



ISS

2021 Policy Updates

U.S.

ISS U.S. 2021 Policy Updates

On November 12, 2020, Institutional Shareholder Services (ISS) published updates to its U.S. benchmark proxy voting policies. These new policies are applicable to all meetings held on or after February 1, 2021. The key policy updates relate to racial/ethnic board diversity and exclusive forum proposals.

The 2021 Americas Proxy Voting Guidelines Updates, which summarize the changes being made as well as the rationale therefor, are available now on the ISS Policy Gateway¹. ISS's complete 2021 policy voting guidelines, which will incorporate these updates, will likely be available from ISS in January 2021.

BOARD COMPOSITION - RACIAL/ETHNIC DIVERSITY

ISS is adopting a new policy to generally vote against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis) at companies apparently lacking at least one racially or ethnically diverse director on the company's board. The policy allows for a one-year grace period, becoming effective for meetings on or after Feb. 1, 2022, and will be applicable for companies in the Russell 3000 and the S&P 1500 indices at that time.

ISS will excuse the absence of racial/ethnic diversity only in the following exceptional circumstances:

- The company has made a firm commitment by the company to include at least one racial and/or ethnic diverse member director within one year (before the next year's annual meeting)
- The company board had at least one racial and/or ethnic diverse member director at the immediately preceding annual meeting.

For 2021, while ISS will not take action against directors, it will in its benchmark research report highlight boards of the companies in Russell 3000 and the S&P 1500 indices that lack racial and ethnic diversity.

In adopting this policy, ISS noted that while adding racially and ethnically diverse directors to the board is often indicated as a priority by nominating and governance committee members, the efforts to recruit minorities have been slow and even declining. According to ISS, close to 200 companies in the S&P 500 index have no Black director.

SHAREHOLDER LITIGATION RIGHTS - EXCLUSIVE FORUM PROPOSALS

ISS has updated its exclusive forum provision policy by bifurcating it for federal and state law matters. For federal securities law matters, unless there are serious governance concerns, ISS will support the charter or bylaw provision adopting "the district courts of the United States" as the exclusive forum. Restricting the forum to a particular federal district court, however, will be considered as one-time failure under its Unilateral Bylaw/Charter Amendments policy causing ISS to generally recommend against directors.

For state law matters, ISS will support charter or bylaw provisions that specify courts located within the state of Delaware as the exclusive forum for Delaware corporations, unless there are serious governance concerns. For exclusive forum provisions that specify states other than Delaware, ISS will take a case-by-case approach taking into consideration the stated rationale, disclosure of past harm from duplicative lawsuits, the scope of the provision and governance features. ISS will vote against provisions that specify a state other than the state of incorporation as the exclusive forum, or that specify a particular local court within the state. ISS will also consider adoption of such provisions as one-time failure under its Unilateral Bylaw/Charter Amendments policy.

¹) <https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf>

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GOVERNANCE FAILURES: MATERIAL ENVIRONMENTAL & SOCIAL RISK OVERSIGHT FAILURES

Under its policy on board accountability, ISS has added explicit reference to poor risk oversight of environmental and social issues amongst the examples of material failure that may result in adverse vote recommendations for directors individually, committee members, or the entire board.

ADVANCE NOTICE REQUIREMENTS

Conforming to the market practices, ISS will now support proposals that provide for shareholder notice of action 120 days prior to the meeting, allowing for at least a 30-day submittal period. Previously, ISS required nomination deadline to begin no earlier than 60 days prior to the meeting.

BOARD REFRESHMENT (AGE/TERM LIMITS)

To promote board diversity through board refreshment, ISS is changing its policy on management and shareholder proposals for term limits from generally against to a case-by-case approach. Recognizing that term limits can be problematic if poorly designed, ISS will consider the rationale, the length of the term limit and the ability to waive the limit in a discriminatory manner among other factors in evaluating management proposals. For shareholder proposals, ISS will look for evidence of problematic issues at the company combined with a lack of board refreshment. Although more commonly used by companies, ISS will continue to recommend against director age limits due to their arbitrary and discriminatory nature and potential for abuse.

