

From the Public Company Advisory Group of Weil, Gotshal & Manges LLP

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Heads Up for the 2017 Proxy Season: ISS Proposes New Triggers for Negative Vote Recommendations in Director Elections Also Addresses Important Issues for U.S.-Listed Cross- Market Companies

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Yesterday, ISS released its key draft proposed proxy voting policy changes for the 2017 proxy season. ISS is seeking comments by 6:00 p.m. EDT on November 10, 2016. ISS' proposed policy changes, questions for comment and details around how to participate in the comment process are available [here](#). Its final 2017 policies are expected to be released during the second week of November, and will apply to meetings held on or after February 1, 2017.

Proposed Changes to ISS Proxy Voting Policies for 2017

Proposed changes for U.S. companies would:

- Result in a negative recommendation for members of the governance committee if the company's charter imposes "undue" restrictions on shareholders' ability to amend the company's bylaws
- Result in a negative recommendation for director nominees at companies that have completed an IPO with a multi-class capital structure affording unequal voting rights absent a "reasonable" sunset provision

Proposed changes for U.S.- listed companies incorporated outside of the U.S. (cross-market companies) would:

- Result in a favorable recommendation on management proposals seeking approval for general share issuances (*i.e.*, those without a specified purpose) of up to 20% of currently issued capital as long as the duration of the authority is "reasonable" and clearly disclosed
- Generally result in multiple say-on-pay proposals being evaluated under ISS's U.S. standards

Interestingly, ISS has not proposed policies on board refreshment or over-boarding of executive chairs, two issues that seemed to be top of mind for investors based on ISS's annual survey results published last month. For a summary of the annual survey results, see our Alert [here](#).

The proposed changes may not be the final word from ISS. In past years, ISS has announced certain final policy changes that were not presented for comment. ISS also announces certain other policy matters through updated FAQs, expected in mid-December.

Restrictions on Shareholder Right to Amend Bylaws – *NEW*

ISS considers shareholders' ability to amend a company's bylaws a fundamental right and notes that some states allow companies to restrict this right in their charters. Under the new proposed policy, ISS would recommend against members of the governance committee if the company's charter contains provisions that "unduly" restrict shareholders' ability to amend the company's bylaws. "Undue" restrictions would include but not be limited to (1) an outright prohibition on the submission of binding shareholder proposals, or (2) share ownership requirements or time holding requirements in excess of SEC Rule 14a-8 (*i.e.*, \$2,000 or 1% for at least 1 year). ISS would continue to issue the negative recommendation until such restrictions were removed.

Spotlight on Maryland REITS

Maryland law, in particular, enables boards to provide that only the directors, and not shareholders, have the right to amend the company's bylaws. In its annual survey results released last month, ISS highlighted that over two-thirds of Maryland REITs have taken advantage of this provision and conferred the power to amend the bylaws exclusively on the board. While the proposed policy update does not specifically address REITs, it appears as though Maryland REITs may be particularly implicated.

ISS seeks specific feedback on the following issues:

- Whether the negative recommendation relating to members of the governance committee on an on-going basis is sufficient
- How boards should address this issue (*e.g.*, would the introduction of a super-majority vote requirement to approve binding shareholder proposals in place of a previous prohibition be viewed as responsive?)

IPO Companies with Dual Classes of Stock with Unequal Voting Rights – *REVISED*

Last year, ISS amended its policy for evaluating certain bylaw or charter amendments adopted by the board prior to or in connection with a company's IPO. For a summary of last year's changes, see our Alert [here](#). Citing an increase in the number of companies completing IPOs with multi-class structures, ISS proposes to amend its policy relating to IPO-companies further for the 2017 proxy season. The amended policy would result in a negative recommendation for director nominees at companies that have completed an IPO with a multi-class capital structure affording unequal voting rights unless there is a "reasonable" sunset provision. ISS will no longer consider the submission of the dual-class provision to a binding shareholder vote when evaluating its voting recommendations in director elections.

ISS seeks specific feedback on the following issues:

- The appropriate factors for the sunset provision – duration, ownership or other factors
- The appropriate duration
- Whether the terms of a sunset provision should differ based on the feature being sunset (*e.g.*, classified board vs. supermajority vote requirements vs. multi-class capital structure) and, if so, how

Proposed Policies for U.S.-Listed Cross-Market Companies

ISS has begun to address the dilemmas faced by certain "cross-market companies." These companies are incorporated outside of the U.S. and therefore subject to the corporate laws of their home countries. At the same time, however, they have NYSE or NASDAQ as their sole or principal trading market and are subject to the full SEC reporting regime as U.S.-incorporated companies. As a result, these companies may be required to seek shareholder approval under their home country law on matters that do not require shareholder approval under U.S. law or they may be required to present multiple proposals on the same matter because of differing home country and U.S. requirements.

Share Issuance Proposals – NEW

Some cross-market companies are required by home country rules to seek approval for *any* share issuance, and typically seek annual approval for a general mandate for share issuances (*i.e.*, those without a specific purpose) in order to avoid having a special meeting each time new shares are issued. U.S. companies are not required to seek approval for share issuances except in specific circumstances. ISS has no U.S. policy on the subject, but has been evaluating general share issuance proposals under its policy applicable to the home country even though the company is not subject to home country listing rules. Pursuant to the proposed voting policy for cross-market companies, ISS would recommend in favor of a general share issuance of up to a maximum of 20% of currently issued capital, so long as the duration of the authority is clearly disclosed and reasonable.

ISS seeks specific feedback on the following issues:

- Whether 20% of currently issued capital is an appropriate threshold for cross-market companies (noting that this would effectively extend the NYSE/NASDAQ requirements into scenarios where they do not currently apply, such as share issuances for cash), or whether issuances up to a lower or higher level would be more appropriate
- Whether such companies should seek annual approval for share issuance mandates, or whether a longer mandate (*e.g.*, 2 years or 3 years) would be acceptable
- Whether the same policy should also apply to foreign private issuers for SEC purposes (*i.e.*, 20-F filers)

Executive Pay Recommendations – NEW

As the number and significance of cross-market companies have increased, ISS cites preferences for aligning voting policies and recommendations for multiple proposals on the same compensation program, rather than inconsistent evaluations of a single pay structure. ISS's proposed policy would assess all say-on-pay proposals that pertain to the same pay program on a case-by-case-basis using the following guiding principle: (1) align voting recommendations so as to not have inconsistent recommendations on the same pay program, and (2) use the policy perspective of the country in which the company is listed (*e.g.*, U.S. say-on-pay policy for all proposals relating to executive pay). If there is no applicable U.S. policy, then the policy of the country that requires it to be on the ballot would apply.

ISS seeks specific feedback on the following issue:

- How companies that are dual-listed or have dual incorporations should fit into this framework

What To Do Now?

- Consider providing comments to ISS on the proposed policy changes before the deadline of November 10, 2016. Comments can be submitted to ISS via email to policy@issgovernance.com.
- Evaluate whether your charter contains any restrictions on shareholders' ability to amend the bylaws and whether governance committee members could be at risk of a negative recommendation under the revised ISS policy.
- Companies preparing for an IPO should carefully consider the impact of adopting a multi-class voting structure with unequal voting rights on future director elections but should continue to make decisions in the best interest of the company. If a multi-class voting structure is contemplated, consider including a sunset provision on any unequal voting rights.

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