

October 8, 2019

Corporate Governance Update – Launch of 2020 ISS Comment Period

Comment Period for the ISS Benchmark Policy Open Until October 18

SUMMARY

On October 7, Institutional Shareholder Services Inc. announced that the comment period for its 2020 benchmark voting policy is open until 5:00 PM ET on October 18, 2019. For U.S. companies, ISS is soliciting comments on proposed changes relating to problematic governance and capital structures of newly public companies, independent board chair shareholder proposals and share repurchase program proposals. ISS is not soliciting comments in the U.S. for board gender diversity, mitigating factors for companies with zero women on boards, director overboarding or climate change risk oversight, all of which were included in ISS's annual policy survey earlier this year.

2020 ISS BENCHMARK POLICY

As it does each year, ISS is soliciting comments from asset owners, asset managers, companies and other market players prior to the release of its annual Benchmark Policy.¹ The 2020 Benchmark Policy is expected to be released in the first half of November and will apply to shareholder meetings held on or after February 1, 2019.

A. PROBLEMATIC GOVERNANCE AND CAPITAL STRUCTURES OF NEWLY PUBLIC COMPANIES

ISS is proposing to update its policy on problematic governance structures for newly listed entities (companies that emerge from bankruptcy, spin-offs, direct listings, and those who complete a traditional initial public offering). The proposed update would create two distinct policies: one that addresses problematic governance provisions and one that addresses multi-class capital structures with unequal voting rights. With respect to problematic governance provisions, ISS will continue to consider supermajority vote requirements, a classified board structure and other egregious provisions in determining whether a

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newly listed entity's bylaw or charter provisions are materially adverse to shareholders; a reasonable subset provision becomes a potential mitigating factor. With respect to multi-class capital structures with unequal voting rights, ISS will generally recommend against the board unless the multi-class capital structure is subject to a reasonable time-based sunset period (taking into account the company's lifespan, post-IPO ownership structure and disclosed rationale) not to exceed seven years from the date of the IPO.

B. INDEPENDENT BOARD CHAIR SHAREHOLDER PROPOSALS

ISS is also proposing to update its policy on shareholder proposals requiring an independent board chair. The proposed update largely codifies the existing case-by-case approach to these proposals but now explicitly identifies factors that will be given substantial weight in favor of ISS recommending "for" such proposals. The factors are: (1) a weak or poorly defined lead independent director role that fails to serve as an appropriate counterbalance to a combined CEO/chair role; (2) the presence of an executive or non-independent chair in addition to the CEO, a recent recombination of the CEO/chair role and/or departure from a structure with an independent chair; (3) evidence that the board has failed to oversee and address material risks facing the company; (4) a material governance failure; and (5) evidence that the board has failed to intervene when management's interests are contrary to those of shareholders. ISS notes that the impact of this proposed update on its vote recommendations is indeterminate at this time.

C. SHARE REPURCHASE PROGRAM PROPOSALS

Finally, ISS is proposing to update its policy on share repurchase programs to codify its existing approach, particularly with respect to the rare cases in which an "against" recommendation may be warranted. Under the proposed policy, ISS would recommend "for" share repurchase proposals in the absence of company-specific concerns regarding greenmail, manipulation of incentive compensation, threats of long-term viability or other company-specific factors. ISS intends for this policy to apply to U.S. domestic issues listed solely in the U.S., regardless of their country of incorporation.

D. NON-U.S. VOTING POLICY PROPOSALS FOR COMMENT

ISS is also requesting feedback for nine other voting policy areas: (1) indemnification proposals in the Americas region and Brazil; (2) director terms, board gender diversity, remuneration committee responsiveness and the use of discretion by remuneration committees in Europe; (3) board gender diversity and the use of discretion by remuneration committees in the United Kingdom and Ireland; (4) board independence in the Middle East and Africa (excluding South Africa) and Turkey; (5) director disclosure and cumulative voting in the United Arab Emirates, Saudi Arabia, Egypt, Jordan and Qatar; (6) board independence in Japan; (7) board gender diversity in India; (8) director accountability for governance failures in South Korea; (8) share repurchase pricing limit proposals in Singapore; and (9) article amendment proposals in Taiwan.

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The announcement of the comment period comes less than a month after ISS released the results of the first half of its Annual Policy Survey.² In that survey, over 85 percent of investors indicated that poor responsiveness to shareholder concerns would most strongly suggest the need for an independent board chair, and 55 percent of investors considered a maximum seven-year sunset provision for a multi-class capital structure to be appropriate.

The comment period for the 2020 benchmark voting policy will be open until 5:00 PM ET on October 18, 2019.

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ENDNOTES

- ¹ The 2019 ISS Benchmark Policy website can be found at <https://www.issgovernance.com/policy-gateway/2019-benchmark-policy-consultation/>.
- ² The 2019 Global Policy Survey Summary of Results can be found at <https://www.issgovernance.com/file/policy/2019-2020-iss-policy-survey-results-report.pdf>.

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