

CORPORATE AND SECURITIES LAW

Alert

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

SEC Approves Elimination of Broker Discretionary Voting for Directors

July 1, 2009

Earlier today, the Securities and Exchange Commission approved an amendment to New York Stock Exchange Rule 452 eliminating broker discretionary voting for uncontested elections of directors. The amendment designates an uncontested election of directors as a “non-routine” matter, thereby removing brokers’ ability to vote without specific instructions from beneficial owners. The amended Rule 452 applies to all shareholder meetings held after January 1, 2010. Because Rule 452 applies specifically to securities brokers, virtually all of whom are governed by New York Stock Exchange rules, this amendment will affect all companies listed on a national stock exchange including companies listed on the NASDAQ Stock Market.

Previously under Rule 452, brokers could cast discretionary votes in uncontested elections of directors if a beneficial owner had not given the broker voting instructions at least 10 days before a scheduled meeting. The amendment to Rule 452 will impact quorum and voting matters for next year’s annual meetings and has the potential to shift more power to activist and institutional investors to determine the outcome of director elections.

What public companies should be doing now

We encourage our public company clients to review their charter and bylaws in light of this amendment to Rule 452. The amended rule’s impact can vary from company to company depending on the voting standards and quorum requirements in the company’s governing documents. If a company has adopted majority voting for directors, it should consider how the loss of broker discretionary votes will impact director elections and what steps the company should take to ensure its director candidates receive the requisite number of votes. At a meeting where shareholders are to vote only on non-routine matters, which now will include uncontested director elections, companies may need to increase their soliciting efforts just to reach a quorum because uninstructed votes will not count towards determining if a quorum exists.

More company resources may be needed to ensure retail shareholders understand how a failure to cast their vote will impact the voting results of a shareholder meeting. The loss of broker discretionary voting will tend to reduce the number of overall votes cast in uncontested elections, which may make it easier for an activist investor to conduct a successful “vote no” campaign against incumbent directors. Additionally, the loss of brokers’ discretionary votes in director elections means institutional investors will make up a larger portion of the vote actually cast. As SEC Commissioner Casey pointed out in today’s Open Meeting, this could increase the influence of proxy advisory firms such as RiskMetrics Group, whose recommendations often sway the votes of institutional investors.

Additionally, because companies utilizing “e-proxy” have generally seen a reduction in the percentage of retail votes cast, companies wishing to use e-proxy will want to evaluate the potential cost savings from delivering proxy materials electronically against the possibility of a failure to obtain a requisite number of votes in director elections without additional soliciting efforts toward retail holders.

As always, we encourage our public company clients to maintain close contact with their investor base; good investor relations and knowledge of the investor base will continue to be invaluable as the amendment to Rule 452 further changes the landscape of director elections.

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. Bass, Berry & Sims PLC's Annual Meeting Subgroup specializes in advising clients of the latest developments related to annual meetings of shareholders including proxy disclosure issues, related party transactions and shareholder voting matters. 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 contact your regular contacts in our Corporate and Securities Group or any of the attorneys in our Shareholder Activism and Annual Meeting Subgroups listed below.

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Bass, Berry & Sims 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 Annual Meetings and Shareholder Activism subgroups.

Annual Meetings

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