

## Glass Lewis Releases 2020 Policy Clarification and Codification Provided for Several Compensation Items

### AUTHOR



**Deb Lifshey**  
Managing Director

On November 1, Glass Lewis released its annual policy updates applicable to proxies that will be filed in 2020<sup>1</sup>. Over the past several years, compensation-related revisions tended to be light. This year, however, there seemed to be more codification around compensation actions that could trigger negative recommendations. We suspect these changes may have been driven in part by the SEC guidance released over the summer that called for a higher level of transparency and due diligence on the part of proxy advisors<sup>2</sup> and Glass Lewis' response to that guidance<sup>3</sup>.

Highlights of compensation-related updates for 2020 include:

- **Say-On-Frequency of Plurality:** If a company adopts a *frequency different from the frequency approved by the plurality of shareholders*, Glass Lewis will generally recommend against all compensation committee members.
- **Say-On-Pay New Factors:** In addition to factors Glass Lewis has considered in the past in assessing whether to recommend in favor of say-on-pay, it will now also consider whether the company has adopted any post-fiscal year compensation changes, and also whether the company has made any one-time awards.
- **Robust Shareholder Responsiveness:** Glass Lewis has expanded on its expectations for those companies that received a significant level of shareholder opposition (20% or greater) to say-on-pay. It expects the level of responsiveness to correspond to the level of shareholder opposition, determined with respect to both the size of the opposition as well as the persistence of shareholder discontent over time. They expect the disclosure to provide a description of engagement with large shareholders, as well as changes that directly address those concerns in the compensation program if appropriate. If this disclosure is not robust, Glass Lewis may consider voting against the upcoming SOP program.

<sup>1</sup> [https://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines\\_US.pdf](https://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines_US.pdf)

<sup>2</sup> <https://www.pearlmeier.com/knowledge-share/client-alert/sec-issues-interpretive-guidance-for-investment-advisors-and-proxy-advisors>,

<sup>3</sup> <https://www.pearlmeier.com/blog/on-our-radar-glass-lewis-responds-to-sec-guidance-on-proxy-voting-advice>

**Pearl Meyer Observation:** In contrast to ISS policy which focuses on disclosure around the outreach program, Glass Lewis suggests that not only must a company engage, but changes must be made as appropriate. This is particularly troubling given that while 20% of stockholders may have voted against say-on-pay, 80% voted for.

- **Explanations for Short-Term Incentive Upward Discretion:** If a company has applied upward discretion (e.g., lowering goals mid-year or increasing calculated payments), GL expects a robust discussion of why the change was necessary.
- **Codification of Policies Around Contractual Arrangements:** While some of these items have been mentioned by Glass Lewis in the past, this year's policy codifies specific design triggers for negative recommendations, including:
  - Excessively broad change-in-control (CIC) triggers, which may include single-trigger and modified single-trigger provisions which provide for payouts absent termination of employment;
    - If disclosure does not specifically state that the CIC arrangement is double-trigger, Glass Lewis will assume it is not;
    - In this category is also "excessively broad definitions" of a CIC, although the policy does not provide guidance as to what this means;
  - Inappropriate severance entitlements, which will be assessed relative to the executive's target compensation, other executive packages, and the executive's predecessor package;
  - Inadequately explained or excessive sign-on arrangements;
  - Guaranteed bonuses (especially as a multi-year occurrence); and
  - Amended contracts that maintain poor practices (on this note, Glass Lewis states that it expects companies to clean up problematic pay practices when renewing employment contracts, including but not limited to excessive CIC, modified single-trigger CIC, excise tax gross-ups, and multi-year guaranteed awards).

Other Major Changes:

- **Non-Disclosure of Outside Audit Fees—Impact on Audit Committee Chair:** Glass Lewis will recommend against the audit committee chair when fees paid to the company's external auditor are not disclosed.
- **Poor Director Attendance—Impact on Governance Chair:** Glass Lewis will recommend against the governance chair in the absence of disclosure on director attendance or when it is unclear which director didn't meet the 75% attendance standard.
- **Exclusion of Shareholder Proposals—Impact on Governance Committee:** Glass Lewis expects companies to include all shareholder proposals except where the SEC has explicitly concurred with a company's argument that it be excluded (if the SEC disagrees or declines to comment,

the company should include the proposal). Failure to do so will result in a recommendation against members of the governance committee.

- **Exclusive Forum Provision —Impact on Governance Committee Chair:** Under past policy, Glass Lewis had a strict rule to recommend against the governance committee chair if the board adopted a forum selection clause without shareholder approval. They seem to have retreated from this absolute provision in the updated guidelines, stating that where it can reasonably be determined that a forum selection clause is narrowly crafted to suit the particular circumstances and/or a reasonable sunset provision is included, Glass Lewis may make an exception to this policy.

### **Conclusions:**

While this year's policy updates are slightly more nuanced than in years past, Glass Lewis' narrative policy is still driven by discretion in most instances. We are optimistic, however, that the SEC's guidelines may have helped move the needle in the right direction toward a little more clarity in the process.

## About the Author

Deborah Lifshy is a managing director in the New York office, where she specializes in advising clients on compensation matters from a legal perspective including securities disclosure, taxation and corporate governance issues, negotiation contracts, and reasonableness opinion letters.

## About Pearl Meyer

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# Pearl Meyer

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## **NEW YORK**

461 Fifth Avenue, 19th Floor  
New York, NY 10017  
(212) 644-2300  
newyork@pearlmeyer.com

## **ATLANTA**

One Alliance Center  
3500 Lenox Road, NE, Suite 1708  
Atlanta, GA 30326  
(770) 261-4080  
atlanta@pearlmeyer.com

## **BOSTON**

93 Worcester Street, Suite 100  
Wellesley, MA 02481  
(508) 460-9600  
boston@pearlmeyer.com

## **CHARLOTTE**

3326 Siskey Parkway, Suite 330  
Matthews, NC 28105  
(704) 844-6626  
charlotte@pearlmeyer.com

## **CHICAGO**

151 North Franklin Street, Suite 450  
Chicago, IL 60606  
(312) 242-3050  
chicago@pearlmeyer.com

## **HOUSTON**

Three Riverway, Suite 1575  
Houston, TX 77056  
(713) 568-2200  
houston@pearlmeyer.com

## **LONDON**

Collegiate House  
9 St. Thomas Street  
London SE1 9RY  
+44 (0)20 3384 6711  
london@pearlmeyer.com

## **LOS ANGELES**

550 S. Hope Street, Suite 1600  
Los Angeles, CA 90071  
(213) 438-6500  
losangeles@pearlmeyer.com

## **RALEIGH**

505 Millstone Drive  
Hillsborough, NC 27278  
(919) 644-6962  
raleigh@pearlmeyer.com

## **SAN JOSE**

333 West San Carlos Street  
San Jose, CA 95110  
(669) 800-5074  
sanjose@pearlmeyer.com

**For more information on  
Pearl Meyer, visit us at  
[www.pearlmeyer.com](http://www.pearlmeyer.com) or  
contact us at (212) 644-2300.**