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ISS and Glass Lewis Publish 2020 Voting Policies

U.S. proxy advisory firms Institutional Shareholder Services (“ISS”) and Glass Lewis have issued updates to their respective voting policies for the 2020 proxy season. Unlike in prior years where the two proxy advisory firms overlapped on some policy areas covered, this year’s updates address a broader range of issues that do not overlap. We summarize the key changes to the ISS and Glass Lewis U.S. voting policies below.

ISS U.S. Policy Updates

Problematic Governance Provisions at Newly Public Companies

In its 2016 updates, ISS adopted a new policy to recommend against one or more directors (except for new nominees, who would be considered on a case-by-case-basis) if, before or in connection with, a company’s initial public offering (“IPO”), the company or the board adopted problematic governance structures that are “materially adverse to shareholder rights.” Since then, ISS has amended this policy explicitly to add that high vote/low vote structures would draw a negative recommendation and also issued a frequently asked questions (“FAQ”) announcement that listed a number of governance structures as potentially being “materially adverse.” In its 2020 updates, ISS proposes to bifurcate this policy on newly public companies to address problematic governance structures and high vote/low vote capital structure separately.

For problematic governance structures, ISS has narrowed its approach so as to state that it will recommend against one or more directors (except for new nominees who are to be considered on a case-by-case basis) if before or in connection with the company’s IPO, the company or its board adopted supermajority vote requirements to amend the bylaws or charter, a classified board or other “egregious” provisions. The list of factors that ISS had included as considerations in making such recommendations has been reduced to one – whether there is a reasonable sunset provision. What constitutes other egregious provisions or a reasonable sunset in this context is not stated, but may be addressed in FAQs expected to be issued early to mid-December.

ISS addresses high vote/low vote capital structures in a new stand-alone policy pursuant to which ISS will recommend against the entire board (except for new nominees who are to be considered on a case-by-case basis) if the company or the board adopts a multi-class capital structure without a “reasonable,” time-based sunset. To assess what is “reasonable,” ISS will consider the company’s lifespan, its post-IPO ownership structure and the board’s disclosed rationale for the sunset period selected. No sunset period greater than seven years from the date of the company’s IPO, and no sunset period based on other events,

e.g., decrease in ownership levels, is listed as being reasonable. ISS clarifies that it will continue to make negative vote recommendations under this policy for incumbent directors in subsequent years, unless the problematic capital structure is reversed or removed, whereas continued negative recommendations for other problematic governance practices will be considered on a case-by-case basis.

Finally, ISS has clarified that the “newly public company” concept encompasses companies emerging from bankruptcy, those formed via spin-offs and those that undertake direct listings, as well as those that complete a traditional IPO.

Independent Board Chair Shareholder Proposals

ISS has updated its policy on independent chair shareholder proposals (which it will generally continue to support) to add that ISS will also consider the rationale behind the proposal in making its voting recommendation. Further, ISS codifies the factors that are given “substantial weight” in its consideration, including those that will increase the likelihood of a “for” recommendation. The general theme of these factors is that a “for” recommendation on independent chair proposals is more likely for boards with less independent leadership/presence, poor oversight or poor governance or that have failed to act when management interests conflict with shareholder interests. Notably, ISS has removed as a factor consideration of whether the proposal is precatory or binding or seeks an immediate change in the chair role or can be implemented at the next CEO transition, but notes that more may come in future FAQs.

Share Repurchase Program Proposals

ISS’ current policy provides that it will recommend “for” management proposals to institute an open-market share repurchase plan in which all shareholders may participate on equal terms. For 2020, ISS expands this policy to add a recommendation to vote to grant the board authority to conduct open-market repurchases. However, in both cases, ISS will only make a “for” recommendation if there is no company-specific concerns regarding greenmail, use of buybacks to inappropriately manipulate incentive compensation metrics, threats to the company’s long-term viability or other company-specific factors. ISS also adds a policy to consider case-by-case proposals to repurchase shares directly from specified shareholders, balancing the stated rationale against the possibility for the repurchase authority to be misused, such as to repurchase shares from insiders at a premium to market.

Note that this policy applies to domestic registrants as well as non-U.S. registrants that are listed only in the United States and are treated as domestic registrants (*i.e.*, they file proxy statements with the SEC), unlike most other ISS policies, which apply only to domestic registrants.

Board Gender Diversity

ISS' previously announced policy to recommend against the chair of the nominating committee (or other directors on a case-by-case basis) if the board has no women directors is effective for the 2020 proxy season. ISS also clarifies that a firm commitment to add a woman director to the board will only act as a mitigating factor until 2021, and further that the presence of a woman director on the board at the preceding annual meeting will require a firm commitment to achieve gender diversity to be a mitigating factor. A "firm commitment" will only qualify as such if the company commits to change within the year and includes a "plan, with measurable goals" outlining how the board will achieve gender diversity.

We note that some stakeholders have moved beyond this minimal "one woman" requirement. BlackRock, for example, currently encourages boards to have at least two women directors on their boards, and State Street identifies as "problematic" boards where fewer than 15% of the directors are women. Finally, Corporation Law Section 301.3 (also known as Senate Bill 826) requires California-incorporated and public California-headquartered companies to have by year-end 2019, at least one woman director and by year-end 2021, at least two women directors if the corporation has five directors, or at least three women directors if corporation has six or more directors, although this law is currently subject to litigation over its validity.

