

Proxy Advisory Firms Issue 2023 Voting Guidelines

February 6, 2023

As companies begin preparing for the 2023 proxy season, we note that Institutional Shareholder Services Inc. (ISS) and Glass Lewis, the leading providers of corporate governance solutions and proxy advisory services, issued updated benchmark policies (proxy voting guidelines), which can be found [here](#) and [here](#), respectively. The updated proxy voting guidelines generally focus on board accountability and oversight considerations and address topics such as climate accountability, board diversity, shareholder rights, corporate governance standards, executive compensation and social issues. What follows is a summary of the proxy voting guidelines published by ISS and Glass Lewis for the 2023 proxy season.

ISS – Summary of 2023 Proxy Voting Guidelines (United States)

- **Climate Board Accountability:** ISS extended the climate board accountability policy it adopted in 2022 to apply to a group of high-greenhouse-gas-emitting companies known as the “Climate Action 100+ Focus Group.” Under the policy, ISS recommends voting withhold or against the incumbent chair of the relevant committee (or other directors on a case-by-case basis) if the company is not taking the “minimum steps needed to understand, assess and mitigate risks related to climate change.” For purposes of this guideline, “minimum steps” include adequately disclosing climate risk disclosure information, such as those climate risks defined under the Task Force on Climate-related Financial Disclosure (TCFD) framework and relevant greenhouse gas (GHG) emissions information.
- **Board Gender Diversity:** ISS extended its board gender diversity policy to cover all public companies in the United States and foreign private issuers. Under the policy, ISS recommends voting withhold or against the chair of the nominating committee (or other directors on a case-by-case basis) where there are no women on the company’s board, subject to an exception if (i) there was at least one woman on the board at the preceding annual meeting and (ii) the board makes a firm commitment to return to a gender-diverse status within one year.
- **Unequal Voting Rights:** ISS recommends voting against directors individually, committee members or the entire board (other than “new directors” (i.e., director nominees being presented for election for the first time)) if the company employs a common stock structure with unequal voting rights (e.g., shares with additional votes per share than other shares, classes of shares that are not entitled to vote on

Contact Information

If you have any questions concerning this alert, please contact:

Kerry E. Berchem
Partner

kberchem@akingump.com

New York

+1 212.872.1095

Garrett A. DeVries
Partner

gdevries@akingump.com

Dallas

+1 214.969.2891

Rosa A. Testani
Partner

rtestani@akingump.com

New York

+1 212.872.8115

Zachary S. Buda
Associate

zbuda@akingump.com

New York

+1 212.872.8150

Kimia Jalalipour
Associate

kjalalipour@akingump.com

Houston

+1 713.250.2263

Patricia M. Precel
Senior Knowledge Management
Counsel

pprecel@akingump.com

New York

+1 212.872.7440

Charles Edward Smith
Consultant

CESmith@akingump.com

New York

+1 214.969.4715

all the same ballot items or nominees or stock with time-phased voting rights). ISS lists certain exceptions to the policy, including newly public companies that have adopted sunset provisions of no more than seven years from going public, companies where minority shareholders are sufficiently protected (such as those that offer shareholders a regular binding vote on whether the capital structure should be maintained) and a de minimis exception for situations where the super-voting shares represent less than five percent of the total voting power.

