NO ACT

PE 12-3408

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549-3010

DIVISION OF
CORPORATION FINANCE

09038703

March 5, 2009

Act: 1934
Section:
Rule: 14a-8
Public
Availability: 3-5-09

Martin P. Dunn
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006-4001

Re: Alaska Air Group, Inc.
Incoming letter dated December 31, 2008

Dear Mr. Dunn:

This is in response to your letters dated December 31, 2008 and January 23, 2009 concerning the shareholder proposals submitted to Alaska by Stephen Nieman, Terry K. Dayton, and William B. Davidge. We also have received a letter from Stephen Nieman dated January 13, 2009. Our response is attached to the enclosed photocopy of your correspondence. By doing this, we avoid having to recite or summarize the facts set forth in the correspondence. Copies of all of the correspondence also will be provided to the proponents.

In connection with this matter, your attention is directed to the enclosure, which sets forth a brief discussion of the Division's informal procedures regarding shareholder proposals.

Sincerely,

Heather L. Maples
Senior Special Counsel

Enclosures

cc: Richard D. Foley

*** FISMA & OMB Memorandum M-07-16 ***

March 5, 2009

Response of the Office of Chief Counsel
Division of Corporation Finance

Re: Alaska Air Group, Inc.
Incoming letter dated December 31, 2008

The first proposal relates to cumulative voting. The second proposal relates to compensation. The third proposal relates to amendments to the company's certificate of incorporation.

There appears to be some basis for your view that Alaska may exclude the proposals under rule 14a-8(c) because the proponent exceeded the one-proposal limitation in rule 14a-8(c). Accordingly, we will not recommend enforcement action to the Commission if Alaska omits the proposals from its proxy materials in reliance on rules 14a-8(c) and 14a-8(f). In reaching this position, we have not found it necessary to address the alternative bases for omission of the third proposal upon which Alaska relies.

Sincerely,

Carmen Moncada-Terry
Attorney-Adviser

DIVISION OF CORPORATION FINANCE
INFORMAL PROCEDURES REGARDING SHAREHOLDER PROPOSALS

The Division of Corporation Finance believes that its responsibility with respect to matters arising under Rule 14a-8 [17 CFR 240.14a-8], as with other matters under the proxy rules, is to aid those who must comply with the rule by offering informal advice and suggestions and to determine, initially, whether or not it may be appropriate in a particular matter to recommend enforcement action to the Commission. In connection with a shareholder proposal under Rule 14a-8, the Division's staff considers the information furnished to it by the Company in support of its intention to exclude the proposals from the Company's proxy materials, as well as any information furnished by the proponent or the proponent's representative.

Although Rule 14a-8(k) does not require any communications from shareholders to the Commission's staff, the staff will always consider information concerning alleged violations of the statutes administered by the Commission, including argument as to whether or not activities proposed to be taken would be violative of the statute or rule involved. The receipt by the staff of such information, however, should not be construed as changing the staff's informal procedures and proxy review into a formal or adversary procedure.

It is important to note that the staff's and Commission's no-action responses to Rule 14a-8(j) submissions reflect only informal views. The determinations reached in these no-action letters do not and cannot adjudicate the merits of a company's position with respect to the proposal. Only a court such as a U.S. District Court can decide whether a company is obligated to include shareholder proposals in its proxy materials. Accordingly a discretionary determination not to recommend or take Commission enforcement action, does not preclude a proponent, or any shareholder of a company, from pursuing any rights he or she may have against the company in court, should the management omit the proposal from the company's proxy material.

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January 23, 2009

VIA E-MAIL (shareholderproposals@sec.gov)

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Alaska Air Group, Inc.
Shareholder Proposals of Richard D. Foley
Securities Exchange Act of 1934 Rule 14a-8

Dear Ladies and Gentlemen:

We submit this correspondence on behalf of our client Alaska Air Group, Inc. (the "Company"), in response to correspondence submitted to the staff of the Division of Corporation Finance (the "Division") of the U.S. Securities and Exchange Commission (the "Commission") by Stephen Nieman regarding a request for no-action relief (the "No-Action Request") submitted on behalf of the Company on December 31, 2008.

The No-Action Request and Mr. Nieman's correspondence relate to the following three shareholder proposals (collectively, the "Proposals"), which were submitted to the Company by Richard D. Foley (the "Proponent"):

- a proposal titled "Reforming Securities Class Actions," which was purportedly submitted on behalf of Mr. Nieman (the "Class Action Proposal");
- a proposal titled "Cumulative Voting," which was purportedly submitted on behalf of Terry K. Dayton (the "Cumulative Voting Proposal"); and
- a proposal titled "Shareholder Say on Executive Pay," which was purportedly submitted on behalf of William Davidge (the "Executive Pay Proposal").

In response to the No-Action Request, Mr. Nieman submitted two letters -- the first relating to the exclusion of all three proposals submitted by the Proponent and the second relating specifically to the Class Action Proposal. Mr. Nieman's correspondence requests that the Division not allow the Company to omit all three Proposals or, alternatively, the Class Action

Proposal from the Company's proxy statement and form of proxy (the "2009 Proxy Materials") for its 2009 Annual Meeting of Stockholders (the "2009 Annual Meeting"). Mr. Nieman's January 13, 2009 letters are attached hereto as Exhibit A. The No-Action Request (exhibits omitted) is attached hereto as Exhibit B.

Copies of this correspondence are being sent concurrently to the Proponent and Mr. Nieman, Mr. Dayton, and Mr. Davidge.

I. EXCLUSION OF THE THREE PROPOSALS

We have reviewed Mr. Nieman's January 13, 2009 letter regarding the Proposals and continue to be of the view that the Company may omit them from its 2009 Proxy Materials in reliance on Rule 14a-8(c).

A. The Company's Notice Adequately Provided Notice of the One-Proposal Limitation of Rule 14a-8(c) to the Proponent as Required by Rule 14a-8(f)

Mr. Nieman's letter regarding the three Proposals addresses our view that the Company may omit all three Proposals in reliance on Rules 14a-8(c) and (f). In that correspondence, Mr. Nieman asserts that "the company did not provide adequate information to cure the eligibility or procedural requirements [pursuant to Rule 14a-8(f)]...[because] [t]he company's December 12, 2009 [sic] notice did not claim that Mr. Foley was a beneficial owner and thus the proponents were not given the opportunity to satisfy the company's concern on this point." Mr. Nieman expresses his view that "[h]ad the company given proper notice required under rule 14a-8(f) this clarification would have been made earlier." Attached to Mr. Nieman's letter are three revised grants of proxy authority to the Proponent, provided by each of Mr. Nieman, Mr. Dayton, and Mr. Davidge and dated January 12, January 7, and January 8, 2009, respectively.

As set forth in the No-Action Request:

- The Company received all three Proposals under a single fax cover sheet on November 28, 2008. Each Proposal was accompanied by a grant of proxy authority from a shareholder to the Proponent stating:

  > This is the proxy for Mr. Richard D. Foley and/or his designee to act on my behalf in all shareholder matters, including this Rule 14a-8 proposal for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting.

- On December 12, 2008, the Company provided notice to the Proponent that Rule 14a-8(c) precludes any one shareholder from submitting more than one proposal to a company for a particular shareholders' meeting. A copy of Rule 14a-8 was included with the notice. The notice stated that:

- the Company believed "that the proposals that you indicate you have submitted on behalf of the purported proponents should each be viewed as submitted by you";
- the Proponent was "required under Rule 14a-8(c) to select and resubmit a single proposal to be considered for inclusion in the Company's proxy materials"; and
- the "revised submission to the Company must be postmarked, or transmitted electronically, no later than 14 days from the date that you receive this letter."

- On December 19, 2008, Mr. Nieman responded to the Company's notice, on behalf of the Proponent, disagreeing with the Company's view that all three Proposals were submitted by the Proponent. In that response, neither the Proponent nor Mr. Nieman took any action to reduce the number of proposals submitted for inclusion in the Company's 2009 Proxy Materials. During the 14-day period provided in the Company's Notice, no other correspondence regarding the Proposals was provided to the Company and no action was taken by the Proponent in response to the Company's notice.

The Company's notice to the Proponent stated the procedural deficiency, stated how the Proponent could cure the deficiency, stated the timeframe in which the Proponent was required to cure the deficiency, stated that only a single proposal submitted within the required timeframe would be considered for inclusion in the Company's proxy materials, and included a copy of Rule 14a-8. As such, the Company's notice provided adequate notice of the one-proposal limitation of Rule 14a-8(c). See General Motors Corporation (Apr. 9, 2007); AmerInst Insurance Group, Ltd. (Apr. 3, 2007); and Downey Financial Corp. (Dec. 27, 2004).

Mr. Nieman argues that the notice provided by the Company was unclear and that Mr. Nieman, Mr. Dayton, and Mr. Davidge were not given the opportunity to satisfy the Company's concerns regarding the Proponent's beneficial ownership of the shares held by the proponents. In this regard, we note that, although the cover letters to each Proposal instructed the Company to "direct all future communications to Mr. Foley," the Company provided the notice to the Proponent and provided copies via certified mail to each of Mr. Nieman, Mr. Dayton, and Mr. Davidge.

Mr. Nieman also states that clarification -- presumably of the grant of proxy authority to the Proponent -- could have been made earlier if the Company's notice had specifically stated that the Proponent was a beneficial owner of all of the relevant shares. However, the procedural deficiency was clearly articulated -- Rule 14a-8(c) "precludes any one shareholder from submitting more than one proposal to a company for a particular shareholders' meeting." Mr. Nieman further states that had the notice noted the beneficial ownership of the Proponent explicitly, the proponents would have provided limited grants of proxy authority to the Proponent in response to such a notification (similar to those provided in Mr. Nieman's correspondence). However, as discussed below, Mr. Nieman is incorrect in his view that providing more limited grants of proxy authority at a later date would have "cured" the procedural deficiency (*i.e.*, the submission of more than one proposal by a single beneficial owner) referenced in the Company's notice.

Rule 14a-8(c) provides that "[e]ach shareholder may submit no more than one proposal to a company for a particular shareholders' meeting." On November 28, 2008, the date the Proponent submitted the Proposals to the Company, the Proponent had been granted proxy authority that, for the reasons discussed in the No-Action Request, caused him to be the beneficial owner of the shares otherwise held by Mr. Nieman, Mr. Dayton, and Mr. Davidge. As such, at the time the Proponent submitted the Proposals, the Proponent was the beneficial owner of the shares that provided eligibility to submit the Proposals. Changing the terms of the grant of proxy authority at a later date would not "cure" the procedural defect noted in the Company's notice to the Proponent -- that is, it would not change the fact that a single shareholder submitted multiple proposals for inclusion in the Company's proxy materials for a particular shareholders' meeting.

Regardless of later actions, on November 28, 2008, a single shareholder -- the Proponent -- submitted three Proposals for inclusion in the Company's proxy materials for a particular shareholders' meeting. Rule 14a-8(c) does not permit a single shareholder to "submit" more than one proposal to a company for a particular meeting. As the Division has stated previously, it is not a sufficient "cure" for a violation of Rule 14a-8(c) (the procedural deficiency identified in the Company's notice) to simply revise the nature of the proponents; rather, the Division has taken the position that the only "cure" for the procedural deficiency of a single shareholder submitting multiple proposals (which was described clearly in the Company's notice) is the resubmission of a single proposal from that shareholder to the company within 14 calendar days of receipt of that notice.[1]

Once the Proponent submitted the three Proposals and the Company provided notice to the Proponent of that defect in his submission, the only means to "cure" that defect would be for the Proponent to timely withdraw two of the three Proposals. Neither the Proponent, nor Mr. Nieman, nor Mr. Dayton, nor Mr. Davidge took either of these actions.[2] Even if the notice had

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1 See Spartan Motors, Inc. (Mar. 12, 2001) (granting request to exclude two proposals under Rule 14a-8(c) that were originally submitted by a single proponent who, upon proper notice from the company, stated that his wife wished to submit the second proposal) and Staten Island Bancorp, Inc. (Feb. 27, 2002) (granting request to exclude five proposals under Rule 14a-8(c) that were originally submitted by a single proponent who, upon proper notice from the company, resubmitted all five proposals with four proposals under the names of nominal proponents).

2 Even if the Division took the view that the notice should have affirmatively stated the Company's view that the Proponent was the beneficial owner of the shares otherwise held by Mr. Nieman, Mr. Dayton, and Mr. Davidge, failure of the notice to state such belief did not result in or contribute to the Proponent's failure to comply with Rules 14a-8(c) and (f). In his response to the Company's No-Action Request, Mr. Nieman did not argue that the original grant of proxy authority did not confer beneficial ownership on the Proponent at the time he submitted all three Proposals; Mr. Nieman merely provided revised grants of proxy authority from himself, Mr. Dayton, and Mr. Davidge that were intended to enable him to make the claim that the Proponent had -- at a date subsequent to the submission of the three Proposals -- ceased to be the beneficial owner of the shares otherwise held by Mr. Nieman, Mr. Dayton, or Mr. Davidge. As stated above, the Division has held that this is not a sufficient cure of a violation of Rule 14a-8(c). See Spartan Motors, Inc. (Mar. 12, 2001). Further, we note that, in certain circumstances, the Division has determined to provide a proponent additional time to cure a defect (e.g., Pfizer Inc. (Feb. 20, 2007) (allowing 7 additional days for the proponent to provide the company with a revised proposal to comply with Rule 14a-8(c) because the

stated the reasons why the Company believed that the Proponent was the beneficial owner of the shares held by each of the nominal proponents, revising the terms of the grants of proxy authority to limit the authority granted to the Proponent would not have been sufficient to "cure" the failure to comply with the one-proposal limitation of Rule 14a-8(c). For these reasons, we continue to believe that the Company may omit all three Proposals from its proxy materials for its 2009 Annual Meeting in reliance on Rules 14a-8(c) and (f).

II. EXCLUSION OF THE CLASS ACTION PROPOSAL

In a separate letter, also dated January 13, 2009, Mr. Nieman expresses his disagreement with the Company's views regarding the alternative bases for excluding the Class Action Proposal. As the views expressed in Mr. Nieman's letter do not change our position regarding the alternative bases for exclusion set forth in the No-Action Request, it continues to be our view that the Company may exclude the Class Action Proposal from its 2009 Proxy Materials for the reasons addressed in that No-Action Request.

A. The Class Action Proposal Consists of More than One Proposal

In Mr. Nieman's separate letter regarding the Class Action Proposal, he expresses his view that the Proposal has a single unifying concept. On pages one and two of his letter, Mr. Nieman states that the Class Action Proposal is "intended to encourage plaintiff's lawyers to 'target officers of the Company who reaped large stock option gains or other incentive compensation as a result of the fraud, thereby penalizing the party actually responsible for the fraud.'" On page two of Mr. Nieman's letter, he states that the "single unifying element is to use Rule 10b-5 FOTM actions to encourage the Company's officers - who are best placed to ensure that the Company's disclosures are not misleading - to comply with Rule 10b-5."

Mr. Nieman's separate letter regarding the Class Action Proposal, in its discussion of whether the proposal is "only one proposal," therefore, provides two alternative intentions of the Class Action Proposal -- it is "intended to encourage plaintiff's lawyers to target officers of the Company" and it is intended to encourage the Company's officers "to comply with Rule 10b-5."

The Supporting Statement includes the following two statements regarding the effect of the Class Action Proposal:

- "This proposal, suggested by Professor Adam Pritchard of the University of Michigan would limit damages in secondary market securities class actions, i.e., suits brought against the Company when it has not sold securities during the time that its common stock was allegedly distorted by a material misrepresentation."

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company failed to clarify the version of the proponent's proposal to which the Rule 14a-8(f) deficiency notice applied)). Neither the Company's notice nor the response of Mr. Nieman warrant such additional time in the current situation, as the only means by which to cure the defect would be withdrawal of two of the three Proposals -- that cure was described clearly to the Proponent in the Notice and the Proponent chose not to avail himself of that cure.

- "The proposed amendment would substantially reduce the incentive of plaintiffs' lawyers to file suit against the Company in response to a drop in the Company stock price."

It is only in the penultimate sentence of the Supporting Statement that Mr. Nieman mentions any purpose of the Class Action Proposal other than to limit class actions against the Company in reliance on the fraud-on-the-market presumption. In that sentence, the Supporting Statement provides that "[u]nder the proposal, lawsuits would instead target officers of the Company who reaped large stock option gains or other incentive compensation as a result of fraud, thereby penalizing the party actually responsible for the fraud." Mr. Nieman's explanation that the single unifying element of the Class Action Proposal is to be found in this single sentence -- although the Supporting Statement does not discuss the benefits of focusing lawsuits on officers, or that the partial waiver would result in those "lawsuits" not being able to rely on the fraud-on-the-market presumption if damages other than disgorgement were sought, or that, because of the partial waiver, those "lawsuits" would not encourage a company's officers to "comply with Rule 10b-5" in situations where there was no disgorgement to be sought -- only makes clearer that there are multiple, disparate elements to the Class Action Proposal.

It continues to be our view that the Class Action Proposal consists of more than one proposal and that, as such, the Company may exclude the Class Action Proposal in reliance on Rules 14a-8(c) and (f).

B. Adoption of the Class Action Proposal Would Cause the Company to Violate Section 29(a) of the Exchange Act

1. The Class Action Proposal is barred by Section 29(a) because it "weaken[s] the ability to recover under the Exchange Act"

The Class Action Proposal seeks to limit damages to disgorgement where plaintiffs rely on the fraud-on-the market presumption. By Mr. Nieman's own statement, by adopting the Class Action Proposal, "the potential damages available in securities class actions would be substantially scaled back." However, Mr. Nieman also argues in his separate letter regarding the Class Action Proposal that the inclusion in the Class Action Proposal of the Company's agreement to pay plaintiffs' fees for certain Rule 10b-5 actions -- those for which there is reliance on the fraud-on-the-market presumption and damages are limited to disgorgement -- "would facilitate the ability of shareholders to bring actions under Rule 10b-5." It is our view that the elimination of the currently existing ability of shareholders to rely on the fraud-on-the-market presumption to recover their out-of-pocket losses in a private action under Rule 10b-5 would *not* "facilitate the ability of shareholders to bring actions under Rule 10b-5." Indeed, eliminating the existing ability of shareholders to recover out-of-pocket damages in those private Rule 10b-5 claims in which reliance is shown through the fraud-on-the-market presumption -- which, as noted in the Supporting Statement, would virtually eliminate the use of the fraud-on-the-market presumption in private actions against an issuer[3] -- would, by definition, "weaken" a plaintiff's "ability to recover under the Exchange Act."

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[3] As stated in the Supporting Statement: "This proposal, suggested by Professor Adam Pritchard of the University of Michigan would limit damages in secondary market securities class actions, i.e., suits brought

In this regard, we note that the fraud-on-the-market presumption was developed specifically to enhance the ability of investors to recover under the Exchange Act. Because of the unique requirements for certifying a class in a class action, the Supreme Court adopted the fraud-on-the-market presumption as part of "a practical resolution to the problem of balancing the substantive requirement of proof of reliance in securities cases against the procedural requisites" for bringing a class action. Basic v. Levinson, 485 U.S. 224, 242 (1988). Without this presumption, "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones." Id. The Class Action Proposal would reverse the Supreme Court's effort to enhance the ability for investors to recover under the Exchange Act by requiring each plaintiff to show actual reliance to recover out-of-pocket losses, even where the Supreme Court has stated that fraud-on-the-market is sufficient.

2. Limiting the available measure of damages in all Rule 10b-5 cases asserting the fraud-on-the-market presumption would be barred by Section 29(a)

Looking to the other causes of action under the Securities Act and the Exchange Act, Mr. Nieman argues that the proper measure of damages in private Rule 10b-5 causes of action is disgorgement and, therefore, the portion of the Class Action Proposal attempting to limit damages in Rule 10b-5 causes of action that rely on the fraud-on-the-market presumption merely "stipulates the measure most consistent with the explicit causes of action provided by the securities laws." As an initial matter, this statement is inconsistent with the statements in the Supporting Statement that "currently, the enormous potential for damages are a powerful incentive for plaintiffs' lawyers to bring even weak suits." Further, this statement is inconsistent with the statement in the Class Action Proposal that "[t]he waiver would *limit* damages to disgorgement..." (emphasis added). Indeed, it appears that this statement represents an aspirational view of the proper measure of damages in private Rule 10b-5 actions, rather than the measure of damages that has been established by the courts.

Section 10(b) does not specify the measure of damages in private causes of action under that Section. Case law has, however, determined that the measure of such damages is not limited to disgorgement of ill-gotten profits. For example:

> Out-of-pocket damages are the typical measure of damages awarded in securities fraud cases brought under Section 10(b) and Rule 10b-5. They are measured as "the difference between the purchase price and the true value of the stock."

See In re Credit Suisse First Boston Corp. Sec. Litig., No. 97 Civ. 4760 (S.D.N.Y. Oct. 20, 1998).

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against the Company when it has not sold securities during the time that its common stock was allegedly distorted by a material misrepresentation."

3. Section 29(a) applies to a waiver of the fraud-on-the-market presumption

a. The fraud-on-the-market presumption is substantive

Mr. Nieman states correctly that Section 29(a) prohibits only the waiver of substantive, not procedural, sections of the Exchange Act. See Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 228 (1987). However, Mr. Nieman makes the unsupported statement in his separate letter regarding the Class Action Proposal that "[t]he duty not to make misrepresentations is substantive; the FOTM presumption is procedural, relating only to means by which the reliance element can be satisfied." It is our view that this is merely Mr. Nieman's statement of the operation of Section 29(a); it is not that of a court or the Commission. Further, such a statement is contrary to the Supreme Court's view that the fraud-on-the-market presumption is substantive. In Basic v. Levinson, the Supreme Court acknowledged "that the presumption of reliance created by the fraud-on-the-market theory provide[s] 'a practical resolution to the problem of balancing the *substantive* requirement of proof of reliance in securities cases against the procedural requisites of [Federal Rule of Civil Procedure] 23." Basic, 485 U.S. at 242 (emphasis added). Mr. Nieman's assertion that the fraud-on-the-market presumption is procedural, in that it is a means by which to prove reliance, is directly contrary to the Supreme Court's statement that proving reliance in securities cases is a *substantive* requirement.

b. Limiting damages to disgorgement under the fraud-on-the-market presumption undermines the substantive rights of the Exchange Act

Mr. Nieman expresses the position that, despite the waiver sought in the Class Action Proposal, "in sum, the limited waiver would not affect the duty of the Company and its officers to comply with Rule 10b-5."

It appears that Mr. Nieman bases this argument on the Supreme Court's statement in McMahon that the "anti-waiver provision of § 29(a) forbids enforcement of agreements to waive 'compliance' with the provisions of the [Exchange Act]." McMahon, 482 U.S. at 228. Mr. Nieman expresses the position that damages can, therefore, be limited in private Rule 10b-5 actions involving the fraud-on-the-market presumption because it will not limit "compliance" by the Company under the Exchange Act. However, the Supreme Court's statement regarding waiver of compliance with the provisions of the Exchange Act must be read in context with the Court's continuing discussion in McMahon explaining that the waiver of *any provision* that undermines the substantive rights in the Exchange Act is void under Section 29(a).

In McMahon, the Supreme Court confirmed its prior holding in Wilko v. Swan, 346 U.S. 427 (1953), that where a waiver results in a situation that is inadequate to "protect the substantive rights" of the Securities Act, a waiver will not be enforceable under Section 14 of the Securities Act.[4] McMahon, 482 U.S. at 228. The Supreme Court held in McMahon that the

[4] Section 14 of the Securities Act, like Section 29(a) of the Exchange Act, declares void any stipulation "to waive compliance with any provision" of the Securities Act.

waiver of Section 27 of the Exchange Act, which grants jurisdiction to United States district courts, was permissible under Section 29(a) only because it determined that the alternate forum agreed to by the plaintiffs was adequate to protect the substantive rights of the Exchange Act -- i.e., the private Section 10(b) claim brought by the plaintiffs. Unlike the waiver in McMahon, a waiver of damages recoverable under the fraud-on-the-market presumption is not adequate to protect the substantive rights of the Exchange Act, as the waiver in itself undermines the private 10b-5 claim brought by the plaintiff by limiting the existing ability to recover under the Exchange Act. It is irrelevant whether waiver of the fraud-on-the-market provision affects government actions, as asserted by Mr. Nieman. Instead, where the waiver limits the ability to recover under a private Section 10(b) claim, as stated in McMahon, that waiver is impermissible because it is inadequate to protect the substantive rights of the Exchange Act.

