

October 19, 2020

ISS Proposes Explicit Support of Delaware Choice of Forum in Exclusive Forum Selection Charter and Bylaw Provisions; Addresses Federal Forum Selection

Institutional Shareholder Services (ISS) has [released](#) its proposed 2021 voting policy updates and, for the first time, proposes expressly recognizing the benefits of Delaware choice of forum provisions for Delaware corporations and generally recommending in favor of management-sponsored proposals seeking shareholder approval of such charter or bylaw provisions. Under the new ISS policy, ISS would:

(1) generally vote for charter or bylaw provisions that specify Delaware, or the Delaware Court of Chancery, as the exclusive forum for corporate law matters for Delaware corporations, “in the absence of serious concerns about corporate governance or board responsiveness to shareholders” (and continue to decline to vote against the directors of Delaware companies who adopt such bylaw provisions “unilaterally”);

(2) continue to take a case-by-case approach with respect to votes regarding exclusive forum provisions specifying states other than Delaware; and

(3) generally vote against provisions that specify a state other than the state of incorporation as the exclusive forum for corporate law matters or a specific local court within the state (and apply withhold vote recommendations to a board’s “unilateral” adoption of such a provision).

Since then-Chancellor Strine’s well-reasoned June 2013 decision in the [Chevron case](#) authorizing board-adopted forum selection bylaws—an [innovation](#) of this Firm—as a potential solution to the problems of duplicative, costly, multi-jurisdictional shareholder litigation and incorrect and inconsistent outcomes, many other states have upheld—and enforced—Delaware exclusive forum provisions against attack. These decisions have consistently recognized the “special expertise in corporate matters” found in the Delaware courts and that litigating in Delaware is reasonable and fair. Assuming that ISS maintains the proposed approach in its final 2021 policies (which are expected to be announced in November), ISS’ recognition of the benefits to companies—and shareholders—from Delaware’s “separate court system specializing in corporate law cases,” “large body of precedent stemming from Delaware’s status as the most common state of incorporation in the US,” and the greater “likelihood of a speedy and efficient resolution of Delaware corporate law cases” when heard in Delaware courts, is welcome.

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With respect to federal forum selection clauses, in March 2020, the Delaware Supreme Court [rejected](#) a facial challenge to federal forum provisions, ruling that charter provisions designating the federal courts as the exclusive forum for lawsuits brought under the Securities Act of 1933 are permissible under Delaware law. Companies have subsequently taken varying approaches with respect to federal provisions, including due to uncertainty as to how ISS—and shareholders—would view such matters. Under the proposed new policy, ISS would:

(1) generally vote for federal forum selection provisions in the charter or bylaws that specify “the district courts of the United States” as the exclusive forum for federal securities law matters (on the theory that having federal courts, rather than state courts, address such claims is beneficial to shareholders);

(2) vote against provisions that restrict the federal forum to a particular federal district court (on the theory that that may create inconvenience); and

(3) generally recommend against directors where the company unilaterally adopts (without a shareholder vote) such a provision that limits federal claims to a particular federal district, rather than federal district courts generally.

ISS’ recognition of the potential benefits to companies and their shareholders of federal forum selection provisions is an important and welcome step forward, even if ISS has not yet endorsed federal provisions that address the continuing problem of forum-shopping by designating in which federal courts suits may be brought while preserving access to specified federal courts for federal claims.

Corporations considering amending their bylaws or charters to include a federal forum provision—and corporations seeking to enforce such provisions once enacted—should continue to do so only on the strength of a record reflecting robust deliberation and consideration of all relevant information and be mindful of anticipated ISS and shareholder perspectives as relevant.

Theodore N. Mirvis  
William Savitt  
Sabastian V. Niles  
S. Christopher Szczerban  
Anitha Reddy