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## SOME SUGGESTIONS FROM A COMPARISON OF BRITISH AND AMERICAN TENDER OFFER REGULATION\*

*Douglas M. Branson*†

With the economic slowdown and the bear market of 1969-70, the time is right to reflect anew on the regulation of a recent phenomenon of the corporate acquisition field—the tender offer.<sup>1</sup> As the stock market recovers, acquisition-minded firms will covetously inspect the underpriced issues that the bear market has left in its wake. Many of the acquisitions that will occur will utilize the tender offer as a means of taking advantage of low share prices. Of course, the regulation of tender offers has been discussed in the periodicals at length.<sup>2</sup> And

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<sup>1</sup> Tender offer includes both cash and exchange offers. In the cash offer the aggressor corporation offers cash to the target company's shareholders, generally for voting shares of the target. In the exchange offer the aggressor offers its common stock, debt, convertible debt, warrants, or some combination thereof for shares in the target. There may also be a hybrid—cash and securities for target shares. Whatever the offering, the common denominator of all tender offers is that the aggressor seeks to acquire an interest in the target corporation by dealing directly with target company shareholders rather than by dealing solely with target company management.

From July 1968 to February 1969, the Securities and Exchange Commission received registration statements covering 104 exchange offers. During the same period, only 54 cash offers were filed at the Commission. The Chairman of the SEC attributed the shift to exchange offers to tight money. *Hearings on Problems in the Securities Industry Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 91st Cong., 1st Sess. 13-14 (1969). Further reduction in the total number of tender offers, stock or cash, is taking place: "It is harder to obtain cash in the tight money market. Common-stock offers become less attractive as price-earnings ratios go down." Cohen, *Takeover Bids*, 26 FINANCIAL ANALYSTS J. 26, 27 (1970).

<sup>2</sup> E.g., Bromberg, *The Securities Law of Tender Offers*, 15 N.Y.L.F. 459 (1969); Cohen,

scholars who deny the necessity of any securities regulation based on disclosure aside,<sup>3</sup> there remain critics of the regulatory system.<sup>4</sup> These critics have pondered shortcomings in present tender offer regulation, in Securities and Exchange Commission (SEC) practices in the tender offer area, and in the principles of legislative and administrative regulation underlying the entire securities field.<sup>5</sup> One approach, however, has not been thoroughly explored—the comparative view.<sup>6</sup> For purposes of comparison, the British regulatory system is the most interesting and the most helpful.

In the English-speaking world, many systems of securities regulation follow the American approach to tender offers. The Canadian provinces, for example, have systems based on a statutory framework and administered by a governmental agency. Disclosure and filing, as in our system, are keynotes of Canadian schemes.<sup>7</sup> Because these other systems greatly resemble the American system, not much is to be gained by comparison. The British system offers similarities for use as a starting point, but in the tender offer area there is much divergence between the British and American systems. American authorities have cited the British experience in the tender offer area as a model of a well-established regulatory scheme.<sup>8</sup> Nothing could be further from the

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*Tender Offers and Takeover Bids*, 23 BUS. LAW. 611 (1968); Schmults & Kelly, *Disclosure in Connection with Cash Takeover Bids: The New Regulations*, 24 BUS. LAW. 19 (1968); Comment, *Regulation of Contested Cash Tender Offers*, 46 TEXAS L. REV. 915 (1968); Comment, *Senate Bill 510 and the Cash Tender Offer*, 14 WAYNE L. REV. 568 (1968).

<sup>3</sup> Manne, *Cash Tender Offers for Shares: A Reply to Chairman Cohen*, 1967 DUKE L.J. 231; Swanson, *S. 510 and the Regulation of Cash Tender Offers: Distinguishing St. George from the Dragon*, 5 HARV. J. LEGIS. 431 (1968).

<sup>4</sup> Some criticism centers around technical faults in the present legislation. See 6 L. LOSS, *SECURITIES REGULATION* 3665-69 (2d ed. Supp. 1969). Other articles probe the entire implementation of the disclosure philosophy in present tender offer regulation. See, e.g., Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269 (1969); Krasik, *Tender Offers: The Target Company's Duty of Disclosure*, 25 BUS. LAW. 455 (1969). And one ably argues against the tender offer's social and economic utility. Kelly, *Some Observations on Contested Take-Over Bids*, 15 N.Y.L.F. 618 (1969).

<sup>5</sup> SEC, *REPORT ON DISCLOSURE TO INVESTORS: REAPPRAISAL OF ADMINISTRATIVE POLICIES UNDER THE '33 AND '34 ACTS* (1969) [hereinafter cited as *WHEAT REPORT*]. The *Wheat Report* is a response to and one of the best summaries of that criticism. See also Manne, *Insider Trading and the Administrative Process*, 35 GEO. WASH. L. REV. 473 (1967); Schneider, *Acquisition Under the Federal Securities Acts—A Program for Reform*, 116 U. PA. L. REV. 1323 (1968).

<sup>6</sup> Some tangential comparative observations are found in Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317, 323-28 (1967). See also 6 L. LOSS, *supra* note 4, at 3649-54.

<sup>7</sup> See Falby, *Takeover Bids and the Securities Act of 1966*, 5 OSGOOD HALL L.J. 227 (1967).

<sup>8</sup> Professor Loss has commented that the takeover area "is one important area of securities regulation where the British until recently were in advance of the Americans." 6 L. LOSS, *supra* note 4, at 3649. See also Fleischer & Mundheim, *supra* note 6.

truth. The British have no direct regulation of tender offers—they have self-regulation—and British self-regulation, which has undergone extensive change since its institution in 1959, functioned ineffectively until 1969.<sup>9</sup>

British experience with the tender offer is extensive,<sup>10</sup> covering the last twenty years,<sup>11</sup> with regulatory efforts spanning a twelve-year period. During those years the British financial community, as opposed to Parliament or a governmental agency, has experimented with and developed a pervasive body of rules and principles. Those principles suggest a new structure for tender offer regulation which could greatly improve the American regulatory system.<sup>12</sup>

The following comparative examination will survey American and British tender offer regulation and will illustrate British regulation by discussion of one takeover bid, the Leasco Data Processing-Pergamon Press affair, the first instance in which the British regulatory system operated at full capacity in an efficient manner and in its present form.

## I

### TERMINOLOGY AND JURISDICTION

At the outset, the terms tender offer and takeover bid should be defined. Although the former is of American and the latter of British vernacular, the two terms are normally used interchangeably. The tender offer or takeover bid must be viewed in contradistinction to other forms of corporate combination. In consolidation or merger, the negotiations normally take place between managements. Following

<sup>9</sup> See text accompanying notes 145-77 *infra*.

<sup>10</sup> Great Britain does not have, however, a system of statutory merger:

We have no exact counterpart of the method of merging of corporations which I believe is common in the United States. I understand that it is possible, for example, for Corporation A to be quite simply merged with Corporation B, all the assets and liabilities of both parties to the merger becoming vested in Corporation B as the Surviving Corporation on the effective date of the merger. There is no similar statutory machinery in England. To achieve a similar result Company B (the surviving company) would acquire all the assets and liabilities of Company A in return for cash or an allotment of shares in Company B. When the acquisition is completed Company A is left with either a sum in cash or a number of shares in Company B; Company A is then liquidated and the cash or shares are distributed in the liquidation.

Peppiatt, *British and American Business Law: A Brief Comparison*, 16 BUS. LAW. 54, 59 (1960).

<sup>11</sup> See Penrose, *Some Aspects of the Development, Criticism and Control of the Take-Over Bid, Since 1945*, 9 JURID. REV. (n.s.) 128 (1964).

<sup>12</sup> Exposition of the British system may also aid practitioners faced with a client desirous of acquiring a British concern. On roughly 10 occasions in one sample year, American concerns moved to acquire British firms by means of tender offers. CITY PANEL ON TAKE-OVERS AND MERGERS, REPORT ON THE YEAR ENDED 31ST MARCH 1969, at 9 (1969).

management agreement, the shareholders vote on the combination and stock is issued either from the newly-formed corporation to the old corporate shells (in consolidation), or from the surviving corporation to the shareholders of the disappearing corporation (in merger).<sup>13</sup> Purchase of assets involves a transfer of stock or cash by the acquiring corporation to the acquired corporation in exchange for the assets and liabilities of that corporation. The acquired corporation normally liquidates, distributing the cash or stock that it has received to its shareholders.<sup>14</sup> There again, as in merger, negotiations are between managements, and shareholders will vote on the transaction. The feature distinguishing tender offer from these other forms of reorganization is that the management of the acquiring corporation deals directly with shareholders of the company in which the acquirer seeks an interest.<sup>15</sup>

A further distinction can be made between the cash tender offer and the stock tender offer. In the stock offer, also called exchange offer, the acquirer transfers stock directly to target company shareholders in exchange for shares of the target.<sup>16</sup> In a cash offer, the acquirer also deals directly with target company shareholders, but the medium is cash. In both types of tender offer, the acquirer may seek only investment in a small number of target shares, working control through a larger portion but less than half the target's outstanding shares, numerical control, more than eighty percent of the voting shares, or complete ownership.<sup>17</sup>

While these general notions of what a tender offer is or is not are the same in both the United States and Great Britain, the jurisdictional elements of the two regulatory systems vary slightly. Both the British City Code on Take-Overs and Mergers and the British Licensed Dealers (Conduct of Business) Rules<sup>18</sup> define takeover

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<sup>13</sup> This is the "A" reorganization under American tax law. INT. REV. CODE OF 1954, § 368(a)(1)(A).

<sup>14</sup> If the acquisition is solely for voting stock, there may be a "C" reorganization. *Id.* § 368(a)(1)(C).

<sup>15</sup> The tender offer involves a vital regulatory difference since the target company management does not necessarily deal with the acquirer nor do shareholders vote on the matter. In tender offers, shareholders may not receive the benefit of management's advice and bargaining power or the benefit of proxy regulations designed to aid shareholders in voting on merger or purchase of assets.

<sup>16</sup> If the 80% control requirement is met, there may be a "B" reorganization. INT. REV. CODE OF 1954, § 368(a)(1)(B). The shares offered in exchange must be registered under the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1964).

<sup>17</sup> The American aggressor will often seek 80% of the offeree's shares so as to permit filing of consolidated income tax returns, the elimination of the intercorporate tax on dividends, and to accomplish a tax-free exchange. INT. REV. CODE OF 1954, §§ 243(b), 354.

<sup>18</sup> The two documents form the heart of British tender offer regulation.

bid. According to the Licensed Dealers Rules, a takeover bid is "an offer to acquire securities of a corporation made to more than one holder of those securities calculated to result in any person acquiring, or becoming entitled to acquire, control of that corporation . . ."<sup>19</sup> The City Code defines "offer" as "take-over and merger transactions howsoever effected,"<sup>20</sup> and by describing its jurisdiction over offers in terms of takeovers, the City Code, where appropriate, incorporates the standard definition of that term as found in the Licensed Dealers Rules. The British, though, use the term merger in a sense different from the American usage, for there is no British equivalent to our statutory merger;<sup>21</sup> rather, British merger is the equivalent of the American purchase of assets.

The British regulatory system applies with few differences to exchange offers and cash offers alike. The principal difference is that, over and above complying with the takeover regulations, a company making an exchange offer may have to include a few more disclosures in the takeover circular or may have to publish a prospectus for the securities offered target shareholders.<sup>22</sup> Thus, British takeover regulation covers exchange offers, cash tender offers, and purchase of assets—all forms of reorganization under British law—and in both the cash and stock offer categories, the British system primarily regulates offers seeking control.<sup>23</sup>

In light of recent amendments to the Securities Exchange Act of 1934, the American securities system no longer treats exchange offers and cash offers as dissimilar forms of reorganization.<sup>24</sup> Both exchange and cash offerors must comply with sections 13(d) and 14(d) of the 1934 Act;<sup>25</sup> in addition, an exchange offeror ordinarily must meet the registration and prospectus requirements of the Securities Act of 1933.<sup>26</sup>

As a result of this basic similarity, control becomes a basic element

<sup>19</sup> Licensed Dealers (Conduct of Business) Rules, rule 18(1), [1960] 1 STAT. INSTR. 391 (No. 1216).

<sup>20</sup> ISSUING HOUSES ASS'N, CITY CODE ON TAKE-OVERS AND MERGERS 5 (rev. ed. 1969) (Definitions).

<sup>21</sup> Note 10 *supra*.

<sup>22</sup> See text accompanying notes 204-07 *infra*.

<sup>23</sup> British self-regulation affects purchase of assets. Regulation is principally by the stock exchanges and not by the Panel on Take-Overs and Mergers.

<sup>24</sup> Pub. L. No. 91-567, § 4 (Dec. 22, 1970), amending Securities Exchange Act of 1934, § 14(d)(8), 15 U.S.C. § 78n(d)(8) (Supp. V, 1970). This new provision deletes the former § 14(d)(8)(A), thus making the American cash tender offer or Williams Bill rules applicable to stock offers, and extending the protection afforded by these rules to such offers. S. REP. NO. 1125, 91st Cong., 2d Sess. 3-4 (1970).

<sup>25</sup> 15 U.S.C. §§ 78m(d), 78n(d) (Supp. V, 1970).

<sup>26</sup> *Id.* §§ 77a-77aa (1964).

of regulatory jurisdiction over both forms of tender offer. Although legislation relating to tender offers fails to define that term,<sup>27</sup> its primary purpose is to regulate offers involving control. American offerors must file certain disclosures with the SEC before implementing any bid to another issuer's shareholders which has the purpose of acquiring five percent or more of a class of that issuer's equity securities;<sup>28</sup> the Commission has the power to exempt from the filing regulations tender offers "not having the effect of . . . changing or influencing the control of the issuer . . ."<sup>29</sup>

When the intention is to pay for shares tendered with securities, considerations other than control are also involved. If the payment of shares for shares will constitute a public offering of securities, the offeror must comply with the registration and prospectus requirements of the 1933 Act as to the shares offered. The most important exemption from this requirement is the so-called private placement. Under section 4(2), the offeror may avoid registration and prospectus rules by offering securities to a few sophisticated investors who together have a controlling block of target company shares.<sup>30</sup>

American tender offer regulation has a jurisdictional element based on the acquisition target's size or status. In order for the federal tender offer regulations to apply, the securities for which an offer is made must be equity securities of a registered company. Under the Securities Exchange Act, section 12(b) companies are those having securities registered on a national exchange; section 12(g) companies are those having assets exceeding one million dollars in value and a

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<sup>27</sup> Curiously, however, Congress made no attempt to define the critical phrase "tender offer for, or a request or invitation for tenders," as used in section 14(d). While this language clearly covers the straightforward offer to purchase, it is unclear, for example, whether section 14(d) covers unpublicized offers to large holders through the use of the mails, or private orders to brokers to assemble a block of the stock through the exchange. Presumptively, at least, such offers or orders are covered, and the SEC has so stated.

Hamilton, *supra* note 4, at 278 (footnote omitted). The author notes that SEC Securities Exchange Act Release No. 8392 (Aug. 30, 1968) "states that a special bid to purchase equity securities through the facilities of a national securities exchange ordinarily constitutes a tender offer under section 14(d)." Hamilton, *supra* note 4, at 278 n.42.

<sup>28</sup> Notes 44-46 and accompanying text *infra*.

<sup>29</sup> 15 U.S.C. §§ 78m(d)(5)(D), 78m(d)(8)(D) (Supp. V, 1970), *as amended*, Pub. L. No. 91-567, §§ 1(b), 4 (Dec. 22, 1970). As a result of the recent amendments, these provisions have been redesignated §§ 13(d)(4)(D) and 14(d)(8)(C) of the Act.

<sup>30</sup> *Id.* § 77d(2) (1964).

The British regulatory system does not concern itself with any public-private distinction. Control is the key element in both cash and stock bids. British regulation specifically refers to what would be a private offering in the United States, making the regulatory scheme a priori applicable to bids to a few stockholders. See text accompanying note 247 *infra*.

class of equity security held by five hundred or more persons.<sup>31</sup> British company law also has classifications of companies according to size which figure in determining the applicability of takeover regulation. A British company is a private one if the articles of association restrict the rights to transfer shares, limit the number of members to fifty, and prohibit public offerings of the company's shares or debentures; if the articles of association do not so provide, the company is a public one.<sup>32</sup> The British takeover regulations apply to all takeovers involving a public company either as offeror or offeree, whether or not the company has its shares quoted; the system excepts only an offer in which a public company takes over a private company, likely in most cases to be an insignificant acquisition.<sup>33</sup>

## II

### AMERICAN REGULATION

#### A. Tender Offers and the 1934 Act

Although recent legislation has made the tender offer provisions of the Securities Exchange Act applicable to both cash and exchange offers,<sup>34</sup> these provisions were developed as a reaction to the increased use of cash tender offers in making corporate acquisitions.

The cash tender offer was virtually unknown in the United States until the 1960's. Once discovered, it was found to have numerous advantages over the proxy fight or stock tender offer.<sup>35</sup> Soon, instead of

<sup>31</sup> 15 U.S.C. §§ 78l(b), (g) (1964).

<sup>32</sup> Companies Act of 1948, 11 & 12 Geo. 6, c. 38, § 28(1). The consequences that flow from the British private-public distinction are akin to those flowing from the American states' classification of companies as close corporations. See R. PENNINGTON, *COMPANY LAW* 613-15 (2d ed. 1967); cf. DEL. CODE ANN. tit. 8, §§ 341-56 (Supp. 1968).

<sup>33</sup> City Panel on Take-Overs and Mergers, Practice Note No. 1: Private Companies and Unquoted Public Companies (Aug. 1, 1969). The note sets out the wide coverage of the City Code. Even takeovers by a public company of a private company are governed by the Code if the acquisition is not insignificant:

[A]n exception [to the disclaimer of jurisdiction over public companies' acquisitions of private firms] would be where, for instance, the relative sizes of the two companies [*i.e.*, target which although private is larger than the offeror] and other circumstances are such that the transaction effectively constitutes a reverse take-over and where a change in effective control of the offeror would result.

*Id.* at 2.

<sup>34</sup> Note 24 *supra*.

<sup>35</sup> These advantages were "secrecy, speed, simplicity and savings." Sowards & Mofsky, *Corporate Take-Over Bids: Gap in Federal Securities Regulation*, 41 ST. JOHN'S L. REV. 499, 501 (1967). The authors intimate that many of the cash tender offer's advantages arose from absence of legislation. For a listing of the advantages a cash tender offer has over a proxy fight, see 6 L. Loss, *supra* note 4, at 3655-57.



using the cash tender offer only after failure in direct negotiations with management, acquirers went directly to shareholders with a cash offer because they desired the simplicity of the cash route or had opted for a regulation-free, speedy acquisition. At times, perhaps merely because of an offeror corporation's superior bargaining power, direct dealing with shareholders led to oppressive incidents.

Movement for cash tender offer regulation began in 1966, when Senator Harrison Williams, Chairman of the Securities Subcommittee of the Senate Committee on Banking and Currency, introduced a bill designed to discipline corporations making tender offers.<sup>36</sup> In January 1967, Senator Williams introduced a second bill, one substantially the same as the present legislation.<sup>37</sup> In contrast to earlier statements condemning corporate raiders, Senator Williams's remarks accompanying his second bill indicated a supposedly new-found concern for balancing the scales between offeror and target company, noted the regulatory disparity between cash tenders on the one hand, and stock offers and proxy fights on the other, and mentioned professional opinion, including that of representatives of the SEC and the New York Stock Exchange, supporting cash tender offer legislation.<sup>38</sup> The Senate Committee unanimously reported the Williams Bill, interjecting only one change. The New York Stock Exchange had persuaded the Committee to delete a provision for a five-day waiting period after the offeror had filed with the SEC, arguing that such a period would give unfair advantage to target management in resisting offers.<sup>39</sup> With assurance that the securities industry had voiced approval, the Senate passed the Williams Bill.<sup>40</sup> A year later, after blind acceptance based upon the financial community's concurrence, the House passed the measure.<sup>41</sup>

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<sup>36</sup> S. 2731, 89th Cong., 2d Sess. (1966). One comment on that bill asserted:

Federal legislation was originally proposed with a view toward protecting incumbent management from what were deemed to be reckless corporate raids. . . . The purpose of this bill is illustrated by the caption in the Congressional Record: "Fuller Disclosure by and Protection Against so-called Corporate Raiders."

Hamilton, *supra* note 4, at 275 (footnotes omitted).

<sup>37</sup> S. 510, 90th Cong., 1st Sess. (1967); 113 CONG. REC. 841 (1967).

<sup>38</sup> 113 CONG. REC. 854-55 (1967); see Sowards & Mofsky, *supra* note 35, at 500, 523.

<sup>39</sup> S. REP. No. 550, 90th Cong., 1st Sess. 4 (1967); *Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 71-76 (1967); 113 CONG. REC. 24662-64 (1967).

<sup>40</sup> Senator Williams said at the time: "Representatives of the New York Stock Exchange, the American Stock Exchange, the National Association of Securities Dealers, the Investment Bankers Association, and Chairman Cohen of the Securities and Exchange Commission . . . have endorsed the legislation." 113 CONG. REC. 24664 (1967).

