



CENTER FOR CAPITAL MARKETS  
COMPETITIVENESS

TOM QUAADMAN  
VICE PRESIDENT

1615 H STREET, NW  
WASHINGTON, DC 20062-2000  
(202) 463-5540  
tquaadman@uschamber.com

November 15, 2010

Ms. Elizabeth M. Murphy  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

**Re: Concept Release on the U.S. Proxy System, File Number S7-14-10, RIN 3235-AK43**

Dear Ms. Murphy:

The U.S. Chamber of Commerce (“Chamber”) is the world's largest business federation representing the interests of over three million companies of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness (“CCMC”) to promote a modern and effective regulatory structure for capital markets to fully function in a 21<sup>st</sup> century economy. An important priority of the CCMC is to advance an effective and transparent corporate governance structure. To achieve this goal, the CCMC has called for the promotion of responsible innovation and the elimination of regulatory dead-zones and gaps in regulatory coverage.

The CCMC has submitted comments, on the Concept Release on the U.S. Proxy System (“Concept Release”), to the U.S. Securities and Exchange Commission (“SEC”) regarding the need to supervise proxy advisory firms. Attached is a letter sent to Institutional Shareholders Services, Inc. (“ISS”) commenting on their draft 2011 policies. We respectfully request that the SEC include this letter in the Concept Release comment file as part of our overall comment on the proxy advisor issue. The attached letter illustrates in a specific concrete manner the problems that result from the lack of transparency, process, and evidentiary basis in the development of voting policies and issuance of voting recommendations.

We would be happy to discuss these issues further with you or the appropriate SEC staff.

Sincerely,



CENTER FOR CAPITAL MARKETS  

---

---

C O M P E T I T I V E N E S S

**TOM QUAADMAN**  
EXECUTIVE DIRECTOR, FINANCIAL REPORTING  
AND INVESTOR OPPORTUNITY

1615 H STREET, NW  
WASHINGTON, DC 20062-2000  
(202) 463-5540  
tquaadman@uschamber

August 4, 2010

Mr. Henry A. Fernandez  
Chairman and CEO  
MSCI  
Wall Street Plaza  
88 Pine Street  
New York, NY 10005

Dear Mr. Fernandez:

I hope that all is well and that the merger of MSCI and RiskMetrics has been a smooth one.

The U.S. Chamber of Commerce and RiskMetrics have been engaged in discussions for some time to help bring about more transparency and accountability in ISS' development of voting policies and issuance of voting recommendations in the consideration of shareholder proposals and director elections. The role of proxy advisory firms is an important one that will continue to grow in influence as additional changes to corporate elections and shareholder considerations are contemplated.

Attached is a proposal that has been put forth to Ethan Berman and Pat McGurn to help achieve these ends. I have also attached a letter that will be filed with the Securities and Exchange Commission commenting upon the proxy advisory portion of the concept release concerning proxy voting systems.

We would be happy to meet with you to discuss these matters further.

Sincerely,

## MEMORANDUM

**TO:** Ethan Berman, Advisory Director, RiskMetrics Group, Inc.  
Martha Carter, Global Head of Governance Research  
Patrick McGurn, Special Counsel

**FROM:** Thomas Quaadman  
Vice President  
Center for Capital Markets Competitiveness  
U.S. Chamber of Commerce

**CC:** Frank G. Zarb, Jr., Katten Muchin Rosenman LLP

**RE:** **Proposal for the Transparent Development of Voting Policies**

---

As per our discussions, this memorandum puts forth the projects and proposals needed to create transparency and accountability in the development of voting policies. In order to achieve that goal, we propose the development of a Code of Standards (the “standards”) in the formulation and annual updating of ISS’ benchmark U.S. corporate governance policies (“policies”). These standards will establish a process to allow for input by all parties as well as to provide clear rules of the road to prevent arbitrary and capricious decision making.

While we believe that there needs to be the long-term development of a formal appeals process for those issuers who disagree with a report or recommendation, in light of your Process for Engagement on Proxy Voting Matters, we intend to review in more detail plans for its implementation (e.g., the time allocated to individual appeals), and to survey our members on their experiences with that process, and provide you with appropriate feedback on the operation of that program.

Nevertheless, our intent is for this memorandum to expedite the discussions and formally commence a joint project to create transparency and accountability in the development of policies.

### **I. Introduction**

It is our understanding that ISS uses the standards contained in its U.S. Policy Voting Manual to formulate the voting recommendations that it provides to its institutional and other clients with respect to the matters being submitted for shareholder action at annual meetings of shareholders.

