Takeover Bids in the Target's Boardroom; An Update After One Year

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Last year, in "Takeover Bids in the Target's Boardroom,"[1] this author argued that:

> (1) the business judgment rule applies to the consideration by the board of directors of a target of an unsolicited takeover bid,[2]
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> (2) there is no requirement that the board of directors of a target submit to the shareholders any unsolicited takeover bid; on the contrary a company can have an express policy of continuing as an independent entity,[3]
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> (3) once the board of directors has in good faith and on a reasonable basis determined to reject a takeover bid, the target may take any reasonable action to accomplish this purpose,[4]
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> (4) there is no real difference between the business judgment rule and the primary purpose test (the test courts often say is violated when they determine that a defensive action was improper because it was for the primary purpose of keeping management in office) as applied to the rejection of, or defending against, a takeover bid—"where the primary purpose test has been applied, the cases really turned on the courts' belief that the directors had not acted in good faith or on a reasonable basis," rather than a philosophical distinction between the two standards.[5]

A year ago there was little direct judicial authority to support these positions. During the past year several significant decisions have been rendered which provide that support. Additionally, several commentators have aligned themselves with the positions taken in *Takeover Bids*.

I. Judicial Developments

In *Panter v. Marshall Field & Co.*,[6] a stockholder action attacking the rejection of a takeover proposal and the defensive measures (*i.e.*, lawsuit and

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1. Lipton, *Takeover Bids in the Target's Boardroom*, 35 Bus. Law. 101 (1979) [hereinafter "*Takeover Bids*"].

2. *Id.* at 131.

3. *Id.* at 130.

4. *Id.* at 123.

5. *Id.* at 124.

6. Panter v. Marshall Field & Co., 486 F.Supp. 1168 (N.D. Ill. 1980), *appeal docketed*, No. 80-1375 (7th Cir. March 21, 1980).

acquisition program) taken by the board of directors to foreclose the takeover, the court held that the business judgment rule governs the consideration of a takeover bid by the board of directors of a target. The court said:

> Directors of a publicly owned corporation do not act outside of the law when they, in good faith, decide that it is in the best interest of the company and its shareholders that it remain an independent business entity. Having so determined, they can authorize management to oppose offers which, in their best judgment are detrimental to the company and its shareholders.[7]

The court agreed with the view set forth in *Takeover Bids* that where directors reach their decision to reject a takeover bid after full consideration of all of the interests affected by the proposal and after receiving antitrust and securities law advice from outside counsel, they can not be held to have breached their fiduciary duties. The court also applied the business judgment rule in evaluating the propriety of acquisitions by the target which were alleged to have been made for the purpose of creating an antitrust impediment to the takeover:

> As to the acquisitions which defendants authorized [target] management to make . . . each was consummated after defendants considered business projections by management[,] received the advice of lawyers and experts, and consulted with accountants and investment bankers. Despite a great deal of straining with financial data, reports and statis-

7. *Id.* at 1186. In an amicus brief submitted to the Seventh Circuit on the appeal of the *Marshall Field* case, the SEC has taken the position that, if the management of a company adopts a policy that it will resist "any and all" takeover efforts because the management believes that the company should remain independent, then such policy would be a material disclosure item. While it is not clear whether the SEC position would require disclosure only in the face of a proposed tender offer, as in the *Marshall Field* case, or generally even in the absence of a tender offer or takeover proposal, as a practical matter the literal SEC position is not very meaningful in that very few companies would decide to reject "any and all" tender offers no matter what the price and no matter what the circumstances of the company. Most companies follow a general policy of preferring to remain independent. This is a valid and legal policy. It does not in any way negate the good faith of the board of directors. As set forth in *Takeover Bids*, absent such a policy companies would constantly be in play; boards of directors would spend an inordinate amount of time considering takeover or liquidation proposals; they would have serious employee, customer, supplier and community relations problems; and long-range planning would be very difficult. *Takeover Bids, supra* n. 1, at 109-10. It is a reasonable business judgment for the management and board of directors of a company to take the position that the company wishes to remain independent and will not pursue takeover or liquidation proposals. This position does not require special disclosure. However, if a company adopts a policy to resist "any and all" takeovers no matter what the price and no matter what the circumstances, then special disclosure may be required. In addition, in order for such a position to meet the business judgment rule it would be necessary for the board of directors to have reached that position on a justifiable basis, *i.e.*, the good-faith belief that the business of the company would be affected adversely in the absence of such a position. Where a business is heavily dependent on maintaining stable relations with employees, customers, suppliers or others, such a good-faith belief might possibly be demonstrated. Each such situation must be approached on a case-by-case basis.