<sup>41</sup> H.R. REP. No. 1711, 90th Cong., 2d Sess. (1968); *Hearings on S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign*

The legislative history reveals little about the background of the Williams Bill, except that the proposal was prompted by the sudden rise in tender offers in the mid-1960's.<sup>42</sup> The final product reflects the basic infirmity that accompanied its birth—it was a stopgap measure calculated to foil aggressive, acquisition-minded firms. The increased prevalence of stock-for-stock exchange offers prompted Congress, in 1970, to make the cash tender offer regulations applicable to exchange offers as well,<sup>43</sup> but the essential weakness of the regulatory approach has yet to be remedied.

### 1. *The Five Percent Rule*

American legislators and the SEC have created a comprehensive system of tender offer regulation<sup>44</sup> which separates prospective offerors into two groups. One group must file a certain information package upon acquiring five percent of any class of a section 12 corporation's equity securities, whether by means of a tender offer or not.<sup>45</sup> The other group files a similar package when making a tender offer, if by that offer the offeror intends to obtain more than five percent of a class of a section 12 company's equity securities.<sup>46</sup> Filing is made with the SEC, the principal executive offices of the issuer of the shares sought, and with each exchange on which such shares are traded. The first category, five percent holders, must file within ten days after passing the five percent mark. The other group must file at or before the time their offer is communicated to target company shareholders.

Even these preliminary matters have given rise to litigation in the short time the Williams Bill has been law; this litigation relates to an

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*Commerce*, 90th Cong., 2d Sess. (1968). Representative Moss alluded again to the virtually unanimous support for the bill:

I think the appearance before the committee of the Securities Exchange Commission [*sic*], the Federal Reserve Board, the New York Stock Exchange, the American Bankers' Association, the American Life Convention, and the Life Insurance Association of America, and numerous other leading financial groups would indicate a strong backing for this type of legislation.

114 CONG. REC. 21483 (1968). The bill swept through without significant opposition and became law on July 29, 1968. *Id.* at 25005.

<sup>42</sup> See text accompanying notes 35-36 *supra*.

<sup>43</sup> H.R. REP. No. 1655, 91st Cong., 2d Sess. 4, 6 (1970).

<sup>44</sup> Securities Exchange Act of 1934, §§ 13(d)-(e), 14(d)-(f), 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (Supp. V, 1970), *as amended*, Pub. L. No. 91-567, §§ 1-5 (Dec. 22, 1970); SEC Regulation 13D, 17 C.F.R. §§ 240.13d-1 to d-101 (1970); SEC Regulation 14D, *id.* §§ 240.14d-1 to d-101.

For a detailed description of the American regulation, see Bromberg, *supra* note 2.

<sup>45</sup> Pub. L. No. 91-567, § 1(a)(2) (Dec. 22, 1970), *amending* Securities Exchange Act of 1934, § 13(d)(1), 15 U.S.C. § 78m(d)(1) (Supp. V, 1970).

<sup>46</sup> Pub. L. No. 91-567, § 3(1) (Dec. 22, 1970), *amending* Securities Exchange Act of 1934, § 14(d)(1), 15 U.S.C. § 78n(d)(1) (Supp. V, 1970).

earlier ten percent ownership figure, recently reduced to five percent. In *Bath Industries, Inc. v. Blot*,<sup>47</sup> a group of Bath shareholders, including a mutual fund, who in the aggregate held more than ten percent of Bath's common stock, decided to oust management through a proxy fight. A temporary restraining order against further pursuit of the plan was upheld in a hearing on a preliminary injunction, the court stating that section 13(d) of the 1934 Act required filing within ten days after a ten percent group decided to act in concert for any purpose.<sup>48</sup> The Seventh Circuit for the most part approved the trial court's view:

[I]t is our conclusion that the Act should be interpreted to require compliance with its disclosure provisions when, but only when, any group of stockholders owning more than 10% of the outstanding shares of the corporation agree to act in concert to acquire additional shares.

This construction focuses on the decision on the part of a group owning more than 10% of a corporation to acquire more shares. Thus it honors the repeated expressions of legislative intent to draft a statute to protect investors rather than to protect current management. It does not proscribe informal discussion among existing shareholders concerning the performance of current management. Nor does it proscribe legitimate cooperation among existing shareholders . . . to take over control of management, *absent* an intention to acquire additional shares for the furtherance of such purpose.<sup>49</sup>

Thus, even when American shareholders combine for purposes other than making a tender offer, if their collective holding exceeds the new five percent rule and further share acquisitions are contemplated, they are required to file under section 13.

The practice of warehousing involves an offeror who acquires target company stock in the market before making the offer. Such purchases will be at the lower, pre-bid price. The securities are held in nominee or street names to avoid tipping off the unsuspecting target. Manifestly, however, the offeror will not want to exceed the now applicable five percent mark,<sup>50</sup> for then section 13(d) would re-

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<sup>47</sup> 305 F. Supp. 526 (E.D. Wis. 1969), *aff'd*, 427 F.2d 97 (7th Cir. 1970).

<sup>48</sup> *Id.* at 538.

<sup>49</sup> *Bath Indus., Inc. v. Blot*, 427 F.2d 97, 109-10 (7th Cir. 1970) (emphasis in original). The court also concluded that Williams Bill filing did not pose an undue burden for a group also complying with federal proxy regulations. *Id.* at 110.

<sup>50</sup> Senator Williams and the SEC advocated the change to a five percent ownership requirement primarily because of warehousing; they sensed something sinister in the pre-offer practice of purchasing target company shares just short of the 10% level. H.R. REP. NO. 1655, *supra* note 43, at 3-5. The new requirement seems but an extension of the original infirmity of the Williams Bill—the legislation was designed as a measure to place strictures on aggressor corporations, rather than as a measure to aid investors or create procedural devices making tender offers fairer to all parties involved.

quire filing, and filing would foreclose a surprise bid. In *Penn Mart Realty Co. v. Becker*,<sup>51</sup> Glen Alden Corporation had warehoused target company stock in contemplation of a future tender offer. Glen Alden scrupulously avoided the then applicable ten percent rule<sup>52</sup> by acquiring the shares in the market and then secretly selling those shares to mutual funds sympathetic to Glen Alden. In a rule 10b-5<sup>53</sup> derivative action against Glen Alden directors for nondisclosure, the court dismissed the case:

In other words, plaintiff claims that the Glen Alden board bargained with IDS [one of the mutual funds] and obtained not only the \$63 per share price for the stock, but also a promise to aid in the tender offer, a service to Glen Alden the value of which is presently unknown. Whatever the value of the package deal alleged by plaintiff, it cannot allege that the board did not at all times act in the interests of the corporation (and hence in the interests of all shareholders) in this transaction. The directors may have bargained poorly; they may even have wasted Glen Alden's assets. But these allegations do not disclose deception of the type prohibited by Rule 10b-5.<sup>54</sup>

The *Bath* holding, however, had it been law at the time, would have foiled Glen Alden's warehousing in preparation for a surprise bid. Since Glen Alden and the mutual funds were not dealing at arm's length, once their combined holding exceeded ten percent, they would have been required to file, under section 13(d) and the *Bath* case, thereby disclosing their holding in the target company. The Seventh Circuit in *Bath* specifically rejected any contention that a warehousing mutual fund that held shares in nominee names would not be counted for Williams Bill purposes:

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<sup>51</sup> 300 F. Supp. 731 (S.D.N.Y. 1969).

<sup>52</sup> At that time, before the Williams Bill's passage, this limit was imposed only by the filing requirements of § 16(a) of the 1934 Act, 15 U.S.C. § 78p(a) (1964).

<sup>53</sup> 17 C.F.R. § 240.10b-5 (1970).

<sup>54</sup> 300 F. Supp. at 736. A practice similar to that in *Penn Mart Realty*, but by a third party sympathetic to the target, has been held to violate 10b-5. In *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970), Crane made an exchange offer to Air Brake shareholders. American Standard Corporation, which planned to merge with Air Brake should Crane be warded off and was Air Brake's preferred suitor, began purchasing Air Brake stock in the market; this drove Air Brake share prices towards the Crane offer price. To avoid filing and disclosure under § 16(a) of the 1934 Act, 15 U.S.C. § 78p(a) (1964), American Standard secretly warehoused the Air Brake shares with a friendly mutual fund. American Standard's and Air Brake's failure to disclose was held violative of 10b-5. Crane had standing to sue even though deception did not involve a purchase or sale by Crane, as required by orthodox 10b-5 law. See note 87 *infra*.

Since *Crane* holds that defensive purchases and secret sales to avoid disclosure made by a friend of the target violate 10b-5, a fortiori such a defensive warehousing arrangement must be disclosed under the tender offer regulations.

[Defendants] contend that the district court erred in construing the term "beneficial owner" in the Act to include any person who has the right to determine how shares are to be voted, whether or not such person has any other incidents of ownership.

....

In the context of a contest for control, both the insurgents and management are interested in the control of votes. If a mutual fund, bank, trustee, broker or anyone else can guarantee a block of votes, the legal title to such shares would appear irrelevant.<sup>55</sup>

The result is that the basic test for Williams Bill percentages is a pragmatic one: if the group under consideration can corral five percent voting power, the group must file.

## 2. *Affirmative Disclosures*

The information package to be filed under sections 13(d)(1) and 14(d)(1) upon reaching the five percent level or upon making a tender offer includes background and identity of the prospective purchaser, source and amount of funds with details of any borrowing transactions, any plans for major changes in the offeree company's business or structure should control be achieved, present holdings of offeree shares and information as to arrangements or rights for further share acquisitions, and other information that the Commission may by regulation prescribe as "necessary or appropriate in the public interest or for the protection of investors."<sup>56</sup> Amendments, if needed, are filed,<sup>57</sup> and subsequent requests or advertisements are also filed before release.<sup>58</sup>

<sup>55</sup> 427 F.2d at 112 (emphasis in original).

Another effect of warehousing, possibly leading to violation of the securities law, is that

[i]n preparing for [an offer] . . . the aggressor ordinarily makes substantial purchases of the target corporation's stock. The subsequent tender offer will cause an increase in the market price of the target stock . . . . Should the cash tender offer fail to bring forth the required number of shares, the target shares previously purchased by the aggressor are often disposed of at a tidy profit.

Hamilton, *supra* note 4, at 300-01. A court has recently held that such a practice can result in *offor* short-swing profit liability to the target. *Emerson Elec. Co. v. Reliance Elec. Co.*, 306 F. Supp. 588 (E.D. Mo. 1969). Section 16(b) of the 1934 Act, 15 U.S.C. § 78p(b) (1964), provides that if sales of securities held for less than six months are made by persons required to file under § 16(a), the profits from such sales inure to the issuer of such securities. Such profits are colloquially called short-swing profits.

<sup>56</sup> 15 U.S.C. §§ 78m(d)(1), 78n(d)(1) (Supp. V, 1970). The Commission has not yet imposed any important additional disclosure requirements. Schedules 13D and 14D, 17 C.F.R. §§ 240.13d-101, 240.14d-101 (1970), set forth only a format. The power to require target company disclosure is found in § 14(d)(4), 15 U.S.C. § 78n(d)(4) (Supp. V, 1970): "Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer . . . shall be made in accordance with such rules . . . as the Commission may prescribe . . . ."

<sup>57</sup> 15 U.S.C. § 78m(d)(2) (Supp. V, 1970).

<sup>58</sup> *Id.* § 78n(d)(1).

The intended benefit of each disclosure item, to both target shareholders and the offeree company, is readily apparent. Absence of information about the identity and plans of offerors has long plagued American stockholders asked to tender shares.<sup>59</sup> With such information available, a shareholder may decide to retain shares, hoping that what he evaluates as better management, the offeror, will win control of the target company. He may also decide to sell in order to avoid bad management by either the incumbent or prospective board, or he may decide to retain his shares in order to support present management. Without even the identity of the offeror at hand, a shareholder cannot gather information on the competence of the offeror in order to evaluate these alternatives. Statements as to present holdings of offeree shares and arrangements for other share acquisitions aid the target shareholder in evaluating the alternatives: he can see whether the offeror is near success already or has only a toe hold on the offeree and thus needs great success with the tender offer to achieve control.

The inability of shareholders to determine whether the offeror really has resources with which to buy tendered shares has led to insistence upon disclosure of sources of funds. Knowledge that the offeror has borrowed heavily to be able to pay for tendered shares may indicate that once control of the offeree is achieved the burden of servicing the debt may hurt the offeror's performance or that the offeror may sell the target company's assets to cover the acquisition's costs.

Although concern for uninformed shareholders contemplating alternative responses may have led to the requirement that offerors state their intentions regarding the target company, an equally important factor was the fear of offerors as prospective corporate raiders who plan to liquidate, loot, or, by some other aggressive scheme, profit from target company assets.<sup>60</sup> Whatever the cause of concern, the offeror's statement of plans for the target company has produced difficulties for both offerors and the judiciary. In *Electronic Specialty Co. v. International Controls Corp.*,<sup>61</sup> the offer provided that upon completion of the offer, the offeror would "give consideration to a merger between itself or a subsidiary and [the target]."<sup>62</sup> The Second Circuit held that the statement seemed "accurate" and that, in relation to the offeror's failure to state the share-for-share basis in such a merger, "[i]t would be

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<sup>59</sup> See Senator Kuchel's remarks on a Swiss bank's blind tender for Columbia Motion Picture Company shares. 113 CONG. REC. 858 (1967); Wall St. J., April 5, 1967, at 2, col. 2.

<sup>60</sup> See 113 CONG. REC. 854-59 (1967). For tacit judicial disapproval of corporate raiding, see *Cheff v. Mathes*, 41 Del. Ch. 494, 199 A.2d 548 (Sup. Ct. 1964).

<sup>61</sup> 409 F.2d 937 (2d Cir. 1969).

<sup>62</sup> *Id.* at 943.

as serious an infringement of these regulations to overstate the definiteness of the plans as to understate them."<sup>63</sup>

Susquehanna Corporation's difficulty with disclosure of plans was not such a simple matter. Susquehanna had stated that it planned no major changes in the business or structure of target Pan American Sulphur; Pan American was to be Susquehanna's natural resource arm. Pan American, though, had recently sold Mexican properties for \$58 million in cash. Testimony indicated that Susquehanna's president had stated that Pan American was sitting on cash assets and that someone could make better use of them. There was evidence that Susquehanna's president was thinking of merging Pan American into American Smelting and Refining, which was then fighting off a tender offer by Penzoil Corporation. Applying something of a *res ipsa loquitur* approach, an SEC hearing examiner upheld SEC staff contentions that intention to use a target's assets in an acquisition program must be disclosed even though the offeror contemplates no specific acquisition, arguing that plans need not "have reached the stage of possibly coming to fruition" to require disclosure.<sup>64</sup> Pan American filed suit to enjoin Susquehanna. The district court shared the SEC's views and granted a preliminary injunction;<sup>65</sup> the Fifth Circuit reversed,<sup>66</sup> holding that since the plan for merger of Pan American and American Smelting never got off the ground, Susquehanna's filing would have been misleading had Susquehanna mentioned a merger:

The person or corporation filing a Schedule 13D statement need not necessarily walk a tortuous path. He must, of course, be precise and forthright in making full and fair disclosure as to all material facts called for by the various items of the schedule. At the same time he must be careful not to delineate extravagantly or to enlarge beyond reasonable bounds.<sup>67</sup>

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<sup>63</sup> *Id.* at 948.

<sup>64</sup> *Susquehanna Corp.*, [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 77,741, at 83,698 (SEC 1969). One commentator shows that many practitioners might run afoul of the SEC staff's view as set forth in *Susquehanna*:

Since a statement of plans must often be formulated from outside the target corporation on the basis of sketchy and often incomplete information, a course of action . . . may prove to be unworkable when full information from the target corporation's records becomes available. Yet a change from stated plans may be an open invitation for litigation. . . .

The practice that has actually developed in other advertisements demonstrates cautious legal draftsmanship, similar to statements in a prospectus. Emphasis throughout . . . is on present intention as contrasted with motive or future intention.

HAMILTON, *supra* note 4, at 283-84.

<sup>65</sup> *Pan Am. Sulphur Co. v. Susquehanna Corp.*, [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,473 (W.D. Tex. 1969), *rev'd*, 423 F.2d 1075 (5th Cir. 1970).

<sup>66</sup> *Susquehanna Corp. v. Pan Am. Sulphur Co.*, 423 F.2d 1075 (5th Cir. 1970).

<sup>67</sup> *Id.* at 1085.

Quoting *Electronic Specialty* on overstatement in disclosure of plans, the court led up to the conclusion that the district court decision was "clearly erroneous" by saying:

Though the offeror has an obligation fairly to disclose its plans in the event of a takeover, it is not required to make predictions of future behavior, however tentatively phrased, which may cause the offeree or the public investor to rely on them unjustifiably.<sup>68</sup>

The Fifth Circuit's decision is probably bad law. Although the Pan American-American Smelting merger idea never got off the ground, the existence of the idea, together with Pan American's large cash holding, indicate that the offeror had in mind some change in Pan American's structure. The court tacitly admitted as much:

It should be obvious to even the uninitiated that when a corporation takes over control of another corporation having \$60,000,000 in cash assets, some kind of change in the latter's business or corporate structure will likely occur some time in the future.<sup>69</sup>

Nevertheless, the Fifth Circuit's opinion rather than the SEC's idea about disclosure of plans represents the current judicial view in the area.<sup>70</sup> Such a view renders disclosure of plans nearly meaningless. Certainly one primary aim of the legislation was to force disclosure of an offeror's plans to use target assets as a stepping stone to further acquisitions.<sup>71</sup>

Curiously, no affirmative disclosure requirements exist for an American target corporation.<sup>72</sup> Once target management does respond to an offer, however, some requirements do come into play. Solicitations or recommendations concerning acceptance or rejection of the offer must be made in accordance with Commission rules.<sup>73</sup> Currently, the Commission requires that any communication regarding the offer must be filed and must include the following items of background information: identity, affiliation with either the offeror or the offeree, persons employed to make such recommendations, and information on the

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<sup>68</sup> *Id.* at 1085-86.

<sup>69</sup> *Id.* at 1085.

<sup>70</sup> The Commission later expressed non-acquiescence in the Fifth Circuit result, upholding the SEC hearing examiner's finding that Susquehanna's disclosure was inadequate. The Commission stated that neither "*res judicata* nor . . . collateral estoppel is applicable because this Commission was not a party to the injunction suit or in privity with any of the parties" and could not appeal. Since the case was of first impression, the Commission's primary jurisdiction made imperative a decision by the SEC on the merits. SEC Securities Exchange Act Release No. 8933, at 8 (July 17, 1970).

<sup>71</sup> See text accompanying note 60 *supra*.

<sup>72</sup> Disclosures may be required, however, in certain defensive situations. Text accompanying notes 82-83 *infra*.

<sup>73</sup> Securities Exchange Act of 1934, § 14(d)(4), 15 U.S.C. § 78n(d)(4) (Supp. V, 1970).



party's or its associates' transactions in the security within the last sixty days.<sup>74</sup>

### 3. *Terms of the Offer*<sup>75</sup>

Under the seven-sixty-day rule of section 14(d)(5), target company shareholders who have deposited securities pursuant to the offer may withdraw the shares in the seven-day period following publication of definitive copies of the offer and may also withdraw once sixty days have elapsed from the date of publication.<sup>76</sup> This provision aims at offerors who pressure shareholders into making a hurried decision on tender. Under the seven-sixty-day rule, the offering circular must inform the shareholder that if he makes a tender during the first days of the offer he can withdraw before the seven-day deadline. On the other end, the sixty-day limitation serves to prevent offerors from delaying deciding whether to take up tendered shares or to pay for shares once taken up, and also to prevent offerors from leaving a tender offer open interminably.

When making an offer for less than 100 percent of the target's outstanding shares,<sup>77</sup> the offeror frequently announced that shares would be accepted in the order received, thereby forcing shareholders to hurry their decision in fear that they might tender after the offeror had reached the desired percentage. Section 14(d)(6), the pro rata-take-up rule, provides that when the offer is for less than all of an outstanding class of securities and the offer is oversubscribed, those securities received by the offeror in the first ten days of the offer must be taken up pro rata.<sup>78</sup>

<sup>74</sup> 17 C.F.R. §§ 240.14d-4, 240.14d-101 (1970).

<sup>75</sup> While Congress chose to follow the general disclosure philosophy underlying federal regulation of proxy contests and public exchange offers, it recognized that cash tender offers posed certain unique problems. Public Law 90-439 therefore goes considerably beyond disclosure in connection with cash tender offers, and requires certain substantive changes in cash tender offer practice. In a sense these provisions, designed to correct specific evils Congress thought existed in current cash tender offer practices, constitute a code of "fair play" in cash tender offers. While substantive regulation is unusual in federal securities legislation, which in most other areas is based on the philosophy of full disclosure rather than substantive control, such regulation is not unknown.

Hamilton, *supra* note 4, at 274-75 (footnote omitted). By a recent amendment of § 14(d) of the Securities Exchange Act of 1934 these substantive changes have been made applicable to exchange offers as well. Note 24 *supra*.

