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**ISS ISSUES 2011 POLICY UPDATES**

On November 19, Institutional Shareholder Services (“ISS”) issued its policy updates for the 2011 proxy season, which covers annual shareholder meetings on or after February 1, 2011. ISS issues corporate governance policies for companies listed in four geographies: the U.S., Canada, International, and Europe. This letter describes the executive compensation policy updates applicable to U.S. companies. ISS will host a webcast on December 1 to present and discuss its policy updates, which can be found on its Policy Gateway at [www.issgovernance.com/policy](http://www.issgovernance.com/policy).

The 2011 ISS policy updates cover a variety of issues, including advisory votes on the frequency of management say-on-pay proposals and golden parachutes required under the new Dodd-Frank Wall Street Reform and Consumer Protection Act, as well as refinements to its existing policies for Burn Rate and Problematic Pay Practices. In addition, ISS changed how it intends to respond to company commitments to prospectively eliminate problematic pay practices. Finally, ISS has changed the application of its policies based on country of listing vs. country of incorporation, which can influence the manner in which ISS views a company’s compensation practices.

**Management Say-on-Pay Vote Frequency**

Under the Dodd-Frank Act management say-on-pay proposals must be presented for a shareholder vote at least every three years and shareholders must vote at least every six years on the frequency of such votes. Neither vote is binding on companies. Under its new policy ISS will recommend for annual say-on-pay votes.

**Votes on Golden Parachutes in an Acquisition, Merger, Consolidation, or Proposed Sale**

Whether or not ISS will recommend for management golden parachute arrangements will be evaluated on a case-by-case basis taking into account the presence of previously identified problematic pay practices related to severance. Practices that may cause ISS to recommend against a management golden parachute proposal, including provisions already in place and disclosed in prior proxy statements, are:

- Recently adopted or materially amended agreements that include excise tax gross-up provisions (since prior annual meeting);
- Recently adopted or materially amended agreements that include modified single triggers (since prior annual meeting);
- Single-trigger payments that will happen immediately upon a change in control, including cash payment and such items as the acceleration of performance-based equity despite the failure to achieve performance measures;
- Single-trigger vesting of equity based on a definition of change in control that requires only shareholder approval of the transaction (rather than consummation);
- Potentially excessive severance payments;
- Recent amendments or other changes that may make packages so attractive as to influence merger agreements that may not be in the best interests of shareholders;
- In the case of a substantial excise tax gross-up from a pre-existing/grandfathered contract: the element that triggered the gross-up (e.g., option mega-grants at low point in stock price, unusual or outsized payments in cash or equity made or negotiated prior to the merger); or
- The company's assertion that a proposed transaction is conditioned on shareholder approval of the golden parachute advisory vote, which would be viewed as problematic from a corporate governance perspective

If a management say-on-pay proposal includes the golden parachute vote, ISS' vote recommendation on the say-on-pay proposal may give higher weight to the presence of the above problematic pay practices in the overall evaluation.

### **Burn Rate Policy**

Under its Burn Rate Policy, ISS recommends against stock plan proposals if a company's three-year average burn rate exceeds the greater of its industry group's mean by more than one standard deviation or two percent of weighted common shares outstanding. This aspect of the policy remains unchanged for 2011, but year-over-year changes to burn rates will be limited to a maximum of two percentage points. Increased market volatility has sometimes led to wider swings in burn-rate caps that may not be reflective of actual share usage. In a departure from prior policy updates, updated burn-rate tables for Russell 3000 and Non-Russell 3000 companies were not published, but will be included in the 2011 Summary Guidelines to be released in December.

### **Problematic Pay Practices**

Last year, ISS reorganized its executive compensation policies under a new, holistic policy in which management say-on-pay proposals became the primary vehicle for recommending against a company's compensation program if a company was determined to have problematic pay

practices.<sup>1</sup> Recommendations to withhold votes or vote against the re-election of compensation committee members (and possibly the full board, including the CEO) occur only if a company does not present a say-on-pay proposal, the board has failed to respond to concerns raised in prior management say-on-pay evaluations, or the most “egregious” problematic pay practices are present. The presence of the most “egregious” problematic pay practices can also lead to an against vote recommendation on an equity plan proposal if excessive non-performance-based equity awards are the major contributors to a pay-for-performance misalignment.

