Updates
December 07, 2020

Preparing for the 2021 Public Company Reporting Season

In anticipation of the upcoming reporting season, we highlight rule changes, guidance, and trends for public companies to consider in preparing annual report and proxy statement disclosures in 2021.

During 2020, the U.S. Securities and Exchange Commission (SEC) adopted many rule changes and provided public companies with useful guidance on various topics, including information related to impacts on companies from COVID-19. In November 2020, Institutional Shareholder Services (ISS) and Glass Lewis released their proxy voting guidelines for shareholder meetings in 2021. The Glass Lewis 2021 Proxy Guidelines are available here. The ISS updates came in the form of an executive summary of its benchmark policy updates and a more detailed comparison showing changes to its policies.

Below, we highlight some of the most significant rule changes, guidance, updates, and institutional investor areas of focus for companies to consider. This update addresses the following topics:

A Year of Modernization—SEC Rule Changes Affecting Form 10-K

The SEC was active in 2020 with numerous rule changes, including the first significant amendments to Regulation S-K's business disclosure rules in over 30 years. At each turn, the SEC reaffirmed its commitment to a principles-based approach to disclosure and a focus on company-specific materiality. We've highlighted amendments affecting a company's annual report on Form 10-K:

Description of Business (Item 101). Perhaps the most anticipated and high-profile change to Reg S-K is the addition of a broad disclosure requirement for human capital resources to the extent material to an understanding of the company's business. The SEC did not define "human capital" or specify a particular framework for disclosure, but SEC Chairman Jay Clayton noted in his comments that he expects companies to provide "meaningful qualitative and quantitative disclosure, including, as appropriate, disclosure of metrics that companies actually use in managing their affairs."

As we described in our September 2020 update, we anticipate companies may look to existing frameworks for human capital management disclosures, such as the standards in the SASB Industry Guides or the International Organization for Standards standard ISO 30414. In addition, a company should consider any metrics or other aspects of human capital it has publicly identified to stakeholders as material to its business, such as in a proxy filing, sustainability or corporate social responsibility report, or employee communication. Disclosure will likely

vary significantly by company and industry, and could include metrics and aspects of human capital such as:

- Talent acquisition/recruiting
- Compensation/benefits
- Employee engagement
- Company culture
- Turnover/retention
- Pay equity
- Workforce composition and diversity
- Safety incidents
- Workforce productivity

In recent months, both State Street Global Advisors and the New York City Comptroller have called on companies to make public disclosure of racial, ethnic, and gender diversity information for their U.S. workforces by job category under the framework set forth by the Equal Employment Opportunity Commission's EEO-1 Report.

Companies that disclose human capital key performance indicators (KPIs) should consider the January 2020 interpretive release on KPIs and metrics in Management's Discussion & Analysis of Financial Condition and Results of Operations (MD&A). The SEC emphasized that disclosures of such metrics should provide the information necessary for adequate context to understand it, including a clear definition of and how the KPI is calculated, a statement indicating why it provides useful information to investors, and a statement indicating how management uses the metric. Regardless of the metrics used or aspects of human capital disclosed, companies should support their disclosures with effective controls and procedures to ensure reliability and consistency in their public filings.

Other amendments to Item 101 include:

- The revised rule only requires disclosure of developments material to an understanding of the general development of the company's business—rather than the previously prescribed five-year timeframe. The amended rule confirms that development topics (including the new topic of material changes to previously disclosed business strategy) must be disclosed only if material to the company's business, further reflecting the principles-based approach to disclosure.
- A company may disclose material developments in the business since the most recent full discussion of the general development of its business without repeating the full discussion. In that case, the company must incorporate by reference, through a single hyperlink, an earlier disclosure that contains a full discussion of the developments material to an understanding of the development of the business (most likely, the company's last Form 10-K). Notably, this allowance for incorporation by reference applies only to the discussion of the general development of the business, and not to the description of the company's business (Item 101(a), but not Item 101(c)). Companies may find it challenging to separate out the portions of their business section that are responsive to these two different requirements, and therefore might be unlikely to take advantage of this rule change.

Legal Proceedings (Item 103) and Risk Factors (Item 105). The amendments provide that material legal proceedings disclosures located elsewhere in a report may be cross-referenced and hyperlinked to reduce repetition and length of filings. In addition, the threshold for disclosures relating to environmental proceedings in which the government is a party has increased from $100,000 to $300,000. A company may opt to use an alternative threshold that it determines is reasonably designed to result in the disclosure of material environmental proceedings, but the threshold may not exceed the lesser of $1 million or 1% of the current assets of the company and its subsidiaries. Any alternative threshold—including any change to the threshold—must be disclosed in each quarterly and annual filing.

