

Memorandum

A Reminder to Issuers to Timely Disclose Their Say-on-Frequency Determinations

April 28, 2017

Under Section 951 of the Dodd-Frank Act and the 2011 implementing rules of the Securities and Exchange Commission (“SEC”), no later than every six years, issuers are required to submit to a non-binding shareholder vote a resolution to determine whether their advisory say-on-pay votes will occur every one, two or three years (“say-on-frequency”). This year is the first six-year anniversary of the initial say-on-frequency vote for calendar-year companies (other than smaller reporting companies and emerging growth companies). As a reminder, under Item 5.07(d) of Form 8-K, issuers submitting a say-on-frequency resolution to a shareholder vote this proxy season must disclose in a timely fashion the company’s decision “as to how frequently the company will include a shareholder vote on the compensation of executives in its proxy materials until the next required” say-on-frequency vote. Such disclosure is required to be filed no later than 150 calendar days after the end of the annual meeting but in no event later than 60 calendar days prior to the company’s deadline for the submission of shareholder proposals under Exchange Act Rule 14a-8.

Failure to file a timely Item 5.07(d) Form 8-K can have important consequences. Most notably, it can result in the issuer’s ineligibility to file a registration statement on Form S-3 for 12 months.¹ Following the first say-on-frequency votes in 2011, “[w]hile most companies filed an 8-K with the preliminary [voting] results a few business days after the vote, hundreds didn’t follow-up with” the disclosure of the board’s determination regarding the frequency of the company’s say-on-pay vote, as required by Item 5.07(d).² At the time, the SEC granted waivers to many companies that missed the filing, allowing them to maintain their Form S-3 eligibility status. Meredith Cross, then-Director of the SEC’s Division of Corporation Finance, had noted,

¹ Additionally, until the late Form 8-K is filed with the SEC, the delinquent issuer may not file a new registration statement on Form S-8.

² Emily Chasan, “[Companies ‘Forgot’ Say-On-Pay Filings: SEC](#),” Wall Street Journal (Feb. 27, 2012).

however, that this “shouldn’t be a recurring problem,” suggesting that the SEC staff may have less of an appetite to grant Form S-3 eligibility waivers this year to issuers that miss the deadline for their required Item 5.07(d) disclosure.

In light of the likely effect on Form S-3 eligibility of a failure to timely disclose the board’s decision regarding the frequency of future advisory say-on-pay votes, issuers with say-on-frequency resolutions in their proxy materials this year should ensure that they do not miss the Item 5.07(d) filing deadline. If possible, those issuers that convene a board meeting after the annual meeting should encourage the board to make a frequency determination at that meeting, so as to enable the company to include this determination in the other Item 5.07 Form 8-K information required to be filed within four days after the annual meeting. This approach will eliminate both the risk that Item 5.07(d)’s unusual disclosure requirement will be overlooked and the cost of preparing an additional Form 8-K.

If you have any questions or would like additional information, please do not hesitate to contact **Yafit Cohn** at +1-212-455-3815 or yafit.cohn@stblaw.com, or any other member of the Firm’s Public Company Advisory Practice.

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UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3901 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul
25th Floor, West Tower
Mirae Asset Center 1
26 Eulji-ro 5-Gil, Jung-Gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000