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## Cross-Border Tender Offers

A transnational survey of the rules governing tender offers, and an analysis of the SEC Rule aimed at the increased inclusion of U.S. shareholders in foreign tender offers.

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# Summary

A tender offer is basically a technique to attain corporate control. It could be characterised as an offer to acquire shares of a company, whose shares are not closely held, addressed to the general body of shareholders, usually at a premium, with a view to obtaining at least sufficient shares to give the offeror voting control of the company.

In the United States tender offers are governed by the Williams Act, which is a part of the Securities and Exchange Act of 1934. The Securities and Exchange Commission (SEC) is the authority monitoring the U.S. securities market including tender offers. In the United Kingdom and Sweden, tender offers are governed by self-regulatory systems, the London City Code on Takeovers and Mergers (the City Code) and *Näringslivets börskommittés rekommendation rörande offentligt erbjudande om aktieförvärv* (NBK/OE), and monitored by self-regulatory bodies, the Panel on Takeovers and Mergers (the Takeover Panel) and *Näringslivets börskommitte* (NBK).

All three systems have the overriding purpose of investor protection. However, the differences in areas as ownership reporting, mandatory bids, commencement of the offering, minimum offer periods, withdrawal rights, and purchases outside the bid creates a regulatory tension between the systems. Furthermore, in the cross-border context the different philosophy regarding regulation of tender offers in the United States, as opposed to the philosophy in the United Kingdom and Sweden, lead to a problem with dual jurisdiction of tender offers.

For example, when a Swedish company make a tender offer for the shares of a company organized under the laws of the United Kingdom that have a small number of U.S. shareholders through American Depositary Shares (ADS), both U.K. and U.S. regulatory systems will govern the tender offer. Since the regulatory tension makes it very difficult to conduct the bid in compliance with both systems, relief from one set of rules must be sought.

Seeking relief from a regulatory system such as the Williams Act is a costly and time-consuming procedure. Instead, a common practice have evolved where U.S. shareholders are excluded from the offer when the bidder determines that it can attain the number of shares needed without the shares held by shareholders residing in the U.S. This procedure is a deviation from the principle of equal bid under both the City Code and NBK/OE that is not objected to by the regulatory authorities.

The exclusion of U.S. shareholders creates a situation where they are forced to sell their shares into the open market, without the procedural and disclosure requirements that the home market normally provides, in order to realise a portion of the premium of the tender offer. In order to prevent this

situation and increase the inclusion of U.S. shareholders in non-U.S. tender offers the SEC has adopted a rule that, to a certain extent, exempts non-U.S. tender offers from the scope of the Williams Act.

Alternatives to the SEC rule, such as the creation of a harmonized intersystem for takeover regulation or a choice of law rule combined with disclosure in English, could be different solutions to the problem with dual jurisdiction of tender offers. Conclusively, it is not certain that the exemptive rule will be as successful as the SEC predicts since the option to exclude U.S. shareholders is open to bidders for non-U.S. targets even with the rule in force.

# Abbreviations

ABA	American Bar Association
ADR	American Depositary Receipt
ADS	American Depositary Share
Alb. L. Rev.	Albany Law Review
AmN	Aktiemarknadsnämnden
Brook. J. Int'l L.	Brooklyn Journal of International Law
CCH	Commerce Clearing House
C.F.R	Code of Federal Regulations
CFTC	Commodity Futures Trading Commission
Cir.	Circuit
Clev. St. L. Rev.	Cleveland State Law Review
Co.	Company
Cong.	Congress
D.C. Cir.	District of Columbia Court of Appeals Cases
D. Del.	United States District Court for the District of Delaware
Del. Code	Delaware Code
D. Mass.	United States District Court for the District of Massachusetts
EC	European Community
Eur. Parl. Doc.	Documents of the European Parliament
EDGAR	Electronic Data Gathering, Analysis and Retrieval system
E.D.N.Y.	United States District Court for the Eastern District of New York
F.2d	Federal Reporter, Second Series
Fed. Sec L. Rep.	Federal Securities Law Reports
FSA	Financial Services Act 1986
F.R.	Federal Register
F. Supp.	Federal Supplement
Geo. Wash. L. Rev.	George Washington Law Review
Harv. L. Rev.	Harvard Law Review
H. Rep.	House of Representatives
Inc.	Incorporated
IOSCO	International Organization of Securities Councils
J. Corp. L.	Journal of Corporation law
L.Ed.	Lawyers' Edition Supreme Court Reports

LHF	Lagen om handel med finansiella instrument
Ltd.	Limited
Miami L. R.	University of Miami Law Review
NASD	National Association of Securities Dealers
NASDAQ	National Association of Securities Dealers' Automated Quotation System
NBK	Näringslivets Börskommitté
NBK/OE	Näringslivets Börskommittés rekommendation rörande offentligt erbjudande om aktieförvärv
N. H. Rev. Stat. Ann.	New Hampshire Revised Statutes Annotated
Notre Dame L. Rev.	Notre Dame Law Review
Nw. U. L. Rev.	Northwestern University Law Review
NYSE	New York Stock Exchange
OJ	Official Journal
OM	OM Gruppen AB
PLC.	Public Limited Company
PLI	Practising Law Institute
S.A.	Société Anonyme
SARs	The Rules Governing Substantial Acquisitions of Shares
S.Ct.	Supreme Court Reporter
S.D.N.Y.	United States District Court for the Southern District of New York
SEC	Securities and Exchange Commission
Sec. Act. Rel.	Securities Act Release
Sec. Exch. Act. Rel.	Securities Exchange Act Release
Sec. Reg & L. Rep.	Securities Regulation & Law Report
Sess.	Session
SFS	Svensk Författningssamling
SROs	Self-regulating organisations recognised under the FSA
SIB	Securities Investment Board
U.S. Const.	The Constitution of the United States
U.S.C.S.	United States Code Service
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
Vand. L. Rev.	Vanderbilt Law Review
W.D. Okl.	United States District Court for the Western District of Oklahoma



# 1 Introduction

## 1.1 Background

International, or cross-border, aspects of mergers and acquisitions are growing in interest in the same pace as the increasingly global world of international business and finance. The increased activity in cross-border securities investment has given the result that many companies have broadly dispersed shareholder bases.<sup>1</sup> Due to the different views taken in Europe and the United States regarding the jurisdiction of takeovers, tender offers may be exposed to dual jurisdiction because of the fact that a corporation has shareholders in several countries.

The tender offer is a means often used for attaining control of a corporation, and the use of tender offers is governed by takeover regulations. Some countries, such as the United Kingdom and Sweden, regulate tender offers only if the target company is organized under the laws of their 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.

In the United States the Williams Act governs tender offers. Tender offers in the United Kingdom and Sweden are governed by the London City Code on Takeovers and Mergers (the City Code) and *Näringslivets börskommittés rekommendation rörande offentligt erbjudande om aktieförvärv* (NBK/OE).

The material differences between takeover regulations in Europe and the United States have created a regulatory tension that makes it almost impossible to comply with the rules of two jurisdictions simultaneously. For a bidder to conduct a tender offer complying with all applicable rules and regulations, relief from the regulatory requirements of one or more jurisdiction may be necessary.

Since the takeover regulation in the United States is more onerous than in most European countries, another solution than seeking relief from one jurisdiction has been frequently used by European corporations. Where the target's shareholder base is narrowly distributed, and the bidder determines that it can attain the number of shares needed by focusing tender activities on shareholders within a limited number of jurisdictions, shareholders from outside those jurisdictions are excluded from the tender offer. The problem with the U.S. shareholders that forces the bidder to take U.S. takeover

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<sup>1</sup> Edward F. Greene, Andrew Curran, and David A. Christman, *Toward a Cohesive International Approach to Cross-Border Takeover Regulation*, 51 Miami L. R. 823, 824 (1997).

regulation into account is avoided simply by excluding U.S. shareholders from the offer.

The exclusion of U.S. shareholders creates a situation where they are forced to sell their shares into the open market in order to realise a portion of the premium of the tender offer. Since the method of excluding shareholders is intended to withhold distribution of offering materials from them, they sell into the market without the benefit of the procedural and disclosure requirements that the home market normally provides.

In order to increase the inclusion of U.S. shareholders of non-U.S. private issuers in tender offers, the Securities and Exchange Commission (SEC) has adopted an exemption from the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act) through the *Final Rule on Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings* that became effective in January 2000.<sup>2</sup>

## 1.2 Purpose and Outline

The basic purpose of this thesis is to present and compare the regulation of tender offers in the United States, the United Kingdom, and Sweden, and to present and analyse the SEC's exemptive rule on cross-border tender offers. Within the scope of those issues are more detailed additional questions raised.

How does the dual jurisdiction of tender offers relate to the rules of conflict of laws? How is it possible to exclude U.S. shareholders with regard to the principle of equal bid, which is generally accepted in both the United Kingdom and Sweden? Finally, is the SEC's final rule on cross-border tender offer the best solution to the problem with the exclusion of U.S. shareholders, or are there alternatives that would be more efficient in creating a system for eliminating existing inequalities between shareholders in cross-border tender offers?

In this thesis some of the questions will be answered in a more concrete way than others. This is due to the fact that in the United Kingdom and Sweden, unlike the United States, this is an area of the law that is left to self-regulatory bodies within the business community. Therefore, deviations from the national rules in cross-border matters sometimes occur on grounds that are rather insubstantial, since the deviation has the approval of the regulatory authority.

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<sup>2</sup> Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings, 64 F.R. 61382, Sec. Act Rel. No. 33-7759 (Oct. 26, 1999), printed version from the SEC's website, <http://www.sec.gov/rules/final/33-7759.htm>, printed 03/10/00 (last checked 18/04/01) [hereinafter Cross-Border Tender Offers, Sec. Act Rel. No. 33-7759].

Since this thesis deals with a topic that is closely connected with the regulation of the U.S. securities market, it is necessary to initially give a presentation of the Securities and Exchange Commission and the U.S. securities regulation. Especially, since this thesis is written predominantly for Swedish and European lawyers that may have limited knowledge in that area.

The view of tender offers in the United States, the United Kingdom, and Sweden is followed by a presentation of the takeover regulations and a comparison that shows the regulatory tension between the different systems of takeover regulation.

Thereafter, the situation prior to the SEC's exemptive rule is presented with reference to the dual jurisdiction, the exclusion of U.S. shareholders, and the practical solution of the problems imposed by the dual jurisdiction before the exemptive rule came into force are discussed.

This is followed by a presentation of the content of the final rule on cross-border tender offers. Finally, before the author's own conclusion, the exemptive rule is analysed and potential alternatives are discussed.

### **1.3 Material and Limitations**

The material used in this thesis includes legal literature and law review articles from the United States, the United Kingdom, and Sweden. Case law from the United States plays a vital role, both in the general presentation of the U.S. securities market and the more specific issues relating to cross-border tender offers. SEC Releases and "No action" letters have been useful for the understanding of the SEC's application of the Williams Act. The different takeover regulations and supporting documents have been used as well as specific information provided by the SEC on its website. In addition, material from the website of International Organization of Securities Councils (IOSCO) is cited in this thesis. Legal databases, such as Lexis-Nexis, Lexis.com, and Westlaw, have facilitated the search for case law, law review articles, U.S. federal statutory laws and regulations, and SEC documents.

The scope of this thesis is narrowed to tender offers in a strict sense. Note that the SEC's exemptive rule, as the full title indicates, deals with cross-border tender and exchange offers, business combinations and rights offerings. What is said in this thesis about tender offers generally applies equally to exchange offers. However, certain implications are connected with cross-border exchange offers due to the fact that they often include the issuing of shares in the "other" jurisdiction. That aspect of exchange offers is dealt with to a limited extent, but the specifics of issuing of shares falls outside the scope of this thesis.

The United States, the United Kingdom, and Sweden are used in this thesis since it is of practical interest to present a scenario where a Swedish company make a takeover bid for another Swedish company, or a company organized under U.K. law, that have a shareholders base that include a certain number of U.S. shareholders. The United Kingdom is also of special interest since the Swedish system of takeover regulation is heavily influenced by the U.K. system.

# 2 Introduction to the Regulation of the U.S. Securities Market

## 2.1 The U.S. Securities and Exchange Commission

### 2.1.1 History

The need for an authority that was capable of monitoring the securities industry emerged in the wake of the Great Crash of 1929. Prior to that date there was little support for federal regulation of the securities market. During the post World War I surge of securities activity most investors gave little thought to the dangers inherent in uncontrolled market operations. However, the post war prosperity and the possibilities to make a fortune in the stock market came to an abrupt end with the crash in October 1929. It is estimated that of the \$50 billion in new securities offered during the post war period, half became worthless.<sup>3</sup>

Public confidence in the capital markets plummeted during the depression that followed the Crash. In order for the economy to recover it was considered as crucial to restore the public's faith in the capital markets. Congress hearings were initiated to identify the problems and search for solutions. The outcome of these hearings provided the Congress with material that formed the base for the necessary legislation. The Securities Act of 1933 and the Securities Exchange Act of 1934.<sup>4</sup>

It has been held that the extent of the Exchange Act was so vast that Congress felt it necessary to establish the U.S. Securities and Exchange Commission.<sup>5</sup> The SEC replaced the Federal Trade Commission as the agency responsible for the administration of the Securities Act and was appointed as the administrator of the Exchange Act.<sup>6</sup> The intention of the Congress was that the SEC should enforce the new laws, promote stability

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<sup>3</sup> *The Investor's Advocate: How the SEC Protects Investors and Maintains Market Integrity*, 2, printed version from <http://www.sec.gov/asec/wwwsec.htm>, printed 03/10/00 (last checked 18/04/01) [hereinafter *The Investor's Advocate*].

<sup>4</sup> *Id.* at 3.

<sup>5</sup> See *inter alia*, Edward N. Gadsby, *Historical Development of the SEC – The Governmental View*, 28 Geo.Wash.L.Rev. 6 (1959).

<sup>6</sup> Homer Cherrington, *The Investor and the Securities Act*, 101, Da Capo Press, New York, 1973, An unabridged republication of the first edition published in Washington D.C. in 1942. See also, section 4 of the Securities Act of 1934, 15 U.S.C.S. § 78d.

in the markets and protect investors.<sup>7</sup> The latter is, in conjunction with maintaining the integrity of the securities markets, still considered as the primary mission of the SEC.

### **2.1.2 General Purpose of the SEC**

The laws and rules that govern the securities industry in the United States derive from the concept that all investors should have access to certain basic facts about an investment prior to buying it. Therefore, the SEC requires public companies to disclose meaningful financial and other information to the public, which provides a common pool of knowledge for all investors to use to judge for themselves if a company's securities are a good investment.<sup>8</sup>

Investor protection is the overriding purpose for the activities of the SEC. The Commission oversees and regulates the U.S. securities markets. Another important feature of the SEC is its enforcement authority, which enables the Commission to bring civil enforcement actions against individuals and companies that break the securities laws.

### **2.1.3 Structure of the SEC**

The SEC is an autonomous, highly departmentalised, federal agency.<sup>9</sup> It is responsible for administering the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940 and the Securities Investor Protection Act of 1970.<sup>10</sup> The Commission has a wide range of authority and various types of administrative responsibilities. The SEC is considered as a relatively small body in comparison with other federal regulatory agencies. However, the Commission has been recognized as one of the more efficient federal agencies.<sup>11</sup>

The SEC is headquartered in Washington, DC, and has four Divisions and 18 Offices. The Commission consists of five Commissioners who are appointed by the President of the United States with the advice and consent of the Senate. Their terms last five years and are staggered so that one Commissioner's term ends on June 5 of each year. In order to ensure a non-partisan body, no more than three Commissioners can be from the same

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<sup>7</sup> *The Investor's Advocate*, *supra* note 3, at 3.

<sup>8</sup> *Id.* at 1.

<sup>9</sup> Thomas Lee Hazen, *The Law of Securities Regulation*, 11, Third Edition, Hornbook Series West Group, St. Paul, 1996.

<sup>10</sup> James M. Bartos and Frank E. Dangeard, *United States Securities Law - A Practical Guide*, 103, Kluwer Law and Taxation Publishers, Deventer, 1992.

<sup>11</sup> Hazen, *supra* note 9, at 11-12.

political party.<sup>12</sup> The five commissioners are sometimes referred to as the full commission, as compared with division heads and SEC staff members.<sup>13</sup>

The Division of Enforcement is responsible for the investigation of suspected securities laws violations.<sup>14</sup> The Division of Corporation Finance has primary responsibility for examining all registration documents for compliance with the securities laws' disclosure requirements.<sup>15</sup> Regulatory practices and policies relating to the stock exchanges, the over-the-counter markets, and broker-dealers fall within the scope of the Division of Market Regulation.<sup>16</sup> Finally, the Division of Investment Management oversees and regulates the investment management industry, administers the securities laws affecting investment companies, including mutual funds, and investment advisers and exercises oversight of registered and exempt utility holding companies under the Public Utility Holding Company Act of 1935.<sup>17</sup>

In the Commission's hierarchy, there are various offices below the four divisions.<sup>18</sup> Some of the offices are engaged in the substantial questions that the Commission is dealing with, while other offices handle the day-to-day operations such as administrative services, controller, data processing, personnel, public information, records and registrations and reports.<sup>19</sup> One example of the former is the Office of the General Counsel. The General Counsel is the chief legal officer of the Commission and the Office

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<sup>12</sup> *The Investor's Advocate*, *supra* note 3, at 4.

<sup>13</sup> Hazen, *supra* note 9, at 12.

<sup>14</sup> The following violations may lead to investigation by the Division of Enforcement: insider trading, misrepresentation or omission of important information about securities, manipulating the market prices of securities, stealing customers' funds or securities, violating broker-dealers' responsibility to treat customers fairly and sale of securities without proper registration. A violation can result in: SEC judicial enforcement actions, reference to the Department of Justice for criminal prosecution or administrative sanctions imposed after a hearing. These actions may be taken against registered issuers, their offices and employees, registered broker-dealers and members of exchanges or self-regulatory associations. Hazen, *supra* note 9, at 12.

<sup>15</sup> The Divisions staff also provides companies with interpretations of the Commission's rules and recommend the Commission to adopt new rules. The documents, that publicly-held companies are required to file and that is reviewed by the Division, include: registration statements for newly-offered securities, annual and quarterly filings, proxy materials sent to shareholders before an annual meeting, annual reports to shareholders, documents concerning tender offers and filings related to mergers and acquisitions. Hazen, *supra* note 9, at 12, and *The Investor's Advocate*, *supra* note 3, at 5.

<sup>16</sup> Hazen, *supra* note 9, at 13.

<sup>17</sup> *Id.*

<sup>18</sup> The Offices are: O. of Administrative Law Judges, O. of Administrative and Personnel Management, O. of the Chief Accountant, O. of Compliance Inspections and Examinations, O. of the Comptroller, O. of Economic Analysis, O. of Equal Employment Opportunity, O. of the Executive Director, O. of Filings and Information Services, O. of the General Counsel, O. of the Information Technology, O. of the Inspector General, O. of International Affairs, O. of Investor Education and Assistance, O. of Legislative Affairs, O. of Municipal Securities, O. of Public Affairs, Policy Evaluation and Research and the O. of the Secretary. *The Investor's Advocate*, *supra* note 3, at 9-14.

<sup>19</sup> Hazen, *supra* note 9, at 13.

represents the SEC in proceedings, prepares material and provides independent advice and assistance to the Commission, the Divisions and the Offices. The Office of Administrative and Personnel Management is an example of the offices that handles day-to-day operations.

#### **2.1.4 The Powers of the SEC**

The Congress has given the responsibility of administering the regulation provided by the securities laws to the SEC.<sup>20</sup> The complexity and constant innovations in the U.S. capital markets has resulted in extensive regulatory powers for the SEC to quickly respond to new situations or transactions.<sup>21</sup> Those powers could be related to the three basic administrative agency powers, which are rule-making, adjudicatory and investigatory-enforcement.<sup>22</sup> In fact, the SEC has all administrative powers except from adjudicate disputes between private parties.

The SEC's rule-making authority is either delegated or interpretative. The former is the case where the Commission's power derives from the certain sections of the securities laws, which specifically empower the SEC to promulgate rules that have the force of statutory provisions.<sup>23</sup> The validity of the rule-making is dependant upon the scope of the authorizing statute. Important questions involving the validity of SEC rules are frequently raised in connection with rules that touch upon corporate governance. The reason for this is that corporate governance is a matter that traditionally has been left to state law.<sup>24</sup>

The SEC also issues interpretative rules to state its position on a subject or to explain provisions of securities law, which might pose problems of application. The rules are designed to aid corporate planners and attorneys in complying with the statutes' requirements. Those rules do not carry with them the force of law, as opposed to the rules promulgated pursuant to specific statutory delegation.<sup>25</sup> However, the interpretative rules are not entirely insignificant as a source of law, since the federal courts traditionally give deference to administrative interpretation when interpreting the scope

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<sup>20</sup> *Id.* at 15-16.

