

From the Public Company Advisory Group of Weil, Gotshal & Manges LLP

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ISS and Glass Lewis Provide Guidance on their Voting Policies Amidst the COVID- 19 Pandemic

Glass Lewis Provides Companies with Opportunity For Direct Feedback on Voting Reports

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ISS and Glass Lewis have provided guidance, available [here](#) and [here](#), on how each proxy advisory firm will apply its proxy voting policies in light of the coronavirus (COVID-19) pandemic. While ISS and Glass Lewis address limited circumstances where their policies may be applied with flexibility, both advisory firms also assert that their current policies already afford sufficient discretion to deal with company-specific situations amidst the COVID-19 crisis. Both ISS and Glass Lewis expect the COVID-19 pandemic to impact governance issues through the 2020 and 2021 proxy seasons and underscore that company disclosure will be critical in evaluating actions taken in response to the pandemic. In this Alert, we summarize the areas of guidance for this proxy season provided by ISS and Glass Lewis. We also discuss Glass Lewis' new Report Feedback Statement (RFS) service, which allows companies to provide direct unedited feedback on Glass Lewis' research reports.

Key ISS and Glass Lewis Policy Developments

Policies Implicating Annual Meetings and Corporate Governance

- Annual Meetings: Virtual-Only and Postponements – ISS and Glass Lewis
- Poison Pills/Defensive Measures – ISS and Glass Lewis
- Board Composition and Effectiveness; Meeting Attendance – ISS

Policies Implicating Compensation

- Change in Metrics – ISS and Glass Lewis
- Option repricing – ISS and Glass Lewis

Dividends, Share Repurchases and Capital-Raising

- Dividends – ISS
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Shareholder Proposals and ESG – Glass Lewis

Annual Meetings and Corporate Governance

Annual Meetings: Virtual-Only Meetings and Meeting Postponements

- **ISS.** In most jurisdictions, ISS does not have a policy to recommend against directors at companies that hold “virtual-only” meetings. ISS notes that it will continue with this permissive approach. As we discussed [here](#), [here](#) and [here](#), the Securities and Exchange Commission (SEC) issued staff guidance and certain states have taken legislative or executive action to provide public companies with flexibility to host “virtual” shareholder meetings during the COVID-19 outbreak. Recognizing that many companies may postpone their annual meetings, ISS’s latest guidance encourages companies to engage with shareholders in other ways, such as webcasts, conference calls and other mediums of electronic communications. ISS will note such communications positively in its reports.
- **Glass Lewis.** As we discussed [here](#), Glass Lewis recently announced that for companies opting to hold a virtual-only shareholder meeting during the remainder of the 2020 proxy season (*i.e.*, March 1, 2020 through June 30, 2020), it will generally not apply its existing policy to recommend against members of the governance committee on this basis, provided that the company discloses its rationale for doing so, including citing the effects of COVID-19. Glass Lewis will resume applying its existing policy on virtual shareholder meetings for all shareholder meetings occurring after June 30, 2020, even “if the pandemic continues well beyond this date” because companies will have been “given sufficient time to address shareholder concerns.”

Poison Pills

Noting that many companies and their advisors are considering whether to adopt a shareholder rights plan (“poison pill”, or “pill”) in the wake of recent stock price declines, ISS and Glass Lewis have updated their existing guidance.

- **ISS.** Under its existing policy, when a board adopts a rights plan with a duration of one year or less without shareholder approval, ISS generally takes into account several factors in determining whether to recommend against director nominees, including the rationale for adopting the rights plan and the company’s existing governance structure. ISS’s new guidance provides that, in most cases, it will consider a severe stock price decline resulting from the COVID-19 pandemic as a valid justification for the adoption of a rights plan with a duration of one year or less. ISS encourages boards to provide detailed disclosure regarding their choice of duration, or any decisions to delay or avoid submitting the plan to a shareholder vote beyond the duration of the plan. ISS will also consider the board’s explanation for its adoption of a poison pill, including any new or existing imminent threats of opportunistic bidders in the wake of recent stock price drops.
- **Glass Lewis.** Glass Lewis typically opposes the adoption of poison pills as not being in the best interests of shareholders. In certain circumstances, Glass Lewis will support a poison pill that is limited in scope to accomplish a particular objective, such as the closing of an important merger, or a poison pill that contains what Glass Lewis believes to be a reasonable qualifying offer clause that includes a number of specific attributes. Glass Lewis provided guidance, available [here](#), that it will consider companies impacted by COVID-19 and the related economic crisis to have reasonable context for adopting a poison pill, provided that: (1) the duration of the pill is limited to one year or less; and (2) the company discloses a sound rationale for adoption of the poison pill as a result of COVID-19. Glass Lewis will recommend a vote against the re-election of all board members who served at the time of adoption of any poison pill that does not meet these conditions. Glass Lewis will also recommend a vote against the re-election of all board members serving at the time of a poison pill’s renewal if the company fails to put the renewal up for shareholder approval. Glass Lewis specifically cites its support of the rights plan adopted by The William’s Companies, Inc. with a 5% trigger threshold and a term of one year as an example of a company disclosing its rationale and shareholder engagement efforts on the topic.

