Glass Lewis Publishes Updates to 2023 U.S. Voting Policy Guidelines

Glass Lewis recently published updates to its voting policy guidelines for U.S. companies applicable to annual meetings of shareholders starting January 1, 2023. In addition to clarifying several of its existing executive compensation policies, including a pair related to the SEC's recent adoption of final rules governing "pay-versus-performance" disclosure and compensation recovery ("clawback") policies, Glass Lewis also made a significant policy change regarding its performance-based equity compensation expectations and revised a number of policies related to the composition of and disclosure about boards of directors.

Compensation-Related Policy Updates and Clarification

Percentage of Performance-Based Equity Compensation

Glass Lewis has revised the threshold for the minimum percentage of an executive's long-term incentive compensation award that should be performance-based from 33% to 50%, and will note as a concern in its voting analyses any programs that fail to meet this threshold. This appears to apply to all executives, not just the chief executive officer.

While Glass Lewis will consistently raise concern with programs that do not meet this standard, it "may" refrain from a negative voting recommendation in the absence of other significant issues with the program's design or operation. However, if there is a negative trajectory (that is, a decrease) to the performance-based allocation of an award, or performance-based awards are significantly rolled back or eliminated, absent exceptional circumstances, such decisions are likely to result in a recommendation against a Say-on-Pay proposal.

While this change is significant for Glass Lewis, it simply matches the policy that ISS has had in place for several years.

Front-Loaded and "Mega-Grant" Awards

Stressing the critical role compensation committees play in determining the compensation of a company's executives, Glass Lewis has clarified that it will generally recommend voting against the chair of a compensation committee when outsized awards (often called "mega-grants") have been made and present perceived concerns such as excessive quantum, the absence of adequate performance conditions, and/or excessive dilution (among other issues). It also has expanded upon the concerns it believes "front-loaded" equity awards (that is, large equity awards that are intended to serve as compensation for multiple years) present. Specifically, it emphasizes that the structure of such awards inhibits a board's ability to respond to unforeseen developments following the award grant as compared to a traditional annual grant schedule and can amplify unintended consequences. Lastly, it has clarified how it analyzes front-loaded awards meant to cover only a particular portion of an executive's regular long-term incentive. In these situations, Glass Lewis analysis of the value of the remaining portion of the long-term incentive will account for the annualized value of the front-loaded portion. Further, it expects that no supplemental award will be granted during the vesting period of the front-loaded portion.

Company Responsiveness (for Say-on-Pay Analysis)

Glass Lewis has clarified how it applies its responsiveness expectations to companies with multi-class ownership structures or control positions (which are common in public technology companies), indicating that it will examine the level of shareholder approval attributable to disinterested shareholders in assessing Say-on-Pay support levels. As a reminder, Glass Lewis expects boards to demonstrate some level of engagement and responsiveness where shareholder opposition exceeds 20%, with exceptions increasing in proportion to shareholder opposition. Glass Lewis also has expanded its discussion of what it considers to be robust disclosure, including a discussion of the rationale for not implementing a change to the pay decisions that drove low support and the company's intentions going forward.

The SEC's New "Pay-Versus-Performance" Disclosure Requirement

In light of the SEC's recently finalized "pay-versus-performance" disclosure requirements (see Thoughtful Pay Alert, *SEC Adopts New Rules for "Pay Versus Performance" Disclosure Requirement* (September 9, 2022), Glass Lewis makes clear that its "pay-for-performance" methodology will not be impacted by the new rule during the 2023 proxy season, but this resulting new disclosure may be reviewed in its qualitative evaluation of executive compensation programs. (This is also consistent with the approach ISS is taking for the 2023 proxy season.)

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Compensation Committee Discretion re: Short-Term and Long-Term Incentives

Glass Lewis had added new discussions to its policies on short-term and long-term incentives to effectively "codify" its views on certain exercises of discretion by a compensation committee on incentive payouts. In summary, when a compensation committee exercises discretion over incentive compensation award outcomes to account for significant events that would otherwise be excluded from the performance results of selected program metrics, Glass Lewis expects companies to provide a thorough discussion of how such events factored into the compensation committee's decisions to exercise discretion or refrain from applying discretion over incentive award payments.

