



Glass Lewis' Updated Voting Policy Guidelines

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Thursday, November 19, 2015

Editor's note: [Andrew R. Brownstein](#) is partner and co-chair of the Corporate practice group, and [David A. Katz](#) is a partner specializing in the areas of mergers and acquisitions, corporate governance and activism, and crisis management at Wachtell, Lipton, Rosen & Katz. This post is based on a Wachtell Lipton memorandum by Mr. Brownstein, Mr. Katz, [David M. Silk](#), [Trevor S. Norwitz](#), [Sabastian V. Niles](#), and [S. Iliana Ongun](#).

Glass Lewis has released [updated U.S. proxy voting guidelines](#) for the 2016 proxy season. Key areas of focus include: (i) nominating committee performance; (ii) changing the Glass Lewis approach to exclusive forum provisions if adopted in the context of an initial public offering; (iii) director "overboarding;" (iv) evaluation of conflicting management and shareholder proposals when both are put to a vote of shareholders; and (v) withhold recommendations in the context of failures of environmental and social risk oversight.

Nominating Committee Performance

Beginning in 2016, Glass Lewis may consider recommending against the chairman of the nominating committee where a failure to ensure that the board has directors with relevant experience, either through director assessment or board refreshment, has contributed to a company's poor performance. Glass Lewis has not specified how it will define "poor performance" or how it will assess what contributed to such performance. Nevertheless, we continue to believe that it is good practice for boards to engage in regular director evaluations and self-assessments.

Exclusive Forum Provisions

During the 2015 proxy season, Glass Lewis automatically recommended against the nominating committee chair at companies that adopted exclusive forum provisions prior to an initial public offering. Beginning in 2016, Glass Lewis will no longer automatically recommend a "withhold" vote in such circumstances, but will instead weigh the presence of the exclusive forum provision in conjunction with the overall governance and shareholder rights profile of the newly public company. At this time, Glass Lewis will continue automatically recommending against the chairman of the nominating committee when a company unilaterally adopts an exclusive forum provision without shareholder approval outside of a spin-off, merger or initial public offering. We continue to believe that [exclusive forum provisions](#) have merit, but boards of directors need to understand the ramifications of implementing such provisions without shareholder approval.

Overboarding

Consistent with the [recently announced proposed changes](#) to ISS's voting policies, Glass Lewis has lowered the number of board positions it views as acceptable: (i) for executive officers with outside directorships, a limit of one outside public company directorship aside from their own; and (ii) for directors who are not executive officers, reducing the acceptable number of total public boards from the current six to five. There will be a one-year grace period until 2017, during which time Glass Lewis would include cautionary language in research reports but would not recommend withhold votes for this reason.

Conflicting Management and Shareholder Proposals

In response to the SEC's recent focus on the application of Rule 14a-8(i)(9), which allowed companies to exclude shareholder proposals that conflict with a management proposal, Glass Lewis has articulated how it will assess conflicting management and shareholder proposals. Going forward, Glass Lewis will consider, among other factors, the nature of the underlying issue, the materiality of the differences between the terms of the shareholder proposal and the management proposal and the company's overall governance profile, including its responsiveness to shareholders as evidenced by its response to previous shareholder proposals and its prior adoption of provisions enabling shareholder rights.

Environmental and Social Risk Oversight

Glass Lewis expects to recommend against directors responsible for risk oversight where the board or management failed to sufficiently identify and manage a material social or environmental risk that did (or could) negatively affect shareholder value. Consistent with past practice, Glass Lewis will also typically recommend against directors of companies with records of inadequate risk oversight (which would be assessed with the benefit of hindsight).

As companies and boards prepare for the 2016 proxy season, they should be mindful of the revised guidelines, but should not substitute such guidelines for their own independent judgments.