MEMORANDUM

To: File

From: Allison Herren Lee
Counsel to Commissioner Kara Stein
U.S. Securities and Exchange Commission

Date: June 16, 2014

Re: Discussion with representatives from Glass Lewis & Co.

On June 6, 2014, Michael J. Spratt and Allison Herren Lee had a phone conversation with Katherine Rabin and Robert McCormick of Glass Lewis & Co. Among the topics discussed was the application of the proxy advisory rules to proxy advisory firms. Glass Lewis then followed up our conversation with the attached letter relating to the same topic.

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June 13, 2014

Re: Proxy Voting Advice

Dear Ms. Lee:

Thank you for your interest in Glass, Lewis & Co., LLC ("Glass Lewis") and the status of proxy advisory services generally under the federal securities laws. In our recent conversation, you asked us to explain our views as to Glass Lewis' status under the proxy solicitation rules. We appreciate this opportunity to respond to your question with the following explanation.

Background

Glass Lewis is an independent governance analysis and proxy voting firm. Glass Lewis principally provides proxy voting research, analysis, recommendations and custom services to institutional investors. Glass Lewis' clients use its research primarily to help them form their proxy voting decisions. Clients also use Glass Lewis' research when engaging with companies before and after their shareholder meetings.

Glass Lewis furnishes its clients with contextual, objective analysis and voting recommendations on all proposals contained in thousands of proxies for companies around the world. Glass Lewis' recommendations are based on its own analysis of each particular company's proposals. Glass Lewis does not tailor its proprietary proxy voting recommendations to the needs of any client, nor does Glass Lewis decide how any client that is a shareholder will vote on any particular matter. Rather, Glass Lewis' subscribers decide for themselves how to cast their votes in accordance with their own proxy voting policies, which may or may not be consistent with Glass Lewis' recommendations on particular issues.

Glass Lewis also provides a number of services to clients needing assistance with the mechanics of exercising their vote. Glass Lewis administers a Web-based vote management system through which clients may receive, reconcile and manage the voting of proxies according to their own voting guidelines and record, audit, report and disclose their proxy votes. Glass Lewis also operates a share recall notification service which alerts clients of upcoming shareholder meetings so they can determine whether to recall shares on loan so they can be voted.

Glass Lewis does not manage client investments and does not advise any client whether to purchase, sell or hold securities. Glass Lewis also does not provide consulting services to the companies it covers in its reports, although it does make its proxy research reports available to such companies post-publication.

Proxy Solicitation

Glass Lewis does not believe that its activities involve the solicitation of proxies within the meaning of the proxy rules. Rule 14a-1(l) under the Securities Exchange Act of 1934 (the "Exchange Act") defines the term "solicitation" as follows:

> The terms "solicit" and "solicitation" include:
>
> (i) Any request for a proxy whether or not accompanied by or included in a form of proxy;
>
> (ii) Any request to execute or not to execute, or to revoke, a proxy; or
>
> (iii) The furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.

The definition also excludes certain activities, including "[t]he furnishing of a form of proxy to a security holder upon the unsolicited request of such security holder."[1]

Glass Lewis' proxy voting analysis, reports and recommendations never contain a "request for a proxy," a "request to execute or not to execute, or to revoke, a proxy", or a "communication . . . reasonably calculated to result in the procurement, withholding or revocation of a proxy." Glass Lewis merely furnishes clients with an analysis of the pertinent issues presented for a shareholder vote and a *recommendation* as to how to vote and, in some cases, assistance with the mechanics of exercising the vote. Glass Lewis does not seek to exercise the vote for its clients, and it has no interest in the outcome of the votes, either as a shareholder or otherwise. In cases where Glass Lewis may have an indirect interest because of an investment made by its parent, Glass Lewis discloses this potential conflict to clients via a disclosure in the relevant report so that clients may take that into consideration in evaluating Glass Lewis' recommendation.

Despite all of this, if Glass Lewis' advice and reports were deemed to be the furnishing of a form of proxy to a security holder, Glass Lewis believes that there are strong arguments that its proxy voting advice is unsolicited, and therefore should not be deemed a solicitation of proxies. As noted, Rule 14a-1 excludes from the definition of "solicitation" the furnishing of a form of proxy to a security holder in response to the unsolicited request of the security holder. More broadly, the SEC staff has taken the position that a broker-dealer may furnish proxy voting advice to a client upon the unsolicited request of the client without becoming subject to the proxy solicitation rules:

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[1] Exchange Act Rule 14a-1(l)(2)(i).

> The Commission normally would not deem a broker-dealer not otherwise a participant in a proxy solicitation to be engaged in soliciting activity triggering application of the Commission's proxy rules where the broker merely responds, whether orally or in writing, to a customer request for an opinion or recommendation on how to vote. Absent evidence to the contrary, the fact that a broker did not affirmatively seek out a customer to offer an opinion or recommendation on the issues submitted to a securityholder vote, but instead expressed a view when asked by a customer, is considered reflective of a lack of intent to solicit a proxy, consent or authorization within the meaning of the Commission's definition of a "solicitation" subject to it's [sic] proxy regulation.[2]

Although the specific context of this no-action request related to a broker-dealer's ability to respond to a brokerage customer's request for advice, we see no reason in principle why the same analysis should not apply to any person responding to a client's unsolicited request for voting advice. Glass Lewis does not approach security holders to tell them how to vote. Rather, Glass Lewis' clients ask for its voting recommendations by subscribing. Glass Lewis believes, therefore, that its advice and recommendations is furnished on an unsolicited basis to the same extent as described in the aforementioned letter.

