Legal update

Institutional shareholder advisors provide updated guidance on proxy season 2020 as a result of the pandemic

April 9, 2020
Corporate governance
Corporate, M&A and securities

In light of COVID-19, Institutional Shareholder Services (ISS) and Glass Lewis have provided updated guidance ahead of the upcoming shareholder meeting season.

The guidance reflects how ISS and Glass Lewis will apply their proxy voting guidelines in light of the pandemic and the unprecedented impact it has had on companies and markets. They cover a wide range of topics from meeting logistics and activism and defensive measures to executive compensation, board composition and payouts and financings. Although their guidance is global, this update explores the items of relevance to Canadian issuers.

Shareholder meeting logistics

Virtual-only AGMs

Both ISS and Glass Lewis have confirmed they support virtual-only shareholder meetings for 2020, which is not a surprise but still likely a relief to the 115-plus issuers that have already announced they will be holding virtual-only meetings this year. However, Glass Lewis has advised that its standard policy on virtual-only meetings, which requires issuers to provide adequate disclosure regarding how shareholder participation rights will be safeguarded, will apply to all shareholder meetings occurring after June 30, 2020, even if the pandemic continues well beyond that date. For meetings held on or before June 30, issuers are still advised to disclose, at a minimum, their rationale for doing so (i.e., that it is related to the COVID-19 pandemic).

Activism and defensive measures

ISS and Glass Lewis both expect to see a rise of shareholder activism, M&A and consolidation as a result of the COVID-19 crisis.

Shareholder Proposals

Since shareholders must submit their proposals well in advance of the meeting, those being considered during the 2020 proxy season are unlikely to have taken into consideration the COVID-19 crisis. Glass Lewis is cautioning shareholders to be mindful of proposals that would require resource-intensive actions during this period of uncertainty.
At the same time, Glass Lewis cautions issuers against using the crisis to dismiss or hamper the ability of shareholders to put forward their resolutions, speak at virtual-only meetings and vote on such matters.

**Poison Pills**

Given the dramatic decline of stock prices, issuers that do not already have a rights plan in place may wish to consider implementing one, recognizing, however, that Canadian issuers and their boards and shareholders benefit from the legislative protection of a 105-day minimum deposit period with a mandatory majority tender condition for non-exempt hostile or unsolicited take-over bids, thus limiting in Canada the general protection afforded by rights plans in other jurisdictions. ISS’s current policy provides issuers with latitude in choosing to adopt a rights plan, provided it meets the definition of a “new generation” plan. Note that, as required by the TSX, the adoption of a shareholder rights plan must be ratified by shareholders within six months of adoption.

**Executive compensation**

**Sharing the Pain**

Glass Lewis has provided a frank assessment of the actions issuers should take to avoid a negative “say-on-pay” vote (or worse), including rolling back planned salary increases and bonuses and otherwise taking measures to share the pain felt by employees and shareholders.

**Changes in Metrics, Goals and Targets**

ISS advises issuers to provide full disclosure on material changes to 2020 compensation programs, including performance metrics, goals and targets. ISS is generally not supportive of in-flight changes made to long-term awards plans and will look at any such changes on a case-by-case basis, together with any changes to the structure of such long-term plans to take into consideration the new economic outlook.

**Option Repricing**

ISS considers option repricing to be a problematic pay practice, and will generally recommend voting against proposals to reprice outstanding options. ISS is not proposing to change this policy, even in light of the current situation.

**Board effectiveness and composition**

**Changes to the Board**

ISS advises that it will use appropriate discretion and flexibility in examining, on a case-by-case basis, boards that need to fill vacancies due to the disability or incapacity of a director or to bring needed expertise to address concerns created by the pandemic.

**Diversity**

Glass Lewis has noted a particular risk in the lack of age and gender diversity on boards and in management, given men and those aged 65 and over are more likely to die or become seriously ill from COVID-19. While Glass Lewis has not indicated a change to its voting recommendations for 2020, this may signal that it will apply more scrutiny to issues of diversity in future years.
Payouts and financings

Since proper cash management is critical during this time, both Glass Lewis and ISS have provided guidance on the spending and raising of cash.

Dividends and Normal Course Issuer Bids

Glass Lewis states that the suspension of dividends and share repurchase programs appears to be a forgone conclusion in most cases. ISS advises that it supports boards re-examining the appropriateness and prudence of continuing to pay dividends at previously anticipated levels. In terms of normal course issuer bids, ISS notes that boards may open themselves and their companies up to intense criticism and reputational damage by undertaking repurchases at the current time.

Financings

Both ISS and Glass Lewis expect to see a rise in financings and that some issuers will need to seek flexible arrangements from shareholders. ISS makes voting recommendations regarding private placement issuances on a case-by-case basis and has advised that the exceptional circumstances caused by COVID-19 will be taken into consideration when making any voting recommendation.

A pragmatic and flexible approach

Both Glass Lewis and ISS have recognized the unprecedented challenges faced by businesses and their shareholders. The key words that Glass Lewis uses to describe its approach to proxy season 2020 are pragmatism, discretion and context. ISS has advised that it will use discretion and flexibility and a thoughtful and considerate approach in applying its policies. And both have indicated that proxy season 2021 will likely be impacted as well.

For further information, please contact one of the following lawyers:

> Elliot Shapiro
  Montréal
  +1 514.847.4516
  elliot.shapiro@nortonrosefulbright.com

> Pierre-Paul Henrie
  Ottawa
  +1 613.780.3777
  pierre-paul.henrie@nortonrosefulbright.com

> Olga Farman
  Québec
  +1 418.640.5852
  olga.farman@nortonrosefulbright.com

> Heidi Reinhart
  Toronto
  +1 416.216.2979
  heidi.reinhart@nortonrosefulbright.com

> Katherine Prusinkiewicz
  Calgary
  +1 403.267.8313
  katherine.prusinkiewicz@nortonrosefulbright.com

> David M. Hunter
  Vancouver
  +1 604.641.4963
  david.hunter@nortonrosefulbright.com

Katherine Prusinkiewicz

References to “Norton Rose Fulbright”, “the law firm”, and “legal practice” are to one or more of the Norton Rose Fulbright members or to one of their respective affiliates (together “Norton Rose Fulbright entity/entities”). No individual who is a member, partner, shareholder, director, employee or consultant of, in or to any Norton Rose Fulbright entity (whether or not such individual is described as a “partner”) accepts or assumes responsibility, or has any liability, to any person in respect of this communication. Any reference to a partner or director is to a member, employee or consultant with equivalent standing and qualifications of the relevant Norton Rose Fulbright entity.

The purpose of this communication is to provide general information of a legal nature. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.

© Norton Rose Fulbright Canada LLP 2020