



The Misplaced Focus of the ISS Policy on NOL Poison Pills

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Since 2009, Institutional Shareholder Services, Inc. (“ISS”) has differentiated between traditional poison pills used to protect against unsolicited takeovers and other coercive transactions and NOL poison pills used to protect and preserve a company’s tax assets, primarily tax operating loss carryforwards.¹ According to ISS’ most recent published proxy voting manual, ISS’ voting policy applicable to management proposals to approve or ratify the adoption of an NOL poison pill has as its purported rationale the evaluation of “*the terms and purpose behind the NOL poison pill, as well as the company’s existing governance structure, to assess whether the structure actively promoted board entrenchment or adequately protects shareholder rights.*”² The proxy voting manual further indicates that “[w]hile ISS acknowledges the high estimated tax value of NOLs, which benefit shareholders, the ownership acquisition limitations contained in an NOL poison pill coupled with a company’s problematic governance structure could serve as an antitakeover device.”³

As we discuss below, to the extent that ISS is looking to assess whether an NOL poison pill is a disguised takeover defense or board entrenchment mechanism, as opposed to a mechanism to protect valuable tax assets, we believe ISS’ current voting policy applicable to NOL poison pills has a misplaced focus. We further believe that, due to this misplaced focus, ISS’ NOL poison pill voting policy does not adequately facilitate the ability of shareholders to understand whether the poison pill they are being asked to approve or ratify is a poison pill intended to protect tax assets or a disguised takeover defense or board entrenchment device.

Currently, the ISS voting policy on NOL poison pills includes among its criteria various aspects of a company’s corporate governance structure, including board independence, existing takeover defenses, track record of responsiveness to shareholders and any problematic governance

¹ ISS United States Proxy Voting Manual - Benchmark Policy Recommendations Effective for Meetings on or after February 1, 2017, published August 9, 2017, page 80.

² Id., page 80.

³ Id., page 80.

concerns.⁴ While a company's corporate governance structure may be relevant to the evaluation of a traditional takeover defense poison pill, we believe it is largely irrelevant to a shareholder's decision whether to vote for the approval or ratification of an NOL poison pill where the company has significant NOLs and the company has articulated why it has taken action to protect the NOLs, including providing an explanation as to why the NOLs are first being protected after the company is being targeted by an activist investor.

Rather than focusing on a company's corporate governance in a manner similar to what it would do in reviewing a traditional takeover defense poison pill, we believe ISS should focus on what we believe is the most important indicator of whether an NOL poison pill is a disguised board entrenchment device – the NOL poison pill's definition of beneficial ownership and whether it strictly follows the definition of ownership contained in Section 382 and the regulations thereunder ("Section 382") of the Internal Revenue Code ("IRC") as opposed to a hybrid definition that juxtaposes a Section 382 definition of ownership with a traditional takeover defense poison pill definition of beneficial ownership.⁵ While ISS' current voting policy on NOL poison pills allows it to consider any other factors that may be applicable, it does not specifically reference an NOL poison pill's definition of beneficial ownership as one of the central criteria it focuses on in determining whether to recommend that shareholders vote to ratify the adoption of the NOL poison pill.⁶ Nor does the current ISS voting policy on NOL poison pills focus on whether the NOL poison pill contains, or authorizes the company's board of directors to adopt, an exemption request process that allows shareholders to submit exemption requests to acquire securities of the company in excess of the 4.9% ownership threshold and be exempted from being deemed "acquiring persons" pursuant to the NOL poison pill.⁷

⁴ ISS United States Proxy Voting Guidelines - Benchmark Policy Recommendations Effective for Meetings on or after February 1, 2018, published January 4, 2018, page 26.

⁵ Ownership of securities is assessed very differently under Section 382 from the way it is assessed under Section 13(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act") and Rule 13d-3 thereunder. In determining, whether a person has ownership of a company's securities for purposes of Section 382, only the "economic owner" is considered to "own" the company's securities and "economic owner" means that such person or entity has the right to receive or direct dividends and/or the proceeds of the sale of the securities. In contrast, for purposes of Section 13(d) of the Exchange Act and Rule 13d-3 thereunder, to determine whether a person has ownership of a company's securities, the focus is on the "beneficial owner" which refers to the person or entity that, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares voting power and/or investment power over the securities. Rule 13d-3 of the Exchange Act provides that voting power is (primarily but not exclusively) the power to vote or direct the voting of the security and investment power is (primarily but not exclusively) the power to dispose of the security or to direct the disposition of the security.