<sup>76</sup> 15 U.S.C. § 78n(d)(5) (Supp. V, 1970).

<sup>77</sup> Eighty percent is a frequent figure. Note 17 *supra*.

<sup>78</sup> 15 U.S.C. § 78n(d)(6) (Supp. V, 1970). The New York Stock Exchange had a similar requirement before the Williams Bill made such practice mandatory. NEW YORK STOCK EXCHANGE, COMPANY MANUAL, at A-180 (1963) provides: "After a minimum period of 10

Finally, section 14(d)(7), the increase-in-consideration rule, requires the offeror to pay increased consideration to all who have tendered pursuant to the offer if the offeror has increased the offer price.<sup>79</sup> The pro rata-take-up rule also applies after an increase in consideration<sup>80</sup> but the statute does not make it clear whether the seven-sixty-day rule applies in such circumstances.<sup>81</sup>

#### 4. *Defensive Disclosure*

The Williams Bill, section 13(e), gives the SEC power to regulate a common tender offer defense, the purchase by the target company of its own shares.<sup>82</sup> Thus far the Commission has chosen to regulate this area in a limited manner.<sup>83</sup> Essentially, before purchasing its own shares after a tender offer has been made, a target company must disclose to the Commission and to its own shareholders the amount and anticipated source of such purchases, whether they are made over an exchange or directly from individuals, the purpose of such purchases, and the source and amount of funds for such purchases, including identification of parties to any borrowing involved.

#### 5. *Antifraud Rules*

The last of the areas of American tender offer regulation is the general antifraud proscription of section 14(e).<sup>84</sup> Although phrased in language similar to that found in rule 10b-5,<sup>85</sup> the tender offer provi-

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days for the acceptance of shares on a pro rata basis, there is no objection to receiving shares thereafter on a 'first-come first-served' basis."

<sup>79</sup> 15 U.S.C. § 78n(d)(7) (Supp. V, 1970).

<sup>80</sup> *Id.* § 78n(d)(6).

<sup>81</sup> The cloudiness results from the express extension in § 14(d)(6) of the pro rata rule to the 10 days following an increase in consideration. No such express extension appears in the seven-sixty-day rule.

<sup>82</sup> 15 U.S.C. § 78m(e) (Supp. V, 1970), *as amended*, Pub. L. No. 91-567, § 2 (Dec. 22, 1970).

<sup>83</sup> 17 C.F.R. § 240.13e-1 (1970).

<sup>84</sup> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

15 U.S.C. § 78n(e) (Supp. V, 1970). The recent amendments have added: "The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." Pub. L. No. 91-567, § 5 (Dec. 22, 1970), *amending* 15 U.S.C. § 78n(e) (Supp. V, 1970).

<sup>85</sup> It shall be unlawful for any person, directly or indirectly, by the use of

sion applies to "any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation," whereas 10b-5 applies to practices "in connection with the purchase or sale of any security." Notably, the "any tender offer" language means that, unlike the other portions of the Williams Bill, the antifraud proscription is not limited to tenders for section 12 company shares. A more important result lies in section 14(e)'s variation from 10b-5 in jurisdictional language.<sup>86</sup> Cases adjudicated after the passage of section 14(e), but involving causes of action arising before its passage, illustrate that section 14(e) provides broader standing to sue than does 10b-5;<sup>87</sup> specifically, an action for an exchange offeror's

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any means or instrumentality of interstate commerce, or of the mails or of any facility of a national securities exchange,

....

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1970).

From the birth of § 14(e), experts have speculated as to the intended effect of language differences between it and rule 10b-5:

In testifying on the Williams Bill, Professor William Painter stated that he found great confusion and no statutory pattern among the anti-fraud provisions of the [1934] Act. He asked rhetorically whether any policy required different standards under each and asked the committee to clarify whether the coverage of 10b-5 and 14e was to be the same. That suggestion was not followed . . .

Krasik, *supra* note 4, at 456-57 (footnote omitted). The courts have not yet noted any difference other than standing. Note 86 *infra*.

<sup>86</sup> The major difference between 14e and 10b-5 is the standing each grants. Assuming the plaintiff has been deceived, orthodox 10b-5 theory, based on *Birnbaum v. Newport Steel Corp.*, [193 F.2d 461, 464 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952)] requires that he be a purchaser or seller. . . . In *Schoenbaum v. Firstbrook*, [268 F. Supp. 385 (S.D.N.Y. 1967), *aff'd*, 405 F.2d 200, *modified*, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969)] the District Court held that the plaintiff had stated no cause of action as to the tender offer because he had not sold any shares pursuant to the offer.

Krasik, *supra* note 4, at 457 (footnotes omitted). The same author continues:

[T]he Court in *Electronic Specialty* said "The primary difference . . . is that whereas 10b-5 has as its final phrase 'in connection with the purchase or sale of [any] security,' 14e ends 'in connection with any tender offer . . .'" After pointing out possible harms to the [target] corporation and a non-tendering shareholder from a fraudulent or deceptive offer, the court stated that either would have standing under 14e. This conclusion is clearly the correct one.

*Id.* at 458 (footnotes omitted), *quoting* *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 945 n.6 (2d Cir. 1969).

<sup>87</sup> In *Iroquois Indus., Inc. v. Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970), target Syracuse had defeated Iroquois's tender offer by publicizing sham merger talks with a third company. Iroquois, according to the Second Circuit, had no standing to object:

Iroquois is not here complaining that it was misled by the acts of defendants

fraud, nondisclosure, or misleading statements can be grounded on section 14(e) and need not involve the purchase or sale of a security.

In the pre-14(e) period, even with a purchase or sale—say, a sale by a tendering shareholder—an action against the offeror for misleading statements could fail because offerors were not insiders.<sup>88</sup> Thus, the shareholder dilemma resulting from the lack of affirmative disclosure requirements was compounded by judicial refusal to apply 10b-5's general disclosure principles to offerors.<sup>89</sup> The uncertainty regarding

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as to any purchases or sales by it of Syracuse China stock; indeed, its basic complaint is that, because of the acts of defendants, it could not purchase such shares. . . .

....  
That Congress enacted the new Section 14(e) to prohibit fraud by "any person" in respect to tender offers is at least an indication that in tender offer contests such as that at bar there was no standing to sue under Rule 10b-5 by either the tender offeror or by the target corporation.

*Id.* at 967-69. The Second Circuit later adopted the view that standing would exist if the act complained of had prevented the plaintiff from purchasing or selling a security. *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970). Other recent court of appeals decisions also contradict *Iroquois's* view on tender offers and standing under 10b-5. *E.g.*, *Kahan v. Rosentiel*, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970). These cases form a part of the wider erosion of 10b-5's purchase-sale requirement. Whatever *Crane* and *Kahan* portend, the erosion they signal is unnecessary in the tender offer area because of the § 14(e) language, "in connection with any tender offer."

<sup>88</sup> One authority for that principle has been *Mills v. Sarjem Corp.*, 133 F. Supp. 753, 764-65 (D.N.J. 1955):

The cases imposing a duty on the part of a purchaser of shares of stock to disclose his knowledge of future prospects and plans all involve situations where the purchaser holds a fiduciary position and where the knowledge has been obtained by virtue of an "inside" position.

Nor did offerors attain insider status at any time during the course of the bid:

The contention is not justified that on September 7, 1948, when the letters and option offers were mailed to the plaintiffs [offeree company shareholders], any defendants occupied an inside position which would create any fiduciary duty of disclosure on their part. . . .

. . . In short, the alleged scheme . . . was conceived and prosecuted strictly by "outsiders" upon whom there was no duty of disclosure.

*Id.* at 765. See Comment, *The Regulation of Corporate Tender Offers Under Federal Securities Law: A New Challenge for Rule 10b-5*, 33 U. CHI. L. REV. 359, 373 (1966) ("It is not clear that a duty to disclose exists at all, even though rule 10b-5 literally applies to 'any person'"). See also *Connelly v. Balkwill*, 174 F. Supp. 49 (N.D. Ohio 1959), *aff'd per curiam*, 279 F.2d 685 (6th Cir. 1960).

Compare the finding in *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970), that an ally of the offeree was an insider. The point that an offeror does not become an insider during the course of an offer cannot be considered settled. If the offeror does become an insider after it makes the offer or when a certain number of tenders are received, then there are interesting questions about what § 14(e) and 10b-5 would require the offeror to disclose over and above the requirements of the Williams Bill provisions.

<sup>89</sup> See *Kennedy, Tender Moment*, 23 BUS. LAW. 1091, 1105 n.57 (1968). The cases cited therein show how plaintiffs unsuccessfully pressed for judicial recognition that 10b-5

the existence of 10b-5 remedies in tender offers contributed to enactment of section 14(e). Although remedying threshold problems regarding standing to sue and identity of insiders, the new antifraud provision does nothing more than carry 10b-5 principles over into the tender offer area.<sup>90</sup>

### 6. *Other Federal Regulation*

In addition to the Williams Bill, there are other federal regulations pertaining to tender offers. One of these is rule 10b-13,<sup>91</sup> prohibiting market purchases by the offeror. The Commission first proposed a rule that would require an offeror to pay to all tenderers the highest price paid in the market if the offeror had made market purchases of target company stock during the course of a tender offer.<sup>92</sup> Later the Commission revised the proposal into a prohibition of all offeror market purchases of target company shares.<sup>93</sup> The rationale was that payment of a higher market price is unfair to those who have tendered, and payment of a lower than bid price in market purchases is also unfair because of the possibility of fewer tendered shares being taken up, or even rescission of the offer should sufficient shares be obtained in the market.<sup>94</sup>

### B. *Exchange Offers and the 1933 Act*

As noted earlier, exchange offers are also covered by the Securities Act of 1933.<sup>95</sup> The vast body of law developed under the 1933 Act dictates that the shares offered to target shareholders be registered with the Securities and Exchange Commission and that, in conformity with section 5, a prospectus complying with statutory requirements be

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required of offerors disclosure of the very items that the Williams Bill provisions require today.

<sup>90</sup> Because 14e specifically covers a tender offer, the question arises what role, if any, Rule 10b-5 and the body of law developed under it can play in this field. The case of *Electronic Specialty Co. v. International Controls Corp.* indicates that 10b-5 and 14e will be held to work together.

Krasik, *supra* note 4, at 456 (footnote omitted).

<sup>91</sup> 17 C.F.R. § 240.10b-13 (1970).

<sup>92</sup> SEC Securities Exchange Act Release No. 8391 (Aug. 30, 1968).

<sup>93</sup> SEC Securities Exchange Act Release No. 8595 (May 5, 1969).

The prohibition would continue from the earliest announcement of the offer or the commencement of the offer until the time the tendered securities may be accepted or rejected by the offeror under the terms of the offer.

<sup>94</sup> Rule 10b-13 became effective as revised on November 10, 1969. SEC Securities Exchange Act Release No. 8712 (Oct. 8, 1969). For a critical appraisal see Lowenfels, *Rule 10b-13, Rule 10b-6 and Purchases of Target Company Securities During an Exchange Offer*, 69 COLUM. L. REV. 1392 (1969).

<sup>95</sup> 15 U.S.C. §§ 77a-77aa (1964).

delivered to the offeree shareholders.<sup>96</sup> Registration, of course, demands extensive disclosure about the offeror's past, present, and future affairs. Much of that disclosure is included in the prospectus.

When the offeror decides to use the stock method, the Securities Act and the regulations thereunder strictly circumscribe what can or cannot be said. Section 5(c) of the Act states: "It shall be unlawful for any person . . . to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security . . . ."<sup>97</sup> Rule 135, however, allows the offeror to make certain limited disclosures before registration, including:

(2) A notice to any class of security holders . . . that it proposes to offer its securities to them in exchange for other securities presently held by such security holders . . . .

....

(b) Such notice shall be sent not more than 60 days prior to . . . the proposed date of the initial offering of the securities.

(c) The notice shall state that the offering will be made only by means of a prospectus which will be furnished to such security holders . . . and shall contain no more than the following additional information:

(1) The name of the issuer;

(2) The title of the securities proposed to be offered; [and]

....

(4) In the case of an exchange offering, the name of the issuer and the title of the securities to be surrendered in exchange for the securities to be offered, the basis upon which the exchange is proposed to be made and the period during which the exchange may be made . . . .<sup>98</sup>

These items are the outer limits of disclosure allowed before a registration statement is filed. Exceeding the limits is popularly known as "gun-jumping," a major sin in American securities offerings.<sup>99</sup>

In *Chris-Craft Industries, Inc. v. Bangor Punta Corp.*,<sup>100</sup> Bangor Punta announced to target Piper Aircraft shareholders that an exchange offer would be forthcoming. In holding that Bangor Punta had

<sup>96</sup> *Id.* § 77e. Often the investor receives the prospectus after he has purchased the securities or tendered in response to the exchange offer. Section 5(b) of the 1933 Act requires in effect that a statutory prospectus only precede or accompany the confirmation slip sent after the sale has been made or after the security has been delivered. WHEAT REPORT 106-26 deals with this and related problems.

<sup>97</sup> 15 U.S.C. § 77e(c) (1964).

<sup>98</sup> 17 C.F.R. §§ 230.135(a)-(c) (1970).

<sup>99</sup> See, e.g., *SEC v. Arvida Corp.*, 169 F. Supp. 211 (S.D.N.Y. 1958).

<sup>100</sup> 426 F.2d 569 (2d Cir. 1970).

violated section 5 by announcing that the value of the hybrid securities package to be offered was eighty dollars, the Second Circuit stated:

It is enough to point out that . . . the SEC had no way of checking the honesty of the figure, and that the public did not receive the detailed information it would have received from a prospectus issued after a registration statement had been filed.<sup>101</sup>

After filing a registration statement, the offeror can only make a written offer by means of a statutory prospectus.<sup>102</sup> Before the registration's effective date, the offeror uses the section 10(b), or "red herring," prospectus, an abbreviated version of the registration statement. The red herring is an offer to sell, but no sale can be made until the registration statement becomes effective.<sup>103</sup> Only after the effective date, which may be from five weeks to three months or more after filing,<sup>104</sup> does the actual exchange offer begin. The offeror must make available to each offeree shareholder a final prospectus which is customarily delivered with the confirmation of the exchange.

### C. State Regulation

Two American states, Virginia and Ohio, have additional regulation for cash offers, imposing more stringent substantive requirements if the target is a Virginia or an Ohio corporation. Both states follow the federal pattern as to filing and disclosure. The significant departure from the federal pattern in the Virginia statute involves timing.<sup>105</sup> An offeror seeking control of a Virginia company must file its disclosure statement ten days before making the offer, as compared with the federal requirement that the offeror only file simultaneously with the offer's implementation. A second major difference

concerns the period during which the shareholder is bound by the tender offer, and cannot withdraw any of the tendered shares. . . . The Virginia statute allows for the withdrawal of shares at any time during the first twenty-one days of the take-over bid. This twenty-one day period, coupled with the ten day waiting period, would allow incumbent management thirty-one days from the time they were first notified of the impending bid until any of their shareholders would be bound in their tender to the offeror: thirty-one days in which to oppose the insurgents. In addition to the twenty-one day withdrawal provision, the Virginia statute also provides

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<sup>101</sup> *Id.* at 575.

<sup>102</sup> 15 U.S.C. §§ 77e(b)-(c) (1964).

<sup>103</sup> *Id.* §§ 77j(a)-(b).

<sup>104</sup> That is, after the SEC has inspected the registration statement and after the offeror has amended the statement.

<sup>105</sup> VA. CODE ANN. § 13.1-531 (Supp. 1970).

that no take-over bid may last longer than thirty-five days. These two provisions cut the effective duration of a take-over bid to fourteen days, for it is only between the twenty-first and thirty-fifth days that the offeror can collect binding tenders from the shareholders.<sup>106</sup>

The Ohio legislation also has a ten-day waiting period.<sup>107</sup> Ohio also requires that anyone owning more than five percent of a class of an Ohio company's stock must state his intention to take over the company to anyone for whom he purchases stock within a year prior to the bid. Obviously, these Ohio provisions favor incumbent managements by virtually eliminating the tender offeror's ability to make a surprise bid.

Both states' statutes may be products of management's fear of being taken over by a corporate raider. However, they also may reflect a belief that the tender offer process must be slowed down so that the outcome of a bid does not depend on how successfully either party can scramble in a few days time. Whether or not the means used by Ohio and Virginia for slowing down the tender offer process are the right ones, their actions may be the start of a trend towards similar regulation in other states.

On the state level, as on the federal level, the exchange offer is subject to registration regulations. State blue sky laws require registration of the securities to be offered target shareholders. Although this is often a simple process of proving to state security commissioners that the securities have been registered with the SEC under the 1933 Act,<sup>108</sup> the task may be voluminous: the process must be repeated in each state where target shareholders reside. And state requirements can subject the offer to added risks, namely, the state commissioners' power to pass on the fairness of the offer. In General Host Corporation's fight for Armour Packing, General Host complied with the federal full disclosure requirements by registering the securities to be offered Armour stockholders. Of course, the federal regulatory scheme does not pass on fairness: full disclosure is made and the investor to whom the security is offered judges the offering's fairness for himself. Two states, however, blocked General Host's offer in their jurisdictions by exercising the fairness power. The Wisconsin Commissioner of Securities

stated that the exchange offer was unfair and inequitable to Armour stockholders because the cash flow of General Host appeared in-

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<sup>106</sup> Comment, *Take-Over Bids in Virginia*, 26 WASH. & LEE L. REV. 323, 332 (1969). The comment concludes that preemption and supremacy clause doctrines do not prevent states from adding to the federal tender offer regulations. *Id.* at 334.

<sup>107</sup> OHIO REV. CODE ANN. § 1707.041 (Page Supp. 1970).

<sup>108</sup> This process is known as coordination. *See, e.g.*, UNIFORM SECURITIES ACT § 303.



sufficient to cover the interest requirements on the debentures that would be outstanding if the exchange offer succeeded. . . .

... Although [the Commissioner's] office found that the General Host prospectus fully disclosed the material terms of the exchange offer, it also found that the offer did not appear fair and equitable, which resulted in the order denying registration of the securities.<sup>109</sup>

Such state action can slow down the exchange offer process. State commissioners often disallow registration in *ex parte* proceedings brought by the target company. Even if the offeror is successful in having the commissioner vacate his order, the time required for hearing and decision may deprive the offeror of advantages it might otherwise have had.

#### D. *Stock Exchange Regulation*

Beneath the first level of federal regulation and the second level of state regulation lies a third tier in American tender offer regulation—self-regulation. The New York Stock Exchange, for example, requires listed companies that become offerors to give all target stockholders an opportunity to participate equally in the offer.<sup>110</sup> The Exchange's requirements, like Virginia's and Ohio's statutes, also reflect a belief that the tender offer process should not be so hurried: "While it is desirable that a period of about 30 days be used, a tender offer should remain open for a minimum of 10 days . . . ."<sup>111</sup> Further, the Exchange demands that if an unusual or exceptional circumstance presents itself, the offeror must discuss the bid with the Exchange's representatives.<sup>112</sup>

### III

#### OUTLINE OF BRITISH SECURITIES REGULATION

British company law is largely consensual, having evolved from partnership law.<sup>113</sup> American corporate law has been largely restrictive,

<sup>109</sup> Release of Wisconsin Office of Commissioner of Securities, 3 BLUE SKY L. REP. ¶ 70,805, at 66,809 (1969). A federal court held that the contentions of unfairness were based on the offer's financial merits and not on fraudulent or misleading statements or omissions. *Armour & Co. v. General Host Corp.*, 296 F. Supp. 470 (S.D.N.Y. 1969). See also *Northwest Indus., Inc.*, 3 BLUE SKY L. REP. ¶ 70,816 (Ohio Dep't of Commerce 1969).

<sup>110</sup> NEW YORK STOCK EXCHANGE, *supra* note 78, at A-179.

<sup>111</sup> *Id.* at A-180.

<sup>112</sup> *Id.* For a current summary and commentary by the New York Stock Exchange's President, see Haack, *Take-Overs and Tenders: A Stock Exchange Viewpoint*, 25 BUS. LAW. 931 (1970).

<sup>113</sup> See Gower, *Some Contrasts Between British and American Corporation Law*, 69

although many states are moving more and more towards enabling acts which, like British company law, allow consensual arrangements to be the law for closely-held corporations.<sup>114</sup> A similar distinction holds true for British and American securities regulation. The pervasive American regulatory scheme, comprised of the 1933 and 1934 Acts, rules and regulations under those Acts, the SEC, the state statutes, and the courts, is restrictive, encompasses most transactions, and is governmentally imposed. Such a network has no counterpart in England. A governmental scheme for securities regulation exists, but a party can opt to join many self-regulating groups. Membership in such groups removes the member from governmental regulation and the associations or groups themselves are not regulated by government. Indeed, like British company law, British securities regulation is consensual in the sense that self-regulation provides the actual law for the association or group.

