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Toward a Cohesive International Approach to Cross-Border Takeover Regulation

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Toward a Cohesive International Approach to Cross-Border Takeover Regulation

EDWARD F. GREENE, ANDREW CURRAN AND DAVID A. CHRISTMAN*

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I. INTRODUCTION

Cross-border¹ mergers and acquisitions have become a standard feature of the increasingly global world of international business and finance. This effect is generally due to economic globalization, which provides commercial entities the opportunity to create synergies by combining operations in different countries. This effect is also a result of the dramatic increase observed within the last fifteen years or so of cross-border securities investment,² which has resulted in many sizable companies having broadly dispersed shareholder bases.

One result of these developments has been that participants in merger and acquisition "M&A" transactions (including bidders, targets and their respective advisers) are increasingly subject to the disclosure and procedural requirements of multiple regulatory systems. The applicability of competing systems of takeover regulation typically arises as a product of the diverse regulatory philosophies among nations. Some countries, such as the United Kingdom and France, regulate tender offers only if the target is organized under the laws of their jurisdiction. In a traditional two-party acquisition, this policy means that only one country's rules apply, since the target generally is not organized under the law of more than one jurisdiction. Other countries, such as the United States and Canada, regulate tender offers on the basis of domestic market interest, or the existence of resident target shareholders, regardless of the target's country of organization. This philosophical difference occasionally overlays a more striking distinction between regulatory systems: the regulating process itself. For example, many countries, including the United States, regulate takeovers according to statute, frequently with delegated rule-making authority to an agency such as the Securities and Exchange Commission. In contrast, other countries, notably the United Kingdom, and recently, Germany, utilize non-statutory bodies to regulate takeovers where compliance is voluntary.

Differences between applicable regulations mean that relief from the regulatory requirements of one or more jurisdictions may be necessary to permit a bidder to conduct a single tender or exchange offer

1. As used in this Article in the context of mergers and acquisitions, the terms "cross-border," "international," "transnational," etc., refer to mergers and acquisitions in which (i) the bidder and target are each organized under the laws of different countries and/or (ii) the target's shareholders are located in more than one country.

2. In the United States, the annual level of investment in the securities of non-U.S. companies has risen from an estimated \$10.4 billion in 1980, to \$130.9 billion in 1990. International Tender and Exchange Offers, Exchange Act Release No. 34-29275, 1991 SEC LEXIS 1026, at *4 (June 5, 1991) [hereinafter SEC Tender Offer Proposal]. During 1995, U.S. investors purchased over \$395 billion in equity securities of non-U.S. entities. See *Treasury Bulletin*, U.S. Dep't of Treasury, Statistical Abstract No. 807 (1996).

complying with all applicable rules and regulations.³ Given adequate time and resources, it is generally possible to obtain relief from conflicting rules and regulations by approaching one or more regulatory authorities.⁴ However, overlapping and competing regulatory schemes may increase the burden on bidders and other transaction participants, and may impose externalities on both the market as a whole as well as on specific groups of shareholders.

In most developed countries, legislators and market participants have reached the conclusion that the benefits of a tender offer regulatory scheme, typically intended to protect target shareholders, outweigh the attendant costs, delays and uncertainties that such regulation creates. Tensions and incompatibilities between systems often multiply these costs, delays, and uncertainties, or impose other detrimental effects. At least theoretically, the detrimental cumulative effect may deter a universe of otherwise beneficial mergers which presumably would have occurred if the law of only one jurisdiction were applicable to ensure sufficient shareholder protections.

Economic theory aside, significant practical detriments can and do befall specific shareholder groups where conflicting regulatory systems govern a particular transaction. Where the target's shareholder base is narrowly distributed, and the bidder determines that it can attain the number of shares desired⁵ or required⁶ by focusing tender activities on shareholders within a limited number of jurisdictions, the bidder will often exclude shareholders outside those jurisdictions from the tender offer. For instance, in takeovers of companies organized under the law of the United Kingdom, bidders frequently implement procedures intended to prevent shareholders in the United States, Canada, Japan and

3. The most obvious solution to this problem—simultaneous conduct of multiple tender offers—is generally unavailable to a bidder because most regulatory systems require that all shareholders be treated equally. See, e.g., SEC Rule 14d-10, 17 C.F.R. § 240.14d-10 (1996). Not surprisingly then, and typically in conjunction with additional requests for relief from applicable rules, takeover participants will frequently seek the permission of regulators to conduct such simultaneous tender offers. See, e.g., *infra* notes 113-15 and accompanying text.

4. See *infra* notes 123-32 and accompanying text.

5. Under the corporate governance laws of some states and certain countries outside the United States, acquisition of a certain percentage of a target's shares may give the bidder the right to "freeze out" the minority shareholders, making the company wholly owned by the bidder. See *infra* note 11.

6. Under the laws of some countries, a tender offer must be for a minimum percentage of the target's outstanding shares. If the bidder does not receive tenders representing at least that number of shares, the offer must lapse. See, e.g., THE CITY CODE ON TAKEOVERS AND MERGERS, in THE CITY CODE ON TAKEOVERS AND MERGERS AND THE RULES GOVERNING SUBSTANTIAL ACQUISITIONS OF SHARES (5th ed. 1996) [hereinafter CITY CODE]. The CITY CODE requires that any bid, which would result in ownership of shares representing more than 50% of a target's voting rights, not be declared "unconditional as to acceptances" unless the bidder has acquired or agreed to acquire shares representing at least 50% of the voting rights. *Id.* at rule 10.

Australia⁷ from participating. These procedures frequently force shareholders to sell their shares into the market in order to realize a portion of the premium that the tender offers. However, these shareholders incur transaction costs (frequently in addition to a differential that is recouped by the arbitrage market), that they otherwise would not incur if they were able to tender through the mechanism open to home country shareholders.⁸ Because the method of excluding shareholders is typically intended, at least in part, to withhold distribution of tender document offering materials from them,⁹ it is ironic that those shareholders who sell into the market, do so without the benefit of the procedural and disclosure requirements that the home market normally provides.¹⁰ Moreover, those who choose not to sell into the market are relegated to minority shareholder status with limited liquidity. They will normally be eliminated in a subsequent "freeze out" or "squeeze" merger.¹¹

The problem of the excluded shareholder is especially prevalent in the United States and affects both cash bids and stock-for-stock exchange offers. In the cash bid context, there are two reasons for U.S. shareholder exclusion. First is the Williams Act.¹² This is the principal

7. See SEC Tender Offer Proposal, *supra* note 2, at *5-6 & n.18 (citing Plessey Co. PLC v. General Electric Co. PLC, 628 F. Supp. 477, 490 (D. Del. 1986); see also Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir. 1989); Hiram Walker Resources Ltd. v. Gulf Canada, C.A. No. 86-0780 (D.D.C. March 25, 1989).

8. See SEC Tender Offer Proposal, *supra* note 2, at *7. Furthermore, these shareholders do not enjoy the ability to withdraw their shares from the tender process if a higher bid is made by a new bidder or the original bid is increased.

9. For instance, under the terms of the 1987 bid for the shares of B.A.T. Enterprises PLC by Hoylake Investments Ltd., offering documents were not sent into the United States, the offer could not be accepted by anyone in the United States, and the cash and securities used as consideration in the offer were not sent into the United States. See Brown and MacLachlan, *infra* note 111, at 193-95.

10. See Concept Release on Multinational Tender and Exchange Offers, SEC Release Nos. 33-6866, 34-28093, 1990 SEC LEXIS 1139 at *2-3 (June 6, 1990) [hereinafter SEC Concept Release].

11. Many jurisdictions have corporate or company law provisions that permit such mergers. For instance, Delaware's General Corporation Law permits "short-form" mergers where 90% or more of the target's shares are held. See DEL. CODE ANN. tit. 8, § 253 (1996). The English Rules provide that if an acquirer acquires at least 90% of the class of shares bid for within four months, they may acquire the balance compulsorily. See Companies Act 1985, ch. 6, 428-430F (Eng.). Therefore, it is unusual for a party making an offer for a U.K. listed company to fail to acquire 100% of the target shares.

Most jurisdictions have rules which require the freeze price to be the same as the original tender offer price. There is no premium for the time cost of funds during the interval. This provides little incentive for shareholders to wait for a freeze out. As a result, most of the shareholders who are unable to sell through the formal tender mechanism will sell into the arbitrage market well before a freeze out.

12. Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(e)-(c), 78n(d)-(f)(1994)).

federal statute governing tender offers in the United States.¹³ Together with the rules and regulations promulgated by the Securities and Exchange Commission ("SEC") thereunder,¹⁴ the Williams Act regime has resulted in procedural and disclosure requirements that are generally more onerous than those in other developed countries. Furthermore, although the SEC is, by its own standards, quick to respond to waiver requests from certain tender offer rules, it is often much slower than regulators in other countries. For instance, the United Kingdom's Take-over Panel frequently responds to requests for interpretive guidance and waivers within 24 hours.

The second reason for U.S. shareholder exclusion or "freeze out" is the perception that the risk of securities fraud liability is substantially higher in the United States than in other countries. The U.S. anti-fraud rules, both within and without the tender offer context, have been interpreted as having broad extraterritorial application.¹⁵ The lure of avoiding the U.S. anti-fraud rules may create a powerful incentive to exclude U.S. shareholders from a tender offer in situations in which a takeover bidder and its advisors would not otherwise face the possibility of U.S. liability.

The exchange offer context implicates these same concerns. Additionally, however, preparing a registration statement complying with the SEC's rigorous requirements adds inherent costs and delays. The SEC will generally not permit home-country disclosure to substitute for SEC-required disclosure when the home-country disclosure does not meet SEC form requirements. The result is that bidders in cross-border exchange offers are highly motivated to exclude U.S. shareholders. Special liability provisions relating to the registration statement and related prospectus result in strict liability for the party issuing the offered securities, reinforcing the already justifiable reluctance to include U.S. shareholders.

Part II of this Article will analyze a hypothetical cross-border takeover bid in order to explore the philosophical and practical differences between the United States and certain European systems of tender offer

13. Although a detailed discussion of non-federal law is beyond the scope of this Article, it should be noted that most states have laws that may impact the conduct of tender offers. See generally, Edward F. Greene, *Regulatory and Legislative Responses to Takeover Activity in the 1980s: The United States and Europe*, 69 TEX. L. REV. 1539, 1556-72 (1991) (describing the development of state anti-takeover laws between 1968 and 1990). For a discussion of state law may impact certain defensive strategies in the context of hostile takeover bids, see *infra* notes 204-08 and accompanying text.

14. See 17 C.F.R. §§ 240.14d-1 to 240.14e-7 (1996).

15. See, e.g., *Consolidated Gold Fields PLC v. Minorco*, 871 F. 2d 252, 255, 262 (2d Cir. 1989) (extra-territorial application of anti-fraud provisions is appropriate where actions will have a substantial effect in United States).

regulation, primarily the United Kingdom and France. The Article will also describe various accommodations that regulators make in some of these jurisdictions when a target's widely dispersed shareholder base makes it necessary for them to conduct the bid in more than one jurisdiction to attain their desired¹⁶ or required¹⁷ tender levels. Part II concludes that, in general, those accommodations indicate a positive and flexible attitude toward the problems presented by cross-border takeovers (assuming certain minimal protections are maintained for shareholders). However, a consistent and cohesive approach to cross-border takeovers continues to be absent, with the result that the externalities discussed above¹⁸ will continue.

Part III will review a number of proposals that have been made since 1990 for (i) improving the U.S. approach to international takeover activity, including the SEC's 1991 Tender Offer Proposal,¹⁹ and (ii) developing an intersystem approach (i.e., a systemic approach for regulators of a number of countries) to resolve the tensions that such activity has created, including the Commission of the European Communities proposed Directive 13.²⁰ Part III concludes that rapid changes in the global capital markets, recent amendment to the U.S. federal securities laws, on-going debate over Directive 13, and recent changes in local takeover rules and regulations within a number of European countries, make this a propitious time to explore ways in which both the SEC and the international regulatory community could work together to resolve tensions that conflicting takeover regulations present.

Part IV of this Article presents two proposals. First, it proposes that the SEC take action to minimize tension between the U.S. and foreign takeover rules, and to provide greater certainty as to foreign bidder liability risk, within certain classes of cross-border takeovers. It is the authors' contention that these steps would reduce the strong incentive these groups currently have to exclude U.S. persons from tender offers.

While acknowledging the difficulty of reaching multilateral accord on regulatory issues, this Article's second proposal is for an international regulatory response to the difficulty posed by cross-border acquisitions. The authors hope that this proposal can be the starting point for

16. See *supra* note 5.

17. See *supra* note 6.

18. See *supra* notes 4-11 and accompanying text.

19. See *infra* note 235. The Tender Offer Proposal has been neither adopted nor publicly revisited by the SEC since its publication.

20. See Commission of the European Communities, Proposal for a 13th European Parliament and Council Directive on Company Law Concerning Takeover Bids, EUR. PARL. DOC. (COM 95) 655 (Feb. 2, 1996) [hereinafter Directive]. See also *infra* notes 209-29 and accompanying text.

meaningful international accord on takeover regulation with the development of a set of consistent and reliable international guidelines.

Where practicable, these proposals will be based on the authors' further conclusions. The first is that a voluntary, self-regulatory system, such as the one existing in the United Kingdom, which relies on market participant involvement and the threat of non-legal sanctions by the financial community for enforcement purposes, is preferable to a statutory system based on legal enforcement of conduct. The second is that, certainly in the case of cash-only tender offers, takeover regulations should be based on the prevailing rules of the target company's country of organization. The Article will also discuss the more difficult related problem of how to deal with cross-border exchange offers (i.e., where the bidder offers shares (or a combination of shares and cash) in exchange for target's securities).

II. REGULATORY CONFLICT IN ACTION

A. *The Hypothetical Bid*

Bidder, S.A., is a société anonyme organized under the law of France. It determines that it could realize a number of important synergies by acquiring *Target P.L.C.*, a public limited company ("PLC") organized under the laws of England and Wales. *Bidder* has a few shareholders in United States, but it is not a reporting company under the Exchange Act, nor has it claimed the exemption from registration available to certain foreign issuers.²¹

Bidder believes that *Target's* established distribution channels in the United States, where approximately eleven percent of *Target's* shareholders reside, and where American Depositary Shares ("ADSs") representing *Target's* shares are quoted on NASDAQ, could provide *Bidder* with an excellent entrée to the U.S. market. *Bidder* has also eyed *Target's* operations in France, where an additional seven percent of *Target's* shareholders reside, with a view that merging the two companies could result in a far better sales-to-operating-expenses ratio.

Bidder decides to undertake an exchange offer for the ordinary shares of *Target*. It will pay two shares of its own stock and £5 cash (or an equivalent dollar amount for ADSs) for each share of *Target*. As required under its constituent documents, *Bidder* obtains the approval of its shareholders to undertake the bid.

1. WHOSE LAWS APPLY?

Bidder faces the prospect of having to comply with regulatory

21. See 17 C.F.R. § 240.12g3-2(b) (1996).

schemes in the United Kingdom, the United States, and France. Because of the philosophy of their regulations and the rules adopted therein, each will assert a legitimate right to regulate the bid. A brief overview of these regulatory schemes, as well as that of Germany, is provided below. The French and the German systems are undergoing, or have recently undergone, significant change.

a. United Kingdom

In the United Kingdom, the City Code applies to offers for all listed and unlisted public companies²² resident in the United Kingdom, the Channel Islands or the Isle of Man as determined by the Takeover Panel.²³ "[I]t is the nature of the company which is the offeree or potential offeree company, or in which control . . . may change or be consolidated, that is relevant."²⁴ Since *Target* is organized under the laws of the England and Wales, the Takeover Panel will consider the bid to be governed by the City Code.

