ISS and Glass Lewis Provide Policy Guidance on Impacts of COVID-19

I. Overview

In response to the COVID-19 pandemic, Institutional Shareholder Services Inc. ("ISS") and Glass Lewis & Co. ("Glass Lewis"), providers of corporate governance and proxy advisory services, have published guidance for investors and companies to navigate a number of voting policy issues that are likely to be directly impacted by the pandemic.[1] Below is a summary of key points.

II. Annual General Meetings

Meeting Postponements. Health and safety concerns arising from the COVID-19 pandemic have already forced many companies to postpone their annual general meetings. Where online participation in annual meetings is prohibited, ISS recommends that companies follow applicable regulatory guidelines and only resume in-person meetings when safe. ISS also states that it will be "positively noted" when companies and their boards foster direct communication with shareholders, who, ISS believes, will expect companies to use standard disclosure documents, press releases, and websites to keep shareholders informed when meetings have been postponed.

Virtual-Only Meetings. ISS benchmark policies have generally encouraged "hybrid" meeting structures -- in-person meetings combined with online participation -- over "virtual-only" meetings. However, in light of the pandemic and the need for social distancing, many companies have announced plans to hold "virtual-only" meetings. In most jurisdictions (including the U.S.), ISS benchmark policies do not include a policy to recommend against companies who hold "virtual-only" meetings, and ISS notes that it does not plan to implement such a policy during this time.

In jurisdictions where ISS benchmark policies discourage "virtual-only" meetings (and where such meetings are otherwise allowed), ISS will not recommend voting against companies holding "virtual-only" meetings until it is determined to be safe to resume in-person meetings. ISS encourages companies that choose to hold "virtual-only" meetings to disclose that the change was due to COVID-19, to create a "meaningful opportunity" for shareholders to participate and engage with directors and senior management, and to commit to returning to an in-person or "hybrid" meeting when safe to do so.

Glass Lewis takes a similar approach to "virtual-only" meetings. If a company sufficiently discloses its rationale for moving to "virtual-only" shareholder meetings due to the COVID-19 pandemic, Glass Lewis will not recommend voting against the members of the governance committee for this reason. However, once the 2020 proxy season ends on June 30, 2020, Glass Lewis will return to its standard policy on virtual meetings. Although "generally neutral" on "virtual only" meetings, Glass Lewis will expect the company to release detailed disclosures

[1] *See* Impacts of the COVID-19 Pandemic: ISS Policy Guidance (the "ISS Policy Guidance"), *available at* https://www.issgovernance.com/file/policy/active/americas/ISS-Policy-Guidance-for-Impacts-of-the-Coronavirus-Pandemic.pdf; *See also* Immediate Glass Lewis Guidelines Update on Virtual-Only Meetings due to COVID-19, *available at* https://www.glasslewis.com/immediate-glass-lewis-guidelines-update-on-virtual-only-meetings-due-to-covid-19-coronavirus/; *and* Poison Pills and Coronavirus: Understanding Glass Lewis' Contextual Policy Approach, *available at* https://www.glasslewis.com/poison-pills-and-coronavirus-understanding-glass-lewis-contextual-policy-approach/ (together, the "Glass Lewis Guidance"). Unless otherwise indicated, quoted statements in this memorandum relating to guidance from ISS are taken from the ISS Policy Guidance, and quoted statements in this memorandum relating to guidance from Glass Lewis are taken from the Glass Lewis Guidance.

of meeting participation in their proxy statements and to structure the meeting so as to ensure meaningful participation by shareholders.

III. Poison Pills

Existing ISS benchmark policies encourage boards to put shareholders rights plans, or "poison pills," to a shareholder vote, but allow companies to adopt short-term rights plans with reasonable triggers in response to an authentic, short-term threat, including the current COVID-19 pandemic. For poison pills with a duration of less than one year, ISS will continue to analyze them on a case-by-case basis by reviewing the disclosed rationale for implementing the poison pill, examining whether directors appear to be attempting to protect shareholders and not merely entrenching themselves and management, and other relevant factors. In particular, ISS notes that a "severe stock price decline as a result of the COVID-19 pandemic is likely to be considered a valid justification for adopting a pill of less than one year duration" and encourages boards to provide detailed disclosures of its decisions regarding the length of the plan and any delay in putting the plan to a shareholder vote if plans are implemented beyond the one year period.

