30 January, 2019

To: Dr. Cordula Heldt - Leiterin der Geschäftsstelle;
Regierungskommission Deutscher Corporate Governance Kodex

RE: Consultation on the proposed amendments to the German Corporate Governance Kodex

Glass, Lewis & Co. ("Glass Lewis") appreciates the opportunity to comment on the amendments to the Kodex proposed by the Regierungskommission during the consultation process that commenced on 6 November, 2018.

About Glass Lewis

Founded in 2003, Glass Lewis is a leading, independent governance services firm that provides proxy research and vote management services to more than 1,300 clients throughout the world. While, for the most part, institutional investor clients use Glass Lewis research to help them make proxy voting decisions, they also use Glass Lewis research when engaging with companies before and after shareholder meetings. Through Glass Lewis' Web-based vote management system, ViewPoint, Glass Lewis also provides investor clients with the means to receive, reconcile and vote ballots according to custom voting guidelines and record-keep, audit, report and disclose their proxy votes.

From its offices in Germany, the UK, Ireland, North America and Australia, Glass Lewis' 360+ person team provides research and voting services to institutional investors globally that collectively manage more than US$35 trillion. Glass Lewis is a portfolio company of the Ontario Teachers' Pension Plan Board ("OTPP") and Alberta Investment Management Corp. ("AIMCo"). Glass Lewis operates as an independent company separate from OTPP and AIMCo. Neither OTPP nor AIMCO is involved in the day-to-day management of Glass Lewis' business. Moreover, Glass Lewis excludes OTPP and AIMCo from any involvement in the formulation and implementation of its proxy voting policies and guidelines, and in the determination of voting recommendations for specific shareholder meetings.

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Glass Lewis is submitting this comment as an interested industry advisor, not on behalf of any or all of its clients.

Following our perusal of the consultation documents, we have identified certain proposed amendments on which we would like to provide comment, as well as current Kodex provisions to which we believe that expansion or additional clarification would be of particular benefit to market participants:

Proposed Format of the Kodex; "Apply and explain"

In general, Glass Lewis finds the proposed new format of the Kodex aligns with the Regierungskommission's goal of "establishing a modern, clear and compact Code". While we believe that the removal of some of the Germany-specific legal provisions that are replicated in the current version of the Kodex, such as the explanation of the supervisory board gender quota in 5.4.1 and the regulations concerning the election of former management board members without a cooling-off period in 5.4.4, may be at odds with the Regierungskommission's objective to make the German governance structure "understandable to international investors who are often less familiar with this system", we are of the opinion that on balance, the benefits of a leaner and more concise Kodex outweigh this potential disadvantage.

One point that the Regierungskommission has not addressed in the draft amendments is the way in which recommendations (*Empfehlungen*) and suggestions (*Anregungen*) are displayed in the Kodex. It is our belief that clearer signification of which elements of the Kodex are comply or explain recommendations and which are suggestions – on top of the current usage of shall/should (*soll/sollte*) - would further improve the clarity of the Kodex, particularly for infrequent or international users. A good example of this is in the Austrian Code of Corporate Governance, in which legal requirements, recommendations, and suggestions are signified through the usage of letters in the margin next to each component.

Glass Lewis is cautiously optimistic that the introduction of "apply and explain" principles into the Kodex, to complement the "comply or explain" recommendations, will lead to increased disclosure on how the specific governance structures adopted by companies serve to fulfil their oversight and strategic objectives and their duties to stakeholders. However, we exhibit some concern that to date, the Regierungskommission has provided limited guidance to issuers on how it foresees satisfactory compliance with recommendation A.19 ("Supervisory Board and Management Board shall explain in which way they apply the principles of the Code").

Our experience from other markets that have adopted a similar approach suggests that without explicit guidance from the Regierungskommission, there exists a risk that “apply and explain” disclosure may provide limited utility to stakeholders and that the application of provision A.19 may prove burdensome to corporate issuers. As the following examples illustrate, similar recommendations have led to markedly different outcomes in other markets.

- **United Kingdom:** As noted by the Regierungskommission, UK listing rules require companies to apply the Main Principles of the UK Corporate Governance Code and report to shareholders on how they have done so. However, we find that the majority of UK companies choose to fulfil this requirement by simply stating that the information included in corporate governance and remuneration reports shows how the principles are applied and that the statutory auditor has not signified non-compliance with any listing rules. A standalone document that specifically addresses governance code principles is generally only seen from AIM companies applying the QCA Corporate Governance Code.

