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Twitter Counters Elon Musk's Takeover Offer with a "Poison Pill"

On April 15, social media company Twitter adopted a "Poison Pill" as a defense to Tesla and SpaceX founder Elon Musk's takeover offer two days earlier to buy the company at $54.20 per share, an offer that valued Twitter at approximately $43 billion. Musk currently owns 9% of the company, its largest existing shareholder.

Poison Pills, formally known as Shareholder Rights Plans and named after the pills spies were said to carry in the event of capture when behind enemy lines, were famously invented in the 1980s by attorney Martin Lipton of the Wachtell Lipton Rosen & Katz law firm, when hostile takeover bids were a frequent part of the corporate landscape. The principle is that when a public company, acting through its Board of Directors, wants to resist an prospective unsolicited or hostile takeover bid, it adopts a Shareholder Rights Plan in its corporate charter or bylaws that allows existing shareholders to buy newly issued shares at a discount to market price, effectively flooding the market, diluting the would-be acquirer's shareholding and making its bid to acquire the target company prohibitively expensive.

Poison Pills come in two main types, "flip-in" and "flip-over." In the flip-in type, which operates before the takeover is completed, the Shareholder Rights Plan allows any existing shareholder other than the potential acquirer to purchase additional newly issued shares at a discount when a stated triggering event occurs, usually once the acquirer reaches a certain ownership threshold. The effect is to immediately dilute the value of the would-be acquirer's existing shares and to make purchase of additional shares to complete the takeover prohibitively expensive. This is the type of Poison Pill put in place by Twitter's Board by a unanimous vote for one year, which set the triggering threshold at 15% (bearing in mind that Musk is currently at 9%).

In the flip-over type of Poison Pill, the existing shareholders are given the right to buy additional shares at a discount after a successful takeover occurs, thereby diluting the acquirer's equity post-acquisition, and again disincentivizing the acquirer to attempt the acquisition in the first place.Twitter's adoption of the Poison Pill may be sufficient to fend off Musk, but the one-year duration also suggests that the Board believes that it can find a preferred (from the Board's point of view) "White Knight" acquirer or investor, not necessarily that the company will remain independent. Musk has been outspoken in his criticisms of Twitter's supposed political commentary policing policies.

Poison Pills, it is finally worth noting, are not without their critics. Among the criticisms are that Shareholder Rights Plans dilute existing equity and force shareholders to to spend more to maintain their equity position, and that Pills favor entrenched and sometimes complacent and sclerotic Board members, to the disadvantage of competition, innovation and the company's existing shareholders.

For additional information, please contact us at info@kurtinlaw.com.

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