⁶ ISS United States Proxy Voting Guidelines - Benchmark Policy Recommendations Effective for Meetings on or after February 1, 2018, published January 4, 2018, page 26.

⁷ The NOL poison pill can either contain, or authorize the company's board of directors to adopt, an exemption request process. The advantage of having the details of the exemption request process in a document separate from the NOL poison pill is that it can be modified from time to time without having to amend the NOL poison pill. We believe that it is preferable, from a transparency perspective, that any exemption request process that is formally adopted by the board be publicly disclosed by the company, either on the company's website or in a Current Report on Form 8-K that is filed with the Securities and Exchange Commission. An example of an NOL poison pill exemption request provision that authorizes the board to (i) grant exemptions for a

To the extent that the company's NOL poison pill does not define beneficial ownership in a manner that is in strict accordance with how ownership is determined pursuant to Section 382⁸ and, instead, juxtaposes a Section 382 definition of ownership with a traditional takeover defense poison pill definition of beneficial ownership, and does not provide for, or authorize the company's board to adopt, an exemption request process, we believe those factors may indicate, more so than the company's corporate governance structure, that the company has, in effect, adopted a poison pill more akin to a traditional takeover defense poison pill albeit with a 4.9% ownership threshold, and a three-year term subject to earlier expiration if the NOLs become expired or exhausted. In reality, one could argue, as some activist investors might, that, in adopting an NOL poison pill with a beneficial ownership definition that, while referencing Section 382, is more closely tied to the beneficial ownership definition contained in Rule 13d-3 of the Exchange Act,

person to acquire the company's securities and not be deemed an "acquiring person" pursuant to the NOL poison pill, and (ii) adopt a process for such a person to request such an exemption is as follows: "Exemption Requests. Any Person who desires to effect any acquisition of Common Stock that would, if consummated, result in such Person Beneficially Owning 4.99% or more of the then outstanding Common Stock (or, in the case of an Existing Holder, additional shares of Common Stock) (a "Requesting Person") may, prior to the Stock Acquisition Date, request that the Board grant an exemption with respect to such acquisition under this Agreement so that such Person would be deemed to be an "Exempt Person" for purposes of this Agreement and would be permitted to become the Beneficial Owner of up to a number or percentage of the shares of Common Stock determined by the Board (the "Exempted Amount") and be exempted from being an Acquiring Person, unless and until such Person acquires Beneficial Ownership of shares of Common Stock of the Company in excess of the Exempted Amount (other than pursuant to a stock split, reverse stock split, stock dividend, reclassification or similar transaction effected by the Company) in which case such Person shall be an Acquiring Person (an "Exemption Request"). The Board shall have the sole discretion to establish and/or modify the process by which a Requesting Person may submit an Exemption Request, including, without limitation, the required form of an Exemption Request, and such process, once established or modified from time to time, shall be publicly disclosed, including in a filing made with the SEC. The Board shall only grant an exemption in response to an Exemption Request if the Board determines in its sole discretion that the acquisition of Beneficial Ownership of Common Stock by the Requesting Person will not limit or impair the availability to the Company of the Tax Benefits. Any exemption granted by the Board hereunder may be granted in whole or in part, and may be subject to limitations or conditions (including a requirement that the Requesting Person agree that it will not acquire Beneficial Ownership of shares of Common Stock in excess of the Exempted Amount), in each case as and to the extent the Board shall determine, in its sole discretion, to be necessary or desirable to preserve the availability to the Company of the Tax Benefits. The Exemption Request shall be considered and evaluated by directors serving on the Board, or a duly constituted committee thereof, who are independent of the Company and the Requesting Person and disinterested with respect to the Exemption Request, and the action of a majority of such independent and disinterested directors shall be deemed to be the determination of the Board for purposes of such Exemption Request."

