Goodmans LLP Update

Corporate Securities Law

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Glass Lewis Releases 2018 Canadian Proxy Voting Guidelines

Proxy advisor Glass, Lewis & Co. recently released its *2018 Canadian Guidelines to Proxy Advice*. With a few exceptions, these policy guidelines will apply to shareholder meetings beginning in January 2018. The new and amended policies address a number of issues that are at the forefront of the Canadian corporate governance landscape.

Gender Diversity Policy

Similar to Institutional Shareholder Services (ISS) (see our November 20 Update, *ISS Releases Final 2018 Voting Policy Updates for Canada*), Glass Lewis is implementing a voting policy that targets board gender diversity. However, the Glass Lewis policy will not take effect until the 2019 proxy season (in 2018, Glass Lewis will consider gender diversity as one factor in its overall review of companies' corporate governance practices).

When the new policy takes effect in 2019, Glass Lewis will generally recommend voting withhold for the nominating committee chair (and potentially other nominating committee members), if the board either:

1. has no female members; or
2. has not adopted a formal written gender diversity policy.

Therefore, unlike the new ISS policy, the Glass Lewis policy will use a single-trigger. However, Glass Lewis indicated that it may refrain from recommending withhold for companies that are not part of the S&P/TSX Composite index, or if the board has provided a sufficient rationale for the lack of female board members or has disclosed a plan to address the lack of gender diversity.

Board Responsiveness

Glass Lewis has an existing policy whereby it may recommend against a management proposal (including director nominations) if a certain threshold of shareholders previously voted against management's recommendation on a similar proposal and the board failed to appropriately respond to the shareholders' concerns. Glass Lewis is lowering that threshold from 25% to 20% of the votes cast on the proposal. This change underscores the importance of board responsiveness when a meaningful number of shareholders disagree with management's recommendation.

Dual-Class Share Structures

Dual-class share structures (in which one class of shares typically has voting rights that are in excess of its economic rights) are relatively common in Canada. The recent proliferation of dual-class share structures in IPOs in Canada (e.g., Shopify, Aritzia, Freshii and Canada Goose) and the U.S. (e.g., LinkedIn, Alibaba Group, Facebook and Snap) has attracted intense scrutiny from corporate governance advocates. Furthermore, S&P recently announced that, moving forward, it will not allow companies with dual-class shares to join certain indices (including the S&P 500).

Glass Lewis has joined these market participants in taking a stand against dual-class share structures by stating it will now:

- consider the presence of a dual-class share structure as an additional factor in its overall assessment of a company's corporate governance practices;
- typically recommend voting in favour of proposals to eliminate dual-class share structures and against proposals to adopt new dual-class share structures; and
- consider the votes of subordinate voting shareholders when applying its board responsiveness policy described above.

Other Policy Changes

Glass Lewis is also making some other minor changes and clarifications to its existing voting policies, including:

- *Overboarded Directors Policy*. Glass Lewis has clarified that, in considering whether public company executives (other than a CEO) are "overboarded", it will take into consideration the scope of their executive duties and responsibilities. This should provide non-CEO public company executives with some leniency in serving on outside public company boards, particularly if their executive duties are not onerous.
- *Virtual Shareholder Meetings*. Beginning in 2019, Glass Lewis will generally recommend voting withhold for members of the corporate governance committee if the board holds a virtual-only shareholder meeting and the company does not provide disclosure in its proxy circular that assures shareholders they will be afforded the same rights and opportunities to participate in the meeting as they would have in person.
- *Proxy Access*. Glass Lewis indicated it will take a case-by-case approach to proxy access proposals in Canada (and other jurisdictions outside the U.S.). In particular, Glass Lewis will consider the applicable regulatory landscape to assess whether existing proxy access rights are sufficient or preferable to those requested in the proposal. Given the infancy of proxy access bylaw proposals in Canada, it is unclear what Glass Lewis' general bias will be toward proxy access in Canada. However, Glass Lewis recently recommended voting against U.S.-style proxy access proposals put forth at both the Royal Bank of Canada and Toronto Dominion Bank (albeit due primarily to concerns over the legality and feasibility of such bylaws under the *Bank Act* (Canada)).

Please contact any member of our Corporate Securities Group to discuss these developments and ensure your company is prepared for these changes.