

Poison Pills in the Wake of COVID-19

Trends, Types of Poison Pills, Pros and Cons, Key Terms, and Steps to Adopt and Implement

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Today's faculty features:

Kevin J. Daniels, Managing Director, Mergers & Acquisitions - Activism and Raid Defense,
BofA Securities, New York

Keith E. Gottfried, Partner, **Morgan Lewis & Bockius**, Washington, D.C.

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The Resurgent Rights Plan: Considerations and Developments in the Current Environment

August 13, 2020

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Today's Agenda

- 1 Shareholder Rights Plan Overview
- 2 Recent Trends
- 3 When Should a Company Adopt a Rights Plan?
- 4 Setting the Key Terms
- 5 The Mechanics: Implementing a Rights Plan
- 6 What's Next? Outlook for H2 2020 and Beyond



Kevin Daniels
BofA Securities
Managing Director
Global Mergers & Acquisitions, Activism & Raid Defense
Tel: (646) 855-4274
Email: kevin.j.daniels@bofa.com



Keith Gottfried
Morgan, Lewis & Bockius LLP
Partner and Head of Shareholder Activism & Defense
Tel: (202) 739-5947
Email: keith.gottfried@morganlewis.com

1 Shareholder Rights Plan Overview

What is a Shareholder Rights Plan?



- A Shareholder Rights Plan is intended to deter a person or group from acquiring beneficial ownership of a company's voting stock in excess of a specified threshold (e.g., 5% to 20%) by threatening the Acquiring Person with severe voting and economic dilution
- The Shareholder Rights Plan is documented in a preferred stock rights agreement between the company and its transfer agent and, with the adoption of the Shareholder Rights Plan, the board declares a dividend of one preferred stock purchase Right for each share of outstanding common stock
- The preferred stock rights agreement provides that:
 - Upon the occurrence of a triggering event, usually the acquisition of a threshold percentage of the company's common stock (including derivative securities),
 - By any person or group that results in a person being deemed an "Acquiring Person,"
 - Each shareholder (other than the Acquiring Person) would be able to exercise Rights to purchase shares of the company's common stock (or the economic equivalent) having a value of 2X the designated exercise price
 - Alternatively, after an Acquiring Person is deemed to exist, the board can exchange the Rights for common shares (or the economic equivalent) at a ratio of one common share per Right

1 Shareholder Rights Plan Overview

What is a Shareholder Rights Plan? *(Cont'd)*



- Existing holders of the company's common stock at or above the triggering ownership threshold are "grandfathered" and don't cause the Rights to become exercisable
- Rights are not initially exercisable and are attached to and trade with the common stock
- Prior to exercise:
 - A Right has no economic value
 - A Right does not give its holder any shareholder rights, including any dividend or voting rights
 - Rights are not evidenced by separate certificates and trade with the company's common stock
 - Any transfer of shares of the common stock also constitutes a transfer of the associated Rights
- Rights become exercisable after a person acquires beneficial ownership of the company's common stock in amounts at or above the triggering ownership threshold, without board approval, after the Shareholder Rights Plan is adopted and publicly announced, an "Acquiring Person" is deemed to exist, and the board has allowed a "Distribution Date" to occur

1 Shareholder Rights Plan Overview

Takeover/Activism Defense Shareholder Rights Plans



- Protects the company and its shareholders from the actions of third parties that the company's board determines are not in the best interests of the company and its shareholders
- Prevents a potential acquirer/ insurgent shareholder from taking advantage of adverse market conditions and short-term declines in the company's share price
- Encourages potential acquirers and insurgent shareholders/groups to negotiate with the board
- Provides the board with a greater period of time to investigate alternatives, and take other steps necessary to serve the best interest of shareholders
- May deter an insurgent shareholder or group from accumulating an amount of shares in the company equal to or in excess of a specific threshold without approval by the company's board
- May prevent insurgent shareholders from forming a "group" under Exchange Act Rule 13d-5(b)
- May prevent certain concerted actions by insurgent shareholders so long as the basic right to solicit, receive, and exercise proxies is not curtailed
- May also be used to safeguard a friendly merger transaction

1 Shareholder Rights Plan Overview

NOL Shareholder Rights Plans



- Primary purpose is to protect NOL carryforwards from being limited under IRC Section 382 by deterring any person from acquiring beneficial ownership of 4.99% or more of the company's common stock without the approval of the board
- Under IRC Section 382, an "ownership change" occurs if the percentage by value of stock of the company owned by one or more 5-percent shareholders has increased by more than 50 percentage points over the lowest ownership percentage held by such shareholders within a rolling 3-year period
- Very similar in structure, mechanics, and dilution to a takeover defense Shareholder Rights Plan
- Key differences are the primary purpose, the low 4.99% triggering ownership threshold, the definition of beneficial ownership, and the inclusion of "sunset" provisions tied to the life of the NOLs
- Requires the board to determine that there are significant NOLs to protect
- Longer duration than many traditional Shareholder Rights Plans (3 years vs. less than 1 year)
- A lot of built-in flexibility as board can exempt a proposed stock acquisition without an amendment
- To receive ISS support, which is easier than with takeover defense Shareholder Rights Plans, the NOL Shareholder Rights Plan must have a term of 3 years or less, include a sunset provision, and protect significant tax assets

