

ISS Publishes Survey for 2016 Proxy Season Policy Formulation

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Changes to charters and bylaws by boards, director and executive compensation, proxy access, director independence and overboarding are the key topics of focus in the ISS survey for the 2016 proxy season. The survey responses from investors, issuers and others help inform ISS policy formulation for the 2016 season, and will have an impact on how the proxy advisory firm makes recommendations, especially on director elections. The survey closes on September 4th at 5:00pm.

A summary with selected examples of the survey questions that pertain to U.S. companies are set forth below. A copy of the entire survey is [here](#). A link that allows you to respond to the survey is [here](#).

Charter and bylaw amendments by boards. What types of charter or bylaw amendments that a board unilaterally adopts would be considered sufficiently problematic to warrant recommending against those directors (such as increasing authorized capital, restricting third-party compensation for dissident nominees or restricting advance notice requirements).

How long a board that unilaterally adopts a bylaw or charter amendment “that diminishes shareholders’ right” should be held accountable, such as for only one year after or until the provision is eliminated.

Proxy access. The types of “material restrictions” in proxy access provisions adopted by companies where a proxy access shareholder proposal passed in 2015, that would be considered problematic enough to recommend against directors (including an aggregation limit of less than 20 shareholders, more restrictive advance notice requirements or re-nomination restrictions if a proxy access nominee fails to receive a certain level of support or restrictions on third party compensation).

Overboarding. The appropriate number of other board seats for directors (both CEOs and non-executives) to be considered “overboarding” and warrant negative recommendations.

Director independence. Whether there should be a cooling-off period for former executives and professional service providers before being viewed as independent directors in addition to those that already exist.

Executive compensation. The use of adjusted or non-GAAP metrics in incentive compensation programs, including whether they are only acceptable if restricted to common metrics, clearly disclosed or must also be reconciled with GAAP metrics.

Director compensation. The types of equity compensation, such as stock options, different forms of restricted stock and stock appreciation rights that may not be appropriate as compensation for directors.

Pre-IPO companies. Who should be held accountable, if anyone, when a pre-IPO board adopts bylaw amendments that “materially diminishes shareholders’ rights” before becoming public.

Net operating loss (NOL) poison pills. Whether a sunset provision shorter than three years is appropriate for an NOL pill renewal and whether certain types of governance features (such as classified boards or dual class structures) may lead investors to oppose NOL pills.

Share Buybacks. What types of five-year historical financial metrics should be included in ISS reports to assess capital allocation and share buyback decisions, to address concerns that “inappropriate buybacks may be value-destroying in

the long term and...potentially increase the value of executive compensation packages.”

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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