Simpson Thacher

Memorandum

Glass Lewis Issues U.S. Voting Policy Updates for the 2020 Proxy Season

November 11, 2019

On November 1, 2019, Glass Lewis issued updates to its U.S. proxy voting guidelines, which will be effective for meetings held in the 2020 calendar year.

Glass Lewis' notable revisions to its U.S. proxy voting guidelines are as follows:

Rule 14a-8 Shareholder Proposals

In light of recent SEC guidance relating to Rule 14a-8 shareholder proposals, Glass Lewis has indicated that if the SEC declines to state a view on whether a shareholder proposal should be excluded from a company's proxy materials, the proposal should be included. A failure to do so will now likely lead Glass Lewis to recommend that shareholders vote against the members of the governance committee.

Glass Lewis has also indicated that if the SEC has verbally permitted a company to exclude a shareholder proposal and there is no written record provided by the SEC about the determination, it expects the company to provide some disclosure concerning this no-action relief. If a company excludes a proposal without including this disclosure, Glass Lewis will generally recommend that shareholders vote against the members of the governance committee.

As a reminder, on September 6, 2019, the Staff of the SEC's Division of Corporate Finance announced that, starting with the 2019-2020 shareholder proposal season, it may respond orally instead of in writing to some no-action requests. According to this earlier announcement, written responses will be provided only when the Staff believes that doing so would provide value, such as more broadly applicable guidance about complying with Rule 14a-8. In addition, the Staff may now decline to state a view with respect to a company's asserted basis for exclusion of the shareholder proposal.

Expanded Say-on-Pay Considerations and Company Responsiveness

Glass Lewis has historically reviewed say-on-pay proposals on both a qualitative and quantitative basis, with a focus on specified areas. These areas will now include a review of significant post fiscal year end changes and one-time awards, particularly where the changes touch upon issues that are material to Glass Lewis recommendations. If Glass Lewis determines that specific policies and practices fail to demonstrably link compensation with performance Glass Lewis will generally recommend voting against the say-on-pay proposal.

Glass Lewis' new guidelines also expand on what Glass Lewis considers to be an appropriate response following low shareholder support (opposition of 20% or more) for the say-on-pay proposal at the previous annual meeting. Insufficient response to low shareholder support has now been included in Glass Lewis' non-exhaustive list of issues that will be weighed together when evaluating a say-on-pay proposal. Absent robust disclosure of engagement activities and specific changes made in response to shareholder feedback, Glass Lewis may consider recommending against the upcoming say-on-pay proposal and/or individual compensation committee members.

The updated guidelines also reflect a greater focus on actions taken in response to shareholder "feedback", as opposed to simply referencing shareholder "engagement". Glass Lewis' expectations regarding the minimum appropriate levels of responsiveness will correspond with the level of shareholder opposition, looking at both the magnitude of opposition in a single year and the persistence of shareholder discontent over time.

More on Executive Compensation

Contractual Payments and Arrangements

For the 2019 proxy season, Glass Lewis clarified its approach to analyzing both ongoing and new contractual payments and executive entitlements. For 2020, Glass Lewis further expanded its guidelines, stating that beyond the quantum of contractual payments, Glass Lewis will now also consider the design of any entitlements. In general, Glass Lewis is wary of terms that are excessively restrictive in favor of the executive, or that could potentially incentivize behaviors that are not in a company's best interest. Certain executive employment terms may help to drive a negative recommendation, including, but not limited to:

- Excessively broad change in control triggers;
- Inappropriate severance entitlements;
- Inadequately explained or excessive sign-on arrangements;
- Guaranteed bonuses (especially as a multiyear occurrence); and
- Failure to address any concerning practices in amended employment agreements.

Change in Control

Glass Lewis has further indicated that it considers double-trigger change in control arrangements, which require both a change in control and termination or constructive termination, to be best practice. Under its new guidelines, any arrangement that is not explicitly double-trigger may be considered by Glass Lewis to be a single-trigger or modified single-trigger arrangement. Further, the new guidelines provide that excessively broad definitions of change in control are potentially problematic as they may lead to situations where executives receive additional compensation where no meaningful change in status or duties has occurred.

Short-Term Incentives

Finally, to the extent a company has applied upward discretion with respect to short-term bonuses, which includes lowering goals mid-year or increasing calculated payouts, Glass Lewis now expects a robust discussion of why the decision was necessary.

Board Committee Performance

In addition to the existing factors that Glass Lewis will consider when evaluating director performance and voting recommendations for specific directors, under its newest guidelines Glass Lewis will consider the following:

Audit Committee

Glass Lewis believes that it is the duty of the audit committee to provide disclosure of the fees paid to the company's external auditor. As such, failure to disclose this information, which is already required under SEC rules, will now generally lead to a recommendation to vote against the audit committee chair.

Nominating and Governance Committee

Glass Lewis believes that attendance at board and committee meetings is one of the most basic ways for directors to fulfill their responsibilities to shareholders and that disclosure of meeting attendance is a critical element in evaluating performance of directors more generally. As such, Glass Lewis will now generally recommend voting against the governance committee chair when a company does not disclose individual directors' board and committee meeting attendance; or a company discloses that a director attended less than 75% of board and committee meetings but the reader is not able to determine which specific director's attendance was lacking.

Compensation Committee

Glass Lewis will now generally recommend against all members of the compensation committee when the board adopts a frequency for future say-on-pay that differs from the frequency approved by a plurality of shareholders.

Exclusive Forum

The updated guidelines clarify that Glass Lewis may make exceptions to its policy of recommending against the governance committee chair when a board adopts a forum selection clause without shareholder approval where it can be reasonably determined that the provisions of a forum selection clause are narrowly crafted to suit the unique circumstances facing the company and/or a reasonable sunset provision is included.

If you have any questions or would like additional information, please do not hesitate to contact **Brad Goldberg** at +1-212-455-2064 or bgoldberg@stblaw.com, **Shari A. Ness** at +1-212-455-2383 or shari.ness@stblaw.com, or any other member of the Firm's Public Company Advisory Practice.