

ISS Updates Its US Proxy Voting Research Procedures & Policies FAQs

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On March 29, 2018, Institutional Investor Services (“ISS”) updated its US Proxy Voting Research Procedures & Policies frequently asked questions (“FAQs”) ¹. While the 2018 US proxy season is well underway, these updated FAQs provide helpful information to companies, particularly with respect to engagement with ISS’ research analysts, as they prepare for the receipt of their ISS reports in advance of their upcoming shareholder meetings.

Engagement with the ISS Research Team

ISS specified the following with respect to engaging with its research team:

Contacting ISS

Companies requesting an engagement should email the Research Helpdesk (globalresearch@issgovernance.com) and should include: (i) a detailed agenda for the engagement; (ii) a list of the company’s participants;² and (iii) the company’s preferred dates/times.

Timing/Scheduling

ISS Discretion

ISS has sole discretion to accept engagements and to determine whether the engagement is conducted in person or by phone. It is recommended that companies plan as early as possible for any desired engagement scheduling.

Blackout Periods

The research team is never in a “blackout” with respect to contact with companies or other parties. There is a blackout period for ISS Corporate Solutions, Inc. (“ICS”)—the group at ISS that provides advice to companies about governance practices and compliance with ISS guidelines—during the period from the filing of the proxy statement through the date of the shareholder meeting (when information is analyzed and voting recommendations are made).

¹ The FAQs are available [here](#).

² ISS prefers that one or more board members take part in any discussion. Any discussion with ISS will center on the company’s long-term focus and strategy and how it drives decision-making to satisfy shareholder objectives.

In addition, Governance QualityScore data verification is closed from the filing of the proxy until the publication of the ISS proxy report.

Timing and Priority for Non-Contentious Meetings

For engagements regarding non-contentious meetings, the preferred time to schedule engagements is August through February. Engagements relating to ISS' new policies should be scheduled after the release of the ISS policy updates in November. Most non-contentious engagements take place prior to the filing of the proxy materials; once the proxy is filed, ISS will generally be able to undertake engagement with the company only where it is necessary and appropriate, and usually only to clarify points on which it has questions. ISS prioritizes engagements with companies with substantive governance issues: for example, companies facing low shareholder support on their say-on-pay or director elections, majority-supported shareholder proposals, ISS recommendations against management proposals at the prior election, or companies undergoing major transitions.

Timing and Priority for Contentious Meetings

For proxy fights or contested mergers, ISS will generally engage with both sides once the proxy materials are released. ISS will reach out directly to schedule the engagements and generally will offer each side an equal opportunity for engagement. In general, ISS will schedule the engagement with the dissident side first to identify the areas of contention, and to give the company the opportunity to respond to the dissident's arguments. Follow-up meetings may also be scheduled.

Engagement with Respect to Vote-No Campaigns

A vote-no campaign against directors may be considered sufficiently contentious to warrant engagement. ISS will review the materials and, if it determines that further engagement is warranted, will reach out to both sides. The vote-no campaign must be via Edgar filings (e.g., an exempt filing) to warrant such consideration; postings on the dissenting shareholders' website would be insufficient.

Information for Discussion

Public Information Only

The FAQs reiterate that all discussions with ISS are on-the-record, material non-public information should not be disclosed and information provided by companies during engagements with ISS should either be already publicly-available to all shareholders or will be disclosed in the filings for the company's upcoming shareholder meeting. ISS accepts no obligation of confidentiality with respect to matters discussed during engagements.

Firewall between ISS Research and ICS

Companies should not: (i) disclose any past, present or expected contact with ICS or its personnel; (ii) disclose or discuss any information obtained from the purchase of ICS services or products; or (iii) identify the company, either directly or indirectly, as an ICS client (or prospective client). Doing so could result in the immediate termination of discussions.

No Consultation or Advice

ISS research analysts cannot offer any advice to the company and no statement made during an engagement should be construed as an indication of how ISS will recommend in a given situation or on a specific proposal.

Other Updates

- *Methods of Providing Additional Information After Publication of an ISS Report:* Previously, a company that wanted to make changes or provide additional information to shareholders after an ISS proxy report had been published was required to publicly disclose the information in a filing with the Securities and Exchange Commission ("SEC") or, if the company was not an SEC filer, in a press release. The updated FAQs clarify that for information that is normally not included in a filed document and only resides on the company's

website, such as corporate governance guidelines or environmental reports, the information can be made public in a press release or on the company website (i.e., even if the company is an SEC filer).

- *Exceptions to the Attendance Policy for Newly-Appointed Directors:* Given that newly-appointed directors will not have had the benefit of advance notification of scheduled meetings, they are generally exempted from a negative vote recommendation if such newly-appointed director attended fewer than 75% of the aggregate of the board and committee meetings for the period for which they served, or if the disclosure with respect to such newly-appointed director's attendance record is otherwise unclear as to whether they attended 75% of their meetings.
- *Evaluation of a Board's Implementation of Proxy Access in Response to a Majority-Supported Shareholder Proposal:* The FAQs clarified that board-implemented proxy access provisions, which provide the board with broad and binding authority to interpret the provision, while problematic, may not void the right on its own but would be considered in connection with other problematic provisions.
- *Poison Pills:*
 - ISS' policy for 2018 is to recommend against director nominees at companies with non-shareholder approved pills that are in effect as of the date of the shareholder meeting (any such poison pills will not be grandfathered under the new policy). Further, ISS still considers "deadhand" or "slowhand" provisions³ problematic.
 - In order to terminate a poison pill prior to its expiration date, most companies can accelerate the pill's expiration date, which does not involve the costs of redemption.
- *Charter/Bylaw Adoptions at Newly Public Companies:* For newly-public companies, the adoption of a multi-class structure,⁴ classified board, and/or supermajority vote requirements will generally result in the continued withhold/against recommendations by ISS. Fee-shifting provisions also result in continued withhold recommendations.
- *Governance Failures Policy:* The FAQs explain that the Governance Failures policy is designed to catch isolated egregious actions that are not covered under other policies. If a type of action applies to a large number of companies, or persists year after year, ISS will generally break this out as its own, standalone policy. For example, unilateral bylaw amendments that diminish shareholders' rights, excessive pledging, and failure to opt out of state statutes requiring a classified board (Indiana and Iowa) previously fell under the Governance Failures policy umbrella, but a sharp increase in the incidence of unilateral bylaw amendments and the related issue of companies going public with poor governance structure caused ISS to separate these issues out as a standalone policy for 2015. Similarly, in 2018, ISS further separated out excessive pledging and the failure to opt out of state statutes requiring a classified board as standalone policies.

³ A "deadhand" provision in a poison pill stipulates that only persons who were members of the board of directors at the time the poison pill was put into place (i.e., continuing directors) have the power to rescind it. A "slowhand" provision prevents a poison pill from being redeemed for a specified period of time after a change in board composition.

⁴ In recent speeches, SEC Chairman, Jay Clayton, has expressed a contrasting view on the importance of the issue of dual-class structures, stating that they were not at the "front of the agenda for something [the SEC] should weigh in on" and that there are more pressing issues to investors and the marketplace. He also expressed that he is "not persuaded by absolutists on either end" of the dual-class share issue and that "governance by indexation," or removing companies from indexes because of their voting share structures, does not sit well with him.

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