

AMP POISON PILL TOUGHENED: CONSIDER TAX EFFECTS

by Robert W. Wood • San Francisco

AMP, Inc., recently strengthened its anti-takeover defenses in the face of a hostile AlliedSignal, Inc., takeover valued at \$9.99 billion, in doing so angering some large AMP shareholders that doubtless would prefer the AlliedSignal deal. To strengthen its defenses, AMP's board voted to amend the poison pill shareholder rights plan so that it will take effect if anyone buys more than 10% of AMP. Previously, the trigger to the poison pill was 20%. See Fairclough, "AMP Toughens Defense Against AlliedSignal Bid," *Wall Street Journal*, Sept. 21, 1998, p. A6.

As is often the case with such shareholder rights plans, the move prompted the bidder, here AlliedSignal, to once again amend the terms of its tender offer so as not to trigger the newly-amended pill. AlliedSignal went forward with its \$44.50 per share offer, but this time for only 9% of AMP's shares. Not surprisingly, AlliedSignal has also amended its legal complaint to legally challenge AMP's latest actions. See Lewis, "AMP Criticized on Poison Pill Move," *Financial Times*, Weekend, 9/19-9/20, 1998, p. 23.

Poison to Whom?

In fact, AMP's strengthening of its anti-takeover measures even created a new adversary: one of the company's founding families. In response to the AMP anti-takeover measures, the Hixon family was upset with the board and made its ire public in a letter expressing dismay about management entrenching itself at the expense of shareholders. See Lipin and Fairclough, "AMP's Antitakeover Tactics Rile Holder," *Wall Street Journal*, October 5, 1998, p. A3. It is interesting that protest should come from a large shareholder (the Hixon family is AMP's second biggest shareholder). However, some of the tax effects of these changes may bear examination.

The tax effects of poison pill plans were much debated until Revenue Ruling 90-11, 1990-1 C.B. 10, where the IRS ruled that the contingent rights awarded under pill plans do not instantly create income. The reason? The pill plan is contingent upon a tender offer or acquisition (and in fact, the certain number of shares being acquired). Revenue Ruling 90-11 concludes that such

a plan also does not constitute an option for purposes of Section 382. Given how difficult the counting of options and the maintenance of NOLs can be in light of the Section 382 rules, this is a good thing, too. A word of caution, though, is that Revenue Ruling 90-11 does not address poison pill plans in general. It only addresses the specific plan that was considered in that ruling.

General Guidance?

Most practitioners rely on Revenue Ruling 90-11 (and its conclusions that shareholder rights given under poison pill plans do not constitute income or options) simply because there is nothing else one can do. The ruling does state, at least for purposes of the Section 382 attribution rules, that it will apply when rights are "similar" to those issued under the plan described in Revenue Ruling 90-11 itself. There is even a standard for what is considered "similar" to the facts of the ruling. Rights are similar if the principal purpose for adopting the plan was to establish a mechanism by which a publicly held company can provide shareholders with rights to purchase stock at substantially less than fair market value as a means of responding to unsolicited offers to acquire the corporation.

How many pill plans are tested against the Revenue Ruling 90-11 standard is uncertain. Frankly, most corporations that are either adopting or amending (typically to beef up) a poison pill plan probably have tax consequences on their mind less than virtually anything else. What is typically on their mind is survival (either corporate or personal). So, I'm not convinced that much thought goes into the degree to which the poison pill plan in question is similar to the poison pill plan considered in Revenue Ruling 90-11. We have in the past discussed how one stacks up a particular pill plan to the Revenue Ruling 90-11 standard. For discussion, see Wood, "More Poison Pill Plans," Vol. 6, No. 11, *MeA Tax Report*, June 1998, p. 1. If a distribution of a poison pill plan is held to be taxable, it is likely that recipient shareholders will be even less happy about the adoption of a poison pill plan than they are about a takeover in the first place. That makes the standards in Revenue Ruling 90-11 worth a review.