Overall, Mr. Nieman appears to ask the Company and the Commission to rely on two positions in determining that the Class Action Proposal complies with Section 29(a):

- First, that -- regardless of the language of the Supreme Court in McMahon that any waiver that would "weaken [the] ability to recover under the [Exchange] Act" is void under Section 29(a) -- an agreement to limit the manner in which the cause of action may be shown in private actions under Rule 10b-5 (*i.e.*, no reliance on the fraud-on-the-market presumption where out-of-pocket damages are sought) or, put differently, an agreement to limit the amount of damages that may be sought in private actions under Rule 10b-5 (*i.e.*, no ability to seek out-of-pocket damages where the fraud-on-the-market presumption is relied on) is not void under Section 29(a); and

- Second, that -- regardless of the specific language of the waiver sought by the Class Action Proposal, the language in the Supporting Statement, and the fact that the waiver would prohibit private Rule 10b-5 actions that currently are permitted (private actions against issuers, officers, and directors that seek out-of-pocket damages in reliance on the fraud-on-the-market presumption) -- the waiver sought by the Class Action Proposal would not "weaken [the] ability to recover under the [Exchange] Act."

Neither of these positions changes our view that Section 29(a) does not permit the waiver sought by the Class Action Proposal. First, the Supreme Court in McMahon made clear the application of Section 29(a) to waivers that would weaken the ability to recover under the Exchange Act (particularly under Rule 10b-5); as the Class Action Proposal would have this effect, we believe that it would be void under Section 29(a). Second, the statements of the Supreme Court in McMahon demonstrate clearly its application to waivers that would limit private Rule 10b-5 actions in the manner sought by the Class Action Proposal.

c. Amending the Articles of Incorporation to include the partial waiver does not adequately "sever the link" to rebut the fraud-on-the-market presumption

Mr. Nieman expresses his view that a partial waiver of the fraud-on-the-market presumption in the Company's articles of incorporation will put future purchasers of the

Company's stock on notice that they can collect only disgorgement, and that this notice effectively rebuts the fraud-on-the-market presumption as permitted in Basic. In this regard, the Supreme Court stated in Basic that "any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff or his decision to trade at a fair market price will be sufficient to rebut the presumption of reliance." Basic at 248. The Supreme Court provided the following acceptable means by which to rebut the presumption:

- Market-makers knew the truth about a misrepresentation, therefore the market price was not affected by the misrepresentation.
- Despite an effort to manipulate a market price, the "truth" credibly entered the market and dissipated the effects of the misstatements.
- A showing that a plaintiff in fact believed that the specific statements made by the Company were misleading, and believed that the stock was artificially underpriced, but sold anyway.

Basic at 248-49.

These examples are easily distinguished from the Class Action Proposal, which seeks a blanket waiver to forever disclaim that the market price accurately reflects the status of the Company. The opportunity for rebuttal is intended for those situations in which a plaintiff relies on a specific misrepresentation put forth by the company; it is not a tool to disclaim all future reliance on anything said by the company. In this regard, we note the following statement of the Supreme Court:

> The presumption of reliance employed in this case is consistent with, and, by facilitating Rule 10b-5 litigation, supports, the congressional policy embodied in the [Exchange] Act. In drafting that Act, Congress expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance on the integrity of those markets . . . . Indeed, nearly every court that has considered the proposition has concluded that, where materially misleading statements have been disseminated into an impersonal, well-developed market for securities, the reliance of individual plaintiffs on the integrity of the market price may be presumed.

Basic at 245-47.

C. ***The Company May Exclude the Class Action Proposal in Reliance on Rule 14a-8(i)(3) Because it is Materially False and Misleading and, Therefore, Contrary to Rule 14a-9***

1. ***The Class Action Proposal is materially false and misleading because it purports to provide a means by which the Company may partially waive the fraud-on-the-market presumption of reliance when such a waiver would be void under Section 29(a) of the Exchange Act***

Mr. Nieman expresses his view that the No-Action Request is "wasting the staff's time by raising" this argument. We respectfully disagree with Mr. Nieman's statement. Based on the foregoing and the discussion in the No-Action Request, it continues to be our view that the Company may exclude the Class Action Proposal in reliance on Rule 14a-8(i)(3).

2. ***The Class Action Proposal is materially false and misleading because it is so inherently vague and indefinite that shareholders will be unable to determine with reasonable certainty the effect of the actions sought by the proposal***

We continue to be of the view that the Company may exclude the Class Action Proposal in reliance on Rule 14a-8(i)(3), as it is materially false and misleading because it is so inherently vague and indefinite that shareholders will be unable to determine with reasonable certainty the effect of the actions sought by the proposal.

As the Supreme Court stated in Basic, "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones." Basic v. Levinson, 485 U.S. 224, 242 (1988). The Class Action Proposal, in "altering the effects of" the fraud-on-the-market presumption likely would, as stated by the Court, "prevent[] [shareholders] from proceeding with a class action" under Rule 10b-5 against any party in which out-of-pocket damages are sought in reliance on the fraud-on-the-market presumption. Shareholders currently are permitted to bring such a private action under Rule 10b-5 and that ability would be eliminated by the Class Action Proposal. Neither the Class Action Proposal nor the Supporting Statement provide any means by which reasonable, current shareholders could understand the effect of the Class Action Proposal in eliminating a private right of action under the Exchange Act which they currently possess. In this regard, the Class Action Proposal states merely that "[t]he waiver would limit damages to disgorgement of the defendants' unlawful gains from their violation of Rule 10b-5."

Contrary to Mr. Nieman's assertion in his separate letter regarding the Class Action Proposal, the Division has stated that the relevant question in determining whether a shareholder proposal is so vague and indefinite as to be misleading is the following -- will shareholders in voting on the proposal, and the company in implementing the proposal (if adopted), be able to determine with any reasonable certainty exactly what actions or measures the proposal requires. See Philadelphia Electric Company (Jul. 30, 1992). As noted in the No-Action Request, we

believe that the Class Action Proposal does not satisfy this standard. Due to the failure of the Class Action Proposal and Supporting Statement to explain to shareholders the effect of the Class Action Proposal on their existing private right of action under Rule 10b-5 -- for example, the potential damages that are being eliminated by the waiver or the effect of the waiver where there are no "unlawful gains" by officers or directors -- shareholders could not reasonably understand the scope or effect of the action they are being asked to take.

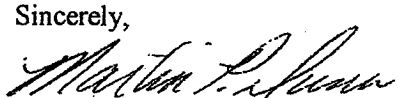
III. CONCLUSION

Based on the foregoing and the discussion set forth in the No-Action Request, we believe that the Company may exclude all three of the Proposals from its 2009 Proxy Materials in reliance on Rules 14a-8(c) and (f). As such, on behalf of the Company, we respectfully request that the Division concur in our view and not recommend enforcement action to the Commission if the Company excludes the three Proposals from its 2009 Proxy Materials.

Based on the foregoing and the discussion set forth in the No-Action Request, we believe that the Company may exclude the Class Action Proposal from its 2009 Proxy Materials in reliance on Rules 14a-8(c) and (f), Rule 14a-8(i)(2), and Rule 14a-8(i)(3). As such, if the Division is unable to concur in our view that the Company may exclude all three Proposals in reliance on Rules 14a-8(c) and (f), we respectfully request on behalf of the Company that the Division concur in our view and not recommend enforcement action to the Commission if the Company excludes the Class Action Proposal from its 2009 Proxy Materials.

If we can be of further assistance in this matter, please do not hesitate to contact me at (202) 383-5418.

Sincerely,



Martin P. Dunn
of O'Melveny & Myers LLP

Enclosures

cc: Ms. Karen Gruen, Alaska Air Group, Inc.
Mr. Andor Terner, O'Melveny & Myers LLP
Ms. Shelly Heyduk, O'Melveny & Myers LLP
Mr. Richard D. Foley
Mr. Stephen Nieman (via email to Mr. Richard D. Foley)
Mr. Terry K. Dayton (via email to Mr. Richard D. Foley)
Mr. William Davidge (via email to Mr. Richard D. Foley)

EXHIBIT A

STEVE NIEMAN, President
The Ownership Union® | www.ourunion.org
15204 NE 181st Loop, Brush Prairie, WA 98606
*** FISMA & OMB Memorandum M-07-16 *** FISMA & OMB Memorandum | **fax (360) 666-6483**

January 13, 2009

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Alaska Air Group, Inc. Rule 14a-8 Proposals by Stephen Nieman, Terry K. Dayton and William Davidge

VIA: Email shareholderproposals@sec.gov

Ladies and Gentlemen:

This addressees the company claim that Stephen Nieman, Terry K. Dayton and William Davidge did not sponsor their proposals based on their individual shareholdings. It is important to note that Rule 14a-8 states (emphasis added):

> f. Question 6: What if I fail to follow one of the eligibility or procedural requirements explained in answers to Questions 1 through 4 of this section?
>
> The company may exclude your proposal, but only after it has notified you of the problem, and you have failed adequately to correct it. ***Within 14 calendar days of receiving your proposal, the company must notify you in writing of any procedural or eligibility deficiencies, as well as of the time frame for your response.*** Your response must be postmarked, or transmitted electronically, no later than 14 days from the date you received the company's notification. A company need not provide you such notice of a deficiency if the deficiency cannot be remedied, such as if you fail to submit a proposal by the company's properly determined deadline. If the company intends to exclude the proposal, it will later have to make a submission under Rule 14a-8 and provide you with a copy under Question 10 below, Rule 14a-8(j).

The intent of this rule is believed to be to allow the proponents to cure any eligibility or procedural requirements. Yet it appears that the company did not provide adequate information to cure the eligibility or procedural requirements. The company's December 12, 2009 notice did not claim that Mr. Foley was a beneficial owner and thus the proponents were not given the opportunity to satisfy the company's concern on this point.

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According to the attached individual letters of Stephen Nieman, Terry K. Dayton and William Davidge each proponent has limited Mr. Richard Foley's authority to act only in regard to their specific 2009 Rule 14a-8 proposals for the forthcoming shareholder meeting before, during and to the conclusion of the forthcoming annual shareholder meeting.

Had the company given proper notice required under rule 14a-8 (f) this clarification would have been made earlier.

For these reasons it is requested that the staff find that this resolution cannot be omitted from the company proxy.

Sincerely,

Stephen Nieman

email cc:
Mr. Terry K. Dayton
Mr. William Davidge
Mr. Richard Foley
Ms. Karen Gruen

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Mr. William Ayer
Chairman and CEO
Alaska Air Group, Inc.
PO Box 68947
Seattle, WA 98168

Re: My Rule 14a-8 Proposal

Dear Mr. Ayer,

This is the proxy for Mr. Richard Foley and/or his designee to act on my behalf regarding my timely submitted 2009 Rule 14a-8 proposal for the forthcoming shareholder meeting before, during and to the conclusion of the forthcoming annual shareholder meeting. This authorization is limited to the 2009 Rule 14a-8 proposal and supercedes the earlier text of "in all shareholder matters."

Sincerely,

Stephen Nieman 1-12-09

Stephen Nieman Date

William B. Davidge

*** FISMA & OMB Memorandum M-07-16 ***

Mr. William Ayer
Chairman and CEO
Alaska Air Group, Inc.
PO Box 68947
Seattle, WA 98168

Re: My Rule 14a-8 Proposal

Dear Mr. Ayer,

This is the proxy for Mr. Richard Foley and/or his designee to act on my behalf regarding my timely submitted 2009 Rule 14a-8 proposal for the forthcoming shareholder meeting before, during and to the conclusion of the forthcoming annual shareholder meeting. This authorization is limited to the 2009 Rule 14a-8 proposal and supercedes the earlier text of "In all shareholder matters."

Sincerely,

William B. Davidge

1-8-2009
Date

Terry K. Dayton

*** FISMA & OMB Memorandum M-07-16 ***

Mr. William Ayer
Chairman and CEO
Alaska Air Group, Inc.
PO Box 68947
Seattle, WA 98168

Re: My Rule 14a-8 Proposal

Dear Mr. Ayer,

This is the proxy for Mr. Richard Foley and/or his designee to act on my behalf regarding my timely submitted 2009 Rule 14a-8 proposal for the forthcoming shareholder meeting before, during and to the conclusion of the forthcoming annual shareholder meeting. This authorization is limited to the 2009 Rule 14a-8 proposal and supercedes the earlier text of "in all shareholder matters."

Sincerely,

T. K. Dayton

Terry K. Dayton

07 JAN 2009

Date

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January 13, 2009

VIA: Email shareholderproposals@sec.gov

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC

Re: Alaska Air Group
Shareholder Proposal of Stephen Nieman
Securities Exchange Act of 1934 Rule 14a-8

Dear Ladies and Gentlemen:

This letter, filed pursuant to Rule 14a-8(k), responds to the no action request submitted by O'Melveny & Myers on behalf of Alaska Air Group, Inc. (the Company), seeking to exclude my shareholder proposal recommending an amendment to the articles of incorporation reforming securities class actions, attached hereto as Exhibit A.

My proposal, stated simply, recommends that the board of the Company take steps to amend its articles of incorporation to effect a partial waiver of the "fraud on the market" (FOTM) presumption of reliance created by the Supreme Court in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). The proposed amendment would apply to any suit invoking the FOTM presumption alleging violations of Rule 10b-5 of the Securities Exchange Act of 1934 against the Company, its officers, directors, or third-party agents. The amendment would limit damages to disgorgement of the defendants' unlawful gains from their violation of Rule 10b-5. In addition, the proposed amendment would commit the Company to pay the reasonable expenses and attorneys' fees of the shareholder who brings a FOTM claim.

The Company contends that it may exclude my proposal pursuant to Rule 14a-8(c) and (f), and (i)(2) and (3). Specifically, the Company urges that the proposed amendment: (1) contains more than one proposal; (2) would violate the anti-waiver provision of the Exchange Act, § 29; and (3) is materially false and misleading. The Company is wrong on all three counts.

A. There Is Only One Proposal

The Company artificially severs my proposed amendment to articles of incorporation into two elements: (1) the partial waiver of the FOTM presumption; and (2) the commitment by the Company to pay reasonable attorneys' fees in cases invoking the FOTM presumption. The Company conspicuously ignores the fact that the recommended commitment to pay attorneys' fees would not apply to other securities fraud claims, such as claims under §§ 11 and 12(a)(2) of the Securities Act, or claims alleging actual reliance under Rule 10b-5. Instead, it argues that my proposal does not have a single unifying concept because on the one hand, it discourages plaintiffs from filing suit by limiting the available damages, and on the other, encourages "plaintiff's lawyers to file suit against the Company, not deter them." (No Action Request, p. 9).

The Company misconstrues the proposal, which is intended to encourage plaintiffs' lawyers to "target officers of the Company who reaped large stock option gains or other incentive

compensation as the result of the fraud, thereby penalizing the party actually responsible for the fraud." (Exhibit A, Supporting Statement). Committing the Company to pay reasonable attorneys' fees in those cases encourages lawsuits against Company officers who have committed fraud, not the Company. (Obviously, the Company need not be a party to the lawsuit to pay the attorneys' fees.) Any claim against the Company invoking the FOTM presumption would be dismissed for failure to state a claim, unless the plaintiff could allege that the Company benefitted from the fraud, which the available evidence shows almost never happens in cases invoking the FOTM presumption. Given that potential damages would be limited to the officers' benefit from their fraudulent conduct, having the Company provide an additional incentive to bring suit against those officers would serve the Company's interest in encouraging those officers to comply with Rule 10b-5. The single unifying element is to use Rule 10b-5 FOTM actions to encourage the Company's officers – who are best placed to ensure that the Company's disclosures are not misleading – to comply with Rule 10b-5. The proposal is consistent with Rule 14a-8(c), as well as the purposes of Rule 10b-5.

B. The Proposal Does Not Violate § 29 of the Exchange Act

The Company next argues that my proposed amendment would violate § 29(a) of the Exchange Act because it would "weaken [the] ability to recover under the [Exchange] Act." (No Action Request, p. 12). In fact, the opposite is true; by providing for the payment of attorneys' fees in meritorious cases against the Company's officers when they violate Rule 10-5, the proposed amendment would facilitate the ability of shareholders to bring actions under Rule 10b-5. Under prevailing practice, many meritorious claims are not brought because the damages recoverable are not large enough to provide for a sufficient fee award from which to compensate the plaintiffs' attorney. A commitment by the Company to pay fees in those cases would encourage plaintiffs' attorneys to bring suits against the Company's officers if they had strong evidence of fraud by them, whether the damages available were large or small. In any event, there is no conflict between my proposal and § 29(a) of the Exchange Act, as explained below.

1. The Proper Measure of Damages in Rule 10b-5 Cases Asserting the FOTM Presumption Is Disgorgement

The Company completely ignores the question of what a plaintiff is entitled to recover in a Rule 10b-5 case invoking the FOTM presumption. The Supreme Court has never resolved this question, and specifically reserved it when it created the FOTM presumption. See *Basic*, 485 U.S. at 248 n. 28. The Court has, however, provided instruction on the proper interpretive approach to § 10(b) when the statutory text is silent on the question to be adjudicated. In those cases, the Court has said:

> When the text of § 10(b) does not resolve a particular issue, we attempt to infer how the 1934 Congress would have addressed the issue had the 10b-5 action been included as an express provision in the 1934 Act. For that inquiry, we use the express causes of action in the securities Acts as the primary model for the § 10(b) action.

Central Bank of Denver v. *First Interstate Bank of Denver*, 511 U.S. 164, 178 (1994). Obviously, the text of § 10(b) does not address the question of the appropriate measure of damages in cases asserting the FOTM presumption of reliance, so we must look at the damages measures used in the explicit causes of action.

There are six explicit causes of action in the securities laws that shed light on the measure of damages in such cases. The first two come from the Securities Act of 1933. The Court has held that

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the "1933 and 1934 Acts should be construed harmoniously." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Section 11 of the Securities Act allows the plaintiff to sue a corporate issuer, along with its officers and directors, for damages if the company has a material misstatement in its registration statement for a public offering. Section 11 has no reliance requirement. Plaintiffs do not need to have read the registration statement that is alleged to be misleading. Damages, however, are limited to the offering price. Securities Act § 11(g). The corporate issuer's liability cannot be greater than its benefit from the fraud. Section 12(a)(2) provides a parallel cause of action for material misstatements in a prospectus or an oral statement made in connection with a public offering. Section 12(a)(2) also does not require reliance, but its remedy is rescission—plaintiffs who prevail are entitled to put their shares back to the seller in exchange for their purchase price (or rescissory damages, if the plaintiff has sold before bringing suit). Under either formula, damages are limited to the amount that the seller received from the investor. In FOTM cases, the corporate defendant being sued has typically received nothing from the investor because it was not issuing securities during the time of the alleged fraud.

Turning to the Exchange Act private causes of action, § 28 preserves existing rights and remedies, but bars plaintiffs from recovering "a total amount in excess of his actual damages on account of the act complained of." This provision tells us nothing, however, about the relation between reliance and damages. More illuminating are the two explicit causes of action allowing for recovery from insider traders. Neither cause of action requires reliance, but both limit damages to the benefit that the insider trader obtained from his violation. First, § 16(b) allows shareholders to bring derivative suits on behalf of the corporation to recover "short swing" gains made by insiders trading in the company's shares (*i.e.*, profits gained, or losses avoided, for "round trip" transactions—buy/sell or sell/buy—within six months of each other). The remedy is limited to the defendant's benefit from the violation, in this case the profits the insider gained (or the losses he avoided) within the six-month period that defines the offense. Second, § 20A creates a private cause of action for insider trading, this time for conduct that violates § 10(b) because the insider has breached a duty of disclosure. The provision allows investors who have traded contemporaneously with insiders to recover damages from those insider traders. Reliance is excused in such cases, *Affiliated Ute v. Citizens of Utah* v. *United States*, 406 U.S. 128 (1972), but damages once again are limited to the defendant's "profit gained or loss avoided in the transaction." Moreover, even that measure is reduced by any disgorgement obtained by the SEC based on the same violations. Thus, where the Exchange Act excuses reliance, recovery is limited to the defendant's gain, not the plaintiff's loss. That is the measure in my proposal.

Section 18 of the Exchange Act comes closest to the Rule 10b-5 FOTM class action. Section 18 allows investors who have relied on a corporation's filings with the SEC to recover damages for misstatements in those filings. Section 18 does not limit damages, thus standing in sharp contrast to the other causes of action. It is also unique in requiring that plaintiff to demonstrate that he purchased or sold "in reliance upon" the misstatement in the company's filings with the SEC. Damages are limited to the "damages caused by such reliance." Thus, out of pocket damages are available under § 18 only when the plaintiff can demonstrate actual reliance. As noted above, the proposed partial waiver would not affect the availability of out-of-pocket damages in such cases. In sum, the principle common to these explicit causes of action is that damages should be limited to some measure of the defendant's benefit (the disgorgement measure of unjust enrichment), unless the plaintiff can show actual reliance on the misstatement, in which case the out-of-pocket measure is appropriate. The measure in my proposal is consistent with that principle, and therefore consistent with §§ 10(b) and 29(a). It does not limit any rights provided by the Rule 10b-5 cause of action, but instead stipulates the measure most consistent with the explicit causes of action provided by the securities laws.

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2. Section 29(a) Only Bars Waiver of Substantive Obligations of the Exchange Act

The Supreme Court has held that the antiwaiver provisions of the securities laws do not apply to procedural provisions. See *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 482 (1989) (construing § 14 of the Securities Act, which is identical to § 29(a) of the Exchange Act). "By its terms, § 29(a) only prohibits waiver of the substantive obligations imposed by the Exchange Act." *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 228 (1987). *Basic* makes clear that the FOTM presumption is procedural, rather than substantive. The Court disclaimed any intent to eliminate the reliance requirement, 485 U.S. at 243, instead characterizing the FOTM presumption as a "useful device[] for allocating the burdens of proof." *Id.* at 245. The Court did not pretend that the FOTM presumption was mandated by the Exchange Act, which would have been difficult argument to make given that the Rule 10b-5 cause of action is implied rather than express. The duty not to make misrepresentations imposed by Rule 10b-5 is substantive; the FOTM presumption is procedural, relating only to means by which the reliance element can be satisfied. A number of courts have upheld waivers of reliance in Rule 10b-5 cases. See *Rissman* v. *Rissman*, 213 F.3d 381, 384 (7th Cir. 2000) ("[A] written anti-reliance clause precludes any claim of deceit by prior representations."); *Harsco Corp.* v. *Segui*, 91 F.3d 337, 343-344 (2nd Cir. 1996); *One-O-One Enterprises, Inc.*, v. *Caruso*, 848 F.2d 1283 (D.C. Cir. 1988).

In any event, my proposal is entirely consistent with the FOTM presumption as set forth by the Court in *Basic*. The *Basic* Court emphasized that the presumption could be rebutted by "[a]ny showing that severs the link between the alleged misrepresentation and ... his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." *Basic*, 485 U.S. at 248. My proposal would sever that link. By partially waiving the FOTM presumption of reliance in the articles of incorporation, the Company will be putting future purchasers of the company's stock on notice that they can only collect disgorgement damages when they rely on that presumption. Consistency with the Court's holding in *Basic* requires consideration not only of the FOTM presumption, but also the means that the Court provided for rebutting that presumption. The stock market would incorporate the limited waiver into the Company's stock price, thereby negating the premise for invoking the FOTM presumption.