While these voting recommendations cover a wide range of subjects, including matters involving the board of directors, shareholder rights and defenses, capitalization, and environmental and social issues, most companies are especially interested in the voting recommendations that involve compensation-related issues. Accordingly, we reference those compensation policies below, however our concerns regarding policy development cut across all issue areas.

Typically, these issues arise in one or more of the following areas:

- *Pay-for-performance*: ISS will analyze a company's compensation policies and practices to determine whether there is an appropriate alignment between CEO pay and company performance.
- *Problematic pay practices*: ISS will analyze a company's compensation program to identify compensation policies or practices that it believes are contrary to a performance-based pay philosophy.
- *Poor communication or responsiveness to shareholders*: ISS will analyze a company's public filings and past actions to determine whether it has poor disclosure practices or has exhibited an unwillingness to be responsive to shareholder concerns.

In addition, in the case of an equity compensation plan proposal, ISS will analyze the plan to determine whether its "cost" (based on the number of shares to be issued over the life of the plan) exceeds an appropriate "shareholder value transfer" ("SVT") amount or if the company's historic use of employee equity exceeds its permissible "burn rate" limit.

We note that, beginning in 2010, ISS has integrated its existing compensation-related policy statements into a single, comprehensive "Executive Compensation Evaluation" policy. It is our understanding that ISS has consolidated its approach to making voting recommendation into the following framework:

- Initially, ISS will apply its compensation-related voting recommendations to any advisory vote on executive compensation (“Say on Pay”) that is being presented for shareholder action.
- If a “Say on Pay” vote is not being conducted, the compensation-related voting recommendations will be applied to any compensation committee members who are up for re-election.
- Finally, the compensation-related voting recommendation will be applied to any equity compensation plan that is being submitted for shareholder action.

## **II. Development of U.S. Corporate Governance Policies**

### ***Overview of Current Process***

It is our understanding that, each year, ISS updates its voting policies to identify and respond to emerging issues and account for the latest trends in corporate governance. In recent years, ISS has solicited feedback from a diverse range of market participants which is considered in updating these policies. This feedback is obtained through several channels, including: annual policy surveys of institutional clients and the corporate community, a series of “roundtable” meetings with industry groups, and ongoing feedback during the proxy season.

In 2010, ISS obtained input on its voting policies through the following process:

- June 24, 2009: 2010-11 Policy Survey issued to client institutions and to corporate issuers;
- August 3, 2009: Survey closes;
- July-October 2009: Policy roundtable discussions with industry constituencies;
- September, 2009: Policy survey results released;
- October, 2009: Draft policy updates released for open comment period;

- November, 2009: Final policy updates released for clients; and
- January, 2010: Policy manual updated.

Typically, the final updated voting policies are published in November, and apply to annual meetings of shareholders held after February of the following year.

Beginning in 2008, ISS also began to make available all of the comments that it receives, in order to provide additional information about the feedback that it has received. ISS does not have any written formal policies or standards that govern policy development, such as the fair solicitation and treatment of public comments. Nor are internal deliberations about policy matters transparent. This lack of transparency and accountability has raised questions regarding recommendations while fostering a lack of confidence in the overall policy development. Consequently, this leaves ISS open to charges that its policy development lacks objectivity and balance leading to decisions that may be arbitrary, capricious or show favoritism.

With the increasingly important role that proxy advisory firm's play within corporate governance systems, this lack of openness to scrutiny has led to a lack of confidence, by some, in the existing systems. We believe that our proposals listed below will start the process of addressing those issues, building transparent systems that will begin to restore confidence and certainty in proxy advisory services, specifically, and corporate governance voting policies in general.

### ***A. Rationale for Proposal***

While ISS' current process provides an opportunity for market participants to give input on various corporate governance and compensation-related policies, it is our understanding that substantive policy decisions reside solely within the discretion of ISS personnel. Currently, there are no written standards upon which those decisions must be made, or that require such personnel to take into account public input or to identify and develop statistical and other relevant evidence. It is also our understanding that internal policy deliberations are not transparent.

There appears to be no requirement that such input be reflected in the resulting draft or final policies in a balanced and fair manner. Nor does there

appear to be any requirement that policies be consistent with other relevant evidence that may be available. In addition, the draft policy updates are somewhat general in nature and do not specify the parameters of the proposed policy (or revised policy), nor the criteria upon which the policies will be applied. Finally, as far as we have been able to ascertain, ISS does not conduct a cost-benefit analysis of any proposed new policies (or revised policies) to determine their likely impact upon a covered company or the economy at large.

