

## Unilateral Board Actions (U.S.)

### Background and Overview

There has been a continued increase in the number of unilateral amendments made by boards to US company charters and bylaws without shareholder approval or ratification that diminish shareholder rights or otherwise negatively impact shareholders. ISS US policy on this topic was amended in 2014 to establish policy relating to unilateral bylaw and charter amendments under the board accountability policy framework. Unilateral bylaw and charter amendments had previously been evaluated under the material governance failures policy. At that time, there were no substantive changes made to the manner in which ISS evaluates such cases; rather, the 2014 amendment was designed to clearly communicate ISS policy on the then-growing issue. We are proposing this year to update policy in light of the increased prevalence of problematic unilateral bylaw and charter amendments.

### Key Changes under Consideration

The proposed policy update will explicitly state that when a board unilaterally amends the company bylaws or charter to either classify the board or establish supermajority vote requirements in any period after completion of a company's initial public offering (IPO), ISS will generally issue adverse vote recommendations for director nominees until such time as the unilateral action is either reversed or is ratified by a shareholder vote.

ISS is also considering implementing a policy providing that, when a board amends the bylaws or charter prior to or in connection with the company's initial public offering to classify the board and establish supermajority vote requirements to amend the bylaws or charter, ISS will generally issue adverse vote recommendations for director nominees at subsequent annual meetings following completion of the initial public offering.

### Intent and Impact

The proposed policy updates are intended both to clarify ISS US policy in this area and update ISS' approach to evaluating unilateral bylaw and charter amendments in light of feedback received from institutional investors. The proposed update does not affect the manner in which ISS evaluates and determines initial vote recommendations on directors with respect to problematic unilateral bylaw and charter amendments, but would explicitly state that certain provisions adopted unilaterally by the board, if not sufficiently addressed, can form the basis for continued adverse vote recommendations for director nominees in subsequent years. The principle underlying the policy continues to be that shareholders should have the right to opine on changes that materially affect their rights, particularly when such changes would diminish their rights or increase the risk of board and management entrenchment. The updates would also specifically address pre-IPO-related amendments that diminish shareholder rights or otherwise negatively impact shareholders.

Thus far in 2015, ISS has issued adverse vote recommendations for director nominees at 21 US companies relating to pre-IPO amendments to bylaws or charters to classify the board and/or introduce supermajority vote requirements. ISS has also issued adverse vote recommendations for director nominees at three companies that introduced post-IPO unilateral changes either classifying the board or adopting supermajority vote requirements to amend the bylaws or charter. One of these post-IPO companies, The Macerich Corporation, subsequently committed to declassify its board.

## Request for Comment

- Are there any unilateral board actions other than board classification or implementation of supermajority vote requirements to amend the bylaws or charter that you consider equally problematic in negatively impacting shareholder rights?
- When, prior to or in connection with an initial public offering (IPO), the board classifies and implements supermajority vote requirements to amend the bylaws or charter, do you consider it appropriate to hold the directors accountable through continuing adverse vote recommendations at annual meetings following the initial public offering?