⁸ To ensure that the NOL poison pill's definition of beneficial ownership is strictly tied to how ownership is determined under Section 382, a proviso can be inserted into the beneficial ownership definition contained in the NOL poison pill similar to the following: "provided, however, that notwithstanding anything in this Agreement to the contrary, a Person shall not be deemed the Beneficial Owner of, or to Beneficially Own, any securities if such securities would not be deemed constructively or otherwise owned by, or otherwise aggregated with securities owned by, such Person, for purposes of Section 382."

and with such definition perhaps enhanced with an “acting-in-concert” provision, the company may be trying to “*have its cake and eat it too.*”

Purpose of NOL Poison Pills

An NOL poison pill is intended to deter any person from acquiring beneficial ownership of 4.99% or more of the company's common stock without the approval of the company's board of directors. By deterring such acquisitions, an NOL poison pill is intended to prevent an “ownership change” from occurring as such term is defined in Section 382. Under Section 382, an “ownership change” occurs if a shareholder or a group of shareholders that is deemed to own at least 5% of a company's common stock increases their ownership (individually, or collectively with other such “5-percent shareholders”) by more than fifty (50) percentage points over their lowest ownership percentage within a rolling three-year period. If an ownership change occurs, Section 382 would impose an annual limit on the amount of the company's NOLs that can be used to offset the company's income taxes equal to the product of the total value of the company's outstanding equity immediately prior to the ownership change (reduced by certain items specified in Section 382) and the federal long-term tax-exempt interest rate in effect for the month of the ownership change. A number of complex rules apply to calculating this annual limit. If an ownership change were to occur, the limitations imposed by Section 382 could result in a substantial delay in the timing of the usage of the company's NOLs or in a material amount of the company's NOLs expiring unused and, therefore, significantly impair the value of such NOLs. Since 1998, approximately 227 NOL poison pills have been adopted, including 10 in 2018 (year to date) and 18 in 2017, with the vast majority of those NOL poison pills being adopted since 2009.⁹

NOL poison pills are very similar in structure, documentation, mechanics and dilution effects to a traditional takeover defense poison pill, but with certain key differences, including, among other differences, the NOL poison pill's purpose and intent, low 4.99% triggering ownership threshold, definition of beneficial ownership tied, at least in part, to how ownership of securities is determined for purposes of Section 382, and sunset provisions tied to the exhaustion or expiration of the NOLs. Similar in effect to a traditional antitakeover poison pill, a person who acquires, without the approval of the board, after the first public announcement of the adoption of the NOL poison pill, beneficial ownership (as defined by Section 382) of 4.99% or more of the company's common stock would be subject to significant dilution.

Like traditional takeover defense poison pills, NOL poison pills have a significant deterrent effect. Of all the NOL poison pills that have been adopted, only one has been publicly disclosed as having been triggered.¹⁰ The triggering of that NOL poison pill was challenged in litigation brought

⁹ FactSet SharkRepellent.net data.

¹⁰ NOL poison pill adopted by Selectica, Inc., a Delaware corporation, on November 16, 2008. See Current Report on Form 8-K filed with the SEC by Selectica, Inc. on November 18, 2008 disclosing the adoption of the NOL poison pill via an amendment to a traditional takeover defense poison pill.

<https://www.sec.gov/Archives/edgar/data/1090908/000095013408020820/f50597e8vk.htm>

in the Delaware Chancery Court and, ultimately, the Court upheld the adoption of the NOL poison pill.¹¹

Relevance of NOL Poisons Pills to Shareholder Activism

Even though NOL poison pills do not have as their primary purpose, protecting the company against activist investors and hostile takeover threats, the public targeting of a company by an activist investor and that activist investor's ability to be a potential catalyst for an ownership change under Section 382, could make the adoption of an NOL poison pill compelling. While the optics may not be ideal and the activist investor and other investors may be quick to question the company's motives and timing for adopting an NOL poison pill after the company is targeted by an activist investor and assert that the NOL poison pill is a disguised board entrenchment and takeover defense mechanism, activist campaigns can significantly increase the risk that a company experiences an ownership change under Section 382, including for the following reasons:

- activism campaigns can sometimes result in significant spikes in the trading volume of a company's shares;
- activism campaigns may involve "wolf-packs" of multiple 5% investors accumulating stakes in the company;
- an activist investor's objective may be to attract other hedge fund investors to the company's stock to support the activist investor in its campaign against the company; and
- an activist investor's objective may be to push for an event at the company such as a sale or other transaction that enhances shareholder value and the possibility of such an event may cause huge spikes in trading volume as other investors move quickly to acquire the company's stock.