Consequently, we are concerned that, while ISS conducts significant outreach to engage a wide range of market participants, the current process is potentially susceptible to being unduly influenced by specific interest groups and input is likely to be more anecdotal than empirical.

### ***B. Proposal***

As we discussed in December, 2009, in order to ensure greater transparency, we recommend that the CCMC and ISS develop standards that would set forth a formal process that ISS would observe to formulate and update its corporate governance policies. At its center, the Standards would:

- Publish written standards for policy development which require that policies and amendments be based in an objective and balanced manner based on input from interested parties, as well as statistical and other evidence that may be available.
- Require advance notice of any proposed changes to ISS' voting policies and an opportunity for public input on any proposed changes before implementation. Also, specified proposed changes should be published for public comment for a minimum specified period, allowing for a uniform system of written input from companies, investors, and other interested parties.
- Require that all other contacts with interested parties on specific proposed changes be documented and included in the public file, along with any other submitted evidence, including completed questionnaires and other surveys that have been submitted by interested parties. All other evidence relevant to the policies in question should also be placed in a public file.

- Conform to other basic requirements for transparency and due process similar to those contained in the Administrative Procedures Act, including transparency of any deliberations about new or amended policies. Accordingly, an open process should be developed to allow companies to appeal decisions made in policy development and recommendations.
- Provide for an annual review of existing policies to determine whether change is needed and to solicit input on any identified current developments. For example, hold an annual discussion forum with industry constituencies, academics, and other interested parties to address specific or localized topics.
- Provide for an annual industry-wide review of impact on policies on proxy voting and to identify potential issues in the voting recommendation process. Review identified industry-wide impediments to the efficient and accurate use of these voting recommendations.

### ***C. Implementation Steps***

We proposed taking the following actions to implement this proposal:

1. Submit proposal to ISS for its input and schedule a meeting to launch project. We envision that this meeting would:
  - Decide whether to proceed with the project;
  - Identify the scope of the project and the ultimate deliverables;
  - Identify the project team (including representatives of ISS, the CCMC, and the Company Working Group); and
  - Determine the timetable for implementation.
2. Project team to develop appropriate policies and procedures
  - As part of this process, the project team will reach out to all identified market constituencies for appropriate input.
  - The project team should also develop an implementation plan, as well as a plan for publicizing the new policies and procedures.
3. Submit formal proposed policies and procedures for CCMC and ISS input.

- Each party to solicit, collect, analyzes, and presents any input and proposed changes and enhancements to the other party.
  - Parties to conduct meeting for purposes of finalizing proposed policies and procedures.
4. Adopt new policies and procedures and execute on implementation plan.

Thank you for your consideration of the proposals raised here and please let us know the best manner to proceed in achieving progress on these issues.



CENTER FOR CAPITAL MARKETS  

---

---

**C O M P E T I T I V E N E S S**

**TOM QUAADMAN**  
VICE PRESIDENT

1615 H STREET, NW  
WASHINGTON, DC 20062-2000  
(202) 463-5540  
tquaadman@uschamber.com

November 11, 2010

Mr. Steve Harvey  
Head of Business  
Institutional Shareholder Services, Inc.  
2099 Gaither Road  
Rockville, Maryland 20850

**Re: ISS 2011 Draft Policies**

Dear Mr. Harvey:

Thank you for making your draft 2011 Governance Policies Update available for comment. Below, please find the U.S. Chamber of Commerce (“Chamber”) comments regarding Institutional Shareholder Services, Inc. (“ISS”) Draft 2011 Governance Policies Update.

**Comments on Overall Process**

As we have mentioned in the past, while ISS’ efforts to seek public comments represent a step in the right direction, the Chamber believes that all proxy advisors, including ISS, should seek comment on their entire portfolio of policies, and not just on incremental changes to those policies. To our knowledge, ISS has never sought comment on the substance of a vast majority of its policies.

The Chamber has also previously stated that all proxy advisors should adopt clear written standards and procedures for policy development. A copy of the proposal the Chamber submitted to ISS and MSCI for such a transparent system is attached. Those procedures should be publicly disclosed, and should require that policies are based on evidence that is available or that can be deduced without unreasonable effort or expense, including written comments and other input from third parties. When appropriate, proxy advisors should hold public conferences or

Mr. Steve Harvey  
November 11, 2010  
Page 2

forums focusing on policy development, and those conferences should be transparent to the public and include representative views. We understand, for instance, that ISS held a forum on its current draft policy amendments, and here again we believe that this is a step in the right direction. However, we suggest that the substance of that forum, and the identities of its participants, be made a matter of public record as part of this solicitation for comments.

