

ISS Detailed Benchmark Survey Focuses on Governance Debates Largely Surrounding Pay Topics – Part II

August 8, 2017 | Client Update | 3-minute read

For US companies, the detailed portion of the ISS benchmark survey targets compensation matters, along with one question on poison pills:

Short-Term Poison Pills. ISS asks whether it should continue its approach of examining poison pills with less than a one-year term on a case-by-case basis when voting on director elections or whether they are generally acceptable.

Using Realizable Pay for Say-on-Pay Analysis. For several years ISS has calculated and presented a realizable pay metric as part of its *qualitative* say-on-pay analysis. ISS believes the measure helps show the difference between target bonus/non-equity incentive and what is actually paid in short term programs and for long term programs, the actual payouts and forfeitures as well as the impact of stock price movements. The survey suggests ISS is considering whether to change its initial *quantitative* methodology to take into account the outcomes of performance-based pay programs using the realizable pay measure.

The possible responses provided to the survey question suggest that realizable pay could mitigate concerns regarding pay-TSR misalignment or excessive pay amounts, or exacerbate concerns regarding what it deems excessive leverage to performance, meaning “large payouts for modest performance.”

Non-Employee Director Pay. Recent shareholder lawsuits have focused attention on the compensation of non-employee directors, which has been increasingly steadily. ISS questions what factors it should examine to identify a company as an outlier for director pay: pay relative to all companies; stock market index peers; or the 4-digit GICS industry group peers. In determining what factors should be considered in whether director compensation presents a problem, ISS asks about examining any of stock option grants, performance equity awards, excessive perks, non-retirement benefit programs as well as retirement programs.

Currently, ISS proxy reports may simply criticize a company for what it views to be off-market director pay. ISS asks in the survey whether additional actions are warranted, including the possibility of continuing to identify the issue without making any adverse recommendations or beginning to recommend against the board committee that approves director pay. Another alternative is to issue an adverse recommendation only after two or more consecutive years of high director pay.

Gender Pay Equity Proposals. We previously discussed shareholder proposals seeking disclosure of gender [pay gaps here](#). ISS asks in the survey whether companies should be disclosing their gender pay gap information in all cases, or only in situations such as when the practice has become an industry norm and the company is lagging its peers, if the company has experienced “significant related controversies,” or only when the disclosure is required by government regulations. Certain practices may mitigate the absence of specific gender pay gap disclosure such as diversity and inclusion policies and practices and/or “compensation philosophy and fair and equitable compensation practices,” the latter being undefined.

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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