

SARBANES-OXLEY AND ALASKA NATIVE CORPORATIONS: DO THE REGULATIONS APPLY?

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The Sarbanes-Oxley Act of 2002 is a wide-reaching securities regulatory reform effort aimed at protecting shareholders and increasing corporate managerial accountability. This Note assesses the impact of the new regulations on Alaska Native Corporations. After establishing that Native Corporations are largely exempt from most of the provisions of the Sarbanes-Oxley Act of 2002, this Note argues, nevertheless, that it would be prudent and consistent with the founding purposes of Native Corporations to adjust their internal best practice to mirror the requirements of the Act.

I. INTRODUCTION

Alaska Native Corporations (“ANCs”) are complicated entities. ANCs exist in a regulatory world of exceptions, exemptions, and special rules and regulations designed to help them achieve their intended purpose: helping Alaska Natives. The unique framework of federal and state rules that govern ANCs benefits those organizations and, in turn, improves the welfare of Alaska Natives and enhances the Alaskan economy. What happens, however, when a set of broad, new federal securities regulations, such as the Sarbanes-Oxley Act of 2002 (“SOX”),¹ interacts with the more specific regulatory regime applicable to ANCs? This Note addresses that question.

This analysis will begin with a general background of ANCs and some of the characteristics that make them different from other corporations. It will then undertake a detailed examination of SOX, apply the Act’s provisions to ANCs, and ultimately determine that SOX has only a negligible impact on the

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1. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

governance and regulation of ANCs. Next, this Note will analyze the interaction between SOX and the provisions of the Alaska Native Claims Settlement Act that bring ANCs within the scope of some securities regulations. The analysis will conclude that ANCs still largely avoid the impact of SOX and the protections that Congress intended the Act to provide to shareholders.

Once SOX's impact is established, this Note will analyze whether the end result is good for ANCs. This inquiry will examine policy issues, congressional intent, and the historical record of foul play by ANCs to conclude that the goals of ANCs would be better met if they were subject to the provisions of SOX. Finally, the analysis concludes with recommendations for incorporating the requirements of SOX into ANCs' "best practices."

II. BACKGROUND

In 1971 Congress enacted the Alaska Native Claims Settlement Act ("ANCSA")² to address longstanding land disputes between Alaska Natives and the U.S. government as well as intense oil speculation that accompanied the operation of multiple profitable oil fields in Alaska.³ Because of these conditions, Congress found "an immediate need" for the settlement of Alaska Native claims of land ownership in the state, and ANCSA was Congress's solution.⁴

ANCSA addresses the formation of ANCs.⁵ These native corporations distribute the benefits of ANCSA to Alaska Natives.⁶ They own land and operate for the benefit of Alaska Natives,⁷ and some have evolved into sophisticated, multinational organizations with multimillion dollar annual revenues.⁸ Just like ordinary corporations, profits from ANCs may be distributed to shareholders in the form of dividends.⁹ In addition to dividends, ANCs provide jobs and the benefits of economic development to Alaska Natives.

2. 43 U.S.C. §§ 1601–1629 (2000).

3. DONALD CRAIG MITCHELL, TAKE MY LAND, TAKE MY LIFE 2–10 (2001).

4. 43 U.S.C. § 1601(a).

5. See §§ 1606–1607 (creating two classes of native corporations: regional corporations and village corporations).

6. § 1606(j).

7. § 1606(d).

8. See Cook Inlet Tribal Council, Inc. Annual Report, 2004 Annual Report, <http://www.citci.com/> (follow "Annual Reports" hyperlink; then follow "2003-2004 Annual Report" hyperlink).

9. 43 U.S.C. § 1606(g)(1)(C).

The drafters of ANCSA set forth rules that govern the financial operations of ANCs in the text of the statute.¹⁰ State statutes followed, which helped clarify the financial duties of the directors of ANCs.¹¹ However, in their hurry to settle land disputes, neither the drafters of ANCSA nor state lawmakers anticipated the possible effects of wide-reaching federal regulations that had yet to be enacted. One such regulation is SOX, which Congress appears to have intended to apply somewhat broadly to publicly held entities. Unfortunately, directors and general counsels of ANCs are unsure of exactly how SOX, a monumental act, affects ANCs. The costs of SOX compliance are high, but the fines and criminal penalties for violating the Act make ignoring it a very risky prospect.¹²

This Note will address the applicability of SOX to ANCs. It will first examine whether part or all of SOX applies to ANCs. This analysis will begin with the text of SOX. It will next analyze the legislative history of SOX in order to gain insight into the legislative intent of the Act as it relates to ANCs. Finally, this article will examine how the enactment of SOX should change the “best practices” of ANCs.

It should be cautioned that many ANCs operate largely through subsidiaries that do not themselves qualify as ANCs.¹³ This Note addresses only the applicability of SOX to the ANCs themselves, not their subsidiaries.

III. THE NATURE OF THE ALASKA NATIVE CORPORATION

The ANC is a vehicle used to transfer benefits of the ANCSA to Alaska Natives. For administrative purposes, ANCSA divided Alaskan land and Alaska Natives into twelve geographic regions.¹⁴ A thirteenth “region” was added for Alaska Natives who do not reside in the state of Alaska.¹⁵ Each of these regions was incorporated into a for-profit corporation under Alaska state law.¹⁶

10. *E.g.*, § 1606.

11. *E.g.*, ALASKA STAT. §§ 10.06.433, .960, .961 (2004).

12. *See, e.g.*, 18 U.S.C. § 1519 (Supp. III 2003) (fine, twenty years imprisonment, or both).

13. For example, Calista Corporation performs much of its business through its five major subsidiaries: Tunista, Inc., Yulista Management Services Inc., Chiulista Camp Services, Inc., Ookichista Drilling Services, Inc., and Ilikista Ventures, Inc. *See* Subsidiary Companies, <http://www.calistacorp.com/busent.html> (last visited Nov. 8, 2006).

14. 43 U.S.C. § 1606(a).

15. § 1606(c).

16. *See* § 1606(d).

These corporations have boards of directors, bylaws, managers, and stockholders, much like any typical public corporation.¹⁷ However, ANCs are atypical in some critical ways. The differences are particularly important when it comes to the specific properties of the stocks they issue and their status with the Securities and Exchange Commission (“SEC”).