The Commission has taken the position that § 29(a) only bars provisions that "effect[] a waiver of the other party's duty to comply with the Exchange Act." Brief for the Securities and Exchange Commission as Amicus Curiae Supporting Petitioners, *Shearson/American Express, Inc. v. McMahon*, 1986 WL 727882. My proposal cannot be construed waiving the Company's duty to comply with Rule 10b-5. The Company would still be subject to the enforcement mechanisms established by Congress in the Exchange Act: Commission enforcement actions and Justice Department criminal prosecutions. The government does not need to prove reliance in its actions, so the partial waiver of the FOTM presumption would not affect government actions in any way. Moreover, the Company would continue to face civil liability for out of pocket damages to shareholder-plaintiffs who allege actual reliance. In addition to these government actions and private cases alleging actual reliance, officers who make material misstatements would also face FOTM lawsuits for disgorgement of their benefits from the fraud. In sum, the limited waiver would not affect the duty of the Company and its officers to comply with Rule 10b-5.

C. The Proposal Does Not Violate Rule 14a-9

The Company's final argument for excluding my proposal is that it is misleading because it does not disclose that it is illegal, that is, that it violates § 29(a). (No Action Request, p. 14). This transparent bootstrapping probably does not warrant a response, but in the interest of completeness I

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will address the argument. As discussed above, the proposal does not violate § 29(a). Therefore, it would be false and misleading to say that it violates § 29(a), as the Company suggests. In other words, the proposal either violates Rule 14a-8(i)(2), or it does not. Rule 14a-8(i)(3) is irrelevant to the question. The Company is wasting the staff's time by raising the latter rule.

The Company also contends that the proposal is misleading because it "is vague and indefinite." (No Action Request, p. 16). Specifically, the Company complains that the proposal does not define the FOTM presumption and does not advise the shareholders that they are being asked to give up a right. On the latter point, it is specious to suggest that altering the effects of a legal presumption is equivalent to giving up a right. (The Company does not explain what that "right" supposedly is.) On the failure to define the FOTM presumption, apparently the Company is unaware that shareholder proposals and supporting statements are limited to 500 words. Rule 14a-8(d). The proposal provides as much detail as is feasible within that constraint; including excerpts from the Court's decision in *Basic* would have done little to further enlighten shareholders on the proposal and its purposes. The mechanics of how the FOTM presumption operates are wholly irrelevant to those purposes and are of interest mainly to securities litigators. (Notably, the Company does not suggest a definition of the FOTM presumption, nor does it explain how it would help shareholders better understand the merits of the proposal.) The relevant question for shareholders is whether they benefit from FOTM class actions as currently structured, which the supporting statement discusses at length. Accordingly, shareholders are provided with the information they need to understand the subject matter and scope of the proposal.

D. Conclusion

Based upon the foregoing analysis, I urge the staff to reject the Company's request for a no-action letter concerning the Proposal. If the staff does not concur with our position, I would appreciate the opportunity to confer with the staff concerning these matters prior to issuing its response.

Pursuant to Rule 14a-8(j), enclosed herewith are six copies of this letter. A copy of this correspondence has been provided to the Company and its counsel. If we can provide additional information to address any questions that the Staff may have with respect to this correspondence or the Company's no-action request, please do not hesitate to call me at *** FISMA & OMB Memorandum M-07-16 ***

Sincerely,

Stephen Nieman

cc: Ms. Karen Gruen, Alaska Air Group, Inc.
Mr. Martin Dunn, O'Melveny & Myers LLP

STEVE NIEMAN, President
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Exhibit A

Steve Nieman's Proposal for Reforming Securities Class Actions and Supporting Statement

BE IT RESOLVED: That the shareholders of Alaska Air Group hereby recommend that the Board of Directors initiate the appropriate process to amend the Company's certificate of incorporation to provide for a partial waiver of the "fraud-on-the-market" presumption of reliance created by the Supreme Court in *Basic v. Levinson*, 485 U.S. 224 (1988). Specifically, the amendment should apply to any suit alleging violations of Rule 10b-5 of the Securities Exchange Act of 1934 against the Company, its officers, directors, or third-party agents. The partial waiver would apply to suits alleging reliance on the "fraud-on-the-market" presumption. The waiver would limit damages to disgorgement of the defendants' unlawful gains from their violation of Rule 10b-5. The amounts disgorged would be distributed to shareholder members of the class. The corporation should also commit to paying the reasonable expenses and attorneys' fees of the shareholder who brings such a claim, subject to approval by the Board of Directors.

SUPPORTING STATEMENT: Securities fraud class actions impose enormous costs on public companies while providing little benefit to shareholders. This proposal, suggested by Professor Adam Pritchard of the University of Michigan, would limit damages in secondary market securities class actions, i.e., suits brought against the Company when it has not sold securities during the time that its common stock was allegedly distorted by a material misrepresentation. See:
http://www.cato.org/pubs/scr/2008/Stoneridge_Pritchard.pdf;
http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202424567666
http://www.securitiesdocket.com/2008/11/17/guest-column-can-shareholders-waive-the-fraud-on-the-market-presumption-of-reliance/.

Currently, such suits effectively result in a "pocket shifting" of money from one group of shareholders (those who continue to hold the company's shares) to another (those who bought during the time that the price was distorted by fraud). Frequently, shareholders will be members of both groups simultaneously, which means they are paying themselves compensation in securities class actions. Sometimes the corporation pays directly for the settlement, and sometimes it pays indirectly in the form of insurance premia, but either way these settlements come out of funds that the corporation could use to pay dividends or make new investments. Almost never do the officers who actually made the misrepresentation have to contribute to the settlement. Consequently, suits provide minimal compensation and, worse yet, scant deterrence of fraud. The only clear winners under this scheme are the lawyers who bring the suits, and those who defend them, who profit handsomely from moving the money around.

The proposed amendment would substantially reduce the incentive of plaintiffs' lawyers to file suit against the Company in response to a drop in the Company's stock price. Currently, the enormous potential damages are a powerful incentive for plaintiffs' lawyers to bring even weak suits and a powerful incentive for companies to settle, even if they believe that they would win at trial. Under the proposal, lawsuits would instead target officers of the Company who reaped large stock option gains or other incentive compensation as the result of fraud, thereby penalizing the party actually responsible for the fraud.

We urge the shareholders to vote for the proposal.

EXHIBIT B

O

O'MELVENY & MYERS LLP

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11140-0014

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WRITER'S E-MAIL ADDRESS
mdunn@omm.com

December 31, 2008

VIA HAND DELIVERY AND E-MAIL

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Alaska Air Group, Inc.
Shareholder Proposals of Richard D. Foley
Securities Exchange Act of 1934 Rule 14a-8

Dear Ladies and Gentlemen:

This letter is to inform you that our client, Alaska Air Group, Inc., a Delaware corporation (the "Company"), intends to omit from its proxy statement and form of proxy (the "2009 Proxy Materials") for its 2009 Annual Meeting of Stockholders (the "2009 Annual Meeting") three shareholder proposals and statements in support thereof (collectively, the "Proposals") submitted by Richard D. Foley (the "Proponent"). The following three Proposals were submitted to the Company by the Proponent:

- a proposal titled "Reforming Securities Class Actions," which was purportedly submitted on behalf of Stephen Nieman (the "Class Action Proposal");
- a proposal titled "Cumulative Voting," which was purportedly submitted on behalf of Terry K. Dayton (the "Cumulative Voting Proposal"); and
- a proposal titled "Shareholder Say on Executive Pay," which was purportedly submitted on behalf of William Davidge (the "Executive Pay Proposal").

Pursuant to Rule 14a-8(j) under the Securities Exchange Act of 1934 (the "Exchange Act"), we have:

- enclosed herewith six copies of this letter and its attachments;

- filed this letter with the U.S. Securities and Exchange Commission (the "Commission") no later than eighty (80) calendar days before the Company intends to file its definitive 2009 Proxy Materials with the Commission; and

- concurrently sent copies of this correspondence to the Proponent.

Copies of the Proposals, the cover letters submitting each of the three Proposals, and the single facsimile cover page under which all three Proposals were submitted are attached hereto as Exhibit A. Copies of other correspondence with the Proponent, Mr. Nieman, Mr. Dayton, and Mr. Davidge regarding the Proposals are attached hereto as Exhibits B through D.

As discussed in Section I of this letter, it is our view that the Company may exclude all three of the Proposals from its 2009 Proxy Materials. Further, as discussed in Section II of this letter, it is our view that the Company has alternative bases upon which it may exclude the Class Action Proposal from its 2009 Proxy Materials.

I. EXCLUSION OF THE THREE PROPOSALS

A. Basis for Excluding the Three Proposals -- Paragraphs (c) and (f) of Rule 14a-8

Rule 14a-8(c) Question 3: How many proposals may I submit? Each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting.

It is our view that the Proposals may be excluded from the Company's 2009 Proxy Materials pursuant to paragraphs (c) and (f) of Rule 14a-8 because the Proponent has submitted more than one shareholder proposal for inclusion in the Company's 2009 Proxy Materials and, despite proper notice, has failed to correct this deficiency.

B. Analysis

1. The proxy granted to the Proponent by each of Mr. Nieman, Mr. Dayton, and Mr. Davidge provides the Proponent with authority over their shares that causes him to be a "beneficial owner" of those shares. As the "beneficial owner" of those shares, the Proponent has submitted more than one shareholder proposal to the Company, in violation of the one-proposal limitation in Rule 14a-8(c).

Exchange Act Rule 13d-3(a) defines the term "beneficial owner" as "any person who, directly or indirectly, through contract, arrangement, understanding, relationship, or otherwise has or shares voting power and/or investment power." Pursuant to the Commission's statements

in Exchange Act Release No. 34-17517 (February 5, 1981), the Rule 13d-3(a) definition of "beneficial owner" applies for purposes of the one-proposal limitation in Rule 14a-8.

Each of Mr. Nieman, Mr. Dayton, and Mr. Davidge granted proxy authority to the Proponent that provides him with the ability to act in all shareholder matters, regardless of whether they pertain to the Proposals, before, during and after the Company's 2009 Annual Meeting. Specifically, the proxy conferred upon the Proponent by each of Mr. Nieman, Mr. Dayton, and Mr. Davidge reads as follows:

> This is the proxy for Mr. Richard D. Foley and/or his designee to act on my behalf in all shareholder matters, including this Rule 14a-8 proposal for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting.

As such, each of Mr. Nieman, Mr. Dayton, and Mr. Davidge granted the Proponent proxy authority that confers upon him all of their powers as a shareholder until further notice. In this regard, it is important to note that the proxy granted to the Proponent:

- is not limited to matters relating to the submission of the Proposals;
- is not limited to voting at the 2009 Annual Meeting; and
- relates to all shareholder matters before, during, and after the 2009 Annual Meeting.

As a result of the unlimited proxy authority granted to him, the Proponent "directly or indirectly, through contract, arrangement, understanding, relationship, or otherwise has or shares voting power" over the shares held by Mr. Nieman, Mr. Dayton, and Mr. Davidge and, therefore, the Proponent falls within the Rule 13d-3(a) definition of "beneficial owner" with regard to those shares.

In Exchange Act Release No. 34-39538 (January 12, 1998) ("Release No. 34-39538") regarding Forms 13D and 13G, the Commission provided significant guidance regarding the effect of a proxy solicitation on "beneficial ownership." In this regard, Release No. 34-39538 provides that "when a shareholder solicits and receives revocable proxy authority (subject to the discretionary limits of Rule 14a-4), without more, that shareholder does not obtain beneficial ownership under Section 13(d) in the shares underlying the proxy." Conversely, Release No. 34-39538 contemplates that one may obtain beneficial ownership where the proxy confers more than "revocable proxy authority."

The proxy authority conferred upon the Proponent does not indicate whether or not it is irrevocable. Regardless of whether it is revocable or irrevocable, however, it is clear that the proxy authority granted to the Proponent goes well beyond the authority to vote shares at an annual meeting of shareholders. Further, the proxy authority granted to the Proponent goes

beyond the discretionary limits permitted by Rule 14a-4 and, indeed, is not subject to any of the limits of Rule 14a-4. In this regard, while Rule 14a-4 permits the granting of discretionary proxy authority under certain circumstances, Rule 14a-4 provides that:

"No proxy shall confer authority:

1. To vote for the election of any person to any office for which a bona fide nominee is not named in the proxy statement;

2. To vote at any annual meeting other than the next annual meeting (or any adjournment thereof) to be held after the date on which the proxy statement and form of proxy are first sent or given to security holders;

3. To vote with respect to more than one meeting (and any adjournment thereof) or more than one consent solicitation; or

4. To consent to or authorize any action other than the action proposed to be taken in the proxy statement, or matters [otherwise permitted by Rule 14a-4]."

As stated above, the proxy granted to the Proponent relates to "all shareholder matters, including this Rule 14a-8 proposal for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting." As the proxy authority granted to the Proponent is unlimited with regard to both permitted actions and duration, it goes well beyond the proxy authority contemplated by Rule 14a-4.

Release No. 34-39538 indicates that a revocable proxy authority "without more" should not result in the holder of that proxy authority being deemed a "beneficial owner" of the shares for which he or she was granted the proxy authority. The unlimited breadth and discretion of the grant of the proxy to the Proponent ("all shareholder matters") and the unlimited time period of the grant of the proxy to the Proponent ("before, during and after the forthcoming shareholder meeting") clearly evidence "more" than a customary grant of revocable proxy authority.

Consequently, we believe that the proxy authority granted to the Proponent causes him to be the beneficial owner of the shares otherwise owned by Mr. Nieman, Mr. Dayton, and Mr. Davidge. As such, the Proponent is the beneficial owner of the shares that provide the eligibility to submit each of the Proposals.

In Exchange Act Release No. 34-12999 (November 22, 1976), the Commission stated that the one-proposal limitation in Rule 14a-8(c) applies "collectively to all persons having an interest in the same securities (*e.g.*, the record owner and the beneficial owner and joint tenants)." For the reasons discussed above, we believe that the proxy granted to the Proponent by each of Mr. Nieman, Mr. Dayton, and Mr. Davidge confers upon the Proponent beneficial ownership of the shares that provide the eligibility to submit each of the Proposals. Accordingly,

the one-proposal limitation in Rule 14a-8(c) applies to the Proponent with respect to the three Proposals, as he is a beneficial owner of those shares and, therefore, one of the "persons having an interest in [those] securities." As the Proponent is the beneficial owner of the shares that provide the eligibility to submit each of the three Proposals, the submission of the three Proposals by the Proponent does not comply with the one-proposal limitation of Rule 14a-8(c).

2. *The basis for the view expressed in this letter that the Proponent is the beneficial owner of the shares is different from the bases presented to the Division of Corporation Finance (the "Division") in prior no-action requests regarding an identical grant of proxy. As such, consistent with the Division's statements in Staff Legal Bulletin No. 14, the Division's responses to those prior no-action requests do not preclude the Division from concurring in our view that the nature of the proxy authority causes the Proponent to be the beneficial owner of those shares.*

We note that AT&T, Inc. submitted requests for a no-action position to the Division with regard to an identical proxy granted to Mr. John Chevedden in each of the last two proxy seasons. See AT&T, Inc. (January 18, 2007) ("AT&T I") and AT&T, Inc. (February 19, 2008) ("AT&T II" and, collectively with AT&T I, the "AT&T Requests"). In the AT&T Requests, AT&T argued that, as a result of the proxy granted to Mr. Chevedden, certain proposals could be omitted in reliance on Rule 14a-8(c). While the Division did not concur with AT&T's position in the AT&T Requests, we do not believe that the Division's position in response to the AT&T Requests precludes the Division's concurrence with our view that the Proponent is subject to, and has not complied with, Rule 14a-8(c). We reach this position based on the following:

- in AT&T I, AT&T expressed its view that the proxy granted to Mr. Chevedden went "beyond mere representation for purposes of the Proposals, and expressly grant[ed] him voting rights as well," and that "[b]ecause the proxy agreement between each of the Nominal Proponents and John Chevedden confers voting rights to John Chevedden, he is a beneficial owner of the Corporation's stock under the definition provided by Rule 13d-3(a);" and

- in AT&T II, AT&T expressed its very similar view that the "proxy agreement between each of the Nominal Proponents and John Chevedden confers to John Chevedden the right to act on the Nominal Proponent's behalf on matters 'regarding this Rule 14a-8 proposal'... includ[ing] the right to vote shares for such proposal," and, accordingly, "he is a beneficial owner of the Corporation's stock under the definition provided by Rule 13d-3(a)."

The Division stated in Staff Legal Bulletin No. 14 (July 13, 2001) that it "will not consider any basis for exclusion that is not advanced by the company" and that it "consider[s] the specific arguments asserted by the company and the shareholder, the way in which the proposal is drafted and how the arguments and [the Divison's] prior no-action responses apply to the

specific proposal and company at issue." Based on this practice, the Division concluded that it "may determine that company X may exclude a proposal but company Y cannot exclude a proposal that addresses the same or similar subject matter."

As we discuss above, it is our view that, as a result of the unlimited breadth, discretion, and duration of the proxy authority granted to the Proponent, the Proponent "directly or indirectly, through contract, arrangement, understanding, relationship, or otherwise has or shares voting power" over the shares held by Mr. Nieman, Mr. Dayton, and Mr. Davidge. Accordingly, under the definition in Rule 13d-3(a), the Proponent is the beneficial owner of the subject shares and, as such, his submission of the three Proposals fails to satisfy the one-proposal limitation in Rule 14a-8(c). Our position in this regard is not based on the more limited position expressed in the AT&T Requests that the holder of a proxy should be deemed the beneficial owner of the subject shares where the proxy confers authority with regard to the submission of proposals or voting at an annual meeting of shareholders.

The basis for the position expressed in the AT&T Requests is significantly different from the basis for the view we express in this letter regarding the application of Rule 14a-8(c) to a person upon whom proxy authority has been conferred. Based on the Division's statements in Staff Legal Bulletin No. 14 and the basis expressed in this letter for our view that the Proponent is the beneficial owner of the shares, we believe that the Division's position in response to the AT&T Requests would not be inconsistent with the Division's concurrence with our view that the Company may omit the Proposals from its 2009 Proxy Materials in reliance on Rule 14a-8(c).

3. *The Company provided sufficient notice to the Proponent pursuant to Rule 14a-8(f) of the submission of multiple proposals in contravention of Rule 14a-8(c) and the Proponent failed to correct such deficiency within 14 calendar days of receipt of that notice.*

On November 28, 2008, the Company received a 15-page facsimile from Mr. Nieman containing all three Proposals.[1] On December 12, 2008, the Company timely provided the Proponent with notice of his failure to comply with Rule 14a-8(c) and advised him by e-mail (following with courtesy copies via certified mail to the Proponent, as well as all three nominal proponents) that, pursuant to Rule 14a-8, he had 14 calendar days to remedy that deficiency in his submission to the Company (copy attached as Exhibit B). The Proponent took no action to reduce the number of proposals submitted by him to the Company in the permitted time.

While the Proponent took no action in response to the Company's December 12, 2008 notice of deficiency, Mr. Nieman submitted a response, on behalf of the Proponent, on December

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[1] Each Proposal is accompanied by a cover letter with a different date (*i.e.*, November 26, 2008, November 28, 2008, and December 1, 2008); however, the copies of the Proposals and the Proponent's cover letters included in Exhibit A show that all three Proposals were received by the Company under the same facsimile cover sheet on November 28, 2008.

19, 2008 and indicated his disagreement with the Company's notice and its statement of the view that the Proponent had not complied with the one-proposal limitation of Rule 14a-8(c) (copy attached as Exhibit C). Mr. Nieman did not, however, take any action to reduce the number of proposals submitted by the Proponent to the Company.

C. Conclusion

We note that, in situations where a proponent has not complied with the one-proposal limitation in Rule 14a-8(c), the Division has indicated that a company may exclude from its proxy materials all of the proposals submitted by that proponent (see, e.g., General Motors Corporation (March 31, 2003) and Downey Financial Corp. (December 27, 2004)). Accordingly, we are of the view that the Company may omit each of the three Proposals from its 2009 Proxy Materials.

For the reasons discussed above, on behalf of the Company, we respectfully request that the Division concur with our view that the Company may exclude each of the three Proposals from its 2009 Proxy Materials in reliance on Rules 14a-8(c) and 14a-8(f).

II. EXCLUSION OF THE CLASS ACTION PROPOSAL

A. Bases for Exclusion

It is our view that the Company may properly omit the Class Action Proposal from its 2009 Proxy Materials in reliance on the following paragraphs of Rule 14a-8:

- Rule 14a-8(c) and (f) because the Class Action Proposal contains two distinct and unrelated proposals: (i) an amendment to the Company's certificate of incorporation to provide for a partial waiver of the "fraud-on-the-market" ("FOTM") presumption and (ii) a Company commitment to paying the reasonable expenses and attorney fees of any shareholder who brings certain claims;

- Rule 14a-8(i)(2) because the Class Action Proposal violates the anti-waiver provision of the Exchange Act; and

- Rule 14a-8(i)(3) because the Class Action Proposal is materially false and misleading.

B. Summary of the Class Action Proposal

The Class Action Proposal first recommends that the Board of Directors initiate the appropriate process to amend the Company's certificate of incorporation to provide "a partial waiver of the 'fraud-on-the-market' presumption of reliance created by the Supreme Court in *Basic v. Levinson*, 485 U.S. 224 (1988)." The Class Action Proposal specifies that the

amendment should apply to any suit alleging violations of Rule 10b-5 under the Exchange Act against the Company, its officers, directors, or third-party agents.

The waiver would:

- apply to suits alleging reliance on the FOTM presumption; and
- limit damages to disgorgement of the defendants' unlawful gains from their violation of Rule 10b-5 -- with the amounts disgorged being distributed to shareholder members of the class.

The Class Action Proposal then seeks for the Company to "commit to paying the reasonable expenses and attorneys' fees of the shareholder who brings such a claim, subject to approval by the Board of Directors."

The Class Action Proposal's Supporting Statement (the "Supporting Statement") refers to conclusions of Professor Adam Pritchard of the University of Michigan set forth in a recent article published in the Cato Supreme Court Review. The Supporting Statement also provides website addresses for that article and two commentaries written by Professor Pritchard regarding the potential use of Rule 14a-8 to amend a company's governing documents to partially waive the FOTM presumption. Notably, the Supporting Statement does not define the FOTM presumption from Basic v. Levinson or discuss the potential impact of the implementation of the Class Action Proposal on shareholders' rights should they attempt to bring a Rule 10b-5 claim.

C. The Class Action Proposal Violates the "One-Proposal" Limitation of Rule 14a-8(c)

Rule 14a-8(c) states that a shareholder may submit no more than one proposal to a company for a particular shareholders' meeting. It is our view that the Class Action Proposal contains two distinct elements that are not part of a single, unifying concept -- rendering the Class Action Proposal two separate proposals. Specifically, the Class Action Proposal seeks:

(1) that the Board of Directors initiate the appropriate process to amend the Company's certificate of incorporation to provide for a partial waiver of the FOTM presumption, thereby limiting damages for suits alleging violations of Rule 10b-5 against the Company, its officers, directors, and third-party agents to disgorgement of any such defendants' unlawful gains from their violation of Rule 10b-5; and

(2) a commitment by the Company to pay the reasonable expenses and attorneys' fees of the shareholder who brings such a Rule 10b-5 claim, subject to approval by the Board of Directors.

The Supporting Statement posits that the proposed amendment to the Company's certificate of incorporation would substantially reduce the incentive of plaintiff's lawyers to file suit against the Company in response to a drop in the Company's stock price. However, the Class Action Proposal's additional request for the Company to "commit to paying reasonable expenses and attorneys' fees of the shareholder who brings such a claim" appears to have no clear correlation to the Supporting Statement's stated goal of reducing the incentive of plaintiff's lawyers to file suit against the Company. Rather, a stated policy of the Company to pay expenses and attorneys' fees of shareholders bringing securities class action suits would appear to encourage plaintiff's lawyers to file suit against the Company, not deter them.

