

DUE TO THE THANKSGIVING HOLIDAY, *CORPORATE & FINANCIAL WEEKLY DIGEST* WILL NOT BE PUBLISHED ON NOVEMBER 29. THE NEXT ISSUE WILL BE DISTRIBUTED ON DECEMBER 6.

SEC/CORPORATE

Glass Lewis Releases 2020 US Proxy Paper Guidelines

On November 1, Glass Lewis released its 2020 US Proxy Paper Guidelines. The updates to the voting guidelines primarily add additional factors that Glass Lewis will review when evaluating proposals and issuing its voting recommendation for shareholders. According to Glass Lewis, the updates seek to fulfill Glass Lewis' overarching goal of protecting and enhancing shareholders' interests by (1) continuing to increase transparency at the board level, both with respect to the selection of board members and with respect to decisions the board undertakes, and (2) discouraging companies from undertaking actions that would bypass the shareholders' ability to vote on matters deemed important by Glass Lewis. Significant updates to the voting guidelines are summarized below.

Nominating and governance committee assessment

In September, the SEC issued guidance stating that when a company seeks to exclude a shareholder proposal, the SEC will inform the shareholder and the company of its position to (1) concur, (2) disagree or (3) decline to state a view with respect to the company's asserted basis for exclusion. The SEC further clarified that, beginning with the 2019-2020 shareholder proposal season, the staff may also respond to no-action requests orally rather than in writing. Glass Lewis clarified that it will recommend voting against all members of the governance committee if a shareholder proposal is omitted and either (a) the SEC declines to state its view with respect to the company's basis for exclusion or (b) the SEC verbally permits the exclusion, but there is no written record and the company fails to provide any disclosure regarding such relief.

Glass Lewis also added additional factors that it will consider when evaluating governance committee members' performance. In particular, Glass Lewis will recommend voting against the chair of the nominating and governance committee if (1) board and committee meeting attendance records of directors are not disclosed or (2) a director attended less than 75 percent of board and committee meetings, and the disclosure is vague to a point where it is not possible to determine such director's identity.

Audit committee and compensation committee assessments

Glass Lewis also established additional factors that it will consider when evaluating audit committee and compensation committee performance. In particular, Glass Lewis will generally recommend voting against the chair of an audit committee if fees paid to a company's external auditor are not disclosed. In addition, Glass Lewis will recommend voting against all members of the compensation committee if the board adopts a frequency proposal for its advisory vote on executive compensation and such proposal was not approved by a plurality of shareholders.

Contractual payments and arrangements for executives

Glass Lewis clarified that, with respect to ongoing and new contractual payments and executive entitlements, it disfavors contractual agreements that include excessive severance payments, new or renewed single-trigger,

change-in-control arrangements, excise tax gross-ups, multi-year guaranteed awards and other provisions that Glass Lewis considers to be problematic. Similarly, contractual arrangements providing for problematic entitlements that are not addressed upon renewal or revision are viewed by Glass Lewis as a missed opportunity to remedy provisions unfavorable to shareholders and could lead to a negative voting recommendation.

Company responsiveness to say-on-pay

Glass Lewis further clarified what it considers an appropriate response to low shareholder support for prior say-on-pay proposals, including the levels of responsiveness based on the severity and persistence of shareholder opposition. Glass Lewis may recommend voting against future say-on-pay proposals if, in response to negative shareholder feedback, a company with low (less than 80 percent) support on a say-on-pay proposal fails to provide robust disclosure of engagement activities and specific changes in response to shareholder feedback.

Exclusive forum provisions

Glass Lewis generally recommends voting against the chair of the governance committee if the board adopts an exclusive forum provision without shareholder approval. However, Glass Lewis may now make exceptions to this policy if it can be reasonably determined that the exclusive forum provision is narrowly crafted to suit the company's specific circumstances.

In addition, Glass Lewis has made various minor clarifications and edits to its guidelines. The full text of the Glass Lewis 2020 US Proxy Paper Guidelines is available [here](#).

ISS Releases 2020 Proxy Voting Guideline Updates

On November 12, the Institutional Shareholder Services (ISS) published its U.S. 2020 Proxy Voting Guideline Updates, which will be effective for shareholder meetings held on or after February 1, 2020. In general, the updates involve clarification of guidelines and formalization of factors to codify ISS's existing approach on recommendations relating to specific issuers. These updates are also intended to bring certain references within ISS's existing guidelines up to date. Particularly significant changes are summarized below.