<sup>21</sup> Bartos and Dangeard, *supra* note 10, at 104.

<sup>22</sup> Hazen, *supra* note 9, at 16.

<sup>23</sup> *Id.* Examples of those sections are: 3(b) of the 1933 Act giving the Commission power to promulgate exemptions from registration, 15 U.S.C.S. § 77c(b), and 10(b) of the 1934 Act which delegates to the Commission the responsibility to promulgate rules determining the scope of anti-fraud liability, 15 U.S.C.S. § 78j(b).

<sup>24</sup> Hazen, *supra* note 9, at 16-17. *See also*, Business Roundtable v. SEC, 905 F.2d 406 (D.C.Cir.1990) where the D.C. Circuit Court of Appeals invalidated the Commission's attempt to regulate substantive voting rights of shareholders with the statement that the securities laws provide an "intelligible conceptual line excluding the Commission from corporate governance."

<sup>25</sup> Hazen, *supra* note 9, at 17.



of a statute.<sup>26</sup> This deference is underlined by the reliability of the agency's expertise as compared to the court's knowledge and authority.<sup>27</sup>

It should be added that the SEC is permitted to delegate some of its regulatory powers to self-regulatory organizations, such as the stock exchanges and the NASD. The rules adopted by such self-regulatory organizations must be submitted for approval by the SEC under section 19 of the Exchange Act.<sup>28</sup>

In addition to its expressly delegated and interpretative rule-making activities, the Commission disseminates unsolicited advisory opinions in the form of SEC releases, which may include guidelines or suggest interpretation of statutory provisions and rules. Such interpretative releases are made both periodically and each time the Commission proposes a new rule or rule amendment.<sup>29</sup>

Furthermore, the SEC gives individual rulings to corporations upon request in the form of "no action" letters. No action letters are SEC staff responses to requests for indication of whether certain contemplated conduct is in compliance with the appropriate statutory provisions and rules.<sup>30</sup> A no action letter is purely a matter between the SEC staff and the party requesting it. The SEC's responses have limited precedential weight, since they are staff interpretations rather than formal Commission action.<sup>31</sup>

The SEC review registration statements filed under the Securities Act and documents filed under the Exchange Act.<sup>32</sup> In addition to the powers of review and the foregoing quasi-legislative responsibilities, the Commission also has regulatory oversight and quasi-judicial power over brokers, dealers, and exchanges that it licenses under the Exchange Act. Correlative to this power is the ability to impose administrative disciplinary sanctions upon those subject to the licensing authority.<sup>33</sup> The Commission also can impose administrative sanctions against other persons who violate the securities laws.<sup>34</sup>

The other major administrative function of the SEC is, as mentioned above, that of enforcement. The SEC is responsible for investigating suspected violations of each act that it administers. Such violations will be addressed

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<sup>26</sup> See *inter alia*, *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

<sup>27</sup> *Hazen*, *supra* note 9, at 17.

<sup>28</sup> *Bartos and Dangeard*, *supra* note 10, at 105.

<sup>29</sup> *Hazen*, *supra* note 9, at 17.

<sup>30</sup> *Id.* at 18.

<sup>31</sup> *Id.*

<sup>32</sup> *Bartos and Dangeard*, *supra* note 10, at 105.

<sup>33</sup> The notion of "those subject to the licensing authority" includes broker-dealers, investment advisors, investment companies and professionals such as attorneys or accountants who practice before the SEC.

<sup>34</sup> *Hazen*, *supra* note 9, at 20.

through the SEC's administrative sanctions or forwarded to the Department of Justice for criminal prosecution.<sup>35</sup> The Commission also performs a direct prosecutorial function by virtue of its authority to seek injunctions against alleged violators, as well as appropriate ancillary relief in the federal district courts.<sup>36</sup> Other parts of the SEC's judicial enforcement arsenal are the authority to seek disgorgement of ill-gotten gains<sup>37</sup>, imposition of civil penalties<sup>38</sup> and bar orders<sup>39</sup>.

The Commission's enforcement powers were expanded through the Securities Enforcement and Penny Stock Reform Act of 1990. The Act further empowers the Commission to impose civil penalties in administrative proceedings, and empowers the SEC to go to court to secure an order barring officers and directors from associating with issuers under the Commission's jurisdiction.<sup>40</sup>

The 1990 enforcement legislation also granted the cease and desist power to the Commission.<sup>41</sup> In short this power gives the SEC the right to issue a cease and desist order for any current or future violations against a regulated securities professional that is violating, has violated, or is about to violate any rule or regulation.<sup>42</sup> Finally, under the SEC Rule of Practice 2(e) the Commission may suspend, limit, or bar any person from practising before it in any way.<sup>43</sup> The power of Rule 2(e) has been used against both accountants and lawyers.<sup>44</sup>

### 2.1.5 The Subject-Matter Jurisdiction of the SEC

The heart of the SEC's jurisdiction is the regulation of the securities markets and securities trading. However, the development and diversification of derivative instruments that began in the 1970s created overlapping

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See section 21A of the Exchange Act, 15 U.S.C.S. § 78u-1 (insider trading) and section 21(d)(3)(B), 15 U.S.C.S. § 78 (d)(3)(B) (judicial enforcement actions generally). The primary purpose of disgorgement of ill-gotten profits is explained by Hazen (Hazen, *supra* note 9, at 429) as a mean to assure that the wrongdoer will not profit from violating the securities laws. This is underlined by the court's statement in SEC v. Huffman, 996 F.2d 800, 802 (5 Cir. 1993) that disgorgement "is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs."

<sup>38</sup> Section 21A of the Exchange Act, 15 U.S.C.S. § 78u-1.

<sup>39</sup> Under appropriate circumstances, a court may order that a violator of the securities law will be barred from association with a company subject to the SEC's registration and reporting requirements. Section 21(d)(2) of the Exchange Act, 15 U.S.C.S. § 78u(d)(2).

<sup>40</sup> Hazen, *supra* note 9, at 21.

<sup>41</sup> See *inter alia*, the Securities Act § 8A, 15 U.S.C.S. § 77h-1 and the Exchange Act §§ 21C and 23(d), 15 U.S.C.S. §§ 78u-3 and 78w(d).

<sup>42</sup> Hazen, *supra* note 9, at 444.

<sup>43</sup> 17 C.F.R. § 201.2(e)(3).

<sup>44</sup> Hazen, *supra* note 9, at 446.

jurisdiction between the SEC and the Commodity Futures Trading Commission (CFTC).<sup>45</sup>

In 1981 the confusion concerning the jurisdictions of the two agencies was eliminated by the Johnson-Shad accord, which was incorporated into section 2 of the Securities Act of 1933 and section 3 of the Securities Exchange Act of 1934.<sup>46</sup> The effect of the accord is that the SEC has jurisdiction on the following matters: direct trading in all securities, all options directly on securities and indices, and Securities Act and Exchange Act registration of public sale of pool securities and options directly in foreign currencies if traded on a stock exchange.<sup>47</sup>

## 2.2 The U.S. Securities Regulation

### 2.2.1 General Information

#### 2.2.1.1 Concurrent Federal and State Jurisdiction

The US system of government regulation derives from the United States Constitution. Under the Constitution, all powers are reserved to the individual states unless expressly granted to the federal government.<sup>48</sup> The power to regulate matters involving interstate commerce and the mails are included in the enumeration of powers granted to the federal government.<sup>49</sup> These powers form the basis for the federal regulation of business activity, including the regulation of securities transactions.<sup>50</sup> Therefore, regulation of securities transaction is under federal jurisdiction.

However, in a series of rulings in the early 20th century, the United States Supreme Court ruled that the various states also have the power to regulate securities transactions affecting them.<sup>51</sup> This common law created state jurisdiction has the effect that both the federal and state authorities have the power to regulate securities transactions. In fact, the federal securities acts expressly allow for concurrent state regulation.<sup>52</sup>

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<sup>45</sup> The futures markets were originally devoted to agricultural and other tangible commodities. The overlapping jurisdiction was created when those markets began to trade financial futures and other derivative instruments wherein the underlying commodities were instruments more commonly associated with the securities markets, including treasury bonds or stock index futures. Hazen, *supra* note 9, at 21.

<sup>46</sup> Hazen, *supra* note 9, at 22.

<sup>47</sup> *Id.* at 23.

<sup>48</sup> U.S. Const. amend. X.

<sup>49</sup> U.S. Const. art. 1 § 8.

<sup>50</sup> Bartos and Dangeard, *supra* note 10, at 1.

<sup>51</sup> See *inter alia*, Hall v. Geiger-Jones Co., 242 U.S. 539, 550, 37 S.Ct. 217, 220, 61 L.Ed. 480 (1917).

<sup>52</sup> Hazen, *supra* note 9, at 391.

Therefore, securities transactions in the United States must comply not only with federal securities laws, but also with the securities laws of each state where any offer or sale is to be made or where any purchaser or customer is located. However, state securities laws rarely are obstacles to an offering, particularly in the event of simultaneous registration under the federal security laws.<sup>53</sup>

### **2.2.1.2 The Theory of Full Disclosure**

The Congress has enacted several statutes with the purpose to protect investors by promoting public disclosure of material facts with respect to companies whose securities are publicly offered or traded in the securities market. Potential investors are assumed to be capable of making their own investment decisions when they have access to sufficient information concerning the issuer and the issued securities.

This full disclosure approach has its origin in English corporate law, which requires the distribution of a prospectus for certain types of offerings.<sup>54</sup> The essence of the theory is that investors are adequately protected if all relevant aspects of the securities being marketed are fully and fairly disclosed.<sup>55</sup> The full disclosure approach represents a level of government involvement between the extremes of mere prevention of fraud under criminal law and passing on the merits of an investment.<sup>56</sup> U.S. disclosure requirements vary according to the issuer, the type of placement, the characteristics of the issued securities, and the potential investors.<sup>57</sup>

### **2.2.1.3 Definition of “Security”**

The term security includes instruments, which are normally considered as securities, such as stock, notes, debentures and bonds, as well as a vast range of other unconventional instruments or contract rights including *inter alia* limited partnership interests. More spectacular examples of such contract rights are scotch whiskey<sup>58</sup>, cattle embryos<sup>59</sup>, animal breeding programs<sup>60</sup> and vacuum cleaners<sup>61</sup>. This is due both to the broad statutory definition of

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<sup>53</sup> Bartos and Dangeard, *supra* note 10, at 2.

<sup>54</sup> See L.C.B. Gower, *Principles of Modern Company Law*, 497, Fourth Edition, Stevens & Sons, London, 1979.

<sup>55</sup> Hazen, *supra* note 9, at 7.

<sup>56</sup> Bartos and Dangeard, *supra* note 10, at 2.

<sup>57</sup> See, Hazen, *supra* note 9, at 119-132 and 861-868.

<sup>58</sup> See, SEC v. Glen-Arden Commodities, Inc., [1973 Transfer Binder] Fed.Sec.L.Rep. (CCH) 94, 142 (E.D.N.Y.1973).

<sup>59</sup> See, Eberhardt v. Waters, 901 F.2d 1578 (11 Cir.1990) (Sale of cattle embryos was a security under Georgia blue sky law.).

<sup>60</sup> See, Bailey v. J.W.K Properties, Inc., 904 F.2d 918 (11 Cir.1990) (Cattle breeding program was an investment contract and hence a security - investors had little or no control over breeding operations or success of investment.).

<sup>61</sup> See, Bell v. Health-Mor, Inc., 549 F.2d 342 (5 Cir.1977).

a security<sup>62</sup> and the United States Supreme Court's view that the term security should be interpreted broadly to extend coverage of the federal securities laws in order to protect investors.<sup>63</sup>

The fact that the definition of "security" is very broad both by statute and by the interpretation of the Supreme Court has caused quite unpredictable guidelines. This broad definition and the courts' problems in providing predictable guidelines are not without criticism.<sup>64</sup>

#### **2.2.1.4 Primary and Secondary Transactions**

The federal securities laws regulate not only markets, but also issuers, purchasers, and sellers of securities. Such securities trading activities can be divided into two basic subgroups, primary and secondary transactions. Each regulated by different Acts.

Primarily the Securities Act governs the process by which securities are first offered to the public. This is frequently referred to as primary offerings or distributions. This is the way in which corporate capital is raised in the public equity markets. Also covered by the Securities Act are so called secondary distributions that occur when the securities are offered to the public by individuals, or institutions who did not acquire the securities in a public offering. Unless an appropriate exemption is applicable, registration of the securities under the Securities Act will be required in these cases. Since the effect of both primary and secondary distribution is that securities for the first time is made available to the public the notion of primary transactions is suitable.

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<sup>62</sup> Section 2(1) of the Securities Act of 1933: The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. 15 U.S.C.S. § 77b(1). Note especially the catch-all phrase "any interest or instrument commonly known as a security".

<sup>63</sup> *See inter alia*, *Reves v. Ernest & Young*, 494 U.S. 56, 110 S.Ct. 945, 108 L. Ed. 2d 47 (1990), *rehearing denied*, 110 S.Ct. 1840, 108 L. Ed. 2d 968 (1990), and *Marine Bank v. Weaver*, 455 U.S. 551, 102 S.Ct. 1220, 71 L. Ed. 2d 409 (1982).

<sup>64</sup> *See inter alia*, Thomas M. Arnold, "When is a car a bicycle?" and *Other Riddles: The Definition of a Security Under the Federal Securities Laws*, 33 *Clev.St.L.Rev.* 449 (1984), Lewis D. Lowenfels & Alan R. Bromberg, *What is a Security Under the Federal Securities Laws?*, 56 *Alb.L.Rev.* 473 (1993), and Marc I. Steinberg & William E. Kaulbach, *The Supreme Court and the Definition of "Security": The "Context" Clause, "Investment Contract" Analysis and Their Ramifications*, 40 *Vand.L.Rev.* 489 (1987).

The other subgroup is what could be summarized as secondary transactions. That is, transactions between investors that involves securities that have previously been issued by the corporation or other issuer (e.g. institutions). None of the proceeds made through these transactions flows back to the companies issuing the securities. This aspect of the secondary securities markets is referred to as “trading” and is regulated primarily by the provisions of the Exchange Act.

### **2.2.1.5 Forms of Foreign Securities in the U.S., Particularly American Depositary Receipts**

Foreign equity securities in the United States are traded in three forms: (a) ordinary shares as issued by the non-U.S. company in its country of origin, (b) in rare instances, shares issued directly for the U.S. market and with dividends distributed in U.S. dollars, and (c) American Depositary Shares (ADS) represented by American Depositary Receipts (ADR). The vast majority of foreign corporate equity securities on the U.S. markets are in the form of ADRs.<sup>65</sup>

An ADR is a negotiable certificate issued by a U.S. commercial bank, known as the depositary. Each ADR represents one or more shares of a foreign company deposited with a branch or correspondent of the depositary bank in the issuer’s home country, known as the custodian bank. The custodian bank is the record holder of the ADSs, and the ADR holder has certain rights through the depositary.<sup>66</sup>

There are both sponsored and unsponsored ADR programs. The former have the support of the company. U.S. broker-dealers, or depositary banks, who conclude that there is sufficient market interest to warrant trading in the shares of the foreign company in the United States, initiate unsponsored ADR programs.<sup>67</sup>

### **2.2.2 Blue Sky Laws**

Before the federal securities laws were issued, most of the states were attempting to deal with the problems of investor protection and regulate the marketing of fraudulently valued securities. This was made through the use of so called “blue-sky” laws<sup>68</sup>, of which the Kansas statute of 1911 was the

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<sup>65</sup> Bartos and Dangeard, *supra* note 10, at 149-150.

<sup>66</sup> *Id.* at 150.

<sup>67</sup> *Id.* at 150-151.

<sup>68</sup> The most common explanation for the derivation of the “blue-sky” appellation relates to the Kansas statute’s purpose to protect the Kansas farmers against the industrialists selling them a piece of blue sky. The Supreme Court of the United States illustrates this in the first opinion on a state securities law. In the case *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 550, 37 S.Ct. 217, 220, 61 L.Ed. 480 (1917) the law was held to be constitutional as a valid use

predecessor.<sup>69</sup> Today every state has enacted a securities act. The state securities laws regulate securities distributions and broker-dealer activities. A large number of states regulate the activities of investment advisers. Several states also regulate tender offers.<sup>70</sup>

The name “blue-sky“ is still used for state securities regulation. In addition to providing investors with full disclosure as the method of investor protection, “blue-sky” laws impose merit requirements on an issuer or offering. The substance of the merit requirements is that the substantive terms of the securities to be offered must qualify on a merit basis.<sup>71</sup>

### **2.2.3 The Securities Act of 1933**

The Securities Act of 1933 was the first piece of legislation in a series of federal securities laws during the 1930s, and it became known as the “Truth in Securities“ Act.<sup>72</sup> The federal legislation contained many of the features of state “blue-sky“ laws except that it did not, and still does not, establish a system of merit regulation. As opposed to state “blue-sky“ laws the Act focuses on disclosure.

The Securities Act regulates the public offering of securities through requirements intended to promote full and fair disclosure necessary for the investor to make an informed decision. Disclosure is made through a registration statement, which is filed with the SEC by the issuer and a prospectus, forming part of and containing most of the information included in the registration statement, which is distributed to potential investors.

Pursuant to section 5 of the Securities Act, a registration statement must be filed with the SEC before any securities may be offered to the public and must be declared effective by the SEC before any sale or delivery of the securities can occur. In addition, the securities may not be delivered unless accompanied or preceded by a prospectus, which satisfies the requirements of the Securities Act.

Registration statements filed with the SEC under the Securities Act are required to contain a detailed description of the issuing company and of the securities to be issued as well as the financial statement of the issuer. The registration statement is in two parts: the first is the prospectus distributed to investors, and the second contains a certain amount of technical information which is not distributed to investors but which may be reviewed by the SEC

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of power of the state to protect the public against “speculative schemes that have no more basis than so many feet of blue sky.“

<sup>69</sup> Ralph F. De Bedts, *The New Deal’s SEC - The Formative Years*, 4, Columbia University Press, New York and London, 1964.

<sup>70</sup> Hazen, *supra* note 9, at 388.

<sup>71</sup> *Id.* at 389.

<sup>72</sup> Milton H. Cohen, “*Truth in Securities*“ *Revisited*, 79 Harv.L.Rev. 1340 (1966).

and is publicly available<sup>73</sup>, including exhibits consisting of certain material contracts of the issuer and other documents.

The fundamental principle underlying the Securities Act is that all securities being placed in the hands of the public for the first time require Securities Act registration, unless an exemption is available.

The Securities Act contains a number of private remedies for investors who are injured due to violations of the Act.<sup>74</sup> There are general antifraud provisions which bar material omissions and misrepresentations in connection with the offer or sale of securities.<sup>75</sup>

The scope of the Securities Act is limited for two reasons. First, its registration and disclosure provisions cover only distributions of securities. Second, its investor protection reach extends only to purchasers, and not sellers, of securities.

## **2.2.4 The Securities Exchange Act of 1934**

In 1934, Congress enacted the Securities Exchange Act of 1934. The Exchange Act is directed at regulating all aspects of public trading of securities. The Act does not focus only on securities, their issuers, purchasers, and sellers. It also regulates the marketplace, including the exchanges, the over-the-counter markets, and broker-dealers generally.

In terms of its investor protection thrust, the Exchange Act has a much broader reach than the Securities Act. The Exchange Act's protection extends to sellers as well as purchasers. It has a general provision that bars fraud and material misstatements or omissions of material facts in connection with any purchase or sale of security.<sup>76</sup> However, the vast majority of the 1934 Act's regulation of securities issuers derives from the Act's periodic reporting and disclosure requirements, which emanate primarily from the fact that securities traded on a national exchange must be registered with the SEC.

The Exchange Act also includes special provisions dealing with stock manipulation, improper trading while in possession of non-public material information, insider short swing profits and misstatements in documents filed with the SEC. In addition to this, the importance of shareholder

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<sup>73</sup> Several of the documents filed with the SEC can be found in the SEC's database EDGAR, which can be accessed from the SEC website, [www.sec.gov](http://www.sec.gov).

<sup>74</sup> Section 11, 15 U.S.C.S. § 77k, for material misstatements and omissions in registration statements, section 12(1), 15 U.S.C.S. § 77l (1), for securities sold in violation of the registration requirements and section 12(2), 15 U.S.C.S. § 77l(2), creating an action by purchasers against the sellers for material misstatements or omissions.

