A. Marks.

20 DIV. 000178.

21 DIV. 000179.

> The other B&S complaint was for the elected incumbents of 2018, they failed to file their proxy information for x amount of years, failure to comply with the signed candidates agreement (which Goldbelt failed to enforce and they should have lost all their votes). They failed to make disclosures. They ignored ethics and campaign agreements by campaigning for one another on FB and even knocking on shareholders doors to solicit votes. These violations should have been protected under Alaska State Law. The complaints were investigated and turned over to enforcement, but they failed to enforce.[22]

Mr. Marks spoke with Mr. Austin, who readily admitted that he published all of these materials.[23] Mr. Austin also told Mr. Marks that his intent in submitting the posts was to educate and inform Goldbelt Shareholders and, in some cases, impact their voting decisions.[24]

B. Procedural Background

On June 16, 2020, the Division issued Order No.19-92-S, entitled "Temporary Cease and Desist Order Effective Immediately, Assessing Civil Penalties, with Notice of Hearing Rights and Notice of Final Cease and Desist Order" (Order).[25] The Order focused on several specific items included within Mr. Austin's Facebook posts identified above. The Order asserted the 35 identified Facebook posts were "proxy statements" as defined in 3 AAC 08.365(14) "because they are communications that were made available to shareholders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy." It further asserted Mr. Austin "violated 3 AAC 08.307 by failing to file his proxy solicitations concurrently with the Administrator when he distributed them to shareholders." The Order finally asserted Mr. Austin violated 3 AAC 08.315(a) in post 35 by 1) omitting information that the Tramway contract information was subsequently disclosed in 2019 and 2) misstating Alaska law on campaign ethics.[26]

Based on these allegations, the Order sought to impose a civil penalty on Mr. Austin in the amount of $1,000. The Division subsequently explained that amount was determined by assessing $500.00 for failing to file the posts concurrently with the Division and $500.00 for publishing material misrepresentations in post 35. The Order also required Mr. Austin

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22 DIV. 000179-180.
23 Testimony of A Marks; Testimony of R. Austin.
24 *Id.*
25 Office of Administrative Hearings (OAH) Case Referral Notice.
26 *Id.*

to comply with all provisions of Alaska statutes and regulations governing proxy solicitations.[27]

Mr. Austin appealed and requested a hearing before the Office of Administrative Hearings (OAH). He submitted three grounds for hearing: (1) his postings were not proxy statements or solicitations; (2) post 35 was not a misrepresentation, and (3) the First Amendment protects his postings from regulation.

C. The Hearing

Attorney Robert Schmidt represented the Division at the hearing. The Division's case was quite straightforward. Counsel for the Division argued that Mr. Austin's Facebook postings were proxy solicitations; post 35 was a misrepresentation; and the First Amendment right to free speech does not apply to proxy solicitations.

1. The Accusation Mr. Austin Failed to Concurrently File Proxy Materials

a. The Division's Case

Mr. Schmidt called two witnesses. Leif Haugen, Director of Investigations, and Alan Marks, the Financial Examiner, who conducted the investigation. Mr. Haugen explained the Division's role and purpose is regulating Alaska Native Corporations and its interpretation and application of the governing regulations. Mr. Haugen testified the fundamental purpose of Alaska regulations governing proxy solicitations sent to shareholders of Alaska Native Corporations (ANCs) is the same as the SEC's purpose in regulating proxy solicitations sent to shareholders of publicly traded corporations: to ensure that those who solicit proxies fully and accurately disclose to shareholders information that is critical to their informed voting.[28] The Division has committed extensive resources to help ensure both ANCs and their shareholders are educated and informed regarding the securities laws which apply to them.[29]

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27 *Id.*

28 Testimony L. Haugen.

29 The Division has engaged in extensive community outreach and education to encourage ANC shareholders to file any shared information and comments whether electronic communications like Facebook or printed materials such as flyers or letters to the editor. It encourages shareholders to err on the side of submitting too much information rather than miss an appropriate filing. The Division also maintains a website with bulletins and answers to frequently asked questions regarding proxy materials. The website provides a telephone number, and Division staff are available to answer questions. Testimony of L. Haugen and A. Marks.

The Division regularly receives 100s if not 1000s of proxy statements and solicitations for each ANC annual meeting.[30] Facebook postings similar to the 35 identified posts by Mr. Austin are routinely received and fall within the Division's hard-core interpretation of its regulations.[31] The Division concluded the identified 35 Facebook postings published by Mr. Austin on the Goldbelt Shareholders page qualified as proxy statements and solicitations under AS 44.45.160 and 3 AAC 08.316 because they were clearly "made available to shareholders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy" and Goldbelt met the regulatory criteria to require contemporaneous filing with the Division.

b. *Mr. Austin's Defense*

Mr. Austin represented himself. He argued that his Facebook postings were not proxy solicitations as a matter of law; post 35 was not a misrepresentation; and the First Amendment right to free speech prohibited regulating his speech so as to require him to submit filings of general interest and comment regarding an ANC with the Division or risk financial sanction for failure.

Mr. Austin argued his Goldbelt Shareholder Facebook posts were not proxy statements or solicitations because there was no evidence that more than 30 people were exposed to his postings or that any identifiable person was subjectively influenced by the information he provided.[32]

In addition, Mr. Austin argued the posts were "private" communications not subject to regulation. Mr. Austin created the closed Goldbelt Facebook page to communicate with like-minded shareholders. Approximately 500 shareholders were members in 2019, but the site was not owned or maintained by the Goldbelt ANC.[33] As such, Mr. Austin claimed the regulations did not apply.

Lastly, Mr. Austin argued that, assuming the postings were proxy solicitations, application of the ANC security statutes and regulations to this speech would violate his First Amendment rights.[34]

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30 Testimony of A. Marks.
31 Testimony of L. Haugen.
32 *Id.*
33 Testimony of R. Austin.
34 *Id.*

2. The Accusation Paragraph 1 of Post 35 was a Material Misrepresentation

a. How the Division Operates

To provide context for its conclusion post 35 was a material misrepresentation, the Division called Alan Marks, the Financial Examiner who conducted the Division's investigation. To do so Mr. Marks first described the Division's statutory and regulatory authority to respond to complaints.

