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2012 Proxy Season: What to Expect From Glass Lewis

Last week, proxy advisor Glass Lewis announced its voting policy changes for 2012. Many of the revisions deal with the same issues that Institutional Shareholder Services (ISS) addressed in its policy changes last month (see our Nov. 1, 2011 article), though with some distinctly different approaches. Below are the key changes Glass Lewis is making for next year.

Say on Pay – Year Two

In the first year of mandatory say on pay (SOP) under the Dodd-Frank Act, Glass Lewis rejected 17.5% of the SOP proposals in its U.S. coverage universe. Most often this was due to a misalignment between pay and performance, based on its proprietary model which assigns companies grades of "A" through "F" on their executive compensation.

For 2012, Glass Lewis will continue using its current methodology for evaluating SOP, which includes applying its quantitative pay-for-performance model and examining various qualitative features of companies' pay programs. However, it intends to give additional scrutiny to companies where shareholder opposition to SOP in 2011 exceeded 25% of the votes cast. In such cases, Glass Lewis expects compensation committees to demonstrate that they are actively engaging with their shareholders and are responding to their concerns on pay. Absent evidence of this, Glass Lewis will recommend against the compensation committee members at the company's 2012 annual meeting.

This approach essentially mirrors that of ISS for reviewing executive compensation programs that received only modest support from shareholders in 2011. However, Glass Lewis has set a lower threshold of SOP opposition than ISS (30%) for companies that it will single out for additional scrutiny and possible withhold recommendations from compensation committee members.

Poison Pills and Classified Boards

Currently, Glass Lewis opposes all board members at a company that adopted a poison pill within the prior 12 months without shareholder approval. As an added clarification, if the board is classified so that shareholders cannot withhold from all directors at a single annual meeting, Glass Lewis will oppose each class of directors as their terms come up in subsequent years.

Exclusive Forum Provisions

Various companies have been adopting bylaws to establish Delaware as the exclusive jurisdiction for state corporate law disputes. Because the January 2011 court opinion in *Galaviz v. Berg* suggested that unilaterally adopted bylaws may not be enforceable, a number of companies began putting their bylaw amendments to a shareholder vote.

Glass Lewis believes forum selection provisions in companies' charters or bylaws may discourage shareholder derivative claims by making them more difficult and costly to pursue. Therefore, shareholders should not be limited to a single jurisdiction in their legal recourse.

For 2012, Glass Lewis has adopted a formal policy on forum selection clauses. It will recommend against the adoption of exclusive forum charter or bylaw provisions when put to a shareholder vote as a stand-alone proposal. At companies that adopt such provisions without shareholder approval, Glass Lewis will recommend withholding votes from the chairman of the corporate governance committee. In the case of newly public companies, Glass Lewis will recommend against the chairman of the corporate governance committee or, absent such committee, the chairman of the board.

In situations where the adoption of an exclusive forum provision is bundled with other charter or bylaw amendments that may be beneficial to shareholders, Glass Lewis will take a case-by-case approach to the proposal. However, it will recommend against the chairman of the corporate governance committee for not presenting the exclusive venue provision to shareholders as a separate voting item.

Glass Lewis's tough stance on forum selection clauses stands in sharp contrast to ISS's 2012 policy. Although ISS opposed virtually all exclusive venue proposals in 2011, it will take a more flexible case-by-case approach to them going forward. Factors ISS will consider include whether or not the company has been materially harmed by shareholder litigation outside its jurisdiction of incorporation, and if the company has certain governance "best practices" in place: an annually elected board, majority voting in uncontested elections, and no non-shareholder approved poison pill.

Neither of the proxy advisors' policies specifically addresses shareholder resolutions to repeal exclusive forum provisions, which may be in the pipeline for 2012. Based on their approaches to management proposals, issuers should expect Glass Lewis to support such shareholder initiatives and ISS to look at them case by case.

Proxy Access

Shareholder proposals to adopt proxy access will be the most closely watched campaign of the 2012 proxy season, both in gauging investor sentiment on this critical issue and the impact it may have on future federal-level rulemaking. At least a dozen binding and non-binding proxy access proposals have already been filed by both institutional and retail investors.

For 2012, Glass Lewis has adopted a formal policy under which it will consider supporting well-crafted and reasonable proxy access proposals on a case-by-case basis. Like ISS, it will examine both company-specific factors (company size and the composition of the shareholder base) and the parameters of the proposed proxy access regime (ownership and holding period requirements to nominate directors).

In contrast to ISS, Glass Lewis expects proponents to present a rationale for why proxy access is needed at the targeted company and will examine related factors, such as the company's financial performance, its responsiveness to shareholders, anti-takeover protections, and the ability of shareholders to take action between annual meetings (written consent and special meetings). ISS eliminated any proponent rationale as a factor in its 2012 policy because it regards proxy access as a matter of good corporate governance. As a result, ISS is likely to support a broader range of shareholder proposals to adopt proxy access than Glass Lewis.

Political Contributions

Shareholder proposals seeking greater transparency of corporate political spending have increased both in number and in investor support in recent years. Glass Lewis reports that it supported 61% of these resolutions in 2011.

In an update similar to ISS's, Glass Lewis is putting more emphasis in 2012 on board oversight of political spending rather than simply evaluating companies' current level of disclosure against peers. It plans to support shareholder resolutions calling for increased reporting on political contributions at companies where there is no explicit board oversight of such expenditures.