

ISS Issues FAQs on Voting Policies, Including Proxy Access

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On Friday ISS issued new and [updated FAQs](#) to their proxy voting policies. Most notably, ISS indicated that it will evaluate a board's implementation of proxy access in response to a shareholder proposal that received majority support by examining whether the major points of the shareholder proposal are being implemented.

In a nod to the complex nature and the evolving standards for proxy access bylaws, ISS will also examine the numerous additional provisions of the bylaws that were not part of the shareholder proposal. With respect to these types of provisions, ISS will examine whether they "unnecessarily restrict the use of a proxy access right." Any vote recommendations driven by a board's implementation of proxy access may pertain to individual directors, nominating/governance committee members, or the entire board.

In terms of the key requirements, ISS may issue an adverse recommendation if the proxy access bylaw implemented or proposed by management is more restrictive than the following:

- Ownership thresholds above 3%;
- Ownership duration longer than three years;
- Aggregation limits below 20 shareholders; and
- Cap on nominees below 20% of the board.

We note that the vast majority of instances where companies have adopted bylaws after shareholder proposals passed meet the above minimum criteria. However, in many cases, the shareholder proposal sought for the number of proxy access nominees to equal 25% of the board. Recent proposals from John Chevedden and other retail investors have also asked boards to adopt proxy access that does not restrict the number of shareholders that can form a nominating group.

According to ISS, in instances where the cap or aggregation limit differs from what was specifically stated in the shareholder proposal, a lack of disclosure by the company regarding shareholder outreach efforts and engagement may also warrant negative vote recommendations. This appears to mean that publicly explaining that these deviations were discussed with shareholders could be sufficient.

ISS will also review other restrictions or conditions on proxy access nominees on a case-by-case basis. The following are examples of provisions that are generally not addressed specifically in the shareholder proposals, but could be considered by ISS to be "potentially problematic," especially when used in combination:

- Prohibitions on resubmission of failed nominees in subsequent years;
- Restrictions on third-party compensation of proxy access nominees;
- Restrictions on the use of proxy access and proxy contest procedures for the same meeting;
- How long and under what terms an elected shareholder nominee will count towards the maximum number of proxy access nominees; and
- When the right will be fully implemented and accessible to qualifying shareholders.

Many companies have adopted at least some of the above provisions in their proxy access bylaws. At this time it is unclear how ISS will implement this aspect of its policy, and it introduces the greatest amount of uncertainty as to which of the above provisions, what combination, and in what form, ISS will deem to be most problematic.

Finally, two types of restrictions will be considered by ISS as “especially problematic,” which seems to be a higher standard than provisions that are “potentially problematic.” These include:

- Counting individual funds within a mutual fund family as separate shareholders for purposes of an aggregation limit; and
- The imposition of post-meeting shareholding requirements for nominating shareholders.

ISS also provided an FAQ on how it will review a proxy access candidate against a lengthy list of factors. In addition, [ISS updated its FAQs](#) on the application of its executive compensation policies and the [FAQs on equity compensation plan policies](#).

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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