

Seeking a Waiver from the SEC for Failure to File 8-K Announcing the Frequency Vote

May 7, 2012 | Client Update | 2-minute read

In 2011, companies included in their proxy ballots a choice for shareholders to advise on whether they preferred to cast advisory votes on executive compensation every 1, 2 or 3 years, the so-called “say-when-on-pay” or frequency vote. Item 5.07(d) of Form 8-K required issuers that did not otherwise announce their decisions earlier to file a second, amended Form 8-K. That deadline was months later, either 150 calendar days after the meeting or 60 days before the shareholder proposal deadline, whichever came first. The SEC Staff realized this year in [reported news accounts](#) that possibly hundreds of companies did not file the amended Form 8-K.

Failure to file this Form 8-K can lead to the loss of Form S-3 eligibility, but the SEC Staff appears willing to consider granting a waiver to those companies that have implemented the frequency that the majority of shareholders supported, which was the case for all but a handful of companies. To obtain a waiver (which the Staff prefers to characterize as a “non-objection”), a company with an existing shelf registration or one that is about to file a shelf registration must file the amended Form 8-K and make a request by writing a letter and uploading it to the new [SEC site](#).

A company will work directly with Office of the Chief Counsel on the exact content of the letter, but in general the information may include:

- Whether the company has an existing Form S-3 registration statement or is planning to file one
- A request for the waiver, including any requests to use an existing Form S-3 registration statement or the ability file a new one
- Background on the frequency vote conducted and the board’s decision as to the frequency selected
- The reasons for the failure to file the Form 8-K on a timely basis
- Whether the company received a shareholder proposal on the frequency of the advisory vote on executive compensation for the 2012 meeting
- Whether the company has previously failed to make any required Exchange Act filings on a timely basis
- Processes and procedures implemented to ensure timely Exchange Act filings in the future

The Staff will respond orally and will not confirm in writing.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Ning Chiu

+1 212 450 4908

ning.chiu@davispolk.com

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.