STEVE NIEMAN, President
The Ownership Union® | www.ourunion.org
15204 NE 181st Loop, Brush Prairie, WA 98606
stevenieman@mac.com | home (360) 687-3187 | fax (360) 666-6483

January 13, 2009

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

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

VIA: Email shareholderproposals@sec.gov

Ladies and Gentlemen:

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

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

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

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

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

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

Sincerely,

Stephen Nieman

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

STEVE NIEMAN, President
The Ownership Union® | www.ourunion.org
15204 NE 181st Loop, Brush Prairie, WA 98606
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Mr. William Ayer
Chairman and CEO
Alaska Air Group, Inc.
PO Box 68947
Seattle, WA 98168

Re: My Rule 14a-8 Proposal

Dear Mr. Ayer,

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

Sincerely,

Stephen Nieman 1-12-09

Stephen Nieman Date

William B. Davidge
51459 EM Watts Road
Scappoose OR 9705

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

Re: My Rule 14a-8 Proposal

Dear Mr. Ayer,

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

Sincerely,

William B. Davidge

1-8-2009
Date

Terry K. Dayton
10510 E. 6th Avenue
Spokane Valley, WA 99206

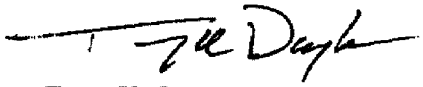
Mr. William Ayer
Chairman and CEO
Alaska Air Group, Inc.
PO Box 68947
Seattle, WA 98168

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
The Ownership Union® | www.ourunion.org
15204 NE 181st Loop, Brush Prairie, WA 98606
stevenieman@mac.com | home (360) 687-3187 | 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. *Segui*, 91 F.3d 337, 343-344 (2nd Cir. 1996); *One-O-One Enterprises, Inc.*, v. *Caruso*, 848 F.2d 1283 (D.C. Cir. 1988).

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

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

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

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

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

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

D. Conclusion

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

Pursuant to Rule 14a-8(j), enclosed herewith are six copies of this letter. A copy of this correspondence has been provided to the Company and its counsel. If we can provide additional information to address any questions that the Staff may have with respect to this correspondence or the Company's no-action request, please do not hesitate to call me at (360) 687-3187.

Sincerely,

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

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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.