

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

In the Matter of )  
 )  
AUSTIN AHMASUK ) OAH No. 17-0353-SEC  
 ) Agency Case No. 2017-00049  
\_\_\_\_\_ )

**NOTICE TRANSMITTING FINAL DECISION**

Attached is the administrative law judge's decision in this matter, which became the final agency decision on March 5, 2018 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 March 8, 2018

By: Signed \_\_\_\_\_  
Law Office Assistant  
Office of Administrative Hearings

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AUSTIN AHMASUK	)	OAH No. 17-0353-SEC
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**DECISION AND ORDER**

**I. Introduction**

Austin Ahmasuk sent a letter to the editor of *The Nome Nugget*. The letter criticized the use of discretionary proxies in the elections of his native corporation’s Board members. It also urged shareholders not to vote their discretionary proxies. The Alaska Department of Commerce, Community and Economic Development, Division of Banking and Securities investigated and determined that Mr. Ahmasuk’s letter to the editor amounted to a proxy solicitation. In Alaska, proxy solicitations must be filed with the Administrator of the Division, and accompanied by disclosures. Mr. Ahmasuk did not file a copy of his letter to the editor or any disclosures with the Administrator. The Division also determined that Mr. Ahmasuk’s letter contained material misrepresentations. Mr. Ahmasuk challenged both of the Division’s findings.

The parties agreed to bifurcate the case. This case resolved the first issue, whether Mr. Ahmasuk’s letter to the editor amounts to a proxy solicitation, through motion practice and oral argument.<sup>1</sup> Mr. Ahmasuk filed a motion for summary adjudication; the Division opposed, and oral argument occurred on November 9, 2017.<sup>2</sup> Mr. Ahmasuk’s motion was denied on December 29, 2017, and summary adjudication was granted in favor of the Division.<sup>3</sup> After its issuance, the parties conferred and requested a status conference. On

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<sup>1</sup> The second issue, whether Mr. Ahmasuk’s letter to the letter contained material misrepresentations, is addressed in OAH. No. 18-0034-SEC

<sup>2</sup> Mr. Ahmasuk filed a motion for summary judgment. Summary adjudication in an administrative proceeding is the equivalent of summary judgment. *See Schikora v. State, Dept. of Rev.* 7 P.3d 938, 940 – 941, 946 (Alaska 2000); 2 AAC 64.250.

<sup>3</sup> Although the Division did not cross-move, it requested the same result in the conclusion of its Opposition to Motion for Summary Adjudication. Summary Adjudication may also be granted in the absence of a specific request if, as here, the nonmoving party is entitled to prevail. *E.g., Dickeson v. Quarberg*, 844 F.2d 1435, 1444 n.8 (10<sup>th</sup> Cir. 1988); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d* § 2720; *see also Rockstad v. Erikson*, 113 P.3d 1215, 1222 & n.19 (Alaska 2005).

January 10, 2018, the parties stipulated to a \$1,500 fine, with \$1,500 suspended, provided Mr. Ahmasuk commits no violation of the Alaska Securities Act for five years. The parties agreed to a penalty in order to appeal the summary adjudication decision.

Because Mr. Ahmasuk's letter to the editor meets the definition of a proxy solicitation, he violated regulations by failing to file the letter and the required disclosures with the Administrator. The Division's conclusions on these points, and the agreed upon penalty referenced above are therefore affirmed.<sup>4</sup>

## II. Facts

There are no material facts in dispute as to the contents of Mr. Ahmasuk's letter.

### A. The SNC 2017 election.

Mr. Ahmasuk is a member of the Sitnasuak Native Corporation (SNC). The SNC is approximately 2,900 members strong and is headquartered in Nome, Alaska.<sup>5</sup> The SNC holds an annual meeting where it elects Board members.

In April 2017, SNC sent voting members election and proxy information.<sup>6</sup> The information provided three options for proxy submissions. First, a member could authorize a "quorum only" proxy vote. Second, a member could issue a directed proxy, whereby the member allocated votes to an identified candidate or candidates. Third, members could authorize a discretionary proxy. Under this option, the Board casts members' votes for their chosen candidates, and allocates votes among their candidates as they see fit.<sup>7</sup> This, however, was not the only avenue for discretionary proxy votes. In May 2017, an independent slate of candidates sent members an alternate discretionary proxy option.<sup>8</sup> Under that option, members could designate who among three listed persons could cast their discretionary proxy votes.<sup>9</sup>

SNC shareholders are divided on the appropriateness of the discretionary proxy voting.<sup>10</sup> The combination of discretionary and cumulative voting options may allow a

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<sup>4</sup> R24 – 25. Division's Cease and Desist Order, March 13, 2017.

