

Important Reminder: Form 8-K Report on Say-on-Frequency Vote

Companies that submitted a say-on-pay frequency vote to shareholders should remember that this vote triggers a Form 8-K, Item 5.07(d) reporting requirement. This report is an additional requirement that is separate from the requirement to report the results of votes on matters submitted to security holders at shareholder meetings under Item 5.07(b). The Item 5.07(d) report is due not later than 150 calendar days after the date of the meeting at which shareholders voted on the frequency of say-on-pay votes, but in no event later than 60 calendar days prior to the Rule 14a-8 deadline to submit shareholder proposals that was disclosed in the company's proxy statement for the meeting at which shareholders voted on the frequency of say-on-pay votes. Failure to file either of these reports on or before their respective due dates may result in loss of Form S-3 eligibility, among other consequences.

There are several ways to satisfy the Item 5.07(d) reporting requirement. Three of the more common are summarized below, although there are other alternatives.

- **Report Item 5.07(b) and Item 5.07(d) in a Single Form 8-K Report.** The company can simultaneously report the results of the annual meeting shareholder votes under Item 5.07(b) and its decision on the frequency of say-on-pay votes under Item 5.07(d) in the **same** Form 8-K report. It is important to review the Form 8-K report to confirm that it complies not only with Items 5.07(a)-(c) but also with Item 5.07(d) before filing.
- **Report Item 5.07(b) in a Form 8-K Report followed by Item 5.07(d) in a Form 8-K/A Amendment.** If the company reports its annual meeting voting results in an Item 5.07(b) Form 8-K report but does not, or cannot, include the information required by Item 5.07(d) in the same Form 8-K report, the company can report its frequency decision in a Form 8-K/A **amendment** to the original Item 5.07(b) Form 8-K report. In this case, the Item 5.07(d) report should **not** be filed as a new Form 8-K report.
- **Report Item 5.07(b) in a Periodic Report followed by Item 5.07(d) in a Subsequent Form 8-K Report.** The company can report the annual meeting voting results in a Form 10-Q or Form 10-K report that is filed on or before the due date for the Item 5.07(b) Form 8-K, as permitted by General Instruction B.3 to Form 8-K. If the

company does not, or cannot, report its decision on the say-on-pay frequency vote in the periodic report, it should file a **new** Item 5.07(d) Form 8-K to report its decision. In this case, the Item 5.07(d) report should **not** be filed as an amendment to the periodic report. *If the filing of the Form 10-Q or Form 10-K report is delayed to a date more than four business days after the company's annual meeting, the company should comply with Item 5.07 by filing a Form 8-K report before the filing deadline for the Item 5.07(b) report on the shareholder votes on other matters at the meeting.*

SEC Staff Guidance. Question 121A.04 in the SEC staff [Exchange Act Form 8-K Compliance and Disclosure Interpretations](#), which discusses the filing requirements and alternatives for Item 5.07(d) Form 8-K reports, reads as follows:

Question 121A.04

Question: May an issuer disclose its decision as to how frequently it will include a shareholder advisory vote on executive compensation in its proxy materials in a periodic report instead of an Item 5.07 Form 8-K, pursuant to General Instruction B.3 to Form 8-K?

Answer: Yes. Pursuant to General Instruction B.3, an issuer may report Item 5.07 Form 8-K information in a periodic report that is filed on or before the date that an Item 5.07 Form 8-K would otherwise be due. If the issuer reports its annual meeting voting results in a Form 10-Q or Form 10-K, it may file a new Item 5.07 Form 8-K, rather than an amended Form 10-Q or Form 10-K, to report its decision as to how frequently it will include a shareholder advisory vote on executive compensation in its proxy materials. However, if the issuer reports its annual meeting voting results in an Item 5.07(b) Form 8-K and also intends to report its frequency decision in a Form 8-K, then, as required by Item 5.07(d), that Form 8-K must be filed as an amendment to the Item 5.07(b) Form 8-K - using submission type 8-K/A - and not as a new Form 8-K. [July 8, 2011]