A. ANC Stock

Initially, original ANC stock (known as “Settlement Common Stock”) was distributed by each regional corporation to every Alaska Native who was a member of that region.¹⁸ One hundred shares of Settlement Common Stock was given to each enrolled Alaska Native.¹⁹ Each share carries with it all the rights carried by any normal share distributed by an Alaska corporation, such as the right to vote for directors.²⁰ ANCs are authorized to issue more stock in accordance with their articles of incorporation. The initial issuance of Settlement Common Stock was given equally to every Alaska Native individual who lived in the region of each corporation.²¹

Settlement Common Stock is unique in that it initially could not be sold or “otherwise alienated” except in some narrow circumstances,²² and then only to another Alaska Native or a descendant of a Native.²³ However, there is an opt-out provision that became effective on December 18, 1991, that allows ANCs to amend their articles of incorporation in order to end all alienability restrictions.²⁴ If an ANC chooses this route, all of its original Settlement Common Stock would be canceled, and new

17. § 1606(f).

18. *See* § 1606(g)(1)(A).

19. *Id.*

20. § 1606(h)(1).

21. § 1606(g)(2).

22. § 1606(h)(1)(B)–(C). Examples of when Settlement Common Stock can be transferred include *inter vivos* gifts to one’s children and transfers pursuant to a court decree of separation, divorce, or child support. However, in these situations, the recipient must be an Alaska Native or a descendent of a Native. § 1606(h)(1)(C). Settlement Common Stock can also be transferred through inheritance “in accordance with the lawful will of such holder or pursuant to applicable laws of intestate succession.” § 1606(h)(2)(A). Regional corporations may nevertheless have the right to purchase, at fair market value, transfers made pursuant to applicable laws of intestate succession to a person not a Native or a descendent of a Native. § 1606(h)(2)(B).

23. § 1606(h)(1)(C).

24. § 1629c(b).

“Replacement Common Stock” would be issued in its place.²⁵ In the event that a Settlement Common Stockholder fails to exchange original Settlement Common Stock with Replacement Common Stock, ANCs would have a right to repurchase the Settlement Common Stock for “fair value.”²⁶

B. ANCs and the SEC

At their formation, ANCs were exempt from the jurisdiction of the SEC.²⁷ Specifically, they were statutorily exempted from “the provisions, as amended, of the Investment Company Act of 1940, . . . the Securities Act of 1933, . . . and the Securities Exchange Act of 1934.”²⁸ However, this exception is not absolute. It lasts only until any of three events occurs: (i) the ANC issues stock of any type besides Settlement Common Stock, where this new stock is issued to anyone besides Alaska Natives who were eligible for Settlement Common Stock or to an entity that does not exist solely for the benefit of Alaska Natives, provided that the new stock is not an exempt security pursuant to SEC rules;²⁹ (ii) the ANC terminates the alienability restrictions on its outstanding Settlement Common Stock;³⁰ or (iii) the ANC registers with the SEC.³¹ The occurrence of any of these three events eliminates an ANC’s jurisdictional immunity from the provisions and requirements of the SEC.³²

C. The Issue of Who is an “Issuer”

Perhaps the most difficult aspect of determining whether specific provisions of SOX apply to ANCs is the definition of the word “issuer”³³ under SOX.³⁴ Many provisions of SOX dealing with the operations of businesses apply only to issuers.³⁵ The term issuer as used here is distinguished from the ordinary usage of the word, which refers to any company that issues securities. Under SOX, a corporation is an issuer if: (i) it has securities registered under

25. § 1606(h)(3).

26. § 1606(h)(2)(B).

27. § 1625.

28. § 1625(a).

29. § 1625(a)(1).

30. § 1625(a)(2).

31. § 1625(a)(3).

32. § 1625(b).

33. An issuer is basically an SEC reporting company, but this paper will follow the convention set in the definition in SOX.

34. 15 U.S.C. § 7201(7) (Supp. IV 2006).

35. *See, e.g.*, § 78m (Supp. III 2003) (dealing with corporate responsibility).

section 12 of that Securities Exchange Act; (ii) it is required to file reports under section 15(d) of 15 U.S.C. 78o(d); or (iii) it has filed a registration statement with the SEC, even if that registration has not become effective where the company has not withdrawn the registration.³⁶ ANCs may qualify as issuers under any of these three tests.

Determination of whether an ANC is an issuer under the first test involves a two-prong analysis.³⁷ ANCs must first meet the definition of issuer under the Securities Exchange Act of 1934 and, second, they must be required to register under section 12 of that act, which provides:

[A]ny person who issues or proposes to issue any security; except that with respect to certificates of deposit for securities, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or of the fixed, restricted management, or unit type, the term “issuer” means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term “issuer” means the person by whom the equipment or property is, or is to be, used.³⁸

ANCs fall within this definition because they issue securities and they are, in fact, required to issue Settlement Common Stock.³⁹ While such stock is not ordinarily a security, it does not fall under any of the exceptions in the statute.

Further, under the two-prong test, a corporation’s securities must also be registered under section 12 of the Securities Exchange Act, which provides that “[i]t shall be unlawful for any member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective as to such security for such exchange”⁴⁰ ANCs are all initially exempted securities under ANCSA, so this section does not apply. Even if an ANC were to lose its exemption, it would still not be bound to register unless it had assets in excess of \$1,000,000 and 500 or more shareholders,⁴¹

36. § 7201(7).

37. *See id.*

38. Securities Exchange Act of 1934 § 12, 15 U.S.C. § 78c(a)(8) (2000). In this section, the term “person” means “a natural person, company, government, or political subdivision, agency, or instrumentality of a government.” § 78c(a)(9).

39. Alaska Native Claims Settlement Act, 43 U.S.C. § 1606(g) (2000).

40. 15 U.S.C. § 78l(a) (2000).

41. § 78l(g)(1)(A).

or if it wanted to trade its stock on a national stock exchange.⁴² However, if an ANC were to either voluntarily register its securities or be forced to register in order to have its stock traded on a national exchange, it would be an issuer for the purposes of SOX.