Under the amended rules, a company must disclose the material risks, rather than the most significant factors, making an investment in the company speculative or risky. Risk factors must be organized under headings in addition to subcaptions that adequately describe the risk. All risk factors that "could apply generically to any registrant or any offering" must be listed under a "General Risk Factor" heading, but the SEC encourages companies to tailor risk factor disclosures to emphasize the specific relationship of the risk to the company or offering. Any Risk Factor section exceeding 15 pages must be accompanied by a bulleted or numbered summary that is no longer than two pages.

Form 10-K Cover Page. Companies are now required to check a box on the cover page of Form 10-K (or 20-F or 40-F) indicating whether an internal control over financial reporting auditor attestation is included in the filing. This cover page change was adopted this year along with further amendments to the definitions of accelerated filer and large accelerated filer to exclude companies that qualify as smaller reporting companies under the revenue test.

E-Signature. In November 2020, the SEC modernized the rules regarding signatures for EDGAR filings. Signatories to SEC filings are required to execute a signature page or other document to authenticate the signature represented in the filing in typed form. This authentication was required to be done manually, and companies were required to retain all such manually executed authentication documents in their files for five years. Under the amended rule, these authentication documents may be signed *electronically*, provided certain conditions are met. Companies may also maintain executed authentication documents electronically rather than in physical form. Please see our recent update on the amended rules for additional detail and recommendations.

Continued SEC Focus on Perquisites

SEC Guidance on COVID-19 Related Perquisites. The SEC's Division of Corporation Finance staff (Staff) in September 2020, issued new guidance alerting companies that certain benefits provided to executives because of the COVID-19 pandemic may be considered perquisites required to be included as "all other compensation" in the proxy statement Summary Compensation Table. In new Compliance and Disclosure Interpretation C&DI 219.05, the Staff confirms that the traditional two-step analysis articulated by the SEC in its 2006 Release 33-8732A would still apply when determining whether an item provided because of the COVID-19 pandemic constitutes a perquisite:

An item is not a perquisite or personal benefit if it is integrally and directly related of the performance of the executive's duties.

Otherwise, an item that confers a direct or indirect benefit and that has a personal aspect, without regard to whether it may be provided for some business reason or for the convenience of the company, is a perquisite or personal benefit unless it is generally available on a non-discriminatory basis to all employees.

The Staff notes that the "integrally and directly related" test depends on the particular facts and may be different for some pandemic-related items that in the past would have been considered perquisites. The guidance lists as an example of benefits that generally would not be considered perquisites "enhanced technology needed to make the executive's home his or her primary workplace upon imposition of local stay-at-home orders," because of its integral and direct relationship to the performance of the executive's duties. On the other hand, the Staff cautions that items such as "new health-related or personal transportation benefits provided to address new risks arising because of COVID-19" may be perquisites even if the company would not have provided the benefit but for the pandemic, unless generally available to all employees. This limited guidance may be challenging for companies to apply in determining whether a benefit is a disclosable perquisite. Treatment of the benefit for tax purposes

has no bearing on the perquisite analysis.

Enforcement Sweep. The SEC's Division of Enforcement in its 2020 annual report and recent public appearances has publicly confirmed that the Division is conducting a sweep relating to perquisite disclosure, using "risk-based data analytics to uncover potential violations," with an apparent focus on personal use of corporate aircraft. The Division announced two recent enforcement action settlements, where the items at issue in one were the personal use of corporate aircraft, expenses associated with hotel stays, and taxes related to those items, and in the other were personal use of corporate aircraft, helicopter trips and other personal travel, housing costs, transportation for family members, personal services, club memberships, and tickets and transportation to entertainment events. Both involved substantial civil penalties, of $600,000 and $900,000.

The SEC's focus on perquisites, both in the enforcement sweep and the guidance on COVID-19 related perquisites, highlights the importance of disclosure controls and procedures for recording and documenting executive benefits, and evaluating whether the benefits constitute perquisites. The same considerations would apply to benefits provided to directors.

D&O Questionnaire Considerations. Companies should review questions regarding perquisites in their annual director and officer questionnaires (D&O Questionnaires) and consider whether the questions are working well in eliciting disclosure of benefits that might be considered perquisites. To clarify the question, a company may want to consider including an explanation of the SEC's two-step analysis for determining whether an item is a perquisite.

