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Proxy Advisory Firms Update Proxy Voting Guidelines

David M. Silk, David A. Katz, Trevor S. Norwitz, Andrea K. Wahlquist,
Adam J. Shapiro, Sabastian V. Niles & Sara J. Lewis

Wachtell, Lipton, Rosen & Katz

Both Institutional Shareholder Services Inc. (ISS) and Glass Lewis recently released updates to their proxy voting guidelines for the 2015 proxy season. Overall, the updates do not provide for significant changes but continue the trend towards a more shareholder-centric model of corporate governance. Key areas of focus include bylaw amendments, board leadership structures, executive compensation and equity plans.

Notably, both sets of updates adopt a more stringent approach towards boards' adoption of bylaw (and, where applicable, charter) amendments that impact shareholder rights without shareholder approval. Both proxy advisors warn that they may use the significant power of their withhold recommendations in response to a unilateral bylaw amendment "that materially diminishes shareholders' rights or that could adversely impact shareholders" (the ISS formulation) or that "reduce[s] or remove[s] important shareholder rights" (the Glass Lewis formulation). The increased scrutiny of unilateral bylaw amendments will apply not only to provisions like "fee-shifting" bylaws (which require shareholder plaintiffs to pay the company's legal expenses if they fail to obtain a favorable court judgment and which we have previously discussed), but also appear to apply to changes like exclusive forum bylaws, which limit wasteful and frivolous multi-forum litigation, and bylaws designed to discourage director conflicts of interest resulting from differential compensation for dissident directors. When updating bylaws, companies should consider explaining the board's rationale for the updates via appropriate disclosure in order to ensure that proxy advisory firms and shareholders understand why particular changes are deemed appropriate and to facilitate discussion with investors.

Board leadership was also addressed in the policy revisions. ISS will implement a more "holistic" methodology in evaluating independent chair proposals, taking into account a number of governance, board leadership and performance factors. Glass Lewis will continue to recommend in favor of independent chair proposals and will now also recommend withhold votes for the governance committee chair of a company with neither an independent chair nor an independent lead director.

Both proxy advisors also revised the methodologies for evaluating compensation-related proposals. ISS created a new "Equity Plan Score Card" (EPSC) as an alternative to its prior series of standalone tests focused on costs and certain egregious pay practices. Under the EPSC regime, recommendations on equity plan proposals will be based on a combination of weighted factors related to plan cost, plan features and company grant practices, with relative weights varying by index group. ISS will continue to recommend a vote against an equity plan if it includes certain problematic features. Glass Lewis' new guidance disfavors out-of-plan equity grants, supports clawbacks and emphasizes the importance of shareholder engagement for companies that receive less than 75% support for their say-on-pay proposals.

The changes to ISS policies are summarized in Annex A, and the changes to Glass Lewis policies are summarized in Annex B. As companies begin to prepare for the 2015 proxy season, they should be mindful of the revised guidelines and anticipate the likely voting recommendations of ISS and Glass Lewis. Companies that will be submitting new or amended incentive plans for shareholder approval should familiarize themselves with the new standards, review the relevant factors when preparing their plans and the related disclosure and consider verifying the underlying data used in ISS' equity plan "shareholder value transfer" models. However, we continue to believe that when it comes to governance and compensation decisions, one size does not fit all, and boards of directors, as well as fiduciaries with voting responsibilities, should not merely defer to the views of proxy advisory firms but must, as always, carefully consider the long-term best interests of the constituencies they serve.

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Proxy Access Proposals for the 2015 Proxy Season

Andrew R. Brownstein, Steven A. Rosenblum, David A. Katz, Trevor S. Norwitz,
Andrew J. Nussbaum, David C. Karp, Gregory E. Ostling, Karessa L. Cain,
Sabastian V. Niles & Francis J. Stapleton

Wachtell, Lipton, Rosen & Katz

A number of U.S. companies have recently received "proxy access" shareholder proposals submitted under SEC Rule 14a-8. Many of the recipients have been targeted under the New York City Comptroller's new "2015 Boardroom Accountability Project," which is seeking to install proxy access at 75 U.S. publicly traded companies reflecting diverse