

# CORPORATE AND SECURITIES LAW

## *Alert*

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

### **The Legislative Tempest Continues: Financial Reform Bill Would Have Major Impact on Public Company Corporate Governance**

November 12, 2009

A financial reform bill introduced earlier this week in the U.S. Senate contains significant corporate governance requirements for public companies. The 1,136 page draft bill, entitled the Restoring American Financial Stability Act of 2009, was introduced by Senate Banking Committee Chairman Christopher Dodd (D-CT) and co-sponsored by eight other Senate Democrats. The majority of this bill concerns an overhaul of financial industry regulation and agencies. However, included in the bill are several corporate governance provisions as described in more detail below, some of which have been included in other proposed legislation introduced in Congress earlier this year.

- **Majority Voting.** The bill would require all companies listed on a U.S. securities exchange to apply majority voting in uncontested elections for directors. Directors who fail to receive a majority of votes cast would be required to tender their resignation to the company's board of directors. A board would have the ability to decline the resignation of any director not receiving a majority vote, but only upon a unanimous vote of the board, and would be required to make certain public disclosures regarding its decision not to accept the resignation. The bill also indicates that plurality voting would apply in a contested election where the number of nominees exceeds the number of directors to be elected.

Majority voting for directors has been on the rise in recent years, especially among large-cap companies. However, a substantial majority of mid-cap and small-cap companies have not adopted majority voting (as of May 2009, 69% of S&P 400 mid-cap companies and 79% of S&P 600 small-cap companies had pure plurality voting, compared to 26% of S&P 500 large-cap companies). Moreover, as discussed in past client alerts, we believe that it is likely 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. The bill authorizes the SEC to adopt rules exempting companies from the majority voting requirements based on factors such as market capitalization and number of shareholders.

- **Shareholder Approval of Staggered Boards.** The bill would prohibit companies listed on a U.S. securities exchange from having a staggered, or classified, board of directors without having received shareholder approval or ratification of the board structure. Listed companies with a staggered board already in place that had not previously been approved by shareholders would be required to submit the staggered board structure to its shareholders for ratification at the company's next annual meeting. Again, this provision would have the greatest impact on mid-cap and small-cap companies, which are more likely than large-cap companies to have a staggered

board (as of May 2009, 59% of S&P 400 mid-cap companies and 53% of S&P 600 small-cap companies had classified boards, compared to 37% of S&P 500 large-cap companies). Unlike the majority voting provision, the bill does not give the SEC authority to exempt certain companies from the scope of this prohibition.

- Board Chairman/CEO Disclosure. The bill would require public companies to disclose whether the company's CEO is also the chairman of its board of directors. Previous legislation introduced in the Senate by Senator Charles Schumer (D-NY and a co-sponsor of the Dodd bill), the Shareholder Bill of Rights Act of 2009, included a prohibition on public company CEOs serving as board chairs. Senator Schumer has indicated that companies have objected most strongly to this provision in the Shareholder Bill of Rights Act, and that he might drop this prohibition from his bill. A disclosure requirement such as included in the Dodd bill stands to receive greater support than an outright prohibition.
- Proxy Access. The bill would authorize and require that the SEC adopt proxy access rules within 180 days after enactment of the bill. The Dodd bill does not include any requirements as to what the SEC's rules would have to include. While the SEC already proposed proxy access rules earlier this summer (and is expected to adopt final rules in early 2010), the Dodd bill would require the SEC to act on its proposal and would also provide a statutory basis for such rules, increasing the likelihood that proxy access rules would survive anticipated legal challenges.

In addition to the corporate governance requirements discussed above, the bill also has a number of executive compensation related provisions, including requirements with respect to annual non-binding shareholder votes on executive compensation (frequently referred to as "say-on-pay"), independence requirements for compensation committee members and advisors (including compensation consultants and legal counsel), additional executive compensation disclosures in public company proxy statements, and clawbacks of executive officer incentive-based compensation following financial restatements. There are additional compensation-related requirements applicable to financial institutions. Our executive compensation and financial institutions subgroups will be providing additional client alerts in the coming days discussing these provisions and the overall financial services reform provisions which make up the majority of the bill.

We believe that it is unlikely that the bill will become law as currently drafted. Senator Dodd's bill has the general support of the Obama administration, and the bill is being co-sponsored by certain moderate Democrats such as Mark Warner (D-VA) and Jon Tester (D-MT). However, no Republicans have yet committed to supporting this legislation, and it appears likely that contentious legislation of this nature would require 60 votes to pass the Senate. More specifically, it is difficult to handicap the likelihood that some or all of these corporate governance provisions will become law. These corporate governance provisions (like the corporate governance provisions in the Shareholder Bill of Rights Act) will generally be objected to by business constituencies and defenders of states' (and particularly Delaware's) prerogative as the primary source of corporate law. However, the fact that these corporate governance provisions are only a small part of a comprehensive financial reform bill (which could be adopted in modified form) rather than stand-alone legislation increases the challenge of forecasting the ultimate outcome of these provisions. We will be monitoring this legislation closely and will continue to 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. If you have any questions regarding the issues addressed in this Corporate and Securities Law Alert or if you would like to set up a meeting with us and your management team or board of directors regarding these

developments, please feel free to contact your regular contacts in our Corporate and Securities Group or any of the attorneys in our Shareholder Activism Subgroup listed below.

Page Davidson	615-742-6253	<a href="mailto:pdavidson@bassberry.com">pdavidson@bassberry.com</a>
Kevin Douglas	615-742-7767	<a href="mailto:kdouglas@bassberry.com">kdouglas@bassberry.com</a>
Chris Chi	615-742-7819	<a href="mailto:cchi@bassberry.com">cchi@bassberry.com</a>
Stephen Hinton	615-742-7799	<a href="mailto:shinton@bassberry.com">shinton@bassberry.com</a>

### Bass, Berry & Sims PLC Corporate and Securities Group

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 Shareholder Activism subgroup:

Corporate Finance/1933 Act	Corporate Governance
Cross-Border Transactions	Distressed M&A
Executive Compensation	Fiduciary Duties
Financial Institutions	Investor Relations/Earnings Releases
Joint Ventures	M&A Trends and Developments
Periodic and Current Reporting	Private Equity/Venture Capital
Private Placements	Real Estate Capital Markets
Securities Laws Liabilities/ SEC Priorities and Enforcement	<b>Shareholder Activism</b>
Trading by Insiders/Equity and Debt Repurchases	Transactional Tax

*The materials contained herein have been abridged from the statutory sources and should not be construed or relied upon for legal advice. Readers are urged to consult legal counsel concerning particular situations and specific legal questions.*

*To ensure compliance with requirements imposed by the IRS, we inform you that this message is not intended to be used, and cannot be used by the addressee or any other person for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code.*

---

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](http://www.bassberry.com)