1 Shareholder Rights Plan Overview

Shelf Shareholder Rights Plans



- Shareholder Rights Plans that are not adopted, but prepared in advance to be adopted on very short notice
- Due diligence is conducted in advance to confirm the availability of blank-check preferred stock to support the adoption of a Shareholder Rights Plan and that no third-party approvals are required
- All significant documents related to the adoption of a Shareholder Rights Plan (rights agreement, preferred stock certificate of designation, form of rights certificate, summary of rights, board resolutions, SEC filings, press release, etc.) are prepared so that a Shareholder Rights Plan can be adopted quickly
- Rights agent (company's transfer agent) reviews, comments, and signs off on the rights agreement
- Initial board review of the Shareholder Rights Plan is conducted in advance so that the board is fully up to speed on the mechanics of a Shareholder Rights Plan, its risks and benefits, and applicable fiduciary duties
- Remaining gating items would be having a financial advisor present to the board on a recommended exercise price and a board meeting to approve and adopt the Shareholder Rights Plan
- No public disclosure is required, typical, or appropriate for a company where the board has "signed off" on a shelf Shareholder Rights Plan

1 Shareholder Rights Plan Overview

Advantages of Shareholder Rights Plans



- Historically, extremely effective
- No shortage of precedent of companies adopting Shareholder Rights Plans
- Can be put into place by the board relatively quickly without shareholder approval
- Insubstantial cost to, and financial effect on, the company
- No earnings or tax impact for the company upon the adoption of a Shareholder Rights Plan
- Does not interfere with M&A or other transactions approved by the board
- Can be easily amended, particularly when needed to facilitate a “friendly” acquisition or financing transaction
- Concept well understood by investors and financial markets
- Favorable legal precedent in Delaware
- Favorable statutory support in other (BUT NOT ALL) jurisdictions
- Deters formation of formal 13D groups and less formal "acting in concert" groups
- Deters accumulations of derivative securities that would not be covered by the HSR Act

1 Shareholder Rights Plan Overview

Limitations of Shareholder Rights Plans



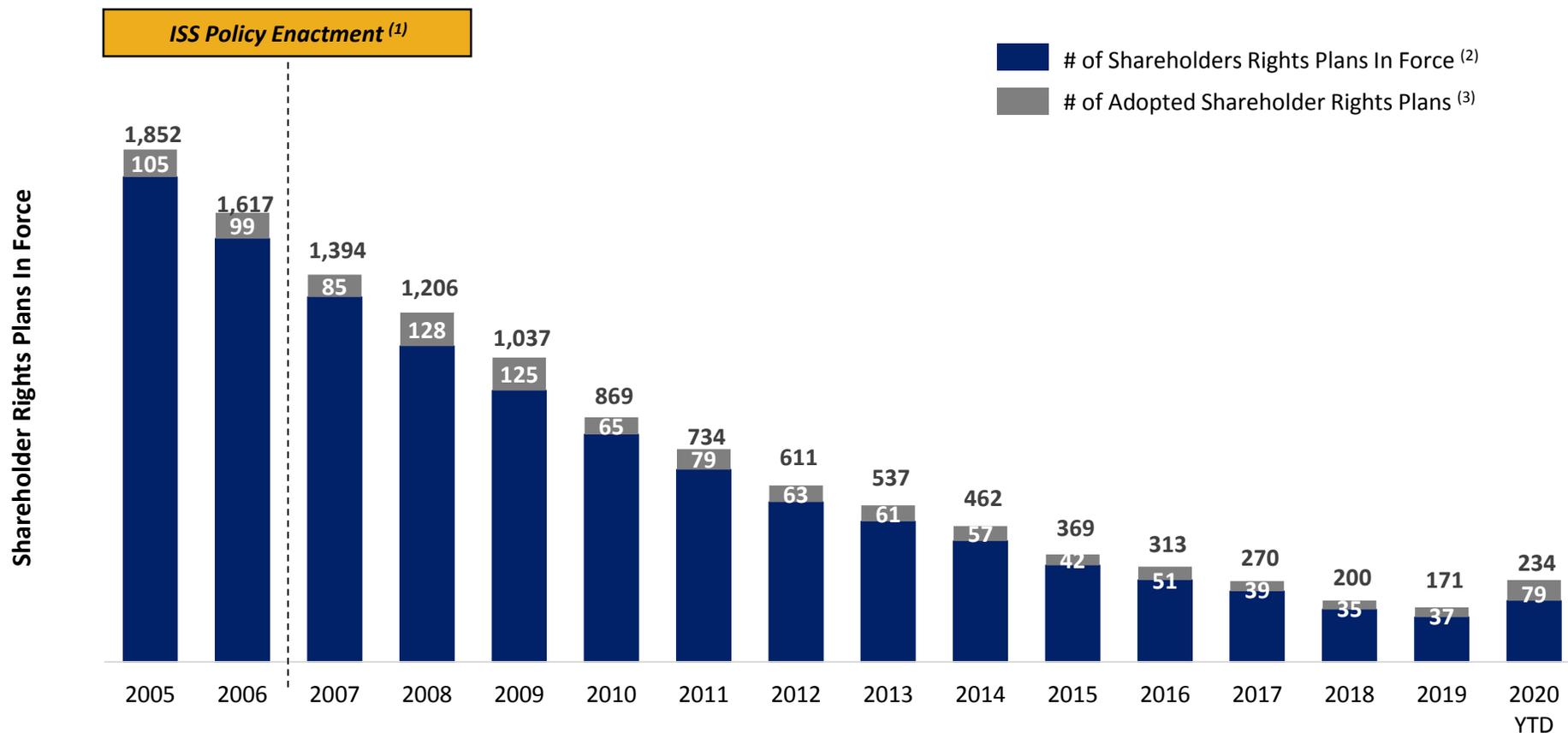
- A Shareholder Rights Plan will not prevent the initiation of a proxy fight against the company and the receipt and exercise of a proxy alone does not typically trigger a Shareholder Rights Plan
- Does not prevent a proxy contest to remove directors and replace them with directors who then vote to terminate the Shareholder Rights Plan
- A Shareholder Rights Plan cannot preclude a proxy contest or other activist campaign or make it mathematically impossible for the activist to be successful
- A Shareholder Rights Plan will not make a company "takeover proof" or prevent potential acquirers perceiving the company to be "in-play" from making offers to acquire the company
- By gaining control of the board, a potential acquirer could cause its designees to redeem the Rights or terminate the Shareholder Rights Plan
- Could alienate some retail and institutional shareholders
- May make it harder to attract institutional shareholders to invest in the company's stock
- Not favored by proxy advisory firms and Rights Plans longer than one year that are not shareholder approved could result in a negative recommendation from the proxy advisory firms

