SIDLEY

SIDLEY UPDATE

Director Overboarding Policies – An Overview and Notable Change for 2020

April 28, 2020

Even with the 2020 proxy season well underway, voting policies of large institutional investors and proxy advisory firms can continue to change. Most recently, in a significant development, State Street Global Advisors amended its director "overboarding" policy to generally align with more restrictive limits in place at BlackRock and Vanguard.

Under its revised policy, State Street may vote against directors who serve on:

- ***For public company CEOs*** – more than two public company boards (i.e., one outside board), down from three public company boards under the prior policy. Like Vanguard (but not BlackRock), State Street's CEO policy also applies to public company named executive officers (NEOs) other than the CEO.
- ***For other directors*** – more than four public company boards, down from six public company boards under the prior policy. Under a new policy, State Street may also vote against board chairs or lead independent directors who serve on more than three public company boards.

The chart below summarizes the director overboarding policies of proxy advisory firms Glass Lewis and Institutional Shareholder Services (ISS) as well as several large institutional investors. With State Street's policy change, investor viewpoints around the maximum number of public company boards are converging towards a ***maximum of one outside board for the CEO*** (i.e., two boards total) (shown in green in the chart below, together with the same limit as applied to NEOs) and ***four boards total for other directors*** (shown in pink in the chart below). Glass Lewis policy is aligned with this as regards the CEO but not other directors. With recent changes to overboarding limits, ISS is now an outlier because its policy permits one additional public company directorship for the CEO and for other directors.

Proxy Advisory Firm / Institutional Investor	***Maximum Public Company Boards[1] Before a Director is Generally Considered "Overboarded"***		
	Director Is a Public Company CEO	***Director Is a Public Company Executive Officer / NEO***	***Director Is NOT a Public Company CEO / Executive Officer***
Proxy Advisory Firm			
Glass Lewis (*considers relevant factors and whether the company*	**2 total** *(negative vote recommendations only at outside boards)*	**2 total** *(if executive officer; negative vote*	**5[2]** *(negative vote recommendation for each board)*

[1] Per its FAQs, ISS counts directorships of "public companies" as determined by S&P Capital IQ, as well as mutual fund families. For example, ISS counts directorships of OTC-listed companies and foreign listed companies that are not SEC registrants as "public company" directorships for overboarding purposes even though those directorships do not require proxy statement disclosure pursuant to Item 401(e)(2) of Regulation S-K.

[2] Glass Lewis will also consider recommending against any audit committee member who serves on more than three public company audit committees, unless the audit committee member is a retired CPA, CFO, controller or has similar experience, in which case the limit will be four committees, taking time and availability into consideration including a review of the audit committee member's attendance at all board and committee meetings.

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	Director Is a Public Company CEO	***Director Is a Public Company Executive Officer / NEO***	***Director Is NOT a Public Company CEO / Executive Officer***
provides sufficient rationale for continued board service)		*recommendations only at outside boards)*	
ISS[3] (*also counts mutual fund family boards as 1 board*)	**3 total (2 outside)** *(negative vote recommendations only at outside boards)*	*Applies only to CEO*	**5** *(negative vote recommendation for each board)*
Institutional Investor[4]			
BlackRock	**2 total (1 outside)** *(vote against at 1 outside board where serving on 2 outside boards)*	*Applies only to CEO*	**4 (3 outside)** *(vote against at each board)*
State Street	**2 total**	**2 total** *(if NEO)*	**4** **3 for board chairs or lead directors**
Vanguard[3]	**2 total (1 outside)** *(vote against only at outside boards)*	**2 total (1 outside)** *(if NEO; vote against only at outside boards)*	**5** *(vote against at each board, except generally where director serves as board chair)*
Fidelity	*Not specified*	*Not specified*	*Not specified*
Bank of New York Mellon	**3 total**	*Applies only to CEO*	**6**
Invesco	**3 total (2 outside)**	*Applies only to CEO*	**6**
JPMorgan	**3 total (2 outside)** *(vote against only at outside boards)*	*Applies only to CEO*	**4**
Massachusetts Financial Services Company[3] **(MFS)**	**2 total** *(vote against only at outside boards)*	*Applies only to CEO*	**4** *(vote against at each board)*
Northern Trust	**2 total**	*Applies only to CEO*	**4**
CalPERS	**2 total** *(vote against only at outside boards)*	**2 total** *(if executive officer; vote against only at outside boards)*	**4**
CalSTRS	**2 total (1 outside)**	*Applies only to CEO*	**4**
NYC Comptroller	**3 total** *(vote against only at outside boards)*	*Applies only to CEO*	**4**

[3] ISS, Vanguard and MFS may grant an exception under certain circumstances, including if the company has disclosed that the director will step down from the board within a reasonable time.

[4] Under the Council of Institutional Investors (CII) policy, absent unusual, specified circumstances, directors with full-time jobs should not serve on more than two other boards, and currently serving CEOs should not serve as a director of more than one other company, and then only if the CEO's own company is in the top half of its peer group. No other director should serve on more than five for-profit company boards. CII's policy is not limited to *public company* boards.

Next Steps

- For directors whose directorships exceed any of the limits above, discuss with the proxy solicitor the estimated negative votes against those directors (particularly at companies that have adopted majority voting in uncontested director elections) and consider how to engage with key institutional investors whose overboarding policies have been triggered.

- Review the company's corporate governance guidelines and consider whether to amend provisions requiring pre-approval of outside public company directorships and/or any limits on outside public company directorships for CEOs, other NEOs and other directors.

- Ensure that director nomination and re-nomination processes provide for review of each nominee's outside board service (including leadership positions and committee service), bearing in mind that private company and non-profit board service can also require a significant time commitment.

- Monitor proxy advisory firm and key institutional investor policy changes regarding director overboarding. While CEOs generally serve on fewer boards now than in the past,[5] we expect continued focus on director overboarding in years to come.

CONTACTS

If you have any questions regarding this Sidley Update, please contact the Sidley lawyer with whom you usually work or

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[5] According to Spencer Stuart, 59% of S&P 500 CEOs serve on no outside boards. Only 23 S&P 500 CEOs serve on two or more outside boards. On average, independent directors of S&P 500 companies serve on 2.1 public company boards, which has been consistent for more than five years. Only 79 independent directors serve on more than four public company boards. *See also Spencer Stuart US Board Index 2019*.