Morgan Lewis

white paper

ISS Releases Four Sets of FAQs, Glass Lewis Provides an Update, and FASB and IASB Make Certain Decisions Relevant to Equity Compensation Plans

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Proxy advisory firms Institutional Shareholder Services (ISS) and Glass Lewis have both released updates to their policies that outline how they will form recommendations to shareholders on how they should vote on governance, compensation, and other matters for the 2015 proxy season. ISS issued its initial update on November 6, 2014[1], and Glass Lewis also issued its initial update in early November 2014.[2] The ISS policy updates are effective for annual meetings after February 1, 2015, and the new Glass Lewis policies are effective for annual meetings after January 1, 2015.

Since then, ISS has issued three sets of frequently asked questions regarding its 2015 policies: on December 22, 2014, it issued frequently asked questions about the Equity Plan Scorecard policy (EPSC FAQs) and how ISS intends to implement the policy;[3] on February 9, 2015, ISS issued frequently asked questions on its 2015 US compensation policies (USCP FAQs);[4] and on February 19, 2015, ISS issued additional frequently asked questions on "Selected Topics,"[5] which we briefly address below. The FAQs are effective for annual meetings after February 1, 2015. Also, on January 30, 2015, Glass Lewis announced on its blog certain "enhancements" to performance metrics that it uses in its US and Canadian pay-for-performance models and its US equity plan model, which it updated on February 2, 2015.[6]

In addition, the Financial Accounting Standards Board (FASB) has taken a number of actions relevant to equity compensation in the last few months. These actions stem from its Simplification Initiative, a project intended to improve and simplify Generally Accepted Accounting Principles (GAAP). On October 8, 2014, the FASB added to its agenda a project to improve and simplify accounting for stock compensation under FASB Accounting Standards Codification (ASC) 718. The project is focused on minimum statutory tax withholding requirements and other related items. In November 2014, the International Accounting Standards Board (IASB) proposed changes to also address the classification of share-based payment transactions where a portion of the shares are withheld for taxes. In January 2015, the FASB issued FASB Accounting Standards Update 2015-01, which eliminates the concept of an extraordinary item from the income statement. Each of these accounting developments is likely to have some impact on equity awards and/or equity compensation plans.

This white paper highlights the ISS EPSC FAQs and USCP FAQs as well as the referenced FASB and IASB actions. It also notes the Glass Lewis update.

ISS EPSC FAQs

Under the ISS equity incentive plan methodology in effect for the 2014 proxy season, ISS evaluated equity-based and other incentive plans by reference to six "negative" factors. These include whether (1) the total cost of the company's equity plans was unreasonable, (2) the plan expressly permitted repricing, (3) there was misalignment in pay-for-performance, (4) the company's three-year burn rate exceeded the burn rate cap of its industry group, (5) the plan had a liberal change-in-control definition, and (6) the plan was otherwise a vehicle for "problematic" pay practices. If any of the six factors was found within the subject plan, ISS recommended a vote against the plan.

ISS's prior "pass/fail" methodology was viewed as problematic and too rigid. For the 2015 proxy season, the EPSC replaces this pass/fail methodology and provides, according to ISS, a "more nuanced consideration of

1. View the ISS update at http://www.issgovernance.com/policy-gateway/2015-policy-information and Executive Summary at http://www.issgovernance.com/file/policy/2015ExecutiveSummary.pdf.

2. View the Glass Lewis update at http://www.glasslewis.com/assets/uploads/2013/12/2015_GUIDELINES_United_States.pdf.

3. View the EPSC FAQs at http://www.issgovernance.com/file/policy/2015faqusequityplanscorecard.pdf. Note that these FAQs were updated on March 3, 2015 to add three new FAQs. The updated EPSC FAQs are at http://www.issgovernance.com/file/policy/2015-faq-us-equity-plan-scorecard-030315.pdf.

