
ISS and Glass Lewis Issue Proxy Voting Guidelines for 2023

Institutional Shareholder Services Inc. (“ISS”) and Glass, Lewis & Co. (“Glass Lewis”) each have issued their respective proxy voting policy guidelines for 2023, 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, 2023 unless otherwise noted. The Glass Lewis updates, including updated guidelines for environmental, social and governance (“ESG”) initiatives, are available [here](#) and [here](#), respectively, and will apply for shareholder meetings held on or after January 1, 2023 unless otherwise noted.

I. ISS Updates

Climate Accountability. As we noted in our [firm memorandum](#) dated January 14, 2022 (“2022 Memorandum”), last year ISS adopted a new policy applicable to companies on the current Climate Action 100+ Focus Group [list](#). Under the 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. 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 greenhouse gas (“GHG”) emissions reduction targets.

For 2023, ISS is extending the framework and updating the factors considered under the policy. In cases where a company is not considered to be adequately disclosing climate-related risks and does not have either medium-term GHG emission reductions targets or Net Zero-by-2050 GHG reduction targets for at least a company’s operations (Scope 1) and electricity use (Scope 2), ISS will generally recommend voting against what are considered to be the appropriate director(s) and/or other items available to be voted on. In addition, emission reduction targets should cover the vast majority (95%) of the company’s operational (Scope 1 and 2) emissions. For 2023, ISS plans to use the same framework for all relevant companies globally, but with differentiated implementation of any negative vote recommendations depending on relevant market and company factors (for example, voting item availability).

Board Gender Diversity. As we noted in our [2022 Memorandum](#), last year ISS expanded its board gender diversity policy to all companies, not just companies included in the Russell 3000 and S&P 1500 indices. The one-year grace period now is expiring, and the policy will be effective February 1, 2023. 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.

Exculpation of Officers. In August 2022, the Delaware General Assembly [amended](#) Section 102(b)(7) of the Delaware General Corporation Law (“DGCL”) to authorize corporations to adopt a provision in their certificate of incorporation eliminating or limiting the monetary liability of certain corporate officers for breaches of the fiduciary duty of care. Under Section 102(b)(7), a corporation must affirmatively elect to include such an exculpation provision in its

certificate of incorporation. ISS is adopting a policy to review proposals providing for exculpation provisions in a company's charter on a case-by-case basis.

Unequal Voting Rights. As we noted in our [2022 Memorandum](#), 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 initial public offering). The previous grandfathering of older companies with unequal voting rights will be removed in 2023. The updated policy also clarifies that the *de minimis* exception only applies to situations where the unequal voting rights represent no more than 5% of the total voting power.

Problematic Governance Structures. Since 2017, ISS's U.S. benchmark policy regarding problematic governance structures (*e.g.*, supermajority vote requirements to amend the bylaws or charter, a classified board structure or "other egregious provisions") for newly public companies has stated that the inclusion of a reasonable sunset provision would be considered as a potential mitigating factor. However, the policy had not distinctly defined the parameters of a sunset provision that would be viewed as reasonable. ISS now defines a "reasonable sunset period" as no more than seven years from the date of going public.

Share Issuance Mandates. ISS is introducing a new policy for U.S.-listed companies incorporated outside the U.S. and listed solely on a U.S. exchange. Under the policy, ISS generally will recommend voting in favor of resolutions to authorize the issuance of common shares not tied to a specific transaction or financing proposal in an amount not to exceed 20% of the company's currently issued common share capital (or 50% in the case of "pre-revenue or other early-stage companies that are heavily reliant on periodic equity financing," provided they can demonstrate the need for the higher limit). The creation of a specific policy on this topic for U.S.-listed but non-U.S. incorporated companies is intended to better reflect the expectations and concerns of investors in the U.S. market. The policy will apply to companies with a sole listing in the U.S., but which are required by the laws of the country of incorporation to seek approval for such share issuances. Dual-listed companies that are required to comply with listing rules in the country of incorporation will continue to be evaluated under the policy for that market.

Political Expenditures Alignment Transparency Shareholder Proposals. ISS is introducing a new policy for shareholder proposals requesting company transparency on the congruency of its political contributions and lobbying with its public commitments and policies, including climate lobbying congruency with its climate goals. Under the policy, vote recommendations by ISS on such proposals will be made on a case-by-case basis, taking into account: (i) the company's policies, management, board oversight, governance processes, and level of disclosure related to direct political contributions, lobbying activities, and payments to trade associations, political action committees, or other groups that may be used for political purposes; (ii) the company's disclosure regarding: the reasons for its support of candidates for public offices; the reasons for support of and participation in trade associations or other groups that may make political contributions; and other political activities; (iii) any incongruencies identified between a company's direct and indirect political expenditures and its publicly stated values and priorities; and (iv) recent significant controversies related to the company's direct and indirect lobbying, political contributions, or political activities.

