

ISS Issues U.S. Compensation Policies FAQs for 2019

December 28, 2018

On December 14, 2018, Institutional Shareholder Services (“ISS”) issued its updated FAQs related to its U.S. Compensation Policies, effective for shareholder meetings occurring on or after February 1, 2019. There were some notable updates with respect to executive compensation and nonemployee director compensation, which are briefly discussed below. **Problematic Pay Practices** ISS had previously identified certain “problematic pay practices” that are likely to result in a negative say-on-pay vote recommendation. ISS has issued some notable updates:

- Impact of Code Section 162(m) Repeal. In light of the Code Section 162(m) repeal, ISS added, as a problematic pay practice, a shift away from performance-based compensation to discretionary or fixed compensation elements.
- Excess Termination Payments. ISS stated that new or materially amended agreements that provide for excess termination payments (no longer limited to change in control based termination payments) are problematic. Generally, termination payments are problematic if they exceed three times an executive’s base pay and annual bonus.
- Problematic “Good Reason” Terminations. ISS stated that new or materially amended agreements that have a “good reason” termination definition that presents windfall risks, such as definitions triggered by potential performance failures (such as a company bankruptcy or delisting) would be problematic. Good reason definitions should be limited to circumstances that are reasonably viewed as an adverse constructive termination (such as employer actions that result in a material negative change to the executive’s title/role, function, or compensation).

ISS has now made it clear that an amendment is considered “material” for purposes of problematic pay practices if it involves any change that is not merely administrative or clarifying.

Nonemployee Director Pay In 2017, ISS stated a policy providing for potential adverse vote recommendations for the members of a company’s board of directors responsible for approving or setting nonemployee director (“NED”) pay in the event that ISS determines there is an established pattern of excessive pay levels without a compelling rationale or other clearly explained mitigating factors. The FAQs provide some updates to ISS’s methodology for evaluating NED pay. In consideration of the methodology change, ISS will not issue adverse recommendations under this policy until meetings occurring on or after February 1, 2020. [View the FAQs.](#)