Rule 14a-8(f) requires that a company seeking to exclude a proposal for failing to comply with the one-proposal procedural limitation of Rule 14a-8(c) notify the proponent of that deficiency within 14 days of receipt of the proposal. The Company received the Class Action Proposal on November 28, 2008. See Exhibit A. On December 12, 2008, the Company notified the Proponent (and shareholder Stephen Nieman) via e-mail of the Class Action Proposal's failure to comply with the one-proposal limitation of Rule 14a-8(c). A copy of that notice, as well as the e-mail signifying delivery of that notice, is attached as Exhibit B.

The Company's December 12, 2008 notice of deficiency provided a description of the one-proposal limitation of Rule 14a-8(c) and stated:

> [T]he proposal that you indicate you have submitted on behalf of Stephen Nieman includes proposals relating to a partial waiver of the "fraud-on-the-market" presumption of reliance and the payment of reasonable expenses and attorneys' fees for shareholders who bring certain claims. As such, if this proposal is selected by you for inclusion in the Company's proxy materials, you are required by rule 14a-8 to reduce such proposal to a single proposal and resubmit it to the Company in order to be considered for inclusion in the Company's proxy materials.[2]

The Company's notice of deficiency indicated that a revised submission meeting the one-proposal requirement was required to be postmarked or submitted electronically no later than 14 days from the date on which the notice was received in order to be eligible for inclusion in the Company's proxy materials. A copy of Rule 14a-8 was attached to the Company's notice.

Rule 14a-8(f) provides an opportunity for a proponent who submits more than one proposal to reduce the number of proposals the proponent submitted within 14 calendar days of

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[2] Please note that the notice provided by the Company to the Proponent also gave notice that the Company considered the three Proposals submitted by the Proponent, purportedly on behalf of various nominal proponents, to be submitted by the Proponent himself. The Company's notice separately addressed the Class Action Proposal, clarifying that if it was selected as the single proposal for inclusion in the Company's proxy materials then the Proposal should be revised to comply with the one-proposal limitation of Rule 14a-8(c).

being notified by the company of the limitation. However, if the proponent does not reduce the number of proposals in response to the company's request, the Division will permit the company to omit all proposals submitted by the proponent. See Pfizer Inc. (February 19, 2007) (concurring that a proposal with multiple elements relating to the election of the Board of Directors could be omitted in reliance on Rule 14a-8(c)) and General Motors Corporation (April 7, 2007) (concurring that a proposal seeking shareholder approval for numerous transactions to restructure the company could be omitted in reliance on Rule 14a-8(c)).

The Proponent took no action in response to the Company's notice of deficiency that the Class Action Proposal was, in fact, two distinct proposals. Stephen Nieman, on behalf of the Proponent, responded to the Company's notice. In that response, Mr. Nieman stated that the request in the Class Action Proposal relating to the reimbursement of fees applies only to cases in which the waiver of the FOTM presumption would apply and that reimbursement is "an important feature to help ensure that deterrence is maintained." See Exhibit C. However, he provided no explanation or basis for his belief that there is a correlation between the payment of expenses and attorneys' fees and the stated goal of the proposed amendment to the certificate of incorporation (i.e., the deterrence of plaintiff's lawyers from filing suit against the Company). Further, Mr. Nieman took no action to revise the Class Action Proposal.

The Division has concurred with the view that a proposal containing multiple elements that relate to more than one concept may be excluded under Rule 14a-8(c). See American Electric Power (January 2, 2001) (reconsideration denied January 31, 2001). Conversely, a proposal containing multiple elements that relate to a single, unifying concept is not inconsistent with the one-proposal limitation of Rule 14a-8(c). See United Parcel Service, Inc. (February 20, 2007).

As noted in the Supporting Statement, and confirmed by statements in the response to the Company's notice of deficiency, the intended purpose of the Class Action Proposal is to "limit damages" in Rule 10b-5 claims and, as a result, deter plaintiff's lawyers from filing securities class action suits against the Company (i.e., deter "the lawyers who bring the suits, and those who defend them, who profit handsomely from moving the money around"). Despite Mr. Nieman's assertions to the contrary, there is no correlation between the Company's payment of reasonable expenses and attorneys' fees and the deterrence of securities class action suits alleging violations of Rule 10b-5. Indeed, rather than relating to a single, unifying concept, the proposal requesting payment of reasonable expenses and attorneys' fees appears to have a purpose that is counter to that of the proposal requesting a waiver of the FOTM presumption in Rule 10b-5 claims.

For the reasons discussed above, on behalf of the Company, we respectfully request that the Division concur with our view that the Company may exclude the Class Action Proposal from its 2009 Proxy Materials in reliance on Rules 14a-8(c) and 14a-8(f).

D. The Class Action Proposal May Be Excluded in Reliance on Rule 14a-8(i)(2) Because it Would Cause the Company to Violate the Anti-Waiver Provision in Section 29 of the Exchange Act

Rule 14a-8(i)(2) permits the omission of a shareholder proposal if the implementation of the proposal would cause the company to violate any federal law to which it is subject. By recommending that the Board of Directors amend the Company's certificate of incorporation to provide a partial waiver of the FOTM presumption of reliance recognized by the Supreme Court, it is our view that the Class Action Proposal would cause the Company to violate Section 29(a) of the Exchange Act ("Section 29(a)").

The Supporting Statement indicates clearly the source and intent of the Class Action Proposal -- "This proposal, suggested by Professor Adam Pritchard of the University of Michigan, would limit damages in secondary market securities class actions, i.e., suits brought against the Company when it has not sold securities during the time that its common stock was allegedly distorted by a material misstatement." The Supporting Statement then refers to three of Professor Pritchard's articles relating to the FOTM presumption and waivers of that presumption. Although not stated in the Proposal or the Supporting Statement, the first referenced article provides the following summary of the FOTM presumption in Rule 10b-5 claims:

> The FOTM presumption allows plaintiffs to skip the step of alleging personal reliance on the misstatement, instead allowing them to allege that the *market* relied on the misrepresentation in valuing the security. The plaintiffs in turn are deemed to have relied upon the distorted price produced by a deceived market. The empirical premise underlying the FOTM presumption is the efficient capital market hypothesis, which holds that efficient markets rapidly incorporate information—true or false—into the market price of a security. Thus, the price paid by the plaintiffs would have been inflated by the fraud, rendering the misstatement the cause in fact of the fraudulently induced purchase. The FOTM presumption assumes that purchasers would not have paid the prevailing market price if they knew the truth.

1. The "waiver" sought by the Class Action Proposal is inconsistent with the "anti-waiver" provision of Section 29(a)

Section 29 of the Exchange Act is titled "Validity of contracts." Paragraph (a) of that section, captioned "Waiver provisions," reads, "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

2. *Section 10(b) is a substantive provision of the Exchange Act that, along with Rule 10b-5 under that Section, imposes a duty on persons trading in securities -- as the Class Action Proposal would limit damages in Section 10(b) and Rule 10b-5 claims, it is void under Section 29(a) because it would "weaken [the] ability to recover under the [Exchange] Act"*

a. *The Supreme Court's Decision in Shearson/American Express Inc. v. McMahon Provides Guidance Regarding the Application of Section 29(a)*

In Shearson/American Express Inc. v. McMahon, two customers sued a brokerage firm alleging violations of Section 10(b) and Rule 10b-5, among other allegations. 482 U.S. 220, 238 (1987). The customers had signed agreements consenting to arbitration for all controversies relating to their accounts. In arguing that their agreement to arbitrate the claims was invalid, the customers relied on Section 27 of the Exchange Act, which grants exclusive jurisdiction over claims arising under the Exchange Act to the United States district courts. The customers reasoned that Section 29(a) invalidated any pre-dispute arbitration agreement as an impermissible waiver of Section 27. Id. at 227-228.

The Court ultimately disagreed with the customers and held that so long as arbitration was "adequate to vindicate Exchange Act rights," an agreement to arbitrate was not an impermissible waiver of Section 27. Id. at 238. It is important to note, however, that the Court's holding is limited to pre-dispute arbitration agreements. In reaching this conclusion, the Court states:

> Section 29(a) is concerned, not with whether brokers 'maneuver[ed customers] into' an agreement, but with whether the agreement 'weaken[s] their ability to recover under the [Exchange] Act.' [Wilko v. Swan] 346 U.S. [427] [at] 432 [(1957)]. The former is grounds for revoking the contract under ordinary principles of contract law; the latter is grounds for voiding the agreement under § 29(a).

Id. at 230. Based on its determination that arbitration procedures that were subject to the Commission's Section 19 authority were "adequate to vindicate Exchange Act rights" (in McMahon, the rights provided by Section 10(b) and Rule 10b-5), the Court determined that the pre-dispute arbitration agreements did not "weaken [the customers'] ability to recover under the [Exchange] Act." Accordingly, the Court found that the waiver of Section 27 was not "tantamount to an impermissible waiver of the McMahons' rights under [Section] 10(b)." Id. at 234.

b. The amendment sought by the Class Action Proposal would be void under Section 29(a) because it would waive compliance with a substantive provision of the Exchange Act and would "weaken [the] ability to recover under the [Exchange] Act"

Section 10(b) creates a substantive obligation and "is a 'provision' of the 1934 Act, with which persons trading in securities are required to 'comply.'" Brief for the SEC as Amicus Curiae Supporting Petitioners, Shearson/American Express Inc. v. McMahon, 1986 U.S. Briefs 44 (Nov. 20, 1986) ("SEC Amicus Brief"). Further, shareholders have a private right of action under Section 10(b) and may bring a private lawsuit to enforce Rule 10b-5. Central Bank of Denver, N.A., v. First National Bank of Denver, N.A., 511 U.S. 164, 171 (1994). In this regard, the Commission has stated that the Section 10(b) and Rule 10b-5 private right of action "has been consistently recognized for more than 35 years [and] [t]he existence of this implied remedy is simply beyond peradventure." SEC Amicus Brief (citing Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983)).

As discussed above, the Court in McMahon held that an agreement that "weaken[s] [the] ability to recover under the [Exchange] Act" is void under Section 29(a). McMahon, 482 U.S. at 230. Unlike the waiver of Section 27 that the Court considered in McMahon, the Class Action Proposal seeks to waive the FOTM presumption, a critical element of a Section 10(b) and Rule 10b-5 claim. As noted by the Supreme Court, the FOTM presumption is vital because otherwise requiring each individual in a private cause of action to show reliance would prevent a class action from proceeding and "would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market." Basic, 485 U.S. at 245.

The Court in McMahon allowed the waiver of Section 27 only because it determined that the alternate forum was adequate to protect the substantive rights of the Exchange Act. However, a partial waiver of the FOTM presumption and a limiting of available damages in Rule 10b-5 claims, which the Class Action Proposal seeks, would weaken substantially a substantive Exchange Act right itself -- the private right of action under Section 10(b) and Rule 10b-5. The Supporting Statement confirms this point, stating that the waiver sought by the Class Action Proposal would "limit damages" in suits alleging violations of Rule 10b-5 against the Company, its officers, directors, and third-party agents.

The amendment sought by the Class Action Proposal would waive a substantive right under the Exchange Act and weaken the ability of private plaintiffs to recover in a Rule 10b-5 action. That the waiver would "weaken their ability to recover under the [Exchange] Act" is not disputed -- the Supporting Statement explicitly states that the waiver would "limit damages" in certain private actions under Rule 10b-5. Therefore, consistent with the test established by the Supreme Court in McMahon, such a waiver would be void under Section 29(a). As such, the amendment to the Company's certificate of incorporation that is sought by the Class Action Proposal, which would provide "a partial waiver of the 'fraud-on-the-market' presumption of

reliance created by the Supreme Court in *Basic v. Levinson*," would cause the Company to violate federal law.

For the reasons discussed above, on behalf of the Company, we respectfully request that the Division concur with our view that the Company may exclude the Class Action Proposal from its 2009 Proxy Materials in reliance on Rule 14a-8(i)(2). [3]

E. The Class Action Proposal May Be Excluded in Reliance on Rule 14a-8(i)(3) Because it is Materially False and Misleading and, Therefore, Contrary to Rule 14a-9

1. The Class Action Proposal is materially false and misleading because it purports to provide a means by which the Company may partially waive the FOTM presumption of reliance when such a waiver, in fact, would be void under Section 29(a) of the Exchange Act

It is our view that the Class Action Proposal also may be excluded under Rule 14a-8(i)(3) as it is contrary to Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials. The Class Action Proposal is materially false and misleading because it falsely represents that an amendment to the Company's certificate of incorporation could provide for a partial waiver of the FOTM presumption under Section 10(b) and Rule 10b-5, when such a waiver would be void under Section 29(a). Therefore, the Class Action Proposal may be excluded under Rule 14a-8(i)(3) because the entire premise of the Class Action Proposal is materially false and misleading in violation of Rule 14a-9.

As discussed in detail in Section II.D., above, Section 29(a) provides that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." In this regard, we note again that the Supreme Court held in McMahon that an agreement that weakens the ability to recover under the Exchange Act is void under Section 29(a). Id. at 230. Accordingly, because the amendment to the Company's certificate of incorporation that is sought by the Class Action Proposal would "limit damages" in Rule 10b-5 claims, that amendment would weaken the ability of plaintiffs to recover under the Exchange Act and, therefore, be void under Section 29(a).

The Class Action Proposal states that "the shareholders of Alaska Air Group, Inc. hereby recommend that the Board of Directors initiate the appropriate process to amend the company's certificate of incorporation to provide for a partial waiver of the "fraud-on-the-market"

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[3] Based on the Division's guidance in SLB 14B, and the procedures for submission set forth in Rule 14a-8(j)(2)(iii), we understand that a legal opinion is required where it is asserted that a proposal may be excluded as improper under state or foreign law, but no such requirement apparently exists when the proposal is improper under federal law. Therefore, we have not included a legal opinion as part of this submission.

presumption of reliance created by the Supreme Court in *Basic v. Levinson*, 485 U.S. 224 (1988)." However, any such amendment to the Company's certificate of incorporation would be void by operation of Section 29(a). The Class Action Proposal, therefore, seeks a result -- a partial waiver of the FOTM presumption -- that the Company is not permitted to effect under the Exchange Act. Accordingly, this statement and the entire Class Action Proposal are materially false and misleading.

The Class Action Proposal materially misleads shareholders by presenting the effect of the proposal as an effect that could be achieved. As such, the underlying premise of the Class Action Proposal is materially false and misleading. We recognize that objections to assertions in a proposal because they are not supported or may be countered do not provide a basis for exclusion of a proposal, as discussed in Staff Legal Bulletin No. 14B (Sept. 15, 2004) ("SLB 14B"), and we believe that such objections are not the bases for our view in this regard. Rather, we believe that the Class Action Proposal itself, not merely a statement in the Class Action Proposal, is materially false and misleading.

In a no-action letter issued previously to the Company, the Division did not object to exclusion of an entire proposal where the proposal contained numerous unsubstantiated, false, and misleading statements. Alaska Air Group, Inc. (January 15, 2004). Similarly, in the Class Action Proposal, it is not possible to edit or exclude specific portions of the proposal, as the proposal itself is false and misleading. Therefore, in accordance with SLB 14B, which notes that the Division "may find it appropriate for companies to exclude the entire proposal, supporting statement, or both as materially false or misleading if a proposal or supporting statement would require detailed and extensive editing in order to bring it into compliance with the proxy rules," we believe it is appropriate for the Company to exclude the Class Action Proposal in its entirety. See also The Bear Stearns Companies Inc. (January 30, 2007) (excluding an entire proposal and supporting statement that sought shareholder support for an annual advisory management resolution to approve the report of the Compensation Committee in the proxy statement as misleading because the Commission rule revisions moved disclosure of executive compensation out of the Compensation Committee Report). Similar to the proposal in The Bear Stearns Companies Inc., counter to the underlying premise of the Class Action Proposal, a vote to amend the Company's certificate of incorporation would not partially waive the FOTM presumption because such a provision in the certificate of incorporation would be void under Section 29(a).

For the reasons discussed above, on behalf of the Company, we respectfully request that the Division concur with our view that the Company may exclude the Class Action Proposal from its 2009 Proxy Materials in reliance on Rule 14a-8(i)(3).

2. *The Class Action Proposal is materially false and misleading because it is so inherently vague and indefinite that shareholders will be unable to determine with reasonable certainty the effect of the actions sought by the proposal*

Pursuant to SLB 14B, reliance on Rule 14a-8(i)(3) to exclude a proposal or portions of a supporting statement may be appropriate when the resolution contained in the proposal is so inherently vague or indefinite that neither the shareholders in voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires. See also Philadelphia Electric Company (Jul. 30, 1992). The Class Action Proposal is inherently vague and indefinite because it fails to provide fundamental information necessary for shareholders to make an informed voting decision. Specifically:

(1) The Class Action Proposal and Supporting Statement does not define the FOTM presumption of reliance; and

(2) The Class Action Proposal and Supporting Statement does not inform shareholders that they are being asked to surrender a right that they currently have under the Exchange Act.

The Class Action Proposal fails to provide on its face a sufficient explanation of the right -- the FOTM presumption in a Rule 10b-5 action -- that shareholders are being asked to waive. The only means by which a reasonable investor may determine an understanding of the "FOTM presumption" referred to in the Class Action Proposal would be to read the referenced decision in Basic v. Levinson or the referenced articles by Professor Pritchard. While the Supporting Statement provides a website address for the latter, any matter put to shareholders for a vote is required to provide sufficient information for a reasonable shareholder to understand the subject matter and scope of the proposal upon which they would be asked to vote. Without some definition of the FOTM presumption, a reasonable investor would have no idea that they are being asked to surrender a substantive right that is available to them currently.

In Berkshire Hathaway Inc. (March 2, 2007), the Division concurred with the company's view that a proposal seeking to restrict the company from investing in securities of any foreign corporation that engages in activities prohibited for U.S. corporations by Executive Order of the President of the United States could be omitted pursuant to Rule 14a-8(i)(3). In that request, Berkshire Hathaway expressed the view that it was not clear from the text of the proposal and supporting statement what conduct was "prohibited for U.S. corporations by Executive [O]rder of the President" and, therefore, shareholders would be asked to vote on a proposal whose potential scope was not fully known.

The same is true of the Class Action Proposal and Supporting Statement. Without the meaning and scope of the FOTM presumption being provided to shareholders, there is no way for a reasonable shareholder to understand the scope or effect of the action they are being asked to take.

For the reasons discussed above, on behalf of the Company, we respectfully request that the Division concur with our view that the Company may exclude the Class Action Proposal from its 2009 Proxy Materials in reliance on Rule 14a-8(i)(3).

F. Conclusion

For the reasons discussed above, on behalf of the Company, we respectfully request that the Division concur with our view that the Company may exclude the Class Action Proposal from its 2009 Proxy Materials in reliance on Rule 14a-8(c) and (f), Rule 14a-8(i)(2), and Rule 14a-8(i)(3).

III. CONCLUSION

Based upon the analysis in Section I, above, we believe that the Company may exclude all three of the Proposals from its 2009 Proxy Materials in reliance on Rule 14a-8(c) and (f). As such, on behalf of the Company, we respectfully request that the Division concur in our view and not recommend enforcement action to the Commission if the Company excludes the three Proposals from its 2009 Proxy Materials.

Based upon the analysis in Section II, above, we further believe that the Company also may exclude the Class Action Proposal from its 2009 Proxy Materials in reliance on Rule 14a-8(c) and (f), Rule 14a-8(i)(2), and Rule 14a-8(i)(3). As such, if the Division is unable to concur in our view that the Company may exclude all three Proposals in reliance on Rule 14a-8(c) and (f), on behalf of the Company, we respectfully request that the Division concur in our view and not recommend enforcement action to the Commission if the Company excludes the Class Action Proposal from its 2009 Proxy Materials.

If we can be of further assistance in this matter, please do not hesitate to contact me at (202) 383-5418.

Sincerely,

Martin P. Dunn
of O'Melveny & Myers LLP

Enclosures

cc:

Ms. Karen Gruen, Alaska Air Group, Inc.
Mr. Andor Terner, O'Melveny & Myers LLP
Ms. Shelly Heyduk, O'Melveny & Myers LLP
Mr. Richard D. Foley
Mr. Stephen Nieman (via email to Mr. Richard D. Foley)
Mr. Terry K. Dayton (via email to Mr. Richard D. Foley)
Mr. William Davidge (via email to Mr. Richard D. Foley)

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January 13, 2009

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Alaska Air Group, Inc. Rule 14a-8 Proposals by Stephen Nieman, Terry K. Dayton and William Davidge

VIA: Email shareholderproposals@sec.gov

Ladies and Gentlemen:

This addressees the company claim that Stephen Nieman, Terry K. Dayton and William Davidge did not sponsor their proposals based on their individual shareholdings. It is important to note that Rule 14a-8 states (emphasis added):

> f. Question 6: What if I fail to follow one of the eligibility or procedural requirements explained in answers to Questions 1 through 4 of this section?
>
> The company may exclude your proposal, but only after it has notified you of the problem, and you have failed adequately to correct it. ***Within 14 calendar days of receiving your proposal, the company must notify you in writing of any procedural or eligibility deficiencies, as well as of the time frame for your response***. Your response must be postmarked, or transmitted electronically, no later than 14 days from the date you received the company's notification. A company need not provide you such notice of a deficiency if the deficiency cannot be remedied, such as if you fail to submit a proposal by the company's properly determined deadline. If the company intends to exclude the proposal, it will later have to make a submission under Rule 14a-8 and provide you with a copy under Question 10 below, Rule 14a-8(j).

The intent of this rule is believed to be to allow the proponents to cure any eligibility or procedural requirements. Yet it appears that the company did not provide adequate information to cure the eligibility or procedural requirements. The company's December 12, 2009 notice did not claim that Mr. Foley was a beneficial owner and thus the proponents were not given the opportunity to satisfy the company's concern on this point.

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According to the attached individual letters of Stephen Nieman, Terry K. Dayton and William Davidge each proponent has limited Mr. Richard Foley's authority to act only in regard to their specific 2009 Rule 14a-8 proposals for the forthcoming shareholder meeting before, during and to the conclusion of the forthcoming annual shareholder meeting.

Had the company given proper notice required under rule 14a-8 (f) this clarification would have been made earlier.

For these reasons it is requested that the staff find that this resolution cannot be omitted from the company proxy.

Sincerely,

Stephen Nieman

email cc:
Mr. Terry K. Dayton
Mr. William Davidge
Mr. Richard Foley
Ms. Karen Gruen

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Mr. William Ayer
Chairman and CEO
Alaska Air Group, Inc.
PO Box 68947
Seattle, WA 98168

Re: My Rule 14a-8 Proposal

Dear Mr. Ayer,

This is the proxy for Mr. Richard Foley and/or his designee to act on my behalf regarding my timely submitted 2009 Rule 14a-8 proposal for the forthcoming shareholder meeting before, during and to the conclusion of the forthcoming annual shareholder meeting. This authorization is limited to the 2009 Rule 14a-8 proposal and supercedes the earlier text of "in all shareholder matters."

Sincerely,

Stephen Nieman 11-12-09

Stephen Nieman Date

William B. Davidge

*** FISMA & OMB Memorandum M-07-16 ***

Mr. William Ayer
Chairman and CEO
Alaska Air Group, Inc.
PO Box 68947
Seattle, WA 98168

Re: My Rule 14a-8 Proposal

Dear Mr. Ayer,

This is the proxy for Mr. Richard Foley and/or his designee to act on my behalf regarding my timely submitted 2009 Rule 14a-8 proposal for the forthcoming shareholder meeting before, during and to the conclusion of the forthcoming annual shareholder meeting. This authorization is limited to the 2009 Rule 14a-8 proposal and supercedes the earlier text of "In all shareholder matters."

