

Washington International Law Journal

Volume 10 | Number 3

5-1-2001

The Tender Offer in Korea: An Analytic Comparison Between Korea and the United States

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THE TENDER OFFER IN KOREA: AN ANALYTIC COMPARISON BETWEEN KOREA AND THE UNITED STATES

Kwang-Rok Kim[†]

Abstract: Even though the tender offer system in Korea was established in 1976, there were very few tender offer transactions until 1997. However, after Korea's economic crisis in late 1997, the Korean government not only took a series of structural reform measures to improve the securities market system, but also widely opened the financial markets to foreign countries by abolishing or amending restrictions on foreign investment. The 1998 reforms to the Korea Securities Exchange Act included significant changes to tender offer regulations, making hostile takeovers more feasible. Since that time, the tender offer has been used as a tool to acquire control of corporations in Korea. In contrast, tender offers have been prominent in the United States' legal world of corporations and securities for many decades and the law regarding tender offers is well established. This article examines the Korean tender offer regulations in comparison to analogous aspects of the more established securities law of the United States, offering recommendations for amendments to Korean law where applicable. Korea should revise its tender offer regulations to simplify confusing aspects of the regulations and process, force disclosure of information that is important to investors but not currently part of mandatory disclosure, and ease excessive restrictions on trading and voting rights in the tender offer process.

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I. INTRODUCTION

Tender offers¹ represent the most significant tactical development in the United States' corporate takeover arena, and have been the "hottest" subject in the legal world of corporations and securities for three decades.² Prior to the passage of the Williams Act, bidders could make very short tender offers, lasting only several days.³ The Williams Act was passed in 1968, and exists today to ensure that shareholders of target companies have the information and time necessary to consider offers, that shareholders are treated equitably, and that a competitive balance is maintained between tender offerors⁴ and target companies.⁵

The Republic of Korea ("Korea") established a tender offer system in 1976, yet no tender offer transactions occurred until 1994. Since the first successful tender offer in 1994, tender offers have been used to acquire control of several corporations.⁶ Recently, tender offer regulations have changed significantly as a result of amendments made to the Korean Securities and Exchange Act ("KSEA"). Accordingly, the popularity of tender offers will likely increase.

This Article examines the Korean tender offer regulations in comparison to analogous aspects of the more established securities law of

¹ "Tender offer" will refer to a cash tender offer throughout this Article.

² See Joseph B. Cahill, Notes & Comments, *Circuits Split on the Elements of Williams Act "Manipulation"—Validity of Tender Offer Defenses Uncertain*, 60 CHI.-KENT. L. REV. 935, 935 (1984). For more information about phenomenon of early tender offers, see LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION 492 (2d ed. 1988); cf. RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 683 (6th ed. 1987); JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 562 (2001).

³ See generally JENNINGS & MARSH, *supra* note 2, at 687.

⁴ The "tender offeror" refers to the bidder throughout this article. "Bidder," in general, means "one who offers to pay a specified price for an article offered for sale at a public auction or to perform a certain contract for a specified price." BLACK'S LAW DICTIONARY 162 (6th ed. 1990). However, in the context of a tender offer, a bidder is anyone seeking to acquire control of the target company by the tender offer.

⁵ See William C. Tyson, *The Williams Act After Hanson Trust v. SCM Corporation: Post-Tender Offer Purchases by the Tender Offeror*, 61 TUL. L. REV. 1, 1 (1986).

⁶ The first successful hostile tender offer in Korea was *Hansol Paper Manufacturing Company's* tender offer to *Donghae Banking Corporation* on October 26, 1994. However, there have not been many subsequent tender offer transactions, primarily because one of the characteristics of the Korean economy is that business people do not generally like hostile mergers and acquisitions.

the United States, offering recommendations for amendments to Korean law where applicable. Part II describes the development and current state of the securities markets in Korea and in the United States, and provides an introduction into the existing securities regulations in both countries. Part III compares tender offer regulations in Korea with those in the United States, and identifies the problems that may arise from tender offers in Korea. Part IV offers suggestions for improving Korean tender offer regulations and securities practice.

II. SECURITIES MARKETS AND EXISTING SECURITIES REGULATIONS IN KOREA AND THE UNITED STATES

A. Korea

1. Development of the Korean Economy and Securities Market

Up until the 1960s, Korea was a typical underdeveloped and largely agrarian country. However, due to the success of its export-driven industrialization, Korea has transformed itself relatively quickly into a modern, industrialized country. The key to Korea's success was its adoption of an outward-looking development strategy based primarily on exports in the heavy chemical industry.⁷ Accordingly, large-scale capital investment has consistently focused on the heavy chemical industry and the Korean economy has been highly dependant on the this industry and closely-related industries. When the market for one major industry is active, its growth can easily affect the growth of other major Korean industries. Conversely, when the market is stagnant, many industries may simultaneously record very low growth.

