EXHIBIT A

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

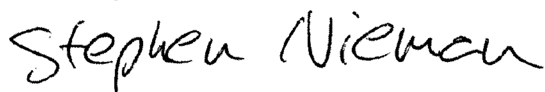
STEVE NIEMAN, President
The Ownership Union® | www.ourunion.org
15204 NE 181st Loop, Brush Prairie, WA 98606
stevenieman@mac.com | **home** (360) 687-3187 | **fax** (360) 666-6483

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,



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
stevenieman@mac.com | **home (360) 687-3187 | fax (360) 666-6483**

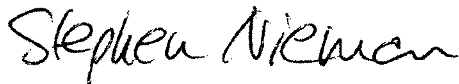
Mr. William Ayer
Chairman and CEO
Alaska Air Group, Inc.
PO Box 68947
Seattle, WA 98168

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
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

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,

07 JAN 2009

Terry K. Dayton

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

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

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

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.

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**

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

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,

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
stevenieman@mac.com | **home** (360) 687-3187 | **fax** (360) 666-6483

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

BEIJING
BRUSSELS
CENTURY CITY
HONG KONG
LONDON
LOS ANGELES
NEWPORT BEACH

1625 Eye Street, NW
Washington, D.C. 20006-4001

TELEPHONE (202) 383-5300
FACSIMILE (202) 383-5414
www.omm.com

NEW YORK
SAN FRANCISCO
SHANGHAI
SILICON VALLEY
SINGAPORE
TOKYO

OUR FILE NUMBER
11140-0014

WRITER'S DIRECT DIAL
(202) 383-5418

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

December 31, 2008

VIA HAND DELIVERY AND E-MAIL

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

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

Dear Ladies and Gentlemen:

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

- a proposal titled "Reforming Securities Class Actions," which was purportedly submitted on behalf of Stephen Nieman (the "Class Action Proposal");

- a proposal titled "Cumulative Voting," which was purportedly submitted on behalf of Terry K. Dayton (the "Cumulative Voting Proposal"); and

- a proposal titled "Shareholder Say on Executive Pay," which was purportedly submitted on behalf of William Davidge (the "Executive Pay Proposal").

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

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

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

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

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

I. EXCLUSION OF THE THREE PROPOSALS

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

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

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

B. Analysis

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

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

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

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

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

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

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

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

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

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

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

> "No proxy shall confer authority:
>
> 1. To vote for the election of any person to any office for which a bona fide nominee is not named in the proxy statement;
> 2. To vote at any annual meeting other than the next annual meeting (or any adjournment thereof) to be held after the date on which the proxy statement and form of proxy are first sent or given to security holders;
> 3. To vote with respect to more than one meeting (and any adjournment thereof) or more than one consent solicitation; or
> 4. To consent to or authorize any action other than the action proposed to be taken in the proxy statement, or matters [otherwise permitted by Rule 14a-4]."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[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).

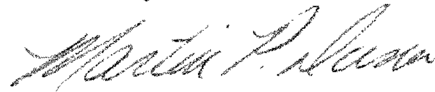
III. CONCLUSION

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)