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Winning Without A Fight:
Steps For Activist Shareholders To Change Management

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Introduction

On March 29th, 2007, three hedge funds and a mutual fund, each a significant stockholder of Take-Two Interactive Software, Inc., attended the annual stockholders meeting of Take-Two and effected a change in control of the board of directors. The four stockholders' dissatisfaction with management had stirred them into action long before the March 29th meeting. ZelnickMedia Corporation, a partnership of experienced and well-regarded media industry executives led by Strauss Zelnick, had approached the four stockholders individually to interest them in a slate of insurgent directors proposed by ZelnickMedia and a plan that ZelnickMedia representatives play a major management role if the insurgent directors were elected. Before any decision had been reached by the four stockholders to go forward, Take-Two announced that it had scheduled for March 23rd, 2007 its first annual stockholders meeting in approximately 22 months, and that it had set the record date for the annual meeting as February 26th. After learning of the stockholders' plan, Take-Two later postponed the meeting until March 29th, citing a need to explore alternatives to the stockholders' plan, including a potential sale of the company. At the March 29th meeting, and without having engaged in a proxy contest, that group of four stockholders elected their slate of insurgent directors instead of existing management's proposed slate, even though the vote was not deemed a proxy contest and many automatically cast votes were already tallied for management's slate. The board of directors of a major public corporation was replaced without having to solicit proxies from its stockholders. This article sets forth various legal issues which the group of stockholders faced. It is a template for activist shareholders to replace management of underperforming companies.

Characteristics of the Target Company

The methods used by the group in the Take-Two matter require the target company to have the following four characteristics:

- Concentration of ownership - The proxy rules limit to not more than ten the number of persons who can be solicited without filing a proxy statement. Absent a concentration of ownership, the ten-person limitation will make it impossible to garner the needed votes.

- Dissatisfied stockholders - Soliciting ten stockholders who are satisfied with management will not result in the election of a new slate of directors. Large holders must be sufficiently discontent with current management to be highly motivated toward change.

- By-laws - The by-laws must be carefully reviewed to determine any impediment to taking action by consent or at the annual meeting. Many public companies require that stockholders supply the target company with the names of director nominees a designated number of days before the annual meeting for those nominees to be eligible for election. If the target company by-laws contain such a provision, they may be drafted to apply only to annual meetings and not to stockholder consents. Mechanics and timing of action must be adjusted to the particular by-laws. In addition, if the group is to attempt to elect directors by written consent (as distinguished from soliciting votes to be cast at the annual meeting called by management or in a proxy contest), the target company's by-laws must permit stockholders to act by consent of holders of a majority or some percentage of the company's outstanding stock.

- No Poison Pill - The existence of a shareholders' rights plan or other automatic poison pill device that operates by mere formation of a "group" for voting of a new slate of directors can make an insurgent change difficult or impossible. Various strategies can be employed to force incumbent directors to take whatever actions are available to allow insurgent action, but the existence and operation of a shareholder rights plan must be carefully studied in each case.

The Written Consent Route

The Proxy Rules

The SEC's proxy rules, contained in Regulation 14A, require that stockholders receive a proxy statement before their votes are solicited, absent an exemption. One exemption is Rule 14a-2(b)(2). That rule permits persons other than target company management to solicit ten or fewer persons without delivering a proxy statement. Two principal concerns should be considered when determining whether or not the ten person limit is reached. The first concern is whether or not the person approached was "solicited," as defined in Rule 14a-1(l). If one stockholder says to a second stockholder, "I'd like to talk to you about the target company, are you willing to discuss the matter?" a negative response by the second stockholder would mean that stockholder was not solicited and therefore would not be counted toward the ten. However, if the second stockholder engaged in discussion, even if that second stockholder elected not to act with the first stockholder, that second stockholder would count toward the ten persons the first stockholder can solicit under the exemption. The second concern is the need to be cautious when soliciting a stockholder which holds target company stock in more than one pocket. For instance, if a fund has three sets of managers who make decisions on voting or disposition of various portions of the fund's portfolio, a solicitation of the fund might well count as three persons being solicited rather than one, even though the solicitation consisted of one inquiry by a group member to one fund.

