

Memorandum

ISS Announces Policy on Proxy Access Proposals

February 20, 2015

On February 19, 2015, Institutional Shareholder Services Inc. (“ISS”) released its much awaited policy on proxy access proposals.¹ Moving away from its previous case-by-case approach in evaluating these proposals, ISS’s new policy provides that it will generally recommend a vote in favor of management and shareholder proxy access proposals with the following features:

- A maximum ownership threshold of three percent of the voting power;
- A maximum duration requirement of three years of continuous ownership for each member of the nominating group;
- “[M]inimal or no limits on the number of shareholders permitted to form a nominating group”; and
- A cap on shareholder nominees generally set at 25% of the board.

ISS noted that it will also “[r]eview for reasonableness any other restrictions on the right of proxy access” and will “[g]enerally recommend a vote against proposals that are more restrictive than these guidelines.”

In addition, ISS will apply its governance failures policy to “generally recommend a vote against one or more directors (individual directors, certain committee members, or the entire board based on case-specific facts and circumstances)” where the company has excluded a properly submitted proxy access shareholder

¹ See Institutional Shareholder Services Inc., “2015 Benchmark U.S. Proxy Voting Policies: Frequently Asked Questions on Selected Topics” (Feb. 19, 2015). For background on proxy access shareholder proposals and related developments this proxy season, see Simpson Thacher & Bartlett LLP, [“SEC Allows Exclusion of Proxy Access Shareholder Proposal Due to Conflict with Management Proposal”](#) (Dec. 8, 2014); Simpson Thacher & Bartlett LLP, [“SEC Reconsiders No-Action Relief Granted to Whole Foods, Declines to Take Position on Conflicting Proposals”](#) (Jan. 22, 2015); Simpson Thacher & Bartlett LLP, [“Proxy Access Update: Whole Foods Delays Annual Meeting, While Several Other Companies Adopt Proxy Access Bylaws”](#) (Feb. 18, 2015).

proposal without obtaining voluntary withdrawal from the proponent, no-action relief from the Securities and Exchange Commission (“SEC”), or a federal court ruling allowing it to exclude the proposal. ISS will recommend against directors in this case “regardless of whether there is a board-sponsored proposal on the same topic on the ballot.” ISS added, however, that if a company “has taken unilateral steps to implement the proposal, . . . the degree to which the proposal is implemented, and any material restrictions added to it, will factor into the assessment.”

Implications of ISS’s Policy

Since the January 16th announcement of the SEC’s Division of Corporation Finance that it will not opine this proxy season on the application of Rule 14a-8(i)(9) – the SEC rule that permits the exclusion of a shareholder proposal that “directly conflicts” with a management proposal – many companies have been assessing their options regarding how to respond to proxy access shareholder proposals. ISS’s policy is aimed to steer all public companies toward a universal proxy access standard, along the lines of the shareholder proposals submitted by the New York City Comptroller’s office. While it is premature to predict any trends, it is clear that ISS’s policy will be one of many factors that boards will take into account in deciding how to respond to proxy access shareholder proposals. In addition, ISS’s reference to court rulings permitting exclusion could encourage issuers to file declaratory judgment actions against shareholder proponents. It is too early, however, to tell whether issuers will pursue this route.

If you have any questions or would like additional information, please do not hesitate to contact **Yafit Cohn** at +1-212-455-3815 or yafit.cohn@stblaw.com, or any other member of the Firm’s Public Company Advisory Practice.

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UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
2 Houston Center
909 Fannin Street
Houston, TX 77010
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
1155 F Street, N.W.
Washington, D.C. 20004
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3919 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul
West Tower, Mirae Asset Center 1
26 Eulji-ro 5-gil, Jung-gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori
Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000