> tics, plaintiffs have not produced evidence which could prove that any of these acquisitions were unsound business ventures.[8]

In *Johnson v. Trueblood*,[9] plaintiffs owning 47 percent of the outstanding shares of a financially-troubled closely-held corporation alleged that defendants, owners of the remaining 53 percent interest, in order to retain control of the corporation breached their fiduciary duty by refusing plaintiffs' offers to make loans and to purchase additional stock and instead caused the corporation to enter into transactions which were less advantageous to the corporation, but which retained the defendants' control. The district court had instructed the jury that the business judgment rule protects a director's decision involving retention of control so long as other rational business reasons supported the decision and that the rule is rebutted only by a showing that the director's sole or primary purpose was to retain control. The plaintiffs appealed, arguing that they only needed to prove that control was *a* motive in the director's decision in order to rebut the business judgment rule. The Third Circuit held that under Delaware law the business judgment rule applied and that plaintiff

> at a minimum . . . must make a showing that the sole or primary motive of the defendant [director] was to retain control. If he [plaintiff] makes [such] a showing . . . , the burden then shifts to the defendant [director] to show that the transaction in question had a valid corporate business purpose.[10]

The Third Circuit said that to permit the business judgment rule to be overcome by a mere showing that control was *a* purpose of a challenged action would, in effect, destroy the rule since, realistically, corporate directors are always motivated at least in part by the desire to retain office, even when acting on business questions which do not have a direct impact on control. The Third Circuit also said that the business judgment rule validates actions "arguably taken for the benefit of the corporation" despite the desire to retain office by the directors who authorized those actions.[11]

In the latter part of 1980, the Second Circuit decided two cases which also support the positions taken in *Takeover Bids.*

In *Treadway Companies, Inc. v. Care Corporation*,[12] Treadway had sold a large block of its common stock to Fair Lanes, Inc., selected as a white knight to rescue Treadway from a threatened takeover by Care. The sale was made to

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8. Panter v. Marshall Field & Co., *supra* n. 6, at 1194.

9. Johnson v. Trueblood, 629 F.2d 287 (3d Cir. 1980), *vacated on other grounds*, 629 F.2d 302 (3d Cir. 1980) (*per curiam*).

10. *Id.* at 293.

11. *Id.* at 292.

12. Treadway Companies Inc. v. Care Corp., [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,603 (2d Cir. 1980), *rehearing denied*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,705 (2d Cir. 1980) [hereinafter "*Treadway*"].

facilitate a proposed Treadway-Fair Lanes merger and to defeat the attempt by Care (owner of one-third of the Treadway stock) to take control of Treadway's board of directors at the upcoming annual meeting. The district court had enjoined the voting of Fair Lanes' Treadway shares on the ground that Treadway's primary motivation in consummating the sale was to protect its incumbent management against Care's takeover effort. The Second Circuit reversed, ruling that Care had not established any basis under New Jersey law (construed in light of general corporation law, including the law of Delaware), for overturning the business judgment of the Treadway directors.