<sup>5</sup> Division's opposition to motion for summary adjudication, p. 2.

<sup>6</sup> Ahmasuk's Motion for Summary Judgment, Ex. 4.

<sup>7</sup> Ahmasuk's Motion for Summary Judgment, Ex. 4. The Division stated that SNC's bylaws allocate discretionary proxies to the Board for its distribution among candidates. The Division did not submit the bylaws.

<sup>8</sup> Ahmasuk's Motion for Summary Judgment, Ex. 5.

<sup>9</sup> Ahmasuk's Motion for Summary Judgment, Ex. 5.

<sup>10</sup> Ahmasuk's Motion for Summary Judgment, Exs. 6 - 8.

single discretionary proxy holder (with enough votes) to significantly impact an election.<sup>11</sup> “Many shareholders believe that the Board of Directors use discretionary and cumulative voting to keep their power by reelecting themselves and others.”<sup>12</sup> In 2016, SNC held a special meeting to address discretionary proxy voting.<sup>13</sup> The number of shareholders fell short of establishing a quorum, thus preventing a vote to eliminate the practice.<sup>14</sup>

SNC’s 2017 election occurred in July. Mr. Ahmasuk was not a candidate in the 2017 election.

B. Mr. Ahmasuk’s letter to the editor.

On February 3, 2017, Mr. Ahmasuk emailed a letter to the editor of *The Nome Nugget*. The letter stated:

Dear Editor,

The Village Corporation for Nome i.e. Sitnasuak Native Corporation (SNC) will soon be holding its annual election and shareholders will file for candidacy. SNC’s shareholders have voiced time and time again that they do NOT want discretionary proxies used. Discretionary proxies are NOT required by any Alaskan law and there is NO law that prohibits an ANCSA corporation from prohibiting them for elections. Hundreds of SNC shareholders have said through public letters, social media, or through mailings that they do NOT want discretionary proxies used for elections. I believe SNC shareholders are realizing that discretionary proxies are harmful to our election process and are realizing in greater numbers such practices are disrespectful to our traditions. In 2015 and 2016 I and others spent many hours collecting signatures for a request for a special meeting to do away with discretionary proxies. We collected hundreds of signatures and we met a 10% requirement as required by Alaska law to petition the SNC Board of Directors to consider doing away with discretionary proxies and to request a special meeting. You might ask yourself why all this commotion about discretionary proxies? Because I and others have thoroughly researched the issue and recognized there is an dramatic ethical argument about what is right and what is wrong with SNC’s elections. Discretionary proxies have allowed single persons to use discretionary proxies to dramatically alter the outcome of an election for their singular goal. You know who they are they are members of the SNC 6. Please do

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<sup>11</sup> Ahmasuk’s Motion for Summary Judgment, Ex. 6.

<sup>12</sup> Ahmasuk’s Motion for Summary Judgment, Ex. 6, p. 2, *Pros and Cons of Cumulative Voting*.

<sup>13</sup> Ahmasuk’s Motion for Summary Judgment, Ex. 2; Ex. 6.

<sup>14</sup> Ahmasuk’s Motion for Summary Judgment, Ex. 6.

NOT vote a discretionary proxy in 2017. Thank you, Austin Ahmasuk  
[address removed]

*The Nome Nugget* published Mr. Ahmasuk's letter on February 9, 2017.<sup>15</sup>

C. The complaint, investigation, and order.

Jason Evans, an SNC Board member, filled out a Division complaint form on the same day Mr. Ahmasuk submitted his letter to *The Nome Nugget*.<sup>16</sup> Mr. Evans alleged that Mr. Ahmasuk's letter was a proxy solicitation, and that the letter contained false and misleading statements.<sup>17</sup> The Division received Mr. Evans' complaint on February 9, 2017.<sup>18</sup> On February 10, 2017, the Division notified both Mr. Ahmasuk and Mr. Evans that it would investigate the alleged violations relating to proxy solicitations.<sup>19</sup>

