Goodmans LLP Update

ISS and Glass Lewis Provide Guidance on Voting Recommendations in Wake of COVID-19 Pandemic

Recognizing the unprecedented challenges public companies and markets around the world face as a result of the COVID-19 pandemic, proxy advisory firms Institutional Shareholder Services Inc. (ISS) and Glass Lewis & Co. (Glass Lewis) provided guidance about how they will apply their voting policies during the 2020 proxy season. The guidance provides increased transparency on a number of important matters public companies are grappling with, including the timing and format of annual shareholder meetings, executive compensation matters, corporate governance challenges, liquidity and capital resources, and shareholder activism. Overall, the guidance suggests proxy advisors are attuned to the unique challenges presented by the COVID-19 pandemic and will take a pragmatic approach when applying their policies to board decisions in response to the pandemic. Both advisors will focus in particular on the board's decision-making process and the effectiveness of company disclosure about the board's decision and rationale.

Virtual Shareholder Meetings

In light of current public health measures to combat COVID-19, ISS and Glass Lewis are providing additional leeway for companies to hold so-called "virtual-only" shareholder meetings (i.e., meetings with no in-person attendance). Companies are encouraged to disclose the reason for holding a virtual-only meeting and to strive to provide shareholders with a meaningful opportunity to participate as fully as possible.

ISS – which does not have an explicit benchmark Canadian policy regarding virtual-only meetings – signalled its approach will apply until it is safe to hold in-person meetings. On the other hand, Glass Lewis will resume applying its benchmark policy for virtual-only meetings for all meetings held after June 30, 2020, even if the pandemic extends beyond that date. Under its benchmark policy for Canada, Glass Lewis will generally recommend against the chair of the nominating and governance committee if the company does not adequately disclose how shareholder participation rights will be protected at a virtual-only meeting.

Shareholder Rights Plans

In Canada, ISS and Glass Lewis will generally oppose a shareholder rights plan unless it conforms to certain best practice guidelines (including a minimum trigger of 20%) and its purpose is limited to giving a board more time to find alternative value-enhancing transactions and ensuring the equal treatment of all shareholders. In its new guidance, ISS indicates a severe stock price decline as a result of the COVID-19 pandemic is likely to be considered valid justification in most cases for adopting a shareholder rights plan with a term of less than one year. In its notice, Glass Lewis states it will consider companies that are impacted by COVID-19 and the related economic crisis as reasonable context for adopting a rights plan under the following conditions: (i) the duration of the plan is limited to one year or less, and (ii) the company discloses a sound rationale for adopting the plan as a result of COVID-19. TSX-listed companies are already required to seek shareholder approval of rights plans within six months of their adoption. It is unclear from the guidance whether ISS and Glass Lewis will allow any deviations from their Canadian guidelines for rights plans (such as the minimum trigger) in light of the impacts of the COVID-19 pandemic.

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Executive Compensation

In their guidance, ISS and Glass Lewis each highlight a number of executive compensation issues raised by the economic consequences of the COVID-19 pandemic, including implementation of planned compensation increases, changes in performance metrics, goals or targets for short- and long-term compensation plans, broader changes to the structure of compensation plans, and repricing of "out-of-the-money" awards.

ISS and Glass Lewis are not making any specific changes to their benchmark policies regarding executive compensation matters at this time. However, ISS encourages boards seeking to materially change the performance metrics, goals or targets used in short-term compensation plans as a result of COVID-19 to contemporaneously disclose the rationale for the changes. With respect to long-term incentive plans, ISS indicated it will continue to generally oppose changes to existing awards that cover multi-year periods and stock option repricing, but will consider such changes on a case-by-case basis in accordance with its existing benchmark policy framework. Glass Lewis, on the other hand, has not issued specific guidance on compensation matters, but expressed an expectation that boards will proactively seek changes to executive pay that align with shareholder and employee experiences.

Given market and economic conditions, executive compensation decisions are likely to draw enhanced scrutiny from investors and proxy advisors. Boards should take care to ensure these decisions are the result of an appropriate governance process and clearly articulate how their decisions further the interests of the company and its shareholders.

Shareholder Proposals

Given the deadline for submitting shareholder proposals for most 2020 annual shareholder meetings preceded the pandemic, there are likely to be few shareholder proposals during the 2020 proxy season that deal with the pandemic directly. However, Glass Lewis indicated it will consider the context and consequences of the pandemic in making its voting recommendations for shareholder proposals generally.

Board Composition

ISS indicated it will apply its policies regarding director independence, overboarding, diversity and other attributes flexibly and on a case-by-case basis with a view to ensuring boards have the right team in place to address the substantial demands and challenges of the pandemic.

Liquidity and Capital Resources

Glass Lewis and ISS highlighted the importance of prudent liquidity and capital management in the current economic environment, including decisions relating to the payment of dividends, share buybacks and capital raising. While these transactions often do not require prior shareholder approval in Canada, where shareholder approval is required, ISS will consider these transactions on a case-by-case basis, while signalling some additional flexibility for reasonable actions taken in response to the COVID-19 pandemic. Going forward, ISS and Glass Lewis will each consider a board's decisions in managing a company's liquidity and capital resources when determining if the board appropriately managed risk in a responsible fashion.

ISS indicated it will continue to evaluate and update its guidance throughout the 2020 proxy season and beyond as new issues arise. A copy of ISS additional policy guidance is available here and its Canadian benchmark policies (and related FAQs) are available here.

Glass Lewis, on the other hand, intends to rely on the discretion afforded under its existing guidelines to adapt to new issues as they arise. A copy of Glass Lewis's notice is available here and additional notices specific to virtual meetings and shareholder rights plans are available here and here. Glass Lewis's complete benchmark guidelines for Canada can be accessed here.

For further information regarding these developments and how they impact your company, please contact any member of our Corporate Finance and Securities Group.