

CORPORATE AND SECURITIES LAW

ALERT

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

Significant Executive Compensation and Corporate Governance Changes on the Horizon: Financial Reform Legislation Passes Senate

May 26, 2010

On May 20, 2010, the U.S. Senate passed the Restoring American Financial Stability Act of 2010. As discussed in our [November 12](#) and [March 19](#) client alerts, the bill contains a number of corporate governance and executive compensation provisions that would significantly impact all public companies. It is expected that Senate and House members will begin reconciling the Senate bill next month with the Wall Street Reform and Consumer Protection Act of 2009 which passed the House last December.

With respect to corporate governance, the Senate bill would require majority voting in uncontested director elections for all companies listed on a national securities exchange. If enacted, this would have a significant impact on the public company corporate governance landscape, given that a significant majority of small-cap and mid-cap companies do not have majority voting. The Senate bill would also authorize the SEC to adopt rules exempting companies from this majority voting requirement based on factors such as market capitalization and number of shareholders. Unlike earlier versions of the legislation, the final Senate bill does not require shareholders of public companies to approve classified boards.

The Senate bill would also authorize the SEC to adopt proxy access rules. While such authorization falls short of the proxy access mandate contained in an earlier version of the Senate bill, it would decrease the likelihood of a successful legal challenge to the SEC's authority to adopt proxy access rules. Based in part on this authority, we believe the SEC will adopt final proxy access rules following enactment of this legislation.

An amendment included in the Senate bill that was not included in prior versions of the bill would prohibit broker discretionary voting on executive compensation and other significant matters, as determined by the SEC. No similar provision was included in the House bill.

With respect to executive compensation, the Senate bill would require public companies to:

- hold an annual nonbinding vote on executive compensation ("Say-on-Pay");
- direct listing exchanges to adopt clawback provisions for incentive compensation following certain financial restatements;
- impose additional independence requirements and considerations for compensation committee members as well as their consultants, legal counsel, and advisors; and

- require additional compensation-related disclosures by public companies.

Among additional disclosures required by the Senate bill, a new requirement included in the Senate bill that public companies disclose the ratio between the CEO's total compensation and the median total compensation of all other employees of the company was not included in the House bill.

While it is anticipated that final legislation will more closely track the Senate bill than the House bill, certain provisions of the final legislation may be modified or removed. In particular, Rep. Barney Frank (D-MA), the sponsor of the House bill, when responding to questions about the Senate bill stated that while he expected the Say-on-Pay and proxy access components would remain in the final legislation, he was "not sure" that mandatory majority voting would be a part of the final bill. We will continue to monitor developments related to this legislation which has the potential to significantly change public company director elections and how public companies compensate their executives.

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. Our Corporate Governance Subgroup counsels boards, audit, nominating/governance committees and special committees of public companies on a variety of key issues, including public disclosure, executive compensation and fiduciary duties issues. Our Executive Compensation Subgroup is comprised of tax and corporate attorneys who monitor and advise on developments in the tax rules, securities laws and corporate governance standards relating to executive compensation. If you have any questions regarding the issues addressed in this 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 communicate with your regular contacts in our Corporate and Securities Group or any of the attorneys in our Subgroups listed below.

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Bass, Berry & Sims PLC Corporate and Securities Group

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