After investigation, the Division issued a March 13, 2017, order: 1) finding that Mr. Ahmasuk's letter to the editor is a proxy solicitation, distributed to shareholders under circumstances reasonably calculated to result in procurement, withholding, or revocation of a proxy; 2) Mr. Ahmasuk violated 3 AAC 08.307 by failing to file a copy of the letter to the editor concurrently with the Administrator; 3) Mr. Ahmasuk violated 3 AAC 08.315(a) by materially misrepresenting that discretionary proxies have allowed single persons to alter the outcome of an election; and 4) Mr. Ahmasuk violated 3 AAC 08.355 by failing to file required disclosures relating to proxy solicitations with the Administrator.<sup>20</sup> The order imposed a \$1,500 civil fine for the alleged violations.<sup>21</sup>

On April 7, 2017, Mr. Ahmasuk requested an appeal to set aside the order.<sup>22</sup> Mr. Ahmasuk provided three grounds for his appeal: 1) the letter to the editor is political speech and is protected by the First Amendment; 2) his letter is not a proxy solicitation; and 3) he did not make false or misleading statements.<sup>23</sup>

### III. Discussion

#### A. Division regulations.

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<sup>15</sup> Ahmasuk's Motion for Summary Judgment, Ex. 2.

<sup>16</sup> R1 – R3.

<sup>17</sup> R1 – R3.

<sup>18</sup> R1 – R7.

<sup>19</sup> R6 – R7.

<sup>20</sup> R23 – R26.

<sup>21</sup> R26.

<sup>22</sup> R27.

<sup>23</sup> R27.

Division regulations define “proxy solicitation” as:

- (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.<sup>24</sup>

A proxy solicitation must be filed concurrently with the Administrator of Securities when it is distributed to shareholders.<sup>25</sup> Numerous disclosures must accompany the filing.<sup>26</sup> These disclosures include: the name and address of each participant joining in the solicitation; identification and description of the participant’s nominees for Board seat; participant’s financial interests and activities with the corporation; and the identification of legal proceedings where the participant’s interests were adverse to the corporation’s.<sup>27</sup> The filing must also provide a description of methods used to solicit proxies, estimated solicitation expenses, and who would bear them.<sup>28</sup>

B. Proxy solicitations in case law.

A typical proxy solicitation identifies candidates and issues and gives direction to the shareholder on the proxy voting process.<sup>29</sup> The only Alaska cases cited by the parties relate to these types of proxy solicitation – with the specific candidates or issues identified.<sup>30</sup> However, both the Federal Securities and Exchange Commission (SEC) and the State of Alaska define proxy solicitations more broadly. As noted, a proxy solicitation includes “other communication...reasonably calculated to result in the procurement, withholding, or revocation of a proxy.”

Courts have also adopted a relatively broad definition for proxy solicitation. 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

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<sup>24</sup> 3 AAC 08.365(16).

<sup>25</sup> 3 AAC 08.307.

<sup>26</sup> 3 AAC 08.355 covers non-Board solicitations. Board solicitations are covered by 3 AAC 08.345.

<sup>27</sup> 3 AAC 08.355.

<sup>28</sup> 3 AAC 08.355.

<sup>29</sup> See Exs. 4 – 5.

<sup>30</sup> See *Meidinger v. Koniag*, 31 P.3d 77 (Alaska 2001); *Rude v. Cook Inlet Region, Inc.*, 294 P.3d 76 (Alaska 2012).

result.<sup>31</sup> 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.”<sup>32</sup> Courts examine the manner and circumstances of the communication when determining whether it meets the definition of a proxy solicitation.<sup>33</sup> 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.<sup>34</sup> For example, “where there is no [proxy] contest and the stockholder has no decision as to whether he will send in his proxy or not, material not on its face solicitating material, such as the research reports and industry surveys...sent out in the ordinary course of...business is unlikely to constitute soliciting material.”<sup>35</sup> Shareholders doing nothing more than exchanging opinions about management’s performance is also not a solicitation.<sup>36</sup>

In *Securities and Exchange Commission v. Okin*, the court found that letters to shareholders criticizing management and asking shareholders to withhold or revoke proxies were solicitations.<sup>37</sup> Okin sent multiple letters: the first shortly before an election, and others afterwards.<sup>38</sup> Like Mr. Ahmasuk’s letter, these did not advocate for or against a specific candidate or issue, but railed against management practices. Unlike the case here, Okin admitted that he planned to solicit proxies to get himself elected.<sup>39</sup> The court considered all the circumstances and found “that the letter was a step in a campaign...to pave the way for an out-and-out solicitation later.” The court found this even though Okin never ran and the later solicitation never occurred.