The Takeover Panel was formed in 1968 on the suggestion of the Governor of the Bank of England and the Chairman of the London Stock Exchange²⁵ in response to "mounting concern about unfair practices"²⁶ in connection with takeover bids. Although the Takeover Panel operated for a time in conjunction with the Council for the Securities Industry,²⁷ it is now solely responsible for administering the Code. A financial levy on certain U.K. securities transactions and offering documents sponsors the Panel's activities.²⁸

The City Code contains a set of ten general principles,²⁹ which are

22. The City Code also applies to certain statutory and chartered companies. See CITY CODE, *supra* note 6, at Introduction 4(a).

23. The City Code is issued and administered by the Panel on Takeovers and Mergers, a non-statutory body most of whose members are appointed by various participants—some themselves regulatory bodies, others not—in the financial community, including the British Bankers Association, The London Stock Exchange Limited and the Securities and Futures Authority. See *id.* at Introduction 2(a). The Chairman, Deputy Chairman and certain other members are appointed by the Governor of the Bank of England. See *id.*

24. *Id.* § 4(a). Introduction 4(a), p. A8.

25. Then known as the International Stock Exchange of the United Kingdom and Republic of Ireland Limited. The name was changed in December 1995.

26. See THE TAKEOVER PANEL, REPORT ON THE YEAR ENDED 31 MARCH 1996, 6 (July 18, 1996).

27. From 1976 to 1986. See Tony Shea, *Regulation of Takeovers in the United Kingdom*, 16 BROOK. J. INT'L L. 89, 90 n.7 (1990).

28. See *id.* at 91.

29. The ten General Principles of the City Code require that (1) all shareholders of the same class be treated similarly; (2) during an offer, the offeror, offeree and their advisers provide all shareholders with the same information; (3) an announcement should only be made when the offeror is sure it can implement the offer; (4) shareholders should be given, and allowed, sufficient time to consider all relevant information; (5) any document or advertisement for shareholders be

applied by the Takeover Panel "in accordance with their spirit,"³⁰ and a set of more detailed rules which provide guidance in specific instances. Because the Code's general principles are expressed in broad terms, and because the rules are "not framed in technical language," it is the spirit of the Code and not merely the letter that must be observed.³¹ As a result, takeover participants in doubt of the Code's operation are encouraged to approach the Takeover Panel for interpretation of its rules and principles. The Takeover Panel encourages transaction participants to avail themselves of its guidance by allowing for prompt telephone advice.³² In cases of difficult interpretive questions or modification or waiver requests,³³ a decision can usually be obtained within 24 hours as the Panel's Executive meets each morning.³⁴

This approach produces fast, efficient and flexible administration of the Code. Although the Panel occasionally has been slow to make rule-changes responding to perceived system abuses,³⁵ requiring participants to adhere to the spirit rather than the letter of the Code means that those seeking to take advantage of "loopholes" existing on the face of the rules may run afoul of the Code if they do not confirm their view of the rules' operation with the Takeover Panel.

As previously noted, the City Code is a not a statutory system enacted by the legislature. Therefore, unlike the Williams Act in the

prepared with great care and accuracy; (6) all parties to an offer act to prevent the creation of a false market in the securities of any party to that offer; (7) if a bona fide offer has been made or is imminent, no action should be taken to frustrate that offer without approval of the shareholders; (8) rights of control be exercised in good faith; (9) directors only have regard to shareholder, employee and creditor interests when giving advice to shareholders; and (10) where control of a company is acquired by persons acting in concert or consolidating their interest, the persons involved be normally required to make a general offer to the other shareholders. See CITY CODE, *supra* note 6, at B2.

30. *Id.* at Introduction A3 § 3(a).

31. *See id.*

32. *See* Shea, *supra* note 27, at 91-92.

33. The Takeover Panel "may modify or relax the application of a Rule if it considers that, in the particular circumstances of the case, it would operate unduly harshly or in an unnecessarily restrictive or burdensome, or otherwise inappropriate, manner." City Code, *supra* note 6 at A3 § 3(a).

34. The Executive is a department of the Takeover Panel charged with advising takeover participants on the City Code. Decisions of the Executive can be appealed to the full Takeover Panel which "can be convened at short notice." *See* William Staple, *The Takeover Panel, in A PRACTITIONER'S GUIDE TO THE CITY CODE ON TAKEOVERS AND MERGERS*, 1, 8-9 (1996) [hereinafter *A PRACTITIONER'S GUIDE*].

35. *See* Deborah A. DeMott, *Current Issues in Tender Offer Regulation: Lessons from the British*, 58 N.Y.U. L. REV. 945, 956 (1983). Professor DeMott notes that "the Panel has usually prohibited an abusive practice only after it has become a problem," but acknowledges that the Code's rules "can be tailored to respond to specific abuses," reducing the risk of "regulatory overkill." *Id.* at n.50. *See also* D.D. Prentice, *Take-Over Bids and the System of Self Regulation*, 1 OXFORD J. LEGAL STUD. 406, 412 (1981).

United States, the City Code does not have the force of law.³⁶ However, the Code is acknowledged by various U.K. self-regulatory bodies as playing a central role in the regulation of takeovers.³⁷ For instance, various securities professionals, including investment banks and lawyers, are required by the self-regulatory bodies which govern them to observe the Takeover Code. Furthermore, a court may view the Code's prescribed conduct as determinative of what a jury may consider reasonable behavior³⁸ and accordingly interpret the Code's requirements as a matter of law.³⁹ As a consequence of its non-statutory position, the "[t]he Code has not, and does not seek to have, the force of law."⁴⁰ However, the disciplinary actions that the Panel can take in respect of violations of the Code's requirements⁴¹ are treated with great seriousness by the United Kingdom financial community. The most significant of these is a Panel recommendation withholding the violator's ability to use the facilities of the securities markets.⁴² When a practitioner (e.g., a lawyer, accountant or financial adviser) is publicly censured for rule violations, his or her professional standing is "severely diminished."⁴³

Unlike the United States' securities laws and regulations, which, as discussed below, contain special provisions regarding information requirements for exchange offer prospectuses, the City Code does not contain special exchange offer provisions.⁴⁴ However, a prospectus prepared in connection with an exchange offer in the United Kingdom must comply with the requirements of the Financial Services Act ("FSA"), the Public Offers of Unlisted Securities Regulations 1995 ("POS Regulations"),⁴⁵ and, under some circumstances, the London Stock Exchange

36. Cf. Andrew Peck, *Documents from the Offeror and Offeree Board, in A PRACTITIONER'S GUIDE*, *supra* note 34, at 127, 128 (noting that the "Code has become a document drafted in increasingly legal terms").

37. "[B]oth government and other regulatory authorities [acknowledge] that those who seek to take advantage of the facilities of the securities markets in the United Kingdom should conduct themselves in matters relating to takeovers in accordance with best business standards and so according to the Code." CITY CODE, *supra* note 6, at A1-2 § 1(c).

38. See *Morgan Crucible Co. PLC. v. Hill Samuel Bank Ltd.*, 3 A11. E.R. 330, 335-36 (1990).

39. See *Regina v. Lord Spens*, 4 A11. E.R. 421 (1991).

40. CITY CODE, *supra* note 6, at A1 § 1(c).

41. The Takeover Panel's disciplinary actions can include (i) private reprimand, (ii) public censure, (iii) informing other regulatory authorities and (iv) taking action for the purposes of the requirements of the Securities Investment Board ("SIB"), the principal U.K. securities regulatory body. See *id.* at A5 § 3(d).

42. In most cases, this will result in any relevant self-regulatory group requiring that member firms not deal with the violator in connection with takeovers. See *Shea*, *supra* note 27, at 95.

43. See *Staple*, *supra* note 34, at 11.

44. Cf. CITY CODE, *supra* note 6 at J11, rule 24.10 (offer document must contain an independent estimation of the value of any unlisted securities offered by a bidder).

45. See, e.g., POS Regulations Rule 8.

Listing Rules (the "Yellow Book").⁴⁶

b. United States

Tender offers in the United States are regulated by the provisions of the Williams Act,⁴⁷ which was passed in 1968 by the U.S. Congress in order to protect investors in takeover bids.⁴⁸ The Williams Act amended the Securities Exchange Act of 1934,⁴⁹ providing the SEC with various rulemaking capabilities⁵⁰ in connection with its administration of the law.

Unlike the City Code, which, as previously discussed, regulates any takeover bid for a company organized under the laws of England and Wales, the Williams Act purports to regulate any tender offer made either "directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise."⁵¹ Because of the broad sweep of the "jurisdictional means" test, the Williams Act effectively reaches any tender offer for a security made to a person in the United States.

The level of regulation under U.S. law depends predominantly upon whether the tender offer involves equity securities registered under section 12 of the Exchange Act,⁵² and whether the consideration offered is in the form, in whole or in part, of securities (other than securities exempt from the registration requirements of the Securities Act). Section 14(e) of the Exchange Act,⁵³ and its related rules under Regulation 14E, apply to all tender offers, and create certain procedural requirements predominantly relating to timing of the offer. Section 14(d) of the Exchange Act, and its related rules under Regulation 14D, require certain disclosure in connection with offers for Section 12 registered

46. See London Stock Exchange, *The Listing Rules*, ch. 5 (1996).

47. Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1994).

48. The legislation was intended to reduce "undue pressure on shareholders to act hastily and to accept an offer, before management or any other group has an opportunity to present opposing argument or competing offers." See Senate Committee on Banking and Currency, *Hearings Before the Subcommittee on Securities on S. 510*, 90th Cong., 1st Sess. at 21 (1967).

49. See Securities Exchange Act of 1934 (codified as amended, at 15 U.S.C. §§ 78a-78jj, (1994)).

50. See, e.g., *id.* § 78n(d)(1) (tender offers to contain such information as the SEC "may by rules and regulations prescribe").

51. *Id.*

52. Section 12 of the Exchange Act requires that any class of equity securities listed on a national exchange—as well equity securities of companies with requisite asset and shareholder levels—be registered with the SEC. See 15 U.S.C. §§ 78m(b), (d). The SEC exempts certain foreign issuers from the requirements of this section. See 17 C.F.R. § 240.12g3-2(b) (1996).

53. 15 U.S.C. §§ 78n(e).

securities.⁵⁴

The question of whether a non-U.S. bidder's efforts to gain control of a company is subject to the Williams Act can be further complicated by the fact that the term "tender offer" is not defined in the Williams Act or the rules promulgated thereunder.⁵⁵ The uncertainty regarding the extraterritorial scope of the U.S. securities laws generally, especially where steps are taken by the bidder to avoid the U.S. jurisdictional means, complicates this determination even further.⁵⁶ The SEC has developed an eight factor analysis for determining whether or not a tender offer has been made,⁵⁷ but the U.S. courts have given this approach a mixed reception.⁵⁸

For purposes of this Article's hypothetical bid, assuming that *Bidder* wishes to include U.S. shareholders in its takeover bid, the offer of cash and shares for *Target* shares held by U.S. shareholders will be considered a tender and exchange offer under U.S. law. Thus, *Bidder* will be subject to the requirements of the Williams Act and the rules promulgated thereunder, which will govern the tender offer, as well as the requirements of the Securities Act, which will govern certain aspects of the exchange offer, particularly the obligation to deliver a prospectus to each *Target* shareholder that complies with the disclosure and timing requirements of the Securities Act.⁵⁹

As noted, the SEC is charged with administering the Williams Act. As with other areas of the U.S. securities laws, the SEC has the power to provide parties, including *Bidder*, with exemptions from various Williams Act requirements. The SEC typically grants such relief in the form of "no-action" letters, in which it agrees that it will not recommend SEC enforcement of what would otherwise constitute violations of applicable regulation. However, obtaining exemptive relief from the SEC can be a time-consuming process. A fair degree of behind-the-scenes negotiation with the SEC staff can be required before agreement is reached. As discussed in greater detail below, the SEC has, in a

54. See *id.* Section 14(d) and its related rules only apply to tender offers which, if consummated, would result in the bidder holding 5% or more of the class of securities sought.

55. See 1 EDWARD F. GREENE ET AL., U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKET § 7.03(1), at 7-8 (3d ed. 1996). In 1979, the SEC proposed a definition of "tender offer" which has never been adopted. See Proposed Amendments to Tender Offer Rules, Securities Act Release No. 6159, 1979 SEC LEXIS 218, at *9-17 (Nov. 29, 1979).

56. See generally Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 Nw. U. L. Rev. 523 (1993).

57. See GREENE, *supra* note 55, at 7-8.

58. See, e.g., *Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47, 57 (2d Cir. 1985) (mandatory application of eight-factor test unnecessary where target shareholders were sophisticated investors not in need of protections of Williams Act).

59. See *infra* notes 170-86 and accompanying text.

number of cross-border acquisitions, granted relief enabling non-U.S. bidders to proceed with takeover bids in the United States without strict compliance with the United States' usual procedural and disclosure requirements.

Failure to comply with the requirements of the Williams Act can result in the SEC bringing an enforcement action in the form of an administrative proceeding, or in a private action by the target or its shareholders.⁶⁰ Violation of the Williams Act, including its insider trading provisions, can also result in criminal liability.

c. Two other examples

France regulates the conduct of tender offers through the Commission des Operations de Bourse (the "COB") and the Conseil des Marchés Financiers (the "CMF"), both of which are statutorily created. The French rules apply to offers for those companies organized under French law and listed on the official market, the second market, or the over-the-counter market of the French stock exchange. Thus, although 7% of *Target's* shareholders are in France, the French rules do not apply because *Target* is organized under the laws of England and Wales.

French law subjects takeovers to extensive regulation. In addition to a number of procedural requirements, which, as discussed more fully below, are broadly similar to those found in the United States and the United Kingdom, France subjects the actual terms of takeover bids, including the price offered for the securities, to regulatory scrutiny.

The new, and still nascent, German Takeover Code⁶¹ also bears mention as it represents something of a hybrid between the U.S. and U.K. approach to regulation. The German code follows the United Kingdom's voluntary, self-regulatory model.⁶² This approach "enable[s] a faster and more efficient reaction to changes . . . [in] the legal and economic environment than . . . would be possible in the case of statutory regulation."⁶³ The German Takeover Commission, like the U.K.'s Takeover Panel, is comprised of appointed members from the financial community,⁶⁴ including credit institutions, academia, investment serv-

60. The Williams Act does not contain an express right of action for private litigants. However the U.S. courts have found an implied private right of action in the statute for target companies and their shareholders. See, e.g., *Polaroid Corp. v. Disney*, 862 F.2d 987, 993 (3d Cir. 1988).

61. See *übernahmekodex Börsensachverständigenkommission* [Takeover Code of the Exchange Expert Commission at the Federal Ministry of Finance] July 14, 1995, translated in *The New German Takeover Code*, Cleary, Gottlieb, Steen & Hamilton, Annex 1 (1996) [hereinafter, CGSH German Memo].

62. See *id.* at 7.

63. CGSH German Memo *id.* at 10.

64. Members are appointed by the German Exchange Expert Commission

ices and others participants in the capital markets. The Takeover Commission can amend the German Takeover Code whenever necessary.

The German Takeover Code does not automatically apply to all takeovers. Rather, a party must provide an affirmative "accession declaration" to the German Takeover Commission—what essentially amounts to a declaration that the relevant party will comply with the German Takeover Code. The legal significance of this declaration, enforceability of the German Code's requirements against the declarer as a matter of contract law or otherwise, remains unclear.⁶⁵ However, when a bidder undertakes voluntary accession to the Takeover Code, it is expected to make the Takeover Code part of the offer and share purchase agreement. In theory, this gives shareholders a contractual remedy against the bidder if the Code is breached. As of this writing, the German Takeover Code has been complied with in a number of tender offers but, in others, the Code was not adhered to.⁶⁶

B. *Regulatory Tension*

This Part will discuss certain tensions that may arise between the United States and United Kingdom regulatory systems in connection with *Bidder's* tender offer for Target. As in the preceding Part, differences among other developed countries' rules will also be noted. The principal differences between the rules arise in the following areas: (1) ownership reporting and mandatory offers, (2) commencement of the offering, (3) minimum offer periods, (4) withdrawal rights, (5) purchases outside the bid, (6) defensive tactics, and (7) disclosure obligations.

