

CORPORATE AND SECURITIES LAW

Alert

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

Treasury Issues Draft Legislation: Say-On-Pay and Compensation Committee Independence

July 20, 2009

As expected, on Thursday, July 16, 2009, the U.S. Treasury Department delivered [draft legislation](#) to Congress covering two specific areas: [say-on-pay](#) and [compensation committee independence](#). Following is a brief summary of the draft legislation.

Say-On-Pay for Public Companies

Beginning with annual meetings held after December 15, 2009, public companies would be required to include a non-binding shareholder vote on executive compensation as disclosed in the proxy. The say-on-pay vote would cover disclosures appearing in the proxy compensation tables (including salaries, bonuses, stock and options awards, total compensation, pension and termination compensation), as well as in the compensation discussion and analysis, the compensation committee report and any related materials.

In addition, the say-on-pay legislation would require a separate non-binding vote on any compensation agreements, understandings and amounts that are based on or otherwise relate to any proxy or consent solicitation materials for a meeting occurring after December 15, 2009, to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all the assets of a company. The draft legislation would require that these agreements, understandings and amounts be disclosed in a "clear and simple tabular form," pursuant to certain regulations to be promulgated by the SEC. The draft legislation directs the SEC to issue rules and regulations with respect to these say-on-pay votes not later than one year after enactment of the legislation.

Compensation Committee Independence

In an effort to drive the compensation committees of public companies to become fully independent of management, while also giving compensation committee members the tools they need to bargain effectively with executives, the draft legislation would require that:

- *Compensation committee members meet stronger standards of independence.* Essentially, these standards are parallel to those required of audit committee members under the

Securities Exchange Act rules, prohibiting compensation committee members from being affiliated with the company or accepting consulting, advisory, or other compensatory fees other than in their capacity as a member of the board of directors or board committees.

- *Any compensation consultant, legal counsel or other advisor to the compensation committee meet certain independence standards.* The specified independence standards are to be promulgated by the SEC.
- *Compensation committees have the sole, discretionary authority to retain and obtain the advice of independent compensation consultants.* Under the draft legislation, compensation committees would have the direct responsibility for appointing, compensating, and overseeing independent compensation consultants.
- *Compensation committees must disclose in any proxy or solicitation material for an annual meeting whether the committee retained and obtained the advice of a compensation consultant.* If the compensation committee did not retain and obtain the advice of a compensation consultant, the committee must provide an explanation concerning that decision. This disclosure will be required in materials for meetings occurring one year after the enactment of the legislation.
- *Compensation committees have the sole, discretionary authority to retain independent legal counsel and other advisors.* The compensation committee would have the direct responsibility for appointing, compensating, and overseeing the independent legal counsel and other advisors.
- *Companies must provide appropriate funding (determined by the compensation committee) for retaining independent compensation consultants, legal counsel and other advisor.*

On Friday, July 17, 2009, Chairman Barney Frank of the House Financial Services Committee circulated a [discussion draft](#) of the *Corporate and Financial Institution Compensation Fairness Act of 2009*, which is based on the draft legislation described above. Chairman Frank [stated](#), "The Financial Services Committee will be marking up legislation next week to give shareholders a say on pay for top executives, which is similar to legislation the House passed in 2007." Given these statements, and the general environment surrounding executive compensation, we expect things will continue to progress quickly in this area.

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. Our attorneys have a wide array of expertise in these areas and provide advice to both public and private companies as well as individual executives and directors. 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 our Corporate and Securities Group or any of the attorneys in our Executive Compensation Subgroup listed below.

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