#### A. *The Statutes*

At first blush, the British securities regulation system does resemble the American. There are two statutes: the Companies Act of 1948<sup>115</sup> and the Prevention of Fraud (Investments) Act of 1958.<sup>116</sup> The former, like the American 1933 Act, governs initial offerings of securities; the latter, like the 1934 Act, governs subsequent dealings in those securities.<sup>117</sup> A regulatory agency, the Board of Trade Companies Department, administers the statutes and the rules promulgated thereunder. The Registrar of Companies, an official within the Board of Trade, functions much like an American secretary of state in the incorporation process, receiving both the articles and memorandum of association for filing. Yet, as will be seen, this seemingly parallel scheme applies to

HARV. L. REV. 1369, 1371-72 (1956). On the subject of British company law, see L. GOWER, *THE PRINCIPLES OF MODERN COMPANY LAW* (3d ed. 1969); R. PENNINGTON, *COMPANY LAW* (2d ed. 1967); Peppiatt, *British and American Business Law: A Brief Comparison*, 16 BUS. LAW. 54 (1960).

<sup>114</sup> *E.g.*, DEL. CODE ANN. tit. 8, §§ 341-56 (Supp. 1968); N.Y. BUS. CORP. LAW §§ 608-09, 614, 616-17, 620, 708-09 (McKinney 1963). See generally R. BAKER & W. CAREY, *CORPORATIONS* 362-512 (4th ed. 1969); Cary, *How Illinois Corporations May Enjoy Partnership Advantages*, 48 NW. U.L. REV. 427 (1953); Hall, *The New Maryland Close Corporation Law*, 27 MD. L. REV. 341 (1967); Israels, *The Close Corporation and the Law*, 33 CORNELL L.Q. 488 (1948); O'Neal, *Developments in the Regulation of the Close Corporation*, 50 CORNELL L.Q. 641 (1965).

<sup>115</sup> 11 & 12 Geo. 6, c. 38 [hereinafter cited as Companies Act]. The Companies Act of 1967, c. 81, supplements the basic 1948 statute.

<sup>116</sup> 6 & 7 Eliz. 2, c. 45 [hereinafter cited as Prevention of Fraud (Investments) Act].

<sup>117</sup> See Stacy, *Company Law Administration: The Companies Department of the Board of Trade*, 58 L. SOC'Y GAZ. 485, 488 (1961).

only about five percent of the United Kingdom's investment transactions.<sup>118</sup>

Fundamental to understanding British securities regulation is the knowledge that virtually no over-the-counter market exists in England.<sup>119</sup> Before raising capital in a public offering, a company must obtain a quotation on a recognized stock exchange.<sup>120</sup> Hence, any corporation of consequence has a listed issue. Again, company law governs the original marketing of securities. There are Companies Act provisions for registration through filing, disclosure, and prospectuses.<sup>121</sup> But the Act exempts from filing and prospectus requirements offerings made through a member of a recognized stock exchange if the offering comports with the exchange's rules.<sup>122</sup> Since in the absence of an over-the-counter market an issue must be listed before being offered to the public, most offerings will comply with exchange requirements, and need not follow company law procedure for offerings. Consequently, public offerings in the United Kingdom become largely a matter of self-regulation.

The significant feature of the Prevention of Fraud (Investments) Act is the command that all communications with shareholders, other than between an issuer and its own members, must be made through certain designated channels.<sup>123</sup> These channels are dealers in securities licensed by the Board of Trade and brokers or firms who are members of a recognized stock exchange, a recognized association, or an entity that has been exempted by the Board of Trade.<sup>124</sup> If the communica-

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<sup>118</sup> Gower, *supra* note 113, at 1381-82; text accompanying note 147 *infra*.

<sup>119</sup> Gower, *supra* note 113, at 1381.

<sup>120</sup> "The over-the-counter market scarcely exists. And in practice no public offering can be made without obtaining a quotation for the shares on one or more of the recognized stock exchanges, nearly always including London." *Id.* "The general public will not normally subscribe an issue which is not quoted, and this experience places the Stock Exchange in a commanding position." Schmitthoff, *The Issue of Securities in Great Britain*, 1969 J. Bus. L. 1, 8.

<sup>121</sup> Companies Act §§ 37-46, 55, 417-23, sched. 4 (provisions dealing with public offerings). See generally Cole, Morley & Scott, *Corporate Financing in Great Britain*, 12 Bus. Law. 324 (1957); Schmitthoff, *Issue of Securities in Great Britain*, 1969 J. Bus. L. 1.

<sup>122</sup> Companies Act § 38. For prospectus requirements see *id.* sched. 4. The exchanges have stringent rules that go far beyond the standards dictated by company law. Cf. COMMITTEE OF THE FED'N OF STOCK EXCHANGES IN GREAT BRITAIN AND IRELAND, *ADMISSION OF SECURITIES TO QUOTATION* (1966) [hereinafter cited as *ADMISSION TO QUOTATION*].

<sup>123</sup> Thus, Prevention of Fraud (Investments) Act § 1 makes it unlawful to carry on a securities business unless the enterprise so doing falls within certain categories defined by the Act.

<sup>124</sup> Those entities falling into one or the other approved category are listed in BOARD OF TRADE, *PARTICULARS OF DEALERS IN SECURITIES AND UNIT TRUSTS* (1970), a publication prepared annually.

tion invites one to purchase or dispose of securities and is made through a licensed dealer in securities, the circular or announcement must be filed with the Board of Trade;<sup>125</sup> furthermore, the communication must comply with the Board of Trade's regulations, the Licensed Dealers (Conduct of Business) Rules.<sup>126</sup> But dealers in securities are the only persons who have to file with the Board of Trade and follow the Board of Trade guidelines. The rest of the financial community is self-regulated because the Prevention of Fraud (Investments) Act exempts the other authorized channels from the Act's filing and disclosure requirements. If the broker or institution is a member of a prescribed stock exchange or recognized association, or is exempted by the Board of Trade, it does not have to comply with the Act and the Licensed Dealers Rules as to form and filing of circulars.<sup>127</sup> Instead, the broker or institution comports with stock exchange or association rules. Hence, the Act, which is the governmental device for regulation of subsequent dealings in securities, directly touches only those few transactions that had no connection with a stock exchange.<sup>128</sup>

### B. *The Stock Exchanges*

The United Kingdom has some ten stock exchanges.<sup>129</sup> Of these, the principal ones belong to the Federation of Stock Exchanges in Great Britain and Ireland, formed in 1965.<sup>130</sup> The federated exchanges have formulated a uniform body of regulations, contained in a series of memoranda, on marketing and on subsequent dealings in securi-

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<sup>125</sup> Prevention of Fraud (Investments) Act § 14.

<sup>126</sup> The Board of Trade's Authority to promulgate and enforce those rules is found in *id.* § 7.

<sup>127</sup> *Id.* § 14.

<sup>128</sup> Section 13 is the only statutory restraint applying to all British subjects, including issuers themselves and the channels through which those issuers are required to act. Under this section anyone inducing another to enter into a securities transaction by means of misleading statements, promises, or forecasts is subject to civil and criminal penalties.

<sup>129</sup> R. PENNINGTON, *supra* note 32, at 305. In addition to the London Exchange, provincial exchanges include the Scottish Stock Exchange, the Belfast Exchange, the Northern Stock Exchange, Dublin, Cork, and Greenock Exchanges, the Midlands and Western Exchange, and the Provincial Brokers Stock Exchange, with headquarters at York but with dealings among members throughout the country. Recent combinations such as the 1963 consolidation of the Glasgow, Edinburgh, Aberdeen, and Dundee Exchanges into the Scottish Stock Exchange have reduced the number of British exchanges from 22 to 10. The exchanges listed herein are the recognized exchanges for Prevention of Fraud (Investments) Act purposes. *Id.* at 306 n.

<sup>130</sup> *Id.* at 595. Members are London, Northern, Scottish, Belfast, Birmingham, Bristol, Cardiff, Cork, Dublin, Nottingham, Swansea, and Provincial Brokers Exchanges. Further consolidation may occur, as studies are being undertaken on the feasibility of one exchange, with all present exchanges becoming branches. *See* The Times (London), Aug. 8, 1969, at 23, col. 1.

ties.<sup>131</sup> Given the importance of exchange regulation and the volume on the federated exchanges, the memoranda containing these regulations affect much of the dealing in British securities.

Much of the self-regulation, tantamount to British securities law, emanates from the "City." This is an amorphous body, roughly equivalent to the American Wall Street, centered around the London Stock Exchange and composed of investment bankers, the London Exchange and the Stock Exchange Federation, institutional investors' associations, alliances of industry, and a few other organizations that speak on behalf of various interests in the securities business. One reason for the City's dominance is that the absence of an over-the-counter market causes the financial community to be concentrated near the exchanges; another reason is the overall dominance of the London Stock Exchange, far surpassing in volume all other British exchanges.<sup>132</sup> Besides the memoranda of the Stock Exchange Federation, much of the regulation emanating from the City, as the seat of the British financial community, is directed by the various associations in governing their respective memberships.<sup>133</sup>

### C. *Company Law*

Certain provisions of company law can play a role in the securities field and in takeover bids. Principal among those provisions is the power of the Board of Trade to appoint an inspector, either on the Board's own motion or on petition of two hundred shareholders or one-tenth of a corporation's membership, to investigate the affairs of a company should suspicious conduct be evidenced.<sup>134</sup> The inspector's

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<sup>131</sup> ADMISSION TO QUOTATION.

<sup>132</sup> In 1969 the dollar volume of all transactions on the London Exchange was 20.9 billion with about 9,400 issues traded. On the next largest British exchange, the Scottish at Glasgow, the 1969 dollar volume was 722 million. Central Statistical Office, Financial Statistics No. 83, at 107 (Jan. 1970). The valuation placed on 1969 New York Stock Exchange transactions was 129.6 billion; the American Stock Exchange volume for the same year was 30.1 billion. SEC, Statistical Bulletin 11 (March 1970).

<sup>133</sup> That regulation will generally be beyond the scope of this article. But, as seen from the discussion of public offerings and of the Prevention of Fraud (Investments) Act, membership in an association or recognized stock exchange bestows exemption from much governmental control. Naturally, then, members would prize their participation in an association; conversely, the association, with the power of expulsion, could wield considerable influence over its members. To date the various associations have not done so. See text accompanying notes 176-77 *infra*. See also *The Times* (London), July 18, 1967, at 17, col. 2.

<sup>134</sup> Companies Act §§ 164-75; see Gower, *supra* note 113, at 1387-89. Stacy, *supra* note 117, at 487, explains the Companies Department procedure in handling requests, which includes, *inter alia*, a chance for directors to respond to the charges before the appointment of an inspector. The appointment procedure can, however, take as little as

report is then published. Since investigation seems to carry with it considerable notoriety in both the financial community and the popular press, publication of the report, even in the absence of further Board of Trade action, is a strong deterrent.<sup>135</sup> Appointment of an inspector can also be on indication that an unknown buyer is purchasing the company's shares with the apparent purpose of influencing control; the inspector's only task is to bring the unknown buyer into the open.<sup>136</sup>

Companies must maintain a register of members for general public inspection, and provide copies upon request. A company must honor such a request within ten days, or a court order will summarily issue.<sup>137</sup> Another relevant company law provision gives the right to a member, upon alleging oppressive conduct by majority shareholders or management, to petition a court for such regulation of the company's affairs as the court thinks fit.<sup>138</sup> The remedy may not be effective in a takeover situation since the provision envisions a constant course of conduct rather than one act of malfeasance, although a court may denominate as oppressive a series of events culminating in a tender offer.<sup>139</sup> Last of the especially relevant company law provisions is the section on compulsory buying out of a minority.<sup>140</sup> Once a party acquires ninety percent of the target corporation's voting shares, that party can by statutory procedure acquire the shares remaining in other hands. Likewise, a minority of less than ten percent can force the ninety percent holder to purchase the minority's shares.

It is important to note that case law in the British securities field

four days. Stacy also points out that the purpose of an inspector is to discover details that cannot otherwise be elicited, not to circumscribe an exercise of discretion by directors which was unpopular with shareholders. *Id.* For a case involving the appointment of an inspector in a takeover situation, see Gower, *Corporate Control: The Battle for the Berkeley*, 68 HARV. L. REV. 1176 (1955).

<sup>135</sup> *E.g.*, note the resistance to the appointment of an inspector in Leasco-Pergamon Press, text accompanying note 270 *infra*. "Board of Trade inspectors examined the affairs of more companies in 1969 than in any of the last 10 years." *The Times* (London), Feb. 19, 1970, at 21, col. 6. Twenty-six inspectors were appointed in 1969, 16 in 1968.

<sup>136</sup> Companies Act § 172; *cf.* the American regulation providing that unless a five percent position is acquired, a shareholder need not reveal his identity or purpose. Text accompanying notes 45-46 *supra*.

<sup>137</sup> Companies Act §§ 110-23 (provisions relating to register of members). Section 113 provides that the list must be presented upon payment of two shillings for every 100 words.

<sup>138</sup> *Id.* § 210.

<sup>139</sup> See Gower, *Corporate Control: The Battle for the Berkeley*, 68 HARV. L. REV. 1176, 1183 & n.23 (1956).

<sup>140</sup> Companies Act § 209. *Cf.* DEL. CODE ANN. tit. 8, § 253 (Supp. 1968). For a detailed treatment of § 209, see Pennington, *Takeover Bids in the United Kingdom*, 17 AM. J. COMP. L. 159, 182-89 (1969).

is virtually nonexistent. First of all, most regulation is self-imposed, with no private rights of action obtaining.<sup>141</sup> Second, even if there is a violation of a statutory provision of universal application, the shareholder often chooses to be vindicated without expense to himself by petitioning for a Board of Trade investigation. The threat of a publicized report alone leads to many settlements.<sup>142</sup> Third, the derivative action is unknown in English law, all litigation being representative.<sup>143</sup> The final factor is the British ethical proscription against the contingent fee, forcing a shareholder to pay a retainer to the solicitor employed—an expensive prospect for one challenging a rich, resourceful corporation.<sup>144</sup>

#### IV

#### BRITISH TENDER OFFER REGULATION<sup>145</sup>

Licensed dealers must submit to the Board of Trade all circulars asking investors to dispose of shares. Hence, the Board has promulgated standards governing the content and distribution of such circulars, necessarily including tender offer communications. These standards, the Licensed Dealers (Conduct of Business) Rules,<sup>146</sup> also govern take-over conduct to some extent. Yet since securities dealers or investment advisers belonging to a recognized stock exchange do not have to be licensed, and since most issues are listed, fewer than five percent of all brokers, dealers, financial advisory firms, or investment bankers come under the aegis of the Licensed Dealers Rules.<sup>147</sup>

The one area in which the Rules have widespread influence is

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<sup>141</sup> Gower, *supra* note 113, at 1382; Loss, *The Fiduciary Concept as Applied to Trading by Corporate "Insiders" in the United States*, 33 MODERN L. REV. 34 (1970).

<sup>142</sup> See Stacy, *supra* note 117, at 487.

<sup>143</sup> There is little use, for example, in talking of shareholder action as a major deterrent in a country whose Bar views as anathema the contingent fee that has made viable instruments out of both the shareholder's derivative suit and the non-derivative class action in the United States.

Loss, *supra* note 141, at 34.

<sup>144</sup> See Gower, *supra* note 113, at 1385.

<sup>145</sup> The only comprehensive, current work in the area is Pennington, *Takeover Bids in the United Kingdom*, 17 AM. J. COMP. L. 159 (1969). Pennington's article reviews cash and stock tender offer regulations, compulsory buyouts of minority shares, and antitrust considerations. The article does not, however, delve into the history of British regulation, nor does it deal with the important Leasco-Pergamon Press affair or attempt any British-American comparison.

<sup>146</sup> [1960] 1 STAT. INSTR. 386 (No. 1216).

<sup>147</sup> 6 L. LOSS, *supra* note 4, at 3650-51. The Licensed Dealers Rules are discussed in *id.* at 3650-52; due to their relative insignificance the Rules will not be summarized here.

the content of bid circulars. Most institutions have, since 1960, voluntarily fashioned takeover circulars in accordance with the Rules.<sup>148</sup> Since 1965 the Stock Exchange Federation has set out the Licensed Dealers Rules' requirements as to content of circulars in the Federation memoranda, making the Rules' requirement mandatory for members of federated exchanges. The City Code on Take-Overs and Mergers,<sup>149</sup> as the principal self-regulatory instrument in the tender offer area, has provisions on disclosure in offer documents, yet those requirements are not comprehensive; rather, their tenor evinces an underlying assumption that a circular will comply with the Licensed Dealers Rules. Compliance with the Rules in this respect has the force of something akin to a customary rule of law.<sup>150</sup>

### A. Regulatory Development

Extensive British experience in the tender offer area dates from World War II. There is no statutory merger or consolidation procedure;<sup>151</sup> the most widespread acquisition technique is the takeover bid. If of a friendly variety, the offer will be accompanied by the offeree board of directors' recommendation. The two managements may even negotiate as to offer price and terms of the takeover, often with the offeror examining the target company's books.<sup>152</sup>

Business amalgamation of this type first reached great popularity in Great Britain in the early 1950's. After the war, the Labor government had urged dividend restraint; even after the restraints had weakened, many complacent boards had not yet raised dividends, at least not in accordance with earnings gains.<sup>153</sup> Since British investors have

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<sup>148</sup> Pennington, *supra* note 140, at 161.

<sup>149</sup> ISSUING HOUSES ASS'N, CITY CODE ON TAKE-OVERS AND MERGERS (rev. ed. 1969) [hereinafter cited as CITY CODE].

<sup>150</sup> Ethical and professional considerations seem to have much force in the British financial community, partly because these were for many years the principal means of regulation. Perhaps also because of the localized nature of the market and because of the fear of governmental regulation being imposed, public censure or adverse publicity is quickly generated and quickly heeded.

Despite the relative insignificance of the British Licensed Dealers Rules, American writers have pointed to the Rules, or at least the British experience in the area of tender offers, as an example of a well-established regulatory system. See 6 L. Loss, *supra* note 4, at 3649-54; Fleischer & Mundheim, *supra* note 6, at 326. As noted earlier, such assertions are misleading. Text accompanying note 9 *supra*.

<sup>151</sup> Note 10 *supra*.

<sup>152</sup> American corporations do use the tender offer to achieve amicable amalgamation. In American parlance, however, tender offer usually conjures up visions of a hotly-contested fight.

<sup>153</sup> Gower, *supra* note 139, at 1176; Penrose, *supra* note 11, at 147-48. Penrose's article summarizes the pre-1964 history in the area.



always been more conscious of yield than of growth,<sup>154</sup> shareholders became more willing to listen to offers for shares. In addition, British accounting practice helped spur a takeover boom. Capital assets in Britain can be revalued, with the increase in value available as a source for bonus shares or even cash dividends.<sup>155</sup> Post-war inflation had left corporations with assets carried at a fraction of their worth. Market prices, based largely on yields, did not reflect these hidden values. Following takeover, offerors would thus be in a position to generate earnings and dividends by selling or revaluing assets.

Adverse public opinion in the British amalgamation boom first arose not in reaction to offerors' conduct, but from indignation at the defense tactics of target companies' managements.<sup>156</sup> In pre-war days, the bid was generally first made to the offeree company board. After the war, with so many companies launching acquisition programs, incumbent managements became less receptive to suitors. Aggressor companies countered with secrecy, surprise, and pressure through rapid development of bids. Incumbent management in turn developed sophisticated defenses against offerors. At that point the financial press, government officials, and others voiced criticism aimed at the no-holds-barred defenses against offers. When regulation came, it was naturally aimed at the controversy that had provoked public concern—defenses. British self-regulation as a result still contains severe restrictions on tender offer defense tactics.<sup>157</sup>

The first attempt at regulation came in 1959 when The Notes on Amalgamations of British Businesses were drafted by the various City institutions at the behest of the Governor of the Bank of England. Although the Notes were to serve only as guidelines, commentators

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<sup>154</sup> Knauss, *Securities Regulation—A Comparison of Practice and Purpose*, 62 AM. SOC'Y INT'L L. PRO. 131, 140 (1969).

<sup>155</sup> Companies Act §§ 147-63 neither prohibits nor permits the revaluation of a capital asset. See R. PENNINGTON, *supra* note 32, at 331. See also CITY CODE rule 15.

<sup>156</sup> One such tactic is chronicled in Gower, *supra* note 139, at 1177. There, defending management conveyed the target company's principal asset, the Berkeley Hotel, to a newly-formed corporation. By then issuing the new company's voting stock to the Savoy pension fund, of which Savoy directors were trustees, target management put the hotel beyond any offeror's reach.