- **South Africa:** The implementation of King IV led to South African companies being recommended to explain how the principles of this code are being applied. In general, we find that King IV has led to increased governance disclosure and most companies have addressed the recommendation by directly responding to the recommended practices under the principles; this is usually found in a corporate governance statement within companies' integrated reporting. Only limited guidance has been provided to corporate issuers on how to comply with the “apply and explain” principle, with the code stating that “[e]xplanation should be provided in the form of a narrative account, with reference to practices that demonstrate application of the principle. The explanation should address which recommended or other practices have been implemented, and how these achieve or give effect to the principle.” However, it is our observation that South African companies are generally struggling with this new approach to disclosure, with large deviations observed between companies and much of the information included appearing to be of limited value to stakeholders.

In order to avoid inconsistent application, ensure the provision of meaningful disclosure, and to aid corporate issuers in their reporting, we recommend that the Regierungskommission carefully consider the format in which it envisages compliance with recommendation A.19 and provide clear guidance to the market.

Management Board Remuneration

Advisory Vote on Remuneration System and Report

We recognise that the frequency and type of vote on the management board remuneration system will be clearly regulated by the new Corporate Law, in compliance with the requirements of the European Shareholders Rights Directive (SRD II). Nonetheless, we welcome the introduction of guidance in this regard (Principle 23) and we deem it particularly relevant in the case of German issuers.

While the number of Say on Pay proposals has been increasing in Germany in recent years, only a minority of companies offer annual advisory remuneration votes, while the majority of issuers provide shareholders with a vote only in conjunction with the introduction of major amendments or after a defined number of years (e.g. every five years). Our observation from other jurisdictions is that debate around management remuneration is significantly more meaningful and productive - for issuers and shareholders - when shareholders are offered the opportunity to express their view on both the remuneration policy for the management board and the implementation thereof on a consistent, predictable basis. As such, while the frequency of the vote on remuneration policy will likely be strictly regulated, we believe that any additional recommendation on the frequency of the vote on the remuneration report would help German issuers transitioning from a sporadic, arbitrary vote to a systematic approval scheme. A recommendation for an annual vote would be in line with emerging international best practice, as well as with current regulation in Belgium, Denmark, France, Italy, Norway, Portugal, Spain, Sweden, Switzerland and the UK providing for a predictable annual shareholder vote on remuneration.

Incentive Structure and Metrics

Glass Lewis believes incentives for executive directors should encourage sustainable, long-term performance. For this reason, we particularly welcome Recommendation D.1, which calls for the share of long-term incentives within the pay mix to exceed the share of short-term incentives. Similarly, we find the emphasis on strategic goals and sustainability (Principle 24) to align with long-term shareholder interests. Furthermore, we advocate an alignment between an incentive plan's numerical performance targets and a company's strategic targets; therefore, we view positively the proposed recommendation on the usage of targets from the operating annual plan for short-term bonuses and targets from the strategic plan for long-term incentives (Recommendation

D.9), which we believe will add needed clarity on structural considerations for issuers.

Finally, with regard to performance metrics, we firmly believe most selected metrics should be clearly objective and measurable. Here, we note that D. 11 recommends that target achievement be comprehensible in its rationale and amount; however, we believe that an additional specification on the expected disclosure of measurable targets (whether *ex post* or *ex ante*) would be beneficial. For example, we note that an explanation of the expected metrics is detailed on p. 18 of the Draft document, conveying the idea that measurable and objective parameters are preferred; we believe it would be useful to put more specific guidance in the body of the text, complementing the recommendations under Principle 25.

Award Type

Given our orientation toward long-term sustainability and alignment with shareholder interest, we prefer that long-term awards be allocated in the form of performance-based equity awards, which provide a clear and direct alignment between executives' and investors' priorities. However, we recognise that each company has different solutions for incentivising and retaining executives. For instance, we recognise that alternative methods of equity alignment such as deferring part of the annual bonus into equity or settling long-term incentive awards in cash with a corresponding robust requirement for management board members to maintain a minimum shareholding throughout their tenure are viewed as viable alternatives by some market participants. Such alternative models are rooted in the tradition and culture of many companies and may continue to be appropriate for them depending on the business model, strategy and shareholder structure.