ISS Guidance on COVID-19-Related Pay Decisions

ISS in October 2020 released FAQs with guidance on how it intends to evaluate pay actions taken by companies in response to COVID-19 and the disclosure it expects to see in proxy statement Compensation Discussion and Analysis (CD&A) sections. The key takeaways from the FAQs are as follows:

Changes to Bonus/Annual Incentive Programs. ISS acknowledges that companies affected by the pandemic may make adjustments to annual incentive programs, including changes to metrics, performance targets, and measurement periods, or may suspend their programs entirely and instead make one-time discretionary payments. ISS may view such actions as a reasonable response to the pandemic so long as the justifications and rationale are clearly disclosed, and the resulting outcomes appear reasonable. ISS provides a non-exclusive list of key disclosure items expected to be covered, including:

- The specific challenges resulting from the pandemic that rendered the original program design obsolete or the original performance targets impossible to achieve, including addressing how changes are not reflective of poor management performance.
- If applicable, an explanation of why midyear changes were made instead of one-time discretionary awards, and how that approach furthers investors' interests.
- The performance criteria for any one-time discretionary awards (which should still carry performance considerations), even if not based on the original metrics or targets. Generic descriptions, such as "strong leadership during challenging times" will be deemed insufficient. Above target payouts under changed programs will be closely scrutinized.
- How the resulting payouts appropriately reflect both executive and company performance, including an estimate of how the resulting payouts compare with what would have been paid under the original program design.
- Any positive changes to the following year's (2021) program, if known, that could mitigate other concerns.

Financial or Operational Targets Below Prior Year Levels. Lower performance goals that reflect external factors such as operational impacts due to the pandemic may be acceptable, but should be accompanied by disclosure about how the compensation committee considered corresponding payout opportunities, particularly if the payout opportunities are not commensurately reduced.

Changes to In-Progress Equity/Long-Term Incentive Cycles. Modifications to performance cycles that are currently in progress will be viewed negatively, because these programs "should be designed to smooth performance over a long-term period and not be altered after the beginning of the cycle based on a short-term market shock." This is especially true for companies with quantitative pay-for-performance misalignment. Changes to award cycles beginning in 2020 may be viewed negatively unless the company's underlying business strategy has fundamentally changed. Modest changes, such as shifting to relative or qualitative metrics, would be viewed as reasonable as long as the compensation committee's actions and rationale are clearly explained. However, "drastic changes," such as shifts to predominantly time-vesting equity or short-term measurement periods would be viewed negatively.

Retention or Other One-Time Awards. Companies that grant one-time awards to address concerns resulting from the pandemic, including for executive retention, should clearly disclose the rational for the award (including magnitude and structure), as well as describing how the award furthers investors' interests. Boilerplate language, such as "retention concerns" will be deemed insufficient. ISS expects that (1) the awards will be reasonable in magnitude, (2) the vesting conditions should be long-term, strongly performance-based and linked to the underlying concerns the award aims to address, and (3) the awards should include shareholder-friendly guardrails to avoid windfall scenarios, including limitations on termination-related vesting.

Temporary Reductions in Base Salary. Mitigating weight will be given to salary reductions only to the extent they decrease total pay. Reductions in salary will be considered more meaningful if targeted incentive payout opportunities are correspondingly reduced.

Update to ISS Responsiveness Policy. When a company receives less than 70% support on its say-on-pay proposal, ISS evaluates the board's responsiveness by reviewing three factors: (1) disclosure of the board's shareholder engagement efforts, (2) the specific feedback received from dissenting investors, and (3) actions or changes made to pay programs and practices to address investors' concerns. However, if a company is unable to implement responsive changes due to the pandemic, the proxy statement should disclose specifically how the pandemic has impeded the company's ability to address shareholder concerns, and the company's longer-term plan on how it intends to address investors' concerns.

Equity Plan Scorecard (EPSC). The only change to the EPSC for the 2021 policy year is to increase the passing score for the S&P 500 model from 53 to 57 points and for the Russell 3000 model to 55 points. For all other EPSC models, the passing score will remain 53 points.

Glass Lewis Compensation-Related Policy Updates

While not explicitly referencing the COVID-19 pandemic, the Glass Lewis 2021 Policy Guidelines focus on increased disclosure for changes to short- and long-term incentive programs. For short-term incentives, Glass Lewis expects a clear and robust disclosure of the justification for significant changes to program structure, including the use of upward discretion to lower goals midyear, increase calculated payouts, or retroactively pro-rate performance periods. For long-term incentives, Glass Lewis expects a clear explanation for any adjustments to metrics or results, any use of upward discretion, and any significant changes to program structure. In addition, any decision to significantly reduce or eliminate the performance-based portion of the long-term incentive mix

may result in a negative recommendation on the say-on-pay proposal outside of exceptional circumstances.

