Securities Regulation Daily Wrap Up, CORPORATE GOVERNANCE—CII report examines the reemergence of the poison pill, (May 12, 2020)

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CII reviewed 46 poison pills adopted in 2020 and found lots to worry about even though many pills had shorter expirations and included other somewhat more shareholder friendly terms.

The shareholder rights plan or poison pill in most years garners at least occasional coverage by the business media and related corporate governance blogs. However, the global spread of the COVID-19 pandemic has raised new concerns about whether activist shareholders might target companies whose stock prices have fallen along with global equities markets in response to the pandemic and the attendant lockdown of much of the global economy.

These concerns have prompted what many governance bloggers have termed the reemergence of the poison pill along with a reemergence of blog posts and other writings on the topic. As an example, the Harvard Law School Forum on Corporate Governance has featured at least 16 blog posts on poison pills just between March and May of 2020, the time period when markets declined steeply due to the pandemic. Ken Bertsch and Lucy Nussbaum, researchers at the Council of Institutional Investor's CII Research and Education Fund (CII-REF), recently examined poison pills adopted in 2020 and highlighted some pro-shareholder developments but also noted factors that could call into question whether the reemergence of poison pills in the COVID-19 environment will benefit shareholders.

CII concerns. The CII-REF report explained that poison pills raise two competing concerns: (1) the potential need for a company to deflect an activist shareholder who wishes to seize control of the company without regard for the company's long-term prospects; and (2) the potential that a poison pill can entrench a company's management and disempower the company's shareholders. The report said shareholders generally eschew rights plans but that some companies still have them "on the shelf" in case they are needed.

According to CII-REF, poison pills have evolved since they were first developed in the 1980s. For example, the report said today's pills typically have shorter durations than the previously common 10-year term. Moreover, pro-shareholder developments in Canada and the skepticism expressed by Delaware courts for certain poison pill features (e.g., dead-hand provisions) had made poison pills somewhat more palatable for shareholders. But the researchers said worries persist about shareholder approvals of poison pills, which often occur only after a pill becomes effective.

2020 rights plans. An appendix to the CII-REF report contains data points on the 46 poison pills adopted in 2020 and which the researchers examined. Overall, the report noted shorter poison pill durations (37 of 46 expire within one year) and lower trigger thresholds, which ranged from 5 percent to 32 percent, with most trigger thresholds grouped between 5 percent and 15 percent. Many of the poison pills with 5 percent triggers, however, were designed to protect net operating losses, which the report cited as a feature many shareholders accept.

Features deemed by the report to be good features include the passive investor exception for investors who do not seek to control a company and qualifying offer language that allows bids that meet stated conditions to go forward without triggering a poison pill (the report conceded that it did not closely examine qualifying offer language in poison pills to determine if such language was in fact meaningful). By contrast, the report viewed dead-hand provisions as strongly negative features that require poison pills to be redeemed only by the directors who put the poison pill in place (or the directors' designated successors).

The CII-REF report's appendix highlighted ten companies rights plans for various negative reasons:

- Trigger only (4.9 percent to 10 percent threshold): Groupon; Nabors Industry; Williams Companies.
- Trigger and dead-hand provision: American Finance Trust; Global Net Lease Inc.
- 2023 expiration: Biospecifics Technologies; Cohen & Co., Inc.; Gannett; Manning & Napier; Warrior Met Coal.

Nevertheless, each of these five companies had one poison pill feature that CII-REF flagged as a good feature: (1) shareholder vote: Warrior Met Coal and Manning & Napier; (2) passive investor exception: American Finance Trust and Williams Companies; and (3) qualifying offer language: Biospecifics Technologies.

The CII-REF report also flagged about half of the 46 companies examined for having poison pills with at least one feature that was deemed "moderately concerning" for shareholders. The most commonly cited feature of moderate concern was a 10 percent trigger threshold.

Companies: Council of Institutional Investor's; CII Research and Education Fund

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