

ISS Releases Draft 2022 Benchmark Policy Updates, Seeks Comments by November 16, 2021

November 11, 2021

Background

On November 4, 2021, Institutional Shareholder Services (ISS) released proposed updates to its US benchmark voting policies for 2022, with a public comment period running through November 16, 2021. The draft policy updates are part of an annual process where ISS solicits feedback on certain policies from institutional investors and other constituents during an open comment period before finalizing its annual policy updates.

Many of the topics covered by the proposed policy changes were included in ISS's 2021 Benchmark Policy Survey (Benchmark Survey) and 2021 Climate Policy Survey (Climate Survey), which [we summarized in a previous alert](#). The draft policy changes that are relevant to US-listed companies relate to board gender diversity, multiclass capital structures, climate oversight, and management and shareholder "say-on-climate" proposals.

Comments on the draft policy updates can be sent to ISS at policy@issgovernance.com and should include your name and organization.

Board gender diversity

Currently, ISS's policy is to recommend voting against or withholding a vote for the reelection of the chair of the nominating committee, or other directors on a case-by-case basis, at US-listed companies with no women serving on the board of directors. Since its inception, this policy has applied specifically to companies in the Russell 3000 and S&P 1500 indices. However, ISS is now proposing to expand coverage of this policy, effective for meetings on or after February 1, 2023, to **all** companies subject to its US policies. ISS notes that this proposed change is the result of the "strong preference" for the expansion of the policy demonstrated by institutional investors during roundtable discussions held in 2021, as well as continued engagement and "increased minimum expectations" from the broader market on this topic.

ISS specifically wants to hear from commenters whether any exemptions to this proposal should apply – for example, whether it would make sense to exempt boards with fewer than a specified minimum number of directors. The equivalent Canadian policy exempts boards with four or fewer directors.

Unequal voting rights

Coverage of ISS's policies relating to, and views on, multiclass capital structures occupies significant real estate in the 2021 benchmark policy update summary. In 2015, ISS implemented a policy recommending ongoing votes against directors of newly public companies with governing documents that provided for adverse governance provisions, such as classified boards, supermajority vote requirements to amend governing documents and unequal voting rights. However, ISS has recognized that

some of these provisions could be protective for newly public companies in the first few years after going public, so the presence of a “reasonable” sunset (no more than seven years) for those structures would allow a company with one or more of these provisions to avoid an adverse director recommendation.

ISS noted that many companies continue to go public with adverse governance provisions, and there is a growing schism between recently public companies that are impacted by the policy and long-standing, more mature public companies to which the policy does not apply due to grandfathering. In its Benchmark Survey, ISS asked whether ISS should recommend against directors at companies who still maintain those poor governance provisions years down the road after going public. As we noted in our previous alert, 94% of investors surveyed responded that ISS should consider issuing adverse recommendations for all companies maintaining these provisions, regardless of when they went public.

Multiclass capital structures with unequal voting rights were considered the worst of the adverse governance provisions, with 92% of investors responding that mature public companies with these structures should **not** be exempted from the application of the policy. Accordingly, ISS is now proposing, starting in 2023, to eliminate the grandfathering of companies with multiclass capital structures. ISS will instead recommend against directors at **all** companies with governance structures that provide their shareholders with unequal voting rights, whether newly public (unless the provision will sunset no more than seven years from the date of the initial public offering) or mature. Among the specific questions for which ISS would like feedback is which specific directors should be targeted for adverse recommendations at companies with unequal voting rights – either those who serve on the governance committee, or directors who are “identifiable beneficiaries” of the multiclass voting structure.

Notably, ISS is not yet proposing to eliminate the grandfathering of companies with the other adverse governance provisions, specifically classified boards and supermajority vote requirements to amend governing documents.

Board accountability on climate

Another major proposed change for 2022 is the addition of a new policy that would seek to hold boards accountable for climate change risks. ISS will generally recommend that investors vote against or withhold from responsible incumbent directors, committees, or full boards of significant greenhouse gas (GHG) emitting companies – for 2022, companies on the Climate Action 100+ focus list – that do not take certain minimum steps necessary to understand, assess, and mitigate climate-change risks to the company and the broader economy.

The “minimum steps” for 2022 under the proposed policy are outlined below.

- **Detailed disclosure of climate-related risks**

ISS cites as an example the framework established by the Task Force on Climate-Related Financial Disclosures (TCFD), which includes board governance measures, corporate strategy, risk management analyses, and metrics and targets.

- **Appropriate, well-defined and quantitative GHG emissions reductions targets**

Targets for Scope 3 emissions related to a company’s products and supply chain will not be required for 2022, but the proposed policy states that the targets should cover “at least a significant portion” of the company’s direct emissions.

ISS states that what it views as the “minimum steps” for compliance with this policy will become more stringent over time.

The addition of this policy is not surprising, given the results of the Climate Survey, where strong majority of investor respondents (more than 85%) supported “clear and detailed disclosure as a minimum criterion for companies strongly contributing to climate change.”

'Say-on-climate' proposals

Finally, ISS has added draft policies on climate-related management and shareholder proposals.

ISS will recommend a case-by-case vote on management proposals that seek approval of a company's climate transition plan, taking into account the scope and rigor of the plan. ISS will consider a broad range of information when evaluating these proposals, including:

- The extent to which a company's disclosures on climate-related issues are in line with TCFD recommendations and other relevant market standards.
- How complete and rigorous a company's short-, medium- and long-term targets are for reducing operational and supply chain GHG emissions.
- Whether a third-party has evaluated and determined that the company's targets are science-based.
- The company's demonstrated commitment to climate issues, related disclosures and performance as compared to its industry peers.

This framework is a codification of the list of considerations that ISS has developed over the past year for analyzing these plans, and incorporates feedback received through the Climate Survey.

In addition, ISS will recommend a case-by-case vote on shareholder proposals that request the company to disclose its GHG emissions levels and reduction targets, and/or its upcoming climate transition action plan, and provide shareholders with the opportunity to regularly express approval or disapproval of its GHG emissions reduction plan. The relevant factors considered in making a recommendation will include:

- The completeness and rigor of the company's climate-related disclosure.
- The company's actual GHG emissions.
- Whether the company has been the subject of recent and significant fines, litigation, or controversy related to its GHG emissions.
- Whether the proposal's request is unduly burdensome in scope or timeframe, or is overly prescriptive.

In assessing a company's climate transition action plan, ISS is requesting feedback on whether any criteria should be given more weight than others.

Questions?

If you have any questions about this alert or any ISS policy guidelines, please contact one of the Cooley attorneys listed here. We will continue to keep you apprised of relevant developments.

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