The Second Circuit stated that the business judgment rule, "which presumes that directors have acted properly,"[13] applies both to the determination that a threatened takeover would be detrimental to the target and to the choice of particular defensive measures, including the issuance and sale of stock, to oppose such a detrimental takeover. Thus, a party challenging a defensive transaction has the burden of proving that the directors of the target "acted in bad faith, or in furtherance of their own interests, or for some other improper purpose."[14] Even if that party carries its burden, the directors' action is still protected if they show that they approved the challenged transactions for "a proper corporate purpose and not merely for the directors' selfish purposes."[15] The directors need not also prove that the actual terms of the transactions were fair. The Second Circuit further made clear that the substance of the directors' deliberations will not be scrutinized once it is apparent that business judgment was in fact exercised.

Since the conduct of the Treadway directors which was complained of would have led to a change of control of Treadway and, consequently, to the severance of the directors' controlling relationship with Treadway, the Second Circuit decision left open the question whether the same reasoning would be applied where the transactions were for the purpose of keeping a target an independent company, with the management and directors of the target continuing in office. This question was answered in *Crouse-Hinds Co. v. InterNorth Inc.*,[16] with the Second Circuit holding that the mere fact that the directors of a target will retain control by authorizing a transaction (an exchange offer to assure consummation of a defensive acquisition) to defeat a takeover bid does not remove the protection of the business judgment rule or shift the burden of proof to the directors. The district court in *Crouse-Hinds* had read *Treadway* as holding that where the directors of a target would retain office as the result of a defensive action to defeat a takeover the burden of proof shifted to the directors. The Second Circuit rejected the district court's interpretation of *Treadway:*

13. *Id.* at 98,210.
14. *Id.*
15. *Id.* at 98,211.
16. Crouse-Hinds Co. v. InterNorth, Inc., No. 80-7865 (2d Cir. Nov. 14, 1980) [hereinafter "*Crouse-Hinds*"].

> We find no basis in the present case for the district court's conclusion that InterNorth carried its burden of demonstrating self-interest or bad faith on the part of the Crouse-Hinds directors. As his starting point, the district judge gave his consideration to the decision in *Treadway*, in which we found that because the Treadway directors, other than the chairman, were not to remain in office after the merger, perpetuation of their control could hardly have been their motivation for actions in furtherance of the merger. . . . Unfortunately, the district judge inferred from this that a quite different proposition must also be true—*i.e.*, that if the directors *are* to remain on the board after the merger, perpetuation of their control *must be presumed* to be their motivation. This inference has no basis in either law or logic. *Treadway* did not disturb the normal requirement that a complaining shareholder present evidence of the directors' interest in order to shift the burden of proof to them.
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> . . .
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> In short, when the tender offeror has presented the target company with an obvious reason [*e.g.*, inadequacy of price, possible illegality or interference with an existing contract] to oppose the tender offer, the offeror cannot, on the theory that the target's management opposes the offer for some other, unstated, improper purpose, obtain an injunction against the opposition without presenting strong evidence to support its theory. We find no such evidence here.[17]

With respect to the speed with which the Crouse-Hinds board of directors reached its decision to oppose the InterNorth tender offer, the Second Circuit said:

> The fact that the initial decision to oppose the [t]ender [o]ffer was made in four days does not prove that either that decision or the subsequent [defensive transaction] stemmed from a control motivation. Such decisions are required to be made promptly . . . and are normally made quickly; and the district court recognized that this decision was not made without Crouse-Hind's having consulted its expert advisers in an effort to be objective. We note further that the [defensive transaction], which is of course the precise target of the counterclaims, was not entered into until eleven days after announcement of the [t]ender [o]ffer.[18]

The Second Circuit decisions in *Treadway* and *Crouse-Hinds* were adumbrated in its earlier decision in *Rodman v. Grant Foundation*,[19] in which the Second Circuit indicated that a strong showing of an "entrenchment of management motivation" would be necessary to overcome the normal judicial reluctance to second-guess the business decisions of a board of directors. In

17. *Id.* at 307-11.
18. *Id.* at 310 n.24.
19. Rodman v. Grant Foundation, 608 F.2d 64 (2d Cir. 1979) [hereinafter "*Rodman*"].