Sincerely,

William B. Davidge

1-8-2009
Date

Terry K. Dayton

*** FISMA & OMB Memorandum M-07-16 ***

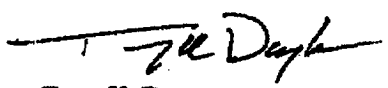
Mr. William Ayer
Chairman and CEO
Alaska Air Group, Inc.
PO Box 68947
Seattle, WA 98168

Re: My Rule 14a-8 Proposal

Dear Mr. Ayer,

This is the proxy for Mr. Richard Foley and/or his designee to act on my behalf regarding my timely submitted 2009 Rule 14a-8 proposal for the forthcoming shareholder meeting before, during and to the conclusion of the forthcoming annual shareholder meeting. This authorization is limited to the 2009 Rule 14a-8 proposal and supercedes the earlier text of "in all shareholder matters."

Sincerely,



Terry K. Dayton

07 JAN 2009

Date

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January 13, 2009

VIA: Email shareholderproposals@sec.gov

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC

Re: Alaska Air Group
Shareholder Proposal of Stephen Nieman
Securities Exchange Act of 1934 Rule 14a-8

Dear Ladies and Gentlemen:

This letter, filed pursuant to Rule 14a-8(k), responds to the no action request submitted by O'Melveny & Myers on behalf of Alaska Air Group, Inc. (the Company), seeking to exclude my shareholder proposal recommending an amendment to the articles of incorporation reforming securities class actions, attached hereto as Exhibit A.

My proposal, stated simply, recommends that the board of the Company take steps to amend its articles of incorporation to effect a partial waiver of the "fraud on the market" (FOTM) presumption of reliance created by the Supreme Court in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). The proposed amendment would apply to any suit invoking the FOTM presumption alleging violations of Rule 10b-5 of the Securities Exchange Act of 1934 against the Company, its officers, directors, or third-party agents. The amendment would limit damages to disgorgement of the defendants' unlawful gains from their violation of Rule 10b-5. In addition, the proposed amendment would commit the Company to pay the reasonable expenses and attorneys' fees of the shareholder who brings a FOTM claim.

The Company contends that it may exclude my proposal pursuant to Rule 14a-8(c) and (f), and (i)(2) and (3). Specifically, the Company urges that the proposed amendment: (1) contains more than one proposal; (2) would violate the anti-waiver provision of the Exchange Act, § 29; and (3) is materially false and misleading. The Company is wrong on all three counts.

A. There Is Only One Proposal

The Company artificially severs my proposed amendment to articles of incorporation into two elements: (1) the partial waiver of the FOTM presumption; and (2) the commitment by the Company to pay reasonable attorneys' fees in cases invoking the FOTM presumption. The Company conspicuously ignores the fact that the recommended commitment to pay attorneys' fees would not apply to other securities fraud claims, such as claims under §§ 11 and 12(a)(2) of the Securities Act, or claims alleging actual reliance under Rule 10b-5. Instead, it argues that my proposal does not have a single unifying concept because on the one hand, it discourages plaintiffs from filing suit by limiting the available damages, and on the other, encourages "plaintiff's lawyers to file suit against the Company, not deter them." (No Action Request, p. 9).

The Company misconstrues the proposal, which is intended to encourage plaintiffs' lawyers to "target officers of the Company who reaped large stock option gains or other incentive

compensation as the result of the fraud, thereby penalizing the party actually responsible for the fraud." (Exhibit A, Supporting Statement). Committing the Company to pay reasonable attorneys' fees in those cases encourages lawsuits against Company officers who have committed fraud, not the Company. (Obviously, the Company need not be a party to the lawsuit to pay the attorneys' fees.) Any claim against the Company invoking the FOTM presumption would be dismissed for failure to state a claim, unless the plaintiff could allege that the Company benefitted from the fraud, which the available evidence shows almost never happens in cases invoking the FOTM presumption. Given that potential damages would be limited to the officers' benefit from their fraudulent conduct, having the Company provide an additional incentive to bring suit against those officers would serve the Company's interest in encouraging those officers to comply with Rule 10b-5. The single unifying element is to use Rule 10b-5 FOTM actions to encourage the Company's officers – who are best placed to ensure that the Company's disclosures are not misleading – to comply with Rule 10b-5. The proposal is consistent with Rule 14a-8(c), as well as the purposes of Rule 10b-5.

B. The Proposal Does Not Violate § 29 of the Exchange Act

The Company next argues that my proposed amendment would violate § 29(a) of the Exchange Act because it would "weaken [the] ability to recover under the [Exchange] Act." (No Action Request, p. 12). In fact, the opposite is true; by providing for the payment of attorneys' fees in meritorious cases against the Company's officers when they violate Rule 10-5, the proposed amendment would facilitate the ability of shareholders to bring actions under Rule 10b-5. Under prevailing practice, many meritorious claims are not brought because the damages recoverable are not large enough to provide for a sufficient fee award from which to compensate the plaintiffs' attorney. A commitment by the Company to pay fees in those cases would encourage plaintiffs' attorneys to bring suits against the Company's officers if they had strong evidence of fraud by them, whether the damages available were large or small. In any event, there is no conflict between my proposal and § 29(a) of the Exchange Act, as explained below.

1. The Proper Measure of Damages in Rule 10b-5 Cases Asserting the FOTM Presumption Is Disgorgement

The Company completely ignores the question of what a plaintiff is entitled to recover in a Rule 10b-5 case invoking the FOTM presumption. The Supreme Court has never resolved this question, and specifically reserved it when it created the FOTM presumption. See *Basic*, 485 U.S. at 248 n. 28. The Court has, however, provided instruction on the proper interpretive approach to § 10(b) when the statutory text is silent on the question to be adjudicated. In those cases, the Court has said:

> When the text of § 10(b) does not resolve a particular issue, we attempt to infer how the 1934 Congress would have addressed the issue had the 10b-5 action been included as an express provision in the 1934 Act. For that inquiry, we use the express causes of action in the securities Acts as the primary model for the § 10(b) action.

Central Bank of Denver v. *First Interstate Bank of Denver*, 511 U.S. 164, 178 (1994). Obviously, the text of § 10(b) does not address the question of the appropriate measure of damages in cases asserting the FOTM presumption of reliance, so we must look at the damages measures used in the explicit causes of action.

There are six explicit causes of action in the securities laws that shed light on the measure of damages in such cases. The first two come from the Securities Act of 1933. The Court has held that

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the "1933 and 1934 Acts should be construed harmoniously." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Section 11 of the Securities Act allows the plaintiff to sue a corporate issuer, along with its officers and directors, for damages if the company has a material misstatement in its registration statement for a public offering. Section 11 has no reliance requirement. Plaintiffs do not need to have read the registration statement that is alleged to be misleading. Damages, however, are limited to the offering price. Securities Act § 11(g). The corporate issuer's liability cannot be greater than its benefit from the fraud. Section 12(a)(2) provides a parallel cause of action for material misstatements in a prospectus or an oral statement made in connection with a public offering. Section 12(a)(2) also does not require reliance, but its remedy is rescission—plaintiffs who prevail are entitled to put their shares back to the seller in exchange for their purchase price (or rescissory damages, if the plaintiff has sold before bringing suit). Under either formula, damages are limited to the amount that the seller received from the investor. In FOTM cases, the corporate defendant being sued has typically received nothing from the investor because it was not issuing securities during the time of the alleged fraud.

Turning to the Exchange Act private causes of action, § 28 preserves existing rights and remedies, but bars plaintiffs from recovering "a total amount in excess of his actual damages on account of the act complained of." This provision tells us nothing, however, about the relation between reliance and damages. More illuminating are the two explicit causes of action allowing for recovery from insider traders. Neither cause of action requires reliance, but both limit damages to the benefit that the insider trader obtained from his violation. First, § 16(b) allows shareholders to bring derivative suits on behalf of the corporation to recover "short swing" gains made by insiders trading in the company's shares (*i.e.*, profits gained, or losses avoided, for "round trip" transactions—buy/sell or sell/buy—within six months of each other). The remedy is limited to the defendant's benefit from the violation, in this case the profits the insider gained (or the losses he avoided) within the six-month period that defines the offense. Second, § 20A creates a private cause of action for insider trading, this time for conduct that violates § 10(b) because the insider has breached a duty of disclosure. The provision allows investors who have traded contemporaneously with insiders to recover damages from those insider traders. Reliance is excused in such cases, *Affiliated Ute v. Citizens of Utah* v. *United States*, 406 U.S. 128 (1972), but damages once again are limited to the defendant's "profit gained or loss avoided in the transaction." Moreover, even that measure is reduced by any disgorgement obtained by the SEC based on the same violations. Thus, where the Exchange Act excuses reliance, recovery is limited to the defendant's gain, not the plaintiff's loss. That is the measure in my proposal.

Section 18 of the Exchange Act comes closest to the Rule 10b-5 FOTM class action. Section 18 allows investors who have relied on a corporation's filings with the SEC to recover damages for misstatements in those filings. Section 18 does not limit damages, thus standing in sharp contrast to the other causes of action. It is also unique in requiring that plaintiff to demonstrate that he purchased or sold "in reliance upon" the misstatement in the company's filings with the SEC. Damages are limited to the "damages caused by such reliance." Thus, out of pocket damages are available under § 18 only when the plaintiff can demonstrate actual reliance. As noted above, the proposed partial waiver would not affect the availability of out-of-pocket damages in such cases. In sum, the principle common to these explicit causes of action is that damages should be limited to some measure of the defendant's benefit (the disgorgement measure of unjust enrichment), unless the plaintiff can show actual reliance on the misstatement, in which case the out-of-pocket measure is appropriate. The measure in my proposal is consistent with that principle, and therefore consistent with §§ 10(b) and 29(a). It does not limit any rights provided by the Rule 10b-5 cause of action, but instead stipulates the measure most consistent with the explicit causes of action provided by the securities laws.

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2. Section 29(a) Only Bars Waiver of Substantive Obligations of the Exchange Act

The Supreme Court has held that the antiwaiver provisions of the securities laws do not apply to procedural provisions. See *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 482 (1989) (construing § 14 of the Securities Act, which is identical to § 29(a) of the Exchange Act). "By its terms, § 29(a) only prohibits waiver of the substantive obligations imposed by the Exchange Act." *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 228 (1987). *Basic* makes clear that the FOTM presumption is procedural, rather than substantive. The Court disclaimed any intent to eliminate the reliance requirement, 485 U.S. at 243, instead characterizing the FOTM presumption as a "useful device[] for allocating the burdens of proof." *Id.* at 245. The Court did not pretend that the FOTM presumption was mandated by the Exchange Act, which would have been difficult argument to make given that the Rule 10b-5 cause of action is implied rather than express. The duty not to make misrepresentations imposed by Rule 10b-5 is substantive; the FOTM presumption is procedural, relating only to means by which the reliance element can be satisfied. A number of courts have upheld waivers of reliance in Rule 10b-5 cases. See *Rissman* v. *Rissman*, 213 F.3d 381, 384 (7th Cir. 2000) ("[A] written anti-reliance clause precludes any claim of deceit by prior representations."); *Harsco Corp.* v. *Segui*, 91 F.3d 337, 343-344 (2nd Cir. 1996); *One-O-One Enterprises, Inc.*, v. *Caruso*, 848 F.2d 1283 (D.C. Cir. 1988).

In any event, my proposal is entirely consistent with the FOTM presumption as set forth by the Court in *Basic*. The *Basic* Court emphasized that the presumption could be rebutted by "[a]ny showing that severs the link between the alleged misrepresentation and ... his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance." *Basic*, 485 U.S. at 248. My proposal would sever that link. By partially waiving the FOTM presumption of reliance in the articles of incorporation, the Company will be putting future purchasers of the company's stock on notice that they can only collect disgorgement damages when they rely on that presumption. Consistency with the Court's holding in *Basic* requires consideration not only of the FOTM presumption, but also the means that the Court provided for rebutting that presumption. The stock market would incorporate the limited waiver into the Company's stock price, thereby negating the premise for invoking the FOTM presumption.

The Commission has taken the position that § 29(a) only bars provisions that "effect[] a waiver of the other party's duty to comply with the Exchange Act." Brief for the Securities and Exchange Commission as Amicus Curiae Supporting Petitioners, *Shearson/American Express, Inc. v. McMahon*, 1986 WL 727882. My proposal cannot be construed waiving the Company's duty to comply with Rule 10b-5. The Company would still be subject to the enforcement mechanisms established by Congress in the Exchange Act: Commission enforcement actions and Justice Department criminal prosecutions. The government does not need to prove reliance in its actions, so the partial waiver of the FOTM presumption would not affect government actions in any way. Moreover, the Company would continue to face civil liability for out of pocket damages to shareholder-plaintiffs who allege actual reliance. In addition to these government actions and private cases alleging actual reliance, officers who make material misstatements would also face FOTM lawsuits for disgorgement of their benefits from the fraud. In sum, the limited waiver would not affect the duty of the Company and its officers to comply with Rule 10b-5.

C. The Proposal Does Not Violate Rule 14a-9

The Company's final argument for excluding my proposal is that it is misleading because it does not disclose that it is illegal, that is, that it violates § 29(a). (No Action Request, p. 14). This transparent bootstrapping probably does not warrant a response, but in the interest of completeness I

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will address the argument. As discussed above, the proposal does not violate § 29(a). Therefore, it would be false and misleading to say that it violates § 29(a), as the Company suggests. In other words, the proposal either violates Rule 14a-8(i)(2), or it does not. Rule 14a-8(i)(3) is irrelevant to the question. The Company is wasting the staff's time by raising the latter rule.

The Company also contends that the proposal is misleading because it "is vague and indefinite." (No Action Request, p. 16). Specifically, the Company complains that the proposal does not define the FOTM presumption and does not advise the shareholders that they are being asked to give up a right. On the latter point, it is specious to suggest that altering the effects of a legal presumption is equivalent to giving up a right. (The Company does not explain what that "right" supposedly is.) On the failure to define the FOTM presumption, apparently the Company is unaware that shareholder proposals and supporting statements are limited to 500 words. Rule 14a-8(d). The proposal provides as much detail as is feasible within that constraint; including excerpts from the Court's decision in *Basic* would have done little to further enlighten shareholders on the proposal and its purposes. The mechanics of how the FOTM presumption operates are wholly irrelevant to those purposes and are of interest mainly to securities litigators. (Notably, the Company does not suggest a definition of the FOTM presumption, nor does it explain how it would help shareholders better understand the merits of the proposal.) The relevant question for shareholders is whether they benefit from FOTM class actions as currently structured, which the supporting statement discusses at length. Accordingly, shareholders are provided with the information they need to understand the subject matter and scope of the proposal.

D. Conclusion

Based upon the foregoing analysis, I urge the staff to reject the Company's request for a no-action letter concerning the Proposal. If the staff does not concur with our position, I would appreciate the opportunity to confer with the staff concerning these matters prior to issuing its response.

Pursuant to Rule 14a-8(j), enclosed herewith are six copies of this letter. A copy of this correspondence has been provided to the Company and its counsel. If we can provide additional information to address any questions that the Staff may have with respect to this correspondence or the Company's no-action request, please do not hesitate to call me at *** FISMA & OMB Memorandum M-07-16 ***

Sincerely,

Stephen Nieman

cc: Ms. Karen Gruen, Alaska Air Group, Inc.
Mr. Martin Dunn, O'Melveny & Myers LLP

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Exhibit A

Steve Nieman's Proposal for Reforming Securities Class Actions and Supporting Statement

BE IT RESOLVED: That the shareholders of Alaska Air Group hereby recommend that the Board of Directors initiate the appropriate process to amend the Company's certificate of incorporation to provide for a partial waiver of the "fraud-on-the-market" presumption of reliance created by the Supreme Court in *Basic v. Levinson*, 485 U.S. 224 (1988). Specifically, the amendment should apply to any suit alleging violations of Rule 10b-5 of the Securities Exchange Act of 1934 against the Company, its officers, directors, or third-party agents. The partial waiver would apply to suits alleging reliance on the "fraud-on-the-market" presumption. The waiver would limit damages to disgorgement of the defendants' unlawful gains from their violation of Rule 10b-5. The amounts disgorged would be distributed to shareholder members of the class. The corporation should also commit to paying the reasonable expenses and attorneys' fees of the shareholder who brings such a claim, subject to approval by the Board of Directors.

SUPPORTING STATEMENT: Securities fraud class actions impose enormous costs on public companies while providing little benefit to shareholders. This proposal, suggested by Professor Adam Pritchard of the University of Michigan, would limit damages in secondary market securities class actions, i.e., suits brought against the Company when it has not sold securities during the time that its common stock was allegedly distorted by a material misrepresentation. See:
http://www.cato.org/pubs/scr/2008/Stoneridge_Pritchard.pdf;
http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202424567666
http://www.securitiesdocket.com/2008/11/17/guest-column-can-shareholders-waive-the-fraud-on-the-market-presumption-of-reliance/.

Currently, such suits effectively result in a "pocket shifting" of money from one group of shareholders (those who continue to hold the company's shares) to another (those who bought during the time that the price was distorted by fraud). Frequently, shareholders will be members of both groups simultaneously, which means they are paying themselves compensation in securities class actions. Sometimes the corporation pays directly for the settlement, and sometimes it pays indirectly in the form of insurance premia, but either way these settlements come out of funds that the corporation could use to pay dividends or make new investments. Almost never do the officers who actually made the misrepresentation have to contribute to the settlement. Consequently, suits provide minimal compensation and, worse yet, scant deterrence of fraud. The only clear winners under this scheme are the lawyers who bring the suits, and those who defend them, who profit handsomely from moving the money around.

The proposed amendment would substantially reduce the incentive of plaintiffs' lawyers to file suit against the Company in response to a drop in the Company's stock price. Currently, the enormous potential damages are a powerful incentive for plaintiffs' lawyers to bring even weak suits and a powerful incentive for companies to settle, even if they believe that they would win at trial. Under the proposal, lawsuits would instead target officers of the Company who reaped large stock option gains or other incentive compensation as the result of fraud, thereby penalizing the party actually responsible for the fraud.

We urge the shareholders to vote for the proposal.

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December 31, 2008

VIA HAND DELIVERY AND E-MAIL

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Alaska Air Group, Inc.
Shareholder Proposals of Richard D. Foley
Securities Exchange Act of 1934 Rule 14a-8

Dear Ladies and Gentlemen:

This letter is to inform you that our client, Alaska Air Group, Inc., a Delaware corporation (the "Company"), intends to omit from its proxy statement and form of proxy (the "2009 Proxy Materials") for its 2009 Annual Meeting of Stockholders (the "2009 Annual Meeting") three shareholder proposals and statements in support thereof (collectively, the "Proposals") submitted by Richard D. Foley (the "Proponent"). The following three Proposals were submitted to the Company by the Proponent:

- a proposal titled "Reforming Securities Class Actions," which was purportedly submitted on behalf of Stephen Nieman (the "Class Action Proposal");
- a proposal titled "Cumulative Voting," which was purportedly submitted on behalf of Terry K. Dayton (the "Cumulative Voting Proposal"); and
- a proposal titled "Shareholder Say on Executive Pay," which was purportedly submitted on behalf of William Davidge (the "Executive Pay Proposal").

Pursuant to Rule 14a-8(j) under the Securities Exchange Act of 1934 (the "Exchange Act"), we have:

- enclosed herewith six copies of this letter and its attachments;

- filed this letter with the U.S. Securities and Exchange Commission (the "Commission") no later than eighty (80) calendar days before the Company intends to file its definitive 2009 Proxy Materials with the Commission; and

- concurrently sent copies of this correspondence to the Proponent.

Copies of the Proposals, the cover letters submitting each of the three Proposals, and the single facsimile cover page under which all three Proposals were submitted are attached hereto as Exhibit A. Copies of other correspondence with the Proponent, Mr. Nieman, Mr. Dayton, and Mr. Davidge regarding the Proposals are attached hereto as Exhibits B through D.

As discussed in Section I of this letter, it is our view that the Company may exclude all three of the Proposals from its 2009 Proxy Materials. Further, as discussed in Section II of this letter, it is our view that the Company has alternative bases upon which it may exclude the Class Action Proposal from its 2009 Proxy Materials.

I. EXCLUSION OF THE THREE PROPOSALS

A. Basis for Excluding the Three Proposals -- Paragraphs (c) and (f) of Rule 14a-8

Rule 14a-8(c) Question 3: How many proposals may I submit? Each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting.

It is our view that the Proposals may be excluded from the Company's 2009 Proxy Materials pursuant to paragraphs (c) and (f) of Rule 14a-8 because the Proponent has submitted more than one shareholder proposal for inclusion in the Company's 2009 Proxy Materials and, despite proper notice, has failed to correct this deficiency.

B. Analysis

1. The proxy granted to the Proponent by each of Mr. Nieman, Mr. Dayton, and Mr. Davidge provides the Proponent with authority over their shares that causes him to be a "beneficial owner" of those shares. As the "beneficial owner" of those shares, the Proponent has submitted more than one shareholder proposal to the Company, in violation of the one-proposal limitation in Rule 14a-8(c).

Exchange Act Rule 13d-3(a) defines the term "beneficial owner" as "any person who, directly or indirectly, through contract, arrangement, understanding, relationship, or otherwise has or shares voting power and/or investment power." Pursuant to the Commission's statements

in Exchange Act Release No. 34-17517 (February 5, 1981), the Rule 13d-3(a) definition of "beneficial owner" applies for purposes of the one-proposal limitation in Rule 14a-8.

Each of Mr. Nieman, Mr. Dayton, and Mr. Davidge granted proxy authority to the Proponent that provides him with the ability to act in all shareholder matters, regardless of whether they pertain to the Proposals, before, during and after the Company's 2009 Annual Meeting. Specifically, the proxy conferred upon the Proponent by each of Mr. Nieman, Mr. Dayton, and Mr. Davidge reads as follows:

> This is the proxy for Mr. Richard D. Foley and/or his designee to act on my behalf in all shareholder matters, including this Rule 14a-8 proposal for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting.

As such, each of Mr. Nieman, Mr. Dayton, and Mr. Davidge granted the Proponent proxy authority that confers upon him all of their powers as a shareholder until further notice. In this regard, it is important to note that the proxy granted to the Proponent:

- is not limited to matters relating to the submission of the Proposals;
- is not limited to voting at the 2009 Annual Meeting; and
- relates to all shareholder matters before, during, and after the 2009 Annual Meeting.

As a result of the unlimited proxy authority granted to him, the Proponent "directly or indirectly, through contract, arrangement, understanding, relationship, or otherwise has or shares voting power" over the shares held by Mr. Nieman, Mr. Dayton, and Mr. Davidge and, therefore, the Proponent falls within the Rule 13d-3(a) definition of "beneficial owner" with regard to those shares.

In Exchange Act Release No. 34-39538 (January 12, 1998) ("Release No. 34-39538") regarding Forms 13D and 13G, the Commission provided significant guidance regarding the effect of a proxy solicitation on "beneficial ownership." In this regard, Release No. 34-39538 provides that "when a shareholder solicits and receives revocable proxy authority (subject to the discretionary limits of Rule 14a-4), without more, that shareholder does not obtain beneficial ownership under Section 13(d) in the shares underlying the proxy." Conversely, Release No. 34-39538 contemplates that one may obtain beneficial ownership where the proxy confers more than "revocable proxy authority."

