

FRONTLINE ADVISORS

Client Update

Proposed ISS Benchmark Policy Changes for 2021

October 14, 2020

Today, Institutional Shareholder Services Inc. ("ISS") announced the launch of its 2021 Benchmark Voting Policy comment period. ISS is soliciting input from market participants on [proposed benchmark policy changes](#), effective for shareholder meetings taking place on or after February 1, 2021. The comment period will remain open until 5:00 PM ET on October 26, 2020, and ISS anticipates releasing its final benchmark policies in the first half of November, in line with previous years.

For the North American markets, ISS proposes the changes below covering board diversity, environmental and social risk oversight, and shareholder litigation rights. While ISS has not explicitly outlined policy changes surrounding its evaluation of executive compensation, we anticipate that ISS will take a nuanced and company specific case-by-case approach to certain executive compensation related matters related COVID-19 for the 2021 proxy season and beyond.

- **Board Diversity, Race and Ethnicity (U.S.):** Effective February 1, 2021, ISS will highlight the lack of apparent racial and/or ethnic diversity for constituents within the Russell 3000 or S&P 1500. Effective February 1, 2022, ISS will generally recommend that shareholders withhold votes from the chair of the nominating committee where the board has no apparent racial or ethnically diverse members. ISS notes that the presence of a racial and/or ethnic minority director at the preceding AGM and a firm commitment to appoint at least one racial and/or ethnic diverse member shall be considered mitigating factors. Based on past experience, we believe that a similar ethnic diversity policy will likely also be introduced in the Canadian market within two years of it being effective in the U.S.
- **Board Diversity, Gender (Canada):** Effective February 1, 2022, ISS proposes to raise the target requirements for board gender diversity to 30% for S&P/TSX Composite Index constituents. Where a constituent with less than 30% women on board has not disclosed a formal written gender diversity policy or the policy does not include a commitment to achieve at least 30% women on the board over a reasonable timeframe, ISS will generally recommend that shareholders withhold votes from the chair of the nominating committee.
- **Material Environmental & Social Risk Oversight (U.S., and Canada):** ISS has made it very clear that demonstratable poor risk oversight of environmental and social issues including climate change may be considered a material governance failure, which may impact director elections. While the policy itself is broad and relatively vague, ISS states that it anticipates that this policy will impact a small number of directors annually.

KEY CONTACTS

This update has been prepared by the expert advisors at FrontLine.

The FrontLine team is comprised of governance experts who have built their practice advising public company issuers and shareholders in all governance matters. Should you have any questions or wish to discuss our advisory capabilities, please contact us.

Victor Guo, CFA
President
E: vguo@frontlineadvisors.ca
T: +1.416.721.9070

Jackie Cheung
Senior Vice President, Governance
E: jcheung@frontlineadvisors.ca
T: +1.647.271.6111

For proxy solicitation needs, please contact the expert advisors at our sister company Gryphon Advisors.

Dexter John, LLB, ICD.D
President & CEO
E: djohn@gryphonadvisors.ca
T: +1.416.602.0050

Mike McLeod
Senior Vice President
E: mmcleod@gryphonadvisors.ca
T: +1.403.830.2070

- **Shareholder Litigation Rights (U.S., and Canada):** In the U.S., ISS has further modified its forum selection policies to support charter/by-laws that specify the “U.S. district courts” as an exclusive forum as it pertains to federal securities law matters. However, ISS will vote against provisions that restrict the forum to a particular federal district court. With regards to state law matters, ISS will generally support charter/by-laws that specify Delaware/Delaware Court of Chancery as an exclusive forum for corporate law matters for Delaware corporations. ISS will take a case-by-case basis for states other than Delaware, and vote against provisions that specify a state other than a state of incorporation, or specify a local court within a state as the exclusive forum for corporate law matters. In Canada, ISS has codified its case-by-case approach to evaluating exclusive forum provision adoptions, which take into account a wide range of factors, including whether there is evidence of past harm (to shareholder value) as a result of shareholder legal action against the company originating outside of the jurisdiction of incorporation. Despite the stated case-by-case approach, we anticipate that except in extremely rare company specific circumstances, ISS will likely not support forum selection by-laws put forth for shareholder approval in the Canadian markets. However, companies that have adopted forum selection provisions within their charter/bylaws at inception or prior to the company being public and do not intend to put their charters/by-laws up for shareholder approval will likely not face any ISS scrutiny unless additional shareholder approval is sought.

Interested to know what influence ISS has on your shareholder base and what these proposed changes mean for you?

Contact our experts today to find out. Issuers and clients who wish to discuss the above-mentioned changes can also contact our expert team directly to explore ways in which we can help you prepare for your next AGM.

About FrontLine Advisors

FrontLine Advisors is a full-service corporate governance and special situations consultancy focusing on complex shareholder matters. We devise proprietary governance strategies and work alongside other advisors to secure favourable outcomes on contentious shareholder meetings and M&A transactions. FrontLine also advises companies before and after their initial public offerings on governance structure design, and provides investment monitoring and due diligence support to family offices and private equity investors.