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COVID-19 Update: ISS Provides Policy Guidance on Limited Duration Poison Pills to Address the Impact of COVID-19

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On April 8, 2020, Institutional Shareholder Services ("ISS") published guidance on its voting policies in light of the market-wide effects of the COVID-19 pandemic. While ISS maintains that its existing policies are sufficiently flexible to take into account the impact of COVID-19 on a case-by-case basis, ISS provided more specific guidance on certain issues, including shareholder rights plans, stating that plans with a duration of less than one year will likely be justified in most cases given the impact of the pandemic on stock prices.

The general policy of ISS encourages boards to put rights plans to a shareholder vote, but provides companies with latitude in adopting plans without a shareholder vote if the plan's duration is less than one year. ISS will evaluate such plans on a case-by-case basis considering the rationale for the plan, its duration and other relevant factors.

Without affirmatively changing its policy on poison pills, the new guidance provides that a "severe stock price decline as a result of the COVID-19 pandemic is likely to be considered valid justification in most cases for adopting a pill of less than one year in duration; however, boards should provide detailed disclosure regarding their choice of duration, or on any decisions to delay or avoid putting plans to a shareholder vote beyond that period." ISS indicated that the triggers for such plans will continue to be closely evaluated in light of the rationale provided for the plan and its duration. ISS will continue to take a case-by-case approach to evaluating rights plans with a term of less than one year, which will include an examination of the terms and duration of such plans, the board's justification for adopting the plan, the potential to protect shareholders from abusive bidders without inappropriately entrenching the existing directors and management and any commitments by adopting companies to seek shareholder approval for any plan renewals.

ISS issued the guidance partially in response to a recent increase in the number of companies that have adopted poison pills and the advice of several law firms and financial advisors that boards consider implementing plans. Since March 15, 2020, 20 companies have announced the adoption of a shareholder rights plan, and the overwhelming majority have cited COVID-19 or the desire to protect against opportunistic bidders in light of recent downward trends in stock prices.[1] These recently adopted plans all have a duration of less than one year and contain beneficial ownership triggers ranging from 5% to 20% (12 plans have a 10% trigger, 6 have a 15% trigger, 1 has a 20% trigger and 1 has a 5% trigger[2]).

ISS will continue to evaluate on a case-by-case basis whether to recommend a vote against or a withhold vote for directors who approve a rights plan with less than one year in duration without a shareholder vote. Companies seeking to implement rights plans and receive a favorable recommendation from ISS will need to structure their plans appropriately and effectively communicate through detailed disclosure the specific rationale for adopting the plan.

1 This total excludes rights plans adopted to protect net operating loss carryforwards which serve a different purpose and typically contain different terms.

2 ISS recently recommended shareholders of a company that adopted a rights plan with a 5% trigger vote against election of the company's Chairman because the recently adopted plan was not put up for a shareholder vote. In making its recommendation, ISS noted that excluding NOL pills, 5% triggers were "extremely rare" and "highly restrictive."

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