



DIVISION OF
CORPORATION FINANCE

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

March 1, 2022

Ronald O. Mueller
Gibson, Dunn & Crutcher LLP

Re: Bank of America Corporation (the "Company")
Incoming letter dated December 17, 2021

Dear Mr. Mueller:

This letter is in response to your correspondence concerning the shareholder proposals (the "Proposals") submitted to the Company by John Chevedden ("Mr. Chevedden") and Kenneth Steiner ("Mr. Steiner") (together, the "Proponents") for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

There appears to be some basis for your view that the Company may exclude the Proposals under Rule 14a-8(c). We note that initially Mr. Chevedden submitted a proposal in his own name and Mr. Steiner submitted his own proposal, while authorizing Mr. Chevedden to act as his representative. Mr. Chevedden subsequently submitted a revised proposal on Mr. Steiner's behalf. In doing so, Mr. Chevedden effectively withdrew Mr. Steiner's original proposal, *see* Staff Legal Bulletin No. 14F (Oct. 18, 2011), and substituted it with the revised proposal that he, himself, submitted. As a result, Mr. Chevedden has submitted a proposal in his own name and submitted a proposal on Mr. Steiner's behalf. The Commission has stated that "a shareholder-proponent [is not] permitted to submit one proposal in his or her own name and simultaneously serve as a representative to submit a different proposal on another shareholder's behalf for consideration at the same meeting." *See* Release No. 34-89964 (Sep. 23, 2020). As required by Rule 14a-8(f), the Company notified the Proponents of the problem, and the Proponents failed to adequately correct it. Accordingly, we will not recommend enforcement action to the Commission if the Company omits the Proposals from its proxy materials in reliance on Rules 14a-8(c) and 14a-8(f).

Copies of all of the correspondence on which this response is based will be made available on our website at <https://www.sec.gov/corpfin/2021-2022-shareholder-proposals-no-action>.

Sincerely,

Rule 14a-8 Review Team

cc: John Chevedden

December 17, 2021

VIA E-MAIL

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

Re: *Bank of America Corporation*
Shareholder Proposals of John Chevedden/Kenneth Steiner
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

This letter is to inform you that our client, Bank of America Corporation (the “Company”), intends to omit from its proxy statement and form of proxy for its 2022 Annual Meeting of Shareholders (collectively, the “2022 Proxy Materials”) two shareholder proposals: the first entitled “Management Pay Clawback Authorization” (the “First Proposal”) submitted directly by John Chevedden (“Chevedden”) and the second entitled “Independent Board Chairman” (the “Second Proposal” and, together with the First Proposal, the “Proposals”) submitted to the Company by Chevedden on behalf of Kenneth Steiner (“Steiner”).

Pursuant to Rule 14a-8(j), we have:

- filed this letter with the Securities and Exchange Commission (the “Commission”) no later than eighty (80) calendar days before the Company intends to file its definitive 2022 Proxy Materials with the Commission; and
- concurrently sent copies of this correspondence to Chevedden and Steiner.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) (“SLB 14D”) provide that shareholder proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Commission or the staff of the Division of Corporation Finance (the “Staff”). Accordingly, we are taking this opportunity to inform Chevedden and Steiner that if they elect to submit additional correspondence to the Commission or the Staff with respect to the Proposals, a copy of such correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

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BACKGROUND

Exhibit A sets forth a timeline that highlights the procedural background of the Proposals. On October 25, 2021, the Company received the First Proposal from Chevedden. *See* Exhibit B. One day later, on October 26, 2021, the Company received an email from Steiner's email address consisting of a letter (the "Proxy Authorization Letter") and the Second Proposal, stating:

"This is my proxy for John Chevedden and/or his designee to forward this Rule 14a-8 proposal to the company and to act on my behalf regarding this Rule 14a-8 proposal, and/or modification of it, for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting. Please direct all future communications regarding my rule 14a-8 proposal to John Chevedden . . . Please acknowledge receipt of my proposal promptly by email to [Chevedden's email address]." *See* Exhibit C.

On October 31, 2021, Chevedden, exercising the full proxy authority granted to him by Steiner, submitted a revised version of the Second Proposal to the Company via email. *See* Exhibit D. Notably, Chevedden did not copy Steiner on the email with the revised Second Proposal nor did Chevedden's correspondence refer to Steiner or contain any correspondence reflecting him as authorizing or approving the revisions to the Second Proposal. Indeed, nothing about Chevedden's correspondence suggests that his actions are limited to assisting Steiner to guide him through the Rule 14a-8 process.

After the Company verified that neither Chevedden nor Steiner was a shareholder of record, the Company sent via overnight mail a deficiency notice to Chevedden, with a copy to Steiner, on November 6, 2021 (the "Deficiency Notice," attached hereto as Exhibit E), which was within 14 calendar days of the dates on which the Company received the Proposals. The Deficiency Notice expressly identified each deficiency, including the multiple proposal deficiency, explained the steps Chevedden and/or Steiner could take to cure each of the deficiencies and stated that the Commission's rules required any response to the Deficiency Notice to be postmarked or transmitted electronically no later than 14 calendar days from the date the Deficiency Notice is received. The Deficiency Notice also included a copy of Rule 14a-8 and Staff Legal Bulletin No. 14F (Oct. 18, 2011). The overnight mailing of the Deficiency Notice was delivered to Chevedden, and a copy was delivered to Steiner, on November 8, 2021. *See* Exhibit F. In addition, the Company sent via email courtesy copies of the Deficiency Notice on November 8, 2021.

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In addition to addressing the need to provide verification of ownership of the requisite amount of Company shares to satisfy one of the ownership requirements of Rule 14a-8(b), the Deficiency Notice informed Chevedden that “[p]ursuant to Rule 14a-8(c) under the Securities Exchange Act of 1934, as amended, a person may submit no more than one proposal, directly or indirectly, to a company for a particular stockholders’ meeting.” Reciting the procedural history described above, the Deficiency Notice stated, “We believe these facts demonstrate that you have submitted more than one proposal for consideration at the Company’s 2022 Annual Meeting.” The Deficiency Notice described how the Rule 14a-8(c) deficiency could be cured, stating “This deficiency can be corrected by notifying the Company which of the Proposals you wish to withdraw.” See Exhibit E.

On November 8, 2021, Chevedden sent three emails to the Company, the last of which was an email from Chevedden with the word “RECALL” in the email subject line and in the body of the email, consisting of a typed but unsigned message appearing over Mr. Steiner’s name, and a copy of the original version of the Second Proposal (the version of the Second Proposal that Mr. Steiner had sent to the Company on October 26). Chevedden’s November 8, 2021 emails and the Company’s response are attached hereto as Exhibit G.

On November 9, 2021, Chevedden emailed proof of his share ownership, which we have not included in the exhibits because we are not contesting such ownership.

On November 10, 2021, an email from Steiner’s email address attempted to revoke the broad proxy authority Steiner had previously granted to Chevedden. Cryptically, the email stated “I am the sole representative for this proposal” and “Mr. Chevedden is not representing me,” but also stated, “Please copy Mr. John Chevedden on any messages regarding this proposal.” See Exhibit H. Notably, this email did not address the fact that Chevedden had subsequently submitted a revised version of the Second Proposal directly to the Company and did not withdraw the Second Proposal.

On November 16, 2021, Chevedden sent an email to the Company in which he attempted to disavow the proxy authority previously granted to him by Steiner, stating “[t]he only 2022 BAC rule 14a-8 proposal that I represent is my proposal. I do not represent Mr. Steiner’s 2022 BAC rule 14a-8 proposal.” See Exhibit I. On November 17, 2021, an email from Steiner’s email address provided proof of his share ownership, which we have not included in the exhibits because we are not contesting such ownership. On November 18, 2021, Chevedden sent a second email to the Company with the same message as his November 16 email. See Exhibit J. Neither Chevedden’s November 16 nor his November

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18 emails address the fact that he had sent the Company a revised version of the Second Proposal, and did not withdraw the Second Proposal.

Consistent with Staff Legal Bulletin 14L (Nov. 3, 2021), the Company on November 19, 2021 sent via email and overnight mail to Chevedden, copying Steiner, a second notice (the “Second Notice”), explaining that the correspondence from Chevedden had not cured the Rule 14a-8(c) deficiency and reiterating the Company’s belief that “the transmittal and revision history of the Proposals demonstrate that you have submitted more than one proposal . . . in violation of Rule 14a-8(c).” See Exhibit K. In the Second Notice, the Company acknowledged the receipt of the emails purporting to withdraw Chevedden’s authority to act on behalf of Steiner (but not withdrawing the Second Proposal submitted by Chevedden) and informed Chevedden that the emails “are not responsive to the Deficiency Notice, and we do not believe that they cure the violation of Rule 14a-8(c) that was identified in the Deficiency Notice.” The Second Notice explained again the one-proposal limitation of Rule 14a-8(c) and, citing Staff no-action letter precedent which was attached to the correspondence, stated, “as previously explained in the Deficiency Notice, in order to correct your violation of Rule 14a-8(c), you must notify the Company which of the Proposals you wish to withdraw.” See Exhibit K.

On November 21, 2021, Chevedden responded to the Second Notice, stating again that despite the broad proxy authority granted to him by Steiner and Chevedden’s subsequent revision and transmission of the Second Proposal, “I do not represent Mr. Steiner’s 2022 Bank of America rule 14a-8 proposal.” See Exhibit L. This correspondence again failed to withdraw or otherwise address the version of the Second Proposal that the Company had received from Chevedden.

The 14-day deadline to respond to the Deficiency Notice expired on November 22, 2021. As of the date of this letter, the Company has not received any other correspondence from Chevedden or Steiner.

BASIS FOR EXCLUSION

We believe that the Proposals may properly be excluded from the 2022 Proxy Materials because Chevedden has exceeded the one-proposal limitation of Rule 14a-8(c).

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ANALYSIS

The Proposals May Be Excluded Under Rule 14a-8(c) Because Chevedden Has Exceeded The One-Proposal Limitation.

A. *The Commission Adopted A One-Proposal Limitation To Curb Abuse of the Shareholder Proposal Process.*

Both Proposals may be excluded from the 2022 Proxy Material by reason of Rule 14a-8(c), as amended,¹ which states, “[e]ach person may submit no more than one proposal, directly or indirectly, to a company for a particular shareholders' meeting” and “[a] person may not rely on the securities holdings of another person for the purpose of meeting the eligibility requirements and submitting multiple proposals for a particular shareholders' meeting.” When the Commission more than 40 years ago first adopted a limit on the number of proposals that a shareholder would be permitted to submit under Rule 14a-8, it stated that it was acting in response to the concern that some “proponents . . . [exceed] the bounds of reasonableness . . . by submitting excessive numbers of proposals.” Exchange Act Release No. 12999 (Nov. 22, 1976) (the “1976 Release”). The Commission further stated that “[s]uch practices are inappropriate under Rule 14a-8 not only because they constitute an unreasonable exercise of the right to submit proposals at the expense of other shareholders but also because they tend to obscure other material matters in the proxy statements of issuers, thereby reducing the effectiveness of such documents.” *Id.* Thus, the Commission adopted a two-proposal limitation (subsequently amended to be a one-proposal limitation) but warned of the “possibility that some proponents may attempt to evade the [rule’s] limitations through various maneuvers.” *Id.* The Commission went on to warn that “such tactics” could result in the granting of no-action requests permitting exclusion of multiple proposals.

In 1982, when it proposed amendments to Rule 14a-8 to reduce the proposal limit from two proposals to one proposal, the Commission stated that its changes to the Rule and the interpretations thereunder were in part due to “the susceptibility of certain provisions of the rule and the staff’s interpretations thereunder to abuse by a few proponents and issuers.” Exchange Act Release No. 19135 (Oct. 14, 1982). Subsequently, in adopting the one-proposal limitation, it stated, “[t]he Commission believes that this change is one way to reduce issuer costs and to improve the readability of proxy statements without substantially

¹ As discussed further below, the Company remains willing to allow Chevedden to withdraw the Second Proposal. Alternatively, recognizing Rule 14a-8(c) was only recently amended, the Company will not object if the Staff concurs only in exclusion of the Second Proposal.

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limiting the ability of proponents to bring important issues to the shareholder body at large.” Exchange Act Release No. 20091 (Aug. 16, 1983).

In 2020, the Commission approved further amendments to Rule 14a-8 to apply the one-proposal limitation of Rule 14a-8(c) to “each person” rather than “each shareholder” and clarified that the Rule applies to proposals submitted “directly or indirectly” by such person. In approving the 2020 amendments to the Rule, the Commission reasonably concluded that the rationale behind the one-proposal limitation applies equally to representatives of shareholders who act on behalf of shareholders they represent. When a representative appears to be the driving force behind a proposal, the Commission explained, it may be that the proposal is “primarily of interest to the representative, with only an acquiescent interest by the shareholder.” Exchange Act Release No. 34-89964 (Sept. 23, 2020) (the “2020 Release”). Thus, one of the purposes of the amendment to Rule 14a-8(c) was to prevent a representative from circumventing the one-proposal limitation by acting as a representative on behalf of another shareholder. For example, the Commission stated in the 2020 Release:

Under the new rule, a shareholder-proponent will not be permitted to submit one proposal in his or her own name and simultaneously serve as a representative to submit a different proposal on another shareholder’s behalf for consideration at the same meeting. Likewise, a representative will not be permitted to submit more than one proposal to be considered at the same meeting, even if the representative were to submit each proposal on behalf of different shareholders.

The Commission explained, “We believe permitting representatives to submit multiple proposals for the same shareholders’ meeting can give rise to the same concerns about the expense and obscuring effect of including multiple proposals in the company’s proxy materials, thereby undermining the purpose of the one-proposal limit.” The Commission further explained that the amendment would not prevent a shareholder from seeking assistance from a representative or other person, but stated, “However, to the extent that the provider of such services submits a proposal, either as a proponent or as a representative, it will be subject to the one-proposal limit and will not be permitted to submit more than one proposal in total to the same company for the same meeting.”

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B. *Chevedden Violated The One-Proposal Limitation Of Rule 14a-8(c).*

The facts described above demonstrate that Chevedden, directly and indirectly, has submitted more than one proposal, and has submitted one proposal while simultaneously serving as a representative to submit a different proposal for the same meeting on another shareholder's behalf, thereby relying on another person's share ownership to avoid the one proposal limitation of Rule 14a-8(c). This is not a situation where Steiner is seeking assistance from Chevedden in navigating the Rule 14a-8 process. From the initial correspondence to the Company, Steiner bestowed upon Chevedden complete control "to act on my [Steiner's] behalf," including "to forward" the Second Proposal to the Company, to modify it, and generally to act on Steiner's behalf "before, during and after" the Company's annual meeting, with all correspondence (including acknowledging receipt of the Second Proposal) to go solely to Chevedden. Instead, this is exactly the type of situation the Commission contemplated in the 2020 Release, where Steiner, the nominal shareholder standing behind the Second Proposal, did not, until well after receiving the Deficiency Notice, demonstrate more than an acquiescent interest in the Second Proposal and where instead the Second Proposal is primarily of interest to his representative, Chevedden.

The applicability of Rule 14a-8(c)'s one-proposal limitation in this context is not affected by the fact that the first version of the Second Proposal was transmitted to the Company from Steiner's email address. As amended, Rule 14a-8(c) provides that a "person may submit no more than one proposal, directly *or indirectly*" (emphasis added). The plain language of the rule now applies to any "person" (whereas previously it only applied to a "shareholder") and applies whenever that person – whether a shareholder or a representative – acts "directly or indirectly" to submit a shareholder proposal. If the test were simply who transmitted a proposal to a company, there would have been no need for the Commission to add the words "or indirectly" to the rule. Moreover, looking solely to who transmitted a proposal to a company would be an impossible standard to administer. For example, many shareholder proposals are transmitted to companies from a fax machine or via U.S. mail, making it impossible to determine who actually transmitted a proposal. Even in the case of proposals that are transmitted via email, it is difficult or impossible to authenticate and credential² who actually transmitted the email, since a shareholder could easily provide an email address and password to the representative. Nor is it reasonable to

² Under the EDGAR Filer Manual, "the term 'credential' is defined as an object or data structure exclusively possessed and controlled by an individual to assert identity and provide for authentication." See Electronic Signatures in Regulation S-T Rule 302, Sec. Act. Rel. No. 10889, at note 14 (Nov. 17, 2020).

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suggest that the Commission would have amended its rules in a manner that would be so easy to circumvent. The Commission reiterated in the 2020 Release that it was “aware of the possibility that some proponents may attempt to evade the new limitations through various maneuvers, such as having other persons whose securities they control submit . . . proposals each in their own names.” In the 2020 Release, the Commission expressly affirmed that the one-proposal rule is intended to combat this type of abuse, and that the intent of “[t]he amended rule text [is to] more effectively apply the one-proposal limit to shareholders and representatives of shareholders.” Thus, it would be inconsistent with the language and stated objective of amended Rule 14a-8(c), and impractical as an administrative matter, to apply Rule 14a-8(c) based solely on who initially transmitted a shareholder proposal to a company.

Moreover, the Staff has never administered Rule 14a-8(c) based solely on who transmitted a proposal to the company. For example, in *Consolidated Freightways, Inc.* (Recon. avail. Feb. 23 1994), the Staff concurred that two shareholder proposals sent to the company by different shareholders under separate letters and on different dates could be excluded under the predecessor of Rule 14a-8(c), noting that the rule applied in those instances when a person attempted to avoid the one-proposal limitation through maneuvers. Similarly, in *Jefferson Pilot Corp.* (avail. Mar. 12, 1992), the Staff concurred that two proposals transmitted to the company by different persons under separate letters and on different dates could be excluded under the one-proposal rule, noting that the two persons appeared to be alter egos. As noted above, when it adopted the most recent amendments to Rule 14a-8(c) limiting each person to no more than one proposal, whether submitted directly or indirectly, the Commission explained that the amendments were intended to “more effectively apply the one-proposal limit to shareholders and *representatives of shareholders.*” 2020 Release (emphasis added). Basing administration of the amended rule on who transmits a proposal thus would be a *less* effective standard than existed in the past, and would undermine the legitimacy and objectives of the Commission’s rulemaking that resulted in amended Rule 14a-8(c).

Applying amended Rule 14a-8(c) to allow exclusion of the Proposals in the present context is consistent with the Commission’s long-held position that “the one-proposal limitation applies in those instances where a person (or entity) attempts to avoid the one-proposal limitation through various maneuvers” and other tactics. 1976 Release. Among other maneuvers and tactics that the Staff has found to violate the one-proposal limitation of Rule 14a-8(c) are:

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- having family members, friends or other associates submit the same or similar proposals after being notified of the one-proposal limitation of Rule 14a-8(c), *see, e.g., Staten Island Bancorp, Inc.* (avail. Feb. 27, 2002); *Spartan Motors, Inc.* (avail. Mar. 12, 2001); *Dominion Resources, Inc.* (avail. Feb. 24, 1993);
- ceding control of a shareholder's shares to another shareholder who has already submitted a proposal, *see, e.g., Peregrine Pharmaceuticals Inc.* (avail. July 28, 2006); *Albertson's Inc.* (avail. Mar. 11, 1994); *TPI Enterprises, Inc.* (avail. July 15, 1987);
- using nominal proponents who are "acting on behalf of, under the control of, or alter ego of" one person, *see, e.g., BankAmerica Corp.* (avail. Feb. 8, 1996); *Weyerhaeuser Co.* (avail. Dec. 20, 1995); *First Union Real Estate (Winthrop)* (avail. Dec. 20, 1995); *Stone & Webster Inc.* (avail. Mar. 3, 1995); *Banc One Corp.* (avail. Feb. 2, 1993); and
- exercising influence or acting in a coordinated or manipulated manner as part of an orchestrated scheme to submit multiple proposals, *see, e.g., International Business Machines Corp.* (avail. January 26, 1998); *Dominion Resources, Inc.* (avail. February 24, 1993); *TPI Enterprises, Inc.* (avail. July 15, 1987).

Similarly, in *General Electric Co.* (avail. Jan. 10, 2008), the proponent initially transmitted three proposals to the company. Following receipt of the company's deficiency notice advising the proponent of the one-proposal limitation of Rule 14a-8(c), the proponent withdrew two of his proposals and indicated he would direct his daughters to resubmit the proposals on their own behalf. Subsequently, the two withdrawn proposals were resubmitted by the proponent's daughters, who identified their father, the initial proponent, as their designated representative with respect to the proposals. Despite the fact that the proponent had not transmitted the resubmitted second and third proposals to the company, the Staff concurred with the exclusion of all three proposals under Rule 14a-8(c).

The Staff in a variety of contexts has concurred that the one-proposal limitation under Rule 14a-8(c) applies when a person attempts to avoid the one-proposal limitation through the exercise of broad proxy authority granted by another shareholder. For example, in *Alaska Air Group, Inc.* (avail. Mar. 5, 2009, *recon. denied* Apr. 8, 2009), each of three shareholders granted the same representative proxy authority to act on their behalf, and that person submitted three different proposals to the company on behalf of those shareholders. Prior to the 2020 amendments to Rule 14a-8(c), the one-proposal limitation applied only to

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shareholders, as opposed to both shareholders and their duly appointed representatives. The Staff granted exclusion of the three proposals in *Alaska Air* on the basis that “the proponent exceeded the one-proposal limitation in [R]ule 14a-8(c).” The proxy authority at issue in *Alaska Air* conferred authority 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.” The company noted that “the unlimited breadth, discretion, and duration of the proxy authority granted to the [p]roponent” distinguished its no-action request from unsuccessful requests submitted by other companies, because the latter requests relied on the view that a proxy holder should be deemed the beneficial owner of shares where the proxy conferred authority only with regard to submitting proposals or voting at an annual meeting of shareholders.

The broad proxy authority granted by Steiner to Chevedden with respect to the Second Proposal is comparable to the “unlimited breadth, discretion, and duration” of the authority granted to in *Alaska Air*. Here, Steiner explicitly gave Chevedden the authority to “forward this Rule 14a-8 proposal to the company and to act on [his] behalf regarding this Rule 14a-8 proposal, and/or modification of it, for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting.” See Exhibit C. And, Chevedden exercised that authority. Prior to receiving the Deficiency Notice, which advised Chevedden of his violation of the one-proposal limitation, all correspondence regarding the Second Proposal came from Chevedden, not Steiner. Of particular note, Chevedden directly transmitted a revised version of the Second Proposal to the Company, without copying Steiner on the transmission or demonstrating that Steiner had reviewed or approved the revisions Chevedden made to the Second Proposal. See Exhibit D.

C. *The Company Timely Notified Chevedden Of The One-Proposal Limitation In Rule 14a-8(c), But Chevedden Failed To Correct This Deficiency.*

Chevedden directly submitted the First Proposal to the Company, and, using Steiner’s shares as a basis for submission of the Second Proposal, was appointed and acted as Steiner’s representative with respect to the Second Proposal. As noted above, the Proxy Authorization Letter gave Chevedden the authority to “forward this Rule 14a-8 proposal to the company and to act on my behalf regarding this Rule 14a-8 proposal, and/or modification of it, for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting.” Exercising that broad proxy authority, Chevedden transmitted a revised version of the Second Proposal directly to the Company, without copying Steiner or demonstrating that Steiner had reviewed or approved the revisions.

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Thus, by directly submitting the First Proposal to the Company and indirectly submitting and serving as the representative for the Second Proposal, Chevedden violated the one-proposal limitation in Rule 14a-8(c). And despite receiving timely notice from the Company, Chevedden failed to select which of the two Proposals he wished to withdraw in order to cure his violation of the one-proposal limitation in Rule 14a-8(c). Accordingly, the Proposals are excludable pursuant to Rule 14a-8(f)(1) for violating Rule 14a-8(c), which states that each person may submit no more than one proposal, directly or indirectly, to a company for a particular shareholders' meeting.

In response to deficiencies in the submission of the Proposals, the Company sent the Deficiency Notice to Chevedden, copying Steiner, and it was delivered to both recipients on November 8, 2021. The Deficiency Notice informed Chevedden of the one-proposal limitation and that his deficiency "can be corrected by notifying the Company which of the Proposals you wish to withdraw." See Exhibit E. On November 8, 2021, Chevedden sent a series of emails to the Company, apparently in response to the Deficiency Notice, but failed to indicate which Proposal he wished to withdraw. See Exhibit G. Through a number of emails sent to the Company on November 10, 2021, November 16, 2021 and November 18, 2021, Chevedden and Steiner attempted to withdraw Steiner's prior grant of proxy authority with respect to the Second Proposal and to disclaim Chevedden's acceptance and exercise of that authority. See Exhibit H, Exhibit I and Exhibit J.

These efforts to withdraw Steiner's prior grant of proxy authority and revise the nature of Chevedden's control over the Second Proposal do not alter the fact that prior to the receipt of the Deficiency Notice, Chevedden's actions demonstrate that he had directly submitted the First Proposal and indirectly submitted the Second Proposal as Steiner's representative with full power to modify and transmit the Second Proposal to the Company, with Steiner demonstrating "only an acquiescent interest" in the Second Proposal.

The Staff has consistently concurred that the sole means to cure a violation of Rule 14a-8(c) after having received timely notice from the company of such violation is for the person to reduce the number of proposals submitted, directly or indirectly, to one proposal by indicating to the company which of the submitted proposals he or she wishes to withdraw and which *single proposal* he or she wishes to submit. In *General Electric*, the Staff confirmed that violations of the one-proposal limitation can only be corrected by the proponent timely notifying the company which proposal(s) he or she wishes to withdraw. Similarly, in *Alaska Air*, the Staff concurred that the proposals at issue could be excluded under Rule 14a-8(c) because the proponent failed to timely reduce the number of submitted proposals to one proposal by informing the company which of the three proposals he

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wished to withdraw and which *single proposal* he wished to submit. As noted by the company's counsel in *Alaska Air*,

“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.”

Thus, Chevedden’s and Steiner’s attempts to recharacterize the nature of Chevedden’s control over the Second Proposal or to revoke the designation of Chevedden as Steiner’s representative are insufficient to cure Chevedden’s violation of Rule 14a-8(c).

In response to Chevedden’s and Steiner’s correspondence, the Company sent Chevedden and Steiner the Second Notice, which directed Chevedden to the Staff’s concurrence in *Alaska Air* and *General Electric* and again explained that to cure his deficiency under Rule 14a-8(c), he must notify the Company which Proposal he wished to withdraw. See Exhibit K. Chevedden responded to the Second Notice by again attempting to revise the nature of his control over the Second Proposal. However, his correspondence did not indicate which Proposal he wished to withdraw, the only sufficient cure for a deficiency under Rule 14a-8(c). See Exhibit L.

