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**Checklist for Responses**  
to  
**Unsolicited Acquisition Proposals and Activist Stockholder Proposals**

Set forth below is a checklist of matters to be considered by a publicly traded company (the "Company") with a view toward being prepared to respond appropriately to an unsolicited acquisition proposal or contact by an activist stockholder advocating strategic or structural changes.

**Advance Preparation**

- I. Establish Response Team
  - A. Small group of key executives (*e.g.*, CEO, CFO, General Counsel, Vice President of Corporate Development, Director of Investor Relations) plus advisors, including outside legal counsel, financial advisors, proxy solicitor and public relations firm (the "Proposal Response Team")
  - B. In order to act with necessary speed, particularly in the context of a tender/exchange offer or an activist proposal for a strategic transaction, advisors should be kept briefed on corporate developments
  - C. Ensure ability to convene special meeting of the Company's Board of Directors (the "Board") within 24 to 48 hours of receipt of proposal
  - D. Maintain night, weekend and holiday information for members of the Proposal Response Team and all directors
  - E. Need for confidentiality and trading prohibitions in the Company's stock
    1. It is critical that no member of the Proposal Response Team or any director or officer with knowledge about the situation make any oral or written statements about the situation. Maintaining confidentiality is crucial and any leaks can be harmful to the Company, as they can lead to rumors, trading in the Company's stock, Securities and Exchange Commission ("SEC") and the NYSE or NASDAQ (as applicable, the "Stock Exchange") inquiries, and, ultimately, premature disclosures
    2. The federal securities laws prohibit trading in the Company's stock while a party is in possession of material non-public information

## II. Implement Communications Strategy

- A. *Handling Inquiries/Proposals*: Educate organization regarding the need for all communications to come from the Company's designated spokesperson and all communications to be reviewed by counsel prior to dissemination. Together with legal counsel and public relations firm, formulate instructions for dealing with:
1. Press
  2. Stock Exchange
  3. Directors
  4. Institutional Investors
  5. Public
  6. Employees
  7. Customers/Suppliers
- B. *Stockholder Relations*: Maintain regular contact with large institutional stockholders and individual investors (including keeping up-to-date list of holdings and contacts) to:
1. Ensure the Company's message is being received and understood
  2. Be in a position to learn of any contacts that stockholders may have received from third parties
  3. Remain informed about activist institutional investors and about corporate governance and proxy issues
  4. Understand role/strategies of arbitrageurs and hedge funds (to be supplemented by consultation with advisors)
- C. *Analyst Meeting/Calls*: Organize frequent contact with the analyst community through luncheons and other meetings to communicate where the Company stands today and its strategy for the future and to gather analyst views so as to inform the Board's discussion of strategies available to the Company. Closely monitor analyst calls as activist proposals often originate as, or are based upon, questions during analyst calls

### III. Stock Watch Program

- A. To facilitate the earliest possible detection of accumulation of the Company's stock by a potential acquirer, maintain a program for gathering and evaluating information regarding the Company's stockholder base, including by means of:
1. Regular review of breakdowns of nominee holdings from securities depositaries and other stock trading information in order to identify any unusual patterns
  2. Regular compilation and review of the list of the Company's largest stockholders, including as much information as possible about identities of beneficial holders holding through nominees
  3. Regular contact with the Company's proxy solicitor and financial advisors for information on rumors that may be circulating

### IV. Conduct Takeover Preparedness Review

- A. Conduct general review of laws applicable in takeover context, including:
1. Delaware General Corporation Law, including Section 203 (relating to business combinations with 15% or greater stockholders)
    - *Key Features:* Prohibits the Company from entering into certain business combinations (*e.g.*, a merger or sale of substantially all of its the assets) with an "interested stockholder" (*i.e.*, a holder of 15% or more of the voting stock) for three years following the date that such stockholder became an interested stockholder unless:
      - the Board approves the transaction prior to the stockholder becoming "interested;"
      - the interested stockholder first crossed the 15% threshold in a transaction resulting in such stockholder holding at least 85% of the voting stock; or
      - on or after the date the stockholder becomes "interested," the transaction is authorized by the Board and 66⅔% of the outstanding voting stock which is not owned by the "interested stockholder"
    - *Protections Afforded:* Provides additional leverage in negotiating with a stockholder making an unsolicited bid for the Company. Unless an offeror is prepared to wait up to three years to engage in a business combination, such offeror would need to negotiate with the Board or receive at least 85% of the outstanding voting stock in a tender offer
    - *Implementation:* Protection of Section 203 is automatic unless a corporation's certificate of incorporation provides otherwise. The Company has not opted out of Section 203; therefore, it is applicable to the Company

