
Glass Lewis and ISS Update Their 2021 Voting Guidelines

I. Overview

Glass, Lewis & Co. (“Glass Lewis”) and Institutional Shareholder Services Inc. (“ISS”), the leading providers of corporate governance and proxy advisory services, have published their updated voting guidelines for the 2021 proxy season. The revised Glass Lewis guidelines¹ generally will apply to meetings held on or after January 1, 2021, while the revised ISS guidelines² generally will apply to meetings held on or after February 1, 2021, with certain exceptions noted below. The following is a summary of the key changes in their respective guidelines affecting U.S. companies.

II. Glass Lewis Guidelines

Board Gender Diversity

The Glass Lewis guidelines regarding board gender diversity for 2021 are consistent with its current guidelines, where at least one female board member is required, but Glass Lewis notes that boards with fewer than two female directors will be flagged as a concern in the 2021 proxy season. Beginning in the 2022 proxy season, Glass Lewis will recommend against the nominating committee chair of a board with fewer than two female directors. However, if a company has a board of directors with six or fewer members, the current voting policy of requiring at least one female director will continue.

Glass Lewis may expand its voting recommendation to other members of the nominating committee if the committee chair’s class of board members is not up for election or due to other circumstances, including general governance profile and applicable state laws. In addition, after reviewing a company’s disclosures regarding diversity, Glass Lewis may determine not to recommend voting against directors if the company is not within the Russell 3000 Index or if the board has provided satisfactory reasons or provides a plan to address diversity going forward.

Furthermore, several states have enacted legislation to promote board diversity. Glass Lewis recommends boards follow the composition requirements of applicable state laws.

¹ See 2021 Proxy Paper Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice United States (the “Glass Lewis Guidelines”), available at <https://www.glasslewis.com/wp-content/uploads/2020/11/US-Voting-Guidelines-GL.pdf?hsCtaTracking=7c712e31-24fb-4a3a-b396-9e8568fa0685%7C86255695-f1f4-47cb-8dc0-e919a9a5cf5b>.

² See Institutional Shareholder Services Inc., Proxy Voting Guidelines Updates for 2021: Benchmark Policy Changes for U.S., Canada, and Latin America (the “ISS Guidelines”), available at <https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf>. Quoted statements in this memorandum are taken from the Glass Lewis Guidelines or the ISS Guidelines, as applicable.

Disclosure of Director Diversity and Skills

Glass Lewis notes that disclosure is essential when gauging a board's diversity and skill set and has initiated monitoring the quality of this disclosure in proxy statements. Accordingly, it will review a company's proxy statement to confirm:

- “the board's current percentage of racial/ethnic diversity;
- whether the board's definition of diversity explicitly includes gender and/or race/ethnicity;
- whether the board has adopted a policy requiring women and minorities to be included in the initial pool of candidates when selecting new director nominees...; and
- board skills disclosure.”

These factors will not be the sole basis of assessment for Glass Lewis's voting recommendations but will inform its overall assessment of the company.

Board Refreshment

Glass Lewis generally supports a regular director evaluation and routine board refreshments to encourage diverse perspectives and contemporary ideas. Although Glass Lewis will not be making voting recommendations based solely on this assessment in 2021, insufficient board refreshment will be flagged as a potential concern when the average tenure of non-executive directors is ten years or more and if independent directors have not joined the board in the past five years. Glass Lewis also believes that, in general, a board should evaluate the skills and experience of its board members to determine if the board's composition is adequate, rather than rely on term or age limits alone, and notes that if any such limits are adopted, any waivers thereof without adequate explanation will lead to recommendations against the nominating or governance committee.

Environmental and Social Risk Oversight

Glass Lewis believes that companies should have an “appropriate oversight structure in place” to monitor and manage environmental and social issues. In its view, these issues should be overseen at the board level, and the company should disclose the directors who have been given these oversight responsibilities.

In the 2021 proxy season, Glass Lewis will flag when companies included in the S&P 500 index do not provide distinct disclosure regarding the board-level oversight applied to environment and/or social issues. Furthermore, beginning in the 2022 proxy season, Glass Lewis will recommend voting against the governance committee chair if such a company fails to produce such disclosure with respect to environmental and social issues.

Special Purpose Acquisition Companies

New to Glass Lewis's guidelines this year is a section detailing its approach to commonly-occurring issues associated with Special Purpose Acquisition Companies (“SPACs”). Glass Lewis generally has a favorable view of proposals seeking to extend business combination deadlines and generally will defer to the recommendation of management and the board. Additionally, Glass Lewis will consider board members of the post-combination entity who previously served as executives of the SPAC to be independent, absent any evidence of an employment relationship or material financial interest.

Disclosure of Voting Results

Glass Lewis believes that thorough disclosure of proxy voting results from the prior annual meeting is an essential shareholder right and notes that these results should be furnished to shareholders within a “reasonable” timeframe. Therefore, Glass Lewis will recommend voting against the governance chair of a company if such

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disclosure has not been provided. The guidelines note that this recommendation will also apply to companies organized in foreign jurisdictions where such disclosure may not otherwise be required.