Rodman, the plaintiffs alleged that proxy material soliciting stockholder approval of purchases by the company of large amounts of its own stock failed to disclose that " 'the principal, if not the sole reason . . .' " for the repurchases was to entrench management's control of the company.[20] In affirming the district court's finding that full disclosure of the repurchases had been made, the Second Circuit said that "the effect of the stock purchases on company control was self-evident from the very size of the transaction, involving as it did over ten percent of the outstanding common stock."[21] The Second Circuit agreed with the lower court's holding that "corporate control is recognized to be of universal interest to corporate officers . . .," and concluded that "[i]n the absence of some ulterior wrongful design hinging upon so-called 'entrenchment', the directors were not required to put forth in the proxy materials an analysis of their otherwise obvious interest in company control."[22]

In addition, in *Lewis v. McGraw*,[23] the Second Circuit held that shareholders may not maintain a cause of action for damages under section 14(e) of the Williams Act where a proposed tender offer is defeated and never in fact made. The court explained:

> [O]ne element of a cause of action under § 14(e) is a showing "that there was misrepresentation upon which the target corporation shareholders *relied*." *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973) (emphasis supplied). In the instant case, the target's shareholders simply could not have relied upon McGraw-Hill's statements, whether true or false, since they were never given an opportunity to tender their shares.[24]

II. Commentator's Views

In the 1980 edition to *Tender Offers: Defenses, Responses, and Planning*,[25] the author agrees with the rationalization of the business judgment rule and primary purpose test put forward in *Takeover Bids* and states:

> In a few cases, the courts have applied both the primary purpose test and the business judgment rule without discussing how the two differ, if at all. These cases should not be dismissed as aberrational, for although the primary purpose test is stricter sounding than the business judgment rule, it may well be that there is no real distinction between the two. All courts, no matter which test they apply, seem to review the entire environment of the transaction, and ask the same questions. Why did the directors act? What factors did they take into account? How carefully did they exercise

20. *Id.* at 70.
21. *Id.* at 71.
22. *Id.*
23. Lewis v. McGraw, 619 F.2d 192 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3332 (1980).
24. 619 F.2d at 195. A similar result was reached in Marshall Field, *supra* n. 6, at 1190-91. *Query* the effect of SEC Rule 14d-2(b), 3 Fed. Sec. L. Rep. (CCH) ¶ 24,282A.
25. Fleischer, Tender Offers: Defenses, Responses, and Planning, 88-4 (1980 ed.).

> their business judgment? Moreover, it is hard to see how these questions could be answered in such a way as to lead to liability under one test and not the other. Where the facts show that the primary purpose of a board in opposing an offer is to perpetuate itself in power, it would be inconsistent for a court to find that they had acted in "good faith" and had exercised "reasonable business judgment." Conversely, most courts seem to decide whether the primary purpose of the board was to achieve a corporate goal, or to maintain itself in power, by examining the alleged business reason for the action taken by the board. Only if the justification is implausible will the court hold that the board's primary purpose was improper. In short, it seems that both the business judgment rule and the primary purpose test essentially demand no more than that directors act, in good faith and with due care, like reasonable businessmen.