Board Composition and Effectiveness; Meeting Attendance

- **ISS.** ISS has signaled that it will be flexible when applying its policies on director independence, overboarding, diversity and other director attributes when evaluating changes to the boardroom roster made in response to the COVID-19 crisis. ISS acknowledges that boards should have broad discretion during the COVID-19 pandemic to ensure that they have the right team in place. ISS will assess, on a case-by-case basis, company disclosure regarding the changes to board composition and situations where a director may need to fill a senior executive role on an interim basis due to the disability or incapacity of an existing member of management.

With respect to meeting attendance, ISS notes that in markets where rules do not require meeting attendance disclosure, companies should provide shareholders with adequate information about directors' attendance at board and committee meetings. ISS cautions, however, that disclosures relating to director attendance records should be sensitive to privacy concerns with respect to an individual director's health.

- **Glass Lewis.** Glass Lewis states that it sees particular risks for boards (and management) that lack age and gender diversity in light of the fact that men and those over the age of 65 being most likely to suffer from COVID-19. Glass Lewis expects to see reduced attendance rates and changes to board independence, and anticipates that "overcommitted" directors are likely to reduce their board seats as the crisis increases demands on their capacity. Glass Lewis suggests that this will be a test of the adequacy of board succession planning. Glass Lewis also stated that there may be a risk to the effectiveness of board meetings and decision-making from going entirely remote without having the right technology or clear governance procedure, citing that the ability of boards and management to navigate the crisis will highlight differences in board effectiveness.

Executive Compensation

Change in Metrics

- **ISS.** ISS will generally analyze COVID-19 related adjustments to 2020 short-term compensation programs (e.g., changes to performance metrics, goals or targets) when it issues its report for the 2021 proxy season. However, ISS encourages boards to provide contemporaneous disclosure to shareholders of their rationales for making changes to the company's 2020 compensation program. Regarding long-term compensation programs, ISS does not support changes to "midstream" or "in-flight" awards covering multi-year periods and will review such changes on a case-by-case basis taking into consideration the company's disclosed rationale for such changes.
- **Glass Lewis.** Glass Lewis views as "responsible" those companies "hit hard" by the crisis that took early and decisive action to roll back planned salary increases or above-target bonus outcomes, thus "sharing the pain felt by employees and shareholders." Glass Lewis will generally determine the reasonableness of any proposed changes to compensation programs and outcomes by considering whether such changes are consistent and proportional to the impact on shareholder interests and employees. Glass Lewis expects boards to proactively seek changes that align with employee and shareholder experiences, including pay cuts for executives. Glass Lewis will afford more discretion in its analysis to companies that already had good track records on governance, performance and the use of board discretion prior to the COVID-19 outbreak. Glass Lewis states that companies would be "wise to avoid" projecting a "business as usual" approach to executive pay (i.e., trying to make executives whole at further expense to shareholder and employees), although it does not specify whether such a scenario would affect its voting recommendations.

Option Repricing

- **ISS.** ISS will continue to apply its current policy on repricing of out-of-the-money stock options. ISS will generally oppose any repricing that occurs within one year of a precipitous drop in a company's stock price without shareholder approval or ratification. In connection with seeking shareholder approval or ratification, ISS will take into account whether (1) the design is shareholder value neutral (a value-for-value exchange), (2) surrendered options are not added back to the plan reserve, (3) replacement awards do not vest immediately, and (4) executive officers and directors are excluded.
- **Glass Lewis.** Glass Lewis does not specify whether changes to option repricing would affect its voting recommendations, but states that it expects that shareholders will have "serious concerns" about repricing, dilution, burn rates, hurdle adjustments, changes to vesting periods, caps and cuts on incentives, and the quality of disclosure concerning the limits and exercise of board discretion.

Dividends, Share Repurchases and Capital Raising

- **Glass Lewis.** Glass Lewis expects "widespread pausing of buyback programs, suspending dividends and an increase in capital raisings and placements." Glass Lewis explains that some companies will need to seek more flexibility to carry out capital raisings than shareholders are used to granting in accordance with strict best practice recommendations, and warns that "dogmatic application of pre-existing standards by investors could mean the difference between a company surviving this crisis and shareholders suffering even greater losses."

Dividends

- **ISS.** ISS recognizes that the recent market downturn has resulted in boards questioning the appropriateness of continuing to pay dividends at previously anticipated levels. In jurisdictions where the payment of dividends is subject to shareholder approval, ISS notes that some companies have removed the proposal from their 2020 annual meeting ballot. For those companies that do seek shareholder approval for a dividend, ISS's policies ordinarily look to dividend payout ratios to be within certain specified ranges. ISS will support broad discretion for boards that seek to set payout ratios that may fall below historical levels or customary market practice, analyzing disclosure about plans to use the cash thus preserved to support and protect the business and workforce.