As such, we are of the opinion that Recommendation D.7 would better reflect the range of methods utilised by companies to align the long-term interests of management board members and shareholders if it were phrased as a suggestion and/or provided additional leeway to corporate issuers.

Performance Period

With regard to the last part of Recommendation D.7, we are concerned about the lack of guidance around the length of performance periods for long-term incentives. While the draft mandates a minimum holding period of four years, no specific indication is provided as to the minimum number of years over which performance should be measured for long-term awards to vest. According to readily accepted international best practice,

performance should be measured over at least three years for an award to qualify as "long-term". Such a period would allow for forward-looking targets to be set, conferring an effective *long-term incentive* to sustainably improve a company's performance and meet longer-term objectives. Of course, the appropriate performance measurement period for incentives will vary by company in accordance with their business cycles and strategic objectives.

The draft appendix includes the following explanations: *"Performance pertaining to the strategic initiatives and measures is rendered in the year under review, and also remunerated for this year"* (p. 18) and *"variable remuneration (both short and long-term) is disbursed promptly following the end of the financial year, either in cash or in shares (see Recommendation D.7 of the Draft GCGC). Recommendation D.13 of the Draft GCGC only refers to the holding period for shares granted"*. These clarifications seem to confirm the idea that a one-year performance period for long-term incentive awards is advised. However, the appendix also states that the required four-year holding period would satisfy "*the recommendation of a multi-year measurement basis set out in section 87 (1) sentence 3 first half-sentence of the AktG"*.

We do not believe that a holding period requirement alone can be assimilated to a rigorous performance *measurement ("Bemessungs-grundlage")*, as required by the AKtG. Absolute share price changes can be a consequence of external market influences and, while obviously relevant for shareholders, cannot be considered directly reflective of the sustainable performance of a company as a whole or of the individual executive's attainments. This explicit focus on share price is further emphasised in the statement at page 28 of the appendix, which declares that, thanks to the use of shares and the imposition of a holding period on said shares, *"the evaluation of the success of strategic measures lies in the hands of the capital market."*

Notably, best practice for long-term equity incentives is moving toward a minimum performance period of between 3-5 years, with a certain number of awards required to be held until after an individual's exit from his/her executive position. In our view, this model provides significant alignment with sustainable long-term performance.

In line with our view on share price hurdles, we believe the evaluation of strategic measures should primarily reflect the performance of the company and its management rather than the market as a whole.

Discretion and Recovery

Glass Lewis believes unlimited and fully discretionary adjustment powers held by a plan administrator serve to weaken the link between pay and performance and have too often been used by boards to adjust awards upwards to arrive at predictable incentive payouts, de-linked from actual performance. However, we recognise that some level of discretion, related to individual and/or qualitative performance assessments, may be necessary and is common, especially for bonus payouts. Further, granting the supervisory board discretion to cancel payments in their entirety in the case of unforeseen negative developments mitigates the risk of contractually obligated payments in accordance with a performance formula that may not fully account for all potential risks.

While D.5 would seem to recommend against the supervisory board retaining such a discretionary authority, the explanation provided for Recommendation D.12 appears to leave space for discretionary upward and downward adjustments. As such, we believe the addition of clearer guidance around setting an appropriate limit to upward and downward discretion and defining the conditions under which discretion should be exercised in Recommendations D.5 and D.12 would be beneficial.

We welcome the introduction of a recommendation on clawback provisions in management board contracts, which is one of the pillars of a functional and transparent remuneration system. However, particularly considering questions on the effectivity of clawback in practice in Germany, we believe that an expansion of this provision to clarify the recommended usage of other means of downward discretion – such as malus provisions on deferred awards – would further strengthen this recommendation.

Disclosure

We base our analysis solely on publicly available information, believing firmly that all shareholders should be able to make voting decisions based on equal access to information. More robust disclosure facilitates more meaningful dialogue and debate, providing a stronger basis for a case-by-case analysis. As such, we welcome the proposed recommendations that emphasise transparency.

We have identified only a few pressing concerns with the draft recommendations on disclosure. We question the effectiveness of Recommendation D.3, which appears to encourage companies to combine pension and fringe benefits with base salary under a single figure. Such disclosure may obfuscate base salary changes over time and leave shareholders unable to evaluate the appropriateness of additional benefits.

We believe the Kodex should ensure that clear, separate disclosure of individual base salaries (paid and annualised), pensions and benefits is provided for each management board member. Given that variable remuneration elements are usually set and described in relation to base salary, we find this element of disclosure to be especially significant.