BOARD ACCOUNTABILITY - POISON PILLS

Due to the adoption, by some companies, of short-term pills with deadhand or slowhand features during the COVID-19 pandemic, ISS has updated its poison pill policy to recommend withhold/against directors if such a feature is included in the poison pill. A deadhand or slowhand feature curtails the ability of the new directors elected in a proxy fight to redeem the pill and hence its inclusion is considered a material governance failure by ISS.

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BOARD INDEPENDENCE - CLASSIFICATION OF DIRECTORS

In its classification of directors, ISS will limit “Executive Director” classification to officers only, not other employees. This change will have no impact on ISS’ vote recommendations but would allow for a more accurate assessment of executive directors on a board.

GENDER DIVERSITY

Under its gender diversity policy that became effective in 2020, ISS is removing the language that allowed for the absence of female director during the transition year as a mitigating factor. Effective February 2021, ISS will make an exception only in cases where there was a woman on the board at the preceding annual meeting and the board makes a firm commitment to add a female director within a year.

GENDER, RACE/ETHNICITY PAY GAPS

For shareholder proposals requesting a report on a company’s pay data or policies and goals relating to gender or, race/, or ethnicity, ISS is adding a factor to account for local laws regarding categorization of race and/or ethnicity and definitions of ethnic and/or racial minorities. ISS is updating its policy as some legal jurisdictions do not categorize employees by race and/or ethnicity and the definitions of ethnic and/or racial minorities also differ from country to country. ISS has also clarified how it considers relative disclosure by indicating that it takes into account a company’s “disclosure regarding gender, race, or ethnicity pay gap policies or initiatives compared to its industry peers”.

VIRTUAL SHAREHOLDER MEETINGS

In light of the widespread use of virtual meetings due to Covid-19 pandemic, ISS is adopting a new policy to generally support management proposals that allow for the virtual shareholder meetings as long as they do not preclude in-person meetings. If a company restricts the meeting to virtual-only, it should disclose the circumstances necessitating the restriction of physical meeting and should provide the same rights for shareholder participation as it would at an in-person meeting. For its vote recommendation on shareholder proposals relating to virtual meetings, ISS would consider the scope and rationale of the proposal and whether any concerns exist with the company’s previous meeting practices.

MANDATORY ARBITRATION

ISS has adopted a new policy for shareholder proposals requesting a report on a company’s use of mandatory arbitration on employment-related claims. In its case-by-case evaluation, ISS will consider a company’s current policies and practices relating to mandatory arbitration agreements, any controversies, litigation or regulatory action involving the company, and the disclosure of company’s policies and practices relative to peers on the issue.

SEXUAL HARASSMENT

ISS has adopted a new policy for shareholder proposals requesting a report on actions taken by a company to prevent sexual harassment or a report on risks posed by a company’s failure to prevent sexual harassment. In its case-by-case policy, ISS will consider a company’s current policies and practices to prevent sexual harassment, any controversies, litigation or regulatory actions faced by the company, and company’s disclosure regarding workplace sexual harassment policies or initiatives compared to its industry peers.

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CLOSED END FUNDS - UNILATERAL OPT-IN TO CONTROL SHARE ACQUISITION STATUTES

ISS has adopted a new policy for Closed End Funds (CEFs) to address the issue of voting rights for an investor that has acquired a large percentage of outstanding share of a fund that has opted-in to a Control Share Acquisition statute. ISS will recommend a vote against or withhold from nominating/governance committee members (or other directors on a case-by-case basis) at CEFs that have not provided a compelling rationale for opting-in, nor submitted a by-law amendment to a shareholder vote.

PEER GROUP SUBMISSION PERIOD

ISS has also opened the peer group submission for companies with annual meetings between February 1, 2021, and September 15, 2021. Companies have from November 16th to December 4th to submit changes to their self-selected pay-setting peer group through ISS's Governance Analytics platform. ISS considers companies' self-selected peer groups as an important input as part of its own peer group construction methodology. Companies that have made no changes to their previous proxy-disclosed executive compensation benchmarking peers, or companies that do not wish to provide this information in advance, do not need to participate.

For European Policy Updates visit:
georgeson.com/uk/iss-2021-policy-updates

If you have questions or comments, please email info@georgeson.com or call 212 440 9800.