Takeover Defense Measures
in Light of Recent Environmental Changes

June 30, 2008
Corporate Value Study Group

1. Objectives and the essence of Takeover Defense Measures

The premise of takeover defense measures[1] is that they should be ultimately for the protection of the interests of shareholders. Rights plans in the United States, which presuppose that shareholders finally decide to support or oppose takeovers through appointment or dismissal of directors at the general meeting of shareholders, are viewed as a mechanism that makes it possible to draw out from the acquirers and the incumbent management of the target companies better takeover terms and management proposals for shareholders. In other words, rights plans are understood as measures for protecting the interests of shareholders.

Furthermore, in examining the essence of takeover defense measures, it should be recognized that hostile takeovers have positive effects (such as the disciplinary effect of their threat on management and possibility of enhancing the shareholder interests).

Also, it should be borne in mind that deterring takeovers by implementation of takeover defense measures deprives shareholders supporting the takeovers of the opportunities of selling their shares to the acquirers.

"Guidelines Regarding Takeover Defense for the Purposes of Protection and Enhancement of Corporate Value and Shareholders' Common Interests" (hereinafter "Guidelines") published by the Ministry of Economy, Trade and Industry and the Ministry of Justice on May 27, 2005, assumes, as takeover defense measures that protect and enhance the shareholder interests[2], (1) defensive measures with the objective of ensuring adequate time and information necessary for shareholders to appropriately decide whether to

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1. In this report, as "takeover defense measures," defensive measures which utilize the gratis issue of stock acquisition rights with differential conditions for exercise and call option clauses are assumed. The basic ideas of the report, however, would also apply to other takeover defense situations.

2. In the "Guidelines," "corporate value and the shareholders' common interests" is referred to as "shareholder interests" in page 3 and subsequent pages, and this report will follow this usage of the term. In relation to this, "corporate value" appearing in the "Guidelines" and in this report is conceptually assumed to be "the discounted present value of future cash flow of the company". This concept should not be arbitrarily stretched in the interpretation of the "Guidelines" or this report.

support or oppose takeovers and opportunities to negotiate between the acquirers and the target companies and (2) defensive measures with the objective of preventing takeovers which are clearly detrimental to the shareholder interests.

Takeover defense measures that are, contrary to these desired objectives, exploited for the purpose of managerial entrenchment should not be allowed, and the Corporate Value Study Group cannot support such takeover defense measures.

In light of the situation where more than 500 Japanese companies have adopted takeover defense measures since the establishment of the Guidelines, this report presents the essence of reasonable takeover defense measures able to gain the understanding and consent of today's shareholders and investors and examines the relationship between such reasonable takeover defense measures and past judicial precedents.

2. Takeover Defense Measures in Recognition of Current Environment

Following the establishment of the Guidelines, a variety of takeover defense measures were adopted in Japan. As a result, cases where disputes over takeover defense measures led to judicial decisions have also appeared.

Given this context, the essence of takeover defense measures in recognition of the current environment can be described as follows.

(1) Granting cash or other financial benefits [3] to the acquirers in implementing takeover defense measures invites the actual implementation. [4] As a result, it deprives shareholders of the

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3. The granting of stock acquisition rights with differential conditions for exercise and call option clauses to the acquirers, as takeover defense measures modeling rights plans that are assumed in this report, is naturally not included in "cash or other financial benefits" referred to here.

4. Rights plans in the United States are arrangements where the target companies issue stock acquisition rights to shareholders in advance, and on the occurrence of takeovers that are detrimental to the shareholder interests, a large number of shares are issued to shareholders other than the acquirers to substantially reduce the acquirers'

opportunities of selling their shares to the acquirers after adequate time and information necessary for them to appropriately decide whether to support or oppose the takeovers or the opportunities for negotiation are ensured. Therefore it could prevent the formation of an efficient capital market. Thus, cash or other financial benefits should not be granted to the acquirers.