Based on the well-established precedent discussed above, because Chevedden has failed to cure the deficiency of submitting multiple proposals, either directly or indirectly, in violation of Rule 14a-8(c), both of the Proposals may be excluded from the Company’s 2022 Proxy Materials. However, recognizing that Rule 14a-8(c) was only recently amended to apply to representatives and proposals that were submitted indirectly, the Company is willing to withdraw this no-action request if Chevedden withdraw the Second Proposal, and will not object if the Staff concurs solely in the exclusion of the Second Proposal under Rule 14a-8(c), or in the event Chevedden were to withdraw the Second Proposal.

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CONCLUSION

Based upon the foregoing analysis, the Company intends to exclude both Proposals from its 2022 Proxy Materials, and we respectfully request that the Staff concur under Rule 14a-8.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8671 or Ross E. Jeffries, Jr., the Company's Corporate Secretary, at (980) 388-6878.

Sincerely,



Ronald O. Mueller

Enclosures

cc: Ross E. Jeffries Jr., Bank of America Corporation
John Chevedden
Kenneth Steiner

EXHIBIT A

Chronology of Chevedden/Steiner Correspondence

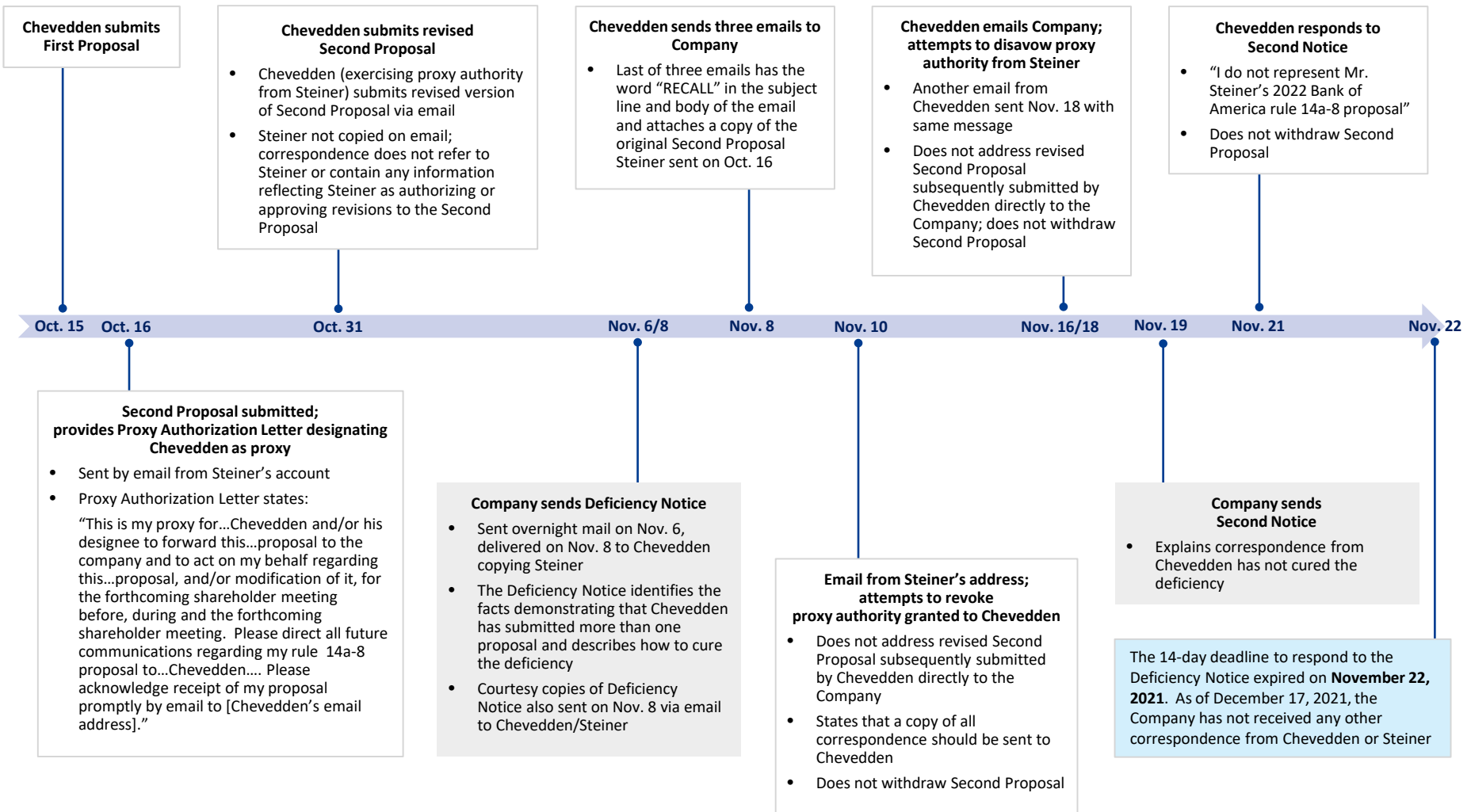


EXHIBIT B

From: John Chevedden [REDACTED]
Sent: Monday, October 25, 2021 3:58 PM
To: Ross Jeffries - Bank of America Corporate Secretary <bac_corporate_secretary@bofa.com>
Cc: Ellen Perrin <ellen.perrin@bankofamerica.com>; Gest, Kristen - Legal <kristen.gest@bofa.com>; Gale Chang <gale.chang@bankofamerica.com>
Subject: Rule 14a-8 Proposal (BAC)``

Dear Mr. Jeffries,

Please see the attached rule 14a-8 proposal to improve corporate governance and enhance long-term shareholder value at de minimis up-front cost – especially considering the substantial market capitalization of the company.

If you confirm proposal receipt in the next day a broker letter can be promptly forwarded that will save you from making a formal request.

Sincerely,
John Chevedden

Mr. Ross Jeffries
Corporate Secretary
Bank of America Corporation (BAC)
100 North Tryon Street
Charlotte, North Carolina 28255

Dear Mr. Jeffries,

This Rule 14a-8 proposal is respectfully submitted in support of the long-term performance of our company.

This Rule 14a-8 proposal is intended as a low-cost method to improve company performance – especially compared to the substantial capitalization of our company.

This proposal is for the next annual shareholder meeting.

I intend to continue to hold through the date of the Company's 2022 Annual Meeting of Stockholders the requisite amount of Company shares used to satisfy the applicable ownership requirement.

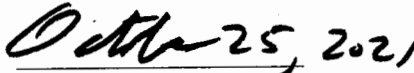
This submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication.

Please assign the proper sequential proposal number in each appropriate place.

I expect to forward a broker letter soon so if you acknowledge this proposal in an email message it may very well save you from requesting a broker letter from me.

Sincerely,


John Chevedden


Date

cc: Ellen Perrin <ellen.perrin@bankofamerica.com>
Assistant Secretary
PH: 704-386-5681
FX: 704-625-4463
Ross Jeffries <ross.jeffries@bankofamerica.com>
Kristen Gest <kristen.gest@bofa.com>
Ross Jeffries <bac_corporate_secretary@bankofamerica.com>
FX: 704-409-0985
Gale Chang <gale.chang@bankofamerica.com>

[BAC: Rule 14a-8 Proposal, October 24, 2021]
[This line and any line above it – *Not* for publication.]
Proposal 4 – Management Pay Clawback Authorization

RESOLVED, shareholders urge the Board of Directors to provide for a General Clawback policy that a substantial portion of annual total compensation of Executive Officers, identified by the board, shall be deferred and be forfeited in part or in whole, at the discretion of Board, to help satisfy any monetary penalty associated with any violation of law regardless of any determined responsibility by any individual officer; and that this annual deferred compensation be paid to the officers no sooner than 3 years after the absence of any monetary penalty; and that any forfeiture and relevant circumstances be reported to shareholders in the annual meeting proxy.

This proposal shall apply to the Executive Officers, whether or not they were responsible for any associated monetary penalty. These provisions should operate prospectively and be implemented in a way that does not violate any contract, compensation plan, law or regulation.

For example on July 14, 2014, the Department of Justice “announced a \$7 billion settlement with Citigroup Inc. to resolve . . . claims related to Citigroup’s conduct in the . . . issuance of residential mortgage-backed securities (RMBS) prior to Jan. 1, 2009. The resolution includes a \$4 billion civil penalty – the largest penalty to date under the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). . . .

Citigroup acknowledged it made serious misrepresentations to the public.” This monetary penalty was borne by Citi shareholders who were not responsible for this unlawful conduct. Citi employees committed these unlawful acts. They did not contribute to this penalty payment, but instead undoubtedly received bonuses.

President William Dudley of the New York Federal Reserve outlined the utility of what he called a performance bond. “In the case of a large fine, the senior management . . . would forfeit their performance bond. . . . Each individual’s ability to realize their deferred debt compensation would depend not only on their own behavior, but also on the behavior of their colleagues. This would create a strong incentive for individuals to monitor the actions of their colleagues, and to call attention to any issues. . . . Importantly, individuals would not be able to “opt out” of the firm as a way of escaping the problem. If a person knew that something is amiss and decided to leave the firm, their deferred debt compensation would still be at risk.”

Please vote yes:

Management Pay Clawback Authorization – Proposal 4

[The line above – *Is* for publication. Please assign the correct proposal number in 2 places.]

Notes:

“Proposal 4” stands in for the final proposal number that management will assign.

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

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:

- the company objects 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.

We believe that it is appropriate under rule 14a-8 for companies to address these objections in their statements of opposition.

See also: Sun Microsystems, Inc. (July 21, 2005).

The stock supporting this proposal 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

The color version of the below graphic is to be published immediately after the bold title line of the proposal.

Will consider withdrawal of the graphic if management commits to a fair presentation of the proposal which includes:

- No management graphic in connection with the rule 14a-8 proposals in the proxy or ballot.
- No proxy or ballot text suggesting that the proposal will be moot due to lack of presentation.
- No ballot electioneering text repeating the negative management recommendation.
- Management will give me the opportunity to correct any typographical errors.
- Management will give me advance notice if it does a special solicitation that mentions this proposal.



FOR

***Shareholder
Rights***

EXHIBIT C

From: Kenneth Steiner [REDACTED]

Date: Tuesday, Oct 26, 2021, 7:34 PM

To: Ross Jeffries - Bank of America Corporate Secretary <bac_corporate_secretary@bofa.com>, Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>, ellen.perrin@bankofamerica.com <ellen.perrin@bankofamerica.com>, kristin.gest@bofa.com <kristin.gest@bofa.com>, gale.chang@bankofamerica.com <gale.chang@bankofamerica.com>

Subject: Rule 14a-8 proposal Bank of America (BAC) [Sent To: ross.jeffries@bankofamerica.com]

Dear Mr. Jeffries,

Please see the attached rule 14a-8 proposal to improve corporate governance and enhance long term shareholder value at de minimis upfront cost, especially considering the substantial market capitalization of the company.

If you confirm proposal receipt in the next day a broker letter can be promptly forwarded that will save you from making a formal request.

Sincerely,

Kenneth Steiner

Kenneth Steiner

Mr. Ross Jeffries
Corporate Secretary
Bank of America Corporation (BAC)
100 North Tryon Street
Charlotte, North Carolina 28255
PH: 704-386-5681
FX: 704-625-4463
FX: 704-409-0350
FX: 704-625-4378
FX: 704-409-0985

Dear Mr. Jeffries,

I purchased stock in our company because I believed our company had potential for improved performance. My attached Rule 14a-8 proposal is submitted in support of the long-term performance of our company. This Rule 14a-8 proposal is submitted as a low-cost method to improve company performance.

My proposal is for the next annual shareholder meeting. I intent to continue to hold through the date of the Company's 2022 Annual Meeting of Stockholders the requisite amount of Company shares used to satisfy the applicable ownership requirement.

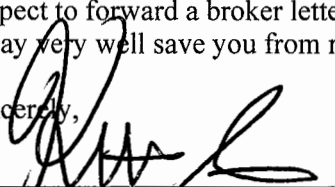
My submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication. This is my proxy for John Chevedden and/or his designee to forward this Rule 14a-8 proposal to the company and to act on my behalf regarding this Rule 14a-8 proposal, and/or modification of it, for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting. Please direct all future communications regarding my rule 14a-8 proposal to John Chevedden at:

[REDACTED]
to facilitate prompt and verifiable communications. Please identify this proposal as my proposal exclusively.

This letter does not cover proposals that are not rule 14a-8 proposals. This letter does not grant the power to vote. Your consideration and the consideration of the Board of Directors is appreciated in support of the long-term performance of our company. Please acknowledge receipt of my proposal promptly by email to [REDACTED]

I expect to forward a broker letter soon so if you acknowledge this proposal promptly in an email message it may very well save you from requesting a broker letter from me.

Sincerely,


Kenneth Steiner

Date

10/12/21

cc: Ellen Perrin <ellen.perrin@bankofamerica.com>
Assistant Secretary
Kristen Gest <kristen.gest@bofa.com>
<bac_corporate_secretary@bankofamerica.com>
Gale Chang <gale.chang@bankofamerica.com>

BAC – Rule 14a-8 Proposal, October 25, 2021
[This line and any line above it – *Not* for publication.]

Proposal 4 – Independent Board Chairman

The shareholders request that the Board of Directors adopt as policy, and amend the governing documents as necessary, to require the Chair of the Board of Directors to be an independent member of the Board.

This proposal topic won 52% support at Boeing and 54% support at Baxter International in 2020. Boeing then adopted this proposal topic in June 2020. The roles of Chairman and CEO are fundamentally different and should be held by 2 directors, a CEO and a Chairman who is completely independent of the CEO and our company.

With the current CEO serving as Chair this means giving up a substantial check and balance safeguard that can only occur with an independent Board Chairman.

A lead director is no substitute for an independent board chairman. A lead director cannot call a special shareholder meeting and cannot even call a special meeting of the board. A lead director can delegate most of his lead director duties to the CEO office and then simply rubber-stamp it. There is no way shareholders can be sure of what goes on.

The lack of an independent Board Chairman is an unfortunate way to discourage new outside ideas and an unfortunate way to encourage the CEO to pursue pet projects that would not stand up to effective oversight.

One sign that Bank of America management does not believe in real engagement with its shareholders is that BAC management gives its shareholders “help” to make sure shareholders vote the approved management way. BAC management routinely spends company money to publish a voting guide for dummies shortly before the annual meeting. What is the point of shareholder engagement if management is routinely stacking the deck in favor of the management approved way?

This proposal topic won 30% Bank of America shareholder support in 2018 in spite of the 2018 management edition of the voting guide for dummies.

If an independent director is not available from inside or outside the company then a non-independent director from inside or outside the company, other than the CEO, can be named as Chairman for a term of 3 months to 6 months. This policy could be phased in when there is a contract renewal for our current CEO or for the next CEO transition.

Please vote yes:

Independent Board Chairman – Proposal 4

[The line above – *Is* for publication. Please assign the correct proposal number in the 2 places.]

Notes:

“Proposal 4” stands in for the final proposal number that management will assign.

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

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:

- the company objects 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.

We believe that it is appropriate under rule 14a-8 for companies to address these objections in their statements of opposition.

See also: Sun Microsystems, Inc. (July 21, 2005).

The stock supporting this proposal 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

The color version of the below graphic is to be published immediately after the bold title line of the proposal.

Will consider withdrawal of the graphic if management commits to a fair presentation of the proposal which includes:

No management graphic in connection with the rule 14a-8 proposals in the proxy or ballot.

No proxy or ballot text suggesting that the proposal will be moot due to lack of presentation.

No ballot electioneering text repeating the negative management recommendation.

Management will give me the opportunity to correct any typographical errors.

Management will give me advance notice if it does a special solicitation that mentions this proposal.

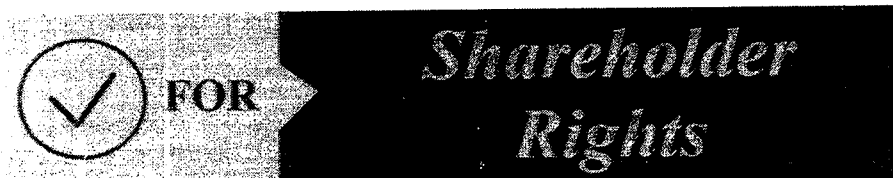


EXHIBIT D

From: John Chevedden [REDACTED]

Sent: Sunday, October 31, 2021 11:23 PM

To: Ross Jeffries - Bank of America Corporate Secretary <bac_corporate_secretary@bofa.com>

Cc: Ellen Perrin <ellen.perrin@bankofamerica.com>; Gest, Kristen - Legal <kristen.gest@bofa.com>;
Gale Chang <gale.chang@bankofamerica.com>

Subject: Rule 14a-8 Proposal (BAC)`` REVISED

REVISED

Dear Mr. Jeffries,

Please see the attached rule 14a-8 proposal to improve corporate governance and enhance long-term shareholder value at de minimis up-front cost – especially considering the substantial market capitalization of the company.

Sincerely,
John Chevedden

Proposal 4 – Independent Board Chairman

The shareholders request that the Board of Directors adopt a policy, and amend the governing documents as necessary in order that 2 separate people hold the office of the Chairman and the office of the CEO as follows:

Selection of the Chairman of the Board The Board requires the separation of the offices of the Chairman of the Board and the Chief Executive Officer.

Whenever possible, the Chairman of the Board shall be an Independent Director.

The Board has the discretion to select a temporary Chairman of the Board who is not an Independent Director to serve while the Board is seeking an Independent Chairman of the Board.

If a temporary non-Independent Director is serving as Chairman of the Board at the time of any Company annual meeting of stockholders, the Company shall request that its stockholders vote on a proposal to ratify that a non-Independent Director continue to serve as Chairman of the Board while the Board is seeking an independent Chairman of the Board.

This proposal topic won 52% support at Boeing and 54% support at Baxter International in 2020. Boeing then adopted this proposal topic in June 2020. The roles of Chairman and CEO are fundamentally different and should be held by 2 directors, a CEO and a Chairman who is completely independent of the CEO and our company.

With the current CEO serving as Chair this means giving up a substantial check and balance safeguard that can only occur with an independent Board Chairman.

A lead director is no substitute for an independent board chairman. A lead director cannot call a special shareholder meeting and cannot even call a special meeting of the board. A lead director can delegate most of his lead director duties to the CEO office and then simply rubber-stamp it. There is no way shareholders can be sure of what goes on.

The lack of an independent Board Chairman is an unfortunate way to discourage new outside ideas and an unfortunate way to encourage the CEO to pursue pet projects that would not stand up to effective oversight.

One sign that Bank of America management does not believe in genuine engagement with its shareholders is that BAC management gives its shareholders extra “help” to make sure shareholders vote the management approved way. BAC management routinely spends company money to publish a voting guide for dummies shortly before the annual meeting. How can there be genuine shareholder engagement if management is routinely stacking the deck in favor of the management approved way to vote?

This proposal topic won 30% Bank of America shareholder support in 2018 in spite of the 2018 BAC management edition of the voting guide for dummies.

Please vote yes:

Independent Board Chairman – Proposal 4

[The line above – *Is* for publication. Please assign the correct proposal number in the 2 places.]

EXHIBIT E

From: [Walter, Geoffrey E.](#)
To: [REDACTED]
Cc: [REDACTED]
Subject: Bank of America Corp. (Chevedden) Correspondence
Date: Monday, November 8, 2021 2:12:00 PM
Attachments: [Bank of America \(Chevedden-Steiner\).pdf](#)

Attached on behalf of our client, Bank of America Corporation, please find our notice of deficiency with respect to the shareholder proposals you submitted. A copy of this letter also was sent to you and Mr. Steiner via UPS overnight delivery. Per Staff Legal Bulletin No. 14L (<https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals>), I am requesting you acknowledge receipt of this email, including the attached deficiency notice.

Sincerely,

Geoffrey Walter

Geoffrey Walter
(he/him/his)

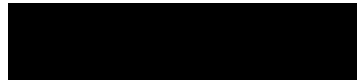
GIBSON DUNN

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W., Washington, DC 20036-5306
Tel +1 202.887.3749 • Fax +1 202.530.4249
GWalter@gibsondunn.com • www.gibsondunn.com

November 6, 2021

VIA OVERNIGHT MAIL AND EMAIL

John Chevedden



Dear Mr. Chevedden:

I am writing on behalf of Bank of America Corporation (the “**Company**”), which has received the following proposals from you pursuant to Securities and Exchange Commission (“**SEC**”) Rule 14a-8 for inclusion in the proxy statement for the Company’s 2022 Annual Meeting of Stockholders:

- (1) the stockholder proposal entitled “Management Pay Clawback Authorization” (the “**First Proposal**”), which you sent to the Company via email on October 25, 2021 (the “**First Proposal Submission Date**”); and
- (2) the stockholder proposal entitled “Independent Board Chairman” (the “**Second Proposal**” and together with the First Proposal, the “**Proposals**”), which was sent to the Company via email on October 26, 2021 (the “**Second Proposal Submission Date**” and it and the First Proposal Submission Date, each a “**Submission Date**”) and which you subsequently revised and sent to the Company via email on October 31, 2021.

Pursuant to Rule 14a-8(c) under the Securities Exchange Act of 1934, as amended, a person may submit no more than one proposal, directly or indirectly, to a company for a particular stockholders’ meeting. In addition, under the rule, a person may not rely on the securities holdings of another person for the purpose of meeting the eligibility requirements and submitting multiple proposals for a single stockholders’ meeting. The SEC stated this means that a stockholder-proponent is not permitted to submit one proposal in his or her own name and simultaneously serve as a representative to submit a different proposal on another stockholder’s behalf for consideration at the same meeting.

As noted above, one day after you directly submitted the First Proposal, the Second Proposal was submitted to the Company. The Second Proposal was accompanied by a letter from Mr. Steiner in which Mr. Steiner granted you proxy authority to “forward this Rule 14a-8 proposal to the company and to act on my behalf regarding this Rule 14a-8 proposal, and/or modification of it, for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting.” On October 31, 2021, you directly submitted a revised version of the Second Proposal to the Company. We believe these facts demonstrate that you

Mr. John Chevedden
November 6, 2021
Page 2

have submitted more than one proposal for consideration at the Company's 2022 Annual Meeting of Stockholders in violation of Rule 14a-8(c). This deficiency can be corrected by notifying the Company which of the Proposals you wish to withdraw. Your response must be postmarked, or transmitted electronically, no later than 14 days from the date you receive this letter. Please note that if you do not timely advise the Company which of the Proposals you wish to withdraw, the Company intends to request the SEC Staff to concur that it may omit both Proposals from the proxy statement for the Company's 2022 Annual Meeting of Stockholders in accordance with SEC rules.

In addition, Rule 14a-8(b) under the Exchange Act provides that a stockholder proponent must submit sufficient proof of continuous ownership of company shares. Thus, Rule 14a-8 requires that you (with respect to the First Proposal) and Mr. Steiner (if you intend to rely on his share ownership with respect to the Second Proposal) demonstrate that you have individually continuously owned at least:

- (1) \$2,000 in market value of the Company's shares entitled to vote on the applicable Proposal for at least three years preceding and including the applicable Submission Date;
- (2) \$15,000 in market value of the Company's shares entitled to vote on the applicable Proposal for at least two years preceding and including the applicable Submission Date;
- (3) \$25,000 in market value of the Company's shares entitled to vote on the applicable Proposal for at least one year preceding and including the applicable Submission Date; or
- (4) \$2,000 of the Company's shares entitled to vote on the Proposal for at least one year as of January 4, 2021, and that you and/or Mr. Steiner have each continuously maintained a minimum investment amount of at least \$2,000 of such shares from January 4, 2021 through the applicable Submission Date (each an "**Ownership Requirement**," and collectively, the "**Ownership Requirements**").

The Company's stock records indicate that neither you nor Mr. Steiner is the record owner of sufficient shares to satisfy any of the Ownership Requirements. In addition, to date we have not received proof that either you or Mr. Steiner have satisfied any of the Ownership Requirements.

To remedy this defect, you and/or Mr. Steiner must submit sufficient proof that you and/or Mr. Steiner have individually satisfied at least one of the Ownership Requirements. Specifically, if you withdraw the First Proposal, sufficient proof that Mr. Steiner satisfied at least one of the Ownership Requirements must be submitted. If you withdraw the Second Proposal, sufficient proof that you satisfied at least one of the Ownership Requirements must be submitted.

Mr. John Chevedden
November 6, 2021
Page 3

If, notwithstanding Rule 14a-8(c), discussed above, you do not withdraw one of the Proposals, then sufficient proof that you and Mr. Steiner each satisfied at least one of the Ownership Requirements must be submitted (although, as noted above, the Company in that situation intends to seek to exclude both proposals from the Company's proxy statement).

As explained in Rule 14a-8(b) and in SEC staff guidance, sufficient proof must be in the form of either:

- (1) a written statement from the "record" holder of the stockholder's shares (usually a broker or a bank) verifying that, at the time the applicable Proposal was submitted (the applicable Submission Date), the stockholder continuously held the requisite amount of Company shares to satisfy at least one of the Ownership Requirements above; or
- (2) a copy of a Schedule 13D, Schedule 13G, Form 3, Form 4 or Form 5 (and any subsequent amendments reporting a change in the ownership level) demonstrating that the stockholder met at least one of the Ownership Requirements above, if the stockholder was required to and has filed any such schedule or form with the SEC, and a written statement that the Eligible Proponent continuously held the requisite amount of Company shares to satisfy at least one of the Ownership Requirements above.

If you and/or Mr. Steiner intend to demonstrate ownership by submitting a written statement from the "record" holder of the applicable shares as set forth in (1) above, please note that most large U.S. brokers and banks deposit their customers' securities with, and hold those securities through, the Depository Trust Company ("**DTC**"), a registered clearing agency that acts as a securities depository (DTC is also known through the account name of Cede & Co.). Under SEC Staff Legal Bulletin No. 14F, only DTC participants are viewed as record holders of securities that are deposited at DTC. You can confirm whether your or Mr. Steiner's broker or bank is a DTC participant by asking the broker or bank or by checking DTC's participant list, which is available at <http://www.dtcc.com/~media/Files/Downloads/client-center/DTC/alpha.ashx>. In these situations, stockholders need to obtain proof of ownership from the DTC participant through which their securities are held, as follows:

- (1) If the broker or bank is a DTC participant, then the stockholder needs to submit a written statement from the broker or bank verifying that on the applicable Submission Date the stockholder continuously held the requisite amount of Company shares to satisfy at least one of the Ownership Requirements above.
- (2) If the broker or bank is not a DTC participant, then the stockholder needs to submit proof of ownership from the DTC participant through which the shares are held verifying that on the applicable Submission Date the stockholder continuously held

Mr. John Chevedden
November 6, 2021
Page 4

the requisite amount of Company shares to satisfy at least one of the Ownership Requirements above. You should be able to find out the identity of the DTC participant by asking the broker or bank. If the broker is an introducing broker, you may also be able to learn the identity and telephone number of the DTC participant through your or Mr. Steiner's account statements, because the clearing broker identified on such account statements will generally be a DTC participant. If the DTC participant that holds the stockholder's shares is not able to confirm the stockholder's individual holdings but is able to confirm the holdings of the broker or bank, then you need to satisfy the proof of ownership requirements by obtaining and submitting two proof of ownership statements verifying that the stockholder continuously held Company shares satisfying at least one of the Ownership Requirements above: (i) one from the broker or bank confirming the stockholder's ownership as described above, and (ii) the other from the DTC participant confirming the broker or bank's ownership.

