

CORPORATE AND SECURITIES LAW

ALERT

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

SEC Adopts New Proxy Disclosure Rules

December 17, 2009

On Wednesday, December 16, 2009, the SEC approved final rules to enhance certain compensation and corporate governance disclosures by public companies. The final rules are based on proposed rules released in July 2009 (described in our [July 15](#) client alert). Although there is some uncertainty around the effective date of the new disclosure requirements, we believe the new proxy disclosure rules will be effective for filings made on or after February 28, 2010 – so depending on when a company's fiscal year ends, it may avoid application of some or all of the new rules in 2010.

The following are some suggestions for public companies to prepare for the new disclosures:

- Prepare to discuss board diversity. The new rules require public companies to disclose in their proxy statements whether their nominating committees consider diversity in reviewing potential nominees and to assess the implementation of any diversity policies. Notable in the rules is the fact that "diversity" is not defined, leaving companies to define diversity in ways they consider appropriate.
- Update D&O questionnaires. D&O questionnaires will need to be updated to gather the information required by the new rules. The new rules require expanded disclosure of director experience and qualifications, service on other boards and involvement in legal proceedings, all information that public companies usually gather through annual D&O questionnaires.
- Have directors review new disclosures on experience and qualifications. Not only are the expanded disclosures regarding director experience and qualifications new, they also require information of a personal nature such as "specific experience, qualifications, attributes or skills." These disclosures are likely to be scrutinized by both investors and proxy advisory services such as RiskMetrics Group, particularly in the context of a proxy contest or "vote no" campaign. Therefore, companies should develop a plan to draft the new disclosures in time for directors and nominees to review and revise prior to printing and mailing their proxy materials. This will help ensure that directors feel the disclosures are complete, accurate and sufficiently highlight the director's qualifications and experience.

- Develop required disclosures about the company's board leadership structure. The new rules require disclosure about a company's board leadership structure, such as whether a company has separated the roles of CEO and board chairman and why it believes its board leadership structure is appropriate. This disclosure should effectively portray why the company has chosen its leadership structure and should complement other disclosures, such as the CD&A. The new rules also require companies to describe the board's role in risk oversight.
- Consider how compensation decisions will be presented under the new rules. The new rules alter the way stock and option awards are disclosed in the summary and director compensation tables in the proxy statement by requiring disclosure of the aggregate grant date fair value of such awards. This could potentially lead to larger dollar amounts being presented for equity awards, particularly for awards intended to cover multiple years because they will be fully reflected in the year they are granted. As a result of these larger dollar amounts, retention, new hire and other large awards may also change the composition of your named executive officer group. Companies should review how their compensation decisions for 2010 will be presented under the new rules.
- Review the role of, and fees paid to, compensation consultants. The new rules require additional disclosures about compensation consultants and their attendant fees, if a compensation consultant that provided advice or recommendations on executive or director compensation (other than any role limited to consulting on broad-based non-discriminatory plans or providing certain surveys) also provided additional services in an amount in excess of \$120,000 during the company's fiscal year (some exceptions apply when multiple compensation consultants are engaged). Again, by reviewing these new disclosure requirements now, companies will be able to understand how their engagement of compensation consultants will be reflected in the required disclosures and whether any changes to their practices may be in order.
- Assess compensation related risks. If risks arising from a company's compensation policies and practices for all employees (not just executive officers) are reasonably likely to have a material adverse effect on the company, the new rules will require discussion of the company's policies or practices as they relate to risk management and risk-taking incentives. Therefore, the initial step all companies must take will be to assess the level of risk arising from their compensation policies and practices to determine whether disclosure is required. Companies (and specifically compensation committees) should begin planning how they will address this assessment early in 2010.
- Prepare to disclose shareholder voting results more quickly. The new rules generally require public companies to disclose shareholder voting results in a Form 8-K within four business days of the date of the meeting, rather than a subsequent Form 10-Q or Form 10 K as under the current rules. Companies should prepare for this short turn-around by coordinating with the vote tabulator for their annual meeting, particularly if it appears that a matter to be voted on will be highly contested. While the new rules do permit preliminary voting results to be reported when final results are not available within the reporting period, a significant change in preliminary and final voting results could subject a company to investor criticism.

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The Corporate and Securities Group includes the following subgroups comprised of our attorneys with a particular expertise who are focused on current trends and developments in these areas of the law. This Alert has been brought to you courtesy of the Corporate Governance, Executive Compensation, Periodic and Current Reporting and Shareholder Activism subgroups:

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