Recent Trends

Rights Plans in Force have Continued to be on the Decline



- Over the past 20 years, rights plans in force have continued to decline
- Largely driven by policies adopted by ISS and Glass Lewis, in addition to those of major institutional investors



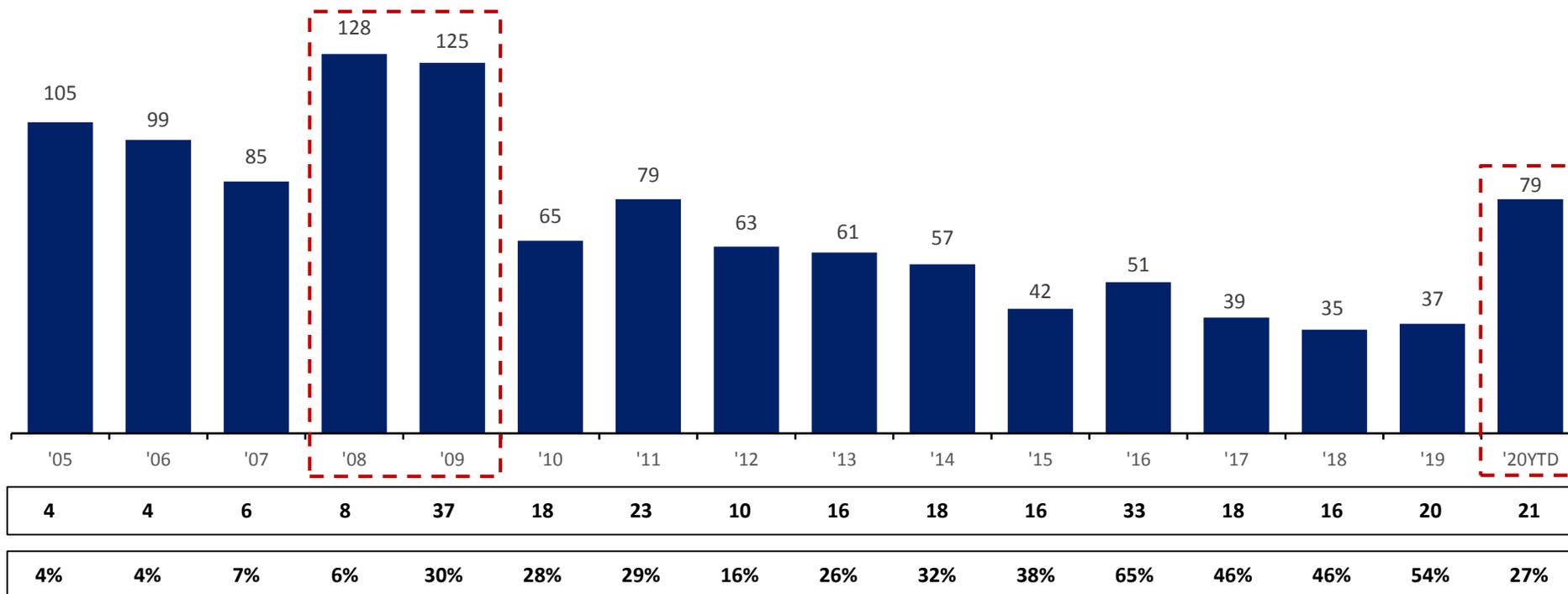
Source: FactSet as of August 4, 2020.
 (1) Effective February 1, 2007.
 (2) Shareholder rights plans enforced as of year end.
 (3) Adoptions include all new adoptions and replacements.

Recent Trends

Historical Shareholders Rights Plan Adoptions



Recent market volatility has increased the importance of rights plans, as was also witnessed in the aftermath of the 2008 financial crisis



2020 Monthly Adoption Volume

	Jan	Feb (Pre-Crisis)	Feb (Post-Crisis)	Mar	Apr	May	Jun	Jul
Responsive Rights Plans	1	0	2	10	6	6	1	2
Preventative Rights Plans	0	1	1	7	13	4	2	2
NOL	0	2	0	5	5	4	0	5
Total	1	3	3	22	24	14	3	9

Source: ISS Governance Service.
 (1) Assumes February 19 2020 as start of the COVID crisis.

