

CORPORATE AND SECURITIES LAW

Alert

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

Delaware Adopts Proxy Access Amendment; SEC Expected to Adopt Proxy Access Rules Shortly

Federal Shareholder Bill of Rights Proposed

May 15, 2009

The hotly debated issue of proxy access – under which a dissident stockholder could require a company to include the dissident’s director nominees in the company’s proxy statement – is once again at center stage in the evolving corporate governance landscape. The Delaware Legislature recently adopted legislation clarifying that corporations may provide proxy access for stockholder nominees and setting forth permissible restrictions and procedures that companies can include in their bylaws related to such access. Meanwhile, after several years of discussion, the SEC is expected to approve new proxy access rules as soon as this month.

Delaware last month approved amendments to its General Corporation Law, including a new Section 112 related to shareholder proxy access. Section 112 permits (but does not require) a company to adopt bylaw provisions that allow both company and stockholder nominees to be included in the company’s proxy statement. Such stockholder access can be conditioned on the stockholder and its nominee satisfying certain requirements. The non-exclusive list of conditions to proxy access that a corporation may require in its bylaws includes: (i) minimum stock ownership and duration of ownership standards for a nominating stockholder; (ii) submission of information regarding the nominating stockholder and its nominees; (iii) limits on the number of stockholder director nominees that may be included in the company’s proxy materials; and (iv) preclusion of stockholders who have recently accumulated a certain ownership percentage in the company, or who have publicly expressed an intention to acquire such a percentage, from enjoying such access.

The Delaware amendments clarify that corporations may impose limitations on proxy access and will almost certainly influence the nature of proxy access provisions included in the bylaws of U.S. public companies. In addition, the Delaware legislation, which becomes effective August 1, 2009, may influence the SEC’s actions with respect to proxy access. SEC Chairman Mary Schapiro has indicated that the commission intends to revisit the issue this month. In particular, it is expected that Rule 14a-8(i)(8) of the Securities Exchange Act will be amended to remove the current restriction on proxy access to stockholder proposals “relating to director elections,” which currently prevents stockholders from having director nominees included in a company’s proxy materials and which currently precludes stockholders from proposing in the company’s proxy materials bylaw amendments related to proxy access (such as those contemplated by new Section 112). What remains to be seen is the extent to which the SEC will be pre-emptive or deferential to Delaware law. For instance, the SEC might prescribe an ownership pre-condition for proxy access (it has previously considered 5%) or leave

these specifics to state legislatures and/or the corporations themselves. Any new proxy access rules adopted by the SEC are expected to be effective beginning with the 2010 proxy season.

The recent Delaware proxy access legislation is part of a set of new governance-related changes to the Delaware General Corporation Law. The other new changes address expense reimbursement for dissident stockholder proponents and annual meeting record date procedures, among other things.

In addition to the changes in Delaware law and possible rulemaking by the SEC, the issue of proxy access may also be impacted by legislation in the U.S. Congress. Senator Charles Schumer (D-NY) has announced his intent to introduce the Shareholder Bill of Rights Act of 2009, which, if passed in announced form, would implement sweeping changes in the corporate governance requirements applicable to U.S. companies and would be an unprecedented federalization of U.S. corporate law. The proposed legislation would: (i) require annual stockholder advisory votes on executive compensation; (ii) require that stockholders be granted access to a corporation's proxy statement to nominate their own candidates to the board of directors; (iii) require listed companies to have an independent director as chair of the board of directors for listed companies; (iv) abolish staggered boards and require the annual election of directors; (v) require majority voting in all uncontested board elections of listed companies; and (vi) require boards of listed companies to create a risk management committee to oversee the risk management practices of the company.

Given the uncertainty surrounding possible SEC rulemaking and Senator Schumer's legislation, we believe it generally advisable for U.S. public companies to monitor these developments closely but to defer action in response to the Delaware legislation until further clarity is provided by the SEC and Congress. This remains a fluid area of the law, and a variety of factors, including the influence of RiskMetrics Group and other shareholder advocacy groups, will influence the "best practices" that emerge with respect to proxy access.

If you have any questions regarding the issues addressed in this Corporate & Securities Law Alert please feel free to contact any of your regular contacts in the Corporate & Securities Group or any of the attorneys in our Shareholder Activism Subgroup or Statutory Developments Subgroup listed below.

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