The Korean economy is composed of large conglomerates called "*chaebols*."⁸ In Korea, *chaebols* operate in every industry from agriculture to media production. For example, four large *chaebols* generate over 47% of the total sales in Korea and more than half of the country's exports.

⁷ Korea Securities Dealers Association, Annual Securities Market in Korea (2000), ch. I. p. 13, at <http://www.ksda.or.kr/Portfoliokorea/publications/publications.htm>.

⁸ In the past, *chaebols* contributed to the outstanding economic growth of Korea. The Korean government and *chaebols* have been in companionship for a long time with respect to rapid economic development. However, *chaebols* are responsible for the current economic crisis. See Woon-Youl Choi & Yeong-Ho Woo, Corporate Governance and Disclosure: Recent Development in Korea, Presentation at the FMA Annual Meeting, Chicago, Illinois (1998), available at <http://www.ksri.org/menu2.htm>. For more information about relationship between the Korean government and *chaebols*, see Kon-Sik Kim, *Corporate Governance in Korea*, 8 J. COMP. BUS. & CAP. MKT. L. 21 (1986).

Chaebols are commonly managed by one family who first established the conglomerate. The families are reluctant to lose their market share, and thus continue to exert great force in the Korean economy.⁹

The performance of the Korean securities market¹⁰ directly reflects the interdependence of Korean industries. In particular, the financial crisis that began in late 1997 demonstrated that changes to the structure of the Korean capital market were necessary. Since being offered financial relief from the International Monetary Fund ("IMF") in 1998, the Korean government has been obliged to change the regulatory system and the structure of its securities market in hopes of restoring the Korean capital market's validity. The 1998 amendments to the KSEA were meant to (1) improve the standard of corporate governance and enhance corporate management; and (2) open the financial market to foreign countries by abolishing or amending some restrictions on foreign investment and introducing new securities market systems. Problems with the 1998 amendments exist largely because the Korean economy urgently needed foreign investment at the end of 1997, and legislators did not have ample time to consider every legal issue presented by the new laws. In addition, the opening of the financial market caused confusion in the Korean financial market, which had not seen extensive competition under the former system.

The two main government bodies that supervise the securities market in Korea are the Ministry of Finance and Economy ("MOFE") and the Financial Supervisory Commission ("FSC").¹¹ As for self-regulatory bodies,

⁹ For example, when there was a hostile merger and acquisition ("M & A") transaction against the company *Midopa* by *Shindongbang* in 1997, the Federation of Korean Industries announced that they would jointly work against the hostile M & A. In addition, the Federation of Korean Industries suggested to the Korean government that the government should make regulations on hostile M & A for the majority shareholder's stable management in 1996. The Federation of Korean Industries consists of sixty institutions, 366 major industries, and some special members.

¹⁰ The Korean securities market is divided into two parts: the stock exchange market and the Korea Securities Dealers Association Automated Quotation ("KOSDAQ") market. The former is operated by the Korea Stock Exchange; the latter is the marketplace for trading stocks of companies registered with the Korea Securities Dealers Association. In the early 1990s, the need for an organized system to operate the over-the-counter ("OTC") market became evident as the number of listed companies grew, and investor interest increased. The KSDA created the KOSDAQ system with the intention of positioning the market the way NASDAQ is positioned in the U.S. stock market. By virtue of this new system, it became possible to trade KSDA-registered stocks through the linking of all of the member securities firms. The Securities and Exchange Act details the types of securities that may be traded on the securities market. Such securities include government and municipal bonds, bonds issued by a corporation established under special laws, investment certificates, corporate bonds, stocks or warrants, Korean depository receipt ("KDR") issued by the Korea Securities Depository, commercial papers ("CP"), and securities options. Stock index futures are also regarded as securities.

¹¹ The Korean Securities and Exchange Act ("KSEA") abolished the existing Securities and Exchange Commission ("SEC") in February 1998, and the FSC was established on April 1, 1998 as a consolidated financial supervisor over the three separate sectors of securities, banking, and insurance. The

there are the Korea Securities Dealers Association ("Association")¹² and the Korea Stock Exchange ("KSE").¹³

2. *Regulations Regarding Corporate Takeovers in Korea*

Hostile mergers and acquisitions are not favored by the corporate climate and public opinion in Korea. Since tender offers are hostile methods of achieving business combinations, there have been few tender offer transactions in Korea. The tender offer system was established in 1976, yet as of June 1999, only twenty-three tender offer transactions had been carried out.

