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23 June 2006

Ms. Nancy M. Morris, Secretary
Securities & Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9303

Re: Request for Commission review of no-action determination regarding shareholder proposal to CA, Inc.

Dear Ms. Morris:

I write on behalf of Amalgamated Bank LongView Collective Investment Fund (the "LongView Fund" or the "Fund") in connection with a no-action determination issued by the Division of Corporation Finance (the "Division") on 20 June 2006 in connection with a shareholder proposal submitted by the Fund to CA, Inc. ("CA" or the "Company"). The Division letter is attached as Exhibit ("Ex.") 1.

Pursuant to 17 C.F.R. § 202.1(c), the Fund respectfully requests that the Commission review the Division's determination and reverse the conclusion reached by the Division upholding CA's view that it may exclude the Fund's proposal from CA's proxy materials. The LongView Fund is an S&P 500 index fund that is a long-term investor in CA and that owns over 150,000 shares of CA common stock.

As we explain more fully below, the Division's ruling qualifies for plenary review by the Commission under section 202.1(c) as it presents "novel" issues of "substantial importance" to shareholders and registrants alike. CA has advised the Division that CA intends to file definitive proxy materials on or about 14 July 2006.

To avoid repetition, we summarize the pertinent facts and argument below. A copy of the Fund's resolution and supporting statement is attached as Ex. 2. Detailed legal arguments of the parties appear in CA's request for no-action relief, filed 21 April 2006 (Ex. 3), the Fund's opposition letter, dated 13 May 2006 (Ex. 4), and CA's reply letter, dated 1 June 2006 (Ex. 5) (previously filed exhibits omitted).

Factual Background.

The Fund's resolution is simple and straight-forward. It would remove from

the CA board of directors two incumbent directors. The proposal is not precatory, but binding, and the right of shareholders to remove directors is firmly established under section 141(k) of the Delaware General Corporation Law ("DGCL") (Ex. 2).

The supporting statement recites reasons why the shareholders should take this action, focusing primarily on the fact that CA has been wracked by accounting scandals that ultimately led to seven top executives (including the CEO, CFO and General Counsel) pleading guilty to criminal charges. The last such plea was entered this week. Indeed, the Company itself escaped criminal prosecution only by signing a Deferred Prosecution Agreement ("DPA") and agreeing such measures as paying its shareholders $225,000,000 in restitution and accepting an outside monitor.

The Fund's letter opposing no-action relief (Ex. 4) expands further on how this came to pass. In brief, questions about the legality of CA's accounting practices first appeared in *The New York Times* in April 2001, and the Justice Department and the Commission both opened investigations several months later, at about the same time that Enron and WorldCom were collapsing from financial scandals and that the Sarbanes-Oxley Act was moving through Congress.

Despite the obvious connection at the time between accounting scandals and a company's financial health, the CA board did not authorize the Audit Committee to investigate the matter until mid-2003, more than two years after the story first broke. Even then, the board acted only after its lawyers met with federal prosecutors who were handling the criminal probe; the lawyers advised CA's board that "governmental authorities place considerable emphasis on the cooperation of entities being investigated, and that a failure to conduct an internal investigation would likely be interpreted as non-cooperation and could therefore create difficulties." (This quotation comes from page 2 of the minutes of a CA board meeting on 2 July 2003, which minutes were filed as an exhibit in the criminal case against CA's former CEO prior to his guilty plea. See Ex. 4 herein.)

The directors affected by CA's motion are the only two directors who served on CA's board prior to 2002, *i.e.*, the only remaining directors who were in a position to do something about the scandal as it unfolded. The Fund's supporting statement states the view that CA's failure address these problems early and to get them resolved has hindered CA's financial recovery since that time. At the time the proposal was submitted in March 2006, CA stock had trailed the S&P 500 for the preceding one-, two- and five-year periods. Over a ten-year period, a share of CA stock was worth ten percent less than it was worth ten years ago, whereas the S&P 500 index had risen 100 percent over the same decade. As of today, the situation is even worse. CA stock is trading at 35% below its value in June 1996, whereas the S&P 500 index is up 90 percent. The Fund argues that "an effective turnaround

and a restoration of investor confidence will require the service of directors who bear no responsibility for management before 2002. We thus propose removing those directors who served during that period."

Ironically, since the time the Fund's resolution was filed, CA's attempted recovery has stumbled anew on several fronts. Despite the hiring of a new CEO and management team starting in 2004, CA recently requested an extension of time for filing its annual report because of a fresh outbreak of accounting problems that will require another restatement and review of internal controls. Also in recent months CA lost its Chief Financial Officer, its Chief Operating Officer, its Chief Technology Officer and its Chief of Global Sales. *See* Ex. 6. In addition, Fitch's revised its outlook for the Company from "stable" to "negative." Ex. 7.

The Division's Ruling.