Differences Between a Traditional Takeover Defense Poison Pill and an NOL Poison Pill

As noted above, there are a number of significant differences between a traditional takeover defense poison pill and an NOL poison pill. Among other differences, NOL poison pills:

- are intended to protect a company's NOLs from being limited or impaired under Section 382 of the IRC, compared to traditional antitakeover poison pills that are intended to protect against hostile acquisitions or coercive transactions;
- have a lower trigger ownership threshold (e.g., below 5%) based on the Section 382 ownership rules compared to the 10-20% trigger ownership thresholds contained in traditional takeover defense poison pills;
- contain a definition of beneficial ownership tied, at least in part, to Section 382's ownership rules;
- are not typically as protective of the company as a traditional antitakeover poison pill against an activist investor or group or a hostile suitor if the definition of beneficial ownership strictly tracks the definition of beneficial ownership contained in Section 382;
- require the board to determine that there are significant NOLs to protect;
- often have a longer duration than many traditional poison pills (3 years vs. less than 1 year);

¹¹ [Selectica, Inc. v. Versata Enterprises, Inc. and Trilogy, Inc. \(Del. Chancery Court - February 26, 2010\)](#)

- include a sunset provision tied to the life and utility of the NOLs since duration is intended to be closely aligned with the protection of tax assets; and
- provide the board with the ability to exempt certain transactions from being deemed triggering events without having to amend the poison pill.

In addition to the aforementioned distinctions, for a company with significant NOLs to protect, it is generally easier for an NOL poison pill that is submitted for shareholder ratification to receive a positive recommendation from the proxy advisory firms, including ISS, than is the case with a traditional takeover defense pill.

ISS Voting Policy for Traditional Takeover Defense Poison Pills

With respect to a traditional takeover defense poison pill, ISS' 2018 voting policies provide that ISS will vote against or withhold from all board nominees (except new nominees, who should be considered case-by-case) if the company has a poison pill with a term of more than a year that was not approved by shareholders.¹² Further, for takeover defense poison pills that are submitted for shareholder approval, ISS' 2018 voting policies provide that ISS will vote on a case-by-case basis, focusing on the features of the poison pill. ISS' 2018 policies indicate that takeover defense poison pills should contain the following attributes:¹³

- no lower than a twenty percent (20%) trigger, flip-in or flip-over;
- a term of no more than three (3) years;
- no dead-hand, slow-hand, no-hand, or similar feature that limits the ability of a future board to redeem the pill (or make it inapplicable to a transaction); and
- a shareholder redemption feature (qualifying offer clause); if the board refuses to redeem the pill ninety (90) calendar days after a qualifying offer is announced, 10 percent of the shares may call a special meeting or seek a written consent to vote on rescinding the pill (or making it inapplicable to a transaction).

In addition, ISS requires that the rationale for adopting the takeover defense poison pill be thoroughly explained by the company.¹⁴ ISS also indicates that, in reviewing the takeover defense poison pill, it will take into consideration the company's existing governance structure, including: board independence, existing takeover defenses, and any problematic governance concerns.¹⁵

ISS Voting Policy for NOL Poison Pills

Since 2009, ISS' voting policies have differentiated between traditional takeover defense poison pills and NOL poison pills.¹⁶ ISS' 2018 voting policies provide that ISS will make its vote recommendations on management proposals for NOL poison pill ratification on a case-by-case

¹² ISS United States Proxy Voting Guidelines - Benchmark Policy Recommendations Effective for Meetings on or after February 1, 2018, published January 4, 2018, page 13.

