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Alert

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Heads Up for the 2022 Proxy Season:

New and Revised ISS and Glass Lewis Policies Focus on Board Accountability for Board Composition and Climate Oversight

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Institutional Shareholder Services (ISS) and Glass Lewis have released updates to their proxy voting policies for the 2022 proxy season, which are available here and here. Glass Lewis updates are also reflected in the Glass Lewis 2022 ESG Initiatives Policy Guidelines, available here. Generally, ISS guidelines apply for shareholder meetings on or after February 1, 2022 and Glass Lewis guidelines apply for shareholder meetings held on or after January 1, 2022.

The updates for 2022 largely focus on the accountability of the board of directors and its committees for oversight of environmental, social and governance issues, including board diversity, climate responsibility and shareholder rights. Companies should familiarize themselves and their boards of directors with the new and updated policies, which will influence the results of director elections and support for shareholder proposals in the 2022 proxy season. Our updated summary of board vulnerabilities is available here.

Key Developments At-A-Glance

- Board Composition and Accountability
  - Gender and Racial/Ethnic Diversity – ISS & Glass Lewis
  - Waivers of Age/Term Limits – Glass Lewis
  - Responsibility for Significant Greenhouse Gas (GHG) Emitters – ISS
  - Board Oversight of ESG – Glass Lewis
  - Board Diversity Disclosure – Glass Lewis
  - Committee Accountability for Classified Boards – Glass Lewis
- Shareholder and Management Proposals
  - Say-on-Climate Proposals – ISS & Glass Lewis
  - Racial Equity Audits – Glass Lewis
- Multi-Class Unequal Share Structures – ISS & Glass Lewis
- SPAC Governance – Glass Lewis

Board Accountability: Board Composition and Diversity

Gender Diversity

ISS – REVISED. ISS's current policy is to recommend that shareholders vote against the chair of the nominating committee (or other directors on a case-by-case basis) at companies in the Russell 3000 or S&P 1500 if there are no women on the board. ISS is extending this policy to all companies starting with annual meetings held on or after February 1, 2023. An exception will be made if there was a woman on the board at the preceding annual meeting and the board makes a firm commitment to add gender diversity within a year.

Glass Lewis – REVISED. Starting with annual meetings held on or after January 1, 2022, Glass Lewis will recommend that shareholders vote against the election of the nominating committee chair at Russell 3000 companies when there are fewer than two gender diverse directors on the board or against an entire nominating committee when a board has no gender diversity. For companies outside of the Russell 3000, and boards with six or fewer directors, Glass Lewis expects at least one gender diverse director beginning January 1, 2022. Beginning with shareholder meetings held after January 1, 2023, Glass Lewis will transition to a percentage-based approach and will generally recommend voting against the nominating committee chair at companies in the Russell 3000 index that do not have at least 30% board gender diversity. Glass Lewis will also begin to make voting recommendations in accordance with mandated board gender diversity requirements set forth in applicable state laws as they come into effect. Glass Lewis is now using the term "gender diverse" rather than women to include individuals that identify as non-binary.

Racial/Ethnic Diversity

ISS – REVISED. For annual meetings held on or after February 1, 2022, ISS will recommend that shareholders vote against the chair of the nominating committee at companies in the Russell 3000 or S&P 1500 with boards that have no apparent racial or ethnical diversity. An exception will be made if there was racial and/or ethnic diversity on the board at the preceding annual meeting and the board makes a firm commitment to appoint at least one racial and/or ethnic diverse member within a year.

Glass Lewis – REVISED. As state laws have begun to encourage and mandate gender diversity as well as board representation from underrepresented communities, Glass Lewis will generally recommend in line with applicable state laws mandating board composition requirements from underrepresented communities.

Disclosure of Board Diversity Policies

Glass Lewis – NEW. In response to the Nasdaq Stock Market's newly adopted diversity disclosure rule, summarized here, for annual meetings held after August 6, 2022, when the first part of the Nasdaq rule becomes effective, Glass Lewis will recommend voting against the chair of the governance committee of Nasdaq-listed companies that do not provide the required diversity disclosure. Under Nasdaq's new disclosure rule, Nasdaq-listed companies are required to annually report aggregated statistical information about the board's self-identified gender and racial characteristics and self-identification as LGBTQ+ using the Nasdaq diversity matrix or in a substantially similar format. For the first year, companies are required to provide only current year data, and in subsequent years companies must disclose data on both the current and prior year.

Glass Lewis – REVISED. Glass Lewis is looking for more comprehensive disclosure on board composition. Beginning in 2022, for companies in the S&P 500 with "poor disclosure" on board composition, Glass Lewis may recommend that shareholders vote against the chair of the nominating and/or governance committee. In particular, Glass Lewis expects companies to disclose (1) the board's current percentage of racial/ethnic diversity, (2) whether the board's definition of diversity explicitly includes gender and/or race/ethnicity, (3) 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 (i.e., the "Rooney Rule"), and (4) board skills disclosure.

