



Defensive Measures

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Roadmap

- What we do mean by defensive measures?
- What are your options at the IPO stage, and what will your likely approach be at the IPO?
- What market pressures will a company come under as it moves away from its IPO?
- Is a dual-class or multi-class approach a good alternative?
- Our perspectives are based on our expertise in:
 - Representing many late-stage private companies and public companies
 - Delaware corporate law



Defensive Measures in General

- **What do we mean by “defensive measures”?**
 - **Provisions in a company’s governing documents—its charter and bylaws—that help protect the company in certain key ways:**
 - ▶ **1. Guard against an undesirable, hostile takeover**
 - Ensure that the board, as central decision-maker, cannot be easily replaced
 - Prevent an easy acquisition of a large stake in the company
 - ▶ **2. Give the company time to respond in an orderly manner if the company comes under pressure by stockholders, including activists**
 - Such pressure could also include stockholder proposals or nominations of only one or two directors



Prototypical Defensive Measures

■ Board composition and powers

- Classified board, paired with directors being removable only for cause
- Supermajority vote for director removal
- Only board sets board size and fills empty seats
- Board authorized to adopt, amend, and repeal bylaws

■ Related to stockholders

- No stockholder action by written consent between annual meetings
- Stockholders cannot call special meetings
- Advance notice bylaw provision for meetings
- Supermajority vote to amend certain charter and bylaw provisions
- Supermajority vote for mergers
- No cumulative voting
- Exclusive forum provision

■ Related to an acquiror

- Blank check preferred stock
- Actual adoption of pill or poison pill on shelf
- Keep company subject to Section 203 of Delaware General Corporation Law/state anti-takeover statute



Likely Approach at IPO Stage

- **Delaware law, which your company is likely incorporated under, is extremely flexible and enabling on these issues**
- **A company will generally want to go out strong, with many defensive measures:**
 - **Protective of company**
 - **Much harder to adopt later – either mechanically (for example, may require a charter amendment, with stockholder approval) or because of likely reactions from stockholders and ISS and Glass Lewis**
 - **Adopt measures on a clear day**



Market Pressures

- **But, many companies come under pressure to – and do – dismantle some of these protections not long after the IPO**
- **Public company life was not always this way**
- **Sources of such pressure:**
 - Institutional investors
 - ISS/Glass Lewis
 - Stockholder proposals
- **For example:**
 - At IPO, 74% of companies have a classified board; of the S&P 500, 10% do
 - At IPO, 72% of companies prohibit stockholders from calling special meetings; of the S&P 500, 37% do
 - Companies much less likely to have a poison pill in place



An alternative? Dual-Class or Multi-Class Structures

- **General concept: Provide certain stockholders with a greater proportion of voting power to insulate the company from short-term pressures or stockholder activism**
- **Illustrative approaches:**
 - **Dual-class structure: Pre-IPO stockholders get high-vote stock and new public stockholders get low-vote stock (LinkedIn)**
 - **Snap approach: Sell non-voting stock to public**
 - **Multi-class approach: Three tiers of voting power (e.g., to founders, other original stockholders, new public stockholders) or dual-class structure paired with a class of non-voting stock (Google and Facebook)**
- **Provides flexibility to company; we have done many of these**
- **But not right for all companies, and we will need to keep an eye to ongoing reactions from the SEC, judges, and the investor community – especially regarding sunset provisions**



Takeaways

- Defensive issues are all about protecting the company and the ability of the board to steer the company as appropriate for stockholders
- Companies have significant flexibility for structuring their defensive measures under Delaware law
- When going public, companies will likely want to have many of these protections
- But there will be market pressure to dismantle and weaken defenses
- Dual-or multi-class structures may be an interesting alternative, depending on the company – but keep an eye to market, regulatory, and judicial reactions



Thank you!

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