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Public Company Update

Glass Lewis Releases Updated Guidelines for 2024 Proxy Season

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On November 16, 2023, proxy advisory firm Glass Lewis released its 2024 Proxy Voting Policy Guidelines. The new guidelines apply to shareholder meetings occurring after January 1, 2024. Unsurprisingly, many of Glass Lewis's significant changes focus on topics that have seen recent attention from the U.S. Securities and Exchange Commission (the "SEC") or other regulators. In a welcome development for public companies, Glass Lewis did away with its board responsiveness policy for 20% supported shareholder proposals. This Public Company Update summarizes the most salient changes for US public companies applicable in the upcoming proxy season.

Significant Changes / New Guidance

Board Responsiveness: Prior to the updated guidelines, if 20% or more of a public company's shareholders voted contrary to management on a shareholder proposal, Glass Lewis expected such company's board to perform shareholder outreach in order to address potential shareholder concerns. Pursuant to the updated guidelines, boards will not face negative exposure from Glass Lewis for not engaging with shareholders on shareholder proposals garnering more than 20% shareholder support (measured as more than 20% of shareholder votes cast as "Against" or "Abstain"). However, the board responsiveness policy still applies to majority supported shareholder proposals.

Material Weaknesses: Glass Lewis added a policy regarding remediation disclosure related to material weaknesses in a company's internal controls over financial reporting. Under the guidelines, companies that have identified a material weakness should disclose detailed remediation plans and update such disclosure to the extent that the material weakness has not been remediated within a year. Remediation plan disclosure should include action items the company will take to rectify the material weakness and any updates thereto should provide an overview of the company's progress toward resolution. Companies that fail to include sufficient disclosure could face Glass Lewis recommending a "no" vote for members of their Audit Committee. Notwithstanding this policy, we think that legal and accounting considerations, as well as compliance with Regulation S-K, should continue to be the main driver for disclosure regarding material weaknesses.

Clawback Provisions: Glass Lewis expanded upon its clawback guidance. In addition to complying with the applicable SEC and the relevant exchanges' rules, Glass Lewis guides companies to consider providing for recoupment of incentive-based compensation where there is "evidence of problematic decisions or actions," such as material misconduct, a material reputational failure, a material risk management failure, or a material operational failure. Furthermore, if a company elects not to pursue recoupment in the instance of restatements stemming from misconduct, the company should disclose its reasons and how it has otherwise addressed the issue. Failure to do so might have an impact on Glass Lewis's recommendation for a company's say-on-pay proposal.

Cyber Risk Oversight: In light of the SEC's recent cybersecurity rules and the continued focus on cyber risk management, Glass Lewis expanded its guidelines on cyber risk oversight. Companies whose shareholders have experienced "significant harm" can expect Glass Lewis to be laser focused on their board's oversight of cybersecurity risk, response to cybersecurity incidents and related disclosures. Furthermore, companies that have been materially impacted by a cybersecurity incident could face Glass Lewis recommending a vote against directors if they do not sufficiently oversee cybersecurity risk or respond to cyber-attacks or if the company does not provide adequate disclosures. Notably, Glass Lewis calls for periodic updates to such disclosure, including for example, when the company has "returned to normal operations" and what resources will be provided for impacted shareholders. Notwithstanding this policy, we think that legal and business considerations should continue to be the main driver for cybersecurity disclosure regarding material cyber security incidents.

Board Oversight of Environmental and Social Issues: Glass Lewis updated its stance on boards' oversight of environmental and social issues. Pursuant to the revised guidelines, companies should codify in the applicable committee charter or other governing document where within the board responsibility for overseeing environmental and social risk sits. These risks include those risks related to, among other things, human capital management, climate change, diversity, health and safety, the environment and shareholder relations.

Board Accountability for Climate-Related Issues: Regulatory oversight of boards' oversight and accountability for climate-related risk persists—Glass Lewis extended its related policy to all companies in the S&P 500 with material exposure to such risks, which it generally defines as companies sitting in certain Sustainability Accounting Standards Board industries like air freight and logistics, chemicals, and waste management.¹ These companies should provide disclosures as recommended by the Task Force on Climate-related Financial Disclosures and also identify "clearly defined board-level oversight responsibilities" for these issues or face Glass Lewis's potential recommendation against responsible directors.