<sup>157</sup> Penrose, *supra* note 11, at 153. Two of the four major revisions in the British self-regulation scheme, those in 1959 and 1967, were direct results of resentment toward bizarre defense strategies. In contrast, the United States Government intervened at an earlier point in the development of tender offer techniques—when offerors began to develop their arsenals but before target company defense reached today's level of sophistication. Thus, the American legislation was the result of dissatisfaction with offerors' tactics. Note 36 and accompanying text *supra*. The American legislation does not in any significant way control target company conduct, either by restricting defenses or by requiring disclosure.

nevertheless thought of them as a sufficient curative. The theme of the guidelines was the desirability of giving investors sufficient information upon which to make a decision, while leaving companies and securities people free from the yoke of regulation. On that basis, the Notes were

[a] sensible, concise and well-written document. . . . The Government in framing new corporate legislation should take note and should not be deflected from its course of giving the economy freedom to grow because of an occasional rascal or a discreditable episode.<sup>158</sup>

Time proved, however, that the parties to a takeover frequently disregarded the guidelines. Inevitably, some of the black sheep were members of the various institutions that had drafted them.<sup>159</sup>

In 1963 the Revised Notes on Amalgamations and Mergers supplanted the earlier document as the expression of the financial community's standards. The Revised Notes, too, were on many occasions ignored. Despite the improvement in content after four years' experience, they had technical flaws.<sup>160</sup> They were ineffective, however, not because of technical fault, but because the principles were not mandatory and there existed no independent or quasi-independent agency for surveillance and enforcement. The drafting associations were too close to the violators—usually members and their clients—to press for obedience.

In the interim between publication of the Notes and the Revised Notes, the Company Law (Jenkins) Committee had presented its report to Parliament.<sup>161</sup> After describing the regulatory web formed by the Prevention of Fraud (Investments) Act and the Licensed Dealers Rules, the Committee recommended statutory authority for extension of similar Board of Trade control to all takeover bids.<sup>162</sup> The Commit-

<sup>158</sup> 193 *ECONOMIST* 440, 441 (1959).

<sup>159</sup> One news article in reflecting on the years of self-regulation said: "With the main contributors to the [Notes], bankers, investment managers, and Stock Exchange, as passive onlookers, it was hardly surprising that companies tended to ignore the Rules." *The Times* (London), March 27, 1968, at 27, col. 1.

<sup>160</sup> Pennington, *supra* note 140, at 170-72, lists three faults, and implies that these faults were the principal reasons for the new scheme. For opinions that lack of a watchdog, not technical fault, had impaired earlier regulatory efforts, see *The Times* (London), July 17, 1967, at 21, col. 1; *id.*, July 18, 1967, at 23, col. 2; *id.*, July 20, 1967, at 21, col. 3.

<sup>161</sup> BOARD OF TRADE, REPORT OF THE COMPANY LAW COMMITTEE §§ 265-94 (1962) [hereinafter cited as JENKINS COMM. REPORT].

<sup>162</sup> *Id.* § 272. "[R]ules . . . should apply to all take-over offers irrespectively of the status of the person by or through whom they are made . . ." *Id.* § 270, at 101. "The scope of the regulations which would be made under the Jenkins recommendations by the Board of Trade would be wider than that of the present rules. The regulations would apply to everyone, as distinct from special classes . . ." Penrose, *supra* note 11, at 152.

tee also advocated that rule-making in the takeover area be placed in the Board of Trade.<sup>163</sup> As events subsequent to the 1963 publication of the Revised Notes demonstrate, the 1962 Jenkins Committee recommendations carried great weight. The Companies Act of 1967<sup>164</sup> incorporated much of the Jenkins Committee Report in revising and amending company law. Undoubtedly, then, the recommendation of governmental regulation prompted the City to shore up self-regulatory efforts and even to write the Revised Notes themselves. But Parliament never reached the Jenkins Committee recommendations on takeover bids,<sup>165</sup> leaving open the possibility that it might take up the recommendations at a later date. So in 1967 the Jenkins Committee recommendations continued to challenge the City to put its house in order.<sup>166</sup>

In July 1967 the Metal Industries Ltd. defense against a takeover bid enraged the financial press. Metal Industries had already succumbed to a takeover bid from Aberdare Holdings Ltd. when it issued a block of shares to another suitor to divest Aberdare of control.<sup>167</sup> In

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<sup>163</sup> JENKINS COMM. REPORT § 272.

<sup>164</sup> Companies Act of 1967, c. 81.

<sup>165</sup> Parliament considered the Jenkins Committee recommendations on a piece-by-piece basis. When an allotted number of topics had been covered, Parliament then enacted the Companies Act of 1967, and scheduled consideration of the remaining recommendations for future sessions:

The Board of Trade may also be reluctant to move [in the takeover area] because a new Companies Bill, into which provisions for an SEC would most conveniently fit, is not scheduled until the 1969-1970 session. The new Bill would cover the last recommendations of the 1962 Jenkins Committee on Company Law, part of which was carried out in last year's Act. But such are the pressures on the time both of Parliament itself and the parliamentary draughtsmen . . . .

228 ECONOMIST, July 1968, at 74.

<sup>166</sup> The Jenkins Committee proposals are treated by Penrose, *supra* note 11, at 151-53. The recommendations, far from being dead, may still stand as a challenge to the City, although Pennington concludes: "[I]t is now doubtful whether they will be adopted unless a full-scale regulation of takeover bids by the Government is undertaken." Pennington, *supra* note 140, at 163.

<sup>167</sup> The Metal Industries defense was permissible because of one of the technical faults in the Revised Notes. This was that the Stock Exchange rules required shareholder approval only for a share issue made for cash. The Notes did not strongly state that defending management was not to wrest the decision away from shareholders. Pennington, *supra* note 140, at 170-71. Company law coincided with Exchange requirements: preemptive rights do not exist and shareholder approval is not necessary to issue shares unless the articles of association so provide. Instead, directors must act as fiduciaries when issuing further share capital. This is an aspect of the consensual nature of company law. Gower, *supra* note 113, at 1380. Thus, Metal Industries reduced Aberdare's holding from 53.5% to 32% by issuing authorized but unissued shares to acquire a subsidiary of the preferred suitor. Neither the Stock Exchange nor the other City institutions punished the parties. *Cf. Condec Corp. v. Lunkenheimer Co.*, 43 Del. Ch. 353, 230 A.2d 769 (Ch. 1967), where, on almost identical facts, the court held that issuance of shares to a preferred suitor was for an improper purpose and was also a breach of directors' common law fiduciary duty.

the week following, no fewer than four major *London Times* articles urged the City, as the seat of the British securities industry, to strengthen self-regulation of takeovers.<sup>168</sup> As a result of that public outcry, the Council of the Stock Exchange, supported by the Governor of the Bank of England, asked the Issuing Houses Association to reconvene the City working party, the ad hoc committee charged with writing self-regulatory guidelines.<sup>169</sup>

That fall, the working party turned their efforts towards a new scheme<sup>170</sup> and produced the City Code on Take-Overs and Mergers in March 1968. Although this was the third self-regulatory effort in nine years, commentators were not skeptical; the financial columnists paid homage to the new document.<sup>171</sup> Principal features of the Code were that the rules were not merely guidelines, but mandatory rules, and that an eight-man Take-Over Panel of prestigious City representatives would enforce the now mandatory rules for takeover conduct. The Governor of the Bank of England endorsed the new system. All concerned expressed relief that legislative interference had been forestalled.

The honeymoon was short. In the summer of 1968, the Panel encountered and failed its first test—the American Tobacco takeover of Gallaher Cigarettes.<sup>172</sup> Gallaher shares were being quoted at \$2.50. On June 26, Phillip Morris made a tender offer of three dollars which Gallaher termed “quite unacceptable.” Phillip Morris decided to withdraw and wait to make another offer until after Gallaher published a profit forecast in July. A few weeks later, but before Gallaher’s profit forecast, American Tobacco made a \$4.20 offer to Gallaher shareholders. The offer was oversubscribed in two hours. It was later revealed that the broker acting as a repository for tenders, and the merchant banker advising American Tobacco, had as clients the members of an underwriting syndicate that had earlier floated a secondary offering of thirty-six percent of the Gallaher shares outstanding. The offering had flopped, leaving the syndicate with a twelve percent holding in

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<sup>168</sup> See *The Times* (London), July 17, 1967, at 1, col. 8; *id.* at 17, col. 1; *id.*, July 18, 1967, at 17, col. 1; *id.*, July 21, 1967, at 20, col. 5.

<sup>169</sup> *Id.*, July 20, 1967, at 17, col. 1.

<sup>170</sup> The institutions represented on the working party were the Issuing Houses Association, the Association of Investment Trusts, the Accepting Houses Committee, the Committee of London Clearing Bankers, the National Association of Pension Funds, the Council of the Stock Exchange, and the Confederation of British Industry. *Id.*, March 27, 1968, at 21, col. 3.

<sup>171</sup> One line of praise was: “[C]learly better than the danger of a new and probably cumbersome bureaucratic machine.” *Id.* at 27, col. 1. See also *id.* at 21, col. 1.

<sup>172</sup> A detailed account of this takeover is set out in 78 *FORTUNE*, Oct. 1968, at 79.

Gallaher. The broker and the merchant banker took up 100 percent of the shares of their clients, the underwriting syndicate members, before taking up pro rata the shares in public hands. The Panel intervened, alleging violation of the Code provision that "[a]ll shareholders of the same class of an offeree company shall be treated similarly by an offeror company."<sup>173</sup> The Panel concluded that the broker and the merchant banker had violated the Code. But the Stock Exchange in admonishing the member broker announced that the broker had breached the Code principle in good faith. The Issuing Houses Association, dealing with the member merchant banker, said the Association viewed the whole matter with "grave concern." Then the Governor of the Bank of England wrote to the Panel:

Action in breach of the code is not justifiable in any circumstances. It harms the reputation of those who are guilty of it, and is prejudicial to the good name of the City in general. . . . [If the City can not discipline itself during future takeover battles] no doubt some form of statutory control will be considered.<sup>174</sup>

Thus, the Gallaher Tobacco affair ended with no real penalties levied for serious violations of the Code. Dissatisfaction with the Panel grew.<sup>175</sup>

Gallaher Tobacco highlighted the last remaining fault in the self-regulatory scheme. Although mandatory rules existed and a Panel had been created to enforce them, the Code provided no definite penalties for breach of the rules.<sup>176</sup> The Panel in effect lapsed back into the

<sup>173</sup> CITY CODE general principle 7.

<sup>174</sup> 78 FORTUNE, Oct. 1968, at 79, 82. The *Economist* commented that the City had accepted the "lame excuses" given by American Tobacco's merchant banker and broker and then said:

The Government seems to have made up its mind not to interfere at this stage with the City's policing of the take-over code although the pressure on the President of the Board of Trade to set up an equivalent of the American Securities and Exchange Commission is now very strong. . . . Of course if the present rate of breaches and alleged breaches of the present code continues, the pressure from industry—and even sections of the City—would force [the Government's] hand.

<sup>228</sup> ECONOMIST, July 1968, at 74.

<sup>175</sup> The Times (London), Oct. 26, 1968, at 17, col. 1.

<sup>176</sup> Unfortunately the Stock Exchange is . . . in a weak position [regarding regulation of takeover bids]. Its only weapon is the suspension or withdrawal of quotation of the securities of the company in question, and it has been slow to use this weapon because it hits innocent investors in the same manner as those guilty of offending against accepted business ethics.

Schmitthoff, *supra* note 120, at 12. The author continues:

The effectiveness of the self-regulatory part of the British issues regulation depends on the sanctions which the authorities administering the self-regulation can apply. In the case of admission of new issues to quotation, the sanction—refusal of admission—is strong and the self-regulation by the Stock Exchange operates

posture of earlier days by merely making findings of fact, and then referring the matter of sanctions to the associations of which the violators were members. Apparently the associations were too close to the violators to mete out stiff punishment. This failure of the Panel to discipline violators or take a stand on sanctions caused some of the criticism to be aimed at Panel members themselves rather than at the basic scheme. Both in answer to that criticism and as a regular step in the original plan, the City reissued the Code in revised form and the Panel was reconstituted in April 1969.<sup>177</sup>

### B. *Organization, Procedure, and Sanctions*

Before entering the last period of British takeover history, that dating from the Panel's reconstitution to the present day, the structure of the regulatory scheme should be described, since that structure has not undergone organic change since the 1969 reconstitution. The Panel has eleven members, including a Chairman and Deputy Chairman, appointed by the Governor of the Bank of England from among City notables; a full-time staff headed by a full-time Director General supports the Panel.

The Director General, and the Panel upon request, are available for opinions before or during a bid. Although circulars must be submitted for screening to the Quotations Department of the Stock Exchange,<sup>178</sup> the Panel will screen a document if a novel question arises. For consultation on serious questions the full Panel can convene in less than twenty-four hours. A party can then, with their permission, quote Panel approval for what may seem to be out of the ordinary. If the facts are as stated by a party requesting a ruling, the Panel will, in subsequent Panel action, be bound by any ruling given. Matters of procedure and substance can be the subject of policy statements or practice notes from the Panel.<sup>179</sup> These statements and notes, along with interpretations given on problems that recur frequently, will presumably be taken up in periodic revisions of the Code.

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most efficiently. In the case of take-over procedure, however, the sanction is weak, and self-regulation has not worked well.

*Id.* at 14.

<sup>177</sup> CITY PANEL ON TAKE-OVERS AND MERGERS, *supra* note 12, at 12.

<sup>178</sup> ADMISSION TO QUOTATION 27.

<sup>179</sup> The City Code contains substantive rules and disclosure principles for tender offer conduct. Procedure for the scheme and for the Panel's operation is not set forth in the City Code. Most of the procedural observations set forth have been gleaned from the CITY PANEL ON TAKE-OVERS AND MERGERS, REPORT ON THE YEAR ENDED 31ST MARCH 1969 (1969), or from the Panel's operation in the Leasco-Pergamon affair.

As of October 1970, five practice notes and one policy statement had been issued.

Once a bid is under way, the Panel will, upon probable cause, intervene in the course of the bid. It may also investigate Code violations after the consummation of an offer. Investigations take the form of informal questioning of bid participants by Panel members. After important investigations, written opinions issue, to be given publicity if warranted by the severity of the violation or the need for clarification. A party can appeal to an Appeals Committee, now headed by Lord Pearce, who presides along with three Panel members not privy to the original proceeding. In the event of an appeal, the Panel withholds the written opinion until the Appeals Committee renders a decision, the entire procedure for investigating possible Code violations does not contemplate judging the merits or demerits of an offer.<sup>180</sup> With questions of fairness eliminated, Panel consideration of an offer involves investigation of compliance with affirmative disclosure requirements, substantive rules for bid conduct, and disclosure, antifraud, fiduciary, and other general principles.<sup>181</sup>

Immediately after taking office, the reconstituted Panel addressed itself to the problem of sanctions, as highlighted by the American Tobacco-Gallaher fiasco. As a result, a policy statement was issued.<sup>182</sup> According to that statement, after time for appeal has expired, proven disregard for the Code will result in sanctions by either the Panel or the various City organizations. Panel sanctions can include private or public censure or a call for a Board of Trade inquiry. City organizations' sanctions are handled through the Stock Exchange Council, the Issuing Houses Association, and most other recognized associations that have amended or are now amending their rules so as to make final the Panel or Appeals Committee findings; these organizations will henceforth give effect to Panel recommendations. The Board of Trade has also agreed to accept Panel recommendations regarding licensed dealers. As a result of these present or contemplated changes, violation of the City Code may well mean loss of one's ability to carry on a securities business.<sup>183</sup>

The Panel has similar recourse with regard to a recalcitrant company; it may have the Stock Exchange suspend quotation in the com-

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<sup>180</sup> CITY CODE 4 (Introduction).

<sup>181</sup> Whether the Panel had the latter powers was a point of contention in Leasco-Pergamon. Text accompanying notes 268-69 *infra*.

<sup>182</sup> City Panel on Take-Overs and Mergers, Policy Statement (April 23, 1969).

<sup>183</sup> Furthermore, the policy statement announced that the Board of Trade had been considering complete relinquishment of Board of Trade power under the Licensed Dealers Rules. The policy statement seemed to hint that should the Panel do a satisfactory job of policing the takeover area and of punishing Code violators, the government might entrust the Panel with complete takeover jurisdiction. *Id.* at 3.

pany's shares, issue a strong reprimand, publicize the violation, or take other action it deems necessary to prevent fraud or force adequate disclosure.<sup>184</sup> The Stock Exchange now includes compliance with the Code as a part of the quotation agreement between company and exchange.<sup>185</sup> Thus, violation by a corporate party to a takeover may result in delisting, with ensuing loss of access to British capital markets.<sup>186</sup>

### C. *Conducting an Offer Under the City Code*

The City Code has twelve general principles applicable to conduct throughout the course of a tender offer, and thirty-five rules applicable at various stages of the bid. The rules are arranged in a chronological order roughly parallel to their applicability in the progression of a tender offer. The Code's application will be demonstrated by applying it to a hypothetical offer. American treatment will also be considered where appropriate.

#### 1. *Partial Bid or Complete Control*

Oddly enough, one of the preliminary questions will plummet the offeror, X, into the heart of the Code. X must at the outset decide what percentage of the target company's stock it wishes to obtain. Although the possibilities are numerous, including working control, voting control, and complete control, the British City Code will subject X to several disadvantages if it seeks less than 100 percent of the target company's voting stock; these increase, moreover, if less than

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<sup>184</sup> As has been noted at note 150 and accompanying text *supra*, one senses that adverse publicity and public censure play a large part in the British financial community's self-regulation. One can surmise possible reasons for this phenomenon. The securities industry is very centralized, allowing members of the City establishment to readily subject a nonconformist to group pressure. Eleven years of operation under constant threat of governmental regulation gives incentive for City members to use such pressure in order to avoid adverse publicity for the industry. Another factor is the detailed financial reporting in newspapers. Financial editors do not hold back on criticism of City behavior or of the self-regulatory efforts. Thus, the financial community must take special care to avoid suspicion of scandal.

<sup>185</sup> See *The Times* (London), March 27, 1968, at 21, col. 2.

<sup>186</sup> See text accompanying notes 119-20 *supra*.

Many details, of course, remain unclear. For instance, the British are not sure that associations will follow all Panel recommendations. The threat of governmental intervention, however, and the government's tentative stand behind the Panel, strengthened by Leasco-Pergamon (text accompanying note 273 *infra*), provide incentive for the various groups to follow Panel orders. Another apparent gap is whether and by whom sanctions will be applied if the violator is neither in a securities business nor associated with a takeover participant. The British believe that matters such as these will be taken care of satisfactorily in future Panel statements.



voting control is sought.<sup>187</sup> The disadvantages are that the offeror must allow tenders to be withdrawn during a longer period, is required to take up shares on a pro rata basis, and may be deprived of market trading privileges.<sup>188</sup>

An initial difficulty arises because of the Code's use of the term "unconditional," which is less than clearly defined:

References to an offer becoming or being declared unconditional include cases in which the offer has as a result of the receipt of sufficient acceptances been announced to have become or been declared unconditional subject only to one or more other previously stated conditions including for example the creation of additional capital [or] the grant of quotation . . . , being fulfilled.<sup>189</sup>

The term is better understood in the context of rules 20, 21, and 26. According to rule 21, an offer must initially be open for at least twenty-one days. Although the depositing shareholder may not withdraw his deposited shares during the first twenty-one days,<sup>190</sup> he may do so at the end of that period, unless the offer has been declared unconditional. Whether the offer can be so declared is governed by rules 20 and 26. Rule 20 permits an offer to be declared unconditional if the offeror company has acquired or agreed to acquire more than fifty percent of the target voting rights. Rule 26 denies this privilege where the offer is for less than fifty percent and states instead that such a bid may not be declared unconditional unless acceptances are received for the number of shares desired; rule 26 also requires all partial bidders to take up shares pro rata should the offer be oversubscribed.<sup>191</sup> The effect of these three provisions is that an offeror who bids for control and who has acquired or agreed to acquire more

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<sup>187</sup> American tender offer regulation would impinge only slightly on the decision: if an American corporation sought less than 100% of a class of target stock and if the offer were oversubscribed, it would have to take up pro rata shares tendered in the offer's first 10 days—hardly a disadvantage. Text accompanying note 78 *supra*.

<sup>188</sup> CITY CODE rules 20-21, 24, 26.

<sup>189</sup> *Id.* at 5 (Definitions).

<sup>190</sup> In the United States, the tendering shareholder may withdraw during the first seven days. Text accompanying note 76 *supra*.

The British rules combine to offer added protection to minority shareholders by discouraging offers that would create a minority susceptible to oppression. Such a minority is especially undesirable when opposite a monolithic majority; 65% to 85% in one set of hands leaves little room for dissent and much room for oppression. The British scheme is also permeated with examples of concern, care, and protection for minority shareholders caught in the middle of a tender offer. *See, e.g.*, CITY CODE general principles 7-10; *id.* rules 10, 20-21, 24, 26. The American legal system offers only the protection that § 14(e), rule 10b-5, state law concepts of fiduciary duty, and state blue sky laws might offer the minority after it has been created.

<sup>191</sup> Since the partial bidder cannot withdraw the offer until the twenty-second day, the pro rata period in the British scheme is 21 days versus the American 10.

than fifty percent may keep his offer open after twenty days without subjection to withdrawal of deposited shares. An offeror who bids for less may, after twenty-one days, prevent withdrawal only if his announced goal has been met. As a practical matter, since all offers will be open for twenty-one days, a shareholder need not deposit his shares until the last day.

