



ISS RELEASES 2011 POLICY CHANGES—WHAT DO THEY MEAN TO YOU?

On November 19, Institutional Shareholder Services (ISS) released their 2011 policy changes, which will be effective for meetings held on or after February 1, 2011.

These changes are the result of an annual review they conduct of their various voting policies factoring in emerging corporate governance issues, changes in proxy disclosure requirements and investor sentiment. In this process, they obtain input from their institutional clients as well as from issuers and their advisors.

This year is a bit different than in the past as the SEC has, and is continuing to, impose significant new proxy and governance-related requirements as part of the Dodd-Frank bill. Also, ISS itself is under the microscope as part of the SEC's "proxy plumbing" review, which includes calls for greater regulation, accuracy and transparency on the part of proxy advisors.

The following are, in our view, the most significant changes which are likely to impact the greatest number of companies:

Compensation-related Issues:

- **Say on Pay Frequency.**

As anticipated ISS will recommend "FOR" annual advisory votes on compensation, irrespective of the company's frequency recommendation, governance profile, compensation practices, or performance.

- **Problematic pay practices.**

ISS has a growing list of practices it objects to, the presence of which may lead to:

- i) "WITHHOLD/AGAINST" recommendations on the compensation committee members;
- ii) "AGAINST" recommendations on Say on Pay, and;
- iii) "AGAINST" recommendations on equity compensation proposals;

For 2011, they have revised the list of "egregious practices" which, by themselves may trigger negative vote recommendations. These include non shareholder-approved re-pricings, "excessive" perks or tax gross-ups, and new or extended change-in-control (CIC) agreements containing features they object to.

- Regarding "commitments" to eliminate problematic pay practices to avoid adverse votes, they will no longer accept "prospective" (i.e. forward looking) commitments, as they feel companies have had enough time to eliminate practices that ISS has previously identified as objectionable. This went in to effect immediately upon the release of the new voting policies, **and means that you no longer can file an 8-K committing to change future practices after receiving a negative recommendation in order to reverse the current vote recommendation.**
- ISS is modifying its burn rate policy to now limit "burn rate cap changes" to a maximum of two percentage points (plus or minus) from the prior year's burn rate cap.

Board-related Issues:

- Regarding “responsiveness to majority-supported shareholder proposals” (even if they are non-binding), ISS will now apply their policy of withholding from existing directors if a proposal receives support of a *majority of votes cast* in “two voting opportunities within the last three years” and the proposed action is not subsequently implemented. Previously, the proposal had to receive support of a majority of votes cast at *two consecutive meetings*. This is meant to capture situations where a proposal is excluded (such as via SEC no action letter) in the intervening year. They will still issue withhold recommendations if a proposal receives support of a *majority of outstanding shares* in one year.
- Regarding director attendance, ISS will no longer accept “private disclosures” from companies indicating reasons why any director(s) attended fewer than 75% of board and committee meetings, which companies typically provide to avoid withhold recommendations on the particular director(s). They will now consider such reasons only if disclosed in the proxy or another SEC filing.

Shareholder Rights and Defenses:

- For shareholder proposals seeking the right to act by consent, ISS will be more flexible than in the past, and will now consider the presence or absence of other provisions in making their vote recommendation, such as the right to call special meetings at 10% threshold, majority election standard, annually elected (i.e. not classified) board and no “non-shareholder approved” poison pill.
- Net Operating Loss (NOL) protective amendments and rights plans (pills) will now be approved only if their duration is no longer than three years.

Application of US or “Home Market” Policies:

Generally, ISS applies their non-US, “home market” policies to companies incorporated outside of the US, even if the majority of the company’s shareholders are US-based. Now, based largely on a spate of recent re-domestications from the US to other countries, ISS will apply its US policies to “non-US” companies if they file DEF 14-A’s, 10-K’s and 10-Q’s and are considered domestic issuers by the SEC. This will affect approximately 74 such companies.

How is Phoenix Advisory Partners helping our clients prepare for the 2011 proxy season?

- On a quarterly basis, we inform our clients what the actual impact of ISS and other proxy advisors such as Glass-Lewis is on their unique institutional ownership base, and which of their top investors are likely to directly follow proxy advisor vote recommendations. This is important information which companies should have before deciding whether or not to make any changes to their practices based on ISS or other proxy advisor policies.
- Review past voting history of our clients’ top investors as part of a projection of future votes on key issues. The cautionary note here is that many investors review and update their policies between proxy seasons. For this reason, past votes should not be overly-relied upon as predictors of their future voting.
- Indicate which of these top investors are open to dialogue with portfolio companies and may shed useful light on their policies and hot button issues. We also tell our clients who to speak with at these investors (i.e. the governance heads and proxy voters, as well as the portfolio managers).
- Review our clients’ preliminary proxy drafts and compensation plans to identify any features likely to raise concerns and generate negative votes from their top investors as well as their proxy advisory firms.

To discuss these issues and how we can assist you, please contact either:

David M. Bobker 212.493.3936—dbobker@phoenixadvisorypartners.com

Edward Greene 212.493.3932—egreene@phoenixadvisorypartners.com

Ron Schneider 212.493.3914—rschneider@phoenixadvisorypartners.com

Phoenix Advisory Partners — 347.578.1396

CORPORATE GOVERNANCE CONSULTING • PROXY SOLICITATION • M&A ADVISORY SERVICES