SIDLEY UPDATE

Roundup of Director Overboarding Policies

October 26, 2021

As public company board service has become increasingly imperative and time-consuming, proxy advisory firms and institutional investors have sharpened their focus on directors who serve on an excessive number of boards. Overboarding concerns have become a key driver for recommendations or votes against director elections in recent years. For example, in its latest investment stewardship report, BlackRock reported that it voted against 163 directors at 149 companies in the Americas on the basis of overboarding from July 1, 2020 to June 30, 2021.

Public companies must stay informed of the director overboarding policies of their key institutional investors and consider how they may impact director elections and whether the company's own overboarding limits should be revised in light of policies in place at key investors. The chart below summarizes the overboarding policies of proxy advisory firms Glass Lewis and Institutional Shareholder Services (ISS) as well as several large institutional investors.

Investor viewpoints around the maximum number of public company boards have converged toward a ***maximum of one outside board for the CEO*** (*i.e.*, two boards total) (highlighted in yellow in the chart below, together with the comparable limit as applied to named executive officers, or NEOs) and ***four boards total for other directors*** (highlighted in green in the chart below). Glass Lewis policy is aligned with this with respect to the CEO but not to other directors. ISS policy permits two outside public company directorships for the CEO and five total boards for other directors. Notably, while the ISS 2019 Benchmark Policy Survey sought feedback on the appropriate number of directorships for non-executive directors and CEOs but did not change its policy in 2020 or 2021, the ISS 2020 and 2021 Benchmark Policy Surveys did not include such a question, indicating that ISS may not be looking to lower its limits for 2022.

Proxy Advisory Firm/ Institutional Investor	**Maximum Public Company Boards 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 provides sufficient rationale for continued board service*)[1]	**2 total** *(negative vote recommendations only at outside boards)*	**2 total** *(if executive officer; negative vote recommendations only at outside boards)*	**5**[2] *(negative vote recommendation for each board)*
ISS[3] (*also counts mutual fund family boards as 1 board*)	**3 total (2 outside)**[4] *(negative vote recommendations only at outside boards)*	*Applies only to CEO*	**5** *(negative vote recommendation for each board)*

Proxy Advisory Firm/ Institutional Investor	Maximum Public Company Boards 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**
***Institutional Investor*[5]**			
AllianceBernstein[6]	**2 total (1 outside)**	*Applies only to CEO*	**3**
BlackRock[7]	**2 total (1 outside)**	**2 total (1 outside)** *(applies to executives and fund managers)*	**4 total (3 outside)** *(vote against at each board)*
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**
Fidelity	**2 unaffiliated**	*Applies only to CEO*	*Not specified*
Goldman Sachs	**2 outside** *(vote against only at outside boards)*	*Applies only to CEO*	**5**
Invesco	*Less than 4 but not specified*	*Less than 4 but not specified*	**4** *(lower (unspecified) threshold applies to chairmanships)*
JPMorgan	**3 total (2 outside)**	*Applies only to CEO*	**4**
Legal & General	**2 total (1 outside)**	*Applies only to CEO*	**4** (*independent board chair counts as 2 roles*)
Massachusetts Financial Services Company (MFS)[8]	**2 total** *(vote against only at outside boards)*	*Applies only to CEO*	**4** *(vote against at each board)*
Neuberger Berman	**2 total** *(vote against only at outside boards)*	**2 total** *(vote against only at outside boards)*	**5**
Norges Bank Investment Management	*Not specified*	*Not specified*	**5** **2 for board chairs**
Northern Trust	**2 total**	*Applies only to CEO*	**4**
NYC Comptroller	**3 total** *(vote against only at outside boards)*	*Applies only to CEO*	**4**
State Street	**2 total**	**2 total** *(if NEO; service on a mutual fund board is not considered)*	**4** **3 for board chairs or lead independent directors** *(service on a mutual fund board is not considered)*
T. Rowe Price	**2 total (1 outside)**	*Applies only to CEO*	**5**

Proxy Advisory Firm/ Institutional Investor	Maximum Public Company Boards 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
Vanguard[9]	**1 outside** *(vote against only at outside boards)*	**1 outside** *(if NEO; vote against only at outside boards)*	**4** *(vote against at each board, except where director serves as board chair or lead independent director)*

Differences in Applying CEO and NEO Overboarding Policies as to "Outside" Boards
While several major institutional investors limit the maximum number of boards for CEOs to two boards total, where the policy limits the number of "outside" boards (such as BlackRock, Vanguard, T. Rowe Price and CalSTRS), a CEO or NEO who does not serve on his or her own company's board may be permitted to serve on only ***one board total*** before he or she is considered overboarded (although, as noted below, investors do not always apply these policies consistently). This is particularly relevant to NEOs, many of whom do not serve on their own company's board. The two case studies below illustrate how BlackRock, Vanguard, T. Rowe Price and CalSTRS applied these policies in different ways in 2021.
Case Study 1: A public company CEO who served on two public company boards but not on the board of the CEO's own company was elected with votes in favor of 86% (at company A) and 78% (at company B) (the lowest level of support by at least 10% for any director at each of those companies) and received vote recommendations ***in favor*** from ISS and Glass Lewis with respect to election to both boards. • BlackRock voted ***against*** at both companies • Vanguard voted ***in favor*** at company A, but most funds ***withheld*** votes at company B • T. Rowe Price voted ***in favor*** at both companies • CalSTRS voted ***in favor*** at both companies
Case Study 2: A public company CFO who served on two public company boards but not on the board of the CFO's own company was elected with votes in favor of 85% (at both company C and company D) (the lowest level of support by at least 10% for any director at each of those companies) and received vote recommendations ***in favor*** from ISS and Glass Lewis with respect to election to both boards. • BlackRock voted ***in favor*** at company C; votes at company D not yet disclosed • Vanguard voted ***against*** at company C; votes at company D not yet disclosed • T. Rowe Price voted ***in favor*** at company C; votes at company D not yet disclosed • CalSTRS voted ***in favor*** at both companies