The SEC's rules require that any response to this letter be postmarked or transmitted electronically no later than 14 calendar days from the date you receive this letter. Please address any response to me care of Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue NW, Washington, DC 20036. Alternatively, you may transmit any response by email to me at rmueller@gibsondunn.com.

If you have any questions with respect to the foregoing, please contact me at 202-955-8500. For your reference, I enclose a copy of Rule 14a-8 as amended for meetings that occur on or after January 1, 2022 but before January 1, 2023 and Staff Legal Bulletin No. 14F.

Sincerely,



cc: Kenneth Steiner

Enclosures

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) To be eligible to submit a proposal, you must satisfy the following requirements:

(i) You must have continuously held:

(A) At least \$2,000 in market value of the company's securities entitled to vote on the proposal for at least three years; or

(B) At least \$15,000 in market value of the company's securities entitled to vote on the proposal for at least two years; or

(C) At least \$25,000 in market value of the company's securities entitled to vote on the proposal for at least one year; or

(D) The amounts specified in paragraph (b)(3) of this section. This paragraph (b)(1)(i)(D) will expire on the same date that §240.14a-8(b)(3) expires; and

(ii) You must provide the company with a written statement that you intend to continue to hold the requisite amount of securities, determined in accordance with paragraph (b)(1)(i)(A) through (C) of this section, through the date of the shareholders' meeting for which the proposal is submitted; and

(iii) You must provide the company with a written statement that you are able to meet with the company in person or via teleconference no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal. You must include your contact information as well as business days and specific times that you are available to discuss the proposal with the company. You must identify times that are within the regular business hours of the company's principal executive offices. If these hours are not disclosed in the company's proxy statement for the prior year's annual meeting, you must identify times that are between 9 a.m. and 5:30 p.m. in the

time zone of the company's principal executive offices. If you elect to co-file a proposal, all co-filers must either:

(A) Agree to the same dates and times of availability, or

(B) Identify a single lead filer who will provide dates and times of the lead filer's availability to engage on behalf of all co-filers; and

(iv) If you use a representative to submit a shareholder proposal on your behalf, you must provide the company with written documentation that:

(A) Identifies the company to which the proposal is directed;

(B) Identifies the annual or special meeting for which the proposal is submitted;

(C) Identifies you as the proponent and identifies the person acting on your behalf as your representative;

(D) Includes your statement authorizing the designated representative to submit the proposal and otherwise act on your behalf;

(E) Identifies the specific topic of the proposal to be submitted;

(F) Includes your statement supporting the proposal; and

(G) Is signed and dated by you.

(v) The requirements of paragraph (b)(1)(iv) of this section shall not apply to shareholders that are entities so long as the representative's authority to act on the shareholder's behalf is apparent and self-evident such that a reasonable person would understand that the agent has authority to submit the proposal and otherwise act on the shareholder's behalf.

(vi) For purposes of paragraph (b)(1)(i) of this section, you may not aggregate your holdings with those of another shareholder or group of shareholders to meet the requisite amount of securities necessary to be eligible to submit a proposal.

(2) One of the following methods must be used to demonstrate your eligibility to submit a proposal:

(i) 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 requisite amount of securities, determined in accordance with paragraph (b)(1)(i)(A) through (C) of this section, through the date of the meeting of shareholders.

(ii) 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:

(A) 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 at least \$2,000, \$15,000, or \$25,000 in market value of the company's securities entitled to vote on the proposal for at least three years, two years, or one year, respectively. You must also include your own written statement that you intend to continue to hold the requisite amount of securities, determined in accordance with paragraph (b)(1)(i)(A) through (C) of this section, through the date of the shareholders' meeting for which the proposal is submitted; or

(B) The second way to prove ownership applies only if you were required to file, and filed, a Schedule 13D (§240.13d-101), Schedule 13G (§240.13d-102), Form 3 (§249.103 of this chapter), Form 4 (§249.104 of this chapter), and/or Form 5 (§249.105 of this chapter), or amendments to those documents or updated forms, demonstrating that you meet at least one of the share ownership requirements under paragraph (b)(1)(i)(A) through (C) of this section. If you have filed one or more of these documents with the SEC, you may demonstrate your eligibility to submit a proposal by submitting to the company:

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

(2) Your written statement that you continuously held at least \$2,000, \$15,000, or \$25,000 in market value of the company's securities entitled to vote on the proposal for at least three years, two years, or one year, respectively; and

(3) Your written statement that you intend to continue to hold the requisite amount of securities, determined in accordance with paragraph (b)(1)(i)(A) through (C) of this section, through the date of the company's annual or special meeting.

(3) If you continuously held at least \$2,000 of a company's securities entitled to vote on the proposal for at least one year as of January 4, 2021, and you have continuously maintained a minimum investment of at least \$2,000 of such securities from January 4, 2021 through the date the proposal is submitted to the company, you will be eligible to submit a proposal to such company for an annual or special meeting to be held prior to January 1, 2023. If you rely on this provision, you must provide the company with your written statement that you intend to continue to hold at least \$2,000 of such securities through the date of the shareholders' meeting for which the proposal is submitted. You must also follow the procedures set forth in paragraph (b)(2) of this section to demonstrate that:

(i) You continuously held at least \$2,000 of the company's securities entitled to vote on the proposal for at least one year as of January 4, 2021; and

(ii) You have continuously maintained a minimum investment of at least \$2,000 of such securities from January 4, 2021 through the date the proposal is submitted to the company.

(iii) This paragraph (b)(3) will expire on January 1, 2023.

(c) *Question 3:* How many proposals may I submit? Each person may submit no more than one proposal, directly or indirectly, to a company for a particular shareholders' meeting. A person may not rely on the securities holdings of another person for the purpose of meeting the eligibility requirements and submitting multiple proposals 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 (§249.308a of this chapter), or in shareholder reports of investment companies under §270.30d-1 of this chapter of 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 section?* (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 §240.14a-8 and provide you with a copy under Question 10 below, §240.14a-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 §240.14a-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) *Director elections:* If the proposal:

(i) Would disqualify a nominee who is standing for election;

(ii) Would remove a director from office before his or her term expired;

(iii) Questions the competence, business judgment, or character of one or more nominees or directors;

(iv) Seeks to include a specific individual in the company's proxy materials for election to the board of directors; or

(v) Otherwise could affect the outcome of the upcoming election of directors.

(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 section should specify the points of conflict with the company's proposal.

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

NOTE TO PARAGRAPH (i)(10): A company may exclude a shareholder proposal that would provide an advisory vote or seek future advisory votes to approve the compensation of executives as disclosed pursuant to Item 402 of Regulation S-K (§229.402 of this chapter) or any successor to Item 402 (a "say-on-pay vote") or that relates to the frequency of say-on-pay votes, provided that in the most recent shareholder vote required by §240.14a-21(b) of this chapter a single year (*i.e.*, one, two, or three years) received approval of a majority of votes cast on the matter and the company has adopted a policy on the frequency of say-on-pay votes that is consistent with the choice of the majority of votes cast in the most recent shareholder vote required by §240.14a-21(b) of this chapter.

(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 addresses substantially the same subject matter as a proposal, or proposals, previously included in the company's proxy materials within the preceding five calendar years if the most recent vote occurred within the preceding three calendar years and the most recent vote was:

(i) Less than 5 percent of the votes cast if previously voted on once;

(ii) Less than 15 percent of the votes cast if previously voted on twice; or

(iii) Less than 25 percent of the votes cast if previously voted on three or more times.

(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 in 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 why it believes shareholders should not vote in favor of my proposal, and I disagree with some of its 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, §240.14a-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 its files definitive copies of its proxy statement and form of proxy under §240.14a-6.



**Division of Corporation Finance
Securities and Exchange Commission**

Shareholder Proposals

Staff Legal Bulletin No. 14F (CF)

Action: Publication of CF Staff Legal Bulletin

Date: October 18, 2011

Summary: This staff legal bulletin provides information for companies and shareholders regarding Rule 14a-8 under the Securities Exchange Act of 1934.

Supplementary Information: The statements in this bulletin represent the views of the Division of Corporation Finance (the "Division"). This bulletin is not a rule, regulation or statement of the Securities and Exchange Commission (the "Commission"). Further, the Commission has neither approved nor disapproved its content.

Contacts: For further information, please contact the Division's Office of Chief Counsel by calling (202) 551-3500 or by submitting a web-based request form at https://tts.sec.gov/cgi-bin/corp_fin_interpretive.

A. The purpose of this bulletin

This bulletin is part of a continuing effort by the Division to provide guidance on important issues arising under Exchange Act Rule 14a-8. Specifically, this bulletin contains information regarding:

- Brokers and banks that constitute "record" holders under Rule 14a-8 (b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8;
- Common errors shareholders can avoid when submitting proof of ownership to companies;
- The submission of revised proposals;
- Procedures for withdrawing no-action requests regarding proposals submitted by multiple proponents; and
- The Division's new process for transmitting Rule 14a-8 no-action responses by email.

You can find additional guidance regarding Rule 14a-8 in the following bulletins that are available on the Commission's website: [SLB No. 14](#), [SLB No. 14A](#), [SLB No. 14B](#), [SLB No. 14C](#), [SLB No. 14D](#) and [SLB No. 14E](#).

B. The types of brokers and banks that constitute “record” holders under Rule 14a-8(b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8

1. Eligibility to submit a proposal under Rule 14a-8

To be eligible to submit a shareholder proposal, a shareholder 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 shareholder meeting for at least one year as of the date the shareholder submits the proposal. The shareholder must also continue to hold the required amount of securities through the date of the meeting and must provide the company with a written statement of intent to do so.¹

The steps that a shareholder must take to verify his or her eligibility to submit a proposal depend on how the shareholder owns the securities. There are two types of security holders in the U.S.: registered owners and beneficial owners.² Registered owners have a direct relationship with the issuer because their ownership of shares is listed on the records maintained by the issuer or its transfer agent. If a shareholder is a registered owner, the company can independently confirm that the shareholder's holdings satisfy Rule 14a-8(b)'s eligibility requirement.

The vast majority of investors in shares issued by U.S. companies, however, are beneficial owners, which means that they hold their securities in book-entry form through a securities intermediary, such as a broker or a bank. Beneficial owners are sometimes referred to as “street name” holders. Rule 14a-8(b)(2)(i) provides that a beneficial owner can provide proof of ownership to support his or her eligibility to submit a proposal by submitting a written statement “from the ‘record’ holder of [the] securities (usually a broker or bank),” verifying that, at the time the proposal was submitted, the shareholder held the required amount of securities continuously for at least one year.³

2. The role of the Depository Trust Company

Most large U.S. brokers and banks deposit their customers' securities with, and hold those securities through, the Depository Trust Company (“DTC”), a registered clearing agency acting as a securities depository. Such brokers and banks are often referred to as “participants” in DTC.⁴ The names of these DTC participants, however, do not appear as the registered owners of the securities deposited with DTC on the list of shareholders maintained by the company or, more typically, by its transfer agent. Rather, DTC's nominee, Cede & Co., appears on the shareholder list as the sole registered owner of securities deposited with DTC by the DTC participants. A company can request from DTC a “securities position listing” as of a specified date, which identifies the DTC participants having a position in the company's securities and the number of securities held by each DTC participant on that date.⁵

3. Brokers and banks that constitute “record” holders under Rule 14a-8(b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8

In *The Hain Celestial Group, Inc.* (Oct. 1, 2008), we took the position that an introducing broker could be considered a “record” holder for purposes of

Rule 14a-8(b)(2)(i). An introducing broker is a broker that engages in sales and other activities involving customer contact, such as opening customer accounts and accepting customer orders, but is not permitted to maintain custody of customer funds and securities.⁶ Instead, an introducing broker engages another broker, known as a “clearing broker,” to hold custody of client funds and securities, to clear and execute customer trades, and to handle other functions such as issuing confirmations of customer trades and customer account statements. Clearing brokers generally are DTC participants; introducing brokers generally are not. As introducing brokers generally are not DTC participants, and therefore typically do not appear on DTC’s securities position listing, *Hain Celestial* has required companies to accept proof of ownership letters from brokers in cases where, unlike the positions of registered owners and brokers and banks that are DTC participants, the company is unable to verify the positions against its own or its transfer agent’s records or against DTC’s securities position listing.

In light of questions we have received following two recent court cases relating to proof of ownership under Rule 14a-8⁷ and in light of the Commission’s discussion of registered and beneficial owners in the Proxy Mechanics Concept Release, we have reconsidered our views as to what types of brokers and banks should be considered “record” holders under Rule 14a-8(b)(2)(i). Because of the transparency of DTC participants’ positions in a company’s securities, we will take the view going forward that, for Rule 14a-8(b)(2)(i) purposes, only DTC participants should be viewed as “record” holders of securities that are deposited at DTC. As a result, we will no longer follow *Hain Celestial*.

We believe that taking this approach as to who constitutes a “record” holder for purposes of Rule 14a-8(b)(2)(i) will provide greater certainty to beneficial owners and companies. We also note that this approach is consistent with Exchange Act Rule 12g5-1 and a 1988 staff no-action letter addressing that rule,⁸ under which brokers and banks that are DTC participants are considered to be the record holders of securities on deposit with DTC when calculating the number of record holders for purposes of Sections 12(g) and 15(d) of the Exchange Act.

Companies have occasionally expressed the view that, because DTC’s nominee, Cede & Co., appears on the shareholder list as the sole registered owner of securities deposited with DTC by the DTC participants, only DTC or Cede & Co. should be viewed as the “record” holder of the securities held on deposit at DTC for purposes of Rule 14a-8(b)(2)(i). We have never interpreted the rule to require a shareholder to obtain a proof of ownership letter from DTC or Cede & Co., and nothing in this guidance should be construed as changing that view.

How can a shareholder determine whether his or her broker or bank is a DTC participant?

Shareholders and companies can confirm whether a particular broker or bank is a DTC participant by checking DTC’s participant list, which is currently available on the Internet at <http://www.dtcc.com/~media/Files/Downloads/client-center/DTC/alpha.ashx>.

What if a shareholder’s broker or bank is not on DTC’s participant list?

The shareholder will need to obtain proof of ownership from the DTC participant through which the securities are held. The shareholder should be able to find out who this DTC participant is by asking the shareholder's broker or bank.⁹

If the DTC participant knows the shareholder's broker or bank's holdings, but does not know the shareholder's holdings, a shareholder could satisfy Rule 14a-8(b)(2)(i) by obtaining and submitting two proof of ownership statements verifying that, at the time the proposal was submitted, the required amount of securities were continuously held for at least one year – one from the shareholder's broker or bank confirming the shareholder's ownership, and the other from the DTC participant confirming the broker or bank's ownership.

How will the staff process no-action requests that argue for exclusion on the basis that the shareholder's proof of ownership is not from a DTC participant?

The staff will grant no-action relief to a company on the basis that the shareholder's proof of ownership is not from a DTC participant only if the company's notice of defect describes the required proof of ownership in a manner that is consistent with the guidance contained in this bulletin. Under Rule 14a-8(f)(1), the shareholder will have an opportunity to obtain the requisite proof of ownership after receiving the notice of defect.

C. Common errors shareholders can avoid when submitting proof of ownership to companies

In this section, we describe two common errors shareholders make when submitting proof of ownership for purposes of Rule 14a-8(b)(2), and we provide guidance on how to avoid these errors.

First, Rule 14a-8(b) requires a shareholder to provide proof of ownership that he or she has "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!" (emphasis added).¹⁰ We note that many proof of ownership letters do not satisfy this requirement because they do not verify the shareholder's beneficial ownership for the entire one-year period preceding and including the date the proposal is submitted. In some cases, the letter speaks as of a date *before* the date the proposal is submitted, thereby leaving a gap between the date of the verification and the date the proposal is submitted. In other cases, the letter speaks as of a date *after* the date the proposal was submitted but covers a period of only one year, thus failing to verify the shareholder's beneficial ownership over the required full one-year period preceding the date of the proposal's submission.

Second, many letters fail to confirm continuous ownership of the securities. This can occur when a broker or bank submits a letter that confirms the shareholder's beneficial ownership only as of a specified date but omits any reference to continuous ownership for a one-year period.

We recognize that the requirements of Rule 14a-8(b) are highly prescriptive and can cause inconvenience for shareholders when submitting proposals.

Although our administration of Rule 14a-8(b) is constrained by the terms of the rule, we believe that shareholders can avoid the two errors highlighted above by arranging to have their broker or bank provide the required verification of ownership as of the date they plan to submit the proposal using the following format:

“As of [date the proposal is submitted], [name of shareholder] held, and has held continuously for at least one year, [number of securities] shares of [company name] [class of securities].”¹¹

As discussed above, a shareholder may also need to provide a separate written statement from the DTC participant through which the shareholder’s securities are held if the shareholder’s broker or bank is not a DTC participant.

D. The submission of revised proposals

On occasion, a shareholder will revise a proposal after submitting it to a company. This section addresses questions we have received regarding revisions to a proposal or supporting statement.

1. A shareholder submits a timely proposal. The shareholder then submits a revised proposal before the company’s deadline for receiving proposals. Must the company accept the revisions?

Yes. In this situation, we believe the revised proposal serves as a replacement of the initial proposal. By submitting a revised proposal, the shareholder has effectively withdrawn the initial proposal. Therefore, the shareholder is not in violation of the one-proposal limitation in Rule 14a-8 (c).¹² If the company intends to submit a no-action request, it must do so with respect to the revised proposal.

We recognize that in Question and Answer E.2 of SLB No. 14, we indicated that if a shareholder makes revisions to a proposal before the company submits its no-action request, the company can choose whether to accept the revisions. However, this guidance has led some companies to believe that, in cases where shareholders attempt to make changes to an initial proposal, the company is free to ignore such revisions even if the revised proposal is submitted before the company’s deadline for receiving shareholder proposals. We are revising our guidance on this issue to make clear that a company may not ignore a revised proposal in this situation.¹³

2. A shareholder submits a timely proposal. After the deadline for receiving proposals, the shareholder submits a revised proposal. Must the company accept the revisions?

No. If a shareholder submits revisions to a proposal after the deadline for receiving proposals under Rule 14a-8(e), the company is not required to accept the revisions. However, if the company does not accept the revisions, it must treat the revised proposal as a second proposal and submit a notice stating its intention to exclude the revised proposal, as required by Rule 14a-8(j). The company’s notice may cite Rule 14a-8(e) as the reason for excluding the revised proposal. If the company does not accept the revisions and intends to exclude the initial proposal, it would also need to submit its reasons for excluding the initial proposal.

3. If a shareholder submits a revised proposal, as of which date must the shareholder prove his or her share ownership?

A shareholder must prove ownership as of the date the original proposal is submitted. When the Commission has discussed revisions to proposals,¹⁴ it has not suggested that a revision triggers a requirement to provide proof of ownership a second time. As outlined in Rule 14a-8(b), proving ownership includes providing a written statement that the shareholder intends to continue to hold the securities through the date of the shareholder meeting. Rule 14a-8(f)(2) provides that if the shareholder “fails in [his or her] 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 [the same shareholder’s] proposals from its proxy materials for any meeting held in the following two calendar years.” With these provisions in mind, we do not interpret Rule 14a-8 as requiring additional proof of ownership when a shareholder submits a revised proposal.¹⁵

E. Procedures for withdrawing no-action requests for proposals submitted by multiple proponents

We have previously addressed the requirements for withdrawing a Rule 14a-8 no-action request in SLB Nos. 14 and 14C. SLB No. 14 notes that a company should include with a withdrawal letter documentation demonstrating that a shareholder has withdrawn the proposal. In cases where a proposal submitted by multiple shareholders is withdrawn, SLB No. 14C states that, if each shareholder has designated a lead individual to act on its behalf and the company is able to demonstrate that the individual is authorized to act on behalf of all of the proponents, the company need only provide a letter from that lead individual indicating that the lead individual is withdrawing the proposal on behalf of all of the proponents.

Because there is no relief granted by the staff in cases where a no-action request is withdrawn following the withdrawal of the related proposal, we recognize that the threshold for withdrawing a no-action request need not be overly burdensome. Going forward, we will process a withdrawal request if the company provides a letter from the lead filer that includes a representation that the lead filer is authorized to withdraw the proposal on behalf of each proponent identified in the company’s no-action request.¹⁶

F. Use of email to transmit our Rule 14a-8 no-action responses to companies and proponents

To date, the Division has transmitted copies of our Rule 14a-8 no-action responses, including copies of the correspondence we have received in connection with such requests, by U.S. mail to companies and proponents. We also post our response and the related correspondence to the Commission’s website shortly after issuance of our response.

In order to accelerate delivery of staff responses to companies and proponents, and to reduce our copying and postage costs, going forward, we intend to transmit our Rule 14a-8 no-action responses by email to companies and proponents. We therefore encourage both companies and proponents to include email contact information in any correspondence to each other and to us. We will use U.S. mail to transmit our no-action response to any company or proponent for which we do not have email contact information.

Given the availability of our responses and the related correspondence on the Commission's website and the requirement under Rule 14a-8 for companies and proponents to copy each other on correspondence submitted to the Commission, we believe it is unnecessary to transmit copies of the related correspondence along with our no-action response. Therefore, we intend to transmit only our staff response and not the correspondence we receive from the parties. We will continue to post to the Commission's website copies of this correspondence at the same time that we post our staff no-action response.

¹ See Rule 14a-8(b).

² For an explanation of the types of share ownership in the U.S., see Concept Release on U.S. Proxy System, Release No. 34-62495 (July 14, 2010) [75 FR 42982] ("Proxy Mechanics Concept Release"), at Section II.A. The term "beneficial owner" does not have a uniform meaning under the federal securities laws. It has a different meaning in this bulletin as compared to "beneficial owner" and "beneficial ownership" in Sections 13 and 16 of the Exchange Act. Our use of the term in this bulletin is not intended to suggest that registered owners are not beneficial owners for purposes of those Exchange Act provisions. See Proposed Amendments to Rule 14a-8 under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No. 34-12598 (July 7, 1976) [41 FR 29982], at n.2 ("The term 'beneficial owner' when used in the context of the proxy rules, and in light of the purposes of those rules, may be interpreted to have a broader meaning than it would for certain other purpose[s] under the federal securities laws, such as reporting pursuant to the Williams Act.").

³ If a shareholder has filed a Schedule 13D, Schedule 13G, Form 3, Form 4 or Form 5 reflecting ownership of the required amount of shares, the shareholder may instead prove ownership by submitting a copy of such filings and providing the additional information that is described in Rule 14a-8(b)(2)(ii).

⁴ DTC holds the deposited securities in "fungible bulk," meaning that there are no specifically identifiable shares directly owned by the DTC participants. Rather, each DTC participant holds a pro rata interest or position in the aggregate number of shares of a particular issuer held at DTC. Correspondingly, each customer of a DTC participant – such as an individual investor – owns a pro rata interest in the shares in which the DTC participant has a pro rata interest. See Proxy Mechanics Concept Release, at Section II.B.2.a.

⁵ See Exchange Act Rule 17Ad-8.

⁶ See Net Capital Rule, Release No. 34-31511 (Nov. 24, 1992) [57 FR 56973] ("Net Capital Rule Release"), at Section II.C.

⁷ See *KBR Inc. v. Chevedden*, Civil Action No. H-11-0196, 2011 U.S. Dist. LEXIS 36431, 2011 WL 1463611 (S.D. Tex. Apr. 4, 2011); *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723 (S.D. Tex. 2010). In both cases, the court concluded that a securities intermediary was not a record holder for purposes of Rule 14a-8(b) because it did not appear on a list of the

company's non-objecting beneficial owners or on any DTC securities position listing, nor was the intermediary a DTC participant.

⁸ *Techne Corp.* (Sept. 20, 1988).

⁹ In addition, if the shareholder's broker is an introducing broker, the shareholder's account statements should include the clearing broker's identity and telephone number. See Net Capital Rule Release, at Section II.C.(iii). The clearing broker will generally be a DTC participant.

¹⁰ For purposes of Rule 14a-8(b), the submission date of a proposal will generally precede the company's receipt date of the proposal, absent the use of electronic or other means of same-day delivery.

¹¹ This format is acceptable for purposes of Rule 14a-8(b), but it is not mandatory or exclusive.

¹² As such, it is not appropriate for a company to send a notice of defect for multiple proposals under Rule 14a-8(c) upon receiving a revised proposal.

¹³ This position will apply to all proposals submitted after an initial proposal but before the company's deadline for receiving proposals, regardless of whether they are explicitly labeled as "revisions" to an initial proposal, unless the shareholder affirmatively indicates an intent to submit a second, *additional* proposal for inclusion in the company's proxy materials. In that case, the company must send the shareholder a notice of defect pursuant to Rule 14a-8(f)(1) if it intends to exclude either proposal from its proxy materials in reliance on Rule 14a-8(c). In light of this guidance, with respect to proposals or revisions received before a company's deadline for submission, we will no longer follow *Layne Christensen Co.* (Mar. 21, 2011) and other prior staff no-action letters in which we took the view that a proposal would violate the Rule 14a-8(c) one-proposal limitation if such proposal is submitted to a company after the company has either submitted a Rule 14a-8 no-action request to exclude an earlier proposal submitted by the same proponent or notified the proponent that the earlier proposal was excludable under the rule.

¹⁴ See, e.g., Adoption of Amendments Relating to Proposals by Security Holders, Release No. 34-12999 (Nov. 22, 1976) [41 FR 52994].

¹⁵ Because the relevant date for proving ownership under Rule 14a-8(b) is the date the proposal is submitted, a proponent who does not adequately prove ownership in connection with a proposal is not permitted to submit another proposal for the same meeting on a later date.

¹⁶ Nothing in this staff position has any effect on the status of any shareholder proposal that is not withdrawn by the proponent or its authorized representative.

<http://www.sec.gov/interp/leg/cfs14f.htm>

EXHIBIT F

Proof of Delivery

Dear Customer,

This notice serves as proof of delivery for the shipment listed below.

Tracking Number

[REDACTED]

Service

UPS Next Day Air®

Shipped / Billed On

11/05/2021

Delivered On

11/08/2021 9:44 A.M.

Delivered To

[REDACTED]

Received By

DRIVER RELEASE

Left At

Front Door

Thank you for giving us this opportunity to serve you. Details are only available for shipments delivered within the last 120 days. Please print for your records if you require this information after 120 days.

