ISS Announces 2018 Updates to US Proxy Voting Guidelines

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

Proxy advisory firm Institutional Shareholder Services (ISS) recently announced updates to its U.S. proxy voting guidelines for the 2018 proxy season. Although the updates are not likely to have a significant impact on 2018 shareholder votes, they represent institutional investors' continuing focus on environmental, social and governance matters, including with respect to executive and director compensation. The voting policy updates are summarized below and will be effective for shareholder meetings held on or after February 1, 2018.

Shareholder Rights Plans. ISS continues to believe that shareholder rights plans should be submitted to shareholders for approval and that adoption of a rights plan that has not been approved by shareholders is a problematic takeover defense that may warrant negative voting recommendations in director elections. For short-term rights plans (those with a term of one year or less), ISS will continue to conduct a case-by-case analysis, with emphasis on the board's disclosed rationale for adopting the rights plan without a shareholder vote. For long-term rights plans (those with a term greater than one year), ISS will no longer distinguish between annually elected boards and classified boards, and will no longer grandfather companies that adopted a rights plan before 2009. (These changes, together, impact approximately 140 companies, according to ISS.) Under the new policy, ISS will recommend against all directors at a company every year for so long as the nonshareholder-approved long-term rights plan remains in place.

Nonemployee Director Compensation. ISS has adopted a new policy providing for adverse voting recommendations for members of the board committee responsible for approving or setting nonemployee director compensation where there is a pattern (over two or more consecutive years) of "excessive" nonemployee director pay without a compelling rationale or other mitigating factors. ISS has not defined "excessive" for this purpose. Because of the two-year pattern requirement, however, this new policy will not impact ISS voting recommendations in 2018.

Pay-for-Performance Methodology. In connection with its existing pay-for-performance measurement methodology, ISS will now also take into consideration the rankings of CEO total pay and company financial performance relative to an applicable peer group over a three-year period.

Say-on-Pay. Existing ISS policy provides that, where a company's prior say-on-pay proposal received less than 70 percent shareholder support, ISS will consider the current say-on-pay proposal and compensation committee members (or, in exceptional cases, the full board) on a case-by-case basis. This analysis takes into account the company's response to the prior say-on-pay vote, including, among other factors, disclosure regarding subsequent shareholder engagement. ISS has expanded on the disclosure of shareholder engagement efforts that will affect its view of a board's responsiveness to include disclosure of (1) the timing and frequency of shareholder engagements and whether independent directors participated; (2) the specific concerns voiced by dissenting shareholders that led to the say-on-pay opposition; and (3) specific and meaningful actions to address shareholders' concerns.

Boardroom Diversity. ISS has revised its "fundamental principles" regarding board composition to include a statement that boards should be sufficiently diverse to ensure consideration of a wide range of perspectives. ISS will also highlight in its reports those boards with no gender diversity. These changes will have no impact on ISS voting recommendations.

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Board Attendance. ISS has revised its policy regarding director attendance to exempt completely new directors, rather than analyzing their attendance on a case-by-case basis.

Pledging. The updated policy codifies ISS policy since 2013 to recommend against board committee members at companies with problematic levels of pledging by directors and officers.

Gender Pay Gap. ISS will consider shareholder proposals requesting reports on company pay data by gender or on company policies to reduce gender pay gaps on a case-by-case basis, taking into account the company's current diversity and inclusion policies, whether the company has been the subject of recent gender pay gap controversies or actions, and how the company's reporting on these matters compares to its peers.

Climate Change. ISS has updated its policy regarding shareholder proposals related to climate change risk to generally recommend in favor of proposals seeking disclosure on how the company identifies, measures, and manages climate change risks.

Classified Board Opt-In. Consistent with its current practice, ISS will recommend against directors where a company has opted into, or failed to opt out of, a state law requiring a classified board.

Special Purpose Acquisition Companies (SPACs). SPACs raise capital for the purpose of making one or more acquisitions and must do so within a specific time frame or dissolve. In response to the increasing number of SPAC extension requests submitted to shareholder votes, ISS adopted a policy to recommend votes on SPAC extension proposals on a case-by-case basis, taking into account the length of the requested extension, any prior extension requests, the status of any pending transactions or progression of the acquisition process, and whether there are any additional incentives for nonredeeming shareholders.

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ISS' summary of the updated voting guidelines is available here, and the full updates are available here. Companies should assess the potential impact of these voting recommendations on matters to be considered by their shareholders during the 2018 proxy season and determine whether any steps should be taken to address the impact.

Companies should also consider whether to make any updates to the compensation benchmarking peers included in ISS' database. ISS uses these company-selected peers when it determines the peer group it will use for evaluating a company's compensation programs. ISS will accept these updates until **December 8, 2017**. Information about this process is available here.

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