Recent Trends

Trends in Recent Adoptions

Rights Plans Statistics YTD 2020

79 Companies have adopted rights plans 2020 YTD

21 Companies adopted NOL rights plans (27% of total)

28 Rights plans were responsive (35% of total)

30 Rights plans were preventative (38% of total)

Of the companies that adopted preventative Rights Plans, the market cap ranges from \$14MM to \$13.1BN

The median market cap of companies adopting preventative Rights Plans is \$378MM

The top 3 sectors where preventative Rights Plans were adopted were Industrials, Energy and Consumer Discretionary

Rights Plans Adopted YTD 2020

Responsive

COMMVAULT 
Starboard

GROUPON
MIG, P2, Chapman



Koch Industries



Icahn



Legion

NOL Rights Plans

Gulfport
ENERGY

GANNETT

UNISYS

TENNECO

THE NEW
HOME
COMPANY

LSB
INDUSTRIES

SANDRIDGE
energy

Preventative



 **NEWPARK**

**Office
DEPOT**

EXPRESS


**Hilton
Grand Vacations**

ISS supports all proposals demanding plans be removed or put to a shareholder vote unless:
(i) the plan has been approved by shareholders or
(ii) the Company has adopted a ISS-compliant policy for future adoption of a rights plan to be put to a shareholder vote



In April 2020, ISS modified their policy. As a result of the COVID-19 pandemic, ISS will consider short-term shareholder rights plans on a case-by-case basis

- ISS will be considering the disclosed rationale for adopting the plan, including any imminent threats and other relevant factors (such as a commitment to put any future renewal of the rights plan to a shareholder vote)
- Boards should provide detailed disclosure regarding their choice of duration of the rights plan, or on any decisions to delay or avoid putting plans to a shareholder vote for a period of a year or longer
- ISS will also examine the specific provisions of a shareholder rights plan and reemphasized that triggers for rights plans will continue to be closely scrutinized within the context of the rationale provided and the length of the plan adopted. ISS indicated that a severe stock price decline as a result of the COVID-19 pandemic would likely be considered valid justification in most cases for adopting a shareholder rights plan of less than one year in duration



ISS may recommend that shareholders vote in favor of the adoption of a rights plan if it meets certain criteria

- 20% or higher flip-in or flip-over trigger
- Term of no more than three years
- No dead-hand, slow-hand, no-hand or similar features
- Shareholder redemption/qualifying offer feature – if the board refuses to redeem the plan 90 days after a qualifying offer is announced, or render the plan inapplicable to the qualifying offer, 10% of the shares may call a special meeting or seek a written consent to vote on rescinding the plan



Rationale for adopting the plan should be thoroughly explained by the company

- In examining a request for a rights plan, ISS will take into consideration the company's existing governance structure, including: board independence, existing takeover defenses and any problematic governance concerns

When Should a Company Adopt a Rights Plan

Potential Adoption Considerations

Adopt Rights Plan Today

Rights Plan “On the Shelf”

Description

- Company adopts rights plan
- Terms can reflect recent market trends and address current circumstances for Company

- The Board and advisors prepare and review a rights plan and related fiduciary and other considerations surrounding adoption
- However, a rights plan is not currently legally adopted; terms can be periodically reviewed and updated to reflect current market trends

Issues for Consideration

- ↑ Restricts new accumulations (including derivatives) to Rights Plan trigger
- ↑ Prevents large accumulation by an activist or raider, especially relevant given the smaller market capitalization today
- ↑ Deters formation of 13D groups and, possibly, less formal groups of insurgents acting in concert
- ↑ Significant uptick in adoption of “preventative” rights plans in 2020 YTD; ~50% of all rights plans adopted this year have been “preventative” ⁽¹⁾
- ↑ ISS has taken a slightly more lenient approach to limited-duration rights plans in 2020 in light of the COVID crisis
- ↓ May be viewed negatively by shareholders and proxy advisory services as potentially “entrenching Board and management”
- ↓ Potentially unwanted attention to the Company and provides a potential rallying point for activist investors and governance groups
- ↓ If adoption of limited duration rights plans is premature, board may not have a rights plan available when it is critically needed

- ↑ Allows quick implementation in response to future events (with only one additional board meeting required)
- ↑ No public disclosure/ISS concerns because no rights plan is adopted
- ↑ Avoids the situation where the poison pill (if of a limited duration) expires at a time when it is needed
- ↑ Avoids creating any uncertainty among employees, customers, vendors or strategic partners that the company is “in-play”
- ↑ Avoids publicly highlighting that the company is concerned about a potential threat whether from an activist or a hostile bidder
- ↓ No deterrent effect on large accumulations, including through derivatives
- ↓ No deterrent effect on formation of 13D groups or less formal groups of insurgents acting in concert
- ↓ For small cap companies, early warning triggers (e.g., HSR) do not provide disclosure
- ↓ As a result, an activist may be able to acquire a large position with no warning

In addition to these general considerations, company specific situations, e.g. significant fall in share price and expectation of future volatility in stock price, could influence the decision to adopt a Rights Plan vs. keeping it on the shelf

