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MEMORANDUM

Date: November 2, 2012
To: ISS
From: Attorneys Listed Below
Re: Comment Letter on Draft Policy Update

We are writing in response to the request for comments on the ISS draft policy updates with respect to the policy changes proposed for “Board Response to Majority-Supported Shareholder Proposals” and “Management Say-on-Pay Proposals.” We appreciate the opportunity to comment.

Board Response to Majority-Supported Shareholder Proposals

Our two specific suggestions with respect to the proposed policy change are set forth below. Before describing those suggestions, however, we thought it important to reiterate our perspective on ISS’ overall approach in this area.

We of course recognize that shareholder perspectives are—and should be—critically important inputs in board deliberations. The viewpoints of shareholders must be considered by boards as they determine their governance practices. We also recognize that withhold or against votes are appropriate where shareholders are dissatisfied with directors.

However, ISS’ approach of automatically recommending withhold or against votes if directors do not act in accordance with majority-approved shareholder proposals strikes us as both inconsistent with the fundamental corporate law principle that boards of directors are obligated to make their own independent decisions and, as the policy ignores the particular circumstances of the proposal and the board’s response, overly simplistic. Directors are obligated to exercise their business judgment as to matters presented to them, and boards may not abdicate this basic fiduciary duty by simply deferring to the judgment of any particular constituency. In addition, it is far from obvious that every proposal that receives majority shareholder support should be adopted—a reality highlighted by the prevalence of shareholders who may be pursuing a short-term investment strategy without regard to the longer-term best interests of the corporation and its shareholders.

Given its automatic application, ISS’ policy is tantamount to a requirement that boards act in accordance with a majority shareholder vote regardless of the substance of the proposal and the

circumstances that might warrant a contrary answer. For the reasons outlined above, we do not believe that such an approach is appropriate.

Insofar as ISS' proposed policy change would increase the number of situations subject to its automatic negative recommendation, we would urge ISS to consider not moving forward with the change. If ISS does elect to proceed with the change, however, we would request that ISS consider the two suggestions outlined below.

Do Not Require Literal Adherence to a Proposal; Consider a Range of Company Responses Potentially Acceptable. For the reasons outlined above, we believe there are serious questions about ISS' overall negative recommendation approach for majority-approved shareholder proposals (regardless of how a "majority" is measured). In addition, ISS' own data shows that nearly 50 proposals submitted to Russell 3000 companies in 2012 received shareholder votes in the 45-55% range. In our view, a proposal receiving only slightly more than 50% support clearly does not evidence a broad base of shareholder support—indeed, it indicates that a substantial number of shareholders do not support the proposal. We have also found that shareholder votes in favor of a particular proposal may simply reflect shareholders' dissatisfaction with respect to a range of matters, rather than support for the particular proposal being voted on.

We therefore urge ISS to take a more nuanced approach toward reviewing company responsiveness to majority-approved proposals (particularly those that receive only a majority of votes cast in one year), such that a company action that does not literally conform to the proposal may nonetheless be deemed sufficiently responsive. ISS already makes voting recommendations on a case-by-case basis with respect to a number of ballot items. The ability for ISS to exercise such discretion, taking into account factors that it believes to be relevant, would provide ISS with the ability to accommodate distinctions among companies' governance practices and allow ISS to evaluate corporate governance matters in light of the circumstances of the particular company (including, importantly, additional input from investors).

In fact, numerous companies do change their practices after a shareholder proposal receives majority support in ways that, while short of strictly implementing the proposal, are viewed by investors as more than sufficient—a reality evidenced by the fact that, in these circumstances, proponents often decide not to resubmit their proposal or, if they do, the vote is often much lower. For example, a company that may have received a majority of shares cast in support of having an independent chairman may respond by increasing the lead director's authority. Even ISS policy indicates that having a lead director with key oversight responsibilities (together with other company practices) represents a countervailing governance structure that may cause ISS to recommend against a proposal for an independent chairman.