4. View the USCP FAQs at http://www.issgovernance.com/file/policy/2015comprehensivecompensationfaqs.pdf.

5. View the "Selected Topics" FAQs at http://www.issgovernance.com/file/policy/2015faquspoliciesonselectedtopics.pdf.

6. View the updates at http://www.glasslewis.com/blog/enhancements-pay-performance-equity-plan-models/.

equity incentive programs." The EPSC considers a range of positive and negative factors based on three categories, or "pillars," which are not equally weighted: Plan Cost, Grant Practices and Plan Features. Each pillar is assigned a maximum number of potential points, which are weighted for index groups based on the company's membership in one of the following groups: S&P 500, Russell 3000, Non-Russell 3000, and initial public offering (IPO) and bankruptcy companies. EPSC FAQ #3 illustrates the new methodology with the following chart:

Pillar	**Model**	**Maximum Pillar Score**	**Comments**
Plan Cost	S&P 500, Russell 3000, Non-Russell 3000	45	All models include the same Plan Cost factors.
	IPO/Bankruptcy	60	
Grant Practices	S&P 500, Russell 3000	35	The Non-Russell 3000 model includes only Burn Rate and Duration factors. The IPO/Bankruptcy model does not include any Grant Practices factors.
	Non-Russell 3000	25	
	IPO/Bankruptcy	0	
Plan Features	S&P 500, Russell 3000	20	All models include the same Plan Features factors.
	Non-Russell 3000	30	
	IPO/Bankruptcy	40	

The FAQs include a chart of EPSC factors and point allocation system, which is copied at the end of this paper. In EPSC FAQ #9, ISS explains that the EPSC factors are not equally weighted. Instead, each factor is assigned a maximum number of potential points, which may vary by model. Some factors are, as ISS explains, binary, but others may generate partial points. For all models, the total maximum points that may be accrued is 100.

An EPSC score of 53 or higher will result, in most cases, in a positive recommendation for the proposal absent any "overriding factors," which ISS describes in the FAQs. These "overriding factors" are in addition to the four factors considered in the Plan Features pillar described below and are basically the same as four of the six factors used in ISS's prior "pass/fail" methodology. The four overriding factors are where the plan does the following:

- Has a liberal change-in-control definition
- Permits repricings or cash buyouts of underwater options or stock appreciation rights without shareholder approval
- Is a vehicle for problematic pay practices or has a pay for performance disconnect
- Features other provisions or practices that are detrimental to shareholder interests, such as tax gross-ups

Pursuant to ISS, the presence of any of these four factors "on a stand-alone basis, will continue to result in a negative recommendation on an equity plan proposal, regardless of the score from all other EPSC factors" (see FAQ #10).

Plan Cost

The Plan Cost pillar is measured by ISS's proprietary shareholder value transfer (SVT) model using a new two-part calculation that includes the following:

- New shares requested, plus shares remaining for future grants, plus outstanding unvested/unexercised grants

- Only new shares requested, plus shares remaining for future grants

The new EPSC methodology does not spell out how the results of the two alternative tests are scored, but note that the second SVT calculation discussed above does not allow a cost carve-out for vested, continuously in-the-money options outstanding more than six years, which was permitted under the prior methodology. ISS explains that because the second part of the calculation reduces the impact of grant overhang on overall cost evaluation, the cost carve-out is no longer needed.

Grant Practices

The Grant Practices pillar incorporates several new factors compared to the prior burn rate analysis, including the following:

- The company's three-year average burn rate relative to industry and index peers. Three index groups, S&P 500, Russell 3000 (ex-S&P 500), and Non-Russell 3000, will be used to determine burn rate caps and factor weightings. IPO/bankruptcy companies are not reviewed under the Grant Practices pillar of the EPSC policy (instead, their scores will be based solely on the Plan Cost and Plan Features pillars, as noted in the EPSC table above).
- Vesting schedule(s) under the CEO's most recent equity grants (three-year look-back).
- The estimated duration of the plan based on the sum of shares remaining available and the new shares requested, divided by the three-year annual average of burn rate shares.
- A comparison of the CEO's most recent total equity grants to those awards subject to performance conditions.
- Whether the company maintains a claw-back policy.
- Whether the company has established postexercise/postvesting shareholding requirements.

The EPSC FAQs do not include specifics on how points are calculated or how any partial points affect the test.

