ALERTS

ISS and Glass Lewis 2018 Proxy Guidelines Continue to Expand Shareholder Influence

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Proxy advisory firms Institutional Shareholder Services (ISS) and Glass Lewis recently published their proxy voting policy updates for 2018. ISS's updated guidelines will apply to stockholder meetings held on or after Feb. 1, 2018, while Glass Lewis's policy will generally apply to meetings held on or after Jan. 1, 2018. The changes reflect an increased focus on governance issues raised by shareholder activists over the past year. The major *updates* to the voting guidelines are summarized below.

ISS 2018 Proxy Voting Guidelines

Staggered Boards: ISS will now recommend a vote against or withhold from the entire board of directors (except new nominees, who are considered on a case-by-case basis) of companies that have opted into, or failed to opt out of, state laws requiring a classified board. Under certain state statutes, such as the Maryland Unsolicited Takeover Act, boards may be able to opt into requirements that would stagger the board without a stockholder vote, while other state statutes require public companies to have staggered boards unless such companies affirmatively opt out of the statute. Companies subject to these statutes have a powerful and preclusive defensive tactic that can be used to entrench boards without stockholder input, and the new ISS policy may serve as a disincentive to companies seeking to use such tactics.

Shareholder Rights Plans (Poison Pills): ISS will now recommend a vote against or withhold from all nominees of a company with a poison pill with a term longer than one year that was not approved by shareholders. Under the previous ISS policy, ISS drew a distinction between classified and annually elected boards with poison pills, and would only recommend votes against or withhold votes at least once every three years for annually elected boards. In addition, a commitment to put a long-term poison pill to a binding shareholder vote no longer will offset an adverse vote recommendation. Regarding short-term rights plans (one-year or less) nominees will be considered on a case-by-case basis, with ISS focusing on the rationale for adopting the pill and other relevant factors.

Restrictions on Binding Shareholder Proposals: In the past, ISS has generally recommended against or withheld from members of a company's governance committee if the company's charter included excessive restrictions on stockholders' ability to amend the charter. The 2018 guidelines expand that general rule to include undue restrictions in all of the company's governing documents, including the bylaws.

Pledging of Company Stock: ISS will recommend a vote against the committee overseeing risks related to pledging or the full board where a significant level of pledged stock by executives or directors raises concerns. This update codifies a practice that ISS implemented in 2013.

Excessive Non-Employee Director Compensation: Non-employee director (NED) compensation has risen every year since 2012. This issue is consistently in the spotlight, and some activists have gone so far as to challenge director pay in proxy fights. Accordingly, ISS is implementing a new policy of providing an adverse vote recommendation for board or committee members responsible for setting NED pay where there is a pattern (i.e., two or more consecutive years) of excessive pay without providing a compelling rationale or other mitigating factors. This policy will not have an effect on 2018 vote recommendations.

Say-on-Pay: ISS has consistently provided that it will recommend a vote against, on a case-by-case basis, compensation committee members or the full board where the company's previous say-on-pay proposal received less than 70 percent shareholder support. While ISS previously considered several factors in this decision, the 2018 guidelines state that ISS will also consider the breadth of company disclosure regarding engagement efforts by institutional investors, specific concerns of dissenting shareholders and specific actions that the company has taken to address shareholders' concerns. When companies comply with these disclosure requirements, it will shine additional light on concerns with executive pay.

Pay-for-Performance Evaluation: In connection with its past pay-for-performance evaluation, ISS will now analyze rankings of CEO total pay and company financial performance over the previous three years as compared to peer group companies. Additionally, ISS will report the multiple of a CEO's total pay relative to its peers over the last fiscal year.

Boardroom Diversity: ISS has made it a fundamental principal that boards should be "sufficiently diverse to ensure consideration of a wide range of perspectives." Accordingly, ISS will identify in its reports where a board lacks gender diversity. However, ISS will not issue any adverse voting recommendations due to a lack of gender diversity. Nonetheless, the gender of directors should be considered when formulating director slates.

Glass Lewis 2018 U.S. Policy Guidelines

Dual-Class Share Structures: Glass Lewis continues to believe that dual-class voting structures are not in the best interest of shareholders and that companies should implement a one vote per share system. Therefore, Glass Lewis will typically recommend that shareholders vote in favor of recapitalization proposals that eliminate dual-class stock structures. Further, Glass Lewis will recommend against proposals to adopt new classes of common stock. Importantly, following an IPO or spin-off, the presence of dual-class shares will be a sign to Glass Lewis that shareholder rights are severely restricted. Finally, in examining the results from shareholder meetings at companies with dual-class stock structures with disparate voting and economic rights, where the vote results indicate that a majority of unaffiliated shareholders supported a shareholder proposal or opposed management's proposal, Glass Lewis believes that the board should demonstrate an appropriate level of responsiveness.

Board Responsiveness: Glass Lewis has long encouraged a board response where 25 percent or more of shareholders vote against management's recommendation. However, in response to increased investor sentiment, spurred by shareholder activism, beginning in 2018, where 20 percent or more of shareholders vote against management, the board should demonstrate some level of responsiveness to shareholder concerns. The 20 percent figure includes when shareholders withhold votes or vote against a director nominee, vote against a managementsponsored proposal or vote for a shareholder proposal. The 20 percent threshold does not automatically lead to a negative recommendation, but will be a contributing factor if Glass Lewis determines that the board was not responsive. This policy change demonstrates that Glass Lewis is raising board response standards in light of increased shareholder engagement.

Virtual Shareholder Meetings: While Glass Lewis believes that virtual meeting technology can be a useful complement to a traditional shareholder meeting, it recognizes the potential that virtual-only shareholder meetings may reduce board accountability and stifle shareholder discourse. In 2018, Glass Lewis will not make voting recommendations based only on a company holding virtual-only meetings. However, beginning in 2019, Glass Lewis will recommend voting against members of the governance committee of a board that plans a virtual-only meeting without robust disclosure that ensures shareholders have the same rights and opportunities as in-person meetings.

Director Commitments: Due to historically high levels of time directors devote to their positions, Glass Lewis will begin generally recommending against directors who serve as an executive officer of a public company while serving on more than two public company boards. However, Glass Lewis will not recommend voting against overcommitted directors at companies where they also are an executive. Similarly, Glass Lewis will typically recommend votes against directors who serve on more than five public company boards. In determining whether to recommend against potentially overcommitted directors, Glass Lewis will consider the size and location of companies where the director serves on the board, director position on those boards, director's tenure on the boards and director's attendance record at board meetings. Conversely, Glass Lewis indicates that it will generally not recommend voting against an overcommitted director who serves on company boards within a consolidated group of companies or whose firm's sole purpose is to manage a portfolio of investments which include the company.

Board Gender Diversity: As in previous years, Glass Lewis will consider board composition and may note instances where it believes a board lacks diverse director candidates. In 2018, Glass Lewis will not make any voting recommendations solely on the basis of board diversity. However, in 2019, Glass Lewis will generally recommend voting against the nominating committee chair of boards that do not have any female directors. Glass

Lewis may extend this recommendation to other nominating committee members depending on the size, industry and governance profile of the company.

Glass Lewis's 2018 U.S. Policy Guidelines are available here.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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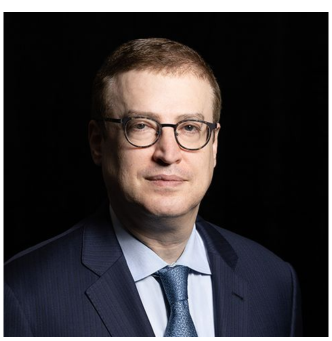

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