While Glass Lewis policies are not generally supportive of poison pills, its policies do allow for poison pills that are "limited in scope to accomplish a particular objective." Glass Lewis considers the COVID-19 pandemic and the related economic crisis to be "reasonable context" for a company to adopt a poison pill so long as the duration of the pill is limited to one year or less and the company provides sufficient reasoning for adopting the pill in light of the pandemic.

IV. Board of Directors

Meeting Attendance. Safety concerns for themselves and others may dictate whether directors attend in-person shareholder meetings or board meetings during the pandemic. Certain markets, like the U.S., have specific disclosure rules that treat telephonic and electronic participation in board and committee meetings as being present. In markets that do not have such rules, ISS recommends that companies, while respecting the privacy concerns of the individual directors, provide sufficient information to allow shareholders to make informed judgments and decisions about a director's attendance.

Changes in Board Composition. ISS benchmark policies currently allow for flexibility related to directors' independence, diversity, and other aspects of board composition. ISS will review on a case-by-case basis if boards need to fill vacancies or add expertise due to concerns created by the pandemic but notes that it believes boards should have discretion to adjust policies under these circumstances.

V. Compensation Issues

*Changes to Targets***.** ISS anticipates that companies will begin to announce their intention to materially change targets, performance metrics, and goals used in their short-term compensation plans in response to uncertainties in the markets and the potential recession following the pandemic. Although these decisions may not be reviewed and addressed by shareholders until the 2021 annual general meeting, ISS recommends that disclosures to shareholders regarding their rationale for such changes be made contemporaneously with any such announcement.

ISS benchmark policies are generally not supportive of changes to long-term incentive plan awards made "midstream" or "in flight." ISS notes that they will look at changes to long-term awards with open performance periods on a case-by-case basis and assess whether boards used appropriate discretion and provided sufficient explanation of their reasoning. If a board determines to alter the structure of their long-term plans in light of the new economic environment, ISS will assess such changes under its existing benchmark policy framework.

Stock Options. ISS notes that, while some companies may seek to reprice "out-of-the money" stock option awards due to the market changes, ISS will continue to scrutinize boards that undertake repricing actions without asking for shareholder approval under its existing board accountability provisions. Under this approach, ISS will generally oppose any repricing that occurs within one year of a "precipitous drop" in the company's stock price. However, ISS will consider other factors, including whether the repricing is value neutral, applicability of share recycling, vesting terms and inclusion of awards to directors and executive officers in such repricing.

VI. Capital Structure and Payouts

Dividends. Existing ISS policies look for dividend payout ratios to be within a range based on earnings from the prior year; however, in light of the pandemic-related market downturn, ISS will allow broad discretion for boards to set payout ratios below past levels or contrary to usual market practice. When assessing such proposals, ISS will look at whether boards disclose plans to use any of the retained cash from the reduced dividend payout to support the company's workforce.

Share Repurchases. ISS will generally continue to recommend in favor of repurchase authorizations within customary limits for each market, in the absence of regulatory restrictions or serious concerns related to the company. However, ISS warns that board actions related to repurchases over the course of 2020 will be evaluated for the next annual meeting with a view toward whether the directors responsibly managed associated risks. While ISS understands that boards may be tempted to establish repurchase authorizations to provide future flexibility, it notes that directors should carefully consider the potential reputational, regulatory, and business risks before moving ahead, even with shareholder approval.

Raising Capital. The uncertainties in the markets will likely lead many companies to seek additional financing sources to support them through the crisis. ISS policies already provide for a case-by-case assessment of requests to increase authorized common or preferred stock, share issuances, private placements, and other related proposals.

ISS will apply existing policies to general authorization and share issuance requests; however, ISS will take under consideration any regulatory changes or new guidance issued due to the pandemic. Existing benchmark policies already consider company-specific factors and in "exceptional circumstances and based on clear and compelling justification by the board of a company's underlying need in the current economic environment" (such as the current pandemic) allow for case-by-case review and possible favorable recommendations for proposals that exceed any usual limits on size and dilution.

ISS voting policies currently provide for a case-by-case analysis of private placement issuances. The factors considered include, exceptional circumstances such as whether the company is expected to go out of business or file for bankruptcy protection if the private placement is not approved, or whether the company's auditor or management has indicated that the company has going-concern issues.

VII. Conclusion

Recent ISS and Glass Lewis guidance in response to the COVID-19 pandemic provides important insight in light of various changes in the way corporate governance matters are conducted. With the uncertainties in the markets, this guidance should be of interest to public companies given the likely influence of the guidance has on voting by institutional investors.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; or Tina Davis at 212.701.3473 or tdavis@cahill.com; or email us at publications@cahill.com.