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ISS Issues Final Voting Policies for 2021 Proxy Season

ISS has issued its final voting policies for the upcoming 2021 proxy season. We highlight in this memorandum the principal changes in voting policies for U.S. issuers.

While there are a few important changes to its U.S. voting policies, ISS's most significant move this season may not be these updates, but rather the termination of its longstanding practice of providing draft proxy voting reports to S&P 500 companies, starting with meetings on or after January 1, 2021. In a letter announcing this change, ISS cited multiple reasons for this decision, including that its clients do not support the draft review process and that companies, instead of merely reviewing the drafts for factual accuracy as originally intended, have been using the early access to lobby for revisions. Under the SEC's proxy advisory rules adopted earlier this year (for our client alert, click [here](#)), ISS is not required to provide companies with draft reports.

Highlighted U.S. Voting Policy Changes

- ***New policy on board racial and ethnic diversity.*** Starting in the 2022 proxy season, ISS will recommend against the nominating committee chair (and possibly other directors) at any Russell 3000 or S&P 1500 board with no apparent racial or ethnic diversity, unless there was diversity at the previous annual meeting and the board makes a firm commitment to appoint at least one racially or ethnically diverse director within a year. For the 2021 proxy season, ISS will highlight in its voting reports any such lack of diversity to "help investors identify companies with which to engage," but will not make any voting recommendations based on this factor.
- ***New policy to support federal forum provisions that specify U.S. district courts generally as the exclusive forum for federal securities law litigation.*** Adoption of a federal forum provision that specifies a particular district court will, however, result in a negative vote recommendation against directors.
- ***New policy to support provisions that specify courts located in Delaware as the exclusive forum for corporate law matters for Delaware companies,*** so long as there are no serious concerns about corporate governance or board responsiveness to shareholders. Provisions for other states will be considered on a case-by-case basis under specified factors. The policy also clarifies that ISS will recommend against provisions that specify a state other than a company's state of incorporation or that specify a particular local court as the exclusive forum for corporate law matters, and further, that adoption of such a provision would result in negative recommendations against directors.

- **Explicit policy to consider as non-independent any director with pay comparable to named executive officers.** While ISS currently has a policy that may, in some cases, classify a director receiving such pay as having a material relationship with the company and therefore non-independent, this is now explicit. ISS also limited its “executive director” classification (by moving employees of a company to another category) to assist investors that have executive director overboarding policies to better assess those positions. Other changes generally rearrange and consolidate its independence conditions, but are not expected to impact any vote recommendations.

Additional U.S. Voting Policy Changes

ISS also made the following updates:

- **ESG risk oversight.** ISS added “demonstrably poor” risk oversight of environmental and social issues (including climate change) to the list of examples of material failures for which ISS may issue, in extraordinary circumstances, a recommendation against directors.
- **Virtual meetings.** ISS added a policy to recommend for management proposals allowing virtual shareholder meetings so long as they do not preclude physical meetings. ISS encourages companies to disclose the circumstances under which virtual meetings would be held and to allow for rights and opportunities that are comparable to those available at physical meetings. ISS will consider shareholder proposals on virtual meetings case-by-case.
- **Deadhand or slowhand poison pills.** ISS clarified that if a board adopts a poison pill with a deadhand or slowhand provision, even if the pill has a term of less than one year or expires before the next annual meeting, ISS will recommend against all nominees (except for new nominees, who will be considered on a case-by-case basis). ISS noted that deadhand and slowhand pills saw a renaissance during the market volatility caused by COVID-19.
- **Advance notice bylaws.** ISS revised its policy on advance notice proposals to clarify that a 90-120 day window before the anniversary of the prior year’s meeting is reasonable (previously the window was 60-90 days before).
- **Board gender diversity.** ISS clarified that, after a transition year, the only exception to its board gender diversity policy (under which Russell 3000 and S&P 1500 companies must have at least one woman on the board or face a negative recommendation against the nominating committee chair and possibly other directors) is if there was a woman on the board in the prior year and the board commits to add a woman within a year.
- **Director term/tenure limits and mandatory retirement ages.** ISS revised the policy on director term/tenure limits to recommend case-by-case on management and shareholder proposals

based on factors specific to the two contexts. Previously, ISS had a policy to vote against management proposals to limit tenure of outside directors. ISS also added a new policy that it will recommend for proposals to remove mandatory age limits.

- **Reports on pay data, mandatory arbitration and sexual harassment policies.** ISS added new policies to the effect that it will consider on a case-by-case basis shareholder proposals requesting reports on a company's use of mandatory arbitration on employment-related claims or actions taken to strengthen policies and oversight to prevent sexual harassment or on risks if a company fails to prevent such harassment.

The new voting policies apply to shareholder meetings held after February 1, 2021. Glass Lewis has not yet issued its revised voting policies, but they typically will follow shortly. For ISS's policy updates, click [here](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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