1. OWNERSHIP REPORTING

Ownership reporting is a subject closely related to tender offer regulation, since most tender offerors start with at least some stake in the target company. Ownership reporting requirements are generally implemented to prevent people from acquiring secretly a controlling stake in an issuer's securities or from doing so without giving all shareholders the opportunity to sell.

To illustrate some of the differing treatments of ownership reporting rules, suppose that prior to commencing a tender offer, Bidder holds 29% of *Target's* shares. Based on its belief that an increased stake in *Target* will provide it with greater influence in *Target's* affairs, *Bidder*

(*Börsensachverständigenkommission*), also known as, and referred to herein as, the BSK. *See id.* at 2. The BSK is, in turn, appointed by the German Ministry of Finance. *See id.*

65. *See id.* CGSH German Memo at 15 (difficulty lies in the fact that the BSK is not a legal entity).

66. *See id.* at 20-22.

makes several market purchases over a two-day period in both London and New York, increasing its ownership of *Target* from 29% to 30.5%. As a result, Bidder will be required to (1) under both U.S. and U.K. rules, report the purchase to the issuer and relevant regulators, and (2) under the U.K. rules, undertake a "mandatory" bid in cash or with a full cash alternative for all of *Target's* outstanding shares.⁶⁷

In the United States, Section 13(d) of the Exchange Act requires any person who, through an acquisition,⁶⁸ becomes "directly or indirectly the beneficial owner" of 5% or more of any class of voting equity securities registered pursuant to section 12 of the Exchange Act to send a statement of beneficial ownership to the issuer of such securities, any exchange on which the securities are listed and the SEC.⁶⁹ This requirement applies whether or not the issuer of the securities is a U.S. company. Movements of more than 1% in ownership require the holder to amend its filing promptly. Accordingly, assuming Bidder had previously complied with its filing obligations in respect of its ownership of 29% of *Target's* shares, the purchase of an additional 1.5% of the shares would require an amended filing.

In addition, under the Hart-Scott-Rodino Antitrust Improvements Act of 1976⁷⁰ (the "HSR Act") and related rules, parties to certain transactions (generally ones involving acquisitions of more than 15% of a company of significant size) must file reports with the U.S. Fair Trade Commission and the Department of Justice, and observe a waiting period before consummation of such transactions. Accordingly, where an issuer does not have securities registered under Section 12 of the Exchange Act (i.e., where Section 13(d)'s ownership reporting requirement does not apply), the first reporting obligation is that required by the HSR Act's, at 15%.⁷¹ Non-compliance with the HSR Act can result in civil penalties.

In the United Kingdom, the Rules Governing Substantial Acquisition of Shares ("SARs") create ownership reporting requirements.⁷² The

67. CITY CODE, *supra* note 6, at F13, rule 9.5(a).

68. So-called "passive acquisitions" of such shares are exempted from the filing requirement as in cases where a holder's percentage of an issuer's outstanding equity increases as a result of the issuer's repurchasing of shares. Curiously, however, members of the SEC's staff have indicated informally that ownership of debentures convertible into a dollar value of shares can trigger a filing obligation if, as a result of a fall in share price, that dollar value would purchase over 5% of the class.

69. Such a statement is generally made on either Schedule 13D or Schedule 13G under the Securities Exchange Act of 1934. See, e.g., 17 C.F.R. § 240.13d-101 (1996).

70. Pub. L. No. 94-435, tit. II, § 201, 90 Stat. 1390 (codified as amended at 15 U.S.C. § 18 (Supp. 1994)).

71. See §§ 18a(a)(2), 18a(a)(3).

72. See CITY CODE, *supra* note 6, at 5-16 contains Substantial Acquisition Rules which are issued and administered by the London Takeover Panel [hereinafter SARs].

SARs are designed to prevent so-called "dawn raids," characterized as substantial acquisitions of shares through market purchases or otherwise in a relatively brief period of time without the knowledge of the issuer. The SARs require any person whose ownership of an issuer's securities goes over a 15% threshold to notify the company and the London Stock Exchange of this fact by the next business day.⁷³ Independent of the SARs, under Sections 198 through 210 of the Companies Act 1985, movement in either direction across a 3% ownership threshold requires notice to the company within two days of dealing,⁷⁴ and to the London Stock Exchange ("LSE") "without delay." Subsequent whole percentage point movements in either direction above 3% require similar notice. In addition, under both French and United Kingdom corporation laws, a company can set almost any threshold percentage at which reporting of interests is required.⁷⁵

Moreover, by virtue of passing the 30% ownership mark, Rule 9.1(a) of the City Code requires that *Bidder* undertake a bid for all of the outstanding equity shares of *Target's* stock.⁷⁶ In fact, under Rule 5.1(a) of the City Code, *Bidder* would have been prohibited, subject to certain exceptions, from crossing the 30% threshold unless a public offer was about to be undertaken. Furthermore, where a person holds over 30%, Rule 5.1(b) prevents that person from acquiring more than an additional 1% without undertaking a public offer.⁷⁷

Mandatory bids are somewhat rare⁷⁸ as the special requirements and limitations that apply to mandatory bids under the City Code result in special care being taken not to cross the relevant thresholds. For instance, a mandatory bid must be for cash, or include a cash alternative, at a price at least as high as the maximum price paid by the bidder during the previous twelve months.⁷⁹ Furthermore, under City Code

73. See *id.* at 9, rule 3. Rule 1 restricts the rate at which shares may be acquired. See *id.* at 5, rule 1.

74. Note that sections 198 through 210 of Companies Act 1985 and SARs both require "dealings." It appears that passive changes in ownership (resulting from reacquisitions or issuances by the company) do not trigger the requirement.

75. See, e.g., CODE DES SOCIÉTÉS [French Companies Law] art. 356-1 (company can set a reporting threshold as low as 0.5%); Companies Act 1985 § 212.

76. See also CITY CODE, *supra* note 6, at B2, principle 10 ("[w]here control . . . is acquired . . . a general offer to all other shareholders is normally required"). *Id.*

77. See *id.* at E4, rule 5.1(a), (b). Under section 430A of the Companies Act 1985, a person who acquires 90% or more of the company's shares or of any class through a takeover offer must notify previously non-assenting shareholders of this fact. Under section 429, non-assenting shareholders then have right to be bought out at the tender offer price.

78. In the year ended March 31, 1995 only 12 out of the 108 bids made for U.K. companies were mandatory bids under Rule 9. Christopher Pearson, *Mandatory and Voluntary Offers and Their Terms*, in A PRACTITIONER'S GUIDE, *supra* note 34, at 90-91.

79. See CITY CODE, *supra* note 6, at F13, rule 9.5. However, exceptions to the "highest price" rule can be made by the Panel where appropriate. See *id.* at F14. Exceptions to the general rule

Rule 9.3, a mandatory bid must be conditional upon 50.1% of the outstanding shares being tendered. The bidder cannot condition the bid on, say, 90% acceptance. Most importantly, unlike a voluntary bid, a mandatory bid cannot contain conditions other than the acceptance condition except in relation to the U.K. Monopolies and Mergers Commission and the European Commission. As a result, conditions that are common in both the United States and the United Kingdom, such as bids conditioned on a lack of adverse change in the target or bidder's business, or the approval of a bidder's shareholders, are not permissible in a mandatory bid under the City Code.

In France, ownership of exchange listed securities must be reported to the CMF and the issuer when the holder's voting rights reach the 5%, 10%, 20%, 33.33%, 50%, and 66.66% levels.⁸⁰ In addition, a person holding more than one-third (33.3%) of the shares or voting rights in a French company listed on the official or second market of the bourse (exchange), must make a bid for all of the company's shares.⁸¹ Interestingly, what most would regard as "passive" acquisitions of control can trigger the mandatory offer requirement. Notably, under the charters of some French companies, shares held by the same party for a specified period (typically two years), without any subsequent acquisitions by such party, become entitled to double voting rights.⁸² The acquisition of double voting rights resulting in the owner having more than one-third of the company's voting rights can trigger the mandatory offer requirement. Under French law, a mandatory offer cannot be conditioned on a minimum number of shares being tendered. The bidder must accept all shares tendered regardless of the number.

Under the Germany Takeover Code, a mandatory offer is triggered if more than 50% of the voting rights are held.⁸³

2. COMMENCEMENT OF THE OFFER

In the United States, Rule 14d-2(b) of the Exchange Act requires a bidder for shares registered under the Exchange Act to commence its offer within five days of a public announcement that includes the price or a range of prices to be offered and the number of securities sought.⁸⁴

may be appropriate where, e.g., the takeover bid is undertaken as part of a rescue plan for a troubled company whose share price has slid since the bidder's initial purchases. See Pearson, *supra* note 78 at 85-86.

80. See French Companies Law art. 356-1 in CODE DES SOCIÉTÉS, *supra* note 74, at 402.

81. See French General Regulation, art. 5-4-1 in THIERRY SCHOEN, THE FRENCH STOCK EXCHANGE: A PRACTICAL GUIDE FOR INVESTORS AND ADVISORS (1995).

82. See SCHOEN, *supra* note 81, at 95.

83. See CGSH German Memo, *supra* note 60 at 18.

84. An announcement that a bidder intends to make a tender offer in the future but which does

On the day of commencement, the bidder must also file with the SEC and provide the target with certain information regarding its bid.⁸⁵

In the United Kingdom, a potential bidder may be required to make a brief public announcement⁸⁶ regarding its intention to make an offer. The announcement can be triggered in a number of ways, but typically it arises as a result of (i) the bidder communicating its "firm intention to make an offer" to the target's board of directors or (ii) either prior or subsequent to communication with the target's board, the target becoming the "subject of rumor and speculation or there . . . [being] untoward movement⁸⁷ in [the target's] share price."⁸⁸ After public announcement, the bidder must mail its offering document to the target and its shareholders within twenty-eight days.⁸⁹

Bidder's first potential regulatory conflict will arise if it triggers the City Code's public announcement requirement. Depending on its content, the brief announcement could be construed as triggering Rule 14d-2(b) under the Exchange Act. This would require Bidder to prepare and distribute its U.S. Schedule 14D-1 within five days, rather than having the City Code's 28 days in which to prepare a formal offer document. This difficulty arose in the context of the 1994 offer by Browning-Ferris

not indicate the number of securities sought or the consideration to be paid does create such a requirement. See 17 C.F.R. § 240-14d-2(d) (1996).

85. See 17 C.F.R. §§ 240.14d-2-240.14d-3 (1996). The filing must comply with the requirements of Schedule 14D-1 which calls for the following information to be provided: The identity of the target company and securities, the identity of the bidder, the source and amount of funds, the purpose of the offer, the amount of target shares held by the bidder and a description of any transactions by the bidder in the target's shares over the preceding 60 days, and financial information regarding the bidder. The practice of market participants is to include financial information regarding the bidder in cash offers. The Schedule 14D-1 typically also includes information on the offer procedures (e.g., timing, withdrawal rights, extensions, etc.).

86. Rule 2.5 of the City Code sets out the information that must be included in the announcement. This information, which is significantly less detailed than that required by Schedule 14D-1 (see *supra* note 83) includes the terms of the offer, the identity of the bidder, details of existing or anticipated shareholdings by the bidder and a description of relevant conditions. See CITY CODE, *supra* note 6, at D5-6, rule 2.5.

87. An "untoward movement" is regarded as one of approximately 10%. See City Code, *supra* note 6, at D4, Note on Rule 2.2.

88. *Id.* at D3, Rule 2.2. In addition, a bidder must make an announcement (a) upon acquisition of shares giving rise to a mandatory offer under Rule 9, (b) when information about the proposed bid is to be extended to "include more than a very restricted number of people (e.g., where a consortium is being put together or where irrevocable commitments are being sought), and (c) when a purchaser is sought for a holding, or aggregate holdings, of shares carrying more than 30% of the voting rights of a company, or when such company's board of directors is seeking potential bidders, and (i) rumor, speculation or untoward movement in share price occurs, or (ii) the number of potential purchasers or bidders is about to be increased "to include more than a very restricted number of people." *Id.*

89. See *id.* at M1, rule 30.1.

Industries, Inc. and BFI Acquisitions PLC for Attwoods PLC.⁹⁰ There the SEC confirmed that the bidder could distribute its Schedule 14D-1 in accordance with City Code practice (i.e., 28 days after the brief announcement required by the Code).

Commencement of the offer under the U.S. and U.K. rules should be contrasted with the French rules. In France, the offer process begins with the bidder's bank's filing a description of the proposed offer with the CMF⁹¹ and a draft prospectus with the COB.⁹² This information is similar to the City Code's "brief announcement" requirement, although the timing is quite different. Under French rules, the bidder must have already applied for all requisite approvals from relevant regulatory bodies (e.g., antitrust authorities) prior to filing. The applications themselves would be a practical impossibility if the City Code's announcement obligation had not been met.⁹³

When the CMF receives the bidder's filing, it will suspend trading of the target for a five-day period while it considers whether the offer is acceptable.⁹⁴ The *Société des Bourses Françaises* ("SBF") announces the filing.⁹⁵ In yet another contrast to both the U.S. and U.K. practice, the bidder must justify the price it proposes offering shareholders, and the CMF may ask the bidder to reconsider the proposed price if it considers it unacceptable.⁹⁶ Once the target's prospectus or the joint prospectus of the target and the bidder, as the case may be, is approved by the COB, the SBF publishes a tender offer "opening notice," that formally commences the opening of the offer.⁹⁷

3. OFFER PERIODS AND EXTENSIONS

Most countries' laws require that a tender offer remain open for a

90. See Browning Ferris Industries, Inc., SEC No-Action Letter, 1994 SEC No-Act. LEXIS 697, at *24-25 (Sept. 19, 1994).

91. The banks must act as guarantors of the bidder's undertaking; if the bidder is unable to purchase the shares tendered by holders in connection with the offering, the banks must make the purchase. See SCHOEN, *supra* note 81, at 85.

92. See *id.* at 86. Both the bidder and its banks must sign the prospectus, guaranteeing that the information contained in the prospectus is complete and not misleading. See *id.*

93. See CITY CODE *supra* note 6, at D3, rule 2.2(e) (requiring announcement where discussions are about to be extended to include more than a "very restricted number of people," or when approach to offeree company results in the offeree company becoming the subject of rumor and speculation).

94. See SCHOEN, *supra* note 81, at 85-86. The French regulators have "broad discretion in this regard." *Id.* at 86. Trading in the target's shares generally resumes two trading days after the SBF publishes the *avis de recevabilité*, announcing the CMF approval of the offer. See CMF REGULATIONS.

95. The SBF assists in preparation and implementation of CMF decisions. See CMF REGULATIONS, *supra* note 94, at art. 5-2-8.