When the Division receives a complaint, it makes an initial decision regarding jurisdiction. The Division does not have jurisdiction to investigate or enforce complaints that an ANC has violated its own by-laws, policies and procedures, or laws other than those related to securities and banking. However, these types of complaints form a significant percentage of the request to investigate it receives. If the Division lacks jurisdiction, it declines the request for investigation without action. These declined complaints are not matters of public record. The Division does, however, notify the complainant of the decision to decline or open the investigation.[35]

If the Division has jurisdiction, it investigates. The investigation may determine that no violation occurred or that an inadvertent or minor violation that can be corrected with education occurred. In those cases, there is no public record of Division action, and the complainant is not informed of the Division's investigatory conclusion.[36]

The Division may also determine a more significant violation occurred. If it does so, the Division sends a cease and desist order to the individual. The individual may provide a satisfactory justification for their conduct. Or the recipient can acknowledge the error and enter a voluntary agreement with the Division. In those cases, the results are not made public. Nor is the complainant informed of the result.[37] Lastly, the recipient may also contest the cease and desist order through the administrative process. Only if the cease and desist order is affirmed is any public record made.[38]

b. The Division's Case

The Division asserted the first paragraph of post 35 was a material misrepresentation due to omissions by Mr. Austin. Specifically, the Division argued the post was materially

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35 *Id.*; *see also,* 3 AAC 08.360(e).
36 *Id.; see also* 3 AAC 08.315.
37 *Id.*
38 *Id.*

misleading because, although Mr. Austin told Goldbelt Shareholder readers that he made a complaint Mr. Beasley failed to disclose a financial conflict involving the Tramway in 2018, Mr. Austin did not also tell readers that Mr. Beasley was cleared by the Division because Mr. Beasley properly made the disclosure in 2019. According to the Division, omission of that information created the false suggestion that the Division substantiated Mr. Austin's complaint.[39] That is, Mr. Austin's post was materially misleading because it falsely implied that the Division had investigated Mr. Beasley and found him in violation of securities law--which was not true. The Division believed inclusion of the additional information would have significantly altered the reader's perception of events.[40]

Mr. Marks testified regarding the background of the Tramway controversy and provided the following information. On April 12, 2018, Mr. Austin filed a complaint with the Division that Richard Beasley, a Goldbelt director, had a financial interest amounting to a conflict of interest in the tourist concession at Mt. Robert's Tramway and Park, a Goldbelt asset, and Mr. Beasley failed to timely disclose that conflict before the 2018 Goldbelt annual meeting.[41] The Division investigated the complaint and found board member Richard Beasley did have a financial interest in the tourist concession, which involved the contract to run a gift shop and provide the materials and artist for an educational/interactive Totem carving demonstration at Mount Robert's Tramway and Park in Juneau.[42]

The financial interest was not disclosed in the 2018 Goldbelt Annual Report. However, the Division investigator spoke with and accepted representations from Goldbelt's attorney that disclosure had been properly made in the 2019 Annual Report rather than the 2018 Annual report.[43] The Division investigator did not interview Mr. Austin or anyone

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39 Testimony of A. Marks,

40 *Id.*

41 *Id.*

42 Mount Robert's Tramway is a popular tourist attraction in Juneau. In operation since 1996, the tram makes a six-minute ascent of 3,819-foot Mount Roberts from the cruise ship docks in Juneau to a height of about 1,800 feet. From the top a visitor views the Chilkat Mountains, the Gastineau Channel, downtown Juneau, Douglas Island, and the highest peaks on Admiralty Island spread out below. The Tram bills itself as more than a pretty view, however. The park at the top includes a cultural heritage education center, a bald eagle rescue and education enclosure, and an alpine hiking area. A gift shop featuring the work of local artisans and a restaurant are also featured. A traditional Native tree carver working on site is an important aspect of the attraction. The concession contract to provide the totem carving is very lucrative. Testimony of C.R. Wanamaker; Testimony of R. Austin.; Testimony of Doug Chilton.

43 According to the information the Division was given, the Goldbelt annual meeting was scheduled for July 14, 2018 in Juneau. The election materials were distributed on May 22, 2018. Mr. Beasley was not selected for the concessionaire contract until mid-May 2018. The Goldbelt board did not approve offering the

from the Mt. Robert's Tram or Park Concession. He did not speak with Mr. Beasley or Doug Chilton, the prior concessionaire. The Division concluded, however, neither Goldbelt nor Mr. Beasley violated Alaska state securities law because it was reasonable to publish the disclosure in the 2019 Annual Report given the timeline provided by the Goldbelt representative.[44]

Per standard procedure, Mr. Austin was not informed of the results of the investigation.[45] Mr. Marks acknowledged that because the Division does not provide a complainant with the results of its investigations, there was no way for Mr. Austin to have known whether the investigation cleared Mr. Beasley or whether Mr. Beasley acknowledged error and agreed to voluntary sanction.[46]

c. *Mr. Austin's Defense*

There were three parts to Mr. Austin's defense to the accusation post 35 was a material misrepresentation. First, he argued that the Division's overall reading of the post was unduly complicated and ignored the practical realities of Facebook and electronic communications. Second, the post was not misleading because read as a whole he did not make any affirmative misrepresentations and the information he "omitted" would not have been important to a reasonable shareholder. Lastly, Mr. Austin argued the statement regarding Mr. Beasley's failure to disclose the Mt. Robert's Tramway and Park totem pole concession could not have been misleading because it was accurate. Even if not accurate, he should not be penalized for his legitimate and good faith opinion.[47]

Mr. Austin testified the first paragraph of post 35 was accurate: he did report Mr. Beasley for the Tramway financial conflict in 2018. The post was his opinion based on reliable information provided to him from artisans involved in the project. He did not make any claims about what the Division did or did not do in response. He should not be punished for failing to include information regarding the Division's investigation of which he was unaware.[48]

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contract to him until June 2, 2018. The contract was signed in August 2018. Mr. Beasley was paid in October 2018. The contract and payment were included in Goldbelt' s 2019 annual report. Testimony of A. Marks.

44 Testimony of A. Marks.

45 *Id.*

46 *Id.* Mr. Marks testified that the Division routinely gives individuals the options of private censure imposed by consent agreement. The Division only makes contested sanctions a matter of public record. *Id.*

47 *Id.*

48 *Id.*

Mr. Austin presented extensive evidence regarding the basis for his belief that Mr. Beasley acted inappropriately regarding his acquisition of an interest in the Mt. Robert's Tramway and Park tourist concession and in the timing of his disclosure of that interest to the Goldbelt board. Mr. Austin and several witnesses testified on this point.[49] Contrary to the information provided by Goldbelt's counsel to the Division investigator which claimed Mr. Beasley's interest in the tourist concession arose immediately prior to publication of the 2018 election materials in May, Mr. Austin's witnesses laid out a persuasive history of business dealings, contract negotiations, and verbal agreement that occurred at least six months prior to May 2018. Mr. Austin and his witnesses suggested that Mr. Beasley failed to disclose the financial interest in a timely manner to Goldbelt to increase his chances of re-election to the board of directors. It was their opinion Mr. Beasley delayed formal adoption of an existing verbal contract. That permitted Mr. Beasley to stand for re-election without the need to disclose the financial conflict and weather potential fall-out and questions about his conduct vis-a-vis the totem pole concession.[50]

The hearing was the first time either Mr. Austin or the Division heard from witnesses on both sides of the concession contract controversy. At the conclusion of this testimony, Mr. Austin acknowledged he understood why the Division reached the conclusion it did regarding his April 12, 2018 complaint, although he disagreed with it. Similarly, the Division conceded that Mr. Austin had a good faith and sincere belief regarding the timing of Mr. Beasley's contacts with the Mt. Robert's concession contract, although it, too, disagreed with his conclusion.

