

ISS Previews 2021 Policy Updates; No Current Revisions to Compensation-Related Policies

As it does each fall, Institutional Shareholder Services (“ISS”), the corporate governance advisory services firm, has published a preview of more than a dozen proposed voting policy changes for the 2021 proxy season across a number of different regional and market policies. This preview highlights three proposed updates for U.S. companies in the corporate governance area, each of which is of interest to the boards of directors of technology and life sciences companies.

Equally noteworthy is that for the second consecutive year, ISS is not currently proposing any changes to its proxy voting guidelines covering executive compensation matters. We expect that ISS will issue its updated U.S. benchmark voting policies (along with its U.S. compensation policies FAQs) later this year and will provide information on any noteworthy changes at such time.

ISS’ updated policies will be effective for annual meetings of shareholders held after February 1, 2021.

Director Elections: Racial/Ethnic Board Diversity

Responding to the expressed belief of many investors that ethnic or racial diversity on boards of directors promote both equality and good corporate governance, ISS is considering a new policy intended to further racial and ethnic diversity on boards of directors.

As proposed, in 2021 ISS would begin highlighting companies in the Russell 3000 and the S&P 1500 with no apparent racial and/or ethnic diversity on the board of directors. This information would be included in ISS’ research reports to help investors identify companies with which to engage and that may foster dialogue between investors and companies on the issue. The absence of a racially or ethnically diverse member of the board would not affect its voting recommendations on directors in 2021.

However, effective for annual meetings on or after February 1, 2022, ISS would generally recommend voting against or withholding the vote from the chair of the board nominating committee (or

other directors on a case-by-case basis (for example, other members of the nominating committee)) where the board of directors has no apparent racially or ethnically diverse members.

ISS goes on to note that in conducting its analysis it may consider factors that could mitigate an unfavorable voting recommendation including the presence of a racial and/or ethnic minority on the board at the preceding annual meeting of shareholders and a firm commitment by the board to appoint at least one racial and/or ethnic diverse member.

Material Environmental and Social Risk Oversight Failures

As reflected in its current policies, under extraordinary circumstances ISS will recommend voting against or withholding the vote from directors individually, committee members, or the entire board of directors if, among other things, it finds a material failure of governance, stewardship, risk oversight, or fiduciary responsibilities at a company.

ISS is proposing to expand the list of examples that represent a failure of risk oversight to include demonstrably poor risk oversight of environmental or social issues, including climate change. Consistent with the heightened expectations that many investors are placing on portfolio companies, where a company is in a highly impactful sector and is viewed as not taking steps to reduce environmental and social risks that are likely to have a large negative impact on future company operations, ISS may recommend taking action against directors who fail to make their companies more resilient, particularly with respect to climate-related risks.

Exclusive Forum Proposals

Under its current policies, ISS will generally recommend a vote on a case-by-case basis on by-law provisions that affect shareholders’ litigation rights (such as exclusive venue and fee-shifting provisions), after taking into account a non-exhaustive list of factors, and against by-laws that mandate fee-shifting where shareholders do not prevail successfully in full on the merits of the case.

ISS Previews 2021 Policy Updates; No Current Revisions to Compensation-Related Policies (continued)

ISS is proposing to update this policy in several respects. At the federal level, ISS would generally support charter or by-law provisions that specify the “U.S. district courts” as the exclusive forum as it relates to federal securities law matters. Alternatively, ISS will recommend a vote against provisions that limit the forum to a specific federal district court. At the state level, ISS would generally support charter or by-law provisions that specify the Delaware Court of Chancery or the state of Delaware as the exclusive forum for corporate law matters for Delaware corporations. For companies incorporated in states other than Delaware, ISS would review the matter on a case-by-case basis and recommend a vote against a provision that specifies a state other than the state of incorporation as the exclusive forum for corporate law matters, or that specify a particular local court within the state.

Finally, ISS would generally recommend a vote against charter or by-law provisions that require a shareholder that is not completely successful on the merits in a lawsuit against a company to pay all litigation expenses of the defendant corporation and its directors and officers.

What’s Next?

ISS is soliciting comments on its proposed policy updates until 5:00 p.m. (ET) October 26, 2020. ISS has indicated that it plans to issue its final policy updates for 2021 during the middle of November. As in prior years, the policy updates will go into effect at the beginning of February of the following year; in this case, February 1, 2021.

To access the ISS portal to its proposed policy updates, click [here](#).

Need Assistance?

Compensia has extensive experience in assisting companies in addressing ISS’ U.S. benchmark voting policy guidelines. If you would like assistance in analyzing the potential impact of the ISS policies on your executive compensation program, or if you have any questions on the subjects addressed in this Thoughtful Pay Alert, please feel free to contact Jason Borrevik at 408.876.4035 or Mark A. Borges at 415.462.2995. ■

ISS Previews 2021 Policy Updates; No Current Revisions to Compensation-Related Policies (continued)

About Compensia

Compensia, Inc. is a management consulting firm that provides executive compensation advisory services to Compensation Committees and senior management.

Silicon Valley

125 S. Market Street
Suite 1000
San Jose, California 95113
408.876.4025

Thomas G. Brown, Chairman
tbrown@compensia.com
408.876.4023

Aaron Johansen
ajohansen@compensia.com
408.907.4310

Tom LaWer
tlawer@compensia.com
408.907.4309

Greg Lochmann
glochmann@compensia.com
408.907.4319

San Francisco

One Embarcadero Center
Suite 2830
San Francisco, California 94111
415.462.2990

Mark A. Borges
mborges@compensia.com
415.462.2995

Erik Beucler
ebeucler@compensia.com
408.907.4314

Amanda Feyerabend
afeyerabend@compensia.com
415.462.2988

Southern California

Ralph Barry
rbarry@compensia.com
858.603.2288

Pacific Northwest

Jason Borrevik
jborrevik@compensia.com
408.876.4035