<u>The Exceptions</u>

Glass Lewis recognizes that the SEC and the courts have interpreted the definition of "solicitation" very broadly in an effort to ensure that the proxy solicitation process is open and fair to shareholders. The historical evolution of this definition is helpfully described in a 1992 release adopting amendments to the proxy solicitation rules (the "1992 Adopting Release").[3] In that release, the Commission noted:

> In adopting the sweeping 1956 definition, the Commission sought to address abuses by persons who were actually engaging in solicitations of proxy authority in connection with election contests. The Commission does not seem to have been aware, or to have intended, that the new definition might also sweep within all the regulatory requirements persons who did not "request" a shareholder to grant or to revoke or deny a proxy, but whose expressed opinions might be found to have been reasonably calculated to affect the views of other shareholders positively or negatively toward a particular company and its management or directors. Since any such persuasion -- even if unintended -- could affect the decision of shareholders even many months later to give or withhold a proxy, such communications at least literally could fall within the new definition. [footnote omitted][4]

Rather than change the definition of solicitation or its interpretation of its scope, the SEC has adopted amendments to the rule exempting certain specified activities from the filing and certain other requirements of the proxy solicitation rules, with the notable exception of the prohibition against false and misleading statements in Rule 14a-9. Of these exemptions, there are two that

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[2] National Association of Securities Dealers (avail. May 19, 1992), 1992 SEC No-Act. LEXIS 657.
[3] *See* Regulation of Communications Among Shareholders, Exchange Act Release No. 31326 (Oct. 16, 1992), 1992 SEC LEXIS 2470, nn. 19-24 and accompanying text.
[4] *Id.* at text accompanying n.22.

potentially can be relied upon by a proxy voting advisor, depending on the facts and circumstances.

Rule 14a-2(b)(3) specifically exempts proxy voting advice, that is -

> The furnishing of proxy voting advice by any person (the "advisor") to any other person with whom the advisor has a business relationship, if:
>
> (i) The advisor renders financial advice in the ordinary course of his business;
>
> (ii) The advisor discloses to the recipient of the advice any significant relationship with the registrant or any of its affiliates, or a security holder proponent of the matter on which advice is given, as well as any material interests of the advisor in such matter;
>
> (iii) The advisor receives no special commission or remuneration for furnishing the proxy voting advice from any person other than a recipient of the advice and other persons who receive similar advice under this subsection; and
>
> (iv) The proxy voting advice is not furnished on behalf of any person soliciting proxies or on behalf of a participant in an election subject to the provisions of §240.14a-12(c).

When it adopted this exemption in 1979, the SEC noted that it was intended to "remove an impediment to the flow of information to shareholders from professional financial advisors who may be especially familiar with the affairs of issuers."[5] Notably, the Commission expressly declined, in opposition to comments received on the proposal, to narrow the exemption to include only registered investment advisers and broker-dealers.[6] In the 1992 Adopting Release, the SEC clarified that the exemption covers "advice given with respect to matters subject to a shareholder vote by financial and investment advisers, investment banking and broker-dealer firms, and lawyers, as well as proxy advisory services in the ordinary course of business," provided the other conditions of the exemption are met.[7]

Glass Lewis meets the conditions of this exemption. Glass Lewis furnishes its proxy voting advice in the ordinary course of its business. Glass Lewis discloses to its clients any conflict of interest it may have with respect to its advice, whether a direct conflict or a conflict arising from its affiliates' interests in the matter. This disclosure is provided on the face of any report to which the conflict pertains. Glass Lewis provides comprehensive, specific and prominent disclosure of all potential conflicts in its reports and is open to expanding such disclosure if warranted. Glass Lewis receives no special compensation for furnishing proxy voting advice beyond the subscription fees it receives from clients who receive its advice, and Glass Lewis

[5] Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, Exchange Act Release No. 16356 (Nov. 1979), at §IV.
[6] *See id.* at text following n.11.
[7] *See* 1992 Adopting Release at n.41. In so doing, the Commission invalidated a prior SEC staff no-action letter denying that a proxy advisory firm could rely on this exemption. *Cf.* Institutional Shareholder Services, Inc. (avail. Jan. 2, 1991), 1991 SEC No-Act. LEXIS 17 (SEC staff interpreted then-Rule 14a-2(b)(2) as applying only to persons that furnish "financial advice" and stated that the Commission appeared to distinguish this from mere "voting advice").

does not specifically furnish or tailor its proxy voting advice on behalf of any person who is soliciting proxies or participating in an election.

