# Recent Developments Regarding 'Wolf Pack' Provisions in Rights Plans

## A traditional stockholder rights plan remains one of the most effective tools a board of directors may use to protect the corporation's stockholders from the threat of a hostile or abusive takeover.

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A traditional stockholder rights plan remains one of the most effective tools a board of directors may use to protect the corporation's stockholders from the threat of a hostile or abusive takeover. Rights plans often include specific provisions designed to address unique threats or issues facing the corporation. One such provision is an "acting in concert"—or so-called "wolf pack"—provision, which is designed to aggregate, for purposes of the rights plan's triggering threshold, ownership of multiple stockholders who may not have an express agreement, arrangement or understanding among themselves, but who are nonetheless acting in concert towards a common goal.

As with any anti-takeover measure adopted unilaterally by the board, the provisions of a rights plan should be tested under *Unocal* to determine whether they represent a reasonable and proportionate response to an identified threat to corporate policy or effectiveness. The Delaware courts have not squarely addressed the validity of wolf pack provisions, although the Court of Chancery has recognized that "wolf pack" activity among a group of investors poses a cognizable threat to which a reasonable response is permissible. *See Third Point v. Ruprecht*, C.A. No. 9469-VCP (Del. Ch. May 2, 2014). A recent ruling of the Court of Chancery, however, provides some insight into the manner in which Delaware courts are likely to analyze wolf pack provisions when deployed in the M&A context. Further, recent litigation suggests that plaintiffs' firms are likely to be more focused on wolf pack provisions in newly adopted rights plans generally.

**'In re Versum Materials Stockholder Litigation'**

In *In re Versum Materials, Inc. Stockholder Litigation*, C.A. No. 2019-0206-JTL (Del. Ch. July 16, 2020) (transcript), the Court of Chancery discussed the wolf pack provision contained in Versum Materials, Inc.'s rights plan, which was adopted in connection with its merger-of-equals transaction with Entegris, Inc. The plaintiffs alleged, among other things, that Versum adopted the rights plan to deter another bidder, Merck KGaA, from taking certain actions that could have led to a superior proposal. After the plaintiffs filed suit challenging the rights plan, Versum amended its plan to remove the wolf pack provision and then subsequently withdrew the rights plan altogether. After the rights plan was withdrawn, Versum terminated its merger agreement with Entegris and entered into a merger agreement with Merck at a higher price, which resulted in the Versum stockholders receiving nearly $1.2 billion in additional merger consideration over what they otherwise would have received had the Versum-Entegris merger been consummated. After the merger with Merck closed, the plaintiffs sought a mootness fee, arguing that their role in causing Versum to eliminate the wolf pack provision and terminate the rights plan provided material benefits to Versum's stockholders.

In its ruling on the mootness fee, the court noted that wolf pack provisions can be used to limit creeping takeovers and potential wolf pack activity by hedge funds. But in discussing the rights plan in light of *Unocal*'s reasonableness prong, the court noted that the evidence of such wolf pack activity in this case was "quite skimpy." Further, in discussing the rights plan in light of *Unocal*'s proportionality prong, the court indicated that Versum's wolf pack

provision was "an expansive provision that [went] beyond traditional concepts of beneficial ownership to include … any type of parallel action in the context of a control contest, regardless of the existence of any type of arrangement, agreement, or understanding, and with the indicative events being, really, customary activities, such as exchanging information, attending meetings, or conducting discussions," and that Merck's actions in connection with its bid, such as "roadshows, solicitation calls, [and] meetings with stockholders," could have been deterred by the wolf pack provision. Additionally, the court noted that the wolf pack provision was asymmetric because it carved out from its scope Entegris and the Versum-Entegris merger such that Entegris was not similarly constrained by the provision. Although Merck submitted an affidavit stating that it did not view the wolf pack provision or the rights plan as an impediment to its topping bid, the court ultimately concluded that the plaintiffs' actions conferred material benefits on Versum's stockholders and awarded the plaintiffs $12 million in fees.

**Other Litigation Regarding Wolf Pack Provisions**

Outside the context of a specific transaction, plaintiffs' firms have recently initiated litigation against at least three companies that adopted rights plans in response to the market disruptions caused by the COVID-19 pandemic. Notably, all three plans contained wolf pack provisions that, the plaintiffs argued, were vague, overbroad and unmanageable.

- **The Williams Companies**. On March 20, the board of directors of The Williams Companies adopted a rights plan with a 5% trigger threshold and a wolf pack provision. On Aug. 27, a stockholder filed suit challenging the rights plan, characterizing the 5% trigger and wolf pack provision as "twin nuclear weapons" that are "unprecedented." Specifically, the complaint alleged that the 5% trigger, if upheld, would "set a new low 'clear day' trigger that would hobble all forms of stockholder activism." The complaint further alleged that the wolf pack provision at issue provided for "daisy chain" aggregation that was overly broad. It also pointed out that the wolf pack provision was asymmetric because it contained express carve-outs for The Williams Companies' officers and directors.
- **AAR Corp.** On March 30, the board of directors of AAR Corp. adopted a rights plan with a 10-20% two-tiered triggering threshold and a wolf pack provision. On Aug. 28, a stockholder filed suit challenging the rights plan, which it characterized as "particularly aggressive." The complaint contained allegations substantially similar to those contained in the complaint attacking The Williams Companies' rights plan.
- **Tribune Publishing Co.** On July 28, the board of directors of Tribune Publishing Co. adopted a rights plan with a 10% trigger and a wolf pack provision. On Aug. 28, a stockholder filed suit challenging the rights plan, which, like AAR Corp.'s plan, was characterized as "particularly aggressive." The complaint also contained allegations substantially similar to those contained in the complaint attacking The Williams Companies' rights plan.

In September 2020, the Court of Chancery granted motions to expedite the actions brought against The Williams Companies and AAR Corp. During the hearing on the motion in the AAR Corp. case, the court, in discussing whether there was a threat of irreparable harm sufficient to justify expedition, noted that because of the alleged effects of the wolf pack provision, "[t]here remains the issue of stockholders being limited in their ability to communicate and organize concerning the accumulation of shares and regarding corporate actions generally in between and in advance of meetings." On Oct. 5, AAR Corp. terminated its rights plan by accelerating the plan's expiration date.

**Key Takeaways**

The situation in *Versum Materials* was unique in that it involved a rights plan adopted in connection with an M&A transaction where a competing bidder's topping bid was ultimately successful. As the plaintiffs' efforts arguably paved the way for additional consideration flowing to stockholders, it is unsurprising that the court was willing to credit the plaintiffs' application for a mootness fee in that particular context. The outcome of the more recent challenges to rights plans and wolf pack provisions adopted to address issues stemming from the COVID-19 pandemic, outside of the M&A context, remains to be seen. Nevertheless, these cases demonstrate that plaintiffs remain highly focused on the effects of rights plans generally and wolf pack provisions in particular. Accordingly, if a board is considering adopting a rights plan that contains a wolf pack provision, it should carefully consider the risks and benefits of including it in light of the specific circumstances facing the company at the time of adoption, including whether any wolf pack activity is ongoing or anticipated, and the effects of such a provision on ordinary-course stockholder activity and in the M&A context. As always, boards should seek and obtain advice from officers and outside experts and advisors in considering all features of a potential rights plan, with an eye toward identifying the specific threats to corporate policy and effectiveness and the manner in which the features of the plan operate to counteract those threats.

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