Setting the Key Terms

Key Considerations to Adopt a Shareholder Rights Plan

- Identify and get clarity on the problem that the Shareholder Rights Plan would be attempting to mitigate
- Determine whether the adoption of a Shareholder Rights Plan is compelling or potentially premature
- Determine whether company's other structural defenses makes adoption of a Shareholder Rights Plan less compelling
- Determine whether the company has NOLs that could justify the adoption of an NOL Rights Plan
- Determine whether the company should adopt a Shareholder Rights Plan or put it "on the shelf"
- Review the company's charter to determine whether blank check preferred stock is authorized
- Determine if the company's state of incorporation prohibits or limits Shareholder Rights Plans
- Determine whether any existing holders need to be "grandfathered in"
- Determine an appropriate triggering ownership threshold
- Determine the duration of the Shareholder Rights Plan, taking into consideration proxy advisory firm policies
- Determine whether the Shareholder Rights Plan should be submitted for shareholder approval / ratification
- Determine whether to have a separate / higher triggering ownership threshold for passive shareholders
- Determine whether any third party approvals are needed to adopt a Shareholder Rights Plan
- Develop narrative for investors on why Shareholder Rights Plan is being adopted

4 Setting the Key Terms

Shareholder Rights Plan – Summary of Key Terms



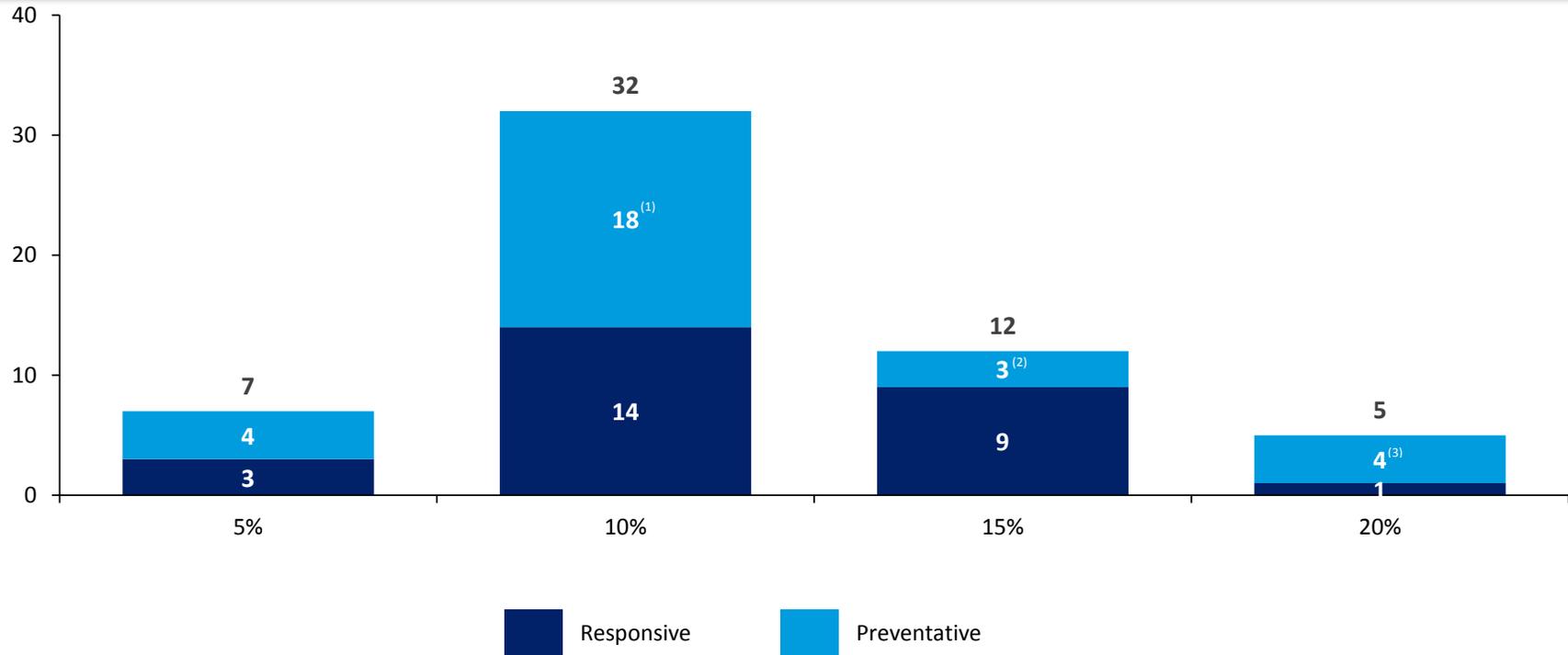
Potential Shareholder Rights Plan Features

Type	Flip-In / Flip-Over
Adoption Date	TBD
Duration	1 – 3 Years
Trigger %	TBD: Typically 10% – 15%
Bifurcated Trigger	TBD: Higher trigger (e.g., 15%, 20%) for passive 13G filers
Trigger Incorporates Derivatives	✓
Exercise Price	TBD: Typically ~5x~6x share price prior to the date of adoption
Exchange Feature	✓
Inadvertent Trigger	✓
Redemption	Board may redeem rights at any time prior to person crossing the specified ownership threshold
Board Ability to Amend	Until rights become exercisable, the Board may amend any provision of the Plan in any respect without the approval of the shareholders

Setting the Key Terms

Shareholder Rights Plan Trigger Threshold Distribution

Trigger Threshold Distribution of Non-NOL Rights Plans Since February 19, 2020



64% Of Non-NOL rights plans adopted since February 19, 2020 have contained two-tier triggers

57% Of Non-NOL rights plans adopted since February 19, 2020 have a 10% trigger

50% Of two-tier triggers were 10%/20% (18 out of 36)

11% Of two-tier triggers were 10%/15% (4 out of 36)

Source: ISS Governance Service, Dealpoint and FactSet as of August 4, 2020.