On February 24, 1998, the Korean government amended the foreign stock exchange regulations and released a new policy for free foreign exchange and foreign investment. Specifically, the Korean government relaxed its limitations on foreign equity ownership.¹⁴ Foreign investors may now acquire one-third of an issuer's equity securities class without the approval of a subject company's board of directors. Previously, foreign investors were only able to acquire 10% of the class of equity securities. In addition, the limitation on foreign subscription for the public purchase of shares was abolished, permitting all kinds of foreign capital exchange, including foreign stock investment without restriction.¹⁵ Foreign investors'

main objective of the FSC is to contribute to the development of the national economy by establishing an affirmative regularity in credit system and fair financial practice, as well as protecting the rights of depositors and investors. The FSC established a sub-committee, the Securities and Futures Commission ("SFC"), to carry out duties set forth in the Act of the Establishment of Financial Supervisory Organization and the KSEA. The main functions of the SFC are to investigate unfair trading, such as insider trading and market manipulation in the securities and futures markets, manage accounting standards and audit review-related business, conduct pre-deliberation of major issues concerning the securities and futures markets before the FSC's discussion, and undertake other tasks delegated by the FSC, the KSEA, and other related Acts. See Woon-Youl Choi & Yeong-Ho Woo, *supra* note 8, at 4-5.

¹² The KSDA, established in November 1953 as a non-profit, self-regulatory organization, became a special legal entity under a 1997 amendment to the KSEA. See Jeungkwon Gorae Bop [Korean Securities and Exchange Act] art.162 (S. Korea) [hereinafter KSEA].

¹³ The KSE, established in February 1956, provides an organized market in Korea for buying and selling securities. In 1987, an amendment of the KSEA established the KSE as semi-autonomous judicial entity owned and operated by its member securities companies. The KSE only grants membership to licensed securities companies. Since there are no specialists who function like wholesalers for an assigned company's securities, the KSE operates various systems for keeping an orderly market, such as a daily price fluctuation limit, suspension of trading, etc. See KSEA, *supra* note 12, art. 71.

¹⁴ See Oikukin Tuja Chokjin Bop Sihaengryung [Korean Enforcement Decree of the Foreign Investment Promotion Act], art. 2(2) (S. Korea).

¹⁵ The Korean government, through the former Ministry of Finance and Economy, pronounced an agreement with the IMF to expand the foreign investment limitation from 26% to 50% per item, and from 7% to 50% per person on December 11, 1997. Since then, the Korean government has expanded 50% per item of the investment limitation to 55%, and completely abolished the foreign investment limitation in May 1998.

hostile takeover activities¹⁶ in the secondary market are now fully permitted.¹⁷

The Korean government made other changes to open its market to foreign exchange and investment. It abolished the 25% mandatory tender offer system within the stock market.¹⁸ Further, the former 10% limit on the number of issued and outstanding stocks that any investor could obtain in Korea has been deleted.¹⁹ Finally, due to enhancement of the “five percent rule,” investors can now easily obtain information concerning the ownership of a target company’s stocks.²⁰

However, due to their hurried enactment, these amendments were completed without sufficient scholarly research about securities regulation. Accordingly, they are designed to meet the needs of the unique situation of Korean enterprises during the economic crisis. These amendments should be carefully reconsidered in order to ensure that Korean tender offer regulations keep up with the ultimate purpose of securities regulations in the economic system.²¹

The basic structure of tender offers in Korea under the KSEA may be summarized as follows. The tender offer is defined as “an offer to buy stock . . . or a solicitation of an offer to sell stocks . . . against many and unspecified persons . . . outside the securities market or intermediation

¹⁶ The limitation on ownership of Korea Telecom, Korea Electronic Power Corporation, Pohang Iron and Steel Company, and some public companies, including eighty-one Korean defense industries, was raised from 25% to 30% in the aggregate, and from 1% to 3% individually.

¹⁷ From December 11, 1997, when the foreign investment limitation was expanded to 50%, to January 31, 1998, the Korean Stock Exchange (“KSE”) recorded 2.1 trillion won (about U.S. \$1.7 trillion) as a net purchase, and eighteen foreign companies or funds reported to the KSE that they acquired more than five percent of equity of specific KSE-listed companies. For more information, see *The Foreign Fund Strategy*, JOONGANGILBO (Seoul, Korea), Feb. 5, 1998, at 3, available at <http://www.joongang.co.kr/search/index.html>.

¹⁸ Under the 25% mandatory tender offer system, shareholders wishing to hold 25% or more of outstanding voting shares were obligated to acquire them through a tender offer. In addition, the number of shares for a tender offer needed to be more than fifty percent of outstanding voting shares, including their securities. This 25% mandatory tender offer system was abolished on February 24, 1998. See Woon-Youl Choi & Yeong-Ho Woo, *supra* note 8, at 5.

¹⁹ See KSEA, *supra* note 12, art. 200.

