

Client Alert

Corporate Practice Group

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Proxy Advisory Firms Issue 2016 Voting Guidelines

Overview

Proxy advisory firms such as Institutional Shareholder Services (ISS) and Glass, Lewis & Co. (Glass Lewis) provide an array of services related to corporate governance and proxy voting to public company shareholders. Specifically, guidance from proxy advisory firms often influences the voting practices of large institutional investors such as public pension funds, mutual funds and large endowments. Because of the strong influence proxy advisory firms have over the voting practices of institutional investors, public companies should carefully monitor changes in proxy advisory firms' voting policies and guidelines.

ISS¹ and Glass Lewis² recently issued new proxy voting guidelines for the 2016 proxy season. Notable updates were issued relating to:

- Unilateral Bylaw and Charter Amendments
- "Over-Boarding"
- Board Candidates Nominated via Proxy Access Procedures

Unilateral Bylaw and Charter Amendments

In its most recent guidance, ISS revised and clarified its policy on actions taken unilaterally by a company's board to amend the company's bylaws or charter, without shareholder approval or ratification, in a manner that materially diminishes shareholders' rights or that could adversely impact shareholders.

The revised guidance states that ISS will generally recommend voting against directors who approve provisions classifying a company's board of directors, establishing supermajority voting requirements to amend its bylaws or charter or eliminating shareholders' ability to amend its bylaws. In addition, ISS altered its previous voting guidelines by indicating that its negative voting recommendations will generally apply for all future annual meetings until the adverse, unilaterally-adopted provision is either reversed or submitted to shareholders for a vote.

ISS separately articulated that it would issue recommendations to vote against or withhold from directors as a result of actions taken by the board prior to or in connection with a newly public company's IPO based on the following factors:

- The level of impairment of shareholders' rights caused by the provision;
- The company's or the board's rationale for adopting the provision;
- The provision's impact on the ability to change the governance structure in the future (e.g., limitations on shareholder right to amend the bylaws or charter, or supermajority vote requirements to amend the bylaws or charter);

- The ability of shareholders to hold directors accountable through annual director elections, or whether the company has a classified board structure; and
- A public commitment to put the provision to a shareholder vote within three years of the date of the IPO.

Previously, ISS's voting guidelines provided that for IPO companies, unilateral board actions would be evaluated on a case-by-case basis. Under the revised voting guidelines, IPO companies should generally assume (absent mitigating circumstances, such as a public commitment to put the policies to a shareholder vote within three years after the IPO) that negative voting recommendations stemming from unilateral board actions will apply for all future meetings until the adverse, unilaterally-adopted provision is either reversed or submitted to shareholders for a vote.

“Over-Boarding”

ISS and Glass Lewis also updated their guidelines with regard to directors who serve on an excessive number of public company boards of directors, a practice known as “over-boarding.” Specifically, ISS will recommend a vote against or withhold vote from individual directors who are not CEOs of public companies and sit on more than five (5) public company boards (prior limit was six (6) public company boards). ISS did not alter its recommendations with respect to CEOs of public companies who sit on other boards of directors (limit is two public company boards besides their own). Glass Lewis will also recommend a vote against or withhold vote from individual directors who:

- do not serve as an executive officer of a public company and sit on more than five (5) public company boards (current limit is six (6) public company boards); or
- serve as an executive officer of a public company and sit on more than two (2) public company boards (current limit is three (3) public company boards).

Unlike other updates made by each of the proxy advisory firms, these updated standards relating to “over-boarding” will not take effect until the 2017 proxy season. A note for each director who would not satisfy these revised standards, however, may be included in each proxy advisory firms recommendations for the 2016 proxy season.

Board Candidates Nominated via Proxy Access Procedures

In its most recent guidance, ISS distinguished its analytical framework for analyzing board candidates nominated pursuant to a company's shareholder proxy access provisions from board candidates nominated in contested elections generally. ISS issues recommendations on a case-by-case basis in contested elections based on a number of factors including, among other things, the company's performance, the candidates' qualifications and the strategic plan of the dissident slate. However, recognizing that the motivation for a proxy contest and nomination of a proxy access candidate may differ, ISS indicated that it in the case of a proxy access board candidate it may also examine “*additional factors which may be relevant, including those that are specific to the company, to the nominee(s) and/or to the nature of the election.*” Specific additional factors ISS identified as potentially significant considerations for assessing proxy access nominations include differing approaches to the company's strategy, concerns regarding board diversity and identifying skills deficiencies within the existing board membership.

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered “Attorney Advertising.”

¹ ISS's complete 2016 Proxy Voting Guidelines Update may be accessed [here](#).

² Glass Lewis's comprehensive Guidelines for the 2016 Proxy Season may be accessed [here](#).