Cahill

January 14, 2022

ISS and Glass Lewis Issue Proxy Voting Guidelines for 2022

Institutional Shareholder Services Inc. (ISS) and Glass, Lewis & Co. (Glass Lewis) have each issued their respective proxy voting guidelines for 2022, which include a number of noteworthy revisions, summarized below. The ISS updates are available here and will apply for shareholder meetings held on or after February 1, 2022 unless otherwise noted. The Glass Lewis updates, including updated guidelines for ESG initiatives, are available here and will apply for shareholder meetings held on or after January 1, 2022 unless otherwise noted.

ISS Updates

Say on Climate. ISS has adopted two frameworks for analyzing Say on Climate proposals, one for proposals submitted by shareholders and another for those submitted by management. These new policies list the main, non-exhaustive criteria that will be considered in ISS's analysis. Vote recommendations by ISS on such proposals will be made on a case-by-case basis, taking into account the completeness and rigor of the plan and disclosures and other relevant criteria, including with respect to shareholder proposals whether the request is unduly burdensome or overly prescriptive.

Climate Accountability. ISS has adopted a new policy applicable to companies that are significant greenhouse gas (GHG) emitters, defined for 2022 as those on the current Climate Action 100+ Focus Group list. Under the new policy, ISS generally will recommend voting against or withholding votes from the incumbent chair of the responsible committee (or other directors on a case-by-case basis) in situations where ISS determines that the company is not taking the minimum steps needed to understand, assess, and mitigate risks to the company and the larger economy relating to climate change. For 2022, ISS considers such "minimum steps" to be: detailed disclosure of climate-related risks (such as those published by the Task Force on Climate-Related Financial Disclosures (TCFD) framework), and appropriate GHG emissions reduction targets.

Board Composition: Gender Diversity. Effective February 1, 2023, ISS has expanded its board gender diversity policy to all companies, not just companies included in the Russell 3000 and S&P1500 indices. Under the policy, ISS generally will recommend voting against or withholding votes from 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.

Board Composition: Racial/Ethnic Diversity. The one-year grace period for ISS's board racial/ethnic diversity policy has now passed, and for companies included in the Russell 3000 and S&P1500 indices, ISS generally will recommend voting against or withholding votes from the chair of the nominating committee (or other directors on a case-by-case basis) where the board has no apparent racially or ethnically diverse members.

Shareholder Proposals Seeking Racial Equity and/or Civil Rights Audits. ISS has adopted a policy reflecting its approach to shareholder proposals asking companies to conduct an independent racial equity and/or civil rights audit. Such proposals were introduced in the 2021 proxy season and are expected to return again in 2022. ISS will recommend votes on a case-by-case basis for these proposals, taking into account several factors listed in its new policy. These factors focus on a company's established process or framework for addressing racial inequity and discrimination internally; its public statements and track record on racial justice; its engagement efforts; whether the company has been subject to relevant controversy, litigation, or regulatory action; and whether the company's actions are aligned with market norms on civil rights and racial or ethnic diversity.

Multi-Class and Other Capital Structures with Unequal Voting Rights. Beginning February 1, 2023, ISS generally will recommend voting against or withholding votes from directors individually, committee members, or the entire board (except new nominees, who will be considered on a case-by-case basis), at all companies with unequal voting rights, irrespective of when they first became public companies (with an exception for newly-public companies with a sunset provision of no more than seven years from the date of their IPO). To make sure the intent is perfectly clear, ISS noted that this policy update means that starting in 2023, ISS likely will recommend voting against directors at many large or iconic U.S. companies that have unequal voting rights structures, such as: Alphabet Inc., Meta Platforms, Inc. (formerly Facebook, Inc.), Ford Motor Company, Berkshire Hathaway Inc., and The New York Times Company. Capital structures with unequal voting rights may be multi-class structures but may also include classes of shares that are not entitled to vote on the same ballot items or for the same nominees, or stock with time-phased voting rights. For 2022, the current policy stands, under which ISS will recommend voting against or withholding votes from directors of newly-public companies that have multi-class capital structures with unequal voting rights without a reasonable time-based sunset provision (which ISS considers to be no more than seven years from the date of their IPO). ISS did modify the current policy applicable to newly-public companies to reflect that a "newly added reasonable sunset" would prevent negative recommendations in subsequent years. Foreshadowing future policies, ISS explained that this is the first step in formulation of policies against adverse governing provisions, which also include supermajority voting and staggered boards.

Common and Preferred Stock Authorizations. ISS has revised its policies for increases in authorized common or preferred stock. Each policy now reflects that ISS will apply the same dilution limits to companies with total shareholder returns in the bottom 10% of the U.S. market as it applies to any other company. Each policy now also identifies as problematic the existence of any outstanding, non-shareholder-approved poison pill, as opposed to one that has been adopted in the past three years.

Equity Plans. Effective for meetings held on or after February 1, 2023, ISS will use a "Value-Adjusted Burn Rate" in evaluating equity-based plans. ISS believes this calculation will more accurately measure the value of recently granted equity awards, by using a methodology that more precisely measures the value of option grants and calculations that are more readily understood and accepted by the market.

Glass Lewis Updates

Say on Climate. Glass Lewis has updated its ESG guidelines to clarify its approach to assessing management- and shareholder-submitted Say on Climate proposals. Citing its concerns relating to "shareholders approving a company's business strategy," Glass Lewis generally will recommend opposition to shareholder proposals requesting that companies adopt a Say on Climate vote. However, when companies have adopted such a vote and are asking for shareholder input on their climate-related strategies, Glass Lewis will evaluate companies' climate transition plans on a case-by-case basis.