Minor Changes and Policy Clarifications. ISS also has adopted clarifications for certain of its existing policies, including its policies regarding equity-based compensation plans, quorum requirements, the use of ESG metrics in compensation programs, and racial equity and/or civil rights audit proposals. With regard to equity-based compensation plans, as we noted in our [2022 Memorandum](#), the one-year transition period for ISS's evaluation of such plans has expired, and effective for meetings held on or after February 1, 2023, ISS will use a "Value-Adjusted

Burn Rate” in evaluating such plans. With regard to quorum requirements, ISS is revising its previous policy of recommending a vote against proposals to reduce quorum requirements for shareholder meetings below a majority of the shares outstanding unless there are compelling reasons to support the proposal. ISS now will take a case-by-case approach, due to the recently observed increase in the inability of companies to achieve a quorum. With regard to the use of ESG metrics in compensation programs, ISS has clarified that its policy generally considers the company’s compensation committee to be in the best position to determine the metrics in its compensation program, while at the same time affirming that improved disclosure may benefit shareholders. Finally, with regard to racial equity and/or civil rights audit proposals, given the growing level of investor support across all sectors for these types of proposals, ISS is updating its policy criteria for the case-by-case analysis of such proposals. Rather than asking whether the company’s actions are aligned with market norms on civil rights, and racial or ethnic diversity, ISS now will ask whether the company adequately discloses workforce diversity and inclusion metrics and goals, as a quantitative assessment of progress.

II. Glass Lewis Updates

Board Gender Diversity. As we noted in our [2022 Memorandum](#), Glass Lewis will transition from a fixed numerical approach to a percentage-based approach for board gender diversity. Glass Lewis generally will recommend against the chair of the nominating committee of a board that is not at least 30% gender diverse at companies within the Russell 3000 index. For companies outside the Russell 3000 index, Glass Lewis’s existing policy requiring a minimum of one gender diverse director will remain in place. Glass Lewis may refrain from recommending a vote against directors when boards have provided a sufficient rationale or plan to address the lack of diversity on the board, including a timeline to appoint additional gender diverse directors (generally by the next annual meeting).

Board Underrepresented Community Diversity. Glass Lewis has expanded its policy on measures of diversity beyond gender. Glass Lewis generally will recommend against the chair of the nominating committee of a board with fewer than one director from an underrepresented community on the board at companies within the Russell 1000 index. Glass Lewis defines “underrepresented community” as an individual who self-identifies as Black, African American, North African, Middle Eastern, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaskan Native, or who self-identifies as gay, lesbian, bisexual, or transgender. For the purposes of this evaluation, Glass Lewis will rely solely on self-identified demographic information as disclosed in company proxy statements. Glass Lewis may refrain from recommending a vote against directors when boards have provided a sufficient rationale or plan to address the lack of diversity on the board, including a timeline to appoint additional directors from an underrepresented community (generally by the next annual meeting).

State Laws on Diversity. Recently, California’s Senate Bill 826 (“SB 826”) and Assembly Bill 979 (“AB 979”) regarding board gender and “underrepresented community” diversity, respectively, were both deemed to violate the equal protection clause of the California state constitution. These rulings currently are on appeal. Accordingly, where Glass Lewis had previously recommended in accordance with mandatory board composition requirements set forth in California’s SB 826 and AB 979, it will now refrain from providing recommendations pursuant to these requirements until further notice. However, Glass Lewis noted that it will continue to monitor compliance with these requirements.

Disclosure of Director Diversity and Skills. Glass Lewis now may recommend voting against the chair of the nominating and/or governance committee at companies in the Russell 1000 index that have not provided any disclosure in each the following categories: (i) the board’s current percentage of racial/ethnic diversity; (ii) whether the board’s definition of diversity explicitly includes gender and/or race/ethnicity; (iii) 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 (iv) board skills disclosure." Additionally, when companies in the Russell 1000 index have not provided any disclosure of individual or aggregate racial/ethnic minority demographic information, Glass Lewis generally will recommend voting against the chair of the governance committee.

Board Oversight of Environmental and Social Issues. Glass Lewis generally will recommend voting against the governance committee chair of any company in the Russell 1000 index that fails to provide explicit disclosure concerning the board's role in overseeing environmental and social issues. Glass Lewis noted that companies should determine the best structure for this oversight.

Director Commitments. Glass Lewis has clarified that it generally will recommend that shareholders vote against a director who serves as an executive officer (other than executive chair) of any public company while serving on more than one external public company board, a director who serves as an executive chair of any public company while serving on more than two external public company boards, and any other director who serves on more than five public company boards.

Cyber Risk Oversight. Based on its view that cybersecurity risk is material for all companies, Glass Lewis now encourages all issuers to provide clear disclosure concerning the role of the board in overseeing issues related to cybersecurity, including disclosure concerning how companies ensure directors are fully versed on these issues. Glass Lewis noted it generally will not make recommendations on the basis of a company's oversight or disclosure concerning cyber-related issues. However, it will closely evaluate a company's disclosure in this regard in instances where cyber-attacks have caused significant harm to shareholders, and may recommend against certain directors should it find such oversight or disclosure to be insufficient.

