

ISS Benchmark Survey for Next Season Focuses on Recent Governance Debates - Part I

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ISS has launched its benchmark policy survey, which helps formulate policies that guides the proxy advisory firm's voting recommendations. For the first time, the policy has two parts: a high-level survey covering what it believes to be fundamental and high-profile topics that closes on August 31; and a more expansive version to drill down on key issues that closes on October 6. In addition to the surveys, ISS also seeks input through roundtables and other outreach.

The press release announcing the survey along with the links for downloading and [filling it out are here](#). New policies for the upcoming proxy season are generally issued in November.

The key questions in the overview survey represent some of the most recent governance controversies, with the available selection of responses providing polar opposite positions and several middle grounds, and include:

One-Share, One-Vote. The controversy surrounding Snap's issuance of no-vote shares continues, as the ISS survey asks participants to weigh in on the appropriateness of either no-vote or low-vote shares. The response choices in the survey reflect the wide variability in viewpoints, ranging from allowing companies to choose whatever capital structure they see fit to finding unequal voting rights never appropriate for any public company. Alternatively, ISS asks whether IPO companies can adopt these structures if they are subject to automatic sunset provisions based on either time elapsed since IPO or the company reaching a certain market capitalization. Beyond IPOs, another response option suggests that public companies with disparate voting right structures obtain "periodic reapproval by holders of the low-vote shares."

Board Gender Diversity. The threshold question focuses on public companies with no female directors on their boards. The possible response choices range from a perception that this is always problematic to giving boards complete deference to determine their own compositions. In the middle ground are the possibilities of case-by-case determinations based on factors such as the type of company and industry sector, or the mitigation of concerns over lack of diversity if there is sufficient disclosure on the board's efforts to change.

For those that view an absence of female directors to be a governance issue, the survey asks whether appropriate investor actions could include any of the following: engaging with the company; voting against individual directors such as the chair or lead director, chair of the governance committee or all members of the governance committee; supporting a shareholder proposal on gender diversity; or supporting a dissident candidate.

Share Issuances and Buybacks at Cross-Market Companies. This survey question applies to US-listed companies incorporated in markets such as the UK, Ireland and Netherlands. The laws of those countries may require shareholder approval for share issuances or share repurchases that would not be necessary for other US companies. Currently, ISS evaluates those management proposals by applying the policy of the country of incorporation, but as those policies are aligned with local listing rules or non-US codes of best practices, they often unnecessarily restrict US companies not listed in those markets.

The possible policy responses for how to evaluate these types of proposals initially range from whether share issuances and/or buybacks should be solely up to board discretion or voted on by shareholders. Given that the country of incorporation may require obtaining shareholder approval, the survey also asks participants for their views when voting

on the proposals. The possible responses include always considering these proposals to be routine in order to treat the companies like their US-listed counterparts that do not need shareholder approval at all, or requiring that the market practice of the company's place of domicile should apply since the proposals are on the ballot in the first place because of that domicile. A so-called hybrid approach would be less restrictive than European best practices but still place limits beyond NYSE and Nasdaq shareholder approval rules.

Virtual/Hybrid Meetings. Over 160 companies held virtual-only meetings in the first half of 2017 and an additional 16 companies held hybrid meetings. Possible survey responses regarding companies' use of these types of meetings include being always acceptable to finding them never appropriate. Alternatively, hybrid meetings may be suitable while virtual-only is not, or both would be viewed as sufficient if the virtual-only meeting provided the same shareholder rights as a physical meeting. There was no discussion of what those rights would encompass.

Pay Ratio. In light of the looming requirement to disclose pay ratio, the survey asks investors how they intend to analyze the data, ranging from never intending to use the pay ratio information to comparing the ratio across companies and/or assessing year-to-year changes at individual companies. An additional question asks how the ratio should be used by others, including the possibility of any of the following for the use of the ratio: a data point for say-on-pay votes or director elections; simply background material for company engagement discussions; a risk factor in making investment decisions or finally; not using it since the information is completely meaningless.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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