



CENTER FOR CAPITAL MARKETS  
C O M P E T I T I V E N E S S

**TOM QUAADMAN**  
EXECUTIVE VICE PRESIDENT

1615 H STREET, NW  
WASHINGTON, DC 20062-2000  
(202) 463-5540  
tquaadman@uschamber.com

November 10, 2016

Mr. Gary Retelny  
President and Chief Executive Officer  
Institutional Shareholder Services, Inc.  
702 King Farm Boulevard  
Suite 400  
Rockville, MD 20850

**Re: 2017 Benchmark Voting Policy Consultation**

Dear Mr. Retelny:

The U.S. Chamber of Commerce (the “Chamber”) formed the Center for Capital Markets Competitiveness (the “CCMC”) to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century global economy.<sup>1</sup> It is an important priority of the CCMC to advance an accountable and transparent corporate governance regime. We are writing to comment on the Institutional Shareholder Services’ (“ISS”) 2017 Benchmark Policy Consultation (the “Consultation”). Our comments are directed to the Consultation Policies on the following topics: (1) multi class capital structure at IPO, (2) restrictions on binding shareholder proposals, (3) general share issuance mandates for cross-market companies, and (4) executive pay assessments.

The CCMC has long advocated for proxy advisory firms to be more transparent and accountable in the development and dispensation of proxy advice. Once again, we renew the concern that we have expressed in the past that the period of ten business days that ISS has provided to comment on the Consultation, and for final policies to be issued the following week, is simply unreasonable and not the hallmark of a deliberative and open-minded approach to policy making.<sup>2</sup> Indeed, this

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<sup>1</sup> The U.S. Chamber of Commerce is the world’s largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region.

<sup>2</sup> See, e.g., the CCMC letter to ISS dated November 9, 2015, available at [https://www.issgovernance.com/file/policy/u.s.\\_chamber\\_of\\_commerce.pdf](https://www.issgovernance.com/file/policy/u.s._chamber_of_commerce.pdf), and the CCMC letter to ISS dated October 28, 2014, available at [http://www.issgovernance.com/file/policy/US\\_Chamber\\_of\\_Commerce.pdf](http://www.issgovernance.com/file/policy/US_Chamber_of_Commerce.pdf).

approach is unheard of with other credible standard-setters, and as we have previously stated, ISS tends to be considered as such in the area of corporate governance.<sup>3</sup> Given the complexity of the issues covered in the Consultation, this abbreviated time frame strongly suggests that policy making is largely conducted outside the public eye.

Moreover, this year we have the additional process concern that by moving forward with an even broader version of a proposal opposed a clear majority of the respondents to its 2016-2017 ISS Global Policy Survey,<sup>4</sup> ISS appears to be contradicting its own stated commitment to an open, responsive process.

The CCMC also renews its concern that the Consultation reflects a continued preference for one-size-fits-all corporate governance measures that fail to address the unique facts and circumstances of individual companies and their shareholders. The CCMC continues to believe that the manner in which ISS develops and finalizes its voting policies must call into question the reliability of any policies that result from the Consultation process. Our specific comments on the policies are stated below.

### **Multi Class Capital Structure at IPO**

The CCMC has long championed efforts intended to facilitate private and public capital formation in the U.S. by supporting diverse capital markets that are the most fair, transparent, efficient, and innovative in the world. In recent years, various regulatory and policy pressures have placed American public companies at a competitive disadvantage, and the number of private companies entering the U.S. public markets through initial public offerings has fallen precipitously. The CCMC supports policies that encourage more companies to enter the U.S. public markets and facilitate capital formation. It should come as no surprise then, that the CCMC opposes any proposed ISS policy that would stand to stifle capital formation and discourage private companies from entering the U.S. public markets through an initial public offering.

We are concerned that if ISS adopts the proposed policy change, private companies will be further discouraged from entering the U.S. public markets. One

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<sup>3</sup> The consultation period closes on November 10, and the final policies will be released the week of November 14.

<sup>4</sup> 2016-2017 ISS Global Policy Survey - Summary of Results, available at <https://www.issgovernance.com/file/policy/2016-2017-iss-policy-survey-results-report.pdf>.

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significant deterrent to going public that we regularly hear from founders, private boards and early-stage investors is the sudden pressure to satisfy short-term performance objectives once the company goes public. To manage this concern, some companies have chosen multi-class capital structures that help to insulate the company from these short-term pressures and allow the company to focus on innovation, growth and long-term performance. The proposed policy change could limit newly public companies' flexibility to manage short-term pressures and, consequently, may altogether discourage companies from entering the U.S. public markets. In turn, a stagnant or declining pool of investments would be detrimental to U.S. investors because investors have fewer public companies in which to invest.

The CCMC also opposes the proposed policy change because it reflects a one-size-fits-all mandate that fails to take into account the unique needs of companies and shareholders. Under the appropriate mechanisms provided under state and federal law, management, directors, and shareholders are permitted to decide the governance structures best suited for an individual company, and a company's capital structure is no different. To be sure, an analysis of individual companies is likely to reveal some companies with multi-class capital structures that perform poorly relative to their peers. But, for the same reason, it very well may make sense for other companies to have a multi-class structure. Indeed, a company's performance may benefit from its multi-class capital structure, with shareholders ultimately reaping the benefits.