- **Problematic Governance Structures – Newly Public Companies:** ISS recommends voting withhold or against directors individually, committee members or the entire board of directors for companies that (i) hold or held their first annual meeting of shareholders after February 1, 2015 and (ii) have bylaws or charter provisions that are materially adverse to shareholder rights (e.g., classified boards, supermajority voting provisions, etc.) until such adverse provisions are reversed or removed.
- **Poison Pills:** ISS recommends voting withhold or against all nominees (other than “new nominees” (i.e., director nominees being presented for election for the first time)) if (i) the company has a poison pill with a “deadhand” or “slowhand” feature¹, (ii) the board makes a material adverse modification to an existing pill (e.g., extending, renewing or lowering the trigger without shareholder approval) or (iii) the company has a long-term poison pill (with a term of over one year) that was not approved by the public shareholders. ISS recommends voting on a case-by-case basis on nominees if the board adopts an initial short-term pill (i.e., having a term of one year or less), taking into consideration the rationale for adopting the pill, the trigger, the company’s market capitalization and a commitment to put any renewal to a shareholder vote.
- **Unilateral Bylaw/Charter Amendments and Problematic Capital Structures:** ISS recommends voting withhold or against directors individually, committee members or the entire board if the board amends the company’s bylaws or charter without shareholder approval in a manner that could adversely affect shareholders or their rights, taking into consideration, among other things, the rationale for adopting the amendment without shareholder ratification, disclosure of any significant shareholder engagement regarding the amendment, the level of potential impairment of shareholder’s rights the amendment would cause, the board’s track record regarding unilateral action on bylaw/charter amendments or other entrenchment provisions, the company’s ownership structures, the company’s existing governance structures and other factors enumerated in the guidelines or otherwise deemed appropriate.
- **Director and Officer Indemnification, Liability Protection and Exculpation:** In light of the recently enacted amendments to the Delaware General Corporation Law (DGCL), which permit corporations to limit or eliminate personal liability for both directors and officers with respect to breach of duty of care claims, ISS recommends a case-by-case approach to voting on adding director and officer indemnification, liability protection and exculpation provisions to a company’s charter, taking into consideration, among other factors, the rationale for the proposed change. Upon approval by stockholders, eligible officers will enjoy the same exculpation protections as directors for all fiduciary duty claims other than claims involving breaches of loyalty, intentional misconduct or knowing violations of

law. Eligible officers will remain subject to claims brought by, or in the name of, the corporation.

- **Problematic Pay Practices:** ISS recommends evaluating problematic pay elements on a case-by-case basis, focusing on executive compensation practices that “contravene the global pay principles,” including practices related to non-performance-based compensation elements, incentivizing risk-taking or windfall-generating risks and circumventing pay-for-performance (such as by backdating or waiving performance requirements). Examples of problematic practices that carry significant weight include repricing or replacing underwater stock options/stock appreciation rights (SARs) without prior shareholder approval, extraordinary perquisites or tax gross-ups and new or materially amended agreements with problematic payment features. ISS notes that the list of problematic practices included in the guidance is not exhaustive and directs readers to review its “U.S. Compensation Policies FAQ” (which can be found [here](#)).
- **Equity-Based and Other Incentive Plans – Value-Adjusted Burn Rate:** Last year, ISS announced a transition to a new “Value-Adjusted Burn Rate” (VABR) methodology for purposes of evaluating stock plans. ISS believes that the VABR methodology is more accurate, precise and more easily understood by the market. VABR benchmarks are calculated as “the greater of: (1) an industry-specific threshold based on three-year burn rates within the company’s Global Industry Classification Standard (GICS) group segmented by S&P 500, Russell 3000 index (less the S&P 500) and non-Russell 3000 index; and (2) a de minimis threshold established separately for each of the S&P 500, the Russell 3000 index (less the S&P 500), and the non-Russell 3000 index.” ISS’s guidance states that $VABR = ((\# \text{ of options} * \text{option's dollar value using a BlackScholes model}) + (\# \text{ of full-value awards} * \text{stock price})) / (\text{weighted average common shares} * \text{stock price})$.
- **Share Issuance Mandates at U.S. Domestic Issuers Incorporated Outside the U.S.:** ISS announced a new policy for U.S. domestic issuers incorporated outside the U.S. and listed solely on a U.S. exchange, which recommends voting for resolutions to authorize (i) the issuance of common shares up to 20 percent of currently issued common share capital (where not tied to a specific transaction or financing proposal) and (ii) up to 50 percent for pre-revenue and other early-stage companies that are heavily reliant on periodic equity financing (burden of proof on the company to establish the need for a higher limit). ISS notes that renewal of these mandates should be sought annually.
- **Amend Quorum Requirements:** ISS recommends voting on a case-by-case basis on proposals to reduce quorum requirements for shareholder meetings below a majority of the shares outstanding, taking into consideration the new quorum threshold requested, the rationale for the reduction, the company’s market capitalization, the company’s ownership structure, previous voter turnout or attempts to achieve quorum and any provisions or commitments to restore quorum to a majority of shares outstanding should voter turnout sufficiently improve. Generally speaking, ISS expresses a preference for quorum requirements that remain as close as possible to a majority of shares outstanding.
- **Diversity – Racial Equity and/or Civil Rights Audit Guidelines:** ISS recommends voting on a case-by-case basis on proposals for the company to conduct an independent racial equity and/or civil rights audit. Factors to consider include the company’s established internal process or framework for addressing

inequity and discrimination, whether the company adequately discloses workforce diversity and inclusion metrics and goals, the company's recent track record of racial justice measures and outreach and whether a company's diversity and/or racial policies have been the subject of recent controversy, litigation or regulatory action.