One more disadvantage, in addition to the pro rata requirement, stems from making an offer for less than 100 percent. A British offeror who bids for 100 percent may, unlike his American counterpart, trade in offeree shares during the course of a bid.<sup>192</sup> But the partial bidder may not deal in the shares of the offeree company during the offer period. Furthermore, the partial bidder for less than fifty percent cannot purchase target company securities in the market for twelve months after the offer expires without Panel permission.<sup>193</sup>

## 2. *Negotiated or Surprise Offer*

After weighing the disadvantages of a partial bid, X must then answer another preliminary question: whether to first approach target company management in hopes of achieving a negotiated tender offer. If X opts to negotiate first rather than make a surprise bid, several Code rules come into play. An examination of these rules and of the general principles reveals detailed guidelines as to the duties of both offeror and offeree during negotiations that may lead to a tender offer.<sup>194</sup> For example, among the guidelines is a warning that the offeror must endeavor to negotiate in secret so as to prevent an information leak that might cause speculative trading.<sup>195</sup> In the event of an untoward movement in share prices, the negotiating parties must make an immediate announcement about the true state of affairs.<sup>196</sup> Offerors must also bear in mind that should negotiations bring forth offers to a few large offeree shareholders, any subsequent offer must be on terms at least as favorable as those the large shareholders have received.<sup>197</sup>

The same or similar precepts apply to the target company in the

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<sup>192</sup> "[I]t is considered undesirable to fetter the market. Accordingly, all parties to a take-over or merger transaction . . . are free to deal at arm's length . . ." CRRY CODE rule 29. American authorities have through rule 10b-13, 17 C.F.R. § 240.10b-13 (1970), prohibited both cash and exchange offerors from market purchases of offeree shares. See text accompanying notes 91-94 *supra*.

<sup>193</sup> CRRY CODE rule 29.

<sup>194</sup> *Id.* rules 1-12. Note that some of the rules also bear on an offeror making a surprise bid.

<sup>195</sup> *Id.* rules 5, 7.

<sup>196</sup> *Id.* rule 5.

<sup>197</sup> *E.g., id.* general principle 8.

negotiation stage. The Code reminds offeree directors to act in the interests of the shareholders as a whole and specifically forbids some of the more common ways in which directors can in a tender offer situation breach their fiduciary duties.<sup>198</sup> The Code warns against favoring a preferred suitor by giving that suitor more or different information than that given to another potential offeror.<sup>199</sup> More positively, target company directors have the right to demand proof that a potential offeror is bona fide through requesting evidence that the offeror has the means to implement the offer.<sup>200</sup> When two companies are agreed as to the basic terms and are reasonably confident that a bid will be forthcoming, the Code directs them to make an immediate and preferably joint press announcement.<sup>201</sup>

### 3. Stock or Cash Offer

Regardless of the offeror's decision on the other two preliminary matters, he must also make one other important pre-bid decision: whether to offer stock or cash. Once the decision for cash is made, the primary task is to raise the money.<sup>202</sup> Using securities as the medium means that both the tender offer regulations and the exchange offer requirements of the Stock Exchange Federation will apply.<sup>203</sup>

The requirements of the British Stock Exchange Federation fit an exchange offer into one of two categories: an offer by a company seeking quotation simultaneously with the making of the offer, and an offer of an issue already quoted.<sup>204</sup> As to the first category, the amount of the offering must be £100,000 and the total valuation placed on the company £250,000. At least fourteen days before the offering, page

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<sup>198</sup> For example, they cannot ordinarily transfer control unless a similar offer is made to all other shareholders (*id.* rule 10) and they must be prepared to justify to the Panel their recommendation of the lower of two offers (*id.* rule 9).

<sup>199</sup> *Id.* rule 11.

<sup>200</sup> *Id.* rule 3.

<sup>201</sup> *Id.* rule 5.

The guidelines provided by the New York Stock Exchange are somewhat analogous to the City Code rules affecting negotiations. These guidelines tell companies to make timely disclosure to ward off speculative market activity, to keep secret corporate developments like tender offers, and to give information on an equal basis to all who inquire. NEW YORK STOCK EXCHANGE, *supra* note 78, at A-18 to -19.

<sup>202</sup> American regulations governing this stage include the Federal Reserve Board's Regulations G, T, U, 12 C.F.R. §§ 207.1-07.5, 220.4-20.6, 221.1-21.4 (1970). These regulations limit the amount of money that can be lent to a percentage of the market value of the securities to be purchased if such securities will be collateral for the loan. Further, the offeror must disclose its borrowing to the SEC.

<sup>203</sup> Stock exchange requirements displace the company law provisions in most cases. See text accompanying notes 127-28 *supra*.

<sup>204</sup> See ADMISSION TO QUOTATION 2.

proofs of the draft prospectus must be filed with the Stock Exchange. This prospectus, and other documents such as the memorandum and articles of association, are screened by the exchange. A member broker or issuing house, employed to sponsor quotation of the issue, must state that it is satisfied with the accuracy of the prospectus. A hearing is held on the application. When the offer takes place, the prospectus is published in two leading newspapers. Preliminary announcements, confined to excerpts of the prospectus, can be inserted in the press if submitted to the exchange at least four days in advance.<sup>205</sup>

The Federated Exchanges impose less stringent requirements on acquirers offering an issue already quoted.<sup>206</sup> Moreover, in both cases, certain additional information must be included in the takeover circular. The additional information includes the latest price of the security offered together with six other prices from the previous six months, description of the offeror's profit and dividend figures for the last three years, changes in financial condition since the last available accounts, the date of the next dividend in which accepting target shareholders will participate, and designation of the place where the accounts, memorandum and articles of association, and material contracts will be available for inspection.<sup>207</sup>

#### 4. *Preparing the Offer*

Finally, after resolving all the preliminary questions, X begins to prepare the actual offer. This stage will not vary significantly whether the medium is securities or cash. If a non-negotiated offer has been decided on, X will begin by obtaining the target's shareholder list, usually by means of a third party so as to avoid tipping off the target.<sup>208</sup> Armed with names of shareholders, X will find communication by circular the most practicable means of reaching target shareholders.<sup>209</sup> The best starting point for constructing the bid circular is the list of required particulars of disclosure directed by the Federated

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<sup>205</sup> *Id.* at 49-53, 64-71.

<sup>206</sup> *Id.* at 53-57, 71-78.

<sup>207</sup> *Id.* at 23-25. An American offeror forgoes secrecy and surprise in making an exchange offer because of the requirements of the registration process. British offerors need not sacrifice secrecy in choosing the stock route.

<sup>208</sup> Companies Act § 113 forces a company to give a shareholder list to anyone who asks for it.

<sup>209</sup> American practice differs. One can obtain a shareholder list only upon establishing grounds entitling one to the list. *E.g.*, ILL. ANN. STAT. ch. 32, § 157.45 (Smith-Hurd Supp. 1970) (proper purpose). As one commentator noted: "The result is that if you file a petition alleging proper purpose or, in fact, showing proper purpose, and that is controverted, you have a trial of an issue of fact with the resulting delays." Stephan, *Highlights*

Exchanges.<sup>210</sup> Quite simply, the particulars of disclosure include: (1) the heading "if you are in any doubt about this offer, you should consult your Stockbroker, Bank Manager, Solicitor, or other professional adviser"; (2) the date, name, and address of the offeror; (3) the name and address of the person making the offer if other than the offeror; (4) when and where to tender; (5) whether the stock will become ex dividend during the offer; (6) when and how the cash will be paid; (7) conditions, including the number of acceptances; (8) if a partial offer, the reasons why; (9) whether, when once acquired, the securities will be transferred to any other person; (10) particulars on any agreements between offeror and offeree directors; (11) the latest middle market quotation for offeree shares together with at least six quotations from the previous six months; (12) the intentions of the offeror regarding the offeree company; and (13) any change in the offeree company's financial position known to the offeror and not included in the offeree company's latest balance sheet.<sup>211</sup>

Code rules and principles lean heavily on the British offeror in preparing its circular. The general disclosure standard is the most inclusive of these rules:

Shareholders shall have in their possession sufficient evidence, facts and opinions upon which an adequate judgement and decision can be reached, and shall have sufficient time to make an assessment and decision. No relevant information shall be withheld from them.<sup>212</sup>

With that standard in mind, X should also recall that the Code requires a statement in the circular that its Board of Directors "have considered all statements of fact and opinion contained therein and accept, individually and collectively, responsibility therefor and

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*of the Montgomery Ward Proxy Contest from a Lawyer's Viewpoint*, 11 Bus. LAW. 86, 90 (1955). Consequently, the American offeror may by-pass the attempt to get a shareholder list and use advertisements in the financial media instead of circulars to implement the surprise offer.

<sup>210</sup> These are the same requirements imposed on dealers by the Licensed Dealers Rules. Thus, although the Rules apply to only five percent of Britain's investment firms, their influence is strong in areas of self-regulation. Text accompanying notes 147-51 *supra*.

<sup>211</sup> ADMISSION TO QUOTATION 23-25. While X is preparing its circular, X's American counterpart is turning to Securities Exchange Act § 14 to prepare its filing for the SEC. Although the required disclosures may be troublesome, they are not so extensive as the British requirements. Of course, the American exchange offeror is following a different path at this point—preparing a registration statement for an offer weeks away.

<sup>212</sup> CRRY Code general principle 3. An American offeror must consider whether his advertisement contains an "untrue statement of a material fact . . . necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading . . ." SEC rule 10b-5(b), 17 C.F.R. § 240.10b-5(b) (1970). The less than affirmative language of this disclosure standard will often mean that an offeror does not give target shareholders the information needed to make an informed decision.

consider that no material factors or considerations have been omitted."<sup>213</sup> Pursuant to these general precepts, X must include in the circular its holdings and its directors' holdings in the offeree company, together with dates and prices for purchases in the previous six months.<sup>214</sup> X must procure from an appropriately independent party a statement that it has the means to carry out the offer and include such statement in the circular.<sup>215</sup> To assure that great care is taken in preparing any profit forecasts or asset revaluations for the circular, and to assure that all assumptions upon which such forecasts are based are stated, X must procure another opinion from an independent source on the reasonableness of the forecasts or revaluations.<sup>216</sup>

### 5. *Launching the Offer*

Having prepared the takeover circular, X is ready to launch its offer. After the takeover circular is screened by the Quotations Depart-

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<sup>213</sup> CITY CODE rule 13. American law does not require such a due diligence statement.

<sup>214</sup> *Id.* rule 16. Similar American requirements exist. Text accompanying note 56 *supra*.

<sup>215</sup> CITY CODE rule 17. One purpose behind the American disclosure requirement concerning offeror borrowing is to enable shareholders to evaluate the offeror's ability to complete the acquisition. Text accompanying notes 59-60 *supra*. A further protective step would be a City Code-like certification by a third party that the offeror will be able to pay for shares tendered. Such certification, though, does not by itself help the shareholder determine whether the acquirer has been borrowing heavily and thus may be a corporate raider.

<sup>216</sup> CITY CODE rule 15. The WHEAT REPORT 95-96 describes the American view:

A number of experienced security analysts suggested to the Study that the Commission should permit "controlled" projections of sales and earnings in prospectuses and other documents filed with the Commission. . . . The British disclosure system recognizes this to a limited degree and the Study carefully considered the merits of British practice. Moreover, the Study recognizes that most investment decisions are based essentially on estimates of future earnings.

Lawyers, underwriters and company officials were generally opposed to the analysts' suggestion. Even if projections were not required but only permitted, it was observed that problems of civil liability would be insurmountable unless projections in prospectuses were expressly granted immunity from sections 11 and 12 of the [1933] Act. This would be extremely difficult for the Commission to do. Moreover, from a management standpoint, projections may change rapidly during a given year as changes occur in the factors on which they are based. Inclusion of such changing projections in a prospectus, which might be used long after it became effective would give rise to significant problems.

It has been the Commission's long-standing policy not to permit projections and predictions in prospectuses and reports filed with the Commission. Such documents are designed to elicit material facts. Their factual character is widely recognized. Investors and their advisers are at liberty to make their own projections based on disclosures resulting from the Commission's requirements. A real danger exists, in the Study's judgment, that projections appearing in prospectuses and other documents filed under the securities laws and reviewed by the Commission would be accorded a greater measure of validity by the unsophisticated than they would deserve.

For these reasons the Study concludes that the Commission's policy on projections should not be changed.

ment of the Stock Exchange,<sup>217</sup> X will file a copy with the Take-Over Panel.<sup>218</sup> The Code then requires that X put the offer forward to the board of the offeree company.<sup>219</sup> The offeree board must notify shareholders by press announcement as soon as the offer is received.<sup>220</sup> When that occurs, offeror X sends out the circular and the offer begins. Characteristically, the pace, if not slowed by regulation, speeds up considerably once the offer begins. Probably the first step will be a decision on the offer by the offeree board. In accordance with its fiduciary duty to act in the interests of the company as a whole, the board decides either to recommend acceptance of the offer, to remain silent and do nothing, to remain silent but assert defenses against the offer, or to resist the offer verbally and legally.

### 6. Offeree Response

Once the offeree board recommends acceptance, little more remains than to await the outcome. Of course, in communicating its recommendation, an American offeree board must meet certain basic standards of disclosure and file its communications with the SEC.<sup>221</sup>

An American offeree board, though, can and perhaps will remain silent.<sup>222</sup> The board's silence cuts against the success of an American offer; since the offeror finds it impracticable to obtain a shareholder list and usually relies on advertisements, a target shareholder who does not see the advertisements and hears nothing from his company may never know about the offer.<sup>223</sup> If the offeree board does speak against the offer, it must not make untrue or misleading statements or omit

<sup>217</sup> ADMISSION TO QUOTATION 23-25.

<sup>218</sup> All parties to a takeover must file all releases or circulars with the Panel. CITY CODE rule 19.

<sup>219</sup> *Id.* rule 1.

<sup>220</sup> *Id.* rule 5. At the time the American offeror files with the SEC, it sends a duplicate filing to the target company and its news advertisements begin to run. The American offer is, in one step, in full swing.

<sup>221</sup> Text accompanying notes 73-74 *supra*.

<sup>222</sup> "Rather surprisingly, there is no requirement that management . . . express its views on the desirability of the tender offer." Hamilton, *supra* note 4, at 284-85. Krasik, *supra* note 4, at 459, hints that general disclosure standards do not in themselves require such offeree disclosure: "[T]here seems to be no question that a defendant can violate 10b-5 through complete silence. . . . [B]ut as of now, a refusal to make a recommendation to shareholders would not be a violation of 10b-5."

<sup>223</sup> See Krasik, *supra* note 4, at 462. *But see* Haack, *supra* note 112, at 933:

The [New York Stock] Exchange is of the view that when a company does become the target of a tender offer, management is obliged to notify its stockholders that the offer is being made. Management may certainly document its vigorous opposition to an offer, or its enthusiastic support, and has no obligation to assist the offeror in any way. But management . . . does have an obligation to acquaint all stockholders with the fact that an offer is being made.

material facts. But whether a resisting American board chooses to speak or remain silent, it can exert any number of other defense tactics.

Many American corporations have devised strategies for defending should an offer ever be made for their company.<sup>224</sup> The defenses utilize a host of different tactics, some of which may be illegal under American law. Management may drive up the price of the stock;<sup>225</sup> sue for an injunction against the offeror, alleging that misleading statements or omissions in the offer violate rule 10b-5 and section 14(e);<sup>226</sup> arrange a defensive merger with a more acceptable partner and thereby, among other things, dilute the equity available for purchase by the offeror;<sup>227</sup> do the same by issuing additional shares to friendly persons for various reasons;<sup>228</sup> seek to obtain governmental intervention under the antitrust laws, if need be by acquiring a business in the same line as the offeror;<sup>229</sup> call on state securities commissioners to block the offer as being unfair;<sup>230</sup> call attention to the tax consequences of the offer;<sup>231</sup> and exert other defenses, some only variations on these basic themes. But however large the possible array of defenses, some of these tactics may not be available under the corporate laws of certain states, the rules of some exchanges, or under federal or state securities laws.<sup>232</sup>

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<sup>224</sup> See Cohen, *supra* note 1, at 28-29, 100-02, for a suggested prearranged strategy. See also Bradshaw, *Defensive Tactics Employed by Incumbent Managements in Contesting Tender Offers*, 21 STAN. L. REV. 1104 (1969); Hayes & Taussig, *Tactics of Cash Takeover Bids*, 45 HARV. BUS. REV. 135 (1967); Kennedy, *Defensive Take-Over Procedures Since the Williams Act*, 19 CATHOLIC U.L. REV. 153 (1969); Mullaney, *Guarding Against Takeovers—Defensive Charter Provisions*, 25 BUS. LAW. 1441 (1970); Schmults & Kelly, *Cash Take-Over Bids—Defense Tactics*, 23 BUS. LAW. 115 (1967).

<sup>225</sup> *E.g.*, by defensive warehousing as in *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970).

<sup>226</sup> *E.g.*, *Susquehanna Corp. v. Pan Am. Sulphur Co.*, 423 F.2d 1075 (5th Cir. 1970); *Armour & Co. v. General Host Corp.*, 296 F. Supp. 470 (S.D.N.Y. 1969).

<sup>227</sup> Or management may merely publicize the possibility of a merger with a more attractive party as in *Iroquois Indus., Inc. v. Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970).

<sup>228</sup> In *Chris-Craft Indus., Inc. v. Bangor Punta Corp.*, 426 F.2d 569 (2d Cir. 1970), target Piper issued 469,199 shares to acquire two small corporations by merger and sought through the resultant dilution to reduce Chris-Craft's chance for successful takeover of Piper. The New York Stock Exchange promptly suspended trading in Piper shares and began proceedings before the SEC for delisting, alleging violation of the requirement that shareholder approval be obtained for the issuance of large share blocks. Piper, under those threats, rescinded the transactions.

<sup>229</sup> *Armour & Co. v. General Host Corp.*, 296 F. Supp. 470 (S.D.N.Y. 1969).

<sup>230</sup> Note 109 and accompanying text *supra*.

<sup>231</sup> If most target stock is held at a low tax basis, a cash offer may become unattractive when target company management emphasizes that the excess of cash received over basis is taxable. See Cohen, *supra* note 1, at 28.

<sup>232</sup> *Id.* See also Haack, *supra* note 112, at 934:



American offerees, even though limited in the defenses they can use, do wage long and fierce battles, and often succeed in defeating a tender offer.<sup>233</sup>

The offeree's posture under the British regulatory scheme is at almost every step different from an American target's position. The offeree board must begin by stating its views on the offer almost immediately after the offer is received.<sup>234</sup> Any such communication regarding the offer is governed by the same general disclosure standard and the same rules as to profit forecasts, and must contain the same due diligence representation as the offeror's circular.<sup>235</sup> In addition, the City Code requires the offeree board to detail holdings of offeree directors in both the offeror and offeree companies, and of the offeree company itself in the offeror, together with dates and prices for purchases in the last six months. Then each director must state in the offeree document his intention regarding his individual holding in the company.<sup>236</sup>

Perhaps more important is the City Code's flat prohibition of offeree defenses. The target company cannot take any action "which could effectively result in any *bona fide* offer being frustrated or in the shareholders of the offeree company being denied an opportunity to decide on its merits."<sup>237</sup> Thus, if the target of a tender offer in Great Britain chooses to resist the offer, it must rely upon management's past record and upon the company's future prospects, which prospects may be shown in the form of earnings and sales predictions and assets revaluations.

### 7. *Substantive Limits on the Bid*

As noted, the British have substantive rules that discourage partial bids.<sup>238</sup> There are also other substantive rules that govern conduct of a

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In its role as watchdog of corporate democracy, the Exchange last year was disturbed by a number of so-called "defensive tactics" developing in response to the growing number of takeover bids. Some of the techniques seemed clearly to violate the principle of corporate democracy.

<sup>233</sup> *E.g.*, B. F. Goodrich fought for months and finally defeated Northwest Industries's takeover attempt. Northwest Indus., Inc., 3 BLUE SKY L. REP. ¶ 70,816 (Ohio Dep't of Commerce 1969).

<sup>234</sup> CITY CODE rule 12.

<sup>235</sup> *Id.* rules 13-15.

<sup>236</sup> *Id.* rule 16.

<sup>237</sup> *Id.* general principle 4. The United States may be moving slowly in that direction. The recent amendment of § 14(e) (note 84 *supra*) is in part directed at offeree defenses: "The committee by adopting this section intends to allow the Commission to deal more adequately with the sophisticated devices sometimes employed by both sides in contested tender offers." S. REP. No. 1125, *supra* note 24, at 6.