Furthermore, the granting of cash or other financial benefits might harm the interests of the shareholders of the target company because it would involve transfer of funds to the acquirer that would have been paid out to shareholders in the form of dividends or that would have, through being directed toward investments, contributed to the shareholder interests of the target company.

To begin with, takeover defense measures should not be implemented unless the directors of the target companies can responsibly explain that they are able to implement such measures without granting cash or other financial benefits since the takeovers would be detrimental to the shareholder interests.

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shareholding ratio. The objective of rights plans, however, is not to ultimately deter takeovers through their actual implementation but is to temporarily halt them and to create pressure for discussions between the acquirers and the target companies. Specifically, in the structure where their implementation would be disadvantageous to the acquirers, the acquirers, in order to avoid this disadvantage, will need to temporarily halt before commencing takeovers and will need to negotiate with the board of directors and shareholders of the target companies for the removal of the stock acquisition rights. As a result, it enables the board of directors of the target companies to ensure adequate time and information necessary for shareholders to appropriately decide whether to support or oppose the takeovers or opportunities for the board of directors of the target companies to negotiate with the acquirers to improve and enhance takeover terms. Therefore, as long as the acquirers act rationally, rights plans will not be implemented.

Given the above, the granting of cash or other financial benefits to the acquirers will remove the disadvantage for them resulting from the implementation of takeover defense measures, and therefore will eliminate the incentive for the acquirers to temporarily halt before commencing takeovers. As a result, it will trigger the implementation of takeover defense measures.

Also, it might invite the board of directors of the target companies to easily implement takeover defense measures without ensuring adequate information and time or opportunities for negotiation or without substantively considering the takeover proposals, based on the understanding that the granting of cash or other financial benefits would strengthen the legality of takeover defense measures.

(2) The argument that takeover defense measures are always justified in so far as they are approved by a majority of shareholders in the general meeting of shareholders, even though directors avoid making a decision on their own and pass on the decision to the formality of the general meeting of shareholders, might send the erroneous message to related parties that firm defense system can be established with the shareholder structure which would guarantee the approval of a resolution of the general meeting of shareholders.[5]

It can even be argued that it would be evasion of responsibility if directors of the target company, who are obliged to carry out the duty of care for the company, avoid making a initial judgment on whether the takeover proposal is in the shareholder interests and justify themselves by passing on the decision of supporting or opposing the takeover to the formality of the general meeting of shareholders.

Hence, the directors of the target company must behave with responsibility and discipline in the face of takeovers.

These situations might invoke uses of takeover defense measures for the purpose of managerial entrenchment or not for the original objective of protecting the shareholder interests. To restrain the possibility of such misguided uses, it will be necessary at the present moment to consider again the desired objectives of takeover defense measures and to examine how the acquirers and the target companies should behave in the face of takeovers.

In undertaking such an examination, it should be recognized that the

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5. In the Supreme Court's decision on the Bull-Dog Sauce Co., Ltd. case (Supreme Court decision of August 7, 2007), the court ruled that "when the gratis issue of stock acquisition rights to shareholders with differential terms is not for the purpose of maintaining corporate value and the interests of shareholders as a whole but mainly for the purpose of maintaining the control of directors managing the company or certain shareholders supporting such directors, such gratis issue of stock acquisition rights should in principle be understood as being issued according to an grossly unfair method. The understanding that firm defense system can be established with the shareholder structure that would ensure formally passing a resolution of the general meeting of shareholders is inconsistent with these rulings in the judicial decision.

Guidelines present basic ideas on the adoption of takeover defense measures prior to the commencement of a takeover and that adopting takeover defense measures in accordance with the Guidelines does not mean that their implementation is permitted unconditionally. It should also be recognized that takeover defense measures that are adopted after the commencement of a takeover are not the subject of the examination in the Guidelines.

In the following sections in this report, the whole of adoption and implementation of takeover defense measures at the present day is the subject of examination.