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<sup>31</sup> *Long Island Lighting Co. v. Barbash*, 779 F.2d 793, at 796 (2<sup>nd</sup> Cir., Ct. App. 1985). Appellate court remanded for determination of whether advertisements criticizing corporate management amounted to proxy solicitation where district court unduly limited discovery.

<sup>32</sup> *Gas Natural Inc. v. Osborne*, 624 Fed.Appx. 944, 950 (6<sup>th</sup> Cir. Ct. App. 2015)(unpublished decision)(citing *Long Island Lighting Co. v. Barbash*, 779 F.2d 793, at 796 (2<sup>nd</sup> Cir., Ct. App. 1985). In *Gas Natural Inc.*, the court found that Osborne’s letters to shareholders were solicitations, but fell within an exemption from the filing requirements. Alaska law contains no such exemptions.

<sup>33</sup> *Gas Natural Inc.* 624 Fed.Appx. at 950 (6<sup>th</sup> Cir. Ct. App. 2015)(internal citations omitted).

<sup>34</sup> *Gas Natural Inc.* 624 Fed.Appx. at 950 (6<sup>th</sup> Cir. Ct. App. 2015)(internal citations omitted).

<sup>35</sup> *Broker-Dealer Participation in Proxy Solicitation*, 29 Fed. Reg. 341, at 342 (Jan. 15, 1964). Also cited in *Gas Natural Inc.*, 624 Fed.Appx. at 950, but with “such as the research reports and industry surveys...sent out in the ordinary course of...business” omitted.

<sup>36</sup> *Gas Natural Inc.* 624 Fed.Appx. at 950 (6<sup>th</sup> Cir. Ct. App. 2015)(internal citations omitted).

<sup>37</sup> *Securities and Exchange Commission v. Okin*, 132 F.2d 784 (2<sup>nd</sup> Cir., Ct. App. 1943).

<sup>38</sup> *Securities and Exchange Commission v. Okin*, 132 F.2d 784 (2<sup>nd</sup> Cir., Ct. App. 1943).

<sup>39</sup> *Okin*, 132 F.2d at 786.

Similarly, in *Gas Natural Inc., v. Osborne*, the court found that a series of letters criticizing management met the definition of solicitation, even though they did not contain the word “proxy” or identify specific candidates. And in *Studebaker Corporation v. Gittlin*, the court determined that a request for a shareholder list sought for the purpose of seeking future proxies amounted to a proxy solicitation.<sup>40</sup> *Studebaker* shows that candidates or issues need not be announced for a solicitation to occur.

Overall, the definition of proxy solicitation is relatively broad under both case law and regulation.

C. Is Mr. Ahmasuk’s letter to the editor a proxy solicitation?

Mr. Ahmasuk argues that his letter to the editor does not meet the definition of a proxy solicitation: there is no recommendation for or against a candidate, and the candidates and election date were yet unknown.

Let us first examine the manner and circumstance of Mr. Ahmasuk’s letter to the editor. Mr. Ahmasuk wrote the letter two months before the identification of candidates and approximately five months before the election. Mr. Ahmasuk did not advocate for or against a distinct outcome. Instead, he urged SNC shareholders to vote their own vote (whatever that may be), instead of allowing a proxy holder that discretion. These factors weigh in favor of Mr. Ahmasuk’s position that the February letter did not amount to a proxy solicitation.