3. The Accusation Paragraph 2 of Post 35 was a Material Misrepresentation

a. *The Division's Case*

The Division asserted the second paragraph of post 35 was a material misrepresentation because Mr. Austin improperly suggested the Division failed to hold miscreant board of directors responsible for securities violations when, in fact, the Division does not have the authority to investigate the type of complaints identified within the paragraph. According to the Division, post 35 misleadingly misrepresented that Mr. Beasley was guilty of securities violations but the Division failed in its enforcement duties

49 There was extensive testimony on this issue over the course of two days.
50 Testimony of R. Austin; Testimony of C.V. Wanamaker; Testimony of D. Chilton.

when, to the contrary, the Division could not take action on the identified type of conduct.[51] The Division argued a material misrepresentation occurred because Mr. Austin failed to adequately explain the distinction between violations of statute and regulation that the Division has the power to enforce and violations of corporate matters over which it has no enforcement authority.

Again, the Division provided extensive testimony from Mr. Marks to place this conclusion in context. Prior to 2019 Mr. Austin filed several complaints against Mr. Beasley, at least one of which was substantiated.[52] During communications regarding these complaints, Mr. Austin was informed by the Division that it did not have the authority to investigate issues regarding whether Mr. Beasley or other Goldbelt incumbent board members acted in violation of Goldbelt ANC bylaws, policies, or procedures. Mr. Austin was informed the Division could only enforce securities and banking laws.[53]

From the Division's perspective, the second paragraph of post 35 made the false or misleading claim that certain actions taken by board incumbents such as mutual candidate endorsements are against Alaska state law when no such Alaska law exists. The complaints in post 35 regarding disclosure timing, campaign ethics, and voter solicitation did not involve questions of whether Mr. Beasley and the other board members violated Alaska securities law; they only involved allegations the board members violated Goldbelt ANC rules. Mr. Austin was aware of that distinction from prior contact with the Division but omitted to include it.[54]

The Division argued the language used would confuse a shareholder into believing that the type of campaign solicitation and mutual endorsement criticized by Mr. Austin was in fact against Alaska securities and banking law when it is not. The alleged conduct might be in violation of Goldbelt corporate bylaws, but it is not prohibited by statute or regulation. The Division asserted Mr. Austin's comments suggesting the Division "failed to enforce" and omitting information regarding Division enforcement authority resulted in a material misrepresentation to shareholders regarding what actions are against securities law.[55] It was the Division's position that the language would confuse a shareholder into believing those

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51 Testimony of A. Marks.
52 DIV 000017-22; 000218-221; R. Austin filing dated September 14, 2020 (DBS Complaint).
53 Testimony of A. Marks.
54 *Id.*
55 *Id.*

actions were against the law with the result the shareholder's vote would be inappropriately swayed.[56]

b. *Mr. Austin's Defense*

Mr. Austin responded to the Division's misrepresentation accusation by requesting post 35 be read in a common-sense manner rather than evaluated as if he were corporate counsel. According to Mr. Austin, the phrase the "violations *should* have been protected under Alaska State Law" was intended to and did convey the idea that the type of misconduct identified *ought* to be covered by state law, not that it was. Similarly, the phrase the Division "failed to enforce" simply meant the board members were not found in violation of securities law. To the lay person, the Division's jargon was a distinction without a difference: either way the Division took no action. Mr. Austin argued requiring a non-lawyer such as himself to correctly describe the legal distinction between declining to investigate for lack of jurisdiction and declining to impose sanctions inflicted an impossible and unrealistic burden of artful phrasing on simple ANC shareholders.

4. The First Amendment Argument

Mr. Austin argued that the Division's definitions of proxy statement and solicitations were overly broad as applied to his Facebook posts. He argued applying AS 45.55.139 and 3 AAC 08.307 to his simple communications sharing useful information regarding ANC operations to other shareholders, mandating concurrent filing, and establishing punishment for failure, would be a violation of his First Amendment right to free speech.

The Division did not address this issue in its prehearing brief, but it responded to Mr. Austin's claims at the hearing by asserting that his Facebook postings were wholly unprotected speech because they fell withing a "security law exception" to the First Amendment. As such, the Division argued the statutes could and should be broadly applied.

The parties acknowledged the need to carefully consider Mr. Austin's First Amendment claim as it was an unresolved issue of both state and federal law. The parties were aware that the issue of First Amendment protections of ANC proxy solicitations was

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56 Testimony of A Marks.

pending before the Alaska supreme court with a decision in draft circulation. The OAH anticipated a ruling would be announced soon after the hearing. The Alaska supreme court did not, however, issue that decision until January 8, 2021, resulting in a delay in resolution of Mr. Austin's case.

III. DISCUSSION

A. Standard of Review

In an administrative proceeding before the OAH, the moving party typically bears the burden of proof by a preponderance of the evidence.[57] The Division argued that OAH should depart from this standard and apply the deferential standard of review used in state court proceedings to review agency final decisions to the Division's non-final internal administrative decision in Mr. Austin's case.[58] Doing so would provide greater acquiescence to the Division's broad interpretation regarding the definition of proxy solicitations. The OAH does not apply a deferential standard of review to other non-final internal agency decisions and has rejected similar requests.[59] The Division was unable to identify legal precedent or advantageous public policy to support its request for deviation from OAH regulation. This decision, therefore, declines to do so.

The Division bears the burden of proof by a preponderance of the evidence.

B. Overview of the Alaska ANC Securities Statutes and Regulations

1. The Controlling Statutes and Regulations

Alaska was divided into twelve geographical regions under the Alaska Native Claims Settlement Act (ANCSA).[60] These regions, and certain Alaska Native villages, formed corporations under state law known as Alaska Native Corporations or ANCs.[61] Alaska Natives are the shareholders of ANCs, which are for-profit entities. ANCs have diverse financial portfolios, including investments and activities in the petroleum industry, government contracting, real estate, engineering, information technology, telecommunications, environmental science, tourism, aerospace, and natural resources. ANCs provide diverse monetary and non-monetary services to shareholders. These include

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57 *7 AAC 64.290(e).*

58 For a discussion of the deferential standard of agency final decisions s*ee, e.g. Ahmasuk*, 478 P.3d at 673.

59 *In the Matter of L.D.*, OAH 18-0011-MDS (Commissioner of Health and Social Services) at 9-11. (Available on-line at https://aws.state.ak.us/OAH/Decision/Display?rec=3363);

60 43 U.S.C. 1601-1629g (1986 &Supp. 2000).

61 *Id.*

dividends that are often crucial sources of income in addition to elder assistance, educational scholarships, memorial benefits, charitable donations, employment opportunities, economic development, and other opportunities.[62] Because ANCSA did not provide a federal role for monitoring ANCs, they are regulated almost exclusively by state law, which is administered by the Division of Banking and Securities (Division).[63]

Alaska's comprehensive scheme of regulations governing solicitation of proxies and other securities issues is set forth at 3 AAC 08.305-.365. The related statutes are AS 45.55.139 and .160. These authorities empower the State to regulate, among other things, proxies, proxy statements, and proxy solicitations.