Nearly all judicial precedents that have attracted public interest dealt with the cases where takeover defense measures were implemented to deter the takeovers by claiming that they would be detrimental to the shareholder interests. The takeover defense measures that were used in these cases are different from those with the objective of ensuring adequate time and information or opportunities for negotiation. Bearing this fully in mind, it is necessary to clarify the reasoning revealed in past judicial precedents and to examine the essence of takeover defense measures.

3. Elaboration

(1) Basic Perspectives and How Directors of the Target Company Should Behave

The Guidelines specify that “takeover defense measures should reflect the reasonable will of the shareholders” (principle of shareholders’ will). The decision to accept or reject a takeover should in the end be made by shareholders.

On the other hand, since directors have the obligation of maximizing the shareholder interests, they must not avoid making a decision on their own and pass on the decision to the formality of the general meeting of shareholders. They must responsibly decide whether or not to adopt and implement takeover defense measures and then fulfill their responsibility

of explaining their decision to shareholders. Therefore, from the perspective of protecting the shareholder interests, which is the objective of takeover defense measures, it will be important to specify how directors of the target company should behave in the face of takeovers.

How directors should behave in the face of takeovers in the face of takeovers will, however, differ in each case, depending on the content of the takeover proposals or the attributes of the acquirers. Because it will be difficult to present uniform standards of conduct, basic principles for the operation of takeover defense measures are presented in the items below.

(i) The board of directors must not obscure the interests to be protected by takeover defense measures by referring to the interests of stakeholders other than shareholders in cases that does not protect or enhance the shareholder interests, or must not broadly interpret implementation terms for the purpose of managerial entrenchment.

(ii) The board of directors must not judge that the implementation of takeover defense measures is necessary only for reasons that in themselves can hardly justify that the takeover is detrimental to the shareholder interests, such as for the takeover planning to use the assets of the target company to secure the debt of the acquirer or to have the target company dispose of its idle assets to pay high dividends by the resulting profits.

(iii) The board of directors must not deprive shareholders of the opportunity of deciding whether to accept or reject the takeover by unnecessarily extending the period for considering the takeover proposal beyond the reasonable extent or by intentionally and repeatedly extending that period.

(iv) The board of directors, from the perspective of whether or not a takeover proposal enhances the shareholder interests, must

faithfully consider[6] takeover terms, the content of the takeover proposal, such as the takeover's effect on the shareholder interests, and the attributes and financial capacity of the acquirer.

(v) The board of directors, when by improving takeover terms there is the possibility that the takeover proposal will contribute to the shareholder interests, the board of directors must faithfully negotiate with the acquirer with the view of improving such terms.

(vi) The board of directors, when it judges that the takeover proposal will enhance the common interests of shareholders, must immediately decide not to implement takeover defense measures without verifying the will of shareholders at the general meeting of shareholders.

(vii) The board of directors must fulfill its responsibility to explain to shareholders matters such as the board's evaluation of the takeover proposal based as much as possible on facts so shareholders can decide whether to accept or reject the takeover.

(viii) The board of directors, if it establishes a special committee, must ensure substantial independence of the committee from incumbent management and must bear final responsibility for deciding whether or not to follow the committee's recommendations.

(2) Categorization of the Perspectives about Takeover Defense Measures

Whether or not takeover defense measures will enhance the shareholder interests will differ in each case, depending on their objectives and contents and on the characteristics of the takeovers. Bearing this in mind, in order to deal with the issue of legality of takeover defense measures, it would be necessary to examine judicial decisions on past cases, by focusing on the objectives of takeover defense measures and how they are operated. As a result of such examination, takeover defense measures can

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6. The consideration of takeover proposals should be made from the financial perspective, such as by retaining outside experts for analysis.

be broadly categorized as follows.