The ten-person exemption does not mean that all of the proxy rules are inapplicable. The anti-fraud provisions of Rule 14a-9 continue to apply. First, one obviously cannot misrepresent or omit a material fact when soliciting the vote of another person. Second, Rule 14a-9 provides that statements made prior to a stockholder meeting regarding the results of a solicitation may be misleading for purposes of that rule, depending on the facts and circumstances. In a typical proxy contest (and a typical proxy solicitation, whether or not there is a contest), one cannot predict the outcome with any justifiable confidence and it follows that the SEC places limits on predictions in Rule 14a-9. Where a group forms and the group members own a majority of the stock and contractually are bound to vote for an insurgent slate, Rule 14a-9 is inapplicable as a matter of logic, although not inapplicable on the face of the rule. A court should not find a Rule 14a-9 violation when a group that contractually is bound to vote a majority of the shares for a slate of candidates approaches other persons (of course, within the ten-person limit) to join with them and increase the number of votes obtained.

A more subtle point arises when a group member has lent shares to a third party on the record date or the date of the consent. Pursuant to the terms of a typical lending arrangement, the borrower (not the lender) of the shares has the right to vote the shares. The lender should be able to solicit the vote of the borrower of the shares without that solicitation counting as an additional person solicited under the ten-person rule. Rule 14a-2(a)(2) exempts solicitations by a person in respect of securities of which he is the beneficial owner. The SEC Division of Corporation Finance Manual of Publicly Available Telephone Interpretations

provides, "If title to securities is transferred by the transfer agent after the record date, but securities were purchased and paid for prior to such date, efforts by the purchaser to obtain proxies from the seller will be deemed an exempt solicitation under [the rule], and will not count toward the ten-person limitation." While the SEC Telephone Interpretations do not address the fact pattern of lending shares, it is sufficiently analogous to suggest that the lender requesting a proxy from the borrower should not increase the number of persons solicited.

The proxy rules also affect whether the group can approach ISS or any other organization that makes voting recommendations to institutional investors. Approaching ISS and others is important since many institutions are guided in their voting by the ISS recommendation. However, approaching ISS may be construed to be an indirect solicitation of institutional investors, thereby causing the group to lose the ten-person proxy rule exemption. One theoretical solution is to file a preliminary proxy statement with the SEC (without ever filing a definitive proxy statement). Filing the preliminary proxy statement gives the group the ability to approach ISS if the group does not give ISS a proxy. However, filing a preliminary proxy statement may not be advisable. First, the target company can attack the preliminary proxy statement's accuracy. This gives the target company an opportunity to challenge and delay the group. Second, the SEC may object to the filing of a preliminary proxy statement without the filing of a definitive proxy statement. Third, the preliminary proxy statement would have to disclose two years of trading in the target company's stock by the person filing the preliminary proxy and by its associates (persons in which the filing person owns 10%). Such a disclosure could contain sensitive and proprietary information.

Section 13(d)

Section 13(d) and the rules promulgated thereunder require persons to file a Schedule 13D if they own more than five percent of the outstanding stock of a public company and intend to influence control or management of the target company. Persons which are either institutional investors which do not have an intention to influence the target company's control or management or passive investors can file a shortened form Schedule 13G in lieu of the more detailed Schedule 13D. Once a qualified institutional investor seeks to influence control or management, or once a passive investor ceases to be passive, then that investor must convert from a Schedule 13G to a Schedule 13D.

Converting from a Schedule 13G to a Schedule 13D has two consequences. First, the reporting person must file a Schedule 13D, requiring far more extensive disclosure about the stockholder and its directors and officers. Second, and more importantly in the context of the director election, upon converting from a Schedule 13G to Schedule 13D, Rule 13d-1(e)(2) prohibits the reporting person, during the ten-day period following the filing of the Schedule 13D, from voting its shares or acquiring any additional shares of the target company. This ten day freeze is important to the timing of director removal.

