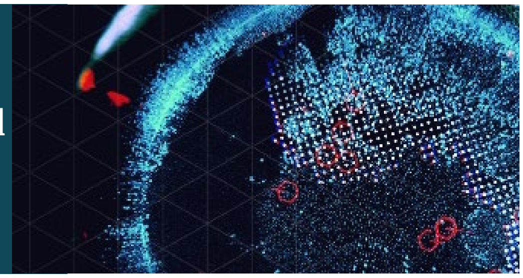
Coronavirus/COVID-19

Managing COVID-19: Corporate Governance and Coronavirus – Views of Proxy Advisors



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COVID-19 will put a spotlight on governance issues during this year's shareholder meeting season. The leading proxy advisory firms, Institutional Shareholder Services Inc. ("ISS") and Glass, Lewis & Co. ("Glass Lewis"), recently published their respective approaches on key topics facing public companies during the COVID-19 pandemic. Generally, both firms acknowledge the broad consequences of COVID-19 on corporate governance and seek to balance flexibility in responding to current circumstances against their established corporate governance policies. Effectively tailored explanations and disclosures will be invaluable for companies in this uncharted territory.

1 Annual Shareholder Meetings

- ISS does not have a general policy in the United States to recommend against directors of companies that hold virtual shareholder meetings. Furthermore, in those limited markets where ISS does have a benchmark policy to discourage such meetings, ISS intends to refrain from issuing adverse recommendations related to companies holding virtual shareholder meetings during the pandemic. Where companies opt for virtual shareholder meetings, ISS encourages clear disclosure, opportunities for shareholder participation and a return to in-person meetings once feasible. Many directors may choose against attending annual meetings or other board meetings in person due to safety concerns, and ISS states that it will accept alternative forms of director attendance, given adequate disclosure is made to shareholders.

- Glass Lewis has indicated that it generally will not recommend a vote against members of a company's governance committee if the company elects to hold a virtual shareholder meeting on or before June 30, 2020, as long as the company discloses a rationale based on COVID-19. A company electing to hold a virtual shareholder meeting after June 30, 2020 must adhere to Glass Lewis's standard policy on virtual shareholder meetings and include assurances in its proxy statement as to how the virtual format of the meeting will not foreclose shareholder participation.

- Given early submission requirements for shareholder proposals, annual meeting agendas are unlikely to feature a heavy focus on COVID-19. Glass Lewis encourages shareholders to understand that many proposals may not be workable under current circumstances. This would be particularly the case for those seeking resource-intensive actions or reporting. At the same time, Glass Lewis discourages companies from obstructing shareholder participation in the meeting.

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Board Actions

- Both ISS and Glass Lewis recognize that boards of directors of companies whose stock prices have fallen significantly may decide to adopt a shareholder rights plan, or poison pill, or take other defensive measures to defend against threats from opportunistic bidders. ISS explains that, consistent with its existing policy, it will evaluate poison pills on a case-by-case basis, taking into account each company's particular situation and the perceived threat in the current environment, as well as the features of the pill and the board's stated rationale for adopting the pill. It notes that a severe stock price decline as a result of the pandemic is likely to be considered a valid justification in most cases for adopting a poison pill of less than one year in duration. However, consistent with its current policy, ISS encourages boards to put future renewals of a short-term pill to a shareholder vote. Similarly, Glass Lewis will be generally supportive of poison pills adopted with a duration of one year or less in which the company discloses a sound rationale based on COVID-19. Though it generally opposes the adoption of poison pills, Glass Lewis appreciates that the pandemic provides a reasonable context for adopting a poison pill.

- If a board ultimately must make changes to its composition as a result of incapacities stemming from COVID-19, ISS will continue to examine these changes on a case-by-case basis in accordance with its existing policies. This could serve as an important test in key succession planning for affected companies. Relatedly, Glass Lewis expects that there may be a reduction in director attendance at board meetings, noting that because directors often sit on numerous boards and because men aged 65 and over are particularly vulnerable to the effects of COVID-19, there is a disproportionate risk of infection to directors which outweighs the benefit of in-person attendance at board meetings.

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Executive Compensation Issues

- ISS encourages contemporaneous disclosure addressing any changes in short-term compensation plans ahead of 2021 annual meetings. Conversely, ISS generally is skeptical of changes to long-term compensation due to COVID-19 and will look at such changes on a case-by-case basis. Glass Lewis also expects to see shareholder concern surrounding modifications to existing compensation plans to account for underperformance in the current market. Specifically, Glass Lewis warns companies against taking an approach to compensation that is disproportionate to the impact on shareholders and employees.

- ISS will continue to be skeptical of boards that seek to reprice stock options without obtaining prior shareholder approval. Under its existing policy, ISS will generally vote against option plans expressly permitting repricing in the absence of shareholder approval. Also consistent with its existing policy, ISS will continue to evaluate company proposals to reprice options on a case-by-case basis. Generally, this will result in an adverse recommendation for any repricing occurring within one year after a drop in the company's stock price. Among other factors, ISS will consider whether (1) the proposed repricing is shareholder value neutral (i.e., a value-for-value exchange), (2) surrendered options are not added back to the share reserve under the applicable plan, (3) replacement awards do not vest immediately, and (4) executive officers and directors are excluded. Glass Lewis has not addressed this topic with regard to COVID-19.

4 Dividends and Share Buyback Programs

- Many companies are considering suspension of dividend programs as a result of cash concerns and a desire to preserve liquidity due to economic uncertainty. Although ISS ordinarily looks for dividend payout ratios based on earnings for the prior year, ISS has said that for this year it will support broad discretion for dividends falling short of historic payout ratios or common practice. ISS also will examine whether companies are providing sufficient disclosure around cash that is preserved from dividend reductions. Glass Lewis notes that it expects to see a suspension of dividend programs but did not indicate whether any changes to its policies will follow.

- The practice of share buybacks during the pandemic has garnered significant negative attention, and moreover, many companies have chosen to suspend buyback programs to preserve cash. ISS urges companies to consider the reputational, regulatory and business risks of continuing share buybacks, and it will generally continue its customary recommendations in favor of shareholder proposals relating to buybacks. Glass Lewis indicated that it anticipates a pause in share buyback programs, but did not address whether any changes to its policies will follow.

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