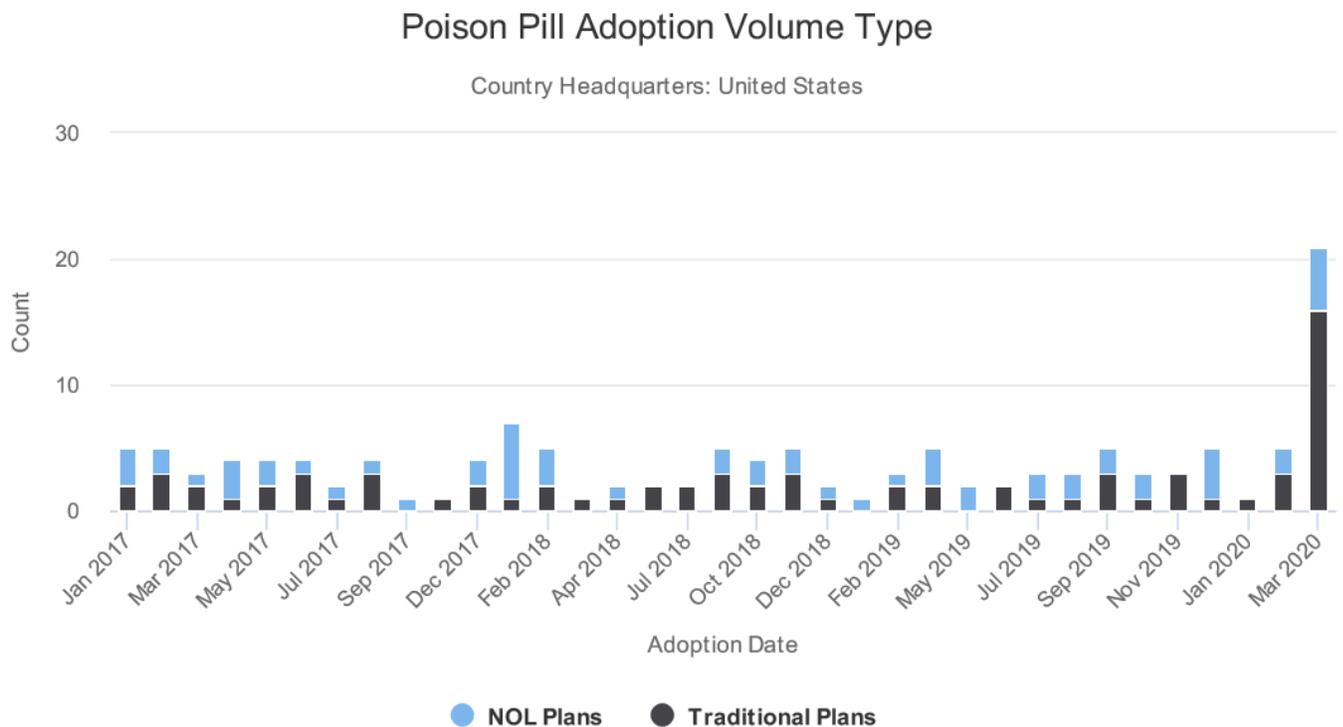


Observations on Recent Poison Pill Activity

April 1, 2020

As a follow up to our recent note regarding companies increasing use of poison pills to guard against opportunist acquirers and activist investors as a result of the coronavirus pandemic ([Corporate America's Medicine Against Coronavirus](#)) here are some additional observations:

Record Month for Adoptions: There were 21 poison pill adoptions by U.S. companies in March, the most in any month since we began tracking this activity on January 1, 2017, and triple the previous most active month of January 2018 with seven adoptions. When only counting traditional anti-takeover type poison pills (i.e., excluding net operating loss carryforwards protection plans "NOL plans"), the sixteen adoptions in March is five times the previous high of three adoptions in any month over the period. Five companies with market capitalizations over \$1 billion adopted traditional poison pills in March. During the entire year of 2019, only three such companies adopted a traditional poison pill.



