

# CORPORATE AND SECURITIES LAW

## *Alert*

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

---

### RiskMetrics Revises Poison Pill Policy; On-the-Shelf Rights Plans on the Rise

**November 24, 2009**

Public company boards of directors that adopt or renew a shareholder rights plan (also known as a “poison pill”) without seeking shareholder approval will face additional investor scrutiny beginning in 2010. The influential proxy advisory firm RiskMetrics Group recently released updates to its proxy voting recommendation guidelines for 2010 which increase the frequency with which RiskMetrics will recommend a vote against directors for adopting or renewing most non-shareholder approved rights plans.

Under these revised voting guidelines, RiskMetrics will recommend that its clients vote against director nominees at companies that adopt a shareholder rights plan with a term greater than one year, or that renew any shareholder rights plan (including with a term of one year or less), without seeking shareholder approval. In the past, RiskMetrics would limit its vote against recommendation for non-shareholder approved rights plans to the annual meeting following adoption or renewal of the rights plan. However, under its new guidelines, RiskMetrics will revisit whether a company has a non-shareholder approved rights plan every three years for companies with annually elected directors. Furthermore, for companies with a classified board of directors, RiskMetrics will recommend a vote against director nominees standing for election each year following the adoption or renewal of a non-shareholder approved rights plan. This new policy will apply to companies that adopt or renew a shareholder rights plan after November 19, 2009. Although this revised policy will not initially apply to companies that adopted or renewed shareholder rights plan prior to November 19, RiskMetrics has indicated that “in future years, it is possible that the policy will be applied retroactively to companies that previously adopted long-term pills.”

RiskMetrics’ policy change on reviewing non-shareholder approved rights plans reflects recent trends in adoption and terms of shareholder rights plans. Traditionally, shareholder rights plans almost always had a term of ten years. In recent years, however, as sentiment against shareholder rights plans (particularly those with longer terms) has increased from shareholder activists and institutional shareholders, rights plans with shorter terms of three years or less have become much more common. Under RiskMetrics’ previous policy companies could adopt non-shareholder approved rights plans with a longer term and try to withstand the negative implications of RiskMetrics’ vote against recommendation at the next annual meeting rather than

having to revisit the issue in subsequent years. The change in RiskMetrics' policy means that adopting or renewing a shareholder rights plan with a longer term will not limit the frequency with which the rights plan will draw scrutiny. Therefore, companies without a rights plan or with a rights plan about to expire should note the potential impact on director elections of adopting or renewing a plan without shareholder approval, especially if the company has majority voting for directors and/or a classified board.

RiskMetrics also revised its policy to provide that it will not automatically recommend a withhold vote for nominees of companies that adopt a new rights plan with a duration of one year or less (as under RiskMetrics previous voting guidelines), but instead will review these nominees on a case-by-case basis. The change in this policy will allow companies that are in-play to adopt a rights plan with a term of one year or less without obtaining shareholder approval, and perhaps reflects a recognition from RiskMetrics that the adoption of a rights plan in the midst of a takeover battle may augment shareholder value by increasing a board's leverage (as reflected in certain previous academic studies).

Rather than adopt or renew a shareholder rights plan, currently many companies have prepared shareholder rights plans "on-the-shelf." In this scenario, a company does not legally adopt a shareholder rights plan, but instead prepares and reviews a form of shareholder rights plan that can be quickly approved by the company's board in the event a threat emerges or a significant shareholder engages in coercive or abusive actions. A company that puts a plan on the shelf neither adopts a shareholder rights plan nor makes any public disclosure regarding this action. Therefore the company avoids (or at least defers) a RiskMetrics withhold recommendation and negative shareholder reaction that may follow the company's adoption of a plan. This approach allows public companies to adopt a plan on very short notice if a threat arises, and also allows boards to consider the terms and merits of a plan in a more deliberate manner outside the fog of a takeover battle. We advise that all public companies without an effective shareholder rights plan consider whether an "on-the-shelf" rights plan should be a part of the company's takeover preparedness.

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)