Alaska law defines "proxy," "proxy statement," and "solicitation" in 3 AAC 08.365, the regulation that defines terms used in other regulations of the Division of Banking and Securities. The Alaska regulations were adopted in 1981.[64] The definition of "solicitation" was taken from the SEC regulation in effect at that time.[65] The Alaska definitions of "proxy" and "solicitation" have not been modified since they were adopted.[66]

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62 Testimony of L Haugen; A Marks and R. Austin.

63 Testimony of L. Haugen.

64 *See* AAC Register 77 (eff. Jan. 4, 1981)

65 *Compare* 3 AAC 08.365(16) *with* former SEC Rule 14a-1 (version of Rule 14a-1 in effect in 1981 is reprinted in Hornstein, *supra* n.18, at 1130 n.7).

66 *Compare* 3 AAC 08.365(12), (16) (Register 77) *with* 3 AAC 08.365(12), (16) (Register 217) (published in 2016). This is noteworthy because the SEC modified its definition of "solicitation" in 1992 in response to considerable public controversy that suggested that the older definition- still used in Alaska- tended to deter shareholders who were not soliciting proxies from discussing corporate performance and was being used unconstitutionally to regulate speech protected by the First Amendment. *See,* Robert S. Frenchman, *The Recent Revisions to Federal Proxy Regulations: Lifting the ban on shareholder communications,* 68 TUL. L. REV. 161, 163 (1993) ("[T]he SEC concluded that its accumulated regulations created unnecessary regulatory impediments and significantly discouraged discussions among shareholders of corporate performance and other matters of direct interest to all shareholders." (internal quotation marks omitted)) The SEC's revised definition exempts from regulation most shareholder communications in public media, except when the shareholder is expressly seeking proxy authority.[66] *See* 17 C.F.R. § 240.14a-l(l)(2)(iv)(A) (commonly referred to as "SEC Rule 14a- 1"); *see generally* Frenchman, *supra* n.26, at 179 ("Recognizing that the broad definition of solicitation and the massive costs of conducting a regulated solicitation had 'a chilling effect on [the] discussion of management performance,' the Commission, in June of 1991, proposed the disinterested persons exemption. Thisreform provides a broad exemption from proxy delivery and disclosure requirements for unaffiliated shareholders that are not seeking proxy authority." (quoting *Regulation of Communications Among Shareholders,* 57 Fed. Reg. 48,276, at 48,279 (Oct. 22, 1992) (footnotes omitted)). Because Alaska did not modify its definition of "solicitation," this decision has narrowly interpreted the law to avoid the concerns expressed about the overbreadth and questionable constitutionality of the pre-1992 SEC definitions. *See Ahmasuk v. State of Alaska, Department of Economic Commerce, Community & Economic Development, Division of Banking and Securities,* 478 P.3d 665 (Alaska 2021).

The definition sections state:

> "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.[67]

> "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.[68]

> "solicitation" means a request to execute or not to execute, or to revoke a proxy; or 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.[69]

If a communication is a proxy statement or solicitation under these definitions, other substantive rules apply. For purposes of this case, the pertinent ones are 3 AAC 08.307, which provides that all annual reports, proxies or similar materials that are made available by any person to at least 30 Alaska resident shareholders of an ANC that has at least $1 million in total assets and at least 500 shareholders must be filed with the Division concurrently with the distribution;[70] and AS 45.55.920(c) which makes it an infraction punishable by $500.00 for a single violation or $5,000.00 for multiple violations for the failure to do so.

The Alaska Securities Act also prohibits misrepresentations of material fact in proxy materials. AS 45.55.160 states: "A person may not, in a document filed with the administrator or in a proceeding under this chapter, make or cause to be made an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading." The corresponding regulation, 3 AAC 08.315(a), provides:

> (a) A solicitation may not be made by means of a proxy statement, proxy, notice of meeting, or other communication that contains a material

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67 3 AAC 08.365(12).
68 3 AAC 08.365(14).
69 3 AAC 08.365(16).
70 *See,* AS 45.55.139.

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.

An affirmative misrepresentation is material if there is a "substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[71] This is an objective standard; it is not necessary to prove one or more shareholders actually granted a proxy due to the misrepresentation.[72] Determining materiality requires identification of 1) the underlying totality of circumstances; 2) an assessment of the inferences a "reasonable shareholder" would draw from that set of facts; and 3) the significance of those inferences to the shareholder.[73]

A misrepresentation due to omission of a material fact occurs if there is "a substantial likelihood 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."[74] An omission is material when there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. Whether an omission is misleading is objectively determined using a reasonable stockholder's perspective.[75] Omitted facts are not material "simply because [they] may be relevant or of interest to some reasonable shareholders."[76]

2. Recent Alaska Caselaw Regarding ANC Proxy Materials

As noted, a Division regulation defines proxy solicitation to include "other communication[s] ... reasonably calculated to result in the procurement, withholding, or revocation of a proxy."[77] This definition is potentially susceptible to a relatively broad interpretation of what does or does not constitute a proxy solicitation. A variety of federal

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71 3 AAC 08.315(a)

72 *Meidinger*, 31 P.3d at 83.

73 *Id.*

74 *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, (1976)..

75 *Id.* at 445.

76 *IBEW Local 98 Pension Fund v. Cent. Vermont Pub. Serv. Corp.*, No. 11-CV-222, 2012 WL 928402, at 9 (D. Vt. Mar. 19, 2012) (citations omitted).

77 3 AAC 08.365(16).

decisions have held that communications do not have to directly request the execution, withholding, or revocation of a proxy to be considered solicitations, if the aim is designed to ultimately accomplish such a result.[78]

Courts consider "whether the challenged communication, seen in the totality of circumstances, is reasonably calculated to influence a shareholder's decision to provide, revoke, or withhold a proxy."[79] Courts also examine the manner and circumstances of the communication when determining whether it meets the definition of a proxy solicitation.[80] Factors considered include the timing of the communication; whether there is an ongoing proxy contest; and whether there is or will be a request for a shareholder's vote.[81] One federal court has found that letters to shareholders criticizing management and asking shareholders to withhold or revoke proxies were solicitations.[82]

Until recently, decisions of the Alaska Supreme Court regarding the law of proxies have focused on the question of what constitutes a material misrepresentation in a solicitation, rather than the definition of proxy solicitation itself.[83] However, as mentioned above, while this case was pending the Court issued its decision in *Ahmasuk v. Division of Banking and Securities*,[84] directly addressing the question of what constitutes a proxy solicitation under the Division's statutes and regulations. In that case the Division fined Mr. Ahmasuk, a shareholder of Sitnasuak Native Corporation, for writing a newspaper opinion letter about the corporation's shareholder proxy voting procedures – specifically the corporation's policy of allowing "discretionary cumulative proxy voting" for director elections – without filing the letter with the Division as a proxy solicitation under 3 AAC 08.307 and without

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78 *See, e.g., Long Island Lighting Co. v. Barbash,* 779 F.2d 793, 795-796 (2nd Cir. 1985) (holding that proxy rules can cover communications that appear in publications of general circulation and are only indirectly addressed to shareholders).

