Simpson Thacher

# Memorandum

## Glass Lewis Issues Voting and Shareholder Initiatives Policy Updates for the 2019 Proxy Season

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Recently, Glass Lewis issued updates to its proxy voting[1] and shareholder initiatives[2] policy guidelines, which will be effective for meetings held in the 2019 calendar year.

Glass Lewis' notable revisions to its U.S. proxy voting guidelines[3] are as follows:

### 1. Board Gender Diversity

Under its new policy, Glass Lewis will generally recommend voting against the chair of a nominating committee of a board that has no female members. It may also recommend voting against other nominating committee members depending on the company's size, industry and governance profile. In this context, Glass Lewis will look at disclosure of diversity considerations and rationale for not having any female board members, including director nomination agreements with significant investors.

### 2. Conflicting and Excluded Proposals on Shareholder Special Meeting Rights

During the 2018 proxy season, when faced with shareholder proposals requesting that companies adopt a lower ownership threshold relating to the right of shareholders to call a special meeting, certain companies submitted their own management proposal seeking to ratify existing special meeting thresholds and successfully petitioned the Securities and Exchange Commission, or the SEC, for no-action relief under the premise that the shareholder proposals conflicted with management's own special meeting proposal setting a higher threshold.

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[1] *See* 2019 Policy Guideline Updates: United States, Canada and Israel.
[2] *See* 2019 Shareholder Initiatives Policy Guidelines.
[3] *See* 2019 Guidelines: United States.

The updated guidelines provide the following in this context:

- Glass Lewis will take a case-by-case approach if a company excludes a special meeting right shareholder proposal as a result of "conflicting" management proposals, taking into account both the shareholder and management thresholds, whether management's proposal is seeking to ratify an existing special meeting right or adopt a bylaw establishing a special meeting right, and the company's overall governance profile.
- Glass Lewis will typically recommend against the chair or members of the nominating and governance committee if a company excludes a special meeting right shareholder proposal in favor of a management proposal ratifying an existing lower special meeting right that is materially different from the shareholder proposal, and also against the ratification proposal.
- Glass Lewis will generally recommend voting for the lower threshold and recommend voting against the higher threshold if there are conflicting proposals on the ballot.
- Glass Lewis may recommend voting in favor of the shareholder proposal and abstaining from voting on a management bylaw amendment seeking to establish a new special meeting right if there are conflicting proposals on the ballot.

Additionally, Glass Lewis previously addressed only scenarios where companies included conflicting proposals, on any subject matter, on the ballot. Glass Lewis' current policy addresses both conflicting and excluded proposals, on any subject matter, stating that if it believes that the exclusion of any shareholder proposal is detrimental to shareholders, it may recommend against members of the nominating and governance committee.

## 3. Environmental and Social Risk Oversight

Glass Lewis believes that companies should ensure appropriate board-level oversight of material risks to their operations, including those that are environmental and social in nature. Accordingly, the updated guidelines codify Glass Lewis' approach to reviewing this oversight role. Glass Lewis may recommend against members of the board of directors who are responsible for oversight of environmental and social risks (or against members of the audit committee if there is no explicit board oversight of these risks) if a company has mismanaged these risks to the detriment of shareholder value, or such mismanagement threatens shareholder value. In this context, Glass Lewis will consider the situation, its effect on shareholder value and any corrective or other responsive action taken by the company.

## 4. Ratification of Auditor: Additional Considerations

Glass Lewis generally supports management's choice of auditor except when it believes the auditor's independence or audit integrity has been compromised. The updated guidelines provide additional factors Glass Lewis will consider when reviewing auditor ratification proposals, including the auditor's tenure, a pattern of inaccurate audits and any ongoing litigation or significant controversies which call into question an auditor's effectiveness.