- **General Corporate Issues – Environmental, Social and Governance (ESG) Compensation-Related Proposals:** ISS recommends voting on a case-by-case basis on proposals seeking a report or additional disclosure on the company's approach, policies and practices on incorporating environmental and social criteria into its executive compensation strategy. Factors to consider include the scope and prescriptive nature of the proposal, the company's current level of disclosure regarding its environmental and social performance and governance, and whether the company has significant controversies or regulatory violations regarding social or environmental issues.
- **Political Activity – Political Expenditures and Lobbying Congruency:** ISS announced a new policy, which recommends voting on a case-by-case basis on proposals requesting greater disclosure of a company's alignment of political contributions, lobbying and electioneering spending with a company's publicly stated values and policies. Factors to consider include the company's policies, processes and level of disclosure related to direct political contributions; lobbying activities and payments to trade associations, political action committees or other similar groups; any incongruities between a company's political expenditures and publicly stated values and priorities, and any recent significant controversies related to the company's direct and indirect lobbying, political contributions or political activities.

Glass Lewis – Summary of 2023 Proxy Voting Guidelines (United States)

- **Climate Board Accountability:** Glass Lewis has included a new discussion on director accountability for climate-related issues, specifically asserting that companies whose own GHG emissions represent a "financially material risk" should provide comprehensive disclosure on how such risks are being mitigated and overseen. Glass Lewis considers companies identified on the Climate Action 100+ Focus Group list as belonging to this group. For companies with material exposure to climate risk stemming from their own operations, Glass Lewis recommends thorough climate-related disclosures in line with the recommendations of the TCFD. Additionally, Glass Lewis provides that boards of these companies should have explicit and clearly defined oversight responsibilities for climate-related issues. In instances where Glass Lewis believes these disclosures are absent or significantly lacking, it may recommend voting against the chair of the nominating and/or governance committee or other relevant committee chair.
- **Board Diversity:**
 - **Gender Diversity:** Prior to the 2023 proxy season, Glass Lewis required a minimum of one gender diverse director. Under its new guidelines, Glass Lewis is transitioning to a percentage-based approach for board diversity. Specifically, for companies in the Russell 3000, Glass Lewis will generally recommend voting against the chair of the nominating committee if the board of a Russell 3000 company is not at least 30 percent gender diverse and against the chair of the nominating committee if the board of a company not included in the Russell 3000

does not have at least one gender diverse director. For companies that fail to comply with this diversity guideline, Glass Lewis has announced that it will review a company's disclosed diversity practices and may refrain from recommending voting against director nominees when the company provides an adequate rationale with respect to such noncompliance or adopts a time-specific plan to address the board's lack of gender diversity.

- **Underrepresented Community Diversity:** Glass Lewis has expanded its policy on measures of diversity beyond gender, adopting a new policy on underrepresented community diversity, under which it will generally recommend voting against the chair of the nominating committee at Russell 1000 companies if the board has less than one director from an underrepresented community. In making voting recommendations, Glass Lewis will carefully review a company's disclosure of its diversity considerations and may refrain from recommending shareholders vote against directors when boards have provided a sufficient rationale or plan to address the lack of diversity on the board. For purposes of this guideline, "underrepresented community" means an individual who self-identifies as Black, African American, North African, Middle Eastern, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaskan Native or who self-identifies as gay, lesbian, bisexual or transgender.
- **Disclosure on Director Diversity and Skills:** Beginning in 2023, Glass Lewis will recommend voting against the chair of the nominating and/or governance committee for companies in the Russell 1000 index that have not provided any public disclosures regarding racial/ethnic minority demographic information. Glass Lewis will additionally recommend voting against companies in the Russell 1000 that have not provided any disclosures in any of its tracked categories, including disclosures related to a board's current percentage of racial and ethnic diversity, 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 (the "Rooney Rule") and board skills.
- **Board Oversight of E&S Issues:** Beginning with the 2023 proxy season, Glass Lewis will generally recommend voting against the nominating or governance committee chair of companies in the Russell 1000 to the extent such companies fail to provide adequate disclosures in their proxy statements or governance documents regarding the role of the board in overseeing environmental and/or social (E&S) issues. Glass Lewis also indicated that, during 2023, it will track board oversight of E&S issues across all companies included in the Russell 3000, but that voting recommendations on these issues will be limited solely to Russell 1000 companies.
- **Cybersecurity:** Glass Lewis has introduced a new section on the topic of cybersecurity oversight and disclosure of risks regarding the same, asserting that such risk is material for all companies. Glass Lewis expects all companies to provide disclosure on the role of the board in overseeing issues related to cybersecurity, as well as disclosure on the steps taken to properly educate directors on the topic. Glass Lewis will not make recommendations on the basis of a company's disclosure concerning cyber-related issues but will closely evaluate a company's cybersecurity disclosure in instances where cyberattacks have caused significant harm to shareholders.
- **Overboarding:** Glass Lewis believes an overcommitted director can pose a material risk to a company's shareholders, and cited recent research that time

