

ISS Clarifies Its Unilateral Bylaw and Charter Amendments Policy as Related to Exclusive Forum and Fee Shifting Provisions and Other Bylaws

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Under its existing policy, ISS will recommend against the election of boards of directors who adopt bylaw or charter amendments that they view as materially diminishing shareholder rights without obtaining shareholder approval.

In a recent set of [FAQs](#), ISS has clarified that some unilaterally adopted bylaw amendments are *not* considered materially adverse. Although the proxy advisory firm will evaluate them on a case by case basis, the adoption of exclusive forum provisions when the venue is the company's state of incorporation, or director qualification bylaws that require disclosure of third-party compensation arrangements, are unlikely to affect ISS' recommendations for the board.

By comparison, bylaws that actually disqualify shareholders' nominees who receive third-party compensation, rather than simply mandate disclosure, would be considered a materially adverse unilateral action and generate a negative recommendation against directors. Also included in this list are unilateral authorization of capital increases that do not meet ISS standards, establishing a staggered board, increasing the vote necessary for shareholders to amend the charters or bylaws, changing majority voting to plurality voting, and removing or restricting shareholders' rights to call a special meeting or act by written consent (such as by raising thresholds or restricting agenda items).

Unlike exclusive forum provisions, ISS will recommend against boards that adopt fee-shifting bylaws that require a suing shareholder to bear all costs of a legal action that is not 100 percent successful.

In assessing the boards of pre-IPO companies, ISS will consider the timing of the adoption of the provisions, 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.

Additional FAQs address proxy access proposals, which we recently discussed [here](#).

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.

Ning Chiu

+1 212 450 4908

ning.chiu@davispolk.com

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