The second way by which an ANC may be classified as an issuer is if it is required to file reports under section 15(d) of the Securities Exchange Act.⁴³ That section requires that:

Each issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to Aug. 20, 1964, [the date of enactment of the Securities Acts Amendments of 1964,] and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended, shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 78m of this title in respect of a security registered pursuant to section 78l of this title.⁴⁴

In sum, an issuer who has registered with the SEC must file periodic reports containing certain financial information.⁴⁵ As discussed previously, ANCs are, at the outset, exempted from SEC filings and registrations.⁴⁶ However, there is nothing preventing an ANC from registering with the SEC. In fact, this contingency is specifically provided for in the securities law exemption.⁴⁷ If an ANC wishes to issue securities other than Settlement Common Stock, however, that ANC would lose its SEC exemption and then would have to register like any other publicly traded company.⁴⁸ Again, unless an ANC loses its SEC exemption, it is exempt because it is not an issuer.

The third way by which an ANC would qualify as an issuer under SOX would be to file a registration statement with the SEC, even if that registration has not become effective, as long as the company has not withdrawn the registration.⁴⁹ The analysis here

42. § 78l(a).

43. § 7201(7).

44. § 78o(d).

45. *See id.*

46. 43 U.S.C. § 1625(a).

47. *See* § 1625(a)(3) (permitting ANCs to file a registration statement with the SEC).

48. § 1625(a)(1).

49. *See* 15 U.S.C. § 7201(7).

mirrors that of the second test. An ANC does not have to register unless it wants to broaden the types of securities it can issue, but it may choose to register for any reason at all.⁵⁰ Under this third approach, any ANC that has registered, for any reason, would be an issuer for purposes of SOX.⁵¹ While an ANC may choose to pursue strategies that make it an issuer, no ANC has yet issued securities other than Settlement Common Stock, or voluntarily registered with the SEC. While this does not mean that no ANC will become an issuer in the future, it does mean that currently no ANC is subject to those sections of SOX that apply only to issuers.

IV. APPLICABILITY OF SOX TO ANCS

A. Jurisdiction of SOX

The first task necessary to establish whether and to what degree ANCs must comply with SOX is to determine which sections of SOX are applicable to corporations and corporate officers, as opposed to accountants, accounting firms, investment brokers, and investment rating agencies.

SOX is divided into eleven titles, each of which is applicable to specific parties. This section of the Note will give an overview of each of the titles, and the following section will provide a closer analysis to sections that are of particular concern to ANCs. Most titles do not directly affect ANCs, and those readers who are already familiar with the general structure and content of SOX may find the following analysis unnecessary for understanding the conclusions and recommendations of this Note.

Title I establishes the Public Company Accounting Oversight Board.⁵² This section outlines the organization of the Board,⁵³ requires that public accounting firms register with the Board,⁵⁴ and grants the Board authority to establish rules regarding accountants.⁵⁵ It further describes the duties of the Board⁵⁶ and establishes how the Board will be funded.⁵⁷ Title I also establishes

50. See 43 U.S.C. § 1625(a).

51. See 15 U.S.C. § 7201(7).

52. Sarbanes-Oxley Act of 2002 tit. I (codified as amended in 15 U.S.C. §§ 7211–7219).

53. 15 U.S.C. § 7211 (Supp. III 2003).

54. 15 U.S.C. § 7212 (Supp. III 2003).

55. See 15 U.S.C. § 7231 (Supp. III 2003) (“The Board may . . . exempt any . . . accounting firm . . .”).

56. 15 U.S.C. §§ 7214–15 (Supp. III 2003).

57. 15 U.S.C. § 7219 (Supp. III 2003).

the application of SOX to foreign accounting firms⁵⁸ and how the Board is to recognize generally accepted accounting standards.⁵⁹

Thus, Title I deals with the establishment of the Public Company Accounting Oversight Board and regulation and registration of accounting firms.⁶⁰ To the extent that ANCs may use public accounting firms, this title may be relevant. However, Title I will not directly impact the internal business of ANCs, though certain standards may apply to its outside accountants.

Title II regulates auditor independence.⁶¹ It governs the relationship between auditors and public companies.⁶² Specifically, it establishes that the non-auditing services an accounting firm can provide to its auditing clients are very limited.⁶³ Title II also limits the amount of time that a lead accounting partner can provide continuous service to the same public company, and provides various other regulations directed toward limiting the relationship between corporations and auditing accountants.⁶⁴ Like Title I, this title may affect ANCs dealings with accounting firms, but Title II is primarily directed at accounting firm relationships with entities that are categorized as reporting companies. Accordingly, Title II will not have a major direct impact on ANCs since they are not reporting companies.

Title III, in contrast, deals directly with “corporate responsibility.”⁶⁵ It details the role of corporations in congressional efforts to regulate public disclosures of financial information.⁶⁶ This theme is continued in Title IV, which requires enhanced financial disclosures from corporations.⁶⁷ Titles III and IV apply directly to the internal functions and public disclosures of

58. 15 U.S.C. § 7216 (Supp. III 2003).

59. 15 U.S.C. § 7218 (Supp. III 2003).

60. §§ 7211–19.

61. Sarbanes-Oxley Act of 2002 tit. II (codified as amended in scattered sections of 15 U.S.C.).

62. *See, e.g.*, 15 U.S.C. § 78j-1(g) (Supp. III 2003) (“[I]t shall be unlawful for a registered public accounting firm . . . to provide to that issuer” certain enumerated services.).

63. *See id.*

64. *See id.*

65. Sarbanes-Oxley Act of 2002 tit. III (codified as amended in scattered sections of 15 and 29 U.S.C.).

66. *E.g.*, 20 U.S.C. § 78m(2) (“The audit committee of each issuer . . . shall be directly responsible for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by that issuer . . .”).

67. Sarbanes-Oxley Act of 2002 tit. IV (codified as amended in scattered sections of 15 U.S.C.).

corporations. Their effect on ANCs will be closely examined later in this Note.

Title V is concerned with the regulation of securities analysts.⁶⁸ It addresses the problems that can stem from securities analysts' power to manipulate securities prices through their recommendations.⁶⁹ It includes a series of rules aimed at reducing the likelihood that analysts' recommendations will be designed to affect the market instead of providing objective information.⁷⁰ Title V, therefore, will not directly affect the internal operations of ANCs.