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Low Triggers/Two-Tier Triggers: Low 10% or less triggers have been used more frequently. Eleven of the sixteen (69%) of the traditional poison pills adopted in March have a trigger of 10% or less compared to 44% of all adoptions from January 1, 2017 to February 29, 2020. Less than 22% of all U.S. companies with traditional poison pill in place on January 1, 2020 had a trigger of 10% or less. The Williams Companies, Inc. use of a 5% trigger in its March 19, 2020 adoption is only the third time we are aware of a company setting a trigger at 5% for a traditional poison pill (all NOL poison pills have a trigger of 5% or less). Companies are also using a two-tier trigger approach at a rate we've never seen. Two-tier poison pills exempt or set a separate higher trigger

threshold for passive investors (e.g., report ownership on Schedule 13G not Schedule 13D). Ten out of the sixteen traditional adoptions in March used a two-tier approach, an extremely high proportion for a rarely used feature. For comparison sake, out of the entire universe of U.S. companies with an active poison pill on January 1, 2020, only seven had a two-tier plan.

Trigger Language: Companies adopting traditional poison pills have also been including derivative and acting in concert language more frequently. All sixteen of the traditional adoptions have included derivative positions and 38% included acting in concert language. Only about half of all U.S. companies with an active traditional poison pill on January 1, 2020 included derivative language and 16% included acting in concert language. The traditional definition of "Beneficial Owner" used in poison pills does not generally include derivative positions and other synthetic long positions. Starting around 2008, in response to the use of derivatives by activist hedge funds, companies began to specifically include derivatives in their poison pill trigger language. Proponents for inclusion of derivative language argue an activist could amass a sizeable position and influence at a company without triggering any SEC reporting requirements. Those positions could quickly be converted to common stock at any point with no advance warning. Acting in concert language seeks to capture additional activity by stockholders beyond what is provided in the traditional definition of "Beneficial Ownership" that would group stockholders together for purposes of aggregating ownership to trigger a company's poison pill (e.g., "to include Persons acting in concert or in parallel"). Companies began to include acting in concert language in poison pills to account for activist "wolf packs" working together but not formally.

March adoptions had lower triggers and included certain features at higher rates than usual

March 2020 Adoptions Versus All Active Poison Pills Over Time					
	March 2020	1/1/2020	1/1/2019	1/1/2018	1/1/2017
NOL Protective	24%	48%	46%	35%	32%
Trigger 10% or Less	76%	60%	57%	45%	42%
Trigger 10% or Less (excl. NOL)	69%	22%	20%	15%	13%
Two-Tier Trigger (excl. NOL)	63%	9%	9%	6%	7%
Two-Tier Trigger	48%	4%	5%	4%	5%
Derivative Trigger	90%	39%	38%	36%	31%
Acting in Concert Language	33%	17%	15%	11%	9%

More Poisonous Pricing: Likely as a result of depressed stock prices, March adoptions have had higher exercise price to market price ratios (average 11.2 and median 7.2 versus an average 5.2 and median 4.3 for all adoptions between 2017 to 2019). Companies set an exercise price at adoption that will reflect the long-term value of the common stock during the life of the poison pill (typically set at 3x to 5x the market price of the common stock at adoption). The higher the exercise price is versus the market price, the greater the dilution to the acquirer if a plan is ever triggered.

Term / Ratification: Companies are adopting limited-duration plans. All sixteen of the traditional adoptions have a term of one year or less. All five NOL adoptions have a term of approximately three years. Only one of

the sixteen companies adopting a traditional poison pill and three adopting an NOL plan disclosed intentions to seek shareholder approval for the adoption.

Messaging: Nine of the sixteen companies that adopted a traditional poison pill cited the impact of the COVID-19 pandemic in its press release announcing the adoption (i.e., AAR Corp., The Chefs' Warehouse, Inc., Delek US Holdings, Inc., Fluor Corporation, Six Flags Entertainment Corporation, Spirit Airlines, Inc., Tailored Brands, Inc., Tempur Sealy International, Inc., The Williams Companies, Inc.). Companies also disclosed the law firm advising on the adoption more frequently than usual. Thirteen of the sixteen traditional adoptions disclosed the legal adviser in either the press release or Rights Agreement. Only 52% of companies adopting traditional poison pills in 2019 disclosed their legal adviser.

Other Noteworthy: The word “pandemics” has made an appearance in Rights Agreements for the first time. The Force Majeure section of six Rights Agreements in March included the term. Deal Point Data had not tracked a Rights Agreement that included the word “pandemics” before this month. Tempur Sealy International, Inc.'s adoption on March 27 was unique in that the company didn't wait until the end of the day to announce it. Companies generally announce adoptions either before the market opens or after it closes for the day. The company's announcement during market hours was only the second time for a U.S. company since 2018.