

## **KINGSDALE MEMO:**

### **ISS, Glass Lewis Provide Guideline Updates in Response to Covid-19 Pandemic**

April 9, 2020

As the COVID-19 pandemic continues to evolve, Institutional Shareholder Services Inc. ("ISS") and Glass, Lewis & Co., LLC ("GL"), have issued updates on their proxy voting guidelines.

As summarized below, GL has given guidance on its virtual-only meeting policy, while ISS has provided updates under four categories: (i) AGM Issues; (ii) Poison Pills, Shareholder Rights and Board/Directors; (iii) Compensation Issues; and (iv) Capital Structure and Payouts.

#### **AGM ISSUES:**

##### ISS

ISS acknowledges that while physical meetings offer opportunities for interface with directors and executives, health and safety concerns are paramount at this time. ISS will not penalize companies that elect to hold virtual-only meetings, regardless of its past preference for hybrid meetings.

Boards are, however, encouraged to disclose clearly the reason for implementing a virtual-only meeting and to provide shareholders with the opportunity to participate as fully as possible. Further, while companies must follow their respective regulatory guidance, ISS will positively note when companies and boards use webcasts, conference calls, and other mediums of electronic communications to engage with shareholders, even if meetings have been postponed.

##### GL

GL acknowledges its previously stated concerns regarding virtual-only meetings but, given the COVID-19 pandemic, it will review an issuer's decision to opt for a virtual-only meeting

on a case-by-case basis, for the remainder of the proxy season (through to June 30, 2020). During this period, if a company opts for a virtual-only meeting, GL will not make negative recommendations against members of the company's Governance Committee, provided that their rationale is disclosed, including citing COVID-19, as a minimum. For companies opting for virtual-only meetings beyond June 30, GL's standard policy will apply which specifies neutrality on virtual-only meetings, provided they enable meaningful shareholder participation.

## **POISON PILLS, SHAREHOLDER RIGHTS AND BOARDS/DIRECTORS:**

### *Poison Pills, Shareholder Rights Plans*

Following the recent stock market tumble, many advisors have recommended Poison Pills ("rights plans" or "shareholder rights plan") or other defensive measures as a means to protect against opportunistic bidders.

ISS's existing policy approach with regard to companies adopting rights plans is flexible and takes short- term threats, such as the current pandemic, into account. For rights plans with a duration of less than a year, ISS will consider, on a case-by-case basis, the disclosed rationale and other relevant factors.

ISS continues to encourage boards to put poison pills to a shareholder vote, but notes that a severe decline in share price as a result of the ongoing pandemic is likely to be considered valid justification, assuming boards provide detailed disclosure regarding their choice of duration, or delay, or avoidance of putting plans to a shareholder vote after this period lapses.

### *Changes to Boards, Senior Management Teams*

In its update, ISS notes that it will consider any changes in the boardroom on a case-by-case basis. ISS acknowledges that, given the current crisis, changes to the board or senior management may be necessary, given the possibility of vacancies due to the incapacity of a director or the need to add critical expertise to address concerns created by the pandemic. Additionally, ISS already provides flexibility in cases where board members may need to fill senior executive roles on an interim basis. ISS's position is that boards should have broad discretion during this crisis and will adjust policy application as appropriate if warranted by

these exceptional circumstances.

#### Attendance at Board, Shareholder Meetings

ISS's update also includes guidance on director attendance at board and shareholder meetings, recognizing that directors may not be able to attend these meetings in-person. This will not have material impact on Canadian and US directors, however, as ISS's policies in both jurisdictions already count telephone or electronic participation as full participation for directors.

### **COMPENSATION ISSUES:**

#### Short-Term Compensation

ISS expects some boards will announce plans to materially change metrics or shift goals or targets used in short-term compensation plans to adjust for material drops in share price. While such decisions will be analyzed and addressed by shareholders at next year's AGMs, ISS encourages boards to provide timely disclosure to shareholders with regard to their rationale for such changes. ISS's benchmark voting policies for long-term compensation plans generally do not support changes to midstream awards, given the multi-year period that they cover. Any such changes will be examined on a case-by-case basis to determine appropriate discretion and an adequate explanation will be required. Any structural changes to long-term plans going forward, to address the new economic environment, will be assessed under ISS's existing framework.

#### Repricing Options

Some companies may seek to reprice options given that the ongoing pandemic and related economic downturn leads outstanding awards to be "out-of-the-money". If boards undertake such actions without asking shareholders to approve their actions in a timely fashion, the directors' actions will be subject to scrutiny under the applicable benchmark policy regarding board accountability. If the board seeks shareholder approval for the repricing of options, ISS will apply their existing case-by-case policy approach: ISS will generally oppose any repricing within one year of a precipitous drop, examining: (i) if the design is shareholder value neutral; (ii) surrendered options are not added back to the plan reserve; (iii) replacement awards do not vest immediately; and (iv) executive officers and directors are

excluded.

## **CAPITAL STRUCTURE AND PAYOUTS:**

### Dividends

The market downturn has some boards questioning their ability to pay dividends at historical levels, while some governments have prohibited—or are considering prohibiting—dividend payments to shareholders of companies that receive subsidies. Where some of ISS's market-specific policies expect dividend payout ratios within a certain range (US and Canadian policies do not specify the need for payout ratios), broad discretion will be supported for boards that seek to set payout ratios below historic levels or customary market practice. When reviewing such shareholder proposals, ISS will look for disclosed plans to use any preserved cash from dividend reductions to support and protect their business and workforce.

### Share Buyback Programs

Many companies have elected to suspend share buyback programs to conserve cash in this uncertain time. Pursuing such schemes, however, could expose issuers to criticism and reputational damage. While these schemes usually have a long time horizon and boards may wish to maintain flexibility by seeking buyback authority, directors must consider the various associated risks. ISS will, absent regulations barring such activities, continue to recommend in favor of repurchase authorities with customary limits based on market. However, ISS will review the board's related actions in advance of the next AGM (2021 for most issuers), to consider if risk was managed in a responsible manner.

### Capital Raises

Currently, ISS will assess, on a case-by-case basis, any requests to increase authorized common or preferred stock, in addition to other related proposals, subject to market-specific rules and guidance. In exceptional circumstances, based on clear and compelling justification by the board of a company's need in the current economic environment, ISS's policies may allow "For" recommendations for proposals that exceed any normal market-specific limits on size and potential dilution. ISS specifies that the current pandemic clearly constitutes such a circumstance.

ISS's Policy Guidance can be downloaded [here](#). GL's most recent update is available [here](#):

If you have any questions, we are here to help 24/7. [Contact us today](#).