(i) Cases where adequate time and information necessary for shareholders to appropriately decide whether to support or oppose the takeovers and opportunities for negotiation between the acquirers and the target companies are ensured by takeover defense measures

Decision of the Tokyo District Court on the Japan Engineering Consultants Co., Ltd.[7] case (July 29, 2005)

(ii) Cases where takeover defense measures are implemented based on the substantive judgment in view of the contents of the takeover proposals in order to deter the takeovers

Deterring takeovers by implementing takeover defense measures generally deprives shareholders in favor of the takeovers of the opportunities to sell their shares to the acquirers. Therefore, the implementation of takeover defense measures based on the substantive judgment in view of the contents of the takeover proposals should in principle be limited. Based on the examination of past judicial decisions, cases where such implementation would be permitted are categorized into the following two typical cases in accordance with the characteristics of the acquirers and their behavior.

(a) Cases where takeover defense measures are implemented against abusive takeovers that are clearly detrimental to the

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[7] *Hanrei jiho* [Judicial precedent report] No. 1909: 87. Regarding a case where not the gratis issue of stock acquisition rights with differential conditions for exercise and call option clauses, but stock split, which does not cause the acquirer to bear a loss of the dilution of his shareholding ratio resulting from the implementation, was used as the defensive measure, the court ruled that, for shareholders to decide whether to delegate the management of the company to either incumbent management or the hostile acquirer, the board of directors can be permitted to take suitable measures against the hostile takeover in order to ensure necessary information provision and a suitable period for consideration, as long as such measure does not violate the spirit or the intent of related laws and orders.

shareholder interests

Decision of the Tokyo High Court on the Nippon Broadcasting System Inc. case[8] (March 23, 2005)

(b) Cases where takeover defense measures are implemented based on the substantive judgment that the takeover proposals are detrimental to the shareholder interests

Decision of the Supreme Court on the Bull-Dog Sauce Co., Ltd. case[9] (August 7, 2007)

Based on the above, regarding each category of (i) and (ii), issues of the relationship with the principle of shareholders' will and the granting of cash or other financial benefits to the acquirer can be understood, in relation to past judicial precedents, as follows.

(3) Cases where adequate time and information necessary for shareholders to appropriately decide whether to support or oppose the takeovers and opportunities for negotiation between the acquirers and the target companies are ensured by takeover defense measures (3. (2) (i) above)

(i) Relationship with the principle of shareholders' will

Arbitrary operations should not be permitted, such as repeatedly requesting information from the acquirer or unnecessarily extending

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8. *Hanrei jiho* [Judicial precedent report] No. 1899: 56. In this case, the court ordered the provisional injunction against the issuance of stock acquisition rights to a third party, for the reason that the relevant takeover can not be found to be abusive. In that decision, however, the court ruled that takeovers within a certain scope are categorized as abusive ones and against such takeovers the board of directors can implement takeover defense measures.

9. *Saiko saibansho minji hanrei shu* [Civil case precedents of the Supreme Court] Vol. 61 No. 5: 2215. Regarding a case where a takeover defense measure was implemented based on the resolution of the general meeting of shareholders, the court recognized that nearly all shareholders other than the acquirer had judged that the acquisition of control by the acquirer would be detrimental to the company's interests and thus the shareholder interests and affirmed the implementation of the takeover defense measure.

the period for consideration of the takeover proposal, on the pretext of ensuring adequate time and information or opportunities for negotiation with the objective of dissuading the acquirer from the takeover.[10]

When such arbitrary operations are avoided, the board of directors would be permitted to adopt takeover defense measures and implement them against the acquirers who do not temporarily halt, violating procedures within a scope recognized as reasonable, in case of ensuring adequate time and information necessary for shareholders to appropriately decide whether to support or oppose the takeovers or opportunities for negotiation to extract better takeover terms for shareholders through negotiation with the acquirers.