<sup>75</sup> Section 17(a), 15 U.S.C.S. § 77q(a).

<sup>76</sup> Section 10(b), 15 U.S.C.S. § 78j(b). Most notable is rule 10b-5, 17 C.F.R § 240.10b-5, promulgated under section 10(b).



suffrage in public corporations made Congress include regulation of the proxy machinery of all publicly traded corporations that are subject to the Act's reporting requirements.<sup>77</sup>

Registration of issuers' securities under the Exchange Act involves full disclosure of the issuer's business, financial position and management as well as numerous periodic reporting requirements.

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<sup>77</sup> See section 14(a) of the Exchange Act, 15 U.S.C.S. § 78n(a), and Hazen, *supra* note 9, at 466.

# 3 Tender Offers and Takeover Regulation

## 3.1 Tender Offers

### 3.1.1 Introduction

A tender offer, or a takeover bid, is a technique for effectuating either a takeover or a merger. In its most basic form it may be characterised as an offer to acquire shares of a company, whose shares are not closely held, addressed to the general body of shareholders, with a view to obtaining at least sufficient shares to give the offeror voting control of the company.<sup>78</sup> Where a tender offer is used for effectuating a takeover, it may take the form of a cash for stock offer, or a stock for stock exchange offer, or a combination of those two forms.

It should be noted that the term tender offer is not exactly synonymous in the United States, the United Kingdom and Sweden. In the United States attempts have been made to define what types of offers that constitutes a tender offer. This has resulted in several criteria for determining whether a tender offer is at hand. However, the U.S. courts have taken an extremely flexible approach, and the definition could be categorized as elusive.<sup>79</sup> In the United Kingdom, the term takeover bid is more frequent. A textual translation of the Swedish equivalent shows common grounds with the U.S. view of what a tender offer is, but in some respects the Swedish rules goes beyond the U.S. view of the meaning of a tender offer.

However, in essence it is the same type of offers that the rules of all three jurisdictions deal with, and in order to clearly present the similarities and differences between the three jurisdictions it is necessary to use a common terminology. The term tender offer, therefore, is generally used in this thesis for an offer by a bidder to on general terms acquire a certain number of shares in another company at a certain price, usually at a premium, directed to the shareholders of the target company.

### 3.1.2 Cross Border Tender Offers

For the purposes of this thesis, a cross-border tender offer is defined as an offer made in more than one country or in which the bidder, the target

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<sup>78</sup> Blank, M.V., Greystoke, A.L., Weinberg, M.A., *Weinberg and Blank on Takeovers and Mergers*, 1002, Fifth Edition, Sweet & Maxwell, London, 1989/1999.

<sup>79</sup> See Symposium, *Current Issues in Tender Offers: The Elusive Definition of a Tender Offer*, 7 J.Corp.L. 503 (1982) [hereinafter *The Elusive Definition*].

company, and the target company's investors are of at least two different nationalities, or residents of at least two different states. For example, a tender offer made by a Swedish company for the shares of a company organized under English law, with a small amount of shareholders residing in the U.S. holding ADRs, is a clear example of a cross-border tender offer.

### **3.1.3 Exchange Offers**

A registered exchange offer is similar to a cash tender offer except that all or part of the consideration offered by the bidder for the target company's shares consists of equity or debt securities of the bidder rather than exclusively cash. One particular implication arises in cross-border exchange offers. Since the bidder will be issuing securities<sup>80</sup>, the exchange offer will be subject to the registration requirements of the jurisdiction governing the bid as well as the tender offer rules. In the case where U.S. law apply to the exchange offer, the bidder must not only comply with the rules of the Williams Act, but also the registration requirements of the Securities Act.

### **3.1.4 Tender Offers in the United States**

#### **3.1.4.1 History**

Initially, the tender offer was employed primarily as a means for a corporation to repurchase its own shares.<sup>81</sup> However, in the 1960's the rising cost of proxy fights and the lack of any regulation of tender offers spurred the use of the tender offer as a takeover device.<sup>82</sup>

This created a situation where an unknown outsider could offer an attractive price for a controlling number of the corporation's shares, and force the shareholders to act without any information about the potential purchaser.<sup>83</sup> Legislation was necessary, since the investors were not provided with adequate information. Therefore, Congress amended the Exchange Act with the Williams Act.<sup>84</sup>

#### **3.1.4.2 Definition of Tender Offer**

It is not always clear whether a particular acquisition of shares is a tender offer for purposes of the federal securities laws. First of all, the term "tender offer" is not defined in the Williams Act. The Congress has, on more than

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<sup>80</sup> This is under the assumption that the bidder's securities offered as consideration is not registered in the jurisdiction governing the bid.

<sup>81</sup> *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv.L.Rev. 1250, 1253 (1973).

<sup>82</sup> The increased use of tender offers was due in part to the fact that a shareholders vote and compliance with the Exchange Act's proxy rules were required in a statutory merger.

<sup>83</sup> *The Elusive Definition*, *supra* note 79, at 503-504.

<sup>84</sup> Hazen, *supra* note 9, at 603.

one occasion, considered and rejected objective definitions of tender offer.<sup>85</sup> The effect is that both the SEC and the courts have broadly construed the term “tender offer“, providing a very flexible definition.

What traditionally has been considered as a tender offer can be discerned from the congressional reports connected with the introduction of the Williams Act: “The offer normally consists of a bid by an individual or group to buy shares of a company – usually at a price above the market price. Those accepting the offer are said to tender their stock for purchase. The person making the offer obligates to himself to purchase all or a specified portion of the tendered shares if specified conditions are met.”<sup>86</sup>

In 1979, the SEC proposed a very detailed definition of tender offer. In general, the terms of the proposal were the following. Subject to certain exemptions, for standard broker-dealer activities on a national securities exchange or in the over-the-counter market, an offer to purchase or solicitations of offers to sell were considered as a tender offer if they: “during any 45 day period are directed to more than 10 persons and seek the acquisition of more than 5% of the class of securities...“. Furthermore, the exempted broker-dealer situations would be considered as tender offer if they fulfilled certain criteria that indicated a deviation from the exempted activity.<sup>87</sup>

However, the proposed rule never turned into a final rule, and the SEC has since abandoned any plans to define tender offer through formal rulemaking.<sup>88</sup> The essence of the SEC’s current position is that “tender

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<sup>85</sup> *Id.* at 617. Note, that in contrast to this most state tender offer statutes contain objective definitions. See e.g., 8 Del.Code § 203(c)(3) that defines the more broad term “Business combination” and N.H.Rev.Stat. Ann. 421-A:2(VI)(a) – “ ‘Takeover bid’ does not include: (3) Any...offer to acquire an equity security, or the acquisition of such equity security pursuant to such offer...from not more than 25 persons...”.

<sup>86</sup> H.Rep. No. 1171, 90 th Cong., 2d Sess. 2 (1968). See also, *The Elusive Definition*, *supra* note 79, at 503 and 505.

<sup>87</sup> The full text of the proposed rule - (1) The term ‘tender offer’ includes a ‘request or invitation for tenders’ and means one or more offers to purchase or solicitations of offers to sell securities of a single class, whether or not all or any portion of the securities sought are purchased, which (i) during any 45 day period are directed to more than 10 persons and seek the acquisition of more than 5% of the class of securities, except that offers by a broker (and its customers) or by a dealer made on a national securities exchange at the then current market or made in the over the counter market at the then current market shall be excluded if in connection with such offers neither the persons making the offers nor such broker or dealer solicits or arranges for the solicitation of any order to sell such securities and such a broker or dealer performs only the customary functions of a broker or dealer and receives no more than the broker’s usual and customary commission or the dealer’s usual and customary markup; or (ii) are not otherwise a tender offer under paragraph b(1)(i) of this section, but which (A) are disseminated in a widespread manner, (B) provide for a price which represents a premium in excess of the greater of 5% of or \$2 above the current market price, and (C) do not provide for a meaningful opportunity to negotiate the price and terms. Proposed Rule 14d-1(b)(1), Sec.Exch.Act Rel. No. 34-16385, (Nov. 29, 1979).

<sup>88</sup> Hazen, *supra* note 9, at 618.

offer“ covers more than traditional takeover attempts involving public solicitation and may, under appropriate circumstances, include even privately negotiated and open market purchases.<sup>89</sup> In addition to this, the SEC has suggested an eight-factor test to determine whether a tender offer exists. The relevant factors are:

- (1) active and widespread solicitation of public shareholders,
- (2) solicitation for a substantial percentage of the issuer’s stock,
- (3) whether the offer to purchase is made at a premium over prevailing market price,
- (4) whether the terms of the offer are firm rather than negotiable,
- (5) whether the offer is contingent on the tender of a fixed minimum number of shares,
- (6) whether the offer is open only for a limited period of time,
- (7) whether the offerees are subject to pressure to sell their stock,
- (8) the existence of public announcements of a purchasing program that precede or accompany a rapid accumulation of stock.

This test has evolved over a period of time and is discussed in the case *Wellman v. Dickinson*.<sup>90</sup> The test is not contained in an official SEC release and the factors are merely broad guidelines. Therefore, the extent to which predictability exists must be gleaned from the cases and SEC rulings.

Ordinarily, open market purchases will not constitute a tender offer. However, in an early release the SEC took the position that a “special bid“, the placement of a fixed-price bid on an exchange for a specified large number of shares, constitutes a tender offer.<sup>91</sup> Therefore, the use of the facilities of an exchange will not automatically preclude the find of a “tender offer“. It could be argued that the view of the SEC is that a series of control related open market purchases could fall within the tender offer definition.<sup>92</sup>

However, the cases have taken a contrary view. A plan of successive open market purchases has been held not to be a tender offer where the aggregate amount of shares so purchased fell short of the five percent threshold.<sup>93</sup> Even the purchase of twenty five percent of a company’s stock in a two-day period was held not to be a tender offer where only one of the SEC’s eight factors was present.<sup>94</sup> In the case *Hanson Trust PLC v. SCM Corporation*<sup>95</sup> it was held that a “street sweep“<sup>96</sup> and a group of privately negotiated purchases for twenty five percent of the target company’s outstanding stock was not a tender offer, even though these purchases occurred on the heels of

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<sup>89</sup> *Id.* at 619.

<sup>90</sup> 475 F.Supp. 783 (S.D.N.Y.1979).

<sup>91</sup> Sec.Exch.Act Rel. No. 34-8392 (Aug. 30, 1968).

<sup>92</sup> *See Hazen, supra* note 9, at 620.

<sup>93</sup> *See Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Company, Inc.*, 356 F.Supp. 1066 (S.D.N.Y.1973).

<sup>94</sup> *See Brascan Limited v. Edper Equities Ltd.*, 477 F.Supp. 773 (S.D.N.Y.1979).

<sup>95</sup> 774 F.2d 47 (2d Cir.1985).

<sup>96</sup> A street sweep is a substantial accumulation of shares in a very short period of time.

the withdrawal of a publicly announced tender offer. The court refused to consider these transactions as a tender offer because, *inter alia*, the price of the purchases was at the market price and the privately negotiated purchases were accomplished without any pressure or secrecy.<sup>97</sup>

In cases involving both open market and privately negotiated stock purchases the crucial criteria seem to be whether or not the “pressure-creating characteristics of a tender offer” accompany the transactions.<sup>98</sup> Thus, it was held that a tender offer had occurred where a publicly announced intention to acquire a substantial block of stock was followed by rapid acquisitions of shares.<sup>99</sup> In contrast, where the acquisition proceeded more slowly and none of the SEC’s eight factors were present, the court found no more than “a particularly aggressive and successful open market stock buying program.”<sup>100</sup>

The cases that discuss whether privately negotiated transfers of controlling blocks of shares can constitute a tender offer are not unanimous. However, the general view is that even if most such transactions not fall within the definition of tender offer, they are susceptible of being categorized as tender offers. In the case *Wellman v. Dickinson* a subsidiary was formed, through which the parent company made simultaneous secret offers to twenty-eight of the target company’s largest shareholders. These shareholders represented a total of thirty five percent of the company’s outstanding shares. The identity of the actual offeror was not disclosed. Furthermore, the target shareholders were given a short period of time, from one half hour to overnight, in which to make a decision. The court held that a tender offer had taken place.<sup>101</sup>

In another case it was indicated that privately negotiated purchases that interferes with a shareholder’s unhurried investment decision and the fair treatment of investors defeats the situations protected by the Williams Act and are, most likely, tender offers.<sup>102</sup> The main theme is that when a privately negotiated attempt to take control over a company raises problems such as secrecy and high pressure, that the Williams Act was designed to prevent, a tender offer may exist.

The cases show that there are several factors and circumstances that could affect the categorization of a certain offer as a tender offer. In fact, the inquiry is highly factual and is handled on an ad hoc basis. The decisions show uniformity to a very limited extent, but they have established some limits to the flexible definition. Even with regard to those limits the

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<sup>97</sup> *Hanson Trust PLC v. SCM Corporation*, 774 F.2d 47 (2d Cir.1985).

<sup>98</sup> *Ludlow Corporation v. Tyco Laboratories, Inc.*, 529 F.Supp. 62, 68 (D.Mass.1981).

<sup>99</sup> *S-G Securities, Inc. v. Fuqua Investment Company*, 466 F.Supp. 1114 (D.Mass.1978).

<sup>100</sup> *Ludlow Corporation v. Tyco Laboratories, Inc.*, 529 F.Supp. 62, 67 (D.Mass.1981).

<sup>101</sup> *Wellman v. Dickinson*, 475 F.Supp 783 (S.D.N.Y.1979).

<sup>102</sup> *Cattlemen’s Investment Company v. Fears*, 343 F.Supp. 1248 (W.D.Okl.1972).

definition of tender offer remains elusive in the absence of a SEC rule or statutory amendment.

### 3.1.5 Tender Offers in the United Kingdom

Unlike the legislative approach with regard to tender offers taken in the United States the takeover regulation in the United Kingdom is based on a non-statutory system. The keyword is self-regulation. The Panel on Takeovers and Mergers (the Takeover Panel) issued the City Code in the late 1960s.<sup>103</sup> The members of the Panel are the main investment bodies, those practicing in the field, and the companies themselves represented by the Confederation of British Industry.<sup>104</sup>

The scope of what is categorized as an offer under the City Code is quite broad.<sup>105</sup> A takeover offer, as defined by the City Code, could be a tender offer, but it could also be another type of takeover offer that would not have been considered as a tender offer in the United States. Therefore, it is fair to say that the City Code applies to a broader scope of takeover offers. Neither the City Code nor other rules<sup>106</sup> associated with it defines the term tender offer. However, a feature of the basic elements of a tender offer could be interpreted from the statement that one of the acquisition techniques that the City Code aimed to outlaw was the purchase of a controlling interest in a company at a considerable premium over the market price without the same offer being made to all shareholders.<sup>107</sup>

### 3.1.6 Tender Offers in Sweden

In contrast to the United States, the use of tender offers in Sweden is not regulated through legislation. Therefore, there is no legal definition of the

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<sup>103</sup> Greene, Curran, and Christman, *supra* note 1, at 830.

<sup>104</sup> See the London City Code on Takeovers and Mergers [hereinafter the City Code], at Introduction 2(a): the Association of British Insurers, the Association of Investment trust Companies, the Association of Unit Trusts and Investment Funds, the British Bankers' Association, the London Investment Banking Association (with separate representation for its Corporate Finance Committee), the Confederation of British Industry, the Institute of Chartered Accountants in England and Wales, the London Stock Exchange Limited and the National Association of Pension Funds.

<sup>105</sup> In the definitions of the City Code it is stated that an offer includes: "wherever appropriate, take-overs and merger transactions however effected, including reverse take-overs, partial offers, Court schemes and also offers by a parent company for shares in its subsidiary. In some circumstances, the Code may have relevance to unitisation proposals which are in competition with an offer to which the Code applies: the Panel should, therefore, be consulted when such proposals are under consideration."

<sup>106</sup> See the Rules Governing Substantial Acquisitions of Shares (the SARs) that explicitly refers to the rules implications in relation to tender offers, at Rule 4.

<sup>107</sup> Peter Lee, *Takeovers-The United Kingdom Experience*, in *Takeovers-Institutional Investors and the Modernization of Corporate Laws*, Edited by John Farrar, 193, Oxford University Press, Auckland, 1993.

term tender offer. Neither have an extensive discussion on the definition of a tender offer taken place in Sweden.

Similar to the United Kingdom tender offers in Sweden are mainly governed by a self-regulatory regime. The Swedish Industry has through the organ *Näringslivets börskommitté* (NBK) issued a recommendation regarding tender offers. The full title is *Näringslivets börskommittés rekommendation rörande offentligt erbjudande om aktieförvärv* (NBK/OE).

Swedish doctrinal writers basically describe a tender offer as an offer to on general terms acquire a certain number of shares in another company at a certain price, directed to the shareholders of the target company. The tender offer can be made in respect of all shares or partially.<sup>108</sup> In Swedish securities law literature the tender offer is presented as one of the three ways to acquire shares in a public company quoted on a stock exchange. The other two alternatives are purchases on the open market through a broker-dealer, and a privately negotiated acquisition.<sup>109</sup>

## 3.2 Takeover Regulation in the United States

### 3.2.1 The Terminology of Takeovers

The world of corporate takeovers is full of symbolic words that illustrate the intensity of takeover battles. The terminology has evolved in the United States, and it may seem exaggerated from a Swedish point of view. The words are, however, frequently used, and a brief presentation of some of them could be both valuable and entertaining.

A “midnight special“ and a “bear hug“ are two different takeover tactics. The former is a more aggressive tactic where a quickly assembled offer creates a surprise element. The latter involves an initial “friendly“ approach to management of the target company with an express or implied choice of coming quietly now or being dragged along later. “Smoking gun“ refers to a mistake that impedes the progress of the tender offer or defensive tactic. A “show stopper“ is a mistake so drastic that it results in the offer’s failure.<sup>110</sup>

“Black knights“ are suitors that are viewed as the least attractive purchaser by the target company. That is, a purchaser that will change the target company radically. “White knights“ may be brought in by the target company to fend off a “black knight“. “Grey knights“ are competing suitors

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<sup>108</sup> Lars Afrell, Håkan Klahr, and Per Samuelsson, *Lärobok i Kapitalmarknadsrätt*, 230, Juristförlaget, Stockholm, 1995.

<sup>109</sup> *Id.*

<sup>110</sup> Hazen, *supra* note 9, at 606.



that are not solicited by the target company but whom are viewed as preferable to the initial aggressor. Preventive measures by companies viewed as potential targets in order to fend off unwanted suitors are referred to as “shark repellents”.<sup>111</sup>

During the 1980s “junk bonds” was introduced and frequently used as a method of financing deals. “Junk bonds” are low quality non-investment grade corporate debt obligations and are hardly used at all today. A common takeover device is the “front-end loaded, two tiered offer”, where the offeror makes an offer for a limited number of the target’s shares with the notice that a second step of the acquisition will follow at a lower price.<sup>112</sup>

Perhaps the most colourful names are to be found among the defensive tactics to thwart hostile takeovers. The “Pac-Man defence” consists of the target company’s attempt to acquire the predator would-be acquirer. “Poison pills” involve the issuance of preferred stock, debt securities or rights to acquire such securities that have a high buy-back price, which is triggered by a hostile acquisition of the target company. “Greenmail” is the term used for premiums paid by target company managements to buy back the hostile bidder’s shares at a premium above the price paid by the hostile bidder.<sup>113</sup>

## **3.2.2 The Williams Act**

### **3.2.2.1 Background**

As mentioned above the use of tender offers, as a takeover device, increased substantially during the 1960’s. This situation led to the 1968 congressional enactment of the Williams Act amendments to the Exchange Act. The Williams Act introduced sections 13(d), 13(e), 14(d), 14(e) and 14(f), which constitute the basis for federal law on tender and exchange offers.<sup>114</sup> Section 13(d) focus on open market and privately negotiated acquisitions, and section 13(e) makes it unlawful for issuers to purchase their own shares in contravention of SEC rules. Sections 14(d), (e) and (f) are directed at tender offers. In addition, section 13(f) was adopted in 1975. It requires disclosure by institutional investment managers, which exercise control over accounts containing significant portfolio holdings of equity securities subject to the Exchange Act’s filing requirements.<sup>115</sup> Section 13(e) and (f) are not of significant importance in this thesis, and will therefore not be dealt with to any larger extent.

Simultaneously with the final rule on cross-border tender offers, dealt with below, the SEC adopted comprehensive revisions to the rules and regulations under the Williams Act through the Regulation of Takeovers and

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 607.

<sup>113</sup> *Id.*

<sup>114</sup> Bartos and Dangeard, *supra* note 10, at 74.

