

ISS Requests Public Comments on a Few of the Policies to be Updated for 2018

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ISS is [seeking public comment](#) on three policies that will impact U.S. companies with the comment period to close on November 9. It will release final policy updates, which will contain more than just these three changes, that will impact the 2018 season in the second half of November. We previously reported on the issues that were raised in two separate surveys [here](#) and [here](#).

The key changes under consideration for the three policies now subject to comment include:

Non-Employee Director Compensation. Under the proposed new policy, ISS would recommend against the board committee members who are responsible for setting or approving non-employee director compensation when there are two or more consecutive years of “excessive” pay without a rationale or other mitigating factors. The policy will not be in effect for 2018 and will only impact “extreme director pay outliers.”

ISS is requesting comment on: (a) the circumstances for exempting even large non-employee director pay from the policy, such as a one-time onboarding grant for new directors; (b) who to hold accountable if the proxy statement is not clear about which board committee sets director pay; and (c) whether “outsized” pay provided to chairs, lead directors or other board members should be included in calculating either average or median director pay.

Gender Pay Gap Shareholder Proposals. The key policy change under consideration would continue to consider case-by-case shareholder proposals seeking reports on a company’s pay data by gender, taking into account: (a) the company’s current policies and disclosures related to both its diversity and inclusion policies and practices and its compensation philosophy and fair and equitable compensation practices; (b) whether the company has been the subject of recent controversy or litigation related to gender pay gap issues; and (c) whether the company’s reporting regarding gender pay gap policies or initiatives lags its peers. ISS asks whether there are other considerations that should be part of the factors.

Poison Pills and Director Elections. Under the existing policy, for companies that adopt long-term (more than a year) poison pills, ISS recommends against all director nominees every year if the board is classified but only once every three years if the board is annually elected. A company could avoid a negative recommendation by making a commitment to put the pill up for vote at the next annual meeting. For companies that adopt short-term pills, ISS looks at it on a case-by-case basis based on the disclosed rationale and a company’s governance track record and generally does not recommend against the board. In addition, companies that adopted pills prior to 2009, when the policy was put into effect, were grandfathered from the policy.

Under the proposed new policy, ISS may, for companies that adopt long-term pills, (a) recommend against all directors every year; (b) no longer take into account commitments to put pills up for vote at the next meeting; and (c) stop grandfathering companies that adopted the pill before 2009. For companies that adopt short-term pills, it remains a case-by-case analysis but with more focus on rationale for the adoption and less on the company’s governance structure.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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