96. See *id.* at art. 5-2-7.

97. See *id.* at art. 5-2-10.

minimum time period, the length of which does not vary in any great measure. Under U.S. law, a tender offer (regardless whether the securities are registered under section 12 of the Exchange Act) must be held open for a minimum of twenty business days.⁹⁸ In addition, if either a change in the offer price or number or percentage of outstanding shares occurs, the offer must remain open for at least ten days after such change.⁹⁹ The French rules also contemplate a twenty trading day minimum offer period.¹⁰⁰ The City Code provides that an offer must be held open for at least twenty-one calendar days after posting (which can mean up to forty-nine days from the first announcement), subject to extension where the bid terms are revised. If the offer becomes unconditional, it must remain open for at least an additional fourteen calendar days to enable others to accept.¹⁰¹ The new German Takeover Code contemplates a minimum offer period of twenty-eight calendar days.¹⁰²

A requirement in some countries prohibiting offers from remaining open longer than a specified period creates even more significant differences between regulatory systems. The U.K. rules require an offer to be declared "unconditional as to acceptances" (i.e., the minimum acceptance level set for the offer must have been satisfied) within sixty calendar days of the mailing of offer documents,¹⁰³ subject to limited exceptions.¹⁰⁴ Furthermore, the offer must be declared "wholly unconditional" (i.e., subject to no remaining conditions) within a further twenty-one calendar days.¹⁰⁵ The purpose of a maximum offer period is to limit the disruption caused to the target of the takeover bid.¹⁰⁶ Ger-

98. See 17 C.F.R. § 240.14e-1(a) (1996).

99. See *id.* § 14e-1(b). The rule also requires a time extension if there is any change in a dealer's soliciting fees.

100. See CMF REGULATIONS, *supra* note 94, at art. 5-2-10.

101. See CITY CODE, *supra* note 6, at M2, rules 31.1 & 31.4.

102. See CGSH German Memo, *supra* note 61, at 28, art. 11. The bidder may agree to an extension of the offer period with the Takeover Commission in the event of a revision in the offer terms. See *id.* at 29, art. 14.

103. See CITY CODE, *supra* note 6, at M4, rule 31.6. If offerors do not achieve this minimum level, the offer is said to "lapse." See *id.* at M5.

104. See *id.* at M4, rule 31.6(a)(i-iii). Extension will "normally only be granted" where a competing bid is announced, where the target's board of directors consents to the extension or where the target announces its results between days 39 and 60 of the offer. See *id.* at M7, rule 31.9 (target should avoid announcing trading results, profit or dividend forecasts, asset valuations or proposals for dividend payments after day 39 of the offer). Rule 31.9 also presumes that such announcements may drive the share price up, requiring the bidder to increase the value of its offer. Accordingly, where an announcement is made in the ordinary course and does "not appear likely to influence materially the outcome of the offer," the Panel will not generally require that the maximum offer period be extended. *Id.*

105. See *id.* at M6, rule 31.7. For offers declared unconditional as to acceptances prior to the sixtieth day of the offer, Rule 31.7's twenty-one day limit begins at the earlier date.

106. See Neil Harvey, *Conduct During the Offer; Timing and Revision; and Restrictions Following Offers*, in A PRACTITIONER'S GUIDE, *supra* note 34, at 158.

many's new Takeover Code contains a similar time restriction, requiring that the offer period not exceed sixty calendar days.¹⁰⁷ In contrast, U.S. rules contain no such provision, a tender offer can remain open indefinitely.¹⁰⁸ The same is true of the French rules although the CMF can take steps to speed up the process if it becomes prolonged.¹⁰⁹

The difference between the U.S. and U.K. rules could create difficulties for *Bidder*. Suppose that *Target's* assets include a number of regulated subsidiaries in the United States (e.g., state-regulated insurance companies) changes in control of which are subject to regulatory approval. Although the Panel has acknowledged that some delays required by the regulatory approval process can require flexibility in the application of the Code,¹¹⁰ it has thus far resisted outright extensions of the offer period where non-U.K. or European Union regulators are concerned. For instance, in the 1989 offer by Hoylake Investments Limited for B.A.T. Industries PLC,¹¹¹ the U.K. Takeover Panel required Hoylake to cause its offer to lapse after it became clear that it would be unable to obtain certain U.S. regulatory approvals in time to comply with the City Code.¹¹²

4. WITHDRAWAL RIGHTS

The term "withdrawal rights" refers to the ability of a tendering shareholder to withdraw the shares prior to a bidder's purchase of them. In tender offers for securities registered under section 12 of the U.S. Exchange Act, withdrawal rights may be exercised until the tender offer expires.¹¹³ There is no statutory requirement that withdrawal rights be

107. See CGSH German Memo, *supra* note 61, at 28, art. 11.

108. It should be noted, however, that especially in light of the steady increases in equity values in the U.S. markets over the last two years, keeping bids open for extended periods of time is likely to require regular upward revisions of offering prices.

109. If an offer has been open for more than ten weeks, the CMF can set a three day deadline for filing of competing bids. See CMF REGULATIONS, *supra* note 94, at art. 5-2-21.

110. See CITY CODE, *supra* note 6, at M6, rule 31.6 n.4 (acknowledging that a delay in a decision as to whether or not the proposed takeover will be referred to the U.K. Monopolies and Mergers Commission or the European Commission on antitrust grounds may require extension of the maximum offer period).

111. For a discussion of the Hoylake bid for B.A.T. Industries, see Meredith M. Brown and Simon MacLachlan, *When Worlds Collide: The Reconciliation of Conflicting Requirements in Cross-Border Acquisitions*, in 1 22ND ANNUAL INSTITUTE ON SECURITIES REGULATION, at 177, 193-97, 199-200 (PLI Corp. L. Practice Course Handbook Series No. 712, 1990).

112. See B.A.T. Industries PLC, Decision of the Appeal Committee of The Takeover Panel (1989/21) (affirming an earlier Panel decision 1989/11) [hereinafter Hoylake Panel Decision]. The Appeal Committee did give Hoylake permission to recommence its bid within twenty-one days of gaining the U.S. approval at issue. This represented a significant accommodation since pursuant to Rule 35.1(a) of the City Code, a lapsed bid cannot be recommenced for a 12 month period. See CITY CODE, *supra* note 6, at N1, rule 35.1(a).

113. See 17 C.F.R. § 240.14d-7(a) (1996). As enacted, the Williams Act required only that

provided if unregistered shares are sought. The French rules are similar to section 12 and permit withdrawals until the offer closes.¹¹⁴

Under the U.K. City Code, shareholders are entitled to withdraw their acceptances during specified interludes and under certain circumstances.¹¹⁵ Unless the offer has already been declared unconditional as to acceptances,¹¹⁶ withdrawals must be permitted from the date which is twenty-one calendar days after the "initial closing date"¹¹⁷ (the closing date is typically twenty-one days after the mailing of the offer document).¹¹⁸ As a result, if the offer has not been declared unconditional as to acceptances within forty-two calendar days of its mailing, tendering shareholders can withdraw their shares until the earlier of (a) the offer "being declared unconditional as to acceptances," or (b) the final time for lodging of acceptances.¹¹⁹ After an offer is declared wholly unconditional, the bidder must keep the offer open for additional acceptances for a subsequent fourteen day period, but during this period no withdrawals are permitted.¹²⁰

Bidder will encounter a conflict between the U.S. rules and the City Code in both the initial forty-two day withdrawal period and the required fourteen day "subsequent offer" period. United States law requires that withdrawal rights be available throughout this period. The SEC has granted two types of relief with respect to withdrawal rights; directly, by enabling the offer to proceed in conformity with City Code rules¹²¹ and indirectly, by permitting simultaneous offers to proceed in

withdrawal rights be available (i) for the first seven days after publication of the offer and (ii) during the period commencing 60 days from the date of the original offer. See 15 U.F.C. § 78(d)(5) (1994). However the SEC, through its rule making capability, extended the withdrawal period. See 17 C.F.R. § 240.14d-7 (1996). See also SEC Release No. 34-35333 (February 6, 1995).

114. See CMF REGULATIONS, *supra* note 94, at art. 5-2-11.

115. See CITY CODE, *supra* note 6, at M13, rule 34.

116. An offer can be declared unconditional as to acceptances at any point. Where the bidder holds more than 50% of the outstanding shares at the commencement of the offering, the offer may be unconditional as to acceptances from its inception.

117. See *supra* text accompanying note 101.

118. See CITY CODE, *supra* note 6, at M13, rule 34.

119. See *id.*

120. See *id.* at M2, rule 31.4.

121. See *In the Matter of Bell Cablemedia PLC*, Exchange Act Release No. 38030, 1996 LEXIS 3367 (December 9, 1996) [hereinafter *Cable & Wireless Communications*].

the U.S. and U.K.,¹²² each in accordance with the local rules.¹²³

The interrelated tender and exchange offers which resulted in the 1997 creation of Cable & Wireless Communications PLC ("CWC") involved this first approach.¹²⁴ Bell Cablemedia PLC ("BCM"), a U.K. company, conducted a tender offer for the shares (including ADSs) of Videotron Holdings PLC ("Videotron"), also a U.K. company. Videotron ADSs were listed on the NASDAQ National Market, with approximately 18% of its shares held by U.S. persons.¹²⁵ As part of the transaction, simultaneous exchange offers were also conducted for BCM's shares and shares of two subsidiaries of NYNEX Corporation (one a U.K. subsidiary, the other a U.S. subsidiary), in each case by the newly formed CWC entity. The tender offer and the exchange offer were each conducted as a single offer, structured to comply with both City Code and Williams Act requirements.

The SEC, at the bidders' request, issued an exemptive order that allowed the bidders to utilize a fourteen day "subsequent offer period" after the offer was declared unconditional, with no right of withdrawal for shares tendered during the period.¹²⁶ However, in a departure from U.K. practice, tendering shareholders could withdraw their securities at any time prior to the initial closing date and during any extension period. A declaration that the offer was unconditional as to acceptances would only serve to "lock up" tendering shareholders if it was made during an extension of the original offer period.¹²⁷

The Ford Motor Company Limited's 1989 takeover of Jaguar PLC exemplifies the second approach.¹²⁸ Jaguar, a U.K. public limited company, had ordinary shares listed on the London Stock Exchange and ADSs representing over 25% of the ordinary shares quoted on the NASDAQ National Market.¹²⁹ Ford structured its bid for Jaguar as two separate tender offers at the same price, conducted simultaneously in the

122. See, e.g., *In re Ford Motor Company Limited Offer to Purchase the Ordinary Shares and American Depositary Receipts of Jaguar PLC*, Exchange Act Release No. 34-27425, 1989 SEC LEXIS 2161 (November 7, 1989) [hereinafter *Ford/Jaguar*].

123.

124. This represents an accommodation in and of itself since the Exchange Act requires equal treatment of all shareholders. However, this rule is inapplicable if the SEC determines, "either unconditionally or on specified terms," that compliance is not necessary or appropriate. See 17 C.F.R. § 240.14d-10(e).

125. See Cable & Wireless Communications, *supra* note 121.

126. The BCM offer for Videotron was a "mandatory" offer under City Code Rule 9.1. The mandatory offer was knowingly triggered by BCM after an acquisition resulted in it holding over 80% of Videotron's shares. For a discussion of mandatory offers under the City Code, see *supra* notes 77-80 and accompanying text.

127. See Cable & Wireless Communications, *supra* note 121, at *5-7.

128. See *id.* at *7-8.

129. See *Ford/Jaguar*, *supra* note 122.

United States and the United Kingdom.¹³⁰

Despite the dual offer structure, Ford sought exemptive relief from the SEC in order to conduct a fourteen day subsequent offer period, as permitted by the City Code, without any right of withdrawal for shares tendered during the period.¹³¹ The SEC granted the relief and confirmed that the simultaneous offerings did not violate the Exchange Act's "all-holders" requirement.¹³²

5. PURCHASES OUTSIDE THE BID

If *Bidder* hopes to purchase any of *Target's* shares outside the formal offer (e.g., in a private transaction with a target shareholder), another area of conflict arises. Contrary to the laws of most European countries, U.S. securities laws, specifically Rule 10b-13 under the Exchange Act, prohibit bidders or their financial advisors (including such advisors' market-making affiliates) from purchasing a target company's securities other than through the tender offer.¹³³ This prohibition applies regardless of whether the bid is for securities registered under section 12 of the Exchange Act.

The existence of Rule 10b-13 is explained by the fact that in partial tender offers under U.S. law, which are either not permitted or generally not practicable under the laws of many other countries, shareholders must be treated on a pro rata basis if the offer is oversubscribed.¹³⁴ Allowing bidders to purchase outside the offer would circumvent the pro rata rule because it would allow outside sellers to obtain a premium price for all of their shares while limiting those tendering through the formal offer in the number of shares they could sell.¹³⁵ Even purchases outside the United States could violate Rule 10b-13.

A bidder in the United Kingdom can purchase shares prior to, as well as in the market during the offer, but the bidder must pay those shareholders tendering through the formal mechanism at least as much as other sellers received from the bidder during the bid and the three month period preceding the bid.¹³⁶ This rule provides shareholder protection similar to the U.S. rule, but in a less formalistic manner. In addi-

130. See *id.* at *1. ADSs do not need to be registered under Section 12 of the Exchange Act in order to be quoted on NASDAQ, but their underlying ordinary shares must be.

131. See *id.* at *2.

132. See *id.* at *3-4.

133. *Id.* at *5.

134. See 17 C.F.R. § 240.10(b)-13(c) (1996). The SEC also takes the position that, where a bid is a "friendly bid" (or, in U.K. parlance, an "agreed bid"), Rule 10b-13 prohibits such purchases by the target and its advisors.

135. See 15 U.S.C. § 78n(d)(6) (1994).

136. In addition to Rule 10b-13, there are other investor protections in place in partial offer context. See C.F.R. § 240.14e-4 (1996).

tion, under U.K. rules, an "exempt market maker" connected to the offer by virtue of its affiliation with the bidder's financial advisors is permitted to carry on its normal market making activities in the target's securities, subject to certain reporting requirements and other limitations.¹³⁷

Recognizing the differences between the relevant American and British rules, and in light of the obligation under London Stock Exchange rules for a market-maker to carry on its activities at all times, the SEC has in the past, subject to certain conditions, provided relief from the Exchange Act's prohibition against purchasing outside the bid to permit such market-making activity outside the United States.¹³⁸ The SEC has also considered providing a blanket exemption for such market-making activities in the context of U.S./U.K. takeover bids.¹³⁹ The conditions that the SEC has placed on market-making activities were similar to those in the SEC's proposed exemptive order.¹⁴⁰

The French and German¹⁴¹ rules regarding market purchases by the bidder are quite similar to the U.K. rules. In France, a takeover bidder who purchases in the market at a price higher than that contained in its offer will see its offer price automatically increased to the higher of 102% of the current offer price, or the actual price paid, regardless of the number of securities purchased.¹⁴² Market-makers complying with regulatory obligations are also exempt from certain restrictions on dealings

137. See CITY CODE, *supra* note 6, at E10, rule 6. See also *id.* at rules 5 and 9.

138. See *id.* at Q1-2, rule 38. An exempt market maker must report all purchases and sales (including the price thereof), as well as other related information, no later than the day following such purchase or sale. See *id.* at Q2, rule 38.5.

139. See, e.g., Ford/Jaguar, *supra* note 122, at 4-5 (during bid); In re Hanson PLC & HB Acquisitions PLC Offers to Purchase the Ordinary Shares and American Depositary Receipts of Beazer PLC, Exchange Act Release No. 34-29835, 1991 SEC LEXIS 2346 (October 18, 1991) (during compulsory acquisition period under U.K. rules); Enterprise Oil PLC & Lasmo PLC, SEC No-Action Letter, 1994 SEC No-Act. LEXIS 459 (April 27, 1994) (providing relief from rules 10b-6 and 10b-13 to permit Enterprise and advisors to purchase outside the U.S. during the bid); offers by Browning-Ferris Industries, Inc. & BFI Acquisitions PLC for Attwoods PLC, SEC No-Action Letter, SEC No-Act. LEXIS 697 (Sept. 19, 1994) (permitting bidders purchase of certain shares at lower price than that available to the public as well as allowing purchases outside the offer); Glaxo P.L.C. offer for Wellcome PLC, SEC No-action Letter, SEC No-Act. LEXIS 213 (February 7, 1995) (permitting Glaxo and advisor to purchase shares in open market, subject to U.K. rules and certain disclosure and reporting obligations).