Plan Features

The Plan Features pillar measures the following four new factors:

- Automatic, single-trigger award vesting on a change in control
- Discretionary vesting authority that may result in "pay for failure" or is otherwise "contrary to a pay-for-performance philosophy"
- Liberal share recycling
- Absence of a minimum one-year vesting period for grants made under the plan

If any of these factors is present, no points for that factor are awarded. If any of these factors is not present, full points for that factor are awarded. The ISS FAQs do not specify the actual number of points that are at stake with respect to a particular factor within this or other pillars.

Additional Considerations

ISS continues to provide guidance on questions that arise under the new EPSC methodology. The March 3, 2015 updates to the EPSC FAQs address three important topics, including how ISS will assess a plan's minimum vesting requirement for EPSC purposes. In new FAQ #22, ISS explains that "[i]n order to receive EPSC points for a minimum vesting requirement, the plan should mandate a vesting period of at least one year which should apply to no less than 95 percent of the shares authorized for grant." This FAQ confirms that ISS will allow a 5% carve-out, although recent ISS commentary indicates that no separate or additional carve-outs will be allowed for director grants, new hire grants, acquisition awards, or other grants and that no partial credit will be provided with respect to this factor. New EPSC FAQ #23 explains that ISS will deem performance-based awards as being subject to automatic, accelerated vesting upon a change in control unless the award is linked to performance attained as of the change-in-control date and/or the award is prorated based on the time elapsed in the performance period as of the change-in-control date. For ISS to determine automatic, single-trigger, accelerated vesting upon a change in control, all awards granted must be considered by ISS to be automatically accelerated. The March 3rd FAQs also address the treatment of plans submitted solely to obtain approval under section 162(m) of the Internal Revenue Code of 1986, as amended.

The EPSC continues to raise a significant number of scoring and interpretative questions that must be considered, such as the following:

- Are there any other exceptions to the one-year vesting period requirement, such as for death, disability, or good reason termination?
- Is monthly vesting permitted before the first anniversary?
- Is the discretionary vesting authority in the plan an absolute analysis, or is some discretion permitted?
- How are points determined for liberal share recycling deficiency?

In sum, although ISS describes the EPSC as allowing a “more nuanced consideration of equity incentive programs,” certain elements of the prior “pass/fail” methodology have been retained. Additionally, the many new factors incorporated into the new methodology have resulted in numerous scoring and interpretive questions, which creates uncertainty about how a plan will fare under the new methodology. ISS continues to address questions regarding the EPSC FAQs and it may issue additional FAQs or interpretations that may or may not be reflected in further published guidance. Companies should carefully monitor or be in contact with ISS for further guidance and updates.

ISS USCP FAQs

On February 9, 2015, ISS issued 104 FAQs that address questions relating to its U.S. Compensation Policies. The USCP FAQs are significantly longer than the November 2014 U.S. Proxy Voting Guideline Updates as well as the EPSC FAQs. These FAQs address several detailed questions, including ones that relate to the following topics:

- How ISS calculates elements of US executive pay, items in the “CEO Tally Sheet” table, and financial data used to calculate “Total Shareholder Return” and company revenue;
- How ISS will evaluate Management Say-on-Pay items, including
  - pay for performance,
  - determining peer companies,
  - identification of pay practices considered “problematic” by ISS, and
  - company reaction to advisory votes on Say-on-Frequency and Golden Parachutes; and
- Equity-related matters, including the cost of equity plans, burn rate, repricing, liberal share recycling, and how ISS will apply the stock option overhang carve-out.

The USCP FAQs refer users to the EPSC FAQs. As noted above, companies should carefully monitor or be in contact with ISS for further guidance and updates.

ISS "Selected Topics" FAQs

On February 19, 2015, ISS issued another set of FAQs on three "Selected Topics." The first relates to how ISS will recommend on proxy access proposals. ISS explains that it now will generally recommend in favor of proxy access proposals, whether from management or shareholders, that have the following provisions:

- Where the maximum ownership threshold is not more than 3% of the voting power
- Where the maximum ownership duration is not more than three years of continuous ownership for each member of the nominating group
- Where there are no limits (minimum or maximum) on the number of shareholders permitted to form a nominating group
- Generally, where the cap on nominees is for 25% of the board

ISS also explains that it will review the reasonableness of any other restrictions on the right of proxy access and generally vote against proposals that have provisions that are more restrictive than those noted above.

