

ISS AND GLASS LEWIS ISSUE PROXY VOTING POLICY UPDATES FOR THE 2021 PROXY SEASON

The two largest proxy advisory firms in the U.S., Institutional Shareholder Services Inc. (“ISS”) and Glass, Lewis & Co. (“Glass Lewis”), have released their updated proxy voting guidelines. ISS’ policy updates are effective for annual shareholder meetings held on or after February 1, 2021. Glass Lewis’ policy updates are effective for annual shareholder meetings held on or after January 1, 2021.

This client briefing discusses both ISS’ and Glass Lewis’ 2021 policy updates for U.S. companies. We note certain key changes, and action items that companies should implement in response, in the box to the right, with a more detailed summary on the following pages. These policy changes and the voting policies of a company’s major shareholders should inform proxy drafting and shareholder engagement for the upcoming annual meeting season.

Key Action Items

- ISS’ and Glass Lewis’ board gender diversity policies are in full effect in 2021; ISS racial/ethnic diversity policy takes full effect in 2022.
- ISS will consider proposals for term limits (not age limits) for directors in 2021 on a case by case basis (ISS previously opposed them). ISS continues to oppose age limits.
- ISS may consider highly paid directors not to be independent.
- ISS will consider unilateral board adoption of exclusive forum provisions to be failures warranting a potential withhold vote for one year. Companies may wish to consider adopting such provisions before February 1, 2021.
- Companies must explicitly disclose their policies on board-level oversight of ESG issues, including climate change, or risk withhold recommendations.
- Both firms are leery of a move to virtual meetings absent a stated rationale (such as the pandemic) and an ability for shareholders to participate in the meeting. Companies should tailor their proxy disclosure accordingly.

ENVIRONMENTAL, SOCIAL, AND CORPORATE GOVERNANCE (ESG) POLICY UPDATES

Board Composition – Gender Diversity	
ISS*	<p>ISS will recommend:</p> <ul style="list-style-type: none"> • a vote <u>against</u> the nominating committee chair and, on a case-by-case basis, other directors where no women serve on the board, unless: <ul style="list-style-type: none"> – there was a woman on the board at the preceding annual meeting, and – the board firmly commits to add a woman within the year. <p style="text-align: center;"><i>*Russell 3000 and S&P 1500 firms only</i></p>
Glass Lewis	<p>Glass Lewis will recommend:</p> <ul style="list-style-type: none"> • in 2021, a vote <u>against</u> the nominating committee chair for companies without a female member on the board. For [S&P 500 company] boards with more than six members, Glass Lewis will note a concern if the board has fewer than two female directors. • in 2022, a vote <u>against</u> the nominating committee chair of a board with more than six members that does not have at least two female directors. <p><u>Note:</u> Glass Lewis may refrain from an adverse recommendation for companies outside the Russell 3000 index or where the board has provided a sufficient rationale or plan to address the lack of board diversity.</p>

Board Composition – Racial/Ethnic Diversity

ISS*	<p>In 2021, ISS’ reports will note boards that lack racial or ethnic diversity in an effort to encourage investor dialogue with management. Beginning in February 2022, ISS will recommend:</p> <ul style="list-style-type: none"> • a vote against the nominating committee chair or, on a case-by-case basis, other directors where no apparent racially or ethnically diverse members serve on the board, unless: <ul style="list-style-type: none"> – the company’s board had racial and/or ethnic diversity at the preceding annual meeting, and – the company commits to appointing at least one racial and/or ethnic diverse member within the year. <p style="text-align: center;"><i>*Russell 3000 and S&P 1500 firms only</i></p>
Glass Lewis	<p>Glass Lewis will recommend a vote in accordance with the board composition requirements of the company’s applicable state (<i>i.e.</i>, recommending against the chair of the nominating committee for companies headquartered in California who fail to meet that state’s required thresholds).</p> <p><u>Note:</u> Glass Lewis did not go as far as ISS on its recommendations on board diversity; however, it did note that several states are beginning to encourage board diversity through legislation, such as California’s requirement that at least one director must be from an “underrepresented community” in a company headquartered in its state by the end of 2021.</p>