⁽¹⁾ Includes Lending Club (8%)

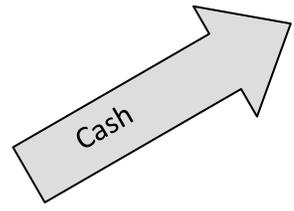
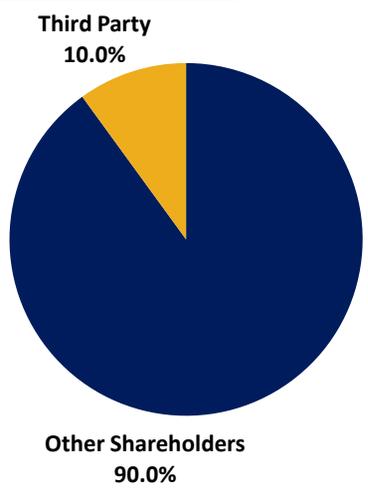
⁽²⁾ Includes BioSig Technologies (12%).

⁽³⁾ Includes Evofem Biosciences (32%).

Preliminary Pricing Based on Illustrative Exercise Price of \$50 and Triggering Event at 10%

Before Flip-in

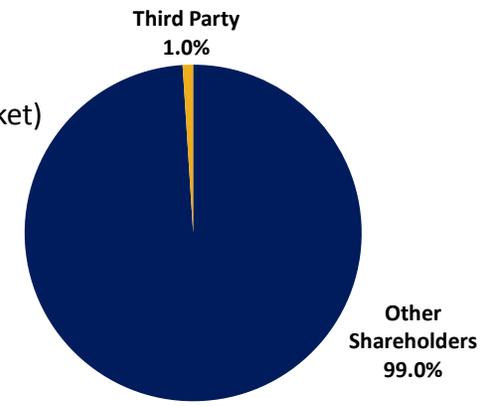
Shares outstanding excluding shares held by illustrative Acquirer:	90.0
Illustrative Acquirer's shares:	10.0
Total shares outstanding	100.0



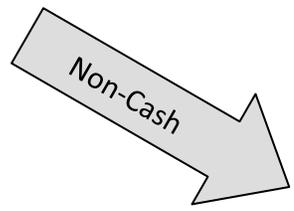
After Flip-in Cash Exercise ⁽¹⁾

\$50
(~5.00x Market)

Shares outstanding excluding shares held by illustrative Acquirer:	990.0
Illustrative Acquirer's shares:	10.0
Total shares outstanding	1,000.0

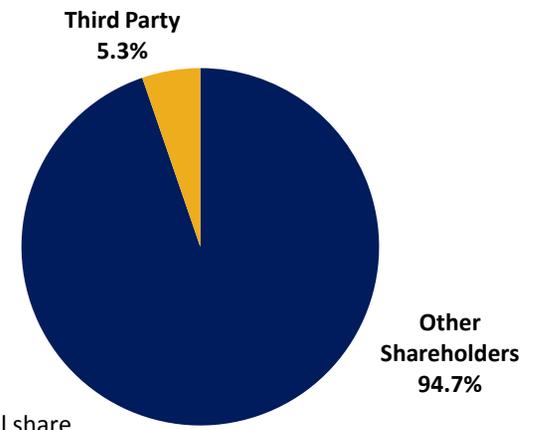


Additional Shares: ~10 for each original share held by all shareholders other than the acquiring third party ⁽²⁾



After Flip-in Non Cash Exercise (Exchange Provision) ⁽³⁾

Shares outstanding excluding shares held by illustrative Acquirer:	180.0
Illustrative Acquirer's shares:	10.0
Total shares outstanding	190.0



Additional Shares: ~1 for each original share

Source: Company Filings.

(1) Based on Illustrative Reference Price of \$10.00 and 100.000mm common shares outstanding.
 (2) Number of additional shares is based on the exercise price divided by half the market price on the date of exercise.
 (3) Alternative to Cash Exercise, Exchange Provision allows a non-cash exchange of rights for shares (essentially a 2-for-1 stock dividend) for everyone but the acquiring third party.

The Mechanics: Implementing a Rights Plan

Steps to Adopt and Implement a Shareholder Rights Plan



- Prepare drafts of documents needed to adopt and implement a Shareholder Rights Plan:
 - Rights agreement
 - Certificate of designation for new series of preferred stock
 - Form of rights certificate
 - Summary of the rights
 - Proposed board resolutions
 - Press release
 - Form 8-K
 - Form 8-A registration statement
 - Stock exchange notification / additional listing form
- Have rights agent (typically, the company's transfer agent) review and comment on the draft rights agreement

