

# South Africa

## Proxy Voting Guidelines

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Benchmark Policy Recommendations

**Effective for Meetings on or after April 1, 2018**

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## OVERVIEW

South African company law and regulatory requirements determine the proposals which need to be presented to shareholders for approval. Of particular importance are the Companies Act 2008 (referred to as "CA" throughout this document), the Johannesburg Stock Exchange (JSE) Listings Requirements (referred to as "LR") and the King Code and Report on Governance for South Africa 2016 ("King IV").

Legal and regulatory requirements are typically enshrined in a company's memorandum of incorporation ("MOI"), which is the constitutional document covering the governance of the company.

At the typical AGM, shareholders will be asked to approve the following:

- › Receipt of annual financial statements;
- › Auditors' reappointment and remuneration;
- › Election of directors;
- › Election of audit committee members;
- › Share issuance authorities;
- › Share buyback authorities;
- › Approval of director fees;
- › Financial assistance to related or inter-related companies;
- › Authority to ratify and execute approved resolutions;
- › Approval of remuneration policy and implementation report.

Non-routine items that are also often seen on South African agendas and require shareholder approval include:

- › Approval of new equity incentive schemes or amendments to existing schemes;
- › Amendments to the MOI;
- › Black Economic Empowerment (BEE) transactions;
- › Social and ethics committee elections;
- › Social and ethics committee report.

This document outlines the ISS policy on the above resolutions. For proposals which typically appear on an infrequent basis at South African meetings, and which are not covered in this document, ISS will refer to the [EMEA Regional Policy](#) as a framework for analysis.

## 1. OPERATIONAL ITEMS

### Annual Financial Statements

► **General Recommendation:** Vote for approval of the financial statements and director and auditor reports, unless:

- › There are concerns about the accounts presented or audit procedures used; or
- › The company is not responsive to shareholder questions about specific items that should be disclosed publicly.

#### Discussion

Companies must submit their annual financial statements, including the reports of the auditors and the directors, to shareholders (CA s30). Although a large majority of South African companies submit their annual financial statements to a shareholder vote, this is not mandated by law. Some companies simply present the statements to the AGM without a formal vote. The JSE requires that annual financial statements and the AGM notice are sent to shareholders at least 15 business days before the AGM (LR s3.19).

### Auditors' Reappointment and Remuneration

► **General Recommendation:** Vote for the re-election of auditors and/or proposals regarding auditor remuneration, unless:

- › There are serious concerns about the accounts presented or the audit procedures used;
- › The auditors are being changed without explanation; or
- › Non-audit related fees are substantial or are routinely in excess of standard audit-related fees.

#### Discussion

A public company must appoint an auditor at each AGM (CA s90). The retiring auditor can be automatically reappointed without any resolution being passed, but most companies include an appropriate agenda item. Some companies also seek separate shareholder approval for the remuneration paid to the auditors.

### Authority to Ratify and Execute Approved Resolutions

► **General Recommendation:** Vote for the authority to ratify and execute approved resolutions, unless opposition is recommended to all other items on the agenda.

#### Discussion

Many companies seek the approval of shareholders for a formal authority allowing the directors (and/or the company secretary) to sign all the necessary documents and do everything required to put into effect the resolutions approved at the general meeting.

## 2. BOARD OF DIRECTORS

### Voting on Director Nominees in Uncontested Elections



**General Recommendation:** Generally vote for the re-election of directors, unless:

#### Independence:

- › The director is a former CEO who has been appointed as chairman;
- › The director is an executive who serves on one of the key board committees (audit, remuneration, nominations);
- › The director is a non-independent NED (per [ISS' Classification](#)):
  - › Serving on the audit committee (unless there is a separate AGM proposal specifically covering his/her election as an audit committee member);
  - › Serving on the remuneration or nomination committee and there is no majority of independent NEDs on the committee. However, such a consideration should take into account the potential implications for the board's Black Economic Empowerment (BEE) credentials; or
  - › The majority of NEDs on the board are not independent. However, such a consideration should take into account the potential implications for the board's BEE credentials.

