

April 12, 2018

ISS Sticks with Its Position on Shareholder Amendment of Bylaws in New FAQ

In an FAQ issued on Monday, Institutional Shareholder Services Inc. (“ISS”) reiterated its positions from the 2017 proxy season that it will regard as “insufficient” both (a) a percentage share ownership requirement or a share holding time requirement, in either case greater than as permitted by SEC Proxy Rule 14a-8 (only \$2000 worth of stock for one year), for a shareholder (or group of shareholders) to propose a binding amendment to the bylaws and (b) a supermajority vote requirement for shareholders to approve a binding shareholder-proposed bylaw amendment. Nevertheless, since the end of the 2017 proxy season, 15 Maryland corporations or Title 8 REITs have adopted bylaw amendments permitting shareholders to amend the bylaws with requirements for shareholder proposal and/or approval in excess of those permitted by ISS. In addition, we are aware of other companies that have decided not to make any change to their bylaw amendment provisions this proxy season.

Some companies are following ISS because they think that if a shareholder makes a precatory proposal under Rule 14a-8 to adopt the ISS position and it passes, ISS will, under its “one strike” policy, recommend against all of the directors standing for election at the next shareholders meeting. This is probably true. However, it should be remembered that (1) only a few such bylaw amendment proposals have ever been made; (2) even if made, the proposal may not pass; (3) even if the proposal passes, the board has until the next proxy season to implement the proposal; and (4) most importantly, institutional shareholders showed a willingness to depart from ISS on the bylaws issue last proxy season and vote for re-election of nominating and governance committee members. In fact, every one of the 200-plus nominating and governance committee members that ISS recommended against solely because of the bylaws issue last year was re-elected, generally by very comfortable margins.

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As always, our colleagues and we are available at any time to discuss these or other matters.

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This memorandum is not intended to provide legal advice or opinion, which may only be given when related to specific fact situations for which Venable LLP has accepted an engagement as counsel.