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COVID-19: Revisiting Shareholder Rights Plans

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Impact of COVID-19

- The turmoil in US equity markets created by the COVID-19 pandemic has resulted in many companies facing depressed stock prices, leaving them vulnerable to unsolicited acquisition proposals or activist activity, which has led to heightened interest in Rights Plans by many of our clients.
- Accordingly, the following slides provide a high-level overview of the advantages, disadvantages, prevalence and operation of Rights Plans.
- Although we think it is unlikely that the COVID-19 pandemic will lead to immediate widespread adoption of Rights Plans, we believe that, in this environment, it is advisable for company boards to put a Rights Plan “on the shelf” so that it can be quickly adopted and implemented if and when a threat emerges.



Overview of Rights Plans

- Validity is well established
 - Thousands of publicly traded companies have adopted Rights Plans and use has been upheld
- Advantages of Rights Plans
 - Gives Board time and leverage to negotiate and pursue standalone plan if determined as preferable
 - Typically does not require shareholder approval
- Disadvantages of Rights Plans
 - ISS, Glass Lewis and many institutional investors oppose adoption of Rights Plans unless approved by shareholder vote
 - ISS and Glass Lewis generally will recommend a vote against all director nominees (except new nominees) if a company has a Rights Plan with a term of more than one year that was not approved by shareholders or if a Rights Plan with a term of less than one year is adopted without adequate justification
- Rights Plans **DO NOT**
 - Prevent a company from becoming subject to a bid
 - Prevent a company from ultimately being taken over by a determined buyer willing to pay an adequate premium
 - Relieve directors of their fiduciary duties (care and loyalty)