According to Spencer Stuart data,[10] limits on additional directorships as disclosed by S&P 500 companies in 2021 are also trending in line with key institutional investor policies.

- ***Limits applicable to all directors:*** In 2021, out of the 67% of S&P 500 companies that disclose numerical limits on additional corporate directorships applicable to all directors (up from 65% in 2020):

- 49% limit additional company directorships to three (four total) (33% of all S&P 500 companies), up from 45% (29% of all S&P 500 companies) in 2020
- 42% limit additional company directorships to four (five total) (28% of all S&P 500 companies), down from 46% (30% of all S&P 500 companies) in 2020

- ***Limits applicable to CEOs:*** In 2021, out of the 35% of S&P 500 companies that disclose numerical limits on additional corporate directorships applicable to the CEO (up from 23% in 2020):
  - 48% limit additional company directorships to one (two total) (12% of all S&P 500 companies), up from 43% (10% of all S&P 500 companies) in 2020
  - 52% limit additional company directorships to two (three total) (13% of all S&P 500 companies), down from 57% (13% of all S&P 500 companies) in 2020

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,[11] we expect continued focus on director overboarding in years to come.

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[1] Per Glass Lewis policy, relevant factors may include the size and location of the other companies where the director serves on the board, the director's board roles at the companies in question, whether the director serves on the board of any large privately-held companies, the director's tenure on the boards in question, and the director's attendance record at all companies. The rationale should allow shareholders to evaluate the scope of the directors' other commitments as well as their contributions to the board including specialized knowledge of the company's industry, strategy or key markets; the diversity of skills, perspective and background they provide; and other relevant factors. Glass Lewis will generally refrain from recommending against a director who serves on an excessive number of boards within a consolidated group of companies or a director that represents a firm whose sole purpose is to manage a portfolio of investments which include the company.

[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 or 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. Glass Lewis may exempt certain audit committee members from the limit if, upon further analysis of relevant factors such as the director's experience, the size, industry mix and location of the companies involved and the director's attendance at all the companies, it can reasonably determine that the audit committee member is likely not hindered by multiple audit committee commitments.

[3] Per its FAQs, ISS counts directorships of "public companies" as determined by FactSet and 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. ISS counts subsidiaries with publicly traded stock as

separate boards, but subsidiaries that only issue debt are not counted. In general, ISS counts directorships of SPACs. CEOs of SPACs are subject to ISS' CEO overboarding policy, with SPAC boards counting the same as other public company boards. ISS will generally not count a board when it is publicly-disclosed that the director will be stepping off that board at its next annual meeting if that meeting will occur in the near future.

[4] ISS will not recommend a withhold vote for the CEO of a parent company board or any of its controlled (>50% ownership) subsidiaries, but may do so at subsidiaries that are less than 50% controlled and boards outside the parent/subsidiary relationship.

[5] 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.

[6] AllianceBernstein may also exercise flexibility on occasions where the overboarded director nominee's presence on the board is critical, based on company-specific contexts in the absence of any notable accountability concerns.

[7] In deciding whether to vote against a director due to overcommitments, BlackRock will assess whether the director's committee service and any committee leadership roles given the time necessary to effectively execute those responsibilities.

[8] MFS may make an exception if (i) the company has disclosed the director's plans to step down from the excessive directorships within a reasonable time or (ii) the director exceeds the permitted number of public company board seats solely due to his or her board service on an affiliated company (*e.g.*, a subsidiary) or service on more than one investment company within the same investment company complex (as defined by applicable law).

[9] Vanguard may grant an exception based on company-specific facts and circumstances including (i) indications that the director will have sufficient capacity to fulfill his or her responsibilities and/or a review of the full board's skill and diversity composition and (ii) if the director has publicly committed to step down from the other directorships to fall within the thresholds.

[10] Spencer Stuart, 2021 U.S. Spencer Stuart Board Index (2021); Spencer Stuart, 2020 U.S. Spencer Stuart Board Index (2020).

[11] According to the 2021 U.S. Spencer Stuart Board Index, 60% of S&P 500 CEOs do not serve on outside public company boards aside from their own board, compared to 54% ten years ago. For independent directors of S&P 500 companies, 66% serve on more than one public company board: 35% serve on two such boards, 20% serve on three such boards, and 11% serve on four or more such boards. On average, independent directors of S&P 500 companies serve on 2.1 public company boards.

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