Another exemption, Rule 14a-2(b)(1), generally exempts any person who conducts a solicitation but does not seek proxy voting authority or furnish shareholders with a form of consent, authorization, abstention, or revocation, and does not act on behalf of any such person.[8] Certain categories of persons are ineligible to rely on this provision, including:

1. the registrant or its affiliates;

2. an officer or director of the registrant engaging in a solicitation financed by the registrant;

3. an officer, director, affiliate or associate of an ineligible person other than the registrant;

4. any nominee for whose election as a director proxies are solicited;

5. any person soliciting in opposition to certain corporate actions who intends to propose an alternative transaction to which such person or one of its affiliates is a party;

6. any person who is required to report beneficial ownership of the registrant's equity securities on a Schedule 13D, with certain exceptions;

7. certain persons who receive compensation from an ineligible person directly related to the solicitation of proxies;

8. if the registrant is a registered investment company, an "interested person" of that investment company;[9]

9. certain persons who have a substantial interest in the outcome of a solicitation; and

10. any person acting on behalf of any of the foregoing.

When it proposed this exemption, the SEC stated that proxy voting advisors were among the types of persons who could rely on it.[10] In connection with the proposal, the Commission stated then that the exemption was "intended to achieve an appropriate balance between securityholders' interest in gaining access to reliable, truthful information that would facilitate voting decisionmaking, and the countervailing need to ensure that all materials disseminated to securityholders that may influence their vote will be free of fraud."[11]

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[8] The Commission stated that a solicitation would not be deemed to be conducted on behalf of an ineligible person merely because a person encourages shareholders to execute a form of proxy disseminated by such ineligible person. *Id.* at n.31.

[9] *See* Section 2(a)(19) of the Investment Company Act of 1940 (definition of "interested person").

[10] *See* Regulation of Securityholder Communications, Exchange Act Release No. 29315 (June 17, 1991), 1991 SEC LEXIS 1204 at n.40 and accompanying text.

[11] *Id.* at text following n.40.

Glass Lewis believes that it meets the requirements for this exemption as well. In particular, Glass Lewis furnishes its clients with proxy voting recommendations and helps clients with the mechanics of casting their votes, but it does not seek proxy voting authority from clients or furnish them with a form of consent, authorization, abstention, or revocation. Glass Lewis is not an ineligible person as described in the rule, and does not act on behalf of any such person.

The proposal and adoption of this exemption were not without controversy, however. The 1992 Adopting Release noted that "corporate commenters" opposed the breadth of this exemption for various reasons, using arguments that sound very similar to those used today by proponents of imposing greater regulatory restrictions on proxy voting advisors. Responding to comments about the need for such communications to be publicly filed, the SEC stated that "[c]orporate commenters . . . argued that disclosure of communications among shareholders is necessary to allow management "a role to play" in rebutting any misstatements or mischaracterizations, to the benefit of shareholders as a whole in ensuring that proxies are executed on the basis of "correct" information."[12] The same argument is made today by parties that want to force Glass Lewis and other proxy voting advisors to give issuers a free look at their voting recommendations before they are published to their clients. The Commission's response to this in 1992 is, we feel, equally appropriate today:

> Of course, much commentary concerning corporate performance, management capability or directorial qualifications or the desirability of a particular initiative subject to a shareholder vote is by its nature judgmental. As to such opinions, there typically is not a "correct" viewpoint.
>
> While voting rights are valuable assets and an uninformed exercise of those rights could represent a wasted opportunity for the voting shareholder, such concern does not justify the government's requiring that all private conversations on matters subject to a shareholder vote be reported to the government. In the Commission's view, the antifraud provisions provide adequate protection against fraudulent and deceptive communications to shareholders on matters presented for a vote by persons not seeking proxy authority and not in the classes of persons ineligible for the exemption.
>
> A regulatory scheme that inserted the Commission staff and corporate management into every exchange and conversation among shareholders, their advisors and other parties on matters subject to a vote certainly would raise serious questions under the free speech clause of the First Amendment, particularly where no proxy authority is being solicited by such persons. This is especially true where such intrusion is not necessary to achieve the goals of the federal securities laws.
>
> The purposes of the proxy rules themselves are better served by promoting free discussion, debate and learning among shareholders and interested persons, than by placing restraints on that process to ensure that management has the ability to address every point raised in the exchange of views. Indeed, the Commission has not perceived, and the comments have not demonstrated, shareholder abuses where proxy authority is not being sought by the person engaged in the communications. However, there have

[12] 1992 Adopting Release at text following n.26.

> been situations in which discontented shareholders have been subjected to legal threats based on the possibility the shareholder might have triggered proxy filing requirements by expressing disagreement to other shareholders.[13]

If one takes the foregoing discussion and substitutes a requirement for Glass Lewis to “file” its reports with the issuers to give them a “role to play” in their publication in place of filing with the SEC, the concerns expressed by the Commission over the effect on free discussion and debate would be magnified to an even greater extent.

Conclusion

We appreciate this opportunity to provide you with our views about Glass Lewis’ status under the proxy solicitation rules. We would be happy to provide any additional information you may need in this regard. Please feel contact me at 415-678-4224 if you have any questions regarding the matters discussed in this letter.

Sincerely,

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[13] *Id.*