Title VI defines changes to the SEC's authority under SOX provisions.⁷¹ It gives the SEC authority to deny any person the ability to practice before the SEC if that person has acted unprofessionally.⁷² It empowers federal courts and the SEC to prevent a person from offering penny stocks⁷³ and to prevent people from being "associated" with a security dealer or broker.⁷⁴ It also amends the Securities Exchange Act in several ways to give the SEC more power to regulate people who work in the securities industry.⁷⁵ Because this title is primarily directed at those people who professionally trade securities, it is unlikely to substantially affect ANCs.

Title VII calls for studies and reports to be conducted dealing with various aspects of accounting firms, credit rating agencies, investment banks, and the enforcement actions that currently affect those entities.⁷⁶ Because ANCs are not classified as any of these types of organizations, this section of SOX is unlikely to have any effect on ANCs.

In contrast, Title VIII is applicable to corporate officers and stiffens penalties for those who commit corporate criminal fraud.⁷⁷ This section is directed toward those people who take actions to mislead the public about a company's financial condition.⁷⁸ It is not

68. Sarbanes-Oxley Act of 2002 tit. V, 15 U.S.C. §§ 78o-6, u-2 (Supp. III 2003).

69. 15 U.S.C. §78o-6.

70. *Id.*

71. Sarbanes-Oxley Act of 2002 tit. VI (codified as amended in scattered sections of 15 U.S.C.).

72. 15 U.S.C. § 78d-3(a).

73. §§ 77t(g), 78u(a)(6).

74. § 78o.

75. § 78o-6.

76. Sarbanes-Oxley Act of 2002 tit. VII.

77. Sarbanes-Oxley Act of 2002 tit. VIII (codified as amended in scattered sections of 11, 18, and 28 U.S.C.).

78. *See* 18 U.S.C. §§ 1519-20.

limited to executives of issuers or those within reporting companies. It affects all people, but especially corporate officers, including executives of ANCs.

Title IX is similar to Title VIII, except that it is broader and deals with white-collar crime.⁷⁹ Specifically, it includes provisions regarding attempt and conspiracy to commit securities fraud⁸⁰ and mail and wire fraud,⁸¹ establishes criminal penalties for failing to fully report corporate financial information,⁸² and includes general sentencing guidelines on white-collar crimes.⁸³ This title is not limited to issuers or reporting companies and is applicable to anyone in a position to commit white-collar crimes, including directors and employees of ANCs.

Title X is a very short section simply stating that the United States Senate believes that a federal tax return from a corporation should be signed by the chief executive officer of the corporation.⁸⁴ While this provision may seem trivial, it nonetheless concerns businesses and, accordingly, is a provision that may be applicable to ANCs.

Title XI is another provision that deals with accountability for corporate fraud.⁸⁵ It defines penalties for tampering with records,⁸⁶ confers upon the SEC authority to temporarily freeze a company's activities while an investigation is pending,⁸⁷ and prevents people who have violated securities laws from serving as officers or directors of companies.⁸⁸ It also requests that the federal criminal sentencing guidelines be amended⁸⁹ and adds a section to the criminal section of the U.S. Code that punishes retaliation against corporate informants.⁹⁰ The effects of these provisions are not limited to officers of issuers or reporting companies, so they have the potential to affect ANCs and their officers.

79. Sarbanes-Oxley Act of 2002 tit. IX (codified as amended in scattered sections of 18, 28, and 29 U.S.C.).

80. 18 U.S.C. § 1348 (Supp. III 2003).

81. 18 U.S.C. § 1341 (Supp. III 2003).

82. 18 U.S.C. § 1350 (Supp. III 2003).

83. 28 U.S.C. § 994 (Supp. III 2003).

84. Sarbanes-Oxley Act of 2002 tit. X.

85. Sarbanes-Oxley Act of 2002 tit. XI (codified as amended in scattered sections of 15 and 28 U.S.C.)..

86. 18 U.S.C. § 1512(c)(2).

87. 15 U.S.C. § 78u-3(c)(3) (Supp. III 2003).

88. § 78u-3(f).

89. 28 U.S.C. § 994.

90. 18 U.S.C. § 1513.

In sum, six of the eleven titles that comprise SOX encompass areas that may affect ANCs and their directors. These are (i) Title III, Corporate Responsibility; (ii) Title IV, Enhanced Financial Disclosures; (iii) Title VIII, Corporate and Criminal Fraud Accountability; (iv) Title IX, White-Collar Crime Penalty Enhancements; (v) Title X, Corporate Tax Returns; and (vi) Title XI, Corporate Fraud Accountability. Each of these titles has unique jurisdictional properties which will be examined separately.

B. Specific SOX Titles and Their Applicability to ANCs

1. Title III: Corporate Responsibility. Title III creates several reporting responsibilities for companies. Whether or not ANCs are affected depends on the threshold determination of whether an ANC is an issuer. Those ANCs that are—or that wish to become—issuers would have several duties under Title III.

First, any ANC which is an issuer must establish an audit committee to oversee the work of any public accounting firm that is employed by the ANC.⁹¹ This committee is made of members of the board of directors of the company but must “otherwise be independent” of the corporation.⁹² The standard for “independent” focuses primarily on economic and personal relationships between the audit committee member and the issuer.⁹³

Second, ANCs that file SEC reports must have those reports certified as accurate by the “principal executive officer or officers, and the principal financial officer and officers.”⁹⁴ This provision will, of course, not apply to ANCs that do not have to file SEC reports. Any ANCs that do file SEC reports, whether voluntarily or because they have lost their SEC immunity, will have to comply with this section.

Third, the section of the corporate responsibility obligations under SOX prohibits an issuer from exerting undue influence on auditors.⁹⁵ Again, this will only affect ANCs who have become issuers. Fourth, issuers must refrain from acting to coerce, mislead, or otherwise manipulate auditors.⁹⁶ Fifth, CEOs and CFOs must use their bonuses to reimburse an issuer in the event that

91. 15 U.S.C. § 78j-1.

92. § 78j-1(m)(3).

93. *See* § 78j-1(m)(3)(B).

94. 15 U.S.C. § 7241(a) (Supp. III 2003).

95. § 7242.

