

CORPORATE AND SECURITIES LAW

Alert

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

Delaware Approves Majority Vote Amendments to the Delaware General Corporation Law

July 13, 2006

Delaware's governor recently approved amendments to the Delaware General Corporation Law proposed by the state legislature in response to the growing push from institutional investors and other shareholder activist groups for a majority vote standard for the election of directors. Currently, the Delaware General Corporation Law provides that directors are elected by a plurality of votes cast, meaning that the directors receiving the highest number of votes cast in favor of their election are elected to the board of directors even if those votes reflect fewer than a majority of the votes cast on the election. This plurality vote standard, coupled with the traditional practice of brokers to consider the election of directors as a routine matter and therefore vote shares held in street name in favor of the slate of directors proposed by management even when the broker has not been instructed on how to vote the shares by the beneficial owner, resulted in management's slate of directors almost always being elected to the board of directors, regardless of how the company had been performing.

Responding to the demands by institutional investors and shareholder activists for majority vote provisions, several companies have adopted bylaw provisions or policies requiring any director not receiving a majority of votes cast to tender his or her resignation to the board of directors. Following concerns over the practicality of these provisions, Delaware has adopted two amendments to the Delaware General Corporation Law which take effect on August 1, 2006. These amendments do not directly eliminate plurality voting for directors, but rather facilitate the adoption of majority vote policies or bylaw provisions by establishing a mechanism for directors to submit resignations that are conditioned upon the occurrence of a future event, including the director's failure to receive a specified number of votes for election to the board. The amendments further provide that this conditional resignation may be irrevocable when conditioned on the failure of the director to receive a specified percentage of the shares voted on the election of directors. The amendments also provide that a bylaw amendment adopted by stockholders which specifies the votes that shall be necessary for the election of directors shall not be further amended or repealed by the board of directors.

With the adoption of these amendments, companies incorporated in Delaware that have not yet adopted majority voting policies or bylaw provisions should expect continued pressure from shareholder activists and institutional investors to do so in the form of shareholder proposals seeking to require a standard other than plurality voting.

In addition to these majority vote amendments, the director election process will also be impacted if the recently issued recommendations of the New York Stock Exchange's Proxy Working Group that seek to bar brokers from voting on the election of directors when they have not been instructed on how to vote by the beneficial owners is approved by the NYSE's board of directors and the Securities and Exchange Commission.

If you have any questions about this Corporate and Securities Law Alert, or would like any additional information, please contact any Bass, Berry & Sims attorney in the Corporate and Securities Practice Area.

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.

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