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To Our Clients

Proposed Delaware Statute a Step Backward

Delaware is again considering a takeover law which will not redress the Federal Williams Act's bias in favor of raiders, but instead further tilt the playing field in favor of raiders. The new Delaware proposal borrows the basic concept of the New York and New Jersey takeover laws by providing a delay in the ability of a raider to effectuate a second-step merger. The proposed Delaware law then carves out a barn-door size exception by providing that it does not apply to a raider who owns less than 10% of the target's shares and then moves to 90% in a single transaction. A raider can secretly accumulate 9.9% then make a tender offer conditioned on getting to the 90% level and thereby completely circumvent the proposed law. Thus Delaware would neither deter 9.9% accumulations nor deter junk bond, bust-up takeovers. The 90% level is readily reached -- even in bids at inadequate prices, commenced without any firm financing -- in a market dominated by institutional investors who rush to any premium.

Even more troubling is the implication that the statute would create questioning the appropriateness of defensive tactics against an all cash bid. This radical change, coupled with the availability of junk bond and bridge financing, would leave the takeover frenzy virtually unrestrained. It is ironic that the new Delaware law was proposed the same week that the Delaware Supreme Court decided the Newmont case -- a landmark reaffirmation of the right of a company to remain independent and take action to defeat a tender offer. It is small comfort to have the right to remain independent if as a practical matter the raiders have tactical advantages that make it virtually impossible.

We believe that Delaware should enact a statute like New York's -- a statute that deters a raider from acquiring 10% or more of a target's stock and then forcing a second step merger. Institutional investors are continuing their campaign against takeover defenses. Raiders are still accumulating positions and putting companies in play; financing is still available to raiders. The takeover frenzy burns as a wall of fire handicapping American corporations in their competition with the Japanese and Europeans. Yet Delaware fiddles with proposals that will exacerbate the problem. Now is the time for Delaware corporations to force the issue. If Delaware is to continue as the leading state of incorporation of major public companies, it should adopt an effective takeover law.

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