New nominees

ISS has revised the definition of "new nominee" to mean a director who is being presented for election by shareholders for the first time and has stated that only a new nominee who has been on a board for less than one year may, on a case by case basis, not be held responsible for problematic governance actions taken by the board before such new nominee joined the board. This update intends to close a previous loophole under which a new nominee may have included directors who served on the board up to three years (depending on the class to which he/she was appointed before being elected by shareholders) and directors who may have served on the board for years prior to the company's public offering.

Director attendance

ISS clarified that nominees who served for only part of the fiscal year, rather than all new nominees, are exempt from its policy to generally recommend a vote against or withhold from directors who attend less than 75 percent of board and committee meetings for the period for which they served.

Board diversity

ISS will recommend voting against the chair of the nominating committee (or other directors as applicable) if there are no women on the company's board, unless the company makes a firm commitment in its proxy statement to appoint at least one woman to the board within one year, with such exception only available through 2020.

Newly public companies

The ISS updates regarding newly public companies create two distinct policies that separately address problematic (1) governance provisions and (2) capital structure.

Problematic Governance Provisions:

ISS will generally recommend voting against or withholding voting for directors (excluding new nominees considered on a case-by-case basis) if, prior to or in connection with the company's public offering, the company or its board adopts bylaw or charter provisions materially adverse to shareholder rights without a reasonable sunset clause. The update clarifies and narrows the focus of ISS's policy regarding certain highly problematic governance structures, such as supermajority voting requirements to amend the bylaws or charter, a classified board structure or other provisions ISS deems egregious. Additionally, unless the adverse provision is reversed or removed, ISS may continue to vote against or withhold voting for such directors in subsequent years.

Problematic Capital Structure:

ISS created a new policy regarding capital structure for newly public companies, stating that it will generally recommend voting against or withholding voting for directors (excluding new nominees, who will be considered on a case-by-case basis) if prior to the company's initial public offering, the company or its board implements a multi-class capital structure that leads to unequal voting rights without a reasonable sunset clause. To assess whether such sunset clause is reasonable, ISS will consider (1) the company's lifespan, (2) post-IPO ownership structure and (3) the board's disclosed rationale for the sunset period (so long as such period is less than seven years). Unless the adverse provision is reversed or removed, ISS may continue to vote against or withhold voting for such directors in subsequent years.

Restrictions on shareholders' rights

ISS clarified that subject matter restrictions, such as prohibitions on the ability of shareholders to amend particular bylaws that govern their ability to amend bylaws, are also considered undue restrictions on shareholders' rights. ISS will generally recommend voting against or withholding voting for members of the governance committee until shareholders are provided with an unfettered ability to amend the company's bylaws or a proposal providing for such unfettered right is submitted for shareholder approval.

Independent board chair shareholder proposals

ISS generally recommends voting for a shareholder proposal that requires the chair of the board to be an independent director. This policy has been updated to largely codify ISS's existing practice by adding six factors that are given "substantial weight" and will increase the likelihood of a recommendation supporting the proposal in question. The six factors taken into consideration are whether the company has (1) a majority non-independent board and/or non-independent directors on key board committees, (2) a weak or poorly defined lead independent director role that fails to serve as an appropriate counterbalance to a combined CEO/chair role, (3) an executive or non-independent chair in addition to the CEO, a recent recombination of the role of CEO and chair and/or a departure from a structure with an independent chair, (4) evidence that the board failed to oversee and address material risks, (5) a material governance failure, particularly if the board failed to adequately respond to shareholder concerns or materially diminished shareholder rights, and (6) evidence that the board failed to intervene when management's interests are contrary to shareholders' interests.

Share repurchase program proposals

ISS expanded its existing policy that recommends shareholders vote for management proposals to institute open-market share repurchase plans, in which all shareholders may participate on equal terms to also recommend voting for proposals that grant the board authority to conduct open-market repurchases, each absent company-specific concerns regarding (1) the use of targeted share buybacks as greenmail to threaten a takeover, (2) use of buybacks to inappropriately manipulate incentive compensation metrics, (3) threats to the company's long-term viability and (4) other company-specific factors as warranted.