In its policy update, ISS has reduced the list of the most “egregious” problematic pay practices that can lead to adverse vote recommendations in and of themselves to the three listed below:

- Repricing or replacing of underwater stock options/SARs without prior shareholder approval (including cash buyouts and voluntary surrender of underwater options);
- Excessive perquisites or tax gross-ups, including any gross-up related to a secular trust (e.g., created to fund non-qualified deferred compensation or pension benefits, including SERPs) or restricted stock vesting;
- New or extended agreements that provide for:
  - Change in control (“CIC”) payments exceeding three times base salary and average/target/most recent bonus;
  - CIC severance payments without involuntary job loss or substantial diminution of duties (“single” or “modified single” triggers); or
  - CIC payments with excise tax gross-ups (including “modified” gross-ups)

### **Problematic Pay Practices-Commitments**

When a problematic pay practice has led, or could lead, to an adverse vote recommendation, ISS has generally accepted company commitments to prospectively eliminate the practice and has either (a) not issued a negative vote recommendation or (b) retracted one if already issued. Effective immediately, ISS will no longer accept prospective commitments to eliminate or curtail the following problematic pay practices:

- Excise tax gross-up, single-trigger, and modified single-trigger provisions in future new or materially amended employment and CIC agreements;
- Excessive perquisites, including home loss buyouts and other perquisites compensation to NEOs that is deemed excessive;
- Tax gross-ups on perquisites, such as for life insurance, personal use of corporate aircraft, home security, and certain relocation benefits (i.e., more generous than a company’s

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<sup>1</sup> See discussion in our November 23, 2009, letter titled “RiskMetrics Group 2010 Policy Updates,” which is available on our website at [www.fwcook.com](http://www.fwcook.com).

broad-based relocation policy), as well as gross-ups for grantor trusts (e.g., secular trusts) and restricted stock awards;

- Guaranteed multi-year incentive awards; or
- Dividend payments on unvested performance shares

Exceptions to this policy change will include the following:

1. Pay-for-performance and burn-rate commitments, since ISS' burn-rate caps and total shareholder return benchmarks that apply to each compensation year are not disclosed until late in the year, after a company may have made grants/awards that ultimately trigger ISS' policy; and
2. Plan language related to certain equity grant practices (e.g., liberal CIC definition), which may be modified under a straightforward procedure so that a plan that is then more beneficial to shareholders may receive a favorable recommendation from ISS

We understand from discussions with ISS Corporate Services staff that grandfathering of problematic pay practices will continue to apply to agreements that are not amended and fixed-term agreements that are amended to remove some, but not all, problematic pay practices as long as the term of the agreement is not extended. We caution that this understanding may not apply in all cases because ISS evaluates every company situation on a case-by-case basis. Amending automatically renewing agreements to remove some, but not all, problematic pay practices will receive closer scrutiny, and ISS' bias will be that all problematic pay practices should be eliminated.

### **Country of Incorporation**

When a U.S. company redomiciles to a non-U.S. location, generally because of a more favorable corporate tax environment, but maintains its primary listing on a U.S. stock exchange and complies with U.S. filing requirements (e.g., proxy statements, 10-Ks, 10-Qs, etc.), there has been confusion about which country's ISS policies will apply. ISS has clarified that its U.S. policies will apply in these situations. ISS will also apply its U.S. policies to companies that were never domiciled in the U.S., but are listed on a U.S. exchange, comply with U.S. filing requirements and are considered domestic issuers by the SEC.

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This letter is intended to alert compensation professionals about developments that may affect their companies and should not be relied on as providing specific company advice. General questions about this letter may be directed to Wendy Hilburn at 212-299-3707 or [wjhilburn@fwcook.com](mailto:wjhilburn@fwcook.com). Copies of this letter and other published materials are available on our website at [www.fwcook.com](http://www.fwcook.com).