A number of other commentators have also supported the positions set forth in *Takeover Bids*. Shortly after *Takeover Bids* was published, Securities and Exchange Commission Chairman Harold Williams noted his agreement, but also argued that the decision with respect to a takeover bid should be made by a committee of independent directors of the target:

> It is my view that a court—in reviewing such a well-monitored, fully-considered and documented special committee [of independent directors] determination to reject and resist an acquisition or tender offer bid—should and would give substantial deference to that decision and to any legal and ethical acts to resist the bid which are reasonably commensurate to the existing threat to the corporation's and its shareholders' interests, provided that the acts themselves are not inconsistent with the corporation's viability.[26]

The difference between Chairman Williams' position and the position taken in *Takeover Bids* is that Chairman Williams would have a special committee of independent directors in every case, while *Takeover Bids* argues that such a committee should be resorted to only in the rare case where there is a very significant conflict of interest involving a majority of the directors of the target. Thus, *Takeover Bids* recommends:

> If a majority of the directors are officers or otherwise might be deemed to be personally interested, other than as shareholders, a committee of independent directors, although not in theory necessary, from a litigation strategy standpoint may be desirable. The exigencies and pressures of a takeover battle are such that it is desirable to avoid proliferation of committees, counsel and investment bankers. The target will be best

26. Speech by Chairman Harold M. Williams, Securities and Exchange Commission, *Tender Offers and the Corporate Directors, reprinted in* [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,445, at 82,881 (speech before the Seventh Annual Securities Regulation Institute, San Diego, Cal. on Jan. 17, 1980).

> served if it is advised by one investment banker and one outside law firm.[27]

Chairman Williams also endorsed the position taken in *Takeover Bids* that in reviewing a takeover the directors of a target may properly consider the adverse impact of the takeover on employees, suppliers, customers, the public and the national economy.[28]

While some commentators argue for stricter standards,[29] it may be assumed that the weight of authority will be in accord with *Treadway* and *Crouse-Hinds*, which is exactly where it should be.[30] As noted in *Takeover Bids*, the

27. *Takeover Bids*, *supra* n.1, at 122.

28. Speech by Chairman Harold M. Williams, *supra* n. 27, at 82, 881-82. *See Takeover Bids*, *supra* n. 1, at 130.

29. *See, e.g.*, Gelfand and Sebastian, *Reevaluating the Duties of Target Management in a Hostile Tender Offer*, 60 B. U. L. Rev. 403, 470-72 (1980).

30. The opposite conclusion is reached in an as yet unpublished article, Easterbrook and Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer* (*see* Harvard L. R. (April 1981)). The authors argue that the business judgment rule should not apply to the consideration of a tender offer. Instead the authors would substitute a rule of target management passivity. They would proscribe all defensive action by a target, including attempting to obtain a higher price by providing information to possible white knights. The authors' thesis is based on the efficient market theory. They argue that we have an efficient market in which all companies sell for what they are worth under their existing management; that most companies have lazy and venal management which the authors refer to as "suboptimal"; that the efficient market discounts for suboptimal management; that a tender offer premium reflects the raider's judgment of the extent of the market discount for suboptimal management and the value of the target's business under the presumably more efficient and honest management of the raider; and that any hindrance to successful completion of tender offers discourages tender offers and therefore penalizes the economy by not facilitating the movement of assets to more efficient management and penalizes shareholders by reducing the probability that their companies will become targets of tender offers.

This rather narrow-based theoretical approach ignores many of the facts about tender offers which may be drawn from the experience of the 12 years since passage of the Williams Act. During this period the number and size of tender offers has increased dramatically. This increase in both number and size of tender offers has taken place despite the growing ability of targets during this period to defend or find a white knight. Also during this period the market prices of the shares of most companies have generally been at price earnings multiples that were less than the after-tax cost of borrowing the funds to buy all of the outstanding shares at a premium of 50% to 100% over the market price. To illustrate, if the equity of a target is selling in the market for 5 times after-tax earnings of $50 million, or a total of $250 million, and money can be borrowed at a 15% interest cost, a raider can pay $500 million, a 100% premium over market, for the target and, assuming no goodwill or increased depreciation, still show $12.5 million after-tax earnings—$50 million earnings less $37.5 million after-tax interest cost on $500 million at 15%; assuming that the entire premium of $250 million is goodwill to be amortized over 40 years at $6.25 million per year, the after-tax earnings would be $6.25 million rather than $12.5 million. The experience of the post-Williams Act period is that the profit enhancement accounting for takeovers, readily available long-term credit, the advantages of borrowing in an inflationary period, the lack of return on investment in new facilities in many industries equivalent to the return from a takeover, and the "social acceptability" of takeovers starting with the 1973-4 decisions of major companies and leading investment bankers to engage in takeovers, have had much more to do with takeover activity than the efficient market theory or any effort by raiders to replace "suboptimal" management. *See also*, Boucher, The Process of Conglomerate Mergers (FTC June 1980). Easterbrook and Fischel also seem to ignore that the search for white knights, which they would proscribe, often results in transactions involving the issuance of equity; as a consequence the nation's capital base is expanded, instead of reduced by the uneconomical transfer payments history of takeover decisions is no different than the history of new product decisions.[31] There are both Edsels and Xeroxes. It would be as impractical for the courts to second-guess takeover decisions as it would be to second-guess new product decisions.