Sincerely,

UPS

Tracking results provided by UPS: 12/04/2021 3:14 P.M. EST

Proof of Delivery

Dear Customer,

This notice serves as proof of delivery for the shipment listed below.

Tracking Number

[REDACTED]

Service

UPS Next Day Air®

Shipped / Billed On

11/05/2021

Delivered On

11/08/2021 9:46 A.M.

Delivered To

[REDACTED]

Received By

DRIVER RELEASE

Left At

Front Door

Thank you for giving us this opportunity to serve you. Details are only available for shipments delivered within the last 120 days. Please print for your records if you require this information after 120 days.

Sincerely,

UPS

Tracking results provided by UPS: 12/04/2021 3:13 P.M. EST

EXHIBIT G

From: John Chevedden [REDACTED]
Sent: Monday, November 8, 2021 2:05 PM
To: Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>
Subject: (BAC)

Mr. Jeffries,

Please forward a pdf of the Saturday letter that purports to be from a \$2 Billion law firm.

John Chevedden

From: John Chevedden [REDACTED]
Sent: Monday, November 8, 2021 2:32 PM
To: Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>
Subject: (BAC) [Sent To: ross.jeffries@bankofamerica.com]

Mr. Jeffries,

Please advise whether a \$2 Billion law firm is authorized to send letters about a rule 14a-8 proposal without showing any employee of the company as being copied.

John Chevedden

From: [Jeffries, Ross E. - Legal](#)
To: [John Chevedden](#)
Subject: RE: (BAC) [Sent To: ross.jeffries@bankofamerica.com]
Date: Monday, November 8, 2021 3:03:34 PM

[WARNING: External Email]

Mr. Chevedden, thank you for your email. I confirm that Gibson Dunn represents Bank of America in Rule 14a-8 matters and is authorized to send correspondence related thereto on Bank of America's behalf.

Ross Jeffries

Ross E. Jeffries, Jr.

Deputy General Counsel and Corporate Secretary
Bank of America Corporation
100 N. Tryon Street
NC1-007-56-06
Charlotte, NC 28255
(980)388-6878 (o)
(704)517-4711 (m)

Please note my new e-mail address is ross.jeffries@bofa.com

From: John Chevedden [REDACTED]
Sent: Monday, November 8, 2021 2:32 PM
To: Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>
Subject: (BAC) [Sent To: ross.jeffries@bankofamerica.com]

Mr. Jeffries,

Please advise whether a \$2 Billion law firm is authorized to send letters about a rule 14a-8 proposal without showing any employee of the company as being copied.

John Chevedden

This message, and any attachments, is for the intended recipient(s) only, may contain information that is privileged, confidential and/or proprietary and subject to important terms and conditions available at <http://www.bankofamerica.com/emaildisclaimer>. If you are not the intended recipient, please delete this message.

From: John Chevedden [REDACTED]
Date: Monday, Nov 08, 2021, 11:19 PM
To: Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>
Subject: Rule 14a-8 Proposal (BAC)`` RECALL

RECALL



Dear Mr. Jeffries,

Please see the attached rule 14a-8 proposal to improve corporate governance and enhance long-term shareholder value at de minimis up-front cost – especially considering the substantial market capitalization of the company.

If you confirm proposal receipt in the next day a broker letter can be promptly forwarded that will save you from making a formal request.

Sincerely,
Kenneth Steiner

EXHIBIT H

From: Kenneth Steiner [REDACTED]
Sent: Wednesday, November 10, 2021 3:45 PM
To: Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>
Cc: Ross Jeffries - Bank of America Corporate Secretary <bac_corporate_secretary@bofa.com>; Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>; John Chevedden [REDACTED]
Subject: Kenneth Steiner Rule 14a-8 proposal

Mr. Jeffries,

I emailed my rule 14a-8 proposal directly to you on October 26, 2021.

I am the sole representative for this proposal.

Please copy Mr. John Chevedden on any messages regarding this proposal.

Mr. Chevedden is not representing me.

However he is not precluded from advising me by the new rules as I understand them.

EXHIBIT I

From: John Chevedden [REDACTED]
Date: Tuesday, Nov 16, 2021, 9:09 AM
To: Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>
Cc: Kenneth Steiner [REDACTED]
Subject: (BAC)

Mr. Jeffries,

The only 2022 BAC rule 14a-8 proposal that I represent is my proposal.

I do not represent Mr. Steiner's 2022 BAC rule 14a-8 proposal.

John Chevedden

EXHIBIT J

From: John Chevedden [REDACTED]
Sent: Thursday, November 18, 2021 12:01 PM
To: Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>; Mueller, Ronald O.
<RMueller@gibsondunn.com>
Subject: (BAC)

[WARNING: External Email]

Mr. Jeffries,
The only 2022 BAC rule 14a-8 proposal that I represent is my proposal.
I do not represent Mr. Steiner's 2022 BAC rule 14a-8 proposal.
John Chevedden

EXHIBIT K

November 19, 2021

VIA OVERNIGHT MAIL AND EMAIL

John Chevedden



Dear Mr. Chevedden:

I am writing on behalf of Bank of America Corporation (the “**Company**”) in response to your email dated November 18, 2021 regarding the stockholder proposal entitled “Management Pay Clawback Authorization” (the “**First Proposal**”), which you sent to the Company via email on October 25, 2021, and the stockholder proposal entitled “Independent Board Chairman” (together with the First Proposal, the “**Proposals**”), which was sent to the Company via email on October 26, 2021 and which you subsequently revised and sent to the Company via email on October 31, 2021.

As we noted in our notice of procedural deficiencies dated November 6, 2021 (the “**Deficiency Notice**”), we believe the transmittal and revision history of the Proposals demonstrate that you have submitted more than one proposal for consideration at the Company’s 2022 Annual Meeting of Stockholders in violation of Rule 14a-8(c) under the Securities Exchange Act of 1934, as amended. Under Rule 14a-8(c), a person may submit no more than one proposal, directly or indirectly, to a company for a particular stockholders’ meeting. The SEC has stated this means that a stockholder-proponent is not permitted to submit one proposal in his or her own name and simultaneously serve as a representative to submit a different proposal on another stockholder’s behalf for consideration at the same meeting.

We have reviewed the emails that you and Mr. Steiner have sent to the Company, dated November 8, 2021, November 10, 2021, November 16, 2021 and November 18, 2021, copies of which are attached hereto as Attachment A. We are writing to inform you that these emails are not responsive to the Deficiency Notice, and we do not believe that they cure the violation of Rule 14a-8(c) that was identified in the Deficiency Notice. The SEC staff has consistently concurred that the sole means to cure a violation of Rule 14a-8(c) after having received timely notice from the company of such violation is for the person to reduce the number of proposals submitted, directly or indirectly, to one proposal. In *General Electric Co.* (avail. Jan. 10, 2008), which also involved multiple proposals submitted directly and indirectly by one person and the one-proposal limitation, the proponent sought to cure his violation of Rule 14a-8(c) by indirectly submitting two of his proposals through other company stockholders. In concurring with exclusion of the proponent’s proposals at General Electric, the SEC staff confirmed that violations of the one-proposal limitation can only be corrected by the proponent timely notifying

Mr. John Chevedden
November 19, 2021
Page 2

the company which proposal(s) he or she wishes to withdraw. *See also Alaska Air Group Inc.* (avail. Mar. 5, 2009) (*See Letter from O'Melveny & Myers dated Jan 23, 2009, at pages 3 and 4, stating "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 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."*). We have attached copies of these no-action letters hereto as [Attachment B](#) and [Attachment C](#) for your information. Accordingly, and as previously explained in the Deficiency Notice, in order to correct your violation of Rule 14a-8(c), you must notify the Company which of the Proposals you wish to withdraw.

As previously noted in the Deficiency Notice, if you do not timely advise the Company which of the Proposals you wish to withdraw, the Company intends to request the SEC Staff to concur that it may omit both Proposals from the proxy statement for the Company's 2022 Annual Meeting of Stockholders in accordance with SEC rules.

Please address any response to me care of Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue NW, Washington, DC 20036. Alternatively, you may transmit any response by email to me at rmueller@gibsondunn.com.

If you have any questions with respect to the foregoing, please contact me at 202-955-8500.

Sincerely,



Ronald O. Mueller

cc: Kenneth Steiner

Enclosures

ATTACHMENT A

From: John Chevedden [REDACTED]
Date: Monday, Nov 08, 2021, 11:19 PM
To: Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>
Subject: Rule 14a-8 Proposal (BAC)`` RECALL

RECALL



Dear Mr. Jeffries,

Please see the attached rule 14a-8 proposal to improve corporate governance and enhance long-term shareholder value at de minimis up-front cost – especially considering the substantial market capitalization of the company.

If you confirm proposal receipt in the next day a broker letter can be promptly forwarded that will save you from making a formal request.

Sincerely,
Kenneth Steiner

From: Kenneth Steiner [REDACTED]
Sent: Wednesday, November 10, 2021 3:45 PM
To: Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>
Cc: Ross Jeffries - Bank of America Corporate Secretary <bac_corporate_secretary@bofa.com>; Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>; John Chevedden [REDACTED]
Subject: Kenneth Steiner Rule 14a-8 proposal

Mr. Jeffries,

I emailed my rule 14a-8 proposal directly to you on October 26, 2021.

I am the sole representative for this proposal.

Please copy Mr. John Chevedden on any messages regarding this proposal.

Mr. Chevedden is not representing me.

However he is not precluded from advising me by the new rules as I understand them.

From: John Chevedden [REDACTED]
Date: Tuesday, Nov 16, 2021, 9:09 AM
To: Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>
Cc: Kenneth Steiner [REDACTED]
Subject: (BAC)

Mr. Jeffries,

The only 2022 BAC rule 14a-8 proposal that I represent is my proposal.

I do not represent Mr. Steiner's 2022 BAC rule 14a-8 proposal.

John Chevedden

From: John Chevedden [REDACTED]
Sent: Thursday, November 18, 2021 12:01 PM
To: Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>; Mueller, Ronald O.
<RMueller@gibsondunn.com>
Subject: (BAC)

Mr. Jeffries,
The only 2022 BAC rule 14a-8 proposal that I represent is my proposal.
I do not represent Mr. Steiner's 2022 BAC rule 14a-8 proposal.
John Chevedden

ATTACHMENT B



DIVISION OF
CORPORATION FINANCE

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

January 10, 2008

Ronald O. Mueller
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306

Re: General Electric Company
Incoming letter dated December 7, 2007

Dear Mr. Mueller:

This is in response to your letter dated December 7, 2007 concerning the shareholder proposals submitted to GE by Dennis W. Rocheleau, Lauren M. Rocheleau, and Shana R. Rocheleau. We also have received a letter from the proponents dated January 3, 2008. 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,

Jonathan A. Ingram
Deputy Chief Counsel

Enclosures

cc: Dennis W. Rocheleau
Lauren M. Rocheleau
Shana R. Rocheleau

FISMA & OMB Memorandum M-07-16

CFOCC-00033982

January 10, 2008

Response of the Office of Chief Counsel
Division of Corporation Finance

Re: General Electric Company
Incoming letter dated December 7, 2007

The proposals relate to directors.

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

Sincerely,

Heather L. Maples
Special Counsel

GIBSON, DUNN & CRUTCHER LLP

LAWYERS

A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

1050 Connecticut Avenue, N.W. Washington, D.C. 20036-5306

(202) 955-8500

www.gibsondunn.com

rmueller@gibsondunn.com

December 7, 2007

RECEIVED

2007 DEC 10 AM 11:13

OFFICE OF CHIEF COUNSEL
CORPORATION FINANCE

Direct Dial
(202) 955-8671

Fax No.
(202) 530-9569

Client No.
C 32016-00092

VIA HAND DELIVERY

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: *Shareowner Proposals of Dennis W. Rocheleau*
Exchange Act of 1934—Rule 14a-8

Dear Ladies and Gentlemen:

This letter is to inform you that our client, General Electric Company (“GE”), intends to omit from its proxy statement and form of proxy for its 2008 Annual Shareowners Meeting (collectively, the “2008 Proxy Materials”) two shareowner proposals captioned “AFA” and “AFB” (collectively, the “Proposals”) initially submitted by Dennis W. Rocheleau (the “Proponent”) and subsequently resubmitted by him through his daughters, Lauren M. Rocheleau and Shana R. Rocheleau (together, the “Nominal Proponents”).

Pursuant to Rule 14a-8(j), we have:

- enclosed herewith six (6) copies of this letter and its attachments;
- filed this letter with the Securities and Exchange Commission (the “Commission”) no later than eighty (80) calendar days before GE intends to file its definitive 2008 Proxy Materials with the Commission; and
- concurrently sent copies of this correspondence to the Proponent and the Nominal Proponents.

GIBSON, DUNN & CRUTCHER LLP

Office of Chief Counsel
Division of Corporation Finance
December 7, 2007
Page 2

Rule 14a-8(k) provides that shareowner proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Commission or the staff of the Division of Corporation Finance (the "Staff"). Accordingly, we are taking this opportunity to inform the Proponent that if he elects to submit additional correspondence to the Commission or the Staff with respect to the Proposals, a copy of that correspondence should concurrently be furnished to the undersigned on behalf of GE pursuant to Rule 14a-8(k).

BASES FOR EXCLUSION

We believe that both Proposals may properly be excluded from the 2008 Proxy Materials pursuant to:

- Rule 14a-8(c) because the Proponent has exceeded the one-proposal limitation; and
- Rule 14a-8(i)(8) because the Proposals relate to the election of a director.

Copies of the Proposals and their supporting statements, as well as related correspondence from the Proponent, are attached to this letter as Exhibit A. On behalf of our client, we hereby respectfully request that the Staff concur in our view that the Proposals may be excluded from the 2008 Proxy Materials for the reasons set forth below.

ANALYSIS

I. The Proposals May Be Excluded under Rule 14a-8(c) Because the Proponent Has Exceeded the One-Proposal Limitation.

A. Background.

On September 21, 2007, GE received a letter from the Proponent, dated September 21, 2007, containing two shareowner proposals, entitled "AFA" and "AFB," for inclusion in the 2008 Proxy Materials. The Proponent's submission contained several procedural deficiencies: (i) he did not provide verification of his ownership of the requisite number of GE shares; (ii) he did not state his intention to hold such shares through the date of the 2008 Annual Meeting; and (iii) he submitted two proposals for consideration at the 2008 Annual Meeting. Thus, in a letter dated October 4, 2007, which was sent within 14 days of the date GE received the Proposals, GE timely provided the Proponent with a notice of deficiencies as required by Rule 14a-8(f) (the "Deficiency Notice"). In the Deficiency Notice, attached hereto as Exhibit B, GE informed the Proponent of the requirements of Rule 14a-8 and how he could cure the procedural deficiencies, including that he was limited to the submission of one shareowner proposal for consideration at the 2008 Annual Meeting pursuant to Rule 14a-8(c). The Deficiency Notice also included a copy of Rule 14a-8. See Exhibit B.

GIBSON, DUNN & CRUTCHER LLP

Office of Chief Counsel
Division of Corporation Finance
December 7, 2007
Page 3

By letter dated October 11, 2007, and received by GE on October 15, 2007, the Proponent responded to the Deficiency Notice (the “Proponent’s Response”), a copy of which is attached hereto as Exhibit C. In the Proponent’s Response, the Proponent stated that he would not be able to meet the ownership requirements of Rule 14a-8(b) in order to be eligible to submit a shareowner proposal for the 2008 Annual Meeting, noting that:

“With respect to I. Share Ownership Deficiency, I cannot cure the defect in time, but will meet the standard for 2009 inasmuch as I purchased more shares today.”

In addition, the Proponent’s Response included the following statements with regard to the number of shareowner proposals he submitted:

“In light of II. Multiple Proposals, I will withdraw ‘AFB’ and have my daughter, Lauren, file “AFA”. You can expect ‘AFB’ next year unless my other daughter, Shana, also holds sufficient GE shares.”

In a letter dated October 14, 2007 (which was received by GE on October 16, 2007), Lauren Rocheleau submitted a shareowner proposal and supporting statement entitled “AFA” that is identical to the proposal and supporting statement submitted by the Proponent, also entitled “AFA.” *See* Exhibit D. By letter dated October 23, 2007 (which was received by GE on October 25, 2007), Shana Rocheleau submitted a shareowner proposal and supporting statement entitled “AFB” that is identical to the proposal and supporting statement submitted by the Proponent, also entitled “AFB.” *See* Exhibit E. The submissions by Lauren Rocheleau and Shana Rocheleau both provide that the Proponent—their father—is the designated representative with respect to the Proposals.

B. Rule 14a-8(c)—The “One-Proposal” Limitation.

Both Proposals may be excluded from the 2008 Proxy Materials by reason of Rule 14a-8(c), which permits each shareowner no more than one proposal for each shareowner meeting. In adopting the predecessor to Rule 14a-8(c) (Rule 14a-8(a)(4)), the Commission noted its awareness of the “possibility that some proponents may attempt to evade the rule’s limitations through various maneuvers. . . .” Exchange Act Release No. 12999 (Nov. 22, 1976). The Commission went on to note that “such tactics” would result in “the granting of request[s] by the affected managements for a ‘no action’ letter concerning the omission from their proxy materials of the proposals at issue.” *Id.* In cases where a shareowner has submitted multiple proposals and then has had family members, friends or other associates submit the same or similar proposals shortly after being notified of the one proposal rule, the Staff repeatedly has concurred that such tactics will entitle the company to no-action relief in reliance on Rule 14a-8(c). *See, e.g., Staten Island Bancorp, Inc.* (avail. Feb. 27, 2002) (concurring in the exclusion under Rule 14a-8(c) of five shareowner proposals, all of which were initially submitted by one proponent, and when

GIBSON, DUNN & CRUTCHER LLP

Office of Chief Counsel
Division of Corporation Finance
December 7, 2007
Page 4

notified of the one-proposal rule, the proponent, a daughter, close friends and neighbors resubmitted similar and in some cases identical proposals); *Spartan Motors, Inc.* (avail. Mar. 12, 2001) (permitting the omission of two proposals under Rule 14a-8(c) that were initially submitted by the proponent where, after he was made aware of the one-proposal rule, two identical proposals were resubmitted under his name and his wife's name); *Dominion Resources, Inc.* (avail. Feb. 24, 1993) (concurring under the predecessor to Rule 14a-8(c) in the exclusion of three shareowner proposals that were initially submitted by one shareowner and when he was notified by the company of the one-proposal limitation, the shareowner had two identical proposals, each created on the same typewriter or word processor and each sent certified mail with consecutive serial numbers, nominally submitted by two different individuals).

Moreover, the Staff has interpreted Rule 14a-8(c) to permit exclusion of all of a group of multiple proposals submitted by related parties when circumstances show that the nominal proponents "are acting on behalf of, under the control of, or alter ego of the [proponent]." *Weyerhaeuser Co.* (avail. Dec. 20, 1995). For instance, in *International Business Machines Corp.* (avail. Jan. 26, 1998), a shareowner proponent submitted four proposals, and after the company notified him of the one-proposal rule, the proponent resubmitted one proposal and then had his wife, his son and his daughter resubmit the other three identical proposals in their own names. The Staff permitted the exclusion of all four proposals for exceeding the one-proposal limitation under the predecessor to Rule 14a-8(c), concurring in the company's argument that the proponent's wife, son and daughter were simply nominal proponents. Similarly, in *Banc One Corp.* (avail. Feb. 2, 1993), the Staff concurred in the exclusion of three shareowner proposals under the predecessor to Rule 14a-8(c), because although the proposals were submitted by three different proponents, it was clear that two of the proponents were only nominal proponents for the original proponent. The company based its argument on the fact that the original proponent stated in a letter to the company that he had "arranged for other qualified shareholders to serve as proponents of three shareholder proposals which we intend to lay before the 1993 Annual Meeting." In the same letter, the proponent named one of the nominal proponents and indicated that he was still finalizing the text of the proposal of one of these nominal proponents. *See also BankAmerica Corp.* (avail. Feb. 8, 1996) (concurring in the exclusion of two shareowner proposals, in reliance on Rule 14a-8(c)—one submitted as president of a corporation and the other as custodian of a minor—noting that nominal proponents were "acting on behalf of, under the control of, or as the alter ego of [the proponent]"); *Occidental Petroleum Corp.* (avail. Mar. 27, 1984) (permitting the exclusion of three proposals where the shareowner proponent "attempted to evade the one proposal limitation . . . by having additional proposals submitted by other nominal proponents" after being notified of the one-proposal limitation by the company and having failed to reduce the number of proposals). This is precisely what the Proponent has done, as set forth in more detail below, by having his two daughters submit the Proposals after he was notified of the one-proposal limitation. As such, the Nominal Proponents have acted on his behalf, and under his control, in submitting the Proposals in violation of Rule 14a-8(c).

GIBSON, DUNN & CRUTCHER LLP

Office of Chief Counsel
Division of Corporation Finance
December 7, 2007
Page 5

The Proponent was notified in the Deficiency Notice of the one-proposal limitation, and was given the opportunity to withdraw one proposal. Nevertheless, the Proponent had the Nominal Proponents resubmit the Proposals, both of whom designated the Proponent as their representative with respect to the Proposals. The Proponent clearly is attempting to evade the rule's limitations through this maneuver. Following receipt of the Deficiency Notice, the Proponent stated that "I will have my daughter file AFA" and that he would have his other daughter submit "AFB" if she owned sufficient shares. That, in fact, is exactly what then happened: the Proponent arranged for others to submit the exact same Proposals, in order to do what he knew he was not permitted to do himself under the Commission's regulations. As further evidence of the Proponent's control or influence over the Nominal Proponents, we note that:

- (i) the Proposals and supporting statements submitted by the Nominal Proponents are identical to the Proposals and supporting statements initially submitted by the Proponent;
- (ii) one of the Nominal Proponents entitled one of the Proposals "AFA" and the other Nominal Proponent entitled the other Proposal "AFB," the exact same captions that the Proponent had used for the Proposals;
- (iii) the Nominal Proponents are both daughters of the Proponent; and
- (iv) Proposals submitted by the Proponent and the Nominal Proponents are in exactly the same format and font.

In short, it is clear from the documents and the facts that the Nominal Proponents are acting under the Proponent's direction and on his behalf in order to circumvent the one-proposal limit in Rule 14a-8(c). Moreover, the Proponent is not eligible to submit even one shareowner proposal for the 2008 Annual Meeting, because, by his own admission, he does not meet the share ownership requirements of Rule 14a-8(b). As noted in the Proponent's Response, he "cannot cure the [ownership] defect in time. . . ." Thus, based on the language set forth by the Commission in Exchange Act Release No. 12999, specifically that "such tactics" and "maneuvers" will result in the granting of no-action relief concerning the omission of the proposals at issue and based on the no-action letter precedent cited above, we believe that both of the Proposals are excludable in reliance on Rule 14a-8(c) for exceeding the one-proposal limitation.

Office of Chief Counsel
Division of Corporation Finance
December 7, 2007
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II. The Proposals May Be Excluded Under Rule 14a-8(i)(8) Because the Proposals Relate to the Election of Directors.

A. Background—Rule 14a-8(i)(8) and GE's Board of Directors.

We believe that the Proposals also are excludable pursuant to Rule 14a-8(i)(8), which permits the exclusion of shareowner proposals “relat[ing] to an election for membership on a company’s board of directors or analogous governing body.” The purpose of the exclusion is to ensure that the shareowner proposal process is not used to circumvent more elaborate rules governing election contests. The Commission has stated, “the principal purpose of this provision is to make clear, with respect to corporate elections, that Rule 14a-8 is not the proper means for conducting campaigns or effecting reforms in elections . . . since other proxy rules . . . are applicable thereto.” Exchange Act Release No. 12598 (July 7, 1976).

As evidenced by the language of the Proposals, their supporting statements and the cover letter under which the Proposals were submitted by the Proponent, both Proposals target Ann Fudge, a current member of GE’s Board of Directors (the “Board”), whom GE expects the Board to nominate for reelection at the 2008 Annual Meeting of Shareowners. Thus, “AFA” undoubtedly is intended to be “Ann Fudge proposal A” and “AFB” is intended to be “Ann Fudge proposal B.” The supporting statement of AFA specifically states that it is intended to apply to Ms. Fudge; it states “in short, we don’t need Ann Fudge.” AFB is likewise designed to target Ms. Fudge in that it would apply to only a few of GE’s directors who will be nominated for reelection at the 2008 Annual Shareowners Meeting, including Ms. Fudge. Finally, the Proponent has stated that the Proposals are intended to have this effect; in his letter of September 21, 2007, initially transmitting the Proposals, the Proponent states among other things, “My approach may be a bit of a blunt instrument, but I am very much offended by Ms. Fudge’s continuing presence on our Board.”

As set forth below, the Staff consistently has concurred in the exclusion of shareowner proposals that are intended to question the business judgment and suitability of a particular director and those proposals that operate to prevent the election of only some of the directors nominated for reelection at the annual meeting. Thus, we believe that both Proposals are excludable from the 2008 Proxy Materials in reliance on Rule 14a-8(i)(8) as relating to the election to the Board.

B. Exclusion of Shareowner Proposal AFA.

AFA provides that:

Section 3. Qualifications of the Company’s Governance Principles which states
“Directors should offer their resignation in the event of any significant change in

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their personal circumstances, including a change in their principal job responsibilities.” will hereafter be interpreted to mean, *inter alia*, that any director who, for any reason other than normal retirement, no longer remains in the executive position held at the time of initial election, or a substantially similar or higher office, must resign immediately from the GE Board unless all other directors by secret ballot unanimously vote to refuse to accept the resignation and the Board then provides a written, public explanation of the reasons for its stance.

Although this Proposal is phrased in general terms, the supporting statement leaves no doubt as to how the Proponent intends for it to operate. It states, “We do not require individuals [as directors] marching to a distant, different drummer In short, we do not need Ann Fudge.”

The Staff consistently has permitted companies to exclude a shareowner proposal that requests or requires the resignation of one or more specific directors who are standing for election at the same meeting at which the proposal will be considered. For example, in *PepsiCo, Inc.* (avail. Feb. 1, 1999), the company received a shareowner proposal requesting that the board of directors “establish a policy that board members shall submit a resignation if their individual professional responsibilities change through ouster, or resignation due to shareholder pressure.” Although in *PepsiCo*, the proponent phrased the proposal to appear broad and generic, the supporting statement indicated that the proposal was directed against two incumbent directors, noting that the company’s board included “two CEOs who were ousted from their own places of employment. We believe that directors should submit a resignation under circumstances such as these.” In concurring that the proposal in *PepsiCo* was excludable under Rule 14a-8(i)(8), the Staff noted that “the proposal, together with the supporting statement, appears to question the ability of two members of the board who PepsiCo indicates will stand for reelection at the upcoming annual meeting to fulfill the obligations of directors.” *See also, e.g., CA, Inc.* (avail. June 20, 2006) (concurring, under Rule 14a-8(i)(8), in the exclusion of a proposal requesting that two members of the board be removed pursuant to a provision of the Delaware General Corporation Law); *Second Bancorp Inc.* (avail. Feb. 12, 2001) (permitting exclusion of a proposal, under Rule 14a-8(i)(8), calling for the resignation of an incumbent director); *U.S. Bancorp* (avail. Feb. 27, 2000) (granting no-action relief under Rule 14a-8(i)(8) for a proposal mandating the removal of the company’s officers and directors); *ChemTrak Inc.* (avail. Mar. 10, 1997) (concurring in the omission of a proposal, under Rule 14a-8(i)(8), requesting that the board of directors accept the resignation of the current chairman).

