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ISS Announces Policy Guidance on the Impact of the COVID-19 Pandemic

ISS Releases Guidance on Policies Regarding Virtual-Only Meetings, Compensation-Related Issues, Defensive Measures and Director Attendance Amid the COVID-19 Pandemic

SUMMARY

Yesterday, Institutional Shareholder Services released guidance on how it intends to apply its Benchmark and Specialty Proxy Voting Policies in light of the COVID-19 pandemic. The guidance addresses how ISS will apply its policies on “virtual-only” meetings, compensation-related issues (particularly changes in metrics and related goals or targets as well as option repricing), poison pills and other defensive measures, and director attendance. In addition, the guidance discusses how ISS plans to apply the policies to meeting postponements, changes to boards of directors or senior management, dividends, share repurchases and capital raisings.¹ ISS notes that, as additional issues arise because of COVID-19, it will continue to update this guidance or provide new information throughout the 2020 proxy season.

A. VIRTUAL-ONLY MEETINGS

Under the ISS benchmark policies for most markets, including the U.S., ISS does not have a policy to recommend votes against director nominees at companies that hold “virtual-only” meetings. In light of the risks created by the COVID-19 pandemic and the decision by many companies to hold “virtual-only” meetings instead of in-person or “hybrid” (both in-person and “virtual”) meetings, ISS will not change or adopt any policies for such markets on “virtual-only” meetings. In the jurisdictions where ISS has policies that discourage “virtual-only” meetings, including the United Kingdom, Ireland and continental Europe, ISS will not make an adverse recommendation related to companies holding “virtual-only” meetings, assuming “virtual-only” meetings are allowed by law without requiring an amendment of bylaws, until it is safe for companies to have in-person meetings again.² ISS encourages companies that are holding “virtual-only”

meetings to disclose the reason for their decision, including if the reason is related to the COVID-19 pandemic, and to provide shareholders with a meaningful opportunity to participate as fully as possible, specifically through the ability to ask questions during the meeting and maintain a dialogue with directors and senior management. ISS also stressed its preference for “hybrid” meetings over “virtual-only” meetings and urged boards to return to in-person or “hybrid” meetings (or put the matter to shareholders to decide) when it becomes safe to do so.

B. COMPENSATION-RELATED ISSUES

In anticipation of boards announcing plans to materially change performance metrics, goals or targets used in short-term compensation plans in response to economic or financial market conditions and possible recession in the wake of the pandemic, ISS acknowledged that such decisions would generally be addressed at next year’s annual meetings but encouraged boards to provide contemporaneous disclosure to shareholders, including the reasons for making changes to performance metrics, goals or targets. While ISS generally disfavors midstream changes to long-term incentive awards, the guidance notes that ISS will look at changes to long-term awards with open performance periods on a case-by-case basis, and assess whether directors exercised appropriate discretion and provided adequate explanation of the rationale for the changes. If boards alter the structures of their long-term plans in light of the new economic environment, ISS will assess such structural alterations under its existing benchmark policies.

ISS will continue to scrutinize companies that reprice (or replace, exchange, cancel and re-grant) “out-of-money” option awards without shareholder approval or ratification in a timely fashion under the U.S. benchmark policy board accountability provisions (and equivalent policies in other markets where relevant). If a board does seek shareholder approval of a repricing or similar action at its 2020 meeting, ISS will apply its current case-by-case policy approach for the appropriate market. ISS specifically noted its policy in the U.S. market to generally oppose any repricing that occurs within one year of a quick drop in the company’s stock price. However, ISS also considers other factors, including whether the repricing is value neutral, applicability of share recycling, vesting terms and inclusion of awards to directors and executive officers in such repricing.

C. POISON PILLS AND OTHER DEFENSIVE MEASURES

Recognizing that some boards may adopt defensive measures, including poison pills, to protect against threats caused by rapid decreases in stock price, ISS stressed that, while its current policy encourages boards to put poison pills to a shareholder vote, companies do have flexibility to adopt short-term poison pills with reasonable triggers in response to an active threat, which ISS noted would likely include a major stock price decline resulting from the COVID-19 pandemic. ISS will continue to apply its existing policy which, for poison pills with a duration of less than a year, considers the situation on a case-by-case basis, examining the disclosed reasons for adopting the pill (such as imminent threats) and other relevant factors, including a commitment to put renewals of the pill to a shareholder vote, whether directors protect

shareholders from abusive bidders without overly entrenching the existing board and management team and the triggers and other specific provisions of the pill. As such, ISS encouraged boards to provide detailed disclosure about their choice of duration of the pill and any decisions to delay a shareholder vote on the pill.³

D. DIRECTOR ATTENDANCE

ISS noted that many directors may choose not to attend in-person shareholder meetings or scheduled board meetings for their safety and the safety of others. Certain markets, such as the U.S., have specific disclosure rules that count telephonic or electronic participation as full participation in board and committee meetings. For those markets that do not, ISS noted that companies should provide disclosure explaining the alternative forms of attendance with enough information about directors' attendance at board and committee meetings to allow shareholders to make informed judgments and voting decisions, while being sensitive to directors' privacy as well.

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ENDNOTES

- ¹ The full ISS policy guidance on the impacts of the COVID-19 pandemic is available at <https://www.issgovernance.com/file/policy/active/americas/ISS-Policy-Guidance-for-Impacts-of-the-Coronavirus-Pandemic.pdf>. In addition to the topics summarized in this memorandum, the guidance covers aspects not relevant to U.S. issuers, including meeting postponements, changes to the boards of directors or senior management, dividends, share repurchases and capital raisings.
- ² ISS generally votes against proposals allowing for convening of virtual-only shareholder meetings in the UK and Ireland and continental Europe. Details of the “virtual-only” meeting policies for the UK and Ireland and continental Europe can be found at: <https://www.issgovernance.com/file/policy/active/emea/UK-and-Ireland-Voting-Guidelines.pdf> and <https://www.issgovernance.com/file/policy/active/emea/Europe-Voting-Guidelines.pdf>, respectively.
- ³ See our memorandum to clients “[Using Rights Plans to Preserve Net Operating Losses](#)”, dated March 27, 2020.

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