Other factors weigh against Mr. Ahmasuk. When interpreting a regulation, we look first to its language. The plain meaning of 3 AAC 08.365(16) supports the Division’s position that Mr. Ahmasuk’s letter to the editor meets the definition of proxy solicitation. Mr. Ahmasuk wrote, “Please do NOT vote a discretionary proxy in 2017.” Mr. Ahmasuk directly asked SNC members not to vote a discretionary proxy in a specific election year. This appears to be both a direct request to not execute a discretionary proxy, as well as a communication reasonably calculated to result in the withholding of a discretionary proxy.<sup>41</sup> Additionally, the language in the regulation does not limit solicitation to communications

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<sup>40</sup> 360 F.2d 692, 696 (2<sup>nd</sup> Cir. 1966).

<sup>41</sup> The Division’s opposition stated that Mr. Ahmasuk’s letter was reasonably calculated to result in the “revocation” of a proxy. *See* Division’s opposition, at 11. At oral argument, the Division argued that Mr. Ahmasuk’s letter requested shareholders to “withhold” voting discretionary proxies. Because the Division’s March 13, 2017, order included “the procurement, withholding, or revocation of a proxy” language, it’s erroneous “revocation” reference is immaterial.



put forth after candidates are announced. Nor does the regulation identify a specific proxy type.

The Division determined that a request to withhold a proxy vote is a proxy solicitation, regardless of proxy type. By extension, the Division's proxy definition would also apply to "quorum only" proxy votes. As noted above, SNC members can vote "quorum only" proxies, which allow enough votes to accumulate to hold the election, but do not give the proxy holder power to cast votes for any candidate, directed or discretionary. While this is farther removed from the layperson's understanding of a typical proxy solicitation, withholding quorum proxies could greatly affect an election – by preventing it from occurring at all.

Likewise, withholding or granting discretionary proxies may greatly impact an election. Mr. Ahmasuk's letter to the editor and SNC's newsletter all state as much. We have seen that any proxy type may significantly affect an election. Furthermore, the parties did not offer persuasive authority on whether a *type* of proxy (either quorum or discretionary), and not one advocating an identified issue or candidate, qualifies as a solicitation. The Division's inclusion of discretionary proxies under the definition of solicitation is therefore reasonable.

Next, we examine whether there was an ongoing proxy contest. *The Nome Nugget* also published other shareholders' letters opposing the use of discretionary proxies and describing the Board's alleged misuse of discretionary proxies.<sup>42</sup> At least one SNC member spread a similar message using social media.<sup>43</sup> These facts indicate that although there was not an active proxy contest in the traditional sense (*e.g.*, voting open, candidates announced, etc.), SNC and many of its shareholders were in active conflict over discretionary proxies. Shareholders also knew they would have the opportunity to cast votes in the not-too-distant future.<sup>44</sup> These facts also bring Mr. Ahmasuk's letter into the definition of a solicitation.

Mr. Ahmasuk's criticism of discretionary proxy practices and the number of other similar communications belie his assertion that his letter to the editor was not calculated to result in the withholding of proxies. Mr. Ahmasuk's letter was not simply a condemnation

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<sup>42</sup> Ahmasuk's Motion for Summary Judgment, Exs. 6 - 8.

<sup>43</sup> Ahmasuk's Motion for Summary Judgment, Ex. 6.

<sup>44</sup> Mr. Ahmasuk's letter to the editor states, "SNC will soon be holding its annual election and shareholders will file for candidacy." *See* Ahmasuk's Motion for Summary Judgment, Ex. 2.

of discretionary proxy rules. The letter contained a specific request for shareholder action and an attempt to prevent the SNC 6 from acting as previously alleged – using the rules to maintain its desired Board composition.

Furthermore, Mr. Ahmasuk contends that even if a shareholder remembered his letter when deliberating proxy options, he or she would withhold discretionary proxies from all sources, not just the Board. This argument fails to recognize the lead-up to Mr. Ahmasuk’s request that shareholders abstain from granting discretionary proxies. Though the bulk of Mr. Ahmasuk’s letter criticizes discretionary proxy voting in general, Mr. Ahmasuk specifically identified the “SNC 6” as the group using discretionary proxies to alter election outcomes.<sup>45</sup> It is possible a shareholder might remember just the request to withhold discretionary proxies. It is also quite possible that a shareholder would remember that the letter pointed to the SNC 6 as the group that alters elections. Accordingly, shareholders might choose to withhold discretionary proxies from the Board’s candidate slate, but not an independent slate. This result is also supported by SNC’s bylaws, which state that discretionary proxies will be distributed among the Board’s candidates.<sup>46</sup>