<sup>115</sup> 15 U.S.C.S. § 78m(f)(1).

Security Holder Communications.<sup>116</sup> The regulation includes the relaxation of existing restrictions on oral and written communications with security holders, by permitting the dissemination of more information on a timely basis. For example, communications regarding a proposed tender offer without "commencing" the offer and requiring the filing and dissemination of specified information, the simplification and integration of disclosure requirements, and the combination of the existing schedules for issuer and third-party tender offers into one schedule entitled "Schedule TO".

### 3.2.2.2 Ownership Reporting

Section 13(d) of the Williams Act focuses on open market and privately negotiated acquisitions of securities subject to the Exchange Act's registration and reporting requirements. Any person who acquires, directly or indirectly, more than a five percent beneficial ownership interest in any class of voting equity security registered pursuant to section 12 must file a statement of ownership with the SEC within ten days after reaching the five percent threshold.<sup>117</sup> Thus, the purchaser has ten days between the crossing of the five percent threshold and the disclosure date. This provides a ten day window for additional undisclosed acquisitions of the target company's stock. This permits the acquisition of considerably more than the five percent threshold before section 13(d)'s early warning disclosures must be made. Note that this requirement applies whether or not the issuer of the securities is a U.S. company. Despite numerous attempts to close it, the ten day window remains open.<sup>118</sup> Additionally, after the passing of the initial level, movements of more than one percent ownership require amendment of the filing promptly.<sup>119</sup>

Schedule 13D is the appropriate form for section 13(d) filings. The person filing must disclose information about itself, its officers, directors, and principal business as well as any financing arrangements that have been entered into to finance the purchase.<sup>120</sup> Failure to make a timely Schedule 13D filing may result in an injunction against future purchases or against holding a shareholders vote until the violation is cured.<sup>121</sup> Disgorgement of any profits made on shares improperly acquired may also be appropriate.<sup>122</sup>

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<sup>116</sup> See Regulation of Takeovers and Security Holder Communications, Sec. Act Rel. No. 33-7760 (Oct. 26, 1999) [hereinafter Regulation M&A Release].

<sup>117</sup> 15 U.S.C.S. § 78m(d).

<sup>118</sup> See, 15 Sec.Reg. & L. Rep. (BNA) 1156 (June 17, 1983) where an SEC advisory group recommended that the 13(d) filing should be due in advance of the purchases and 16 Sec.Reg. & L.Rep. (BNA) 793 (May 11, 1984) where legislative proposals by the SEC included the closing of the ten day window.

<sup>119</sup> 15 U.S.C.S. § 78m(d).

<sup>120</sup> 17 C.F.R § 240.13d-101.

<sup>121</sup> See *inter alia*, SEC v. First City Financial Corporation Ltd., 890 F.2d 1215 (D.C.Cir.1989) (injunction against future purchases), and CNW Corporation v. Japonica Partners., L.P., 874 F.2d 193 (3d Cir.1989) (injunction against holding a shareholders vote).

<sup>122</sup> SEC v. First City Financial Corporation Ltd., 890 F.2d 1215 (D.C.Cir.1989) (requiring disgorgement of profit from shares purchased after Schedule 13D was due).

### 3.2.2.3 Filing and Disclosure

Section 14(d) and applicable SEC rules require the filing of tender offers along with certain mandated disclosures. Filing requirements are not limited to the tender offeror but apply to anyone who is recommending in favour of or against a tender offer covered by the Williams Act. In addition there are certain substantive requirements for any tender offer subject to section 14(d).

Section 14(d) of the Williams Act requires that any person planning a tender offer for any class of equity security subject to the registration requirements of section 12 must file with the SEC all solicitations, advertisements, and any other material to be used in connection with the tender offer.<sup>123</sup> This filing must take place prior to the distribution of the tender offer material, and must be updated to reflect material changes and developments.<sup>124</sup> Regulation 14D sets out the SEC's filing and disclosure requirements under section 14(d). In addition to the long-form filing set out in Schedule TO, the tender offeror must file ten copies of all additional tender offer material with the SEC no later than the date upon which it is first published or disseminated.<sup>125</sup> All documents, not only the first formal filing of the initial offer, used in the tender offer and solicitation must be on file with the SEC prior to their use.<sup>126</sup>

Rule 14d-2 originally provided that a tender offer begins at 12:01 a.m. on the earliest date of the following events: (1) the first publication of the long form tender offer file pursuant to Rule 14d-4(a)(1), (2) the first publication of a summary advertisement,<sup>127</sup> or (3) the first public announcement of the tender offer, unless within five days of the announcement the bidder makes a public announcement withdrawing the tender offer or complies with the disclosure and filing requirements of Rules 14d-3(a), 14d-6, and 14d-4, all of which require public dissemination of the relevant information.<sup>128</sup>

The revised Rule 14d-2 under the Regulation M&A Release replaces the rules above with a filing requirement for all written communications that relates to a tender offer beginning with and including the first public announcement of the transaction. Under the revised rules, "commencement" is when the bidder first publishes, sends or gives security holders the means to tender securities in the offer.<sup>129</sup>

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<sup>123</sup> 15 U.S.C.S. § 78n(d)(1).

<sup>124</sup> 15 U.S.C.S. § 78n(d).

<sup>125</sup> 17 C.F.R. § 240.14d-3(b).

<sup>126</sup> 17 C.F.R. § 240.14d-3. Once it is clear that a tender offer exists, the courts tend to strictly construe issues relating to the determination of the commencement date. This is the case since the Williams Act is designed to provide disclosure as early as practicable. *See also*, Gerber v. Computer Associates International, Inc., 812 F.Supp. 361 (E.D.N.Y.1993).

<sup>127</sup> Rule 14d-4(a)(2) allows summary publications for certain tender offers. 17 C.F.R. § 240.14d-4(a)(2).

<sup>128</sup> 17 C.F.R. § 240.14d-2.

<sup>129</sup> 17 C.F.R. § 240.14d-2 (1999).

Schedule TO must disclose the name of the bidder<sup>130</sup>, name of the target company and the title of class of securities being sought. It further is necessary to disclose the source of funds to be used in connection with the tender offer and the identity and background of the person filing the document. Also, all past contracts, transactions or negotiations between the tender offeror and the target company, the purpose of the tender offer and the bidders plans and proposals for the future with regard to the target company must be disclosed. Schedule TO must divulge the bidders current interest in the target and identify all persons retained or employed or compensated in connection with the tender offer. The bidder's financial statement must be disclosed when the bidder's financial structure is material to an investor's decision whether or not to tender shares in the target company.<sup>131</sup>

In addition to the disclosures above, the Schedule TO filing must list any present or proposed material contracts, arrangements, understandings or relationships between the bidder, its officers, directors, controlling persons or subsidiaries and the target company or any of its officers, directors, controlling persons or subsidiaries that would bear upon the target company's shareholders decision whether or not to tender the shares. Furthermore, the applicability of the antitrust laws, or the margin requirements as well as the pendency of material legal proceedings must be disclosed.<sup>132</sup>

Section 14(d)(3) of the Act provides that in determining the applicable percentage of outstanding shares of any class of equity securities, securities held by the issuer or its subsidiary must be excluded from the computation.<sup>133</sup> Section 14(d)(4) requires full disclosure according to such rules as the SEC may promulgate with regard to any solicitation or recommendation to a target company's securities holders, either to accept or reject a tender offer or request for tender made by someone else.<sup>134</sup> Section 14(d)(5) provides that all securities deposited pursuant to a tender offer may be withdrawn by or on behalf of the depositor at any time until the expiration of the seven days after the first publication of the formal tender offer, and at any time after sixty days from the date of the original tender offer or request for invitation, unless a different period is provided for by the SEC rules.<sup>135</sup>

Section 14(d)(6) requires pro rata acceptance of shares tendered where the tender offer by its terms does not obligate the tender offeror to accept all

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<sup>130</sup> "The term 'bidder' means any person who makes a tender offer or on whose behalf a tender offer is made [except for a tender offer by a issuer]." 17 C.F.R. § 240.14d-1(b)(1).

<sup>131</sup> 17 C.F.R. § 240.14d-1.

<sup>132</sup> *Id.*

<sup>133</sup> 15 U.S.C.S. § 78n(d)(3).

<sup>134</sup> 15 U.S.C.S. § 78n(d)(4).

<sup>135</sup> 15 U.S.C.S. § 78n(d)(5).

shares tendered.<sup>136</sup> Section 14(d)(7) provides that whenever a person varies the terms of a tender offer or request before the expiration thereof, by increasing the consideration offered to the holders of the securities sought, the person making such an increase in consideration must pay to all persons tendering securities pursuant to their requests that same price whether or not the securities were tendered prior to the variation of the tender offer's terms.<sup>137</sup>

Based on section 14(d) the SEC has adopted the "all holders" and the "best price" rules, which have been considered as necessary and appropriate by the SEC for the implementation of the Williams Act.<sup>138</sup> The "all holders" rules prohibit discriminatory tender offers by both issuers and third parties.<sup>139</sup> However, there is an explicit exception in this requirement for tender offers that exclude one or more shareholders in compliance with a constitutionally valid state statute.<sup>140</sup>

The "best price" rule requires equal treatment for all securities holders, and thus entitles anyone receiving payment under the tender offer to the highest consideration paid to any other security holder at any time during such tender offer.<sup>141</sup> This requirement do not prohibit use of different types of consideration, and it is not necessary that the different types of consideration are substantially equivalent in value as long as the tender offer permits the security holders to elect among the types of consideration offered. When different types of consideration are offered, the tender offeror may limit the availability and offer it to tendering shareholders on a pro rata basis.<sup>142</sup>

Section 14(d)(8) of the Act exempts certain tender offers or request for tenders from the scope of section 14(d)'s requirements.<sup>143</sup> The exempted situations are when the acquirer's total acquisition of securities within the preceding twelve months does not exceed two percent of the outstanding securities of the class<sup>144</sup>, and when the tender offeror is the issuer.<sup>145</sup> The Act also gives the SEC exemptive power by rule, regulation, or order from transactions that will not change or influence the control of the issuer.<sup>146</sup>

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<sup>136</sup> 15 U.S.C.S. § 78n(d)(6).

<sup>137</sup> 15 U.S.C.S. § 78n(d)(7).

<sup>138</sup> See, Sec.Exch.Act. Rel. No. 34-23421 (July 11, 1986).

<sup>139</sup> 17 C.F.R. §§ 240.13e-4 and 240.14d-10.

<sup>140</sup> 17 C.F.R. §§ 240.13e-4(f)(9)(ii) and 240.14d-10(b)(2).

<sup>141</sup> 17 C.F.R. §§ 240.13e-4(f)(8)(ii) and 240.14d-10(a)(2). See *inter alia*, Field v. Trump, 850 F.2d 938 (2d Cir.1988) (Purchase of dissident director's shares during brief purported withdrawal of tender offer, violated the SEC's best price requirement since the same premium was not offered to all tendering shareholders.).

<sup>142</sup> 17 C.F.R. §§ 240.13e-4(f)(10) and 240.14d-10(c).

<sup>143</sup> 15 U.S.C.S. § 78n(d)(8).

<sup>144</sup> 15 U.S.C.S. § 78n(d)(8)(A).

<sup>145</sup> 15 U.S.C.S. § 78n(d)(8)(B).

<sup>146</sup> 15 U.S.C.S. § 78n(d)(8)(C).

### 3.2.2.4 Antifraud Rules

Section 14(e) of the Williams Act is the general antifraud provision that prohibits material misstatements, omissions, and fraudulent practices in connection with tender offers.<sup>147</sup> Section 14(e) is the only provision of the Williams Act that is not limited to tender offers directed at securities of companies that are subject to the Exchange Act's reporting requirements. The section applies to any tender offer.

In determining what is material, it is not necessary to disclose very preliminary merger discussions that may lead to a tender offer.<sup>148</sup> However, the Supreme Court has held that whether preliminary merger negotiations have crossed the materiality threshold is a question of fact. The materiality of a certain fact depends upon whether a reasonable investor would consider it significant in making his investment decision.<sup>149</sup>

The antifraud provision of the Williams Act supplements the more general provisions of sections 10(b) and 18(a) of the Exchange Act. It is not unusual for a target company to attempt to use section 14(e) to obtain a court injunction against a hostile tender offer.

In Regulation 14E the SEC has set out a series of acts and practices, which violate section 14(e)'s prohibitions. Similarly to section 14(e), Regulation 14E applies to all tender offers. Rule 14e-1 requires that any person making a tender offer must hold the offer open for at least twenty business days from the date upon which it is first published.<sup>150</sup> After amendments in 1986, the twenty business days period also applies to tender offers made by the issuer.<sup>151</sup> Further amendments in 1991 created an alternative sixty calendar day period when a tender offer is part of a transaction involving reorganisation of one or more partnerships into another entity.<sup>152</sup>

Rule 14e-1(b) further provides that the tender offeror may not increase or decrease the terms of the offer, the type of consideration, or the dealer's soliciting fee, unless the tender offer remains open for at least ten business days from the publication of the notice of such increase or decrease.<sup>153</sup> According to Rule 14e-1(c) it is unlawful practices for a tender offeror to fail to pay the consideration offered or return the securities tendered promptly after either the withdrawal or termination of the tender offer.<sup>154</sup> Rule 14e-1(d) makes it unlawful to extend the length of the tender offer without issuing a notice of such extension by press release or other public announcement.<sup>155</sup>

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<sup>147</sup> 15 U.S.C.S. § 78n(e).

<sup>148</sup> *Staffin v. Greenberg*, 672 F.2d 1196 (3d Cir.1982).

<sup>149</sup> *Basic, Incorporated v. Levinsson*, 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988).

<sup>150</sup> 17 C.F.R. § 240.14e-1(a).

<sup>151</sup> Sec.Exch.Act Rel. No. 34-22788 (Jan. 14, 1986).

<sup>152</sup> Sec. Act Rel. No. 33-6922 (Oct. 30, 1991). These types of transactions are generally known as roll-up transactions.

<sup>153</sup> 17 C.F.R. § 240.14e-1(b).

<sup>154</sup> 17 C.F.R. § 240.14e-1(c).

<sup>155</sup> 17 C.F.R. § 240.14e-1(d).

The shareholders tendering shares registered under section 12 of the Exchange Act may exercise withdrawal rights until the tender offer expires.<sup>156</sup> As enacted, the Williams Act required only that 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.<sup>157</sup> However, the SEC through its rule making capability extended the withdrawal period. There are no statutory requirements that withdrawal rights be provided if unregistered shares are sought.

It follows from Rule 14e-2 that whenever a tender offer is made for a target company's shares, the target company has ten business days from the first date upon which the tender offer is published to respond.<sup>158</sup> The target company's management must make one of the following responses during the ten day period: a recommendation of acceptance or rejection of the tender offer, an expression of no opinion with a decision to remain neutral towards the offer, or that it is not able to take a position with respect to the bidder's offer.<sup>159</sup> This statement must include all reasons for the position taken. In setting forth its reasons, the target company's management is subject to all of the rules concerning materiality as well as the potential civil and criminal liabilities for material misstatements.<sup>160</sup>

Rule 14e-3 prohibits insider trading during a tender offer.<sup>161</sup> This rule supplements the insider trading prohibitions that are found in Rule 10b-5, the Insiders Trading Sanctions Act of 1984 and The Insider Trading and Securities Fraud Enforcement Act of 1988.<sup>162</sup> In addition to insiders of the target company the prohibitions also apply to anyone else: "who is in possession of material information relating to such tender offer which information he knows or has reasons to know is non-public and which he knows or has reason to know has been acquired directly or indirectly from (1) the offering person, (2) the issuer of the securities sought or to be sought by such tender offer, or (3) any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer..."<sup>163</sup> According to the rule there is no violation if the transaction was an independent investment decision rather than based on knowledge of material non-public information.<sup>164</sup>

Rule 14e-4 is designed to prevent tendering of shares that are not actually owned.<sup>165</sup> The rule prohibits short tendering and hedged tendering by market

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<sup>156</sup> 17 C.F.R. § 240.14d-7(a) (1996).

<sup>157</sup> See 15 U.S.C.S. § 78(d)(5).

<sup>158</sup> 17 C.F.R. § 240.14e-2.

<sup>159</sup> *Id.*

<sup>160</sup> Hazen, *supra* note 9, at 637.

<sup>161</sup> 17 C.F.R. § 240.14e-3.

<sup>162</sup> Hazen, *supra* note 9, at 638.

<sup>163</sup> 17 C.F.R. § 240.14e-3(b).

<sup>164</sup> *Id.*

<sup>165</sup> 17 C.F.R. § 240.14e-4.

professionals in tender offers for less than the target company's outstanding stock. The former is the practice of tendering or guaranteeing securities not owned by the person making the tender or guarantee.<sup>166</sup> The latter occurs when market professionals sell on the open market that portion of their target company holdings that they estimate will not be accepted by the tender offeror.<sup>167</sup>

### 3.2.2.5 Disclosure of Management Turnover

Tender offers will, just as any transfer of corporate control, frequently result in a shift in corporate management. Therefore, it is not uncommon to find tender offers containing agreements relating to management turnover and the election of new directors. These control transfers can raise problems under state law relating to invalid control premiums and other breaches of fiduciary duties.<sup>168</sup> In order to prevent such problems the Williams Act superimposes certain disclosure obligations.

Full disclosure is required by section 14(f) of the Williams Act when a tender offer for equity securities subject to the Act's reporting requirements contains agreements concerning the designation of new directors otherwise than through a formal vote at a meeting of securities holders.<sup>169</sup> Contemplated management turnover, including any arrangement regarding the make-up of the majority of the directors, also must be disclosed.<sup>170</sup>

Rule 14f-1 provides for specific disclosures in the event there is going to be a change in the majority of directors otherwise than at a shareholders meeting, in a transaction subject to either section 13(d) or section 14(d).<sup>171</sup> At least ten days prior to the taking of office by such a new director, the issuer must file with the SEC and transmit to all security holders of record who would have been entitled to vote for the election at a meeting, all the information regarding the director that would otherwise be required in Schedule 14A.<sup>172</sup> The purpose of section 14(f)'s disclosure requirements is to assure that all shareholders are aware of any changes in management control that are being effected without a shareholder vote.

### 3.2.2.6 Purchases Outside the Bid

Under the Regulation M&A Release, Rule 10b-13 of the Securities Exchange Act was replaced by Rule 14e-5.<sup>173</sup> Basically, both the new and

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<sup>166</sup> See, *Merill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 636 F.Supp. 444, 445 (S.D.N.Y.1986), *reversed* 808 F.2d 930 (2d Cir.1986).

<sup>167</sup> See, *id.* at 446.

<sup>168</sup> Hazen, *supra* note 9, at 642.

<sup>169</sup> 15 U.S.C.S. § 78n(f).

<sup>170</sup> *Id.*

<sup>171</sup> 17 C.F.R. § 240.14f-1.

<sup>172</sup> *Id.*, and 17 C.F.R. § 240.14a-100. The basic feature of Schedule 14A is that it calls for disclosure of the nominee's past experience in office.

<sup>173</sup> 17 C.F.R. § 240.14e-5 (1999). Regulation of Takeovers and Security Holder Communications, Sec. Act Rel. No. 33-7760 (Oct. 26, 1999).



the old rule prohibits a person who is making a cash tender offer or exchange offer from purchasing or arranging to purchase, directly or indirectly, the security that is the subject of the offer (or any security that is immediately convertible into or exchangeable for the subject security), otherwise than as part of the offer. What the SEC did when Rule 10b-13 was replaced by Rule 14e-5 was to codify several interpretations and exemptions.<sup>174</sup>

## 3.3 Takeover Regulation in the United Kingdom

### 3.3.1 Introduction

As mentioned above, the takeover regulation in the United Kingdom is based on a non-statutory system of self-regulation. In fact, the Takeover Panel and the City Code was created in the late 1960s in response to mounting concerns about unfair practices in connection with takeover bids, and under the threat of legislation by the Prime Minister, Harold Wilson.<sup>175</sup> The Takeover Panel and the City Code operate principally to ensure fair and equal treatment of all shareholders in relation to takeovers.

### 3.3.2 Governing organ

The Takeover Panel is a non-government, non-statutory body that regulates the conducts of takeover bids. It comprises of members of the business community.<sup>176</sup> It is quite independent from the Securities and Investments Board and the Department of Trade and Industry. Its main purpose is to ensure that the target company shareholders are fairly and equitably treated.<sup>177</sup> The Takeover Panel works on a day-to-day basis through its executive, headed by the Director General.<sup>178</sup>

The Takeover Panel co-operates with other regulatory authorities, such as the Securities and Investments Board, the Department of Trade and Industry, the London Stock Exchange, and the Bank of England. The co-operation extends to the mutual exchange of information and, where appropriate, reporting breaches of the City Code to the relevant authority. The Takeover Panel works closely with the Stock Exchange in monitoring dealings.<sup>179</sup>

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<sup>174</sup> See Regulation M&A Release, *supra* note 116.

