

# Meridian Client Update

February 1, 2011

## SEC Issues Final Rules on Say on Pay, Say on Vote Frequency and Say on Golden Parachutes

On Tuesday, January 25, 2010, the Securities and Exchange Commission (“SEC”) adopted by a 3-2 vote of the Commissioners final rules to implement the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) relating to shareholder approval of a company’s executive compensation programs (“Say on Pay”), frequency of Say on Pay voting (“Say on Vote Frequency”) and golden parachute compensation arrangements (“Say on Golden Parachutes”). The final rules also provide guidance on the required disclosure of golden parachute arrangements that are subject to a shareholder vote. The final rules are substantially similar to the proposed rules with some modifications, as noted below. The final rules are not effective until 60 days after publication in the Federal Register.

The final rules differ from the proposed rules in the following respects:

- **CD&A Disclosure of the Impact of the Most Recent Say on Pay Vote.** The proposed rules would have required a public company to disclose in their Compensation Discussion and Analysis (CD&A) whether, and if so, how the company has taken into account the results of previous Say on Pay votes in determining compensation policies and decisions. The final rules clarify that this mandatory disclosure relates to the company’s consideration of the **most recent** Say on Pay vote. However, if a company also considered earlier Say on Pay votes in determining current compensation policies and decisions, then the Company’s CD&A must disclose its consideration of these earlier Say on Pay votes. Oddly, in the final rules, the SEC acknowledges that Dodd-Frank Act does not mandate that companies make any disclosure regarding their consideration of Say on Pay votes.
- **Disclosure of Say on Pay Vote Frequency Decisions.** The proposed rules would have required a company to report on Form 10-Q (or Form 10-K if the shareholder vote occurs during a company’s fourth quarter) its decision regarding how frequently to conduct Say on Pay voting in light of Say on Vote Frequency results. The final rules require that a company disclose its decision regarding how frequently it will conduct Say on Pay votes (i) no later than **150 days** after the date of the end of the annual or other shareholder meeting in which the Say on Vote Frequency took place on Form 8-K, but (ii) in no event later than 60 calendar days prior to the deadline for submission of shareholder proposals under Rule 14a-8 for the subsequent annual meeting. This Form 8-K will be an amendment to the Form 8-K filed by a company to disclose the preliminary voting results within four business days following the date of the shareholder meeting and the final voting results within four business days of when they are known.
- **Disclosure of Current Frequency of Say on Pay Votes in the Proxy.** The proposed and final rules require a company to disclose in its proxy statement, when applicable, that the company is providing a Say on Vote Frequency vote, and a brief explanation as to the general effect of the vote, such as whether the vote is

non-binding. The final rules add a requirement for companies to disclose in their proxy the current frequency of Say on Pay votes and when the next scheduled Say on Pay vote will occur.

■ **Exclusion of Shareholder Proposals Related to Say on Pay Votes or the Frequency of Say on Pay Votes.**

Under the proposed rules, a company would have been permitted to exclude from its proxy materials a shareholder proposal that would provide a Say on Pay vote or seeks future Say on Pay votes or that relates to the frequency of Say on Pay votes, provided the company has adopted a policy on the frequency of Say on Pay votes that is consistent with the **plurality** of votes cast in the most recent Say on Vote Frequency vote. Under the final rules, the **SEC changed the vote threshold for exclusion from a plurality to a majority**. Specifically, the final rules permit the exclusion of the foregoing shareholder proposals if, in the most recent Say on Vote Frequency vote, a majority of votes cast supported a single frequency (i.e., 1, 2 or 3 years) and the company has adopted a policy on the frequency of Say on Pay votes that is consistent with the majority vote.

■ **Effective Date of the Golden Parachutes Vote and Golden Parachutes Disclosure Requirements.** In contrast to Say on Pay and Say on Vote Frequency, which went into effect on January 21, 2011, Say on Golden Parachutes and related disclosure of golden parachute arrangements are not effective until the completion of SEC rulemaking. The final rules provide that these requirements will be effective for merger proxy statements filed **on or after April 25, 2011**.

■ **Temporary Exemption for Smaller Reporting Companies.** The final rules provide a temporary two-year exemption to smaller reporting companies (i.e., companies with a public float of less than \$75 million) from Say on Pay and Say on Vote Frequency vote requirements. These companies will not be required to hold a Say on Pay or Say on Vote Frequency vote until their first annual or other meeting of shareholders occurring on or after January 21, 2013. However, smaller reporting companies are subject to Say on Golden Parachutes Vote requirements for merger proxy statements filed **on or after April 25, 2011**.

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