"Clawback" Provisions

Glass Lewis has updated its guidance on "clawback" policies in response to the SEC's recent adoption of a final rule directing the NYSE and Nasdaq to adopt new listing standards addressing clawbacks. Until such listing standards become effective, Glass Lewis will continue to raise concerns where a company maintains a clawback policy that only meets the requirements of Section 304 of the Sarbanes-Oxley Act. Supplemental disclosure by such companies of early efforts to meet the standards of the final rules may help to mitigate concerns.

Governance-Related Policy Updates and Clarifications

Board of Directors Diversity

Glass Lewis continues to tinker with its policies regarding diversity on the board of directors, making the following revisions for the 2023 proxy season:

- *Gender Diversity* – Glass Lewis is transitioning from a fixed numerical approach to a percentage-based approach for board gender diversity, a change that was first announced last year. It will now generally recommend voting against the chair of the nominating committee at Russell 3000 companies if at least 30% of the board is not gender diverse. (For non-Russell 3000 companies, the existing policy requiring at least one gender diverse director will continue in effect.)

- *Underrepresented Community Diversity* – Glass Lewis will generally recommend voting against the chair of the nominating committee at companies in the Russell 1000 where the board does not include at least one director from an underrepresented community. For this purpose, "underrepresented community" means an individual who self-identifies as Black, African American, North African, Middle Eastern, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaskan Native, gay, lesbian, bisexual, or transgender.

For both the gender diversity and underrepresented community requirements, exceptions may be made if the company has provided an adequate rationale or plan to address the lack of board diversity, including a timeline to appoint additional gender diverse or underrepresented community diverse directors (generally by the next annual meeting).

- *State Diversity Laws* – Glass Lewis has revised its discussion regarding state laws on diversity following recent changes to the status of certain state laws. As California's board gender and underrepresented community diversity laws are currently under appeal after having been found to violate the equal protection clause of the California state constitution, Glass Lewis plans to refrain from providing recommendations pursuant to these California board composition requirements until further notice while it monitors the appeals process.

Director Commitments (Overboarding)

Glass Lewis has clarified its overboarding policy. It will generally recommend voting against:

- Executive officers serving as a director (other than executive chair) if he or she serves on more than one other external public company board;

- Executive chairs serving as a director of more than two other external public company boards; and

- Any other director who serves on more than five public company boards.

Disclosure of Director Diversity and Skills

- As a reminder of its existing policy, Glass Lewis will generally recommend voting against the chair of the nominating or governance committee of Russell 1000 companies that have not:

- Provided proxy statement disclosure of director diversity and skills categories that it tracks; or

- Disclosed individual or aggregate racial/ethnic minority demographic information.

Board Responsiveness

Under Glass Lewis' previous "board responsiveness" policy, any time 20% or more of shareholders vote contrary to the recommendation of management, the board should, depending on the issue, demonstrate some level of responsiveness to address the concerns of shareholders. Glass Lewis has clarified this policy to provide that it believes the board should always engage with shareholders and demonstrate some initial level of responsiveness when the 20% threshold is exceeded. And when a majority or more of shareholders vote contrary to management, the board should engage with shareholders and provide a more robust response to fully address shareholder concerns. While the 20% threshold alone will not automatically generate a negative vote recommendation on a future proposal, it may be a contributing factor to a recommendation to vote against management's recommendation in the event it determines that the board did not respond appropriately. As with the Say-on-Pay responsiveness changes summarized above, for controlled companies and those with multi-class share structures that carry unequal voting rights, it will evaluate the level of disapproval attributable to unaffiliated shareholders in determining whether board responsiveness is warranted and will generally evaluate vote results on a "one share, one vote" basis.

Environmental and Social-Related Policy Updates

For companies in the Russell 1000 that have failed to provide explicit disclosure about the board's role in overseeing environmental and social issues, Glass Lewis will generally recommend voting against the chair of the governance committee.

In addition, Glass Lewis has expanded its tracking of board-level oversight of environmental and social issues to all companies within the Russell 3000 index. Further, Glass Lewis has added specific guidance regarding oversight of cybersecurity and, for companies whose GHG emissions represent a financially material risk, climate-related matters.

Further Information

For more information on these updates and to view Glass Lewis' 2023 U.S. policy guidelines, click here

About the Authors

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