

# Memorandum

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## ISS Issues FAQs on its U.S. Proxy Voting Policies, Including With Regard to Proxy Access

December 24, 2015

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On December 18, 2015, Institutional Shareholder Services Inc. (“ISS”) issued 78 Frequently Asked Questions (“FAQs”) regarding its U.S. proxy voting policies and procedures (excluding those relating to compensation).<sup>1</sup> Among them are two FAQs pertaining to proxy access:

### 1. How will ISS evaluate a board’s implementation of proxy access in response to a majority supported shareholder proposal?

In assessing a board’s response to a majority supported shareholder proposal for proxy access, ISS will examine:

- “whether the major points of the shareholder proposal are being implemented”; and
- whether additional provisions that were not included in the shareholder proposal “unnecessarily restrict the use of a proxy access right.”

ISS’s assessment will inform its vote recommendation with regard to individual directors, nominating/governance committee members, or the entire board, as appropriate.

ISS may issue adverse vote recommendations “if a proxy access policy implemented or proposed by management contains material restrictions more stringent than those included” in the shareholder proposal with respect to the following features, “at a minimum:

- **Ownership thresholds** above three percent;
- **Ownership duration** longer than three years;

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<sup>1</sup> See Institutional Shareholder Services, Inc., [U.S. Proxy Voting Policies and Procedures \(Excluding Compensation-Related\): Frequently Asked Questions](#) (Dec. 18, 2015).

- **Aggregation limits** below 20 shareholders;
- **Cap** on nominees below 20 percent of the board.”

According to ISS, where an aggregation limit or cap differs from that provided in the shareholder proposal, “lack of disclosure by the company regarding shareholder outreach efforts and engagement may also warrant negative vote recommendations.”

Turning to the addition of provisions in the company’s proxy access policy or management proposal beyond those included in the shareholder proposal, ISS indicated that it will review “restrictions or conditions on proxy access nominees” on a case-by-case basis. The restrictions ISS deems problematic, “especially when used in combination include, but are not limited to:

- Prohibitions on resubmissions 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 toward the maximum number of proxy access nominees; and
- When the right will be fully implemented and accessible to qualifying shareholders.”

In addition, the two types of restrictions that ISS considers “especially problematic” are:

- “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.”

## **2. How will ISS evaluate proxy access nominees?**

In recognition that “the circumstances and motivations of a proxy contest and a proxy access nomination may differ significantly,” ISS has developed an analytical framework for evaluating candidates nominated pursuant to proxy access. When evaluating such nominees, “ISS will take into account any relevant factors including, but not limited to”:

- **Nominee/Nominator Specific Factors:**
  - Nominators’ rationale;
  - Nominators’ critique of management/incumbent directors; and
  - Nominee’s qualifications, independence, and overall fitness for directorship.
- **Company Specific Factors:**
  - Company’s performance relative to its peers;

- Background to the contested situation (if applicable);
  - Board's track record and responsiveness;
  - Independence of directors/nominees;
  - Governance profile of the company;
  - Evidence of board entrenchment;
  - Current board composition (skill sets, tenure, diversity, etc.); and
  - Ongoing controversies, if any.
- **Election Specific Factors:**
    - Whether the number of nominees exceeds the number of board seats; and
    - Vote standard for the election of directors.
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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](mailto:yafit.cohn@stblaw.com), or any other member of the Firm's Public Company Advisory Practice.

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