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ISS and Glass Lewis Announce Final 2020 Voting Policies

Proxy advisory firms Institutional Shareholder Services (ISS) and Glass Lewis recently announced updates to their U.S. proxy voting policies for the 2020 proxy season. ISS's new policies will apply to shareholder meetings held on or after February 1, 2020 and Glass Lewis's new policies will apply to meetings that are held on or after January 1, 2020.

ISS Benchmark Policy Changes. ISS had previously released [draft proposals](#) on several of the proposed changes in October. Changes to non-U.S. voting policies covering [Europe, the Middle East and Africa](#), and [Asia](#) have also been announced. Notable updates to ISS's [U.S. voting policies](#) include:

Independent Board Chair – Shareholder Proposals. ISS has identified factors that will increase the likelihood ISS will recommend a vote “For” shareholder proposals requiring an independent board chair while affirming that ISS does not mandate a separation of the CEO and Chair roles nor an independent Chair. Such factors include: (i) a weak or poorly defined lead independent director role; (ii) the presence of an executive or non-independent chair in addition to the CEO, a recent recombination of the role of CEO and chair, and/or departure from a structure with an independent chair; (iii) evidence that the board has failed to oversee and address material risks facing the company; (iv) a material governance failure, particularly if the board has failed to adequately respond to shareholder concerns or if the board has materially diminished shareholder rights; or (v) evidence that the board has failed to intervene when management's interests are contrary to shareholders' interests.

While ISS has indicated that its evaluation of independent board chair proposals will remain a holistic process and that it will not “ignore” company performance, it has eliminated from the guidelines the previously explicit statement that one-, three- and five-year performance may be a mitigating factor.

Problematic Governance Structure – Newly Public Companies. ISS has revised its voting policies with respect to newly listed companies (which include companies emerging from bankruptcy, spin-offs and direct listings in addition to companies that complete traditional initial public offerings). ISS will generally recommend a vote against or withhold from directors and boards of newly listed companies that have, without sunsets; (i) supermajority vote requirements to amend the organizational documents of the company; (ii) a classified board structure; or (iii) other “egregious” (in ISS's opinion) provisions, provided, as noted above, that ISS will deem a reasonable sunset provision to be a mitigating factor.

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In addition, ISS will now generally recommend a vote against or withhold from directors and boards of newly public companies with a multi-class capital structure in which the classes have unequal voting rights that are not subject to a reasonable time-based sunset. When determining the reasonableness of a sunset period, ISS will assess a company's lifespan, its post-IPO ownership structure and the board's disclosed rationale, although sunsets expiring more than seven years from the date of the initial public offering will not be considered reasonable.

Share Repurchase Program Proposals. For the rare cases where a company advances a management proposal regarding share repurchases that grant the board authority to conduct open-market repurchases, ISS will recommend approval provided that such buybacks do not facilitate greenmail, are not used to inappropriately manipulate incentive compensation metrics, threaten the company's long-term viability, or raise any other company-specific concerns. ISS will also recommend, on a case-by-case basis, proposals to repurchase shares from specified shareholders, with the goal of balancing the company's stated rationale for such repurchases against the possibility of misuse.

Board Accountability – Restrictions on Shareholders' Rights. ISS has made two changes to its voting policy concerning the ability of shareholders to amend company bylaws. First, ISS will oppose management proposals seeking to approve or ratify requirements that are in excess of SEC Rule 14a-8's requirements. Second, ISS will vote against or withhold from members of the governance committee if the company's bylaws impose what ISS considers "undue restrictions" on shareholders' ability to amend the bylaws, even if such restrictions have been approved by the company's shareholders—including as to subject matter restrictions, share ownership and holding period requirements more restrictive than 14a-8 and prohibitions on the submission of binding shareholder proposals.

Exemptions for New Nominees. In forming its recommendations for director nominees who have served on the board for less than one year, ISS will consider factors such as whether the director should be held responsible for an action taken by the board before s/he joined that ISS disfavors. ISS will also exclude director nominees who have served only part of the fiscal year from its attendance policy.

