

Glass Lewis Talks About Say-on-Pay and Updates to Voting Policies

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During its [2012 North American Proxy Season review](#), proxy advisory services firm Glass Lewis looked back to the 2011 proxy season and also gave insights as to what we can expect from them in 2012. Highlights included:

Say-on-Pay. Glass Lewis recommended against 17.5% of say-on-pay proposals in 2011. They use a proprietary model to evaluate companies and come up with “A” to “F” grades. 10% of companies that they reviewed received “F”s in 2011, with the average say-on-pay results at those companies at 73%. While, like ISS, they cite pay for performance issues as the primary reasons for causing negative recommendations, Glass Lewis also tends to cast an unusual focus on CD&A disclosure that sometimes surprises companies. According to Glass Lewis, they find it problematic when companies disclose performance measures but not the rationale for the selection or the weighting of the measures, or when they perceive inadequate discussion of a compensation committee’s exercise of discretion. Glass Lewis grades CD&A disclosure as “poor, fair and good,” and 5% of companies received “poor” citations in 2011. They mentioned Amazon as an example of a company that, in their view, both performs and has appropriate executive compensation, but has poor CD&A disclosure. In terms of evaluating company responses to prior year say-on-pay votes, Glass Lewis will examine those companies that received at least 75% negative votes for whether to recommend against either the chairman of the compensation committee or the entire committee, depending on companies’ engagement efforts with shareholders and then the level of responses.

Shareholder Proposals, Including Proxy Access. Glass Lewis data shows that there were 443 shareholder proposals in 2011, a decrease from 591 in 2012, mainly attributable to the absence of compensation proposals in light of mandatory say-on-pay. This year’s most popular proposal, given the election year, will likely be on political contributions and related topics. As for proxy access shareholder proposals, similar to ISS, Glass Lewis will review those on a case-by-case basis before making recommendations, including the percentage ownership requested and holding period requirement. Their list of factors that they will consider is much longer than the ISS policy, including an analysis of the company’s shareholder base in both percentage of ownership and type of shareholders, responsiveness of board and management to shareholders as evidenced by “progressive shareholder rights policies” such as annual elections and majority voting, and company performance and steps taken to improve bad performance.

Exclusive Forum Provisions. Glass Lewis discussed the selection of Delaware as an exclusive forum for shareholder derivative suits by 80 companies as of November, adopted either after seeking shareholder approval or by board action alone. We recently blogged about [ISS policies](#) on this matter. Like ISS, Glass Lewis generally recommends against an exclusive forum provision and a company will need to demonstrate that it has a long history of suffering from frivolous lawsuits to justify the proposal. But Glass Lewis also takes it a step further and will recommend against the chairman of the governance committee if the company adopts exclusive forum provisions either without shareholder approval or pursuant to a bundled bylaw or charter amendment (where exclusive forum is coupled with other changes). If a company adopts an exclusive forum provision before a company’s IPO, Glass Lewis will recommend against the chairman of the governance committee or the board chairman if there is not a governance committee chairman.

Talk to Us Now. Glass Lewis reiterated that they do not engage with companies during the proxy season, long a frustrating policy for companies after they receive negative Glass Lewis reports, but they are available for discussions during the off-season. At times during the proxy season, they will sponsor “proxy talks” involving a specific company and invited clients.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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