Proxy Statement as Vehicle for ESG Disclosures

Most public companies are well aware of the significant interest by institutional investors in disclosure on environmental, social and governance, or ESG, topics. As we discussed in our Investor Focus on Sustainability update in our Sustainability Series earlier this year, most larger public companies are now producing stand-alone sustainability or corporate social responsibility (CSR) reports. But whether a company has been producing a fulsome sustainability report for years or is just beginning to consider reporting on ESG topics, the annual proxy statement provides an excellent opportunity to highlight company efforts in this area to investors.

One ESG disclosure that is responsive to proxy statement disclosure requirements is to include discussion of ESG risks in the role of the board and its committees in risk oversight. In discussing risk oversight, a company can highlight whether the board or one of its committees takes primary responsibility for overseeing various ESG risks. Many companies have also started highlighting ESG topics in their proxy statements that might also be covered in a sustainability or CSR report, such as employee relations or human capital management, health and safety, environmental sustainability, and community impacts.

As highlighted in the investor focus on sustainability client update mentioned above, proxy statement disclosures on ESG topics, whether reporting on past performance or providing projections for the future, can be the subject of securities law liabilities. Companies should carefully examine and verify these disclosures, as they do for all disclosures in SEC filings, for accuracy and clarity, as well as providing appropriate cautionary statements for forward-looking disclosures. In addition, if a company includes a reference to its online sustainability or CSR report, the reference should be only an inactive textural reference, and not a hyperlink, to avoid inadvertently including the full report in the proxy statement.

ISS and Glass Lewis Policy Updates—Board Risk Oversight of ESG Issues. ISS has added "demonstrably poor risk oversight of environmental and social issues, including climate change" to the list of material failures of governance, stewardship, risk oversight, or fiduciary responsibilities at the company that will result in a recommendation of a vote against or a withhold from directors individually, committee members, or the entire board. Other examples are bribery, large or serial fines or sanctions from regulatory bodies, significant adverse legal judgments or settlements, or hedging of company stock.

Glass Lewis will note as a concern for companies in the S&P 500 failure to provide clear disclosure regarding board-level oversight of environmental and/or social issues. For the 2022 proxy season, Glass Lewis will generally recommend voting against the chair of the governance committee for an S&P 500 company that fails to provide explicit disclosure of the board's oversight role for these issues.

These policy updates provide one more reason for companies to consider affirmatively addressing board oversight of ESG issues in the proxy statement.

Board Diversity

Board diversity has continued to be a key focus by institutional investors and proxy advisors. While these groups have had voting policies addressing gender diversity for several years, in 2020 the conversation turned to racial and ethnic diversity on boards.

A number of states have enacted diversity laws affecting publicly traded companies. In 2020, California passed a statute patterned on the state's 2019 gender diversity statue, which will require publicly held companies headquartered there to have at least one director from an underrepresented community by the end of 2021 and two to three directors by the end of 2022, depending on board size. An "underrepresented community" is defined in terms of race, ethnicity, or sexual orientation. California's gender diversity statute continues to phase in, with California-headquartered companies being required to have two to three female board members by the end of 2021, depending on board size.

A 2020 Washington statute requires public companies incorporated in the state to have a gender-diverse board (women constituting 25% of the board) or provide a "board diversity discussion and analysis." Although the statute goes into effect on January 1, 2022, because of how the statute defines a gender-diverse board, a company with a December 31 fiscal year end would need to meet the 25% gender diversity requirement by April 5, 2021. See our update on the new Washington law for more detail on the statute. Illinois, Maryland, and New York have also implemented statutes requiring companies to report to the state regarding board diversity, Colorado, Massachusetts, and Pennsylvania have passed advisory resolutions on board diversity, and various other states have similar legislation under consideration.

In December, Nasdaq submitted to the SEC for approval proposed listing rule amendments to require board diversity disclosures. The proposed rules would require most Nasdaq-listed companies to have at least one director who self-identifies as a woman and at least one director who self-identifies as an underrepresented minority or LGBTQ+, or to explain why they do not. The rules also call for public disclosure of diversity statistics for the board of directors, and provide a recommended matrix for this disclosure, which tracks the EEO-1 Report racial and ethnic categories. Diversity disclosures would be required to be made within one year of SEC approval of the amendments, and the board composition rules would be phased in over several years.