79 *Gas Natural Inc. v. Osborne,* 624 Fed.Appx. 944, 950 (6th Cir. 2015) (unpublished decision) (*citing Barbash,* 779 F.2d at 796).

80 *Gas Natural Inc.*, 624 Fed.Appx. at 950 (a series of letters criticizing management held to meet the definition of solicitation, even though they did not contain the word "proxy" or identify specific candidates).

81 *Id.*

82 *Securities and Exchange Commission v. Okin,* 132 F.2d 784 (2nd Cir. 1943) (letters to shareholders were a "step in a campaign … to pave the way for an out-and-out solicitation later" and therefore were proxy solicitations, even though (a) they did not advocate for or against a candidate or issue, and (b) no future solicitation ever occurred).

83 *See Meidinger, supra*; *Rude v. Cook Inlet Region, Inc.*, 294 P.3d 76 (Alaska 2012).

84 478 P.3d 665 (Alaska 2021).

making required disclosures under 3 AAC 08.355. Mr. Ahmasuk appealed the Division's sanction, and it was upheld by both an administrative law judge and the superior court.[85]

The Supreme Court, however, reversed, holding that the opinion letter was not a proxy solicitation under the Division's regulations. The Court noted that the regulations provide that a proxy is "a written authorization or consent, or a written revocation of an authorization or consent, for someone to vote a shareholder's shares;" and a proxy solicitation is "a request to execute or not to execute, or to revoke a proxy," or " a communication to shareholders reasonably calculated to result in the procurement, withholding, or revocation of a proxy."[86] The Court emphasized that in analyzing the Division's decision that Mr. Ahmasuk's letter was a solicitation, "context is key;" the context in this instance was a "longstanding corporate governance debate" about Sitnasuak's discretionary cumulative proxy voting policy.[87] The Court then posed a series of questions:

> How are shareholders supposed to debate the issue without what the Division contends is a "communication to shareholders . . . reasonably calculated to result in . . . withholding" some future proxy? For example, how could a group of Sitnasuak shareholders even have prepared and submitted a petition for a corporate charter change eliminating discretionary cumulative voting for directors without coming within the Division's broad interpretation of its solicitation definition? To avoid penalties, must such petition communications and related statements asking shareholders to use direct and not discretionary proxy forms be filed with the Division as a proxy solicitation, along with other burdensome requirements? Surely not.[88]

The Court expressed the concern that "the Division's broad regulatory interpretation contravenes the proxy regulations' purposes and stifles corporate governance debate," potentially "go[ing] beyond valid regulation and into free speech infringement."[89] The Court also considered that Mr. Ahmasuk had written his letter to the editor of the local newspaper well before the corporation's 2017 director election, and that he was "neither running as a director candidate nor asking to be a proxyholder."[90] Talking all of these factors into account, the Court held that "[t]he Division's interpretation and application of its proxy solicitation regulation are unreasonable on the facts of this case" (impliedly finding that the Mr.

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85 *Id.* at 670-71.
86 *Id.* at 673-79.
87 *Id.* .
88 *Id.at 676* (internal citation omitted).
89 *Id.* at 677-78.
90 *Id.* at 678-79.

Ahmasuk's opinion letter was not a proxy solicitation). The Court therefore reversed the sanction against Mr. Ahmasuk (while explicitly not reaching his constitutional arguments).[91]

C. Mr. Austin's 2019 Facebook Postings were Proxy Solicitations

This case centers on the application of Alaska's proxy solicitation regulations to nine communications regarding election of the 2019 Goldbelt ANC board of directors.[92] The 2017-2018 communications are not at issue.

Ahmasuk rejected the broad interpretation of proxy solicitations advocated by the Division in this case. A finding of proxy solicitations requires a determination that the author provided the information with the expectation it would lead to shareholder education or debate ***and*** with the intent that reader shareholders would be persuaded to cast proxies in a particular manner based on the opinions they formed from the information presented. Applying this standard, one must ask whether Mr. Austin's 2019 Facebook posts primarily consist of debate and discourse about corporate issues of importance to shareholders? Or are they primarily aimed at electoral purposes, reasonably calculated to result in the procurement, withholding, or revocation of a proxy?

Mr. Austin's nine 2019 postings can be divided into three categories: "Candidate" posts; "Shareholder Comment" posts; and "Criticism" posts. Mr. Austin's Candidate posts were all originally filed in support of his campaign for a seat on the Goldbelt Board of Directors in 2017 or 2018. At that time, they were indisputably calculated to impact the casting of proxies by soliciting votes for himself. However, Mr. Austin published only four Candidate posts in 2019: posts 1, 5, 8 and 10.[93] It is difficult to ascertain Mr. Austin's purpose in posting the four Candidate posts in 2019.

On balance, however, this decision concludes that the four Candidate posts were designed and intended to solicit proxies against the sitting incumbent board members. These posts were filed only a few weeks before the election. They were published on a website devoted to solely

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91 *Id.* at 679.

92 A 90- day statute of limitations applies to enforcement regarding the earlier posts and they will not be addressed. 3 AAC 08.360(b). The requests for investigation only addressed Mr. Austin's 2019 Facebook posts and no determination of good cause to review 2017 or 2018 was ever made. DIV 000103 and 123. Penalties for Facebook submissions not directly related to the 2019 Goldbelt election are time barred. The Division suggested without persuasive authority that so long as the an electronic posting remained on-line, each time it was read could qualify as a new proxy because any shareholder who chose to do so had the option of reading older posts and using them in their voting analysis. The same would be true of old printed material, and the Division's argument is rejected.

93 The Division did number additional posts, but they were duplicates of these.

to Goldbelt ANC activities. Mr. Austin admitted he sought to influence voter conduct and discourage votes in favor of certain incumbents. Thus, it appears Mr. Austin sought to use his ethical reputation and popularity as a foil to discredit certain incumbent members of the board and sway shareholder voting. The proxy was simply against rather than for an individual. These posts were made available to shareholders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy. Therefore, the four Candidate post re-published in April and May 2019 were proxy solicitations as defined by regulation. They should have been filed concurrently with the Division.[94]

Mr. Austin filed three Shareholder Comment posts in 2019. Post 13, republished in July 2019, described how long each of the incumbents had been in office.[95] Post 23, republished on May 10, 2019, discussed management of the Goldbelt Ancestral Trust.[96] Post 28, republished on April 2, 2019, reminded shareholders that the Goldbelt ethics committee had been eliminated and specifically urged them to reject incumbents who had voted to do so.[97]

These three posts do contain significant information valuable for legitimate debate and discourse about corporate issues of importance to shareholders. But that valuable information is mixed with direct and indirect advocacy against the sitting directors. The overall tenor and emphasis are on removal of current board members. The purpose of these postings is to persuade other shareholders how to vote. Mr. Austin may have been motivated by sincere and legitimate opinions regarding the incumbent board members. That is not the issue, however; the issue is whether these Shareholder Comment posts were sufficiently directed at electoral aims. They were.

