

February 19, 2015

ISS Clarifies 2015 Voting Policies Regarding Proxy Access,
Excluding Shareholder Proposals and “Unilaterally” Adopting Bylaw and Charter Amendments

Today, ISS [published FAQs](#) clarifying its [2015 proxy voting policy updates](#) as to (i) how ISS will recommend on [proxy access](#) proposals; (ii) potential ISS “withhold” recommendations where companies exclude shareholder proposals in reliance on the exemptions provided under Rule 14a-8; and (iii) “unilateral” adoption of bylaw and charter amendments that materially diminish shareholder rights or adversely impact shareholders.

Proxy Access. ISS previously took a case-by-case approach regarding evaluation of proxy access proposals. ISS will now generally recommend in favor of management and shareholder proposals for proxy access that have the parameters outlined below, review “for reasonableness” any other requirements, and generally recommend a vote against proposals that are more restrictive than these guidelines. For companies that include both management-sponsored and shareholder-sponsored proxy access proposals on the ballot, ISS will review each of them under the policy.

ISS’ favored parameters for proxy access include:

- an ownership threshold of not more than 3%;
- a holding period of not longer than 3 years of continuous ownership;
- permitting shareholders to aggregate shares to meet ownership thresholds, with “minimal or no limits” set on the size of any such nominating groups;
- a nomination cap “generally” of 25% of the board.

Institutional shareholders continue to announce varying policies with respect to proxy access, including as to preferred parameters on these and other variables.

Treatment of Competing Management-Sponsored and Shareholder-Sponsored Proposals; Exclusion of Rule 14a-8 Shareholder Proposals. If a company submits to a vote both a management-sponsored proposal on a topic alongside a shareholder-sponsored proposal on the topic, ISS has confirmed that it will review each of them under the applicable ISS voting policy. In addition, ISS will now generally issue “withhold” votes against directors if a company omits from its ballot a properly submitted shareholder proposal without obtaining:

- voluntary withdrawal of the proposal by the proponent;
- no-action relief from the SEC; or
- a federal court ruling confirming that the proposal has been properly excluded.

Although such a “withhold” recommendation would generally be made even if there is a management-sponsored proposal on the same topic on the ballot, if the company has taken unilateral steps to implement the shareholder proposal, then the degree to which the proposal is implemented, and any material restrictions added to it, will factor into the assessment.

*If your address changes or if you do not wish to continue receiving these memos,
please send an e-mail to Publications@wlrk.com or call 212-403-1443.*

Charter and Bylaw Amendments Adopted Without Shareholder Approval. ISS previously announced that it would generally recommend “withhold” votes against directors if charter or bylaw amendments were enacted without shareholder approval and “in a manner that materially diminishes shareholders’ rights or that could adversely impact shareholders.” In assessing bylaw and charter changes at pre-IPO companies, ISS will consider the timing of the adoption of the provisions that diminish post-IPO shareholders rights, the clarity of disclosures of such changes (including in the company’s prospectus or other documents connected to the public offering) and the continuity of board membership. Today’s ISS FAQs provide illustrative examples of amendments that would not automatically be deemed “materially adverse” and of amendments that generally would be:

Generally not deemed “materially adverse”:

- Advance notice bylaws that set customary and reasonable deadlines;
- Director qualification bylaws that require disclosure of third-party compensation arrangements;
- Exclusive venue/forum provisions (when the venue is the company’s state of incorporation).

Generally deemed “materially adverse” (if done without shareholder approval):

- Increasing the authorized share capital available for issuance beyond the limits outlined in ISS’ capital structure frameworks;
- Board classification to establish staggered director elections;
- Director qualification bylaws that disqualify shareholders’ nominees or directors who could receive third-party compensation;
- Fee-shifting bylaws that require a suing shareholder to bear all costs of a legal action that is not 100% successful;
- Increasing the vote requirement for shareholders to amend charter/bylaws;
- Removing a majority vote standard and substituting plurality voting;
- Removing or restricting the right of shareholders to call a special meeting (raising thresholds, restricting agenda items); and
- Removing or materially restricting the shareholder’s right to act in lieu of a meeting via written consent.

These ISS policies clearly require careful consideration.

Andrew R. Brownstein
Sabastian V. Niles