Share Repurchases

- **ISS.** Citing the high level of scrutiny regarding share buybacks in the wake of the pandemic-related market plunges, ISS notes that repurchases are "anything but routine" in the current climate, and that boards may open themselves to "intense criticism and reputational damage by undertaking repurchases," especially if the company has reduced or instituted other cutbacks in its workforce. In jurisdictions requiring shareholder approval for share repurchases, ISS will generally continue to recommend in favor of repurchase authorization within customary limits, and it will review a board's actions related to repurchases over the course of 2020 in the run-up to the 2021 proxy season to consider if directors managed risks in a responsible manner.

Capital-Raising: Share Issuances and Private Placements

- **ISS.** ISS will continue to provide case-by-case recommendations on management proposals regarding share issuances or private placements, while considering additional factors relating to COVID-19. ISS will continue to apply its existing policy framework to general share authorizations and share issuance requests, taking into account local market regulatory guidance. ISS states that it considers the COVID-19 pandemic to constitute “exceptional circumstances” under its current policies, which permit a “For” recommendation on a proposal that exceeds normal market-specific limitations on size and potential dilution. ISS will continue to consider company-specific factors including: (1) disclosure in the proxy statement (or equivalent disclosure documents) of the specific purposes for the proposed increase; (2) the risks to shareholders of not approving the request; and (3) the size and potential dilutive impact of the request combined with any market-specific guidelines on limits and preemptive rights.

With respect to private placements, ISS will apply its case-by-case analysis taking into account: (1) the rationale for the private placement issuance; (2) potential dilution to existing shareholders; (3) the discount/premium in issuance price to the unaffected share price before the announcement of the private placement; (4) conflicts of interest; (5) consideration of alternatives; and (6) the market’s reaction to the proposed private placement since announcement. ISS will also consider whether there are exceptional circumstances, such as the company expecting to go out of business or file for bankruptcy protection in the event that the transaction is not otherwise approved, or if the company’s auditor or management has indicated that there are going concern issues.

Shareholder Proposals and ESG

- **Glass Lewis.** Glass Lewis notes that most shareholder proposals were submitted pre-crisis and probably did not take the pandemic into account. Glass Lewis urges investors to be mindful that many of the shareholder proposals this proxy season may not adequately account for companies’ current circumstances or constraints. Glass Lewis further states that issues that appeared accretive in the context of a strong market may not make as much sense in the midst of this crisis and the very material challenges that many companies are now facing in the short to medium-term. Specifically, Glass Lewis notes that companies hardest hit by social distancing, including in the airline, restaurant or hotel industries, may be considering a different set of risks than at their prior annual meeting. Glass Lewis also warns companies not use the crisis to hamper shareholder proponents’ ability to put forward their proposals, speak at virtual meetings and have shareholders vote on such proposals.

Glass Lewis Report Feedback Statement

Glass Lewis [announced](#) the launch of its Report Feedback Statement (RFS), which will allow companies to provide unedited feedback on Glass Lewis’ research. Companies that have filed proxy materials at least twenty-one (21) days prior to the relevant meeting may provide a feedback submission to Glass Lewis between seven (7) days and after the Glass Lewis report has been published, and no later than fourteen (14) days before a company’s meeting. According to Glass Lewis, it will republish its voting recommendation reports “with the last word” coming from the company unfiltered and unedited. Investors will be notified when the company’s feedback is available and the feedback will be accessible from the front page of each report. The RFS service is available for annual and special meetings.

For companies that subscribe to Glass Lewis, there is no additional cost to submit an RFS, as long as the company selects the right to do so when it purchases the Glass Lewis Report. If the company declines the right to an RFS at the time of purchasing a report, the company will be charged a separate fee if it later decides to submit an RFS. Shareholder proponents will also be able to participate in the RFS process. Glass Lewis has provided additional information and frequently asked questions on the RFS process [here](#). Among other things, Glass Lewis encourages companies to consult with legal counsel on the content and disclosure requirements relating to statements made by the company and to include only information that is otherwise “publicly available.” The FAQs also state that the statements should not defame or disparage Glass Lewis.

This announcement follows the SEC’s November 2019 proposed amendments to the proxy rules, available [here](#), and August 2019 guidance on the role of proxy advisory firms, as we previously discussed [here](#). The proposed amendments would add new disclosure and engagement requirements for proxy advisory firms, including, in certain circumstances, treating proxy advisor recommendations as “solicitations” under the federal proxy rules and requiring proxy advisors to provide companies with the opportunity to review and comment on their voting recommendations before they are made public. The comment period for the proposed rule ended on February 3, 2020, but no final rule has been issued.

Companies participating in the RFS program should also note that the feedback provided to Glass Lewis may be deemed “soliciting” material as defined in Rule 14a-1(1) of the Securities Exchange Act of 1934, as amended, requiring the filing of the communication with the SEC as additional soliciting material.

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