Gender, Race, or Ethnicity Pay Gaps

ISS	<p>When evaluating shareholder proposals for more company reporting on pay gaps, ISS clarified two factors that it will consider:</p> <ul style="list-style-type: none"> • a company’s current policies and compensation philosophy towards pay gaps (based on company disclosures); and • local laws on race and ethnicity categorizations and definitions of ethnic and/or racial minorities.
Glass Lewis	<p>Glass Lewis affirmed its current policy on gender pay gaps but also expressed a new concern for racial pay inequity as well.</p>

Board Refreshment – Age and Term Limits

ISS ISS will consider recommending a vote for management proposals to introduce director term limits that are well-designed and balanced. Previously, ISS recommended against such proposals.

ISS will continue to recommend a vote against proposals to institute age limits, and in favor of proposals that remove mandatory age limits.

Glass Lewis Glass Lewis strongly supports routine director evaluations, rather than age or tenure limits.

Glass Lewis may identify as a concern boards with an average tenure for non-executive directors of 10 years or more with no new directors joining in the prior five years; however, Glass Lewis would not recommend a negative voting action solely for this deficiency.

Governance Failures – ESG Risk Oversight / Management-Proposed ESG Resolutions

ISS ISS has elevated “demonstrably poor” oversight of environmental and social issues, including climate change, to its list of material risk oversight failures that may result in a withhold vote against directors or committee members. ISS list of material failures already includes: bribery, large regulatory fines or sanctions, sizable legal judgements or settlements, and hedging of company stock.

Note: ISS did not elaborate on what failures or type of issues would cause it to recommend against directors; however, the other items on the list suggest it must be a serious failure.

Glass Lewis Beginning in 2021, Glass Lewis will note as a concern for companies in the S&P 500 index unclear disclosures in proxy statements and governance committee charters relating to board-level oversight and accountability on ESG issues.

After January 1, 2022, Glass Lewis will further recommend voting against the governance chair of a board in the S&P 500 index that fails to provide explicit disclosures on a board’s oversight of ESG issues.

On management-proposed ESG resolutions, Glass Lewis will take a case-by-case approach, considering a variety of factors, including:

- whether the proposal materially impacts shareholders,
- whether there is a competing or corresponding shareholder proposal on the topic,
- the company’s general responsiveness to shareholders and to emerging ESG issues, and
- whether the proposal is binding or advisory.

Glass Lewis – Shareholder Proposals on Climate Change Matters

Glass Lewis	<p>Glass Lewis will generally recommend (for all industries) voting <u>for</u> shareholder proposals that request enhanced disclosures on climate-related issues, such as 1) a scenario analysis or a report consistent with the recommendations of the Task Force on Climate-related Financial Disclosures (“TCFD”) and 2) climate-related lobbying.</p> <p>Glass Lewis may recommend against these proposals if the company’s existing climate policies or reporting sufficiently addresses the request or the proposal, if adopted as written, is inconsistent with long-term shareholder value creation. Additionally, GL will recommend against any proposal that requires a company to suspend its industry association memberships or otherwise limits the company’s ability to participate in the trade associations it belongs.</p>
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Shareholder Proposals for More Reporting on Employee Matters

ISS	ISS will evaluate on a case by case basis shareholder proposals seeking disclosure of a company’s policies on prevention of sexual harassment and its use of mandatory arbitration for employment-related claims.
Glass Lewis	Glass Lewis will generally recommend a vote <u>for</u> shareholder proposals that request companies to disclose their EEO-1 reports (compliance surveys that require company employment data to be categorized by race/ethnicity, gender and job category) and other types of disclosure concerning workplace diversity or details about how companies are promoting diversity within their workforce.