¹³ Id., page 26.

¹⁴ Id., page 26.

¹⁵ Id., page 26.

¹⁶ ISS United States Proxy Voting Manual - Benchmark Policy Recommendations Effective for Meetings on or after February 1, 2017, published August 9, 2017, page 80.

basis, considering the following factors, if the term of the pill would be the shorter of three (3) years (or less) and the exhaustion of the NOLs¹⁷:

- the ownership threshold;
- the value of the NOLs;
- shareholder protection mechanisms (sunset provision, or commitment to cause expiration of the pill upon exhaustion or expiration of the NOLs);
- the company's governance structure (board independence, takeover defenses, track record of responsiveness to shareholders, and any other governance concerns); and
- any other factors that may be applicable.

Accordingly, if the company has significant pre-tax NOLs that it can point to and adopts an NOL poison pill with a term of the shorter of three (3) years (or less) and the exhaustion of the NOLs and a sunset provision tied to the exhaustion or expiration of the NOLs, and there are not overriding governance issues of concern to ISS, under ISS' current voting policies applicable to NOL poison pills, our experience has been that a company is likely to receive ISS support for shareholders to vote to approve or ratify the adoption of an NOL poison pill with a 4.9% ownership threshold. Our experience has also been that such seems often to be the case even if the NOL poison pill was adopted after the company was targeted by an activist investor.

Determining Whether to Adopt a Takeover Defense Poison Pill or an NOL Poison Pill

In a perfect world, a company that has both significant NOLs and an activist investor or potential hostile suitor at the door would need to determine which problem it is most concerned with, the protection of its NOLs from being limited under Section 382 or the protection of the company against an activist investor, an activist investor "wolf-pack" or hostile suitor. A "pure" NOL poison pill would not typically provide the company with the same level of protection as a traditional takeover defense poison pill, even given the lower ownership threshold contained in an NOL poison pill. That is because, a "pure" NOL poison pill would contain a definition of beneficial ownership tied to Section 382 which may not be as broad as what would be contained in a typical takeover defense poison pill, particularly when you take into consideration some of the "bells and whistles" found in a typical takeover defense poison pill such as "acting in concert" provisions and coverage for derivative securities such as cash-settled equity swaps.¹⁸

¹⁷ ISS United States Proxy Voting Guidelines - Benchmark Policy Recommendations Effective for Meetings on or after February 1, 2018, published January 4, 2018, page 26.

¹⁸ When used in connection with poison pills, acting-in-concert provisions attempt to define beneficial ownership of a potential acquiring person by ascribing to such person beneficial ownership of shares of a company's voting securities held by not only persons with whom a group may have been formed pursuant to Section 13(d) of the Exchange Act, but also persons with whom, pursuant to the definition, such person is deemed to be acting in concert with. An example of such an acting-in concert definition is as follows: "*A Person shall be deemed to be "Acting in Concert" with another Person if such Person knowingly acts (whether or not pursuant to an express agreement, arrangement or understanding) at any time after the first public announcement of the adoption of this Agreement, in concert or in parallel with such other Person, or towards a common goal with such other Person, relating to changing or influencing the control of the Company or in connection with or as a participant in any transaction having that purpose or effect, where (i) each Person is conscious of the other Person's conduct and this awareness is an element in their respective decision-making processes and (ii) at least one additional factor supports a*

A “pure” NOL poison pill would also provide the company’s board of directors with the flexibility to approve exemption requests from current and potential shareholders so that they can purchase securities of the company without being deemed “acquiring persons” under the NOL poison pill, particularly in circumstances where such an exemption would not adversely affect the company’s ability to utilize the NOLs or bring the company significantly closer to experiencing an “ownership change” under Section 382. Accordingly, by adopting an NOL poison pill, a company may be creating the expectation that, from time to time, it is prepared to consider approving exemption requests that provide the requesting person with an exemption from the ownership limitations that trigger the NOL poison pill. Such is not typically the case with a traditional takeover defense poison pill.

