

CORPORATE AND SECURITIES LAW

ALERT

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

Senator Dodd Revives Financial Reform Bill

March 19, 2010

On March 15, 2010, Senate Banking Committee Chairman Christopher Dodd (D-CT) released a revised draft of his comprehensive financial regulatory reform legislation. The revised bill, entitled the Restoring American Financial Stability Act of 2010, contains several corporate governance provisions that were included in Senator Dodd's original bill released on November 10, 2009 (as discussed in our [November 12](#) client alert):

- Majority Voting. Senator Dodd's revised bill requires that all companies listed on a U.S. securities exchange apply majority voting in uncontested elections of directors. In addition, the revised bill would authorize the SEC to adopt rules exempting companies from majority voting requirements based on factors such as market capitalization and number of shareholders. This change would have a significant impact on public companies that have not switched to majority voting, including a significant majority of mid-cap and small-cap companies. Moreover, in the absence of this bill's majority voting mandate, we believe that the SEC's recent elimination of broker discretionary voting in uncontested director elections, effective as of January 1, 2010, will somewhat stem the trend toward companies voluntarily adopting majority voting.
- Proxy Access. Senator Dodd's revised bill grants the SEC authority to adopt proxy access rules. Senator Dodd's original bill required the SEC to adopt proxy access rules within 180 days after the enactment of the bill. If adopted, this provision would provide a statutory basis for proxy access if (as is expected soon) the SEC adopts final proxy access rules and insulate the SEC from anticipated legal challenges that it does not have the authority to adopt such rules.

Senator Dodd's revised bill does not include the provision in the original bill which prohibited companies listed on a U.S. securities exchange from having a classified board of directors without shareholder approval of such board structure.

Senator Dodd's revised bill also contains a number of executive compensation provisions, most of which are similar to those released in Senator Dodd's original draft of the bill (as discussed in our [November 18](#) client alert). Set forth below are some of these key provisions:

- Advisory Vote on Executive Compensation ("Say-on-Pay"). As was expected, the revised bill would require a nonbinding shareholder vote on executive compensation in connection with proxy statements requiring compensation disclosure. This Say-on-Pay vote would apply to all shareholder meetings taking place six months after the bill's enactment, and, therefore, would not apply to the 2010 proxy season. Unlike the original bill, however, the revised bill

no longer requires companies to provide shareholders with a separate Say-on-Pay vote for any type of compensation payable to a CEO upon the occurrence of a merger or acquisition.

- Compensation Committee Independence. Similar to the original bill, the SEC would direct the national securities exchanges to require, as a condition to listing, that companies have entirely independent compensation committees. Furthermore, compensation committees would only be permitted to select compensation consultants, legal counsel and other advisors to the compensation committee after considering certain independence factors to be determined by the SEC. Compensation committees would also have the sole discretion, and be provided appropriate funding, to retain or obtain independent compensation consultants, legal counsel and other advisors services, as well as be directly responsible for their appointment, compensation, and oversight. The revised bill would require companies to provide specific disclosure in the proxy statement regarding (1) whether the committee had retained or received advice from a compensation consultant, and (2) whether the consultant's work raised any conflict of interest and if so, how that conflict is being addressed.
- Executive Pay Versus Performance Disclosures. The revised bill would require the SEC to amend the proxy statement disclosure rules to require companies to disclose information that demonstrates the relationship between compensation that was actually paid to executives with the financial performance of the company.
- Recovery of Erroneously Awarded Compensation ("Clawback") Policies. The revised bill would require companies listed on an exchange to adopt and disclose a clawback policy providing that, in the event a company must restate its financials due to material noncompliance of the company with any financial reporting requirement under the securities laws, the company would recover incentive-based compensation (including stock options) from any current or former executive officers in excess of what would have been paid to them under the restated financials for the three-year period preceding the date on which a company is required to prepare the restatement.
- Employee/Director Hedging. The revised bill would require companies to disclose in their annual proxy statements whether they permit any employees or directors to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds) that are designed to hedge or offset any decrease in the market value of equity securities granted for compensatory purposes or otherwise held by the individual.
- Excessive Compensation by Holding Companies of Depository Institutions. The revised bill would prohibit bank holding companies from having compensation plans that provide their executives, employees, directors, or principal shareholders with excessive compensation or benefits, or could lead to a material financial loss to the bank holding company.

These corporate governance and executive compensation provisions are part of a more comprehensive financial reform package which has faced significant opposition from Republicans. We believe that it is unlikely that Senator Dodd's revised bill will become law as currently drafted, but it is possible that some of these corporate governance and executive compensation provisions could be included in a revised bill with bipartisan support. Although Senator Dodd negotiated with Senator Bob Corker (R-TN) over the last several weeks on the provisions of the legislation, no Senate Republican supported its introduction, and it appears likely that the Republican minority in the Senate would attempt to filibuster the bill in its current form. We will continue to monitor this legislation closely and provide updates related to this and other legislative developments of interest to our clients and friends.

Bass, Berry & Sims PLC's Shareholder Activism Subgroup monitors and advises on developments in the area of proxy contests, activist campaigns, takeover defenses and shareholder communications. Bass, Berry & Sims PLC's Executive Compensation Subgroup is comprised of tax and corporate attorneys who monitor and advise on developments in the tax rules, securities laws and corporate governance standards relating to executive compensation. If you have any questions regarding the issues addressed in this alert or would like to set up a meeting with us and your management team or board of directors, please feel free to communicate with your regular contacts in our Corporate and Securities Group or any of the attorneys in our Subgroups listed below.

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Bass, Berry & Sims PLC Corporate and Securities Group

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