<sup>238</sup> Text accompanying notes 187-93 *supra*.

bid. The offer must be open twenty-one days, and if the offeror seeking voting control obtains or agrees to obtain fifty percent of the target's voting shares, it can, prior to the twenty-first day, bind shareholders who have tendered.<sup>239</sup> Once the offeror declares the offer unconditional—binding tenderers—the offer must remain open for acceptances for another fourteen days.<sup>240</sup> Further, an offer must be kept open for eight days more after a revision in the offer. If the change is an increase in the consideration offered, X must pay the increased consideration to those who tendered before as well as to those who tendered after the increase. In no case, though, can the offeror tie up tendered shares for more than sixty days after the initial offer.<sup>241</sup>

British and American regulations both, then, have an increase-in-consideration rule. Both have pro rata periods, the British twenty-one days and the American ten days.<sup>242</sup> The only respect in which the American substantive limitations are more liberal is in the flat seven-day withdrawal period. In Britain, if the bid is for voting control, the shareholder who has tendered loses his right to withdraw after twenty-one days if the offeror accepts or agrees to accept more than fifty-percent of the offeree voting stock and declares the offer unconditional. Yet since the British target shareholder always has twenty-one days to make the original decision on tendering, the right to withdraw becomes of lesser urgency. Shareholders who have not been rushed by time limitations in their initial decisions will be less likely to withdraw. The overall effect of the British bid conduct rules is a considerable slowing of the tender offer process.

### 8. *Share Dealings*

Another aspect of regulation during the actual course of the tender offer concerns trading in either company's shares by the companies themselves or by their associates.<sup>243</sup> Extending back before the offer has been announced, the British system forbids insiders from trading on the information that an offer may be forthcoming.<sup>244</sup> A British offeror, not being subject to any reporting requirements under either company law or the City Code, can warehouse offeree company

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<sup>239</sup> CITY CODE rules 20-21.

<sup>240</sup> *Id.* rule 22.

<sup>241</sup> *Id.* rule 21; *id.* general principle 8.

<sup>242</sup> Note 191 *supra*.

<sup>243</sup> This is governed in Britain by CITY CODE rules 29-33.

<sup>244</sup> *Id.* rule 30. This is of course the sum and substance of the American rule announced in *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

stock.<sup>245</sup> Although no reporting requirements exist and an offeror can maintain secrecy while warehousing, if a British offeror makes an offer to one or more target shareholders before the general bid, the Code explicitly demands that the bid must be on similarly favorable terms.<sup>246</sup> And if these one or two shareholders have large holdings approaching or involving control, the offeror must extend a bid to all other shareholders after purchasing those controlling interests.<sup>247</sup>

Once the bid begins, the British partial bidder cannot purchase target shares in the market. The British offeror aiming at 100 percent of the target shares can make market purchases during the bid, subject to daily reporting to the stock exchange, the press, and the Take-Over Panel.<sup>248</sup> When, however, market purchases by the British offeror are above the offer price, the offeror must pay the weighted average price of such purchases to all those who sell to it pursuant to the bid.<sup>249</sup>

Defensive purchasing—the target company bidding for its own shareholders' stock—is allowed in Britain, subject only to reporting to the stock exchange, the press, and the Take-Over Panel.<sup>250</sup> Of course, the Code provisions forbidding the offeree to take action frustrating an offer or to take action depriving shareholders of the ultimate decision may impinge heavily upon the offeree's power to buy in the market during the pendency of an offer.

#### D. *The Leasco-Pergamon Affair*

The ten-year period, 1959-69, saw considerable refinement of the British self-regulatory experience, culminating in the Take-Over Panel's strong policy statement on sanctions. Last in this process of evolution is the Leasco-Pergamon affair, which serves as an example of the scheme's operation and as an indication of its acceptance by the government and the public. Leasco-Pergamon was the first British take-over in which the system operated satisfactorily—the first major incident after the regulatory system had come of age.

<sup>245</sup> An American offeror can also warehouse, but upon reaching the five percent level it will have to report its dealings in offeree shares. Text accompanying note 50 *supra*.

<sup>246</sup> CITY CODE general principle 9.

<sup>247</sup> *Id.* rule 10.

<sup>248</sup> *Id.* rule 29. An American offeror, of course, can never purchase target company shares in the market once the bid has been launched. Text accompanying notes 91-94 *supra*.

<sup>249</sup> CITY CODE rule 31. *Cf.* rule 10b-13 as originally proposed, text accompanying notes 91-92 *supra*.

<sup>250</sup> CITY CODE rule 29. Before purchasing its own shares an American target company must disclose to the SEC and to its shareholders its intentions and methods in making such purchases. Text accompanying notes 82-83 *supra*.

In early 1969, Leasco Data Processing began to search for a dynamic leader for European computer operations. Robert Maxwell, Pergamon Press board chairman and leading stockholder, attracted Leasco's eye.<sup>251</sup> Besides, Pergamon as a publisher of scientific books and journals had a vast storehouse of publications that would be a valuable adjunct to a computer service. On June 17, 1969, Leasco and Pergamon jointly announced an offer to Pergamon shareholders at thirty-seven shillings per share, with details to be worked out and the formal offer to be made sometime in July.<sup>252</sup> Then Leasco's representatives began looking at Pergamon's books with a view towards preparing a pro forma forecast for Leasco's European operations. Meanwhile, Leasco began warehousing Pergamon shares, buying at thirty-five to thirty-six and reaching over the twenty-one percent level on July 9.<sup>253</sup> British authorities granted various consents to the takeover.<sup>254</sup> On July 24 Leasco disclosed a purchase bringing its Pergamon holdings to thirty-five percent.<sup>255</sup>

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<sup>251</sup> The Leasco-Pergamon episode featured a confrontation between two personalities, Saul Steinberg of Leasco Data Processing and Robert Maxwell of Pergamon Press. Steinberg had founded Leasco in 1961 with \$25,000 capital. In 1968 Leasco had assets of \$775 million; its earnings had rocketed from \$1.4 million in 1967 to \$27 million in 1968. Among Steinberg's coups was the takeover of Reliance Insurance. Steinberg was one of the first to realize that insurance companies had valuable reserves, useful in an acquisition program. Perhaps, however, Steinberg achieved his greatest acclaim in failure. He had announced a probable exchange offer for Chemical Bank of New York. Bank trust departments began selling Leasco shares heavily and Leasco's financial advisers refused to work in the bid. Steinberg eventually was forced by the financial community to abandon the idea. But at the age of 30, he began eyeing one of the United Kingdom's largest corporations. At that point one commentator wrote of Steinberg:

There is an obvious and intriguing parallel with his current adversary, Robert Maxwell. Both slogged their own way to the top, making the inevitable enemies in the process. Both have been involved in takeover situations that drew fierce and lasting competition from the powerful, conservative money establishment.

Jacobson, *Saul Steinberg: Portrait of the Millionaire as a Young Man*, *The Times* (London), Oct. 7, 1969, at 23, col. 3.

Maxwell's achievements were not overshadowed by Steinberg's. He purchased Pergamon Press in 1951 for £13,000. Through acquisitions and through development of the scientific publishing business, Maxwell parlayed Pergamon into a corporation that recorded £2.1 million of earnings in 1968. Maxwell, too, was noted for failures—his 1967 £5.4 million bid for Butterworths, the leading English legal publisher, and his 1968 bid for News of the World, publisher of a leading newspaper supplement. In both cases the target companies encouraged rival bids in order to defeat the Maxwell bid. *Id.*, July 19, 1969, at 25, col. 1; *id.*, Aug. 23, 1969, at 11, col. 3.

<sup>252</sup> *Financial Times* (London), June 19, 1969, at 21, col. 3.

<sup>253</sup> *The Times* (London), July 10, 1969, at 28, col. 1.

<sup>254</sup> *Id.*, July 11, 1969, at 28, col. 3 (exchange control consent); *id.*, July 19, 1969, at 12, col. 4 (antitrust approval).

<sup>255</sup> *Id.*, July 24, 1969, at 21, col. 6. At that time, with Maxwell's promised 34%, Leasco had more than numerical control.

During July, however, Leasco accountants had found that Pergamon's statements as to past earnings and forecasts as to future earnings were erroneous and misleading. Questionable transactions were uncovered between Pergamon, International Learning Systems Corporation (ILSC), a subsidiary in which Pergamon had a fifty per cent interest, and Maxwell Scientific, an American firm owned by Robert Maxwell.<sup>256</sup> More importantly, there was the ugly specter of Maxwell's self-dealing in Pergamon assets with a corporation he owned. Since gaining Maxwell's services was one of Leasco's primary reasons for making the Pergamon acquisition, any reflection on Maxwell's integrity lessened the value of Pergamon in Leasco's eyes. Further deterioration in Leasco-Pergamon relations resulted from Maxwell's restating Pergamon's profit forecast at £ 2.05 million, compared with the £ 2.5 million forecast in the original Leasco-Pergamon negotiations.<sup>257</sup>

The London financial press knew something was up when August arrived and a formal offer had still not appeared. Inquiries were answered in terms of a week or "in about a fortnight," with the additional comment that "there are many complications."<sup>258</sup> Then Leasco discovered that a Maxwell family trust had sold 600,000 Pergamon shares to a broker, who had in turn sold 200,000 to Rothschilds, Leasco's merchant banker. Maxwell had not disclosed the sale.<sup>259</sup> Maxwell was to have sold his and his family's holdings in a single transaction after the formal offer. By seemingly breaching that promise to Leasco, Maxwell further reduced Leasco's faith in him.<sup>260</sup>

On the day following discovery of the Maxwell sale, Friday, August 22, Leasco withdrew. Pergamon share prices plummeted. The Take-Over Panel asked each party to make an early public statement,

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<sup>256</sup> Pergamon, through ILSC, had been sending past issues of scientific journals to Maxwell Scientific. The journals had been sent on something akin to a sale-or-return basis, but Pergamon recorded the item as £ 660,000 sale. Because the transaction was a sale or return of items of unknown market value, Pergamon's earnings would have to be drastically revised depending upon whether the journals were sold and whether, if sold, they would bring the price that Pergamon had recorded as the sale price. *Id.*, Aug. 26, 1969, at 15, col. 1.

<sup>257</sup> *Id.*, Aug. 23, 1969, at 11, col. 7.

<sup>258</sup> *Id.*, Aug. 14, 1969, at 20, col. 4.

<sup>259</sup> *Id.*, Aug. 21, 1969, at 15, col. 1. CITY CODE rule 29 would generally require reporting of such a sale. However, the Panel accepted Maxwell's contention that he had no control over the foreign trustees.

<sup>260</sup> It also appeared that Maxwell had been attempting to salvage some gain when he began to realize that the ultimate offer might not be forthcoming due to the sale-or-return problem and other accounting matters. See CITY CODE rule 30, forbidding trading on inside information.

requested suspension of Pergamon quotations, and began meetings with the parties.<sup>261</sup> Formal statements by Leasco and Pergamon followed,<sup>262</sup> consisting largely of character assassinations aimed at the opposing side. The following week the Panel held extensive hearings.

The Panel found no serious breaches of the specific Code rules, and did not cite any rule or principle of the City Code. Instead, the Panel dealt with the problem of general disclosure, including omission of Maxwell's relationship to Maxwell Scientific in past sales of journals and misstatements of Pergamon's earnings. Since Pergamon's quotation on the Stock Exchange had been suspended, no market existed for the thirty-one percent of Pergamon's shares still in public hands. To aid shareholders so locked in with Pergamon shares, the Panel brought Leasco and Pergamon back together for negotiations.<sup>263</sup> In the end the Panel approved a Leasco-Pergamon agreement whereby Leasco agreed to take up outsiders' shares at twenty-five times the price-earnings ratio and to take up insiders' holdings, namely Maxwell's, at nineteen times earnings, with the figures to be based upon an independent audit of 1968 and 1969 Pergamon earnings. By asking the Board of Trade to investigate, the Panel resolved the disclosure questions, the misleading statements concerning Pergamon's earnings, and the nondisclosure of substantial transactions between Pergamon and a company owned by Pergamon's chief executive.<sup>264</sup>

Although some commentators were skeptical before the Panel's opinion issued,<sup>265</sup> the financial media lauded the Panel's efforts as self-regulatory success at last. Panel efforts in getting Leasco to reinstate its offer had saved Pergamon shareholders from the catastrophe of having to sell in the market once quotation of Pergamon was resumed. More importantly, the Panel had been brave enough to venture into the general disclosure area, and had also taken commendable action in calling for a suspension of trading in Pergamon shares and for a Board of Trade inquiry, an improvement over the mere slap on the wrist it

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<sup>261</sup> The Times (London), Aug. 22, 1969, at 15, col. 1.

<sup>262</sup> *Id.*, Aug. 23, 1969, at 11, col. 7; *id.*, Aug. 27, 1969, at 17, col. 1.

<sup>263</sup> *Id.*, Aug. 26, 1969, at 15, col. 1; *id.*, Aug. 28, 1969, at 1, col. 2.

<sup>264</sup> The Panel withheld its opinion pending the outcome of the Leasco-Pergamon bid reinstatement negotiations. On August 29, only one week after Leasco had withdrawn, the Panel published its opinion. *Id.*, Aug. 29, 1969, at 17, col. 2. After a review of facts, the opinion found that Leasco had justly withdrawn on the basis of loss of faith in Maxwell and Pergamon. The opinion then merely articulated the questions as to Maxwell and Pergamon's disclosure. The disposition was the call for a Board of Trade inquiry to see whether Maxwell had had a reasonable basis for the Pergamon profit forecasts and whether Maxwell had disclosed to shareholders adequate information regarding the ISLC accounts and the relationship between his companies and Pergamon. *Id.* at 21, col. 6.

<sup>265</sup> *E.g.*, *id.*, Aug. 25, 1969, at 18, col. 4.

administered in the American Tobacco-Gallaher takeover. The City was pleased because legislative interference had been forestalled.<sup>266</sup>

The sequel was disappointing, although the events do not detract from the Panel's accomplishment. The irascible Maxwell repudiated the new agreement after a dispute on whether the agreement gave Leasco the right to force Maxwell out as Pergamon's chief executive. Leasco, however, expressed a continued desire to purchase public shares.<sup>267</sup> Maxwell then appealed to the Take-Over Panel Appeals Committee. He desired review of the Panel's call for a Board of Trade inquiry. The most colorable contention was that the Panel had strayed from its proper field—examination of bid documents and policing of conduct during an actual takeover bid—into the general disclosure area and into events having their genesis in actions occurring long before the formal bid, such as the sale-or-return arrangement with Maxwell Scientific. As Lord Pearce's Appeals Committee pointed out, the Code requires that no relevant information be withheld from shareholders.<sup>268</sup> The Panel cannot secure fair treatment for shareholders, said the Committee, if confined to examination of offer documents and formal offeree replies. Likewise, pre-bid information cannot be divorced from bid information if shareholders are to receive information sufficient for an informed judgment on the offer.<sup>269</sup>

The Board of Trade inquiry into Pergamon's and Maxwell's disclosure got underway soon after the Appeals Committee decision. Beset by delays, including the reluctance of some ex-Pergamon directors to cooperate, the Board of Trade report was still not complete more than a year and a half after the initial Panel action.<sup>270</sup>

On November 3, 1969, Leasco filed suit in the United States against Maxwell, Maxwell Scientific, and others,<sup>271</sup> alleging violation

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<sup>266</sup> *Bus. Guardian*, Aug. 29, 1969, at 10, col. 2; *The Times (London)*, Aug. 29, 1969, at 21, col. 1; *id.*, Aug. 30, 1969, at 11, col. 3.

<sup>267</sup> *Financial Times (London)*, Sept. 15, 1969, at 1, col. 3.

<sup>268</sup> CITY CODE general principle 3.

<sup>269</sup> *The Times (London)*, Sept. 19, 1969, at 22, col. 5.

In a Pergamon shareholders meeting, held in October, Leasco overrode Maxwell's last ditch effort to retain control of the Pergamon board. Leasco elected three independent directors, eschewing complete control until it had made good on a renewed promise to acquire numerical stock control through an offer to remaining Pergamon shareholders. *The Times (London)*, Oct. 6, 1969, at 18, col. 6; *id.*, Oct. 10, 1969, at 19, col. 1; *Wall St. J.*, Oct. 13, 1969, at 10, col. 2.

<sup>270</sup> *The Times (London)*, Sept. 10, 1969, at 1, col. 1; *id.*, at 19, col. 2; *id.*, Jan. 20, 1970, at 17, col. 1.

<sup>271</sup> *Wall St. J.*, Nov. 4, 1969, at 9, col. 1. The allegations of Leasco are set forth in an opinion on a jurisdictional issue. *Leasco Data Processing Equip. Corp. v. Maxwell*, FED. SEC. L. REP. ¶ 92,805 (S.D.N.Y. Sept. 16, 1970).

of rule 10b-5 in inducing plaintiff Leasco into purchasing Pergamon shares. The complaint alleged that Leasco was damaged because, had the true facts been known, it could have purchased the Pergamon shares at a lower price. It alleged further damages from the suspension of quotation and the Board of Trade inquiry when the facts did come to light.<sup>272</sup> Thus, the year 1969 and the most recent period of British takeover regulation ended in the United States with the Leasco suit. On the other side of the Atlantic the year ended on a note strongly favoring self-regulation:

At the Mansion House the Prime Minister allowed himself an expression of satisfaction at the City's latest attempts at self-policing, which began with the reconstitution of the Panel on Takeovers and Mergers in the spring of this year. It is, of course, too early to judge the work and effectiveness of the panel even if its fiercest critics admit to admiring the speed and authority with which it has worked.<sup>273</sup>

## V

### DRAWING FROM THE BRITISH EXPERIENCE

American securities regulation is based on the principle of disclosure. Besides deterring or detecting fraud and manipulation, disclosure is supposed to provide investors with enough information to enable them to make rational investment decisions. Recognizing that "a pragmatic balance must be struck between the needs of the unsophisticated investor and those of the knowledgeable student of finance,"<sup>274</sup> the system of disclosure operates through a filtration process:

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<sup>272</sup> Pergamon's accounting methods, resulting in earnings overstatements and consequent good market performance, made Pergamon appear to be a better target than it was. Pergamon's course of conduct would seem to be a deceptive practice under *Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc.*, 307 F. Supp. 910 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 842 (2d Cir. 1970). In *Butler*, the offeree alleged that the potential acquirer's past earnings misstatements made it seem a better offeror than was the case. *Butler's* contention was that offeror Comprehensive, through earnings statements based upon nondisclosure of accounting methods changes, had in the months preceding the exchange offer pushed Comprehensive share prices from 15 to 35, thereby engaging in a deceptive practice under rule 10b-5. The Second Circuit upheld trial court acceptance of the contention.

<sup>273</sup> *The Times* (London), Nov. 21, 1969, at 27, col. 1. For Maxwell, later events sounded sour notes. After a year of untangling Pergamon accounts, independent auditors published a revision of Pergamon earnings from the reported 1968 figure of £2.1 million to £140,000. For the first nine months of 1969, earnings were less than £50,000. Maxwell had in August 1969 forecast Pergamon 1969 profits at £2.05 million. *Id.*, Aug. 20, 1970, at 17, col. 1.

<sup>274</sup> WHEAT REPORT 10.



"Information communicated to and absorbed by professionals filters out to and benefits a wider public."<sup>275</sup>

It is clear that this leisurely process of disclosure cannot operate effectively within the context of a fast-moving takeover situation. In fact, the speed with which an American tender offer proceeds often works to deprive the shareholder of an opportunity to make a meaningful decision regarding the offer. Regulation of tender offers should be improved with an eye towards restoring the shareholder to his rightful position as arbiter of the offer. Besides aiding investors, regulation in the tender offer area must, as it currently does not, provide certainty for those whom the system regulates—the corporations themselves. The British system suggests several ways in which these needed reforms can take place.

#### A. *The Problem of Time Pressure*

In the course of a rapidly developing American offer, there is little time in which to act should the offeree company or the offeror act fraudulently. Even if a shareholder has the temerity to challenge a corporation, a court will hesitate to issue a restraining order, fearing that it might appear to be passing on the merits of the offer, or that the order might irrevocably withdraw an opportunity from other shareholders, or simply believing that any decision made in the haste required by a quickly developing tender offer will be a poorly considered one.<sup>276</sup> The same hesitancy results, too, on the SEC's part, for any action could derail the tender offer.<sup>277</sup> Thus, the shareholder's only course of action may be to wait until the offer has run its course, file a lawsuit, and be vindicated years later, at least to the extent that

<sup>275</sup> *Id.*

<sup>276</sup> Many courts have wrestled with the problem:

[T]he equities of the situation speak against an injunction. . . . The stockholders are entitled to exercise their own judgment as to these matters. . . . The decision whether to buy, exchange, or do neither should rest with each individual stockholder.

*Armour & Co. v. General Host Corp.*, 296 F. Supp. 470, 475 (S.D.N.Y. 1969) (footnote omitted).

While courts should rigorously enforce the policy of honesty and fair dealing prescribed by federal securities legislation, they must guard against the risk that, at the instance of incumbent management, they may be frustrating informed stockholders from doing what the latter want.

*Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc.*, 425 F.2d 842, 845 (2d Cir. 1970).

<sup>277</sup> See *Sowards & Mofsky*, *supra* note 35, at 512. Under the 1934 Act, the Commission could publish information relating to violations (§ 21(a)), delist the securities (§ 19(a)(2)), threaten criminal prosecution (§ 32), or seek injunctive relief (§ 21(e))—all drastic measures and only to be taken after an investigation that may take more time than the consummation of a tender offer. 15 U.S.C. §§ 78s(a)(2), 78u(a), 78u(e), 78ff (1964).

money damages can redress the wrong. The gist of the problem is that the interaction of the explosive tender offer and the inflexible administrative-judicial process produces a momentum not easily reversed. Procedural difficulties may in turn inhibit the system from deterring questionable practices. Once discovered, fraud may go unredressed because of the lack of an effective and immediate remedy.