Short- and Long-Term Incentives

Short-Term Incentives. Glass Lewis ordinarily expects performance measures for short-term incentives to be correlated with the company's financial and non-financial metrics such as safety and environmental issues. In the 2021 guidelines, Glass Lewis indicates that it has broadened its description of "upward discretion" to apply to retroactively pro-rated performance periods. The Glass Lewis guidelines also codify additional elements that will be considered in evaluating a company's short-term incentive plan. For example, any significant change in a company's short-term incentive plan is expected to be thoroughly disclosed, including the justification for such change, and if a company lowers performance goals from the prior year, the company is expected to disclose the rationale.

Long-Term Incentives. The Glass Lewis guidelines also codify additional elements that will be used to assess a company's long-term incentive plan. For example, inappropriate performance-based awards, if combined with other significant issues, may lead to a negative recommendation. Additionally, Glass Lewis notes that a substantial reduction in performance-based award allocations will likely lead to a negative recommendation, absent exceptional circumstances. Glass Lewis also notes that long-term incentive equity granting practices, substantial structural program changes, and any use of upward discretion are expected to be thoroughly disclosed.

Board Responsiveness

The 2021 guidelines clarify Glass Lewis's position in evaluating substantial support for non-binding shareholder resolutions. Management resolutions that were opposed by more than 20% will be noted, and Glass Lewis may express its views on management's response thereto. In general, Glass Lewis believes that "significant board action" is called for in response to resolutions approved by the majority.

Governance Following an IPO or Spin-Off

In regard to post-IPO corporate governance concerns, Glass Lewis usually will focus on the governance committee, but the guidelines clarify that it will expand its recommendation to include other director nominees if there is no governance committee or if those committee members' class of directors is not up for election.

The guidelines also specify that Glass Lewis generally will recommend voting against all members of a board if the company adopted a multi-class share structure with disproportionate voting rights or other take-over mechanisms (such as a classified board or poison pill) before an IPO if:

- the board has not also committed to submit these provisions to a shareholder vote at the first post-IPO shareholder meeting or
- the board has not provided a "reasonable sunset" of these provisions (in general, three to five years for classified boards and poison pills, and seven years or less for multi-class shares).

Excise Tax Gross-Ups and Votes on Golden Parachute Payments

The Glass Lewis guidelines implement clarifying language for evaluating the addition of new excise tax gross-ups to specific change in control transactions. A negative recommendation may be expanded in these situations (in addition to any related golden parachute proposal where gross-up entitlements first appear) to also include a recommendation against the compensation committee members and the "say-on-pay" proposals of those involved.

Option Exchanges and Repricing

When reviewing option exchanges and repricing proposals, Glass Lewis will generally oppose such proposals, with any exceptions being driven by the exclusion of officers and board members from the program and the program being value-neutral or value-creative.

Compensation - Peer Group Methodolog

The guidelines note that, in forming Glass Lewis's previously announced proprietary peer groups, country-based and sector-based peers, as well as the company's self-disclosed peers, are considered.

Virtual-Only Shareholder Meetings

The revised Glass Lewis guidelines delete the temporary exception relating to virtual meetings held between March 1, 2020 and June 30, 2020 and Glass Lewis has thus reverted to its standard policy on virtual-only meetings. For meetings held in a virtual-only format, Glass Lewis expects thorough disclosure in the company's proxy statement clarifying a shareholder's ability to participate. For instance, explaining how a shareholder is able to ask questions at the meeting, procedures for posing questions received during the meeting, and how the company plans to respond should be addressed. The governance committee chair will generally be held accountable if such disclosure is not made.

III. Institutional Shareholder Services Guidelines

Board Oversight

ISS guidelines generally provide that, under "extraordinary circumstances," ISS will recommend that shareholders vote against or withhold votes from directors, committee members, or the entire board in the event of, among other things, material failures of risk oversight. The 2021 guidelines expand the scope of oversight risk to include "environmental and social issues, including climate change."

Board Diversity

Gender Diversity. In the 2020 proxy season, then-current ISS guidelines allowed companies a transitional year in order to formulate a firm commitment to gender diversity on their boards. The 2021 ISS guidelines update this policy to provide that, for companies in the Russell 3000 or S&P 1500 indices, ISS will generally recommend to vote against or withhold votes from the nominating committee chair if the company does not have any women on the board, but an exception will be made if (i) there was at least one woman on the board at the previous annual meeting and (ii) the board has committed to reinstate its gender diversity within a year.

Racial and/or Ethnic Diversity. The 2021 ISS guidelines introduce a new policy to address interest expressed by investors in seeing racial and ethnic board diversity. In 2021, ISS will flag companies in the Russell 3000 and S&P 1500 indices if their boards do not have clear racial and/or ethnic diversity; however, beginning on February 1, 2022, ISS will recommend a vote against – or withhold votes from – the chair of the nominating committee if the board of directors does not have clear racially or ethnically diverse members. An exception will be made if (i) the board was considered racially and/or ethnically diverse at the prior annual meeting and (ii) the board has committed to appoint at least one racially or ethnically diverse member within a year.