<sup>175</sup> Lee, *supra* note 107, at 192, and Greene, Curran, and Christman, *supra* note 1, at 830.

<sup>176</sup> See above 3.1.5 at note 104.

<sup>177</sup> Lee, *supra* note 107, at 193.

<sup>178</sup> The City Code, at Introduction 2(b).

<sup>179</sup> The City Code, at Introduction 2(c).

### 3.3.3 The City Code

#### 3.3.3.1 Background

The City Code is based upon ten general principles, which are essentially statements of good standards of commercial behavior. The Takeover Panel applies the principles in accordance with their spirit.<sup>180</sup> The general principles are supplemented with a set of more detailed rules, which provide guidance in specific instances.

Because, the City 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.<sup>181</sup> As a result, takeover participants in doubt of the City Code's operation are encouraged to approach the Takeover Panel for interpretation of its rules and principles.<sup>182</sup> A decision on the interpretation of the rules can usually be obtained within 24 hours as the Panel's Executive meets each morning.<sup>183</sup> Furthermore, 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.<sup>184</sup> This approach produces fast, efficient and flexible administration of the City Code.

There is a possibility for parties and aggrieved shareholders to appeal the decision of the executive to the Takeover Panel for a hearing,<sup>185</sup> and the executive may institute disciplinary proceedings when it considers that there has been a breach of the Code.<sup>186</sup> If the Panel considers that there has been a breach of the Code, a disciplinary action is taken.<sup>187</sup> The financial community of the United Kingdom treats those disciplinary actions with great seriousness.

The Panel's recommendation to withhold a violator's ability to use the facilities of the securities market will in most cases result in requirements from self-regulatory groups that member firms should not deal with the

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<sup>180</sup> The City Code, at Introduction 3(a).

<sup>181</sup> *Id.*

<sup>182</sup> Tony Shea, *Regulation of Takeovers in the United Kingdom*, 16 *Brook J. Intl'l L.* 89, 91-92 (1990).

<sup>183</sup> William Staple, *The Takeover Panel*, in *A Practitioner's Guide to the City Code on Takeovers and Mergers*, 8-9, 1995 Edition, City & Financial Publishing, Chobham/Surrey, 1995.

<sup>184</sup> The City Code, at Introduction 3(a).

<sup>185</sup> The City Code, at Introduction 3(c).

<sup>186</sup> The City Code, at Introduction 3(d).

<sup>187</sup> *Id.* If the Panel finds there has been a breach of the code, it may have recourse to: (i) private reprimand; (ii) public censure; (iii) reporting the offender's conduct to another regulatory authority; (iv) taking action for the purpose of the requirements of the FSA and the SIB, relevant SROs which oblige their members not to act for the offender in a takeover or in certain other transactions; and /or (v) requiring further action to be taken, as the Panel thinks fit.

violator in connection with takeovers.<sup>188</sup> When a practitioner is publicly censured for rule violations, his or her professional standing is "severely diminished".<sup>189</sup>

### **3.3.3.2 Applicability**

The City Code applies to offers for all listed and unlisted public companies resident in the United Kingdom, the Channel Island or the Isle of Man as determined by the Takeover Panel.<sup>190</sup> The Code is concerned with takeover and merger transactions, however effected, of all relevant companies. However, it does not apply to offers for non-voting, non-equity share capital.<sup>191</sup>

### **3.3.3.3 General Principles**

The general principles of the City Code require that<sup>192</sup>:

- (1) All Shareholders of the same class of an offeree company must be treated similarly by an offeror.
- (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 should be 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 should be exercised in good faith.
- (9) Directors only have regard to shareholder, employee and creditor interest when giving advice to shareholders.
- (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.

The City Code contains 14 sections divided into 38 detailed rules. The following presentation will be limited to some of the Rules that are most relevant for this survey.

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<sup>188</sup> Shea, *supra* note 182, at 95.

<sup>189</sup> Staple, *supra* note 183, at 11.

<sup>190</sup> The City Code, at Introduction 4(a).

<sup>191</sup> The City Code, at Introduction 4(b).

<sup>192</sup> See the City Code, at General Principles.

#### **3.3.3.4 Mandatory bids**

Rule 9.1(a) of the City Code require that a person that acquires shares which carry 30 percent or more of the voting rights of a company shall undertake a bid for all the outstanding equity shares of the target company. In fact, Rule 5.1(a) of the City Code prohibits, subject to certain exceptions, an offeror from crossing the 30 percent threshold unless a public offer is to be undertaken.

A mandatory bid must be conditional upon 50,1 percent of the outstanding shares being tendered.<sup>193</sup> The bidder cannot condition the bid on, for instance 90 percent acceptance. The 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.<sup>194</sup> Finally, a mandatory bid, unlike a voluntary bid, cannot contain conditions other than the acceptance condition, except in relation to the U.K. Monopolies and Mergers Commission and the European Commission.<sup>195</sup>

#### **3.3.3.5 Ownership reporting**

The City Code is supplemented by the SARs, which create ownership-reporting requirements.<sup>196</sup> The SARs are designed to prevent so called “dawn raids”, characterised as substantial acquisitions of shares through market purchases or otherwise in a relatively brief period of time without the knowledge of the issuer, and to promote accelerated disclosure.<sup>197</sup> The SARs require any person whose ownership of an issuer’s securities goes over a 15 percent threshold to notify the company and the London Stock Exchange of this fact by the next business day.<sup>198</sup>

Furthermore, English Company Law sets up a three percent threshold for movements in relations to dealings. Movement in either direction across the three percent ownership threshold requires notice to the company within two days of dealing, and to the London Stock Exchange without delay.<sup>199</sup>

#### **3.3.3.6 Commencement of the offer**

A potential bidder may be required to make a brief public announcement regarding its intention to make an offer. That announcement shall include: 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.<sup>200</sup> The announcement typically arises as a result of the bidder

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<sup>193</sup> The City Code, Rule 9.3(a).

<sup>194</sup> The City Code, Rule 9.5(a).

<sup>195</sup> The City Code, Rule 9.4.

<sup>196</sup> The SARs are issued and administered by the Takeover Panel.

<sup>197</sup> Blank, Greystoke, Weinberg, *supra* note 78, at 2023, and Greene, Curran, and Christman, *supra* note 1, at 838.

<sup>198</sup> The SARs, Rule 3.

<sup>199</sup> The Companies Act 1985, sections 198-210.

<sup>200</sup> The City Code, Rule 2.5(b).

communicating its “firm intention to make an offer”.<sup>201</sup> After public announcement, the bidder must mail its offering document to the target and its shareholders within twenty-eight days.<sup>202</sup>

### **3.3.3.7 Offer periods and extensions**

The City Code provides that an offer must be held open for at least twenty-one calendar days after posting.<sup>203</sup> If the offer becomes unconditional, it must remain open for at least an additional fourteen calendar days period to enable others to accept.<sup>204</sup>

An offer is required 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 the offer documents.<sup>205</sup> Furthermore, the offer must be declared “wholly unconditional” (i.e., subject to no remaining conditions) within twenty-one calendar days of the first closing date or of the date the offer becomes or is declared unconditional as to acceptances.<sup>206</sup> The effect is a maximum offer period that may last up to eighty-one calendar days after posting.

### **3.3.3.8 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. Unless the offer has already been declared unconditional as to acceptances, withdrawals must be permitted from the date, which is twenty-one calendar days after the initial closing date (the closing date is typical twenty-one days after the mailing of the offer document).<sup>207</sup>

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.<sup>208</sup> 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.<sup>209</sup>

### **3.3.3.9 Purchases outside the bid**

A bidder can purchase shares prior to the offer, as well as in the open market during the offer. However, the bidder must pay those shareholders tendering

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<sup>201</sup> See the City Code, Rule 2.5(a).

<sup>202</sup> See the City Code, Rule 30.1.

<sup>203</sup> The City Code, Rule 31.1.

<sup>204</sup> The City Code, Rule 31.4.

<sup>205</sup> The City Code, Rule 31.6.

<sup>206</sup> The City Code, Rule 31.7.

<sup>207</sup> The City Code, Rule 34.

<sup>208</sup> See *id.*

<sup>209</sup> See the City Code, Rule 31.4.

through the formal mechanism at least as much as other sellers received from the bidder during the bid and the three months preceding the bid.<sup>210</sup> In addition, an “exempt market maker”<sup>211</sup> 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.<sup>212</sup>

### **3.3.3.10 Disclosure**

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)<sup>213</sup> and listed on the London Stock Exchange.<sup>214</sup> The target company is required 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.<sup>215</sup> The target company must advise its shareholders of its view within fourteen calendar days of the offer being commenced.<sup>216</sup>

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<sup>210</sup> See the City Code, Rule 6.

<sup>211</sup> An exempt market-maker is a person who is registered as a market-maker with the Stock Exchange in relation to the relevant securities, or is accepted by the Panel as a market-maker in those securities, and, in either case, is recognised by the Panel as an exempt market-maker for the purposes of the Code. See the City Code, at Definitions.

<sup>212</sup> The City Code, Rule 38.

<sup>213</sup> Almost all U.K. companies are incorporated under one of the Companies Acts, the first of which was recognised in 1948. Only companies organised before 1860, and certain specialised entities (e.g., trade unions, trusts and building societies, which are similar to thrifts) remain outside the ambit of these acts. See Gower, *supra* note 54, at 3-4.

<sup>214</sup> See the City Code, Rule 24.2(a)(i) - The offer document must contain the following information about the offeror, whether the consideration is securities or cash: (1) for the last 3 financial years for which the information has been published, turnover, net profit or loss before and after taxation, the charge for tax, extraordinary items, minority interests, the amount absorbed by dividends and earnings and dividends per share; (2) a statement of the assets and liabilities shown in the last published audited accounts; (3) all known material changes in the financial or trading position of the company subsequent to the last published audited accounts or a statement that there are no known material changes; (4) details relating to items referred to in (1) above in respect of any interim statement or preliminary announcement made since the last published audited accounts; (5) inflation-adjusted information if any of the above has been published in that form; (6) significant accounting policies together with any points from the notes to the accounts which are of major relevance to an appreciation of the figures, including those relating to inflation-adjusted information; (7) where, because of a change in accounting policy, figures are not comparable to a material extent, this should be disclosed and the approximate amount of the resultant variation should be stated; (8) the names of the offeror's directors; (9) the nature of its business and its financial and trading prospects; and (10) a summary of the principal contents of each material contract (not being a contract entered into in the ordinary course of business) entered into by the offeror or any of its subsidiaries during the period beginning two years before the commencement of the offer period, including particulars of dates, parties, terms and conditions and any consideration passing to or from the offeror or any of its subsidiaries.

<sup>215</sup> The City Code, Rule 25.1.

<sup>216</sup> The City Code, Rule 30.2.

## 3.4 Takeover Regulation in Sweden

### 3.4.1 Introduction

Characteristic for the regulation of tender offers in Sweden is that it is in essence governed by a self-regulatory regime. The tender offer procedure is governed by NBK/OE.

### 3.4.2 Governing organs

NBK is the organ instituted by the Swedish Industry. Its primary task is to issue recommendations of an ethical nature, with regard to the stock market. Another private organ that is closely connected with NBK is *Aktiemarknadsnämnden* (AmN). It was established in 1986 and modeled after the Panel on Takeovers and Mergers in the United Kingdom. AmN has a policy creating function and therefore is quite powerful in determining if a takeover procedure is conducted in accordance with generally accepted stock market principles.

NBK is the rule-making organ issuing general recommendations. AmN could in essence be viewed as an organ for settling disputes since it evaluates how a tender offer is conducted in a particular case. This is made through official statements.<sup>217</sup> Note that AmN's power is limited to making statements regarding generally accepted stock market principles, and that it is not capable of issuing any sanctions.

The purposes and aims of the Swedish regulation of tender offers is very similar to the purposes and aims of the Williams Act in the United States, and the City Code in the United Kingdom. Investor protection and full disclosure are the key elements in NBK/OE.

### 3.4.3 NBK/OE

#### 3.4.3.1 Background

The recommendation was first issued in 1971. The self-regulatory system of the City Code was the main source of inspiration for the creation of NBK/OE. The recommendation, which is also known as the Takeover Recommendation, was revised in 1988 and 1999, and today it is named *Rekommendation rörande offentligt erbjudande om aktieförvärv (1999)*. The validity of the recommendation is based on a clause in the contract

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<sup>217</sup> Afrell, Klahr, and Samuelsson, *supra* note 108, at 233.

between the public companies quoted on the stock exchange and the Stockholm Stock Exchange.<sup>218</sup>

The underlying purpose of the recommendation is to assure that the shareholders are provided with adequate information to make a qualified decision whether to accept the tender offer or not. Since a tender offer does not create any space for negotiations between the offeror and the offeree, it is necessary to protect the investors (the shareholding public). Therefore, it is essential to uphold a flow of information to increase the protection for the investments of the shareholders.<sup>219</sup>

The primary reason for the creation of NBK/OE is increased investor protection, and the recommendation focuses on equal treatment of the shareholders and their need of information to be adequate equipped to respond to the offer.<sup>220</sup>

NBK/OE consists of five parts. The first part deals with the applicability of the recommendation. The second, and most substantial, part encompasses a detailed description of the procedure and the structure of the tender offer. The third part is concerned with the situations where a partial tender offer must be extended to all shares of the target company, that is a mandatory bid. The fourth part deals with management buyouts and the fifth part is concerned with the structuring of the prospectus. All those parts, except the one concerned with management buyouts, will be presented in more detail below.

### **3.4.3.2 Applicability**

The recommendation is applicable to tender offers made by a Swedish or foreign legal or physical person and directed to the shareholders of a Swedish company. Only tender offers regarding securities that are issued by a Swedish company falls within the scope of the recommendation. The recommendation explicitly refers to the approach that it is the law under which the target company is organized that governs the offer, including the cases where the offeror is a foreign company.<sup>221</sup>

Note that the recommendation is not limited to shares. Other securities issued by the target company, such as options, debentures, and convertibles, are also intended to fall within the scope of the recommendation.<sup>222</sup>

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<sup>218</sup> *Id.* at 232. It should be noticed that the Stockholm Stock Exchange was previously named OM Stockholm Stock Exchange, but it changed its name on April 3 of 2001.

<sup>219</sup> NBK/OE, at Introduction.

<sup>220</sup> Afrell, Klahr, and Samuelsson, *supra* note 108, at 233.

<sup>221</sup> NBK/OE (I).

<sup>222</sup> *Id.*



### **3.4.3.3 Commencement of the offer**

The first thing a tender offeror have to do, once the decision to make a tender offer is made, is to present a press release in accordance with the requirements of section II:2.<sup>223</sup> Furthermore, the offeror shall draw up a prospectus in accordance with section V. The prospectus shall be distributed to all shareholders included in the offer, to the Stockholm Stock Exchange, and to the appropriate extent to the media.<sup>224</sup>

Unlike the Williams Act and the City Code, NBK/OE does not expressly state a certain period of time, from the public announcement of the offer, within which the bidder must commence its offer. However, both section II:1 and its supplementary note stress that it is of great importance that information about the offer is publicly disclosed immediately after a decision to make an offer. The offer commences once the prospectus is mailed to the shareholders.

With regard to the timing for the exact commencement of the offer, section II:1 and the note simply state that the public announcement shall be followed by a prospectus. This formulation leaves the door open for speculation. Does the wording “shall follow” suggest that the prospectus shall be posted immediately after the public announcement, or that a prospectus shall eventually be posted and that a reasonable period is allowed? With reference to the statement that the offer shall be disclosed immediately it is reasonable to take the view that a speedy process is preferred by NBK, and that the offer shall commence shortly after the public announcement.

### **3.4.3.4 Acceptance and withdrawal of acceptance**

Section II:3 regulates the deadline for acceptance. The period of time open to acceptance shall be at least three weeks from the date the prospectus is presented. That period of time shall be stated in the prospectus. An extension of the acceptance period is possible if the offeror has reserved that right to himself in the prospectus.<sup>225</sup>

The acceptance is binding under Swedish contract law. However, if the offeror has set up certain conditions for the accomplishment of the offer, in respect of which he has reserved to himself the right to make alterations, the offer shall state that the shareholders are entitled to withdraw the acceptance. Withdrawals are allowed until the bidder announces that the certain conditions have been fulfilled or, if such announcement is not made, until the last day of the offer according to the offer document. Furthermore,

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<sup>223</sup> The press release shall contain: - the main terms for the offer, - the number of shares and the voting shares in the target company that the offeror owns or otherwise is in control of, - information of the extent to which the offeror has assured acceptance from shareholders in the target company, - the motives for the offer and the effects of the acquisition, - a time frame for the accomplishment of the offer.

<sup>224</sup> NBK/OE (II) para. 1.

<sup>225</sup> NBK/OE (II) para. 3.

if the condition applies to an extended offer, withdrawals are allowed under the same circumstances as stated above.<sup>226</sup>

#### **3.4.3.5 The terms of the offer**

Section II:5 and 6 deals with the specific terms of the offer, that is in essence equal treatment of the shareholders. The basic rule in section II:5 is that all holders of shares issued on identical terms shall be offered identical consideration for each share. If there are legal impediments for certain shareholders to accept the type of consideration offered, they can be offered another type of consideration, provided that the value is the same.<sup>227</sup> In accordance with section II:6 different classes of shares, and different types of securities, can be treated differently. The holders of non-identical securities can be offered different prices. Furthermore, holders of a certain type of securities can be excluded from the offer, if the type of security they hold is not dependent upon the other securities included in the offer.<sup>228</sup>

#### **3.4.3.6 Purchases outside the bid**

Sections II:7-9 regulate purchases outside the tender offer. Basically, purchases outside the offer shall not be made on more valuable terms than the tender offer. If such purchases are made in contradiction with that requirement, the offer shall be raised so it is equal with the other purchases.

#### **3.4.3.7 Partial offers and persons acting in concert**

Section II:10 sets up the terms and the disclosure requirements for partial offers. A non-exhaustive enumeration of the persons that are considered as acting in concert with the bidder is presented in section II:11.

#### **3.4.3.8 Measures taken by the target company**

Restrictions of the measures taken by the target company are drawn up in section II:12. Where the directors or management of the target company are negotiating a tender offer, or after such an offer is made, measures that may jeopardize the offer must be based on the decision of the general meeting of shareholders. However, the board of directors is always entitled to declare their opinion of the offer to the public. Sections II:13-15 are concerned with the disclosure of the turnout of the offer and other potential decisions by the bidder. Finally, section II:16 precise how the offer and other related decisions should be announced and when they are considered to be announced.<sup>229</sup>

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<sup>226</sup> NBK/OE (II) para. 4.

<sup>227</sup> NBK/OE (II) para. 5.

<sup>228</sup> NBK/OE (II) para. 6.

<sup>229</sup> NBK/OE (II) para. 16 – Documents that are about to be made public shall be handed over to TT and at least one of the national newspapers. The document is considered announced once it is handed to TT. The document shall simultaneously be handed over to the Stockholm Stock Exchange.

#### **3.4.3.9 Mandatory bids**

The most important new feature of NBK/OE (1999) is the introduction of mandatory bids in section III. NBK stated that the inclusion of a mandatory bid rule in NBK/OE was necessary to keep the Swedish rules up to date with the international development.<sup>230</sup>

Under the circumstances that a partial offer is made, the mandatory bid rule will apply to bids of a certain extent. If the offeror through his acquisition of shares in the target company ends up holding shares, which carry 40 percent or more of the voting rights of the company, an offer to purchase all the outstanding shares of the target company shall be made.<sup>231</sup> However, the mandatory bid does not apply when the 40 percent barrier is exceeded as the effect of a tender offer in respect of all shares. Evidently, in that case the shareholders of the target company that rejected the offer had the option to leave the company through that offer and another bid is not necessary.

