Votes to Ratify Poison Pills Have Become Routine as Plans Evolve
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It's hard to believe that the votes associated with what was once the most controversial item in the corporate governance landscape have become downright routine. According to research compiled by Deal Point Data, 74 out of the 75 company proposals to approve a poison pill (aka a shareholder rights plan) passed since January 1, 2017. The lone proposal that was voted down comes with an asterisk because it was not a typical vote. Only SandRidge Energy, Inc.'s poison pill adopted in November 2017 and amended in January 2018 to make it more stockholder friendly before the vote was not approved. However, this was not the standard poison pill ratification vote. Carl C. Icahn waged a proxy fight to replace the company's entire Board with his own nominees which included soliciting votes against the ratification of the poison pill. Mr. Icahn successfully argued that the principal reason cited by the company for needing the poison pill, to protect the stockholders right to vote on the proposed acquisition of Bonanza Creek Energy, Inc., no longer applied since the merger had been terminated.

This is not a case where investors have changed their views on poison pills, it's the poison pills that have changed. None of the adoptions or extensions that were approved were the ten-year anti-takeover type poison pills of old. Poison pills have evolved from the blunt instruments adopted by large numbers of companies to deal with any possible threat that may emerge years into the future into limited focus tools to serve a specific purpose during a specific time of need. Long-term "routine" adoptions before any threat emerges have been replaced with poison pills "on the shelf" ready to be adopted only when circumstances give rise to the need for the plan. Less than 7% of the poison pills adopted since 1/1/2017 were traditional ten-year anti-takeover type plans. Poison pills designed to protect net operating loss carryforwards and other tax attributes ("NOL plans") are also becoming an increasing proportion of companies adopting and maintaining poison pills. On January 1, 2017, NOL plans represented 25% of all active poison pills. As of December 15, 2018, that number has grown to 32% of active poison pills. NOL plans have also represented 39% and 37% of all adoptions and amendments to extend in 2017 and 2018 respectively. Of the non-NOL adoptions since January 1, 2017, 40% were limited duration plans with a term of approximately a year or less. The announcements of these short-term plans typically included an explanation by the company regarding the specific threat or reason the plan was currently needed. Long-term durations in general have become increasingly rare. Eighty-nine percent of all adoptions since January 1, 2017 had a term of approximately three years or less.

U.S. Public Company Active Poison Pills

	#	%
All Active	244	100%
Foreign Private Issuer	60	25%
S&P 1500	28	11%
Russell 3000	83	34%
Stockholder Approved	110	45%
NOL Protective	79	32%
Expiration Date in 2019	98	40%
Trigger:		
5% or less	81	33%
10%	22	9%
15%	65	27%
20%	67	27%
Two-Tier Trigger	10	4%
Derivative Trigger	80	33%
Acting in Concert Language	72	30%
Derivative and Acting in Concert	18	7%
Grandfather Existing Holders	183	75%

As of December 15, 2018. Excludes companies with active pills that deregistered their common stock and suspended SEC reporting obligations ("going dark").

The biggest change is the vote itself. For the first twenty years after the adoption of the first poison pill in the 1980s any type of company ratification vote was extremely rare. That began to slowly change in 2005 as a result of a new Institutional Shareholder Services (ISS) policy to recommend is clients withhold votes for director nominees at companies that adopt or renew a poison pill after January 1, 2005 without seeking stockholder approval. Governance activists also played a significant role in companies removing poison pills and seeking approval for adoptions. In the year's leading up to the ISS policy, proposals to redeem or require stockholder approval for any adoption or extension were consistently among the top issues for stockholder proposals including the submission of 100 anti-poison pill proposals in 2003. ISS added additional teeth to the policy for the 2010 proxy season by changing it from a one-time negative vote after the poison pill was adopted to a recommendation against directors of companies maintaining long-term non-stockholder approved pills every three years (or every year for companies with a classified Board). The policy was simplified for the 2018 proxy season so that ISS will recommend a vote against directors every year at all companies that have a long-term poison pill that was not approved by stockholders. As part of the 2018 policy change, ISS would no longer grandfather companies with poison pills adopted before November 2009 from votes against their election for maintaining non-stockholder approved poison pills. With the prospect of votes against directors, several companies with older non-approved poison pills terminated their plans. The number of companies announcing poison pill terminations jumped by over 500% in the first quarter of 2018 versus the same period in 2017 (from 3 in Q1 2017 to 19 in Q1 2018). Today, 45% of all active pills were approved by stockholders for the current term. This percentage excludes companies that have disclosed plans to seek approval but have yet to hold the vote, so this number will likely increase. In 2017, 50% all of adoptions were either approved by stockholders or the company disclosed intentions to seek but has yet to hold or never held the vote (a few of these companies terminated the poison pill before the vote). Over a third of the 2017 adoptions were limited duration plans (year or less plans) that are rarely voted on. Using this approach, a company can adopt a short-term plan while a threat persists. At the end of the term, the company can reevaluate the threat and if needed could then seek stockholder approval for a replacement adoption or extension of the existing plan. ISS' policy includes an exception for short-term plans (i.e., "vote case-by-case on nominees if the board adopts an initial pill with a term of one year or less, depending on the disclosed rationale for the adoption, and other factors as relevant (such as a commitment to put any renewal to a shareholder vote)"). Excluding limited duration plans (year or less plans), 63% of 2017 adoptions have been approved by stockholders or the company disclosed intentions to seek stockholder approval. Another statistic on how much things have changed: One. That's the number of anti-poison pill stockholder proposals in the last two years.