Other Updates

Other notable updates include the following:

- ISS has clarified that when it varies the application of its voting policies for "new [director] nominees," this case-by-case consideration applies only if the director has been on the board for less than a year. In other words, if a director, such as one who has been appointed to a classified board, has been on the board for more than one year, but is only coming up for election for the first time, that director would not be considered "new."
- To the list of "egregious" factors that will cause ISS to automatically recommend a vote against an equity-based compensation plan proposal, ISS has added the inclusion of an "evergreen" feature in the plan (*i.e.*, a plan containing automatic share replenishment).
- ISS has added "subject matter restrictions" to the list of undue governance document restrictions on shareholders' ability to amend the company's bylaws that would lead it to recommend against members of the governance committee. In addition, ISS has clarified that it will view the submission of management proposals to approve or ratify requirements in excess of SEC Rule 14a-8 for the submission of binding bylaw amendments as an insufficient restoration of shareholders' rights in this context. It will continue to recommend a vote against, or withhold a vote for, members of the

governance committee until shareholders are provided with “an unfettered ability to amend the bylaws or a proposal providing for such unfettered right is submitted for shareholder approval.”

Finally, we note that while ISS conducted a survey regarding changes to its overboarding policies, no updates have been proposed this year.

For a complete list of ISS’ 2020 U.S. policy updates, click [here](#). As a reminder, ISS often publishes additional policy FAQs as the proxy season progresses, so more changes and guidance may still be forthcoming.

Key 2020 Glass Lewis U.S. Policy Updates

Policy on the SEC Staff’s New Shareholder Proposal No-Action Procedures

In September 2019, the SEC’s Division of Corporation Finance announced that instead of issuing a written response to all no-action requests with respect to shareholder proposals submitted under Rule 14a-8, the SEC Staff may give oral responses, which may also include declinations to grant relief in addition to yes or no answers.¹ Glass Lewis’ 2020 policy updates address this new procedure by stating that companies should only omit proposals if the Staff has explicitly concurred that a proposal is excludable, or else Glass Lewis would likely recommend against governance committee members. Further, if the Staff has declined to grant no-action relief, or grants relief orally and there is no written SEC record or company disclosure of that occurrence, Glass Lewis will also recommend against members of the governance committee (the “NGC”). ISS has yet to issue any guidance on how it would address these situations beyond what is in its existing policies.

Exclusive Forum Clauses

While Glass Lewis maintains its policy generally to recommend against the NGC chair if the board adopted an exclusive forum clause without shareholder approval during the past year, it clarifies that it “may make an exception” if the clause “is narrowly crafted to suit the particular circumstances facing the company and/or a reasonable sunset provision is included.”

Nominating and Governance Committee Performance and Director Attendance

Glass Lewis has codified additional factors it will consider when evaluating the performance of NGC members in relation to director attendance. In particular, Glass Lewis will generally recommend voting against the NGC chair if (i) the directors’ records for board and committee meeting attendance are not

¹ For the Staff announcement, see <https://www.sec.gov/corpfin/announcement/announcement-rule-14a-8-no-action-requests>.

disclosed or (ii) it is disclosed that a director attended fewer than 75% of board and committee meetings but it is not possible to determine which specific director's attendance was lacking.

Audit Committee Performance and Audit Fee Disclosure

Glass Lewis will generally recommend voting against the audit committee chair when fees paid to the company's external auditor are not disclosed. If the audit committee chair is not up for re-election due to the existence of a staggered board, then Glass Lewis will note its concern regarding the audit committee chair, but will not recommend a vote against other audit committee members.

Supermajority Vote Shareholder Proposals

While it continues generally to support shareholder proposals seeking to eliminate supermajority voting provisions, Glass Lewis has clarified that it may recommend against such proposals at controlled companies because of its view that supermajority voting provisions actually protect minority shareholders at controlled companies.

Say-on-Pay and Other Executive Compensation-Related Policies

Glass Lewis also issued a number of executive compensation-related policies, including the below:

- Compensation committee performance. Beginning this year, Glass Lewis will generally recommend against all members of the compensation committee if the board adopts a frequency for say-on-pay votes that differs from that approved by a plurality of shareholders.
- Company responsiveness. Glass Lewis has clarified that an "insufficient" response to prior low shareholder support may cause it to recommend against a future say-on-pay vote. Glass Lewis explains that the minimum appropriate level of response should correspond with the "level of shareholder opposition, as expressed both through the magnitude of opposition in a single year, and through the persistence of shareholder discontent over time."
- Contractual payments and arrangements. Glass Lewis has clarified that it disfavors contractual agreements that are excessively restrictive in favor of the executive, including excessive severance payments, new or renewed single-trigger change-in-control arrangements, excise gross ups and multi-year guaranteed awards. Further, Glass Lewis believes that the extension of such entitlements through a renewed or revised employment agreement "represents a missed opportunity to remedy shareholder un-friendly provisions."
- Gender Pay Equity Shareholder Proposals. Glass Lewis will review shareholder proposals requesting disclosure of a company's median general pay ratio on a case-by-case basis. It will generally

recommend a vote against these proposals if the company has disclosed sufficient information about diversity initiatives, including how it is ensuring that women and men are paid equally for equal work.

For the Glass Lewis 2020 U.S. proxy voting policy updates, click [here](#). For the Glass Lewis 2020 Shareholder Initiatives Policy, click [here](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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