ISS proposes 30% target for gender diversity on public boards

November 25, 2020

Updates to Institutional Shareholder Services' (ISS) annual voting guidelines for the 2021 proxy season include new target requirements for women on the board of directors of public companies. The other ISS changes, which relate to exclusive forum proposals and ESG failures, will be effective for shareholder meetings starting February 1, 2021.

Gender diversity policy: ISS supports target of 30 per cent women on boards

Starting in February 2022, ISS will recommend a withhold vote for the chair of the Nominating Committee for S&P/TSX Composite Index issuers where less than 30 per cent of the board is comprised of women, and

- the issuer has not disclosed a formal written gender diversity policy; or
- the issuer's formal written gender diversity policy does not include a commitment to achieve at least 30 per cent women on the board over a reasonable timeframe.

The change was, in part, spurred by a number of large Canadian institutions and issuers that voluntarily endorsed 30 per cent targets for female board representation.

ISS's current policy, which provides that a widely-held issuer must either have one woman on the board, or a formal gender diversity policy including goals and defined targets to attain representation of women on the board, will continue to generally apply to public companies that are not on the S&P/TSX Composite Index.

ISS reiterated that diversity policies should include a clear commitment to increase board diversity and that boilerplate or contradictory language may result in withhold recommendations for directors.

In addition to gender diversity, ISS's U.S. updates also focus on racial and ethnic diversity. This is consistent with what we have seen elsewhere in Canada. For example, in January 2020, the *Canada Business Corporations Act* was amended to require

disclosure in proxy circulars related to board and senior management representation of not only women, but of Aboriginal peoples, persons with disabilities, and members of visible minorities.

Further, the Ontario Capital Markets Modernization Taskforce's 2020 recommendations on improving board diversity also extend beyond gender. Finally, more than 350 organizations across Canada signed a CEO pledge with specific actions and targets designed to end anti-Black systemic racism, including the goal of achieving a minimum 3.5 per cent of executive and board roles in Canada being held by Black leaders by 2025.

With the heightened attention to gender diversity under the ISS and other guidelines, a broadly based discussion regarding diversity on Canadian boards of directors and in senior management positions will likely continue to be at the forefront of corporate governance discussions during the 2021 proxy season and beyond.

ISS's approach to exclusive forum proposals

Exclusive forum bylaws designate specific courts as the exclusive venue for certain litigation and are intended to discourage forum shopping by plaintiffs, as well as reduce an issuer's potential burden of defending similar claims in multiple jurisdictions. While historically more prevalent in the U.S., a number of Canadian issuers have started to consider similar bylaws. ISS will consider exclusive forum proposals on a case-by-case basis, and, in doing so, will consider the following factors:

- jurisdiction of incorporation;
- rationale for adoption;
- legal actions subject to the provision;
- evidence of past harm from shareholder legal action against the issuer outside the jurisdiction of incorporation;
- corporate governance provisions and shareholder rights; and
- any other problematic provisions that raise concerns regarding shareholder rights.

Governance failures: Poor risk oversight of environmental and social issues

ISS's governance failures policy varies from market to market. However, ISS is updating its policy guideline across various regions, including Canada, to explicitly reference poor risk oversight of environmental and social issues, including climate change, as an example of a material failure that may result in an adverse vote recommendation.

Takeaway

The updates to ISS's voting guidelines demonstrate some of the rapidly changing trends and best practices in corporate governance. Given the impact ISS recommendations can have on shareholder voting, issuers are well advised to consider these guidelines and respond accordingly.

As the 2021 proxy season is fast approaching, we encourage you to contact BLG if you have questions related to the ISS updates, or for more information on any other corporate governance initiatives.

By

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