Another Section 13(d) issue is that investors which agree to act together with respect to voting or disposition of securities of the target (e.g., by signing the Investor Agreement described below) will form a "group" at that time. Rule 13d-5(b)(1) provides that persons become a "group" when they agree to act in concert for the purpose of acquiring, selling, voting or holding the target company's voting securities. That group is a Section 13(d) reporting person and must file a Schedule 13D. Precisely when the group agrees to act in concert is intensely factual. It is wise to have a defining moment, or a "hook," that signifies the formation of the group at a given time. It is not adequate to arbitrarily designate a given time as the moment of formation of the group. Rather, the persons which comprise the group should have a meeting (preferably in person but by telephone is acceptable) and explicitly agree to act in concert at that meeting or on that call. Until that point, the group should identify a disagreement among the parties as to a material term. The material term should be such that the group would not have an agreement to act in concert unless the dispute as to that term is resolved. Before the group is formed, it is advisable to end each meeting and call in which two or more prospective group members participate by specifically confirming that they have no agreement to act together and disavowing that they have formed a group.

Another practical concern is how information is disseminated. Each time a prospective group member wants to communicate with other persons which will potentially form the group, it is advisable to send a separate email or letter to each person rather than to have a distribution addressed to all parties. In addition, each person which will become a group member should be represented by separate counsel rather than having all potential group members represented by the same counsel. The potential group members should not be acting like a group for any purpose prior to agreeing to be a "group" for Section 13 purposes.

A 1998 SEC Release makes clear that passive recipients of soliciting activities which grant a revocable proxy to any group member (and, by analogy, those which deliver consents) are not deemed to be group members.

The Schedule 13D that is filed could, but it should not be, construed as a proxy solicitation. To reduce the chances the Schedule 13D (or the consents, as discussed below) would constitute a solicitation, each should contain a legend noting that it is not a solicitation of any action. Something like the following should help:

NEITHER THE INVESTOR AGREEMENT NOR THIS [SCHEDULE 13D][CONSENT] IS A SOLICITATION AND NO STOCKHOLDER OF [TARGET COMPANY] IS REQUESTED TO JOIN THE INVESTOR AGREEMENT [OR THIS CONSENT]. THE REPORTING PERSONS ARE NOT HEREBY SOLICITING, AND DO NOT INTEND TO SOLICIT, ANY STOCKHOLDER TO VOTE, WITHHOLD A VOTE, GRANT A PROXY WITH REGARD TO, OR IN ANY OTHER WAY TAKE ACTION WITH REGARD TO THE ELECTION OF DIRECTORS OR ANY OTHER MATTER TO BE VOTED UPON [AS DESCRIBED IN THIS SCHEDULE 13D][IN THIS CONSENT]. THE REPORTING PERSONS WILL NOT ACCEPT PROXIES FROM ANY STOCKHOLDER IN CONNECTION WITH THE ACTIONS CONTEMPLATED BY THE INVESTOR AGREEMENT OR THIS [SCHEDULE 13D][CONSENT].

Collecting data for a Schedule 13D can be quite time consuming. The two most cumbersome items are the last 60 days' trading history of each group member (which the SEC insists must include stock lending and stock borrowing) pursuant to Item 5(c) of Schedule 13D, and the information about officers, directors, and controlling persons of each group member as required by Instruction C of Schedule 13D.

After the initial 13D is filed, the group members should amend the Schedule 13D whenever a material event occurs, including a change in the group's ownership of one percent or greater of the target's stock. In addition, after the group's slate is elected, the group should file an exit Schedule 13D describing the election results and stating that the individual members no longer intend to be, and shall no longer be deemed, a group for any purposes, including under the federal securities laws. The former group members would then file their individual Schedule 13D or Schedule 13G, as applicable.

Form 3

Under Section 16(a), each person which becomes a more than ten percent beneficial owner must file a Form 3. Those group members which already are more than ten percent beneficial owners would not have the obligation to file a Form 3. Rule 16a-1(a)(1) provides that solely for the purpose of determining whether a person is a more than ten percent beneficial owner under Section 16(a), "beneficial owner" means any person deemed a beneficial owner pursuant to Section 13(d). Because each group member is deemed to beneficially own all the shares of the other group members under Rule 13d-3, and assuming the group in the aggregate owns more than ten percent of the stock, each group member which was not already a more than ten percent holder before the formation of the group would have to file a Form 3 within 10 days after the group was formed. The group as such would not have to file a Form 3. Any change in any group member's ownership of target shares thereafter will require a Form 4 filing.