SHAREHOLDER RIGHTS

ISS – Federal Forum Selection Provisions

ISS	<p>ISS will recommend:</p> <ul style="list-style-type: none"> • a vote <u>for</u> federal forum selection provisions in the charter or bylaws that make U.S. district courts generally the exclusive forum for federal securities law claims. • A vote <u>against</u> provisions restricting the forum to a specific federal district court. <p><u>Note:</u> ISS will consider a unilateral adoption by the board of an exclusive forum provision in the bylaws or charter to be a one-time failure under ISS’ Unilateral Bylaw/Charter Amendments policy, which may result in a withhold vote for directors or committee members. ISS generally grandfathers provisions that were in place before its policy goes into effect; therefore, companies considering such provisions may wish to adopt them before February 1, 2021.</p>
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ISS – State Forum Selection Provisions

ISS	<p>ISS will recommend:</p> <ul style="list-style-type: none"> • for Delaware corporations, a vote <u>for</u> charter or bylaw provisions that specify Delaware state courts as the exclusive forum for corporate law matters in the absence of serious concerns about a company's governance. • for companies incorporated outside of Delaware, ISS will review the provision on a case by case basis based on enumerated factors and will generally recommend a vote <u>against</u> provisions that provide for an exclusive forum outside that company's state of incorporation or specify a certain local court within that state. <p><u>Note:</u> Like its federal forum selection recommendation, a unilateral adoption of such provisions would be considered a one-time failure under ISS' Unilateral Bylaw/Charter Amendments policy.</p>
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ISS – Fee-Shifting

ISS	<p>ISS will recommend a vote <u>against</u> directors on an ongoing basis if the board unilaterally adopts a provision in its charter or bylaws mandating fee-shifting whenever plaintiffs are not completely successful on the merits.</p> <p><u>Note:</u> A unilateral adoption of such provisions would be considered a one-time failure under ISS' Unilateral Bylaw/Charter Amendments policy.</p>
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Virtual Shareholder Meetings

ISS	<p>ISS will recommend:</p> <ul style="list-style-type: none"> • a vote <u>for</u> management proposals for virtual shareholder meetings, so long as in-person meetings are not precluded. Companies should disclose the circumstances under which a virtual-only meeting would be held and provide shareholders a comparable means to participate electronically. • <u>Note</u> that certain large institutional investors such as Counsel of Institutional Investors, CalPERS, CalSTRS and the New York City Pension Funds generally oppose virtual meetings, except in extraordinary situations (such as the pandemic).
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<p>Glass Lewis</p>	<p>Glass Lewis will recommend:</p> <ul style="list-style-type: none"> • A vote <u>against</u> governance committee members where the board is planning to hold a virtual-only shareholder meeting and the company does not provide the following (which should be disclosed in proxy materials): <ul style="list-style-type: none"> – an ability for shareholders to participate in the meeting, including asking questions, – procedures for posting questions during the meeting and answers on the website after the meeting and – technical and logistical details for meeting access and technical support.
<p>ISS - Advance Notice Requirements for Shareholder Proposals</p>	
<p>ISS</p>	<p>ISS will recommend on a case-by-case basis, voting <u>for</u> advance notice provisions that require 120 day notification prior to the annual shareholder meeting for shareholder proposals and nominations (other than Rule 14a-8(e)(2) proposals or director nominations submitted under proxy access provisions.) Advance notice of 120 days has become the market standard. ISS' previous policy was to recommend against notice periods of more than 60 days.</p>
<p>ISS – Deadhand or Slowhand Poison Pills</p>	
<p>ISS</p>	<p>A “deadhand” provision permits only board members at the time of adoption of the plan to redeem stock issued to dilute the hostile acquirer’s holdings and to rescind such measure.</p> <p>Similarly, a “slowhand” provision prevents redemption of a poison pill for a specific time period (typically 180 days) after a change in the board’s composition.</p> <p>Both features had fallen out of popularity but re-emerged, including in the REIT market (“slowhand” provisions are specifically authorized in Maryland), due to market volatility caused by the COVID-19 pandemic.</p> <ul style="list-style-type: none"> • ISS will recommend a vote <u>against</u> all poison pills proposals that include “deadhand” or “slowhand” features.