ISS Policy Update—Board Racial and Ethnic Diversity. ISS for the first time is addressing racial and ethnic diversity in its voting policies. During a one-year transitional period, ISS's research reports in 2021 for S&P 500 or Russell 3000 companies will highlight a lack of apparent racial and/or ethnic diversity, designed "to help investors identify companies with which to engage and that may foster dialogue between investors and issuers on this topic." Effective for annual meetings on or after February 1, 2022, ISS will vote against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis) of companies whose boards have no apparent racially or ethnically diverse members. 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 racially and/or ethnically diverse member within a year. Aggregate diversity statistics provided by a company will be considered only if they are specific as to racial and/or ethnic diversity.

Glass Lewis Policy Update—Director Diversity and Skills Disclosure. Glass Lewis has not adopted a voting policy with respect to board racial and ethnic diversity, but in the 2021 proxy season will begin providing an assessment of proxy statement disclosure regarding board diversity, skills, and the director nomination process for S&P 500 companies. This assessment will contribute to Glass Lewis' overall governance assessment and may be a contributing factor in recommendations when other board-related concerns have been identified.

ISS Policy Update—Board Gender Diversity. ISS's gender diversity policy will be fully phased in for the 2021 proxy season. ISS will generally recommend a vote against or withhold from nominating committee chairs (or other directors on a case-by-case basis) at S&P 1500 or Russell 3000 companies that have no women on the board. During the 2020 transitional year, ISS would not make an adverse vote recommendation if the company made a firm commitment to appoint at least one woman to the board within a year. For 2021, the only mitigating factor will be if the company had a woman on the board at the preceding annual meeting and makes a firm commitment to having at least one woman on the board within a year.

Glass Lewis Policy Update—Board Gender Diversity. Glass Lewis' previously announced policy to recommend against a nominating committee chair for a company with no female directors is applicable for the 2021 proxy season. A new policy on gender diversity will be effective for shareholder meetings on or after January 1, 2022, under which Glass Lewis will generally recommend voting against the nominating committee chair of a board with fewer than two female directors. If a board has six or fewer total directors, the existing policy requiring at least one female director will remain in place.

D&O Questionnaire Considerations. In light of the board diversity disclosures sought by investors and proxy advisors, and the potential for SEC approval of the proposed Nasdaq listing rule amendments, companies should consider adding a diversity disclosure question to their annual D&O Questionnaires soliciting information on gender (male, female, non-binary), race and ethnicity, and LGBTQ+ status. These questions should be optional, allowing directors to opt not to disclose such information, and explicitly solicit consent to public disclosure of the information in the company's SEC filings, corporate website, or other locations the company expects to provide this disclosure. Given that this information is personal, and directors may be surprised by the request, we also recommend that companies educate their boards about the growing investor demand for this information and the potential for state law or stock exchange listing requirements for such disclosures before including the question in a D&O Questionnaire.

Virtual Annual Meetings

There was a dramatic shift to virtual-only annual meetings during the last proxy season as COVID-19 spread throughout the United States. Many states that would have required at least an in-person component offered temporary relief to hold virtual-only meetings, the Staff issued helpful guidance on switching to and holding a virtual-only meeting, and proxy advisory firms and investors relaxed voting policies surrounding virtual-only annual meetings. As discussed further below, for the 2021 proxy season ISS adopted its first voting policy on management proposals allowing for virtual meetings—to generally vote for such proposals.

As companies look ahead to the 2021 proxy season, they should consider the potential need for another year of virtual-only annual meetings and reflect on the lessons learned from the 2020 proxy season. Companies may also want to review specific guidance from their significant institutional investors on virtual meeting practices as they are published early in 2021.

Preparing for the 2021 Annual Meeting Format. Coming into the 2021 proxy season, companies will have more time to consider and plan for a virtual-only annual meeting possibility than they did in 2020. These proactive measures should incorporate the continued uncertainty of the scope and duration of the pandemic, and allow the company the flexibility to respond to continuing developments. In preparing for 2021 annual meetings, companies should consider the following actions:

- *Review SEC guidance and governing state and local law*, including laws governing the format of the annual meeting as well as any measures restricting in-person gatherings. To be prepared to respond quickly, companies should understand the existing limits and status of any temporary or emergency measures, and ensure that there are processes in place to monitor any SEC, state, and local developments and responses. State law virtual shareholder meeting requirements might also specify certain disclosures to be included in the meeting notice or proxy statement.
- *Update the company's governing documents if necessary*, to take advantage of state law rules allowing for virtual-only annual meetings.
- *Solicit feedback from investors* regarding the 2020 annual meeting. As discussed below, some investors voiced concern with components of virtual-only annual meetings that companies may want to address in