We understand that our recommended approach will impose additional burdens on ISS, but we believe that reviewing a company's actions on a case-by-case basis rather than simply requiring companies to adhere to a strict application of a shareholder proposal (x) is a more sophisticated approach that recognizes the complexity of many of the issues included in shareholder proposals and (y) recognizes the important distinctions between proposals that receive a majority of outstanding shares in support or two out of three years of shares cast in favor and proposals that receive only the support of a majority of votes cast in one year. It also supports ISS' efforts not to adopt one-size-fits-all approaches to every situation.

Implement for 2014, Not 2013, Annual Meetings. We also recommend that, if ISS elects to move forward with its proposed change, it do so beginning in connection with 2014, not 2013, annual meetings. The matters subject to shareholder proposals can be complex and important. For the reasons outlined below, we believe companies should be afforded adequate time to consider the relevant issues carefully, in a manner consistent with the timetable on which companies have been relying.

Until the proposed policy change, companies believed that they had two years from their 2012 meeting, at minimum, to decide how to respond to majority-approved shareholder proposals. If ISS' proposed policy is adopted in late November, there may not be sufficient time for boards to review and, if they choose, respond to this policy update. Companies with annual meetings as early as March or April would only have a few months to assess the impact of this new policy for their next annual meeting—particularly as boards complete their busy year-end work focusing on financial reporting obligations and compensation decisions. Shareholder proposals often deal with complex, fundamental changes to a company's corporate governance practices, and companies should be provided with enough time to consider the various alternatives.

Among other things, companies may be in the process of discussing governance matters with their shareholders and simply may not be able to complete that process in time to respond to the proposed ISS policy change. Without this investor feedback, companies may not be certain of the investor sentiment that led to the vote, or the full scope of the direction that their investors would like them to take, especially for votes that passed only by a small margin.

Management Say-on-Pay Proposals

Grant Meaningful Deference to Company-Selected Peer Group. We endorse ISS' inclusion of a company's selected peer group as an additional input in the ISS peer group selection methodology. We appreciate ISS' responsiveness to concerns that its prior methodology, based solely on a company's S&P GICS group, with revenue and market capitalization as the ultimate determinants, often skewed a subject company's peer group toward companies that, in fact, were not true peers and were not an appropriate reference group for executive compensation decisions. We note that even a method that takes into account the GICS group of a company's own selected peers can often result in the inclusion of companies with whom the company does not compete for executive or specialist talent or even customers or investor dollars.

While we are aware of the reservations expressed by certain commentators with respect to sole reliance on a company's selected peer group, our experience is to the contrary. The companies with whom we work are uniformly rigorous, disciplined and thoughtful about the selection of their peer groups and carefully consider a full range of relevant factors including, importantly, the companies with whom they compete for talent. As such, where a company's CD&A provides a thoughtful, compelling analysis and explanation of a given compensation committee's decisions with respect to its peer group, we believe those decisions should be granted considerable deference by ISS, and should not be overridden by the mechanical use of various databases and financial metrics that cannot, and were not designed to, factor in the nuances involved in compensation-related peer group decisions.

We also believe that overlapping peers—*i.e.*, where company A's selected peer group includes company B, and B's selected peer group likewise includes A—are particularly meaningful. Overlapping peers reflect the judgment of two different boards or independent committees and, likely, at least two different independent advisers. We believe that inclusion of overlapping peer

companies will contribute to more rigorous and realistic comparative pay and performance analyses and obviate to a greater extent the mismatches that resulted from the prior methodology. Accordingly, we suggest that each such overlapping peer be included in the ISS peer group for each subject company, without regard to revenue or market capitalization. To the extent ISS prefers to cap the number of peers at a specific number, the overlapping peers should replace an equal number of quantitative outliers.

We support ISS' efforts in encouraging interested persons to comment on the draft policies before making a determination about the final policies that will affect 2013 annual meetings. Please contact David Caplan, Ning Chiu, Kyoko Takahashi Lin, Phillip Mills or Jack Wright at Davis Polk if you have any questions as to the foregoing. Thank you for your consideration.