

# PROXY UPDATE

January, 2011

## SEC Adopts Final Rules Regarding Say on Pay, Say on Frequency and Say on Golden Parachutes

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On January 25, 2011 the SEC adopted its final rules regarding Say on Pay, Say on Frequency and Say on Golden Parachute proposals. The final rules have been adopted in much the same way as initially proposed, with some notable modifications highlighted below. Please click [here](#) to review our newsletter that discussed the proposed rules.

### [Say on Pay and Say on Frequency: No Preliminary Filing, Non-Binding, Non-Discretionary](#)

The SEC has confirmed in the final rules that a preliminary filing of the proxy statement is not required for Say on Pay or Say on Frequency proposals. The SEC has also confirmed that the proposals remain non-binding for the issuer and will not be classified as discretionary matters for brokerage firms.

### [Smaller Reporting Companies Exempt on Say on Pay and Say on Frequency Until 1/21/13](#)

In a major departure from the proposed rules, smaller reporting companies (those with less than \$75 million public float) will not be required to have the Say on Pay and Say on Frequency proposals on the ballot until their next annual meeting, after January 21, 2013. This gives smaller reporting companies a 2 year reprieve to comply with the implementation of the new rules.

Smaller reporting companies would, however, still have to put a Say on Golden Parachute proposal on the agenda should they hold a shareholders' meeting relating to a merger or acquisition as discussed in more detail below.

### [Say on Frequency – 1, 2, 3, Abstain](#)

The SEC affirmed that the choices on an issuer's proxy relating to the Say on Frequency vote must be 1 year, 2 years, 3 years and abstain. We are advising clients seeking approval of a 3-year or a 2 year frequency vote to arrange the voting boxes on the proxy card to read "3, 2, 1, abstain" in order to capture favorable votes from individual shareholders that may, by habit, automatically check the first box on each proposal. This should be done for both registered holders and street-name holders. Not all tabulation agents have this ability, so each company should consult with their tabulation agent in advance. Understanding that some tabulators will have trouble implementing the 4 option system, the SEC, until December 31, 2011, will not object if an issuer only has 3 options, 1 year, 2 years and 3 years, provided an unmarked proxy does not grant discretionary voting authority with regards to that proposal. We are also advising clients to make a recommendation on the Say on Frequency proposal so that unmarked proxies are voted with the board's recommendation.

### Say on Frequency – Change to Vote Requirement and Timing of Disclosure

In another significant change, the SEC has modified the vote required to exclude future shareholder proposals on the frequency issue from a plurality to a majority of votes cast<sup>1</sup>. Under the final rules, in order for an issuer to exclude a shareholder proposal on frequency, the Say on Frequency vote must get a majority vote; in addition, the issuer must adopt the frequency vote that is consistent with the vote and there must be an abstain box on the proxy card. So, if 3-years wins the vote with less than a majority of the votes cast and the company implements a Say on Pay vote every 3 years, the company would not be allowed to exclude a shareholder proposal the next year requesting annual say on pay votes.

The SEC has also changed the timeline for an issuer to disclose its decision on the frequency vote to allow additional time for issuers to consider the results of the Say on Frequency vote and decide how frequently it will conduct Say on Pay votes. Under the proposed rules this disclosure would have been required in either the next 10-Q or 10-K filed by the company, but the final rules require the issuer to file a Form 8-K disclosing the company's decision on how they will implement the Say on Frequency proposal following a shareholder vote. The company must file the Form 8-K no later than 150 calendar days after the date of the annual meeting, but in any event no later than 60 calendar days prior to the deadline for submission of Rule 14a-8 shareholder proposals for the subsequent annual meeting.

### Say on Golden Parachutes

Under the final rules, companies are required to have a separate proposal approving "golden parachutes" in connection with a merger or acquisition. This is for preliminary proxy or information statements, Schedule TOs, 13E-3, and 14D-9 and Form S-4 and F-4 filed on or after April 25, 2011. Companies are required to provide additional disclosure regarding compensation arrangements with executive officers in connection with merger transactions, known as "golden parachute" arrangements. Disclosure is required of all agreements and understandings that the acquiring and target companies have with the named executive officers of both companies. The rule requires this disclosure in both narrative and tabular formats.

The "golden parachute" disclosure is also required in connection with other transactions, including going-private transactions and third-party tender offers, so that the information is available for shareholders no matter the structure of the transaction. As mentioned earlier, smaller reporting companies are not exempt for this portion of the rule.

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Morrow & Co. is available at any point to answer your questions or assist you as you move toward the 2011 proxy season. Please feel free to contact your Morrow representative with any questions you may have. You may also contact Tom Ball, John Ferguson, or Fred Marquardt at 203-658-9400.

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<sup>1</sup> For purposes of determining the vote, abstentions are not counted as votes cast.

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