



“FORGOTTEN” SAY-ON-PAY FREQUENCY DISCLOSURE

In 2011, public companies conducted their first shareholder advisory votes on executive compensation and also asked shareholders how often the company should conduct future say-on-pay votes. Companies were required to report the results of their shareholders meetings in a Current Report on Form 8-K within four business days after each meeting. In addition, each company was required to inform shareholders whether future say-on-pay votes would occur every one, two, or three years until it holds its next frequency vote.

Many companies either disclosed their frequency decision in their original Form 8-K or subsequent Form 10-Q filing.

In an action that has caused confusion, representatives of the SEC's Division of Corporation Finance recently announced, in the Practising Law Institute's "The SEC Speaks in 2012" conference, that a number of issuers "forgot" to report their frequency decision

in accordance with the SEC's rules and interpretations. A company's failure to file a Form 8-K disclosing its say-on-pay frequency decision (as opposed to just the voting result) arguably results in loss of eligibility to use a Form S-3 registration statement for approximately one year.

However, if your company is in this position, all is not lost. We and others have urged the SEC staff to be flexible here, and the SEC Staff has indicated that it will likely grant Form S-3 eligibility waivers for this technical "foot fault" if (1) the company first amends its Form 8-K to disclose the frequency the company has chosen for future say-on-pay votes, and (2) its frequency decision matches the frequency recommended by its shareholders in the frequency vote.

For more information about this issue, please contact your principal Jones Day contact or one of the lawyers listed below.

LAWYER CONTACTS

General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com.

Robert A. Profusek

New York

+1.212.326.3800

raprofusek@jonesday.com

Christopher M. Kelly

Cleveland

+1.216.586.1238

ckelly@jonesday.com

Robert T. Clarkson

Silicon Valley

+1.650.739.3996

rtclarkson@jonesday.com

Thomas C. Daniels

Cleveland

+1.216.586.7017

[tcdaniels@jonesday.com](mailto:tcDaniels@jonesday.com)

Timothy J. Melton

Chicago

+1.312.269.4154

tmelton@jonesday.com

Manan Shah

New York

+1.212.326.3986

mdshah@jonesday.com

Stephen P. Coolbaugh

Cleveland

+1.216.586.7226

spcoolbaugh@jonesday.com

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our “Contact Us” form, which can be found on our web site at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.