The Mechanics: Implementing a Rights Plan

Steps to Adopt and Implement a Shareholder Rights Plan *(Cont'd)*

- Hold board meeting to consider and approve the Shareholder Rights Plan and new series of preferred stock, set an exercise price for the Rights, set a record date for the distribution of the Rights, and declare a dividend of one Right per common share
- Company executes Rights Agreement with the Rights Agent
- Company issues a press release announcing the adoption of the Shareholder Rights Plan
- Company files a Certificate of Designation with the Secretary of State of its state of incorporation to authorize a new series of preferred stock that would be issuable under the Shareholder Rights Plan
- Company files a Form 8-A Registration Statement to register the Rights under the Securities Exchange Act of 1934 (no registration required under the Securities Act of 1933) and a Form 8-K disclosing the adoption of the Shareholder Rights Plan
- Company notifies stock exchange to list the Rights

The Mechanics: Implementing a Rights Plan

Role of the Financial Advisor in the Consideration of a Shareholder Rights Plan



- Review the company's takeover defense profile, its vulnerabilities, and the threats it faces
- Advise the company on its shareholder activism / takeover defense options
- Advise the company on threats facing comparable companies and how such threats are being addressed
- Advise the company on the how a Shareholder Rights Plan functions
- Advise the company on a Shareholder Rights Plan's pros and cons, including the risks of adopting a Shareholder Rights Plan too early
- Advise the company on a range of exercise prices for the Rights and the potential dilution at such exercise prices that would result to an Acquiring Person if the Rights were triggered
- Advise the company on how financial markets / investor community may react to a Shareholder Rights Plan's adoption
- Further the record that the board made an informed decision in adopting a Shareholder Rights Plan
- Further the record that the board satisfied its UNOCAL duties: (i) after a reasonable investigation, the board determined, in good faith, that a threat to corporate policy existed that warranted a defensive response, and (ii) the adoption of a Shareholder Rights Plan was a proportionate and reasonable response
- Financial advisor is NOT valuing the company or issuing a fairness opinion

The Mechanics: Implementing a Rights Plan

Timing of Implementation of a Shareholder Rights Plan



Day 1

- Adoption of plan by the Board of Directors
- Company enters into rights agreement with rights agent
- Notify stock exchange of record date for dividend of rights
- File additional share listing form with stock exchange to add rights to listing
- File Certificate of Designation of new series of preferred stock
- Press release announcing adoption, record date and triggering events
- Filing of Form 8-K (along with copy of the Shareholder Rights Plan)
- Filing of Form 8-A
- Have legends placed on share certificate to indicate rights

Day 11 (or thereafter)

- Record date for determination of shareholders entitled to receive rights

The Mechanics: Implementing a Rights Plan

Legal Issues Applicable to Adopting a Shareholder Rights Plan



- When a board takes defensive measures, such as adopting a shareholder rights plan, in response to a third-party takeover attempt or activist challenge, in each case, deemed to be a threat to corporate control or policy, a Delaware court will apply the presumption afforded by the Business Judgment Rule only after it first engages in more rigorous scrutiny of a board's decision to take such defensive measures. This so-called "enhanced Business Judgment Rule" was first articulated in Delaware in *Unocal Corp. v. Mesa Petroleum Co.* (1985)
- In *Moran v. Household International, Inc.* (1985), decided shortly after *Unocal*, the Delaware Supreme Court applied the *Unocal* analysis specifically to a case involving the adoption of a shareholder rights plan. The Court in *Household* upheld the board's adoption of a rights plan as a pre-planned defensive measure as a legitimate exercise of business judgment and indicated that the adoption of a rights plan can be a proportionate response under the *Unocal* analysis
- A board's adoption of a rights plan does not exonerate it from its fiduciary obligations with respect to the use of the plan. When a board is faced with a takeover bid and a request to redeem a rights plan, the board's responses will be held to the same fiduciary standards applicable to any other board's decision to adopt a defensive mechanism
- Challenges to rights plans, if made at all, generally occur when it presents a barrier to a specific takeover bid or stock accumulation
 - That was the case in the decision of the Delaware Chancery Court in *Air Products and Chemicals, Inc. v. Airgas, Inc.*, C.A. No. 5249 (Del. Ch. Feb. 15, 2011) where the Court held that the power to defeat an inadequate hostile tender offer ultimately lies with the board of directors provided that the board meets its burden to articulate a legally cognizable threat (e.g., a tender offer with an inadequate offer price coupled with the concern that a majority of the company's stockholders could be likely to tender into that inadequate offer) and has taken defensive measures that fall within a range of reasonable responses proportionate to that threat, such as the adoption of a rights plan

The Mechanics: Implementing a Rights Plan

Legal Issues Applicable to Adopting a Shareholder Rights Plan (*Cont'd*)



- Under the *Unocal* standard, directors who adopt defensive measures, such as a shareholder rights plan, in reaction to a perceived threat carry the burden of proving that their decision-making process satisfies a two-pronged test:
 - **Part one:** the board that adopts the measure in question had reasonable grounds for believing that a danger to corporate policy and effectiveness existed, and
 - **Part two:** the defensive response was reasonable in relation to the threat posed
- When Unocal is applicable, initial burden on showing compliance with fiduciary duties lies with the directors
- Under Unocal, where defensive measures are taken by a majority of independent directors, proof of the board's good faith and reasonable investigation is "materially enhanced"
- *The reasonableness test:* requires the board to demonstrate that, after a reasonable investigation, it determined in good faith, that the company faced a threat to corporate policy and effectiveness that warranted a defensive response
- *The proportionality test:* requires the board to demonstrate the proportionality of its defensive response and its reasonableness in relation to the threat posed which entails an analysis of the nature of the threat posed and whether the defensive action taken was "draconian" (i.e., coercive or preclusive) in nature or outside the range of reasonable responses
- Once the directors are able to meet their burden in showing that they complied with the Unocal test of reasonableness in perceiving the threat and proportionality of their response, the burden shifts back to the plaintiffs who have the ultimate burden to show a breach of the directors' fiduciary duties

