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SEC Adopts Rules Requiring Shareholder Advisory Votes on Executive Compensation (Say-on-Pay) and Golden Parachute Arrangements

On January 25, 2011, the SEC adopted rules required by Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) that require the following shareholder advisory (non-binding) votes:

- Say-on-Pay - Shareholders vote on executive compensation when registrants solicit proxies for the election of directors; and
- Golden Parachute Arrangements - Shareholders vote on golden parachute executive compensation to be paid in connection with a merger, going private, or tender offer transaction.

The SEC had proposed the rules in October 2010, and the rules were finalized largely as proposed. We discussed the proposal in our [BDO Knows: SEC Significant 2010 Developments](#) publication.

The say-on-pay rules are effective for the first annual or other meeting of shareholders at which directors are elected occurring on or after January 21, 2011, even if proxy statements have been sent to shareholders prior to this date. Under authority granted by the Dodd-Frank Act, the Commission decided to temporarily exempt smaller reporting companies from the say-on-pay rules until annual meetings occurring on or after January 21, 2013. The golden parachute arrangement shareholder advisory votes are required in proxy statements initially filed on or after April 25, 2011. Unlike the say-on-pay rules, smaller reporting companies did not receive a temporary exemption, and are required to implement the golden parachute rules at the same time as all other registrants.

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The new rules require public companies subject to the Commission's proxy rules¹ to:

- Provide their shareholders with an advisory vote on executive compensation every year, every other year, or once every three years;²
- Provide their shareholders, at least once every six years, with an advisory vote on the desired frequency of the vote on executive compensation;
- Disclose the outcome of the shareholder say-on-pay and frequency votes in an Item 5.07 Form 8-K filing no later than four business days following the shareholders meeting. In that Form 8-K, a registrant must also disclose, if it has decided, how frequently the registrant will hold say-on-pay votes; otherwise
- Amend the initial Item 5.07 Form 8-K to disclose how frequently the registrant will hold say-on-pay votes. The amendment is required within 150 days of the annual meeting in which the vote took place; however, this date must be no later than 60 calendar days prior to the deadline for shareholders to submit proposals for the subsequent annual meeting.
- Disclose in the Compensation Discussion and Analysis whether, and if so, how the registrant has considered the results of previous say-on-pay votes;³ and
- Provide their shareholders with advisory votes on and disclosures of golden parachute arrangements in connection with mergers, going private, and tender offer transactions. This advisory vote can be held either at an annual meeting at which an advisory vote on all other compensation takes place or at the meeting at which shareholders are asked to approve the merger or acquisition transaction.

For more information, see the SEC's press release at <http://www.sec.gov/news/press/2011/2011-25.htm> and the adopting release at <http://www.sec.gov/rules/final/2011/33-9178.pdf>

¹ Foreign private issuers are not subject to the SEC's proxy rules and therefore are not subject to these new rules.

² The Instruction to Rule 14a-21(a) provides the following non-exclusive example of a resolution that would satisfy the applicable requirements: "RESOLVED, that the compensation paid to the company's named executive officers as disclosed pursuant to Item 402 of Regulation S-K, including the Compensation Discussion and Analysis, compensation tables and narrative discussion is hereby APPROVED."

³ Smaller reporting companies are not required to provide a Compensation Discussion and Analysis and therefore are not required to provide this disclosure.