2. Proxy Rules under Securities Exchange Act of 1934
    - Applicable if acquirer seeks to elect directors to the Board or to have stockholder vote on any other matter at the annual meeting
  3. Tender Offer Rules under Securities Exchange Act of 1934
    - Applicable if a third party seeks to acquire control via a tender offer
      - *Rules 14e-2/14D-9*: Require company which is target of tender/exchange offer to disclose its position with respect to offer and file with the SEC and mail a Schedule 14D-9 to target stockholders *within 10 business days of commencement of offer*
      - *Schedule 14D-9 Information*: To ensure ability to comply with requirements above, basic information for Schedule 14D-9 should be compiled in advance and kept up to date
  4. Hart-Scott-Rodino ("HSR") Act, European Community Merger Regulation and other applicable antitrust/competition laws
  5. Other relevant regulatory regimes, including, in the case of foreign acquirers, potential Committee on Foreign Investment in the United States review
- B. Review important certificate of incorporation and bylaw provisions, including those listed below, and consider any modifications, including in light of positions of the ISS division of MSCI Inc. ("ISS"):
1. Classified Board structure
    - *Significance*: if no classified Board, then all directors can be replaced at an annual meeting
  2. Stockholder action by written consent
    - *Significance*: if stockholders can only act via meetings, then hostile raider or activist cannot remove and replace directors fairly quickly—and without a meeting of stockholders—through a solicitation of written consents
  3. Special meetings called by stockholders
    - *Significance*: if only the Board can convene a special meeting of stockholders is made only by the Board, then all business is not sought to be presented by the board is confided to the annual meeting, thereby limiting the Board's "window of vulnerability" to a proxy contest to one meeting per year

4. Advance notice bylaws for stockholder nominations of director candidates and business proposals
    - *Significance*: intended to prevent surprise proxy contests and to give stockholders advance information about dissident nominees or other controversial business proposals
  5. Whether only the Board (and not stockholders) fixes the exact number of directors, within a stated range
    - *Significance*: if only the Board has control over the total number of directors, then limits a hostile raider or activist from seeking to increase the size of the Board so as to attempt to more easily gain control of the Board
  6. Whether only the Board can fill director vacancies
    - *Significance*: if only the Board can fill director vacancies, then stockholders cannot remove directors and then elect new directors to fill the resulting vacancies
  7. Whether directors may be removed with or without cause
    - *Significance*: Delaware law provides that directors of companies where the board of directors is not classified can always be removed without cause
  8. Authorization of sufficient common and blank-check preferred stock
    - *Significance*: broad and potentially powerful tool sometimes used to effectuate a white squire arrangement (*e.g.*, a significant voting block to be held by a "friendly" stockholder)
- C. Review rights agreement or rights agreement draft, if any, and consider any modifications
- D. Review employment arrangements, employee benefit plans and indemnification provisions/policies and consider any modifications
1. Consider whether current change of control provisions provide proper incentives to Company executives in change of control situations
- E. Review material agreements for provisions triggered by a change of control of the Company and any other provisions that affect the Company's flexibility in responding to acquisition proposals

- V. Consider Additional Advance Preparation
  - A. Advance preparation of earnings projections and strategic plans (both base case and reflecting potential strategic alternatives) for use in the evaluation of acquisition proposals, activist proposals and alternative transactions
- VI. Preparation of the Board to Deal with Potential Acquisition Proposals or Contacts by Activists
  - A. Schedule periodic Board discussions of the strategic direction of the Company, including the merits of proceeding on a stand-alone basis, pursuing acquisitions, divestitures or strategic business combinations, or engaging in other extraordinary transactions
  - B. Utilize strategic direction discussions as an opportunity for the Board and CEO to ensure that they share a common understanding regarding strategic vision for the Company, given the possible need to communicate such vision to a potential acquirer or an activist stockholder without prior notice
  - C. Schedule annual presentations by outside counsel to familiarize directors with their fiduciary duties and other applicable legal considerations in the context of mergers and acquisitions to foster a relationship with outside counsel
  - D. Schedule annual presentations by financial advisors to familiarize directors with the financial and strategic opportunities available to the Company and to develop a rapport with the financial advisors
  - E. Directors to guard against subversion by potential acquirers or activist stockholders and refer all approaches to the CEO
- VII. Preparation of CEO to Deal with Acquisition Proposals or Contacts by Activists
  - A. As noted above, CEO should be the sole spokesperson for the Company on acquisition proposals and strategic transactions
    - 1. If appropriate, consider retaining an expert in media training to assist CEO
  - B. Handling casual passes/non-public bear hugs
  - C. Handling public offers/public bear hugs
  - D. Handling contacts by activist stockholders
  - E. CEO communications with the Company officers and members of the Board
  - F. The Company should establish policy of not commenting on takeover discussions and rumors