In relation to this point, the court ruled in the Japan Engineering Consultants case that "for shareholders to appropriately decide …the board of directors is permitted to exercise its authority to provide necessary information and to gain a suitable period for consideration…" and that "in some cases, it should also be allowed to take appropriate measures against an acquirer who does not respond to reasonable requests,...from the perspective of protecting the interests of shareholders as a whole, by reason that necessary information and a suitable period for consideration is not ensured.[11]

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10. Requiring the acquirer of information disclosure exceeding the level necessary for shareholders to appropriately decide whether to support or oppose the takeover and then implementing takeover defense measures on the ground that such disclosure is not done should be allowed. Needless to say, the board of directors of the target company should not be allowed to decide arbitrarily the level of information necessary for shareholders' decision, and it should be determined objectively.

11. Specifically, the rulings of the court are as follows (Tokyo District Court decision of July 29, 2005, on the Japan Engineering Consultants case).

"In case of contest for corporate control, the decision of whether to delegate the management of the company to either incumbent management or the hostile acquirer … should be made by shareholders. For shareholders to appropriately decide this matter, the board of directors is permitted to exercise its authority to provide necessary information and to ensure a suitable period for consideration. Therefore, it would not be abuse of the authority of the board of directors if, when a hostile acquirer contesting corporate control appeared, the board of directors requests the hostile acquirer to

In contrast, to the cases where takeover defense measures are implemented based on the substantive judgment that the takeover proposals are detrimental to the shareholder interests, after the acquirers observe reasonable procedures and adequate time and information for shareholders to appropriately decide and opportunities for negotiation are ensured, the analysis in this section does not apply. For such cases, the more restrictive analysis of (4) below should be referred to.[12]

(ii) On the granting of cash or other financial benefits to the acquirers

The decision whether to accept or reject a takeover should in the end be made by shareholders. Therefore, in cases where the acquirers do not follow reasonable procedures and do not allow shareholders adequate time and information to appropriately decide whether to support or oppose the takeovers or opportunities for negotiation, there is no need to grant cash or other financial benefits in implementing takeover defense measures. In such cases, the acquirers have the opportunity of consummating the takeovers successfully, by ensuring shareholders the opportunities to decide by

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present a business plan and establish a period for consideration, to discuss with the acquirer to consider the business plan, to express its views as the board of directors, and to propose alternatives to shareholders, as long as the materials requested and the period for consideration are reasonable."

" … The board of directors can not only request at its discretion that a hostile acquirer present a business plan and establish a suitable period for consideration for the purpose of providing appropriate information to shareholders to make their appropriate decisions possible, but, in some cases, it should also be allowed to take appropriate measures against an acquirer who does not respond to reasonable requests, …from the perspective of protecting the interests of shareholders as a whole by reason that necessary information and appropriate period for consideration is not ensured.

12. For example, such cases belong to the category of (3) rather than (4), where takeover defense measures are used in the face of takeovers to temporarily halt them until general meetings of shareholders scheduled within a certain period, where shareholders' will on whether to accept or reject the takeovers is to be queried, so that adequate time and information necessary for shareholders to decide and opportunities for negotiation would be ensured. In such cases, verifying the shareholders' will on whether to accept or reject the takeovers by choosing at general meetings of shareholders between opposing resolutions on the election of directors proposed by the company and directors proposed by shareholders is merely the occurrence of what is scheduled under the category of (3), not belonging to the category of (4).

giving them adequate time, information, and opportunities for negotiation and having shareholders express their support for the takeovers. Thus, when the acquirers do not observe the procedures, it would be within the scope of reasonableness to implement takeover defense measures without granting cash or other financial benefits (see the note on page 18).