We fail to see the benefits that may derive from the immediate elimination of the model tables included in the current version of the Kodex, as proposed in Principle 30. In recent years, the vast majority of German issuers have complied with this Kodex recommendation, providing interested stakeholders with a consistent and comparable view of remuneration at all companies.

Moreover, while the appendix refers to Art. 162 of the Draft AKtG, which should contain "comprehensive and detailed requirements for the remuneration report," at this time, we do not find the provisions included in Art. 162 to be comparable to the level of detail provided by the model tables in the current version of the Kodex. We recognise, however, that maintaining a detailed recommendation on the format of tables that could ultimately conflict with legal requirements would be problematic. As such, we encourage the Regierungskommission to consider reintroducing the disclosure template provided by the current Kodex to ensure that they complement, rather than conflict with, the final requirements of the Draft AKtG. Such a template could be particularly useful for defining the ideal format and level of detail of information provided above and beyond the minimum legal requirements.

Quantum

With regard to quantum, we value the recommendations in D.2 and D.6, which call for defined caps for both aggregate remuneration and variable elements, as well as the assessment of "unusual" remuneration levels. We believe that Recommendation D.6 could be strengthened through the inclusion of guidelines for disclosing the process utilised by the supervisory board to assess remuneration levels, the outcomes thereof and the related board decisions, if any.

Finally, we find the discussion of benchmarking exercises in Recommendation D.8 to be extremely valuable. Here, we believe the inclusion in the appendix of practical examples of how to avoid the "upward spiral" could be useful. For example, the appendix could include suggestions on the measured use of global peers with different pay cultures or the aimed ranking of the company in a peer group.

Post-Termination Payments

We do not identify any issues with the proposed provisions on post-termination payments (Recommendations D.13, D.14 and D.15). With regard to severance, we still note that the current cap of two years' total remuneration is more generous than the market practice in neighbouring countries (e.g. Netherlands and Switzerland) and cap of two years of non-variable pay explicitly recommended by the European Commission Recommendation of 30 April 2009 as regards the regime for the remuneration of directors of listed companies.

Finally, we support the Regierungskommission in its strict approach to accelerated vesting and change in control payments, which Glass Lewis believes could serve as potential obstacles to takeover transactions.

Supervisory Board Independence

Indicators (Recommendations B.8-9)

Glass Lewis welcomes the proposed introduction of indicators for evaluating the independence of shareholder representatives on the supervisory board in recommendation B.8. In our extensive engagement with German issuers, we have consistently heard that providing a consistent independence assessment of shareholder representatives on the board is difficult due to the lack of guidance from the Kodex and the plethora of independence standards adopted by various market participants. We believe that the proposed indicators to be adopted will provide better guidance in line with global standards while continuing to allow supervisory boards of German companies to conduct an assessment based on their own criteria where appropriate. Crucially, these recommendations should also lead to increased disclosure in cases where an indicator is fulfilled pursuant to recommendation B.9, allowing for a more robust case-by-case analysis of the situation.

We believe that further minor adjustments to the recommendations and suggestions could substantially improve disclosure of the board's assessment of the independence of its members, which would serve the interests of numerous market participants.

Given the relative autonomy that would be retained by the supervisory boards of German companies to conduct an independence assessment of shareholder representatives, we believe the introduction of a recommendation that companies disclose the precise basis on which an assessment has been conducted – if this should differ from the indicators adopted by the Kodex – would greatly assist market participants in making

a case-by-case assessment of the board. Without such guidance, there is a risk that companies may continue to use their own standards without transparently disclosing them, which would nullify the effectiveness of Recommendations B.8 and B.9.

Additionally, the draft version of the Kodex includes a “material business relationship”, receiving “material variable remuneration”, and having a “close family relationship” as independence indicators. Given the potential for substantial variation of interpretation of these indicators, we believe that further guidance from the Regierungskommission, or the inclusion of a recommendation for corporate issuers to define a materiality threshold for such circumstances, would greatly improve the comparability of these indicators.

We note that we have been unable to identify clear guidance to issuers for cases in which the fulfilment of indicators is expected to change during the term of election for a shareholder representative (e.g. for shareholder representatives whose tenure on the supervisory board would exceed 12 years). We believe that additional guidance from the Regierungs-kommission would reduce the scope for interpretation thereby increasing the meaningfulness and consistency of disclosure at the time of election, when shareholders are asked to make a critical choice about the individual’s continued role on the supervisory board.

