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It's Easier to Go "Overboard": ISS Amends Director Overboarding Policy

Today Institutional Shareholder Services Inc. (ISS) announced that, effective February 1, 2017, it will reduce the number of public company boards on which a director may serve before it recommends that shareholders withhold votes from that director under its amended Overboarded Directors Policy (the Amended Policy).¹ A director who serves on too many public company boards is said to be "overboarded".

ISS's Amended Overboarded Directors Policy

Following initial consultation and draft publication for comment, ISS has issued the Amended Policy, which will apply to TSX-listed issuers for the 2017 proxy season. Consistent with the existing policy, the Amended Policy is double-triggered: ISS will generally issue a withhold recommendation for a director nominee if that director is overboarded *and* has attended fewer than 75% of board and committee meetings held within the past year without a valid reason for the absences. Under the Amended Policy, a director nominee will be regarded as overboarded in one of the following scenarios:

- if the nominee is the CEO of a public company and sits on more than one outside public company board (down from two), in addition to the company of which he or she is CEO; or
- if the nominee is not the CEO of a public company and sits on more than four public company boards (down from six).

Cautionary language will be included in ISS reports if directors are overboarded, regardless of attendance. The Amended Policy is a response to concerns that as demands on public company directors continue to increase and their responsibilities become increasingly complex, individuals who serve on too many public company boards may face excessive time commitments and therefore be unable to fulfill director duties. Those time commitments may be even greater, thus rendering performance of duties more challenging, for directors who serve on board committees and as board and/or committee chairs. For example, ISS indicates that a 2014 study surveying the annual time commitment per board of 120 Canadian directors shows that the average annual time commitment per board was 304 hours, and even higher for larger cap issuers. Studies in the United States show that these time commitments are higher than in previous years.

¹ ISS, *Americas Proxy Voting Guidelines Updates: 2016 Benchmark Policy Recommendations* (November 20, 2015). Available at <http://www.issgovernance.com/file/policy/2016-america-policy-updates.pdf>.

Expected Impact on Directors

Although more directors are likely to be considered overboarded under the Amended Policy, because ISS issues a withhold recommendation only if a director's attendance is also poor, ISS expects the overall impact of the Amended Policy to be moderate. For example, according to ISS's draft Amended Policy previously issued for comment, applying the Amended Policy retrospectively to data from TSX-listed companies for the period between September 2014 and September 2015 would have yielded only 14 withhold recommendations (rather than the six withhold recommendations that were actually issued).² However, with respect to overboarding only, ISS indicated that had the Amended Policy been in place during that same look-back period, 267 non-CEO directors (up from 40) and 329 CEO directors (up from 174) would have been deemed overboarded, representing a 568% and 89% increase, respectively, over the numbers under the current ISS policy.

Given the recent focus on gender diversity on boards (see *Davies Governance Insights 2015*), it would appear possible that the Amended Policy could have a disproportionate effect on women, as more and more Canadian issuers strive to increase the number of women on their boards. If the pool of women qualified to serve as directors of public companies is smaller than the equivalent pool of men, and the demand to have women represented on boards has increased, women may be more likely to be overboarded than men. In fact, applying the Amended Policy to independent data we collected for a subset of TSX-listed issuers for *Davies Governance Insights 2015*, to date, this argument is unsubstantiated: under ISS's Amended Policy, more men than women would have been overboarded if the Amended Policy had applied in the 2015 proxy season.

Advice for Boards

More CEO and non-CEO directors of Canadian public companies are likely to find themselves overboarded under ISS's Amended Policy, with the result that maintaining strong director attendance records will be critical to avoiding ISS's withhold recommendations starting in 2017. Governance committees of some public companies are also addressing overboarding as part of their director nomination processes. Issuers that have not considered or addressed overboarding as part of the director selection and nomination process should consider gathering and analyzing the relevant facts to ensure that each director nominee can, among other things, devote the necessary time, energy and attention to carrying out his or her duties as a director and remain onside ISS's Amended Policy.

For information about other important emerging and recurring governance themes that are shaping the Canadian corporate governance landscape, download a copy of our recently released fifth annual edition of *Davies Governance Insights 2015*.

² ISS, *Director Overboarding (Canada)*. Available at <http://www.issgovernance.com/file/policy/canada-overboarding.pdf>.

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