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Glass Lewis Issues 2016 US Proxy Policy Guidelines

Proxy advisory firm Glass Lewis recently issued its U.S. voting policy guidelines for the 2016 proxy season. The guidelines include a few key changes, a summary of which is outlined below.

Conflicting Shareholder Proposals. Conflicting shareholder proposals relating to proxy access provisions were one of the key issues of the 2015 proxy season. In response to this issue, the Securities and Exchange Commission staff issued a new standard in October 2015 for determining if a company can exclude a shareholder proposal based on the view that it competes with another proposal. Under the new standard, companies now may exclude only shareholder proposals that directly conflict with a management proposal. As a result, Glass Lewis revised its guidelines to outline the points it will evaluate when deciding on the recommendation it will make on how to vote on competing shareholder proposals. Those points include:

- the nature of the underlying issue;
- the benefit to shareholders;
- the materiality of the differences in provisions between the management and shareholder proposals;
- the appropriateness of the provisions; and
- the company's governance profile and responsiveness to shareholders.

Director Overboarding. The new guidelines update Glass Lewis' historical view on when it believes a board member serves on too many public company boards. Glass Lewis typically recommends voting against a director serving on more than six public company boards or a director who is an executive officer of a public company while serving on more than two other public company boards. Beginning in 2017, Glass Lewis will recommend voting against directors who serve on more than five public company boards and directors who are executives officers and serve on more than one other board. During the 2016 transition period, Glass Lewis intends to "closely review director board commitments and may note as a concern instances of directors" exceeding its new lower limits.

Exclusive Forum. The new guidelines note that Glass Lewis will no longer recommend that shareholders vote against the chairperson of the nominating and corporate governance committee solely based on an exclusive forum bylaw being adopted in connection with an initial public offering (IPO). When an exclusive forum bylaw is adopted in connection with an IPO, Glass Lewis will weigh the forum bylaw against other provisions that limit shareholder rights such as supermajority vote requirements, classified boards and fee-shifting bylaws. Presumably, if Glass Lewis finds the entirety of the provisions to be unduly restrictive of shareholder rights, it will recommend a vote against the chairperson of the nominating and corporate governance committee. Glass Lewis intends to continue to recommend voting against the nominating and corporate governance committee chairperson when an exclusive forum bylaw is adopted without shareholder approval outside of a spin-off, merger or IPO.

Environmental and Social Risk Oversight. The new guidelines formalize Glass Lewis' view that a board of directors should ensure a complete analysis of the identification, mitigation and management of environmental and social risks, and the guidelines provide more clarity as to when Glass Lewis may recommend votes against directors for failure to satisfy this standard. Glass Lewis intends to recommend a vote against directors who are responsible for risk oversight when "the board or management has failed to sufficiently identify and manage a material environmental or social risk that did or could negatively impact shareholder value."

Nominating Committee Performance. The new guidelines clarify that Glass Lewis will now consider recommending a vote against the chairperson of the nominating and corporate governance committee when a board's failure to ensure it has directors with relevant experience has contributed to the company's poor performance. It is not clear how Glass Lewis intends to assess whether directors have relevant experience, how that lack of relevant experience contributed to a company's poor performance or when performance will be considered poor. The new guidelines note that Glass Lewis will consider a company's periodic director assessment process and the steps the company has taken to refresh the members of the board.

Compensation Updates. The new guidelines include additional information and clarifications related to Glass Lewis' consideration of a few compensation-related matters. Those matters include one-time and transitional compensation awards (e.g., inducement awards) for which Glass Lewis will expect a "meaningful explanation" in the proxy statement regarding the amounts payable and the process by which the amounts were determined. Glass Lewis believes the explanation should include in particular the basis for any make-whole payments and departures from or effects on the company's regular compensation arrangements. Also, the new guidelines make clear that, in evaluating equity compensation plan proposals, Glass Lewis will evaluate the proposal against payment limits and peer groups that it determines appropriate and its own assessment of the difficulty of attaining any performance vesting goals.

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Companies should assess the potential impact of these guidelines on the voting recommendations that Glass Lewis may make regarding matters to be considered by their shareholders during the 2016 proxy season and whether any steps should be taken to address that impact.

A copy of the voting guidelines is available here.

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