²⁰ The objective of the five percent rule, which is the disclosure rule for block trading of listed stocks on the KSE or KOSDAQ market, is to promote market transparency and to protect existing majority shareholders from hostile M & A’s. Generally, acquisition of 5% of the total issued shares and any changes of approximately 1% may not be important information affecting corporate management. Under the five percent rule, any investor who owns 5% or more of the shares of KSE-listed or SDA-listed corporations (holdings of the affiliated persons to be combined) must report the status ownership of shares and such changes to the FSC, KSE and KSDA within five days after a change in ownership of shares of one percent or more. See *id.* art. 200-2.

²¹ The KSEA provides: “The purpose of this Act is to contribute to the development of the national economy by attaining wide and orderly circulation of securities, and by protecting investors through fair issuance, purchase, sale or other transactions of securities.” *Id.* art. 1.

market operated by the Association”²² Tender offers are mandatory when any person intends to acquire 5% or more of voting stock or any other securities through purchase, exchange, bid, or any other acquisition by transfer from more than ten shareholders in a six-month period.²³ Anyone wishing to tender an offer should designate a securities firm as an agent,²⁴ file a tender offer statement with the FSC,²⁵ give public notice in at least two major daily newspapers,²⁶ and submit copies of the statement to the target company, the KSE, and the Association.²⁷ After completion of the filing, notifying and submitting procedures, a ten-day waiting period must pass before the tender offer becomes valid.²⁸ When a tender offer provision is violated, the FSC, KSE, and Association enforce the tender offer under the KSEA.

B. *United States*

During the 1960s, tender offers, appeared in the United States,²⁹ and now are widely regarded as “the most effective means . . . for wresting control from a resisting management,” as increasing numbers of investors have embarked on campaigns to acquire controlling stock interests in publicly-held corporations.³⁰ In 1968, Congress passed the Williams Act³¹ as an amendment to the Securities Exchange Act of 1934 (“Exchange Act”).³² The Williams Act was a federal legislative response “to the increased use of cash tender offers in corporate acquisitions, a device that had ‘removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities law.’”³³ The Williams Act was designed to protect investors faced with tender offers “by ensuring that they would receive sufficient and timely information to

²² *Id.* art. 21(3). The “Association” refers to the Korea Securities Dealers Association.

²³ See KSEA, *supra* note 12, art. 21(1); Jeungkwon Korae Bop Sihaengryung [Enforcement Decree of the Securities and Exchange Act], art. 10-2 (S. Korea) [hereinafter Enforcement Decree].

²⁴ See Enforcement Decree, *supra* note 23, art. 11-4(1).

²⁵ See *id.* art. 11-4(4).

²⁶ See KSEA, *supra* note 12, art. 22(2).

²⁷ See *id.* art. 22.

²⁸ See *id.* art. 23(1).

²⁹ Daniel R. Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 2 (1978).

³⁰ DAVID L. RATNER, *SECURITIES REGULATION* 107 (1996).

³¹ The Williams Act is contained in §§ 13(d)-(e) and 14(d)-(f) of the Securities Exchange Act of 1934. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1999).

³² *Id.* §§ 78a-m.

³³ *Edgar v. Mite Corp.*, 457 U.S. 624, 632 (1982) (quoting *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 22 (1977)).

decide whether to tender their shares."³⁴

The Williams Act added the following provisions to the Exchange Act. Section 13(d) of the Exchange Act³⁵ is designed to provide shareholders with knowledge of potential purchasers' identities and intentions by requiring disclosure from all owners of greater than 5% of any class of securities.³⁶ Section 13(e)³⁷ limits an issuer in purchases of its own securities.³⁸ The SEC occasionally uses Section 13(e) to "regulate self-tender offers, issuer repurchases in the open market, and going-private transactions."³⁹ Section 14(d), the major provision affecting tender offers, requires any person who plans to make a tender offer to submit all materials used in connection with the tender offer to the SEC and to submit a disclosure statement similar to the one required by 13(d).⁴⁰ Section 14(e) prohibits fraud and "material" misrepresentation in connection with a tender offer.⁴¹ Specifically, 14(e) makes unlawful any untrue statement of material fact, any omission tending to make statements misleading, and any fraudulent, deceptive, or manipulative acts in connection with any tender offer. Section 14(e) also gives the SEC authority to define and prescribe means reasonably designed to prevent such acts.

Although tender offers have proven to be a highly effective method of taking over corporations, neither the Exchange Act nor the primary SEC Rule applying to tender offers defines the meaning of the term "tender offer."⁴² However, a conventional tender offer⁴³ in the United States, as defined by extensive case law, is a public offer or solicitation by a company, an individual or a group of persons to purchase during a fixed period of time

³⁴ Neil Fabricant, *Hostile Tender Offers: Can the States Shut Them Down?*, 22 J. CORP. L. 27, 30 (1996). When it was finally enacted, the Williams Act added Sections 13(d), 13(e), 14(d), 14(e), and 14(f) to the Exchange Act. See Marina Jaudenes, Note, *Sweeping the Market: The Use and Control of A Bold Acquisition Technique*, 1988 COLUM. BUS. L. REV. 607, 611 (1988).

