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Delaware Court’s Injunction of “Extreme” Poison Pill Unlikely to Affect Typical Market Practice

In [*The Williams Companies Stockholder Litigation*](#), the Delaware Court of Chancery enjoined a shareholder rights plan adopted by The Williams Companies at the outset of the COVID-19 pandemic. This “poison pill” had a package of novel features, including a 5% trigger (albeit with a passive investor carve-out) and an “acting in concert” provision that extended to “parallel conduct” between different investors, which together constituted “a more extreme combination of features than any pill previously evaluated” in Delaware.

The court, in an opinion by Vice Chancellor McCormick, found that two of the board’s three objectives in approving the rights plan—namely, to prevent shareholder activism and protect against potential “short-termism” generally without any specific threat—were not legally permissible rationales to adopt a rights plan. The board’s third objective—preventing rapid and undisclosed accumulation of shares by activists—was assumed to be permissible under Delaware law, but was found not to justify the highly unusual features included in this particular pill. All that said, the court was clear that the concerns boards typically identify when adopting an activist defense pill—the potential for creeping control from share accumulations and the potential for negative control from an activist hedge fund having a level of share ownership that could give it outsized influence over the company’s decision-making—remain legitimate justifications for adopting a pill, especially when faced with evidence of accumulation.

While it is very rare for Delaware courts to enjoin a rights plan, this decision is likely to have very little, if any, effect on market practice or on the ability of Delaware companies to use rights plans to protect themselves from inappropriate and excessive accumulations of shares by activist hedge funds. Pills with 5% triggers are almost unheard of except where companies are protecting tax attributes, and the Williams pill’s “conscious parallelism” concept that grouped the shareholdings of different investors together for pill threshold purposes—as opposed to requiring that the investors have an agreement, arrangement or understanding—is also exceedingly rare.

Companies that have adopted rights plans or have “on the shelf” pills should evaluate their rights agreement to determine whether any changes are required in light of this decision, though this is unlikely to be the case.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Scott A. Barshay
+1-212-373-3040

sbarshay@paulweiss.com

Rachael G. Coffey
+1-212-373-3982

rcoffey@paulweiss.com

Jaren Janghorbani
+1-212-373-3211

jjanghorbani@paulweiss.com

Robert B. Schumer
+1 212-373-3097

rschumer@paulweiss.com

Krishna Veeraraghavan
+1 212-373-3661

kveeraraghavan@paulweiss.com

Steven J. Williams
+1-212-373-3257

swilliams@paulweiss.com

Counsel Frances F. Mi and Jason S. Tyler and legal consultant Cara G. Fay contributed to this memorandum.

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