

February 18, 2000

SEC Permits Exclusion Of Binding Rights Plan Proposal

This year's proxy season is certain to see a significant number of stockholder proposals calling for binding votes on by-laws that purport to eliminate or regulate the adoption of "poison pill" rights plans. The Director of Corporate Programs at Institutional Shareholders Services recently predicted that the debate on the use of such by-law proposals "will reignite in 2000."

On February 14, 2000, the SEC's Division of Corporate Finance issued a no-action letter permitting a Delaware corporation to exclude such a stockholder proposal from its proxy material under Rule 14a-8(i)(1), based on the opinion of Morris, Nichols, Arsht & Tunnell, the corporation's Delaware counsel, that the proposal was not a proper subject for stockholder action. The proposed by-law (1) required the redemption of the rights outstanding under the corporation's rights plan, (2) prohibited the corporation from adopting a rights plan in the future without stockholder approval and (3) purported to be unamendable, except by stockholder vote.

In concluding that the by-law would violate Delaware law, the opinion of counsel cited the holding of the Delaware Supreme Court in *Moran v. Household International, Inc.*, 500 A.2d 1346 (Del. 1985). *Moran* established that the board of directors had the inherent authority to adopt a rights plan as part of its duty to manage the business and affairs of a corporation. The opinion of counsel also emphasized the Supreme Court's more recent holding in *Quickturn Design Systems, Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998). In *Quickturn*, the Court invalidated a rights plan that prohibited directors from redeeming rights in certain circumstances following the election of a new board of directors, finding that such a plan impermissibly circumscribed the power of directors in a fundamental area of corporate management.

The opinion of counsel also noted that the provision purporting to make the by-law unamendable by the board of directors was inconsistent with a provision in the corporation's charter that gave directors the right to amend by-laws. Almost all public Delaware corporations have such a charter provision.

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