#### Composition:

- › Repeated absences (less than 75 percent attendance) at board and committee meetings have not been explained.

#### Accountability:

- › Elections are bundled;
- › Adequate disclosure has not been provided in a timely manner;
- › There are clear concerns over questionable finances or restatements, questionable transactions with conflicts of interest or records of abuses against minority shareholder interests;
- › The board fails to meet minimum governance standards;
- › There are specific concerns about the individual nominee, such as criminal wrongdoing or breach of fiduciary responsibilities; or
- › Under extraordinary circumstances, vote against individual directors, members of a committee, or the entire board, due to:
  - › Material failures of governance, stewardship, risk oversight, or fiduciary responsibilities at the company;
  - › Failure to replace management as appropriate; or
  - › Egregious actions related to a director's service on other boards that raise substantial doubt about his or her ability to effectively oversee management and serve the best interests of shareholders at any company.

**Alternative Directors:** Proposals to re-elect alternate directors will take into account the vote recommendation that applies for the director for whom they serve as an alternate. In addition, the specific nature of the alternate role will be considered, for example whether or not the individual serves as a genuine alternate (i.e. only attending board and committee meetings in the absence of a particular director) or appears to have a broader board position.

## ISS Classification of Non-Independent Non-Executive Directors

### Non-Independent Non-Executive Director (NED)

- › Any director who is attested by the board to be a non-independent NED;
- › Any director specifically designated as a representative of a significant shareholder of the company;
- › Any director who is also an employee or executive of a significant shareholder of the company;
- › Beneficial owner (direct or indirect) of at least 5 percent of the company's shares, either in economic terms or in voting rights;
- › Government representative;
- › Currently provides (or a related person provides) professional services to the company, to an affiliate of the company, or to an individual officer of the company or of one of its affiliates in excess of ZAR 100,000 per year. In line with King IV, there should be a three-year cooling-off period for individuals appointed as the designated auditor/partner in the external audit firm or as a senior legal adviser to the company;
- › Represents customer, supplier, creditor, banker, or other entity with which company maintains transactional/commercial relationship (unless company discloses information to apply a materiality test, which indicates materiality if the company makes or receives annual payments exceeding the greater of ZAR 2 million or 5 percent of the recipient's gross revenues);
- › Any director who has cross-directorships with executive directors of the company;
- › Relative (immediate family member) of current or former executive of the company or its affiliates. King III specifies a three-year cooling-off period;
- › A new appointee elected other than by a formal process through the general meeting (such as a contractual appointment by a substantial shareholder);
- › Founder/co-founder/member of founding family but not currently an employee;
- › Former executive (five-year cooling off period); or
- › Any director who receives any form of performance-related remuneration.

### Discussion

The appointment of a new director must be confirmed by shareholders at the next AGM (LR schedule 10, para 10.16(c)). Furthermore, at least one-third of non-executive directors (NEDs) must retire by rotation at each AGM (LR schedule 10, para 10.16(g)), although at some companies retirement by rotation provisions extend to executive directors. Each director must be categorised as either executive, non-executive or independent (LR s3.84(e)). The roles of chairman of the board and chief executive must not be held by the same person (LR s3.84(b)).

## Audit Committee Elections



**General Recommendation:** Vote for the re-election of the audit committee and/or audit committee members, unless:

- › Committee member elections are bundled into a single voting item, and the committee includes one or more non-independent NEDs;
- › Committee members are elected individually, and the audit committee member is a non-independent NED;
- › Repeated absences (less than 75 percent attendance) at committee meetings have not been explained; or
- › There are serious concerns about the accounts presented, the audit procedures used, or some other feature for which the audit committee has responsibility.

### Discussion

Companies (other than those covered by the Banks Act) must establish an audit committee of at least three members, which must be elected by shareholders at the AGM (CA s94).