Moreover, a company's capital structure is fully disclosed to shareholders at the time of their investment decision. It is not clear why a company with a multi-class capital structure should face reprisal for its capital structure if shareholders made the decision to purchase shares with knowledge of that company's capital structure. The appropriate solution for shareholders who disagree with a company's capital structure is to invest elsewhere.

### **Restrictions on Binding Shareholder Proposals**

We strongly object to ISS's policy proposal to recommend votes against or withheld from members of governance committees of any company that imposes "undue restrictions" on its shareholders' ability to propose amendments to its bylaws. ISS suggests that establishing eligibility requirements that are even slightly more restrictive than those set forth in Rule 14a-8 (which require proponents to own at

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least \$2,000 worth of shares for at least one year) would be deemed to be an “undue restriction.” The CCMC strongly believes that corporate governance is a matter that should be reserved for state corporation law. The Consultation’s proposed policy, if adopted, would lead to greater federalization of corporate governance by using SEC Rule 14a-8 as a default.

We are concerned that ISS’s 2017 Annual Policy Survey (the “2017 Survey”) did not include questions on this far-reaching proposal. Instead, in the 2017 Survey, ISS specifically targeted entities formed as Maryland real estate investment trusts (“REITs”), asking whether investors and non-investors believe ISS policy should be to recommend votes against board members of REITs whose bylaws may only be amended by the board, as long-permitted under the Maryland REIT Law, among other questions. The questions that were specific to REITs closely tracked a series of shareholder proposals that have been submitted to REITs in recent years by a single activist investor that is separately seeking to organize employees of the targeted companies.

With regard to these 2017 Survey questions relating to Maryland REITs, ISS reported that (i) only roughly a third of the investor respondents believed that ISS should consider recommending against directors of REITs who have not opted out of the provisions of Maryland REIT Law that give the board the ability to amend bylaws without shareholder approval and (ii) more than half of non-investor respondents opposed the idea. As noted above, ISS did not ask in the 2017 Survey about this new, much broader policy proposal regarding recommending against all members of any governance committee whose company has not provided stockholders with the right to amend its bylaws or if it has set eligibility requirements that are more stringent than those of Rule 14a-8.

Notwithstanding the tepid investor and non-investor responses to the Maryland-specific questions, ISS is nevertheless seeking comment on a proposal that would effectively penalize any entity (not just REITs) that imposes even modest eligibility limits on shareholders who wish to campaign for binding bylaw amendments that may be contrary to investor value. This approach is wholly inconsistent with ISS’s espoused principles of transparency and accountability, which are prominently stated on its website, and its representation that ISS relies on the

input received in response to its annual survey “to develop its draft policy updates on emerging governance issues each year.”

Substantively, we question ISS’s assumption that empowering every shareholder who holds merely a *de minimis* percentage of an entity’s shares to propose binding bylaw amendments without limit, in all circumstances, makes for good corporate governance. Shareholders currently may—and often do—submit formal, non-binding proposals and they have the ability to nominate and elect directors. Moreover, they can and do engage with issuers in many less formal ways and many important corporate governance changes have been achieved through such collaborations. ISS has presented no data or evidence that the ability of a shareholder who holds merely a *de minimis* percentage of shares to propose binding bylaws amendments incrementally benefits shareholders. Moreover, recent disruptive campaigns sponsored by such shareholders, including the special interest activist mentioned above, raise serious and real concerns to the contrary.

### **General Share Issuance Mandates for Cross-Market Companies**

The Consultation’s proposed policy seeks to impose additional requirements on U.S.-listed companies that are incorporated outside of the U.S., beyond what is already required by the companies’ home country of incorporation. The CCMC believes that corporate governance matters, such as shareholder voting requirements for share issuances, are best reserved for the companies’ home country of incorporation. ISS seeks to prohibit the use of general share issuances involving more than 20 percent of a company’s currently issued capital, even if the law of the company’s country of incorporation would allow it. We do not believe that ISS should adopt a policy that could be inconsistent with any company’s home country laws.

The CCMC believes that ISS should instead be deferential to the laws of the company’s home country of incorporation, just as the U.S. expects of foreign countries. Imposing additional restrictions on U.S.-listed, non-U.S.-incorporated companies could place U.S. companies operating abroad at risk of retaliatory disparate treatment as foreign regulators may seek to impose reciprocal requirements on U.S. companies operating in their countries. Such a result could place U.S. companies at a competitive disadvantage globally and ultimately impair capital formation.

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### Executive Pay Assessments

The CCMC continues to resist a one-size-fits-all policy approach, particularly when it relates to complicated matters such as the assessment of executive compensation. Executive compensation structures can differ substantially between countries based on local custom, tax regime, micro-economic factors and the overall regulatory environment. The CCMC, therefore, opposes the use of U.S. policy to evaluate all executive compensation proposals on the ballots of U.S.-listed, non-U.S.-incorporated companies. We believe investors would be better served by providing greater comity to the laws of the jurisdiction of incorporation and local factors that impact compensation decisions.

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In conclusion, the CCMC strongly urges ISS not to adopt any of its proposed policy changes.

We thank you for your consideration of these comments and would be happy to discuss the issues raised in this letter with you or your staff.

Sincerely,

A handwritten signature in black ink, appearing to read 'TK' with a long horizontal flourish extending to the right.

Tom Quadman