Further, the Staff consistently has permitted the exclusion of shareowner proposals that question the personal suitability of a specific individual to serve on the Board. As noted above, in *PepsiCo* the Staff provided that the proposal and supporting statement, when viewed together, seemed to “question the ability of two members of the board.” *See also Brocade Communication Systems, Inc.* (avail. Jan. 31, 2007); *Exxon-Mobil Corp.* (avail. Mar. 20, 2002); *AT&T Corp.*

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(avail. Feb. 13, 2001); *Honeywell International Inc.* (avail. Mar. 2, 2000) (where, in each case, the Staff concurred the proposal was excludable under Rule 14a-8(i)(8) noting that “the proposal, together with the supporting statement” appeared to “question the business judgment” of a board member or members who would stand for reelection at the upcoming annual meeting of shareowners). *See also Delta Air Lines, Inc.* (avail. Jul. 21, 1992) (granting exclusion of a shareowner proposal that “calls into question the qualifications of at least one director for reelection and thus the proposal may be deemed an effort to oppose the management’s solicitation on behalf of the reelection of this person” in reliance on the predecessor to Rule 14a-8(i)(8)).

Here, the facts are substantially similar to those in *PepsiCo*. AFA requests that GE’s Governance Principles require the immediate resignation of any director who no longer remains in the executive position held at the time of initial election, or a substantially similar or higher office. As the company noted in its letter to the Staff in *PepsiCo*, the Proponent here has “carefully constructed the wording of the proposal so that it appears to be a broad, generic proposal establishing a certain criteria for board membership.” However, when viewed together with the language in the supporting statement quoted above and the Proponent’s cover letter under which AFA initially was submitted, it is clear that AFA is targeting Ms. Fudge, whom GE expects the Board to nominate for reelection at the 2008 Annual Meeting. In his cover letter dated September 21, 2007, the Proponent notes that he is “very much offended by Ms. Fudge’s continuing presence on our Board.” This statement, together with the language of the supporting statement as well as the Proposal’s title of AFA (presumably, Ann Fudge proposal A), makes it clear that by its terms and underlying meaning, AFA is targeting Ms. Fudge, a specific member currently serving on the Board who the Board expects to nominate for reelection at the 2008 Annual Meeting. Based on the well-established precedent set forth above, the Staff views the proposals and supporting statements together when evaluating the excludability of shareowner proposals under Rule 14a-8(i)(8). As such, we believe that AFA is attempting to question the ability of, and seek to disqualify from reelection, a current member of the Board who would otherwise be nominated for reelection at the 2008 Annual Meeting. Accordingly, AFA is excludable from the 2008 Proxy Materials under Rule 14a-8(i)(8).

C. *Exclusion of Shareowner Proposal AFB.*

AFB provides that:

Prior to the annual nomination and election of directors, the Board’s N[ominating and]G[overnance]C[ommittee] will specifically review the performance of all directors who have served for more than 8 years on our Board. If only one director meets that standard, he or she will not be recommended unless the entire Board unanimously votes by secret ballot to endorse that member’s candidacy. If

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more than one director so qualifies, the NGC will force rank the directors and the bottom rated candidate will not be re-nominated.

In various contexts, the Staff has permitted companies to exclude under Rule 14a-8(i)(8) shareowner proposals that, in purpose or effect, seek through the Rule 14a-8 process to oppose the election of specific nominees for election to the company's board of directors, an effort that should properly be the subject of a Rule 14a-12 "election contest." For example, in *Archer-Daniels-Midland Co.* (avail. Aug. 6, 1999), the Staff concurred that the company could exclude a shareowner proposal that sought to disqualify for election any director who failed to offer to buy the company. The company argued, among other things, that the proposal related to an election for directors given that only a very particular and limited group of individuals could qualify. The company also noted that, although on its face the proposal spoke in terms of qualifications, the practical effect would be the same as the waging of a proxy contest to place on the board only those who would approve a narrowly defined extraordinary transaction.

Similarly, AFB is excludable because its practical effect is to disqualify one of a limited number of Board members, as AFB only applies to current directors "who have served for more than 8 years on our Board." Currently, seven of the 16 members of GE's Board have served more than 8 years: James I. Cash, Jr., Ann M. Fudge, Claudio X. Gonzalez, Andrea Jung, Sam Nunn, Roger S. Penske and Douglas A. Warner III. To the extent that GE's Board nominates some or all of these directors for reelection at the 2008 Annual Shareowners Meeting, as is expected, the effect of AFB would be to disqualify one of GE's nominees. AFB does not similarly disqualify nominees who have served on the Board for less than eight years. Such disparate treatment constitutes an opposition to the reelection of current directors, which indicates the Proponent's intent to circumvent Rule 14a-12, and which renders AFB excludable under Rule 14a-8(i)(8).

AFB requests that GE's Nominating and Governance Committee "specifically review the performance of all directors who have served more than 8 years on our Board," and provides that if "only one director meets that standard, he or she will not be recommended unless the entire Board unanimously votes by secret ballot to endorse that member's candidacy" and calls for a force ranking of certain nominees in which the "bottom rated candidate will not be re-nominated." Thus, similar to *Delta Air Lines*, AFB "calls into question the qualifications of at least one director for reelection and thus the proposal must be deemed an effort to oppose the management's solicitation on behalf of the reelection of this person." *Delta Air Lines, Inc.* (avail. Jul. 21, 1992) (granting exclusion of a shareowner proposal that "calls into question the qualifications of at least one director for reelection and thus the proposal may be deemed an effort to oppose the management's solicitation on behalf of the reelection of this person" in reliance on the predecessor to Rule 14a-8(i)(8)). As such, AFB is excludable under Rule 14a-8(i)(8) because it questions the business judgment and suitability for office of specific GE directors who will be up for reelection at the upcoming annual meeting and attempts to use

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the Rule 14a-8 process to oppose the election of specific nominees to the Board. *See also Brocade Communication Systems, Inc.* (avail. Jan. 31, 2007); *Exxon-Mobil Corp.* (avail. Mar. 20, 2002); *AT&T Corp.* (avail. Feb. 13, 2001) (where, in each case, the Staff concurred that the proposal was excludable under Rule 14a-8(i)(8) noting that “the proposal, together with the supporting statement” appeared to “question the business judgment” of a board member or members who would stand for reelection at the upcoming annual meeting of shareowners).

Moreover, the Staff consistently has determined that shareowner proposals are excludable under Rule 14a-8(i)(8) when such proposals involve director nomination criteria or director qualifications that, if implemented, would affect the selection of director nominees, or the election of such nominees, at the annual meeting at which the proposal would be presented. *See, e.g., Washington Mutual, Inc.* (avail. Feb. 20, 2007) (concurring that a proposal relating to certain requirements for director nominees was excludable under Rule 14a-8(i)(8) noting that “it could, if implemented, disqualify nominees for director at the upcoming annual meeting”); *Bank of America Corp.* (avail. Jan. 12, 2007) (noting that a shareowner proposal was excludable under Rule 14a-8(i)(8) that sought to reduce the size of the company’s board of directors, noting that “implementation of the proposal may disqualify nominees for directors at the upcoming annual meeting”); *Peabody Energy Corp.* (avail. Mar. 4, 2005) (noting that a shareowner proposal seeking to adopt a policy so that independent directors would comprise two-thirds of the company’s board of directors was excludable under Rule 14a-8(i)(8) because “it could, if implemented, disqualify nominees for director at the upcoming annual meeting”). As noted above, AFB targets seven of the 16 current members of the Board, and if implemented, one of those seven directors would be disqualified as a nominee for reelection at the 2008 Annual Meeting. Thus, as set forth in the precedent cited above, AFB is excludable under Rule 14a-8(i)(8) because it questions the business judgment and suitability for office of specific GE directors who will be up for reelection at the upcoming annual meeting and could “if implemented” disqualify a director nominee at the upcoming 2008 Annual Meeting.

CONCLUSION

Based on the foregoing analysis, we respectfully request that the Staff concur that it will take no action if GE excludes the Proposals from its 2008 Proxy Materials for the reasons set forth above. We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. In addition, GE agrees to promptly forward to the Proponents any response from the Staff to this no-action request that the Staff transmits by facsimile to GE only.

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If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 995-8671, my colleague Elizabeth A. Ising at (202) 955-8287 or David M. Stuart, GE's Senior Counsel, at (203) 373-2243.

Sincerely,

Handwritten signature of Ronald O. Mueller in cursive, with the initials "EAF" written at the end of the signature.

Ronald O. Mueller

ROM/jlk
Enclosures

cc: David M. Stuart, General Electric Company
Dennis W. Rocheleau
Lauren M. Rocheleau
Shana R. Rocheleau

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EXHIBIT A

September 21, 2007

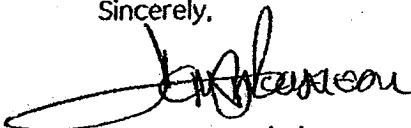
Brackett B. Denniston, Secretary
General Electric Company
3135 Easton Turnpike
Fairfield, CT 06828

Dear Brackett:

Following up on our earlier dialogue, and that which I had with Mike McAlevey on September 12, I submit the attached two proposals for inclusion in next year's proxy statement.

My approach may be a bit of a blunt instrument, but I am very much offended by Ms. Fudge's continuing presence on our Board. As I have said previously, I am not attacking her integrity, her decency, or her willingness to devote time to our Board. What I am asserting is that she is a relative lightweight and if she were white, she would never have been nominated. This, in my opinion, is not the first time GE's devotion to diversity or political correctness has proved to be wrongheaded and - violative of "The Letter and the Spirit" standards.

Sincerely,



Dennis W. Rocheleau

*** Redacted - FISMA ***

SHAREHOLDER PROPOSAL #AFA

RESOLVED: That Section 3. Qualifications of the Company's Governance Principles which states "Directors should offer their resignation in the event of any significant change in their personal circumstances, including a change in their principal job responsibilities." will hereafter be interpreted to mean, inter alia, that any director who, for any reason other than normal retirement, no longer remains in the executive position held at the time of initial election, or a substantially similar or higher office, must resign immediately from the GE Board unless all other directors by secret ballot unanimously vote to refuse to accept the resignation and the Board then provides a written, public explanation of the reasons for its stance.

COMMENT: Certainly we should expect that our directors should be able to devote sufficient time to fulfill their Board duties. But our Board also should not countenance serial instances of arguable "job failure" or burnout by our directors ... however it may be spun for the public. We need the informed insights of the best people engaged in activities reasonably related to the conduct of the Company. We do not require individuals marching to a distant, different drummer providing the beat for bicycling in Europe, practicing yoga, reading ... or even writing ... short stories, or learning to yodel. In short, we don't need Ann Fudge.

SHAREHOLDER PROPOSAL #AFB

RESOLVED: Prior to the annual nomination and election of directors, the Board's NGC will specifically review the performance of all directors who have served for more than 8 years on our Board. If only one director meets that standard, he or she will not be recommended unless the entire Board unanimously votes by secret ballot to endorse that member's candidacy. If more than one director so qualifies, the NGC will force rank the directors and the bottom rated candidate will not be re-nominated.

COMMENT: Insufficient dynamism is an unhealthy byproduct of a "once elected you stay until you resign or reach 74" reality that abides with respect to the outside directors on our Board. In a Company that apparently embraces an executive culture of "grow or go", "rank and yank", and "a little angst improves performance", its Board ought to practice what it countenances. The argument that we always get it right in our initial selection of directors defies the laws of statistics ... and our history.

EXHIBIT B



October 4, 2007

VIA FEDERAL EXPRESS
Dennis W. Rocheleau

FISMA & OMB-Memorandum M-07-16

David M. Stuart
Senior Counsel
Investigations/Regulatory

GE
3135 Easton Turnpike
Fairfield, CT 06828
USA

T+1 203 373 2243
F+1 203 373 2523
david.m.stuart@ge.com

Re: Shareowner Proposal

Dear Mr. Rocheleau:

I am writing on behalf of General Electric Company (the "Company"), which received on September 21, 2007, your letter dated September 21, 2007, including two shareowner proposals entitled "Shareholder Proposal #AFA" and "Shareholder Proposal #AFB" for consideration at our 2008 Annual Meeting of Shareowners (collectively, the "Submission"). Your Submission contains certain procedural deficiencies, as set forth below, which Securities and Exchange Commission ("SEC") regulations require us to bring to your attention.

I. Share Ownership Deficiency

Rule 14a-8(b) under the Securities Exchange Act of 1934, as amended ("Exchange Act"), provides that each shareowner proponent must submit sufficient proof that it has continuously held at least \$2,000 in market value, or 1%, of a company's shares entitled to vote on the proposal for at least one year as of the date the shareholder proposal was submitted. The Company's stock records do not indicate that you are the record owner of sufficient shares to satisfy this requirement. In addition, to date we have not received proof from you that you have satisfied Rule 14a-8's ownership requirements as of the date that the proposal was submitted to the Company.

To remedy this defect, you must submit sufficient proof of your ownership of Company shares. As explained in Rule 14a-8(b), sufficient proof may be in the form of:

- a written statement from the "record" holder of your shares (usually a broker or a bank) verifying that, as of the date the proposal was submitted, you continuously held the requisite number of Company shares for at least one year; or
- if you have filed a Schedule 13D, Schedule 13G, Form 3, Form 4 or Form 5, or amendments to those documents or updated forms, reflecting your ownership of Company shares as of or before the date on which the one-year eligibility period begins, a copy of the schedule and/or form, and any subsequent amendments reporting a change in the ownership level and a written statement that you continuously held the required number of shares for the one-year period.

In addition, under Rule 14a-8(b), a shareowner must provide the company with a written statement that he or she intends to continue to hold the shares through the date of the shareowners' meeting at which the proposal will be voted on by the shareowners. In order to correct this procedural defect, you must submit a written statement that you intend to continue holding the shares through the date of the shareowner meeting.

For your information, I enclose a copy of Rule 14a-8.

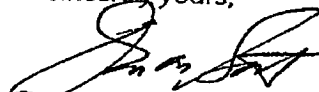
II. Multiple Proposals

Pursuant to Rule 14a-8(c) under the Exchange Act, a shareowner may submit no more than one proposal to a company for a particular shareowners' meeting. As stated in your cover letter, dated September 21, 2007, your Submission contains two proposals: one entitled "Shareholder Proposal #AFA" and another entitled "Shareholder Proposal #AFB." You can correct this procedural deficiency by indicating which proposal you would like to submit and which proposal you would like to withdraw.

III. Your Response to this Letter

The SEC's rules require that your response to this letter be postmarked or transmitted electronically no later than 14 calendar days from the date you receive this letter. Please address any response to me at the address or fax number as provided above.

Sincerely yours,



David M. Stuart

DMS/jlk
Enclosure

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Shareholder Proposals – Rule 14a-8

§240.14a-8.

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 (§240.13d-101), Schedule 13G (§240.13d-102), Form 3 (§249.103 of this chapter), Form 4 (§249.104 of this chapter) and/or Form 5 (§249.105 of this chapter), 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 (§249.308a of this chapter) or 10-QSB (§249.308b of this chapter), or in shareholder reports of investment companies under §270.30d-1 of this chapter of 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 mail 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 mail 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 section?**
- (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 §240.14a-8 and provide you with a copy under Question 10 below, §240.14a-8(f).
 - (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 §240.14a-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 an election for membership on the company's board of directors or analogous governing body;
- (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 section 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 in 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 why it believes shareholders should not vote in favor of my proposal, and I disagree with some of its 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, §240.14a-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 mails 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 its files definitive copies of its proxy statement and form of proxy under §240.14a-6.

From: Origin ID: BETA (203)373-2673
Roma Smith
General Electric HQ
3135 Easton Turnpike
W3D-D16
Fairfield, CT 06828



CL50964772123

Ship Date: 04OCT07
ActWgt: 1 LB
System#: 8593357/INET7091
Account#: S *****

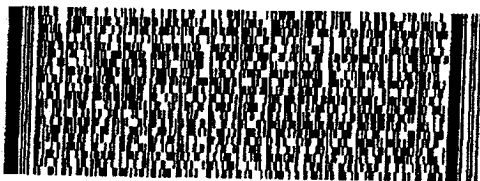
Delivery Address Bar Code



Ref # Legal Litigation
Invoice #
PO #
Dept #

FISMA & OMB-Memorandum M-07-16
BILL SENDER
Dennis Rocheleau

FISMA & OMB-Memorandum M-07-16

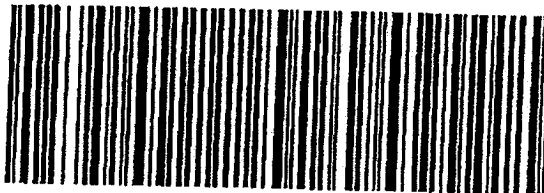


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FRI - 05OCT AA
PRIORITY OVERNIGHT

ZS-BETA

JFK
CT-US
06825



Shipping Label: Your shipment is complete

1. Use the 'Print' feature from your browser to send this page to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning: Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.

Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com. FedEx will not be responsible for any claim in excess of \$100 per package, whether the result of loss, damage, delay, non-delivery, misdelivery, or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim. Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental, consequential, or special is limited to the greater of \$100 or the authorized declared value. Recovery cannot exceed actual documented loss. Maximum for items of extraordinary value is \$500, e.g. jewelry, precious metals, negotiable instruments and other items listed in our Service Guide. Written claims must be filed within strict time limits, see current FedEx Service Guide.

EXHIBIT C

10/11/07

JOHN M. STUART, ESQ.
SENIOR COUNSEL - GE HQ

John M. Stuart:

I RECEIVED YOUR FEDERAL EXPRESS LETTER, DATED OCTOBER 4, 2007, YESTERDAY WHEN MY NEIGHBOR, WHO HAD REMOVED 15 FROM MY KORN-BRENCHES FROM YOUR STAY WHILE I WAS IN WISCONSIN FOR TWO WEEKS, DROPPED BY TO EXPLAIN WHERE SHE HAD "HIDDEN" IT. EXCUSE THIS HAND-WRITTEN REPLY, BUT I WANTED TO BE SURE THIS RESPONSE MEETS THE STANDARDS SET FORTH IN SECTION III. OF YOUR MESSAGE.

AS FOR THE TWO OTHER SECTIONS OF YOUR LETTER, WITH RESPECT TO I. STRONG OWNERSHIP DEFICIENCY, I CAN NOT CURE THE ISSUES IN TIME, BUT WILL ^{MEET} THE STANDARDS FOR 2009 INASMUCH AS I PURCHASED MORE SHARES TODAY. IN LIGHT OF II. MULTIPLE PROPOSERS, I WILL WITHDRAW "AFB" AND HAVE MY DAUGHTER, CORINNE, FILE "AFA". YOU CAN EXPECT "AFB" NEXT YEAR UNLESS MY OTHER DAUGHTER, SIOBHA, ALSO HAD SUFFICIENT GE SHARES.

I KNOWLEDGE THAT GE HAS TO FOLLOW THE SEC RULES, BUT SOMETIMES RELATIONSHIPS SUFFER IN THE REGISTRATION PROCESS. THANKS FOR RESPONDING IN TIME TO HELP ME TO MEET THE 10/31 FILING DEADLINE.

Sincerely,

John M. Stuart

Dennis W. Rochefort

*** Redacted - FISMA ***

EXHIBIT D

RECEIVED

OCT 16 2007

B. B. DENNISTON II

October 14, 2007

Brackett B. Denniston, Secretary
General Electric Company
3135 Easton Turnpike
Fairfield, CT 06828

Dear Mr. Denniston:

I submit the attached proposal for inclusion in next year's proxy statement. Either I, or Dennis W. Rocheleau, my representative, will present the proposal at the Annual meeting in Erie. I believe that I own sufficient shares to meet SEC Rule 14a-8(b) requirements and intend to hold such shares through the date of the shareowners meeting.

Sincerely,



Lauren M. Rocheleau

FISMA & OMB-Memorandum M-07-16

SHAREHOLDER PROPOSAL #AFA

RESOLVED: That Section 3. Qualifications of the Company's Governance Principles which states "Directors should offer their resignation in the event of any significant change in their personal circumstances, including a change in their principal job responsibilities." will hereafter be interpreted to mean, inter alia, that any director who, for any reason other than normal retirement, no longer remains in the executive position held at the time of initial election, or a substantially similar or higher office, must resign immediately from the GE Board unless all other directors by secret ballot unanimously vote to refuse to accept the resignation and the Board then provides a written, public explanation of the reasons for its stance.

COMMENT: Certainly we should expect that our directors should be able to devote sufficient time to fulfill their Board duties. But our Board also should not countenance serial instances of arguable "job failure" or burnout by our directors ... however it may be spun for the public. We need the informed insights of the best people engaged in activities reasonably related to the conduct of the Company. We do not require individuals marching to a distant, different drummer providing the beat for bicycling in Europe, practicing yoga, reading ... or even writing ... short stories, or learning to yodel. In short, we don't need Ann Fudge.

EXHIBIT E

October 23, 2007

Brackett B. Denniston, Secretary
General Electric Company
3135 Easton Turnpike
Fairfield, CT 06828

RECEIVED

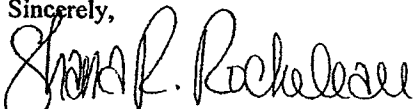
OCT 25 2007

B. B. DENNISTON I

Dear Mr. Denniston,

I submit the attached proposal for inclusion in next year's proxy statement. Either I, or Dennis W. Rocheleau, my representative, will present the proposal at the Annual meeting in Erie. I believe that I own sufficient shares in GE Stock Direct Account [REDACTED] to meet SEC Rule 14a-8(b) requirements and intend to hold such shares through the date of the shareholder's meeting.

Sincerely,



Shana R. Rocheleau

FISMA & OMB Memorandum M-07-16

SHAREHOLDER PROPOSAL #AFB

RESOLVED: Prior to the annual nomination and election of directors, the Board's NGC will specifically review the performance of all directors who have served for more than 8 years on our Board. If only one director meets that standard, he or she will not be recommended unless the entire Board unanimously votes by secret ballot to endorse that member's candidacy. If more than one director so qualifies, the NGC will force rank the directors and the bottom rated candidate will not be re-nominated.

COMMENT: Insufficient dynamism is an unhealthy byproduct of a "once elected you stay until you resign or reach 74" reality that abides with respect to the outside directors on our Board. In a Company that apparently embraces an executive culture of "grow or go", "rank and yank", and "a little angst improves performance", its Board ought to practice what it countenances. The argument that we always get it right in our initial selection of directors defies the laws of statistics ... and our history.

RECEIVED

January 3, 2008

2008 JAN 10 PM 4:11

OFFICE OF CHIEF COUNSEL
CORPORATION FINANCE

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

RE: Shareowner Proposal of DW Rocheleau, LM Rocheleau, SR Rocheleau

Dear Ladies and Gentlemen:

Pursuant to my conversation with Mr. Hines of your office, we are sending this letter outlining in an informal way our objection to GE's request for a no-action letter with respect to the shareowner proposals submitted by Lauren and Shana Rocheleau, which GE, consistent with its theory, continues to attribute to Dennis Rocheleau. This is our collective response to GE's letter mailed to all of us dated 12/7/07, which I received on December 19, 2007 in a UPS delivery from Gibson, Dunn and Crutcher, LLP.

At the outset, we acknowledge the obvious: our knowledge of SEC rules and regulations is infinitesimal compared to that of GE and its law firm. Nor do we have their resources. So in the same spirit of economy, efficiency, independence and family values that animated the methodology of the original submissions, we submit this commentary. Its somewhat scrambled syntax should not be offensive to anyone who crafted Section 3 of GE's Governance Principles or interprets it in the way GE asserts is appropriate.

The factual recitation of events in GE's 12/7/07 letter is accurate; some inferences drawn therefrom are more problematic. Moreover, GE has felt free to include correspondence beyond the proposals under attack. However, GE has conveniently forgotten other correspondence which puts these proposals in context. We believe Exhibits A through D, attached, establish that: 1) these issues have been of concern to us for some time, 2) we have attempted to gather needed information, 3) we tried to resolve the matter informally ... without publicity or rancor. GE has not been very forthcoming and our patience was exhausted. GE is apparently more comfortable making its case a legalistic one. That is GE's privilege and does not surprise us.

Inasmuch as Dennis is retired (from GE) and both Shana and Lauren are employed, it seemed sensible and economical for Dennis to submit the proposals and attend the shareowners meeting; one person doing the work of two or three, if you will. We thought GE, of all companies, should appreciate such efficiency and economy of operation, but obviously not. (For your information, two former executives who each own thousands of GE shares and who share our views on this governance matter were, not surprisingly, unwilling to publicly bite the hand that fed them. Moreover, Dennis, prior to his retirement, held ... not very happily ... millions of dollars of GE shares in a deferred compensation account. What we are attempting to demonstrate is that the proponents of these proposals are not "buy-a-share-to-bitch" gadflies. We recognize that this is a serious undertaking and we are approaching it that way.)

Certainly a lot has changed in the world of corporate governance since the Commission's comments in Exchange Act Release No. 12999 in 1976. We believe that the standards of board membership should be of the utmost importance to shareowners and the subject of open and vigorous debate. Apparently GE thinks otherwise. It would be dispiriting, if not tragic, if the SEC agreed with them in these very challenging times for investors.

We do not know the precise facts of the many cases cited by GE, e.g. Staten Island Bancorp in 2002 going back to Occidental Petroleum in 1984. We don't intend to distinguish those cases to make ours, which is simply this: each of us is a GE shareowner, each is an adult, each has advanced degrees from first rank universities, and each is capable of acting independently.

Yes, the proposals are structured the same. They are copies of Dennis' originals; why re-invent a good wheel? They were, however, invested with the independence of individual submission letters. In short, GE is asking the SEC to value Pecksniffian procedural niceties over substantive shareowner interests.

For the record, I am proud of my daughters and love them dearly. But I do not control them in this or so many other more consequential matters of their existence. We frequently discuss issues of importance and sometimes they agree with me and sometimes not. That they did so in this instance should not disqualify them; it amplifies the power of the idea. They own their own shares. They are entitled to voice their views on GE's management. They ought not to be disenfranchised because their father was open and honest with GE every step of the way.