commitment associated with being a director has been on a significant upward trend in the past decade. As a result, Glass Lewis will recommend that shareholders vote against (i) a director who serves as an executive officer (other than executive chair) of any public company while serving on more than one additional external public company board, (ii) a director who serves as an executive chair of any public company while serving on more than two additional external public company boards and (iii) any other director who serves on more than five public company boards.

- **Director and Officer Indemnification, Liability Protection and Exculpation:** Recently enacted amendments to the DGCL permit corporations to limit or eliminate personal liability for both directors and officers with respect to breach of duty of care claims. Officers may not be exculpated from claims brought against them by, or in the name of, the corporation (i.e., derivative actions). Despite this change to the DGCL, Glass Lewis asserts it will closely evaluate proposals to adopt officer exculpation provisions “on a case-by-case basis.” The foregoing notwithstanding, Glass Lewis will generally recommend voting against officer exculpation proposals eliminating monetary liability for breaches of duty of care for certain officers unless (i) a compelling rationale for adoption is provided by the board of directors and (ii) the provisions are reasonable.
- **Shareholder Proposals Requesting Racial Equity or Civil Rights Audits:** Glass Lewis has codified its approach to proposals requesting that companies undertake racial equity audits, asserting that when assessing these resolutions, Glass Lewis will assess factors including (i) the nature of the company’s operations, (ii) level of disclosure provided by the company and its peers on internal and external stakeholder impacts and steps it takes to mitigate any attendant risks and (iii) any relevant controversies, fines or lawsuits. Based on these specific factors, Glass Lewis will generally recommend voting in favor of well-crafted proposals requesting such audits when doing so could help the target company identify and mitigate potentially significant risks.
- **Board Responsiveness:** Glass Lewis clarified its expectations for board responsiveness (i.e., shareholder engagement) indicating that when 20 percent or more shareholders vote on nominations or proposals contrary to the board’s or management’s voting recommendations, then boards should engage with shareholders on the relevant issue(s) in order to demonstrate a minimum degree of responsiveness to the concerns of such shareholders. Relatedly, Glass Lewis believes that a more robust shareholder engagement program should be implemented when a majority of shareholders vote contrary to the board’s or management’s voting recommendations. Such engagement may include implementing shareholder proposals with majority support, more fulsome engagement with shareholders, and public disclosures that specifically address issues of importance to shareholders. Glass Lewis also indicated that it will now evaluate board responsiveness by assessing, among other factors, disclosures by companies relative to shareholder engagement efforts.
- **Disclosure of Shareholder Proponents:** Glass Lewis believes that companies should provide clear disclosure in their proxy statements concerning the identity of the proponent of any shareholder resolutions that may be going to a vote. Glass Lewis believes failing to disclose the identity of shareholder proponents in proxy filings leaves shareholders with an incomplete picture of the proposal itself. If a

U.S.-based company does not clearly disclose the identity of a proponent (or lead proponent when there are multiple filers) in their proxy statement, Glass Lewis may recommend voting against the chair of the nominating and governance committee. Additionally, Glass Lewis recommends companies provide information regarding the share ownership levels of the proponent(s) in an effort to allow other shareholders to better understand whether and how the proponent's financial interests are aligned with those of the company and its shareholders, as well as the company's engagement (or lack thereof) with a proponent.