The FAQs also address ISS's expectations regarding whether a company includes a shareholder proposal on its ballot or not. After reviewing recent developments in this area that involve the US Securities and Exchange Commission (SEC) and a no-action letter submitted by Whole Foods Market, Inc.,[7] ISS explains that, under its governance failures policy, it will generally recommend a vote against one or more individual directors or the entire board based on specific facts and circumstances, if a company omits a properly submitted shareholder proposal but has not obtained either

- voluntary withdrawal of the proposal by the proponent,
- no-action relief from the SEC (which the SEC is currently no longer providing), or
- a U.S. District Court ruling that the company can exclude the proposal from its ballot.

ISS notes that it will recommend against directors in this situation, regardless of whether there is a board-sponsored proposal that relates to the same topic but where the company has taken unilateral steps to implement the proposal, ISS will consider the degree to which the proposal is implemented in assessing its recommendation.

The third area addressed by the FAQs relates to unilateral bylaw and charter amendments. ISS states in the FAQs that its positions do not indicate a change in policy, but rather address developments in the area, including the increase in unilateral bylaw/charter amendments over the last year. ISS notes that it will continue to recommend a vote against the board where a unilaterally adopted amendment is deemed materially adverse to shareholder rights. ISS identifies materially adverse unilateral amendments as including, but not limited to, the following:

- Authorized capital increases that do not meet ISS's Capital Structure Framework
- Establishment of a classified board with staggered director elections
- Director qualification bylaws that disqualify shareholders' nominees or directors who could receive third-party compensation
- Fee-shifting bylaws that require a suing shareholder to bear all costs of a legal action that is not 100% successful

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7. *See*, e.g., Statement from SEC Chair White, *available at* http://www.sec.gov/news/statement/statement-on-conflicting-proxy-proposals.html.

- Increasing the vote requirement for shareholders to amend charter/bylaws
- Removing a majority vote standard and substituting plurality voting
- Removing or restricting the right of shareholders to call a special meeting (raising thresholds, restricting agenda items)
- Removing or materially restricting a shareholder's right to act in lieu of a meeting via written consent

ISS states that the following unilaterally adopted bylaw amendments will be considered on a case-by-case basis, but generally would be deemed to be not materially adverse:

- Advance notice bylaws that set customary and reasonable deadlines
- Director qualification bylaws that require disclosure of third-party compensation arrangements
- Exclusive venue/forum (when the venue is a company's state of incorporation)

With respect to bylaw and charter changes at pre-IPO companies, ISS states that it will consider the timing as well as the clarity of disclosures of such unilateral amendments and the continuity of board membership in making director voting recommendations.

Glass Lewis Proxy Voting Guidelines Update

Glass Lewis also updated its proxy voting guidelines, effective for meetings on or after January 1, 2015. The updates, like the ISS updates, relate to governance and executive compensation matters. To evaluate equity-based compensation plans, Glass Lewis continues to use a series of analyses for 2015 that it believes are "key to equity value creation."[8] On January 30, 2015, Glass Lewis announced "enhancements"—or updates—to the performance metrics that it uses in its US and Canadian pay for performance models and its US equity plan model. The updates took effect on February 2, 2015.[9]

Tentative FASB Decisions Regarding Share-Based Payment Rules

As issuers of equity compensation know, FASB dramatically changed the financial accounting treatment of equity compensation (especially stock options) by issuing in late 2004 what was originally known as FAS 123R.[10] A summary of the effects of those accounting pronouncements is well beyond the scope of this white paper, however, the pronouncements draw a clear distinction between equity awards, the value of which is generally determined at grant and then spread over a service period, thus resulting in a fixed charge, and liability awards, which must be marked to market and therefore can result in more volatile charges.

Many share-based compensation plans permit employers to withhold shares issued upon an employee's exercise of an option or vesting of a restricted stock award as a means of meeting statutory tax withholding requirements. Although equity awards settled in cash can result in liability classification, ASC 718 includes specific guidance for equity classification of options that permit shares to be withheld by a company to satisfy an employee's minimum tax withholding, provided that

8. View the analyses at http://www.glasslewis.com/issuer/stock-option-model-details/.

9. View the updates at http://www.glasslewis.com/blog/enhancements-pay-performance-equity-plan-models.

10. *See* http://www.fasb.org/summary/stsum123.shtml and http://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1218220124271&acceptedDisclaimer=true, later codified in FASB ASC 718.