(At this juncture it seems appropriate to acknowledge that I, Dennis Rocheleau, the only family member encumbered by a Harvard Law degree and not currently employed, produced the initial draft of this response. All who have signed it have read it, commented thereon and, of course, are in agreement with it.)

With respect to Part II of GE's 12/7/07 letter and Rule 14a - 8(i)(8), we submit that the 10/14/07 Proposal "AFA", presumably "Advocating Fairness A", does not relate to the election of a director, but to the proper interpretation and application of GE's own Governance Principles regarding the possible resignation of a director. If it will make GE and the SEC feel better, we will remove any reference to Ms. Fudge and re-label the proposals. As I told a member of the GE legal staff on 12/20/07, we are willing to be accommodative ... even as GE continues to misinterpret the scope and application of our proposals and uses our candor as a club to control shareowners.

Without generating an exegesis of the apposite SEC rules and regulations, and decisions flowing therefrom, let us plainly state that our proposals are not blunt instruments intended to circumvent more elaborate rules governing election contests. Nor are they a negation of managerial discretion. Quite the opposite in fact. We are attempting to introduce more elaborate rules and enhance discretion by tethering it to performance based standards vetted by democratic processes. In effect, we are asking no more than that the Company live up to its self-imposed standards.

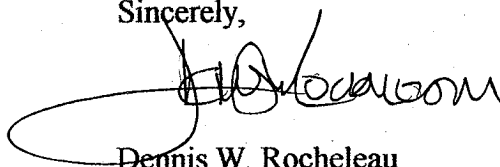
The Company's tortured reading of its Governance Principles has been rejected by several lawyers far more brilliant than I, one of whom is an expert on corporate governance who has enjoyed decanal status at arguably this country's pre-eminent law school. If there is a way to right that travesty without a proxy fight, we are all for it.

We would very much like to have our individual proposals included in the proxy for GE's 2008 Annual Shareowners Meeting ... every bit as much as we, as our conduct exhibits, would have preferred that it did not come to this. We are prepared to discuss our position with you in person. But just as GE has elected to have others speak for it, we would like to have Dennis Rocheleau speak for all of us.

To some extent, others have already spoken for us. GE's previous Chairman and CEO, Jack Welch, recently said, "... boards frequently tolerate troublesome performance from one or two of their own. It's simply too time consuming or impolitic to eradicate." Well, one of us has the time and we have never been worried about being politically correct. And as former SEC Chairman Arthur Levitt once said: "It's a sad day when the S.E.C., the investors' advocate, chooses to gag the voices of those they are charged to protect. Not only do shareholders deserve a say in who runs the companies they own, but free and fair markets depend on this oversight." Please don't stifle our modest whisper.

Thank you very much for your consideration of our position which we are also concurrently providing to R.O. Mueller, Esq. and D.M. Stuart, Esq.

Sincerely,



Dennis W. Rocheleau



Lauren M. Rocheleau



Shana R. Rocheleau

FISMA & OMB Memorandum M-07-16

(In alphabetical order; not a hierarchy of control)

attachments

MUCB 12/29/06

December 27, 2006

Brackett B. Denniston, III, Esquire
Sr. Vice President and General Counsel
GE Corporate - E3C
3135 Easton Turnpike
Fairfield, CT 06828

Dear Brackett:

I would like to advance the "ongoing and energetic debate" about corporate governance.

To that end, earlier this year I wrote Jeff Immelt expressing my objection to the re-election of Board members Fudge and Gonzalez. Ms. Fudge's recent "retirement"/resignation from Young and Rubicam Brands (as reported in The New York Times on 12/2/06) has re-invigorated me. As you know, our governance principles state, in paragraph 3, Qualifications, that "directors should offer their resignation in the event of any significant change in their personal circumstances, including a change in their principal job responsibilities." (Emphasis added) Accordingly, on December 4, 2006 I asked members of your staff if Ms. Fudge had resigned. Although they were helpful, I soon found myself chasing my tail in a sense.

Now I present you with the following questions/requests for information:

1. Did Ms. Fudge offer her resignation? If so, when and in what form?
2. Has the Board, or any appropriate committee thereof, considered such offer? In what manner and with what conclusion?
3. If Ms. Fudge offered to resign and GE did not accept it, what was the specific basis of that non-acceptance?
4. Given that the Board self-evaluation process is an "important determinant" for Board tenure, may I have access to it insofar as it pertains to Ms. Fudge?
5. Who is the "independent governance expert" referenced in Paragraph 9 of the governance principles and did he or she play a role in any consideration of Ms. Fudge's offer to resign? If so, what was it?

I can understand why GE might wish to keep this matter relatively private or quiet. Therefore, I am quite willing to treat all information you provide me as "confidential", but I am totally unwilling to keep the larger issue from the attention of the shareowners at the upcoming annual meeting.

EXHIBIT B

February 28, 2007

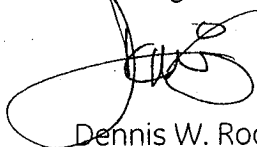
BB Denniston, III, Esq.
SVP and General Counsel
Corporate Legal
GE Corporate
3135 Easton Turnpike
Fairfield, CT 06828

Brackett:

When did GE start treating letters of disgruntlement from retirees as if they were a bill presented by a supplier? I have not forgotten my December 27, 2006 letter to you even if everyone at GE has.

Accordingly, I am in the process of planning my trip to Greenville despite the fact that it will crowd my HLS reunion in Cambridge. Perhaps there I should look for the "Viet Dinh" of my class. Should I seek out your daughter for lunch at the Hark?

Best regards,



Dennis W. Rocheleau

*** Redacted - FISMA ***

March 15, 2007

BB Denniston, III, Esq.
SVP and General Counsel
Corporate Legal
GE Corporate
3135 Easton Turnpike
Fairfield, CT 06828

Brackett:

Our discussion last Wednesday, March 7, 2007, regarding Board composition was stimulating, if not as satisfying as I would have liked. Although your interpretation of the "resignation" protocol under Section 3 of the Governance Principles is plausible, when I compare the specificity of the resignation process described in Section 20, majority vote policy, I stand on my assertion: Section 3 is badly drafted. Moreover, other GE attorneys did not so interpret it. At the very least, your interpretation goes only one way on a two-way street. Be that as it may, you are a far better lawyer than I and an expert on governance, which I clearly am not. But I intend to learn, so alert the Board.

My bottom line is this: If Kevin Mahar were willing to cut me some slack regarding his comments at last year's Annual Meeting, I am willing to acknowledge my friendship and respect for you and consequently embrace a caesura in my "Boot Ann Fudge from the Board" campaign. And you may be right that the Annual Meeting is a perfect example of Wanniski's Law.

Although I won't appear in Greenville, I do intend both to study this matter more fully and to write the Nominating and Corporate Governance Committee about my concerns and suggestions. *Ken Langone resigned and the Board didn't say "no" or re-nominate him ... and the world didn't end. I cannot imagine that an element of the "diverse experience" which the Board seeks includes walking away from two senior management positions. As for Ms. Fudge's vaunted product management skills, I think we can cover that base adequately with either Mr. Lafley or Mr. Immelt.

You'll eat those Greenville grits without me, but next year's venue may offer more appealing fare.

Best personal regards,

Dennis W. Rocheleau

FISMA & OMB Memorandum M-07-16

P.S. If Ms. Fudge could part company with Marriott and Honeywell as a director, why can't we say goodbye too?

EXHIBIT J

August 2, 2007

Rochelle B. Lazarus
Ralph S. Larsen
A.G. Lafley
Andrea Jung
Claudio X. Gonzalez
Susan Hockfield
Douglas A. Warner, III

General Electric Company
3135 Easton Turnpike
Fairfield, CT 06828

Ladies and Gentlemen:

Over the past two years I have expressed to both GE's CEO and General Counsel my misgivings about our Board's composition. Recently when I suggested that Ms. Fudge should have submitted her resignation in light of her changing responsibilities at Young and Rubican Brands, I was told that I had misinterpreted GE's governance principles.

Accordingly, I now intend to clarify those principles and pursue Ms. Fudge's removal by means of shareowner proposals at the 2008 Annual Meeting. In pursuit of that objective, I have several questions to which I would appreciate answers in order to conduct this process with a maximum of civility and a minimum of confusion.

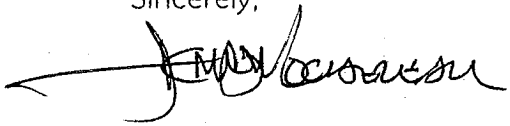
Please provide written answers to the following questions at your earliest convenience. If you do not answer any question, I would appreciate a written explanation for that stance.

1. Does the Nominating & Governance Committee (hereinafter N&GC) utilize internal interpretative guidelines for its governance principles? If so, please provide same for "3. Qualifications", and, in particular, the sentence "Directors should offer their resignation in the event of any significant change in their personal circumstances, including a change in their principal job responsibilities."
2. If such guidelines exist, when were they first written and applied?
3. When Ms. Fudge's responsibilities at Y&R Brands changed, did she submit her resignation? If not, why not?
4. Does "N&GC" believe it has the power to waive the standards of the governance principles, particularly "3. Qualifications"? If so, under what theory or authority?
5. Has any sitting Board member ever not been re-nominated unless disqualified by age or prior resignation or death? If so, what is the history or record of such actions over the past 25 years?

6. When evaluating candidates for the Board in 2006, when Ms. Hockfield was added, how many other candidates were considered by N&GC? What was the composition of that group, broken out by sex and race, and how many were suggested by shareowners not on the Board?
7. At the time Ms. Fudge was added to the Board, what was the race and gender mix of her "considered" competitors and was her then organizational superior, Betsy Holden, among them?

Thank you for your consideration of my requests for information. If you would like to have a dialogue on this matter prior to next year's Annual Meeting, I would welcome the opportunity to discuss my issues and concerns with you individually or collectively or with your designated representative.

Sincerely,

A handwritten signature in black ink, appearing to read "Dennis W. Rocheleau", with a long horizontal stroke extending to the left.

Dennis W. Rocheleau

*** Redacted - FISMA ***

ATTACHMENT C



DIVISION OF
CORPORATION FINANCE

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

March 5, 2009

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.



O'MELVENY & MYERS LLP

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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

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."

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 issuer³ -- would, by definition, “weaken” a plaintiff’s “ability to recover under the Exchange Act.”

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).

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.

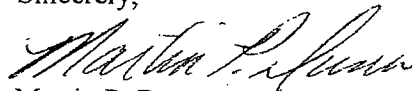
III. CONCLUSION

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 Ternier, 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
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*** FISMA & OMB Memorandum M-07-16 ~~Home~~ OMB Memorandum | Fax (360) 666-6483

January 13, 2009

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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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*** FISMA & OMB Memorandum M-07-163
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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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*** FISMA & OMB Memorandum M-07-031 ***
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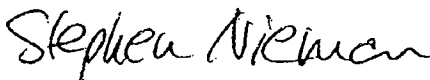
Mr. William Ayer
Chairman and CEO
Alaska Air Group, Inc.
PO Box 68947
Seattle, WA 98168

Re: My Rule 14a-8 Proposal

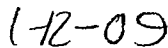
Dear Mr. Ayer,

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



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


Date

Terry K. Dayton

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

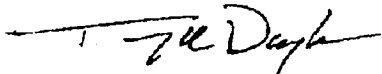
Mr. William Ayer
Chairman and CEO
Alaska Air Group, Inc.
PO Box 68947
Seattle, WA 98168

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

STEVE NIEMAN, President
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15204 NE 181st Loop, Brush Prairie, WA 98606

*** FISMA & OMB Memorandum # 07-03002 OMB Memorandum # 07-03002 fax (360) 666-6483

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

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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 10b-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. *** 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
The Ownership Union® | www.ourunion.org
15204 NE 181st Loop, Brush Prairie, WA 98606

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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'MELVENY & MYERS LLP

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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

- I. 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 Division'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

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

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

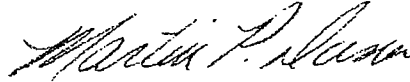
Based upon the analysis in Section I, above, we believe that the Company may exclude all three of the Proposals from its 2009 Proxy Materials in reliance on Rule 14a-8(c) and (f). As such, on behalf of the Company, we respectfully request that the Division concur in our view and not recommend enforcement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

O'MELVENY & MYERS LLP
Alaska Air Group, Inc.
December 31, 2008 - Page 18

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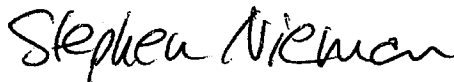
Mr. William Ayer
Chairman and CEO
Alaska Air Group, Inc.
PO Box 68947
Seattle, WA 98168

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



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



Date

Terry K. Dayton

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

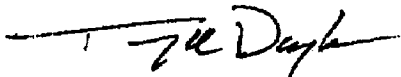
**Mr. William Ayer
Chairman and CEO
Alaska Air Group, Inc.
PO Box 68947
Seattle, WA 98168**

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

STEVE NIEMAN, President
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*** FISMA & OMB Memorandum M-07-104 home OMB Memorandum M-07-104 fax (360) 666-6483

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

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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. Segul*, 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.



O'MELVENY & MYERS LLP

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December 31, 2008

OUR FILE NUMBER
11140-0014

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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 Division'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

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

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).

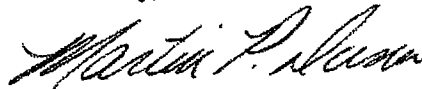
III. CONCLUSION

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:

- o 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 ***

~~HM:~~ FISMA & OMB Memorandum M-07-16 ***

~~FA:~~ 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,



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



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:

- o **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 ***

*** ~~FIM~~ & OMB Memorandum M-07-16 ***

*** ~~F&M~~ & 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)



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
proposal.**

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

submitted this

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:

- o 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:

- o 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.

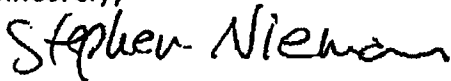
Please direct all future communication to Mr. Foley at:

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

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

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

Sincerely,



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:

- o 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.

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

TELEPHONE (949) 760-9600
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SAN FRANCISCO
SHANGHAI
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SINGAPORE
TOKYO
WASHINGTON, D.C.

December 12, 2008

OUR FILE NUMBER
600,000-10

SENT VIA CERTIFIED MAIL.

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

AND FACSIMILE & OMB Memorandum M-07-16 ***

WRITER'S DIRECT DIAL
(949) 823-6980

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

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.

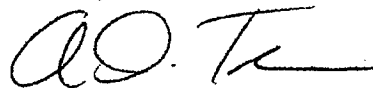
O'MELVENY & MYERS LLP

Mr. Richard D. Foley - December 12, 2008 - Page 2

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

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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

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EXHIBIT C

STEVE NIEMAN, President
The Ownership Union® | www.ourunion.org
15204 NE 181st Loop, Brush Prairie, WA 98606

*** FISMA & OMB Memorandum M-07-114 Home OMB Memorandum M-07-10447 fax (360) 666-6483

December 19, 2008

Mr. Andor D. Turner, 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. Turner:

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
CIO OM*MM

Date: 12-19-08

Fax No: (949)823-6994

From: Steve Nieman

Cover Plus: |

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

Notes:

EXHIBIT D

Alaska Air Group, Inc.

VIA EMAIL

December 2, 2008

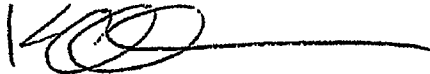
Mr. Stephen Nieman
15204 NE 181st Loop
Brush Prairie, WA 98606

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

EXHIBIT L

From: [John Chevedden](#)
To: [Jeffries, Ross E. - Legal](#); [Walter, Geoffrey E.](#)
Subject: (BAC)
Date: Sunday, November 21, 2021 11:26:36 PM

[WARNING: External Email]

Mr. Jeffries,

Mr. Steiner and I both intend to follow the new rules which are so new that there are no precedents yet to learn from in the no action process that fit close enough.

In his effort to follow the new rules Mr. Steiner submitted his proposal directly to Bank of America management on October 26, 2021 – well before the due date.

I do not represent Mr. Steiner's 2022 Bank of America rule 14a-8 proposal.

John Chevedden

December 19, 2021

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

1 Rule 14a-8 Proposal
Bank of America Corporation (BAC)
Management Pay Clawback Authorization
John Chevedden

Ladies and Gentlemen:

This is a counterpoint to the December 17, 2021 no-action request.

Management discusses *General Electric* and *Alaska Air* on page 11. However these cases did not involve 2 persons who each had more than 2 decades experience with rule 14a-8 proposals. These cases did not involve 2 persons who separately became interested in rule 14a-8 proposals more than 2 decades prior.

Sincerely,



John Chevedden

cc: Kenneth Steiner

Ross Jeffries <ross.jeffries@bankofamerica.com>

January 2, 2022

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

2 Rule 14a-8 Proposal
Bank of America Corporation (BAC)
Management Pay Clawback Authorization
John Chevedden

Ladies and Gentlemen:

This is a counterpoint to the December 17, 2021 no-action request.

Management did not have the confidence to test its absurd claim that Mr. Steiner is not the "driving force" behind his Independent Board Chairman proposal by accepting an offer to meet with Mr. Steiner. No company that has made a similar 2022 claim has accepted an offer from Mr. Steiner to meet.

It is absurd to claim that Mr. Steiner is not the driving force behind his Independent Board Chairman proposals given that Mr. Steiner has sponsored more than 100 proposals on this topic.

Rule 14a-8 provides that an inadvertent mistake can be cured:

"(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? (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 § 240.14a-8 and provide you with a copy under Question 10 below, § 240.14a-8(j)."

Sincerely,


John Chevedden

cc: Kenneth Steiner
Ross Jeffries

From: [Kenneth Steiner](#)
To: [ShareholderProposals](#); ross.jeffries@bankofamerica.com; [olmsted](#)
Subject: #1 Rule 14 a-8 Proposal Counterpoint for Bank of America (BAC) Independent Board Chairman from Kenneth Steiner
Date: Saturday, January 15, 2022 11:37:26 AM
Attachments: [15012022.pdf](#)

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Kenneth Steiner

January 15, 2022

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

1 Rule 14a-8 Proposal
Bank of America Corporation (BAC)
Independent Board Chairman
Kenneth Steiner

Ladies and Gentlemen:

This is a counterpoint to the December 17, 2021 no-action request.

Attached is evidence that I submitted my rule 14a-8 proposal directly to the Company prior to the due date.

Attached is evidence that I timely submitted my broker letter directly to the Company.

Sincerely,

Kenneth Steiner

cc: John Chevedden

From: Kenneth Steiner [REDACTED]
Subject: Rule 14a-8 proposal Bank of America (BAC)

Date: October 26, 2021 at 4:34:25 PM PDT

To: bac_[REDACTED], ross.jeffries@[REDACTED]
ellen.perrin@[REDACTED], kristin.gest@[REDACTED]

Dear Mr. Jeffries,

Please see the attached rule 14a-8 proposal to improve corporate governance and enhance long term shareholder value at de minimis upfront cost, especially considering the substantial market capitalization of the company.

If you confirm proposal receipt in the next day a broker letter can be promptly forwarded that will save you from making a formal request.

Sincerely,

Kenneth Steiner

Kenneth Steiner

PII

Mr. Ross Jeffries
Corporate Secretary
Bank of America Corporation (BAC)
100 North Tryon Street
Charlotte, North Carolina 28255

Dear Mr. Jeffries,

I purchased stock in our company because I believed our company had potential for improved performance. My attached Rule 14a-8 proposal is submitted in support of the long-term performance of our company. This Rule 14a-8 proposal is submitted as a low-cost method to improve company performance.

My proposal is for the next annual shareholder meeting. I intent to continue to hold through the date of the Company's 2022 Annual Meeting of Stockholders the requisite amount of Company shares used to satisfy the applicable ownership requirement.

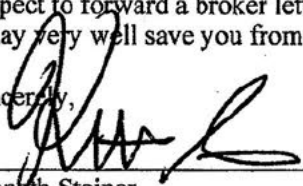
My submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication. This is my proxy for John Chevedden and/or his designee to forward this Rule 14a-8 proposal to the company and to act on my behalf regarding this Rule 14a-8 proposal, and/or modification of it, for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting. Please direct all future communications regarding my rule 14a-8 proposal to John Chevedden at:

to facilitate prompt and verifiable communications. Please identify this proposal as my proposal exclusively.

This letter does not cover proposals that are not rule 14a-8 proposals. This letter does not grant the power to vote. Your consideration and the consideration of the Board of Directors is appreciated in support of the long-term performance of our company. Please acknowledge receipt of my proposal promptly by email to PII

I expect to forward a broker letter soon so if you acknowledge this proposal promptly in an email message it may very well save you from requesting a broker letter from me.

Sincerely,


Kenneth Steiner

Date

10/12/21

cc: Ellen Perrin
Assistant Secretary
Kristen Gest
<bac
Gale Chang

BAC – Rule 14a-8 Proposal, October 25, 2021
[This line and any line above it – *Not* for publication.]

Proposal 4 – Independent Board Chairman

The shareholders request that the Board of Directors adopt as policy, and amend the governing documents as necessary, to require the Chair of the Board of Directors to be an independent member of the Board.

This proposal topic won 52% support at Boeing and 54% support at Baxter International in 2020. Boeing then adopted this proposal topic in June 2020. The roles of Chairman and CEO are fundamentally different and should be held by 2 directors, a CEO and a Chairman who is completely independent of the CEO and our company.

With the current CEO serving as Chair this means giving up a substantial check and balance safeguard that can only occur with an independent Board Chairman.

A lead director is no substitute for an independent board chairman. A lead director cannot call a special shareholder meeting and cannot even call a special meeting of the board. A lead director can delegate most of his lead director duties to the CEO office and then simply rubber-stamp it. There is no way shareholders can be sure of what goes on.

The lack of an independent Board Chairman is an unfortunate way to discourage new outside ideas and an unfortunate way to encourage the CEO to pursue pet projects that would not stand up to effective oversight.

One sign that Bank of America management does not believe in real engagement with its shareholders is that BAC management gives its shareholders “help” to make sure shareholders vote the approved management way. BAC management routinely spends company money to publish a voting guide for dummies shortly before the annual meeting. What is the point of shareholder engagement if management is routinely stacking the deck in favor of the management approved way?

This proposal topic won 30% Bank of America shareholder support in 2018 in spite of the 2018 management edition of the voting guide for dummies.

If an independent director is not available from inside or outside the company then a non-independent director from inside or outside the company, other than the CEO, can be named as Chairman for a term of 3 months to 6 months. This policy could be phased in when there is a contract renewal for our current CEO or for the next CEO transition.

Please vote yes:

Independent Board Chairman – Proposal 4

[The line above – *Is* for publication. Please assign the correct proposal number in the 2 places.]

Notes:

"Proposal 4" stands in for the final proposal number that management will assign.


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

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:

- the company objects 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.

We believe that it is appropriate under rule 14a-8 for companies to address these objections in their statements of opposition.

See also: Sun Microsystems, Inc. (July 21, 2005).

The stock supporting this proposal 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 .

The color version of the below graphic is to be published immediately after the bold title line of the proposal.

Will consider withdrawal of the graphic if management commits to a fair presentation of the proposal which includes:

- No management graphic in connection with the rule 14a-8 proposals in the proxy or ballot.
- No proxy or ballot text suggesting that the proposal will be moot due to lack of presentation.
- No ballot electioneering text repeating the negative management recommendation.
- Management will give me the opportunity to correct any typographical errors.
- Management will give me advance notice if it does a special solicitation that mentions this proposal.



FOR

*Shareholder
Rights*

From: Kenneth Steiner <[REDACTED]>
Subject: Broker letter for Kenneth Steiner Rule 14a-8 proposal from Kenneth Steiner for Bank of America (BAC)
Date: November 18, 2021 at 3:58:27 PM PST
To: ross.jeffries@[REDACTED], rmueller@[REDACTED]

Dear Mr. Jeffries and Mr Mueller,

Please see the attached broker letter.
Please confirm receipt.



November 3, 2021

Kenneth Steiner
[REDACTED]
[REDACTED]

Re: Your TD Ameritrade account ending in [REDACTED]

Dear Kenneth Steiner,

Pursuant to your request, this letter is to confirm that as of the date of this letter, Mr. Kenneth Steiner held and has held continuously, in the above referenced account, since at least September 1, 2018, at least 200 shares each of the following securities:

Bank of America Corporation (BAC)
American Express Company (AXP)
E.I. du Pont de Nemours and Company (DD)
Howmet Aerospace Inc. (HWM) (Was Arconic Inc.)
TETRA Technologies, Inc. (TTI) (1000 shares)

The DTC clearinghouse number for TD Ameritrade is 0188.

If we can be of any further assistance, please let us know. Just log in to your account and go to Client Services > Message Center to write us. You can also call Client Services at 800-669-3900. We're available 24 hours a day, seven days a week.

Sincerely,

William Walker
Resource Specialist
TD Ameritrade

TD Ameritrade understands the importance of protecting your privacy. From time to time we need to send you notifications like this one to give you important information about your account. If you've opted out of receiving promotional marketing communications from us, containing news about new and valuable TD Ameritrade services, we will continue to honor your request.

Market volatility, volume, and system availability may delay account access and trade execution.

TD Ameritrade, Inc., member FINRA/SIPC (www.finra.org, www.sipc.org), a subsidiary of The Charles Schwab Corporation. TD Ameritrade is a trademark jointly owned by TD Ameritrade IP Company, Inc. and The Toronto-Dominion Bank. © 2021 Charles Schwab & Co. Inc. All rights reserved.

Distributed by TD Ameritrade, Inc., 200 South 108th Avenue, Omaha, NE 68154-2631.

TDA 1002212 02/21

From: [Kenneth Steiner](#)
To: [ShareholderProposals](#); ross.jeffries@bankofamerica.com; [olmsted](#)
Subject: #2 Rule 14 a-8 Proposal Counterpoint for Bank of America BAC Independent Board Chairman from Kenneth Steiner
Date: Monday, January 17, 2022 12:14:48 AM

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Kenneth Steiner

January 16, 2022

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

2 Rule 14a-8 Proposal
Bank of America Corporation (BAC)
Independent Board Chairman
Kenneth Steiner

Ladies and Gentlemen:

This is a counterpoint to the December 17, 2021 no-action request.

The November 6, 2021 deficiency letter may be defective. The company provided no precedent that would purportedly show that a rule 14a-8 proposal is not entitled to a separate deficiency notice.

I submitted my proposal directly to the company. It would seem that I should be entitled to a separate deficiency notice focused exclusively on my proposal.

The November 6, 2021 deficiency letter does not separate out specifically what I purportedly needed to do.

Sincerely,

Kenneth Steiner

cc: John Chevedden

Ross Jeffries

January 17, 2022

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

3 Rule 14a-8 Proposal
Bank of America Corporation (BAC)
Management Pay Clawback Authorization
John Chevedden


Ladies and Gentlemen:

This is a counterpoint to the December 17, 2021 no-action request.

