

TURNING UP THE HEAT ON BOARD DIVERSITY AND E & S RISK OVERSIGHT: QUICK GUIDE TO ISS AND GLASS LEWIS 2021 PROXY SEASON UPDATES

Dec 11, 2020

Institutional Shareholder Services (“ISS”) and Glass Lewis recently released their respective policy updates for the 2021 proxy season. Key updates are summarized below.

TOPIC	ISS	GLASS LEWIS
Effective Date for Updates	Meetings on or after February 1, 2021	Meetings on or after January 1, 2021

TOPIC**ISS****GLASS LEWIS****Gender/Racial/Ethnic Board Diversity**

For 2021, ISS reports for Russell 3000 or S&P 1500 companies will *highlight* boards that lack racial and/or ethnic diversity (or lack diversity disclosure).

For 2022, for Russell 3000 or S&P 1500 companies where board has no apparent racially or ethnically diverse members, will generally recommend voting against or withhold from nominating committee chair (or other directors on case-by-case basis).

Exception will be made if company had racial and/or ethnic diversity on board at preceding annual meeting and board makes firm commitment to appoint at least one racial and/or ethnic diverse member within one year.

Only exception to adverse vote recommendations for companies with no women directors will be if board temporarily lost its gender diversity (i.e., there was at least one woman at prior year annual meeting and board makes firm commitment to return to gender-diverse status within a year).

Continue current voting recommendation of voting against nominating committee chair of board with no women board members, but note as concern boards with fewer than two women directors.

For meetings on or after January 1, 2022, generally recommend voting against nominating committee chair (and possibly other nominating committee members) if fewer than two women directors.

For boards with six or fewer total members, existing voting policy requiring at least one woman director will remain in place after January 1, 2022.

Will also carefully review a company's disclosure of diversity considerations and may not recommend vote against directors of non-Russell 3000 index companies, or when boards have provided sufficient rationale or plan to address lack of board diversity.

In addition to standard policy on board diversity, will recommend in accordance with applicable state law board diversity requirements in effect from time to time.

TOPIC	ISS	GLASS LEWIS
Director Diversity & Skills Disclosure	Aggregate diversity statistics provided by board will be considered only if specific as to racial and/or ethnic diversity.	<p>Will begin tracking quality of diversity disclosure in proxy statements. For 2021 proxy season, reports for companies in S&P 500 index will include assessment of company proxy statement disclosure on board diversity, skills and director nomination process.</p> <p>These reports specifically will reflect how company's proxy statement presents: (i) board's current percentage of racial/ethnic diversity; (ii) whether board's definition of diversity explicitly includes gender and/or race/ ethnicity; (iii) whether board has adopted policy requiring women and minorities to be included in initial pool of candidates when selecting new director nominees (aka "Rooney Rule"); and (iv) board skills disclosure.</p>
Board Refreshment	Board refreshment best implemented through ongoing program of individual director evaluations, conducted annually, to ensure evolving needs of board are met and to bring in fresh perspectives, skills, and diversity as needed.	<p>Will not be make voting recommendations solely on basis of this assessment in 2021, but ratings will help inform assessment of company's overall governance and may be contributing factor in recommendations when additional board-related concerns are identified.</p> <p>Beginning in 2021, will note as a potential concern instances where the average tenure of non-executive directors is 10 years or more and no new independent directors have joined the board in last five years.</p> <p>Will not make voting recommendations solely on this basis</p>

TOPIC**ISS**

Will recommend on case-by-case basis vote on management proposals regarding director term/tenure limits, considering:

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

Will recommend on case-by-case basis vote on shareholder proposals asking for company to adopt director term/tenure limits, considering:

- Scope of shareholder proposal; and
- Evidence of problematic issues at company combined with, or exacerbated by, lack of board refreshment.

Will generally recommend against management and shareholder proposals to limit tenure of independent directors through mandatory retirement ages. Will recommend vote for proposals to remove mandatory age limits.

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in 2021, but insufficient board refreshment may be contributing factor in recommendations when additional board-related concerns are identified.

TOPIC	ISS	GLASS LEWIS
E & S Risk Oversight	List of examples of material failures of risk oversight that can result in vote against or withhold recommendations for entire board was expanded to include: “demonstrably poor risk oversight of environmental and social issues, including climate change.”	<p>Will note as a concern when boards of S&P 500 companies do not provide clear disclosure concerning board-level oversight of environmental and/or social issues.</p> <p>Beginning January 1, 2022, will generally recommend voting against the governance chair of S&P 500 companies that fail to provide explicit disclosure concerning board’s role in overseeing E&S issues.</p>

TOPIC	ISS	GLASS LEWIS
Virtual Shareholder Meetings	<p>Will generally recommend vote for management proposals allowing for convening of shareholder meetings by electronic means, so long as they do not preclude in-person meetings.</p> <p>Companies are encouraged to disclose the circumstances under which virtual-only meetings would be held, and to allow for comparable rights and opportunities for shareholders to participate electronically as they would have during an in-person meeting.</p> <p>Will recommend on case-by-case basis vote on shareholder proposals concerning virtual-only meetings, considering:</p> <ul style="list-style-type: none"> ▪ Scope and rationale of the proposal; and ▪ Concerns identified with the company’s prior meeting practices. 	<p>Removed the temporary exception to policy on virtual shareholder meeting disclosure that was in effect for meetings held between March 1, 2020 and June 30, 2020.</p> <p>Standard policy on virtual meeting disclosure is now in effect. Specifically, for companies choosing to hold their meeting in virtual-only format, Glass Lewis expects robust disclosure in proxy statement addressing the ability of shareholders to participate in meeting, including:</p> <ul style="list-style-type: none"> ▪ Shareholders’ ability to ask questions at the meeting; ▪ Procedures, if any, for posting appropriate questions received during the meeting and the company’s answers on its public website; and ▪ Logistical details for meeting access and technical support. <p>Where such disclosure is not provided, will generally hold the governance committee chair responsible and recommend vote against governance committee members.</p>