The proxy authority conferred upon the Proponent does not indicate whether or not it is irrevocable. Regardless of whether it is revocable or irrevocable, however, it is clear that the proxy authority granted to the Proponent goes well beyond the authority to vote shares at an annual meeting of shareholders. Further, the proxy authority granted to the Proponent goes

beyond the discretionary limits permitted by Rule 14a-4 and, indeed, is not subject to any of the limits of Rule 14a-4. In this regard, while Rule 14a-4 permits the granting of discretionary proxy authority under certain circumstances, Rule 14a-4 provides that:

"No proxy shall confer authority:

1. To vote for the election of any person to any office for which a bona fide nominee is not named in the proxy statement;

2. To vote at any annual meeting other than the next annual meeting (or any adjournment thereof) to be held after the date on which the proxy statement and form of proxy are first sent or given to security holders;

3. To vote with respect to more than one meeting (and any adjournment thereof) or more than one consent solicitation; or

4. To consent to or authorize any action other than the action proposed to be taken in the proxy statement, or matters [otherwise permitted by Rule 14a-4]."

As stated above, the proxy granted to the Proponent relates to "all shareholder matters, including this Rule 14a-8 proposal for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting." As the proxy authority granted to the Proponent is unlimited with regard to both permitted actions and duration, it goes well beyond the proxy authority contemplated by Rule 14a-4.

Release No. 34-39538 indicates that a revocable proxy authority "without more" should not result in the holder of that proxy authority being deemed a "beneficial owner" of the shares for which he or she was granted the proxy authority. The unlimited breadth and discretion of the grant of the proxy to the Proponent ("all shareholder matters") and the unlimited time period of the grant of the proxy to the Proponent ("before, during and after the forthcoming shareholder meeting") clearly evidence "more" than a customary grant of revocable proxy authority.

Consequently, we believe that the proxy authority granted to the Proponent causes him to be the beneficial owner of the shares otherwise owned by Mr. Nieman, Mr. Dayton, and Mr. Davidge. As such, the Proponent is the beneficial owner of the shares that provide the eligibility to submit each of the Proposals.

In Exchange Act Release No. 34-12999 (November 22, 1976), the Commission stated that the one-proposal limitation in Rule 14a-8(c) applies "collectively to all persons having an interest in the same securities (*e.g.*, the record owner and the beneficial owner and joint tenants)." For the reasons discussed above, we believe that the proxy granted to the Proponent by each of Mr. Nieman, Mr. Dayton, and Mr. Davidge confers upon the Proponent beneficial ownership of the shares that provide the eligibility to submit each of the Proposals. Accordingly,

the one-proposal limitation in Rule 14a-8(c) applies to the Proponent with respect to the three Proposals, as he is a beneficial owner of those shares and, therefore, one of the "persons having an interest in [those] securities." As the Proponent is the beneficial owner of the shares that provide the eligibility to submit each of the three Proposals, the submission of the three Proposals by the Proponent does not comply with the one-proposal limitation of Rule 14a-8(c).

2. *The basis for the view expressed in this letter that the Proponent is the beneficial owner of the shares is different from the bases presented to the Division of Corporation Finance (the "Division") in prior no-action requests regarding an identical grant of proxy. As such, consistent with the Division's statements in Staff Legal Bulletin No. 14, the Division's responses to those prior no-action requests do not preclude the Division from concurring in our view that the nature of the proxy authority causes the Proponent to be the beneficial owner of those shares.*

We note that AT&T, Inc. submitted requests for a no-action position to the Division with regard to an identical proxy granted to Mr. John Chevedden in each of the last two proxy seasons. See AT&T, Inc. (January 18, 2007) ("AT&T I") and AT&T, Inc. (February 19, 2008) ("AT&T II" and, collectively with AT&T I, the "AT&T Requests"). In the AT&T Requests, AT&T argued that, as a result of the proxy granted to Mr. Chevedden, certain proposals could be omitted in reliance on Rule 14a-8(c). While the Division did not concur with AT&T's position in the AT&T Requests, we do not believe that the Division's position in response to the AT&T Requests precludes the Division's concurrence with our view that the Proponent is subject to, and has not complied with, Rule 14a-8(c). We reach this position based on the following:

- in AT&T I, AT&T expressed its view that the proxy granted to Mr. Chevedden went "beyond mere representation for purposes of the Proposals, and expressly grant[ed] him voting rights as well," and that "[b]ecause the proxy agreement between each of the Nominal Proponents and John Chevedden confers voting rights to John Chevedden, he is a beneficial owner of the Corporation's stock under the definition provided by Rule 13d-3(a);" and

- in AT&T II, AT&T expressed its very similar view that the "proxy agreement between each of the Nominal Proponents and John Chevedden confers to John Chevedden the right to act on the Nominal Proponent's behalf on matters 'regarding this Rule 14a-8 proposal'... includ[ing] the right to vote shares for such proposal," and, accordingly, "he is a beneficial owner of the Corporation's stock under the definition provided by Rule 13d-3(a)."

The Division stated in Staff Legal Bulletin No. 14 (July 13, 2001) that it "will not consider any basis for exclusion that is not advanced by the company" and that it "consider[s] the specific arguments asserted by the company and the shareholder, the way in which the proposal is drafted and how the arguments and [the Divison's] prior no-action responses apply to the

specific proposal and company at issue." Based on this practice, the Division concluded that it "may determine that company X may exclude a proposal but company Y cannot exclude a proposal that addresses the same or similar subject matter."

As we discuss above, it is our view that, as a result of the unlimited breadth, discretion, and duration of the proxy authority granted to the Proponent, the Proponent "directly or indirectly, through contract, arrangement, understanding, relationship, or otherwise has or shares voting power" over the shares held by Mr. Nieman, Mr. Dayton, and Mr. Davidge. Accordingly, under the definition in Rule 13d-3(a), the Proponent is the beneficial owner of the subject shares and, as such, his submission of the three Proposals fails to satisfy the one-proposal limitation in Rule 14a-8(c). Our position in this regard is not based on the more limited position expressed in the AT&T Requests that the holder of a proxy should be deemed the beneficial owner of the subject shares where the proxy confers authority with regard to the submission of proposals or voting at an annual meeting of shareholders.

The basis for the position expressed in the AT&T Requests is significantly different from the basis for the view we express in this letter regarding the application of Rule 14a-8(c) to a person upon whom proxy authority has been conferred. Based on the Division's statements in Staff Legal Bulletin No. 14 and the basis expressed in this letter for our view that the Proponent is the beneficial owner of the shares, we believe that the Division's position in response to the AT&T Requests would not be inconsistent with the Division's concurrence with our view that the Company may omit the Proposals from its 2009 Proxy Materials in reliance on Rule 14a-8(c).

3. *The Company provided sufficient notice to the Proponent pursuant to Rule 14a-8(f) of the submission of multiple proposals in contravention of Rule 14a-8(c) and the Proponent failed to correct such deficiency within 14 calendar days of receipt of that notice.*

On November 28, 2008, the Company received a 15-page facsimile from Mr. Nieman containing all three Proposals.[1] On December 12, 2008, the Company timely provided the Proponent with notice of his failure to comply with Rule 14a-8(c) and advised him by e-mail (following with courtesy copies via certified mail to the Proponent, as well as all three nominal proponents) that, pursuant to Rule 14a-8, he had 14 calendar days to remedy that deficiency in his submission to the Company (copy attached as Exhibit B). The Proponent took no action to reduce the number of proposals submitted by him to the Company in the permitted time.

While the Proponent took no action in response to the Company's December 12, 2008 notice of deficiency, Mr. Nieman submitted a response, on behalf of the Proponent, on December

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[1] Each Proposal is accompanied by a cover letter with a different date (*i.e.*, November 26, 2008, November 28, 2008, and December 1, 2008); however, the copies of the Proposals and the Proponent's cover letters included in Exhibit A show that all three Proposals were received by the Company under the same facsimile cover sheet on November 28, 2008.

19, 2008 and indicated his disagreement with the Company's notice and its statement of the view that the Proponent had not complied with the one-proposal limitation of Rule 14a-8(c) (copy attached as Exhibit C). Mr. Nieman did not, however, take any action to reduce the number of proposals submitted by the Proponent to the Company.

C. Conclusion

We note that, in situations where a proponent has not complied with the one-proposal limitation in Rule 14a-8(c), the Division has indicated that a company may exclude from its proxy materials all of the proposals submitted by that proponent (see, e.g., General Motors Corporation (March 31, 2003) and Downey Financial Corp. (December 27, 2004)). Accordingly, we are of the view that the Company may omit each of the three Proposals from its 2009 Proxy Materials.

For the reasons discussed above, on behalf of the Company, we respectfully request that the Division concur with our view that the Company may exclude each of the three Proposals from its 2009 Proxy Materials in reliance on Rules 14a-8(c) and 14a-8(f).

II. EXCLUSION OF THE CLASS ACTION PROPOSAL

A. Bases for Exclusion

It is our view that the Company may properly omit the Class Action Proposal from its 2009 Proxy Materials in reliance on the following paragraphs of Rule 14a-8:

- Rule 14a-8(c) and (f) because the Class Action Proposal contains two distinct and unrelated proposals: (i) an amendment to the Company's certificate of incorporation to provide for a partial waiver of the "fraud-on-the-market" ("FOTM") presumption and (ii) a Company commitment to paying the reasonable expenses and attorney fees of any shareholder who brings certain claims;

- Rule 14a-8(i)(2) because the Class Action Proposal violates the anti-waiver provision of the Exchange Act; and

- Rule 14a-8(i)(3) because the Class Action Proposal is materially false and misleading.

B. Summary of the Class Action Proposal

The Class Action Proposal first recommends that the Board of Directors initiate the appropriate process to amend the Company's certificate of incorporation to provide "a partial waiver of the 'fraud-on-the-market' presumption of reliance created by the Supreme Court in *Basic v. Levinson*, 485 U.S. 224 (1988)." The Class Action Proposal specifies that the

amendment should apply to any suit alleging violations of Rule 10b-5 under the Exchange Act against the Company, its officers, directors, or third-party agents.

The waiver would:

- apply to suits alleging reliance on the FOTM presumption; and
- limit damages to disgorgement of the defendants' unlawful gains from their violation of Rule 10b-5 -- with the amounts disgorged being distributed to shareholder members of the class.

The Class Action Proposal then seeks for the Company to "commit to paying the reasonable expenses and attorneys' fees of the shareholder who brings such a claim, subject to approval by the Board of Directors."

The Class Action Proposal's Supporting Statement (the "Supporting Statement") refers to conclusions of Professor Adam Pritchard of the University of Michigan set forth in a recent article published in the Cato Supreme Court Review. The Supporting Statement also provides website addresses for that article and two commentaries written by Professor Pritchard regarding the potential use of Rule 14a-8 to amend a company's governing documents to partially waive the FOTM presumption. Notably, the Supporting Statement does not define the FOTM presumption from Basic v. Levinson or discuss the potential impact of the implementation of the Class Action Proposal on shareholders' rights should they attempt to bring a Rule 10b-5 claim.

C. *The Class Action Proposal Violates the "One-Proposal" Limitation of Rule 14a-8(c)*

Rule 14a-8(c) states that a shareholder may submit no more than one proposal to a company for a particular shareholders' meeting. It is our view that the Class Action Proposal contains two distinct elements that are not part of a single, unifying concept – rendering the Class Action Proposal two separate proposals. Specifically, the Class Action Proposal seeks:

(1) that the Board of Directors initiate the appropriate process to amend the Company's certificate of incorporation to provide for a partial waiver of the FOTM presumption, thereby limiting damages for suits alleging violations of Rule 10b-5 against the Company, its officers, directors, and third-party agents to disgorgement of any such defendants' unlawful gains from their violation of Rule 10b-5; and

(2) a commitment by the Company to pay the reasonable expenses and attorneys' fees of the shareholder who brings such a Rule 10b-5 claim, subject to approval by the Board of Directors.

The Supporting Statement posits that the proposed amendment to the Company's certificate of incorporation would substantially reduce the incentive of plaintiff's lawyers to file suit against the Company in response to a drop in the Company's stock price. However, the Class Action Proposal's additional request for the Company to "commit to paying reasonable expenses and attorneys' fees of the shareholder who brings such a claim" appears to have no clear correlation to the Supporting Statement's stated goal of reducing the incentive of plaintiff's lawyers to file suit against the Company. Rather, a stated policy of the Company to pay expenses and attorneys' fees of shareholders bringing securities class action suits would appear to encourage plaintiff's lawyers to file suit against the Company, not deter them.

Rule 14a-8(f) requires that a company seeking to exclude a proposal for failing to comply with the one-proposal procedural limitation of Rule 14a-8(c) notify the proponent of that deficiency within 14 days of receipt of the proposal. The Company received the Class Action Proposal on November 28, 2008. See Exhibit A. On December 12, 2008, the Company notified the Proponent (and shareholder Stephen Nieman) via e-mail of the Class Action Proposal's failure to comply with the one-proposal limitation of Rule 14a-8(c). A copy of that notice, as well as the e-mail signifying delivery of that notice, is attached as Exhibit B.

The Company's December 12, 2008 notice of deficiency provided a description of the one-proposal limitation of Rule 14a-8(c) and stated:

> [T]he proposal that you indicate you have submitted on behalf of Stephen Nieman includes proposals relating to a partial waiver of the "fraud-on-the-market" presumption of reliance and the payment of reasonable expenses and attorneys' fees for shareholders who bring certain claims. As such, if this proposal is selected by you for inclusion in the Company's proxy materials, you are required by rule 14a-8 to reduce such proposal to a single proposal and resubmit it to the Company in order to be considered for inclusion in the Company's proxy materials.[2]

The Company's notice of deficiency indicated that a revised submission meeting the one-proposal requirement was required to be postmarked or submitted electronically no later than 14 days from the date on which the notice was received in order to be eligible for inclusion in the Company's proxy materials. A copy of Rule 14a-8 was attached to the Company's notice.

Rule 14a-8(f) provides an opportunity for a proponent who submits more than one proposal to reduce the number of proposals the proponent submitted within 14 calendar days of

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[2] Please note that the notice provided by the Company to the Proponent also gave notice that the Company considered the three Proposals submitted by the Proponent, purportedly on behalf of various nominal proponents, to be submitted by the Proponent himself. The Company's notice separately addressed the Class Action Proposal, clarifying that if it was selected as the single proposal for inclusion in the Company's proxy materials then the Proposal should be revised to comply with the one-proposal limitation of Rule 14a-8(c).

being notified by the company of the limitation. However, if the proponent does not reduce the number of proposals in response to the company's request, the Division will permit the company to omit all proposals submitted by the proponent. See Pfizer Inc. (February 19, 2007) (concurring that a proposal with multiple elements relating to the election of the Board of Directors could be omitted in reliance on Rule 14a-8(c)) and General Motors Corporation (April 7, 2007) (concurring that a proposal seeking shareholder approval for numerous transactions to restructure the company could be omitted in reliance on Rule 14a-8(c)).

The Proponent took no action in response to the Company's notice of deficiency that the Class Action Proposal was, in fact, two distinct proposals. Stephen Nieman, on behalf of the Proponent, responded to the Company's notice. In that response, Mr. Nieman stated that the request in the Class Action Proposal relating to the reimbursement of fees applies only to cases in which the waiver of the FOTM presumption would apply and that reimbursement is "an important feature to help ensure that deterrence is maintained." See Exhibit C. However, he provided no explanation or basis for his belief that there is a correlation between the payment of expenses and attorneys' fees and the stated goal of the proposed amendment to the certificate of incorporation (i.e., the deterrence of plaintiff's lawyers from filing suit against the Company). Further, Mr. Nieman took no action to revise the Class Action Proposal.

The Division has concurred with the view that a proposal containing multiple elements that relate to more than one concept may be excluded under Rule 14a-8(c). See American Electric Power (January 2, 2001) (reconsideration denied January 31, 2001). Conversely, a proposal containing multiple elements that relate to a single, unifying concept is not inconsistent with the one-proposal limitation of Rule 14a-8(c). See United Parcel Service, Inc. (February 20, 2007).

As noted in the Supporting Statement, and confirmed by statements in the response to the Company's notice of deficiency, the intended purpose of the Class Action Proposal is to "limit damages" in Rule 10b-5 claims and, as a result, deter plaintiff's lawyers from filing securities class action suits against the Company (i.e., deter "the lawyers who bring the suits, and those who defend them, who profit handsomely from moving the money around"). Despite Mr. Nieman's assertions to the contrary, there is no correlation between the Company's payment of reasonable expenses and attorneys' fees and the deterrence of securities class action suits alleging violations of Rule 10b-5. Indeed, rather than relating to a single, unifying concept, the proposal requesting payment of reasonable expenses and attorneys' fees appears to have a purpose that is counter to that of the proposal requesting a waiver of the FOTM presumption in Rule 10b-5 claims.

For the reasons discussed above, on behalf of the Company, we respectfully request that the Division concur with our view that the Company may exclude the Class Action Proposal from its 2009 Proxy Materials in reliance on Rules 14a-8(c) and 14a-8(f).

D. The Class Action Proposal May Be Excluded in Reliance on Rule 14a-8(i)(2) Because it Would Cause the Company to Violate the Anti-Waiver Provision in Section 29 of the Exchange Act

Rule 14a-8(i)(2) permits the omission of a shareholder proposal if the implementation of the proposal would cause the company to violate any federal law to which it is subject. By recommending that the Board of Directors amend the Company's certificate of incorporation to provide a partial waiver of the FOTM presumption of reliance recognized by the Supreme Court, it is our view that the Class Action Proposal would cause the Company to violate Section 29(a) of the Exchange Act ("Section 29(a)").

The Supporting Statement indicates clearly the source and intent of the Class Action Proposal -- "This proposal, suggested by Professor Adam Pritchard of the University of Michigan, would limit damages in secondary market securities class actions, i.e., suits brought against the Company when it has not sold securities during the time that its common stock was allegedly distorted by a material misstatement." The Supporting Statement then refers to three of Professor Pritchard's articles relating to the FOTM presumption and waivers of that presumption. Although not stated in the Proposal or the Supporting Statement, the first referenced article provides the following summary of the FOTM presumption in Rule 10b-5 claims:

> The FOTM presumption allows plaintiffs to skip the step of alleging personal reliance on the misstatement, instead allowing them to allege that the *market* relied on the misrepresentation in valuing the security. The plaintiffs in turn are deemed to have relied upon the distorted price produced by a deceived market. The empirical premise underlying the FOTM presumption is the efficient capital market hypothesis, which holds that efficient markets rapidly incorporate information—true or false—into the market price of a security. Thus, the price paid by the plaintiffs would have been inflated by the fraud, rendering the misstatement the cause in fact of the fraudulently induced purchase. The FOTM presumption assumes that purchasers would not have paid the prevailing market price if they knew the truth.

1. The "waiver" sought by the Class Action Proposal is inconsistent with the "anti-waiver" provision of Section 29(a)

Section 29 of the Exchange Act is titled "Validity of contracts." Paragraph (a) of that section, captioned "Waiver provisions," reads, "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

2. *Section 10(b) is a substantive provision of the Exchange Act that, along with Rule 10b-5 under that Section, imposes a duty on persons trading in securities -- as the Class Action Proposal would limit damages in Section 10(b) and Rule 10b-5 claims, it is void under Section 29(a) because it would "weaken [the] ability to recover under the [Exchange] Act"*

a. *The Supreme Court's Decision in Shearson/American Express Inc. v. McMahon Provides Guidance Regarding the Application of Section 29(a)*

In Shearson/American Express Inc. v. McMahon, two customers sued a brokerage firm alleging violations of Section 10(b) and Rule 10b-5, among other allegations. 482 U.S. 220, 238 (1987). The customers had signed agreements consenting to arbitration for all controversies relating to their accounts. In arguing that their agreement to arbitrate the claims was invalid, the customers relied on Section 27 of the Exchange Act, which grants exclusive jurisdiction over claims arising under the Exchange Act to the United States district courts. The customers reasoned that Section 29(a) invalidated any pre-dispute arbitration agreement as an impermissible waiver of Section 27. Id. at 227-228.

The Court ultimately disagreed with the customers and held that so long as arbitration was "adequate to vindicate Exchange Act rights," an agreement to arbitrate was not an impermissible waiver of Section 27. Id. at 238. It is important to note, however, that the Court's holding is limited to pre-dispute arbitration agreements. In reaching this conclusion, the Court states:

> Section 29(a) is concerned, not with whether brokers 'maneuver[ed customers] into' an agreement, but with whether the agreement 'weaken[s] their ability to recover under the [Exchange] Act.' [Wilko v. Swan] 346 U.S. [427] [at] 432 [(1957)]. The former is grounds for revoking the contract under ordinary principles of contract law; the latter is grounds for voiding the agreement under § 29(a).

Id. at 230. Based on its determination that arbitration procedures that were subject to the Commission's Section 19 authority were "adequate to vindicate Exchange Act rights" (in McMahon, the rights provided by Section 10(b) and Rule 10b-5), the Court determined that the pre-dispute arbitration agreements did not "weaken [the customers'] ability to recover under the [Exchange] Act." Accordingly, the Court found that the waiver of Section 27 was not "tantamount to an impermissible waiver of the McMahons' rights under [Section] 10(b)." Id. at 234.

b. The amendment sought by the Class Action Proposal would be void under Section 29(a) because it would waive compliance with a substantive provision of the Exchange Act and would "weaken [the] ability to recover under the [Exchange] Act"

Section 10(b) creates a substantive obligation and "is a 'provision' of the 1934 Act, with which persons trading in securities are required to 'comply.'" Brief for the SEC as Amicus Curiae Supporting Petitioners, Shearson/American Express Inc. v. McMahon, 1986 U.S. Briefs 44 (Nov. 20, 1986) ("SEC Amicus Brief"). Further, shareholders have a private right of action under Section 10(b) and may bring a private lawsuit to enforce Rule 10b-5. Central Bank of Denver, N.A., v. First National Bank of Denver, N.A., 511 U.S. 164, 171 (1994). In this regard, the Commission has stated that the Section 10(b) and Rule 10b-5 private right of action "has been consistently recognized for more than 35 years [and] [t]he existence of this implied remedy is simply beyond peradventure." SEC Amicus Brief (citing Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983)).

As discussed above, the Court in McMahon held that an agreement that "weaken[s] [the] ability to recover under the [Exchange] Act" is void under Section 29(a). McMahon, 482 U.S. at 230. Unlike the waiver of Section 27 that the Court considered in McMahon, the Class Action Proposal seeks to waive the FOTM presumption, a critical element of a Section 10(b) and Rule 10b-5 claim. As noted by the Supreme Court, the FOTM presumption is vital because otherwise requiring each individual in a private cause of action to show reliance would prevent a class action from proceeding and "would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market." Basic, 485 U.S. at 245.

The Court in McMahon allowed the waiver of Section 27 only because it determined that the alternate forum was adequate to protect the substantive rights of the Exchange Act. However, a partial waiver of the FOTM presumption and a limiting of available damages in Rule 10b-5 claims, which the Class Action Proposal seeks, would weaken substantially a substantive Exchange Act right itself -- the private right of action under Section 10(b) and Rule 10b-5. The Supporting Statement confirms this point, stating that the waiver sought by the Class Action Proposal would "limit damages" in suits alleging violations of Rule 10b-5 against the Company, its officers, directors, and third-party agents.

The amendment sought by the Class Action Proposal would waive a substantive right under the Exchange Act and weaken the ability of private plaintiffs to recover in a Rule 10b-5 action. That the waiver would "weaken their ability to recover under the [Exchange] Act" is not disputed -- the Supporting Statement explicitly states that the waiver would "limit damages" in certain private actions under Rule 10b-5. Therefore, consistent with the test established by the Supreme Court in McMahon, such a waiver would be void under Section 29(a). As such, the amendment to the Company's certificate of incorporation that is sought by the Class Action Proposal, which would provide "a partial waiver of the 'fraud-on-the-market' presumption of

reliance created by the Supreme Court in *Basic v. Levinson*," would cause the Company to violate federal law.