Executive Ownership Guidelines: Glass Lewis chose to codify its approach to executive share ownership. In order to promote alignment between the long-term interests of executive leadership and shareholders, Glass Lewis guides companies to adopt and enforce *minimum* executive share ownership policies. Moreover, the exact terms of a company's minimum requirements should be clearly disclosed in its Compensation Discussion and Analysis. Glass Lewis also guides that the inclusion of unearned performance awards and/or unexercised stock options should generally not be included within an executive's share ownership count, and certainly not without sufficient rationale.

¹ The full list includes agricultural products, air freight & logistics, airlines, chemicals, construction materials, containers & packaging, cruise lines, electric utilities & power generators, food retailers & distributors, health care distributors, iron & steel producers, marine transportation, meat, poultry & dairy, metals & mining, non-alcoholic beverages, oil & gas, pulp & paper products, rail transportation, road transportation, semiconductors, waste management.

Proposals for Equity Awards for Shareholders: If a company is seeking shareholder approval for an individual equity grant and the recipient is a significant company shareholder, the company should consider whether the grant is appropriate, given the potential sway the significant shareholder may have in influencing the proposal's passage. To the extent a company elects to proceed, it should take action to mitigate the potential conflict of interest, like requiring the shareholder to abstain from voting.

Net Operating Loss (“NOL”) Pills: Companies that have or plan to adopt NOL pills should review them for the inclusion of an acting in concert provision. Glass Lewis considers such provisions to call into question the “true objective” of the pill. Accordingly, it has updated its policy to consider whether a pill includes an acting in concert provision or was implemented not on a clear day (i.e., after the filing of a Schedule 13D or other activist activity) when determining whether to recommend a vote for or against.

Clarifying Amendments

In addition to the new policies listed above, Glass Lewis made a number of clarifying amendments to its existing policies.

Board Gender and Underrepresented Community Diversity: For the upcoming proxy season, Glass Lewis clarified that it expects a company's nominating and corporate governance committee to oversee board diversity and related communications. In the past, when evaluating its recommendation of (i) the chair of a nominating and corporate governance committee of a Russell 1000 company with less than one underrepresented community director or of a Russell 3000 company with a board lacking 30% gender diversity or (ii) of the members of the nominating committee of a Russell 3000 company with no gender diversity, Glass Lewis looked to see if the company included a timeline to address its lack of diversity and underscored its expectation that the lack of diversity would be solved by the next annual meeting. In the 2024 guidelines, Glass Lewis clarified the timeline could be “as soon as reasonably practicable,” providing companies additional grace with sufficient rationale. Furthermore, Glass Lewis amended its definition of “underrepresented community director” to include someone who self-identifies as “a member of the LGBTQIA+ community” rather than someone who self-identifies as “gay, lesbian, bisexual, or transgender.”

Non-GAAP to GAAP Reconciliation: Glass Lewis highlighted the importance of companies including non-GAAP-to-GAAP reconciliations in their proxy statements to the extent significant adjustments from GAAP compliant performance results were made when determining performance achievements and payouts. A lack of such disclosure could impact Glass Lewis's recommendation for a company's say-on-pay vote.

Pay v. Performance Disclosure: Going forward, Glass Lewis may consider a company's new pay v. performance disclosures when conducting its quantitative assessments underlying a company's pay-for-performance grade.

Company Responsiveness for Say-on-Pay Opposition: Glass Lewis clarified how it calculates the level of significant shareholder opposition to a company's say-on-pay proposal that would trigger adequate company responsiveness. It will consider both votes cast “Against” as well as abstentions, with anything over 20% requiring the company to address.

Interlocking Directorships: During the 2024 proxy season, Glass Lewis may consider additional types of director interlocks, including those with close family members of executives or within a company group.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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