

CORPORATE AND SECURITIES LAW ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Another Turn in the Road of Proxy Access

December 18, 2009

Comment Period Reopened

In a move that surprised some observers, the Securities and Exchange Commission announced earlier this week that it is reopening for 30 days the comment period with respect to its proposed proxy access rules that were initially released in June 2009. The SEC indicated that by doing so it hopes to solicit input on additional material and data that has been submitted to the public comment file since the initial August 17 deadline.

The SEC's announcement reflects the many challenging issues the SEC is grappling with in connection with its consideration of proxy access. We continue to believe that the SEC is committed to mandating proxy access for public companies, as reflected in the proposed SEC rules. However, we also believe that final proxy access rules could vary significantly from the rules proposed in June and may include a mechanism whereby public companies, through shareholder action, would be permitted to approve proxy access bylaws that are more restrictive and less shareholder proponent-friendly than the proxy access provisions mandated by the SEC.

Should Companies Propose Proxy Access Bylaws at their 2010 Annual Meeting?

There is an emerging dialogue in corporate law circles about whether or not calendar year-end public companies should submit proxy access bylaws to shareholders for approval at their 2010 annual meeting. A primary argument in favor of this approach is that, if a company's shareholders approve proxy access bylaw amendments at its 2010 annual meeting, these company-tailored proxy access bylaws (rather than SEC-mandated proxy access provisions) will govern the company's 2011 director election process (assuming that the SEC final rules permit companies to adopt more restrictive proxy access provisions with shareholder approval). In contrast, a company that does not have shareholder-approved proxy access bylaws in place after its 2010 annual meeting will generally not have the opportunity to obtain shareholder approval of company-proposed proxy access bylaws prior to the company's 2011 annual meeting (unless the company calls a special shareholder meeting between annual meetings, which is unlikely). Therefore, the company's 2011 director election process would be subject to the prescribed SEC proxy access rules, without any ability of the company to adopt proxy access provisions tailored specifically for the company for the 2011 proxy season (it seems

likely, but is not certain, that the SEC's proxy access rules will be in effect for the 2011 proxy season).

Another advantage to this "early adoption" approach is that companies that propose proxy access bylaws at their 2010 annual meeting may be viewed as being shareholder friendly and at the forefront of best corporate governance practices. Companies that act proactively may have a greater ability to gain shareholder approval of proxy access bylaws at this stage, before proxy advisory services such as RiskMetrics have more comprehensive voting policies in place with respect to proxy access bylaws, and before shareholders develop a greater resistance to approving proxy access bylaws that are more restrictive than those ultimately mandated by SEC rules.

Nevertheless, on balance, we continue to believe that it is generally not advisable for most public companies to submit proxy access bylaw amendments to their shareholders for approval at the 2010 annual meeting. In short, we believe the uncertainty regarding the content of the final rules weighs against this action in the case of most public companies. The argument in favor of submitting proxy access bylaws is predicated on the assumption that the final rules (unlike the proposed rules) will allow companies to adopt, via shareholder action, proxy access bylaws that are more restrictive than those prescribed by the SEC. While there is reason to think this may occur, it still is not clear the extent to which, if any, the SEC will limit the ability of public companies to adopt proxy access bylaws that deviate from SEC standards.

In addition, there are many other difficult issues the SEC is weighing in its consideration of proxy access, the outcome of which could have a significant impact (both from a legal and strategic perspective) on what provisions companies will elect to include in their proxy access bylaws. Given the time it will take the SEC to review additional comments in connection with the reopening of the comment period, it appears likely that final rules will not be adopted by the SEC before March or April of next year. Therefore, many calendar-year end companies that elect to propose proxy access bylaws at their 2010 annual meetings may be faced with the unenviable prospect that final SEC rules will not even be released prior to the time that companies would deliver a proxy statement to their shareholders (or submit a preliminary proxy statement with these proposed amendments). Consequently, any endeavor to propose proxy access bylaw amendments to shareholders at this time runs a significant risk that management and shareholder time and attention will be expended on bylaw amendments that will need to be materially revised again based on the final rules.

To date, few public companies have adopted proxy access bylaws, through board action or otherwise. We believe that a relatively small number of public companies will elect to submit proxy access bylaws to their shareholders at their 2010 annual meeting; in particular, companies (often large-cap companies) that have been at the vanguard of adapting to emerging corporate governance trends and "best practices" in recent years may be more likely to take this action. However, we believe that the vast majority of public companies (particularly mid-cap and small-cap companies) will elect not to take this action and will wait to digest final SEC rules before deciding how to respond.

For additional background regarding proxy access developments, including summaries of the SEC's proposed rules, see our previous Corporate and Securities Law Alerts dated [October 6](#), [September 9](#), [July 22](#), [June 15](#) and [May 15](#).

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