- **Compensation Policy Updates and Clarifications:**

- **Compensation Clawback Provisions:** Consistent with new rules adopted by the SEC in October 2022, each of the Nasdaq and The New York Stock Exchange must update relevant listing standards to ensure that listed companies maintain and adequately disclose their compensation clawback policies. The stock exchanges will have until November 28, 2023 to finalize updating such standards and companies will have 60 days thereafter to satisfy such updated standards. In the interim, Glass Lewis will continue to elevate concerns for companies with compensation clawback policies that are tied solely to the Sarbanes-Oxley Act. Glass Lewis signaled that it expects its evaluation of specific elements of compensation clawback policies to evolve consistent with market practice and developments.
- **Long-Term Incentives:** Glass Lewis has revised upward the minimum percentage of long-term incentive grants that should be tied to performance-based criteria from 33 percent to 50 percent. Glass Lewis indicated that beginning with the 2023 proxy season, it may raise concerns with respect to executive compensation programs that provide less than 50 percent of long-term incentive awards that are subject to vesting conditions that are performance-based. Glass Lewis indicates that it may refrain from issuing unfavorable voting recommendations when an executive compensation program is otherwise designed or operated without any issues; however, unfavorable recommendations may arise when a negative trajectory arises relative to the allocation amount.
- **Linking Executive Pay to Environmental and Social Criteria:** Glass Lewis reiterated its position that E&S criteria can play a meaningful role in executive compensation programs when such criteria are linked explicitly and clearly to a company's broader ESG strategies and goals. These criteria should be tailored to a company's particular facts and circumstances, including its industry, risk profile, financial condition, as such other factors as may be appropriately considered. Glass Lewis underscored the importance of providing shareholders with adequate disclosures to enable the shareholders to understand how E&S and/or ESG criteria are being integrated into an executive compensation program and how such criteria will be measured.
- **Compensation Committee Performance:** Beginning with the 2023 proxy season, Glass Lewis may recommend voting against the compensation committee chair when a company issues a "mega-grant" (i.e., an award to a single individual valued at in excess of \$100 million) that present concerns such as excessive quantum, lack of adequate performance conditions, and excessive dilution, among other factors.

- **Grants of Front-Loaded Awards:** In order to address the increasing use of “mega-grants,” Glass Lewis explicitly added these types of awards to its guidance covering front-loaded awards. These types of awards are subject to enhanced scrutiny by Glass Lewis. Glass Lewis also reiterated its concerns with respect to constraints on a board’s ability to respond to unforeseen circumstances when these types of awards are used. Finally, Glass Lewis also clarified how it analyzes front-loaded awards that are intended to cover solely the performance-based or time-based portions of an executive’s long-term incentive compensation.
- **One-Time Awards:** Beginning with the 2023 proxy season, Glass Lewis expects that a company’s disclosures with respect to one-time awards will include its methodology for determining the quantum of, and structure of, the award.
- **Pay for Performance:** Glass Lewis referenced the pay versus performance disclosure requirements announced by the SEC in August 2022, indicating that such disclosure requirements will not impact the pay versus performance methodology used by Glass Lewis for the 2023 proxy season. Nevertheless, Glass Lewis indicated that the disclosure requirements from the SEC’s new rule may be included in its assessment of executive pay programs on a qualitative basis.
- **Company Responsiveness to Say-On-Pay:** Glass Lewis clarified its expectations regarding shareholder engagement when shareholder opposition to say-on-pay proposals equals or exceeds 20 percent. Under those circumstances, when evaluating such shareholder opposition, Glass Lewis indicated that it may examine the degree of opposition among disinterested shareholders as an independent group. Glass Lewis expects a board to engage with shareholders in a manner that is consistent with the level of opposition. In these instances, engagement may take the form of, among other things, meeting with large shareholders (including shareholders that voted against the say-on-pay proposal) and modifying compensation programs to address shareholder concerns.

¹ Generally speaking, “deadhand” or “slowhand” features are anti-takeover devices that limit or constrain a future board’s ability to redeem or cancel a “poison pill” by requiring such redemption or cancellation to be approved solely by a majority of current directors or their successors.