

CORPORATE AND SECURITIES LAW

Alert

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

New Development in Executive Compensation Affecting Public Companies and Financial Institutions: The House Passes the Corporate and Financial Institution Compensation Fairness Act of 2009

August 4, 2009

On July 31, 2009, the United States House of Representatives passed the “Corporate and Financial Institution Compensation Fairness Act of 2009” (the “Act”), which is Representative Barney Frank’s latest version of the “say-on-pay” bill. The United States Senate, which is expected to heavily debate the Act, is not expected to consider a similar bill until sometime after the August recess.

As passed by the House, the Act is separated into three parts: (i) “say-on-pay;” (ii) compensation committee independence; and (iii) regulation of the compensation levels of “covered financial institutions,” which include certain depository institutions and their holding companies, broker-dealers, credit unions and other financial institutions as designated by the appropriate federal regulators. The following summarizes these three sections as currently passed by the House.

- **Say-on-Pay**

Effective six months after the Act becomes law, all public companies will be required to include in their annual meeting proxy statements a separate non-binding shareholder vote to approve the compensation of named executive officers. Additionally, at any meeting of the shareholders of a public company at which the shareholders are asked to approve a merger, acquisition, consolidation or sale of substantially all of the assets, the public company that is soliciting shareholder approval would have to disclose and seek non-binding shareholder approval of any compensation that the named executive officers may receive as a result of such transaction. This separate vote would not be required if the compensation had previously been approved by a non-binding shareholder vote in connection with the annual say-on-pay vote described above. Additionally, certain institutional investment managers would be required to report at least annually how they voted on the foregoing “say on pay” proposals if they owned \$100 million or more of the public company’s stock during the preceding 12 months. The Act does give the SEC the power to grant certain exemptions, which may be used by the SEC to exempt certain smaller issuers, but as presently drafted the legislation would apply to all public companies regardless of size.

- **Compensation Committee Independence**

Effective nine months after the Act becomes law, each member of the compensation committee of a public company must be independent and the compensation committee must have the authority to retain and be independently responsible for engaging and overseeing compensation consultants (who must be independent) or other independent counsel or advisers. Additionally, beginning with proxy statements mailed for annual shareholder meetings held more than one year after the Act becomes law, each public company will be required to disclose in its proxy materials whether the compensation committee retained and obtained the advice of an independent compensation consultant. As with “say-on-pay,” the Act does give the SEC the power to grant certain exemptions, but as presently drafted the legislation would apply to all public companies regardless of size.

- **Executive Compensation and Financial Institutions**

Effective nine months after the enactment of the Act, the appropriate Federal regulators (i.e., the FRB, OCC, OTC, NCUA, SEC and the FHFA) must issue regulations requiring any covered financial institution with assets in excess of \$1 billion to disclose to the appropriate Federal regulator all incentive-based compensation arrangements offered by such covered financial institution. The appropriate Federal regulator will determine whether such compensation is properly structured to align sound risk management, account for the time horizon of risks and meet such other criteria as may be proscribed by the appropriate Federal regulators to reduce any risks that could threaten the soundness of such financial institutions or have adverse effects on economic conditions. Additionally, the Act grants the appropriate Federal regulator the power to proscribe regulations that would require disclosure of, and prohibit, incentive based compensation that threatened the soundness of the covered financial institutions or could have adverse consequences on economic conditions and financial stability.

Please note that the foregoing is only a summary of the House bill and that the Act and the provisions contained therein are subject to change once it goes through the Senate. Even if passed by the Senate and signed into law, the SEC would still have to adopt rules and regulations which could take as long as six months. Accordingly, we do not recommend that you make any changes to your corporate structure or practices at this time, but encourage you to keep up to date on any new developments regarding this legislation as it moves through Congress.

Bass, Berry & Sims PLC’s Financial Institutions Subgroup monitors and advises on developments affecting financial institutions and their holding companies. Our attorneys have extensive experience in this area and provide advice to both public and private financial institutions.

If you have any questions regarding the issues addressed in this Corporate and Securities Law Alert please feel free to contact any of your regular contacts in the Corporate and Securities Group or any of the attorneys in our Financial Institutions Subgroup listed below.

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