(iii) Level of information disclosure to shareholders

Within the category of (3), since the objective of takeover defense measures is to provide adequate time and information necessary for shareholders to appropriately decide whether to support or oppose the takeovers or opportunities for negotiation, information disclosure to shareholders is an important issue.[13]

(a) Information disclosure by the target company

As already noted, the board of directors should fulfill its responsibility to explain matters to shareholders so they can decide whether to support or oppose the takeover. From such a perspective, it would be desirable for the target company to disclose matters in specific detail, including indicating financial figures, such as (1) management vision and management policies of the incumbent management or an alternative proposal, (2) evaluation of the purchase price by the incumbent management, and (3) judgment of incumbent management, if any, that the takeover will be detrimental to the shareholder interests.[14]

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13. The subject of examination here is the information provision that is required by or required from the target company, from the perspective of the managerial responsibility for explaining so that by using takeover defense measures shareholders can appropriately decide whether to support or oppose the takeover. From the perspective of ensuring the fairness of capital markets and of providing and disclosing appropriate information to shareholders and investors, a disclosure system has been established under the Financial Instruments and Exchange Act, to which both the target company and the acquirer must naturally comply.

14. However, with respect to the evaluation of the purchase price ((2) in this sentence), it would be difficult to demand to disclose the price which the management think would be

The regular disclosure of management vision or management policies ((1) above), however, is a companies' responsibility to shareholders. If such disclosure is made adequately, it would also be possible, in the face of takeovers, to present the same material to shareholders, revised as necessary with current information.

(b) Information disclosure by the acquirer[15]

There are certain limitations to information disclosure by the acquirer, given that the acquirer does not undertake due diligence and that disclosing all specific figures, such as profit for the post-takeover period, is equivalent to forcing the acquirer to show his hand and would give rise to difficulties in terms of his takeover strategies. Thus, it is reasonable to think that there are limitations to the disclosure of detailed management plans, management outlooks, or profit forecasts for the post-takeover period.[16,17]

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appropriate.

15. For shareholders to decide whether to support or oppose a takeover, it would be desirable to fairly secure the opportunity for the acquirer and the target company to directly explain matters such as their proposals to, and to discuss and negotiate with shareholders. For this purpose, it would be desirable for the acquirer to be able to know who the shareholders of the target company are, such as by inspecting the shareholder register. Even in the case that there is formally a cause for rejection of the acquirer's request to inspect the shareholder register, it is not understood that the request can always and uniformly be rejected under the Companies Act (Tokyo High Court decision of June 12, 2008, on the Nihon Housing Co., Ltd. case).

16. For example, it would be inappropriate, in comparison with the status of disclosure by the target companies, to implement takeover defense measures on account of the acquirers not providing all information which the target companies have requested to comprehensively disclose, (1) as the basis for calculation of the purchase price, presupposed facts and assumptions of the calculation, the calculation method, numerical information used in the calculation, and the synergy amount and the basis for its calculation or (2) as management policies for the post-takeover period, the details of such matters as business plans, financial plans, capital policies, dividend policies, and asset usage plans.

17. In particular, in the case of an all-or-nothing offer with no minority shareholders left after the takeover,(where a cash tender offer for all shares is made on condition that two-thirds or more of voting shares of the target company are tendered and where the acquirer is committed to, when he acquires two-thirds or more of voting shares,

However, given the objective of takeover defense measures to ensure adequate time and information necessary for shareholders to appropriately decide whether to support or oppose the takeover or opportunities for negotiation, it would be desirable for the acquirers to disclose their attributes and basic management policies for the post-takeover period.[18]

(4) Cases Where Takeover Defense Measures Are Implemented Based on the Substantive Judgment in View of the Contents of the Takeover Proposals in Order to Deter the Takeovers (3. (2) (ii) (a) and (b) above)

(i) Relationship with the principle of shareholders' will

(a) Cases where takeover defense measures are implemented against abusive takeovers that are clearly detrimental to the shareholder interests (3. (2) (ii) (a) above)

Against abusive takeovers that are recognized to be clearly detrimental to the shareholder interests, the board of directors may implement takeover defense measures upon its own judgment from the perspective of protecting the shareholder interests. (Tokyo High Court decision on the Nippon Broadcasting System case)[19]

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immediately conduct a cash-out merger or other organizational restructuring to pay the remaining shareholders the same amount as the purchase price in the preceding tender offer), it is reasonable to think that the acquirer does not need to disclose detailed management plans, management outlooks, or profit forecasts for the post-takeover period.

