

CLIENT MEMORANDUM

ISS Issues Research Note on Activist Incentive Compensation for Directors

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Supports the Election of Third Point Nominees to the Board of Dow Chemical

On April 21, 2015, Institutional Shareholder Services Inc. (“ISS”), the premier proxy advisory firm, issued a research note supporting the election of certain directors of The Dow Chemical Company (“Dow”) originally nominated by Third Point LLC (“Third Point”). Third Point had entered into contractual incentive compensation arrangements with its nominees to the Dow board. While some compensation arrangements between activist stockholders and their board nominees have attracted criticism (notably Elliott Management’s proxy contest involving Hess Corporation and Jana Partners’ contest with Agrium Inc.), the arrangements that were carefully structured between Third Point and its nominees received ISS support. Dow’s upcoming annual meeting presents one of the few high-profile opportunities for stockholders to vote on directors who benefit from such third-party compensation.

Willkie Farr & Gallagher LLP represented Third Point in its activist campaign with Dow, including the design and implementation of the stock appreciation rights discussed in this client alert. The compensation arrangements at issue gave Third Point’s nominees the right to receive, if earned, two cash payments from Third Point based upon the appreciation of Dow’s stock over three and five years. Fifty percent of the first payment right vested on each of the second and third anniversaries of the date the nominees were appointed to Dow’s board, and fifty percent of the second payment right vested on each of the fourth and fifth anniversaries of that date.

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ISS noted that Third Point structured the incentive compensation, including the long vesting periods associated with the payments, in a manner designed to address concerns that nominees' interests might conflict with the interests of stockholders. ISS also noted that the arrangements were included in a binding agreement in which Third Point established the payments as one-time grants and relinquished the ability to modify the economic terms of the stock appreciation rights. ISS also noted the lack of direct influence by Third Point over its independent nominees (who constituted a minority of the board), or special communication rights benefiting Third Point. It is also critical to note that the compensation arrangements were not tied to Third Point's returns, or indeed whether Third Point remained an investor in Dow.

While ISS made clear that such arrangements will ultimately depend on the facts and circumstances, ISS support for the election of Third Point's nominees provides confirmation that such arrangements – if carefully crafted – can be stockholder-friendly and align the interests of board nominees and stockholders. The Third Point/Dow arrangements thus provide a good blueprint for future proxy contests.

Clients having questions about the Third Point/Dow arrangements, the ISS research note, or activist situations generally, should contact Steven J. Gartner (212 728 8222, sgartner@willkie.com), Tariq Mundiya (212 728 8565, tmundiya@willkie.com), Michael A. Schwartz (212 728 8267, mschwartz@willkie.com), Manuel A. Miranda (212 728 8747, mmiranda@willkie.com) or the Willkie attorney with whom you regularly work.

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