140. See SEC Tender Offer Proposal, *supra* note 2, at *94-97. However, the SEC has never granted relief from the trading rules to permit purchases outside the offer within the United States.

141. The conditions were (1) that the disclosure documents filed in the United States in connection with the offer state that such purchases were possible, (2) that all such purchases take place outside the United States, and (3) that the market-makers concerned disclosed in the United States all purchases made by them on the same basis as required by the City Code. See *id.* at *95.

142. See e.g., CGSH German Memo, *supra* note 61, at 29, art. 13. The bidder must also advise the German Takeover Commission of any transactions it undertakes in the target's securities. *Id.* art. 12.

in target shares.¹⁴³

6. DEFENSIVE TACTICS

Although hostile bids are colorful affairs on both sides of the Atlantic Ocean,¹⁴⁴ one of more striking differences between U.S. and foreign corporation law is the ability of U.S. companies to implement defensive tactics, such as poison pills, to repel active bidders and discourage potential ones.

Poison pills usually take the form of warrants or rights issued as a dividend and traded as a unit with shares. The most popular type of poison pill, the "flip in," provides that if a specified percentage of an issuer's stock is acquired, all other shareholders receive the right to purchase the issuer's stock at a deep discount to the market price. This dilutes the acquiror's percentage ownership and the value of the investment. When such circumstances do not exist, the exercise price is far in excess of the share's market price. Furthermore, the issuer's board retains the ability to redeem the rights at any time for nominal consideration. As a result, in the absence of a takeover, the rights have no economic significance. U.S. corporations are increasingly aggressive at setting the percentage of ownership that will cause the right to "flip-in." While the first "flip-in" pills had percentages of 50%, levels of 20%, and in many cases 10%, are now common.

United States federal securities laws do not address a corporation's ability to adopt poison pills measures. As in most areas of corporate governance, the laws of the state of incorporation control. In most states, a board can successfully resist a legal challenge to a defensive strategy by establishing that it had reasonable grounds for believing that a threat to corporate policy and effectiveness existed, and that the defensive measures adopted were reasonable in relation to the threat posed.¹⁴⁵ Courts are generally deferential to the directors' judgment. As a result, boards enjoy considerable discretion to adopt poison pills and other structural defenses against hostile takeovers, including "lock-up" provisions and "no-shop" clauses.¹⁴⁶

Under the U.K. City Code, any actions taken to frustrate a bid must

143. See SCHOEN, *supra* note 81, at art. 5-2-23.

144. See *id.* at art. 5-2-17(c) (exempting certain market makers from special restrictions on target shares traded on the monthly settlement market).

145. See *e.g.*, *Morgan Crucible Co. PLC v. Hill Samuel Bank Ltd.*, 3 ALL E.R. 330, 331 (ch. 1990) ("The formal offer document went out on 17 December. The usual exchange of boasts and insults followed.").

146. The first part of the test can be satisfied by the board's demonstration that they acted in good faith and with reasonable investigation.

be approved by the target's shareholders.¹⁴⁷ However, the difficulties of engineering a vote within the City Code's compressed timetable, plus the average shareholder's preference for a bidder's premium over a potentially management-entrenching defense strategy by the target, make the City Code's rule a fairly flat prohibition. This prohibition applies as soon as the target has reason to believe that an offer is going to be made. Amongst other things, it prevents the target from issuing any additional shares in the company (even where previously authorized),¹⁴⁸ granting options over unissued shares¹⁴⁹ or making any disposal or acquisition of a material amount of assets.¹⁵⁰

As in the United States, defensive actions in the United Kingdom have, by local standards, engendered a fair amount of litigation. While the issues in the U.S. courts typically resolve around whether the directors complied with their fiduciary obligations in adopting a particular defensive measure, the question before the U.K. Takeover Panel is generally more basic: Did the steps taken by the target constitute prohibited "frustrating action?"

Two recent, well publicized takeovers illustrate the difficult questions that this seemingly simple exercise can pose. In the Hoylake takeover bid for BAT Industries,¹⁵¹ BAT undertook various activities in the United States which Hoylake asserted were designed to frustrate its takeover bid. The actions included lobbying politicians and others in the United States who, in the words of the Panel, "might influence the outcome of the offer,"¹⁵² involving itself in a "substantial" way in certain state insurance regulatory investigations, and intervening in various legal proceedings instituted by Hoylake in federal court to avoid the need to obtain state approval.¹⁵³ The Panel rejected the claim that these

147. "Lock-up" provisions are options granted to a bidder on target securities or assets which become exercisable if another bidder acquires the target at a higher price. "No-shop" clauses are covenants that prohibit a target from soliciting or accepting other acquisition offers.

148. See CITY CODE, *supra* note 6, at B2, general principle 7. See also *id.* at I13, rule 21.

149. A U.K. organized company cannot hold what in the U.S. are commonly referred to as "treasury shares." A U.K. company must immediately retire any shares purchased or redeemed by it. See Companies Act 1985, § 160(4) (Eng.).

150. See CITY CODE, *supra* note 6, at I15, rule 21 n.7 (where target proposes to grant options in accordance with normal practice under an employee or executive share option plan, "panel will normally give its consent").

151. In addition, the target may not enter into any contracts otherwise than in ordinary course of business. See *id.* Rule 21's notes set out some additional thoughts on what may be frustrating actions. See *id.* at n.3 (declaration and payment of dividends otherwise than in the ordinary course); *id.* at n.6 (amending or entering into an employment agreement with, or varying the terms of employment of, a director "otherwise than in the ordinary course of business"); *id.* at n.8 (Panel must be consulted before taking action that will affect target's pension arrangements).

152. See *supra* notes 111-12 and accompanying text.

153. Hoylake Panel Decision, *supra* note 112, at 2. According to the Panel decision, Hoylake claimed that BAT had arranged for 200 members of Congress to sign a letter to the then Secretary

efforts constituted "frustrating actions."¹⁵⁴

The panel was less forgiving of the efforts of Consolidated Gold Fields PLC ("Consolidated"), a U.K. public limited company, to forestall its acquisition by Minorco S.A., a Luxembourg corporation, by filing antitrust and securities fraud actions in the U.S. federal courts.¹⁵⁵ Although Consolidated succeeded in securing an injunction on the antitrust issue, the Panel ordered Consolidated to withdraw its U.S. court actions.¹⁵⁶ Minorco's victory was bittersweet, however, because a 49% owned affiliate of Consolidated was also pressing an action against Minorco in the U.S. courts. The Panel determined that because of Consolidated's minority position, the Panel could not require Consolidated to cause its affiliate to withdraw its action. The antitrust injunction remained in place and Minorco's bid lapsed.¹⁵⁷

Since the Hoylake and Minorco takeovers, U.K. companies have become more subtle in their defensive maneuvers. For instance, in addition to the "usual exchange of boasts and insults"¹⁵⁸ that hostile U.K. takeovers reportedly engender, a number of targets have recently added "sweeteners" to their defensive rhetoric. The recent announcement by Southern Electric, a U.S. company, that it planned a bid for National Power PLC, one of the U.K. electricity generators privatized by Her Majesty's Government in the early 1990s, was met with a statement from National Power's management that it would declare a special £1 billion dividend if the bid failed.¹⁵⁹ The U.K. electricity distributor Northern Electric took a similar tack, effectively promising shareholders a windfall if they resisted Trafalgar House's takeover bid.¹⁶⁰ The Take-

of State, James Baker, stating that "foreign financiers are seeking to buy up America," and urging him to communicate "concern" about the bid to the U.K. government. *Id.* at 9.

154. See text accompanying *supra* note 6.

155. See Hoylake Panel Decision, *supra* note 112, at 12. The Panel determined that: (i) lobbying is a "democratic right" with which the Panel should not interfere; (ii) participation in state regulatory proceedings may be necessitated by duties to shareholders and insurance policyholders and are thus entitled to deference, and (iii) intervention by BAT in Hoylake's federal court action was "essentially linked to . . . regulatory process" and thus permissible. See *id.* at 12-15. The Panel did acknowledge, however, that the "taking of legal proceedings" under other circumstances might run afoul of General Principle 7. *Id.* at 14.

156. See Consolidated Gold Fields, PLC v. Anglo American Corporation of South Africa Ltd., 698 F. Supp. 487, 495-97 (S.D.N.Y. 1988) (holding *inter alia*, that notwithstanding Minorco's efforts to avoid the jurisdictional means, there were enough significant U.S. effects to justify extraterritorial application of U.S. antifraud laws).

157. See Brown & MacLachlan, *supra* note 111, at 192-93.

158. See *id.* at 193.

159. See *supra* text note 142.

160. Michael Harrison, *National Power gives pounds 1.2 bn back to investors*, THE INDEPENDENT (London), May 18, 1996, at 18 ("bumper handout . . . as a means of defending itself against a potential bid").

over Panel did not view either of these steps as "frustrating action."¹⁶¹

Other European regulations also limit permissible defensive actions by targets, although not to the same extent as the City Code, a fact which rankles British financial players.¹⁶² For instance, a French company can, prior to the commencement of a bid, take a number of steps designed to discourage potential hostile bidders. This action is, as elsewhere, subject to the directors' compliance with their fiduciary duties. For instance, a corporation's bylaws can limit the exercise of any one shareholder's voting rights as long as the shareholder does not hold a majority of the shares.¹⁶³ This means that bidders who acquire 45% percent of a company's outstanding shares may be unable to exercise control even if the other shareholdings are widely dispersed.¹⁶⁴ French shareholders can enter into right-of-first-refusal agreements and cross-shareholding arrangements with friendly parties provided they disclose such agreements to the COB and the CMF and to the public through press releases.¹⁶⁵

After a bid is commenced, a target's options become far more limited under the French rules. The principal defensive measures that French companies employ include encouraging a friendly bid by a "white knight" and/or legally challenging the hostile offer in court or before the antitrust authorities.¹⁶⁶

The new German Takeover Code, in principle at least, takes an approach similar to the U.K.'s. It prohibits targets from taking measures that "run counter to the interests of the holders of securities in taking advantage of the tender offer," unless the target obtains shareholder approval.¹⁶⁷ However, the German Code also provides that contracts entered into prior to the commencement of a bid may be honored, creating at least the potential for pre-bid defensive steps.¹⁶⁸

7. DISCLOSURE

United States and United Kingdom rules may require both *Bidder* and *Target* to provide regulators and shareholders with specified information. In a U.S./U.K. cash-only offer, these requirements do not raise

161. See Mary Fagan, *Northern Telecom brings out sweeteners*, THE INDEPENDENT (London), July 22, 1995, at 18.

162. See Kirstin Ridley, *Trafalgar Loses Appeal on Northern Bid*, THE REUTERS EUROPEAN BUSINESS REPORT (London), Mar. 17, 1995.

163. "The U.K. government would like to see a stiffening of the rules throughout Europe to create a more level playing field . . ." Harvey, *supra* note 105, at 155.

164. See CODE DES SOCIÉTÉS, *supra* note 75, at 282, art. 177.

165. See Schoen, *supra* note 81, at 110-11.

166. See *id.* at 115-16.

167. See *id.* at 124.

168. CGSH German Memo, *supra* note 60, at 31, art. 19.

serious conflicts. However, in an exchange-offer context, the different disclosure regimes, with related liability risks, can frequently lead to exclusion of U.S. shareholders from the bid.

Disclosure by Bidder

In the United States, because *Target's* shares are listed on NASDAQ and are, accordingly, registered under section 12 of the Exchange Act, *Bidder* will be required to make a filing on Schedule 14D-1¹⁶⁹ and to amend the filing to reflect any material changes in the information.¹⁷⁰

Even if the target's securities are not registered under section 12, making Section 14D inapplicable, a bidder still needs to prepare a disclosure document containing the terms of the offer, if only for informational purposes. In addition, under the Exchange Act's anti-fraud provisions, if a party possesses material non-public information regarding an issuer's securities, such knowledge may trigger an obligation to either disclose the non-public information or refrain from purchasing the securities.¹⁷¹ Accordingly, a bidder may need to disclose certain information in its possession that is not necessarily related to the offer or its terms.

The City Code sets out specific information requirements for the offer document where the offeror is incorporated under the Companies Act 1985 (or its predecessors)¹⁷² and listed on the London Stock Exchange.¹⁷³ Much of this information is similar to that required by Schedule 14D-1.¹⁷⁴ In addition, both bidders and targets must provide information relating to their business, finances and operations (regard-

169. *See id.*

170. *See* 17 C.F.R. § 240.14d-3(a)(1) (1996). For a summary of the Schedule 14D-1 requirements, *see supra* note 85.

171. *See* 17 C.F.R. § 240.14d-3(b) (1996).

172. *See generally*, EDWARD F. GREENE & DAVID A. CHRISTMAN, *United States, in INTERNATIONAL INSIDER DEALING*, 3, 7-8 (Mark Stamp et al. eds., 1996). Furthermore, pursuant to the Exchange Act, if "substantial steps" have been taken toward the commencement of a tender offer, a person in possession of non-public information which such person knows or has reason to know has been acquired from either the target or the bidder (or their agents), violates the law by trading in the target's stock without disclosing the information. 17 C.F.R. § 240.14e-3; *see also* GREENE & CHRISTMAN, *supra*, at 28.

173. Almost all U.K. companies are incorporated under one of the Companies Acts, the first of which was recognized in 1948. *See* L.C.B. GOWER, *PRINCIPLES OF MODERN COMPANY LAW*, 3-4, (3d ed. 1969). Only companies organized before 1860, and certain specialized entities (e.g., trade unions, trusts and building societies, which are similar to thrifts) remain outside the ambit of these acts.

174. *See* CITY CODE, *supra* note 6, at J2, rule 24.2(a)(i). This includes the London Stock Exchange's Unlisted Securities Market or its Alternative Investment Market. *See id.* If a bidder is not incorporated under the Companies Act 1985 (or one of its predecessors), and is not listed on the London Stock Exchange, then alternative information is required. *See id.* at J2-3, rule 24.2(b).

less of whether listed on the London Stock Exchange).¹⁷⁵ The directors of each company providing such information must acknowledge responsibility for the statements contained in the document. Additionally, the "Panel regards financial advisers as being responsible *to the Panel* for guiding their clients and any relevant public relations advisers with regard to any information released during the course of an offer."¹⁷⁶

Disclosure by Target

Under the Exchange Act, *Target's* management must issue a statement to its shareholders recommending either acceptance or rejection of *Bidder's* offer, indicating that it is adopting a neutral stance, or stating that it is unable to take any position.¹⁷⁷ The statement must be sent to shareholders within ten business days from the date the offer is first published.

The City Code requires *Target* to circulate its views on the offer, including any alternative offers, and to inform its shareholders of any advice it receives from its independent advisors.¹⁷⁸ If the response document contains the financial advisor's recommendation or opinion, it must also include a statement that the advisor consents to the issuance of the document. *Target* must advise shareholders of its view within fourteen calendar days of the offer being commenced.¹⁷⁹

Exchange Offer

In addition to the disclosure required in a cash-only offer, under the U.S. rules, if *Target* shareholders are to be offered *Bidder* shares (either in lieu of or in addition to cash), *Bidder* must register the offered shares with the SEC. The registration statement designated for use by a non-

175. See *id.* at rule 24.2(a) (describing the financial and other information required with respect to the offeror). The information includes financial statements for the preceding three years as well as any subsequent interim statements; a statement of assets, liabilities and cash flow as published in the last audited accounts as well as all material changes in the financial or trading position of the company since the last audited accounts; any inflation adjusted information and significant accounting policies including descriptions of variations of figures resulting from any change in accounting policy; the directors' names; the nature of the business; a description of any material contracts entered into in the last two years; and, if the company is not incorporated under the Companies Act 1985 with listed shares, information on any person having an investment in the offeror such that he may have a potential or direct interest in the capital of the offeree. See *id.* at J3-4.

