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The Current State of Takeover Defenses: What Do Takeover Preparedness and Defenses Mean Today?

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Today's Presenters



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Today's Topics

- The M&A market & the threat of hostile activity
- What is a “takeover defense” today?
- Structural takeover defenses
- Dealing with efforts to dismantle defenses
- Employee protections
- Other means of defending
- Advance preparation
- Ways in which a hostile overture may unfold

The M&A Market & The Threat of Hostile Activity

What is a “Takeover Defense” Today?

What is a “Takeover Defense” Today?

- In today’s world, maintaining the status quo is rarely an option
 - Companies constantly reinvent themselves
- So, what is a company defending against?
 - Hostile takeover attempt/Threat to independence
 - Disruption to strategic plan
 - Action that undermines ability to determine own destiny
 - Including deciding when to sell, merge, divest or acquire
 - “Outsider nominees” elected to Board
- What is a defense?
 - Structural
 - Business strategies
 - Capital strategies
 - Shareholder relations

Structural Takeover Defenses

Structural Takeover Defenses

- Purpose: To give a Board and management the time and means to defend against undesirable actions
- Due to the need for shareholder approval, there is little that an existing public company can do to add to its arsenal
 - Annual meeting advance notice bylaws (including derivatives)
 - Bylaws regarding special meeting and consent solicitation procedures
 - “Poison pill” rights plan
 - Pursue amendments to applicable corporate law
 - Seek authority for additional common stock
 - Establish an ESOP
 - Employee plan terms on voting and tender decisions
- Clean slate takeover defense opportunities – IPOs, spin-offs
 - Full menu generally available (including dual class structure), but expect prompt usual reactions

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“Poison Pill” Rights Plans

- Types of rights plans
 - “Traditional” ten year plan
 - NOL plan
 - Shareholder-approved plan
 - *Ad hoc* plan targeted at special situation
- Shareholder and proxy adviser objections to rights plans
 - “Traditional” ten year plan is most objectionable
 - Limited “pass” may be available for other plans
 - Term of plan is important - more than 12 months?
- A company should at least keep a plan “on the shelf,” stay abreast of developments and keep its Board informed
 - Address ownership through derivatives

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Pursuing Amendments to Applicable Corporate Law

- Potential subjects include
 - Mandatory staggered board
 - Control share, restrictions on business combinations
 - Constituency provisions
- Tread carefully
 - A company's open support can trigger investor/adviser ire
 - Will ultimate punishment be push for reincorporation?
- Examples: Indiana, Iowa, Oklahoma

Dealing With Efforts to Dismantle Defenses

Dealing With Efforts to Dismantle Defenses

- Targets of shareholder proposals to dismantle
 - Eliminate staggered board
 - Eliminate supermajority vote requirements
 - Seeking shareholder ability to call special meetings
 - Seeking shareholder ability to act by consent
 - Eliminate blank check preferred
 - Require shareholder approval for bylaw amendments

Dealing With Efforts to Dismantle Defenses

- What to do
 - Understand the landscape; do not rush to act
 - Confirm likely proxy adviser recommendation
 - Consider ability to win despite adverse proxy adviser recommendations
 - Seek to delay as long as possible
 - Take to a vote rather than conceding
 - Phase out staggered board elimination after loss
 - But, ISS will no longer give one year pass
 - Avoid inadvertent actions that undercut position
 - Is negotiation an option?

Employee Protections

Employee Protections

- The possibilities
 - Golden parachutes
 - Tin parachutes
 - Equity and incentive plan change in control protection
 - Rabbi trusts for deferral plan, other obligations
 - Overfunded pension plan protection
- The limitations
 - Proxy advisers are watching
 - Shareholders are watching

Other Means of Defending

Other Means of Defending

- Good performance
- Develop a sound strategic plan, including a realistic business plan, that you can sell to shareholders
 - Business strategies
 - Capital strategies, including dividends, buybacks, recaps
 - Identify and address key areas of vulnerability
- Shareholder relations
 - Be mindful of Reg. FD

Advance Preparation

Advance Preparation

- Know your shareholders
 - Stock watch
 - Track key contacts on portfolio side and voting side
 - Make regular contacts with larger shareholders – and take and keep notes
 - Understand potential hostile parties
- Have an informed Board that is committed to a strategic plan
 - Review strategic alternatives
- Have regular Board updates on the subject with advisers
- Reach out regularly to ISS, Glass-Lewis
- Engage, prepare and communicate with advisers
 - Investment banker, lawyers, proxy solicitor, investor/public relations firm
- Listen to what the investment community says about you and prepare responses (even if not you do not immediately use the responses)

Advance Preparation (cont.)

- Remind directors / officers to not comment on rumors and to refer any approaches to the CEO
- Complete a general legal review
 - Applicable state statutory provisions
 - Change in control terms of compensation arrangements
 - CIC implications under key corporate documents
 - Antitrust review
 - Potential tax issues
 - Foreign statutes and regulations
- Avoid committing publicly to future dates for earnings calls and your annual meeting
- Anticipate possible need to act quickly and have procedures and systems in place
 - Including communications with all relevant constituencies
- Communicate with credit agencies

Ways in Which a Hostile Overture May Unfold

Ways in Which a Hostile Overture May Unfold

- Possibilities
 - Casual/friendly overture
 - Soft “bear hug” letter – no terms
 - Strong “bear hug” letter – includes terms
 - Publicly disclosed offer
 - Tender offer/exchange offer
 - Proxy fight
- Variables
 - Need to respond or negotiate?
 - Need to advise, convene Board?
 - Need to publicly disclose?
 - Applicability of legal requirements

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Questions & Answers

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