For the reasons discussed above, on behalf of the Company, we respectfully request that the Division concur with our view that the Company may exclude the Class Action Proposal from its 2009 Proxy Materials in reliance on Rule 14a-8(i)(2). [3]

E. The Class Action Proposal May Be Excluded in Reliance on Rule 14a-8(i)(3) Because it is Materially False and Misleading and, Therefore, Contrary to Rule 14a-9

1. The Class Action Proposal is materially false and misleading because it purports to provide a means by which the Company may partially waive the FOTM presumption of reliance when such a waiver, in fact, would be void under Section 29(a) of the Exchange Act

It is our view that the Class Action Proposal also may be excluded under Rule 14a-8(i)(3) as it is contrary to Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials. The Class Action Proposal is materially false and misleading because it falsely represents that an amendment to the Company's certificate of incorporation could provide for a partial waiver of the FOTM presumption under Section 10(b) and Rule 10b-5, when such a waiver would be void under Section 29(a). Therefore, the Class Action Proposal may be excluded under Rule 14a-8(i)(3) because the entire premise of the Class Action Proposal is materially false and misleading in violation of Rule 14a-9.

As discussed in detail in Section II.D., above, Section 29(a) provides that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." In this regard, we note again that the Supreme Court held in McMahon that an agreement that weakens the ability to recover under the Exchange Act is void under Section 29(a). Id. at 230. Accordingly, because the amendment to the Company's certificate of incorporation that is sought by the Class Action Proposal would "limit damages" in Rule 10b-5 claims, that amendment would weaken the ability of plaintiffs to recover under the Exchange Act and, therefore, be void under Section 29(a).

The Class Action Proposal states that "the shareholders of Alaska Air Group, Inc. hereby recommend that the Board of Directors initiate the appropriate process to amend the company's certificate of incorporation to provide for a partial waiver of the "fraud-on-the-market"

---

[3] Based on the Division's guidance in SLB 14B, and the procedures for submission set forth in Rule 14a-8(j)(2)(iii), we understand that a legal opinion is required where it is asserted that a proposal may be excluded as improper under state or foreign law, but no such requirement apparently exists when the proposal is improper under federal law. Therefore, we have not included a legal opinion as part of this submission.

presumption of reliance created by the Supreme Court in *Basic v. Levinson,* 485 U.S. 224 (1988)." However, any such amendment to the Company's certificate of incorporation would be void by operation of Section 29(a). The Class Action Proposal, therefore, seeks a result -- a partial waiver of the FOTM presumption -- that the Company is not permitted to effect under the Exchange Act. Accordingly, this statement and the entire Class Action Proposal are materially false and misleading.

The Class Action Proposal materially misleads shareholders by presenting the effect of the proposal as an effect that could be achieved. As such, the underlying premise of the Class Action Proposal is materially false and misleading. We recognize that objections to assertions in a proposal because they are not supported or may be countered do not provide a basis for exclusion of a proposal, as discussed in Staff Legal Bulletin No. 14B (Sept. 15, 2004) ("SLB 14B"), and we believe that such objections are not the bases for our view in this regard. Rather, we believe that the Class Action Proposal itself, not merely a statement in the Class Action Proposal, is materially false and misleading.

In a no-action letter issued previously to the Company, the Division did not object to exclusion of an entire proposal where the proposal contained numerous unsubstantiated, false, and misleading statements. Alaska Air Group, Inc. (January 15, 2004). Similarly, in the Class Action Proposal, it is not possible to edit or exclude specific portions of the proposal, as the proposal itself is false and misleading. Therefore, in accordance with SLB 14B, which notes that the Division "may find it appropriate for companies to exclude the entire proposal, supporting statement, or both as materially false or misleading if a proposal or supporting statement would require detailed and extensive editing in order to bring it into compliance with the proxy rules," we believe it is appropriate for the Company to exclude the Class Action Proposal in its entirety. See also The Bear Stearns Companies Inc. (January 30, 2007) (excluding an entire proposal and supporting statement that sought shareholder support for an annual advisory management resolution to approve the report of the Compensation Committee in the proxy statement as misleading because the Commission rule revisions moved disclosure of executive compensation out of the Compensation Committee Report). Similar to the proposal in The Bear Stearns Companies Inc., counter to the underlying premise of the Class Action Proposal, a vote to amend the Company's certificate of incorporation would not partially waive the FOTM presumption because such a provision in the certificate of incorporation would be void under Section 29(a).

For the reasons discussed above, on behalf of the Company, we respectfully request that the Division concur with our view that the Company may exclude the Class Action Proposal from its 2009 Proxy Materials in reliance on Rule 14a-8(i)(3).

2. *The Class Action Proposal is materially false and misleading because it is so inherently vague and indefinite that shareholders will be unable to determine with reasonable certainty the effect of the actions sought by the proposal*

Pursuant to SLB 14B, reliance on Rule 14a-8(i)(3) to exclude a proposal or portions of a supporting statement may be appropriate when the resolution contained in the proposal is so inherently vague or indefinite that neither the shareholders in voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires. See also Philadelphia Electric Company (Jul. 30, 1992). The Class Action Proposal is inherently vague and indefinite because it fails to provide fundamental information necessary for shareholders to make an informed voting decision. Specifically:

(1) The Class Action Proposal and Supporting Statement does not define the FOTM presumption of reliance; and

(2) The Class Action Proposal and Supporting Statement does not inform shareholders that they are being asked to surrender a right that they currently have under the Exchange Act.

The Class Action Proposal fails to provide on its face a sufficient explanation of the right -- the FOTM presumption in a Rule 10b-5 action -- that shareholders are being asked to waive. The only means by which a reasonable investor may determine an understanding of the "FOTM presumption" referred to in the Class Action Proposal would be to read the referenced decision in Basic v. Levinson or the referenced articles by Professor Pritchard. While the Supporting Statement provides a website address for the latter, any matter put to shareholders for a vote is required to provide sufficient information for a reasonable shareholder to understand the subject matter and scope of the proposal upon which they would be asked to vote. Without some definition of the FOTM presumption, a reasonable investor would have no idea that they are being asked to surrender a substantive right that is available to them currently.

In Berkshire Hathaway Inc. (March 2, 2007), the Division concurred with the company's view that a proposal seeking to restrict the company from investing in securities of any foreign corporation that engages in activities prohibited for U.S. corporations by Executive Order of the President of the United States could be omitted pursuant to Rule 14a-8(i)(3). In that request, Berkshire Hathaway expressed the view that it was not clear from the text of the proposal and supporting statement what conduct was "prohibited for U.S. corporations by Executive [O]rder of the President" and, therefore, shareholders would be asked to vote on a proposal whose potential scope was not fully known.

The same is true of the Class Action Proposal and Supporting Statement. Without the meaning and scope of the FOTM presumption being provided to shareholders, there is no way for a reasonable shareholder to understand the scope or effect of the action they are being asked to take.

For the reasons discussed above, on behalf of the Company, we respectfully request that the Division concur with our view that the Company may exclude the Class Action Proposal from its 2009 Proxy Materials in reliance on Rule 14a-8(i)(3).

F. Conclusion

For the reasons discussed above, on behalf of the Company, we respectfully request that the Division concur with our view that the Company may exclude the Class Action Proposal from its 2009 Proxy Materials in reliance on Rule 14a-8(c) and (f), Rule 14a-8(i)(2), and Rule 14a-8(i)(3).

III. CONCLUSION

Based upon the analysis in Section I, above, we believe that the Company may exclude all three of the Proposals from its 2009 Proxy Materials in reliance on Rule 14a-8(c) and (f). As such, on behalf of the Company, we respectfully request that the Division concur in our view and not recommend enforcement action to the Commission if the Company excludes the three Proposals from its 2009 Proxy Materials.

Based upon the analysis in Section II, above, we further believe that the Company also may exclude the Class Action Proposal from its 2009 Proxy Materials in reliance on Rule 14a-8(c) and (f), Rule 14a-8(i)(2), and Rule 14a-8(i)(3). As such, if the Division is unable to concur in our view that the Company may exclude all three Proposals in reliance on Rule 14a-8(c) and (f), on behalf of the Company, we respectfully request that the Division concur in our view and not recommend enforcement action to the Commission if the Company excludes the Class Action Proposal from its 2009 Proxy Materials.

If we can be of further assistance in this matter, please do not hesitate to contact me at (202) 383-5418.

Sincerely,

Martin P. Dunn
of O'Melveny & Myers LLP

Enclosures

cc:

Ms. Karen Gruen, Alaska Air Group, Inc.
Mr. Andor Terner, O'Melveny & Myers LLP
Ms. Shelly Heyduk, O'Melveny & Myers LLP
Mr. Richard D. Foley
Mr. Stephen Nieman (via email to Mr. Richard D. Foley)
Mr. Terry K. Dayton (via email to Mr. Richard D. Foley)
Mr. William Davidge (via email to Mr. Richard D. Foley)

EXHIBIT A

KAG only

OWNERSHIP UNION (OU®)

15204 NE 181st Loop
P.O. Box 602
Brush Prairie, WA 98606
Fax: 360-666-6483

FASCIMILE

To: Karen Gruen AAG

Date: 11-28-08

Fax No: (206) 392-5807

From: Steve Nieman

Cover Plus: 15

Email: FISMA & OMB Memorandum M-07-16 ***

Notes:

Dec. 1, 2008

Mr. Bill Ayer, Chairman and CEO
Alaska Air Group, Inc. ("AAG" or "company")
PO Box 68947
Seattle, WA 98168

Dear Mr. Ayer:

This Rule 14a-8 proposal is respectfully submitted for the next annual shareholder meeting. This proposal is submitted in support of the positive, long-term performance of our company.

The above format is requested for publication without re-editing, re-formatting or elimination of text, including beginning and concluding text, unless prior agreement is reached. It is respectfully requested that this proposal be proofread before it is published in the definitive proxy statement to ensure that the integrity of the submitted format is replicated in the proxy materials. Please advise if there is any typographical question.

Please note that the title of the proposal is part of the argument in favor of the proposal. In the interest of clarity and to avoid confusion, the title of this and each other ballot item is requested to be consistent throughout all the proxy materials. The company is requested to assign a proposal number (represented by "3" above) based on the chronological order in which proposals are submitted. The requested designation of "3" or higher number allows for ratification of auditors to be item 2.

This proposal is believed to conform with Staff Legal Bulletin No. 14B (CF), September 15, 2004 including:

- Accordingly, going forward, we believe that it would not be appropriate for companies to exclude supporting statement language and/or an entire proposal in reliance on rule 14a-8(i)(3) in the following circumstances:
  - company officials object to factual assertions because they are not supported;
  - the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;
  - the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; and/or

- **the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such [See also: Sun Microsystems, Inc. (July 21, 2005)].**

Stock will be held until after the annual meeting and the proposal will be presented at the annual meeting.

Please acknowledge this proposal promptly by email.

This is the proxy for Mr. Richard D. Foley and/or his designee to act on my behalf in all shareholder matters, including this Rule 14a-8 proposal for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting.

Please direct all future communication to Mr. Foley at:

*** FISMA & OMB Memorandum M-07-16 ***
FMI FISMA & OMB Memorandum M-07-16 ***
FAX MA & OMB Memorandum M-07-16 ***
Email: FISMA & OMB Memorandum M-07-16 ***

Your consideration and the consideration of the Board of Directors is appreciated.

Sincerely,

(signature above)
(print your name on line below)

Terry K Dayton

Terry K. Dayton

*** FISMA & OMB Memorandum M-07-16 ***

[AAG: Rule 14a-8 Proposal; submitted Nov. 28, 2008 via FAX (206) 392-5807 and email to karengruen@alaskaair.com]

Proposal No. 3 CUMULATIVE VOTING

RESOLVED, that our board initiate in 2009 the appropriate process to amend our company's certificate of incorporation to ensure that cumulative voting is permitted to elect director nominees to the board.

This binding proposal does not infringe on the right of our board and management to determine in its discretion the best method to implement cumulative voting if shareholders support it with a majority vote.

Cumulative voting means that each shareholder may cast as many votes as equal to number of shares held, multiplied by the number of directors to be elected. A shareholder may cast all such cumulated votes for a single candidate or split votes between multiple candidates, as that shareholder sees fit. Under cumulative voting shareholders can withhold votes from certain nominees in order to cast multiple votes for others.

Proposalist Terry Dayton, a Horizon Air communications agent, has notified the Alaska Air Group, Inc. ("AAG") that he intends to present the following proposal at the 2009 Annual Meeting.

SUPPORTING STATEMENT

At our company in 2008, cumulative voting won 52% of the vote, and in 2005 it won 56% of the vote. Cumulative voting also received 55%-support at General Motors in 2006 and 54% at Aetna. The Council of Institutional Investors www.cii.org has recommended adoption of this proposal topic. CalPERS has also recommend a yes-vote for proposals on this topic.

Cumulative voting allows a significant group of shareholders to elect a director of its choice -- safeguarding minority shareholder interests and bringing independent perspectives to Board decisions. Most importantly cumulative voting encourages management to optimize shareholder value by making it easier for minority stockholder groups (such as workers) to gain board representation. It represents a powerful incentive for improved management of our company.

This proposal is particularly important because our company has underperformed its peers over one-year, three-year and five-year periods. Additionally we still have plurality voting, no shareholder right to call a special meeting or act by written consent, and our board lacks representation by the strategic stakeholders of workers and customers.

Vote Yes on Proposal No. 3 for Cumulative Voting

(For more information on this proposal, please visit www.votepal.com/)

Notes:

Terry Dayton of *** FISMA & OMB Memorandum M-07-16 *** submitted this proposal.

The above format is requested for publication without re-editing, re-formatting or elimination of text, including beginning and concluding text, unless prior agreement is reached.

It is respectfully requested that this proposal be proofread before it is published in the definitive proxy to ensure that the integrity of the submitted format is replicated in the proxy materials.

Please advise if there is any typographical question.

Please note that the title of the proposal is part of the argument in favor of the proposal. In the interest of clarity and to avoid confusion, the title of this and each other ballot item is requested to be consistent throughout all the proxy materials.

The company is requested to assign a proposal number (represented by "4" above) based on the chronological order in which proposals are submitted. The requested designation of "4" or higher number allows for ratification of auditors to be item 2

This proposal is believed to conform with Staff Legal Bulletin No. 14B (CF), September 15, 2004 including:

- Accordingly, going forward, we believe that it would not be appropriate for companies to exclude supporting statement language and/or an entire proposal in reliance on rule 14a-8(i)(3) in the following circumstances:
  - company officials object to factual assertions because they are not supported;
  - the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;
  - the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; and/or
  - the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such [See also: Sun Microsystems, Inc. (July 21, 2005)].

Stock will be held until after the annual meeting and the proposal will be presented at the annual meeting.

Please acknowledge this proposal promptly by email.

Nov. 26, 2008

Mr. Bill Ayer, Chairman and CEO
Alaska Air Group, Inc. ("AAG" or "company")
PO Box 68947
Seattle, WA 98168

Dear Mr. Ayer:

This Rule 14a-8 proposal is respectfully submitted for the next annual shareholder meeting. This proposal is submitted in support of the positive, long-term performance of our company.

The above format is requested for publication without re-editing, re-formatting or elimination of text, including beginning and concluding text, unless prior agreement is reached. It is respectfully requested that this proposal be proofread before it is published in the definitive proxy statement to ensure that the integrity of the submitted format is replicated in the proxy materials. Please advise if there is any typographical question.

Please note that the title of the proposal is part of the argument in favor of the proposal. In the interest of clarity and to avoid confusion, the title of this and each other ballot item is requested to be consistent throughout all the proxy materials.
The company is requested to assign a proposal number (represented by "3" above) based on the chronological order in which proposals are submitted. The requested designation of "3" or higher number allows for ratification of auditors to be item 2.

This proposal is believed to conform with Staff Legal Bulletin No. 14B (CF), September 15, 2004 including:

- Accordingly, going forward, we believe that it would not be appropriate for companies to exclude supporting statement language and/or an entire proposal in reliance on rule 14a-8(i)(3) in the following circumstances:
  - company officials object to factual assertions because they are not supported;
  - the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;
  - the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable

to the company, its directors, or its officers; and/or

- **the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such [See also: Sun Microsystems, Inc. (July 21, 2005)].**

Stock will be held until after the annual meeting and the proposal will be presented at the annual meeting.

Please acknowledge this proposal promptly by email.

This is the proxy for Mr. Richard D. Foley and/or his designee to act on my behalf in all shareholder matters, including this Rule 14a-8 proposal for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting.

Please direct all future communication to Mr. Foley at:

*** FISMA & OMB Memorandum M-07-16 ***
*** FISMA & OMB Memorandum M-07-16 ***
*** FISMA & OMB Memorandum M-07-16 ***
*** FISMA & OMB Memorandum M-07-16 ***

Your consideration and the consideration of the Board of Directors is appreciated.

Sincerely,

(signature above)
(print your name on line below)
William DAVIDGE

William B. Davidge

*** FISMA & OMB Memorandum M-07-16 ***

[AAG: Rule 14a-8 Proposal; submitted Nov. 28, 2008 via FAX (206) 392-5807 and email to karengruen@alaskaair.com]

4 – SHAREHOLDER SAY ON EXECUTIVE PAY

RESOLVED, that shareholders request our board of directors to adopt a policy that provides shareholders the opportunity at each annual shareholder meeting to vote on an advisory resolution, proposed by management, to ratify the compensation of the named executive officers set forth in the proxy statement's Summary Compensation Table and the accompanying narrative disclosure of material factors provided to understand the Summary Compensation Table (but not the Compensation Discussion and Analysis). The proposal submitted to shareholders should make clear that the vote is non-binding and would not affect any compensation paid or awarded to any named executive officers.

Statement of William Davidge

Investors are increasingly concerned about mushrooming executive pay especially when it is insufficiently linked to performance. In 2008, shareholders filed close to 100 "Say on Pay" resolutions. Alaska Air was one of ten companies where shareholders voted more than 50% for "Say on Pay" – 54% based on yes and no votes. The Cumulative voting proposal by Terry Dayton also exceeded a 50% vote at our 2008 annual meeting.

The Council of Institutional Investors www.cii.org recommended timely adoption of shareholder proposals upon receiving their first vote exceeding 50%. Large numbers of shareholder have been know to withhold votes from directors who do not adopt shareholder proposals receiving more than a 50% vote.

"There should be no doubt that executive compensation lies at the root of the current financial crisis," wrote Paul Hodgson, a senior research associate with research firm The Corporate Library. Shareholders at Wachovia and Merrill Lynch did not support "Say on Pay" ballot proposals in 2008. These investors don't have much of a say on anything now.

An Advisory Vote establishes an annual referendum process for shareholders about senior executive pay. The results of this vote would provide the board and management with useful information about shareholder views on the company's senior executive pay.

Aflac submitted an Advisory Vote in its 2008 proxy resulting in a 93% vote in favor, indicating strong investor support for good disclosure and a reasonable compensation package. To date eight other companies have also agreed to an Advisory Vote, including Verizon, MBIA, H&R Block, Blockbuster and Tech Data.

Influential proxy voting service RiskMetrics Group, recommends votes in favor, noting: "RiskMetrics encourages companies to allow shareholders to express their opinions of executive compensation practices by establishing an annual referendum

process. An advisory vote on executive compensation is another step forward in enhancing board accountability."

The Council of Institutional Investors endorsed advisory votes and a bill to allow annual advisory votes passed the House of Representatives by a 2-to-1 margin. As presidential candidates, Senators Obama and McCain supported the Advisory Vote.

I urge our board to allow shareholders to express their opinion about senior executive pay.

Shareholder Say on Executive Pay – Yes on 4

(For more information on this proposal, please visit www.votepal.com/)

Notes:

William Davidge of *** FISMA & OMB Memorandum M-07-16 *** submitted this proposal.

The above format is requested for publication without re-editing, re-formatting or elimination of text, including beginning and concluding text, unless prior agreement is reached.

It is respectfully requested that this proposal be proofread before it is published in the definitive proxy to ensure that the integrity of the submitted format is replicated in the proxy materials.

Please advise if there is any typographical question.

Please note that the title of the proposal is part of the argument in favor of the proposal. In the interest of clarity and to avoid confusion, the title of this and each other ballot item is requested to be consistent throughout all the proxy materials

The company is requested to assign a proposal number (represented by "4" above) based on the chronological order in which proposals are submitted. The requested designation of "4" or higher number allows for ratification of auditors to be item 2

This proposal is believed to conform with Staff Legal Bulletin No. 14B (CF), September 15, 2004 including:

- Accordingly, going forward, we believe that it would not be appropriate for companies to exclude supporting statement language and/or an entire proposal in reliance on rule 14a-8(i)(3) in the following circumstances:
  - company officials object to factual assertions because they are not

supported;

- the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;
- the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; and/or
- the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such [See also: Sun Microsystems, Inc. (July 21, 2005)].

Stock will be held until after the annual meeting and the proposal will be presented at the annual meeting.

Please acknowledge this proposal promptly by email.

Nov. 28, 2008

Mr. Bill Ayer, Chairman and CEO
Alaska Air Group, Inc. ("AAG" or "company")
PO Box 68947
Seattle, WA 98168

Dear Mr. Ayer:

This Rule 14a-8 proposal is respectfully submitted for the next annual shareholder meeting. This proposal is submitted in support of the positive, long-term performance of our company.

The above format is requested for publication without re-editing, re-formatting or elimination of text, including beginning and concluding text, unless prior agreement is reached. It is respectfully requested that this proposal be proofread before it is published in the definitive proxy statement to ensure that the integrity of the submitted format is replicated in the proxy materials. Please advise if there is any typographical question.

Please note that the title of the proposal is part of the argument in favor of the proposal. In the interest of clarity and to avoid confusion, the title of this and each other ballot item is requested to be consistent throughout all the proxy materials.

The company is requested to assign a proposal number (represented by "5" below) based on the chronological order in which proposals are submitted. The requested designation of "5" or higher number allows for ratification of auditors to be item 2.

This proposal is believed to conform with Staff Legal Bulletin No. 14B (CF), September 15, 2004 including:

- Accordingly, going forward, we believe that it would not be appropriate for companies to exclude supporting statement language and/or an entire proposal in reliance on rule 14a-8(l)(3) in the following circumstances:
  - company officials object to factual assertions because they are not supported;
  - the company objects to factual assertions that, while not materially false or misleading, may be disputed or

countered;

- the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; and/or
- the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such [See also: Sun Microsystems, Inc. (July 21, 2005)].

Stock will be held until after the annual meeting and the proposal will be presented at the annual meeting.

Please acknowledge this proposal promptly by email.

This is the proxy for Mr. Richard D. Foley and/or his designee to act on my behalf in all shareholder matters, including this Rule 14a-8 proposal for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting.

Please direct all future communication to Mr. Foley at:

*** FISMA & OMB Memorandum M-07-16 ***

HM: *** FISMA & OMB Memorandum M-07-16 ***
FAX: *** FISMA & OMB Memorandum M-07-16 ***
Email: *** FISMA & OMB Memorandum M-07-16 ***

Your consideration and the consideration of the Board of Directors is appreciated.

Sincerely,

Stephen Nieman

STEPHEN NIEMAN

Stephen Nieman
15204 NE 181st Loop
Brush Prairie WA 98606

[AAG: Rule 14a-8 Proposal; submitted Nov. 28, 2008 via FAX (206) 392-5807 and email to karengruen@alaskaair.com]

Proposal No. 5 REFORMING SECURITIES CLASS ACTIONS

BE IT RESOLVED: That the shareholders of Alaska Air Group, Inc. hereby recommend that the Board of Directors initiate the appropriate process to amend the Company's certificate of incorporation to provide for a partial waiver of the "fraud-on-the-market" presumption of reliance created by the Supreme Court in *Basic v. Levinson*, 485 U.S. 224 (1988).

Specifically, the amendment should apply to any suit alleging violations of Rule 10b-5 of the Securities Exchange Act of 1934 against the Company, its officers, directors or third-party agents. The partial waiver would apply to suits alleging reliance on the "fraud-on-the-market" presumption. The waiver would limit damages to disgorgement of the defendants' unlawful gains from their violation of Rule 10b-5. The amounts disgorged would be distributed to shareholder members of the class. The corporation should also commit to paying the reasonable expenses and attorneys' fees of the shareholder who brings such a claim, subject to approval by the Board of Directors.