Board Oversight of Environmental and Social Risk. For companies included in the S&P 500 index, Glass Lewis generally will recommend voting against the governance committee chair of a company that does not provide explicit disclosure concerning the board's role in overseeing environmental and social issues. Glass Lewis also will note as a concern when boards of companies included in the Russell 1000 index fail to provide clear disclosure concerning the board-level oversight of such issues. Glass Lewis noted that companies are best positioned to determine the appropriate structure of such oversight.

Board Composition: Gender Diversity. Glass Lewis has expanded its policy on board gender diversity and generally will recommend voting against the chair of the nominating committee of a board with fewer than two gender diverse directors, and against the entire nominating committee of a board with no gender diverse directors, at companies included in the Russell 3000 index. For companies outside the Russell 3000, and for all boards with six or fewer total directors, Glass Lewis's existing policy requiring a minimum of one gender diverse director will remain in place. Beginning with shareholder meetings held after January 1, 2023, Glass Lewis will transition from a fixed numerical approach to a percentage-based approach and generally will recommend voting against the nominating committee chair of a board that is not at least 30% gender diverse at Russell 3000 companies. Glass Lewis also has replaced references in its guidelines to female directors with "gender diverse directors," defined as women and directors who identify with a gender other than male or female. Glass Lewis also stated that it will recommend in accordance with board composition requirements set forth in applicable state laws, but it generally will refrain from recommending against directors when those applicable state laws do not mandate board composition requirements, are non-binding, or only impose disclosure or reporting requirements.

Director Diversity Disclosure. Glass Lewis now may recommend voting against the chair of the nominating and/or governance committee at companies included in the S&P 500 index that fail to provide disclosure in each of the following categories: (1) the percentage of racial/ethnic diversity represented on the board; (2) whether the board's definition of diversity explicitly includes gender and/or race/ethnicity; (3) whether the board has a policy requiring women and other diverse individuals to be part of the director candidate pool; and (4) board skills disclosure. Beginning in 2023, for S&P 500 companies that have not disclosed individual or aggregate racial/ethnic minority demographic information, Glass Lewis generally will recommend voting against the chair of the governance committee.

Multi-Class and Other Capital Structures with Unequal Voting Rights. Glass Lewis now will recommend voting against the chair of the governance committee at companies with a multi-class share structure and unequal voting rights if they are not subject to a reasonable sunset provision (generally seven years or less).

Committee Chairs on Staggered Boards. If a committee chair is not up for election due to a staggered board structure, and where Glass Lewis has identified multiple other concerns, it generally will recommend voting against other members of the relevant committee who are up for election, on a case-by-case basis.

Waiver of Age and Tenure Policies. Glass Lewis has revised its approach to boards waiving their age and/or tenure policies, and it generally will recommend voting against the nominating and governing committee chair where a board has waived its limits for two or more consecutive years. Glass Lewis did indicate it would consider whether the board has a compelling rationale behind its waiver, such as consummation of a corporate transaction.

Written Consent. In evaluating shareholder proposals requesting that companies lower the ownership threshold required to initiate written consent, Glass Lewis generally will recommend voting in favor of lowering the threshold when the company has no special meeting provision, or only allows shareholders owning more than 15% of its shares the ability to call a special meeting. Glass Lewis generally will recommend opposition to lowering the ownership threshold necessary to initiate written consent if the company has a 15% or lower ownership threshold to call a special meeting.

Special Purpose Acquisition Company (SPAC) Governance. Glass Lewis has added voting guidelines regarding SPACs. If Glass Lewis determines that the company has adopted overly-restrictive governing documents, where before the company goes public, the board adopts a multi-class share structure or an anti-takeover provision (poison pill, staggered board), it generally will recommend voting against all board members who served at the time the company went public if the board did not submit these provisions to an advisory shareholder vote at the meeting where shareholders voted on the business combination; or did not also commit to submitting these provisions to a shareholder vote at the company's first shareholder meeting after the company went public; or did not provide for a reasonable sunset of these provisions (generally three to five years for staggered boards or poison pills, seven years or less for multi-class share structures).

SPACs and Overboarding. Under its "overboarding" policies, Glass Lewis generally recommends voting against a director who serves as an executive officer of any public company while serving on more than two public company boards and any other director who serves on more than five public company boards. The 2022 updates clarify that where a director's only executive role is at a SPAC, the higher limit generally will apply.

Clarifying Amendments. Glass Lewis also has adopted clarifications for certain of its existing policies, including most significantly its policies regarding authorizations/increases in authorized preferred stock, federal forum provisions and director independence. With regard to authorizations or increases in authorized preferred stock, Glass Lewis generally recommends voting against preferred stock authorizations or increases, unless the company discloses a commitment not to use such shares as an anti-takeover defense or in a shareholder rights plan, or discloses a commitment to submit any shareholder rights plan to a shareholder vote prior to its adoption. With regard to federal forum provisions, Glass Lewis generally recommends voting against chairs of governance committees when boards have adopted such provisions without seeking shareholder approval. Finally, with regard to director independence, Glass Lewis applies a three-year look back for material financial transactions, and a five-year look back for former employment relationships.

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If 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 in it, please do not hesitate to call or email authors Helene R. Banks (partner) at 212.701.3439 or hbanks@cahill.com; Geoffrey E. Liebmann (partner) at 212.701.3313 or gliebmann@cahill.com; Kimberly C. Petillo-Décossard (partner) at 212.701.3265 or kpetillo-decossard@cahill.com; Glenn J. Waldrip, Jr. (partner) at 212.701.3110 or gwaldrip@cahill.com; or Sarah Klein-Cloud (attorney) at 212.701.3231 or sklein-cloud@cahill.com; or email publications@cahill.com.