Board Accountability for Climate-Related Issues. Glass Lewis now emphasizes that for companies with material exposure to climate risk stemming from their own operations, it believes they should provide thorough climate-related disclosures in line with the recommendations of the TCFD. It also believes the boards of such companies should have explicit and clearly defined oversight responsibilities for climate-related issues. Accordingly, in instances where Glass Lewis finds either of these disclosures to be absent or significantly lacking, it may recommend voting against the responsible directors.

Officer Exculpation. Glass Lewis's policy now includes a new section regarding officer exculpation. As discussed above, Section 102(b)(7) of the DGCL now authorizes corporations to adopt a provision in their certificate of incorporation eliminating or limiting the monetary liability of certain corporate officers for breaches of the fiduciary duty of care. Glass Lewis notes that it will closely evaluate proposals to adopt officer exculpation provisions on a case-by-case basis, and that it generally will recommend voting against such proposals, unless the board provides a compelling rationale for the adoption and the provisions are reasonable.

Long-Term Incentives. Glass Lewis has raised its threshold for the minimum percentage of the long-term incentive grant that should be performance-based, from 33% to 50%. Glass Lewis now will raise concerns where less than half of an executive's long-term incentive grants are subject to performance-based vesting conditions. Glass Lewis may refrain from a negative recommendation in the absence of other significant issues with the equity-based incentive program's design or operation. However, where performance-based awards are significantly rolled back or eliminated from a company's long-term incentive plan, such decisions generally will be viewed negatively, and may lead to a recommendation against the say-on-pay proposal.

Disclosure of Shareholder Proponents. Glass Lewis now calls on companies to provide clear disclosure in their proxy statements concerning the identity of the proponent (or lead proponent if multiple proponents have submitted a proposal) of any shareholder proposal that may be going to a vote. If such disclosure is not provided, Glass Lewis generally will recommend voting against the governance committee chair. In addition, Glass Lewis

encourages disclosure concerning a company's engagement (or lack thereof) with a proponent and also welcomes disclosure from proponents concerning their engagement with companies.

Racial Equity Audits. Glass Lewis has codified its approach to proposals requesting that companies undertake racial equity or civil rights audits. When analyzing these resolutions, Glass Lewis will assess: (i) the nature of the company's operations; (ii) the level of disclosure provided by the company and its peers on its internal and external stakeholder impacts and the steps it is taking to mitigate any attendant risks; and (iii) any relevant controversies, fines, or lawsuits. After taking into account these company-specific factors, Glass Lewis generally will recommend in favor of well-crafted proposals requesting that companies undertake a racial or civil rights-related audit when Glass Lewis believes that doing so could help the target company identify and mitigate potentially significant risks.

Retirement Benefits and Severance. Glass Lewis has updated its approach to proposals requesting that companies adopt a policy whereby shareholders must approve severance payments exceeding 2.99 times the sum of the executive's base salary plus bonus. Although Glass Lewis noted it generally supports these policies, it may recommend shareholders vote against such proposals where companies already have adopted policies whereby they will seek shareholder approval for any cash severance payments exceeding 2.99 times the sum of the executive's base salary plus bonus.

Clarifying Amendments. Glass Lewis also has adopted clarifications for certain of its existing policies, including most significantly its policies regarding clawbacks of executive compensation. Whether or not a company is affected by [new Rule 10D-1](#)¹ under the Securities Exchange Act of 1934, as amended, during the intervening time between the final rule's announcement and the effective date of listing standards, Glass Lewis has emphasized it believes it is prudent for boards to adopt detailed compensation recovery policies "that, at a minimum, provide companies the ability to recover compensation from former and current named executive officers in the event of overpayment due to erroneous data that triggered an accounting restatement." It also noted that for companies that will be subject to the new listing standards and have not yet adopted clawback policies that exceed the requirements of Section 304 of the Sarbanes-Oxley Act, "providing detailed disclosure in the proxy statement evidencing the board's proactive effort to ensure that the company will be in compliance may serve to mitigate concerns."

Glass Lewis also has clarified its approach to board responsiveness to shareholder voting contrary to management. Glass Lewis believes that boards should engage with shareholders and demonstrate some initial level of responsiveness when 20% or more of shareholders vote contrary to management. In addition, when a majority or more of shareholders vote contrary to management, Glass Lewis believes that boards should engage with shareholders and provide a more robust response to fully address shareholder concerns. With respect to controlled companies and companies that have multi-class share structures with unequal voting rights, Glass Lewis will carefully examine the level of disapproval attributable to unaffiliated shareholders and will generally evaluate vote results on a "one share, one vote" basis.

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¹ Rule 10D-1 directs the national securities exchanges and associations that list securities to, among other things, establish listing standards that require each issuer to develop and implement a clawback policy.

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-Décosard (partner) at 212.701.3265 or kpetillo-decosard@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.

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