

ISS Provides 2019 Voting Policy Updates

November 29, 2018 – Governance & Compliance Insider

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ISS recently announced the 2019 updates to its proxy voting policies, which can be found [here](#) and which will be applied to annual meetings held on or after February 1, 2019. Among the various updates provided by ISS, the following policies are particularly relevant for our clients, because they expand the circumstances in which ISS may recommend votes against director candidates:

Absence of Board Gender Diversity. Effective for meetings held on or after February 1, 2020, companies included in the Russell 3000 and S&P 1500 will be subject to greater scrutiny regarding board gender diversity. ISS will recommend a vote "against" or a "withhold" vote for the chair of a company's nominating committee (or other directors on a case-by-case basis) if there are no women on the company's board. ISS will consider certain mitigating factors in the event a company does not have any female directors, including a firm commitment statement in the proxy statement to appoint at least one female director to the board in the near term, the presence of a female on the board at the preceding annual meeting, and other relevant factors that ISS may deem applicable. One rationale for the change is that investors are showing a greater preference for increased boardroom gender diversity, with ISS reporting that only 3% of surveyed investors did not believe that a lack of gender diversity in the boardroom is problematic, while over 80% of surveyed investors believed that a lack of gender diversity is problematic. In addition, ISS reported the results of a recent study that found that female directors are more likely to possess the skills most sought after by boards, including, among other skills, audit, strategic planning, risk management, and corporate social responsibility.

Poor Board Meeting Attendance. ISS also codified its approach to poor attendance by directors at board meetings without the director providing a reasonable justification for the director's poor attendance. In this case-by-case approach, ISS will continue recommending votes "against" or a "withhold" vote for directors with poor attendance and will also recommend voting "against" or a "withhold" vote for other directors in the following situations:

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- After three years of poor attendance by any director, ISS will recommend a vote "against" or "withheld" from the chair of the nominating or governance committee.
- After four years of poor attendance by any director, ISS will recommend a vote "against" or "withheld" from the full nominating or governance committee.
- After five years of poor performance by any director, ISS will recommend a vote "against" or "withheld" from all director nominees.
- The policy may apply in certain situations involving non-consecutive years of poor attendance.

Management Ratification Proposals. Similar to the new Glass Lewis policy on conflicting & excluded proposals, ISS is codifying its policy to recommend a vote "against" or "withheld" from individual directors, members of the governance committee, or even the full board, when a board asks shareholders to ratify existing charter or bylaw provisions, unless they align with best practice. ISS will take into account the following factors when making its recommendations:

- the presence of a shareholder proposal addressing the same issue on the same ballot;
- whether the provision at question was adopted in response to the above-mentioned shareholder proposal;
- the board's rationale for seeking the ratification of the provision;
- the disclosure of the actions to be taken by the board if the ratification proposal fails;
- the level of impairment to shareholder rights caused by the existing provision that the board is seeking to have ratified;
- the history of proposals on the same provision at prior company shareholder meetings;
- the company's ownership structure; and
- whether the board of used ratification proposals to exclude shareholder proposals in the past.

The rationale for this policy is that the use of board sponsored proposals to ratify existing charter or bylaw provisions increased significantly during the most recent proxy season in response to the SEC's grant of no-action relief to certain companies that sought to exclude shareholder proposals from the ballot by including a conflicting proposal to ratify a charter or bylaw provision.

Lack of Board Responsiveness to Failed Ratification Proposals. ISS will undertake a board responsiveness analysis if a majority of votes were cast against a proposal seeking to ratify an existing charter or bylaw provision at the prior year's meeting and the board fails to act. This change is being made to align this policy with the ratification proposal policy discussed above.

Including Five-Year TSR in Initial Screen of Director Performance Evaluations. ISS updated its policy to consider not only one- and three-year, but also five-year, total shareholder returns in the initial screen of whether a company has exhibited sustained poor performance. Previously, five-year TSR was a secondary factor in the analysis. This change is intended to reduce the number of companies that undergo scrutiny for

poor performance.

In addition to policy changes that may affect ISS's support for director candidates, ISS also updated its financial performance methodology and its voting policies with regard to reverse stock splits and social and environmental proposals:

Use of EVA Data in Financial Performance Assessment. During the 2019 annual meeting season, ISS research reports on companies in the U.S. and Canada will feature Economic Value Added (EVA) data as a supplement to GAAP-based measures. Moving into 2020, ISS will consider the inclusion of EVA-based measurements as part of its Financial Performance Assessment methodology.

Circumstances in which ISS will Support Reverse Stock Splits. ISS made two changes with respect to the approval of reverse stock splits:

- First, ISS will recommend a vote "for" a reverse stock split if (1) the number of authorized shares available to the company is also proportionately reduced or (2) the effective increase in authorized shares is equal to or less than the allowable increase calculated in accordance with ISS policy.
- Second, rather than recommending a vote "against" a reverse stock split proposal that does not include the two factors listed above, ISS will take a case-by-case approach based on several factors, including but not limited to the following factors: (1) whether the company has received a notification of potential delisting from a stock exchange, (2) there is substantial doubt about the company's ability to continue as a going concern without additional financing, (3) the rationale provided by the company, or (4) other factors as applicable.

Impact of Significant Controversies on Social and Environmental Proposals. ISS expanded the factors it will examine on a case-by-case approach to social and environmental proposals make clear that it will also consider whether there are significant controversies, fines, penalties or litigation associated with the company's social or environmental proposals.