18. Given the necessity for the shareholders of the target company to evaluate the adequacy of the purchase price and for the board of directors of the target company to present an alternative proposal to shareholders, the acquirer should disclose basic management policies for the post-takeover period to serve as a reference for the shareholders and the management of the target company.

19. Specifically, the rulings of the court are as follows (Tokyo High Court decision of March 23, 2005, on the Nippon Broadcasting System case).

"When there are special circumstances justifying the issuance of stock acquisition rights from the perspective of protecting the common interests of shareholders, specifically, when the company can explain and establish that the hostile acquirer is not seeking

(b) Cases where takeover defense measures are implemented based on the substantive judgment that the takeover proposals are detrimental to the shareholder interests (3. (2) (ii) (b) above)

As noted above, the implementation of takeover defense measures based on the substantive judgment that the takeover proposals are detrimental to the shareholder interests should be limited.[20] Should such takeover defense measures be implemented, as is discussed below, the requirements of necessity and reasonableness should be satisfied.

Shareholders' support expressed at the general meeting of shareholders can be considered as a fact that indicates the implementation of takeover defense measures reflect the reasonable will of shareholders (Notes 1 and 2). It should be recognized, however, that takeover defense measures are not immediately justified simply because a majority of shareholders expressed their support for their implementation. In other words, in relation to the issue of legality, such matters as whether the board of directors has fulfilled its responsibility to explain matters to shareholders in the process of verifying their will as well as the attributes of the acquirer, the content of the takeover proposal, and the shareholder structure of the target company should be considered in judging the fairness of the implementation of the takeover defense measures (see footnote 5 on page 5).

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reasonable management in good faith and that there are circumstances that the acquisition of control by the acquirer would cause irreparable detriment to the target company, the issuance of stock acquisition rights that would influence who should acquire the control of the company cannot be prohibited."

[20] In cases where the contents of takeover defense measures are disclosed before the commencement of a takeover, should the acquirer follow reasonable procedures, and should adequate time and information necessary for shareholders to appropriately decide, and opportunities for negotiation between the acquirer and the target company be ensured, it is assumed that the will of shareholders on whether to accept or reject the takeover will be expressed, in principle, either by shareholders deciding for or against the takeover proposal or by shareholders choosing to appoint or dismiss directors at the general meeting of shareholders.

Note 1: Under the Companies Act, excluding matters for resolution of the general meeting of shareholders, significant matters on company management are decided by the board of directors (in the case of companies with board of directors), and one way for shareholders to decide the company's management and governance is appointment or dismissal of directors. Thus, a so-called precatory resolution on adoption or implementation of takeover defense measures receiving the majority vote of voting shares at a general meeting of shareholders can be considered as a fact that indicates the takeover defense measures reflect the reasonable will of shareholders.

Note 2: With respect to the cases of (b), there is the view that it is too rigid to require that a general meeting of shareholders always be convened not only when adopting takeover defense measures but also when implementing such measures in the face of takeovers. On the other hand, it is essential that the decision on the implementation of takeover defense measures is based on shareholders' will. Therefore, for the decision to implement takeover defense measures to be made exclusively by the board of directors, at the very least, specific requirements for the implementation should be defined in accordance with individual situations when such measures are adopted and, after such requirements being verified, prior approval of assigning the decision to the board of directors in the face of takeovers should be given by shareholders. In addition, the implementation of takeover defense measures by the board of directors should be within the scope of the approval and in accordance with the specific requirements. It should, however, be recognized that in such cases the board of directors will particularly bear a responsibility to explain that their decision is in accordance with the specified requirements and within the approved scope.

(ii) On the granting of cash or other financial benefits to the acquirers

(a) Cases where takeover defense measures are implemented against abusive takeovers that are clearly detrimental to the shareholder interests (3. (2) (ii) (a) above)

Since the implementation of takeover defense measures in these cases can be viewed to be analogous to legitimate self-defense, there is no need to grant cash or financial benefits to the acquirers.

