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Proxy Voting Guidelines for External Managers

Topic: **Social Issues**
Subtopic: **Risks Associated with Concealment Clauses**
Approved: ***May 3, 2024***

Description:

Resolutions on this topic address the use of concealment clauses by employers. Most shareholder resolutions request a company report on the potential risks of using concealment clauses in employment and post-employment agreements.

Topic background:

Concealment clauses are any employment or post-employment agreement, such as arbitration, non-disclosure, or non-disparagement agreements, that employees or contractors are asked to sign. They are used to prevent employees or contractors from speaking publicly about certain matters that occur in the workplace. For many sectors, concealment clauses in employment agreements are used to protect corporate information, such as intellectual capital and trade secrets. However, they often extend to discussion of harassment, discrimination, and other unlawful acts.

Concealment clauses in employment contracts are known to suppress information about sexual harassment, wage theft, or discrimination. Proponents of these resolutions are concerned that the broad use of concealment clauses at a company allows for continued discrimination and limits accountability. These agreements gained more attention during the #MeToo and racial justice movements for their role in enabling harassment and discrimination at companies. A workplace that tolerates such behavior puts its reputation and human capital at risk, which could have a material impact on shareholder value.

There have been several proposed and implemented laws in response to growing awareness around concealment clauses.[1] Changing federal or state laws related to the use of concealment clauses could affect a company's practices, reveal negative information about their work environment, or result in a surge of claims by current or former employees. Shareholders may file a resolution if they are concerned about management's awareness of or ability to manage this risk.

Considerations for voting:

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[1] On December 7, 2022, President Biden signed the Speak Out Act into law. The act prevents the enforcement of non-disclosure agreements in instances of sexual assault and harassment. On March 24, 2022, the Governor of Washington, Jay Inslee, signed the Silenced No More Act into law. California, Maine, New York, and other states have also reduced companies' abilities to use concealment clauses.

- Given the legislative activity around concealment clauses, we recommend considering whether the company has employees or operations in states with new or proposed legislation.
- Investors should take into consideration whether a company has a history of harassment or discrimination in the workplace and how it has responded to any incidents or allegations.
- Although a company may continue to use concealment clauses in employment contracts, investors should note if the company has taken any steps to limit their use, particularly concerning unlawful acts.

Illustrative examples of votes:

1. Vote in support of resolutions that request a Board of Directors prepare a public report assessing the potential risks to the company associated with its use of concealment clauses in the context of harassment, discrimination, and other unlawful acts.
2. Vote against shareholder resolutions that favor overly prescriptive approaches to employment policy or ones that are contrary to or duplicative with applicable law.

Harvard offers broader general guidance on its recommended approach to considering shareholder resolutions in "Overview of Harvard University's Proxy Voting Guidelines for External Managers" (follow link to download full text). When determining votes on resolutions, we consider each resolution in light of this general guidance as well as in light of a resolution's specific request and contextual information about the relevant company and its approach to the issue. Any reporting should be issued at reasonable cost and omit proprietary information.