## Social and Ethics Committee Elections

► **General Recommendation:** Vote for the re-election of the social and ethics committee and/or social and ethics committee members, unless:

- › The committee does not satisfy the minimum guidelines for membership, as set out in South African company law; or
- › Serious concerns have been raised with the work of the committee during the year.

### Discussion

The Companies Act includes provisions envisaging that companies form a social and ethics committee (CA s72). Further legislation – in the form of the Companies Regulations 2011 – specifies that these committees must include at least three directors or prescribed officers, at least one of whom must be a director who is not involved in day-to-day management (s43). There is no requirement for shareholders to vote on the members of the committee, but a small minority of companies include these elections on the AGM agenda.

## Voting on Director Nominees in Contested Elections

► **General Recommendation:** For contested elections of directors, e.g. the election of shareholder nominees or the dismissal of incumbent directors, ISS will make its recommendation on a case-by-case basis, determining which directors are best suited to add value for shareholders.

The analysis will generally be based on, but not limited to, the following major decision factors:

- › Company performance relative to its peers;
- › Strategy of the incumbents versus the dissidents;
- › Independence of directors/nominees;
- › Experience and skills of board candidates;
- › Governance profile of the company;
- › Evidence of management entrenchment;
- › Responsiveness to shareholders;
- › Whether a takeover offer has been rebuffed;
- › Whether minority or majority representation is being sought.

When analyzing a contested election of directors, ISS will generally focus on two central questions: (1) Have the dissidents proved that board change is warranted? And (2) if so, are the dissident board nominees likely to effect positive change (i.e., maximize long-term shareholder value).

## 3. CAPITAL STRUCTURE

### Share Issuance Authorities

► **General Recommendation:** Vote for a general authority to place authorised but unissued ordinary shares under the control of the directors, unless:

- › The authority is over a number of shares equivalent to more than 10 percent of the current issued share capital;
- › The authority would allow shares to be used for share incentive scheme purposes and the underlying scheme(s) raises concern; or
- › The company used the authority during the previous year in a manner deemed not be in shareholders' best interests.

Vote for a general authority to issue ordinary shares for cash, unless:

- › The authority is over a number of shares equivalent to more than 10 percent of the current issued share capital; or
- › The company used the authority during the previous year in a manner deemed not to be in shareholders' interests.

Vote for a general authority to issue preference shares, unless:

- › Following the issue, preference shares would comprise greater than 50 percent of the company's issued share capital; or
- › The terms of the preference shares would adversely affect the rights of existing shareholders.

The issue of shares pursuant to a specific transaction will be considered on a case-by-case basis, depending on the merits of the underlying deal.

#### Discussion

In line with the provisions of its MOI, a company will typically seek a general authority to issue shares (sometimes referred to as "placing shares under the control of the directors"). This authority can be used to issue shares on a non-preemptive basis. The JSE has separate rules governing the issue of shares for cash. The Listings Requirements allow companies to request a general authority to issue shares for cash up to a maximum of 15 percent of the issued share capital on a non-preemptive basis, subject to approval by shareholders (LR s3.32, s5.52). The JSE specifies that a general authority to issue shares for cash requires 75 percent support.

### Share Buyback Authorities



**General Recommendation:** Vote for a general share buyback authority, unless:

- › The company wishes to repurchase more than 20 percent of its issued share capital over the year;
- › The repurchase can be used for takeover defenses; or
- › There is clear evidence of abuse.

#### Discussion

Companies are allowed to acquire their own shares (CA s48). The JSE specifies a number of conditions in relation to share buybacks, one of which is that general authorities are permitted up to 20 percent of the issued share capital in any one financial year (LR s5.68). Further, general authorities require the approval of shareholders by way of a special resolution (LR s5.72).

## 4. REMUNERATION

### Fees for Non-Executive Directors



**General Recommendation:** Vote for the fees payable to non-executive directors unless the proposed fees are excessive, relative to similarly-sized companies in the same sector.