(b) Cases where takeover defense measures are implemented based on the substantive judgment that the takeover proposals are detrimental to the shareholder interests (3. (2) (ii) (b) above)

As noted above, in cases where the substantive judgment that the takeover proposals are detrimental to the shareholder interests is recognized as being based on shareholders' will, the requirement of necessity for implementation can be viewed as satisfied. Furthermore, the requirement of reasonableness should be satisfied. From such a perspective, when the acquirer disputes the implementation of takeover defense measures, such as through the appointment or dismissal of directors at the general meeting of shareholders, and when the acquirer's proposal fails to gain the majority vote of shareholders other than himself, it should be possible, for example with time to withdraw or halt the takeover ensured, for the acquirer to avoid the loss incurred by the dilution of the shareholding ratio resulting from the implementation of the takeover defense measures (possibility of avoiding loss for the acquirer). When such a process is guaranteed for the acquirer, it is reasonable not to grant cash or other financial benefits to the acquirer (Note).

Note: In the Supreme Court's decision on the Bull-Dog Sauce Company case, the court ruled that when the acquisition of control by a certain shareholder would impair the interests of

the company and thus the shareholder interests (necessity), it would not violate the intent of the principle of the equal treatment of shareholders to discriminate against that shareholder in order to prevent such impair, as long as the discriminatory treatment does not violate the principle of impartiality and does not lack reasonableness (reasonableness). Based on this reasoning by the court, it can be viewed as a fact which indicates the necessity of takeover defense measures, that a majority of shareholders decided that the takeover proposal is detrimental to the shareholder interests, such as through the appointment or dismissal of directors. Furthermore, as mentioned above, if the acquirer has the possibility of avoiding loss, takeover defense measures cannot lack reasonableness without granting cash or other financial benefits to the acquirer since the acquirer can avoid the loss of the dilution of the shareholding ratio resulting from the implementation of the takeover defense measures by withdrawing or halting the takeover proposal after contesting the implementation of the takeover defense measures.

(In addition, when the contents of takeover defense measures are disclosed before the commencement of a takeover, since the acquirer will begin the takeover while being aware of the potential loss of the dilution of the shareholding ratio resulting from the implementation of the takeover defense measures, it is possible to think that the acquirer has accepted the risk of such a loss (acquirer's acceptance of risk has taken effect).It has been indicated that for this reason it is not necessary to grant cash or financial benefits to the acquirer.)

(5) The Structure of a Special Committee when Establishing Such a Committee

In some cases, as a way to gain the understanding of shareholders that takeover defense measures will not be operated arbitrarily, a special committee, whose recommendations are to be respected as much as

possible, is established.

There is an argument, however, that the responsibilities of such a committee are vague from the perspective of shareholders, and it should be recognized that formally establishing such a committee and following its recommendations will not immediately justify the decisions of the board of directors.

Hence, the board of directors should decide with responsibility on the necessity of establishing a special committee and the committee's composition, and it should bear the responsibility of explaining to shareholders that this decision is reasonable. It has been indicated that it would be desirable if a special committee is mainly composed of independent, outside directors. Whatever the case, substantial independence of the committee from the incumbent management should be ensured.

Furthermore, when a special committee is established and when its recommendations are to be respected as much as possible in the face of takeovers, it should be recognized that the board of directors bears final responsibility for its decision to follow the committee's recommendations and the responsibility of explaining to shareholders that this decision is reasonable.

4. In Conclusion

This report presents the essence of takeover defense measures at the present day in light of environmental changes after the establishment of the Guidelines.

This report was published on June 30, 2008. It should be noted that this report could not be referenced for discussion over takeover defense measures in June 2008, when general meetings of shareholders peak.

Appendix: Roster of the Corporate Value Study Group

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