Additionally, ISS clarified that it will vote on a case by case basis on proposals to repurchase shares directly from specified shareholders, evaluating any such proposal based upon the stated rationale and the possibility for misuse, such as the repurchase of shares from insiders at a premium.

Evergreen provisions in equity-based and other incentive plans

ISS expressed its view that the environment, following the 2017 tax reform, raises concerns regarding evergreen provisions that automatically replenish plan reserves and circumvent regular shareholder reapproval at reasonable

time intervals. Evergreen provisions in equity-based compensation plans are now considered an overriding factor in ISS's Equity Plan Scorecard evaluation and may lead to a recommendation that shareholders vote against an equity-based compensation plan proposal.

Pay gap data

ISS generally recommends voting on a case-by-case basis on requests for reports on a company's pay data by gender or policies and goals to reduce any gender pay gap and has updated its existing guidelines to cover requests made on the basis of race or ethnicity.

The full text of the ISS 2020 Americas Proxy Voting Guidelines Updates is available [here](#).

BROKER-DEALER

FINRA Proposes Limitations on Serving as a Customer's Beneficiary

The Financial Industry Regulatory Authority (FINRA) is requesting public comment on a proposed rule that generally would prohibit registered persons from serving as a customer's beneficiary, executor or trustee, or holding a power of attorney or similar position for or on behalf of a customer. The proposed rule also would provide two exceptions from this general prohibition, including (1) instances in which the customer is a member of the registered person's immediate family and (2) instances in which the member firm approves in advance the relationship. In addition, the proposed rule would require member firms to review and assess these relationships.

As noted by FINRA, the proposed rule is intended to address potential conflicts of interest.

The comment period for this proposal expires on January 10, 2020.

More information is available [here](#).

FINANCIAL MARKETS

See "Cryptoassets: UK Jurisdiction Taskforce Publishes Statement" in UK Developments section.

CFTC

CFTC to Hold Open Commission Meeting on November 25

The Commodity Futures Trading Commission (CFTC) will hold an open meeting on Monday, November 25 at 10:00 a.m. EST to discuss (1) Final Rules amending CFTC Rules 4.5, 4.7, 4.13, 4.14 and 4.27; and (2) a Proposed Rule amending swap clearing requirement exemptions under Part 50 of the Commodity Exchange Act.

The meeting is open to the public on a first-come, first-served basis, as well as via live webcast and via conference call.

More information, including viewing and listening instructions, is available [here](#).

UK DEVELOPMENTS

Cryptoassets: UK Jurisdiction Taskforce Publishes Statement

On November 11, the UK Jurisdiction Taskforce (UKJT) published a statement with two key findings on the legal status of cryptoassets and smart contracts under English law (the Statement). The UKJT is a taskforce of the LawTech Delivery Panel of the Law Society, which is the representative body for solicitors in England and Wales. The Statement was made following a public consultation, which closed in June 2019.

In the Statement, the UKJT considered the features which distinguish cryptoassets from conventional assets (using the term "cryptoassets" generally rather than formulating a precise definition). Following this analysis, they concluded that cryptoassets are "property" under English law — but they are not "things in possession". Some of the implications of this are that cryptoassets:

- are not "goods" for the purposes of the Sale of Goods Act 1979;
- cannot be the object of a bailment (since bailment requires the transfer of possession); and
- cannot be the object of a pledge or lien because these types of security also require the transfer of possession.

This finding will also have implications for succession on death, bankruptcy and insolvency, fraud, theft or breach of trust, for example.

In term of smart contracts, the UKJT also did not define these precisely but instead identified the key features: terms recorded in a "computer-readable form", which are performed "automatically and without the need for, and in some cases without the possibility of, human intervention."

The UKJT found that smart contracts can be valid under English law and may be enforced by the courts; however, the UKJT does not believe that a smart contract would necessarily satisfy a requirement that a contract be "in writing".

The purpose of the Statement is to provide legal certainty and improve market confidence. The Statement may be persuasive, but it is not legally binding. It remains to be seen whether these findings would be followed by the court.

The Statement is available [here](#).

For additional coverage on financial and regulatory news, visit [Bridging the Week](#), authored by Katten's [Gary DeWaal](#).

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UK DEVELOPMENTS

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