CA's request for no-action relief did not challenge the Fund's proposal on the ground that it contained false or misleading statements, such that the proposal could be stricken in whole or in part under Rule 14a-8(i)(3). Nor has CA questioned the legality under Delaware law of a resolution to remove directors, such that Rule 14a-8(i)(1) or (2) might be invoked. The only basis presented for exclusion is Rule 14a-8(i)(8), which permits the exclusion of a proposal that "relates to an election for membership on the company's board of directors or analogous governing body."

After considering arguments from both sides, the Division's response advised CA: "There appears to be some basis for your view that CA may exclude the proposal under rule 14a-8(i)(8) as relating to an election for membership on its board of directors. Accordingly, we will not recommend enforcement action to the Commission if CA omits the proposal from its proxy materials in reliance on rule 14a-8(i)(8)."

Why the Commission Should Review
and Reverse the Division's Determination.

The Importance of the Issue.

The Division's ruling raises an exceptionally important question, which is whether the (i)(8) exclusion can be stretched from covering proposals that relate to procedures for the *election* of directors to proposals that would *remove* directors from office. As we explain more fully below, the election process and the removal process are analytically distinct, both under federal securities laws and under the pertinent state law (in this case, Delaware). Also, the concern that prompted the Division to read the (i)(8) exclusion as a way of excluding proposals for multiple director nominations – *i.e.*, the prospect of contested elections – has no bearing on proposals

when shareholders seek to remove directors.

To be sure, the Division has in the past relied upon election-related no-action rulings to uphold excluding removal proposals, and CA relied upon those letters in seeking no-action relief here.[1] Those actions are of no precedential value, however, because, so far as the Fund is aware, the proponents there did not discuss the legal and policy issues that distinguish election-related proposals from removal proposals. The Division, in reaching the conclusion it did here, appears to have bowed to the results in its prior decisions without examining those issues in depth or offering any cogent statement as to why its election-related concerns should carry over to the realm of removal proposals.

The Division's decision thus requires review by the Commission, which has not previously opined on this removal vs. election issue. The issue is of substantial importance: State law plainly and unambiguously gives CA shareholders the right to remove directors, and CA does not challenge that point. The issue is whether the Commission will interpose itself between a company and its shareholders when the shareholders believe that certain directors should be removed from office and when state law empowers such removal. As we now explain, federal securities regulation should not be used to trump clearly established shareholder rights in this area.

Analysis of State and Federal Law.

CA's letter to the Division sought to blur the distinction between director elections and removal by arguing (Ex. 3 at 2) that the Fund's proposal would prevent the affected directors "from completing their current term as directors, and/or from serving for a new term, and would interfere with the annual shareholder election process. The Proposal, in short, relates directly to an election for membership on the Company's board of directors."

The problem with this argument is that under Delaware law, the fact that a director may be elected to a fixed term does not limit shareholders' ability to remove that director before his or her term is up. Under DGCL § 141(b), "[e]ach director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal." Under DGCL § 141(k) – which is expressly cited in the Fund's resolution – directors may be removed without cause at any point during their tenure when, as here, the board of directors elects all directors annually. (Separate rules govern classified boards and companies with

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[1] *Fresh Brands, Inc.* (7 January 2004); *Lipid Sciences, Inc.* (2 March 2002); *Mesaba Holdings, Inc.* (5 March 2001); *NetCurrents, Inc.* (25 April 2001); *J.C. Penney Co., Inc.* (19 March 2001); *Second Bancorp, Inc.* (12 February 2001).

cumulative voting).[2]

Moreover, CA's bylaws deny shareholders the right to call a special meeting. As a result, a meeting called by the CA board is the *only* time that CA shareholders can vote on whether to remove a director. CA Bylaws, Art. II, sec. 2 ("Special meetings of the stockholders, for any proper purpose or purposes, may be called only by the Board of Directors"), Ex. 3.1 to Form 8-K (4 February 2005). As CA noted in its reply (Ex. 5), such a limitation on shareholder rights is entirely permissible under Delaware law.

Thus, the Delaware legislature was untroubled by the fact that shareholders might remove directors close to the time that directors are elected. That being the case, why should the Commission interpret its rules to shield a company from its shareholders?

CA's concern – that a vote on removing directors would somehow "interfere" with the election process – ignores the fact that the (i)(8) exclusion was enacted with very different concerns in mind. The 1976 release proposing the predecessor version of the (i)(8) exclusion suggested that "with respect to corporate elections," a shareholder proposal "is not the proper means for conducting campaigns or effecting reforms in elections since other proxy rules . . . are applicable thereto." Release No. 12598, 1976 WL 160410 (7 July 1976). The reference is apparently to regulations dealing with proxy solicitations for candidates being nominated for the board of directors in contested election situations. Apart from obligations imposed under state law, those rules require a party soliciting proxies for such candidates to print proxy materials that meet the requirements of Rule 14A by giving information about the candidates, the participants in the solicitation and related data, so that shareholders can review the competing proxy materials and make an informed choice as to who should run their company. See, *e.g.*, Rule 14a-4(b)(2) (proxy materials must identify candidates); Rule 14a-101, Item 7 (specifying information to be disclosed "[i]f action is to be taken with respect to the election of directors").