TOPIC**ISS****GLASS LEWIS****Compensation,
including Gender,
Race/Ethnicity Pay
Gaps**

Will recommend on case-by-case basis on requests for reports on company's pay data by gender and/or race/ethnicity, or a report on company's policies and goals to reduce any gender or race/ethnicity pay gaps, taking into account:

- Company's current policies and disclosure related to both its diversity and inclusion policies and practices and its compensation philosophy on fair and equitable compensation practices;
- Whether company has been the subject of recent controversy, litigation, or regulatory actions related to gender, race, or ethnicity pay gap issues;
- Company's disclosure regarding gender, race, or ethnicity pay gap policies or initiatives compared to its industry peers; and
- Local laws regarding categorization of race and/or ethnicity and definitions of ethnic and/or racial minorities.

Codified additional factors to consider in assessing company's short-term incentive plan. Specifically, expect clearly disclosed justifications to accompany any significant changes to company's short-term incentive plan structure, as well as any instances in which performance goals have been lowered from the previous year. Also expanded description of the application of upward discretion to include instances of retroactively prorated performance periods.

Codified additional factors to consider in assessing long-term incentive plan structure. Specifically, defined inappropriate performance-based award allocation as criterion which may, in presence of other major concerns, contribute to a negative recommendation. Any decision to significantly roll back performance-based award allocation will be reviewed as a regression of best practices, which outside of exceptional circumstances, may lead to a negative recommendation. Also defined that clearly disclosed explanations are expected to accompany long-term incentive equity granting practices, as well as any significant structural program changes or use of upward discretion.

TOPIC**ISS****GLASS LEWIS****Mandatory
Arbitration
Shareholder
Proposals**

Will recommend on case-by-case basis vote on requests for report on company's use of mandatory arbitration on employment-related claims, taking into account:

- Company's current policies and practices related to use of mandatory arbitration agreements on workplace claims;
- Whether company has been the subject of recent controversy, litigation, or regulatory actions related to use of mandatory arbitration agreements on workplace claims; and
- Company's disclosure of its policies and practices related to use of mandatory arbitration agreements compared to its peers.

TOPIC**ISS****GLASS LEWIS****Sexual Harassment
Shareholder
Proposals**

Will recommend on case-by-case basis vote on requests for report on company actions taken to strengthen policies and oversight to prevent workplace sexual harassment, or report on risks posed by company's failure to prevent workplace sexual harassment, taking into account:

- Company's current policies, practices, oversight mechanisms related to preventing workplace sexual harassment;
- Whether company has been the subject of recent controversy, litigation, or regulatory actions related to workplace sexual harassment issues; and
- Company's disclosure regarding workplace sexual harassment policies or initiatives compared to industry peers.

TOPIC**ISS****GLASS LEWIS****Exclusive Forum
Proposals for State
Law Matters**

Will generally recommend vote for charter or bylaw provisions that specify courts located within the state of Delaware as the exclusive forum for corporate law matters for Delaware corporations, in absence of serious concerns about corporate governance or board responsiveness to shareholders.

For states other than Delaware, will recommend on case-by-case basis vote on exclusive forum provisions, taking into consideration various factors.

Will generally recommend vote against provisions that specify a state other than the state of incorporation as the exclusive forum for corporate law matters, or that specify a particular local court within the state; unilateral adoption of such provision will generally be considered a one-time failure under ISS' Unilateral Bylaw/Charter Amendments policy.

TOPIC	ISS	GLASS LEWIS
Federal Forum Section	<p>Will generally recommend vote for federal forum selection provisions in charter or bylaws that specify "the district courts of the United States" as the exclusive forum for federal securities law matters, in absence of serious concerns about corporate governance or board responsiveness to shareholders.</p>	
Fee-Shifting Provisions (requiring unsuccessful shareholder plaintiff to pay fees of defendant company and its directors and officers)	<p>Will recommend vote against provisions that restrict the forum to a particular federal district court; unilateral adoption (without shareholder vote) of such provision will generally be considered a one-time failure under the Unilateral Bylaw/Charter Amendments policy.</p> <p>Will generally recommend vote against provisions that mandate fee-shifting whenever plaintiffs are not completely successful on merits (i.e., including cases where the plaintiffs are partially successful).</p> <p>Unilateral adoption of fee-shifting provision will generally be considered an ongoing failure under Unilateral Bylaw/Charter Amendments policy.</p>	

TOPIC**ISS****GLASS LEWIS**

Will recommend on case-by-case basis vote on advance notice proposals, giving support to those proposals which allow shareholders to submit proposals/nominations as close to meeting date as reasonably possible and within the broadest window possible, recognizing need to allow sufficient notice for company, regulatory, and shareholder review.

Advance Notice for Shareholder Proposals/

To be reasonable, company's deadline for shareholder notice of proposal/

Nominations

nominations must be no earlier than 120 days (changed from 60 days under prior policy) prior to the anniversary of the previous year's meeting and have a submittal window of no shorter than 30 days from the beginning of the notice period (also known as a 90-120 day window). The submittal window is the period under which shareholders must file their proposals/nominations prior to the deadline.

"Deadhand" or "Slowhand" Poison Pill Provisions

Expanded list of poison pill features to include deadhand or slowhand features, whether with respect to short-term or long-term poison pills, which will cause ISS to recommend voting against or withhold for all director nominees (other than new directors who will be considered on a case-by-case basis).

RELATED PRACTICE AREAS

- Securities & Corporate Governance

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