The November 6, 2021 deficiency letter is defective. Its primary purpose is to trigger a withdrawal of a rule 14a-8 proposal without the effort of submitting a no action request. It is based on a wish list interpretation of rule 14a-8(c).

Thus the November 6, 2021 deficiency letter fails to give the proponents all the options they have to cure any purported defects.

Sincerely,


John Chevedden

cc: Kenneth Steiner
Ross Jeffries

January 19, 2022

VIA E-MAIL

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

Re: *Bank of America Corporation*
Supplemental Letter Regarding Shareholder Proposals of John Chevedden/Kenneth Steiner
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

On December 17, 2021, we submitted a letter (the “No-Action Request”) on behalf of our client, Bank of America Corporation (the “Company”), to inform the staff of the Division of Corporation Finance (the “Staff”) of the Securities and Exchange Commission (the “Commission”) that the Company intends to omit from its proxy statement and form of proxy for its 2022 Annual Meeting of Shareholders (collectively, the “2022 Proxy Materials”) two shareholder proposals: the first entitled “Management Pay Clawback Authorization” (the “First Proposal”) submitted directly by John Chevedden (“Chevedden”) and the second entitled “Independent Board Chairman” (the “Second Proposal” and, together with the First Proposal, the “Proposals”) submitted to the Company by Chevedden on behalf of Kenneth Steiner (“Steiner”). The No-Action Request sets forth the basis for our view that the Proposals properly may be excluded from the 2022 Proxy Materials because Chevedden exceeded the one-proposal limitation of Rule 14a-8(c).

This supplemental letter responds to subsequent correspondence from Chevedden and Steiner.

The Subsequent Correspondence.

On January 2, 2022, Chevedden submitted a response to the No-Action Request (the “Response”), a copy of which is attached hereto as Exhibit S-1. In the Response, Chevedden claims that Steiner is the “driving force” behind the Second Proposal and that the Company did not accept “an offer to meet with Steiner.”

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January 19, 2022
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On January 15, 2022, Steiner copied the Company on email correspondence to the Staff, a copy of which is attached hereto as Exhibit S-2, which Steiner states is “evidence that I submitted my rule 14a-8 proposal directly to the Company prior to the due date” and “evidence that I timely submitted my broker letter directly to the Company.” On January 17, 2022, Steiner copied the Company on email correspondence to the Staff, a copy of which is attached hereto as Exhibit S-3, raising concerns of a possible defect with the November 6, 2021 deficiency notice that was sent to both Chevedden and Steiner (the “Deficiency Notice,” attached to the No-Action Request as Exhibit E), which among other things stated that the Proposals violated the one-proposal limit of Rule 14a-8(c). Specifically, Steiner states, “It would seem that I should be entitled to a separate deficiency notice focused exclusively on my proposal.”

Response and Analysis

We continue to believe that the Proposals are excludable under Rule 14a-8(c) because Chevedden failed to cure the deficiency of submitting multiple proposals despite receiving timely notice from the Company of the one-proposal limitation in Rule 14a-8(c), and Chevedden’s misleading and inapposite statements in the Response offer no evidence to the contrary.

Chevedden’s claim in the Response that the Company failed to accept an offer to meet with Steiner is misleading because Steiner never offered to meet with the Company. As discussed in more detail in the No-Action Request, on October 26, 2021, the Company received an email from Steiner’s email address consisting of a letter authorizing Chevedden “to act on [Steiner’s] behalf regarding this Rule 14a-8 proposal, and/or modification of it, for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting.” See Exhibit C to the No-Action Request, attached for convenience as Exhibit S-4 to this letter. Neither this email nor the materials attached to the email contained any offer to meet with the Company. On November 10 and November 17, 2021, the Company received additional emails from Steiner’s email address. See Exhibit S-5 to this letter. Like the first email, these emails did not include an offer to meet with the Company. In short, contrary to Chevedden’s assertion in the Response, Steiner has never offered to meet with the Company. The Company would gladly meet with Steiner or Chevedden to discuss the Proposals; to date Chevedden has not responded to the Company’s request by email on January 3, 2022 to meet with him.

Importantly, whether Steiner offered to meet with the Company has no bearing on the issue at hand. As explained in the No-Action Request, it was Chevedden’s actions, not Steiner’s, that violates the one-proposal limitation in Rule 14a-8(c): Chevedden submitted

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the First Proposal and he then accepted appointment as Steiner's representative for the Second Proposal and, exercising that authority, Chevedden submitted a revised version of the Second Proposal to the Company, which he has never withdrawn. Through these actions, Chevedden has violated Rule 14a-8(c), under which "a shareholder-proponent will not be permitted to submit one proposal in his or her own name and simultaneously serve as a representative to submit a different proposal on another shareholder's behalf for consideration at the same meeting." Exchange Act Release No. 34-89964 (Sept. 23, 2020) (the "Adopting Release"), at 58. As such, contrary to the statement in Steiner's January 17 email, the Deficiency Notice (which, regardless, Steiner was copied on, received, and responded to with respect to his proof of share ownership) was properly addressed to Chevedden. It is Chevedden's failure to correct his violation of the one-proposal limitation in Rule 14a-8(c) by withdrawing one of the Proposals, despite receiving timely notice of the deficiency from the Company pursuant to Rule 14a-8(f) (and follow up correspondence providing Chevedden additional opportunities to cure), that provides the basis for exclusion of the Proposals.¹

As stated in the No-Action Request, we believe that the language of Rule 14a-8(c), the Commission's rationale and statements leading to its adoption, and the Staff's long-standing interpretations of the "one-proposal" rule all demonstrate that the one-proposal rule is applicable in the present circumstance, and accordingly that the Proposals can be omitted.

In the Adopting Release, the Commission explained the reason for the one-proposal rule:

As the Commission explained when it adopted the one-proposal restriction in 1976, the submission of multiple proposals by a single proponent "constitute[s] an unreasonable exercise of the right to submit proposals at the expense of other shareholders" and also may "tend to obscure other material matters in the proxy statement of issuers, thereby reducing the effectiveness of such documents." . . . We believe permitting representatives to submit multiple proposals for the same shareholders' meeting can give rise to the same concerns about the expense and obscuring effect of including multiple proposals in the company's proxy materials, thereby undermining the purpose of the one-proposal limit.

The Commission has explained and defended its rationale for extending Rule 14a-8(c) to apply to representatives in its brief in *Interfaith Center On Corporate Responsibility*,

¹ Because the Second Proposal violated Rule 14a-8(c), there was no need for the Company to address the failure to satisfy the engagement provision of Rule 14a-8(b)(1)(iii).

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James McRitchie, and As You Sow v. SEC, (D.D.C. No. 1:21-cv-01620-RBW Nov. 19, 2021) (the “*Commission Brief*”):

The Commission reasonably concluded that this “reasoning applies equally to representatives who submit proposals on behalf of shareholders they represent.” *Id.* When a representative appears to be the driving force behind a proposal, the Commission explained, it may be that the proposal is “primarily of interest to the representative, with only an acquiescent interest by the shareholder.” *Id.* at 70,250. And because representatives are not covered by the one-proposal limit, a shareholder could circumvent the limit by submitting “one proposal personally and additional proposals as a representative” or “multiple proposals as a representative” on behalf of such acquiescent shareholders. 84 Fed. Reg. at 66,468.

Commission Brief, at pages 37-38. As stated in the Adopting Release, “When a representative speaks and acts for a shareholder, there may be a question as to whether the shareholder has a genuine and meaningful interest in the proposal, or whether the proposal is instead primarily of interest to the representative, with only an acquiescent interest by the shareholder.” Instead of requiring companies or the Staff to make a factual determination of whether the shareholder or the representative is the true proponent of a proposal, the Commission reasonably extended Rule 14a-8(c) to apply equally to representatives.

Once a person agrees to act as a representative, as Chevedden did when he sent the Company the revised Second Proposal, and speaks and acts for a shareholder, as Chevedden has done here, that person is, in the words of Rule 14a-8(c), “rely[ing] on the securities holdings of another person for the purpose of meeting the eligibility requirements” and therefore is prohibited from “submitting multiple proposals for a particular shareholders' meeting.”²

² As discussed in the No-Action Request, Chevedden did not simply assist Steiner with drafting the proposal, advising on steps in the submission process, and engaging with the company. Instead, Steiner wholly turned all responsibility over to Chevedden as his proxy with respect to the proposal and gave Chevedden full authority “to act on [Steiner’s] behalf regarding this Rule 14a-8 proposal, and/or modification of it, for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting.” And Chevedden thereafter acted upon that authorization by submitting the revised version of the Second Proposal and engaging directly with the Company with respect to the Proposal (as he has continued to do to the present).

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Moreover, as discussed in the No-Action Request, it would be inconsistent with the language of Rule 14a-8(c), the Commission’s rationale and statements leading to its adoption, and the Staff’s long-standing interpretations of the “one-proposal” rule³ (which the Commission can be presumed to have been familiar with)⁴, as well as impractical on an administrative level,⁵ to apply the one-proposal limit based on who transmits a proposal to the Company. Indeed, the express language of Rule 14a-8(c) applies regardless of whether a shareholder or representative acts “directly or indirectly.” If a shareholder authorizes two different representatives to each send a company different proposals for the same annual meeting, that shareholder would be treated as having submitted two proposals “indirectly,” in violation of Rule 14a-8(c). In amending Rule 14a-8(c), “[t]he Commission reasonably concluded that this ‘reasoning applies equally to representatives,’” *Commission Brief* at 45, and accordingly the Commission amended that rule to apply to “[e]ach person” regardless of whether a shareholder or a representative, and regardless of whether acting “directly or indirectly.”⁶ A representative cannot rely on the indirect submission of a proposal to circumvent Rule 14a-8(c). The focus of the language in Rule 14a-8(c) is on whether the representative is “rely[ing] on the securities holdings of another person for the purpose of meeting the eligibility requirements” in order to present multiple proposals at a shareholder meeting; not on the physical act of who sends the proposal to the company and an

³ *Consolidated Freightways, Inc.* (Recon. avail. Feb. 23 1994); *Jefferson Pilot Corp.* (avail. Mar. 12, 1992).

⁴ When an administrative agency changes its existing position, an agency must at least “display awareness that it is changing position” and “show that there are good reasons for the new policy.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis deleted). In explaining its changed position, an agency must also be cognizant that longstanding policies may have “engendered serious reliance interests that must be taken into account.” *Ibid.*; see also *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742.

⁵ As noted in the No-Action Request, in many cases it is impossible to know or demonstrate who actually transmitted a proposal to a company.

⁶ Indeed, the Commission recognized that representatives “typically,” but not always, act directly to send a proposal to a company, but the Commission was equally concerned about the situation when the representative speaks and acts for the shareholder after the initial submission. *See Adopting Release* at 39 (“In practice, the representative *typically* submits the proposal to the company on the shareholder’s behalf along with necessary documentation After the initial submission, the representative often speaks for and acts on the shareholder’s behalf in connection with the matter. *When a representative speaks and acts for a shareholder*, there may be a question as to whether the shareholder has a genuine and meaningful interest in the proposal, or whether the proposal is instead primarily of interest to the representative, with only an acquiescent interest by the shareholder.” (emphasis added)).

Office of Chief Counsel
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artificially narrow interpretation of the term “submit” that ignores the Commission’s decision to apply the rule regardless of whether a person acts “directly or indirectly.”

Regardless, as discussed in the No-Action Request, the Proposals that are the subject of the No-Action Request were both sent to the Company by Chevedden. *See Exhibit B and Exhibit D* to the No-Action Request, attached as *Exhibit S-6* hereto. The Second Proposal, submitted by Chevedden, has not been withdrawn, notwithstanding Chevedden’s receiving notice pursuant to Rule 14a-8(f). Even though Steiner on November 10, 2021 stated that Chevedden “is not representing me,” that statement was made only after Chevedden and Steiner received the deficiency notice stating that the Second Proposal violated the one-proposal rule. As discussed in the No-Action Letter, it is well established through the *General Electric Co.* and *Alaska Air Group, Inc.* precedents cited in the No-Action Letter that once notified of a two-proposal deficiency, proponents cannot cure the issue by attempting to recharacterize their status *vis-à-vis* the two proposals; the only means to cure is to withdraw one of the two proposals.

Moreover, Chevedden has never withdrawn the Second Proposal that he sent to the Company as Steiner’s representative.⁷ In this respect, the situation differs from that considered in *Baxter International Inc.* (avail. Jan 12, 2021), where Chevedden withdrew the second proposal that had been submitted, so that the sole remaining issue was whether Steiner subsequently was acting as an *alter ego* for Chevedden.⁸ Here, after submitting his own proposal, Chevedden accepted appointment as Steiner’s representative and sent the Company the Second Proposal, and neither he nor Steiner have withdrawn that proposal. Having failed to respond to the Company’s deficiency notice under Rule 14a-8(f) (and to subsequent offers by the Company to allow Chevedden to withdraw the Second Proposal), Chevedden has failed to cure the Rule 14a-8(c) violation and therefore both Proposals are properly excludable under Rule 14a-8(c).

⁷ As stated in the No-Action Request, on November 8, 2021, Chevedden sent three emails to the Company, the last of which was an email from Chevedden with the word “RECALL” in the email subject line and in the body of the email, consisting of a typed but unsigned message appearing over Mr. Steiner’s name, and a copy of the original version of the Second Proposal. Chevedden’s November 8 email did not attach, address, or withdraw the Second Proposal that he sent to the Company as Steiner’s representative.

⁸ Similarly, in *IQVIA Holdings Inc.* (avail. Jan 12, 2021), the company sought to invoke Rule 14a-8(c) by claiming that Steiner and Chevedden were part of a “group” and that Steiner was “acting on behalf of, under the control of, or alter ego of” Chevedden.

Office of Chief Counsel
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Based upon the foregoing and the No-Action Request, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposals from its 2022 Proxy Materials. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8671 or Ross E. Jeffries, Jr., the Company's Corporate Secretary, at (980) 388-6878.

Sincerely,



Ronald O. Mueller

Enclosures

cc: Ross E. Jeffries Jr., Bank of America Corporation
John Chevedden
Kenneth Steiner

EXHIBIT S-1

From: John Chevedden [REDACTED]
Date: Sunday, Jan 02, 2022, 10:49 PM
To: Office of Chief Counsel <shareholderproposals@SEC.GOV>
Cc: Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>
Subject: #2 No Action Request Counterpoint `(BAC) [Sent To: ross.jeffries@bankofamerica.com]

Ladies and Gentlemen,
Please see the attached no action request counterpoint.

Sincerely,
John Chevedden

January 2, 2022

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

2 Rule 14a-8 Proposal
Bank of America Corporation (BAC)
Management Pay Clawback Authorization
John Chevedden

Ladies and Gentlemen:

This is a counterpoint to the December 17, 2021 no-action request.

Management did not have the confidence to test its absurd claim that Mr. Steiner is not the "driving force" behind his Independent Board Chairman proposal by accepting an offer to meet with Mr. Steiner. No company that has made a similar 2022 claim has accepted an offer from Mr. Steiner to meet.

It is absurd to claim that Mr. Steiner is not the driving force behind his Independent Board Chairman proposals given that Mr. Steiner has sponsored more than 100 proposals on this topic.

Rule 14a-8 provides that an inadvertent mistake can be cured:

"(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? (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 § 240.14a-8 and provide you with a copy under Question 10 below, § 240.14a-8(j)."

Sincerely,


John Chevedden

cc: Kenneth Steiner
Ross Jeffries

EXHIBIT S-2

From: Kenneth Steiner [REDACTED]
Sent: Saturday, January 15, 2022 11:37 AM
To: Shareholderproposals@sec.gov; Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>; olmsted [REDACTED]
Subject: #1 Rule 14 a-8 Proposal Counterpoint for Bank of America (BAC) Independent Board Chairman from Kenneth Steiner [Sent To: ross.jeffries@bankofamerica.com]

Kenneth Steiner

January 15, 2022

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

1 Rule 14a-8 Proposal
Bank of America Corporation (BAC)
Independent Board Chairman
Kenneth Steiner

Ladies and Gentlemen:

This is a counterpoint to the December 17, 2021 no-action request.

Attached is evidence that I submitted my rule 14a-8 proposal directly to the Company prior to the due date.

Attached is evidence that I timely submitted my broker letter directly to the Company.

Sincerely,

Kenneth Steiner

cc: John Chevedden

From: Kenneth Steiner [REDACTED]
Subject: Rule 14a-8 proposal Bank of America (BAC)

Date: October 26, 2021 at 4:34:25 PM PDT

To: bac_ [REDACTED], ross.jeffries@ [REDACTED]
ellen.perrin@ [REDACTED], kristin.gest@ [REDACTED]

Dear Mr. Jeffries,

Please see the attached rule 14a-8 proposal to improve corporate governance and enhance long term shareholder value at de minimis upfront cost, especially considering the substantial market capitalization of the company.

If you confirm proposal receipt in the next day a broker letter can be promptly forwarded that will save you from making a formal request.

Sincerely,

Kenneth Steiner

Kenneth Steiner

PII

Mr. Ross Jeffries
Corporate Secretary
Bank of America Corporation (BAC)
100 North Tryon Street
Charlotte, North Carolina 28255

Dear Mr. Jeffries,

I purchased stock in our company because I believed our company had potential for improved performance. My attached Rule 14a-8 proposal is submitted in support of the long-term performance of our company. This Rule 14a-8 proposal is submitted as a low-cost method to improve company performance.

My proposal is for the next annual shareholder meeting. I intent to continue to hold through the date of the Company's 2022 Annual Meeting of Stockholders the requisite amount of Company shares used to satisfy the applicable ownership requirement.

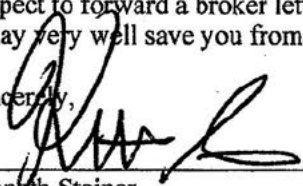
My submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication. This is my proxy for John Chevedden and/or his designee to forward this Rule 14a-8 proposal to the company and to act on my behalf regarding this Rule 14a-8 proposal, and/or modification of it, for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting. Please direct all future communications regarding my rule 14a-8 proposal to John Chevedden at:

to facilitate prompt and verifiable communications. Please identify this proposal as my proposal exclusively.

This letter does not cover proposals that are not rule 14a-8 proposals. This letter does not grant the power to vote. Your consideration and the consideration of the Board of Directors is appreciated in support of the long-term performance of our company. Please acknowledge receipt of my proposal promptly by email to PII

I expect to forward a broker letter soon so if you acknowledge this proposal promptly in an email message it may very well save you from requesting a broker letter from me.

Sincerely,


Kenneth Steiner

Date

10/12/21

cc: Ellen Perrin [REDACTED]
Assistant Secretary
Kristen Gest [REDACTED]
<bac [REDACTED]
Gale Chang [REDACTED]

BAC – Rule 14a-8 Proposal, October 25, 2021
[This line and any line above it – *Not* for publication.]

Proposal 4 – Independent Board Chairman

The shareholders request that the Board of Directors adopt as policy, and amend the governing documents as necessary, to require the Chair of the Board of Directors to be an independent member of the Board.

This proposal topic won 52% support at Boeing and 54% support at Baxter International in 2020. Boeing then adopted this proposal topic in June 2020. The roles of Chairman and CEO are fundamentally different and should be held by 2 directors, a CEO and a Chairman who is completely independent of the CEO and our company.

With the current CEO serving as Chair this means giving up a substantial check and balance safeguard that can only occur with an independent Board Chairman.

A lead director is no substitute for an independent board chairman. A lead director cannot call a special shareholder meeting and cannot even call a special meeting of the board. A lead director can delegate most of his lead director duties to the CEO office and then simply rubber-stamp it. There is no way shareholders can be sure of what goes on.

The lack of an independent Board Chairman is an unfortunate way to discourage new outside ideas and an unfortunate way to encourage the CEO to pursue pet projects that would not stand up to effective oversight.

One sign that Bank of America management does not believe in real engagement with its shareholders is that BAC management gives its shareholders “help” to make sure shareholders vote the approved management way. BAC management routinely spends company money to publish a voting guide for dummies shortly before the annual meeting. What is the point of shareholder engagement if management is routinely stacking the deck in favor of the management approved way?

This proposal topic won 30% Bank of America shareholder support in 2018 in spite of the 2018 management edition of the voting guide for dummies.

If an independent director is not available from inside or outside the company then a non-independent director from inside or outside the company, other than the CEO, can be named as Chairman for a term of 3 months to 6 months. This policy could be phased in when there is a contract renewal for our current CEO or for the next CEO transition.

Please vote yes:

Independent Board Chairman – Proposal 4

[The line above – *Is* for publication. Please assign the correct proposal number in the 2 places.]

Notes:

"Proposal 4" stands in for the final proposal number that management will assign.


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

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:

- the company objects 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.

We believe that it is appropriate under rule 14a-8 for companies to address these objections in their statements of opposition.

See also: Sun Microsystems, Inc. (July 21, 2005).

The stock supporting this proposal 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 

The color version of the below graphic is to be published immediately after the bold title line of the proposal.

Will consider withdrawal of the graphic if management commits to a fair presentation of the proposal which includes:

- No management graphic in connection with the rule 14a-8 proposals in the proxy or ballot.
- No proxy or ballot text suggesting that the proposal will be moot due to lack of presentation.
- No ballot electioneering text repeating the negative management recommendation.
- Management will give me the opportunity to correct any typographical errors.
- Management will give me advance notice if it does a special solicitation that mentions this proposal.



FOR

**Shareholder
Rights**

From: Kenneth Steiner <[REDACTED]>
Subject: Broker letter for Kenneth Steiner Rule 14a-8 proposal from Kenneth Steiner for Bank of America (BAC)
Date: November 18, 2021 at 3:58:27 PM PST
To: ross.jeffries@[REDACTED], rmueller@[REDACTED]

Dear Mr. Jeffries and Mr Mueller,

Please see the attached broker letter.
Please confirm receipt.



November 3, 2021

Kenneth Steiner
[REDACTED]
[REDACTED]

Re: Your TD Ameritrade account ending in [REDACTED]

Dear Kenneth Steiner,

Pursuant to your request, this letter is to confirm that as of the date of this letter, Mr. Kenneth Steiner held and has held continuously, in the above referenced account, since at least September 1, 2018, at least 200 shares each of the following securities:

Bank of America Corporation (BAC)
American Express Company (AXP)
E.I. du Pont de Nemours and Company (DD)
Howmet Aerospace Inc. (HWM) (Was Arconic Inc.)
TETRA Technologies, Inc. (TTI) (1000 shares)

The DTC clearinghouse number for TD Ameritrade is 0188.

If we can be of any further assistance, please let us know. Just log in to your account and go to Client Services > Message Center to write us. You can also call Client Services at 800-669-3900. We're available 24 hours a day, seven days a week.

Sincerely,

William Walker
Resource Specialist
TD Ameritrade

TD Ameritrade understands the importance of protecting your privacy. From time to time we need to send you notifications like this one to give you important information about your account. If you've opted out of receiving promotional marketing communications from us, containing news about new and valuable TD Ameritrade services, we will continue to honor your request.

Market volatility, volume, and system availability may delay account access and trade execution.

TD Ameritrade, Inc., member FINRA/SIPC (www.finra.org, www.sipc.org), a subsidiary of The Charles Schwab Corporation. TD Ameritrade is a trademark jointly owned by TD Ameritrade IP Company, Inc. and The Toronto-Dominion Bank. © 2021 Charles Schwab & Co. Inc. All rights reserved.

Distributed by TD Ameritrade, Inc., 200 South 108th Avenue, Omaha, NE 68154-2631.

TDA 1002212 02/21

EXHIBIT S-3

From: Kenneth Steiner [REDACTED]

Date: Monday, Jan 17, 2022, 12:14 AM

To: Shareholderproposals@sec.gov <Shareholderproposals@sec.gov>, Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>, olmsted [REDACTED]

Subject: #2 Rule 14 a-8 Proposal Counterpoint for Bank of America BAC Independent Board Chairman from Kenneth Steiner [Sent To: ross.jeffries@bankofamerica.com]

Kenneth Steiner

January 16, 2022

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

2 Rule 14a-8 Proposal
Bank of America Corporation (BAC)
Independent Board Chairman
Kenneth Steiner

Ladies and Gentlemen:

This is a counterpoint to the December 17, 2021 no-action request.

The November 6, 2021 deficiency letter may be defective. The company provided no precedent that would purportedly show that a rule 14a-8 proposal is not entitled to a separate deficiency notice.

I submitted my proposal directly to the company. It would seem that I should be entitled to a separate deficiency notice focused exclusively on my proposal.

The November 6, 2021 deficiency letter does not separate out specifically what I purportedly needed to do.

Sincerely,

Kenneth Steiner

cc: John Chevedden

Ross Jeffries

EXHIBIT S-4

From: Kenneth Steiner [REDACTED]

Date: Tuesday, Oct 26, 2021, 7:34 PM

To: Ross Jeffries - Bank of America Corporate Secretary <bac_corporate_secretary@bofa.com>, Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>, ellen.perrin@bankofamerica.com <ellen.perrin@bankofamerica.com>, kristin.gest@bofa.com <kristin.gest@bofa.com>, gale.chang@bankofamerica.com <gale.chang@bankofamerica.com>

Subject: Rule 14a-8 proposal Bank of America (BAC) [Sent To: ross.jeffries@bankofamerica.com]

Dear Mr. Jeffries,

Please see the attached rule 14a-8 proposal to improve corporate governance and enhance long term shareholder value at de minimis upfront cost, especially considering the substantial market capitalization of the company.

If you confirm proposal receipt in the next day a broker letter can be promptly forwarded that will save you from making a formal request.

Sincerely,

Kenneth Steiner

Kenneth Steiner

Mr. Ross Jeffries
Corporate Secretary
Bank of America Corporation (BAC)
100 North Tryon Street
Charlotte, North Carolina 28255
PH: 704-386-5681
FX: 704-625-4463
FX: 704-409-0350
FX: 704-625-4378
FX: 704-409-0985

Dear Mr. Jeffries,

I purchased stock in our company because I believed our company had potential for improved performance. My attached Rule 14a-8 proposal is submitted in support of the long-term performance of our company. This Rule 14a-8 proposal is submitted as a low-cost method to improve company performance.

My proposal is for the next annual shareholder meeting. I intent to continue to hold through the date of the Company's 2022 Annual Meeting of Stockholders the requisite amount of Company shares used to satisfy the applicable ownership requirement.