- the option holder cannot require the employer to withhold taxes in excess of statutory minimums (federal, state, and local taxes and employment taxes) and
- The employer, as a matter of practice, does not withhold taxes in excess of statutory minimums.

If an award fails to meet both of these criteria, ASC 718 requires the measurement and classification of the entire award as a liability, not just the amount withheld for tax purposes.

On February 4, 2015, the FASB decided to issue a proposed Accounting Standards Update that would recommend a number of simplifications to the accounting for stock-based compensation. Among the proposals is the expansion of the current exception to liability classification when an employer uses a net-settlement feature to withhold shares to meet the minimum statutory withholding requirements. Specifically, the proposal will provide that the partial cash settlement of an equity award for tax withholding purposes will no longer result, by itself, in liability classification of the award, provided that the amount withheld does not exceed the highest applicable marginal tax rate in the applicable jurisdiction. The proposal will provide for a modified retrospective transition method for compliance with the new standard that will require changes to outstanding liability awards at the date of adoption.[11] In addition, the proposal will provide that companies should classify cash paid when withholding shares to meet the minimum statutory withholding requirements as a financing activity on their statement of cash flows. (The FASB's other tentative decisions regarding ASC 718, including the presentation of excess tax benefits on the statement of cash flows, the accounting for income taxes upon settlement of an award, the accounting for forfeitures, and the classification of awards with repurchase features are not addressed in this white paper.)

At its February 4, 2015 meeting, the FASB declined to provide an effective date for the tentative changes, but noted that it would consider including a question about that in the coming exposure draft.

In light of these tentative decisions, companies should examine their existing stock plans to determine if any amendment is appropriate (for example, because the minimum withholding provision is hardwired into many plans) and, if so, whether shareholder approval of the amendment is required under applicable stock exchange rules, which generally require shareholder approval of material changes to equity incentive plans. There are also related practical considerations relevant to this decision: to the extent that an issuer permits share withholding at greater than the minimum rate, the issuer will need to generate additional cash to pay over to the tax authorities. This incremental cash payment obligation may not be a major concern for large, publicly traded issuers but may be an issue for smaller companies.

Given that the Private Company Council decided at its February 13, 2015 meeting to direct the FASB staff to conduct further research on private company alternatives to accounting for share-based payments,[12] there is a possibility that the FASB will make additional changes to the accounting for share-based payments, including changes that affect public companies.

IASB Proposes Revisions to Rules on Statutory Minimum Withholding Rules

In November 2014, the IASB proposed changes to the International Financial Reporting Standards (IFRS) 2, "Share-based Payment," to, among other things, clarify the classification of a share-based payment transaction in

11. Tentative decisions of the FASB, including those discussed here, can be found on the FASB's website at http://www.fasb.org/jsp/FASB/Page/SectionPage&cid=1218220079432. For a summary of the FASB's decisions on February 4, 2015, see http://www.fasb.org/cs/ContentServer?c=FASBContent_C&pagename=FASB%2FFASBContent_C%2FActionAlertPage&cid=1176164779563. The FASB's earlier decisions on December 17, 2014 (which note tentative decisions taken at the October 8, 2014 meeting) can be found at http://www.fasb.org/cs/ContentServer?c=Document_C&pagename=FASB%2FDocument_C%2FDocumentPage&cid=1176164704889.

12. *See* http://www.fasb.org/cs/ContentServer?c=Document_C&pagename=FASB%2FDocument_C%2FDocumentPage&cid=1176164902011.

which an entity withholds a portion of the shares that would otherwise be issued upon vesting of the share-based payment. Under the proposed amendments set out in Exposure Draft ED/2014/5 Classification and Measurement of Share-Based Payment Transactions, cases in which an employer settles the share-based payment net by withholding a specified portion of the equity instruments to meet the statutory withholding requirements would be classified as equity settled in its entirety.[13] This holds true if the entire share-based payment would otherwise be classified as equity settled without the net settlement feature.