As noted, the timing of Mr. Ahmasuk’s letter and the lack of announced candidates weigh in his favor, but not heavily. Mr. Ahmasuk relies on SEC language stating “where there is no [proxy] contest and the stockholder has no decision as to whether he will send in his proxy or not, material not on its face solicitating material...is unlikely to constitute solicitating material.”<sup>47</sup> This citation omits critical language which names the types of communication, “*such as the research reports and industry surveys...sent out in the ordinary course of...business,*” that fall outside the definition of solicitation. Mr. Ahmasuk’s communication is far removed from a research report, survey, or other standard corporate communication.

After considering the totality of the circumstances, the fact remains that Mr. Ahmasuk specifically requested SNC shareholder action, mentioned proxy voting by name, and delivered a

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<sup>45</sup> Other SNC shareholder communications indicate that the Board, and a specific Board member, alter election outcomes through discretionary proxy use. *See* Ahmasuk’s Motion for Summary Judgment, Exs. 6 – 8. It also appears that this specific Board member is also the person who filed the complaint against Mr. Ahmasuk with the Division. *See* Division’s Opposition to Motion, Ex. 2, *ANSCA Corp. Complaint Form*.

<sup>46</sup> Division’s oral argument.

<sup>47</sup> *Broker-Dealer Participation in Proxy Solicitation*, 29 Fed. Reg. 341, at 342 (Jan. 15, 1964).

message in line with many others that share his concerns. If a request for voter information meets the proxy solicitation definition, then Mr. Ahmasuk's letter to the editor does as well.<sup>48</sup>

D. Does the Division's interpretation of proxy solicitation regulations violate the constitution?

1. *Free speech.*

The First Amendment requires a compelling state interest and narrowly tailored restriction before the government can regulate political free speech.<sup>49</sup> The parties agree that the government's interest in protecting the integrity of corporation elections is a compelling state interest. The agreement ends there. Mr. Ahmasuk argues that only proxy solicitations advocating for or against a candidate or issue meet the compelling interest standard. This argument is unpersuasive.

The rules exist to protect the integrity of the voting and information dissemination process in general. They are not limited to campaigns advocating specific candidates or issues. Both the SEC's and Alaska's proxy rules authorize discretionary voting.<sup>50</sup> This indicates an intent to regulate both directed and discretionary proxies. And, as discussed, all proxy types may have a profound effect on election outcomes.

Further, the Alaska Supreme Court in *Meidinger v. Koniag, Inc.*, ruled that the proxy solicitation regulations do not violate the right to free speech.<sup>51</sup> Mr. Ahmasuk correctly points out that the finding was based on a traditional proxy solicitation (i.e. candidates identified), and not a solicitation to withhold a discretionary proxy. But like Meidinger, Mr. Ahmasuk provided no case law supporting his assertion that a discretionary proxy falls outside the purview of solicitation regulations.

Additionally, the SEC recognizes this potential for unlawful constraint on free speech in the regulation's broad definition of solicitation. The SEC exemptions are instructive, even though Alaska chose not to adopt them. And Mr. Ahmasuk specifically advocated that the Division adopt the SEC's exemptions to avoid constitutional flaws.<sup>52</sup> The SEC's rules include exemptions from the filing requirements where the shareholder communicates his

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<sup>48</sup> See *Studebaker*, 360 F.2d 692.

<sup>49</sup> See *Green Party v. State, Div. of Elections*, 147 P.3d 728 (Alaska 2006).

<sup>50</sup> See 17 CFR § 240.14a-4; 3 AAC 08.355.

<sup>51</sup> 31 P.3d 77, 84 -85 (Alaska 2001).

<sup>52</sup> Ahmasuk's Motion for Summary Judgement at 20 – 21.

position and the reason for it, *does not otherwise engage in a proxy solicitation*, and the communication is made in a newspaper or similar public forum.<sup>53</sup>

At oral argument the Division agreed that the letter would not constitute a proxy solicitation if it did not include the sentence, “Please, do NOT vote a discretionary proxy in 2017.” The Division’s position here is in line with the SEC exemption noted above.<sup>54</sup> Mr. Ahmasuk did not stop at simply communicating his position – he requested that SNC shareholders not vote a discretionary proxy in 2017. This puts Mr. Ahmasuk’s letter to the editor outside the exemption.