Overall and ‘Key Role’ Independence (Recommendations B.10-11)

We believe that the proposed introduction of recommendations regarding overall independence of shareholder representatives, the independence of the remuneration committee chair, and a threshold for the minimum number of shareholder representatives independent of the controlling shareholder is a further positive development. The recommendations acknowledge that many market participants consider the suitability of individual candidates for the supervisory board in the context of the overall composition of the board and expect a higher level of independence of the chairs of key board committees.

However, from our understanding of the proposed independence recommendations, it appears to be possible for a supervisory board to comply with these recommendations and for all but one of the shareholder representatives to be affiliated with either the company, its management board, or a controlling shareholder. This is due to the fact that there is no link between the recommendations in B.10 and B.11; as such, it appears possible that the recommended minimum two shareholder representatives that are independent from the controlling shareholder could be affiliated

with the company or its management. Only in the case of the audit committee chair is there a clear recommendation that an individual be independent from the company, its management board, and a controlling shareholder.

Furthermore, we note that the recommendation in B.11 appears to be more lenient toward larger supervisory boards; we are concerned that the recommendation may be setting the bar too low for large supervisory boards. For example, the supervisory board of Volkswagen – which has received substantial domestic and international criticism for the lack of independent oversight – would nevertheless fulfil the recommendation of B.11 despite each shareholder representative having an affiliation with the company, a controlling shareholder, or substantial shareholder. Conversely, we believe it is unrealistic to expect the supervisory board of a controlled company consisting of only four shareholder representatives to ensure that half of the seats are held by individuals independent from the controlling shareholder.

While we are mindful that the Regierungskommission has proposed the independence indicator for major shareholder representatives to be set at the level of the controlling shareholder, we believe that many market participants have expectations on a minimum number of shareholder representatives that are not affiliated with the company, its management, and ***major*** shareholders (for instance, controlling 10%+ of a company's issued share capital or voting rights). There are a number of recent cases in Germany (e.g. thyssenkrupp; RWE) which indicate that the interests of major, non-controlling shareholders often differ substantially from those of free-float shareholders.

We believe that the concerns highlighted in the previous two paragraphs could be remedied through the inclusion of a recommendation that controlling shareholders are not represented on the supervisory board proportionally above their stake in a company's share capital or voting rights and amending B.11 to recommend a minimum number of shareholder representatives that are independent of the company, its management, and shareholders controlling 10%+ of the company's share capital/voting rights. The recommendation in B.11 would, in our view, also benefit from a clearer split in expectations between small and large supervisory boards, with our suggested approach indicated below.

Summary of Recommendations

To summarise, we believe that Recommendations B.8 - B.11 would benefit from:

- Inclusion of a recommendation that companies disclose the basis on which an independence assessment was made, should this differ from usage of the indicators in B.8;
- Inclusion of a recommendation that companies define materiality thresholds utilised in the assessment against the criteria in B.8;
- Provision of clear guidance to issuers for cases in which the fulfilment of indicators is expected to change during the term of a shareholder representative;
- Inclusion of a recommendation that controlling shareholders are, at a maximum, proportionately represented on the shareholder-elected portion of the supervisory board in line with their stake in the company's share capital or voting rights;
- Amending B.11 to recommend that supervisory boards with five or fewer shareholder representatives have at least one member, or for boards with six or more shareholder representatives at least two members, that are independent of the company, its management, and shareholders controlling 10%+ of the company's share capital/voting rights.

Supervisory Board Attendance (Recommendation A.14)

Glass Lewis welcomes the introduction of a recommendation that companies disclose the attendance of supervisory board members at board and committee meetings on an individual basis. While this practice has grown in prevalence among German companies in recent years, we believe that the inclusion of a recommendation in the Kodex will help to underscore the investor expectations that this information be disclosed.

Glass Lewis is mindful that the external activities of supervisory board members and related timetabling issues can sometimes lead to board members being unable to attend meetings – particularly during their first year on the board. However, repeated and/or unexplained low attendance is often interpreted as a sign that a board member has insufficient time to dedicate to the role or that this role is not considered a priority.