Takeover Bids analyzed the 36 unsolicited tender offers that were rejected and defeated by the target between the end of 1973 and June 1979 and showed that in more than 50 percent of the cases as of August 1979 the shareholders were better off than if the tender offer had been successful. At the end of November 1980 this was true in an even higher percentage of the defeated tender offers. In addition to the examples provided by defeated tender offers, there are numerous examples of other situations where the shareholders of a target have benefitted from the target's decision to reject or avoid a takeover:

- In January 1977, Viacom rejected a $20 takeover bid, reflecting a premium of 95 percent over the then market price of $10.25, by Storer Broadcasting; at the end of November 1980, Viacom was at $57.25.
- In October 1978, Freeport Minerals purchased for $14.00, reflecting a premium of 19 percent over the then market price of $11.78, about 10 percent of its shares from Denison Mines, which had accumulated the shares through market purchases; at the end of November 1980, Freeport Minerals was at $61.25.
- In June 1978, Bache purchased for $10.50, reflecting a premium of 26 percent over the then market price of $8.13, about 7.5 percent of its shares from certain private investors, who had accumulated the shares through market purchases; at the end of November 1980, Bache was at $23.63.
- In January 1979, Bunker-Ramo entered into a standstill agreement whereby Fairchild Industries purchased from Martin Marietta 20.6 percent of Bunker-Ramo's shares at $23.50, reflecting a premium of 32 percent over the then market price of $17.88; at the end of November 1980, Bunker-Ramo was at $39.
- In April 1978, ASARCO entered into a standstill agreement whereby Bendix purchased from ASARCO 14.2 percent of its shares at $23, reflecting a premium of 22 percent over the then market price of $18.88; at the end of November 1980, ASARCO was at $48.[32]

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which, they contend, arise from cash tender offers. While their arguments are interesting, the authors have failed to make a case for replacing the business judgment rule.

31. In a November 26, 1980 letter to the shareholders of Berkshire Hathaway Inc., Warren Buffett, Chairman, and one of the most successful investment managers and corporate entrepreneurs of the current era, said: "That's the nature of an uncertain business world. Most of our acquisitions look either better or worse than originally projected within a couple of years after purchase."

32. On October 29, 1980 ASARCO agreed to repurchase its shares held by Bendix at $55, reflecting a premium of 13% over the then market price of $48.50. *See, The reasons behind ASARCO's buyback*, Business Week, November 17, 1980, at 47.