#### **3.4.3.10 Structure of the prospectus**

The prospectus shall be drawn up by the offeror and it must contain the necessary information to facilitate a comprehensive evaluation of the offer. The parts of the prospectus that relates to the target company shall be made in consultation with the directors of the target, and if that is not possible the prospectus shall disclose how information regarding the target company can be obtained.<sup>232</sup>

The supplement of NBK/OE regulates the details of the prospectus. In essence, those details shall enable the shareholders to evaluate the future prospects of the offeror and the target company.<sup>233</sup> In respect of events that occur after the offer is made public, but before the expiration of the time for acceptance, that can affect the offer to more than a limited extent, the offeror must provide the shareholders with relevant information without delay, unless the information is of public knowledge.<sup>234</sup>

#### **3.4.3.11 Ownership reporting**

The rules governing ownership reporting are found outside NBK/OE. At a basic level, rules on ownership reporting are placed in the securities legislation. *Lagen om handel med finansiella instrument* SFS 1991:980 (LHF) applies to a tender offer where the bidder already holds shares in the target company. The bidder is required to disclose its holding of shares to the target company and the Stockholm Stock Exchange when the acquisition amounts to or exceeds 10, 20, 33 1/3, 50, and 66 2/3 percent of the voting shares.<sup>235</sup>

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<sup>230</sup> NBK/OE, at Introduction.

<sup>231</sup> NBK/OE (III) para. 1.

<sup>232</sup> NBK/OE (V) para. 1.

<sup>233</sup> NBK/OE (V) para. 2.

<sup>234</sup> NBK/OE (V) para. 4.

<sup>235</sup> SFS 1991:980, 4:1.

In addition to LHF, NBK has issued a Recommendation on Ownership Reporting.<sup>236</sup> Due to differences in LHF and the recommendation it is appropriate to apply them separately.<sup>237</sup> The recommendation requires reporting at a larger number of percentages.<sup>238</sup> In respect of tender offer it is important to notice that acquisitions through a tender offer are exempted from the recommendation. However, purchases outside the bid are still required to follow the reporting requirements of the recommendation.<sup>239</sup>

## 3.5 Regulatory Tension

### 3.5.1 Introduction

When the basic elements of the different takeover regulations are compared some regulatory tensions will be discovered. This is particularly interesting since a cross-border tender offer with connection to either Sweden or the United Kingdom and the United States will be exposed to dual jurisdiction.<sup>240</sup> Principal differences between the rules arise in the following areas: ownership reporting, mandatory bids, commencement of the offering, offer periods, withdrawal rights, and purchases outside the bid.

### 3.5.2 Ownership reporting and mandatory bids

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.

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<sup>236</sup> Näringslivets Börskommittés Rekommendation rörande Offentliggörande vid Förvärv och Överlåtelse av Aktier m.m., 1994.

<sup>237</sup> *Id.* at Introduction.

<sup>238</sup> Initially five percent, and thereafter all acquisitions that amounts to or exceeds every percentage equally divided with five, up to 90 percent of the share capital. Näringslivets Börskommittés Rekommendation rörande Offentliggörande vid Förvärv och Överlåtelse av Aktier m.m. 1994, section II.1(a).

<sup>239</sup> Näringslivets Börskommittés Rekommendation rörande Offentliggörande vid Förvärv och Överlåtelse av Aktier m.m., 1994, the note under section II.

<sup>240</sup> See below 4.2.2. It should be added that the Takeover Panel are highly aware of this problem and have amended the City Code with a recommendation to seek advice from the executive, *see* the City Code, at Introduction 4(c): Code transactions may from time to time be subject to the dual jurisdiction of the Panel and an overseas takeover regulator. In such cases, early consultation with the executive is strongly recommended so that guidance can be given on how any conflicts between the relevant requirements may be resolved.

All three system of takeover regulation in this survey has ownership reporting requirements. However, the level for the reporting requirements differs. The initial reporting requirement under the Williams Act is five percent<sup>241</sup>, and under the City Code and LHF that requirement is three<sup>242</sup> and ten percent<sup>243</sup> respectively. After the passing of the initial level under the Williams Act, movements of more than one percent ownership require amendment of the filing promptly.<sup>244</sup> Under the City Code subsequent movements in either direction above three percent requires notice.<sup>245</sup> In contrast, NBK/OE use fixed levels at 10, 20, 33 1/3, 50, and 66 2/3 percent.<sup>246</sup>

Both the City Code and NBK/OE require that a bid is undertaken for all the outstanding equity shares of a target company's stock once a certain percentage of the voting shares are acquired. Under the City Code a mandatory bid shall be undertaken if a 30 percent ownership mark is passed, and according to NBK/OE 40 percent is the relevant level.<sup>247</sup> Unlike this, mandatory bids are not required under U.S. law.

### **3.5.3 Commencement of the offer**

Under the City Code a bidder is required to commence with the offer within a certain period of time, twenty-eight days, from the public announcement.<sup>248</sup> Previously, the Williams Act contained a five business days rule for the commencement of the offer. Today, a tender offer will be considered to commence with the first public announcement of the transaction.<sup>249</sup> NBK/OE does not contain such an express provision, but with regard to the spirit of the recommendation it is reasonable to say that the offer shall commence in very close connection with the public announcement.

A potential regulatory conflict, in a situation where both U.S. and U.K. rules governs the offer, could arise under both the former and the present wording of the Williams Act if a bidder make a public announcement under the City Code's requirement. That announcement could be constructed as triggering Rule 14d-2(b) under the former wording the Williams Act. This would require the bidder to prepare and distribute its U.S. Schedule 14D-1 (today Schedule TO) within five days, rather than having the City Code's twenty-eight days, in which to prepare a formal offer document. When such

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<sup>241</sup> 15 U.S.C.S. § 78m(d).

<sup>242</sup> Companies Act 1985, sections 198-210.

<sup>243</sup> SFS 1991:980, 4:1.

<sup>244</sup> 15 U.S.C.S. § 78m(d).

<sup>245</sup> Companies Act 1985, sections 198-210.

<sup>246</sup> SFS 1991:980, 4:1.

<sup>247</sup> See the City Code, Rule 9.1(a), and NBK/OE (III) para. 1.

<sup>248</sup> The City Code, Rule 30.1.

<sup>249</sup> 17 C.F.R. § 240.14d-2 (1999).

situations have occurred in practice the SEC has allowed a bidder to distribute its Schedule 14 D-1 in accordance with City Code practice.<sup>250</sup>

Under the revised rule 14d-2 the difference is even more striking. The public announcement required under the City Code could be constructed as the first public announcement. Thus, the offer has commenced under the Williams Act, while the City Code allows twenty-eight days to prepare the formal offer.

### 3.5.4 Offer periods

A striking difference between the three systems of takeover regulation is that the Williams Act and NBK/OE only requires a minimum period for how long the offer must be open, while the City Code is expressly prohibiting offers from being open longer than a specified period.

According to Rule 14e-1(a) under the Williams Act it is required that a tender offer must be held open for a minimum of twenty business days, and under NBK/OE the offer shall be open to acceptance for at least three weeks from the date the prospectus is presented. In the supplementary note to section II:3 of NBK/OE the absence of a maximum offer period is motivated with the statement that the circumstances varies from case to case to such an extent that it is not suitable with a maximum limit.<sup>251</sup>

The City Code contains a minimum limit of twenty-one calendar days after posting.<sup>252</sup> However, unlike the Williams Act and NBK/OE the offer can only be open for sixty calendar days in general, and if the offer is declared "wholly unconditional" the offer period may last up to eighty-one calendar days after posting.<sup>253</sup> The purpose of a maximum offer period is to limit the disruption caused to the target of the takeover bid.<sup>254</sup>

### 3.5.5 Withdrawal rights

In tender offers for securities registered under section 12 of the Exchange Act, withdrawal rights may be exercised until the tender offer expires.<sup>255</sup>

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<sup>250</sup> See Browning Ferris Industries, Inc., SEC No-Action Letter, 1994 SEC No-Act. LEXIS 697, at \*24-25 (Sept. 19 1994).

<sup>251</sup> NBK/OE (II) para. 3. However, in the following sentence it is pointed out that it is important that the offer is not unduly extended.

<sup>252</sup> See the City Code, Rule 31.1.

<sup>253</sup> See the City Code, Rules 31.6 and 31.7.

<sup>254</sup> Neil Harvey, *Conduct During the Offer; Timing and Revision; and Restrictions Following Offers*, in *A Practitioner's Guide to the City Code on Takeovers and Mergers*, 158, 1995 Edition, City & Financial Publishing, Chobham/Surrey, 1995.

<sup>255</sup> See 17 C.F.R § 240.14d-7(a) (1996). As enacted, the Williams Act required only that 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

Under NBK/OE withdrawals are allowed until the bidder announces that certain conditions set out in the offer have been fulfilled, or until the last day of the offer according to the offer document.<sup>256</sup> In respect of the latter alternative under NBK/OE the Swedish rules are similar to the laws of the United States. As opposed to that, the approach taken in the United Kingdom results in a forty-two calendar days maximum limit for withdrawals.<sup>257</sup>

A conflict may occur between the U.S. rules and the City Code, since the former requires that withdrawal rights be available throughout the offer period. In such cases the SEC has granted two types of relief with respect to withdrawal rights. Directly, by enabling the offer to proceed in conformity with the City Code rules<sup>258</sup> and indirectly, by permitting simultaneous offers to proceed in the U.S. and the U.K., each in accordance with the local rules.<sup>259</sup>

### **3.5.6 Purchases outside the bid**

With respect to purchases outside the bid there is a fundamental difference between the United States on the one hand and the United Kingdom and Sweden on the other. Contrary to the City Code and NBK/OE, that permits purchases outside the bid provided that the consideration is equal to the offer<sup>260</sup>, Rule 14e-5 under the Exchange Act of 1934 prohibits bidders or their financial advisors from purchasing a target company's securities other than through the tender offer.<sup>261</sup>

### **3.5.7 Conclusion**

As is evident from the preceding comparison, the takeover rules of various jurisdictions address certain common concerns. For instance, all three regulatory systems seek to ensure equal treatment of all shareholders and adequate time for analysis of the offer by the shareholders. What constitutes the best means of achieving these goals is, of course, what creates the observed differences between the systems. Ironically, while seeking what are essentially similar protections, these differing regulatory systems have created incompatibilities that hinder rather than help cross-border transactions.

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U.S.C.S. § 78(d)(5). However, the SEC through its rule making capability extended the withdrawal period. *See* 17 C.F.R. § 240.14d-7 (1996).

<sup>256</sup> NBK/OE (II) para. 4.

<sup>257</sup> *See* the City Code, Rule 34.

<sup>258</sup> *See In re Bell Cablemedia PLC*, Sec. Exch. Act Rel. No. 34-38030, 1996 LEXIS 3367 (Dec. 9, 1996).

<sup>259</sup> *See In re Ford Motor Company Limited Offer to Purchase the Ordinary Shares and American Depositary Receipts of Jaguar PLC*, Sec. Exch. Act Rel. No. 34-27425, 1989 SEC LEXIS 2161 (Nov. 7, 1989).

<sup>260</sup> *See* the City Code, Rule 6, and NBK/OE (II) paras. 7-9.

<sup>261</sup> *See* 17 C.F.R. § 240.14e-5 (1999).

From a Swedish perspective it is interesting that the City Code is not the sole source of inspiration to the Swedish rules. Although NBK/OE is modeled after the City Code some of the substantial rules are similar to the rules of the Williams Act that differ from the rules of the City Code.



# 4 The SEC's Exemptive Rule on Cross-Border Tender Offers

## 4.1 Introduction

Due to the different views of tender offer jurisdiction in most European countries and in the United States a situation has occurred where a tender offer could be governed by two different regulatory systems. The effect is that relief from one of the jurisdictions may be necessary in order to permit a bidder to conduct a single tender or exchange offer complying with all applicable rules and regulations. However, it has been common practice for non-U.S. bidders to exclude U.S. shareholders of a non-U.S. target when the desired or required number of shares can be attained without the shares held by U.S. shareholders.

These procedures frequently force excluded shareholders to sell their shares into the secondary market in order to realize a portion of the premium available through the tender offer, ironically without the safeguards provided by the procedural and disclosure requirements of both the home market and foreign markets. According to the SEC, the effect is that U.S. security holders are denied the opportunity to receive a premium for their securities and to participate in an investment opportunity.<sup>262</sup> Therefore, the SEC issued an exemptive rule to encourage foreign bidders to include U.S. shareholder in cross-border tender and exchange offers.<sup>263</sup>

## 4.2 The Situation Prior to the SEC's Final Rule

### 4.2.1 Applicable Law and Choice of Law

It should be noticed that the SEC's exemptive rule is not a conflict of laws rule. It is only a limitation on the application of the Williams Act to a certain extent, in order to facilitate U.S. investor participation in cross-border tender offers relating to the securities of foreign companies.

It could be held that there exist two different philosophies regarding the regulation of tender offers.<sup>264</sup> The regulatory systems of some jurisdictions, such as the United Kingdom and Sweden, regulate tender offers only if the target company is organized under the laws of their jurisdiction. As opposed

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<sup>262</sup> Cross-Border Tender Offers, Sec. Act Rel. No. 33-7759, *supra* note 2, at 3.

<sup>263</sup> Cross-Border Tender Offers, Sec. Act Rel. No. 33-7759, *supra* note 2.

<sup>264</sup> *See* Greene, Curran, and Christman, *supra* note 1, at 824.

to that, other jurisdictions, such as the United States and Canada, regulate tender offers on the basis of domestic market interest or the existence of resident shareholders regardless of the target's country of organization.

Generally, the country under whose laws the target company is incorporated has the primary interest in regulating a tender offer. However, in this age of internationalisation of securities markets, states other than the home country may have an interest in regulating the tender offer. The target company's stock may be listed on stock exchanges in other countries. Citizens in other countries may own target company securities in other ways, for example through ADS or directly trading on the target's home stock exchange. The bidder may send offering documents through the mails to such shareholders. In addition to tender offers to domestic target companies, the United States also regulate tender offers and transactions in securities in other countries that occur within U.S. borders.

In the United Kingdom, the City Code applies to tender offers for all listed and unlisted public companies resident in the United Kingdom, the Channel Islands or the Isle of Man as determined by the Takeover Panel.<sup>265</sup> In Sweden, NBK/OE limit the applicability of the recommendation to tender offers made to the shareholders of a Swedish company.<sup>266</sup> This approach results in a system where it is easy to foresee which law that will govern the tender offer.

Within Europe, aside from the explicit jurisdictional limitations in the City Code and NBK/OE, a choice of law problem relating to the transfer of shares in a company is probably solved by holding out the law of the place of incorporation as the law governing the transfer.<sup>267</sup> In more detail, the personal law of the company is determined by the place of incorporation in some jurisdictions, such as Sweden, while other jurisdictions use the place where the board of directors has its seat.<sup>268</sup> Therefore, the problem with the applicability of competing systems of takeover regulation is not likely to arise within Europe.

As opposed to the European approach, the United States has traditionally viewed its jurisdiction expansively and imposed its regulations on transactions that may be viewed as essentially foreign.<sup>269</sup> In the regulation of cross-border tender offers U.S. courts have used expansive notions of jurisdiction to apply the federal securities laws to transactions with minimal

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<sup>265</sup> The City Code, at Introduction 4(a).

<sup>266</sup> NBK/OE (I).

<sup>267</sup> Lawrence Collins with Specialist Editors, *Dicey and Morris on the Conflict of Laws*, 983, Thirteenth Edition, Vol. 2, Sweet & Maxwell, London, 2000.

<sup>268</sup> See Michael Bogdan, *Svensk Internationell Privat- och Processrätt*, 150, Fifth Edition, Norstedts Juridik AB, Stockholm, 1999.

<sup>269</sup> See Warren Pengilley, *Extraterritorial Effects of United States Commercial and Antitrust Litigation: A View from "Down Under"*, 16 Vand. J. Transnat'l L. 833 (1983).

U.S. contacts.<sup>270</sup> In essence, U.S. federal securities laws have a broad extraterritorial application.

In the United States the Williams Act governs international tender offers. Section 14(d)(1) applies to 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.”<sup>271</sup>

The concrete criteria for applying U.S. federal law to international transactions are the existence of material actions (the ‘conduct’ test) or material effects (the ‘effects’ test) in the United States. With regard to tender offers the position of the SEC has traditionally been that the U.S. securities laws presumptively apply wherever the offer is made, as long as the offer is conducted in or has an effect in the United States.<sup>272</sup>

Two cases that illustrate the application of the conduct and effects tests in the tender offer context and the extraterritoriality of the Williams Act are *Plessey Co. PLC v. General Electric Co. PLC*<sup>273</sup> and *Consolidated Gold Fields PLC v. Minorco, S.A.*<sup>274</sup> In the former case did the District Court of

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<sup>270</sup> Jill E. Fish, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 Nw.U.L.Rev. 523, 524 (1993). See also Neal T. Buehe & Thomas J. Coyne, *Securities Law – Subject Matter Jurisdiction in Transnational Securities Fraud Cases: The Expanding Application of the Conduct Test*, 59 Notre Dame L. Rev. 471, 472 (1984).

<sup>271</sup> 15 U.S.C.S § 78n(d)(1).

<sup>272</sup> Fish, *supra* note 270.

<sup>273</sup> 628 F. Supp. 477 (D. Del. 1986). In 1985 General Electric Company PLC. (“GEC”), a British company, announced a takeover bid for another British company, Plessey Company PLC. (Plessey). GEC took steps to keep its bid from being subject to U.S. tender offer regulation. Although the vast majority of Plessey’s shares were traded outside of the United States, there were about 1.2 million Plessey ADRs traded on the NYSE, which could be converted into Ordinary shares. Approximately 1.6 % of Plessey’s equity securities were held in the United States. The Plessey offer, by its terms, was for Ordinary shares and did not extend to ADRs. The offer stated that it would not “be made directly or indirectly in, or by use of the mails or by any means or instrumentality of interstate or foreign commerce or any facilities of a national securities exchange of, the United States of America, its possessions or territories or any area subject to its jurisdiction or any political sub-division thereof.” Plessey sued in the federal District Court in Delaware, arguing that GEC made a tender offer subject to the U.S. tender offer rules through a press release issued in the U.K. and the sending of the press release to the depository of the ADRs. The court found it doubtful that GEC had used U.S. jurisdictional means to make its offer and denied Plessey’s motion for a preliminary injunction.

<sup>274</sup> 871 F.2d 252 (2d Cir.), *cert. dismissed*, 492 U.S. 939 (1989). Minorco S.A., a Luxembourg corporation, sought to acquire Consolidated Gold Fields PLC (“CGF”), a British corporation. Of the 213 450 000 CGF shares outstanding, 5 300 000 (2.5%) were held by U.S. residents. Of these shares, approximately 50 000 were held directly by U.S. residents, 3.1 million were held through nominee accounts in the U.K., and 2.15 million were held through shares represented by ADRs. In its offering documents, Minorco used the same statement that was used in *Plessey* to avoid the application of the Williams Act. CGF alleged, *inter alia*, that Minorco violated the antifraud rules of the Exchange Act by making misleading statements about the extent to which Minorco was controlled by South African interests. The Second Circuit stated that U.S. antifraud laws may be given extraterritorial

Delaware refuse to exercise subject matter jurisdiction since the bidder had “steadfastly avoided American channels in its pursuit of a foreign target”.<sup>275</sup> In the latter case did the Second Circuit state that, in a situation where the bidder had taken the same precautions as in *Plessey*, the U.S. securities laws applied to acts committed abroad if those acts had a substantial and foreseeable effect in the United States. Substantial effect was based on the fact that British law required the ADR depository banks to forward the tender offer to Gold Fields shareholders in the United States.<sup>276</sup> The Second Circuit distinguished this decision from the *Plessey* litigation that was not based on allegations of fraud. The court held that “the antifraud provisions of American securities laws have broader extraterritorial reach than American filing requirements.”<sup>277</sup>

No choice of law rule exists to solve this situation where both the law of the country of organization and U.S. law governs the tender offer. Perhaps the existence of a clear choice of law rule, between European countries and the U.S., regarding tender offers is an alternative solution to the problem with the exclusion of U.S. shareholders from tender offers. However, the U.S. view is that only the Williams Act gives the U.S. investors adequate protection.

A choice of law rule could be similar to the European approach with the law of the target’s country of organization as the law governing the tender offer. The advantage of a rule based on that approach would be a more predictable situation, and only one legal system to comply with for the bidder. Potentially, that rule could be challenged with the argument that in cases where U.S. shareholders for some reason hold a substantial part of the shares it would be unreasonable that the tender offer would be governed by the law of the target’s country of organization. Similarly, the rule would be complicated to apply when the target is organized under the law of more than one jurisdiction. However, that challenging scenario does not occur very often and the target’s country of organization would be a suitable basic rule.

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reach whenever a predominantly foreign transaction has substantial effect within the United States.

<sup>275</sup> *Plessey Co. PLC v. General Electric Co. PLC*, 628 F. Supp. 477, 495 (D. Del. 1986).

