

CORPORATE AND SECURITIES LAW

Alert

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

Proxy Access Rules Unlikely for 2010 Proxy Season

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Recent news reports indicate that the SEC is unlikely to vote on the adoption of proposed proxy access rules until 2010, meaning such rules would not be in place for the 2010 proxy season for registrants whose fiscal year ends at calendar year end. The SEC had originally hoped to vote on the proposed rules as early as November 2009. If adopted in proposed form, these rules would allow shareholders to submit director nominations for inclusion in a company's proxy statement. For background regarding proxy access developments, including summaries of the SEC's proposed rules, see our previous Corporate and Securities Law Alerts dated September 9, July 22, June 15 and May 15.

Delaying action will give the SEC more time to address concerns raised in the more than 500 comment letters received by the SEC in response to the proposed rules. The delay also provides more time for Congress to act on pending legislation in the U.S. Senate and House that would authorize and direct the SEC to adopt proxy access. Such legislation would provide the SEC with clearer authority to adopt the sweeping proxy access mandates outlined in its proposed rules, which will likely face legal challenge if adopted in the absence of such authorizing legislation.

In a speech last Friday, SEC Commissioner Elisse B. Walter (one of the three SEC commissioners who earlier voted in favor of the proposed rules) discussed the possibility that final proxy access rules could include a means for shareholders to adopt proxy access provisions more restrictive than the SEC's proposed rules. In her remarks, however, Commissioner Walter stated she is less receptive to giving directors the ability to restrict proxy access without shareholder approval. Nonetheless, Commissioner Walter's remarks indicate a willingness by the SEC to address the multitude of comments which have been submitted regarding the proposed rules and to give companies some flexibility in responding to a proxy access regime. Her comments also suggest that final proxy access rules, if adopted, could vary significantly from the rules proposed in June.

While the SEC's decision on proxy access appears to be delayed for the moment, it is not currently clear whether the SEC will also delay adoption of a proposed amendment to Rule 14a-8 that would require public companies to include shareholder proposals regarding proxy access in their proxy statement. Some commentators have suggested that, to facilitate private ordering of proxy access, the SEC should adopt the proposed Rule 14a-8 amendment rather than the proposed proxy access rules. While there is still time for the SEC to act on the Rule 14a-8

amendment in advance of the 2010 proxy season, doing so would likely draw strong criticism from proponents of proxy access who do not view the proposed Rule 14a-8 amendment as a sufficient advancement for proxy access.

What do these developments mean?

While these developments have generated significant buzz in corporate law circles, the delay of potential action on the proposed rules until next year makes sense given the complex and wide-ranging implications of proxy access. The additional time should give the SEC time to consider the many comments it has received and could mean that final rules, if adopted, will address some of the concerns public companies and certain other commentators have had with the proposed rules.

We still generally believe it premature for public companies to adopt proxy access-related amendments to their bylaws in advance of the adoption of final SEC proxy access rules. Any endeavor to amend a public company's bylaws in advance of the adoption of final SEC rules runs a significant risk that company time and expense will be wasted on bylaw amendments that will need to be revised again, perhaps materially, based on what is included in the final rules. Moreover, if the SEC's proposed Rule 14a-8 amendment is not adopted in advance of the 2010 proxy season, it appears that shareholder proponents will not be permitted to include proxy access bylaw amendments in a public company's proxy statement for this proxy season.

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Page Davidson	615-742-6253	pdavidson@bassberry.com
Kevin Douglas	615-742-7767	kdouglas@bassberry.com
Chris Chi	615-742-7819	cchi@bassberry.com
Stephen Hinton	615-742-7799	shinton@bassberry.com

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315 Deaderick Street • Suite 2700 • Nashville, TN 37238-3001 • (615) 742-6200

The Tower at Peabody Place • 100 Peabody Place, Suite 900 • Memphis, TN 38103-3672 • (901) 543-5900

1700 Riverview Tower • 900 S. Gay Street • Knoxville, TN 37902 • (865) 521-6200

Our Nashville office is moving.

As of December 15, 2009, the new address will be:

150 3rd Avenue South, Suite 2800 • Nashville, TN 37201

www.bassberry.com