2021.
- *Connect with the company's virtual meeting service provider* to discuss any concerns stemming from the 2020 annual meeting, and understand any upgrades or changes the service provider will make before the 2021 annual meeting.
- *Carefully review the company's proxy disclosure*, and consider if instructions to join and participate in the virtual meeting can be revised in "plain English" or can be more transparent. If the company is not ready to commit to a virtual-only annual meeting in 2021, proxy materials should provide for flexibility in case a virtual-only meeting becomes necessary (see our update on COVID-19 annual meeting considerations for suggestions on how the proxy materials can disclose the possibility that the meeting location may not be finally determined until after the proxy materials are mailed).

Lessons Learned from the 2020 Proxy Season. During the 2020 annual meeting season, investors were largely understanding of the challenges faced by companies that had to quickly pivot to virtual-only meetings due to local restrictions on in-person meetings. Based on experiences at 2020 annual meetings, many investors and governance commentators voiced concerns over shareholders being able to access meetings, ask questions, and participate in a meaningful way. Companies preparing for virtual meetings in 2021 might consider the following areas to address and anticipate investor concerns:

- *Ensure that all shareholders will receive the necessary information*, such as codes or links, to access and attend the virtual meeting as a shareholder. During 2020, some shareholders holding shares in street name encountered obstacles to being able to attend certain virtual meetings as a "shareholder" rather than as a "guest." This situation might mean the shareholder was not able to vote or ask questions during the meeting. Companies should confirm with their service providers, particularly if they are using different service providers for the virtual meeting platform and mailing proxy materials, that all shareholders, including those holding in street name, will be able to participate in the meeting as shareholders. Any special steps required for street name shareholders should be clearly disclosed in the proxy statement.
- *Consider how shareholder proponents will present their proposals at the meeting*. Some companies placed limitations on the process for shareholder proponents to present at the meeting, including in some cases allowing proponents to provide only a written statement to be read aloud by management. Such limitations were not well received by shareholder proponents and investor advocates. Companies may want to consider alternative approaches, such as asking proponents to provide a recorded presentation to avoid last-minute technical challenges, or providing a special dial-in or log-in to allow proponents to present live during the meeting.
- *Develop a process and procedure for Q&A sessions, and revisit the company script.* Some shareholder and investor advocates expressed concern that many 2020 virtual annual meeting Q&A sessions lacked transparency. Practices that led to these concerns include: (1) not permitting questions to be submitted during the meeting, (2) not making submitted questions viewable to attendees or published by the company after the meeting, (3) not clarifying how questions were chosen to be answered if not all questions submitted were answered, and (4) concluding the Q&A portion by stating that no other questions were asked when shareholders had submitted unanswered questions. Companies may want to consider developing, or refreshing, their procedures for the Q&A segment of a virtual meeting to address these concerns, and then disclosing these procedures. Procedures might be disclosed to shareholders in proxy materials, rules of conduct posted to the company's website containing the proxy materials, or by announcing the rules during the meeting. Many companies that receive a significant number of questions during virtual annual meetings have adopted a practice of publishing all questions and answers on the company's annual meeting website after the meeting.

Glass Lewis Policy Clarification—Virtual-Only Shareholder Meetings. Glass Lewis's temporary exception to its policy on virtual shareholder meetings that was in effect for meetings held between March 1, 2020, and June 30, 2020, has expired. Its standard policy is now in effect, which requires robust disclosure in the

company's proxy statement addressing the ability of shareholders to participate in meetings, including ability to ask questions at the meeting, procedures for posting appropriate questions received during the meeting and company answers to those questions on its company website, and logistical details for meeting access and technical support. Glass Lewis will generally hold the governance committee chair responsible for any failure to make this disclosure.

Other Institutional Investor and Proxy Advisor Areas of Focus

Board Matters

Board Refreshment—Age and Term Limits. The current ISS policy is to recommend against all age- or term-limit proposals. The policy to recommend against age-limit proposals will continue, but ISS is changing its policy on term-limit proposals to a case-by-case approach. The new policy is based on ISS's view that board refreshment "is best implemented through an ongoing program of individual director evaluations, conducted annually, to ensure the evolving needs of the board are met and to bring in fresh perspectives, skills, and diversity as needed." With this view in mind, ISS may support shareholder proposals for term limits "in cases where there are problematic board issues/governance failures at the company where lack of turnover appears to be a contributing factor." It may also support well-designed management term-limit proposals that provide an appropriate balance, taking various factors into consideration.