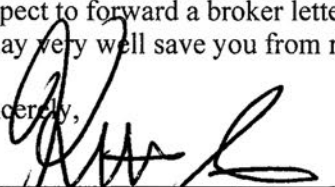
My submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication. This is my proxy for John Chevedden and/or his designee to forward this Rule 14a-8 proposal to the company and to act on my behalf regarding this Rule 14a-8 proposal, and/or modification of it, for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting. Please direct all future communications regarding my rule 14a-8 proposal to John Chevedden at:

[REDACTED]
to facilitate prompt and verifiable communications. Please identify this proposal as my proposal exclusively.

This letter does not cover proposals that are not rule 14a-8 proposals. This letter does not grant the power to vote. Your consideration and the consideration of the Board of Directors is appreciated in support of the long-term performance of our company. Please acknowledge receipt of my proposal promptly by email to [REDACTED]

I expect to forward a broker letter soon so if you acknowledge this proposal promptly in an email message it may very well save you from requesting a broker letter from me.

Sincerely,


Kenneth Steiner

Date

10/12/21

cc: Ellen Perrin <ellen.perrin@bankofamerica.com>
Assistant Secretary
Kristen Gest <kristen.gest@bofa.com>
<bac_corporate_secretary@bankofamerica.com>
Gale Chang <gale.chang@bankofamerica.com>

Proposal 4 – Independent Board Chairman

The shareholders request that the Board of Directors adopt as policy, and amend the governing documents as necessary, to require the Chair of the Board of Directors to be an independent member of the Board.

This proposal topic won 52% support at Boeing and 54% support at Baxter International in 2020. Boeing then adopted this proposal topic in June 2020. The roles of Chairman and CEO are fundamentally different and should be held by 2 directors, a CEO and a Chairman who is completely independent of the CEO and our company.

With the current CEO serving as Chair this means giving up a substantial check and balance safeguard that can only occur with an independent Board Chairman.

A lead director is no substitute for an independent board chairman. A lead director cannot call a special shareholder meeting and cannot even call a special meeting of the board. A lead director can delegate most of his lead director duties to the CEO office and then simply rubber-stamp it. There is no way shareholders can be sure of what goes on.

The lack of an independent Board Chairman is an unfortunate way to discourage new outside ideas and an unfortunate way to encourage the CEO to pursue pet projects that would not stand up to effective oversight.

One sign that Bank of America management does not believe in real engagement with its shareholders is that BAC management gives its shareholders “help” to make sure shareholders vote the approved management way. BAC management routinely spends company money to publish a voting guide for dummies shortly before the annual meeting. What is the point of shareholder engagement if management is routinely stacking the deck in favor of the management approved way?

This proposal topic won 30% Bank of America shareholder support in 2018 in spite of the 2018 management edition of the voting guide for dummies.

If an independent director is not available from inside or outside the company then a non-independent director from inside or outside the company, other than the CEO, can be named as Chairman for a term of 3 months to 6 months. This policy could be phased in when there is a contract renewal for our current CEO or for the next CEO transition.

Please vote yes:

Independent Board Chairman – Proposal 4

[The line above *Is* for publication. Please assign the correct proposal number in the 2 places.]

Notes:

"Proposal 4" stands in for the final proposal number that management will assign.

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

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:

- the company objects 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.

We believe that it is appropriate under rule 14a-8 for companies to address these objections in their statements of opposition.

See also: Sun Microsystems, Inc. (July 21, 2005).

The stock supporting this proposal 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

The color version of the below graphic is to be published immediately after the bold title line of the proposal.

Will consider withdrawal of the graphic if management commits to a fair presentation of the proposal which includes:

No management graphic in connection with the rule 14a-8 proposals in the proxy or ballot.

No proxy or ballot text suggesting that the proposal will be moot due to lack of presentation.

No ballot electioneering text repeating the negative management recommendation.

Management will give me the opportunity to correct any typographical errors.

Management will give me advance notice if it does a special solicitation that mentions this proposal.

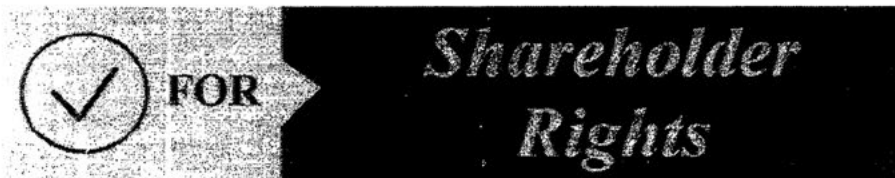


EXHIBIT S-5

From: Kenneth Steiner [REDACTED]
Sent: Wednesday, November 10, 2021 3:45 PM
To: Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>
Cc: Ross Jeffries - Bank of America Corporate Secretary <bac_corporate_secretary@bofa.com>; Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>; John Chevedden [REDACTED]
Subject: Kenneth Steiner Rule 14a-8 proposal

Mr. Jeffries,

I emailed my rule 14a-8 proposal directly to you on October 26, 2021.

I am the sole representative for this proposal.

Please copy Mr. John Chevedden on any messages regarding this proposal.

Mr. Chevedden is not representing me.

However he is not precluded from advising me by the new rules as I understand them.

From: Kenneth Steiner [REDACTED]
Date: Wednesday, Nov 17, 2021, 9:26 AM
To: Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>
Subject: Broker letter for rule 14a-8 proposal from Kenneth Steiner for Bank of America ((BAC) [Sent To: ross.jeffries@bankofamerica.com]

Dear Mr Jeffries,
Please see the attached broker letter below in the pdf

Please confirm receipt

Sincerely

EXHIBIT S-6

From: John Chevedden [REDACTED]
Sent: Monday, October 25, 2021 3:58 PM
To: Ross Jeffries - Bank of America Corporate Secretary <bac_corporate_secretary@bofa.com>
Cc: Ellen Perrin <ellen.perrin@bankofamerica.com>; Gest, Kristen - Legal <kristen.gest@bofa.com>; Gale Chang <gale.chang@bankofamerica.com>
Subject: Rule 14a-8 Proposal (BAC)``

Dear Mr. Jeffries,

Please see the attached rule 14a-8 proposal to improve corporate governance and enhance long-term shareholder value at de minimis up-front cost – especially considering the substantial market capitalization of the company.

If you confirm proposal receipt in the next day a broker letter can be promptly forwarded that will save you from making a formal request.

Sincerely,
John Chevedden

Mr. Ross Jeffries
Corporate Secretary
Bank of America Corporation (BAC)
100 North Tryon Street
Charlotte, North Carolina 28255

Dear Mr. Jeffries,

This Rule 14a-8 proposal is respectfully submitted in support of the long-term performance of our company.

This Rule 14a-8 proposal is intended as a low-cost method to improve company performance – especially compared to the substantial capitalization of our company.

This proposal is for the next annual shareholder meeting.

I intend to continue to hold through the date of the Company's 2022 Annual Meeting of Stockholders the requisite amount of Company shares used to satisfy the applicable ownership requirement.

This submitted format, with the shareholder-supplied emphasis, is intended to be used for definitive proxy publication.

Please assign the proper sequential proposal number in each appropriate place.

I expect to forward a broker letter soon so if you acknowledge this proposal in an email message it may very well save you from requesting a broker letter from me.

Sincerely,


John Chevedden


Date

cc: Ellen Perrin <ellen.perrin@bankofamerica.com>
Assistant Secretary
PH: 704-386-5681
FX: 704-625-4463
Ross Jeffries <ross.jeffries@bankofamerica.com>
Kristen Gest <kristen.gest@bofa.com>
Ross Jeffries <bac_corporate_secretary@bankofamerica.com>
FX: 704-409-0985
Gale Chang <gale.chang@bankofamerica.com>

[BAC: Rule 14a-8 Proposal, October 24, 2021]

[This line and any line above it – *Not* for publication.]

Proposal 4 – Management Pay Clawback Authorization

RESOLVED, shareholders urge the Board of Directors to provide for a General Clawback policy that a substantial portion of annual total compensation of Executive Officers, identified by the board, shall be deferred and be forfeited in part or in whole, at the discretion of Board, to help satisfy any monetary penalty associated with any violation of law regardless of any determined responsibility by any individual officer; and that this annual deferred compensation be paid to the officers no sooner than 3 years after the absence of any monetary penalty; and that any forfeiture and relevant circumstances be reported to shareholders in the annual meeting proxy.

This proposal shall apply to the Executive Officers, whether or not they were responsible for any associated monetary penalty. These provisions should operate prospectively and be implemented in a way that does not violate any contract, compensation plan, law or regulation.

For example on July 14, 2014, the Department of Justice “announced a \$7 billion settlement with Citigroup Inc. to resolve . . . claims related to Citigroup’s conduct in the . . . issuance of residential mortgage-backed securities (RMBS) prior to Jan. 1, 2009. The resolution includes a \$4 billion civil penalty – the largest penalty to date under the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). . . .

Citigroup acknowledged it made serious misrepresentations to the public.” This monetary penalty was borne by Citi shareholders who were not responsible for this unlawful conduct. Citi employees committed these unlawful acts. They did not contribute to this penalty payment, but instead undoubtedly received bonuses.

President William Dudley of the New York Federal Reserve outlined the utility of what he called a performance bond. “In the case of a large fine, the senior management . . . would forfeit their performance bond. . . . Each individual’s ability to realize their deferred debt compensation would depend not only on their own behavior, but also on the behavior of their colleagues. This would create a strong incentive for individuals to monitor the actions of their colleagues, and to call attention to any issues. . . . Importantly, individuals would not be able to “opt out” of the firm as a way of escaping the problem. If a person knew that something is amiss and decided to leave the firm, their deferred debt compensation would still be at risk.”

Please vote yes:

Management Pay Clawback Authorization – Proposal 4

[The line above – *Is* for publication. Please assign the correct proposal number in 2 places.]

Notes:

"Proposal 4" stands in for the final proposal number that management will assign.

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

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:

- the company objects 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.

We believe that it is appropriate under rule 14a-8 for companies to address these objections in their statements of opposition.

See also: Sun Microsystems, Inc. (July 21, 2005).

The stock supporting this proposal 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

The color version of the below graphic is to be published immediately after the bold title line of the proposal.

Will consider withdrawal of the graphic if management commits to a fair presentation of the proposal which includes:

No management graphic in connection with the rule 14a-8 proposals in the proxy or ballot.

No proxy or ballot text suggesting that the proposal will be moot due to lack of presentation.

No ballot electioneering text repeating the negative management recommendation.

Management will give me the opportunity to correct any typographical errors.

Management will give me advance notice if it does a special solicitation that mentions this proposal.



FOR

*Shareholder
Rights*

From: John Chevedden [REDACTED]

Sent: Sunday, October 31, 2021 11:23 PM

To: Ross Jeffries - Bank of America Corporate Secretary <bac_corporate_secretary@bofa.com>

Cc: Ellen Perrin <ellen.perrin@bankofamerica.com>; Gest, Kristen - Legal <kristen.gest@bofa.com>;
Gale Chang <gale.chang@bankofamerica.com>

Subject: Rule 14a-8 Proposal (BAC)`` REVISED

REVISED

Dear Mr. Jeffries,

Please see the attached rule 14a-8 proposal to improve corporate governance and enhance long-term shareholder value at de minimis up-front cost – especially considering the substantial market capitalization of the company.

Sincerely,
John Chevedden

Proposal 4 – Independent Board Chairman

The shareholders request that the Board of Directors adopt a policy, and amend the governing documents as necessary in order that 2 separate people hold the office of the Chairman and the office of the CEO as follows:

Selection of the Chairman of the Board The Board requires the separation of the offices of the Chairman of the Board and the Chief Executive Officer.

Whenever possible, the Chairman of the Board shall be an Independent Director.

The Board has the discretion to select a temporary Chairman of the Board who is not an Independent Director to serve while the Board is seeking an Independent Chairman of the Board.

If a temporary non-Independent Director is serving as Chairman of the Board at the time of any Company annual meeting of stockholders, the Company shall request that its stockholders vote on a proposal to ratify that a non-Independent Director continue to serve as Chairman of the Board while the Board is seeking an independent Chairman of the Board.

This proposal topic won 52% support at Boeing and 54% support at Baxter International in 2020. Boeing then adopted this proposal topic in June 2020. The roles of Chairman and CEO are fundamentally different and should be held by 2 directors, a CEO and a Chairman who is completely independent of the CEO and our company.

With the current CEO serving as Chair this means giving up a substantial check and balance safeguard that can only occur with an independent Board Chairman.

A lead director is no substitute for an independent board chairman. A lead director cannot call a special shareholder meeting and cannot even call a special meeting of the board. A lead director can delegate most of his lead director duties to the CEO office and then simply rubber-stamp it. There is no way shareholders can be sure of what goes on.

The lack of an independent Board Chairman is an unfortunate way to discourage new outside ideas and an unfortunate way to encourage the CEO to pursue pet projects that would not stand up to effective oversight.

One sign that Bank of America management does not believe in genuine engagement with its shareholders is that BAC management gives its shareholders extra “help” to make sure shareholders vote the management approved way. BAC management routinely spends company money to publish a voting guide for dummies shortly before the annual meeting. How can there be genuine shareholder engagement if management is routinely stacking the deck in favor of the management approved way to vote?

This proposal topic won 30% Bank of America shareholder support in 2018 in spite of the 2018 BAC management edition of the voting guide for dummies.

Please vote yes:

Independent Board Chairman – Proposal 4

[The line above – *Is* for publication. Please assign the correct proposal number in the 2 places.]

January 19, 2022

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

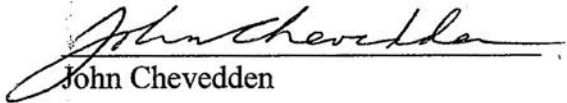
4 Rule 14a-8 Proposal
Bank of America Corporation (BAC)
Management Pay Clawback Authorization
John Chevedden

Ladies and Gentlemen:

This is a counterpoint to the December 17, 2021 no-action request.

Please see the attached pages which are from the company exhibits in the original no action request.

Sincerely,


John Chevedden

cc: Kenneth Steiner

Ross Jeffries

From: Kenneth Steiner [REDACTED]

Sent: Wednesday, November 10, 2021 3:45 PM

To: Jeffries, Ross E. - Legal [REDACTED]

Cc: Ross Jeffries - Bank of America Corporate Secretary <[REDACTED]>;

Jeffries, Ross E. - Legal [REDACTED]; John Chevedden [REDACTED]

Subject: Kenneth Steiner Rule 14a-8 proposal

Mr. Jeffries,

I emailed my rule 14a-8 proposal directly to you on October 26, 2021.

I am the sole representative for this proposal.

Please copy Mr. John Chevedden on any messages regarding this proposal.

Mr. Chevedden is not representing me.

However he is not precluded from advising me by the new rules as I understand them.

From: John Chevedden [REDACTED]

Date: Tuesday, Nov 16, 2021, 9:09 AM

To: Jeffries, Ross E. - Legal <[REDACTED]>

Cc: Kenneth Steiner [REDACTED]

Subject: (BAC)

Mr. Jeffries,

The only 2022 BAC rule 14a-8 proposal that I represent is my proposal.

I do not represent Mr. Steiner's 2022 BAC rule 14a-8 proposal.

John Chevedden

JOHN CHEVEDDEN

January 30, 2022

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

5 Rule 14a-8 Proposal
Bank of America Corporation (BAC)
Management Pay Clawback Authorization
John Chevedden

Ladies and Gentlemen:

This is a counterpoint to the December 17, 2021 no-action request.

The January 2, 2022 no action rebuttal stated:

"Management did not have the confidence to test its absurd claim that Mr. Steiner is not the 'driving force' behind his Independent Board Chairman proposal by accepting an offer to meet with Mr. Steiner. No company that has made a similar 2022 claim has accepted an offer from Mr. Steiner to meet."

Management disingenuously responded with this untimely message seeking a meeting that excluded Mr. Kenneth Steiner:

From: "Jeffries, Ross E. - Legal" <[REDACTED]>
Subject: RE: #2 No Action Request Counterpoint (BAC) [Sent To: [REDACTED]]
Date: January 3, 2022 at 3:22:54 PM PST
To: John Chevedden <[REDACTED]>

Mr. Chevedden: Happy New Year and I hope you had a peaceful holiday season.

If acceptable to you, I would like the opportunity to speak on the phone before Bank of America responds to your letter from yesterday. Is there a time that is convenient for you? I don't expect to take very much of your time.

Thank you,
Ross Jeffries

Management then claimed on January 19, 2022 that the above message helped its cause.

Sincerely,


John Chevedden

cc: Kenneth Steiner
Ross Jeffries

February 8, 2022

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

6 Rule 14a-8 Proposal
Bank of America Corporation (BAC)
Management Pay Clawback Authorization
John Chevedden

Ladies and Gentlemen:

This is a counterpoint to the December 17, 2021 no-action request.

Mr. Ross Jeffries telephoned the undersigned after the due date for 2022 proposals and asked whether Mr. Steiner's October 31, 2021 revised proposal was in play. Mr. Jeffries was told that that the unrevised October 25, 2021 proposal was the only 2022 proposal in play for Mr. Steiner.

Mr. Jeffries did not seek written confirmation and did not ask for a telephone call with Mr. Steiner to confirm this.

Sincerely,


John Chevedden

cc: Kenneth Steiner

Ross Jeffries

February 10, 2022

VIA E-MAIL

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

Re: *Bank of America Corporation*
Second Supplemental Letter Regarding Shareholder Proposals of John
Chevedden/Kenneth Steiner
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

On December 17, 2021, we submitted a letter (the “No-Action Request”) on behalf of our client, Bank of America Corporation (the “Company”), to inform the staff of the Division of Corporation Finance (the “Staff”) of the Securities and Exchange Commission (the “Commission”) that the Company intends to omit from its proxy statement and form of proxy for its 2022 Annual Meeting of Shareholders (collectively, the “2022 Proxy Materials”) two shareholder proposals because John Chevedden (“Chevedden”) acting directly and as Mr. Steiner’s representative exceeded the one-proposal limitation of Rule 14a-8(c). On January 19, 2022, we submitted a supplemental letter regarding two responses to the No-Action Request (the “First Supplemental Letter”).

On February 8, 2022, Chevedden submitted his latest response to the No-Action Request, captioned “#6 Rule 14a-8 Proposal” (the “February 8 Response”), a copy of which is attached hereto as Exhibit S-1. In the February 8 Response, Chevedden claims that Ross Jeffries, Deputy General Counsel and Corporate Secretary of the Company, telephoned Chevedden and discussed the Proposals.

We have confirmed with Mr. Jeffries that, contrary to Chevedden’s assertion, the alleged telephone call did not occur and that at no time has Mr. Jeffries spoken with Chevedden or Mr. Steiner regarding the Proposals. Chevedden’s latest claim is additionally confounding because Mr. Jeffries sent an email to Chevedden on January 3, 2022 which requested the opportunity to discuss the Proposals with Chevedden, which Chevedden never responded to. A copy of that email, which Chevedden included as part of his January 30 letter to the Staff captioned “#5 Rule 14a-8 Proposal”, is attached hereto as Exhibit S-2. Notably, in that correspondence Chevedden dismisses Mr. Jeffries’ request for a call and does not allude to having held any conversations with the Company regarding the Proposals.

Office of Chief Counsel
Division of Corporation Finance
February 10, 2022
Page 2

Regardless of the conversation that Chevedden now alleges to have occurred, the fact remains that the Company timely gave written notice of the two-proposal deficiency to Chevedden, and provided instructions on how he could correct the situation. The burden was on Chevedden to respond in writing to cure the deficiency, and he failed to do so.

Over the course of dealing surrounding Chevedden's submission of the Proposals and subsequently, with six responses seeking to recharacterize (and now, distort) the facts, Chevedden demonstrates that he did not simply assist Mr. Steiner with "drafting the proposal, advising on steps in the submission process, and engaging with the company." Exchange Act Release No. 34-89964 (Sept. 23, 2020) (the "Adopting Release"), at 59. Instead, each response and the collective responses demonstrate that Chevedden "appears to be the driving force behind a proposal." *Interfaith Center On Corporate Responsibility, James McRitchie, and As You Sow v. SEC*, at 37 (D.D.C. No. 1:21-cv-01620-RBW Nov. 19, 2021). As stated in the Adopting Release, "When a representative speaks and acts for a shareholder, there may be a question as to whether the shareholder has a genuine and meaningful interest in the proposal, or whether the proposal is instead primarily of interest to the representative, with only an acquiescent interest by the shareholder." Adopting Release, at 39. The recent amendments to Rule 14a-8(c) clearly apply to these facts.

Based upon the foregoing, the No-Action Request and the First Supplemental Letter, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposals from its 2022 Proxy Materials. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8671 or Ross E. Jeffries, Jr., the Company's Deputy General Counsel and Corporate Secretary, at (980) 388-6878.

Sincerely,



Ronald O. Mueller

Enclosures

cc: Ross E. Jeffries Jr., Bank of America Corporation
John Chevedden
Kenneth Steiner

EXHIBIT S-1

From: John Chevedden [REDACTED] PII
Sent: Tuesday, February 8, 2022 10:36 AM
To: Office of Chief Counsel <shareholderproposals@SEC.GOV>
Cc: Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>
Subject: #6 No Action Request Counterpoint `(BAC) [Sent To: ross.jeffries@bankofamerica.com]

Ladies and Gentlemen,
Please see the attached no action request counterpoint.

Sincerely,
John Chevedden

February 8, 2022

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

6 Rule 14a-8 Proposal
Bank of America Corporation (BAC)
Management Pay Clawback Authorization
John Chevedden

Ladies and Gentlemen:

This is a counterpoint to the December 17, 2021 no-action request.

Mr. Ross Jeffries telephoned the undersigned after the due date for 2022 proposals and asked whether Mr. Steiner's October 31, 2021 revised proposal was in play. Mr. Jeffries was told that that the unrevised October 25, 2021 proposal was the only 2022 proposal in play for Mr. Steiner.

Mr. Jeffries did not seek written confirmation and did not ask for a telephone call with Mr. Steiner to confirm this.

Sincerely,


John Chevedden

cc: Kenneth Steiner

Ross Jeffries

EXHIBIT S-2

From: John Chevedden [REDACTED] PII
Date: Sunday, Jan 30, 2022, 9:35 PM
To: Office of Chief Counsel <shareholderproposals@SEC.GOV>
Cc: Jeffries, Ross E. - Legal <ross.jeffries@bofa.com>
Subject: #5 No Action Request Counterpoint `(BAC) [Sent To: ross.jeffries@bankofamerica.com]

Ladies and Gentlemen,
Please see the attached no action request counterpoint.

Sincerely,
John Chevedden

JOHN CHEVEDDEN

January 30, 2022

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

5 Rule 14a-8 Proposal
Bank of America Corporation (BAC)
Management Pay Clawback Authorization
John Chevedden

Ladies and Gentlemen:

This is a counterpoint to the December 17, 2021 no-action request.

The January 2, 2022 no action rebuttal stated:

"Management did not have the confidence to test its absurd claim that Mr. Steiner is not the 'driving force' behind his Independent Board Chairman proposal by accepting an offer to meet with Mr. Steiner. No company that has made a similar 2022 claim has accepted an offer from Mr. Steiner to meet."

Management disingenuously responded with this untimely message seeking a meeting that excluded Mr. Kenneth Steiner:

From: "Jeffries, Ross E. - Legal" <[REDACTED]>
Subject: RE: #2 No Action Request Counterpoint (BAC) [Sent To: [REDACTED]]
Date: January 3, 2022 at 3:22:54 PM PST
To: John Chevedden <[REDACTED]>

Mr. Chevedden: Happy New Year and I hope you had a peaceful holiday season.

If acceptable to you, I would like the opportunity to speak on the phone before Bank of America responds to your letter from yesterday. Is there a time that is convenient for you? I don't expect to take very much of your time.

Thank you,
Ross Jeffries

Management then claimed on January 19, 2022 that the above message helped its cause.

Sincerely,


John Chevedden

cc: Kenneth Steiner
Ross Jeffries

From: [Kenneth Steiner](#)
To: [ShareholderProposals](#); ross.jeffries@bankofamerica.com; [olmsted](#)
Subject: #3 Rule 14 a-8 Counterpoint to no-action request from Bank of America (BAC) Independent Board Chairman proposal from Kenneth Steiner
Date: Thursday, February 10, 2022 9:40:12 PM

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Kenneth Steiner

February 10, 2022

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

3 Rule 14a-8 Proposal
Bank of America Corporation (BAC)
Independent Board Chairman
Kenneth Steiner

Ladies and Gentlemen:

This is a counterpoint to the December 17, 2021 no-action request.

The management February 10, 2022 letter talks about a shareholder having a meaningful interest in a proposal topic.

For example I sponsored 10 Independent Board Chairman proposals during the random year of 2015:

IMKTA JNJ AXP PFE ABT BAX MHFI JPM WEN LDOS

I could also produce a list of companies where I sponsored the Independent Board Chairman proposal for each year sine 2015.

Sincerely,

Kenneth Steiner

cc: John Chevedden

Ross Jeffries

JOHN CHEVEDDEN

February 10, 2022

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

7 Rule 14a-8 Proposal
Bank of America Corporation (BAC)
Management Pay Clawback Authorization
John Chevedden

Ladies and Gentlemen:

This is a counterpoint to the December 17, 2021 no-action request.

I remember the telephone call with management asking whether the unrevised October 25, 2021 proposal was the only 2022 proposal in play for Mr. Steiner.

It was memorable because the call was not scheduled and it marked an exception to the rule that an original proposal submittal is usually superseded by a revision.

Mr. Jeffries' January 3, 2022 invitation to a telephone call with only the undersigned was in bad faith because it excluded Mr. Steiner.

It is at least a bad practice for management to send bundled deficiency letters regarding 2 proposals with 2 proponents.

Sincerely,



John Chevedden

cc: Kenneth Steiner

Ross Jeffries

From: [Kenneth Steiner](#)
To: [ShareholderProposals](#); ross.jeffries@bankofamerica.com; [olmsted](#)
Subject: #4 Counterpoint for Bank of America no action request for Independent Board Chairman proposal from Kenneth Steiner
Date: Monday, February 21, 2022 3:55:02 PM

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Kenneth Steiner

February 10, 2022

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

4 Rule 14a-8 Proposal
Bank of America Corporation (BAC)
Independent Board Chairman
Kenneth Steiner

Ladies and Gentlemen:

This is a counterpoint to the December 17, 2021 no-action request. In regard to the management deficiency letters addressed solely to Mr. Chevedden, these letters should have told me specifically what I needed to do to cure deficiencies, if any, in the event that the Staff did not concur with the management hypothesis that I was not the sponsor of my proposal.

Management was overwhelmingly focused on its hypothesis in order to distract me from curing deficiencies, if any, in the event that the Staff did not concur with the management hypothesis.

Management could have told me that, although it was the management hypothesis that I was not the sponsor or my proposal, the final outcome would rest on the Staff decision in the no action process. Management could have told me that since the new rule has just gone into effect there are no precedents to rely on.

Sincerely,

Kenneth Steiner

cc: John Chevedden

Ross Jeffries