As such, we believe that the expansion of this provision to include a recommendation or suggestion that companies provide additional disclosure on the reasons for poor one-off or repeated attendance of its members would lead to the provision of useful information to the market. Our suggestion is that companies would be recommended to explicitly

address the reasons for attendance of any supervisory board member of below 75% of the relevant board and committee meetings, which would align with global best practice standards.

Furthermore, we believe that the expansion of the provision to recommend that companies clearly indicate which board and committee meetings were held solely in the form of a video or telephone conference, as well as which board members participated in in-person meetings through telephone or video link, would provide information that shareholders find relevant and is a practice that has already been adopted by a number of companies in Germany and abroad.

Supervisory Board Terms (Recommendation B.1)

Glass Lewis whole-heartedly welcomes the inclusion of a recommendation that shareholder representatives on the supervisory board should not be elected for terms of more than three years. In general, we believe that the regular re-election of supervisory board members improves the accountability and responsiveness of shareholder representatives to shareholders. Further, we believe that this will be a step in the right direction toward international best practice, with legislation, best practice recommendations, and prevailing practice in most developed capital markets indicating appropriate board terms of between one and three years.

We are aware that some German investors may prefer to maintain a five-year board term, while staggering the election cycles. This may also better align with the legal framework for the election cycle for employee representatives. In our view, global investors overwhelmingly prefer shorter term lengths, but in any case, would welcome the election of board members on a more regular basis.

Another viable alternative to increase the accountability of supervisory board members to shareholders would be a recommendation or suggestion that the ratification of supervisory board members is offered on an individual basis (*Einzelentlastung*) in cases where there are no supervisory board elections at an annual meeting. This practice has already been adopted by some German companies (e.g. TUI; Lanxess).

External Mandates (Recommendations B.5-6; B.15)

Glass Lewis is optimistic that the introduction of a recommended maximum number of external positions at publicly-listed companies will lead to a reduction in the number of candidates with potentially excessive external

commitments being proposed for election by establishing a commonly accepted benchmark aligned with global investor expectations. Given the comply or explain nature of these recommendations, we are also hopeful they will lead to meaningful disclosure on why 'overboarded' candidates are being proposed for election and how, in the board's view, the candidate has sufficient time to devote to the mandate.

While this may be beyond the scope of the current proposed updates to the Kodex, we recommend that the Regierungskommission considers creating evidence-based guidelines for a reasonable assessment of the commitments required of committee members. For instance, the time commitment of the audit committee chair at many large German companies appears to be comparable to that of the board chair and should be taken into consideration when evaluating a supervisory board member's overall commitment level. We believe that the inclusion of a recommendation or suggestion that companies also clearly indicate the memberships of shareholder representatives in the committees of the boards of publicly-listed companies at which they serve would be useful. This could, for example, be incorporated into Recommendation B.15.

Removal of Recommendation to Announce Candidacy for Chair Position (Article 5.4.3)

The amendments to the Kodex foresee the removal of a current recommendation in Article 5.4.3 that "candidates for the Supervisory Board Chair shall be announced to the shareholders" on the basis that the publication of a recommended candidate from the previous constitution of the supervisory board may prejudge the new supervisory board's decision.

While we are mindful that the decision on which supervisory board member will chair the board is a competence of the newly-appointed board, with a decision to be taken in the board's constituent meeting following the AGM, we are concerned that the removal of this recommendation may lead to reduced information made available to, and sub-optimal decision-making by, market participants. Further, we do not believe that it is necessarily reflective of succession planning at supervisory board level in practice.

Through our engagement with corporate issuers in Germany, it is clear to us that most supervisory boards conduct in-depth and regular work on the board succession process and the identification of possible candidates. The skills and experience that the supervisory board is searching for in a chair often differ substantially from those being sought in other candidates for the board – particularly in large supervisory boards where there is more

scope for the appointment of individuals with very specific skillsets. As such, we are of the belief that there is generally a high level of agreement within the nominating committee and the board itself as to which of the candidates or incumbent board members will be appointed to the role long before the general meeting actually takes place. Furthermore, in the vast majority of cases, elections at annual meetings concern the replacement of fewer than half of the shareholder representatives with new members. As such, assuming no fundamental disagreement with the nominating committee's suggestions, there would generally be no difference between the board's post-AGM decision and its pre-AGM suggestion. Finally, given that Article 5.4.3 is currently recommending only the announcement of candidates, rather than a firm commitment from the supervisory board, we do not believe that this recommendation significantly prejudges the newly-constituted supervisory board.