## 5. Virtual-Only Shareholder Meetings

Noting a relatively small but growing contingent of companies electing to hold shareholder meetings by virtual means only, Glass Lewis has expressed its concern that virtual-only meetings have the potential to curb the ability of a company's shareholders to meaningfully communicate with the company's management. Under Glass Lewis' new policy, if a company holds its annual shareholder meeting by virtual means only, Glass Lewis may recommend against members of the nominating and governance committee if the company does not provide disclosure assuring that shareholders will be afforded the same rights and opportunities to participate as they would at an in-person meeting. According to the policy, effective disclosure includes addressing the ability of shareholders to ask questions during the meeting and related rules, the procedures, if any, for website posting of questions and answers from the meeting and logistics for access to the virtual meeting platform and related technical support.

## 6. Executive Compensation

Glass Lewis has expanded its discussion of several executive compensation topics and how they factor into say-on-pay voting recommendations and, in some cases, recommendations against compensation committee members. These topics include excise tax gross-ups, severance and sign-on arrangements, grants of front-loaded awards, clawback provisions and CD&A disclosure for smaller reporting companies (in light of the SEC's expansion of the number of companies eligible to comply with reduced disclosure requirements for such companies). The updated guidelines also include clarifying language regarding how peer groups contribute to recommendations, revising the description of the pay-for-performance model and adding discussion on the consideration of discretion in incentive plans. Finally, Glass Lewis has also added an explanation of the structure and disclosure ratings in its Proxy Papers and addressed certain recent developments in its discussion of director compensation and bonus plans.

Glass Lewis' notable revisions to its shareholder initiatives policy guidelines include those relating to conflicting special meeting shareholder proposals and environmental and social risk oversight similar to those described above, as well as the following:

- *Environmental and Social Issues - Diversity Reporting and Materiality Considerations*

  Glass Lewis has revised its policy regarding shareholder proposals relating to environmental and social issues to specifically address proposals that request additional reporting on a company's diversity initiatives. Previously, Glass Lewis evaluated these proposals in the context of risk, on a case-by-case basis. Under the revised policy, Glass Lewis will generally support shareholder proposals requesting additional disclosure on employee diversity and those requesting additional disclosure on the steps that companies are taking to promote diversity within their workforces. In this context, Glass Lewis will consider the industry in which the company operates and the nature of its operations, the company's current level of disclosure on issues related to workforce diversity, the level of such disclosure at the company's peers and any lawsuits or accusations of discrimination within the company.

Glass Lewis has also revised its guidelines to reflect that it will place significant emphasis on the financial implications of a company adopting, or not adopting, any environmental or social shareholder proposal and, in this context, will consider the standards developed by the Sustainability Accounting Standards Board.

- *Clawbacks*

  Previously, when examining clawback-related proposals, Glass Lewis would review the relevant policies and regulations then-currently proposed or in place, and if the board had already adopted a comprehensive recoupment policy, and the policy covered the major aspects of the proposal, it generally did not support the adoption of further policies. Glass Lewis has since become increasingly focused on the specific terms of recoupment policies, beyond whether a company maintains a clawback that simply satisfies the legal minimum under Sarbanes-Oxley, given that the SEC has not yet finalized its rules under Dodd-Frank. While Glass Lewis will still generally not support amendments to a comprehensive recoupment policy, in cases where it believes companies have failed to adopt policies that provide sufficient protections for reputational and financial harm, Glass Lewis may now consider supporting well-crafted proposals seeking to expand a company's policy.

- *Written Consent*

  Glass Lewis has historically supported the right for shareholders to act by written consent. That said, it now believes that special meetings are preferable to action by written consent, as special meetings provide more protection for minority shareholders and better ensure that management is able to respond to the concerns raised by shareholders. Accordingly, Glass Lewis has revised its policy regarding shareholder proposals requesting that companies allow shareholders the right to action by written consent. In cases where a company has adopted a special meeting right of 15% or below and has adopted reasonable proxy access provisions, Glass Lewis will now generally recommend that shareholders vote against these proposals.

If you have any questions or would like additional information, please do not hesitate to contact **Karen Hsu Kelley** at +1-212-455-2408 or kkelley@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.


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