176. See *id.* at J5, rules 24.2(a) & (c). These rules require the offer document to include financial statements for the preceding three fiscal years as well as certain accounting information and a list of each company's directors. This rule also requires the bidder to provide a description of the nature of its business, and of its financial and trading prospects, and a summary of each material contract (other than ordinary course contracts) it, or its subsidiaries, has entered into during the preceding two years. See *id.*

177. See *id.* at J3, rule 19.2(a).

178. 17 C.F.R. § 240.14e-2(a). The statement must be made in conformance with Schedule 14D-9. See *id.* § 240.14d-9.

179. See CITY CODE, *supra* note 6, at J12, rule 25.1.

U.S. bidder's exchange offer requires: (1) a detailed description of the terms of the offer, (2) a business description of both the bidder and the target, (3) audited balance sheets for the two most recent fiscal years, and (4) audited income statements for the three most recent fiscal years (accompanied by auditors' opinions and consents). In addition, if the acquisition is material to the bidder, a pro forma income statement and balance sheet must be prepared, intended to present the business that will result from a successful takeover. This historical and pro forma financial information is more extensive than that required by the U.K. City Code.

The City Code does not contain any significant additional disclosure requirements in connection with an exchange offer.¹⁸⁰ However, under certain circumstances, "listing particulars" conforming with the London Stock Exchange Yellow Book requirements may be required.¹⁸¹ In addition, under the Financial Services Act ("FSA"), most exchange offer documents will be regarded as "investment advertisements," which can only be offered by an "authorized person." The FSA contains its own antifraud provisions, violation of which can result in civil or criminal liability.¹⁸²

The cost and timing delays inherent in registering *Bidder's* securities with the SEC may make an exchange offer in the U.S. impracticable if it hopes to meet the City Code's timetable. The SEC has shown some willingness to be flexible with non-U.S. bidders¹⁸³ in this area as well as with respect to the information contained in exchange-offer registration statements relating to cross-border acquisitions. For instance, when Blockbuster Entertainment Corporation, a U.S. company, made an offer for Cityvision PLC, the SEC agreed to permit the bidder's registration statement to contain information on the target that was broadly consistent with that required by the U.K. rules. In addition, the SEC did not require Blockbuster's and City Vision's financial advisors to consent to the registration statement's references to them, thus excepting them from the relatively stringent liability regime normally applicable to so-called "experts."¹⁸⁴

The bidder's difficulties are compounded when both it and the tar-

180. See *id.* at M1, rule 30.2.

181. Cf. *id.* at J11, rule 24.4 (where securities are offered as consideration, effect of the acquisition on the emoluments of the bidder's directors must be discussed); rule 24.10 (offer document must contain an independent estimation of the value of any unlisted securities offered by a bidder).

182. Listing particulars are required where the exchange-offer bidder is listed on the London Stock Exchange.

183. See Financial Services Act, 1986, ch. 5 § 57 (Eng.).

184. For instance, the SEC may be willing to review drafts of the registration statement on an expedited, confidential basis.

get are non U.S. reporting issuers, because the bidder must provide financial information relating to the target similar to that provided in its own stead. This information must be reconciled to U.S. Generally Accepted Accounting Principles ("GAAP"). However, the SEC has been flexible with respect to the requirement that the target information be audited. Target information must be provided regardless of the target's and bidder's comparative sizes.

It bears mention that, outside the exchange offer context, where an issuer's registration statement covers a period in which an acquisition has just begun or is about to begin, historical and pro forma information regarding the target and resulting business is only required where the target's size or revenues makes the acquisition material to the issuer. The SEC has recently changed the materiality thresholds for such information.¹⁸⁵

Finally it should be noted that if both the bidder and the target are U.S. reporting issuers, the registration process is relatively simple with information relating to each entity being incorporated by reference in the document. However the bidder must still disclose any non-public information it has received and may be required to discuss the negotiations that led to the bid.

C. *Common Concerns*

As is evident from the preceding discussion, the takeover rules of various jurisdictions address certain common concerns. For instance, all of the jurisdictions discussed above seek to ensure equal treatment of all shareholders and adequate (unpressured) time for analysis of the offer by shareholders. What constitutes the best means of achieving these goals is, of course, what creates the observed differences between the systems. Each takes a different view of how rules regarding mandatory offers, purchases outside the offer, disclosure requirements and defensive maneuvers can best serve the objectives. Ironically, while seeking what are essentially similar protections, these differing regulatory systems have created incompatibilities that hinder rather than help cross-border transactions. As previously noted, U.S. shareholders are frequently unable to participate in acquisitions of non-U.S. companies. As a result,

185. Section 7(a) of the Securities Act requires "experts," such as accountants or engineers, who are mentioned in the registration statement as having prepared or certified any part of the registrations statement (e.g., financial statements), to consent to references to them therein. See 15 U.S.C. § 77g(a) (1994). Consenting experts may be sued for damages arising from material misstatements or omissions in the document. See *id.* § 77k(a)(4). However, the SEC may waive the consent requirement where it is impracticable for the registrant to obtain them or where to do so would involve undue hardship. See *id.* § 77g(a). Hostile bidders frequently rely on this relief. See 1 ISDM, *supra* note 54, at 7-14 n. 41.

such shareholders lose the very protections the U.S. system is intended to provide.

The difficulties of complying with largely procedural requirements do not adequately explain the regularity with which U.S. shareholders are excluded. Certainly in the exchange offer context, the extensive disclosure requirements under the U.S. rules and the uncertainties relating to liability for bidders, targets and advisors are also significant contributing factors.

III. RECENT PROPOSALS FOR CROSS-BORDER TAKEOVERS

A. *Proposals for Improving the U.S. Approach*

This Part explores a number of proposals that have been made to (i) ease the regulatory conflict between the takeover laws of the United States and the laws and practices of other countries and (ii) create inter-system accord on takeover rules.

1. THE SEC PROPOSALS

In 1990, the SEC issued a concept release indicating its desire to encourage foreign bidders to include U.S. shareholders in cross-border tender and exchange offers.¹⁸⁶ The SEC sought comment on the question of whether (in situations in which a relatively small percentage of the target's shares are located in the U.S.) it should permit foreign bidders to make the offer into the U.S. based on the procedural rules and disclosure practices of the bidder's home market.¹⁸⁷ Among other things, the SEC expressed the belief that accommodating foreign rules would enable it to more freely assert its jurisdiction extraterritorially without offending principles of international comity.¹⁸⁸ The *Concept Release* underscored the SEC's view that U.S. securities laws apply to any tender or exchange offer in which it is reasonably foreseeable that the offer will result in excluded American investors selling their securities abroad or in the U.S. markets. It also foreshadowed the SEC's intention to make the U.S. anti-fraud rules applicable to tender and exchange offers, even where conducted in conformity with the foreign company's home rules and practices.

Later that year, the SEC adopted a multi-jurisdictional disclosure system ("MJDS") that enables Canadian companies to proceed in the United States under Canadian procedural and disclosure rules if less than

186. Regulation S-X, Rule 3-05. Depending on the relative size of the target, the issuer must provide historical financial information. Broadly speaking, the target company must be 20% of the bidder's size or greater before such financial information is required.

187. See SEC Concept Release, *supra* note 10 at *1-3, *5-6.

188. See *id.* at *18-19.

40% of the target's securities are held by U.S. shareholders.¹⁸⁹ Under the MJDS, a Canadian bidder in an exchange offer can, subject to certain requirements, register its offered securities under the disclosure documents required under Canadian securities laws.¹⁹⁰ Using such documents in the U.S. would subject the issuer to the civil liability and anti-fraud provisions of the Securities Act and the Exchange Act.¹⁹¹

Responses to the *Concept Release* were mixed. Among the commentators was the Company Law Subcommittee of the City of London Law Society (the "Law Society"),¹⁹² which indicated that U.K. bidders were not likely to adopt the SEC's *Concept Release* approach as long as their domestic laws allowed them to exclude U.S. persons from participating in offers. The Subcommittee provided two reasons to support their assertion. First, hostile bidders would be unwilling to accept the U.S.'s high risk of litigation with a target, which could frustrate the bid. Second, in an exchange offer, bidders and their directors and their officers were not likely to agree to expose themselves to U.S. civil liability standards under the Securities Act.

Likewise, in a letter to the SEC, the Committee on Federal Regulation of Securities, Section of Business Law of the American Bar Association (the "ABA Committee") indicated that application of U.S. anti-fraud provisions would be an obstacle to foreign bidders allowing U.S. shareholders to participate in tender and exchange offers.¹⁹³

In 1991, the SEC published its Tender Offer Proposal.¹⁹⁴ The proposal set forth three possible exemptive schemes designed to encourage foreign bidders to include U.S. persons in foreign exchange and tender offers. Essentially, the SEC proposed that, where 10% or less of a foreign company's outstanding shares are held by U.S. shareholders, the SEC would generally exempt the bidder¹⁹⁵ from the U.S. securities laws governing tender offers. To qualify, the bidder would have to (i) enable U.S. shareholders to participate in the bid on terms no less favorable

189. See *id.* at *6 n.3.

190. See Proposed Rules, Exchange Act Release No. 33-6879, 55 F.R. 46,288, at 46,322 (Nov. 2, 1990).

191. See *id.* at 46,288.

192. The SEC indicated in the release that good-faith compliance with Canadian disclosure requirements would constitute compliance with U.S. disclosure requirements. *Id.* at 46,346.

193. See Comment Letter from Martin G. Chester, Chairman, Company Law Sub-Committee, to Jonathan G. Katz, Secretary, U.S. Securities & Exchange Commission (Sept. 10, 1990) (File No. S7-10-90, SEC Public Reference Room, Washington, D.C.); see also Comment Letter from British Merchant Banking and Securities Association (Sept. 19, 1990) (on file with author) 4 (threat of litigation is "most important" reason for exclusion of U.S. shareholders).

194. See Comment Letter from James H. Cheek et al., Chairmen, Committee on Federal Regulation of Securities, Section of Business Law of the American Bar Association (Sept. 20, 1990) (on file with authors). The letter is described in Fisch, *supra* note 56, at 540 n.10.

195. See SEC Tender Offer Proposal, *supra* note 2.

than those offered to other holders; (ii) make any offering circular or similar document required by the target's home country available to U.S. investors (in English); and (iii) indicate that the offer and its related disclosures were being made in conformance with the rules of another country. Under such circumstances, the SEC's tender offer disclosure requirements, and the numerous U.S. procedural rules, would not apply.¹⁹⁶

As the *Concept Release* suggested, under the Tender Offer Proposal, the general antifraud provisions of the U.S. securities laws (including the prohibition on insider trading) would apply to tender offers conducted in accordance with the proposal.¹⁹⁷ Irrespective of the ABA Committee's and the Law Society's views, the SEC indicated that the anti-fraud provisions should not prevent bidders from taking advantage of the proposed scheme since, even if the offer were not disseminated in the United States, the bidder would be liable for fraud both in the target's home country and in the United States "given the foreseeable effect of . . . fraud in the United States."¹⁹⁸

In the area of exchange offers, the SEC release acknowledged a "much more difficult problem from a regulatory perspective . . . since an exchange transaction involves the offer and sale of securities in the United States, thereby establishing a continuing presence of the offering person in the United States capital markets."¹⁹⁹ Nevertheless, the SEC recognized that the costs and delays caused by the exchange-offer registration process had generally led bidders to exclude U.S. shareholders of non-U.S. target companies. The SEC proposed a two-tier exemptive system: one registration exemption where five million dollars or less of securities were to be offered in the United States; and a simplified registration form (relying entirely on home country documents) for larger qualifying exchange offers where U.S. shareholders owned 5% or less of the target's shares.

Under the less-than-\$5 million exemption, the offer would have to be made available to U.S. holders on the same basis as to other shareholders. However, if a state's "blue sky" laws did not have a comparable exemption, the bidder could exclude U.S. shareholders in that state.

196. The exemption would be available for bids by both U.S. bidders and non-U.S. bidders for non-U.S. companies. An equivalent exemption under proposed Rule 13e-4(b) was to be available for bids by a non-U.S. company to repurchase its own shares, although many countries do not permit companies generally to repurchase their own shares.

197. See *supra* notes 169-71 and accompanying text. In addition, under the proposal, a bidder in an exempt tender offer would be permitted to make purchases outside the offer (but not in the United States) if permitted by the rules of the target's home country.

198. See SEC Tender Offer Proposal, *supra* note 2, at *7-8.

199. *Id.* at *35.

Securities issued under this exemption would be freely tradable in the United States. Therefore, the bidder would not become subject to periodic reporting requirements.

The simplified registration statement exemption would permit eligible bidders²⁰⁰ to register securities in the United States using English language documents prepared in accordance with the requirements in the target company's home country. For example, no U.S.-styled financial statements, or reconciliation to U.S. GAAP would be required.

The registration statement would be filed with the SEC on the day the offering circular was filed in the target's home jurisdiction, and would be effective upon filing. This would eliminate the delays normally involved in the U.S. registration process. Additionally, notwithstanding its public offering of securities in the United States, a bidder using the simplified registration statement would not become subject to the SEC's periodic reporting requirements.²⁰¹

Under either the less-than-\$5 million exemption or the simplified registration process, U.S. shareholders would have to be given the same opportunity to participate in an exchange offer as other shareholders (except that residents of a particular state could be excluded if the bidder was unable to register the securities under such state's "blue sky" laws (despite a good faith effort)), and the general anti-fraud provisions of the U.S. securities laws would still apply for any material misstatements or omissions.

In light of the fairly well-trod path established through various exemptive orders involving bids for companies subject to the City Code, the SEC also announced a proposal to formalize certain procedures through a blanket exemptive order applicable to any tender offer for a U.K. company subject to both the U.S. and U.K. regulatory schemes. Under this proposed exemptive order, a U.K. takeover bid could proceed simultaneously in the United States under the same procedures as were authorized in Ford's bid for Jaguar.²⁰² This exemption would not be available if the U.K. target company (1) had more than fifty percent of its voting securities directly or indirectly owned by U.S. residents, and (2) was effectively run from the United States. In the case of an

200. *Id.* at *39.

201. A bidder would be eligible to use the procedure only if (i) it had shares listed or quoted on one of 17 designated major non-U.S. stock exchanges and securities markets for at least three years or (ii) it had at least three years of operations and a current "public float" (excluding shares owned by affiliates) of at least \$75 million. *See id.* at *51-52.

202. Such bidders would be required to furnish to the SEC (but not file formally) the information required under a Rule 12g3-2(b) exemption both at the time of offer commencement and thereafter so long as there are at least 300 U.S. holders of any class of its equity securities. *See id.* at *68-70.

exchange offer, bidders relying on the proposed exemptive order would nevertheless be required to file an appropriate registration statement regarding the securities being issued.

Under the proposal, bidders would have the choice of making either concurrent offers (a la Ford/Jaguar) or unitary offers (a la Hanson/Beazer), the central difference between the two being that a unitary offer requires only one offer document, and all target company shareholders would have withdrawal rights until the offer became unconditional as to acceptances. Since the rules of the Takeover Panel do not require withdrawal rights initially, if concurrent offers are made, two offer documents must be prepared and withdrawal rights would be available only to U.S. shareholders of the target until the offer becomes unconditional as to acceptances.

The SEC never adopted any of the schemes contained in the Tender Offer Proposal. It is believed that the SEC's view was that the home-country disclosure requirements in most non-U.S. jurisdictions were insufficient to adequately protect U.S. investors or where disclosure levels were adequate, that such disclosure was a by-product of local market practice rather than compliance with local laws and regulations.

