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Takeover Response Checklist

1. Team to Deal with Takeovers

   a. Company -- small group (3-6) of key officers

   b. Law firm -- corporate partner and litigation partner; local counsel in each jurisdiction where may be needed

   c. Investment banker - current files and periodic due diligence

   d. Proxy soliciting firm

   e. Public relations firm

   f. Continuing contact and periodic meetings are important

   g. One person must be the team leader; debates and consensus decisions are the antithesis of dealing successfully with a takeover

   h. Takeover defense is an art not a science; judgment and instinct are the key attributes; it is essential to be flexible and capable of major changes in tactics on a moment's notice

2. No Blackbook

   a. There are no stereotype responses; whatever is necessary can be created in just about the same time as necessary to modify blackbook model

   b. Existence of a blackbook can give false sense of security and can be embarrassing in litigation

3. War List of Telephone Numbers of the Team and Ability to Convene Special Meeting of Board in 24 to 48 Hours

   a. Instructions for dealing with press and stock exchange

4. Structural Defenses

   a. As legal defenses to a hostile tender offer have become less and less effective, structural defenses have become of increasing importance. In many cases

a structural response is the only way to obtain the best deal for the shareholders. Structural defenses are difficult. In many cases a structural defense will be possible only if there has been careful advance preparation by the company and its investment banker and counsel. Periodic team runthroughs of responses to hypothetical offers are important.

b. Counter tender offer

c. Structure of loan agreements and indentures with respect to buy back of shares, self tender offer, spin-off or preemptive strike against a raider

d. Authorization of common and blank check preferred stock for acquisition or recapitalization exchange offer or for Convertible Preferred Stock Dividend Plan

e. Advance preparation of earnings projections and liquidation values for evaluation of takeover bid and for use in talking to institutional investors

f. Plan for contacts with institutional investors and analysts

g. Plan for recapitalization exchange offer

h. Plan for liquidation

i. Amendments to stock options, employment agreements, executive incentive plans and severance arrangements ("Golden Parachutes")

j. Consortium white knights; management leveraged buyout; ESOP leveraged buyout

k. "Crown Jewels" in separate subsidiaries

l. Charter and by-law amendments with respect to change of control

m. Amendments to employee stock plans to pass through voting and instructions as to accepting a tender offer

5. Preparation of Board of Directors

   a. Periodic presentations by lawyers and investment bankers to familiarize directors with the law and the advisors

   b. Company may have policy of continuing as an independent entity

   c. Company may have policy of not engaging in takeover discussions

   d. Directors must guard against subversion by raider and should refer all approaches to the CEO

   e. Psychological and perception factors often more important than legal and financial factors in avoiding being singled out as a takeover target

6. Preparation of CEO

   a. Handling casual passes

   b. Handling offers

7. Responses to Casual Passes

   a. No duty to discuss or negotiate

   b. No duty to announce

   c. Important to avoid misunderstanding by refusing to meet and firmly and unequivocally rejecting overture in most cases; most raiders go away if rebuffed at the very outset

8. Response to Offers

   a. No response other than will call you back

   b. Call war list and assemble team

   c. No press release or statement other than "stop-look-and-listen" and call of special board meeting to consider

d. Consider trading halt (NYSE limits halt to short period)

e. Determine whether to meet with raider

f. Schedule 14D-9 must be filed within 10 business days

9. Special Meeting of Board to Consider Offer

a. No duty to accept or negotiate a takeover offer; no need for a special committee to deal with takeovers

b. Board must act in good faith and on a reasonable basis; business judgment rule applies to takeovers