Why We Believe that the ISS Voting Policy on NOL Poison Pills Has a Misplaced Focus

Certainly, for the reasons articulated above, there are numerous circumstances where the adoption of an NOL poison pill by a company that is being targeted by an activist investor is in the best interests of shareholders and, in those circumstances, we believe that ISS and the other proxy advisory firms should be unequivocal in recommending that shareholders vote in favor of those poison pills without attempting to dilute their recommendation with what we believe is misplaced focus on issues not relevant to whether the company should be protecting a significant company asset from being limited or even completely eviscerated by the application of Section 382.

Where a company has significant NOLs to protect and can articulate why it believes that the adoption of an NOL poison pill to protect such NOLs is in the best interests of shareholders, factors such as timing of the adoption of an NOL poison pill soon after the company was targeted by an activist investor and how an NOL poison pill “conveniently” bolsters the company’s activist defense should fall to the wayside. Likewise, factors such as the company’s governance structure, the board’s independence, existing takeover defenses, whether the company is sufficiently responsive to shareholders and other “problematic governance concerns” should also fall by the wayside where the company has demonstrated that the protection of its NOLs is in the best interests of shareholders. Under such circumstances, we do not believe that even reluctant recommendations such as where ISS indicates that “*cautionary support*” is warranted is justified if the only justification for such “*cautionary support*” are concerns with the company’s corporate governance practices or the timing of the adoption of the NOL poison pill. By way of analogy, we

determination by the Company’s Board of Directors that such Persons intended to act in concert or in parallel, which additional factors may include, without limitation, exchanging information, attending meetings, conducting discussions, or making or soliciting invitations to act in concert or in parallel; provided that, the additional factor required shall not include actions by an officer or director of the Company acting in such capacities. A Person who is Acting in Concert with another Person shall also be deemed to be Acting in Concert with any third party who is also Acting in Concert with such other Person. No Person shall be deemed to be Acting in Concert with another Person solely as a result of (i) making or receiving a solicitation of, or granting or receiving, revocable proxies or consents given in response to a public proxy or consent solicitation made to more than 10 holders of shares of a class of stock of the Company registered under Section 12 of the Exchange Act, or (ii) soliciting or being solicited for tenders of, or tendering or receiving tenders of, securities in a public tender or exchange offer made pursuant to, and in accordance with, Section 14(d) of the Exchange Act by means of a tender offer statement filed on Schedule TO.”

would not expect ISS to recommend that shareholders of a selling company vote against a premium merger, or indicate that only “*cautionary support*” of the transaction is warranted, just because the board of the selling company did not follow best practices in corporate governance. We do not believe that shareholders should be punished and prevented from having the company take important, if not critically important, actions that are in the best interests of shareholders, including protecting what could be the company’s most significant asset, just because there are concerns with the company’s corporate governance practices or because the company took certain actions after learning that it had been targeted by an activist investor.

However, we can also see why an activist investor and the proxy advisory firms may question the motives of the company in adopting an NOL poison pill, even if the activist investor itself truly believes that it is in the best interest of all shareholders for the company to protect the NOLs from being limited under Section 382. We believe the activist investor’s argument on this issue is bolstered when the company adopts an NOL poison pill that, based on its terms, looks more like a traditional takeover defense poison pill than a true NOL poison pill, albeit with a 4.9% ownership threshold and a three-year term subject to earlier expiration upon the expiration or exhaustion of the NOLs.

While the current ISS policy on NOL poison pills calls out a company’s governance structure and “*problematic governance concerns*” as being among the criteria it will assess in determining whether to recommend in favor of an NOL poison pill, noticeably absent from the specified criteria considered by ISS is the NOL poison pill’s definition of beneficial ownership and whether it is strictly tied to the definition of ownership contained in Section 382 and the regulations thereunder as opposed to a hybrid definition that juxtaposes a Section 382 definition of ownership with a traditional takeover defense poison pill definition of beneficial ownership.¹⁹ Nor does ISS include in its specified criteria whether the NOL poison pill contains, or authorizes the board to adopt, an exemption request process that allows the board to exempt certain acquisitions of the company’s stock from creating an “acquiring person” pursuant to the NOL poison pill. While we recognize that ISS’ voting policy indicates that it will consider “*any other factors that may be applicable*,”²⁰ it is not clear what this means other than that it provides ISS with additional flexibility to base its voting recommendation on other unspecified factors. We believe that the ISS voting policy on NOL poison pills, rather than focusing on the company’s governance structure, should place more focus on the NOL poison pill’s definition of beneficial ownership and whether the NOL poison pill contains, or authorizes the company’s board of directors to adopt, an exemption request process. We believe that such a change in focus would be significantly more revealing of the purpose of the NOL poison pill and whether the NOL poison pill is more intended to serve as a board entrenchment or antitakeover mechanism than a mechanism to protect a company’s tax assets.