Board Composition. The one-year transition period for ISS's gender diversity policy has now passed and ISS will recommend against the chair of the nominating committee (or other directors on a case-by-case basis) at companies where there are no women on the company's board. Any commitment by such company to appoint at least one woman to the board within a year will only be a mitigating factor.

Compensation. ISS has updated the policy under which it evaluates equity-based compensation programs to include evergreen (automatic share replenishment) features as an "overriding factor" that will generally trigger a recommendation to vote against the relevant plan proposal.

Other. ISS will vote on a case-by-case basis on proposals requesting reports on a company's pay data by race or ethnicity, taking into account whether such factors have been the subject of recent controversy, litigation or regulatory action and whether the company is lagging behind its peers on reporting such factors.

Glass Lewis Proxy Guidelines. Notable changes to Glass Lewis's 2020 U.S. proxy voting policies include:

Exclusion of Rule 14a-8 Shareholder Proposals. As [previously discussed](#), the SEC announced in September 2019 that the staff may respond orally, instead of in writing, to certain exclusion requests, and may also decline to take a view on whether or not a Rule 14a-8 proposal may be excluded (without suggesting that that means the proposal should be included). In an effort to encourage inclusion of shareholder proposals, Glass Lewis has announced it will consider recommending against all members of the governance committee when a shareholder resolution is excluded and the SEC has declined to state a view on whether such resolution should be excluded, and when the SEC has verbally permitted a company to exclude a shareholder proposal and the company has not provided disclosure concerning verbal receipt of no-action relief.

This continues Glass Lewis's unsettling trend of suggesting it will use its influence over voting outcomes to discourage companies from exercising their legal rights to omit shareholder proposals that are properly excludable. In this regard, Glass Lewis previously has expressed its view that shareholders should be able to vote on matters of material importance (whether or not a proposal meets the Rule 14a-8 procedural and substantive requirements), especially in cases where the proposal is "encouraging responsible and financially sustainable business practices."

Shareholder Proposals Seek to Remove Supermajority Vote Requirements. In instances where shareholder proposals seeking to eliminate supermajority voting provisions are submitted at controlled companies, Glass Lewis may recommend that shareholders vote against such proposals on the grounds that such requirements can be protective of shareholder interests.

Director Attendance. While director absenteeism has long been a basis for potential withhold vote recommendations, Glass Lewis will now generally recommend voting against the governance committee chair when: (i) directors' records for board and committee meeting attendance are not disclosed; or (ii) disclosure indicating that one or more directors attended less than 75% of board and committee meetings is so vague that it is not possible to determine which specific director's attendance was lacking.

Audit Committees and Auditor Ratification. Glass Lewis will now generally recommend voting against the audit committee chair when fees paid to the company's external auditor are not disclosed.

Compensation Committee Performance. Glass Lewis will also generally recommend against all members of the compensation committee when the board adopts a frequency for its advisory vote on executive compensation other than the frequency approved by a plurality of shareholders.

Say-on-Pay Votes and Other Compensation-Related Proposals. Glass Lewis has added to its list of reasons to recommend voting against a say-on-pay vote an “insufficient response” by the company to a prior year’s low shareholder say-on-pay vote result, with the appropriate levels of responsiveness expected generally to correspond with the level of shareholder opposition.

Also, Glass Lewis has refined its analysis of executive employment arrangements, including affirmatively stating that: (i) it considers explicitly double-trigger change in control arrangements (which require both a change in control and a termination or constructive termination) to be best practice, and that where executives receive additional compensation “where no meaningful change in status or duties has occurred,” such change in control “definitions” are potentially problematic; and (ii) it is best practice to correct problematic pay practices, such as excessive or modified single-trigger change in control entitlements, excise tax gross-ups and/or multi-year guaranteed awards, in any materially amended employment agreements. Companies should also be aware that Glass Lewis no longer relies solely on Equilar peer groups when comparing pay for performance across companies.

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We believe that ongoing company engagement with investors and being able to mobilize quickly with counsel to review and respond to proxy advisory firm recommendations will continue to be essential to counteract adverse ISS and Glass Lewis decisions.

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