Proxy Advisory Firms Issue Compensation-Related Guidance Regarding the Impacts of the COVID-19 Pandemic

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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As discussed in our March 23, 2020, client alert "Recommendations for Compensation Committees During the COVID-19 Crisis," compensation committees charged with implementing programs intended to incentivize and retain employees through alignment with company performance and strategic business objectives find themselves with a very uncertain near-term future and tasked with knowing the unknowable. The client alert summarized several of the specific issues that compensation committees should consider in the context of current events, including the timing of compensation decisions, bonus and equity award performance targets and metrics, discretion and adjustment of performance targets, burn rates and grant pricing, option repricing and compensation reductions and waivers.

Institutional Shareholder Services (ISS) and Glass Lewis (GL) recently issued guidance regarding the impacts of the COVID-19 pandemic, available here and here. The notable compensation-related points are summarized below.

Institutional Shareholder Services

ISS acknowledged that many companies will materially change performance metrics, goals or targets used in short-term compensation plans. ISS encourages boards to provide contemporaneous disclosure to shareholders of these changes and the reasons for making these changes. Although such disclosure is often not required by securities law, the guidance suggests it may result in a more favorable reception by ISS.

For long-term compensation plans, ISS reiterated that its benchmark voting policies generally are not supportive of changes to outstanding awards but stated it will assess any changes on a case-by-case basis to determine if "appropriate" discretion was exercised by directors and if the company provided an adequate explanation of any changes to shareholders. ISS will continue to assess any structural changes to long-term compensation plans under its existing benchmark policy framework.

ISS also reaffirmed that it will assess any shareholder proposals to reprice stock options on a case-by-case basis and will generally recommend against any repricing that occurs within one year of a precipitous drop in the company's stock price. Additionally, ISS will consider whether or not (i) the repricing is value-neutral to shareholders (a value-for-value exchange), (ii) shares in respect of surrendered options are added back to the plan reserve, (iii) the vesting schedule of replacement awards is unchanged, and (iv) executive officers and directors are excluded from the repricing.

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Glass Lewis

GL will generally determine the reasonableness of any proposed changes to compensation programs and outcomes by considering whether or not they are consistent and proportional to the impact on shareholder interests and employees. GL expects that boards will proactively make changes to executive compensation that align with the experiences of shareholders and employees. Finally, GL provided that it will afford more discretion in its analysis for those companies that GL believes have shown a "good" and established history on governance, performance and the use of board discretion prior to the COVID-19 pandemic.

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