

FMR Equity Plan Voting Policy Update

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Companies considering new equity plans should take note that Fidelity (a large shareholder of just about every public company) has adopted a new voting policy for equity plans. As of March 2011 its policy focuses on burn rate rather than dilution. Fidelity will vote “no” on a plan if:

(A) the company's three-year burn rate on equity awards is greater than:

- 1.5% for Russell 1000 companies;
- 2.5% for companies not in the Russell 1000;
- 3.5% for companies with a market cap below \$300M; and

(B) the burn rate is not otherwise acceptable to Fidelity based on circumstances specific to the company or plan.

Note that this test is based strictly on company size and, unlike the ISS test, takes no account of industry practice. (ISS applies a limit equal to the greater of 2% or one standard deviation from the average burn rate for the company's industry group). Fidelity's new policy will tend to particularly impact companies in the tech sector and in other industries with high share usage rates. If a company fails the Fidelity test, Fidelity may contact the company and try to get the company to commit to reduce its future burn rate or make other changes in exchange for Fidelity's support. Our sense is that Fidelity may be getting push-back from companies in a number of industries, so it would not be surprising if Fidelity reconsiders its approach.

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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