## **Responding to Activity by Potential Acquirers or Activist Stockholder**

- I. Types of Activity
  - A. Accumulation in the market
  - B. Casual pass/non-public bear hug
  - C. Public offer/public bear hug, which may be accompanied by (a) tender/exchange offer and/or (b) proxy contest
  - D. Contact by activist stockholder, which may be accompanied by actual or threatened proxy contest relating to (a) election of directors and/or (b) stockholder resolution regarding action that activist stockholder wants the Company to take
- II. Initial Responses to Accumulation in the Market
  - A. Monitor trading
  - B. Monitor Schedule 13D, Schedule 13G and HSR filings:
    1. Schedule 13D: must be filed within 10 days of crossing 5% threshold (but can file voluntarily at any time)
    2. Schedule 13G: must be filed within 45 days of the end of the calendar year in which the qualified institutional investor exceeds the 5% threshold. Going forward, amendments are required on an annual basis. Amendments are also required within 10 days after the end of a month in which beneficial ownership exceeds 10% or more and within 10 days after the end of a month when ownership increases or decreases by at least 5%
      - Note: A person who has filed on Schedule 13G must file a statement on Schedule 13D within 10 days if the person (a) has acquired or holds the securities with a purpose or effect of changing or influencing control of the company, or in connection with or as a participant in any transaction having that purpose or effect; and (b) is at that time the beneficial owner of more than five percent of a class of equity securities of the company
    3. HSR filing: required prior to acquiring in excess of \$63.4 million in stock
      - Note: Consider, in context of possible derivative arrangements (*e.g.*, equity swaps), (a) reviewing descriptive disclosure in Item 6 of any filed Schedule 13D and (b) litigation against potential acquirer for failure to adequately disclose ownership
  - C. Monitor instability in the market and change in stockholder profile

### III. Initial Responses to Casual Passes/Non-Public Bear Hugs

- A. If oral dialogue, keep discussion limited and in conformity with strategic vision discussed with the Board. There is no "one size fits all" response; rather, the response is dictated by facts and circumstances. If written communication, response will likely be in the form of a letter
  - 1. Keep in mind Regulation FD issues and applicability to such discussion (*i.e.*, need to avoid selective disclosure of confidential information)
- B. Inform Proposal Response Team and convene meeting
  - 1. Response to any particular approach/proposal should be developed within context of periodic discussions of strategic direction of the Company with the Board; Proposal Response Team should confer to decide on proper response and recommendation to the Board
- C. Consider any need for public disclosure
- D. Review the stock watch
- E. Evaluate activist, proposal and proposed response
  - 1. Gather all publicly available information regarding identity, stock ownership and track record of activist as well as other shareholders with which it typically invests or acts as a "group;" consider potential for "wolf pack" (*i.e.*, parallel trading and group activity)
  - 2. Review Schedule 13D (if applicable) and other public filings by activist and other stockholders; consider issues associated with compliance with regulatory requirements, including whether activist is part of an undisclosed "group" or has failed to disclose derivative position in Company's stock
  - 3. Evaluate merits of activist's suggestions versus the Company's plan and other alternatives
  - 4. Assess activist's strategy and tactics, including likelihood and timing of activist making a public proposal, pursuing possible proxy contest to replace members of Board or seek adoption of other proposal, and/or launching tender offer for Company
  - 5. Company management and financial advisors assess terms of proposal in comparison to (a) Company's operating and strategic plan, and (b) alternative transactions or measures, including remaining independent, strategic options (*e.g.*, alliances/strategic investments, divestitures/spin-offs, joint ventures or business combinations), financial options (*e.g.*, share buyback, dividend)