#### Discussion

The remuneration paid to directors for their services as directors can only be paid in accordance with a special resolution approved by shareholders within the previous two years (CA s66). (This relates to the fees payable to directors, not the remuneration which an executive director will receive as an employee of the company, and therefore in practice concerns the fees paid to non-executives.) Companies either seek approval for these fees under one resolution, or provide separate resolutions for each different type of fee.



## Approval of Remuneration Policy

► **General Recommendation:** When assessing a company's remuneration policy, ISS generally recommends a vote against if the level of disclosure around the policy is below what is required for shareholders to make an informed judgment. In the event of satisfactory disclosure, ISS recommends a vote for the approval of the executive remuneration policy on a case-by-case approach, paying particular attention as to whether:

- › The company operates long-term incentive schemes (including matching shares) which do not have performance conditions attached for all or a substantial proportion of awards;
- › The vesting period for long-term incentive schemes is set at less than three years;
- › Long-term schemes include an element of retesting;
- › The policy provides for grants of share options at a discount to market value;
- › The potential maximum dilution under all share incentive schemes exceeds 5 percent of the issued share capital of a large, widely held company, or 10 percent in the case of an emerging high-growth company, and there are no mitigating circumstances (e.g. stringent performance measures);
- › The quality of disclosure around the severance provisions of the executive directors' service contracts, including any potential termination payments, is considered inadequate;
- › The policy is in any way not considered aligned with shareholder interests.

In circumstances where a company has demonstrated a significant shift towards good practice, it may be appropriate for ISS to recommend support for the remuneration policy resolution, notwithstanding the presence of some historical issues of concern.

### Discussion

The King IV report recommends that companies provide shareholders with an annual, non-binding vote on the remuneration policy (Part 5.4, Recommended Practice #37). The policy should set out all elements of remuneration that are offered to executive management. The JSE Listings Requirements (LR s.3.84(k)) mandate that this advisory vote is put to shareholders at each AGM.

## Approval of Implementation Report

► **General Recommendation:** When assessing the implementation report, ISS generally recommends a vote against if the level of disclosure regarding the application of the policy is below what is required for shareholders to make an informed judgment. In the event of satisfactory disclosure, ISS recommends a vote for the approval of the implementation report on a case-by-case approach, paying particular attention as to whether:

- › Large increases in fixed remuneration have been implemented which have not been adequately explained;
- › The company has made bonus payments, but these have not been clearly linked to performance (including guaranteed bonuses or transaction bonuses);
- › The company has made ex-gratia payments or one-off special awards to executives during the year which have not been adequately explained;
- › The performance conditions for long-term incentive schemes, where applicable, are not disclosed, or are not considered sufficiently challenging or relevant;
- › Significant termination-related or restraint of trade payments have been made to executive directors, and the reasons for these are not disclosed or, where they are disclosed, do not adequately justify the size of the payment;
- › Discretion has been used during the year in a manner not considered consistent with shareholder interests, or the application of the policy is in any way not considered aligned with shareholder interests, with particular attention given to any payments or decisions which have been made outside of the policy framework previously communicated to shareholders.


In circumstances where a company has demonstrated a significant shift towards good practice, it may be appropriate for ISS to recommend support for the implementation report resolution, notwithstanding the presence of some historical issues of concern.

In cases where a serious breach of good practice is identified, and typically where issues have been raised over a number of years, the chair of the remuneration committee (or, where relevant, other members of the remuneration committee) may receive a negative voting recommendation.

### Discussion

The King IV report recommends that companies provide shareholders with an annual, non-binding vote on the implementation report (Part 5.4, Recommended Practice #37). This report should contain details of all remuneration awarded to individual members of the governing body and executive management during the reporting period. The JSE Listings Requirements (LR s.3.84(k)) mandate that this advisory vote is put to shareholders at each AGM.