96. § 7242(a).

misconduct by a CEO or CFO requires that issuer to prepare an accounting restatement.⁹⁷

Sixth, a major section of Title III is devoted to requiring that directors and executive officers cease all personal trading in securities of the issuer that employs them, if that issuer is experiencing a “blackout period.”⁹⁸ A blackout period is a time of at least three consecutive days when employees are prevented from trading the issuer’s securities within their individual portfolio accounts.⁹⁹ The final provision, which requires attorneys who are working for an issuer to report evidence of material violations of securities laws, also only applies to issuers.¹⁰⁰ Title III provides many examples of responsibilities under SOX that an ANC may avoid by not taking actions to become an issuer.

2. *Title IV: Enhanced Financial Disclosures.* SOX devotes an entire title to clarifying and intensifying financial disclosure requirements.¹⁰¹ The most critical thing to note about this title is that it is an amendment to Section 13 of the Securities Exchange Act of 1934.¹⁰² ANCs that have kept their exemption from the Securities Exchange Act of 1934 are not affected by Title IV of SOX.

A complete and exhaustive account of what is required of issuers under Title IV would not be practical to pursue in this analysis. Generally speaking, ANCs that are issuers must: disclose off-balance sheet transactions;¹⁰³ decline to give personal loans to executives, unless those loans fall into a series of narrow exceptions, as defined in SOX;¹⁰⁴ disclose transactions which involved either a holder of more than ten percent of any class of the issuer’s securities, or a member of the management of the issuer;¹⁰⁵ abide by a code of ethics, as set by the SEC, for financial officers;¹⁰⁶ disclose whether or not there is a financial expert on the audit committee, and if there is not, explain why there is not an

97. § 7243.

98. § 7244(a)(1).

99. § 7244(a)(4)(A).

100. § 7245(1).

101. Sarbanes-Oxley Act of 2002 tit. IV (codified as amended in scattered sections of 15 U.S.C.).

102. Sarbanes-Oxley Act of 2002 § 401.

103. 15 U.S.C. § 78m(j).

104. § 78m(k)(a).

105. § 78p(a)(1).

106. § 7264.

expert;¹⁰⁷ and finally, submit to an enhanced review of their periodic financial disclosures¹⁰⁸ and make immediate disclosures of new financial information concerning a material change in the financial condition of the company.¹⁰⁹

In sum, an ANC that becomes an issuer is exposed to a barrage of new regulations. Those who are exempt under 43 U.S.C. § 1625 completely escape these new regulations, and are free to continue operating as they have been in regard to financial disclosures.

3. *Title VIII: Corporate and Criminal Fraud Accountability.* From its first provision, Title VIII is different and more potent than its counterparts. For example, it is not limited to “issuers,” but rather “whoever” falls within its provisions.¹¹⁰ Its first provision is that anyone who knowingly alters information relating to any matter concerning a Title 11 bankruptcy may be fined or imprisoned up to twenty years.¹¹¹ This certainly affects ANCs to the extent that it may encourage employees and officers to abide by bankruptcy laws, but it does not create any additional corporate laws. Accordingly, it is unlikely to have any impact on the operations of an ANC. Next, Title VIII provides sentencing guidelines for individuals who destroy corporate audit records of an issuer.¹¹²

The second section is another that stands out as having a potential effect on ANCs. It modifies Title 11 of the U.S. Bankruptcy Code by making debts non-dischargeable if they are incurred in violation of a securities law.¹¹³ What makes this important to all ANCs is that the violation that triggers this provision can be a violation of *any* securities law, state or federal.¹¹⁴ This means that an ANC may lose the ability to discharge some of its debt if it violates statutes that affect all ANCs (for example, state statutes that require disclosure to ANC shareholders).¹¹⁵ Most importantly, this part of SOX applies whether or not the ANC is an issuer.¹¹⁶

107. § 7265.

108. § 7266.

109. § 78m(l).

110. 18 U.S.C. § 1519.

111. *Id.*

112. §1520.

113. 11 U.S.C. § 523(a)(19)(A)(i) (Supp. III 2003).

114. *Id.*

115. ALASKA STAT. § 10.06.433 (2004).

116. 11 U.S.C. § 523(a).

The somewhat subtle implications of this provision warrant special attention. As will be shown later in this paper, 43 U.S.C. § 1625 requires ANCs to comply with the SOX provision that obligates the principal executive officer to certify that the company's annual report is accurate.¹¹⁷ Bearing that in mind, suppose that a bank makes a loan to an ANC and relies upon its annual report to determine that the company is creditworthy for this particular loan. Suppose next that the company goes into bankruptcy, and wishes to discharge all or a portion of that loan. Suppose further that it is discovered that the annual report was inaccurate. It certainly seems possible that the officer's certification in this case was a violation of a securities law and that the bank's reliance on the annual report will make the loan non-dischargeable. There may be room here for counter-arguments, including that the violation was not "for" the loan, but this is certainly a scenario of which ANCs should be aware and consider carefully when they incur debts.¹¹⁸

Title VIII also extends the statute of limitations for civil claims involving corporate fraud.¹¹⁹ This is only a procedural change, however, and does not modify any substantive law.¹²⁰ Another provision to protect whistleblowers similarly does not change substantive law.¹²¹ It prevents corporate actors from discriminating against employees who have disclosed evidence of fraud.¹²² This applies only to companies that have securities registered with the SEC (which would only include ANCs who have either registered securities other than Settlement Common Stock or those who have voluntarily registered).

The last section of Title VIII creates criminal penalties for defrauding shareholders of publicly traded companies.¹²³ It also applies only to issuers and creates criminal penalties for anyone who fraudulently obtains money or other property in connection with the sale of securities.¹²⁴

Title VIII thus has significant impact on the management of ANCs that may become issuers in the future. Executives of those companies will be subject to increased criminal liability and are

117. *See infra* Part V.

118. *See* 11 U.S.C. § 523(a)(19)(A)(i).

119. 28 U.S.C. § 1658 (Supp. III 2003) (extending the statute of limitations to four years).

120. *See id.*

121. 18 U.S.C. § 1514A (Supp. III 2003).

122. 28 U.S.C. § 1658.

123. 18 U.S.C. § 1348.

