

CORPORATE AND SECURITIES LAW

ALERT

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

SEC Delays Proxy Access

October 5, 2010

In a surprising move, the SEC yesterday issued an order delaying the effectiveness of the recently adopted proxy access rules pending resolution of a lawsuit challenging the new rules' validity. An SEC spokesman has said the SEC expects the lawsuit to be resolved by late spring of 2011. As a result, the new proxy access rules will likely not be effective for most public companies until the 2012 proxy season. The new rules, which allow shareholders who meet certain qualifications to nominate director candidates through the company's proxy statement, were adopted by the SEC in August of this year and otherwise would have become effective on November 15, 2010.

The SEC's order came in response to a motion filed last week by the Business Roundtable and the Chamber of Commerce of the United States of America to delay the effectiveness of the proxy access rules pending the resolution of a lawsuit challenging the new rules' validity in the U.S. Court of Appeals for the D.C. Circuit. The lawsuit alleges that the proxy access rules are "arbitrary and capricious" under the federal Administrative Procedures Act and create significant ambiguities in the application of federal and state law in the director and election process. The lawsuit also states that the SEC erred in its assessment of the costs, inefficiencies and adverse consequences the new rules will have on U.S. public companies, including empowering activist investors, unions and others to pursue special interest agendas.

The SEC explained that "under all of the circumstances of this matter, a stay of Rule 14a-11 and related rule amendments is consistent with what justice requires. Among other things, a stay avoids potentially unnecessary costs, regulatory uncertainty, and disruption that could occur if the rules were to become effective during the pendency of a challenge to their validity."

The SEC also delayed the amendment to Rule 14a-8, "because the amendment to Rule 14a-8 was designed to complement Rule 14a-11 and is intertwined, and there is a potential for confusion if the amendment to Rule 14a-8 were to become effective while Rule 14a-11 is stayed." The amendment to Rule 14a-8 would allow shareholders to include in companies' proxy statements bylaw amendment proposals.

We will be consulting with our friends and clients regarding these developments, including whether it is advisable to delay amending advance notice bylaws in advance of the 2011 proxy season in light of the SEC's order. The SEC's order granting stay can be found at <http://sec.gov/rules/other/2010/33-9149.pdf>.

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 would like us to discuss these developments in greater detail with you, please feel free to communicate with your regular contacts in our Corporate and Securities Group or any of the attorneys in our Shareholder Activism Subgroup listed below.

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