

# Goodmans<sup>LLP</sup> Update

## Glass Lewis and ISS Release 2021 Canadian Proxy Voting Guidelines

Proxy advisors Institutional Shareholder Services (ISS) and Glass, Lewis & Co. (Glass Lewis) recently released their updated [Proxy Voting Guidelines](#) and [2021 Canadian Guidelines to Proxy Advice](#), which generally apply to shareholder meetings in 2021. The updates address a number of issues that are at the forefront of the Canadian corporate governance landscape, including board diversity and composition, exclusive forum provisions, and environmental and social risk oversight.

### Board Diversity

In line with increasing pressure from a broad range of market participants to continue to enhance diversity in board and executive officer positions, both Glass Lewis and ISS are strengthening their policies on board gender diversity.

#### *Glass Lewis*

In 2021, Glass Lewis will note as a concern boards consisting of less than two female directors. Beginning in 2022, Glass Lewis will recommend against the nominating committee chair when a board has fewer than two female directors (for boards with six or fewer members, only one female director will be required). Glass Lewis may refrain from making a negative voting recommendation if the company has disclosed a sufficient rationale or plan to address the lack of diversity on the board.

#### *ISS*

Beginning in 2022, ISS will recommend against the chair of the nominating committee (or directors responsible for board nominations) where females comprise less than 30% of the board and the issuer has not disclosed a formal written gender diversity policy that includes a commitment to achieve at least 30% female representation on the board over a reasonable timeframe.

This is a significant escalation from ISS' existing policy – which will remain in effect for the 2021 proxy season – of only recommending against the chair of the nominating committee (or directors responsible for nominations) if an issuer has no women on its board and has not disclosed a formal written gender diversity policy.

These policies do not apply to widely-held companies that are not part of the S&P/TSX Composite Index, companies that have recently graduated from the TSXV to the TSX or companies with four or fewer directors.

### Exclusive Forum Bylaws

An “exclusive forum bylaw” mandates that certain claims against an issuer be commenced in the jurisdiction where the corporation is domiciled. These bylaws have been widely adopted in the United States. Although their adoption in Canada has been more modest, this year they have garnered attention from both proxy advisors.

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## *Glass Lewis*

Glass Lewis believes that exclusive forum provisions discourage the use of shareholder claims by making them more difficult to pursue and will generally recommend shareholders vote against them. Glass Lewis may consider supporting an exclusive forum provision if the issuer (i) provides a compelling argument as to why the provision will benefit shareholders, (ii) provides evidence of abuse of legal process in other non-favoured jurisdictions, (iii) narrowly tailors the provision to the applicable risks, and (iv) maintains a strong record of good corporate governance practices.

## *ISS*

ISS, on the other hand, makes recommendations about exclusive forum bylaws on a case-by-case basis, taking into account (i) the issuer's jurisdiction of incorporation, (ii) the board's rationale for adopting the bylaw, (iii) the scope of legal claims subject to the bylaw, (iv) evidence of past harm as a result of shareholder claims against the issuer in foreign jurisdictions, and (v) any other problematic provisions that raise concerns regarding shareholder rights.

## **New Glass Lewis Policies**

Commencing with the 2021 proxy season, Glass Lewis has adopted a number of new or amended policies related to board composition and corporation governance:

- *Board Refreshment.* Glass Lewis will now consider it a governance concern if the average tenure of an issuer's non-executive directors is 10 years or more and no new independent directors have joined the board in the past five years.
- *Board Competency.* Glass Lewis may now recommend voting against the chair of the nomination committee if a board has not addressed major concerns regarding board composition, including the composition, mix of skills, and experience of the non-executive board members.
- *Environmental and Social Risk Oversight.* Beginning in 2022, Glass Lewis will generally recommend voting against the governance chair if an issuer in the S&P/TSX 60 Index does not provide clear disclosure concerning board-level oversight of environmental and/or social issues. During the 2021 proxy season, the absence of this disclosure will be considered a concern in Glass Lewis' overall governance assessment. Glass Lewis will continue to review a company's overall governance practices to determine if its board is engaging in meaningful oversight of environmental and social issues.
- *Audit Committee Expertise.* Commencing in 2021, Glass Lewis will more carefully scrutinize the professional expertise of audit committees for TSX-listed issuers, and expects these issuers will have at least one member with experience as a certified public accountant, chief financial officer or corporate controller or otherwise meaningful experience overseeing similar functions. At this time, Glass Lewis will not make voting recommendations based on this factor alone, but will consider insufficient expertise a concern in making its overall governance assessment.
- *Board and Committee Meeting Attendance.* As previously announced, commencing in 2021 Glass Lewis will generally recommend voting against the governance committee chair when (i) records for board and committee meeting attendance are not disclosed, and (ii) the number of audit committee meetings that took place during the most recent year is not disclosed. Glass Lewis will also recommend against the audit committee chair if the audit committee did not meet at least four times during the year.

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