c. No director has ever been held liable for rejection of takeover offer. In the Marshall Field case shareholders sued the directors of Field for causing withdrawal of a high premium tender offer by Carter Hawley Hale, following which withdrawal the market price of Field dropped to below its pre-offer level. The actions complained of by the shareholders were: (1) the adoption of a secret policy of remaining independent in the face of any takeover bid, no matter how attractive; (2) the acquisition of stores in substantial competition with stores owned by Carter; and (3) the filing of an antitrust suit against Carter. While recognizing that the desire to fend off Carter and retain control of Field was among the directors' motives in entering into the transactions in question, the court ruled that the shareholders had failed to show that that motive had been the directors' "sole or primary purpose"; under the court's view of the business judgment rule, the fact that one purpose of a transaction may be to consolidate or retain the directors' control does not suffice to shift to the directors the burden of establishing a compelling business purpose for the transaction. The court held that only in the event of "fraud, bad faith, gross overreaching or abuse of discretion" would the business judgment of the directors be questioned; the court thus explicitly refused to apply a "different [business judgment] test in the takeover context"

d. Presentation

(i) Management - budgets, financial position, real values (off-balance sheet values), new products, general outlook, timing

(ii) Investment Banker - opinion as to fairness or adequacy, state of the market and the economy, comparable acquisition premiums, timing

(iii) Lawyer - legality of takeover (antitrust, compliance with SEC disclosure requirements, regulatory approval of change of control, etc.), reasonable basis for board action

e. Front-end loaded two-tier offers and partial offers present fairness issues which in and of themselves may warrant rejection and strong defensive action

f. More than half of the targets of bearhugs remain independent; exchange offers are defeated more than half of the time; about 20% of the targets of any-and-all cash tender offers remain independent.

10. Analysis of Raider

a. Investment banker

b. Accountant

c. Lawyer

d. Special investigators (Washington agency and general litigation searches)

11. Preparation by Investment Banker

a. Due diligence file and analysis of off-balance sheet values

b. Recapitalization and liquidation alternatives

c. Quarterly review

d. Communication of material developments and regular contact is important

12. Preparation by Lawyer

a. Review of business to determine products and markets for antitrust analysis of a raider

b. Regulatory agency approvals for change of control

c. Impact of change of control on business

d. Disclosures that might cause a potential raider to look elsewhere

e. Recapitalization and liquidation alternatives

f. Amendments to stock options, executive compensation and incentive arrangements and severance arrangements

g. Regular communication

13. Shareholder Relations

a. Dividend policy

b. Financial public relations

c. Preparation of fiduciary holders with respect to takeover tactics designed to panic them

d. Contacts with analysts and institutional holders

14. Response to Accumulation in Market

a. Monitoring trading

b. Maintain contact with specialist and arbitrageurs

c. Schedule 13D - 5%, Hart-Scott - 10%

d. Duty of board to prevent transfer of control without premium

e. Disruption of executives, personnel, customers, suppliers etc.

f. Uncertainty in the market; change in shareholder profile

g. Immediate response to accumulation

(i) Litigation

(ii) Purchase of accumulated shares

(iii) Standstill agreement

15. Staggered Board and Shark Repellent Charter Amendments Have Not Proved Effective Against Any-and-All Cash Tender Offers but May Be Effective as to Partial and Front-End Loaded Offers, Proxy Fights, or Other Bust-Ups

a. Rejection of Shark Repellents. In 1983 more than 90% of the corporations that proposed fair-price charter provisions or staggered boards obtained shareholder approval. If shareholders fail to approve shark repellents it may be viewed as an invitation to a takeover bid.

b. Bust-Ups and Staggered Boards. Current takeover activity has expanded from the any-and-all cash tender offer of the 1970's to include a significant number of partial and front-end loaded two-tier tender offers, the TWA and Superior Oil type of proxy fight and the Icahn-Marshall Field type of bust-ups. While staggered election of the board of directors and super-majority merger votes or other shark repellents have proved not to be effective in deterring any-and-all cash tender offers, they may be quite effective in deterring the other types of takeovers.

