

Unwanted attention to increase as poison pills dissolve

[Print](#)

By Helen Thomas in New York

Published: March 12 2010 02:00 | Last updated: March 12 2010 02:00

US companies are finding themselves increasingly exposed to unwanted take-over attention after a dismantling of companies' poison pills prompted by pressure from corporate governance activists.

Poison pills are designed to stave off unwanted attention by threatening to dilute the value and voting power of a potential acquirer once its stake in the company crosses a certain threshold.

Meanwhile, other defensive steps include staggered executive boards, where only part of the board of directors is replaced at any one time.

Groups that represent the interests of institutional shareholders, such as RiskMetrics, have found increasing success in getting such provisions removed, arguing that most anti-takeover provisions do not uphold shareholder interests.

Only 28 per cent of S&P 1,500 companies had a poison pill in place last year, down from 43 per cent in the previous two years, according to data from RiskMetrics.

"Defensive barriers have come down dramatically. As staggered boards go away, poison pills fall and as the role of activist shareholders increases we would expect to see a meaningful trend towards more unsolicited and hostile deals," says Paul Parker, head of global M&A at Barclays Capital.

Such a change in the US, well known for the discretion granted to boards of directors in fending off bids, might increasingly be felt as the economic recovery takes hold.

"At this point of the business cycle, there may be a disconnect between a target board's expectations and a bidder's outlook," notes Matthew Herman, a mergers and acquisitions partner in Freshfields. "Target boards that have failed to recognise the new economic reality may be reluctant when a buyer arrives offering a premium."

But while the broader US trend has been towards lowering companies' defensive barriers, lawyers also argue that the courts have continued to support the rights of boards to put in place and use defensive structures when it reaches litigation.

Lawsuits tend to come hand in hand with unsolicited takeover offers in the US. Last week, for example, Astellas Pharma of Japan launched a \$3.5bn hostile bid for OSI Pharmaceuticals of the US and sued to block OSI's poison pill. However, few such cases actually get as far as a court judgment. A standard negotiating tactic, they fall away as deals die or as buyers and reluctant sellers come to an agreement.

However, last month, the Delaware Court of Chancery upheld the rights of US companies to ward off predators using poison pills. The case in question - involving Selectica, a small software company - was unusual.

Theodore Mirvis, a litigation partner at Wachtell, Lipton, Rosen & Katz, the firm generally credited with inventing poison pills, argued: "The decision constitutes a powerful rejoinder to those who have claimed that the pill has been weakened in recent years by newly emerging fiduciary constraints."

Copyright The Financial Times Limited 2010. Print a single copy of this article for personal use. Contact us if you wish to print more to distribute to others.