



VIA EMAIL

November 9, 2015

Global Policy Board  
Institutional Shareholder Services Inc.  
702 King Farm Boulevard  
Suite 400  
Rockville, MD 20850

Re: 2016 Proxy Voting Policies

Dear Members of the Policy Board:

The Society of Corporate Secretaries and Governance Professionals appreciates the opportunity to comment on Institutional Shareholder Services Inc.'s ("ISS") proposed voting policies for 2016.

Founded in 1946, the Society is a professional membership association of more than 3,200 corporate secretaries, in-house counsel, and other governance professionals who serve approximately 1,600 entities, including 1,000 public companies of almost every size and industry. Society members are responsible for supporting the work of corporate boards of directors and their committees and the executive management teams of their companies regarding corporate governance and disclosure. Our members generally are responsible for their companies' compliance with the securities laws and regulations, corporate law, and stock exchange listing requirements.

We note that the two week period provided for comments is not adequate for shareholders, companies and others to fully consider and respond to the impact of the proposed changes, particularly for our organization in that we are writing on behalf of many members.

For the reasons described below, we have significant concerns regarding ISS's proposed changes to its policies regarding director overboarding and a board's right to amend its bylaws unilaterally.

### **Director "Overboarding"**

ISS proposes to lower the acceptable number of board positions for active CEOs as well as for directors who are not the CEO. We believe these proposed changes in policy are not appropriate for the reasons set forth below.

## ISS Should Not Change Its Current "Overboarding" Policy

First, there is no evidence to support the argument that CEOs who sit on two outside boards or directors who sit on six boards are less effective directors. To the contrary, the experience of our members demonstrates otherwise. Directors who serve on multiple boards benefit from their exposure to other companies' board practices and, thus, are better able to exercise their fiduciary duties and effectively oversee company management. CEOs in particular bring valuable multinational perspectives to boards. In fact, companies put a premium on ensuring outside CEO experience is represented in the boardroom.<sup>1</sup> Given their experience, CEOs are more adept at asking the right questions, challenging conventional thinking and leading the board through a crisis. Imposing arbitrary limits on board service unnecessarily limits the pool of director candidates and increases the difficulty of finding and retaining the most effective directors, especially for those boards seeking to obtain valuable outside CEO experience.

Second, there are already mechanisms in place to help shareholders evaluate whether directors are devoting sufficient time to the boards on which they sit. Companies are required to disclose and identify, by name, any director who attended fewer than 75% of board and committee meetings. Institutional investors generally vote against "absent directors" unless there are extenuating circumstances such as an illness.

Third, there is considerable evidence that many boards and directors self-regulate on this issue; most S&P 500 directors serve on fewer than three boards. According to the 2014 Spencer Stuart Board Index, 75% of S&P 500 boards have established some restriction on additional board service, compared to just 67% of boards in 2009 and 55% in 2006 who had such restrictions. Nominating committees certainly take these factors into account when making annual determinations on which directors to nominate for election.

Fourth, we believe this change could have a disproportionate impact on women and minority directors who are already serving as board members. These individuals, particularly current or retired CEOs, are in high demand and already bumping up against the existing ISS thresholds and turning down other board seats. While there is an abundance of qualified diverse board candidates who are not CEOs, it will take some time for search firms and boards to identify them and nominate them for election. ISS's proposed change could have the unintended consequence of, in the short term, decreasing diversity on boards.

## If ISS Does Change the Policy, Existing Directorships Should Be Grandfathered

Should ISS determine to move forward with these policy changes, we recommend, as an alternative to the proposed one-year grace period, that ISS consider a grandfather provision under which directors who are not deemed "overboarded" under the current policy would be protected from the more restrictive guidelines as proposed. This grandfather approach would be fair and reasonable because ISS has previously acknowledged that these specific directors serving on these specific boards merited a FOR recommendation. ISS's own data suggests that

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<sup>1</sup> James J. Drury III & James J. Drury IV, *The Weight of America's Boards*, JAMESDRURYPARTNERS, 4 (2014), <http://www.jdrurypartners.com/board-weight-study-2014/pdf/Board-Weight-Report-2014.pdf>.

under this new policy, the number of CEO and non-CEO directors who would be considered “overboarded” would increase by 325% for CEOs, 190% for non-CEOs with a 5 board limit, and 1000% for non-CEOs with a 4 board limit. It seems arbitrary, unfair and unreasonable to suggest to ISS’s clients that, without any change in facts or circumstances, directors who were not previously “overboarded” have suddenly become “overboarded” even though none of their responsibilities changed.