124. *Id.*

liable in civil suits for a longer period of time.¹²⁵ As to non-issuers, it creates criminal liability in the event of fraud¹²⁶ and decreases bankruptcy protections in cases where an ANC has violated securities laws.¹²⁷

4. *Title IX: White-Collar Crime Penalty Enhancements.* Title IX, a criminal provision, applies more universally than some other SOX titles. In this regard, it is one of the stronger provisions. At the same time, however, since it is a criminal code, it applies more strongly to directors, officers, and other employees than to ANCs themselves. Although business entities can be fined in a criminal action, only individuals can be placed in jail.

Ideally, Title IX will not affect ANCs' business at all (since all affiliated people should obey the law). However, it may have a chilling effect on some activities, particularly those which are close to the line of being illegal, and in this way may affect ANCs' business practices.

The first provision of Title IX penalizes attempts and conspiracies to commit securities crimes just as much as if the person had committed the crime himself.¹²⁸ This could have a significant impact on executives who previously may have been more willing to go along with potential illegal practices, when that individual was not at the heart of the illegal activity.

Next, Title IX dramatically increases the penalties for criminal mail and wire fraud.¹²⁹ The jail time for such violations is increased from five to twenty years.¹³⁰ Similarly, the penalties for violating the Employee Benefits Retirement Income Security Act of 1974 are substantially stiffened.¹³¹ SOX Title IX also calls for the United States Sentencing Commission to make a large-scale review of white-collar crime sentences.¹³²

Finally, it creates criminal sanctions for knowingly failing to properly certify financial reports filed with the SEC.¹³³ While this

125. See 28 U.S.C. § 1658.

126. 18 U.S.C. § 1519.

127. 11 U.S.C. § 523(a).

128. 18 U.S.C. § 1349 (Supp. III 2003).

129. § 1341.

130. *Id.*

131. 29 U.S.C. § 1131 (Supp. III 2003) (raising fines of individuals to \$100,000 maximum and fines of non-individuals to \$500,000; raising jail penalties to ten years.).

132. 28 U.S.C. § 994.

133. 18 U.S.C. § 1350.

technically applies to “whoever,”¹³⁴ the practical effect of having this penalty attached to SEC filings is that only executives at ANCs who are also issuers are affected by this provision.

5. *Title X: Corporate Tax Return.* Title X is a unique SOX provision because it does not provide for its own enforcement.¹³⁵ It merely says that it is the opinion of the Senate that the CEO of a company should sign the federal income tax statement of that company.¹³⁶ This provision was not incorporated into the U.S. Code, but exists only within SOX itself. It does not appear that this will affect ANCs in any official way, but, in light of this provision, it would be a good idea for all ANCs to have their CEO sign any tax information that goes to the federal government.

6. *Title XI: Corporate Fraud Accountability.* Title XI is a mix of criminal penalties and enabling clauses designed to help curb corporate fraud.¹³⁷ It first creates criminal liability for anyone who interferes with, or attempts to interfere with an “official proceeding.”¹³⁸ It goes on to give the SEC power to temporarily freeze payments to people under investigation for securities violations.¹³⁹ However, this power only exists when the investigation concerns an issuer.¹⁴⁰

Under SOX Title XI, the SEC has significant power to prevent any person who has committed a securities violation from becoming an officer or director of an issuer.¹⁴¹ The last provision is a modification of the criminal code, which affects issuers and non-issuers alike.¹⁴² It is essentially a whistleblower clause that punishes employers for retaliation, “including interference with the lawful employment or livelihood of any person” who has provided truthful information to the SEC.¹⁴³

These provisions create some criminal liabilities for officers of ANCs, but unless that ANC is an issuer, the corporations themselves largely avoid the effects of Title XI. However,

134. § 1519.

135. Sarbanes-Oxley Act of 2002 tit. X.

136. *Id.*

137. *See* Sarbanes-Oxley Act of 2002 tit. XI (codified as amended in scattered sections of 15 and 18 U.S.C.).

138. 18 U.S.C. § 1512(c).

139. 15 U.S.C. § 78u-3(c)(3)(A)(i).

140. *Id.*

141. *Id.* (permitting the issuance of a temporary order).

142. 18 U.S.C. § 1513(e).

143. *Id.*

directors of ANCs who might otherwise be tempted to commit securities fraud, and then try to cover their tracks, may think again in light of the provision regarding interference with official proceedings.

C. The Collective Implications for ANCs

The preceding analysis shows that there are only eight provisions of SOX that apply to ANCs that are not issuers: (i) Title VIII criminal liability for anyone who knowingly alters information relating to a bankruptcy;¹⁴⁴ (ii) Title VIII's provision which makes certain debts non-dischargeable if they are incurred in violation of securities laws;¹⁴⁵ (iii) Title VIII extension of the statute of limitations for civil claims involving securities fraud;¹⁴⁶ (iv) Title IX provision making attempt and conspiracy to commit securities crimes penalized the same as the underlying crime;¹⁴⁷ (v) Title IX increased penalties for mail and wire fraud;¹⁴⁸ (vi) Title X declaration of Congress's opinion that the CEO of a company should sign all federal tax returns coming from the company;¹⁴⁹ (vii) Title XI criminal penalties for anyone who interferes with official proceedings;¹⁵⁰ and (viii) Title XI criminal sanctions that protect corporate whistleblowers from being deprived of their livelihood.¹⁵¹

Six of these are criminal provisions that are primarily directed at individual executives, and one of the remaining statutes is merely an alteration to civil procedure and does not affect any substantive law. That leaves only items number two and number six from the list above. Furthermore, number six is a mere opinion of Congress that does not come with any enforceability clause. Therefore, it is only number two above—the SOX section that makes debts non-dischargeable in bankruptcy if those debts were incurred in violation of securities laws¹⁵²—that directly affects the business of non-issuer ANCs. This provision only applies in bankruptcy, and then only if debts were incurred illegally. Consequently, ANCs which are not issuers avoid nearly all of the force of SOX. There are no structural changes, disclosure changes,

144. 11 U.S.C. § 523(a).

145. § 523(a)(19)(A)(i).

146. 28 U.S.C. § 1658.

147. 18 U.S.C. § 1349.

148. §§ 1341, 1343.

149. Sarbanes-Oxley Act of 2002, tit X.

150. 18 U.S.C. § 1512(c).