Applying *Ahmasuk* standard, this decision concludes the Shareholder Comments were part of a deliberate effort to solicit proxies for or against identifiable candidates or positions being presented to shareholders for a vote. Mr. Austin's Facebook postings providing financial and personal information, criticism, and opinion regarding the incumbent members of the Goldbelt Board of Directors and management were designed to inform and persuade Goldbelt shareholders as to how to cast their proxies. These postings were part of a deliberate effort to solicit proxies for or against identifiable candidates or positions being presented to

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94 3 AAC 08.365(14).
95 Div. 000154.
96 Div. 000166.
97 Div. 000172.

shareholders for a vote. They expressed opinions that were reasonably calculated to affect the views of other shareholder negatively or positively on specific issues and toward particular candidates. They were not simply communications of items of import to shareholder debate intended to assist shareholders reach independent decisions based on their own perceived importance of the information and vote accordingly.
Thus, they were proxy solicitations that should have been filed concurrently with the Division per AS 45.55.139 and 3 AAC 08.307.

The final category were the Criticism posts. Mr. Austin filed only two such posts in 2019.[98] Post 31, published on June 6, 2019, criticized a sitting incumbent and implied she was engaged in the mismanagement of Goldbelt monies by purchasing expensive Mont Blanc pens.[99] Post 35, published on May 29, 2019, directly informed shareholders that Mr. Austin believed the named incumbents had engaged in inappropriate ethical conduct and repeatedly violated Goldbelt bylaws, policies, and procedures.[100] Members of ANC boards of director, like all political and quasi-political office holders, must be held accountable to their fiduciaries. Only through monitoring and dispersion of information can the shareholder body remain educated. Posts which are critical of their performance, including these, serve a valuable function.

However, the posts published by Mr. Austin were also designed to affect electoral decisions. They were designed to inform shareholders of matters of legitimate interest but also directly aimed at influencing proxies against the sitting incumbent board members. They were reasonably calculated to influence shareholder voting. These posts meet the definition of proxy solicitations as outlined in *Ahmasuk.*

In conclusion, the record demonstrates that Mr. Austin authored and published nine Facebooks posts related to the 2019 Goldbelt shareholder election that qualified as proxy solicitations. The Goldbelt Facebook page had more than 30 members and the manner of electronic posting would reasonably lead to a presumption of numerous readers.[101] The size of Goldbelt's financial assets and shareholder composition meet regulatory standards. Thus, under 3 AAC 08.355 those nine posts should have been concurrently submitted to the Division.

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98 The Division listed two other posts, but one was only published regarding the 2018 shareholder vote and the Division did not establish any date for the other.

99 Div. 000176.

100 DIV. 000179-180.

101 3 AAC 08.312(b).

D. Neither AS 45.55.160 nor 3 AAC 08.307 violate the First Amendment as Applied to Mr. Austin's Nine Facebook Posts

Mr. Austin argued that if his postings were proxy statements and solicitations then AS 45.55.160 and 3 AAC 08.307 requiring he file them concurrently with the Division or risk monetary fine constitute an unconstitutional infringement upon his First Amendment rights.

At the hearing the parties agreed that the Alaska supreme court had not resolved the substantive free speech claim made by Mr. Austin.[102] However, the identical issue was then under consideration in *Ahmasuk* with a decision expected in the immediate future. The decision in that case was delayed, however, and did not issue until January 2021. Because the *Ahmasuk* decision resolved that case on grounds other than the expected First Amendment issue, this decision addresses the merits of Mr. Austin's First Amendment challenge in some detail below.

Before doing so, however, it is critical to note that this decision addresses only the question of whether the contested ANC securities statutes and regulations are constitutional *as applied.* " In the circumstances of this case, where neither the statutes nor regulations have previously been ruled unconstitutional by the judicial branch, it would not be appropriate for an executive branch decisionmaker to rule on a constitutional challenge that seeks nullification. Under the doctrine of separation of powers, that function is reserved for the judicial branch, and unless and until judicial invalidation occurs the executive branch must obey the statute."[103] It is appropriate for an executive branch adjudication to make a factual record for a constitutional challenge such as this one, however.

1. The Analytical Framework for Assessing First Amendment Claims

Mr. Austin's case raises the direct question regarding free speech and ANC proxy materials not reached by *Ahmasuk.*

The Free Speech Clause of the First Amendment prohibits the government from "abridging the freedom of speech," but does not define what that freedom entails. The right to free speech, like all constitutional rights is subject to reasonable time, place, and manner

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102 The Alaska supreme court has rejected a First Amendment challenge based on overbreadth and vagueness. *See Meidinger supra* ("Meidinger next argues that Alaska's proxy solicitation regulations are vague and overbroad, and hence violate the right to free speech under article I, section 5 of the Alaska Constitution. But Meidinger' s argument is unsupported by any case law involving proxy solicitations. We therefore reject Meidinger' s constitutional argument.)

103 *In the Matter of Holiday Alaska, Inc.*, OAH 08-0245-TOB (Commissioner of Commerce, Community and Economic Development 2009)(Available on-line at https://aws.state.ak.us/OAH/Decision/Display?rec=6204) at 5.

restrictions.[104] The only restrictions on Mr. Austin's speech were that he would need to concurrently "repeat it" to the Division and it could not contain material misrepresentations.

In order to determine whether AS 45.55.160 and 3 AAC 08.307 establishing these restrictions are unconstitutional as applied to Mr. Austin's nine Facebook posts, the nature of his speech must be identified. Mr. Austin asserted he had an absolute right to free speech that could not be regulated by the Division. The Division asserted that Mr. Austin's Facebook posts were commercial or unprotected speech entitled to little or no First Amendment protection.

The Supreme Court has long history of applying differing levels of protection depending on the nature of the challenged speech and whether it is political or ideological, commercial, or unprotected. The Supreme Court has long interpreted the Clause to protect against government regulation of certain core areas of "protected" speech (including some forms of expressive conduct) while giving the government greater leeway to regulate other types of speech, including a handful of limited categories that the Court has deemed largely "unprotected." Thus, identifying the category of speech at issue (e.g., commercial speech, obscenity) is the first, crucial step in determining what First Amendment standards, including what level of judicial scrutiny, should apply. Regulations of protected speech generally receive strict or intermediate scrutiny, which are high bars for the government to meet. In contrast, the government typically has more leeway to regulate unprotected speech.

Political and ideological speech are the core of the First Amendment, including speech concerning "politics, nationalism, religion, or other matters of opinion."[1] Political speech can take other forms beyond the written or spoken word, such as money[1] or symbolic acts.[1] A government regulation that implicates political or ideological speech generally receives strict scrutiny in the courts, whereby the government must show that the law is narrowly tailored to achieve a compelling government interest.[105]

Commercial speech—generally, speech that merely proposes a commercial transaction or relates solely to the speaker's and the audience's economic interests—has historically received less First Amendment protection than political speech. Under the test set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), such

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104 *E.g. Trask v. Ketchikan Gateway Borough*, 253 616 (Alaska 2011)(remanding question of application of Borough regulation to non-commercial sign).