³⁵ 15 U.S.C. § 78m(d).

³⁶ Section 13(d) of the Exchange Act specifically requires any person acquiring beneficial ownership of more than 5% of a class of registered equity securities to disclose, within ten days of the source and amount of funds used to make the purchase, any plans or proposals to make major changes in the issuer if a takeover is the purpose of the purchases, the number of shares presently owned, and the details of any arrangements with other parties concerning the shares to be acquired. *Id.*

³⁷ *Id.* § 78m(e).

³⁸ Richard L. Epling, *Exchange Offers, Defaults, and Insolvency: A Short Primer*, 8 BANK. DEV. J. 15, 19-20 (1991).

³⁹ Mark L. Berman, Note, *SEC Takeover Regulation Under the Williams Act*, 62 N.Y.U.L. REV. 580, 587-88 (1987).

⁴⁰ 15 U.S.C. § 78n(d).

⁴¹ *Id.* § 78n(e).

⁴² Epling, *supra* note 38, at 21.

⁴³ For more information about the "conventional tender offer," see Note, *The Developing Meaning of "Tender Offer" under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250 (1973).

all or a portion of a class or classes of securities of a publicly-held corporation at a specified price or upon specified terms for cash and/or securities.⁴⁴

III. COMPARATIVE ANALYSIS OF TENDER OFFERS IN KOREA AND THE UNITED STATES

A. *Scope of Application of Tender Offer Regulations*

The KSEA Article 21(1) states the scope of tender offer application in Korea under the title of "Applicable Object of Tender Offer."⁴⁵

1. *Defining the Tender Offer*

a. *Korea*

Article 21(3) of the KSEA specifies that an offer is deemed a "tender offer" if it is ". . . against many and unspecified persons, [and] . . . outside the securities market."⁴⁶

1) *"Outside the securities market"*

Tender offers in Korea are limited to transactions "outside the securities market."⁴⁷ Accordingly, tender offer regulations do not apply to securities transactions at the KSE or at the intermediate market operated by

⁴⁴ See *id.* at 1251.

⁴⁵ KSEA, *supra* note 12, art. 21(1). Article 21(1) provides:

A person who intends to acquire voting stocks or any other securities as prescribed by the Presidential Decree [hereinafter referred to as "stocks, etc."] through purchase, exchange, bid or any other acquirement by transfer [hereinafter referred to as "purchase, etc."] from persons not less than the number as prescribed by the Presidential Decree outside the securities market or the intermediation market operated by the Association during the period as prescribed by the Presidential Decree shall acquire the stocks, etc., through tender offer, in case where the total number of the stocks, etc., held [including the cases prescribed by the Presidential Decree as owning or its equivalent] by the person himself and specially connected persons [this means the specially connected person as prescribed by the Presidential Decree; hereinafter the same shall apply] after the purchase, etc., is 5% or more of the total number of the stocks, etc. [including the case where the person himself and specially connected persons who have acquired 5% or more of the total number of stocks, etc., make purchase, etc., of the stocks, etc.].

Id.

⁴⁶ *Id.* art. 21(3). The "Association" refers to the Korea Securities Dealers Association.

⁴⁷ See *id.* art 21(3).

the Association.⁴⁸ The reason for this restriction is that transactions “outside the securities market” are less secure. Transactions occurring within the KSE are secured by the nature of disclosure, equitability, and transferability, through self-regulation and other rules.

Tender offers often place pressure to sell on uninformed shareholders, prompting them to sell their stocks without sufficient information.⁴⁹ However, since the KSEA limits the use of tender offer regulations to securities transactions occurring “outside the securities market,”⁵⁰ tender offers need not be formed in KSE transactions despite possible shareholder pressure.

2) *“Many and unspecified persons”*

The “many and unspecified persons”⁵¹ phrase in the KSEA means that the number of people who are targets of the offer must be numerous in order for the tender offer regulations to apply. The Enforcement Decree of the KSEA defines “many” to mean at least ten.⁵² In other words, a solicitation of an offer to sell stocks from less than ten people is not a tender offer. It is difficult to define a fixed number for “many and unspecified persons,” particularly when the tender offer applies to a group of people that includes many qualified shareholders who have extensive knowledge and experience about a securities investment. However, legislators have evidently judged that there is no need to protect shareholders through the tender offer if the number of persons is less than ten.⁵³ In particular, when an offeror buys stocks several times from specific persons up to 5%, or when the offeror buys stocks from “many but specified persons,” the tender offer cannot be

⁴⁸ The Korea Securities Dealers Association, established in November 1953 as a non-profit, self-regulatory organization, became a special legal entity under the revised 1997 Securities and Exchange Act. See Woon-Youl Choi & Yeong-Ho Woo, *supra* note 8, at 5.