Investors Agreement

When the group has reached the conclusion that it wants to act in concert, the group members should enter into an Investors Agreement. The Investors Agreement should contain the following principal terms:

- A representation as to how many shares each group member has a right to vote;
- A covenant that each group member will not sell, transfer, or otherwise dispose of its shares or encumber in any way its right to vote its shares;
- An agreement as to how shares will be voted;
- An agreement as to how expenses should be allocated; it is likely counsel to one of the group members will bear a disproportionately large share of the burden of producing documents, and the group members may wish to have the expenses of that counsel shared among the group members;
- An agreement on future cooperation, including supplying information for the Schedule 13D and any amendments thereto;
- An agreement to take all actions necessary to be positioned to vote shares, at a meeting or by written consent;
- A representation that the information to be supplied in the Schedule 13D or other documents by each group member is accurate, and indemnification with respect to that representation;
- A termination provision which allows a reasonable amount of time for the group to tender its written consents to the target company's secretary and to otherwise see the proposed actions to completion; and
- An agreement that public announcements by the parties should be prohibited without mutual consent.

Delaware Consent Issues

Delaware law controls the validity of the written consent. A stockholder must hold its shares in certificate form (rather than book entry form, as is common practice for funds and other institutional investors) on the date the stockholder executes a written consent for the stockholder's consent to

be effective. The group must allot themselves at least several days to complete of the process of getting their shares certificated.

Generally, written consents are effective only if holders of a majority of stock consent to them. Under Section 228(c) of the Delaware General Corporation Law, stockholders have 60 days from the first day a consent is filed to complete the consent process. Therefore, the group could file consents for less than all the shares on day one and try to induce other stockholders (within the proxy rules 10-person limitation) during the ensuing 59 days to file consents to reach a majority vote.

An interesting question is whether or not a group member must hold its shares once it has delivered its written consent to the target company. The general view is that the group member can sell its shares once its consent is delivered. Even so, to avoid any dispute, it is wise to provide in the Investors Agreement that group members (until the termination date) should not be able to sell their shares or encumber their vote until consents representing a majority of the outstanding shares have been delivered. Apart from any possible dispute, a court is more likely to view a consent solicitation sympathetically, should the target company attack it, if the stockholders continue to own their stock.

Rule 14f-1

Rule 14f-1 provides that if persons which filed a Schedule 13D are to elect a majority of the directors other than at a stockholders meeting, the issuer must distribute a mini-proxy statement (a Schedule 14f-1) ten days prior to the majority of the directors taking office. The rule does not prohibit electing directors in two steps. For instance, Rule 14f-1 does not bar the group members from signing a consent, which immediately places one nominee on the board and, after the Rule 14f-1 ten-day period has expired, replaces the remainder of the incumbent directors with the remainder of the new slate of nominees.

The obligation to distribute the Schedule 14f-1 resides with the target company. The group should deliver to the target company with its written consent a suggested form of Schedule 14f-1. The Schedule 14f-1 would be based on public information the target company disseminated plus information about the group's slate of nominees. The consent would instruct the target company promptly to distribute the Schedule 14f-1 and also to correct any errors in the Schedule 14f-1 of which the target company has knowledge.

Since the target company has the obligation to file with the SEC and distribute to its stockholders the Schedule 14f-1, should the target company within a reasonable time (e.g., three days after the consents became effective) not distribute the Schedule 14f-1, the group nevertheless could install a majority of the board pursuant to its rights under Delaware law.

The group would have no Section 14(c) obligation as Section 14(c) applies only to the target company.

Timeline with 13D/G and 14f-1 waiting periods

Day	Action
1	Group members currently filing Schedule 13Gs convert to Schedule 13Ds
11	Group submits first consent (by-laws are amended)
11	Group submits second consent (one incumbent director is replaced by one insurgent director effective immediately and remainder of incumbent directors are removed and replaced with remainder of insurgent slate effective on the earlier of 10 days after Schedule 14f-1 is mailed and Day 24)
14	*Target company mails Schedule 14f-1
24	Second consent becomes fully effective (full slate of insurgent directors takes office)

*The target company should be allowed a certain number of days to update, complete, file and mail the Schedule 14f-1; this timeline assumes three days are allotted.