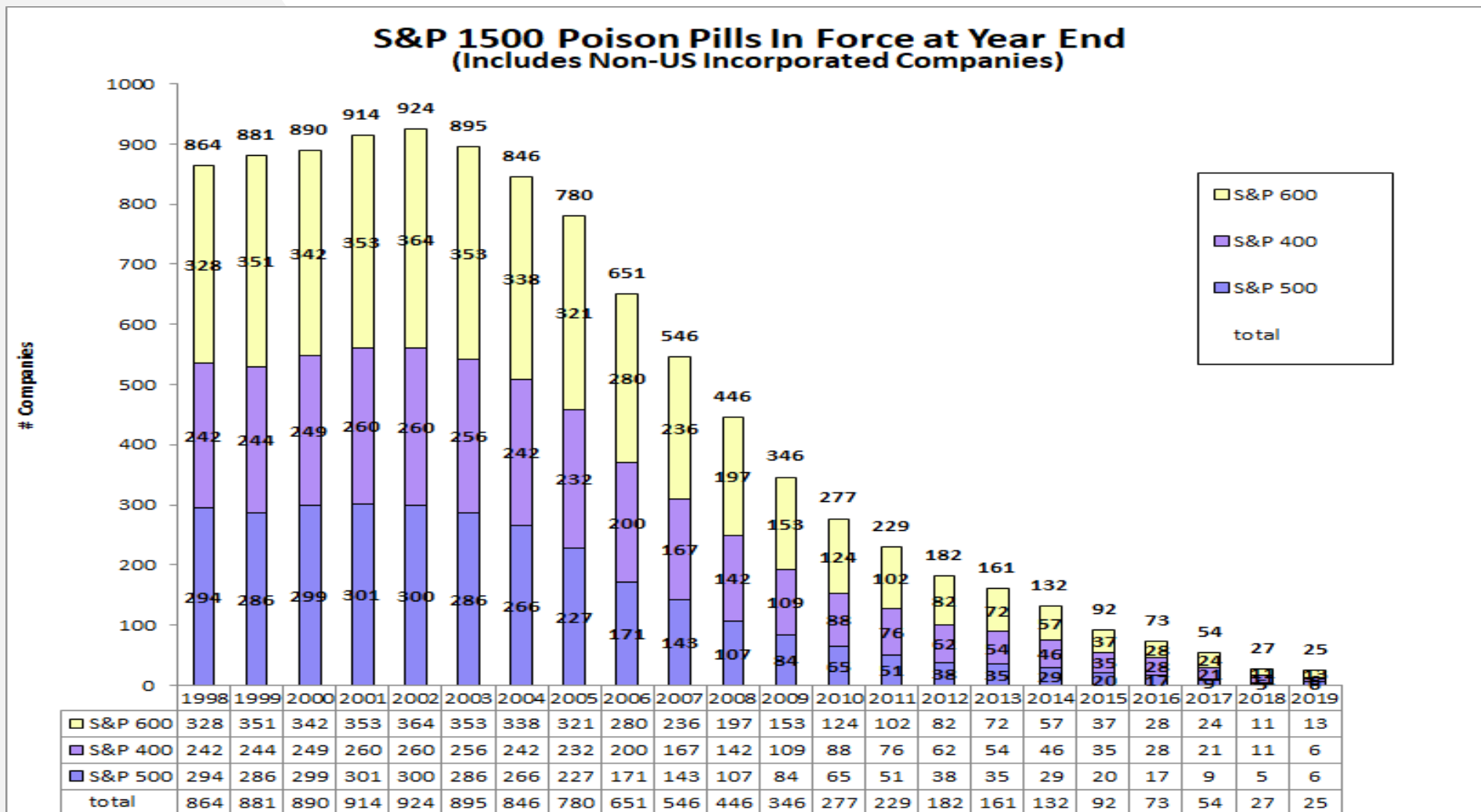


Standard of Judicial Review for Delaware Corporations

- Courts generally apply “enhanced scrutiny” in reviewing the adoption of defensive measures
- Under “enhanced scrutiny,” Board must show:
 - it had reasonable grounds for believing that a danger to corporate policy and effectiveness existed; and
 - the defensive measure adopted was reasonable in relation to the threat posed
- If Board meets both prongs of “enhanced scrutiny” standard, the Board’s actions will be protected under the business judgment rule
- Courts will still scrutinize the use of defensive tactics – both when initially adopted and at subsequent times when the Board could remove them to let a transaction proceed



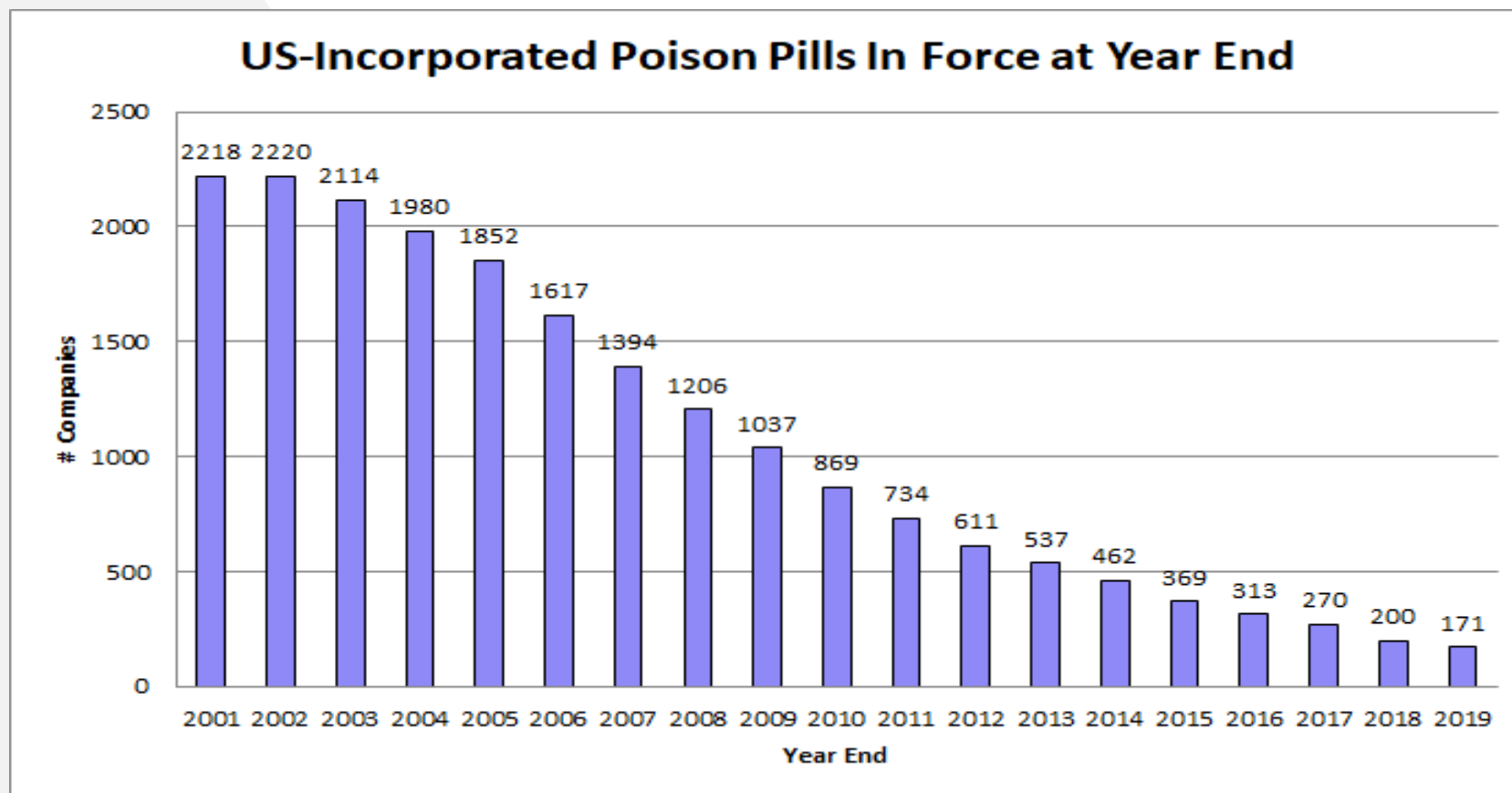
Prevalence of Rights Plans in S&P 1500 Companies



Source: FactSet TrueCourse, Inc.