Most, if not all, ISS clients are required to vote based on fiduciary and other duties. As fund managers they must manage their funds to seek an investment return and the exercise of due care in proxy voting is a part of that function. Due diligence, and the consideration of evidence in developing voting recommendations, is an important part of that process. While survey data may provide some guidance in this process, many investors likely already know how they may be initially inclined to vote absent additional diligence performed by their proxy advisor. Clients of proxy advisors could vote based on those initial inclinations alone without retaining the services of a proxy advisor; accordingly, we do not believe that a survey alone adds evidential value to the process. We urge ISS to adopt a level of transparency into its processes necessary to demonstrate that an appropriate linkage—based on available evidence—is made between voting recommendations and investment return to the ultimate economic owners of the shares.

We understand that comments on the draft policies will be considered by an ISS Global Policy Board whose participants are not disclosed. We understand that the Board is chaired by an ISS employee, and that ISS employees make up at least a large number of its members. We suggest that ISS disclose the Board participants, and seek to include representative viewpoints and appropriate experts, including experts in generating and evaluating relevant data. We also urge ISS to adopt a written policy to ensure that a majority of the Board members are independent of ISS and of any other special interests, and to ensure that its deliberations are transparent. Finally, we urge ISS to consider appointing an independent chair to set the Board's agenda and oversee the Board's deliberations, depending on the overall circumstances and governance structure that guides its deliberations.

Such a system will provide real rules of the road that all participants may abide by, and will ensure that votes are cast based on appropriate diligence and due care—while also avoiding conflicts of interest, or giving some stakeholders more of a say

than others. If process, balance, and transparency are goals for corporate governance, then the operation and behavior of proxy advisory firms should exhibit similar norms.

### **Independent Chair Shareholder Proposals**

This draft policy appears to set a strong presumption that ISS will recommend in favor of independent chair shareholder proposals unless the company discloses in its proxy statement reasons for a different governance structure that ISS finds "compelling." Indeed, the language of the proposed draft standard appears to reflect a pre-judgment that combining the roles of CEO and Chairman is presumptively inappropriate. It states that it will focus on "compelling" factors that "challenge the efficacy of appointing an independent chair." We suggest that ISS disclose the evidence upon which it has based its conclusion that having an independent Chairman is presumptively more "efficacious," and in the interest of its clients. We believe that the disclosure of such evidence should become a routine part of the public comment process. Alternatively, we suggest that ISS consider revising the language of the draft policy to include more balanced and neutral language reflecting that either governance approach could be suitable depending on the overall circumstances.

The use of a presumption, in the draft policy, in favor of the separation of the Chairman and CEO positions, is out of alignment with the disclosure upon which it is based. Item 407 of Regulation S-K does not require the type of detailed disclosure that would be necessary to rebut a strong presumption in favor of having an independent Chairman. Instead, Item 407 is worded in a neutral and affirmative manner to seek the reasons why the company has determined that a particular leadership structure is appropriate. We believe that some companies that have good and compelling reasons to combine the two roles may nonetheless fail ISS' stricter standard simply because of this misalignment between the standard and the corresponding disclosure requirement.

A company's disclosures under Item 407 should be the starting point of a company-specific and industry-specific analysis that could, with due diligence and care, form the basis of a vote recommendation on governance structure. Undeniably, a blanket policy on leadership structure—or a strong presumption that has a substantially similar effect—would seem to ignore or marginalize any concerns over the impact upon shareholder value and appropriate management of a company. Application of such a presumption is equally out of alignment with the congressional

intent of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). In particular, while Section 972 of the Dodd-Frank Act requires disclosure of the Chairman and CEO positions, Congress specifically rejected proposals that mandated the separation of CEO and Chairman.

The proposed presumption appears to lack support even from ISS' own survey data. We note that, according to the ISS 2010-2011 Policy Survey Summary of Results, a vast majority of investors registered some support for separating the roles of CEO and Chairman. However, the question described on page 9 of the summary results appears to ask if the respondent supports *combining the roles in every case*. A negative response to that question simply means that the respondent does not support a "one-size-fits all" approach that would always require separation of the roles. It provides no information on respondents' views regarding the frequency or the circumstances in which the roles should be separated. The published survey results accordingly do not necessarily support an inference that respondents believe that one governance structure is presumptively preferable to another. More to the point, however, we do not believe that a survey alone is ever sufficient evidence upon which to base a voting policy designed to ensure that an investor has conducted the necessary diligence to exercise appropriate due care in registering a vote.