Since it received so much attention, the American Express offer for McGraw-Hill is worthy of special note. Many arbitrageurs and professional investors felt that the $40 per share offer, reflecting a 50 percent premium over the pre-offer market price of $26, mandated acceptance. While the decision of the McGraw-Hill directors to reject the offer was publicly criticized by those investors and attacked in several shareholder lawsuits, within less than two years the directors' decision was completely vindicated with the shares selling in the market for more than the $40 offer price. When taxes and current control premiums are considered, the benefit of the directors' decision to the McGraw-Hill shareholders becomes even more dramatic. Thus, the McGraw-Hill case, which when the bid was made was argued by some to be the one which would establish that a target's board did not have discretion to reject a takeover bid, has become cogent evidence of the validity of the premises of *Takeover Bids*, not just in court but also in the marketplace.[33]

III. Procedure to be Followed by the Board of Directors

The cases decided during the past year emphasize the point made in *Takeover Bids* as to the importance of the procedure to be followed by the board of directors of a target in considering a takeover bid. The new tender offer rules adopted by the SEC in November 1979 also highlight this point through the rules' requirement that a target's board consider and respond to a tender offer[34] and that the target disclose the reasons for the board's decision. Thus, what was said in *Takeover Bids* warrants repetition:

A) Management (usually with the help of investment bankers and outside legal counsel) should make a full presentation of all of the factors relevant to the consideration by the directors of the takeover bid, including:
   (1) historical financial results and present financial condition
   (2) projections for the next two to five years and the ability to fund related capital expenditures
   (3) business plans, status of research and development and new product prospects
   (4) market or replacement value of the assets
   (5) management depth and succession
   (6) can a better price be obtained now

33. *See*, *It pays to go solo*, The Economist, November 22, 1980, at 101:

> Irate McGraw-Hill shareholders, who lambasted their board for not taking the $40 a share takeover offer by American Express last year, now have a consolation prize. This week the share price was up to $42. For weeks it had hovered around $39. Contrary to folk wisdom on Wall Street, shareholders often do better (or at least as well) when takeover bids are rejected.

34. *Compare* SEC Rule 14e-2, 3 Fed. Sec. L. Rep. (CCH) ¶ 24,296 *and* SEC Rule 14d-9, 3 Fed. Sec. L. Rep. (CCH) ¶ 24,288B *with* Berman v. Gerber Products Co., 454 F. Supp. 1310, 1325 (W.D. Mich. 1978) ("in general the Williams Act does not appear to impose upon the management of a target company an affirmative duty to respond to a tender offer at all").

(7) timing of a sale; can a better price be obtained later
(8) stock market information such as historical and comparative price earnings ratios, historical market prices and relationship to the overall market, and comparative premiums for sale of control
(9) impact on employees, customers, suppliers and others that have a relationship with the target
(10) any antitrust and other legal and regulatory issues that are raised by the offer
(11) an analysis of the raider and its management and in the case of a partial offer or an exchange offer pro forma financial statements and a comparative qualitative analysis of the business and securities of both companies.

B) An independent investment banker or other expert should opine as to the adequacy of the price offered and management's presentation.

C) Outside legal counsel should opine as to the antitrust and other legal and regulatory issues in the takeover and as to whether the directors have received adequate information on which to base a reasonable decision.

D) If a majority of the directors are officers or otherwise might be deemed to be personally interested, other than as shareholders, a committee of independent directors, although not in theory necessary, from a litigation strategy standpoint may be desirable. The exigencies and pressures of a takeover battle are such that it is desirable to avoid proliferation of committees, counsel and investment bankers. The target will be best served if it is advised by one investment banker and one outside law firm.

E) It is reasonable for the directors of a target to reject a takeover on any one of the following grounds:
(1) inadequate price
(2) wrong time to sell
(3) illegality
(4) adverse impact on constituencies other than the shareholders
(5) risk of nonconsummation
(6) failure to provide equally for all shareholders
(7) doubt as to quality of the raider's securities in an exchange offer.

Once the directors have properly determined that a takeover should be rejected they may take any reasonable action to accomplish this purpose, including litigation, complaints to governmental authorities, the acquisition of a company to create an antitrust or regulatory problem for the raider, the issuance of shares to a big brother, or the premium purchase of shares of the target from the raider.[35]

35. *Takeover Bids, supra* n. 1, at 121–24.