#### Any Change Should Not be Effective Until 2017

At a minimum, any policy change should not be effective until 2017 to give companies and boards sufficient time to assess whether and what action should be taken, to minimize any disruption in board composition and to allow for orderly board succession planning. In addition, we believe that “cautionary language” should not be included in the 2016 ISS reports as it would be unfair to companies and prejudicial to directors in light of the tight timing from the change in policy.

#### Current Exceptions for Subsidiary Boards Should be Retained

Finally, we strongly urge ISS to retain the existing exceptions for CEOs, including the exception for CEOs who sit on the board of a subsidiary, and if a change is made for non-CEOs, that the limit be reduced by one rather than two directorships.

#### **Unilateral Board Actions**

ISS proposes to issue adverse vote recommendations for director nominees if a board unilaterally amends the company’s charter or bylaws to either classify the board or establish supermajority vote requirements.

As an initial matter, we note this proposed policy update has the effect of circumscribing actions that may be permitted to be taken lawfully by a board under state law and/or a company’s governing documents. In fast changing, dynamic environments, boards need to be able to react with agility to protect the best interests of the company and its shareholders. Explicitly categorizing certain types of amendments as the basis for an adverse vote recommendation assumes, incorrectly, that there are no circumstances in which a board, in the exercise of its fiduciary duties, can determine that it is appropriate to make such changes.

We recognize that there has been an evolution in corporate governance in favor of board declassification and the elimination of supermajority vote provisions. These changes have occurred, in large part, through the existing shareholder engagement and shareholder proposal frameworks that are well understood by companies and shareholders. The proposed policy does nothing to facilitate dialogue between boards and shareholders, but rather creates an immediate, adversarial environment. Attempting to label certain unilateral board actions as always problematic, without context and without any room for exceptions, does not serve boards, shareholders or their advisors well. The proposed policy update ties a board’s hands and limits the options available to a board in determining the best course of action for a company and its shareholders.

In addition, a recently released paper "[The Shareholder Value of Empowered Boards](#)," authored by University of Notre Dame Professor Martijn Cremers and University of Arizona Professor Simone Sepe, challenges the assumption that staggered boards are inconsistent with long-term value creation. The paper presents new empirical evidence that reveals the limitations of prior evidence that purportedly suggested that staggered boards are detrimental to firm value and - based on unique and comprehensive data covering 34 years of staggering and destaggering decisions - shows that staggered boards are associated with a statistically and economically significant increase in firm value.

The features targeted by the proposed policy are prevalent in some pre-IPO companies. As these companies go public, the terms of the company's governing documents and the ability of the board to take action are fully and amply disclosed and investors have a choice whether or not to invest in the company. Investors must evaluate and weigh competing factors as they make their investment decisions. In addition to the empirical link to shareholder value as respects classified boards (noted above), there are other sound governance reasons that may support the retention of a classified board and supermajority provisions, such as promoting management continuity for a period of time following the IPO or private investors having negotiated for such terms. Accordingly, we do not believe it would be appropriate to recommend a vote against directors at annual meetings following the IPO when the board adopts or retains the ability to unilaterally amend its charter or bylaws having previously disclosed its governance procedures to investors.

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Finally, we note that according to ISS's own statistics, fewer than 10% of its institutional clients responded to its most recent global voting policy survey and there was no clear consensus. We believe this is not sufficient input to justify these significant policy changes.

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We appreciate the opportunity to provide comments. We would be glad to discuss our concerns further and/or respond to any questions you may have.

Sincerely,



Randi Val Morrison  
Director - Policy & Reporting

cc:

Gary Retelny, President and CEO, ISS  
Joseph B. Amsbary, Jr., Chair, Policy Advisory Committee, SCS&GP