While ISS indicates that the rationale for its current policy on NOL poison pills is intended to allow shareholders to make informed decisions when presented with proposals to adopt or ratify such NOL poison pills and to encourage issuers to submit such pills to a shareholder vote,²¹ we would argue that the current ISS voting policy on NOL poison pills does not go far enough to highlight for shareholders the differences between the purposes of an NOL poison pill as distinct from

¹⁹ ISS United States Proxy Voting Guidelines - Benchmark Policy Recommendations Effective for Meetings on or after February 1, 2018, published January 4, 2018, page 26.

²⁰ *Id.*, page 26.

²¹ ISS United States Proxy Voting Manual - Benchmark Policy Recommendations Effective for Meetings on or after February 1, 2017, published August 9, 2017, page 80.

those of a takeover defense poison pill and whether a particular poison pill, by its terms, is a “pure” NOL poison pill or is more akin to a traditional takeover defense poison pill, albeit with a lower 4.9% ownership threshold. We believe that, in order to allow shareholders to make informed decisions when presented with proposals to approve or ratify NOL poison pills, the ISS policy on NOL poison pills should encourage issuers to provide shareholders with information on how the NOL poison pill differs from a traditional takeover defense poison pill, including the following:

- what were the considerations that the board took into effect in deciding to adopt an NOL poison pill rather than a traditional takeover defense poison pill;
- how does the definition of beneficial ownership contained in the NOL poison pill differ from the definition of beneficial ownership that is typically contained in a traditional takeover defense poison pill;
- whether the definition of beneficial ownership is limited to economic ownership as determined under Section 382 and the regulations thereunder or is more of a hybrid definition in that it also includes beneficial ownership as determined under Section 13(d) of the Exchange Act and Rule 13d-3 thereunder;
- does the NOL poison pill provide for or authorize the board to adopt an exemption request process that would allow current or potential shareholders to request an exemption that would allow them to acquire shares of the company’s common stock without being deemed an “acquiring person” under the NOL poison pill; and
- what process will the board follow to review the NOL poison pill on a periodic basis to determine that the NOL poison pill continues to be necessary to protect the company’s NOLs and continues to serve the best interests of shareholders.

As noted above, while it may be appropriate to question the timing and convenience of the adoption of the NOL poison pill relative to the timing of the company becoming aware that it has been targeted by an activist investor, we believe those factors must ultimately give way to whether the NOL poison pill, regardless of the convenient timing of its adoption, protects and preserves valuable tax assets and is in the best interests of shareholders. Further, we believe that a focus on the company’s corporate governance structure (unless directly related to whether the NOL poison pill is in the best interests of shareholders), in connection with assessing whether shareholders should vote for the ratification of the NOL poison pill, is misplaced and, if anything, may impede the ability of shareholders to make informed voting decisions when presented with proposals to approve or ratify such NOL poison pills. If the objective is to facilitate the ability of shareholders to make informed voting decisions as to whether the NOL poison pill is a disguised takeover defense or board entrenchment mechanism, for the reasons discussed above, we believe the focus of ISS’ voting policy on NOL poison pills should be on whether the NOL poison pill contains a definition of beneficial ownership that closely tracks Section 382’s definition of ownership, and whether the NOL poison pill contains, or authorizes the company’s board of directors to adopt, an exemption request process for current and potential shareholders to request exemptions from the NOL poison pill such that they can acquire securities of the company without being deemed “acquiring persons” pursuant to the NOL poison pill.