## New Equity Incentive Scheme or Amendment to Existing Scheme

 **General Recommendation:** ISS evaluates management proposals seeking approval for a share incentive scheme on a case-by-case basis. When judging such items, ISS will generally recommend a vote against if the level of disclosure on the proposal is below what is required for shareholders to make an informed judgment on the scheme. In the event of satisfactory disclosure, ISS will recommend a vote for the proposal unless one or more of the following apply:


- › Performance conditions do not apply, have not been disclosed or are not considered sufficiently challenging or relevant.
- › Performance conditions can be retested.
- › Performance is measured over a period shorter than three years.
- › The plan allows for option repricing or issue of options at a discount or backdating of options.
- › The potential maximum dilution under all share incentive schemes exceeds 5 percent of the issued share capital of a large, widely held company, or 10 percent in the case of an emerging high-growth company, and there are no mitigating circumstances (e.g. stringent performance measures).
- › The scheme provides for potentially excessive individual reward or has no caps on individual participation.
- › NEDs can participate in the scheme.
- › The scheme is in any way not considered aligned with shareholder interests.

Proposals to amend a scheme will involve an assessment of the nature of the amendment.

### Discussion

Share incentive schemes which involve the issue of new shares must be approved by shareholders via a resolution requiring 75 percent support (LR schedule 14). Certain provisions in existing schemes cannot be altered without shareholder approval.

## Financial Assistance

 **General Recommendation:** Vote for a general authority to provide financial assistance, unless:

- › As part of the authority, the company requests a general authority to provide financial assistance to directors, and this is not limited to participation in incentive schemes;
- › The authority would facilitate the operation of an incentive scheme(s) which raises governance concerns, with particular attention given to any schemes which authorise the provision of preferential loans to directors; or
- › As part of the authority, the company seeks approval to provide financial assistance "to any person".

Evidence that the company has used a previous authority in a manner deemed not to be in shareholders' interests would warrant further review and analysis.

#### Discussion

Financial assistance proposals are commonplace following the implementation of South Africa's Companies Act 2008. Under the Act, companies are required to seek shareholder approval in advance of providing certain forms of financial assistance (e.g. loans or loan guarantees) (CA s44, s45). Typically these authorities are limited to the provision of assistance to related or inter-related companies – i.e. intercompany loans – and are not contentious. In some cases, however, these proposals may cover the provision of loans to senior executives, or facilitate the administration of share incentive schemes.

Shareholder approval is required for assistance provided to (a) related or inter-related companies (e.g. a subsidiary), (b) directors or prescribed officers (i.e. senior executives who are not directors), (c) for the purpose of subscribing for any options or securities issued by the company or by a related or inter-related company, or (d) for the purpose of purchasing any securities of the company or a related or inter-related company.

## 5. OTHER ITEMS

### New Memorandum of Incorporation (MOI)/ Amendments to the MOI

- **General Recommendation:** Vote on a new MOI or on amendments to the MOI on a case-by-case basis, depending on the impact on shareholder rights.

ISS will normally recommend a vote against an MOI which limits retirement by rotation to non-executive directors only.

#### Discussion

Shareholder approval is required for a new MOI or amendments to the existing MOI (CA s16). The Listings Requirements include detailed guidance on what should be included within an MOI (schedule 10).

### Black Economic Empowerment (BEE) Transactions

- **General Recommendation:** Vote on BEE transactions on a case-by-case basis. Factors considered include the overall dilutive impact, the structure of the transaction and the identity of the company's chosen BEE partners. Proposals which are genuinely broad-based are more appealing than those which stand to benefit a narrow group of investors, as are those which have a long-term timeframe.

#### Discussion

BEE transactions often involve the issue of new shares to specific partners or the provision of financial assistance and, as such, require shareholder approval. The precise nature of the transaction can vary significantly from company to company.

### Social and Ethics Committee Report

- **General Recommendation:** Vote for the report of the social and ethics committee, unless:
- › The report does not include details of how the committee has undertaken the functions prescribed to it by South African company law; or
  - › Serious concerns have been raised with the work of the committee during the year.

**Discussion**

The Companies Regulations 2011 require the social and ethics committee to report, through one of its members, to the shareholders at the AGM on the matters within its mandate (s 43). There is no requirement for shareholders to vote on this report, but a small minority of companies include this as a voting item on the AGM agenda.

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