<sup>276</sup> It is important to notice that this is different from the Hoylake bid (*see below*), where the terms of the offer precluded those who received the offering documents from sending the documents into the United States, regardless of their obligations under British law. Sending the offer documents by U.S. mail would render the offer invalid. Meredith M. Brown and Simon MacLachlan, *When Worlds Collide: The Reconciliation of Conflicting Requirements in Cross-Border Acquisitions*, in 1 22 Annual Institute on Securities Regulation 177, 193 (PLI Corporate Law and Practise Course Handbook Series No. 712, 1990).

<sup>277</sup> *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 262 (2d Cir.) (citing *Berch v. Drexel Firestone, Inc.* 519 F.2d 974, 986 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975)), *cert. dismissed*, 492 U.S. 939 (1989).

## 4.2.2 The Applicability of Competing Systems of Takeover Regulation

The different philosophies and the absence of a choice of law rule creates a situation where a tender offer could be governed by two different regulatory systems. As mentioned above, the City Code expressly raises a *caveat* with regard to this issue of dual jurisdiction.<sup>278</sup> This situation cause problem with regard to the procedural requirements, the requirements for the substance of the tender offer disclosure, and increased costs and uncertainties.<sup>279</sup>

In fact, it is very difficult for an offer to comply simultaneously with the procedural regulations of the United Kingdom or Sweden and the United States.<sup>280</sup> The differences between the applicable regulations has the effect that relief from one of the jurisdictions may be necessary in order to permit a bidder to conduct a single tender or exchange offer complying with all applicable rules and regulations.

## 4.2.3 Exclusion of U.S. Shareholders

The problem that gave rise to the SEC's exemptive rule is that U.S. shareholders are often excluded from tender offers involving private issuers in other jurisdictions. Using the words of the SEC in an earlier proposal, "It is very common for bidders to exclude U.S. security holders...to avoid the application of the U.S. securities laws, particularly when U.S. security holders own a small amount of the securities of the foreign issuer."<sup>281</sup> The SEC referred to a survey made by the Takeover Panel in 1997. In all tender offers of that survey, where the U.S. ownership of the target was less than fifteen percent, the bidders excluded U.S. persons.<sup>282</sup>

These procedures frequently force shareholders to sell their shares into the market in order to realize a portion of the premium available trough the tender offer. Because the method of excluding shareholders is typically intended, at least in part, to withhold distribution of offering materials from them,<sup>283</sup> 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.

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<sup>278</sup> The City Code, at Introduction 4(c).

<sup>279</sup> See Fish, *supra* note 270, at 523-530.

<sup>280</sup> See, *Inter alia*, *In re Ford-Jaguar*, Exchange Act Release No. 34-27425, 1989 SEC LEXIS 2161 (Nov. 7, 1989) and *In re Procordia-Volvo-Pharmacia*, Sec. Exch. Act Rel. No. 34-27671, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) 84,514 (Feb. 2, 1990), where the bids was structured as two separate tender offers in order to comply with the rules of both jurisdictions (United Kingdom and United States in the first case and Sweden and United States in the second case).

<sup>281</sup> Sec. Act. Rel. No. 33-7611 (Nov. 13, 1998), at section II.A.

<sup>282</sup> See Sec. Act. Rel. No. 33-7611 (Nov. 13, 1998), at section II.A.1.

<sup>283</sup> See *Plessey Co. PLC v. General Electric Co. PLC* 628 F. Supp. 477 (D. Del. 1986).

Apart from the question why U.S. shareholders are excluded, that will be dealt with below, it is interesting to see how this exclusion is possible under the rules in the United Kingdom and Sweden. This is particularly interesting since a principle of equal bid to the shareholders of the target is applied under both the City Code and NBK/OE.<sup>284</sup> Furthermore, neither the City Code nor NBK/OE explicitly provide for an exemption from the principle of equal bid that excludes shareholders that causes the application of the rules of another jurisdiction. The question is even more intriguing due to the fact that both the City Code and NBK/OE contain a mandatory bid rule.

The underlying procedure for excluding U.S. shareholders is that the bidder has sought to avoid use of any of the specified jurisdictional means that leads to the application of U.S. law.<sup>285</sup> However, when a bidder is required to make an offer to all shareholders, as is the case with the mandatory bid, the avoidance of the jurisdictional mean would be difficult to achieve. As an effect of that, the motivations for the coherence between the principle of equal bid and the mandatory bid on the one side, and the exclusion of U.S. shareholders on the other have been quite vague.

In *Plessey Co. PLC v. General Electric Co. PLC*<sup>286</sup> the District Court accepted the bidder's (GEC's) argument that it was common practice in cross-border tender offers to make a distinction between ordinary shares and ADRs convertible into ordinary shares.<sup>287</sup> The offer could therefore be restricted to shareholders outside the United States by tendering for one class of securities and not tendering for the ADRs. Thus, from GEC's argument it appears that the principle of equal bid is subordinate to the needs of the bidder in a situation where dual jurisdiction threatens to impede the deal. ADRs are simply considered as a different class of shares that falls outside the scope of the principle of equal bid.

Similarly, the motivation for setting aside the principle of equal bid and the mandatory bid rule in the *Hoylake* takeover bid for *BAT Industries*<sup>288</sup> was

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<sup>284</sup> According to General Principle No. 1 of the City Code all shareholders of the same class of an offeree company shall be treated similarly by an offeror, and under NBK/OE (V) all holders of shares with equal terms shall be offered identical or similar consideration.

<sup>285</sup> See Section 14(d)(1) of the Williams Act that applies to 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." 15 U.S.C.S § 78n(d)(1).

<sup>286</sup> 628, F. Supp. 477 (D. Del. 1986).

<sup>287</sup> *Plessey Co. PLC v. General Electric Co. PLC*, 628, F. Supp. 477, 488-489 (D. Del. 1986).

<sup>288</sup> The Hoylake bid for BAT Industries is discussed in, Brown and MacLachlan, *supra* note 276, at 193-197 and 199-200. In July 1989, Hoylake, a Bermuda company, announced its bid for BAT, a British company. The bid involved the offer of Hoylake securities in exchange for BAT shares. Hoylake took great pains not to use any U.S. jurisdictional means, so as to avoid triggering the registration requirements of the Securities Act and the tender offer requirements of the Williams Act. The offer document pointed out that the Hoylake securities being offered were not registered under the Securities Act and could not

rather insubstantial and does not give much guidance. This is, in particular, illustrated by the answers given by Hoylake's U.K. counsel to the question from the SEC staff whether the restrictions on BAT shareholders in the U.S. were inconsistent with U.K. law and takeover regulation. The SEC staff explicitly asked about the restrictions in relation to General Principle 1 of the City Code, to the effect that the bidder must treat all holders of the same class of shares of a target company similarly.<sup>289</sup> Hoylake's U.K. counsel said that, although the offer included restrictions on the manner in which it was made and the manner in which it could be accepted, for U.K. law purposes, the offer did extend to all common shares.<sup>290</sup> Furthermore, the U.K. counsel stated that while U.S. shareholders were not per se excluded, they were "effectively precluded" from participating in the exchange offer because of the strict limitations on the jurisdictional means.<sup>291</sup>

This issue has not been dealt with to a larger extent in Sweden.<sup>292</sup> None of AmN's official statements deal with the exclusion of U.S. shareholders. However, since the Swedish system is highly influenced by the U.K. system it is reasonable to draw the conclusion that the Swedish view is not very different from the view taken in the United Kingdom.

Although it is difficult to find a clear justifiable basis for the exclusion of U.S. shareholders, it is not hard to see that the Takeover Panel and NBK are willing to permit conduct in contravention with their "own" rules when the effect of the conduct is not to the detriment of the shareholders residing in the jurisdiction covered by the regulation. The exclusion of U.S. shareholders is permitted, despite the principle of equal bid, since it would be impracticable to require the bidder to include U.S. shareholders. Therefore it is fair to say that the principle of equal bid in the United Kingdom and Sweden is relative with respect to U.S. shareholders.

## 4.3 The Final Rule on Cross-Border Tender Offers

### 4.3.1 Background

A solution to the problem with the exclusion of U.S. shareholders has been on the SEC's agenda for more than ten years prior to this final rule. In 1990,

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be offered, sold or delivered, directly or indirectly in or into the U.S., and furthermore made clear that the offer did not extend to ADRs.

<sup>289</sup> Brown and MacLachlan, *supra* note 276, at 195.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 196.

<sup>292</sup> For a thorough presentation of the equal bid principle in Sweden see, Claes Bergström, Peter Högfeldt, and Per Samuelsson, *Om Kravet på Likabehandling av Aktieägare*, Tidskrift för Rettsvitenskap 117 (1994).

as mentioned above, 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.<sup>293</sup> Following that release the SEC's Tender Offer Proposal was published in 1991.<sup>294</sup> In essence, that proposal was almost identical to what today forms the Tier I Exemption.<sup>295</sup>

The view of the SEC is that when bidders exclude U.S. security holders from tender or exchange offers, they deny U.S. security holders the opportunity to receive a premium for their securities and to participate in an investment opportunity.<sup>296</sup> The final rule was adopted with the intention to encourage bidders and issuers to extend tender and exchange offers to the U.S. security holders of foreign private issuers. The purpose of this exemption is to allow U.S. holders to participate on equal basis with foreign security holders.<sup>297</sup> According to the SEC the rule balances the need to provide U.S. security holders with the protections of the U.S. securities laws against the need to promote the inclusion of U.S. security holders in the relevant types of cross-border transactions.<sup>298</sup>

#### **4.3.2 The Actual Conflict and how it was dealt with prior to the Exemptive Rule**

In order to explain the conflict, a situation where both English and U.S. law could govern a potential tender offer is presented. A company organized under Swedish law is about to require a company organized under English law. However, approximately ten percent of the English company's shareholders reside in the United States where ADSs representing the English company are quoted on NASDAQ. What will happen if a tender offer is made to all shareholders, in both the United Kingdom and the United States?

First, according to the view taken by the regulatory system in the United Kingdom, English rules governs the tender offer. In the United Kingdom the City Code applies to offers for all listed and unlisted companies resident in the United Kingdom as determined by the Takeover Panel. Since the English company is organized under English law, the Takeover Panel will consider the tender offer to be governed by the City Code. Second, the extraterritorial application of the U.S. regulatory system has the effect that from that perspective U.S. law also governs the tender offer. The Williams Act purports to regulate any tender offer made either directly or indirectly, by

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<sup>293</sup> See Concept Release on Multinational Tender and Exchange Offers, Sec. Act Rel. No. 33-6866, and Sec. Exch. Act Rel. No. 34-28093, 1990 SEC LEXIS 1139 at \*2-3 (June 6, 1990).

<sup>294</sup> See International Tender and Exchange Offers, Sec. Exch. Act Rel. No. 34-29275, 1991 SEC LEXIS 1026, at \*4 (June 5, 1991).

<sup>295</sup> See below 4.3.3.1.

<sup>296</sup> Cross-Border Tender Offers, Sec. Act Rel. No. 33-7759, *supra* note 2, at 3.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*



use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise.<sup>299</sup> 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 Swedish company will face a situation where compliance with both regulatory systems is necessary. However, it is generally possible to obtain relief from one of the systems by approaching the regulatory authority of that system. Alternatively, the Swedish company could choose to exclude the U.S. shareholders from the tender offer.

There are several reasons why the Swedish company would prefer to make the tender offer in accordance with the English City Code. The Williams Act and the SEC rules and regulations promulgated thereunder have created a regulatory regime that is quite complicated to comply with.<sup>300</sup> In fact, the procedural, disclosure and filing requirements in the Williams Act and its accompanying rules and regulations are more onerous than those in most countries, including the United Kingdom.<sup>301</sup>

Although the SEC is fairly quick to respond to waiver requests from certain tender offer rules, it is often slower than regulators in other countries. This is particularly the case in a comparison with the United Kingdom’s Takeover Panel that frequently responds to requests for interpretative guidance and waivers within 24 hours.<sup>302</sup>

Another reason for the exclusion of U.S. shareholders is the perception that the risk of securities fraud liability is substantially higher in the United States than in other countries. The U.S. antifraud rules have been interpreted as having broad extraterritorial application, and they may even apply despite efforts of the bidder to exclude U.S. holders.<sup>303</sup>

However, perhaps the most important reason for a foreign company’s decision to exclude U.S. shareholders is the general exposure to litigation in the United States. Failure to comply with the requirements of the Williams Act may not only result in SEC enforcement action, but also in a private action by the target company or its shareholders. Although the Williams Act does not contain an express right of action for private litigants, the U.S. courts have found an implied right of action in the statute for target companies and their shareholders.<sup>304</sup> In fact, litigation is frequently used as a

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<sup>299</sup> 15 U.S.C.S § 78n(d)(1).

<sup>300</sup> See 3.2.2. above.

<sup>301</sup> Greene, Curran, and Christman, *supra* note 1, at 827.

<sup>302</sup> See Staple, *supra* note 183.

<sup>303</sup> See *inter alia* Consolidated Gold Fields, PLC v. Anglo-American Corporation of South Africa Ltd., 698 F. Supp. 487 (S.D.N.Y. 1988), and Consolidated Gold Fields, PLC v. Minorco, S.A. 871 F.2d 252 (2d Cir., 1989).

<sup>304</sup> See *inter alia* Polaroid Corp. v. Disney 862 F.2d 987, 993 (3d Cir. 1988).

defensive tactic in battles for corporate control. The use of litigation as a defensive tactic increased heavily during the 1980s.<sup>305</sup> Since U.S. litigation tends to be more intrusive, more time consuming and more costly than litigation in other countries, foreign bidders are loath to engage in conduct that will require them to submit to and comply with U.S. law.

In order to exclude U.S. shareholders and avoid the application of U.S. law a bidder has to take a number of precautions. Offering documents are not mailed into the United States, the offer is not announced in the U.S. press and tenders made from the United States are not accepted.<sup>306</sup> The effect of this exclusion is that U.S. investors are barred from tendering their shares to the bidder directly. The opportunity for U.S. investors to enjoy the premium of the tender offer outside the United States is therefore restricted to either arrange to have the shares tendered from outside the United States or sell them into the international arbitrage market.<sup>307</sup> Either procedure causes U.S. investors to incur substantial transaction costs.

In the cases prior to the exemptive rule, where U.S. shareholders was not excluded, the bidders negotiated with the SEC to produce transaction structures that complied with both U.S. law and the law of the target's home country. Due to the fact that it is very difficult to comply simultaneously with U.S. law and the requirements of many foreign countries, bidders frequently requested that the SEC exempted them from some of the conflicting elements of U.S. law before the offer was made.

Two well-known examples of this individually structured approach are the *Ford-Jaguar*<sup>308</sup> and *Procordia-Volvo-Pharmacia*<sup>309</sup> transactions. In both instances, negotiations between the bidder and the SEC resulted in a deal structured as two separate tender offers, one of which was made in the United States and the other abroad. These transactions were used as a model for other foreign bidders who sought similar relief.<sup>310</sup>

However, even under that structure the burdens of compliance with U.S. law were substantial, and the SEC's willingness to negotiate did not lead to an increased inclusion of U.S. shareholders.<sup>311</sup> The exclusion meant that U.S. investors were not able to receive the tender offer premium, and the efforts by foreign bidders to avoid triggering application of U.S. law reduced the information available to U.S. investors about the transaction. The SEC

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<sup>305</sup> See Fish, *supra* note 270, at 531.

<sup>306</sup> The District Court of Delaware has held that such precautions are sufficient to avoid application of the U.S. securities laws. See *Plessey Co. PLC v. General Electric Co. PLC*, 628, F. Supp. 477 (D. Del. 1986).

<sup>307</sup> Fish, *supra* note 270, at 533.

<sup>308</sup> *In re Ford-Jaguar*, Exchange Act Release No. 34-27425, 1989 SEC LEXIS 2161 (Nov. 7, 1989).

<sup>309</sup> *In re Procordia-Volvo-Pharmacia*, Exchange Act Release No. 34-27671, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) 84,514 (Feb. 2, 1990).

<sup>310</sup> Fish, *supra* note 270, at 537.

<sup>311</sup> *Id.*

observed that this was a matter of serious concern and issued a Concept Release on Multinational Tender and Exchange Offers.<sup>312</sup>

### 4.3.3 Content

#### 4.3.3.1 The Tier I Exemption

##### 4.3.3.1.1 Background

The Tier I exemption applies to bids for a foreign target company, of which 10 percent or less of the security holders reside in the U.S., made by U.S. and foreign companies. The effect of the exemption is that eligible issuer and third party tender offers will not be subject to Rules 13e-3, 13e-4, Regulation 14D or Rules 14e-1 and 14e-2.<sup>313</sup>

The exemption is subject to certain conditions. The U.S. shareholders must hold securities of the class sought in the tender offer. In cases that otherwise would be subject to Rule 13e-4 or Regulation 14D, the bidder is required to submit an English language translation of the offering materials to the SEC. In addition to this, it is stated that U.S. security holders participate in the offer on terms at least as favourable as those offered to any other holders, and the bidder must provide them with the tender offer circular or other offering documents in English.<sup>314</sup> The practical effect is that instead of complying with the U.S. tender offer rules; it is sufficient that the bidder comply with the applicable rules of the target company's home jurisdiction. This is combined with submission and distribution of offering documents in English.

##### 4.3.3.1.2 U.S. Ownership Limitation

Although commenters to the proposals for the final rule favoured a higher limitation for U.S. ownership, the SEC makes it clear that their opinion is that ten percent is the appropriate level.<sup>315</sup> One interesting aspect of the ownership limitation is that a subsequent competing bidder to an initial bidder, relying on the Tier I exemption, will not be subject to the ten percent ownership limitation. As a result, the second bidder will not be disadvantaged by any movement of securities into the United States following the announcement of the initial offer.<sup>316</sup>

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<sup>312</sup> See Concept Release on Multinational Tender and Exchange Offers, SEC Release Nos. Sec. Act Rel. No. 33-6866, and Exch. Act Rel. No. 34-28093, 1990 SEC LEXIS 1139 (June 6, 1990).

<sup>313</sup> Cross-Border Tender Offers, Sec. Act Rel. No. 33-7759, *supra* note 2, at 6.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> See *id.* at 7.

#### **4.3.3.1.3 Disclosure and Dissemination**

The formal disclosure requirements for a bidder relying on the Tier I exemption is limited to the submission of the offering materials under foreign law to the SEC for notice purposes only. If the bidder is a U.S. company this is done under cover of Form CB. A foreign bidding company is also required to file a consent to service on form F-X.<sup>317</sup> Form F-X is necessary in order to appoint an agent for service in the United States.

A number of commenters argued that the requirement to file those forms would be too burdensome and discourage bidders from relying on the exemptions. The SEC responded that their interest in monitoring the availability of the exemptions and ensuring U.S. security holders access to these documents justified the burden of preparing the forms.<sup>318</sup>

Regarding the dissemination of tender offer circulars or other informational documents to U.S. security holders in English the SEC has clarified that requirement further: “If the foreign subject company’s home jurisdiction permits dissemination solely by publication, the offeror likewise will publish the offering materials simultaneously in the United States, although it may in addition mail the materials directly to U.S. holders. If the materials are disseminated by publication, the offeror must publish the materials in a manner reasonably calculated to inform U.S. investors of the offer.”<sup>319</sup>

#### **4.3.3.1.4 Equal Treatment**

The Tier I exemption provides for the participation of U.S. security holders in the offer on terms at least as favourable as those offered to any other holders of the subject securities. Equal treatment also requires that the procedural terms of the tender offer, that is duration, pro rationing, and withdrawal rights, must be the same for all security holders.<sup>320</sup>

It is important to notice that equal treatment does not literary mean that the form of payment must be identical. If non-U.S. security holders are offered consideration consisting of both cash and securities U.S. holders may be offered only cash. However, the bidder must have a reasonable basis to believe that the cash is substantially equivalent to the value of the consideration offered to non-U.S. holders.<sup>321</sup>

#### **4.3.3.1.5 Exemption from Rule 13e-3**

Transactions eligible for the Tier I exemption does not have to comply with the SEC’s going private disclosure requirements under Rule 13e-3. The SEC recognised that it would be impractical to impose the procedural, disclosure

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<sup>317</sup> *Id.*

<sup>318</sup> *See id.* at 8.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

and filing requirements of Rule 13e-3 when there are no other U.S. requirements.<sup>322</sup>

#### **4.3.3.1.6 Sections 13(d), 13(f) and 13(g)**

The relief provided for in the exemptive rule will not extend to and affect the beneficial ownership reporting requirements of Sections 13(d), 13(f) and 13(g) of the Exchange Act. The SEC justifies those filing requirements with a need for disclosure of the ownership and control of reporting companies, both domestic and foreign, trading in the U.S. markets.<sup>323</sup>

#### **4.3.3.1.7 Exemption from Rule 14e-5**

Rule 14e-5 of the Exchange Act was as mentioned above formerly Rule 10b-13. According to the rule a bidder is prohibited from purchasing securities otherwise than pursuant to the tender offer. When a cross-border tender offer is covered by the Tier I exemption, that is when U.S. security holders hold ten percent or less of the subject securities, the tender offer will be exempted from rule 14e-5.<sup>324</sup>

#### **4.3.3.2 The Tier II Exemption**

In order to minimize conflicts with foreign regulatory schemes bidders are entitled to limited relief from the U.S. tender offer rules under the Tier II exemption. This relief is available to both issuer and third party tender offers when the subject company is a foreign private issuer and U.S. ownership is no greater than 40 percent.<sup>325</sup> It is notable that several of the things that were covered by the exemption in the proposal are instead covered by the amendments to the tender offer rules in the Regulation M&A Release.