Diversity Policies At-A-Glance

ISS

- At least one gender diverse director at Russell 3000 or S&P 1500 companies for annual meetings held on or after February 1, 2022
- At least one racially/ethnically diverse director at Russell 3000 or S&P 1500 companies for annual meetings held on or after February 1, 2022
- At least one gender diverse director at all companies for annual meetings held on or after February 1, 2023

Glass Lewis

- At least two gender diverse directors at all Russell 3000 companies for annual meetings held on or after January 1, 2022
- At least one gender diverse director at all companies with six or fewer directors for annual meetings held on or after January 1, 2022
- At least 30% gender diverse directors at all Russell 3000 companies for annual meetings held on or after January 1, 2023
- Following state law mandates on board diversity for annual meetings held on or after January 1, 2022
- Nasdaq listed companies must provide required disclosure by August 8, 2022 (see below)

For Nasdaq-Listed Companies

- Disclose in proxy statement or on website the Nasdaq-required board matrix by the later of the date a company files its proxy statement for the 2022 annual meeting or August 8, 2022
- Have one diverse director or explain why none (including boards with five or fewer directors) by the later of the date a company files its proxy statement for the 2023 annual meeting or August 7, 2023
- For boards with six or more directors, have two diverse directors or explain why not, by the later of the date a company files its proxy statement for the 2025 annual meeting or August 6, 2025, for companies listed on the Nasdaq Global Select Market or Nasdaq Global Market, and by the date a company files its proxy statement for the 2026 annual meeting or August 6, 2026, for companies listed on the Nasdaq Capital Market
- Generally, a one-year phase-in for newly public companies and a grace period for vacancies are permitted

Age and Term Limits: Waivers

Glass Lewis – REVISED. Beginning in 2022, Glass Lewis will generally recommend that shareholders vote against the nominating and/or governance committee chair at companies that have waived their self-imposed age and term limits for two or more consecutive years, unless a compelling rationale is provided. Glass Lewis identified a recent corporate transaction as a compelling rationale.

Committee Accountability at Companies with Classified Boards

Glass Lewis – REVISED. In the event that Glass Lewis has identified multiple concerns that would cause Glass Lewis to recommend that shareholders vote against a committee chair, beginning in 2022, Glass Lewis will now hold other directors accountable if the committee chair is not up for election.

Climate and ESG Accountability

Board Oversight of Environmental and Social Issues

Glass Lewis – NEW. Beginning in 2022, Glass Lewis will generally recommend voting against the chair of the governance committee of companies in the S&P 500 index who fail to provide explicit disclosure concerning the board's role in overseeing environmental and/or social issues. Also beginning in 2022, Glass Lewis will note as a concern when boards of Russell 1000 companies do not provide clear disclosure on board oversight of E&S matters.

Say-on-Climate: Management and Shareholder Proposals

ISS – NEW. ISS has codified its framework for analyzing proposals on climate transition plans. Generally, ISS will recommend on a case-by-case basis on management and shareholder say-on-climate proposals. For management proposals asking shareholders to approve the company's climate action plan, ISS will look at the "completeness and rigor of the plan" and factors, including (1) the extent to which the company's climate related disclosures are in line with the Task Force on Climate-related Financial Disclosure (TCFD) recommendations and other market standards, (2) disclosure of operational and supply chain GHG emissions (scopes 1, 2 and 3), (3) whether the company has made a commitment to be "net zero" for operational and supply chain emissions (scopes 1, 2 and 3) by 2050, (4) whether the company discloses a commitment to report on the implementation of its plan in subsequent years, and (5) whether the company's climate data has received third-party assurance, as well as other factors. For shareholder proposals, ISS takes into account (1) the completeness and rigor of the company's climate related disclosure, (2) the company's actual GHG emissions performance, (3) whether the company has been the subject to recent significant violations, fines, litigation or other GHG controversies, and (4) whether the proposal is unduly burdensome or prescriptive.

Glass Lewis – Revised. Glass Lewis takes a different approach than ISS to say-on-climate proposals. Generally, Glass Lewis supports robust disclosure about a company's climate change strategies and board oversight, as well as shareholder engagement on the subject. However, it also believes that setting long-term climate strategy is the responsibility of the board of directors and that by allowing shareholders to weigh in on the company's long-term climate strategy (which Glass Lewis believes should be indistinguishable from the company's long-term business strategy), the board may be abdicating some of this responsibility. In addition, Glass Lewis believes that not all shareholders have all the information necessary to make an informed decision on climate change strategy. As such, Glass Lewis will generally recommend against shareholder proposals on say-on-climate, but will take into consideration the request of the resolution, the company's existing climate governance framework, initiatives and reporting, the company's industry and size and the company's exposure to climate-related risks. Glass Lewis will evaluate management proposals on say-on-climate on a case-by-case basis taking into account the request of the resolution, the board's role in overseeing the company's climate strategy, the company's industry and size, whether the company's GHG emissions targets and the disclosure of these targets appear reasonable in light of its operations and risk profile and where the company is on its climate reporting journey.