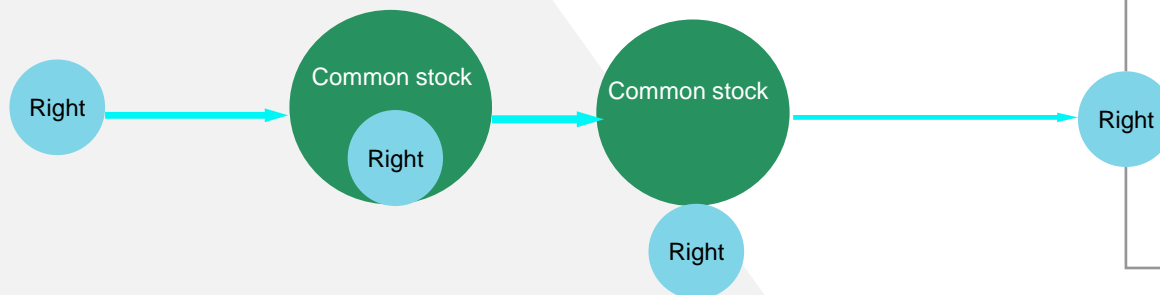


Prevalence of Rights Plans in US- Incorporated Companies





Operation of a Typical Rights Plan



Flip-In Event:

- In a Flip-in Event, Rights give company shareholders, other than the Acquiring Person, the right to purchase stock in the company at half price, resulting in substantial dilution to the Acquiring Person
- After the occurrence of a Flip-In Event, the Board may exchange the Rights, other than Rights owned by the Acquiring Person, for company stock, resulting in substantial dilution to the Acquiring Person without the payment of the exercise price by company shareholders

Flip-Over Event: If a Flip-Over Event occurs, unexercised Rights give company shareholders, other than the Acquiring Person, the right to purchase stock of the Acquiring Person at half price, resulting in substantial dilution to the Acquiring Person's shareholders

DIVIDEND DECLARED

- One Right for each share of common stock
- Record date usually 10 days later

RIGHTS ATTACHED TO COMMON STOCK

- Rights trade together with common stock
- Rights not exercisable
- Rights expire at future date, subject to earlier redemption by Board

DISTRIBUTION EVENT

- Public announcement that an Acquiring Person has acquired a 15% or greater ownership interest in the company
- Commencement of a tender offer for at least 15% of the company's common stock

DISTRIBUTION DATE

- Rights to purchase preferred stock separate from common stock and trade on stock exchange (generally, significantly out-of-the-money unless Triggering Event occurs)
- Distribution Date generally occurs 10 days after the earlier to occur of either of the Distribution Events
- Generally, Distribution Date may be extended by the Board

TRIGGERING EVENTS

- **Flip-In Event:** The Acquiring Person acquires a 15% or greater ownership interest in the company, resulting in Rights becoming immediately exercisable, other than by the Acquiring Person
- **Flip-Over Event:** After an Acquiring Person has acquired a 15% or greater ownership interest in the company, the company (i) merges or consolidates with any other person and is not the surviving entity, (ii) is acquired by any other person through a merger or consolidation, or (iii) sells 50% or more of its assets or earnings power to another person



WilmerHale's COVID-19 Task Force

WilmerHale has assembled a cross-disciplinary task force of legal authorities across the wide array of disciplines implicated by the outbreak of COVID-19. Our task force is led by Alejandro (“Ali”) Mayorkas, a former Deputy Secretary of the US Department of Homeland Security, who was responsible for the Department’s response to the international Zika and Ebola outbreaks. In that role, the Federal Emergency Management Agency, Customs and Border Protection, the Transportation Security Administration and 19 other agencies and offices in the third-largest department in the federal government reported to Ali.

Our COVID-19 Task Force has:

- Assembled a team of lawyers dedicated to tracking and analyzing fast-moving legal developments.
- Provided dozens of alerts and webinars to help clients navigate the multiple, intersecting legal issues being driven by this rapidly-moving crisis, all of which can be found at <https://www.wilmerhale.com/en/insights/topic-centers/coronavirus-covid19-center>.
- Advised numerous clients across a wide range of industries and locations in developing legal and operational plans and protocols, draft foundational documents and agreements, engage in planning for scenarios that could arise with the spread of the pandemic, run tabletop exercises and work with local, state and federal regulators to ensure seamless communication and cooperation when appropriate.
- Prepared attorney work product on legal issues, including federal and state preemption of local executive orders, the use of personal respirators and other personal protective equipment in the workplace.
- Compiled an organized compendium of federal, state, county and local executive orders and related guidance, including Shelter-in-Place Orders and anti-eviction orders.



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