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ISS 2016 Voting Policies

Posted by Andrew R. Brownstein & David A. Katz, Wachtell, Lipton, Rosen & Katz, on Tuesday, November 24, 2015

Editor's note: Andrew R. Brownstein is partner and co-chair of the Corporate practice group, and David A. Katz is a partner specializing in the areas of mergers and acquisitions, corporate governance and activism, and crisis management at Wachtell, Lipton, Rosen & Katz. This post is based on a Wachtell Lipton memorandum by Mr. Brownstein, Mr. Katz, David M. Silk, Trevor S. Norwitz, Sabastian V. Niles, and S. Iliana Ongun.

[November 20, 2015], ISS announced its final U.S. voting policies for the 2016 proxy season. ISS had previously released draft proposals on several of the topics in October. Changes to non-U.S. policies were also announced, including with respect to Brazil, Canada, France, Hong Kong & Singapore, India, Japan, the Middle East & Africa and the U.K. & Ireland. ISS also released an updated equity plan scorecard "FAQ," which contains a new model index for large companies that are newly public or emerging from bankruptcy, as well as other minor adjustments to scorecard factors.

Proxy Access. Although ISS did not revise its specific voting policies with respect to shareholder proxy access proposals, it anticipates releasing a "FAQ" document in December 2015 that will provide information on which proxy access provisions ISS considers to be overly restrictive. The FAQ will also clarify the framework used to analyze proxy access nominations, which is expected to be conceptually similar to the framework ISS uses to analyze proxy contests.

Overboarding. For directors who are not the CEO, ISS has reduced the acceptable number of board positions from the current six (the board under consideration plus five others) to a total of five (the board under consideration plus four others). As previously proposed, there will be a one-year grace period until 2017, during which time ISS would include cautionary language in research reports but would not recommend negative votes for this reason. ISS had also considered, but did not implement, a limit of one outside public company directorship (as opposed to two) for CEOs, and an alternate limit of four total for non-CEOs.

Unilateral Board Actions. ISS will generally issue adverse recommendations for directors at the meeting following an IPO if a pre-IPO board amends the company's bylaws or charter prior to or in connection with the IPO to diminish shareholder rights. ISS has not specified which bylaw or charter provisions would be deemed to diminish shareholder rights; however, during the comment period ISS focused on board classification and supermajority voting provisions.

In subsequent years, ISS will consider issuing adverse recommendations against directors on a case-by-case basis, giving significant weight to whether shareholders have the ability to amend the provisions by majority action and whether the company holds annual director elections. ISS

will also consider as a mitigating factor a company's commitment to submit the provision to a shareholder vote within three years of the IPO.

IPO companies, like spun-off companies, often have staggered boards (and the supermajority provisions necessary to make them meaningful) to provide a measure of protection for young companies to enable them to pursue their strategy without being immediately vulnerable to hostile takeover bids. We believe that boards of companies planning public offerings or spin-offs should continue to do what they believe is best for long-term value creation. However, they must be aware that ISS may seek to wield its "withhold" recommendation against directors who make such a decision and factor that into their director selections.

Compensation at Externally Managed Issuers (EMIs). As previously proposed, an EMI's failure to provide sufficient disclosure for shareholders to reasonably assess named executive officer compensation will be deemed a problematic pay practice warranting a recommendation against the EMI's say-on-pay proposal.

Peer Groups. ISS announced that companies may submit updated self-selected peer groups from November 24 through 8pm EST on December 11, 2015. The deadline for companies to submit updated self-selected peer groups to Equilar is December 31, 2015.

The revised voting policies will take effect for meetings on or after February 1, 2016.