In essence there is four relieves available to a bidder that enjoys the Tier II exemption. First, the bidder is allowed to make one offer to the U.S. holders and another to non-U.S. holders if the terms of both offers are equal. However, it should be noticed that the Tier I exemption for cash only consideration do not apply to Tier II offers.<sup>326</sup> Second, notice of extensions may be made in accordance with the requirements of home jurisdiction law or practice.<sup>327</sup> Third, payment made in accordance with the requirements of home jurisdiction law or practice will satisfy the prompt payment requirements of Rule 14e-1(c). Finally, regarding changes to the minimum condition, the SEC will not object if bidders reduce or waive the minimum acceptance condition without extending withdrawal rights during the remainder of the offer if certain enumerated conditions are met.<sup>328</sup>

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<sup>322</sup> *Id.* at 9.

<sup>323</sup> *Id.* at 10.

<sup>324</sup> *Id.* at 11-13.

<sup>325</sup> *Id.* at 10.

<sup>326</sup> *Id.* at 54.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 11.

Subject to the mentioned relives the bidder must comply with the remaining tender offer provisions, including the procedural, disclosure and filing requirements of the Williams Act. Filing of Form CB or CB and F-X is not required since the bidder will file a schedule TO.<sup>329</sup> Similarly to the Tier I exemption a subsequent competing bidder is not subject to the ownership limitation of the Tier II exemption.<sup>330</sup> Furthermore, according to the Tier II exemption an offer commences once the bidder disseminates transmittal forms or discloses instructions on how to tender into an offer, and first at that point is the bidder required to file the Schedule TO.<sup>331</sup> It is worth to mention that the Tier II exemption is merely a codification of exemptive and interpretative positions that the SEC has applied in cross-border acquisitions.<sup>332</sup>

#### **4.3.3.3 Exchange Offers**

The particular implications of the compliance with the registration requirements under the Securities Act of 1933 in exchange offers are also dealt with in the exemptive rule. Under Rule 802 securities issued in exchange offers for foreign private issuers' securities are exempted from the registration requirements of the Securities Act. Similar to tender offers under the Tier I exemption exchange offers are exempted if U.S. security holders own ten percent or less of the securities of the target company.<sup>333</sup>

#### **4.3.3.4 The Exclusion of the Antifraud Rules from the Scope of the Final Rule**

One important feature of the final rule is that the U.S. antifraud, anti-manipulation rules, and civil liability provisions will apply to an exempted transaction. The SEC justifies the applicability of the antifraud rules, in the absence of many of the disclosure and procedural protections of the federal securities laws, as necessary in order to ensure a basic level of protection for U.S security holders.<sup>334</sup> The SEC has advocated this view in the discussions ever since the Concept Release.<sup>335</sup>

#### **4.3.3.5 Schemes with the Intention to Evade the Legislation**

Finally, it is important to notice that neither the Tier I, nor the Tier II tender offer exemption is available for any transaction or series of transactions that technically complies with the exemption but is part of a plan or scheme to

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<sup>329</sup> As mentioned above, schedules 13E-4 and 14D-1, the schedules previously used for issuer and third party tender offers, respectively, have been combined into new schedule TO in the Regulation M-A Release.

<sup>330</sup> Cross-Border Tender Offers, Sec. Act Rel. No. 33-7759, *supra* note 2, at 10.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 11.

<sup>333</sup> *Id.* at 14.

<sup>334</sup> *See id.* at 4.

<sup>335</sup> *See* Concept Release on Multinational Tender and Exchange Offers, SEC Release Nos. Sec. Act Rel. No. 33-6866, and Sec. Exch. Act Rel. No. 34-28093, 1990 SEC LEXIS 1139 (June 6, 1990).

evade the tender offer provisions of the Exchange Act.<sup>336</sup> An illustration of this situation is that if an initial offer is commenced solely as a pretext for making a subsequent offer automatically eligible for the exemption, the Tier I exemption would not be available.

#### **4.4 Cross-Border Tender Offers with the Exemptive Rule in Force**

If the hypothetical scenario presented above occurred today with the exemptive rule in force, the Swedish company could commence with the tender offer under the relief provided for by the Tier I exemption. Provided that the U.S. shareholders hold securities of the class that is sought in the tender offer it could be directed to all shareholders, including the ones residing in the United States.

However, it is necessary for the bidder to take the following precautions. Submit the offering materials to the SEC under cover of Form CB. In addition to Form CB the company must file Form F-X in order to appoint an agent for service in the United States. The company must make sure that the terms of the offer to the U.S. shareholders are at least as favourable as those offered to any other holders, and that the U.S. shareholders are provided with the tender offer circular or other offering documents translated into English.

The Swedish company can now proceed in accordance with the rules of the City Code. Since this is a Tier I situation the company is also free to purchase shares outside the tender offer due to the exemption from Rule 14e-5. Nevertheless the relief provided for by the Tier I exemption, the Swedish company may still be liable for misstatements, misrepresentation and omissions under the U.S. antifraud rules.

Finally, it must be noticed that even if the exemption is available, the company still have the option to choose not to include U.S. shareholders if it can attain the number of shares desired or required without directing the offer to U.S. shareholders.

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<sup>336</sup> Cross-Border Tender Offers, Sec. Act Rel. No. 33-7759, *supra* note 2, at 7.

# 5 Analysis of the SEC's Exemptive Rule

## 5.1 Will the Intention and Purpose of the Exemptive Rule be Fulfilled?

### 5.1.1 Increased Inclusion of U.S. Shareholders

During the ten years of the SEC's work that preceded the final rule on cross-border tender offers the issue that raised the loudest discussion is whether or not the presence of the antifraud rules in the exemption is essential to increase the inclusion of U.S. shareholders.

The SEC has advocated a line where the antifraud rules are necessary as a basic level of protection for U.S. security holders.<sup>337</sup> As opposed to that, American Bar Association, in its comments on the Concept Release, held that the removal or limitation of application of the U.S. antifraud laws and regulations was necessary to encourage non-U.S. bidders to include U.S. shareholders in tender offers.<sup>338</sup>

Some European practitioners support the SEC's approach. In the article "*Toward a Cohesive International Approach to Cross-Border Takeover Regulation*" it is held that the mere fact that U.S. investors are willing to make their initial investment decision on the basis of the target's home country disclosure practices is not a justification for depriving those investors of the fundamental antifraud protections provided by the U.S. securities laws.<sup>339</sup> The proposal regarding the antifraud concerns in that article is much in line with the SEC's own argument that the antifraud rules provides a basic level of protection.<sup>340</sup>

In contrast to that view, it could be held that investors who make the conscious decision to invest in securities of a company which is not incorporated in their own jurisdiction have consciously made a choice that the rules by which the company and their relationship with it will be governed will be those of the foreign jurisdiction and not their own. Why

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<sup>337</sup> See *id.* at 4.

<sup>338</sup> See Comment Letter from James H. Cheek et al., Chairmen, Committee on Federal Regulation of Securities, Section of Business Law of the ABA, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (September 20, 1990). The letter is printed in, 1 22 Annual Institute on Securities Regulation 219, 219-245 (PLI Corporate Law and Practise Course Handbook Series No. 712, 1990).

<sup>339</sup> Greene, Curran, and Christman, *supra* note 1, at 861.

<sup>340</sup> See *id.* at 869-871.



should the U.S. shareholders be provided with a level of protection that is not available to their fellow shareholders residing in the other jurisdiction?

As long as foreign takeover regulations permit the exclusion of U.S. shareholders the option to exclude them is available to a bidder. With reference to the different views of the impact of the applicability of the antifraud rules, it could be held that a bidder in the position to choose between structuring the bid under the exemptive rule or simply exclude U.S. shareholders might choose the latter in a situation of uncertainty. Whether the applicability of the antifraud rules is the determining factor for such a decision or not is hard to predict today. However, it could not be excluded that some bidder's decisions might be affected by the presence of the antifraud rules.

Another factor that may impede the full success of the exemptive rule, and that in part is connected to the antifraud issue, is the fear of foreign companies to be exposed to litigation in the U.S. In fact, when a foreign bidder makes a tender offer that is covered by the exemptive rule there is still a risk of ending up in U.S. litigation. Proceedings may be initiated against the company with allegations of breach of the antifraud rules.

Finally, it should be noticed that the SEC has not yet produced any figures illustrating the effect of the final rule on cross-border tender offers. Neither, has any work, to this date, been commenced to evaluate the extent to which bidders for non-U.S. corporations have started to structure bids under the exemptive rule instead of excluding U.S. shareholders. However, the SEC is optimistic that the rule is having the intended effect.<sup>341</sup>

### **5.1.2 Equal Participation**

Equal participation is very much dependant upon the increased inclusion of U.S. shareholders. There is no use in discussing equal participation until U.S. shareholders are included in tender offers to a larger extent. In my opinion the questions of increased inclusion of U.S. shareholders and the equal participation by them in cross-border tender offers are tightly knot together. The expressions are merely two sides of the same coin.

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<sup>341</sup> Information received through email communication with Ashley Gillespie, Law Intern with the SEC.

## 5.2 An Intersystem as an Alternative to the Exemptive Rule

### 5.2.1 Introduction

The SEC rule discussed in this thesis is a product of one state's efforts to correct the adverse effects of competing systems of takeover regulation. An alternative to that solution would be the creation of an intersystem of takeover regulation. One attempt to create a system of that kind is the 13 European Parliament and Council Directive on Company Law concerning takeover bids (Directive 13).<sup>342</sup> In addition, some scholars have proposed that the International Organization of Securities Councils (IOSCO) should investigate the possibilities for an international regulatory response to the difficulties cross-border acquisitions pose.<sup>343</sup> However, as will be illustrated by the difficulties of reaching accord on Directive 13 the path to an intersystem is long and winding.

### 5.2.2 Attempts to Create an Intersystem

#### 5.2.2.1 EC Directive 13

Directive 13 was originally proposed in 1989. Serious opposition from member states derailed the proposal in 1991. After a period of dormancy the European Commission, in 1993, initiated "detailed consultation" with the member states that lead to the most recent proposal in 1996.<sup>344</sup> The strenuous response that greeted the original Directive 13 proposal both reveals the difficulty inherent in attempting to create uniform regulation across national borders and helps explain the 1996 proposal's character as a "frame" directive with general principles rather than binding rules.

The advantage with an intersystem as compared to the SEC's final rule, to solve the problems imposed by dual jurisdiction, lies in the existence of a choice of law provision. The Directive sets out what is essentially a "residence" test. 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.<sup>345</sup> Although Directive 13 in its current proposal uses a different factor than the City Code and NBK/OE to determine which member state's supervisory authority

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<sup>342</sup> OJ 1989 C24/8.

<sup>343</sup> See Greene, Curran, and Christman, *supra* note 1, at 871-873.

<sup>344</sup> Commission of the European Communities, Proposal for a 13 European Parliament and Council Directive on Company Law Concerning Takeover Bids, Eur. Parl. Doc. (COM 95) 655 (Feb. 2, 1996).

<sup>345</sup> *Id.* at art. 4.2. Furthermore, 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.

should oversee a given bid, the great value lies in the intention to clearly hold out one applicable system of takeover regulation to the bid.

### 5.2.2.2 IOSCO

The securities councils and commissions of almost 100 countries are members of IOSCO.<sup>346</sup> Although the work of IOSCO to present date has not touched extensively on the area of takeover regulation, IOSCO has been attempting for a number of years to coordinate various international efforts for uniform regulation of capital markets. Such attempts have been made in areas as, international disclosure standards for cross-border offerings and initial listings by foreign issuers,<sup>347</sup> and cross-border activity of collective investment schemes.<sup>348</sup>

The scholarly recommendation to IOSCO advocates the same approach to solve the problem with dual jurisdiction as can be found in Directive 13, a choice of law provision. It is stated that: “A[n]... 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 participants.”<sup>349</sup>

### 5.2.3 An Intersystem – Reality or Utopia?

In theory, an intersystem will contribute to solve many of the problems that exists today and that will exist even with the SEC’s exemptive rule in force. In practice, however, such a system is virtually impossible to impose. Several states with their own views of the ways to regulate tender offers and takeovers are not very likely to easily agree on one international standard. The member states’ scepticism against Directive 13 illustrates how hard it is for different states to agree on one uniform standard.

The difficulties with reaching one international standard is specifically true where the systems themselves are either products of local ingenuity, or where local rules are undergoing rapid change. In such cases, it is not hard

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<sup>346</sup> For a presentation of all the member countries *see*, <http://www.iosco.org/iosco.html> (last checked 18/04/01). The United States is represented by the SEC, while Sweden is represented by *Finansinspektionen*, and the United Kingdom is represented by the Financial Services Authority.

<sup>347</sup> International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers. A Report of the International Organization of Securities Councils, September 1998, [http://www.iosco.org/docs-public/1998-intnl\\_disclosure\\_standards.html](http://www.iosco.org/docs-public/1998-intnl_disclosure_standards.html) (last checked 18/04/01), in which tender offers were explicitly excluded from the scope of the report.

<sup>348</sup> Discussion Paper on International Co-operation in Relation to Cross-Border Activity of Collective Investment Schemes. A report of the Technical Committee of the International Organisation of Securities Commissions, June 1996, [http://www.iosco.org/docs-public/1998-intnl\\_disclosure\\_standards.html](http://www.iosco.org/docs-public/1998-intnl_disclosure_standards.html) (last checked 18/04/01).

<sup>349</sup> Greene, Curran, and Christman, *supra* note 1, at 872.

for countries to find objections to an international standard that they do not find desirable. The advantage with the existence of a choice of law provision as the solution to the problem with competing systems of takeover regulation is obvious. However, the creation of an intersystem is more than a choice of law provision. It also includes harmonized minimal standards, and it is there that the problem to reach consensus lies.

## 6 Conclusion

The term tender offer is not synonymous in the United States, the United Kingdom, and Sweden. However, in essence the term is similar in all three jurisdictions and it could basically be presented as an offer by a bidder to on general terms acquire a certain number of shares in another company at a certain price, usually at a premium, directed to the shareholders of the target company.

Serious attempts in the United States to clearly define the term tender offer has been more or less fruitless and the courts' categorization of a tender offer is still very flexible, and even held to be elusive. In the United Kingdom and Sweden the courts have made no such attempts to create a clear definition of a tender offer. Under both the City Code and NBK/OE the scope of what is considered as a tender offer is quite broad, albeit not as unpredictable as the U.S. courts' categorization of a tender offer.

The Williams Act, the City Code, and NBK/OE all have the overriding purpose of investor protection. On a more substantial level, all three jurisdictions seek to ensure equal treatment of all shareholders, adequate time for analysis of the offer, and disclosure of vital information to the shareholders. What constitutes the best means of achieving these goals is what creates the observed differences between the systems. Those differences create regulatory tensions between the systems that in some aspects hinder the mutual purpose of investor protection.

The extraterritoriality of the conduct test and the effects test in the United States, as opposed to the view taken in the United Kingdom and Sweden, that the target's country of organization should determine what country's law that should govern the tender offer, have lead to a situation where a cross-border tender offer could be required to comply with more than one system of takeover regulation. In the relation between the United States on the one hand, and the United Kingdom or Sweden on the other, there are no conflict of law rules that could solve this problem with dual jurisdiction.

Choice of law rules that applies within Europe could be presented as support for the view taken in the United Kingdom and Sweden. The assumptive conclusion that one can draw from this fact is that it is the extraterritorial approach taken by the U.S. courts that leads to the situation with competing systems of takeover regulation.

Since the regulatory tension makes it very difficult to conduct the bid in compliance with both systems, relief from one set of rules must be sought. Seeking relief from a regulatory system such as the Williams Act is a costly and time-consuming procedure. U.S. shareholders are instead excluded from

the offer when the bidder determines that it can attain the number of shares needed without the shares held by shareholders residing in the U.S.

A bidder that wishes to exclude the U.S. shareholders from a tender offer seeks to avoid use of any of the specified jurisdictional means in section 14(d)(1) of the Williams Act, that leads to the application of U.S. law. An analysis of the reasoning in *Plessey Co. PLC v. General Electric Co. PLC* and *Consolidated Gold Fields PLC v. Minorco, S.A.* results in an approach, from a U.S. perspective, that such an exclusion is effective except in cases dealing with allegations of breach of the antifraud rules. Thus, the antifraud rules are of a particularly extraterritorial nature.

From a U.K. and Swedish perspective the exclusion of U.S. shareholders is a deviation from the principle of equal bid. The deviation from that principle has been explained with reference to the shares held by U.S. shareholders as an implied different class of shares, and that the U.S. shareholders are not *per se* excluded but “effectively precluded” from participating in the offer. The fact that those rather vague arguments are accepted can be seen as a product of the self-regulatory systems, where the regulatory authority gives its consent to such acts since it would be impracticable to require the bidder to include U.S. shareholders. The effect is that the principle of equal bid is relative with respect to U.S. shareholders.

The exclusion of U.S. shareholders creates a situation where they are forced to sell their shares into the open market, without the procedural and disclosure requirements normally provided by the home market, in order to realise a portion of the premium of the tender offer. To prevent this situation and increase the inclusion of U.S. shareholders in non-U.S. tender offers the SEC adopted an exemptive rule from the scope of the Williams Act.

The final rule on cross-border tender offers is definitely a step in the right direction with regard to the increased inclusion of U.S. shareholders and their opportunity to equal participation in a tender offer. However, at least as long as foreign jurisdictions, such as the United Kingdom and Sweden, provide a bidder with the option to exclude U.S. shareholders the SEC can not rule out the possibility that in cases of uncertainty, a bidder that considers the applicability of the antifraud rules as negative and that loath the risk of exposure to U.S. litigation will simply exclude U.S. shareholders rather than use the exemptive rule. Therefore, there is a possibility that the exemptive rule will not be as successful as the SEC predicts.

An alternative to the SEC’s exemptive rule as a solution to the problem with competing systems of takeover regulation would be the creation of an intersystem of takeover regulation. An example of such a system is the EC Directive 13. Furthermore, proposals have been made that IOSCO should investigate the conditions for creating an international harmonized system for takeover regulation.

The lack of enthusiasm among the member states in the European Union over Directive 13 and the opposition against the early proposal shows that an intersystem may be a fictional solution. However, the dual jurisdiction as an isolated part of Directive 13 and the view of the solution to the problem with dual jurisdiction proposed to IOSCO resembles the choice of law provisions in the City Code and NBK/OE. Conclusively, it may be held that it is the material differences and minimal harmonization standards that are the main obstacles for an intersystem, not the choice of law provision.

Evidently, that view supports another alternative solution to the problem with competing systems of takeover regulation. The creation of a choice of law rule holding out the jurisdiction most closely connected with the target company. Either the country of organization, as in the City Code and NBK/OE, or the country in which the target is residing, as in Directive 13 and the proposal to IOSCO, would be the proper system of takeover regulation governing the tender offer. That choice of law rule should be combined with a requirement that the offering documents should be translated into English and distributed to “foreign” shareholders.

The latter alternative solution is attractive since investors who make the conscious decision to invest in securities of a company which is not incorporated in their own jurisdiction have consciously made a choice that the rules by which the company and their relationship with it will be governed will be those of the foreign jurisdiction and not their own. Furthermore, this coincides with my response to the statement that the particular protection of U.S. shareholders under the antifraud rules provides a necessary basic level of protection.

The choice to deal in foreign securities involves a moment of risk. U.S. investors who make the business decision to invest in a foreign company would not object to have the same advantages as other shareholders in that company, if they are provided with the same measures of protection, that is the target company’s home takeover regulation. Therefore, I am not convinced that the exclusion of the antifraud rules from the scope of the exemptive rule was necessary. The presence of them may discourage bidders from structuring the tender offer under the exemptive rule, and instead exclude the shareholders in the United States. In that case, the SEC is back at square one.

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