2. ACADEMIC PROPOSALS

A number of academic commentators have analyzed the U.S. response to international cross-border acquisition activity by focusing on the extraterritorial application of U.S. law in the takeover area. In addition to the concern raised in this article regarding the Williams Act's impact on U.S. shareholders of non-U.S. target companies, these commentators indicate that the extraterritorial application of U.S. securities laws (as well as other U.S. laws) infringes on the sovereignty of foreign nations, injuring international relations and occasionally provoking retaliatory measures.

One recent proposal calls for a legislative solution to the difficulties posed when U.S. and foreign takeover laws clash.²⁰³ The proposal suggests that existing U.S. laws and regulations would remain applicable to tender offers for securities of companies either incorporated under U.S. law, listed on a U.S. national exchange, or registered under Section 12 of the Exchange Act. The proposal also suggests that the Congress amend the Exchange Act such that the Williams Act and Exchange Act anti-fraud provisions would have no application to tender offers for securities other than those described above.

A bidder's ability to take advantage of this proposed law would be

203. See *id.* at *82-97. Regarding the SEC's Ford/Jaguar relief, see *supra* notes 122-38 and accompanying text.

conditioned on (1) his providing U.S. shareholders with an English translation of any tender offer disclosure required by his domestic market, and (2) his extension of the offer to U.S. and non-U.S. investors on "substantially equal terms." The author also suggests qualifying the latter of these two requirements in terms of *substantial equality* of offers. That way, bidders could make cash offers to U.S. holders while concurrently making exchange offers in other markets. This enables the exchange-offer bidder to "avoid the registration requirements of federal law, so long as the U.S. investors receive substantially equal consideration for their stock."²⁰⁴

The proposal is intended to ensure that only foreign issuers who choose to directly utilize U.S. capital market facilities (i.e., the national exchanges), will be subject to extraterritorial application of U.S. antifraud laws.²⁰⁵ Other commentators agree that only through the removal or limitation of application of the U.S. antifraud laws and regulations can the U.S. hope to encourage non-U.S. bidders to include U.S. shareholders in tender offers.²⁰⁶

This approach demonstrates a fundamental misunderstanding of the nature and function of the U.S. antifraud laws. They are, and were intended to be, investor protection laws. Within the realm of antifraud law then, it is not appropriate to attempt to determine who sought the benefits of the U.S. market, but rather such analysis requires assessing the purchasing investors' expectations. Such persons may have (as the SEC has acknowledged) been willing to make their initial investment decision on the basis of the target's home country disclosure practices. However, that is not a justification for depriving those investors of the fundamental antifraud protections provided by the U.S. securities laws when a third party (the bidder) offers to either purchase those securities or to exchange them for its own. Part IV discusses the authors' belief that negating investor protections provided by the basic antifraud rules of the Exchange Act is neither a realistic nor politically acceptable approach to the problem of U.S. shareholders being excluded from tender offers.²⁰⁷

204. See Fisch, *supra* note 56, at 573-575.

205. See *id.* at 573-74 & n.274.

206. *Id.* at 574. "With the benefit of this use comes the burden of complying with U.S. law." *Id.* It bears mention that, even if the bidder's domestic rules regarding equal treatment of shareholders were to permit them to bifurcate an offer so that U.S. holders could be offered cash while non-U.S. holders were given a choice between cash and shares, the bidder might still have to take extensive measures to avoid the need to register the shares for "flowback" into the United States. See GREENE, *supra* note 55, at 7-21 (Hoylake bid ensured that shares provided to non-U.S. holders would not be sold into U.S. for six-month period.)

207. See *supra* notes 192-93 and accompanying text.

B. *Proposals for Intersystem Approaches*

1. DIRECTIVE 13

The Commission of the European Communities recently proposed an amended 13th European Parliament and Council Directive on Company Law concerning Takeover Bids ("Directive 13" or the "Directive"). Directive 13 is a "framework" directive. It is intended to require European Union ("EU") member states to implement regulations ensuring the observation of certain general principles in takeover conduct throughout the EU.²⁰⁸ The Directive sets out minimum standards with relatively little specificity as to how they should be attained, and to allow member states to create detailed rules "according to their national practices"²⁰⁹

Directive 13 was originally proposed in 1989. After comment by both the EU Economic and Social Committee and the European Parliament, it was revised in September 1990. Serious opposition from member states derailed the proposal in 1991 until, after a period of dormancy, in 1993 the European Commission initiated a "detailed consultation" with the various member states that produced the current proposal.²¹⁰ The strenuous response which greeted the original Directive 13 proposal both reveals the difficulty inherent in attempting to create uniform regulation across national borders and helps explain the current proposal's light, and perhaps overly politic, tread.

The Directive contemplates each member state's appointing a "supervisory authority" charged with protecting minority shareholders, ensuring that the requisite degree of information regarding bids is made available, and policing the actions of target companies' boards of directors. The Directive indicates that these supervisory authorities should have the power to waive certain national rules in order "to cope with a great variety of circumstances which can arise in fast moving financial

208. In the cross-border acquisition context, negating the applicability of Rule 10b-5 would create numerous problems. For example, a person selling shares to a non-U.S. bidder relying on a materially misleading tender offer document would have no recourse in the U.S. courts to redress their injury. At the same time, a person purchasing a bidder's shares while the bidder was simultaneously providing false information in its domestic market (thereby driving up prices of its unregistered shares in the United States), *would* have recourse to the U.S. courts.

209. These general principles are that (1) all shareholders of a target company "who are in the same position" should be treated equally, (2) offerees should have sufficient time and information to reach a properly informed decision, (3) the target board should act in the interests of the company as a whole and especially with respect to the interests of shareholders, (4) false markets should not be created in either the bidder's or target's securities, and (5) the target should not be hindered in conducting its business for an unreasonably long time. *See* DIRECTIVE, *supra* note 20, at art. 5.

210. *See Explanatory Memorandum*, Part I.7 in Directive, *supra* note 20 [hereinafter *Explanatory Memorandum*].

markets.”²¹¹ Furthermore, they should have the power to order the taking of certain measures which they deem necessary in connection with bids.

The U.K.’s Takeover Panel is a clear model for the supervisory authority that the drafters of Directive 13 have posited.²¹² Not surprisly then, the Directive “does not exclude the possibility” that a member state would appoint as its supervisory authority a self-regulatory body (such as the Panel).²¹³ However, in order to comply with this concept of a statutorily implemented system, countries wishing to utilize a Panel-like body would effectively have to make it a creature, at least in name, of its legislature. In light of the Takeover Panel’s long-running role as a non-legal body overseeing the most active takeover market in the European Union,²¹⁴ this possibility has raised the ire of both the U.K. financial community²¹⁵ and the Panel itself.²¹⁶

The Directive sets out what is essentially a “residence” test for determining which member state’s supervisory authority should oversee a given bid. In all cases, the residence of the target will determine which state’s rules and procedures govern. Under the Directive, a member state’s supervisory authority would have jurisdiction if the target company has its “registered office” in that country and lists its shares on that country’s exchange.²¹⁷ If the target has its registered office in one country and lists its shares in another, then the rules of the country in which the target’s shares were first listed and continue to be listed govern.²¹⁸ This is in contrast with the current practice in the U.K. and France which both premise jurisdiction on the country of organization.²¹⁹

The Directive goes beyond the jurisdictional issue and provides

211. *See id.* at I.1-3.

212. *Id.* at III, art. 4.

213. *See House of Lords SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, TAKEOVER BIDS*, H.L., Thirteenth Report #32, Comm. Print 1996, [hereinafter U.K. SELECT COMMITTEE REPORT] (European Commission told Committee that U.K. system was model for Directive 13).

214. *See Explanatory Memorandum*, *supra* note 210, at I.11. Indeed the preamble to the Directive indicates that it is “desirable to encourage the voluntary control exercised by self regulatory bodies in order to avoid recourse to administrative or judicial action.” Directive, *supra* note 20, at preamble.

215. *See U.K. SELECT COMMITTEE REPORT*, *supra* note 213, at 5. According to the Committee, the United Kingdom annual number of takeover bids for companies listed in the United Kingdom exceeds those in all other member states put together. *See id.*

216. If the Code were put “on a statutory footing,” the U.K. Select Committee Report stated, it would “put in jeopardy those qualities of the present regime most valued by companies, shareholders and professional advisers alike, namely speed, and flexibility certainty.” *Id.* at 31.

217. *See, e.g., The Takeover Panel and the Thirteenth Directive on Company Law Concerning Takeover Bids*, 1 Takeover Panel Release (undated) (“takeover activity as carried out in the UK is too complex and fast-moving to be satisfactorily regulated on a statutory basis”).

218. *See Directive*, *supra* note 20, at art. 4., para. 2.

219. *See id.*

varying degrees of guidance for implementing the other general principles on which it focuses. The most difficult area the drafters addressed was whether minority shareholder protection necessitates a rule requiring mandatory bids for all shares once a certain level of control has been acquired. The original proposal called for a mandatory full bid under such circumstances (as the City Code and French rules require), but serious objections to this approach were raised by some member states.²²⁰ As a result, the current Directive permits member states to adopt alternative methods of protecting minority shareholders, but requires member states that "opt out" of the mandatory bid rules to "demonstrate that these other means really give minority shareholders a proper protection."²²¹ Furthermore, member states electing to require mandatory bids can implement a rule requiring either a full or a partial bid.²²²

Another potentially contentious area which the Directive covers is that of defensive maneuvers against hostile bids. The Directive requires member states to pass rules prohibiting target boards from taking "any action which may result in the frustration of the offer" without shareholder approval.²²³ However, the Directive makes no mention of pre-offer actions that might deter potential bidders, and says very little about what might constitute action resulting in frustration of a bid.²²⁴

The Directive provides the most specific guidance about rule implementation in the areas of disclosure and minimum bid periods. With respect to disclosure, Directive 13 indicates that member states should require a bidder to notify both the target and the relevant supervisory authority prior to making any public announcement. The Directive also sets out particular information that the formal offer document should contain.²²⁵ It also requires that a copy of the offer document be provided to the supervisory authority prior to the offer being made pub-

220. The U.K. Select Committee Report pointed out that the Directive's approach may, in some circumstances, deprive the relevant supervisory authority of the "practical advantages in having the [target] subject to the company laws of the same Member State as the supervisory authority." U.K. SELECT COMMITTEE REPORT, *supra* note 213, at 35.

221. See *Explanatory Memorandum*, *supra* note 210, at III, art. 3 (certain member states were "particularly opposed" to the original Directive's proposed requirement that a full mandatory bid be launched upon acquisition of control).

222. *Id.*

223. See Directive, *supra* note 20, at art. 10. The Directive contains two minimum standards for the conduct of mandatory bids. The first requires any mandatory bid, whether for all "or for a substantial part" of the shares, to be directed to all shareholders. The second requires that an oversubscribed partial bid allow shareholders an opportunity to sell their shares on a pro rata basis. The U.S. rules also permits partial offers, but Directive 13 is different because it does not require any prohibition on purchases outside the offer. See *supra* notes 133-43 and accompanying text.

224. Directive, *supra* note 20, at art. 8.

225. The Directive does, however, emphasize that "the issuing of shares which may result in a lasting impediment to the offeror" is to be prohibited. *Id.* at art. 8.

lic.²²⁶ Directive 13 also contemplates offers remaining open for a period somewhere between four and ten weeks.²²⁷

The Directive represents an interesting, if somewhat tentative, step towards an intersystem approach to takeover regulation. As noted, the difficulty the drafters have faced in convincing member states to endorse the prior proposals underscores the problem of reaching accord on cross border regulations. This is especially true where the national systems themselves are either products of local ingenuity and therefore a source of national pride (for instance, the United Kingdom's), or where local rules are undergoing rapid change (as France's laws were at the time of the original Directive proposal). The revised Directive 13 attempts, more than anything, to steer a clear course among the *existing* rules of the various national schemes. Indeed, if the states do implement the Directive, it will most likely be due to the fact that it will require only minimal changes to the existing systems of the more active takeover markets (principally the United Kingdom and France) than with it requiring member states to take bold steps to harmonize their laws.²²⁸

2. PROPOSALS OF THE INTERNATIONAL ORGANIZATION OF SECURITIES COUNCILS

Although its work has not touched extensively on the area of takeover regulation, the International Organization of Securities Councils ("IOSCO") has been attempting for a number of years to coordinate various international efforts for uniform regulation of capital markets. IOSCO is comprised of representatives of sixteen national securities councils and commissions, including the SEC. Its coordinating efforts thus far have been principally in the areas of accounting,²²⁹ clearance and settlement, disclosure and information sharing.²³⁰

One of the tools IOSCO uses in coordinating regulatory efforts between member countries is the "memorandum of understanding" ("MOU"). MOUs are statements of intent between regulatory authorities. The statements contained in MOUs are not legally binding, and do

226. See *id.* at art. 6. This information parallels Rule 24 requirements in the City Code. See CITY CODE, *supra* note 6, at J2-11, rule 24.

227. See Directive, *supra* note 20, at art. 6, para. 2.

228. See *id.* at para. 3.

229. As the U.K. Select Committee Report noted, "[W]e gained the distinct impression that the support for the Directive in the majority of other Member States is based upon the assumption (which we believe to be correct) that they will not have to make any important changes to their existing systems." U.K. SELECT COMMITTEE REPORT, *supra* note 213, at 32.

230. See e.g., *Trying to agree on global standards*, CORP. ACCT. INT'L, (Jan. 1996), at 13 (describing agreement between IOSCO and the International Accounting Standards (IASs) Committee on the use of IASs as the basis for a set of core accounting standards for use in cross-border offerings).

not take precedence over the signatories' local laws or regulations. However, MOUs have become a common currency for cooperation between regulators, for instance, in the context of information sharing arrangements.²³¹ The SEC has entered into MOUs with regulators from approximately 30 other countries.²³²

Part IV.B of this Article puts forth a preliminary proposal for an international regulatory response to the difficulties cross-border acquisitions pose. In light of the problems inherent in reaching international accord on takeover regulation (as evidenced by Directive 13's lengthy incubation period and the tentative nature of its proposals) it is the authors' belief that any meaningful international response will have to proceed very slowly, with participants given sufficient latitude to respond to changes in local and international practices. To that end, Part IV.B will propose using MOUs as an initial step in the development of a set of internationally acknowledged guidelines for use by takeover regulators.

IV. TWO PROPOSALS

The remainder of this Article puts forward two proposals. The first is a proposal for the SEC to recommence its stalled efforts to encourage the inclusion of U.S. shareholder in tender offers for non-U.S. companies. The second is more extensive. It is a proposal for using IOSCO to create a working party to recommend a set of minimum takeover regulation standards that participating countries would agree, through the use of MOUs, to observe.

A. *Proposal for SEC Action*

A number of recent events make this a propitious time for the SEC to take steps to encourage the inclusion of U.S. persons in bids for non-U.S. companies. First, there has been considerable movement by non-U.S. countries in the area of takeover regulation since the SEC's 1991 proposal. For instance, France, Germany and Switzerland have all introduced, or will shortly be introducing, new or significantly amended takeover rules. To the extent that the SEC Tender Offer Proposal has been permitted to lie fallow due to concerns over the procedures and disclosure practices in non-U.S. countries, these recent changes may have

231. See e.g., *At the Annual Conference of the International Organization of Security Councils (IOSCO), signing of an Information-sharing Agreement Between Securities Commissions*, BUS. WIRE (Canada), Sept. 16, 1996 (describing signing of a memorandum of understanding between the U.S. Commodity Futures Trading Commission and the New Zealand Securities Commission regarding shared access to information regarding securities transactions).

