Advisory
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WIGGIN AND DANA

Say-On-Pay: Disclosing Decisions on Frequency of Vote

SEC Considers Waiver Requests in Connection with Delinquent 8-K Filings

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The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 directed the SEC to enact rules requiring public companies to hold a non-binding advisory "Say-on-Pay" vote to approve the compensation program for their named executive officers and an accompanying non-binding advisory vote as to the frequency of holding the Say-on-Pay vote - every year, every two years, or every three years. These rules went into effect for the 2011 proxy season.

During and following the 2011 proxy season, there was considerable discussion and guidance about the Say-on-Pay and frequency votes in articles, panels and blogs. Public companies considered this information in determining what frequency to recommend to shareholders in their 2011 proxy statements and ultimately what frequency to adopt as their policy. One aspect that did not receive the same level of publicity was the SEC's related changes to the Form 8-K disclosure rules, specifically Item 5.07 "Submission of Matters to a Vote of Security Holders."

Form 8-K Item 5.07(d) Disclosure Requirements

Companies were well accustomed to the requirement to file a Form 8-K within four business days of the annual meeting to disclose the voting results of the proposals on which the shareholders voted at the annual meeting. The SEC is now learning that many companies were not aware of the new Item 5.07(d) requirement (effective as of April 4, 2011) to disclose, with respect to the frequency vote, *"the company's decision in light of such vote as to how frequently the company will include a shareholder vote on the compensation of executives in its proxy materials until the next required vote on the frequency of shareholder votes on the compensation of executives."*

Companies are required to disclose their decision within 150 days of the annual meeting through a filing on Form 8-K, 8-K/A or 10-Q (under Part II, Item 5. Other Information), and those that do not are considered "delinquent filers." Companies that have not yet met the requirements of Item 5.07(d) should disclose the required information as soon as possible. We suggest companies do so by means of filing a Form 8-K/A to amend the original filing disclosing the voting results of the annual meeting of shareholders.

The Effect on S-3 Registration Statements

One of the consequences of being a "delinquent filer" is the loss of the ability to file a new Form S-3 registration statement with the SEC or use a previously filed Form S-3. Pursuant to the eligibility requirements of Form S-3, companies must, for a period of twelve calendar months and any portion of a month immediately preceding the filing of the Form S-3, file all reports under Sections 13, 14 or 15(d) of the Securities Exchange Act of 1934, as amended, in a timely manner and continue to do so for the term of the S-3. Thus, failure to timely disclose the information required by Item 5.07(d) will cause a company to lose its Form S-3 eligibility and the ability to conduct expeditious and cost-effective equity or debt "takedowns."

continued next page

The intent of Item 5.07(d) is to improve company/shareholder communications concerning executive compensation and a company's decision on the frequency of holding the Say-on-Pay vote. The intent was not to restrict a public company's options in raising capital.

S-3 Eligibility Waiver Requests

The Director of the SEC's Division of Corporation Finance, Meredith B. Cross, addressed this issue recently and clarified the staff's position on Form 8-K Item 5.07(d) delinquent filers and their S-3 eligibility status. Ms. Cross acknowledged that due to the eligibility requirements of Form S-3, the failure of companies to meet the requirements of Item 5.07(d) is having the unintended consequence of excluding such companies from the capital markets because they are no longer eligible to use an existing S-3 or file a new Form S-3.

Because the Say-on-Pay votes and related disclosure requirements are new to companies and the intent of the requirements was to improve shareholder communication regarding executive compensation, not to restrict a company's ability to raise capital, the staff is entertaining Form S-3 eligibility waiver requests from companies in this limited context. Ms. Cross noted that, unlike in the past, each waiver request submitted to the Division of Corporation Finance will be considered based on the facts and circumstances described in the waiver and that the staff is more likely to grant a waiver to a company where the board recommendation, the shareholder vote and the company's ultimate decision were all consistent (i.e., an annual frequency in each case). The staff will look less favorably upon waiver requests from companies that recommended one frequency period and the shareholders voted in favor of another frequency, regardless of what frequency the board ultimately adopted. In either case, Ms. Cross urges all companies that have not yet complied with Item 5.07(d) and disclosed their Say-on-Pay frequency decision to do so immediately and to make a Form S-3 eligibility waiver request thereafter for the staff's consideration.