Glass Lewis will begin noting as a potential concern companies where average tenure of non-executive directors is 10 or more years and no new independent directors have joined the board in the past five years. It will not make voting recommendations solely on this board refreshment analysis for the 2021 proxy season, but may consider this factor together with other board-related concerns.

Board Independence—Classification of Directors. ISS has revised its independence classification categories ("executive director," "non-independent non-executive director," or "independent director") to categorize a director with pay comparable to named executive officers as a "non-independent non-executive" (making explicit its current policy). Other changes include categorizing as "executive director" only officers, not other employees, such as those on the board as employee representatives, and adding to the definition of an affiliate of an "executive director" the manager/advisor of an externally managed issuer, such as many REITS.

Shareholder Proposals on Social Issues

Gender, Race/Ethnicity Pay Gaps. ISS has updated its policy regarding the factors it will consider in evaluating requests for reports relating to gender or race/ethnicity pay gaps. It will now consider the company's disclosure regarding gender, race, or ethnicity pay gap policies or initiatives compared to its peers. It also recognizes that some jurisdictions do not allow companies to categorize employees by race and/or ethnicity and that definitions of ethnic and/or racial minorities differ from country to country, so a global racial and/or ethnicity statistic would not necessarily be meaningful or possible to provide.

Mandatory Arbitration. ISS has adopted a new policy on requests for reports on a company's use of mandatory arbitration on employment-related claims, noting that these proposals have received increased support from shareholders in the past two years, with one receiving majority support in 2020. ISS will review these requests on a case-by-case basis, considering the company's disclosure of its policies and practices compared to its peers and whether the company has been the subject of recent controversy, litigation, or regulatory actions.

Sexual Harassment. ISS has adopted a new policy on requests for reports on company actions to strengthen policies and oversight to prevent workplace sexual harassment, or on risks posed by a company's failure to

prevent workplace sexual harassment. ISS will review these requests on a case-by-case basis, considering factors similar to those for evaluating mandatory arbitration proposals.

Shareholder Rights and Defenses

Virtual Meetings. ISS has adopted a new policy to generally recommend *for* management proposals allowing for virtual shareholder meetings so long as they do not preclude in-person meetings. ISS encourages companies 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. Shareholder proposals on shareholder meeting formats will be considered on a case-by-case basis, considering the scope and rationale of the proposals and concerns identified with the company's prior meeting practices.

Advance Notice Requirements. ISS has revised its policy regarding proposals for advance notice requirements. Citing current market practice, ISS will now recommend a vote for proposals that require notification no earlier than 120 days prior to the anniversary of the previous year's meeting, with at least a 30-day period for submission (known as a 90-120 day window). Previously, notification could not be required more than 60 days prior to the meeting. This policy does not apply to Rule14a-8 shareholder proposals or proxy access director nominations.

Exclusive Forum Provisions. ISS has revised its policy regarding charter and bylaw exclusive forum provisions. The updated policy provides that ISS will generally recommend a vote for management proposals to adopt a federal forum selection provision that specifies "the district courts of the United States," in the absence of serious concerns about corporate governance or board responsiveness. ISS's policy previously did not specifically address federal forum selection provisions, and this addition was made in light of a March 2020 Delaware Supreme Court ruling that deemed such provisions to be facially valid. It will recommend against proposals to adopt a specific district court as the exclusive forum, with unilateral adoption considered a one-time failure under the ISS Unilateral Bylaw/Charter Amendment policy that may result in a recommendation against or withhold from directors, committee members, or the entire board.

For state law matters, ISS updated its policy to generally support management proposals regarding state law forum selection provisions, absent of serious concerns about corporate governance or board responsiveness, to specify that this policy applies to Delaware corporations that select Delaware courts. For states other than Delaware, ISS will consider proposals on a case-by-case basis. It will generally vote against provisions that specify a state other than the state of incorporation or a particular local court within the state, with unilateral adoption generally considered a one-time failure under the Unilateral Bylaw/Charter Amendments policy.

Poison Pills. ISS notes that in light of market volatility experienced during the COVID-19 pandemic, many companies have implemented short-term poison pills with a deadhand or slowhand feature, which restricts the board's ability to redeem the pill. ISS will consider unilateral adoption of a poison pill with these features to be a material governance failure that could warrant adverse voting recommendations against all director nominees (except new nominees) even if the pill has expired by the time of the annual meeting.

