

Corporate Securities Law

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ISS Proposes to Up the Ante on Gender Diversity and Overboarded Directors

Institutional Shareholder Services Inc. (ISS) recently published its [2018 Benchmark Policy Consultation](#) regarding new and proposed changes to its voting policies, which include important new policies for Toronto Stock Exchange (TSX)-listed companies related to overboarded directors and board gender diversity. If implemented, these new policies could require a number of TSX-listed companies to re-examine their board composition if they wish to avoid attracting withhold vote recommendations and potentially triggering majority voting policies.

Background

Each year, to ensure that its benchmark voting policies take into consideration many perspectives, ISS gathers input from institutional investors, issuers, asset managers and owners and other market constituents. Following the release of ISS' 2017-2018 [Global Policy Survey Summary of Results](#), ISS announced it is considering and seeking feedback on 13 new and changed voting policies, two of which apply in Canada to TSX-listed companies:

- a new policy that encourages greater gender diversity at the board level, and
- a further tightening of ISS's policy regarding so-called "overboarded" directors.

New Board Gender Diversity Policy

Diversity (gender diversity in particular) has become an issue of increasing focus. ISS observed that "Canadian institutional investors have begun to voice their frustration with the slow movement on boardroom gender diversity" and "the regulators have reviewed results [of an approach based on disclosure of company diversity policies] and expressed disappointment over

the slow market response to increasing gender diversity on boards". According to Canadian Securities Administrators Multilateral Staff Notice 58-309 – *Staff Review of Women on Boards and in Executive Officer Positions – Compliance with NI 58-101 Disclosure of Corporate Governance Practices*, in 2017, women occupied only 14% of board seats among TSX-listed companies, an increase of only 3% since 2015. The report also indicates that the representation of women on boards of the 35% of TSX-listed companies that had adopted a written gender diversity policy as of 2017 was nearly double the representation of women on boards of companies that had not adopted such a policy.

Under its proposed new policy, ISS generally would recommend voting "withhold" for the Chair of the nominating (or similar) committee, or the Chair of the board if no such committee has been established, if the company (i) has not adopted a written gender diversity policy, and (ii) has no female directors (i.e., the "withhold" recommendation would be subject to a "double-trigger"). ISS indicated it will examine the substance and rigour of companies' gender diversity policies including whether the policies include measurable goals or targets to increase diversity within a reasonable period of time. ISS also indicated that, in making its recommendations, it may also consider a board's approach to gender diversity in executive officer positions.

The proposed policy would not apply to companies with four or fewer directors or to companies that have become publicly listed or have graduated from the TSX Venture Exchange within the current or prior fiscal year.

In addition to seeking comment on additional issues that should be considered when evaluating a company's formal gender diversity policy, ISS is seeking feedback on whether the policy should apply to all TSX-listed companies and, if so, whether a one-year transition period for TSX non-Composite Index companies is appropriate.

Goodman's Update

This ISS initiative could result in gender diversity becoming an even more substantive consideration in the upcoming proxy season, and the quality of an issuer's gender diversity policy (and associated disclosure) likely will be increasingly relevant, particularly for issuers with no female directors.

Revised Overboarded Director Policy

ISS currently has a policy to generally recommend a "withhold" vote in respect of a proposed director (other than the CEO) who (i) serves on more than four public company boards, and (ii) failed to attend at least 75% of the director's board (and committee, if applicable) meetings within the past year without valid reasons (i.e., it is currently a "double-trigger"). In the case of a CEO of a public company, the first trigger would be pulled if the CEO serves on more than one outside board.

ISS is proposing to change its policy to a single-trigger by eliminating consideration of attendance at meetings as a factor in determining its voting recommendations. Serving as a director of more than four public company boards (one outside board in the case of a CEO of a public company) presumptively would result in a nominee being "overboarded" and incapable of effectively discharging his or her duties as a director.

ISS' data suggests application of the revised policy between August 1, 2016 and July 31, 2017 would have resulted in 315 director nominees of TSX-listed companies, representing 5.7% of total director nominees, being subject to a "withhold" recommendation. Given the number of additional director nominees that would be subject to a "withhold" recommendation under the proposed policy (relative to ISS' current policy), ISS is proposing a one-year transition period to allow companies to address any existing overboarding situations, such that the proposed policy would become effective in February 2019.

ISS' proposed change would more closely align its policy with Glass Lewis' single-trigger guideline for overboarded directors. Under its guidelines, Glass Lewis generally recommends withholding votes from director

nominees who serve on more than five boards or executive directors who serve on more than two public company boards. At the same time, Glass Lewis will also consider mitigating factors (such as the size and location of the other companies on which the director serves, tenure and attendance at all companies) before making its recommendation, so it is more flexible than the ISS policy as it is proposed to be amended.

While accepting any comments on the policy, ISS is specifically seeking feedback on (i) how to count directorships on boards of a company and its subsidiaries (whether CEO directors should be exempted in the context of such directorships) and (ii) whether the one-year transition period is appropriate.

The comment period ends on November 9, 2017 for both policy initiatives. ISS anticipates that the final benchmark voting guidelines will be released in the second half of November.

Please contact any member of our Corporate Securities Group to discuss these developments.