⁴⁹ See Kon-Sik Kim, *Kaejung Jungkwongoraebopsang-ui Gongjungmaesujedo [Tender Offer System under the Revised Securities and Exchange Act]*, INKWONKWA JUNGUI [HUMAN RIGHTS & JUSTICE], Apr. 1997, at 26.

⁵⁰ See KSEA, *supra* note 12, art. 21(3).

⁵¹ See *id.* art. 21(3).

⁵² See *id.* art. 21(1). Enforcement Decree, *supra* note 23, art. 10-2(2) provides:

The term ‘persons not less than the number prescribed by the Presidential Decree’ means the case where the aggregate number of persons who are the counterparts of the purchase of the stocks concerned, etc. and that of the persons who have been the counterparts of the purchase of the stocks concerned during the period is 10 or more.

Id.

⁵³ Kim, *supra* note 49, at 32. See also Jong-Joon Song, *Kangjegonggaemaesujedoui Bopriwa Choohooui Bopjuk Moonjae [The Legal Principal of Compulsory Tender Offer and Future Legal Problems]*, 76 HANKUK BUBHAK WONBO, Nov. 5, 1997, at 11, 13.

forced because the offeror did not buy from “unspecified persons.”

b. *United States*

The United States Supreme Court, in *Blue Chip Stamps v. Manor Drug Stores*,⁵⁴ stated that the analysis of the term “tender offer” should begin with the language of the Williams Act.⁵⁵ However, the Williams Act lacks a definition provision. Under Section 3(b) of the Exchange Act, the SEC has the authority to define the term “tender offer.”⁵⁶ Various SEC proposals⁵⁷ have suggested that Section 14(d) of the Exchange Act should apply in more specific circumstances.⁵⁸ However, none of these proposals have been successful. Thus, it is necessary to examine the SEC’s attempt to define the meaning of “tender offer,” and therefore the applicability of Section 14(d) disclosure requirements, through case law.

A federal district court in the Southern District of New York first considered the definition of a tender offer in an open market transaction in *Wellman v. Dickinson*.⁵⁹ In *Wellman*, the court used an eight-factor test suggested by the SEC to determine whether tender offer regulations

⁵⁴ *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

⁵⁵ *See id.* at 756.

⁵⁶ 15. U.S.C. § 78c(b). “The Commission and the Board of Governors of the Federal Reserve System, as to matters within their respective jurisdictions, shall have power by rules and regulations to define technical, trade, accounting, and other terms used in this chapter, consistently with the provisions and purposes of this chapter.” *Id.*

⁵⁷ *See* Proposed Amendments to Tender Offer Rules, Exchange Act Release No. 16,385, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,374, at 82,600 (Nov. 29, 1979).

⁵⁸ The first proposal stated that Section 14(d) should apply to (1) one or more offers to purchase or solicitations of offers to sell securities of a single class; (2) during any forty-five-day period; (3) directed to more than ten persons; and (4) seeking the acquisition of more than 5% of the class of securities. *Id.* at 82,603. The second proposal would have applied Section 14(d) when (1) offers to purchase or the solicitation of offers to sell are disseminated in a widespread manner; (2) the price offered represents a premium in excess of five percent or \$2 above the current market price of the securities being sought; and (3) the offers do not provide for a meaningful opportunity to negotiate the price and terms. *Id.* at 82,604-05. Other rule proposals stated that all purchases of the target company’s stocks made by a tender offeror or an affiliate within a certain period after the termination of the tender offer for the stocks of that company could be integrated with the offer for purpose of the disclosure, withdrawal, increased price, and perhaps the proration provisions of Section 14(d). *See* Tyson, *supra* note 5, at 36-39. The SEC has proposed two rules to this general effect, but they were never adopted. *See* Tender Offers—Notice of Proposed Rules and Schedules, Exchange Act Release 12,676, [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,659, at 86,692 (Aug. 2, 1976) (proposing that open market, private, and other purchases by the tender offeror, made within forty days after the termination of a tender offer, be integrated with the tender offer for purposes of the Section 14(d)(1) disclosure, the Section 14(d)(5) withdrawal, and the Section 14(d)(7) increased price provisions); Proposed Tender Offer Rules and Schedule, Exchange Act Release 15,548, [1979 Transfer Binder] Fed. Sec. L. rep. (CCH) ¶ 81,935, at 81,206 (Feb. 5, 1979) (same, but only for purposes of the Section 14(d)(7) increased price provision).