SEC Rule Changes Not Yet Effective—Looking Ahead

Shareholder Proposals

In September 2020, the SEC adopted final amendments to Rule 14a-8, increasing the eligibility requirements for a shareholder proposal's inclusion in a company's proxy statement. The highlight of these amendments is the

introduction of a new tiered approach to determining the ownership requirements a shareholder proponent must meet and eliminating the ability for shareholders to aggregate their holdings for the purpose of meeting the shareholder threshold. Starting with the 2022 proxy season, shareholders must satisfy one of three alternative tests:

- Continuous ownership of at least $2,000 of the company's securities for at least three years.
- Continuous ownership of at least $15,000 of the company's securities for at least two years.
- Continuous ownership of at least $25,000 of the company's securities for at least one year.

The new requirement will have a transition period. For annual meetings and special meetings held between January 1, 2022, and January 1, 2023, a shareholder will be eligible to submit a proposal without satisfying the new ownership requirements if the shareholder continuously holds at least $2,000 of a company's securities for at least one year as of the effective date of January 4, 2021, and continuously maintains at least $2,000 of such securities through the date the proposal is submitted.

The amendments also raise the threshold levels of shareholder support a proposal must receive to be eligible for resubmission at future meetings as shown below.

Times the Proposal Was Voted on in the Last Five Years:	**Prior Rule**	**Amended Rule**
Once	3%	5%
Twice	6%	15%
Three or more times	10%	25%

In addition to these changes, the amendments:

- Require specific documentation when a proposal is submitted by a representative on behalf of a shareholder proponent.
- Require shareholder proponents to identify specific dates and times they can be available to engage with the company to discuss the proposal.
- Amend the "one-proposal" rule to provide that no person acting as a representative may submit more than one proposal for the same shareholder meeting.

For further discussion of these changes see our September 2020 update.

Proxy Voting Advice

In July 2020, the SEC adopted final amendments to its proxy solicitation rules. In these amendments, the SEC codified its longstanding view that proxy voting advice generally constitutes a solicitation within the meaning of the federal proxy rules. Further, by adding failure to disclose material information regarding proxy voting advice to the list of examples of potentially misleading statements, the SEC made clear that proxy advice was subject to Rule 14a-9 even if the proxy voting advice is exempt from the filing and information requirements.

These amendments also added disclosure and procedural conditions proxy advisers must satisfy to rely on exemptions from the information and filing requirements of the proxy solicitation rules. The amendments generally will be effective for the 2022 proxy season.

While proxy voting advice has generally been exempt from the filing and disclosure requirements of the proxy rules under Rule 14a-2(b)(1), now proxy advisors will have to comply with specific disclosure and procedural requirements to rely on this exemption. Notably, proxy advisers will be required to provide all companies with a copy of the proxy adviser's report relating to annual shareholder meetings at or prior to the time the report is initially provided to the proxy adviser's clients. Additionally, proxy advisers must adopt and publicly disclose written policies and procedures that ensure they provide clients with a timely notice that a company has provided a written response to the proxy voting advice. Finally, the rules enhance the conflict of interest disclosures a proxy adviser must make in its advice.

In November 2020, ISS notified S&P 500 companies that for annual meetings held on or after January 1, 2021, it will no longer provide them with draft versions of its proxy voting reports before sending them to its investor clients. Instead, ISS advised that any errors companies bring to its attention will be provided to its clients by supplemental "Alerts."

Steps to prepare and further discussion of these amendments can be found in our August 2020 update.

Amendments to Management's Discussion & Analysis

In addition to the numerous modernization amendments discussed above, the SEC announced further amendments to Reg S-K in November 2020. These rule changes include, among other things:

- Adding a new Item 303(a), Objective, to state the principal objectives of MD&A.
- Amending current Item 303(a)(1) and (2) (amended Item 303(b)(1)) to modernize, enhance, and clarify disclosure requirements for liquidity and capital resources.
- Amending current Item 303(a)(3) (amended Item 303(b)(2)) to clarify, modernize, and streamline disclosure requirements for results of operations.

Companies are required to comply with these further rule changes beginning with the first fiscal year ending on or after the date that is 210 days after publication in the Federal Register. Watch for our upcoming client update with additional information about the rule changes.

Authors

J. Sue Morgan

Of Counsel
JMorgan@perkinscoie.com 206.359.8447

Allison C. Handy

Partner
AHandy@perkinscoie.com 206.359.3295

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