

## *Institutional Shareholder Services Inc. Proposes New Canadian Gender Diversity Benchmark Policy*

On October 14, 2020, Institutional Shareholder Services Inc. ("ISS") published its annual proposed benchmark voting policies for comment from the public. ISS expects to announce its final benchmark policy changes during the first half of November and it will take effect for annual meetings held after Feb. 1, 2021. However, ISS provides a grace period for some of the more expansive proposed policy changes, including those related to board gender diversity, which will not take effect until February 2022.

The proposed benchmark gender diversity voting policy applies new requirements for Canadian issuers. ISS did not make corresponding changes to its U.S. voting policy.

### **I. Canada – ISS Gender Diversity Voting Policy**

#### Current Policy

Under ISS's current gender diversity voting policy, a company which has not disclosed a formal written gender diversity policy and has zero female directors on its board will receive a negative voting recommendation. ISS specifies further that the policy cannot just be boilerplate and should contain a clear commitment to diversity, including quantitative goals and targets. For companies which do not meet the foregoing requirements, ISS will recommend a "withhold" vote for the chair of the nominating committee (or similar committee) or, if no committee or no chair of such committee has been identified, then the chair of the board of directors.

The current policy only imposes gender diversity requirements for Toronto Stock Exchange-listed companies that are "widely-held", meaning they are either (i) on the S&P/TSX Composite Index; or (ii) designated as such by ISS based on the number of its clients holding securities of the company. ISS specifically exempts newly publicly listed companies within the current or prior fiscal year; companies that have transitioned from the TSX Venture Exchange

within the current or prior fiscal year; and companies with four or fewer directors.

#### Proposed Benchmark Policy

The proposed benchmark policy maintains similar requirements for "widely-held" Toronto Stock Exchange-listed companies. However, for those companies on the S&P/TSX Composite Index, ISS raises the requirement from having at least one female director to having at least 30% women on the board. This update requires both that the board be comprised of at least 30% women and that the disclosed gender diversity policy includes a commitment and establishes targets to achieve such representation. If an applicable company does not have at least 30% women on the board, the updated benchmark adds that the disclosed policy should provide a reasonable timeframe for such attainment. For companies that do not comply with the above, ISS will issue a negative recommendation in the same manner as under the current benchmark.

The exemptions ISS provides to certain companies under its current policy continue to apply, but only to "widely-held" companies that are not on the S&P/TSX Composite Index.

### **II. Other Canadian Gender Diversity Obligations**

#### Glass Lewis

Glass Lewis takes a similar approach to ISS. Specifically, they will (i) generally make a negative recommendation to vote withheld against the nominating committee chair when the board has no female directors and has not provided sufficient explanation or disclosed a plan to address the lack of diversity on the board; and (ii) may make a negative recommendation against the nominating committee chair when the board has not adopted a formal diversity policy.

### *National Instrument 58-101*

National Instrument 58-101 – *Disclosure of Corporate Governance Practices* ("**NI 58-101**") imposes disclosure requirements for non-venture issuers in certain of the provinces and territories of Canada. Among other things, NI 58-101 generally requires that applicable issuers disclose and describe or explain the lack of: policies relating to the identification and nomination of women directors; board or nominating committee consideration of the representation of women in the director identification and selection process as well as in executive officer appointments; targets regarding the representation of women on the board and in executive officer positions; and the number of women on the board and in executive officer positions.

### *Canada Business Corporations Act (the "CBCA")*

For companies incorporated under the CBCA, "distributing corporations" (which generally includes Canadian reporting issuers or public companies) are required to disclose certain information related to diversity covering "designated groups", meaning women, Aboriginal peoples, persons with disabilities and members of visible minorities. While the required information on gender diversity is substantially similar to the requirements under NI 58-101, the CBCA differs in that it applies to non-venture issuers and requires disclosure of targets and progress.

Among other things, the CBCA requires disclosure of: policies relating to identification and nomination of members of designated groups for directors; if a policy has been adopted, a short summary of its objectives and key provisions, whether the board or an applicable committee measures effectiveness of the policy and how it is measured, and descriptions of measures taken to ensure that it is effectively implemented as well as annual and cumulative progress in achieving the objectives of the policy; board or nominating committee consideration of the representation of designated groups in identifying director nominees for election or re-election, as well as in senior management appointments; whether the company has adopted a target or range of target numbers or percentages for members of each designated group to hold positions on the board of directors or to be senior management by a specific date as well as target and annual and cumulative progress; and the number and proportion, expressed as a percentage, of members of

each designated group who hold positions on the board of directors or are members of senior management.

### **III. U.S. Obligations**

#### *ISS*

ISS's U.S. voting policy is similar to the Canadian in that it only applies to some of the largest public issuers – those in the Russell 3000 or S&P 1500 indices. They generally recommend a vote against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis) at companies where there are no women on the company's board. Mitigating factors against a negative recommendation include: until February 1, 2021, a firm commitment, as stated in the proxy statement, to appoint at least one woman to the board within a year; or the presence of a woman on the board at the preceding annual meeting and a firm commitment to appoint at least one woman to the board within a year.

The proposed benchmark does not change the threshold for board gender diversity.

#### *Glass Lewis*

Glass Lewis's voting policy for U.S. companies is similar to its Canadian equivalent. They recommend voting withheld against a nominating committee chair when the board has no female directors and has not provided sufficient rationale or disclosed a plan to address the lack of diversity on the board.

#### *Securities and Exchange Commission (the "SEC")*

Pursuant to Item 407 of Regulation S-K, U.S. issuers generally have to disclose how its nominating committee considers diversity in identifying nominees for director.

In recent Compliance and Disclosure Interpretations, the SEC provided that to the extent a board or nominating committee considered any self-identifying diversity characteristics of a nominee for director (provided that the director consented to the disclosure of those characteristics), they would expect the company to identify those characteristics and discuss how they were considered.

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