The “Preventative Rights Plan”: Implications for companies that have already adopted short-term Rights Plan early next year

NOL Rights Plans: Likely to see a continued resurgence

- More impairment charges, resulting in significant NOL's
- Potential value of NOL's likely to be a greater focus for many companies

A “second wave”?: A market reversal later this year may prompt more companies to consider adopting preventative Rights Plans

- Potential utility given proximity to nomination window season early in 2021

Responsive rights plans: Companies will continue to adopt pills in response to activist accumulations and hostile bids

Board focus: Increased focus in the Boardroom of having a Rights Plan “on the shelf” and update to Boards on recent trends and developments regarding rights plans

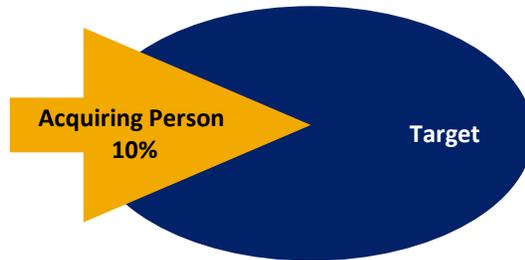
Appendix



Illustrative Shareholder Rights Plan Mechanics – Flip-In and Flip-Over

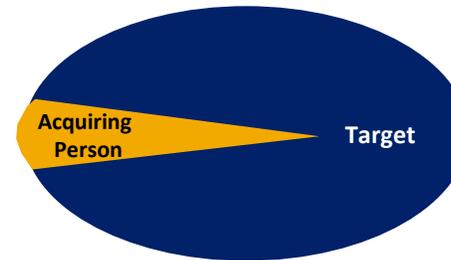
How a “Flip-In” Works

Target Equity Before Flip-In



If Acquiring Person's interest exceeds 10%...

Target Equity After Flip-In



All shareholders (excluding the Acquiring Person) may exercise right to buy Target's equity for 1/2 price – thus greatly enlarging Target equity and diluting Acquiring Person

How a “Flip-Over” Works

The Acquisition



If Target is merged into Acquiror...

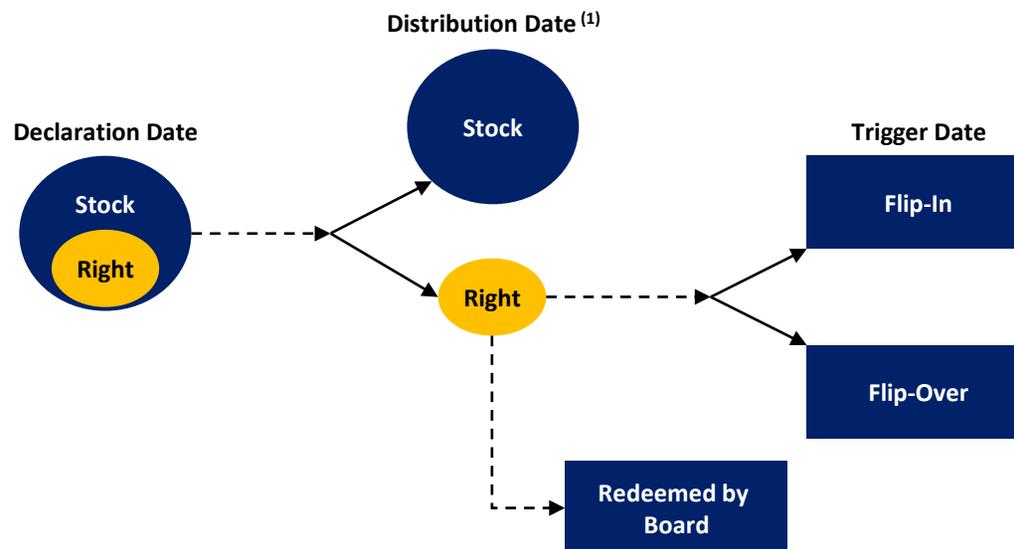
The Result



Target shareholders have the right to buy Acquiror's equity for 1/2 price resulting in substantial dilution to Acquiror

What is a Shareholder Rights Plan?

- When a Shareholder Rights Plan is adopted, each holder of common stock of the company receives a right to buy additional stock (incentive stock or common stock, depending on how the plan is constructed) at an exercise price that permits shares to be acquired at a significant discount to the stock
- The right is attached to, and trades with, the common stock until a distribution date occurs
- Upon the occurrence of certain events, all shareholders except the bidder can exercise the rights and purchase stock at the "cheap" exercise price. For NOL Rights Plans, the trigger is typically 5% or lower
- Because crossing the trigger threshold would cause catastrophic dilution (economic and voting) to the bidder, the bidder will stop short of threshold and seek to:
 - Negotiate with board of target for an exemption
 - Pressure board of target to remove or amend rights plan or grant an exemption
 - Commence proxy fight to take over target board and then remove plan
 - Challenge plan in court



(1) Earlier of 10 days after public announcement of the accumulation of a specified level of stock or 10 business days (which may be subject to extension by the Board) after the public announcement of the commencement of a tender offer which would result in a person owning greater than a specified amount of stock.