105 E.g., *Texas v. Johnson*, 491 U.S. 397 (1989).

laws are constitutional if they directly advance a substantial government interest and are not broader than necessary to serve that interest. 447 U.S. 557 (1980). *Central Hudson* defined commercial speech as, first, "expression related solely to the economic interests of the speaker and its audience," or, second, speech "proposing a commercial transaction."[106] This test has been adopted in Alaska.[107]

Courts apply an even less stringent standard than intermediate scrutiny to laws that require the disclosure of factual, uncontroversial information.[108] This even more deferential standard of review typically applies to corporate disclosures because they do not restrict commercial speech but rather require it. As the Second Circuit has explained, "[c]ommercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not offend core First Amendment values of promoting efficient exchange of information or protecting liberty interests."[109]

In general, the government may regulate fraudulent speech in order to prevent public or consumer deception.[110] But, as with other types of speech regulations, the government may not enact overbroad, unduly burdensome, or "prophylactic" rules for this purpose.[111]

The latitude accorded the government to regulate speech depends not only on the nature of the speech, but also on other circumstances involved: is the regulation directed at the content of speech and does it act as a prior restraint?[112] The principle of "content neutrality" is at the core of First Amendment analysis. Content based regulations are presumptively invalid. "[O]nly a regulation which impinges on the right to speak and associate to the least possible degree consistent with the achievement of the state's legitimate goals will pass constitutional muster."[113] Restrictions that are content neutral, on the other hand, are subject only to intermediate scrutiny and are valid so long as they are appropriately tailored to serve a significant government interest.[114]

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106 447 U.S. at 560.
107 *Alaska Transportation Commissioner v. AIRPAC, Inc.*, 685 P.2d 1248, 1253 (Alaska 1974).
108 *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).
109 *National Electrical Manuf. Asso. v. Sorrell,* 272 F.3d 104, 113-114 (2nd Cir.2001).
110 *See Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003)
111 *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 798 (1988); *Zauderer*, 471 U.S. at 649.
112 *E.g. Marks v. City of Anchorage*, 500 P. 2d 644, 647 (Alaska 1972).
113 *Vogler v. Miller*, 651 P.2d 1, 5 (Alaska 1982); *see also Capital Square Review and Advisory Bd. v. Pinetter*, 515 U.S. 753, 761 (1995).
114 *Clark v. Comty for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

"A prior restraint is an official restriction imposed on speech or other forms of expression in advance of actual publication."[115] Such laws are disfavored and subject to strict scrutiny even if content neutral. Here, Mr. Austin's speech was not restrained. No one prevented him from publishing.

2. Application to Mr. Austin's Facebook posts

It is difficult to apply this well-established but complex legal framework to application of 3 AAC 08.307 to the categories of postings made by Mr. Austin because they contain differing forms of protected speech. What category certain posts would fall within is subject to perception and argument. Some are fully protected political and quasi-political speech concerning ANC politics, elections, and the suitability of candidates to hold office. Some are less protected commercial speech relating solely to the economic interests of the speaker and his audience. Some could be considered unprotected speech.

Mr. Austin's postings are a mix of purely commercial speech regarding his stake and opinions as a shareholder discussing the corporation, its management, and ultimately its value with traditionally more protected speech regarding political candidates within the organization. His postings intertwine informative and perhaps persuasive speech seeking support for his positions and imparting views, opinions, and comments on economics, Native Corporations politics and management. Many addressed questions worthy of legitimate debate and discussion among shareholders. A few others were merely expressions of personal opinion or the repeat of gossip. Several contained one or more form of speech.

Other circumstances complicate the analysis. At the time these posts were made, Mr. Austin was not a member of the board with specific obligations to ANC members but a less powerful simple shareholder. There is an imbalance of power between the ANC and its shareholders that should not be ignored, and it is important to prevent statutes and regulations designed to protect shareholders from being weaponized against them.

Mr. Austin's posts were voluntary. Requiring the voluntary disclosure be concurrently extended to the Division is not a practical burden;[116] but once disclosed to the Division, an arm of the State, the disclosure is also judged for its accuracy and the author may be penalized for

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115 *State v. Haley*, 687 P.2d 305, 315 (Alaska 1984).

116 *Zauderer, supra.*

violations.[117] The portion of the law providing for subsequent sanction by the government could have a chilling effect on discussion..

Analyzing Mr. Austin's speech thus presented some very difficult issues.

Ultimately, however, this decision concluded to apply strict scrutiny to the Division's application of its regulations to all nine of Mr. Austin's 2019 Facebook postings. It was initially possible to separate the Facebook postings into the distinct categories identified above, but after doing so applying different tests to one Facebook post and another test to another became "artificial and impractical," especially when certain posts were themselves internally mixed. Mr. Austin's comments were not purely commercial speech as defined by the Supreme Court; they involved quasi-political speech along with general comments and criticisms of the incumbent board members useful to healthy debate. Therefore, consistent with the decisions in *Riley v First National Federation of the Blind,* 487 U.S. 781 (1988)[118] and *City of Skagway v. Robertson*, 143 P.2d 965 (Alaska 2006) this decision considers the totality of Mr. Austin's posts containing fully protected and less protected speech to be "inextricably intertwined." The Division's interpretation and application of the regulations will, therefore, be evaluated using the more exacting constitutional standard.

Using that standard, the government has a compelling interest in leveling the playing field of access to information regarding Native Corporation value, expanding shareholder participation, and protecting the integrity of elections. Use of proxies by most ANC boards is critical to achieve quorum as most corporate shareholders are not centralized in one location.[119] Insuring these wide-spread shareholders have access to accurate information and points of view in addition to those in the corporation's self-produced annual report is crucial to maintaining an educated and effective shareholder body. This is particularly true as Native Corporation Shareholders cannot sell their shares so the only way they can express disapproval or approval of ANC management is by voting. The statutory requirement to file proxies, proxy statements, and

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117 AS 45.55.920; AS 4555.160.

118 In *Riley* the Supreme Court struck down a state law requiring a professional fundraiser disclose the percentage of contributions actually given to charitable organizations. The Court concluded the statutorily compelled speech was "inextricably intertwined with otherwise fully protected speech" and the nature of First Amendment scrutiny must be adjusted. The regulations in Mr. Austin's case are not similarly burdensome because, unlike the fundraiser, he was already voluntarily publicly disclosing information and the ANC securities regulations, therefore, involve a significantly lessened burden than the statute at issue in *Riley*.

119 *See, e.g. Rude v. Cook Inlet Region, Inc.,* 322 P.3d 853, 858 (Alaska 2014) noting the geographic challenges presented to ANC management.

all related documents with the Division and the corresponding requirement that these materials not contain false or misleading statements is imperative to the conduct of fair and impartial corporate elections and resultant shareholder safety. The government interests are compelling.

AS 45.55.139 and 3 AAC 08.307 regarding submission to the Division are content neutral. They do not act as a prior restraint. They apply solely to widespread communications to 30 or more people regarding financial dealings only of corporations with significant assets. It is not difficult to submit a proxy statement to the Division. In this case, it could have been done via email through the same smart phone or computer terminal used to upload the information to Facebook.