Classification of Directors

The 2021 guidelines update ISS's policy to reflect certain changes in the classification of directors. The principal change is to limit the definition of "Executive Director" to include only officers, instead of officers and employees and to exclude certain persons such as those on the board as employee representatives. ISS states that

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this change will not result in any vote recommendation changes but is intended to provide additional clarity for institutional holders whose overboarding policies apply to executive officers.

Board Accountability – Poison Pills

The 2021 guidelines update ISS’s policy regarding poison pills to provide that ISS will recommend voting against or withholding votes from all nominees if the proposed poison pill, whether short-term or long-term, has a “deadhand” or “slowhand” feature, in addition to the current factors.³ ISS asserts that while a specific recommendation against deadhand or slowhand poison pills was previously unnecessary because these provisions only appeared in long-term plans (which ISS was recommending against for that reason), many companies recently have adopted short-term (one year or less) poison pills, some of which included these provisions, due to the COVID-19 pandemic and the unpredictability of the market. ISS explains that a deadhand or slowhand poison pill is “unjustifiable” because these pills are clearly intended to prevent the shareholders from voting to replace a board in order to allow an offer to continue.

Board Refreshment

The 2021 guidelines update ISS’s policy regarding age limits on the board of directors to now recommend voting in favor of proposals to remove mandatory age limits. ISS believes that board refreshment is best accomplished through continuing evaluations of individual directors in order to confirm the needs of the board are met and to provide new perspectives, skills and diversity.

With respect to management proposals concerning director term/tenure limits, ISS generally recommends voting on a case-by-case basis and urges consideration of:

- “The rationale provided for adoption of the term/tenure limit;
- The robustness of the company’s board evaluation process;
- Whether the limit is of sufficient length to allow for broad range of director tenures;
- Whether the limit would disadvantage independent directors compared to non-independent directors; and
- Whether the board will impose the limit evenly, and not have the ability to waive it in a discriminatory manner.”

ISS also generally recommends voting on a case-by-case basis on shareholder proposals that address term/tenure limits and consideration of the following:

- “The scope of the shareholder proposal; and
- Evidence of problematic issues at the company combined with, or exacerbated by, a lack of board refreshment.”

Notice Requirements for Shareholder Proposals and Nominations

ISS policy generally supports advance notice proposals that allow shareholders to submit their proposals “as close to the meeting as reasonably possible.” The 2021 guidelines expand the meaning of “reasonable” in this context to mean a window to submit a proposal beginning no earlier than 120 days prior to the anniversary of the prior year’s meeting and no shorter than 30 days from the beginning of the notice period.

³ *Id.*

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Shareholder Litigation Rights

The 2021 guidelines include a new recommendation regarding federal forum selection provisions that distinguishes between provisions that only specify “the district courts of the United States” (which ISS generally will recommend a vote for) and those that specify a particular district court (which ISS generally will recommend against and will also be considered a failure under ISS’s “Unilateral Bylaws/Charter Amendments” policy).

The 2021 guidelines also revise ISS’s recommendation policy regarding state forum selection provisions. ISS will generally recommend voting (1) in favor of the selection of Delaware courts for corporate law matters by Delaware corporations, (2) case-by-case on the selection of another state’s courts for corporate matters by a company incorporated in that state (depending on the company’s stated rationale for adopting, other governance features, and other factors), and (3) against the selection of the courts of a state other than the company’s state of incorporation.

Virtual Shareholder Meetings

The ISS guidelines include a recommendation to generally vote in favor of management proposals for virtual-only shareholder meetings, but only if they do not preclude in-person meetings. Additionally, ISS suggests that companies disclose the circumstances under which virtual-only meetings will be held and to permit for similar rights and opportunities that shareholders would usually have during an in-person meeting. The guidelines also include a case-by-case recommendation for shareholder proposals regarding virtual-only meetings (depending on the stated rationale and identified concerns).

Social and Environmental Issues

Gender, Race/Ethnicity Pay Gaps. The 2021 guidelines revise ISS’s policy to clarify that when voting on a proposal regarding reports on a company’s pay data, shareholders should take into account the company’s disclosures regarding gender, race or ethnicity pay gap policies compared to its industry peers and local laws regarding the classification of race and ethnicity.

Sexual Harassment. The 2021 guidelines implement a new policy to address sexual harassment in the workplace. This policy recommends that shareholders vote on a case-by-case basis on proposals requesting reports regarding a company’s actions to “strengthen policies and oversight to prevent workplace sexual harassment” or on related risks (depending on current policies and practices, any recent controversies, and other factors).

Mandatory Arbitration. The 2021 guidelines put a new policy into effect regarding mandatory arbitration proposals. ISS recommends shareholders to vote on a case-by-case basis on proposals for a report on the company’s use of mandatory arbitration in the employment context (depending on current policies and practices, any recent controversies, and other factors).

IV. Conclusion

The 2021 Glass Lewis and ISS guidelines provide extensive, helpful insight in anticipation of the coming proxy season and expand upon an on-going focus on concerns related to diversity, social issues and governance practices.

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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 in it, please do not hesitate to call or email authors Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; or Tina Davis at 212.701.3473 or tdavis@cahill.com; or email publications@cahill.com.

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