151. § 1513(e).

152. 11 U.S.C. § 523(a)(19)(A)(i) (Supp. III 2003).

or securities practice changes that will affect non-issuer ANCs as a direct result of SOX.

V. A LEGAL HOOK UNDER 43 U.S.C. § 1625

There is one more possibility for bringing ANCs under the regulatory requirements of SOX. The same federal law that exempts ANCs from the Securities Exchange Act also addresses disclosure obligations.¹⁵³ Specifically, it provides that

[a] Native Corporation that, but for this section, would be subject to the provisions of the Securities Exchange Act of 1934 [15 U.S.C. § 78a et seq.] shall annually prepare and transmit to its shareholders a report that contains substantially all the information required to be included in an annual report to shareholders by a corporation subject to that Act.¹⁵⁴

There are two ways in which an ANC could become otherwise subject to the Securities Exchange Act. First, if it has securities listed on a national exchange¹⁵⁵ and, second, if it has assets in excess of \$1,000,000 and also has equity securities held by 500 or more people.¹⁵⁶

At present, no ANC has any securities listed on a national exchange. However, many, if not all, ANCs have assets in excess of \$1,000,000¹⁵⁷ and more than 500 shareholders.¹⁵⁸ Therefore, ANCs are currently required to “prepare and transmit to its shareholders a report that contains substantially all the information required to be included in an annual report to shareholders by a corporation subject to that Act.”¹⁵⁹ Since SOX made amendments to the

153. 43 U.S.C. § 1625.

154. § 1625(c)(1).

155. 15 U.S.C. § 78l(a).

156. *See* § 78l(g)(1)(B).

157. For example, Sealaska Native Corporation has over \$276 million in assets. Sealaska 2004 Annual Report, http://www.sealaska.com/2004AR/pdfs/2004-03_cbs.pdf (last visited Nov. 8, 2006). This raises a difficult valuation issue which will not be analyzed here. Many ANCs own vast amounts of land, much of which is very remote. The remoteness and relative seclusion of the land makes valuing it very difficult. This could be the subject of a difficult dispute if the \$1,000,000 threshold was ever a point of contention between an ANC and the SEC or a shareholder.

158. For example, Calista Native Corporation originally had 13,303 shareholders. Calista Corporation Business Enterprises, <http://www.calista.com/share1.html> (last visited Nov. 8, 2006). While the number of shareholders will fluctuate somewhat due to inheritances or gifting, the total number of Calista, or any ANC shareholders, is very unlikely to ever drop below 500. *Id.*

159. 43 U.S.C. § 1625(c)(1) (2000).

Securities Exchange Act, it thereby brings ANCs under some of its requirements—or, at least “substantially” under those requirements, but only insofar as SOX modified the annual report requirement.¹⁶⁰

SOX makes changes to several annual reporting requirements. It demands that the principal executive officer certify that the annual report is accurate.¹⁶¹ It also requires the disclosure of off-balance sheet transactions¹⁶² and that each annual report state the company’s structure of internal reporting.¹⁶³ One problematic requirement is for the disclosure of whether or not the audit committee contains at least one financial expert.¹⁶⁴ It is unclear how this rule could apply to ANCs, which are not required to have an audit committee.¹⁶⁵

Though these changes will affect the annual reporting requirements of ANCs, they escape SOX’s enhanced review of those annual reports.¹⁶⁶ Recall that though some provisions of SOX are applied to ANCs via section 1625, ANCs are still outside the jurisdiction of the SEC.

Section 1625, combined with SOX’s changes to existing regulations, will affect some of the reporting requirements of ANCs. However, it is only a sliver of SOX that makes its way through. Furthermore, enforcement of those provisions is not under the jurisdiction of the SEC, which is the body charged with enforcing SOX. While these new requirements doubtlessly push ANCs in the direction of more full disclosures to shareholders, they represent only a fraction of the protections and regulations brought upon ordinary corporations by SOX.

VI. CONSIDERATIONS OF CONGRESSIONAL INTENT—ARE THESE RESULTS ACCEPTABLE?

SOX was enacted in response to “those who have shaken confidence in our markets.”¹⁶⁷ Its purpose was “to address the systematic and structural weakness affecting our capital markets

160. *Id.*

161. 15 U.S.C. § 7241(a).

162. 15 U.S.C. § 78m(j).

163. 15 U.S.C. § 7262.

164. § 7265.

165. § 78j-1; *see supra* Part IV.B.1.

166. 15 U.S.C. § 7266.

167. George W. Bush, U.S. President, Remarks by President George W. Bush at Signing of Corporate Accountability Bill (July 30, 2002), *in* FEDERAL NEWS SERVICE, INC., 2002.

which were revealed . . . in recent months and years.”¹⁶⁸ The paradigmatic example of these revelations were the financially catastrophic events related to the fall of Enron and WorldCom, both specifically mentioned by Congress in SOX’s legislative history.¹⁶⁹ The question, then, is whether ANCs have a significant potential to cause the sort of damage that was caused by the misdeeds of Enron and WorldCom.

The Senate report on the collapse of Enron first focuses on the “shock waves” that Enron’s bankruptcy sent through the American economy.¹⁷⁰ Enron was the seventh largest company in the U.S. at the time of its collapse, and its bankruptcy had broad effects on the market.¹⁷¹ Of particular concern to the Senate was the fact that the collapse affected, either directly or indirectly, the investments of “over half” of American families.¹⁷² Furthermore, Enron shareholders realized huge losses on their investments, and those Enron employees who had their retirement funds invested in company stock saw devastating and life-changing losses with the collapse of Enron’s stock.¹⁷³ These were the core harms that Congress responded to when they enacted SOX.

The collapse of an ANC would not likely have a massive effect on the national economy. While some ANCs are quite large,¹⁷⁴ they do not compare to the size and economic power of Enron. Furthermore, an ANC collapse would have virtually no effect on the stock market, because their securities are not traded on stock markets.¹⁷⁵ It appears that this first concern of Congress is not relevant in the case of ANCs.

Congress’s second core concern was for owners of Enron’s stock, either through market investment or through retirement accounts. An analysis of this factor in regard to ANCs shows some clear distinctions. First, ANC shareholders do not, in the traditional sense, “invest” in the corporation. Instead, stock was

168. S. REP. NO. 107-205, at 2 (2002).

169. *Id.* at 2, 29 n.59.