⁵⁹ *Wellman v. Dickinson*, 475 F. Supp. 783 (S.D.N.Y. 1979), *aff’d* on other grounds, 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983).

applied.⁶⁰ Applying these eight elements to the facts of the case, the court found that “all but the element of publicity were present and therefore classified the transactions cumulatively as a tender offer.”⁶¹

After *Wellman*, most courts follow this eight-factor test.⁶² In *SEC v. Carter Hawley Hale Stores, Inc.*,⁶³ District Court Judge Tashima held that: “(1) the [SEC]’s eight factor test, rather than the two element *S-G Securities*⁶⁴ test, was the applicable benchmark; and (2) since only two of the eight indicia were present the repurchase program did not constitute a tender offer.”⁶⁵

The Ninth Circuit Court of Appeals, in upholding the District Court’s decision in *Carter Hawley*,⁶⁶ mentioned the eight-factor test as a guideline, but not a compulsory provision, so that “not all factors need be present to

⁶⁰ See *id.* at 823-24. The *Wellman* court said that:

Even if this transaction were not seen as a conventional tender offer, it would not necessarily fall outside the ambit of Section 14(d). As discussed above, the concept of a tender offer has never been precisely defined either in the Williams Act itself or by the Commission. Congress left to the Commission the task of providing through its experience concrete meaning to the term. The Commission has not yet created an exact definition, but in this case and in others, it suggests some seven elements as being characteristic of a tender offer: (1) active and widespread solicitation of public shareholders for the shares of an issuer; (2) solicitation made for a substantial percentage of the issuer’s stock; (3) offer to purchase made at a premium over the prevailing market price; (4) terms of the offer are firm rather than negotiable; (5) offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased; (6) offer open only a limited period of time; (7) offeree subjected to pressure to sell his stock. These characteristics were recently accepted as appropriately describing the nature of a tender offer. See *Hoover v. Fuqua Industries, Inc.*, C. 79-1062A (N.D. Ohio June 11, 1979). In that case, the Commission also had listed an 8th characteristic not included here whether the public announcements of a purchasing program concerning the target company precede or accompany rapid accumulation of large amounts of the target company’s securities. The reason this last characteristic was left out undoubtedly was because publicity was not a feature of this transaction.

Id.

⁶¹ Jaudenes, *supra* note 34, at 613.

⁶² See *In re CTS Corp. v. M. Coons*, 428 N.E. 794, 800 (Ind. App. 1981). For a critical analysis, see *Brascan Ltd., v. Edper Equities Ltd.*, 477 F. Supp. 773 (S.D.N.Y. 1979).

⁶³ Sec. Exch. Comm’n v. *Carter Hawley Hale Stores, Inc.*, 587 F. Supp. 1248 (C.D. Cal. 1984).

⁶⁴ *S-G Secs. Inc. v. Fuqua Inv. Co.*, 466 F. Supp. 1114 (C.D. Mass. 1978). The court argued the matter of shareholders pressures, and concluded that the tender offer occurs

where there is: (1) a publicly announced intention by the purchaser to acquire a substantial block of the stock of the target company for purposes of acquiring control thereof, and (2) a subsequent rapid acquisition by the purchaser of large blocks of stock through open market and privately negotiated purchases, such actions constitute a tender offer for purposes of Section 14(d) of the statute.

Id. at 1126-27. The court also found that “(t)his publicity created a risk of the pressure on sellers that the disclosure and remedial tender offer provisions of the Williams Act were designed to prevent.” *Id.* at 1126.

⁶⁵ *Carter Hawley*, 587 F. Supp. at 1248.

⁶⁶ Sec. Exch. Comm’n v. *Carter Hawley Hale Stores, Inc.*, 760 F. 2d. 945 (9th Cir. 1985).

find a tender offer; rather, they provide some guidance as to the traditional indicia of a tender offer.”⁶⁷ The Ninth Circuit also recognized that “the shareholder pressure did not result from any untoward action on the part of Cater Hawley Hale (“CHH”). . . . Rather, it resulted from market forces, the third-party offer, and the fear that at the expiration of the offer the price of CHH shares would decrease.”⁶⁸ In *Hanson Trust PLC. v. SCM Corp.*, the Second Circuit also considered the relative pressure on shareholders in holding tender offer regulations inapplicable.⁶⁹ Holding that the acquisition of 25% of a company’s stock in five private purchases and one open-market purchase was not a tender offer, the court said:

Since the purpose of Section 14(d) is to protect the ill-informed solicitee, the question of whether a solicitation constitutes a “tender offer” within the meaning of Section 14(d) turns on whether, viewing the transaction in the light of the totality of circumstances, there appears to be a likelihood that unless the pre-acquisition filing strictures of that statute are followed there will be a substantial risk that solicitees will lack information needed to make a carefully considered appraisal of the proposal put before them.⁷⁰

Thus, it appears that shareholder pressure is an essential part of what constitutes a tender offer in the United States.