Although this proposal would align IFRS 2 with existing US GAAP in this area, ED/2014/5 does not clearly permit share withholding up to the highest marginal tax rate consistent with the expected FASB proposal. Accordingly, issuers that comply with IFRS 2 may want to request that the IASB clarify the final amendments so that they conform to the expected revisions to ASC 718 and allow share withholding at a rate in excess of the minimum statutory rate.

In addition to that proposed change, ED/2014/5 also proposes to clarify the accounting for (i) cash-settled share-based payment transactions that include vesting conditions, such as a performance condition, and (ii) modifications of share-based payment transactions from cash-settled to equity-settled. The IASB has requested comments by March 25, 2015.

FASB Elimination of the Extraordinary Item Concept

In an effort to simplify the process of producing and issuing income statements, the FASB decided in October 2014 to eliminate the requirement that preparers report events that meet the criteria for extraordinary classification separately in the income statements, net of tax and after income from continuing operations. Not only was the classification of an event as extraordinary time-consuming and somewhat complex for preparers, but users advised the FASB that the extraordinary item classification was rare and not very useful. The FASB adopted final standards for this action in January 2015.[14] This concept has relevancy for equity compensation and incentive plans because some plans call for an adjustment of goals in the event of the recognition of an extraordinary item. Although the new standard still requires reporting either separately in the income statement as a part of income from continuing operations or in the notes to the financial statements, events that previously would have met the definition of an extraordinary item, issuers with equity, and compensation plans that included an adjustment provision under the prior FASB standard may want to review their plans to ensure that they continue to work as intended under the new standard.

13. *See* http://www.ifrs.org/Current-Projects/IASB-Projects/IFRS-2-Clarifications-Classification-and-Measurement/ED-November-2014/Documents/ED-Proposed-Amendments-IFRS-2-November-2014.pdf.

14. *See* http://www.fasb.org/jsp/FASB/FASBContent_C/ProjectUpdatePage&cid=1176164211686.

EPSC Factors & Point Allocation System

Factor	Definition	Scoring Basis
SVT: A+B+C Shares	Company's SVT relative to peers—based on new shares requested + shares remaining available + outstanding grants and awards	Scaled depending on company SVT versus ISS's SVT benchmarks
SVT: A+B Shares	Company's SVT relative to peers—based on new shares requested + shares remaining available	Scaled as above
CIC Single Trigger	Automatic vesting of outstanding awards upon a change in control	Yes—no points No—full points
Liberal Share Recycling: FV	Certain shares not issued (or tendered to the company) related to full-value share vesting may be regranted	Yes—no points No—full points
Liberal Share Recycling: Options	Certain shares not issued (or tendered to the company) related to option or SAR exercises or tax withholding obligations may be regranted; or, only shares ultimately issued pursuant to grants of SARs count against the plan's share reserve, rather than the SARs originally granted	Yes—no points No—full points
Minimum Vesting Requirement	Does the plan stipulate a minimum vesting period of at least one year for at least one award type?	No or vesting period < 1 year—no points Vesting period =/> 1 year—full points
Full Discretion to Accelerate (non-CIC)	May the plan administrator accelerate vesting of an award (unrelated to a CIC, death, or disability)?	Yes—no points No—full points
Three-Year Average Burn Rate	Company's three-year average burn rate (as a percentage of common shares outstanding) relative to industry and index peers	Scaled depending on company's burn rate versus ISS benchmarks
Estimated Plan Duration	Estimated time that the proposed share reserve (new shares plus existing reserve) will last, based on company's three-year average burn-rate activity	Duration =/< 5 years—full points Duration >5 </= 6 years—½ of full points Duration > 6 years—no points
CEO's Grant Vesting Period	Period required for full vesting of the most recent equity awards (stock options, restricted shares, performance shares) received by the CEO within the prior three years	Vesting Period > 4 years—full points; Vesting Period =/> 3 years </= 4 (or no award in prior 3 years)—½ of full points; Vesting Period < 3 years—no points
CEO's Proportion of Performance-Conditioned Awards	Proportion of the CEO's most recent fiscal year equity awards (with a three-year look back) that is conditioned on achievement of a disclosed goal	50% or more—full points; 33% < 50%—½ of full points; < 33%—no point

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