232. See Working Party No. 4 of the Technical Committee, Int'l Org. of Sec. Comm'n, Principles for Memoranda of Understanding 1 (Sept. 1991) (on file with authors).

gone some way to addressing the SEC's concerns. Second, the European movement towards creating a harmonized set of takeover standards for European Union member states steadily increases the likelihood that U.S. shareholders will continue to be excluded from takeovers. Finally, assuming that the SEC reopens the question, the recently passed Capital Markets Efficiency Act of 1996 may require the SEC to take substantive action in light of the new requirements imposed upon it when it acts in its rule-making capacity.²³³

1. TENDER OFFER PROPOSAL

The SEC should adopt rules to ensure that cash-only tender offers for non-U.S. companies (regardless of whether the bidder is a U.S. company or not) are able to proceed on the basis of those procedural and disclosure requirements the bidder is obligated to comply with (in most cases, these will be dictated by the law or other relevant authority of the country in which the target is resident).²³⁴ As further discussed in Part IV.A.3. the U.S. antifraud rules would apply to the statements made by the bidder in connection with the takeover attempt.

The theory behind this approach is that investors in non-U.S. companies should be on notice that they may be subject to non-U.S. regulation, both in connection with takeover rules and otherwise. To ensure that this is the case, however, a concerted effort by issuers, regulators, and financial intermediaries should be made to provide U.S. investors (indeed all investors) with disclosure about the corporate governance and takeover regulations that may apply to an interest in a given company's shares. For instance, the SEC should require non-U.S. registrants to include such information in registration statements.²³⁵ Furthermore, issuers selling shares in unregistered international or global offerings should include such information as a matter of course. Finally, the banks and other financial entities that act as ADR program depositaries should provide ADR holders with information on the rights and responsibilities of share ownership in the issuer's country.

233. D. Rhett Brandon & Glenn M. Reiter, *Regulators Move to Harmonize Capital Markets Rules*, INT'L FIN. L. REV., June 1996, at 53, 54 (indicating that since the beginning of 1995, the SEC has signed MOUs with Egypt, Israel, Russia, and others).

234. The Act requires that, under both the Exchange Act and the Securities Act, "[w]henever pursuant to this title the Commission is . . . required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." Capital Markets Efficiency Act of 1996, Pub. L. No. 104-290, § 106(a)-(b), 110 Stat. 3416, 3424-25 (adding section 3(f) to the Exchange Act and section 2(b) to the Securities Act).

235. This proposal could be modified so as to limit its availability to bids conducted under the laws of specified countries. Perhaps, eventually, to countries that have entered into MOUs as described in Part IV.B.

The approach being recommended is analogous to one which the SEC has already adopted regarding proxy disclosure by non-U.S. companies. Pursuant to Rule 3a12-3 under the Exchange Act, securities registered by foreign private issuers are exempt from the proxy rules contained in section IX of the Exchange Act.

2. EXCHANGE OFFER PROPOSAL

As previously noted, the use of home disclosure creates greater difficulty in the context of an exchange offer than it does in the context of a straight, cash-only tender offer. A shareholder faced with an exchange offer is essentially being asked to make a potentially long-term investment in the bidder company. Furthermore, at least under some circumstances, the bidder will subsequently become subject to U.S. reporting requirements.

Based on the analysis contained in Part IV.A.1 above, the case for permitting the use of home country disclosure is strongest when the bidder and the target are subject to the same home-country requirements (i.e., when they are residents of the same country, or when, under the rules governing the bid outside the United States, the bidder must comply with the requirements of the target's country). Under those circumstances, it is proposed that the bidder should be able to register the securities being offered under the same kind of simplified registration process as was proposed by the SEC in 1991. That is, the disclosure requirements for use in the home country would form the basis of the registration statement, which would be declared effective on filing, subject to (1) the documents containing adequate warning about the deviation from normal U.S. disclosure requirements, (2) the bidder acknowledging that its liability for any material misstatements and omissions under both the Securities Act and the Exchange Act, and (3) the bidder filing a Form F-N with the SEC, identifying an agent for service of process within the United States.

The case for the bidder using its home country disclosure is somewhat weaker where the bidder is using different disclosure criteria than that required by the target's home country. In such cases, the U.S. shareholders have not made their initial investment decision on the basis of the bidder's domestic regulatory and disclosure practices. Under such circumstances, the SEC should consider allowing the bidder to use the simplified registration statement described in the preceding paragraph, subject to the same requirements as in the same-country scenario, but with the addition of (1) a summary of the salient differences between the bidder's and target's home country disclosure and regulatory systems,

and (2) a summary of the differences between the exchange offer document and the one that the target's domestic rules requires.

In both the same-country and different-country scenarios, the analysis is further complicated where the target company has elected or is required to comply with U.S. reporting requirements (either as a result of it being listed on a national exchange or otherwise). In that case, the argument that the securities of U.S. investors were purchased on the basis of home country disclosure is inapposite, and some measure of additional information may need to be provided.²³⁶ As a starting point, the authors would urge that the standards proposed by the SEC for availability of the simplified registration statement be reimplemented under these circumstances (i.e., a bidder that has been listed on a recognized non-U.S. exchange for a specified period of time should be able to use its home country disclosure).²³⁷ Also, when a bidder does not comply with U.S. GAAP (or IAS reporting), the SEC could require the addition of an unaudited U.S. GAAP (or IAS reporting) reconciliation of its latest financial statements.²³⁸ Finally, in situations where a bidder does not meet the listing criteria, then an audited U.S. GAAP (or IAS) reconciliation, and an MD&A comparing results for the two most recent fiscal year-ends would be required.

3. ANTIFRAUD CONCERNS

As noted in Part III, the authors reject the contention that the solution to the problem of U.S. investor exclusion from cross-border takeovers is the removal or negation of the U.S. takeover antifraud provisions. Rather, the proposals put forth in Parts IV.A.1 and IV.A.2 would be undertaken alongside a two-part effort to actively encourage inclusion through (1) the use of the SEC's rule-making or exemptive authority to provide potential cross-border takeover participants with a greater sense of certainty about liability risks under U.S. law, and (2) an international education effort by the SEC designed to inform non-U.S. regulators of the adoption of the rule changes proposed herein, and to encourage them to require the inclusion of U.S. shareholders in order for bidders to be in compliance with the applicable "equal treatment" rules in their jurisdictions.

The proposals which follow work from the assumption that sections 11 and 12 of the Securities Act create the greatest degree of uncertainty

236. The SEC already effectively requires that annual reports and registration statements by equity issuers contain information on required disclosure of interests.

237. However, "doomsday conversions" should not be permitted to trigger this additional protection for investors. I.e., a target should not be permitted to begin complying with U.S. reporting requirements as a defensive measure against a non-reporting bidder.

238. See *supra* note 200.

regarding U.S. liability.²³⁹ These sections, with their varying “due diligence” and similar defenses, demand that unpracticed participants in the U.S. capital markets act with the greatest of caution. This is a significant handicap in the fast-paced takeover context. This article proposes that the SEC either take steps to create greater certainty regarding the scope of section 11 or 12 liability, or that it use its exemptive authority to create exemptions from sections 11 or 12 liability for those exchange offer registration statements and prospectuses meeting the requirements set out in Part IV.A.1 and IV.A.2 above. In either case, traditional liability for intentional or reckless fraudulent conduct would still exist under section 10(b) and Rule 10b-5, providing U.S. investors with adequate protection.²⁴⁰

The SEC could provide potential bidders with greater certainty regarding the risk of U.S. liability under sections 11 and 12 of the Exchange Act in connection with tender and exchange offers by taking the following steps. First, it could adopt a rule that builds on the MJDS to establish a presumption that good faith compliance with home-country disclosure requirements (coupled with compliance with the SEC-imposed requirements described above) is sufficient to satisfy U.S. antifraud requirements (including those concerning material omissions). Second, it should revise Rule 437 under the Securities Act to permit advisors that are subject to liability (or otherwise made responsible for disclosure or reports under the applicable home country rules) to be named in disclosure documents without the filing of a consent (i.e., without exposing themselves to section 11 “expert” liability). Third, it could revise Rule 176 under the Securities Act²⁴¹ to provide greater guidance and protection for the directors and advisors of an exchange-offer

239. Where the home-country disclosure required in connection with the exchange offer under is substantially less than that required in connection with an offering or listing in the home country, then the bidder would be required to comply with the offering or listing disclosure requirements.

240. Section 11 of the Securities Act creates liability for material misstatements in, or material omissions from, a registration statement. Such liability may extend to the issuer, directors signing the registration statement, underwriters and experts consenting to being named in the registration statement. For the issuer, Section 11 liability is “strict” in that no amount of investigation or “due care” can shield the issuer from such liability if there is a material misstatement in, or omission from, the registration statement. See 15 U.S.C. § 77(k)(a) (1994). For most other parties, however, liability is subject to a defense based on reasonable investigation. See *id.* § 77(k)(b) (defense available where party, after reasonable investigation, had reasonable grounds to believe no such misstatement or omission existed).

Section 12 of the Securities Act creates liability for persons who offer or sell securities by means of a prospectus or oral communication through use of the jurisdictional means—unless such person can “sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.” *Id.* § 77.

241. This would provide investors with the same level of protection as in unregistered offerings of securities made by way of private placements.

bidder, including identifying a standard for underwriters and outside directors that appropriately defines the level of due diligence necessary to meet the various defenses available under the Securities Act, in the cross-border offer context.

As noted, an alternative to the proposals set forth in the preceding paragraph would be for the SEC to use its exemptive authority to create exemptions from sections 11 and 12 liability for those exchange offer registration statements meeting the requirements set out in Part IV.A.1 and IV.A.2.

Under either alternative, the anti-fraud provisions of Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, would continue to provide investors with adequate protection against securities fraud.

The implementation of either of these alternatives, together with the adoption of the proposals described in Parts IV.A.1 and IV.A.2, should enable the SEC to approach regulators in other countries (especially those that have active takeover markets such as the United Kingdom) and urge them to require bidders to include U.S. persons in order to be in compliance with the "all-holders" or "equal treatment" requirements of the particular jurisdiction.

In conjunction with this approach, the SEC should adopt a presumption that any tender offer for a class of securities of which more than 5% are U.S. held will have "significant effects" in the United States, and thus they will be subject to its tender offer rules. This will also create a strong incentive for non-U.S. bidders to include U.S. holders, since there will be risks associated with *excluding*, as well as including, U.S. persons.

As previously discussed, there are currently two disincentives for non-U.S. bidders to include U.S. shareholders in tender and exchange offers. First, there is the cost and delay of complying with multiple procedural and disclosure requirements. Second, there is the risk, or perceived risk, of liability under the U.S. anti-fraud provisions. The preceding proposal fully addresses the first of these disincentives and, it is hoped, takes sufficient steps to address the second as well. If these or similar proposals are adopted, the authors believe, exclusion of U.S. shareholders from cross-border takeovers will be the exception, not the norm.

B. *An Intersystem Proposal*

The difficulty of reaching agreement on minimal standards for takeover regulation has been discussed above in connection with the proposed Directive 13 in Europe. It would be naive to assume that any proposal intended to reach that goal (other than one that is the product of

extensive international scrutiny, comment and review) will find favor in all, or even many, quarters. However, in light of the broader perspective on the practices of various countries that the preparation of this Article has afforded, the authors believe they would be remiss not to at least make a preliminary proposal, one that hopefully will be picked up by others, refined and improved upon, and perhaps form the basis of meaningful accord across national boundaries (or at least meaningful discourse).

The proposal consists of two components. First, a general framework that could be utilized to engender international discussion on the subject of takeover regulation. To this end, the authors would suggest that IOSCO establish a working party to study the status of international takeover regulation and to formulate a set of non-binding recommendations regarding (1) the nature of supervisory authority, (2) methods for determining whether the rules of the target's, the bidder's or a third country should govern a takeover bid, and (3) minimum standards by which takeovers should be conducted.²⁴² Securities commissions (or in countries without securities commissions, other relevant government authorities) would be invited to enter into MOUs with respect to the recommendations, essentially agreeing to take steps to implement them (if so empowered) or to use best efforts to influence the legislative process to do so.

The second component of the proposal is a brief discussion of some assumptions on which the authors believe the IOSCO recommendations should be based. First, that, where workable, takeover regulation supervision is best handled by a voluntary, non-legal body similar to the U.K. Takeover Panel. Commentators are generally in agreement that the Panel's speed, coupled with its flexibility and finality, is exceptionally well-suited to the needs of takeover participants (included affected shareholders). However, it should be noted that what has worked in the United Kingdom will not be practicable everywhere, especially where statutory forms of regulation are already entrenched. Accordingly, the IOSCO working party may well start with the assumption that non-legal bodies are the optimal approach, but that different jurisdictions, perhaps after some experimentation, may or may not find such an approach suitable.

A second assumption for the IOSCO working party would be that the rules of the country in which the target is resident should govern the transaction, and that therefore, the decisions of the regulatory authority within that country (whether legal or extra-legal) would be binding on

242. See 17 C.F.R. § 230.176 (1996). Rule 176 sets out what constitutes "reasonable investigation and reasonable grounds for belief" under section 11 of the Securities Act.

participants. One component of the MOUs entered into by the various consenting countries would be that deference be paid to the determinations of this "lead" regulatory body under any particular takeover, subject of course to a public policy exception.

Lastly, the minimal standards for conducting of takeovers would, it is assumed, be intended to incorporate the spirit of the common goals discussed at the end of Part III. A discussion of all of the specific requirements that could or should be considered in pursuit of those goals is impossible here. However, one area of takeover regulation that has created controversy in the past, mandatory bids, does bear discussion.

The authors provisionally support the theory that a regulatory system should create a full mandatory bid obligation after a certain level of control has been attained. To do otherwise permits the kind of "creeping control" that many regulatory systems have realized can marginalize minority shareholders. This is exemplified by France's recent switch from a partial mandatory bid rule (requiring a control person to seek at least 66% of the target's shares after attaining control) to a full mandatory bid rule. The economic literature on this subject is thus far inconclusive so it is also expected that the IOSCO working party will study carefully the empirical evidence provided by participating countries.

V. CONCLUSION

Cross-border mergers and acquisitions have become a standard feature of the increasingly global world of international business and finance. One result of these developments has been that participants in M&A transactions, including bidders, targets and their respective advisers, are increasingly subject to the disclosure and procedural requirements of multiple regulatory systems. Differences between the relevant regulatory systems means that, without relief in one or more jurisdictions, it may be impossible for a bidder to conduct a single tender or exchange offer that complies with all applicable rules and regulations.

When a bidder determines that the number of shares that it wants or needs for its purposes can be attained by focusing its tender activities on shareholders in a limited number of jurisdictions, shareholders outside those jurisdictions are frequently excluded from the tender offer. This problem of shareholder exclusion is especially prevalent in the United States. This is due to the fact that the U.S. tender offer rules create procedural and disclosure requirements that are generally more onerous than those in other developed countries and that the risk of securities fraud liability is generally viewed as significantly higher in the United States than in other countries.

This Article has proposed that the SEC take action to minimize tension between the U.S. tender offer procedures and exchange-offer disclosure rules on the one hand, and those of other countries on the other hand, and that it either provide more concrete guidance on the level of diligence required of non-U.S. bidders, their directors and financial advisors in order to establish a defense to liability under the U.S. securities laws or, alternatively, that it use its exemptive authority to relieve cross-border exchange offers from antifraud liability under the Securities Act (but not the Exchange Act's Section 10(b) and Rule 10b-5). It is the authors' contention that these steps would reduce the currently strong incentive for excluding U.S. persons from cross border tender and exchange offers.

This Article has also put forth a preliminary proposal for an international regulatory response to the difficulty posed by cross-border acquisitions. The authors hope that these proposals can be the starting point both for meaningful action by the SEC to ensure greater inclusion of U.S. persons in tender and exchange offers and for international accord on takeover regulation and the development of consistent and reliable set of internationally acknowledged takeover guidelines.