The Consents Themselves

Two consents probably are needed. The first consent, signed by holders of a majority of the stock should be delivered to the corporate secretary before the second consent of any stockholder is delivered.

The first consent should modify the most recent publicly-filed version of the by-laws to ensure that the incumbents have not changed the by-laws and, as explained below, cannot change the by-laws, until the election, and with the consent, of at one of the insurgent directors.

The group should focus on at least three points in the by-laws on file. First, it must be determined whether stockholders or the board or either of them can amend the by-laws. The group must be able to amend the by-laws in connection the first written consent to provide that the by-laws cannot be amended by the board until one of the insurgent directors is elected to the board and that when one

insurgent director (but not all of the insurgent directors) is elected, all actions of the board must be approved by the unanimous consent of all directors in office. This amendment prohibits the incumbent directors, between the time that the first consent is effected and the time when all of the insurgent directors are elected, from taking any actions that would obstruct the change in control.

Second, the by-laws should be amended if necessary to allow stockholders to determine the number of authorized directors on the board, or alternatively the by-laws should be amended to reflect the desired number of authorized directors. This is important because the stockholders must ensure there are no vacancies on the board during the period when only one insurgent director is seated which the remaining incumbent directors might fill to try to outnumber the insurgent slate once that slate is seated (depending on the number of insurgents on the slate).

Third, the by-laws might be amended to provide that stockholders by consent can call a directors' meeting. This is important if a majority of the incumbent directors (but not all the incumbent directors) are to be replaced. Without a directive from stockholders, the remaining incumbents could force a long delay (depending upon who can call a directors meeting under the by-laws and the amount of advance notice required under the by-laws) between the time the insurgent slate is seated and the time when the first directors meeting can be held and the insurgents can begin acting.

The second consent is more substantive. It provides for the following:

- The removal of at least one of the incumbent directors, if so desired;
- The addition of at least one insurgent director; care must be taken that the combination of removing incumbent directors, adding insurgent directors, and, according to one case, counting as part of the new slate those incumbent directors who agree to act with the insurgent directors, does not result in a change of a majority of the directors that would implicate Rule 14f-1;
- Fixes the number of directors to the number in office as a result of the removal of incumbents and the election of insurgents described above;
- The removal of all of the remaining incumbent directors (except, if desired, those who agree to act with the insurgent directors); the effective date of the removal would be approximately 13 days after the date the Section 13(d) 10-day freeze expires (this 13 day estimate contemplates three days or so that the target company should be allotted to correct the Schedule 14f-1 and file and mail it, plus the ten days Rule 14f-1 requires after mailing and before a change in the majority of the board takes place);
- The addition of the remainder of the insurgent slate, effective the same time the incumbent directors are removed (13 days);
- At the same time as the insurgent directors are added and the incumbent directors are removed (13 days), fixes the number of the directors under the by-laws to the number of directors who then would be in office;
- The recommendation to the directors that the target company reimburse the group for the group's out-of-pocket expenses;

Attaches the proposed Schedule 14f-1; although the group would file both consents as an exhibit to its Schedule 13D, it should withhold filing the Schedule 14f-1 as an attachment to the second consent until the second consents are ready to be delivered by holders of a majority of the stock (the purpose for the delay in filing the Schedule 14f-1 is to obviate any argument that the Schedule 14f-1, made public by the Schedule 13D, could be deemed a solicitation of consents from other stockholders in violation of the proxy rules); and

- Instructs the target company to correct any Schedule 14f-1 defects and promptly file it with the SEC and mail it to stockholders.

Each consent should contain the same legend provided above in the discussion of the Schedule 13D to minimize any claim that the filing of the consents as exhibits to the Schedule 13D constitutes a proxy solicitation.

First Board Meeting After Election of the New Slate

At the first board meeting after the new slate is seated, in addition to any other business the board wishes to conduct, the board should do the following:

- Amend the by-laws to reflect whatever changes are appropriate, including deleting the provision requiring unanimous director consent until the insurgent slate is elected;
- Approve reimbursement of the group's expenses;
- Populate the board committees;
- Appoint new officers; and

- Approve any arrangement made with officers being removed.