16. Contacts with Potential White Knights and Big Brother Standstill Agreements

a. Advance contact with potential white knights can lead to misunderstanding and takeover bid in certain cases

b. Standstill agreement may be detrimental to shareholders (disliked by professional investors who may stir up takeover activity)

c. Doubt as to legality of standstill agreement if not supported by independent business purpose such as exchange of technology or need for capital

d. Employee trusts may be effective in certain cases

17. Hart-Scott-Rodino Antitrust Act and New Antitrust Policies and Legislation

a. Hart-Scott prevents dawn raids on big companies but under Hart-Scott still can buy up to $15M even if more than 15% and there is 10% investment exception

b. New merger guidelines and current mood in Administration and Congress do not deter big conglomerate acquisitions.

18. Some Recent Experiences and Important Lessons

a. Mega Takeovers. Takeovers in the $2-10 billion range are possible. Prior to 1981 it was generally assumed that companies with a market value in excess of $1 billion were relatively safe from a non-negotiated takeover. The Seagram offers for St. Joe and Conoco, the Socal bearhug of Amax, the Mobil bids for Conoco and Marathon and the Mesa bid for Cities show that this assumption is no longer valid.

b. White Knights. While there are white knights for $2-10 billion deals who can act in 10-20 days, it is axiomatic that it is much more difficult to find a white knight for a $2-10 billion deal than for the $100 million to $1 billion deals that were typical during the 1970's. Therefore advance preparation is essential. Potential white knights should be identified and the financial information necessary for white knight negotiations should be kept current. Natural resource companies should keep their reserve reports and appraisals up to date. Close coordination between a company and its investment banker is essential. Whether or not

advance contact with a potential white knight is desirable is a question for individual determination and generalization is not appropriate. We continue to believe that advance contact with potential white knights carries significant risk of provoking undesired takeover proposals.

c. Counter Tender Offers. NLT-American General showed the efficacy of the counter tender offer to obtain a higher price. Bendix-Martin Marietta showed that the counter tender offer could be an effective defense.

d. Self-tenders. Cash self-tender offers and preferred stock exchange offers are more likely to be effective in defeating tender offers for large companies than for small companies. With small companies, unless such transactions result in a majority of the stock being in friendly hands, the net effect is to make the overall cost of the takeover lower and thus make it easier rather than more difficult. With large companies this is not a significant factor. If the target has a good story and major shareholders can be induced to maintain their investment positions, a restructuring of the capitalization of the target may be an effective defense.

e. Raider Topping its Own Bid. A raider who springs a tender offer without prior contact with the target is most unlikely to be able to induce the target to enter into negotiations. Where the raider is prepared to pay a higher price, one way to proceed is through a unilateral increase in the offer price at the right time. The best time for such a move is after a litigation victory or just prior to a meeting of the target's board. Accordingly, it is important for the target to be aware of the possible use of this tactic and to prepare its board of directors in advance.

f. Placing a Blocking Block. The NYSE 18-1/2% rule (requiring, on pain of delisting, a shareholder vote to approve issuance of more than 18-1/2% of a company's stock) negates one of the most effective

takeover defenses. Frequently a target is able to place 25-35% of its stock in friendly hands at a price in excess of the takeover bid, but is prevented from doing so by the NYSE rule. Where the target's board of directors, on the advice of the target's investment bankers, determines that such a placement is in the best interests of the shareholders, there is no legal reason not to go forward. Delisting is one of the elements to be considered by the board, but should not be overriding in the board's determination. The NYSE 18-1/2% rule was adopted prior to the current wave of takeover activity and operates against the shareholders best interests rather than to protect them as originally intended.

g. Golden Parachutes. Despite all the adverse publicity we continue to recommend that executive incentive plans and severance arrangements be structured to protect executives in the event of a takeover. If this is not done prior to a takeover bid, there is danger that if it is done in the face of a takeover bid it will not be understood as being appropriate and in the best interests of the company and its shareholders. These amendments have become fairly standard and have been adopted by a large number of companies.

h. Antitrust Showstoppers. Marathon-Mobil, Grumman-LTV, etc. demonstrate that the antitrust defense is alive and well and can be a show-stopper.