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Glass Lewis Publishes Voting Guidelines for the 2022 Proxy Season

Glass Lewis has published its 2022 proxy season voting guidelines, including specific guidelines on environmental, social and governance (ESG) matters. The changes to the guidelines follow ISS' recently proposed revisions for the upcoming proxy season (as discussed in our prior memo). Glass Lewis' guidelines primarily focus on updates to its positions on board diversity, disclosure of board diversity and skills, environmental and social risk oversight, multi-class share structures with uneven voting rights, SPAC governance and director commitments, waiver of age and tenure policies, "say on climate" proposals and shareholder action by written consent.

Glass Lewis has also provided clarification on shareholder proposals, executive pay, authorizations of preferred stock, federal forum provisions, post-IPO governance, director independence and related-party transactions.

Notable takeaways from the proposed changes include:

Board Diversity:

Glass Lewis has expanded its expectations on board gender diversity and updated guidance related to state laws and stock exchange requirements related to board diversity.

- **Board Gender Diversity**:
  - **2022**: Glass Lewis will generally recommend voting against the chair of the nominating committee where a board has fewer than two gender diverse directors, and against the entire nominating committee if there are no gender diverse directors. In this year's guidance, Glass Lewis also replaced references to "female" directors with references to "gender diverse" directors, which includes both women and non-binary directors.
  - **2023**: Glass Lewis plans to transition to a percentage-based approach in place of the current fixed number approach, whereby companies will generally be expected to have at least a 30% gender diverse board.
- **State Laws on Board Diversity**: Glass Lewis has clarified that it will generally recommend in line with board composition laws mandated by state laws, in addition to its standard policy on diversity. State laws that do not

mandate board composition requirements, are non-binding, or only import disclosure or reporting requirements will not be considered by Glass Lewis in determining whether to recommend against directors. The new guidance also notes that in line with a new California state law, California companies will need to have at least one director from an underrepresented ethnic or LGBT community or face a recommendation against the chair of the nominating committee.

- **Stock Exchange Disclosure Requirements**: In August 2021, Nasdaq received approval from the Securities and Exchange Commission for new listing rules regarding disclosure of board diversity. Beginning in August 2022, Glass Lewis will recommend against the chair of the governance committee for Nasdaq-listed companies where the company has not provided such disclosures.

- **Disclosure of Director Diversity and Skills**: The guidelines identify four categories to be included in disclosure about the board: (i) the percentage of racially/ethnically diverse directors; (ii) whether the board defines diversity to include gender and/or race/ethnicity; (iii) whether the board has adopted the "Rooney Rule" requiring women and minority to be included in the initial pool of director candidates; and (iv) board skills disclosure.

    - **2022**: For S&P 500 companies that do not provide disclosure in any of the above categories, Glass Lewis may recommend voting against the chair of the nominating and/or governance committee.

    - **2023**: Glass Lewis will generally recommend voting against the chair of the nominating and/or governance committee at S&P 500 companies that do not disclose individual or aggregate racial/ethnic board demographic information.

ESG:

Glass Lewis' updated guidelines expressly assert that it will carefully monitor companies' performance with respect to environmental and social issues, including those related to "climate and human capital management." Glass Lewis states its view that "material risks to a company's operations" can include those that are "environmental and social in nature," and provides as specific examples of such potential risks matters related to "climate change, human capital management, diversity, stakeholder relations, and healthy, safety and environment."

- **Environmental and Social Risk Oversight**: In 2022, Glass Lewis will implement its previously announced policy to recommend against the governance committee chair for S&P 500 companies that fail to provide explicit disclosure regarding the board's role in overseeing environmental and social issues.

- **"Say on Climate" Proposals**: Glass Lewis has registered greater concern than ISS regarding proposals asking shareholders to approve climate transition plans, as in its view, shareholders often do not have sufficient information to evaluate such plans and such votes may be seen as abdicating the board's strategic responsibilities. As such, Glass Lewis will generally oppose shareholder "say on climate" proposals. For management-sponsored "say on climate" proposals, Glass Lewis will recommend based on its assessment of whether appropriate disclosures have been made and the board's role in setting strategy in light of shareholders voting on climate transition plans. Notably, Glass Lewis has committed to evaluate each climate transition plan in the context of each companies' "unique operations and risk profile."

- **Linking Executive Pay to Environmental and Social Criteria**: Glass Lewis clarified that each company's unique circumstances should determine whether and how executive pay is linked to environmental and social criteria, but if there are proposals seeking to tie executive compensation to environmental or social practices, Glass Lewis will review the company's compliance with applicable laws and examine the company's history of environmental and social related concerns. Under the guidelines, companies should disclose the rationale for selecting environmental and social metrics, the target-setting process, and the resulting compensation outcomes, but Glass Lewis reiterated that compensation committees should retain control over the selection of performance metrics (including whether and how environmental and social criteria should be used) in short-term or long-term compensation milestones. The approach outlined under the guidelines aligns with market practice and maintains significant leeway for companies' varying approaches to integrating ESG in executive compensation.

Multi-Class Share Structures with Unequal Voting Rights:

Glass Lewis has identified a reasonable sunset of a multi-class share structure with unequal rights as generally seven years or less. Glass Lewis will vote against the chair of the governance committees at companies with such share structures where there is not a reasonable sunset provision.

Director Commitments of SPAC Executives

When a director's only executive role is at a SPAC, Glass Lewis will not hold that role against the director for purposes of overboarding and will generally apply its higher limit for company directorships. In practice this means that Glass Lewis will generally recommend a vote against a director who (1) serves in an executive role only at a SPAC; and (2) serves on more than five public company boards.

Waiver of Self-Imposed Age and Tenure Policies:

Boards waiving self-imposed age and/or tenure policies for two or more consecutive years will face negative recommendations against the nominating and/or governance committee chair. However, Glass Lewis will consider a compelling rationale for why the board proposes to waive its policy/policies (e.g., a corporate transaction).

Shareholder Action by Written Consent:

Glass Lewis has codified its approach to shareholder proposals requesting the right for shareholders to act by written consent. Where a company has provided for a shareholder special meeting right of 15% or below and has "reasonable" proxy access provisions, Glass Lewis will generally recommend against the written consent proposal. In cases where the right to act by written consent already exists, Glass Lewis will recommend in favor of lowering the ownership threshold to 15%. Glass Lewis will generally recommend against written consent proposals at companies where the required ownership thresholds are already 15% or lower.

Exclusive Forum and Fee-Shifting Bylaw Provisions:

Glass Lewis clarified its approach to companies that adopt exclusive forum provisions and/or fee-shifting bylaw provisions. Where the board has adopted exclusive forum provisions designating federal or state courts as the sole jurisdiction for matters without seeking shareholder approval, Glass Lewis will generally recommend voting against the chair of the governance committee. The same recommendation against the chair of the governance committees applies to boards who adopt "fee-shifting" or "loser pays" bylaws that require plaintiffs who sue the company and fail to receive a judgment in their favor to pay the legal expenses of the company without seeking shareholder approval.

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The revisions to Glass Lewis voting guidelines cover more topics than those proposed changes by ISS for the 2022 proxy season, but the revisions are relatively measured and codify prior practice or trends. In preparing for the upcoming proxy season, boards and management teams should assess the updated voting guidelines of proxy advisors, and the views of other stakeholders, and consider whether changes to existing company practices are appropriate.

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