

Guidelines Regarding Takeover Defense for the Purpose of Protection and Enhancement of Corporate Value and Shareholder's Common Interests (Summary)

May 27, 2005

Ministry of Economy, Trade and Industry

Ministry of Justice

1. Purpose and Character of the Guidelines

- To propose highly legal and reasonable takeover defense measures to be adopted before a conflict arises
- The Guidelines are designed based on legal precedents, doctorins and the reports of the Corporate Value Study Group (Chairperson: Professor Hideki Kanda, The University of Tokyo)
- These Guidelines are not legally binding, but it is expected that they will be respected by the interested parties and become the code of conduct for the business community
- The Guidelines are subject to constant review and revision

2. Three Principles of Takeover Defense Measures

The basis of takeover defense measures is protecting and enhancing corporate values and the interests of shareholders as a whole. Therefore, they must conform to the following three principles.

(1) Principle of protecting and enhancing corporate value and the interests of shareholders as a whole

The purpose of takeover defense measures is to maintain and enhance corporate value (including company assets that contribute to shareholder interests, earnings power, financial soundness, and growth potential, etc.) as well as the interests of shareholders as a whole (common interests to shareholders as a whole).

- (Ex. 1) Defensive measures against certain types of takeovers that are clearly detrimental to the interests of shareholder as a whole
- Green mail (Acquisition with the intent to sell back the shares at a higher price)
 - Scorched earth intent acquisitions (intent to cannibalize assets)

- (Ex. 2) Defensive measures against coercive, two-tiered takeovers
- Two-tiered takeover (a type of takeover that coerces shareholders into selling their shares by way of setting second stage purchase terms that are disadvantageous in comparison to the first stage purchase terms, etc.)
- (Ex. 3) Defense measures to ensure that shareholders receive adequate information to correct their fallacy, and to provide the target an opportunity to pursue alternatives

(2) Principle of prior disclosure and shareholder' will

- (i) Disclose the details of takeover defense measures in advance to allow shareholders to make appropriate investment decisions
- (ii) Must reflect the reasonable will of the shareholders
 - Adopt after obtaining approval at a general meeting of shareholders
 - If they are adopted by a resolution of the board of directors, there should be a mechanism that allows the shareholders to remove them

(3) Principle of ensuring the necessity and reasonableness

Takeover defense measures should not be excessive.

- Ensured through conformance with Commercial Law ~ the principles of shareholder equality and protection of property rights
- It is necessary to have measures to prevent the abuse by management

3. Specific Examples of Takeover Defense Measures

(1) Defensive measures adopted based on approval at a general meeting of shareholders

(Ex) Defensive measures using new stock acquisition rights (recorded in the articles of incorporation type and favorable issue type) and golden shares, etc.

- **High probability of being considered as fair issuance because approval at a general meeting of stockholders is obtained**
- **Devices like the following are required to increase reasonableness and to obtain market support**
 - A mechanism that makes it possible to remove the takeover defense measure in the event

of a takeover bid that is in the shareholders' best interests (the so-called "dead hand" type exclusion).

- It is recommended to adopt a **sunset clause** (provisions requiring the periodic approval at general meetings of the shareholders) to ensure that the most current will of the shareholders is reflected
- **Golden shares and super voting stock** that cannot be redeemed provides favorable treatment to certain shareholders, and discriminates against shareholders other than the acquirer, so **a publicly traded company should be cautious about adopting such measures.**

(2) Defensive measures adopted based on a resolution of the board of directors.

(Ex) Rights Plans using new stock acquisition rights (conditional issuance decision type, etc.)

- **Devices like the following are required to increase legality**
 - Establishment of **provisions that allow the measures to be removed at the will of the shareholders.**
 - **No discriminatory treatment of shareholders other than the acquirer without reasonable reason**
 - Adoption of **measures to prevent the abuse of power by the board of directors**
- **Measures like the following that are effective at preventing the abuses of power by the board of directors are required to increase reasonableness and to obtain market support**
 - **Establishment of objective criteria for the termination of takeover defense measures**
(Indispensable in cases where inside directors alone are allowed to decide whether to implement defensive measures)
(Ex) Establish evaluation and negotiation periods, and remove defensive measures after the periods elapse.
- **Consideration of the judgments of independent outsiders**
(Indispensable in cases where there are no established objective termination criteria)
(Ex) The decision whether to implement defensive measures should include careful consideration of the judgments of a special committee composed of independent outside directors.