

New Glass Lewis Policies Announce Negative Recommendations for Directors in Some Instances When Companies Exclude Special Meeting and Other Shareholder Proposals through SEC Process

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Under its 2019 [updated guidelines](#), Glass Lewis will typically recommend against the members of the nominating and governance committee when a company is able to exclude a shareholder proposal on the right to call special meetings by presenting the ratification of an existing provision through a management proposal. That happened several times last season, with some controversy, when companies asked shareholders to ratify existing special meeting rights that had a higher ownership threshold than the shareholders had proposed.

The updated guidelines also warn that in the event Glass Lewis believes that the exclusion of *any* shareholder proposal that is permitted by the SEC is “detrimental to shareholders,” it may, “in very limited circumstances,” recommend against the members of a governance committee. While it appears this policy will not be used often, companies should be warned that the legitimate use of the SEC no-action letter process may result in negative recommendations against directors. There is no clarification on how this would be applied.

As for other recommendations regarding special meeting proposals:

- When proxy statements have both company and shareholder proposals requesting different thresholds, Glass Lewis will recommend in favor of the lower threshold.
- When there are conflicting management and shareholder special meeting proposals and the company doesn't have an existing special meeting right, Glass Lewis may consider recommending in favor of the shareholder proposal and abstaining from management's proposal.

Board Gender Diversity. Glass Lewis will recommend voting against the nominating chair of a board that has no female directors, and may extend the negative recommendation to the entire committee depending on the size of the company, its industry and governance profile. Company disclosure on diversity will be considered.

Virtual-Only Meetings. Glass Lewis may recommend voting against members of the governance committee at companies with virtual-only meetings, depending on whether the company has effective disclosure assuring that shareholders have the same rights as they would at an in-person meeting, which could include the ability to ask questions, managing technical and logistical issues and providing procedures for accessing technical support. One of the possible disclosures include the procedures, if any, for posting questions received during the meeting and the company's answers after the meeting. We note that this appears more stringent, as companies with in-person meetings do not tend to post meeting Q&As.

Board Environmental and Social Risk Oversight. For large cap companies and in instances where Glass Lewis believes that there are “material oversight issues,” the firm will review a company's overall governance practices and identify which directors or board-level committees have been charged with oversight of environmental and/or social issues. Glass Lewis may consider recommending against the directors who are responsible for oversight of those risks, or

members of the audit committee if there is no mention of explicit board oversight of environmental and social issues, where the firm believes that “a company has not properly managed or mitigated environmental or social risks to the detriment of shareholder value, or when such mismanagement has threatened shareholder value.”

Executive Compensation. The updated guidelines address and clarify several areas affecting say-on-pay and compensation committees, including new excise tax gross-ups, contractual payments, grants of front-loaded awards, clawbacks, the use of peer groups for Glass Lewis recommendations, a revised description of the pay-for performance model and added discussion around the use of discretion in incentive plans.

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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