Next, Mr. Ahmasuk asserts that the Division’s interpretation creates a chilling effect on free speech. According to Mr. Ahmasuk, the filing and disclosure requirements are too burdensome. Mr. Ahmasuk, however, successfully complied with filing requirements in the past. This undermines his argument that the regulations create a chilling effect on free speech.<sup>55</sup> Like the court in *Meidinger*, we reject this constitutional challenge.

## 2. *Due process.*

Mr. Ahmasuk also argues that a finding upholding the Division’s determination would violate due process. Due process requires that regulations give fair notice of what is forbidden or required, and prohibits impermissibly vague laws.<sup>56</sup> Mr. Ahmasuk is a knowledgeable and active SNC shareholder. In the past, Mr. Ahmasuk advocated for or against specific candidates and submitted these communications to the Division.<sup>57</sup> Mr. Ahmasuk considered the proxy regulations and assumed a letter issued before the designation of candidates and not in favor of a candidate would not meet the proxy solicitation definition. He then chose not to submit a copy of the letter to the Division or comply with disclosure requirements.

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<sup>53</sup> 17 CFR § 240.14a-1(I)(2)(iv)(B) (emphasis added).

<sup>54</sup> The Division’s interpretation at oral argument appears at odds with other Division decisions on the same issue, where shareholders did not specifically ask others not to vote their discretionary proxies. *See* Ahmasuk’s Motion for Summary Judgment, Exs. 6 – 8. This lends support to Mr. Ahmasuk’s contention that the regulation, as interpreted by the Division, is too broad, and subject to inconsistent enforcement. However, the Division’s interpretation as applied to communications other than Mr. Ahmasuk’s letter to the editor is outside the scope of this hearing.

<sup>55</sup> Mr. Ahmasuk also claims that one should consider the world of regulation-readers when examining a regulation’s chilling effect. But this decision is limited to the regulations as applied to Mr. Ahmasuk, not the public.

<sup>56</sup> *See State v. O’Neill Investigations, Inc.*, 609 P.2d 520 (Alaska 1980).

<sup>57</sup> Ahmasuk’s Motion for Summary Judgment at 10; Ex. 1.

But it is the Division’s interpretation of the regulation that is under scrutiny, not Mr. Ahmasuk’s. Here, the Division correctly identified a letter to the editor, which specifically asks shareholders not to vote discretionary proxies in the upcoming 2017 election, as a proxy solicitation. Mr. Ahmasuk’s erroneous assumption that the regulations do not apply does not implicate due process. Returning to the regulation’s plain language any “communication...calculated to result in the...withholding...of a proxy” qualifies as a solicitation.<sup>58</sup> It seems reasonable that a reader of this regulation would understand that an actual request to withhold a type of vote, as in Mr. Ahmasuk’s letter, falls within the definition. This regulation, therefore, is not so broad, or vague as to violate due process.

#### **IV. Conclusion and Order**

Mr. Ahmasuk’s letter to the editor is a proxy solicitation, and this determination does not run afoul of the constitution. The Division’s conclusions and penalty listed below are affirmed.

Mr. Ahmasuk violated 3 AAC 08.365(16). His letter to the editor is a proxy solicitation communicated to shareholders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy.

Mr. Ahmasuk violated 3 AAC 08.307 by failing to file his proxy solicitation concurrently with the Administrator when he distributed it to shareholders.

Mr. Ahmasuk violated 3 AAC 08.355 by failing to file required disclosures with the Administrator.<sup>59</sup>

Mr. Ahmasuk is assessed a civil penalty of \$1,500, with \$1,500 suspended, on the condition that he not violate the Alaska Securities Act for a period of five years. Payment is due 60 days after this decision becomes final, or after the expiration of all appeal rights, or upon a final decision that Mr. Ahmasuk violated the Alaska Securities Act.

Dated: January 18, 2018.

*Signed*  
\_\_\_\_\_  
Bride Seifert  
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]

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<sup>58</sup> 3 AAC 08.365(16).

<sup>59</sup> R24 – 25.