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To Our Clients

Enclosed is an update of our takeover response checklist. There is a significant increase in takeover activity. This is a good time for a preparedness review.

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Takeover Response Checklist

This outline provides a checklist of matters to be considered in putting a company in the best possible position to respond to a takeover bid or a proxy fight. Not all the matters in this outline are appropriate for any one company. Takeover defense is an art, not a science. It is essential to be able to adopt new defenses quickly and be flexible in responding to changing takeover tactics.

Today the single most important takeover defense is the poison pill. The two principal types have been approved by the Delaware Supreme Court and over 400 companies have adopted it.

1. Team to Deal with Takeovers
 - a. Company -- small group (3-6) of key officers
 - b. Lawyer
 - c. Investment banker
 - d. Proxy soliciting firm
 - e. Public relations firm
 - f. Continuing contact and periodic meetings are important
2. 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
3. Structural Defenses
 - a. 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.
 - b. Poison Pill -- Share Purchase Rights Plan and Note Purchase Rights Plan -- the CALPERS and CREF Resolutions
 - c. Financial Restructuring -- self tenders and massive dividends prior to an attack

- d. Structure of loan agreements and indentures with respect to buy back of shares; self tender offer; spin-off; preemptive strike against a raider; put of debt in event of change of control
- e. Authorization of sufficient common and blank-check-preferred stock
- f. Non-voting common stock -- scaled voting
- g. Advance preparation of earnings projections and liquidation values for evaluation of takeover bid
- h. Plan for contacts with institutional investors and analysts and with media and political bodies
- i. Plan for recapitalization exchange offer
- j. Plan for liquidation
- k. Amendments to stock options, employment agreements, executive incentive plans and severance arrangements (golden parachutes) -- protection of overfunded pension plans
- l. White squire arrangements
- m. Consortium white knights
- n. Leveraged buyout -- leveraged cashout
- o. ESOP arrangements
- p. Crown jewels in separate subsidiaries
- q. Spin-offs of master limited partnerships
- r. Charter and by-law amendments with respect to change of control and greenmail
- s. Amendments to employee stock plans to pass through voting and instructions as to accepting a tender offer
- t. Options under new state takeover laws of the Indiana type

4. Preparation of Board of Directors to Deal with Takeovers
 - 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 take-over 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
5. Preparation of CEO to Deal with Takeover Approaches
 - a. Handling casual passes
 - b. Handling offers
 - c. Communications with officers and board of directors
6. 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; many non-professional raiders go away if rebuffed at the very outset
7. 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

8. Special Meeting of Board to Consider Offer

- a. A premium over market is not necessarily a fair price; a fair price is not necessarily an adequate price; timing alone may be a sufficient basis for rejection of a takeover offer
- b. No duty to accept or negotiate a takeover offer; where outside directors are a majority, there is no need for a special committee to deal with takeovers
- c. Board must act in good faith and on a reasonable basis; business judgment rule applies to takeovers
- 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; only about 10% of the targets of any-and-all cash tender offers remain both independent and unstructured

9. Preparation by Investment Banker

- a. Due diligence file and analysis of off-balance sheet values
- b. Leveraged buyout, recapitalization, spin-off and liquidation alternatives
- c. Quarterly review
- d. Communication of material developments and regular contact is important

10. 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. Leveraged buyout, recapitalization, spin-off and liquidation alternatives
- f. Amendments to stock options, executive compensation and incentive arrangements and severance arrangements -- protection of pension plans
- g. Regular communication

11. Shareholder Relations

- a. Restructuring
- b. Dividend policy
- c. Financial public relations
- d. Preparation of fiduciary holders with respect to takeover tactics designed to panic them
- e. Contacts with analysts and institutional holders

12. Response to Accumulation in Market

- a. Monitoring trading
- b. Maintain contact with specialist
- c. Schedule 13D -- 5%, Hart-Scott -- \$15M/10%, raider partnerships
- 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; greenmail; double dipping
 - (iii) Standstill agreement

13. 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. Bust-Ups and Staggered Boards. Current takeover activity includes a significant number of partial and front-end-loaded two-tier tender offers, and bust-up open market accumulations and proxy fights. 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 and are worth having.

14. Contacts with Potential White Knights and Big Brother Standstill Agreements (White Squire Arrangements)

- 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. Swap of voting stock and mutual standstill agreements
- e. Employee trusts may be effective in certain cases

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

- a. Hart-Scott should prevent dawn raids on big companies but under Hart-Scott still can buy up to \$15M even if more than 15%, there is 10% investment exception and there is still a partnership loophole.
- b. New merger guidelines and current mood in Administration and Congress do not deter big conglomerate acquisitions

16. The Junk Bond, Bridge Loan Phenomenon

17. The Role of the Institutional Investor

18. Indiana-Type Takeover Statutes

19. Pending Federal Legislation