170. *Id.* at 1.

171. *Id.*

172. *Id.*

173. *Id.*

174. Afognak Native Corporation and its subsidiaries, for example, have offices from Alaska to Hawaii to Florida. Alutiiq LLC, <http://www.alutiiq.com/map.php> (last visited Sep. 10, 2006).

175. The Senate investigation did also recognize the cumulative effect on the national economy of nonpayment of contracts associated with bankruptcies. S. REP. NO. 107-70, at 1 (2001). However, this effect from an ANC bankruptcy is likely to be relatively small, and not a threat to the national economy.

distributed to them as part of a large-scale settlement with the U.S. government.¹⁷⁶ Second, since all current ANC stock is not transferable, stockholders do not have an economic interest in the market value of the share.

A collapse of an ANC would still be very harmful because it would deprive shareholders of dividends on their settlement common stock. Recall that the primary purpose of ANCs is to distribute the benefits of the ANCSA to Alaska Natives.¹⁷⁷ A collapse of an ANC due to poor accounting practices or financial mismanagement would be a shameful failure of an ANC to reach its goal. While Congress did not consider exactly this issue, it is well within its goals and general intent to protect ANC shareholders from losing the benefits of owning Settlement Common Stock.

An argument may be raised that SOX-type protections are not necessary for ANCs, because they have a deeper commitment to their shareholders than a traditional corporation. Their history and purpose is different than those of a traditional for-profit company. Indeed, this is reflected in the missions of ANCs. For example, the mission statement of Afognak Native Corporation provides that the company's governing body exists "to manage and protect cultural resources, to manage and protect our land resources, to reinvigorate Alutiiq identity and social structure, and to heal divisions among the Alutiiq people."¹⁷⁸ The mission statements of most, if not all, ANCs mirror these general goals. They all seek to provide for Alaska Natives and take a holistic approach toward achieving this goal. One may think that it is unlikely that an organization which operates by those goals would ever engage in the type of harmful activities addressed by SOX. Unfortunately, history has shown otherwise.

The Cape Fox Corporation experienced financial mismanagement in 1996 and 1997 when its Chairman of the Board of Directors stole from the corporation, and managers took money from the corporation in the form of personal loans.¹⁷⁹ Personal loans to executives are exactly one of the findings from Enron¹⁸⁰ that Congress sought to address with SOX.¹⁸¹

176. 43 U.S.C. § 1606(g) (2000).

177. See § 1606(j).

178. Native Village of Afognak, <http://www.afognak.org/governance.php> (last visited Sep. 10, 2006).

179. *Martinez v. Cape Fox Corp.*, 113 P.3d 1226, 1228 (Alaska 2005).

180. S. REP. NO. 107-70, at 26 (2001).

181. See 15 U.S.C. § 78m.

In 1990, the Kake Corporation made illegal and unauthorized dividend payments to a select group of shareholders.¹⁸² The injured shareholders in that case were eventually awarded damages, but the misappropriation of dividends and the expense of the lawsuit might have been avoided if there had been greater scrutiny and transparency on the process by which Kake made financial decisions.

Admittedly, these scandals were minor in comparison to the massive downfalls of Enron and WorldCom. However, they are just as important for the individual stockholders who were harmed, and they show that ANCs have the potential to cause damages similar to those that SOX sought to prevent. It would seem that Congress made a mistake in allowing ANCs to slip through the nets of SOX.

VII. LOOKING FORWARD: HOW ANCS SHOULD ADAPT INTERNAL BEST PRACTICES TO SOX

By and large, ANCs avoid the requirements of SOX. This means that shareholders of ANCs are not granted the protections of that act. This is unfortunate because the type of protection that SOX grants may be even more important to ANC shareholders than to equity holders in ordinary companies.

It must be remembered that the primary purpose of ANCs is to distribute benefits of the ANCSA to Alaska Natives.¹⁸³ Because of this, ANCs should take upon themselves a greater fiduciary responsibility to their shareholders than an ordinary corporation. The directors and management of ANCs should take steps above and beyond what is required by the law to make sure that the purpose of their corporations, to protect and expand the interests of every holder of Settlement Common Stock, is fulfilled.

SOX, though not legally binding, should be used as a guideline to protect the interests of ANC stockholders. Congress has taken extensive time and energy to develop a system of protecting shareholders from known dangers to their interests, dangers from which ANCs are not immune. Managers and board members of ANCs should take advantage of Congress's work and implement corporate guidelines, or "best practices," which are identical to SOX in every way that is relevant to the corporations they control.

For example, ANCs should have to create an audit committee to oversee the auditing and accounting practices within their companies. The cost of implementing these guidelines would not

182. *Hanson v. Kake Tribal Corp.*, 939 P.2d 1320, 1324 (Alaska 1997).

183. *See* 43 U.S.C. § 1606(j) (2000).

be insignificant, but would be cheap in comparison to the costs associated with a corporate meltdown like Enron and WorldCom experienced. Above all, the costs would be an investment in protecting the interests of shareholders.

A final and substantial problem that ANCs may have in implementing SOX-like guidelines is enforcement. Without a body like the SEC overseeing and enforcing the best practices, the guidelines would be enforced by the same people they are meant to regulate. A prudent way of dealing with this problem would be to have a stockholder-selected and fully independent compliance committee. This committee would take exactly the same role as the SEC has in SOX and would be vested with all the same powers that are afforded the SEC under SOX. This group could even be integrated with the audit committee mentioned previously. They would be the watchdog for shareholders who would ensure that the types of harms that were the catalyst for SOX litigation do not befall ANCs and their shareholders.

VIII. CONCLUSION

An examination of SOX reveals that it will have a minimal effect on ANCs which are not issuers. Currently, that means that ANCs largely escape SOX. However, the fact that SOX does not apply to ANCs does not mean that they are not capable of causing the harms that SOX was meant to protect against. ANCs should protect their stockholders by instituting internal best practices that mirror SOX requirements. This would be a meaningful step toward living up to the ANCs' purpose. Internal governance similar to SOX would help ensure that the benefits of ANCSA are distributed to owners of Settlement Common Stock for years and generations to come.