Glass Lewis believes that the announcement of candidates for the supervisory board chair in the agenda for general meetings is an extremely useful piece of information for shareholders, given that there may be certain candidates that would be deemed by market participants to be appropriate for a regular board seat but where concerns may exist should this candidate be appointed as supervisory board chair. Without such information, shareholders cannot be expected to make a fully informed decision on the election of supervisory board members.

As noted by the Regierungskommission, the role of supervisory board chair now requires a substantially higher level of commitment than a regular board position. The nomination of an individual who also holds an executive role at another publicly-listed company, or who holds a number of non-executive positions, may be seen as being unproblematic if this individual is intended to hold a regular board seat but may be a critical issue for some shareholders if this individual is a candidate for the more time-consuming board chair position.

Further, many shareholders favour the appointment of an independent board chair. Particularly for candidates who recently served on a company's management board, who are representatives of major shareholders, or who have a business relationship with a company, there are likely to be a number of shareholders who would support this individual's election to the board but would have concerns regarding their appointment as chair.

In our view, the removal of this recommendation may lead to a situation where shareholders are not regularly informed of the nominating committee's intentions regarding its proposed candidates. This in turn could lead to shareholders having to rely on potentially inaccurate reports

on board chair candidates in the press or to take a conservative view when analysing the candidates and proposed composition of the board under the assumption that all shareholder representatives may be appointed as chair, potentially leading shareholders to vote against candidates they would otherwise support.

In our view, the advantages of this current Kodex provision significantly outweigh the disadvantages. As such, we strongly recommend that the Regierungskommission reconsiders the removal of this provision.

Removal of Suggestion to Call an EGM in the case of a Takeover Offer (Article 3.7)

Article 3.7 of the Kodex currently suggests that "[i]n the event of a takeover offer, the Management Board should convene an Extraordinary General Meeting at which shareholders will discuss the takeover offer and, if appropriate, decide on corporate actions".

While we are mindful of the Regierungskommission's assertion that this suggestion has encountered criticism from a legal standpoint, Glass Lewis is concerned that the removal of this provision may be interpreted as a reduction in shareholder rights by the market. In our view, particularly in cases where the management and supervisory boards have recommended that shareholders do not tender their shares or where competing offers have been received, the convocation of an EGM at which shareholders are able to question a company's corporate bodies on their recommendations should be viewed as best practice and an in the interests of transparent, two-way communication during an important event. Further, while major shareholders and large institutional shareholders generally have the means and clout to ensure engagement with management, this opportunity is generally not available to all shareholders. As such, it is our belief that informational EGMs during an important corporate action are also in the interests of the equal treatment of shareholders.

Particularly considering cases in recent years in Germany where there has been a high level of outcry from stakeholders at their lack of involvement during substantial corporate actions (e.g. Bayer/Monsanto and Linde/Praxair mergers), we are concerned that the removal of this suggestion may serve to downplay the usefulness of informational general meetings to discuss takeover offers with shareholders.

As such, we recommend that the Regierungskommission reconsiders the removal of this provision.

Removal of Recommendation to Justify Appointment of Former Management Board Members as Supervisory Board Chair (Article 5.4.4)

Article 5.4.4 of the Kodex currently recommends that former management board members that are proposed for election to the supervisory board, and which have been announced as candidates for the supervisory board chair position, "shall be an exception that has to be justified to the General Meeting". The Regierungskommission contends that "[t]here is no need for giving additional reasons beyond this proposal and a rationale of the proposal for election by the Supervisory Board following the recommendation B.2 of the GCGC draft."

The transition of individuals from the management board to the position of supervisory board chair, with or without a cooling-off period, is viewed critically by many shareholders. We are not convinced that the recommendations in B.2 of the draft will ensure that shareholders continue to receive necessary information on a practice that may lead to reduced independent oversight on the supervisory board.

Particularly considering the proposed removal of the recommendation that the supervisory board announces candidates for the supervisory board position (Article 5.4.3), we are similarly concerned that the removal of this provision will lead to reduced clarity regarding the proposed role of former management board members that are being proposed for election without a cooling-off period.

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Glass Lewis welcomes the opportunity to comment on the proposed amendments to the Kodex and is available to answer any questions the Regierungskommission may have regarding the comments provided above. Additionally, Glass Lewis raises no objection to these comments being published on the Regierungskommission's website.

Respectfully submitted,

/s/
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/s/
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/s/
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/s/
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