The Division has expressed a concern about shareholders trying to skirt SEC rules covering elections by using Rule 14a-8 resolutions to propose procedures for the inclusion of shareholder-nominated candidates in company-prepared proxy materials. *See Unocal Corp.*, 1990 SEC No-Act. LEXIS 183 (6 February 1990) (proxy access procedure is "a matter more appropriately addressed under Rule 14a-11 [now 14a-12]"); *BellSouth Corp.*, 1998 SEC No-Act. LEXIS 151 (4 February

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[2] As a further indication that Delaware law treats elections and removal differently, we note that under DGCL § 141(b), a director who is removed from office may not "hold over" until his or her successor is selected. Removal is effective immediately.

1998). More specifically, the Division has expressed concern that such shareholder proposals dealing with proxy access may lead to "contested elections" that may not be subject to the regulatory constraints required in election contests. *E.g., Sears, Roebuck & Co.* (28 February 2003); *AOL Time Warner Inc.* (28 February 2003). Any concern about encouraging "contested elections" for a board seat has no bearing in this context.

The reason is that the pertinent provisions of Rule 14A and Schedule 14A that apply to the *election* of directors do not specifically address or regulate resolutions to *remove* directors. An independent solicitation in favor of removing specific directors is not subject to the sort of Schedule 14A disclosures that are required when a candidate is being nominated for election to the board. Nor do the rules governing presentation of the voting options on the proxy card treat the removal of directors as similar in character to the election of directors. A proposal to remove a director or directors is treated as a single "matter" to be voted under Rule 14a-4(a)(3) (a proxy card must simply identify "each separate matter intended to be acted upon"). By contrast, Rule 14a-4(a)(4) requires an opportunity to vote yes, no, or abstain as to "each separate matter referred to therein as intended to be acted upon, *other than elections to office*" (emphasis added), as to which SEC rules require that shareholders be given a chance to vote for each nominee separately or as a bloc.

Thus, SEC rules have never viewed solicitations aimed at removing a director as requiring the same regulatory treatment that is applied to the process for electing directors, and so allowing director-removal proposals on company-prepared proxy materials would not "interfere" with other proxy solicitation rules. Of course, if the Fund or any other proponent of a resolution to remove directors should choose to solicit support via "Dear Shareholder" letters, newspapers advertisements or otherwise, the proponent would be subject to generally applicable requirements, such as Rule 14a's prohibition on materially false or misleading statements, as well as any public filing requirements on EDGAR.

As noted above, the no-action letters cited by CA to the Division (see note 1, *supra*) are not persuasive and should not be followed by the Commission for several reasons.

First, it does not appear that the proponents submitted legal argument setting forth how Delaware law recognizes a dichotomy between election to office and removal from office. Given the lack of counter-arguments on this key legal point, the most that can be said of the cited letters is that the company sustained its burden under Rule 14a(g).

Second, none of the letters analyzed our point that SEC rules do not treat proposals to remove directors as subject to the heightened disclosure and other

requirements that are imposed on solicitations involving elections to office. It thus cannot be said that shareholder proposals under Rule 14a-8 would interfere and possibly conflict with a separate set of regulatory requirements.

Third, the fact that this Fund's proposal will be voted at an annual meeting where the candidates are seeking re-election has no bearing on the proper interpretation of Rule 14a-8 when state law effectively mandates that procedure.

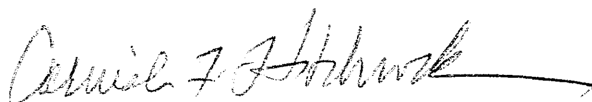
Moreover, the issues will be clear. A shareholder who wishes to re-elect a director being challenged can vote for the nominee and against the shareholder proposal; the nominee will be elected. Tellingly, however, the converse is not true, which is an additional policy reason for the Commission not to read its rules as broadly as CA argues. CA employs a plurality election system, and a nominee for an uncontested seat may be elected with one vote, even if all other shares are voted "withhold." CA lacks a "majority election" policy or bylaw under which directors who fail to achieve a majority of the votes cast must tender their resignation. Thus, the only way that shareholders may remove a CA director, short of mounting an independent solicitation, is by exercising their rights under DGCL § 141(k).

Conclusion.

State law gives CA shareholders a right of removal that does not interfere with federal securities laws or with any concerns that may be exist with respect to director elections. If anything, CA is trying to use federal regulation to protect itself from its shareholders. The SEC should decline the invitation and reverse the staff ruling.

Thank you for your consideration of these points. Please do not hesitate to contact me if there is further information that the Fund can provide.

Respectfully submitted,



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cc: Lawrence M. Egan, Esq.
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