

# CORPORATE AND SECURITIES LAW

## *Alert*

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

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### SEC Proposes Proxy Access Rules

May 22, 2009

On Wednesday, the SEC voted to propose rules allowing stockholders to submit director nominations for inclusion in a company's proxy statement. These rules, if adopted, would fundamentally alter the process of public company director nominations and elections. As discussed in our May 15, 2009 Corporate and Securities Law Alert, the proposed rules were anticipated following recent Delaware legislation concerning proxy access and the Shareholder Bill of Rights Act of 2009, which has been proposed by Sen. Charles Schumer (D-NY). The proposed rules would federalize issues of proxy access currently governed by state law and corporate bylaws.

The SEC's proxy access proposal includes a new Rule 14a-11 under the Securities Exchange Act of 1934, which would require the inclusion of stockholder director nominations in a company's proxy statement. Stockholders would be able to nominate in the aggregate director candidates representing the greater of 25% of a company's board of directors or one candidate. If more stockholder director nominations were submitted than could be included under the new rules, a "first-submitted" rule would determine which nominations are to be included in the company's proxy statement. In addition to compliance with applicable state law, to be eligible to submit director nominations under the proposed rule a stockholder or group of stockholders would be required to meet a threshold ownership percentage varying by company size (1% for large accelerated filers, 3% for accelerated filers and 5% for non-accelerated filers). The proposed rules also include a minimum stock holding period, disclosure requirements regarding both the nominating stockholder and the nominee(s), and a certification that the nominating stockholder does not intend to effect a change of control of the company (although it should be noted that the proposed rules do not prohibit a nominating stockholder from seeking to take over the company after nominees are elected). Under the proposal, nominees would be required to satisfy independence standards of the applicable stock exchange, but would not need to be independent of the nominating stockholder(s).

Additionally, proposed amendments to Rule 14a-8 would allow stockholder proxy access with respect to proposals concerning stockholder nomination rights and related procedures, which companies are currently able to exclude from the company's proxy statement. The existing Rule 14a-8 eligibility requirements that the submitting stockholder have held at least \$2,000 in market value of the company's voting securities for at least a year as of the submission of the proposal would continue to apply to such proxy access proposals.

Notably, the proposed SEC proxy access rules would effectively trump recent Delaware proxy access legislation (and all other state corporate law on the issue). The recent Delaware legislation permits, but does not require, stockholder proxy access. In the absence of SEC action, the new Delaware framework would have permitted companies and their stockholders to determine the conditions for permitting proxy access, such as

ownership thresholds, size of dissident slates and informational requirements, rather than having federal standards for such conditions govern. However, the recent changes in Delaware law remain relevant in light of the SEC's proposed amendments to Rule 14a-8, as a stockholder could submit a proposal that a company adopt stockholder proxy access procedures that are even more permissive and "stockholder-friendly" than the SEC's proposed rules.

If adopted, the proposed rules would apply to all SEC reporting companies other than those companies which only have listed debt securities. It is expected that the SEC's final proxy access rules will be effective beginning with the 2010 proxy season. It remains to be seen how the proposed SEC rules will affect adoption of the Shareholder Bill of Rights Act of 2009, which, as detailed in our May 15, 2009 Corporate and Securities Law Alert, proposes sweeping federalization of various corporate governance matters.

### ***What public companies should consider doing now***

The SEC's proposed proxy access rules, the full text of which is expected to be released shortly, will be subject to public comment for 60 days following release. We expect that the SEC will receive extensive comments on the proposed rules from public companies, attorneys, proxy advisors and stockholder activist groups. We encourage our public company clients to consider submitting comment letters after reviewing the proposed rules. We note that, in the context of the current environment of depressed stock market prices, the new rules could be especially problematic for small-cap companies where stockholders might use strategic stock purchases to reach the minimum ownership threshold at a relatively modest price, then nominate directors for up to a quarter of the company's board seats.

The SEC's initial release on the issue indicates that permissible state-law requirements with respect to director nominations – such as advance notice bylaw nomination requirements that require director nominations be made a certain amount of time before a company's annual meeting – would still apply in proxy access context. However, because Delaware case law with respect to advance notice bylaws continues to develop and the SEC's proxy access rules are subject to change following public comment, companies are advised to await final rulemaking before taking responsive action. In any event, it appears that all public companies will need to undertake a comprehensive review of their bylaws and director election procedures before the 2010 proxy season in order to ensure that they comport with developing Delaware law and federal rule-making.

In the meantime, we encourage our public company clients to consider the entirety of their corporate governance practices and to maintain close contact with their investor base in light of the proposed SEC rules and the current activist shareholder environment.

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 Shareholder Activism Subgroup 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 Shareholder Activism subgroup.

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