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## SEC No-Action Position Affects Three-Party Proxy Contests

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Two recent no-action letters from the SEC staff may encourage multi-party "short slate" proxy contests. These no-action letters permit the backers of each short slate to vote for the nominees on the other short slate. The no-action position was conditioned on representations from the backers of the two slates that they had not formed a "group" and had no intention of forming a "group" within the meaning of Regulation 13D-G.

Affiliates of Carl Icahn and Eastbourne Capital submitted no-action requests in connection with a proxy contest at Amylin Pharmaceuticals, Inc. Amylin currently has a 12-person board of directors, elected annually by plurality. On January 30, 2009, Amylin received two separate notices, one from affiliates of Icahn and the other from affiliates of Eastbourne. Each notice advised Amylin that the sender intended to nominate five candidates for election to the company's board at its 2009 annual meeting.

The no-action position involves the "short slate rule," Rule 14a-4(d) under the Securities Exchange Act. The short slate rule applies when a participant in a proxy contest is soliciting in support of nominees who, if elected, would constitute a minority of the board of directors. When the short slate rule applies, the participant may seek authority to vote for nominees named in the *company's* proxy statement. The March 30, 2009 letters from the Office

of Mergers and Acquisitions of the SEC's Division of Corporation Finance advise the Icahn and Eastbourne entities that the SEC staff will not recommend enforcement action against these entities if they seek authority to vote for the nominees named in *each other's* proxy statements.

The staff specifically conditioned its no-action position on representations from the Icahn and Eastbourne entities that they had not expressly or impliedly agreed to act as a group, had not otherwise formed a group, and had no present intention to form a group within the meaning of Regulation 13D-G. The letters state that no-action relief is unavailable if the Icahn and Eastbourne entities form a group, or if either forms an intent to form a group, at any time before or during Amylin's 2009 annual meeting. The letters also take note of representations from the Icahn and Eastbourne entities that neither would actively recommend the election of the other's nominees, that each would direct its proxy solicitors not to actively recommend the election of the other's nominees, and that each of the Icahn and Eastbourne entities was soliciting in support of nominees who, if elected, would constitute a minority of Amylin's board.

The staff's no-action letters do not specifically address what Eastbourne characterized as Amylin's "poison debt." According to Eastbourne's no-action request, Amylin has outstanding convertible notes that Amylin would be required to purchase at par if a "fundamental change" under the applicable indenture occurs. Eastbourne's no-action request observes that these notes are currently trading significantly below par, that a "fundamental change" under the applicable indenture would be deemed to occur if "continuing directors" do not constitute a majority of Amylin's board, and that "continuing directors" include Amylin's incumbent directors and new directors "approved" by the directors then in office. The election of a majority of directors not "approved" by Amylin's incumbent board would,

according to Eastbourne's no-action request, also constitute a default under Amylin's principal senior credit agreement, permitting Amylin's lenders to terminate their commitments and accelerate the outstanding debt. It is unclear whether the SEC staff's analysis was implicitly based in part on the belief that the Icahn and Eastbourne entities would limit themselves to a minority of Amylin's board in order to avoid triggering these default and payment provisions. Indeed, notwithstanding the no-action position, Eastbourne's preliminary proxy statement filed April 3, 2009 states, "Eastbourne does not currently intend to solicit proxies or seek authority to vote for more stockholder-proposed nominees than would represent a minority of the Board if elected." The SEC staff's no-action letters caution that the no-action position is based solely on the representations and the facts presented in the requests from the Icahn and Eastbourne entities and that any different facts or circumstances may require a different conclusion.

On April 15, 2009, as part of a settlement of litigation associated with the proxy contest, Amylin announced that it will "approve" the Icahn and Eastbourne nominees for purposes of the indenture and its convertible notes, contingent on the entry of a judicial order that it has the power to do so. At the time this alert was distributed, the Icahn and Eastbourne entities had not announced whether each would seek authority to vote for stockholder nominees that would collectively constitute a majority of Amylin's board.

Although relatively infrequent, in 2009 alone at least three companies including Amylin have faced three-party contests. The staff's no-action position has significant implications for three-party proxy contests, particularly if the no-action position is applicable to companies without the type of debt that exists at Amylin.

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