Form 8-K

As a result of the matters described above, the target company must file a Form 8-K with the SEC within four business days after the first consent becomes effective. The Form 8 K would file as exhibits the by-laws, as amended, and the first consent. The Form 8-K would discuss the contents of the second consent or, if received before the 8-K is filed, file as an exhibit the second consent. Any action subsequently taken at the first board meeting, to the extent falling within Form 8-K's items, also would be disclosed in the Form 8-K.

The Annual Meeting Route

As an alternative to the consent solicitation described above, the group members can attend in person or by proxy the annual stockholders meeting called by the target company and vote for the insurgent slate.

The annual meeting route (rather than consent route) has two advantages under Delaware law. First, proxies under Delaware law are presumed to be valid whereas written consents delivered in a consent solicitation bear no such presumption. Second, the number of shares the group members can vote at an annual meeting is determined on the record date and the number of shares as to which the group members can give consent is determined on the date of the consent.

Many of the issues we addressed in connection with the written consent apply equally to voting at an annual meeting. The issues surrounding the proxy rules, Section 13(d), and the necessity for filing a Schedule 13D and a Form 3 are equally applicable to a written consent and to voting at an annual meeting. However, Rule 14f-1 does not apply to voting at an annual meeting since that rule addresses changes of directors other than at annual meetings.

Voting Issues

A number of issues surround a vote at a meeting. As discussed above, when converting from a Schedule 13G to a Schedule 13D, a rule promulgated under Section 13(d) mandates a 10-day freeze upon voting and acquiring additional stock of the target company. While the shares should be able to be voted even if the record date falls within the 10-day freeze, it is better to avoid any uncertainty. Therefore, the prospective group members may wish to wait until the record date is announced, form the group, convert from a Schedule 13G to a Schedule 13D, and have the 10-day freeze run after the record date.

A proxy solicitor, which should be utilized by the group, should monitor for the group how the vote is shaping up by obtaining records of the votes cast by proxy and records of the shares moved out of book entry name and into the hands of stockholders in preparation for voting. This should be done daily as the meeting date approaches.

As to the form of ballot that should be employed by the group to vote for its insurgent slate, it is wise to take the ballot distributed by the target company at the annual meeting, scratch out the names of the incumbent directors, and replace them by handwriting the names of the insurgent directors. This method minimizes the possibility that the target company will object to the form of ballot. It also helps insulate the group from a proxy rules claim that the group was soliciting by preparing its own ballot, since no alternative ballot will have been prepared or disseminated. If the group prepared and delivered an alternative ballot, the proxy rules would prohibit the group from disseminating that ballot to other stockholders, and failing to disseminate a copy of that ballot to the other stockholders present at the meeting may call into question the validity of the vote under Delaware law.

Agreement with the Target Company

It is highly advantageous for the group to enter into an agreement with the target company governing the rules of the annual meeting. Depending upon the reaction of existing management and the relative strength of the group, such an agreement may or may not be achievable. Among the topics to possibly be agreed upon are the following:

— The purposes of the meeting;

— The agenda for the meeting;

— The identity of the Inspector of the election and the ability of the group, either directly or through the target company's secretary, to deliver documents to the Inspector;

— The chair of the meeting;

— The persons allowed to attend the meeting from the group's side; of course, employees of each group member and those who are listed on their respective proxies can attend as a matter of right, but it is wise to specify other persons who can attend, such as counsel, public relations consultants and the group's proxy solicitor;

— The persons who may move and second the nominations of the insurgent directors;

— The presumption that a quorum is present without a vote or other verification for purposes of conducting the meeting, subject to the final report of the Inspector;

— The opportunity of insurgent director candidates to speak at the meeting; care must be taken as to this opportunity to avoid violating the proxy rules;

— The form of ballot described above and also the form of proxies the group members will be delivering;

— The expediency with which the Inspector will conclude the results of the elections, facilitated by the target company;

— The appointment of the Inspector to maintain custody of all proxies and ballots until all disputes and challenges have been resolved;

— The ability of group members, after the delivery of the Inspector's report, to copy and examine the ballots and proxies submitted to the Inspector; and

— The opportunity for the group to deliver the consents after the vote is announced as described below if necessary; the target company's secretary should remain in the meeting room to receive the consents.