But time pressure may also cause the target shareholder to complain even when he detects no possible wrong. He must make a hurried decision in a pressure-laden atmosphere, a decision perhaps involving much of his financial security. Although the present American substantive rules ease that burden by guaranteeing, in effect, ten days in which to decide whether to tender,<sup>278</sup> ten days may not be enough. Since the offeror will implement the takeover attempt by advertisement, a few days may elapse before the shareholder learns of the offer. He may not then have the latest interim and annual reports of his company; he probably will not have any information about the offeror. Other matters may delay his obtaining the information he wants through his broker, with a day or so left to make an important decision.<sup>279</sup> The pressure of time limitations may also cause offeree company directors and officials to make decisions in haste. The short time available and the possible liability if all aspects of the disclosure are not thoroughly checked may cause management to refrain altogether from giving an opinion that the shareholder very much wants.

The insufficiency of time in an American tender offer results in one predominant wrong: the result depends too much on skill and imagination exercised in a few days' time and not on the past records and future prospects of the companies involved. The British, on the other hand, have slowed the takeover bid by requiring that all bids must be open for twenty-one days.<sup>280</sup> The New York Stock Exchange recommends thirty days,<sup>281</sup> and two states have slowed the tender offer process by imposing time standards that extend ten or more days

<sup>278</sup> See text accompanying notes 77-78 *supra*.

<sup>279</sup> There is no question that the contested take-over bid causes great confusion and uncertainty among stockholders of the target company . . . . First, there is the barrage of charges and countercharges and the doubt generated by legal actions on both sides. More basically, there is the difficulty of deciding the financial merits. . . .

. . . .

It is felt that in extreme cases stockholders will sell their shares in the market for cash and invest elsewhere simply because they are hopelessly confused . . . .

Kelly, *supra* note 4, at 626-28.

<sup>280</sup> CITY CODE rule 21.

<sup>281</sup> NEW YORK STOCK EXCHANGE, *supra* note 78.

beyond federal limits.<sup>282</sup> Thus, the consensus seems to be that tender offer regulation should inhibit the process to a greater degree than does present federal regulation.

Slowing down the process would have beneficial effects: suits based on fraud would be better considered; courts could entertain them with less sense of urgency, and the threat of suit or administrative persuasion would have more time to operate. Investors would have more time to gather information and reach a decision. More time might result in better reasoned disclosures, arguments, and opinions, and might give offeree management the opportunity to prepare its response more effectively. And finally, the filtration process might be more viable in a tender offer if it had more time to work and if investors had more time to decide.<sup>283</sup>

### B. *Target Defenses*

The Virginia statute requiring the cash offeror to file ten days in advance of the offer and requiring all offers to be open twenty-one days slows the tender offer process considerably. For that very reason, however, the Virginia regulation has been criticized as legislation that "while attempting to cure one evil creates only another—the further entrenchment of inefficient corporate management."<sup>284</sup> Merely slowing the process while still focusing most regulation on the offeror would admittedly have that effect. It therefore becomes apparent that to gain the beneficial effects of broader time restrictions without introducing the evil of favoring one side or the other requires further balancing. The British do just that by prohibiting offeree management from using any defense "which could effectively result in any *bona fide* offer being frustrated or in the shareholders of the offeree company being denied an opportunity to decide on its merits."<sup>285</sup> By both slowing the tender offer process and prohibiting defenses, the British system reduces and balances the power of both the offeror and the target company to influence the offer's outcome.

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<sup>282</sup> Text accompanying notes 105-07 *supra*.

<sup>283</sup> In an exchange offer, the filing of the 1933 Act registration statement gives the target company and its shareholders notice of the offer. Offeree management has time to give due consideration to its response and target shareholders have time to gather and consider data. Nevertheless, events occurring after the registration becomes effective may, because of the complete absence of substantive time limitations on exchange offers, give rise to the same infirmities present in the cash offer area. This seems to have been the impetus for the amendment extending the Williams Bill's minimal substantive protection to shareholders faced with an exchange offer. Note 24 *supra*.

<sup>284</sup> Comment, *supra* note 106, at 335.

<sup>285</sup> CRR CODE general principle 4.

Cultivation of tactics that wrest the decision away from offeree company shareholders has been noted in the American literature.<sup>286</sup> Paradoxically, although disclosure is provided in order to enable shareholders to come to an informed decision, the law seems to allow smart management to defeat the offer. The American system allows maneuvers that negate the shareholder's vote by tender. This is certainly an anomaly. To provide the necessary balance among offeror, target company management, and offeree shareholders, regulation should prohibit most or all defenses to tender offers.<sup>287</sup>

Some think this change would favor the offeror by prohibiting offeree defenses other than entreaty and calling attention to management's past record.<sup>288</sup> That thought suggests a further improvement—allowing American target companies to make limited earnings and sales projections by way of defense to a tender offer. The Wheat Report, as a lexicon of current American views, concludes that forecasts should not be allowed.<sup>289</sup> However, since the Wheat Report directs itself primarily to prospectuses and does not directly consider tender offer regulation, the Report's objections should not be dispositive here. Profit forecasts may not be too important in the relatively slow exchange offer process. But in a cash tender offer time does not permit formulation of forecasts and filtration to shareholders, the normal investment adviser practice in other securities areas. If the cash tender offer is retained as a faster takeover technique, investors called upon to make a decision need assistance—profit and sales predictions grounded on stated assumptions and subject to a reasonable belief test.

Management is certainly capable of making such predictions; but because it has the most at stake, offeree management may puff predictions. Subject to a reasonable belief test and a requirement that assumptions be stated, puffing could be made a fraudulent or decep-

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<sup>286</sup> Note 224 *supra*.

<sup>287</sup> Administratively, the SEC might define such defenses as fraudulent or deceptive, in line with a practice the Commission has utilized in other areas. Many defenses are manipulative or deceptive in the full sense of those words: e.g., protective mergers, dilution of equity ownership, and other actions taken at the unilateral insistence of target company management. Of course, the target company must remain free to challenge fraud perpetrated by the offeror.

<sup>288</sup> An outright prohibition would place management at a significant disadvantage in its battle with the offeror because "detailed analysis of 50 subject companies suggests that . . . the typical subject company has exhibited disappointing operating performance, paid decreasing dividends and is excessively liquid." Thus, management would ordinarily not have much verbal ammunition at hand if it is restricted to current and historical material.

Krasik, *supra* note 4, at 464 (footnote omitted).

<sup>289</sup> Note 216 *supra*.

tive practice. At the worst, puffing is no more manipulative or deceptive than tender offer defenses that silently wrest the decision away from shareholders. The British allow circumscribed predictions.<sup>290</sup> Although the use of profit and sales forecasts has been troublesome,<sup>291</sup> the British have not moved to eliminate the practice, resolving instead to continue in the same vein with better safeguards. By slowing the tender offer process and by prohibiting management from unreasonably frustrating an offer, the reforms proposed would put the decision squarely in the shareholders' hands.

### C. *Affirmative and Defensive Disclosures*

From the shareholders' viewpoint, present affirmative disclosure requirements are insufficient.<sup>292</sup> Comparison with the proxy contest or the stock tender offer, the two areas in which an acquirer deals directly with target company shareholders, reveals a wide disparity in required disclosure between those two areas and the cash tender offer. The proxy statement, received well in advance of shareholders' voting, contains disclosure on both the acquirer and the target company. The target's annual report may accompany the proxy.<sup>293</sup> So too with the prospectus an offeror submits in an exchange offer. In cash tender offers, present disclosure essentially includes only the background of the offeror, the offeror's plans for the target, and the offeror's present and proposed future positions on offeree shares.<sup>294</sup> These items of information are a patently insufficient basis for the choice between sticking with present management, tendering, or retaining stock in hope that the offer will succeed.<sup>295</sup>

Present disclosure requirements have 'been criticized not only

<sup>290</sup> CITY CODE rule 15.

<sup>291</sup> Since the creation of the City Code, forecasts made in the course of a take-over bid have been subjected to, apparently, careful scrutiny.

A vague outline of the assumptions, including commercial ones, on which forecasts are made has to be provided. A company's auditors or independent accountants have to affirm that the accounting principles used are consistent with past practice and financial advisers such as merchant banks have to express similar support for a board's views. The difficulty is that while this procedure sounds impressive, neither auditors nor bankers in any sense underwrite or approve the forecasts themselves . . . .

. . . [T]ighter control of partisan predictions is clearly required.

The Times (London), Jan. 24, 1970, at 15, col. 1.

<sup>292</sup> See Fleischer & Mundheim, *supra* note 6, at 326.

<sup>293</sup> Securities Exchange Act of 1934, § 14(c), 15 U.S.C. 78n(c) (1964). See generally SEC Regulation 14A, 17 C.F.R. §§ 240.14a-1 to-12 (1970).

<sup>294</sup> Text accompanying notes 56-74 *supra*.

<sup>295</sup> Of course, if many shareholders retain shares in hope the offer will succeed, the offer will fail. The perversity of that choice, however, should not be grounds for depriving the shareholder of the opportunity to make it.

for being insufficient but also for being ineffectual.<sup>296</sup> Disclosure of position in offeree shares does help the investor evaluate the offeror's chances for success or control; disclosure of plans, though, is of dubious utility. As interpreted by one court, an offeror need only state present, concrete intentions under the heading of plans disclosure.<sup>297</sup> This may be realistic, since many offerors see an attractive target selling at a share price not really in accord with asset values or future prospects. The offeror then goes after the target without intending to formulate definite plans until success has been achieved. As a result of the offeror's having few plans and of court decisions, "[t]he practice that has actually developed in . . . advertisements demonstrates cautious legal draftsmanship. . . . Emphasis throughout the advertisements is on present intention as contrasted with motive or future intention."<sup>298</sup>

Before making a choice on a tender offer the shareholder would like a view of the corporation seeking his shares and a review of his own company's performance, both financial and as judged by the market place. One suggestion, short of sending a pro forma statement, envisions stating in the offering advertisement a location from which the offeror's annual and latest interim reports can be obtained.<sup>299</sup> The offeree company would then respond in kind. Or the SEC could utilize its existing power to expand upon the present affirmative disclosure requirements for offerors and to formulate requirements for target companies. British practice might reveal items for inclusion in SEC requirements for offerors.<sup>300</sup> Note, however, that the British do not specifically require disclosure of past and present operating and financial details. But the general British disclosure standard that shareholders receive all information necessary to making an informed judgment on the offer would require disclosure of some items of that nature.

The British, unlike the Americans, also require target company

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<sup>296</sup> "Most witnesses . . . [in the hearings on the Williams Bill] were . . . vague about how the required disclosure would in fact help the public investor." Hamilton, *supra* note 4, at 276 (footnote omitted). "The most obvious result of these disclosure requirements is a substantial growth of verbiage in . . . tender offers, and a corresponding decrease in their readability." *Id.* at 282.

<sup>297</sup> *Susquehanna Corp. v. Pan Am. Sulphur Co.*, 423 F.2d 1075, 1085-86 (5th Cir. 1970).

<sup>298</sup> Hamilton, *supra* note 4, at 283.

<sup>299</sup> Sowards & Mofsky, *supra* note 35, at 513.

<sup>300</sup> British affirmative disclosure does include some useful items: if a partial bid, the reasons why; whether the acquired securities will be transferred to any other person; agreements between the offeror and offeree directors; recent and past quotations of the shares involved; and any unpublished change in the offeree's financial position known to the offeror. Text accompanying note 211 *supra*.

management to make certain disclosures.<sup>301</sup> As in offeror disclosure, the British general disclosure standard would require the offeree to set forth financial and operating details.

American regulation has been strongly criticized because it does not require that target company management either voice an opinion on the offer or make any disclosures.<sup>302</sup> That situation should be changed: first, a shareholder should never be in the dark as to how his own board of directors feels about a major corporate development such as an offer; and second, the shareholder may not be able to ferret out the information on the status of his company which he needs to make the major investment decision posed by the offer. The possibility that American offeree management might remain silent so as not to attract attention to the offer heightens the necessity of mandatory offeree disclosure.

If the SEC moves to provide for more disclosure by offeror and offeree companies, the Commission should take special care in formulating these requirements to meet the needs of investors. The call for special care springs from the limited time for decision on a tender offer, and the resulting unavailability of a filtration process to make complicated disclosure meaningful for the shareholder asked to tender his shares. The new disclosure cannot be like that now required in a proxy merger statement or in a prospectus, formidable to meaningless for the average investor.<sup>303</sup> Tender offer disclosure requirements must be formulated on the basis of what the average investor understands and wants or needs to know. Such disclosure should look to both offeror and offeree for operating and financial information. It could be minimal but informative, including a brief description of past and present operations, future prospects, balance sheets and earnings statements for the last two years, and price-earnings ratios for a similar period.<sup>304</sup>

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<sup>301</sup> Offerees must voice an opinion on the offer, detail offeree and offeree directors' holdings in offeree and offeror shares, list the directors' individual intentions as to the offer, and detail offeree directors' contracts with the offeror. Text accompanying notes 234-36 *supra*.

<sup>302</sup> *E.g.*, Krasik, *supra* note 4, at 458-66.

<sup>303</sup> As one source phrases the problem: "It is doubtful that anyone ever read the prospectus other than the parties preparing it, the SEC staff (which developed an extensive comment letter), and the printers, who charged \$15,000 for their efforts." Schneider, *supra* note 5, at 1333.

<sup>304</sup> Most corporations involved in a tender offer voluntarily disclose much of this information so these requirements would not be an added burden in most tender offers. They would, however, guard against the few occasions where an offeree remains silent or where the offeror conducts a hard-hitting, surprise bid that offers only cash and the minimal amount of disclosure to target shareholders.

The principal problem with simplified, meaningful disclosure upon which investors can make an informed decision is that such disclosure may not lend itself to the other purpose of affirmative disclosure—the prevention and discovery of fraud. A possible answer is a dual disclosure system involving direct, simplified disclosure to investor and more complex reporting to agencies to ensure against fraud, with little attention to filtration in the fast takeover. A detailed document would go to the SEC. Another document, partly a truncated version of the filed document and partly information written specifically for the average investor, would go to the shareholders.<sup>305</sup>

Movement in the disclosure area will not derogate from the general American antifraud provisions, rule 10b-5 and section 14(e). Rather, by formulating concrete affirmative disclosure requirements, the proposal would reduce the area of exposure to fraud action, cutting into the disclosure morass with understandable rules. This in turn would tend not only to aid investors, but to achieve certainty and ease of compliance. The major criticism of securities regulation today centers around the increasing uncertainty among those who move in areas governed by American securities law.<sup>306</sup> This doubt exists in large part because of the imprecision of the all-pervading American general disclosure, antifraud rule 10b-5, and will probably increase as section 14(e) becomes more widely interpreted. To corporations, these principles create doubt as to what action and what disclosure are required in making or defending against a tender offer; corporate officials must act quickly with few concrete guidelines.<sup>307</sup> One effect of that uncertainty is to produce in some cases the opposite extreme of overdisclosure.<sup>308</sup> From the investors' standpoint, with only a few days to

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<sup>305</sup> The Wheat Report recommends efforts in this direction, proposing a separate six- or seven-page summary of merger proxy statements, printed separately and containing essential information for investors. WHEAT REPORT 376-81. The Report's suggestion shows that such a dichotomy is not unrealistic. And time considerations in a tender offer make such efforts just as imperative as efforts in the statutory merger situation.

<sup>306</sup> The law in this area has reached an intolerable level of uncertainty. This uncertainty arises in large part from the failure of the Commission to make known its interpretative positions, and also from the Commission's flexibility (one is tempted to say, inconsistency) in applying its interpretations. We cannot hope to reduce such a complex body of law to a black-letter code as simple to apply as, say, a multiplication table. On the other hand, members of the public attempting to comply with the law are entitled to a somewhat higher order of predictability than that presently obtaining.

Schneider, *supra* note 5, at 1357.

<sup>307</sup> Incumbent target company management has a greater problem because the only regulatory guideline is the general disclosure standard. A reading of Krasik, *supra* note 4, reveals the complexity and uncertainty for an offeree attempting to comply with rule 10b-5 or § 14(e).

<sup>308</sup> "I have generally advised clients engaged in tender offers to make disclosures by



reflect upon the document, overdisclosure may be just as bad as underdisclosure.<sup>309</sup> The investor never reaches the meaningful content of the circular because he is stopped cold by the formidable bulk and appearance of the document.

The absence of extensive experience with 10b-5 principles in the tender offer area compounds the doubt. Little case law exists on what 10b-5, through 14(e), requires in matters peculiar to tender offers. The first major judicial statement on 14(e), although positing 14(e)'s transport of 10b-5 principles into the tender offer area,<sup>310</sup> indicates that the standard might be different in the takeover area. Judge Friendly, in reversing a district court finding of a 14(e) violation, spoke of parties to a tender offer:

They act quickly, sometimes impulsively, often in angry response to what they consider, whether rightly or wrongly, to be low blows by the other side. Probably there will no more be a perfect tender offer than a perfect trial. Congress intended to assure basic honesty and fair dealing, not to impose an unrealistic requirement of laboratory conditions . . . .<sup>311</sup>

The general 10b-5 standards may thus be of lesser import in the takeover area. The courts will have to decide on a case-by-case basis what is fraudulent or deceptive in connection with a tender offer.

#### D. Codification of Rules

The British City Code does have attractive features in the way of ease of compliance. The Code communicates certain policies found in the general principles and the less mechanical Code rules. These same policies may exist in American law, yet they are not so plainly stated, often being the result of SEC interpretation or court decision. An American corporate official knows he should not trade on inside information. His lawyer tells him because his lawyer knows a court has deduced that principle from rule 10b-5, which the SEC in turn has adopted pursuant to section 10 of the 1934 Act.<sup>312</sup> A British financier

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way of an offering circular patterned after, but more abbreviated than, an S-1 Registration Statement." Kennedy, *supra* note 89, at 1107.

<sup>309</sup> The British have recognized that fact: "It may be that apart from the expert investor, a shareholder pays little attention to a long and detailed prospectus and that too much disclosure, so far from helping, wearies and confuses him." Cole, Morley & Scott, *supra* note 121, at 370.

<sup>310</sup> *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 945 (2d Cir. 1969).

<sup>311</sup> *Id.* at 948.

<sup>312</sup> See Manne, *Insider Trading and the Administrative Process*, 35 GEO. WASH. L. REV. 473 (1967).

can find the same standard of conduct plainly stated in the City Code: "No dealings of any kind . . . in the shares of the offeror and offeree companies by any person who is privy to the preliminary take-over or merger discussions . . . may take place . . ." <sup>313</sup> The same distinction carries over into areas where a wrong might be less obvious than trading on inside information. Compare, on general disclosure, "[s]hareholders shall have in their possession sufficient evidence, facts and opinions upon which an adequate judgement and decision can be reached" <sup>314</sup> with "[i]t shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading . . ." <sup>315</sup> True, the statements are of slightly different import and coverage. That is one of the principal American problems: one rule covers an endless spectrum of conduct.

An ideal regulatory system should not have to wait for case-by-case development. A set of specific rules deduced from the general standard would be much simpler. <sup>316</sup> Ideally, courts do formulate specific rules in the litigation process. Again ideally, legal periodicals and treatises collect courts' formulations in articles. However, this smacks of retrospective legislation and abdication of administrative responsibility: "The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future." <sup>317</sup> Achieving the goal of predictability by formulating disclosure rules and rules defining which tender offer practices are manipulative, deceptive, or fraudulent, together with cooling and balancing the tender offer process, will lead to better regulation of tender offers. One more expedient may further enhance predictability: the drawing of basic legislation—new disclosure rules for offeror and offeree and definitions of fraudulent or deceptive

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<sup>313</sup> CITY CODE rule 30.

<sup>314</sup> *Id.* general principle 3.

<sup>315</sup> Securities Exchange Act of 1934, § 14(e), 15 U.S.C. § 78n(e) (Supp. V, 1970).

<sup>316</sup> A statutory rule would be preferable to the piecemeal creation of a standard of management conduct by court decision. A rule could provide a guideline for management so that it would know in advance what action must be taken to avoid liability, as well as provide a clear guideline by which the Commission and courts can judge management conduct. In addition, a statutory rule could avoid the confusion of possibly conflicting holdings in various lower courts. Such a rule could save the time, expense and potential hardships to shareholders and management of litigating, over a period of years, each aspect of the disclosure problem that would be settled by the enactment of a comprehensive rule.

Krasik, *supra* note 4, at 473-74.

<sup>317</sup> SEC v. Chenery Corp., 332 U.S. 194, 202 (1947).

practices—into one document, arranged in an order paralleling the chronology of a tender offer and written in understandable, concise prose. This final step would bring tender offer regulation full circle—to an American equivalent of the British City Code.