Board Accountability for Significant GHG Emitters

ISS – NEW. Starting in 2022, for significant GHG emitters, ISS will recommend against the incumbent chair of the responsible committee where ISS believes the company is not taking "minimum steps" needed to understand, assess and mitigate risk related to climate changes to the company and the larger economy. For 2022, ISS defines "significant GHG emitters" as those companies that are currently on the Climate Action 100+ Focus Group List (available here). ISS's new policy provides that the "minimum steps" necessary include (1) detailed disclosure of climate-related risk, such as according to the TCFD framework, including board governance measures, corporate strategy, risk management analyses and metrics and targets and (2) appropriate GHG emission reduction targets as defined in the ISS policy for 2022. ISS plans to address new climate policies in updated FAQs.

Racial Equity Audits

ISS – NEW. In response to a new shareholder proposal requesting that companies conduct independent racial equity audits and/or civil rights audits, ISS has developed a new voting policy pursuant to which it will vote in favor of such proposals on a case-by-case basis taking into account factors such as (1) the company's public statements relating to racial justice efforts, (2) the company's established process or framework for addressing racial inequity and discrimination internally, (3) whether the company has engaged with impacted communities, (4) the company's track record of racial justice measures and outreach, (5) any recent controversies, litigation or regulatory actions, among others, and (6) market norms. Although these proposals did not pass at any annual meetings in 2021, they garnered significant levels of shareholder support and are expected to be on ballot in 2022.

Shareholder Rights: Multi-Class and Unequal Voting Rights

Multi-Class Share Structures with Unequal Voting Rights

ISS – REVISED. Since 2015, it has been ISS's policy to recommend that shareholders vote against directors of newly public companies (i.e., whose first shareholder meetings were in 2015 or thereafter) that have adopted governance provisions considered by ISS to be the most adverse to shareholder rights, including a classified board, supermajority vote requirements to amend the company's governing documents and multi-class capital structures with unequal voting rights, unless there was a reasonable sunset on these provisions. Companies that had adopted such provisions prior to the implementation of the 2015 ISS policy were "grandfathered" and therefore directors at such companies were not vulnerable to a negative recommendation for reasons relating to this ISS Policy. Beginning in 2023, ISS will recommend that shareholders vote against the entire board of directors (except new nominees) at any company with an unequal voting rights structure, subject to certain limited exceptions, including the presence of a sunset not later than seven years from the date of the initial public offering. ISS notes that this policy update will impact many "iconic" U.S. companies that have unequal voting rights. ISS is focusing first on unequal voting rights, which it considers the problematic governance provision most adverse to shareholders' rights.

Glass Lewis – NEW. Beginning in 2022, Glass Lewis has adopted a policy to recommend that shareholders vote against the chair of the nominating and/or governance committee at companies that have multi-class share structures with unequal voting rights that do not provide for a reasonable sunset, which it defines generally as seven years or less.

SPAC and De-SPAC Governance

Shareholder Rights

Glass Lewis – NEW**.** Glass Lewis believes that when the shareholders are required to approve a binding certificate of incorporation ("charter") as a condition to approval of a business combination with a SPAC, shareholders should also be provided with advisory votes on material charter amendments as a means to voice their opinions on any restrictive governance provisions. Accordingly, beginning in 2022, in cases where Glass Lewis determines that a de-SPAC company has adopted overly restrictive governing documents, where, prior to the company becoming publicly traded, the board adopts a multi-class share structure with voting rights are not aligned with economic interest or an anti-takeover provision, such as a poison pill or classified board, Glass Lewis will generally recommend that shareholders vote against all members of the board at the time the combined company became publicly traded if the board did not (1) also submit these provisions to a shareholder vote on an advisory basis at the meeting where shareholders voted on the business combination, (2) commit to submitting these provisions to a shareholder vote at the combined company's first shareholder meeting following de-SPAC, or (3) provide for a reasonable sunset on these provisions (generally three to five years in the case of a classified board or poison pill; or seven years or less in the case of a multi-class share structure).

Over-boarding for SPAC Executives

Glass Lewis – NEW**.** Glass Lewis's current policy is to recommend that shareholders vote against a director who serves as an executive officer of any public company while serving on more than two public company boards and any other director who serves on more than five public company boards. Recognizing the limited nature and business operations of a SPAC, Glass Lewis will generally apply the higher limit of five public company directorships when a director's only executive role is at a SPAC.