Activities On The Date Of The Meeting

On the date of the meeting, the insurgents should have two rooms adjacent to the meeting room. The first room should be for all of the members of the group, their proxy solicitor, public relations consultants and respective counsel. In another room, a representative of the group's proxy solicitor and a lawyer for the group should be in attendance. The purpose of this additional room is to receive and speak with other stockholders which were approached by the group (subject to the proxy rule ten-person limit) and did not join the group but nevertheless may vote for the insurgent slate or join a subsequent consent if necessary. These stockholders should not be in the same room as the group members in order to maintain a clear distinction and position that they should not be deemed to have joined the group. Similarly, if more than one of the stockholders is in the room at the same time, they should not interface for the same reason.

In the room where the group is meeting, Delaware counsel and the proxy solicitor should carefully examine the ballots and the attached proxies prepared by each group member to ensure they are in the proper order. A script should be distributed to the person who is going to propose and the person who is going to second the nomination of the insurgent directors.

Back-Up Consents

The ability to vote at the stockholders meeting is determined by the number of votes that can be cast on the record date of the annual meeting. The number of votes that can be given by consent is determined on the date the consent is delivered. Therefore, if the members of the group are unable to vote at the meeting enough of the shares owned by them on the record date to carry the vote at the meeting, a back-up consent may be desirable. This possible need for a back-up consent underscores the importance of specifying in the Investors Agreement that the group members must retain their shares through the meeting date. This back-up consent can come in two varieties. First, if the group with their allies (within the proxy rule 10-person limit) can garner a majority of the vote by consent, the consent route can assure victory to the insurgents even if the incumbents win at the election. In such a case, the group and their allies would deliver consents very similar to those described above under the consent procedure, removing the whole board in stages to comply with Rule 14f-1. Second, if the majority of the insurgent nominees are elected at the meeting but some of the incumbents receive more votes than certain insurgents and therefore are elected, the consent can be used by holders of the majority of the stock to remove the incumbents elected and replace them with the insurgents not elected at the meeting.

Form 8-K

A Form 8-K must be filed by the target company to report the results of the annual meeting.

First Board Meeting

The same topics for the first board meeting would be appropriate except all the officers of the target company who are going to continue in office would have to be re-appointed, if so desired.

Target Company Defenses

The target company may try to erect defenses once it learns from a Schedule 13D filing that the group is going to try to replace management. Management can try to sell the company, amend the by-laws, enter into employment contracts or other compensatory arrangements with or without change in control triggers, or issue new stock to dilute the group members' ownership.

Under Delaware case law, once the incumbent directors learn of the plans of the group, actions they take are highly suspect and are likely to be struck down by a Delaware court as devices of entrenchment. Bear in mind that this type of insurgent action raises an even higher bar for management to justify defensive measures; a majority of the stockholders are demanding a change in management and management should be disinclined to resist such change.

The target company also could commence litigation. The most obvious attacks would be whether a group was formed earlier than was reported on the Schedule 13D, whether the Schedule 13D contained inaccuracies, whether the form of ballot, proxies, consents and back-up consents were proper, and (if a preliminary proxy statement is filed) the accuracy of the preliminary proxy statement.

Although an obstacle, the threat that these litigations will ultimately hinder the group from realizing their objectives is weaker than that presented by the usual court battles surrounding face-offs between stockholders and management, such as proxy contests and tender offers. Because the insurgent group in this template, such as in the Take-Two matter, represents a majority of the stockholders of the target company, management should be very unlikely to prevail.

CONCLUSION

Today hedge funds and mutual funds often own very large blocks of stock of their portfolio companies. Where collectively a group of funds own a majority (or close to a majority) of a company's outstanding shares, those funds need not sit idly and watch as management steers the company in a manner the group agrees is not in the best interests of the company's stockholders, and changing the company's course need not include a proxy fight. A well-coordinated effort by a stockholder group following this template can put stockholders back in control to determine the direction of their company.

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