SUPPORTING STATEMENT

Securities fraud class actions impose enormous costs on public companies while providing little benefit to shareholders. This proposal, suggested by Professor Adam Pritchard of the University of Michigan, would limit damages in secondary market securities class actions, i.e., suits brought against the Company when it has not sold securities during the time that its common stock was allegedly distorted by a material misrepresentation. See:
http://www.cato.org/pubs/scr/2008/Stoneridge_Pritchard.pdf;
http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202424567666
http://www.securitiesdocket.com/2008/11/17/guest-column-can-shareholders-waive-the-fraud-on-the-market-presumption-of-reliance/.

Currently, such suits effectively result in a "pocket shifting" of money from one group of shareholders (those who continue to hold the company's shares) to another (those who bought during the time that

the price was distorted by fraud). Frequently, shareholders will be members of both groups simultaneously, which means they are paying themselves compensation in securities class actions.

Sometimes the corporation pays directly for the settlement, and sometimes it pays indirectly in the form of insurance premia, but either way these settlements come out of funds that the corporation could use to pay dividends or make new investments. Almost never do the officers who actually made the misrepresentation have to contribute to the settlement. Consequently, suits provide minimal compensation and, worse yet, scant deterrence of fraud. The only clear winners under this scheme are the lawyers who bring the suits, and those who defend them, who profit handsomely from moving the money around.

The proposed amendment would substantially reduce the incentive of plaintiffs' lawyers to file suit against the Company in response to a drop in the Company's stock price. Currently, the enormous potential damages are a powerful incentive for plaintiffs' lawyers to bring even weak suits and a powerful incentive for companies to settle, even if they believe that they would win at trial.

Under the proposal, lawsuits would instead target officers of the Company who reaped large stock option gains or other incentive compensation as the result of fraud, thereby penalizing the party actually responsible for the fraud.

We urge shareholders vote for proposal No. 5.

(For more information, please visit www.votepal.com/)

Notes:

Stephen Nieman of 15204 NE 181st Loop, Brush Prairie, WA 98606 submitted this proposal.

The above format is requested for publication without re-editing, re-formatting or elimination of text, including beginning and concluding text, unless prior agreement is reached.

It is respectfully requested that this proposal be proofread before it is published in the definitive proxy to ensure that the integrity of the

submitted format is replicated in the proxy materials.

Please advise if there is any typographical question.

Please note that the title of the proposal is part of the argument in favor of the proposal. In the interest of clarity and to avoid confusion, the title of this and each other ballot item is requested to be consistent throughout all the proxy materials.

The company is requested to assign a proposal number (represented by "4" above) based on the chronological order in which proposals are submitted. The requested designation of "4" or higher number allows for ratification of auditors to be item 2

This proposal is believed to conform with Staff Legal Bulletin No. 14B (CF), September 15, 2004 including:

- Accordingly, going forward, we believe that it would not be appropriate for companies to exclude supporting statement language and/or an entire proposal in reliance on rule 14a-8(l)(3) in the following circumstances:
  - company officials object to factual assertions because they are not supported;
  - the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;
  - the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; and/or
  - the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such [See also: Sun Microsystems, Inc. (July 21, 2005)].

Stock will be held until after the annual meeting and the proposal will be presented at the annual meeting.

Please acknowledge this proposal promptly by email.

EXHIBIT B

O'MELVENY & MYERS LLP

BEIJING
BRUSSELS
CENTURY CITY
HONG KONG
LONDON
LOS ANGELES
NEW YORK

610 Newport Center Drive, 17th Floor
Newport Beach, California 92660-6429

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SAN FRANCISCO
SHANGHAI
SILICON VALLEY
SINGAPORE
TOKYO
WASHINGTON, D.C.

December 12, 2008

OUR FILE NUMBER
600,000-10

WRITER'S DIRECT DIAL
(949) 823-6980

WRITER'S E-MAIL ADDRESS
aterner@omm.com

SENT VIA CERTIFIED MAIL
EMAIL *** FISMA & OMB Memorandum M-07-16 ***
AND FACSIMILE *** FISMA & OMB Memorandum M-07-16 ***

Mr. Richard D. Foley

*** FISMA & OMB Memorandum M-07-16 ***

Dear Mr. Foley:

I am writing this letter on behalf of our client, Alaska Air Group, Inc. (the "Company"). The Company has received the shareholder proposals that you indicate you have submitted on behalf of Stephen Nieman, Terry K. Dayton, and William Davidge.

SEC Rule 14a-8 (a copy of which is enclosed) sets forth certain eligibility and procedural requirements that must be satisfied for a stockholder to submit a proposal for inclusion in a company's proxy materials. In accordance with Rule 14a-8(f) (Question 6), we hereby notify you of the following eligibility and procedural deficiencies relating to your proposals:

1. Rule 14a-8(c) (Question 3) precludes any one shareholder from submitting more than one proposal to a company for a particular shareholders' meeting. In this regard, we believe that the proposals that you indicate you have submitted on behalf of the purported proponents should each be viewed as submitted by you and, as such, exceed the limitation that a proponent may submit only one proposal. As such, you are required under Rule 14a-8 to select and resubmit a single proposal to be considered for inclusion in the Company's proxy materials.

2. Rule 14a-8(c) (Question 3) precludes any one shareholder from submitting more than one proposal to a company for a particular shareholders' meeting. In this regard, the proposal that you indicate you have submitted on behalf of Stephen Nieman includes proposals relating to a partial waiver of the "fraud-on-the-market" presumption of reliance and the payment of reasonable expenses and attorneys' fees for shareholders who bring certain claims. As such, if this proposal is selected by you for inclusion in the Company's proxy materials, you are required under Rule 14a-8 to reduce such proposal to a single proposal and resubmit it to the Company in order to be considered for inclusion in the Company's proxy materials.

In accordance with Rule 14a-8(f)(1), and in order for your proposal to be eligible for inclusion in Alaska Air Group's proxy materials, your revised submission to the Company must be postmarked, or transmitted electronically, no later than 14 days from the date that you receive this letter.

Please note that the requests in this letter are without prejudice to any other rights that the Company may have to exclude your proposal from its proxy materials on any other grounds permitted by Rule 14a-8.

Sincerely,

Andor D. Terner
of O'MELVENY & MYERS LLP

Attachment -- Copy of SEC Rule 14a-8

cc: Steve Neiman
15204 NE 181st Loop
Brush Prairie, WA 98606
Facsimile: (360) 666-6483
Email: *** FISMA & OMB Memorandum M-07-16 ***

Terry K. Dayton

*** FISMA & OMB Memorandum M-07-16 ***

William Davidge

*** FISMA & OMB Memorandum M-07-16 ***

Karen A. Gruen, Esq.
Alaska Air Group, Inc.
19300 Pacific Highway South
Seattle, WA 98188

Martin P. Dunn
Rebekah J. Toton
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, D.C. 20006

Text of Rule 14a-8

Rule 14a-8. Shareholder Proposals.

This section addresses when a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders. In summary, in order to have your shareholder proposal included on a company's proxy card, and included along with any supporting statement in its proxy statement, you must be eligible and follow certain procedures. Under a few specific circumstances, the company is permitted to exclude your proposal, but only after submitting its reasons to the Commission. We structured this section in a question-and-answer format so that it is easier to understand. The references to "you" are to a shareholder seeking to submit the proposal.

(a) Question 1: What is a proposal?

A shareholder proposal is your recommendation or requirement that the company and/or its board of directors take action, which you intend to present at a meeting of the company's shareholders. Your proposal should state as clearly as possible the course of action that you believe the company should follow. If your proposal is placed on the company's proxy card, the company must also provide in the form of proxy means for shareholders to specify by boxes a choice between approval or disapproval, or abstention. Unless otherwise indicated, the word "proposal" as used in this section refers both to your proposal, and to your corresponding statement in support of your proposal (if any).

(b) Question 2: Who is eligible to submit a proposal, and how do I demonstrate to the company that I am eligible?

(1) In order to be eligible to submit a proposal, you must have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date you submit the proposal. You must continue to hold those securities through the date of the meeting.

(2) If you are the registered holder of your securities, which means that your name appears in the company's records as a shareholder, the company can verify your eligibility on its own, although you will still have to provide the company with a written statement that you intend to continue to hold the securities through the date of the meeting of shareholders. However, if like many shareholders you are not a registered holder, the company likely does not know that you are a shareholder, or how many shares you own. In this case, at the time you submit your proposal, you must prove your eligibility to the company in one of two ways:

(i) The first way is to submit to the company a written statement from the "record" holder of your securities (usually a broker or bank) verifying that, at the time you submitted your proposal, you continuously held the securities for at least one year. You must also include your own written statement that you intend to continue to hold the securities through the date of the meeting of shareholders; or

(ii) The second way to prove ownership applies only if you have filed a Schedule 13D, Schedule 13G, Form 3, Form 4 and/or Form 5, or amendments to those documents or updated forms, reflecting your ownership of the shares as of or before the date on which the one-year eligibility period begins. If you have filed one of these documents with the SEC, you may demonstrate your eligibility by submitting to the company:

(A) A copy of the schedule and/or form, and any subsequent amendments reporting a change in your ownership level;

(B) Your written statement that you continuously held the required number of shares for the one-year period as of the date of the statement; and

(C) Your written statement that you intend to continue ownership of the shares through the date of the company's annual or special meeting.

(c) **Question 3: How many proposals may I submit?**

Each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting.

(d) **Question 4: How long can my proposal be?**

The proposal, including any accompanying supporting statement, may not exceed 500 words.

(e) **Question 5: What is the deadline for submitting a proposal?**

(1) If you are submitting your proposal for the company's annual meeting, you can in most cases find the deadline in last year's proxy statement. However, if the company did not hold an annual meeting last year, or has changed the date of its meeting for this year more than 30 days from last year's meeting, you can usually find the deadline in one of the company's quarterly reports on Form 10-Q or 10-QSB , or in shareholder reports of investment companies under Rule 30d-1 under the Investment Company Act of 1940. In order to avoid controversy, shareholders should submit their proposals by means, including electronic means, that permit them to prove the date of delivery.

(2) The deadline is calculated in the following manner if the proposal is submitted for a regularly scheduled annual meeting. The proposal must be received at the company's principal executive offices not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting. However, if the company did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting, then the deadline is a reasonable time before the company begins to print and send its proxy materials.

(3) If you are submitting your proposal for a meeting of shareholders other than a regularly scheduled annual meeting, the deadline is a reasonable time before the company begins to print and send its proxy materials.

(f) Question 6: What if I fail to follow one of the eligibility or procedural requirements explained in answers to Questions 1 through 4 of this Rule 14a-8?

(1) The company may exclude your proposal, but only after it has notified you of the problem, and you have failed adequately to correct it. Within 14 calendar days of receiving your proposal, the company must notify you in writing of any procedural or eligibility deficiencies, as well as of the time frame for your response. Your response must be postmarked, or transmitted electronically, no later than 14 days from the date you received the company's notification. A company need not provide you such notice of a deficiency if the deficiency cannot be remedied, such as if you fail to submit a proposal by the company's properly determined deadline. If the company intends to exclude the proposal, it will later have to make a submission under Rule 14a-8 and provide you with a copy under Question 10 below, Rule 14a-8(j).

(2) If you fail in your promise to hold the required number of securities through the date of the meeting of shareholders, then the company will be permitted to exclude all of your proposals from its proxy materials for any meeting held in the following two calendar years.

(g) Question 7: Who has the burden of persuading the Commission or its staff that my proposal can be excluded?

Except as otherwise noted, the burden is on the company to demonstrate that it is entitled to exclude a proposal.

(h) Question 8: Must I appear personally at the shareholders' meeting to present the proposal?

(1) Either you, or your representative who is qualified under state law to present the proposal on your behalf, must attend the meeting to present the proposal. Whether you attend the meeting yourself or send a qualified representative to the meeting in your place, you should make sure that you, or your representative, follow the proper state law procedures for attending the meeting and/or presenting your proposal.

(2) If the company holds its shareholder meeting in whole or in part via electronic media, and the company permits you or your representative to present your proposal via such media, then you may appear through electronic media rather than traveling to the meeting to appear in person.

(3) If you or your qualified representative fail to appear and present the proposal, without good cause, the company will be permitted to exclude all of your proposals from its proxy materials for any meetings held in the following two calendar years.

(i) Question 9: If I have complied with the procedural requirements, on what other bases may a company rely to exclude my proposal?

(1) ***Improper Under State Law:*** If the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization;

Note to paragraph (i)(1): Depending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.

(2) ***Violation of Law:*** If the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject;

Note to paragraph (i)(2): We will not apply this basis for exclusion to permit exclusion of a proposal on grounds that it would violate foreign law if compliance with the foreign law would result in a violation of any state or federal law.

(3) ***Violation of Proxy Rules:*** If the proposal or supporting statement is contrary to any of the Commission's proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials;

(4) ***Personal Grievance; Special Interest:*** If the proposal relates to the redress of a personal claim or grievance against the company or any other person, or if it is designed to result in a benefit to you, or to further a personal interest, which is not shared by the other shareholders at large;

(5) ***Relevance:*** If the proposal relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business;

(6) ***Absence of Power/Authority:*** If the company would lack the power or authority to implement the proposal;

(7) ***Management Functions:*** If the proposal deals with a matter relating to the company's ordinary business operations;

(8) ***Relates to Election:*** If the proposal relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election;

(9) ***Conflicts with Company's Proposal:*** If the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting;

Note to paragraph (i)(9): A company's submission to the Commission under this Rule 14a-8 should specify the points of conflict with the company's proposal.

(10) ***Substantially Implemented:*** If the company has already substantially implemented the proposal;

(11) ***Duplication:*** If the proposal substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the company's proxy materials for the same meeting;

(12) ***Resubmissions:*** If the proposal deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials within the preceding 5 calendar years, a company may exclude it from its proxy materials for any meeting held within 3 calendar years of the last time it was included if the proposal received:

(i) Less than 3% of the vote if proposed once within the preceding 5 calendar years;

(ii) Less than 6% of the vote on its last submission to shareholders if proposed twice previously within the preceding 5 calendar years; or

(iii) Less than 10% of the vote on its last submission to shareholders if proposed three times or more previously within the preceding 5 calendar years; and

(13) ***Specific Amount of Dividends:*** If the proposal relates to specific amounts of cash or stock dividends.

(j) **Question 10: What procedures must the company follow if it intends to exclude my proposal?**

(1) If the company intends to exclude a proposal from its proxy materials, it must file its reasons with the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The company must simultaneously provide you with a copy of its submission. The Commission staff may permit the company to make its submission later than 80 days before the company files its definitive proxy statement and form of proxy, if the company demonstrates good cause for missing the deadline.

(2) The company must file six paper copies of the following:

(i) The proposal;

(ii) An explanation of why the company believes that it may exclude the proposal, which should, if possible, refer to the most recent applicable authority, such as prior Division letters issued under the rule; and

(iii) A supporting opinion of counsel when such reasons are based on matters of state or foreign law.

(k) **Question 11: May I submit my own statement to the Commission responding to the company's arguments?**

Yes, you may submit a response, but it is not required. You should try to submit any response to us, with a copy to the company, as soon as possible after the company makes its submission. This way, the Commission staff will have time to consider fully your submission before it issues its response. You should submit six paper copies of your response.

(l) **Question 12: If the company includes my shareholder proposal with its proxy materials, what information about me must it include along with the proposal itself?**

(1) The company's proxy statement must include your name and address, as well as the number of the company's voting securities that you hold. However, instead of providing that information, the company may instead include a statement that it will provide the information to shareholders promptly upon receiving an oral or written request.

(2) The company is not responsible for the contents of your proposal or supporting statement.

(m) **Question 13: What can I do if the company includes in its proxy statement reasons for why it believes shareholders should not vote in favor of my proposal, and I disagree with some of the statements?**

(1) The company may elect to include in its proxy statement reasons why it believes shareholders should vote against your proposal. The company is allowed to make arguments reflecting its own point of view, just as you may express your own point of view in your proposal's supporting statement.

(2) However, if you believe that the company's opposition to your proposal contains materially false or misleading statements that may violate our anti-fraud rule, Rule 14a-9, you should promptly send to the Commission staff and the company a letter explaining the reasons for your view, along with a copy of the company's statements opposing your proposal. To the extent possible, your letter should include specific factual information demonstrating the inaccuracy of the company's claims. Time permitting, you may wish to try to work out your differences with the company by yourself before contacting the Commission staff.

(3) We require the company to send you a copy of its statements opposing your proposal before it sends its proxy materials, so that you may bring to our attention any materially false or misleading statements, under the following timeframes:

(i) If our no-action response requires that you make revisions to your proposal or supporting statement as a condition to requiring the company to include it in its proxy materials, then the company must provide you with a copy of its opposition statements no later than 5 calendar days after the company receives a copy of your revised proposal; or

(ii) In all other cases, the company must provide you with a copy of its opposition statements no later than 30 calendar days before it files definitive copies of its proxy statement and form of proxy under Rule 14a-6.

Toton, Rebekah

From: Heyduk, Shelly
Sent: Friday, December 12, 2008 9:21 PM
To: *** FISMA & OMB Memorandum M-07-16 ***
Cc: Karen Gruen
Subject: Alaska Air Group -- Shareholder Proposals

Attachments: Ltr to Foley.PDF

Mr. Foley,

On behalf of Alaska Air Group, the attached letter was sent to you today by facsimile and certified mail in accordance with Rule 14a-8(f) under the Exchange Act.

Regards,
Shelly Heyduk

Ltr to Foley.PDF
(393 KB)

Shelly A. Heyduk ▪ O'Melveny & Myers LLP
610 Newport Center Drive ▪ Suite 1700 ▪ Newport Beach, CA 92660-9429
Direct Dial (949) 823-7968 ▪ Fax (949) 823-6994 ▪ **sheyduk@omm.com**

Toton, Rebekah

From: Heyduk, Shelly
Sent: Friday, December 12, 2008 9:24 PM
To: *** FISMA & OMB Memorandum M-07-16 ***
Cc: Karen Gruen
Subject: Alaska Air Group -- Shareholder Proposals

Attachments: Ltr to Foley.PDF

Mr. Nieman,

On behalf of Alaska Air Group, the attached letter was sent to you today by facsimile and certified mail in accordance with Rule 14a-8(f) under the Exchange Act.

Regards,
Shelly Heyduk

Ltr to Foley.PDF
(393 KB)

Shelly A. Heyduk ▪ O'Melveny & Myers LLP
610 Newport Center Drive ▪ Suite 1700 ▪ Newport Beach, CA 92660-9429
Direct Dial (949) 823-7968 ▪ Fax (949) 823-6994 ▪ **sheyduk@omm.com**

EXHIBIT C

STEVE NIEMAN, President
The Ownership Union® | www.ourunion.org
15204 NE 181st Loop, Brush Prairie, WA 98606
*** FISMA & OMB Memorandum M-07-16 *** home OMB Memorandum M-07-16*** | **fax (360) 666-6483**

December 19, 2008

Mr. Andor D. Terner, Esq.
of O'MELVENY & MYERS LLP
610 Newport Center Drive, 17th Floor
Newport Beach, CA 92660-6429

SENT VIA EMAIL (aterner@omm.com)
AND FAX (949-823-6994)

Dear Mr. Terner:

Mr. Foley asked that I respond to your Dec. 12, 2008 letter addressed to him concerning William Davidge, Terry Dayton and myself naming Mr. Foley as our proxy as we exercise our lawful rights as ALK stockholders to submit shareholder proposals to our company.

I disagree with both points you raised. Each of the three proposals sponsored by the ALK shareholders named above are duly qualified under SEC Rule 14a-8. The three of us asked Richard to be our communication-liaison proxy, which as you are aware, is our right as shareholders to seek counsel or assistance from anyone to aid in the legal exercise of our ownership rights. Over the last six years, Mr. Foley has voluntarily served in this capacity, and both Alaska Air Group, Inc. management and the staff of the U.S. SEC have accepted this arrangement.

Regarding my sponsor titled "Reforming Securities Class Actions": My proposal has a number of features that are not severable and should not be considered general in nature. The proposal to reimburse fees only applies to cases in which the waiver of the "fraud on the market" presumption would apply, just as the damages stipulation would only apply in those cases. Moreover, if the shareholders elect to adopt this resolution, the attorney's fees reimbursement is an important feature to help ensure that deterrence is maintained.

Contrary to the assertions made in your letter, I believe my proposal is consistent with Rule 14a-8 in all respects, and demand that it be included in Alaska Air Group's 2009 proxy statement as is. It is my belief that a majority would vote for it in the affirmative.

Sincerely,

Steve Nieman

email cc: Mr. Richard Foley
Mr. William Davidge
Mr. Terry Dayton
Ms. Karen Gruen, Esq.
Mr. Adam Pritchard

OWNERSHIP UNION (OU®)

15204 NE 181st Loop
P.O. Box 602
Brush Prairie, WA 98606
Fax: 360-666-6483

FASCIMILE

To: Andor Terner c/o OM*M

Date: 12-19-08

Fax No: (949)823-6994

From: Steve Nieman

Cover Plus: 1

Email *** FISMA & OMB Memorandum M-07-16 ***

Notes:

EXHIBIT D

Alaska Air Group, Inc.

VIA EMAIL

December 2, 2008

Mr. Stephen Nieman
15204 NE 181st Loop
Brush Prairie, WA 98606

Dear Mr. Nieman:

Your Rule 14a-8 proposal regarding Reforming Securities Class Actions was received in our office via email and fax on Friday, November 28, 2008.

Rule 14a-8 requires that you submit proof of beneficial ownership. Please forward your broker letter (a written statement from the record holder of ownership of securities) by email to karen.gruen@alaskaair.com or by fax at 206-392-5807. We must receive your proof of beneficial ownership within 14 days of your receipt of this notice. Please be aware that your proposal may be insufficient if this requirement is not met.

Sincerely,

Karen Gruen
Associate General Counsel/Assistant Secretary

KAG/cw

cc: Richard Foley via email

Alaska Air Group, Inc.

VIA EMAIL

December 2, 2008

Mr. William B Davidge

*** FISMA & OMB Memorandum M-07-16 ***

Dear Mr. Davidge:

Your Rule 14a-8 proposal regarding Cumulative Voting was received in our office via email and fax on Friday, November 28, 2008.

Please note we found a minor typographical error in paragraph 2 under "Statement of William Davidge" which will be corrected upon final printing.

Rule 14a-8 requires that you submit proof of beneficial ownership. Please forward your broker letter (a written statement from the record holder of ownership of securities) by email to karen gruen@alaskaair.com or by fax at 206-392-5807. We must receive your proof of beneficial ownership within 14 days of your receipt of this notice. Please be aware that your proposal may be insufficient if this requirement is not met

Sincerely,

Karen Gruen
Associate General Counsel/Assistant Secretary

KAG/cw

cc: Richard Foley via email

Alaska Air Group, Inc.

VIA EMAIL

December 2, 2008

Mr Terry Dayton

*** FISMA & OMB Memorandum M-07-16 ***

Dear Mr. Dayton:

Your Rule 14a-8 proposal regarding Cumulative Voting was received in our office via email and fax on Friday, November 28, 2008.

Rule 14a-8 requires that you submit proof of beneficial ownership. Please forward your broker letter (a written statement from the record holder of ownership of securities) by email to karen.gruen@alaskaair.com or by fax at 206-392-5807. We must receive your proof of beneficial ownership within 14 days of your receipt of this notice. Please be aware that your proposal may be insufficient if this requirement is not met.

Sincerely,

Karen Gruen
Associate General Counsel/ Assistant Secretary

KAG/cw

cc: Richard Foley via email

BOX 68947 SEATTLE WA 98168-0947/206-431-7040