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Consequences of Failures to Make Say-on-Pay Frequency Disclosures on Form 8-K

As you are all by now well aware, the Dodd-Frank Act requires issuers to provide shareholders with the opportunity to vote on whether the issuer's "say-on-pay" advisory vote will occur every one, two or three years. As with the say-on-pay vote itself, the frequency vote is merely advisory and not binding on the issuer. Consequently, once the votes are tallied, issuers must consider what frequency they will adopt.

The frequency decision must be disclosed by an issuer under Item 5.07 of Form 8-K within 150 calendar days after the shareholder meeting at which the frequency vote is held,[1] but no later than 60 calendar days before the deadline for shareholders to submit proposals for the next annual meeting. This extended Form 8-K deadline allows issuers additional time to carefully consider the results of the frequency vote before they are required to disclose their decisions, while also providing shareholders with sufficient time to make a proxy proposal in the subsequent year if the issuer did not adopt the frequency favored by shareholders.

In the 2011 proxy season, the majority of issuers dutifully disclosed their frequency decision with the preliminary voting results of their annual meetings or otherwise provided disclosure in a timely manner under the rules, but others simply neglected this requirement. The results of a failure to file a Form 8-K or Form 8-K/A can be significant.[2] First, if a Form 8-K is not timely filed, the issuer will not be eligible to file a Form S-3 Registration Statement for twelve months. Similarly, an issuer is not eligible to file a new Form S-8 registration statement if it has failed to file a required Form 8-K; however, there is no "timeliness" obligation under Form S-8 and, therefore, Form S-8 eligibility is restored once the late Form 8-K is actually filed. Finally, loan documents and other agreements can often contain covenants requiring issuers to timely file all required SEC reports, so a late filing could put an issuer in default under these agreements.

Recently, the staff of the Division of Corporation Finance of the Securities and Exchange Commission (SEC) noted that if an issuer's board followed the shareholders' frequency recommendation but neglected to file the Form 8-K disclosing the decision, the staff will consider granting a waiver with respect to the timeliness requirements subject to certain conditions. In that event, the issuer would maintain its Form S-3 (and Form S-8) eligibility. The staff noted that issuers should nonetheless file the late Form 8-K as promptly as possible so that there is a record of their decision. In certain instances, however, such as if an issuer adopted a say-on-pay frequency policy that is different from the shareholders'

[1] In a July 8, 2011 Compliance and Disclosure Interpretation, the SEC noted that issuers may disclose their decisions as to the frequency vote in periodic filing (e.g. on a Form 10-Q or 10-K) if filed prior to the specified deadline.

[2] Note that if the shareholder meeting voting results were initially disclosed on Form 8-K, the frequency decision would need to be disclosed as an amendment to the original filing by using Form 8-K/A. In contrast, if the voting results were initially disclosed in a periodic filing, then the frequency decision would need to be disclosed on a Form 8-K. Many issuers simply included both the voting results and the frequency decision on the original Form 8-K filing.

preference, a waiver would not likely be granted as the issuer would have infringed on the shareholders' rights to present a proxy proposal on say-on-pay frequency.

The SEC staff maintains an informal waiver request process. Before submitting a written request, the issuer should consider whether to first call the staff to get an indication as to whether the staff will consider the request. The staff's policy is to consider only those requests that are viewed as "ripe" which generally means within a 30-day window of either filing a new Form S-3 or the annual registration statement updating date under Section 10(a)(3) of the Securities Act of 1933. A waiver request must be in writing and addressed to the Division of Corporation Finance's Office of Chief Counsel. The request should include: (1) a short description of the issuer, including its filing status under the Securities Exchange Act of 1934 (Exchange Act), and the market on which its securities are listed or quoted; (2) a discussion of the reason for the waiver request, including whether the issuer is asking for continued use of one or more current Form S-3 registration statements or for filing a new Form S-3; (3) a description of the late Exchange Act filing, including the date the report was due and the date filed, the reasons for the late filing and a description of new procedures put into place to prevent a reoccurrence of another late filing; (4) a discussion as to whether the information was otherwise publicly disclosed and, if so, how it was disclosed; (5) a statement as to whether the issuer otherwise meets the eligibility requirements of Form S-3; (6) a statement about the issuer's history for timely filing other Exchange Act reports; and (7) a discussion as to why the staff should grant the issuer's request. Waiver request letters are not public and the staff will notify the issuer by phone of its decision; a written response from the staff is not provided. If a waiver is granted and the issuer is filing a new Form S-3 registration statement, the issuer should consider including such fact in a cover letter to the filing. Doing so lets the disclosure review office know that the issuer has discussed the late filing with the Chief Counsel's Office.

All issuers should review their filings to ensure that they provided all required disclosures. To the extent that an issuer did not timely file, it should review its covenants and SEC registration statements to determine whether further action is required. It also should revisit the adequacy of its disclosure controls and procedures and evaluate what if any disclosure regarding the effectiveness of its controls may be required under Item 307 of Regulation S-K.

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