- 6. Proposal Response Team to determine recommended initial response to activist. Will likely involve seeking time for Board to consider proposal and alternatives.
- F. Consider appropriateness of special meeting of the Board or CEO contacting individual directors
    - 1. Determine what type of initial communication to Board can and should be made prior to any response—oral, written, meeting—recognizing that any substantive response should await Board review
  - G. Consider the need/advisability to enter into a confidentiality/standstill agreement
  - H. Consider lawsuit against potential acquirer for any violations of SEC rules, HSR and other applicable laws in connection with potential acquirer's proposal
- IV. Initial Responses to Public Offer/Public Bear Hug
- A. Inform Proposal Response Team and convene meeting
    - 1. Proposal Response Team to consider whether or not to issue a "Stop, Look and Listen" communication (if offer is made by means of tender/exchange offer) or similar press release advising stockholders to take no action with respect to offer until the Board has had an opportunity to review the offer and the stockholders have had the opportunity to consider the Board's view with respect to the offer
  - B. Review the stock watch
  - C. Evaluate potential acquirer, proposal and proposed response
    - 1. See Item III.E. above
  - D. Call special meeting of the Board to discuss offer
  - E. Consider suggesting to the Board that it should consider establishing a committee to deal with the proposal, either for efficiency purposes or to deal with conflicts, if any
  - F. Consider the need/advisability to enter into a confidentiality/standstill agreement
  - G. Prepare preliminary statement of the Company for consideration by the Board
  - H. Determine whether to recommend a meeting with potential acquirer
    - 1. If meeting is held, keep in mind Regulation FD issues and applicability to such discussion (*i.e.*, need to avoid selective disclosure of confidential information)

- I. Special meeting of the Board to consider offer
  1. The Board receives presentations from outside counsel, financial advisors and the Company management and, if appropriate, opinion of financial advisor regarding offer
  2. The Board considers appropriate action in light of, among other things:
    - (a) The Board's fiduciary duties to the Company's stockholders
    - (b) The Company's stand-alone strategic and financial plan (projections, new products/technology, undervalued assets, etc.)
    - (c) Analysis of the strategic and financial prospects of the potential acquirer as well as the combined company
    - (d) Strategic alternatives available to the Company, both involving the Company as a stand-alone entity (recapitalizations, special dividend, etc.) and involving third party strategic partners (joint ventures, business combinations, etc.)
    - (e) Valuation analyses prepared by financial advisors and management both of the Company and the potential acquirer
    - (f) Regulatory and other legal considerations in connection with the offer, risk of non-consummation, etc.
  3. If proposal is in the form of tender offer, the Board adopts resolutions regarding matters such as the filing of the Schedule 14D-9 and maintaining confidentiality of any discussions with third parties in which the Company may engage
- J. The Company issues press release and/or mails letter to stockholders to communicate determination of the Board, if appropriate
- K. If a tender/exchange offer has been made, the Company must prepare and file with the SEC its Schedule 14D-9 within *10 business days* of commencement of the offer
  1. Filed with SEC and provided to offeror
  2. Need to notify the Stock Exchange
  3. States the Company's recommendation to stockholders with respect to offer: the Company may recommend "for" or "against" the offer, state that it is remaining neutral with respect to the offer or state that it is unable to take a position on the offer

- L. Commence preparation of proxy statement/supplemental proxy materials in the event of a proxy contest
  - M. Launch communications plan
  - N. Consider lawsuit against potential acquirer for any violations of SEC rules, HSR and other applicable laws in connection with potential acquirer's proposal
- V. Initial Responses to Contacts by Activist Stockholders
- A. Inform Proposal Response Team of the contact and the terms of the inquiry/proposal
  - B. Consider any need for public disclosure
  - C. Review the stock watch
  - D. Evaluate potential acquirer, proposal and proposed response
    - 1. See Item III.E. above
  - E. Consider appropriateness of calling special meeting of the Board or CEO contacting individual directors
  - F. Commence preparation of substantive response and materials that should be presented to the Board in light of the Company's strategic vision
    - 1. If the proposals being put forth by the activist stockholder have been studied by management and reviewed with the Board, are there factors that would change the "answer" previously determined?
  - G. Consider form of response to activist stockholder
    - 1. Weigh advantages/disadvantages of reviewing matters in-depth with stockholder
    - 2. If stockholder has asked for a meeting, consider pros and cons of scheduling such a meeting
    - 3. Consider Regulation FD issues and applicability to communications with activist stockholders (*i.e.*, need to avoid selective disclosure of confidential information)
  - H. Consider the need/advisability to enter into a confidentiality/standstill agreement
  - I. Consider need to "get the word out" on whether or not the approach has been made public. Relevant factors may include trading patterns in the Company stock, "wolf pack" issues, likelihood of proxy contest, etc.

- J. Proposal Response Team should assess stockholder's long term strategy, including the prospect and timing of a proxy contest to replace members of the Board
- K. Consider lawsuit against potential acquirer for any violations of SEC rules, HSR and other applicable laws in connection with potential acquirer's proposal
- L. Consider necessity of further Board review or action