ISS – Board Independence – Classification of Directors

- ISS** ISS has clarified the following:
- A director may not be considered independent if his or her pay is comparable to an “Executive Officer’s” compensation for multiple years.
 - An “Affiliate” of a director also includes a manager or advisor of an externally managed issuer, which will expressly pick up many externally-managed REITs.

Glass Lewis – Governance Following IPO or Spin-off

- Glass Lewis** When the board has adopted a multi-class share structure and anti-takeover provisions, such as a poison pill or classified board, in connection with an IPO or spin-off within the past year, Glass Lewis will recommend:
- a vote against all board members who served at the time of the IPO if the board:
 - did not also commit to submitting the multi-class structure to a shareholder vote at the company’s first shareholder meeting following the IPO, or
 - did not provide a reasonable sunset of the multi-class structure, which is generally seven years or less, or the anti-takeover provision, which generally is three to five years or less.
- Note: If the multi-class share structure is put to a shareholder vote, Glass Lewis will examine the level of approval or disapproval attributed to unaffiliated shareholders.

EXECUTIVE COMPENSATION

Glass Lewis – Incentive Programs

Glass Lewis	Glass Lewis may issue a negative recommendation on a company's say-on-pay proposal if the company has rolled back or eliminated performance-based awards outside of exceptional circumstances. <u>Note:</u> Glass Lewis expects clear disclosure of the justification for any use of upward discretion which significantly changes a company's short or long-term performance program structure.
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Glass Lewis – Excise Tax Gross-Up

Glass Lewis	Glass Lewis may recommend <u>against</u> management's say-on-pay and golden parachute proposals and may recommend withholding votes for the compensation committee in situations where new excise tax gross ups will be provided in connection with a specific change-in-control transaction.
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ISS – COVID 19 Pay Guidance

ISS	ISS' 2020 guidance as to how ISS may approach pandemic-related pay decisions in its pay-for-performance qualitative evaluation will continue to apply in 2021.
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Glass Lewis – Option Exchanges and Repricing

Glass Lewis	Glass Lewis generally opposes option exchanges and repricings (absent macroeconomic or industry (as opposed to company-specific) events). Officers and directors should be excluded from these programs, and such programs should be value-neutral or value-creative to shareholders in order to avoid a negative recommendation.
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OTHER

Glass Lewis – Special Purpose Acquisition Companies (“SPACs”)

Glass Lewis	<p>Glass Lewis introduced a policy relating to special purpose acquisition companies (SPACs).</p> <p><i>Extension of deadline proposals.</i> When a special shareholder meeting is held to solicit approval to extend the business combination deadline in cases where a target is identified but management needs more time to finalize the deal, Glass Lewis will generally defer to the recommendation of management if the extension request is reasonable.</p> <p><i>Independence.</i> Glass Lewis will view any director who is a former SPAC executive as independent, unless there is evidence of an employment relationship or continuing material financial interest in the combined entity.</p>
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Glass Lewis – Voting Results Disclosure

Glass Lewis	<p>Glass Lewis will recommend voting <u>against</u> the governance committee chair when a detailed record of proxy voting results from the prior annual meeting has not been disclosed.</p>
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ISS – CEFS – Unilateral Opt-in to Control Share Acquisition Statutes

ISS	<p>In May 2020, the SEC withdrew a prior staff letter (known as the “Boulder Letter”) and published new guidance for closed-end management investment companies (“CEFs”) stating that the staff may no longer recommend enforcement against CEFs opting into a Control Share Acquisition statute (a “CSAA”). These protective provisions have been employed by boards against activist investors who are increasingly using measures permitted under state corporate law to push for liquidation or conversion into open-ended funds.</p> <p><u>ISS recommends:</u></p> <ul style="list-style-type: none"> • a vote <u>against</u> or a <u>withhold</u> vote for CEF nominating committee members (or other directors on a case-by-case basis) who have not provided a compelling rationale for opting-in to a CSAA, nor submitted a by-law amendment to a shareholder vote.
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