Cooley

ISS Issues Off-Cycle US Executive Compensation FAQ on Meaning of 'Robust' Clawback Policy

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On October 11, 2024, Institutional Shareholder Services (ISS) released a new FAQ regarding clawback policies as an update to its United States Executive Compensation Policies, which give insight into, among other things, ISS procedures for determining its say-on-pay (SOP) proposal recommendations. Note that companies without an SOP proxy proposal (e.g., emerging growth companies) should not be impacted by this new ISS guidance.

Procedural significance

ISS FAQs are generally updated annually in November or December for the following year's proxy season, so this off-cycle addition is noteworthy. This also is the first inclusion of clawback policies in the FAQs relating to the US Executive Compensation Policies.

In short, the new FAQ (which is excerpted in full below) specifies that a clawback policy will not be viewed as "robust" for purposes of ISS' Executive Compensation Analysis unless it extends beyond Dodd-Frank requirements and applies to all time-vesting awards as well as performance-vesting awards. This is consistent with ISS' existing position under its Equity Plan Scorecard, where an equity plan will not receive points under the clawback policy metric unless the policy applies to both time- and performance-based awards.

Implications

Many companies do not go beyond the minimum Dodd-Frank requirements. Regardless, it appears that – going forward – a clawback policy that does not apply to time-based awards will be viewed negatively by ISS in determining its SOP vote recommendation, though it is not clear how much weight will be given to this factor. We continue to think that while companies should periodically revisit their clawback policies and take this new ISS position into account as another factor in the overall calculus, the guiding principle should be to ensure that the policy remains appropriate and best serves its purpose in the company's particular circumstances.

New FAQ 46

What is needed in order for to [sic] ISS to consider a clawback policy "robust," as displayed in the "Executive Compensation Analysis" section of the research report?

In order to receive credit for a "robust" clawback policy in the "Executive Compensation Analysis" section of the research report, a company's clawback policy must extend beyond minimum Dodd-Frank requirements and explicitly cover all time-vesting equity awards. A clawback policy that adheres only to minimum Dodd-Frank requirements will not be considered robust, because those requirements generally do not cover all time-vesting equity awards.

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