It is an advantage, that in the United States each company has the ability to fashion its own governance structure to suit its unique circumstances. The legitimate factors that companies consider vary from company to company, and industry to industry. Thus, while we support a case-by-case approach, the application of the draft policy should follow clear, transparent processes. We note that the draft policy does not indicate *who* will decide whether a company's reasons for combining the CEO and Chairman roles are "compelling." We suggest that ISS identify the personnel involved, including appropriate biographical information, and ensure that their decisions, and the bases for those decisions, are transparent.

We also suggest that ISS revise the language of the second part of the draft policy that states that ISS will consider whether a company has "a robust counterbalancing governance structure." This language appears to reflect a pre-judgment that combining the CEO and Chairman roles is inappropriate, insofar as it suggests that such a governance structure is out-of-balance, and needs to be "counterbalanced." Again, if ISS determined that combining the roles is presumptively inappropriate, we suggest that it disclose the evidence upon which it

has based that conclusion. Alternatively, we suggest that ISS revise the language so that it is worded in a neutral and balanced manner.

Finally, in various places under this draft policy, as well as under other policies, ISS refers to the views of investors but does not identify them either by name or by category. For example, under this draft policy, ISS refers to "a substantial majority of investor respondents," and to "a significant number of respondents." We believe that it would be helpful, in commenting on the draft policies, if ISS provided more detail about the types of investors that supported a given point, as well as the types of investors that tended to take a different view.

### **Management Say on Pay Frequency Proposals**

ISS proposes to recommend in favor of a yearly say on pay vote, without consideration of the circumstances of the individual company. The draft policy does not state that this position is based on survey or other data, and we recommend that ISS disclose upon what evidence it based this proposal.

We believe that a "one-size-fits-all" approach that applies a uniform response would undermine the purposes of Section 951 of the Dodd-Frank Act, and the SEC's proposed rules designed to implement that legislation. Congress and the SEC clearly contemplate that investors be provided with an informed choice from among four options—1, 2, 3 years, or abstain. As you are aware, this is an atypical ballot item insofar as it is more in the nature of a referendum than a traditional proxy vote. A uniform recommendation—particularly one that lacks evidentiary diligence, or even apparently support through survey data—would defeat those purposes. In adopting Section 951, Congress clearly determined that a "one-size-fits all" approach is not appropriate, and that in some cases a 2 or 3-year time interval would be suitable.

As this is the first time frequency votes, regarding say on pay, will ever be voted on, it is unclear how ISS can make any recommendation without supporting data.

We recommend that ISS remain neutral on this topic, and encourage its clients to make individual, informed decisions on how they wish to register their votes.

Mr. Steve Harvey  
November 11, 2010  
Page 6

### **Director Attendance**

The draft policy would limit the reasons that ISS would find acceptable for director attendance below the 75% threshold—to three enumerated categories. The Chamber believes that director engagement is critical for strong corporate governance and we urge ISS not to limit the potential reasons, but rather to consider the reasons on a case-by-case basis. We believe that it would be acceptable to include the three categories as guidance about the types of reasons that are most typically deemed to be compelling, but that this should not be an exclusive list. Other reasons that are sufficiently meritorious to be disclosed in a company's proxy materials should generally also be compelling, whether or not they fall within a particular category. Under such an approach, ISS could review and reject the disclosed reasons, but would retain flexibility when confronted with unusual facts or circumstances. It is our experience that such unusual facts and circumstances do arise from time to time.

### **Increase Authorized Capital Proposals**

We are unable to comment on this draft proposal because there is insufficient publicly available information about ISS current approach, which lacks sufficient transparency. Consequently, without such data being available, we believe that ISS is not in a position to make any recommendations. As for its revised approach, ISS has not provided sufficient details or examples as to its proposed operation, nor the evidentiary basis upon which ISS developed the proposed alternative approach. We urge ISS to disclose the identities of parties whom it consulted in forming the proposed alternative approach, and the information garnered from those consultations, as well as other alternative approaches that it may have considered and rejected.

We truly appreciate the opportunity to comment. Please do not hesitate to call me with further questions or comments.

Sincerely,



Tom Quadman

Enclosure