The nexus between AS 45.55.139 and 3 AAC 08.307 and the compelling government interests is sufficiently narrowly tailed to satisfy both strict and reduced First Amendment scrutiny. No equally effective less restrictive alternative was identified by Mr. Austin or the Division. Nor does the Division's interpretation of the regulation appear to be underinclusive. That is, it does not fail to address other speech that would harm the government interest in the same degree as the speech governed by the contested regulations.[120] The Alaska supreme court has previously held the proxy regulations are not vague or overbroad.[121] Therefore, Mr. Austin's constitutional rights were not violated by the requirement he provide the Division concurrent copies of his Facebook postings, including his own re-submitted Candidate posts.[122]

In sum, nine of Mr. Austin's Facebook posts were subject to the filing requirements in 3 AAC 08.307. The regulation does not run afoul of the constitution as applied.

E. Facebook Post 35 Was Not a Material Misrepresentation

a. Paragraph 1 was Not a Misrepresentation Because the Alleged Omission Was Not Material

The Division had the burden of proof by a preponderance of the evidence to establish Facebook post 35 was a material misrepresentation. The Division did not meet its burden.

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120 *Central Hudson, supra*; *see also* Eugen Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U.Pa.L.Rev. 2417, 2424 (1996).

121 *Meidinger,* 38 P.3d at 84-85.

122 There was no allegation any of Mr. Austin's Candidate postings were false or misrepresentations. This decision does not address or resolve any question regarding First Amendment protections for inaccurate political speech.

For a misrepresentation to occur, first the assertion of fact must be false or misleading.[123] Mr. Austin's statement was not false: in 2018 Mr. Austin did complain to the Division that Mr. Beasley had a perceived impropriety with the Tramway concession. Importantly, Mr. Austin did not claim or suggest the Division subsequently determined a violation occurred; he simply did not include any information regarding the results of his complaint.[124]

Contrary to the Division's argument, it is not obvious that reasonable people would find Mr. Austin's statement misleading, but even assuming the statement was misleading, it was not material. His failure to specifically include additional information that the Division did not find a violation is not material in this case. A reasonable shareholder would expect that had the Division found Mr. Beasley in violation of ANC securities law, Mr. Austin would have included that information in the post because Mr. Austin obviously disapproved of Mr. Beasley's performance. The logical inference drawn by a reasonable shareholder reading the paragraph as a whole is that the Division did not find Mr. Beasley violated ANC securities law or, at least, Mr. Austin did not know whether it had done so. Thus, there was no "substantial likelihood 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"[125] because the mix of information already contained in the post lead only to the conclusion that the Division took no action known to Mr. Austin, which the Division acknowledged was true.

Furthermore, the reasonable ANC shareholder does not simply rely on information in Facebook postings or other electronic media to make important investment decisions. The reasonable ANC shareholder has access to the Division's website as well as ANC disclosures and financial records. A reasonable shareholder could easily access the Division's website and see that no sanction had been imposed.

The Division erred when it concluded that portion of post 35 was materially misleading.

b. Paragraph 2 was Not a Misrepresentation Because It Does Not Contain a False or Misleading Statement of Fact

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123 3 AAC 08.315.

124 Post 35 was published May 29, 2019. The annual meeting was July 11, 2019. Per Goldbelt bylaws the annual report is due six weeks in advance of the annual meeting which would have been the week of May 20, 2019. The Division could not make the decision clearing Mr. Beasley without verifying the information was in the 2019 Goldbelt annual report. This timeline weights in favor of the finding Post 35 was not a misrepresentation.

125 *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, (1976).

The Alaska Securities Act prohibits misrepresentations of material fact in proxy solicitations.[126] In this case, the Division argued that the second paragraph of post 35 made incorrect assertions that certain actions by incumbents in violation of Goldbelt corporate bylaw, policies and procedures were also against state ANC security law. The Division does not agree that the alleged violations of corporate bylaws were a violation of state law and argues the post was a material misrepresentation. This argument, however, alleges that Mr. Austin made a misrepresentation of law, not of fact.

It is hard for misstatements of the law to be misrepresentations of material fact because everyone is presumed to know the law.[127] The prevailing legal theory across fields of law is that "everyone is equally capable of determining the law, is presumed to know the law and is bound to take notice of the law and, therefore, in legal contemplation, cannot be deceived by representations concerning the law or permitted to say he or she has been misled."[128] There is no reason to assume the reasonable ANC shareholder is ignorant of the law. Nor has the Division pointed to other reason to depart from this general rule of law in Mr. Austin's case.

The Division's remaining argument was the phrase the "complaints were investigated and turned over to enforcement, but they failed to enforce" qualified as a violation of 3 AAC 08.315 because Mr. Austin failed to provide sufficient explanation regarding Division jurisdiction with the result he made a misrepresentation of fact. The distinction requested by the Division is subtle. It requires disciplined parsing of language inconsistent with general Facebook reading habits. It applies a heightened standard of legal sophistication. Mr. Austin may have used incomplete jargon, but he did not make a fundamental error when he informed reader shareholders that no violation was found in response to his complaint.

A substantial likelihood that a reasonable shareholder with knowledge of the law reading the phrase in context would consider this distinction important in deciding how to vote does not exist. The Division erred when it concluded post 35 constituted a misrepresentation in violation of 3 AAC 08.315(a).

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126 AS 45.55.160.

127 *E.g. Ferrell v. Baxter,* 484 P.2d 250, 264 (Alaska 1971).

128 *Williston on Contracts,* Misstatements of Law, § 69:10 (4th Ed.)(2004).

IV. The Appropriate Sanction

Mr. Haugen testified that the $1,000.00 fine was comprised of two $500.00 assessments, one covering the failure to make proper concurrent filing and one covering the material misrepresentations. This is how the Division has traditionally approached assessment of fines. The approach is reasonable, and consistency is an admirable goal. Because this decision has concluded Mr. Austin did fail to make concurrent filings of several proxy statements and solicitations, the $500 fine for violating 3 AAC 08.315 shall remain in effect

However, because the Division's finding regarding post 35 has been reversed that fine is set aside.

V. Conclusion and Order

Mr. Austin violated Alaska securities law by failing to file nine proxy solicitations regarding the 2019 Goldbelt shareholder vote concurrently with the Administrator when he published them to shareholders. The statutes and regulations requiring he do so, do not violate the First Amendment as applied.

Mr. Austin is assessed a civil penalty of $500.00 for his violation. Payment is due 90 days after this decision becomes final, or after the expiration of all appeal rights, or upon a final decision that Mr. Austin violated the regulations referenced herein.

Mr. Austin did not violate Alaska securities law by making a misrepresentation in his proxy materials because the omissions identified by the Division in Post 35 did not violate the standards established in AS 45.55.160 or 3 AAC 08.315. The $500.00 fine assessed by the Division for this infraction is reversed.

Dated: March 8, 2021

Carmen E. Clark
Administrative Law Judge