⁶⁷ *Id.* at 950. See also *Zukerman v. Franz*, 573 F. Supp. 351, 358 (S.D. Fla. 1983). The *Zukerman* court held that “Section 14(e) does not require a plaintiff to have been subject to a formal tender offer before becoming eligible for protection under said statute,” and found that:

[T]he alleged cash merger proposal at issue in this cause satisfies the following factors: 1. Whether there is an ‘active and widespread solicitation of public shareholders’ for shares of an issuer; 2. Whether the solicitation is made for a substantial percentage of the issuer’s stock; 3. Whether the offer to purchase is made at a premium over the prevailing market price; 4. Whether the terms of the offer are firm rather than negotiable; 5. Whether the offer is contingent on the tender of a fixed minimum number of shares, and perhaps, subject to the ceiling of a fixed maximum number to be purchased; 6. Whether the offer is open for only a limited period of time; 7. Whether the offerees are subjected to pressure to sell their stock; and 8. Whether public announcements of a purchasing program concerning the target company precede or accompany a rapid accumulation of large amounts of target company securities.

Id.

⁶⁸ *Id.* at 952.

⁶⁹ *Hanson Trust PLC. v. SCM Corp.*, 774 F. 2d. 47 (2d Cir. 1985).

⁷⁰ *Id.* at 57.

In *Kennecott Copper Corp. v. Curtiss-Wright Corp.*,⁷¹ the Second Circuit held that a series of stock sales, made on the stock market and to relatively sophisticated investors, did not constitute a tender offer, noting that the offer price was not above market price and that shareholder pressure was not a factor in the transactions. *Curtiss-Wright* established that although stock market transactions may trigger the disclosure requirements of Section 13(d) of the Exchange Act, they are not subject to the tender offer regulations of Section 14(d).

This case law analysis illustrates that even though most courts follow the SEC's eight-factor test to determine whether a given solicitation is a tender offer, there is still no specific and definitive standard.

c. *Comparison*

As demonstrated above, the KSEA more concretely prescribes the definition of a tender offer than United States law does. In practice, the basic meaning of tender offer in Korea is not generally very different from that in the United States. However, the backgrounds of each country's securities markets are quite different.

Since transactions at the KSE are not recognized as a tender offers, despite evidence of other tender offer characteristics, including strong shareholder pressure, shareholders in Korea have no opportunity to learn of possible takeover bids achieved on the stock market as they would in the United States through the disclosure requirements of Section 13(d) of the Exchange Act. Therefore, Korea should consider applying tender offer regulations to certain transactions within the stock market that include substantial shareholder pressure. In addition, the standardized legal treatment with the numerical criterion is not working effectively in the securities market. The numerical reference in the "many and unspecified persons" clause should be estimated on a case-by case basis considering the conditions of each transaction.⁷²

⁷¹ *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195 (2d Cir. 1978).

⁷² In *Hanson*, the court said that:

Although many of the above-listed factors are relevant for purposes of determining whether a given solicitation amounts to a tender offer, the elevation of such a list to a mandatory 'litmus test' appears to be both unwise and unnecessary. As even the advocates of the proposed test recognize, in any given case a solicitation may constitute a tender offer even though some of the eight factors are absent or, when many factors are present, the solicitation may nevertheless not amount to a tender offer because the missing factors outweigh those present.

Hanson, 774 F. 2d. at 57.

2. *The Offeror*

a. *Korea*

Article 21(1) of the KSEA defines the “tender offeror” as any person who, after a series of purchases⁷³ within six months, holds more than 5% of that class of stock. The tender offeror includes not only the purchaser, including an individual, a corporation, or any other organization, but also “specially connected persons”⁷⁴ who may be “specially related persons”⁷⁵ or “persons acting in concert.”⁷⁶

“Persons acting in concert” are defined as those who jointly acquire or dispose of stocks . . . through an agreement or contract with a tender offeror, or make an agreement with a tender offeror to exercise the voting right or right in concert.⁷⁷ Where the person concerned is an individual, “specially related persons” include family members, as enumerated in the Enforcement Decree of the KSEA.⁷⁸ If the person concerned is a corporation or other organization, the “specially related persons” include officers, affiliated companies, and officers of affiliated companies.⁷⁹

If a “specially related person” possesses less than 1,000 stocks, or presents evidence that he is not a “person in concert,” he is not regarded as a “specially related person” in the application of the tender offer regulations.⁸⁰

b. *United States*

The Williams Act provides that “any person” may be a “tender offeror,” and the SEC Rule further defines “any person.” Under SEC Rules, a tender offeror is one who is directly or indirectly the beneficial owner of

⁷³ See *supra* Part III.

⁷⁴ See KSEA, *supra* note 12, art. 21(1); Enforcement Decree, *supra* note 23, art.10-3.

⁷⁵ See Enforcement Decree, *supra* note 23, art. 10-3(2).

⁷⁶ See *id.* art. 10-3(4). For meaning of the phrase “specially related persons,” when the “person” concerned is an individual, see Enforcement Decree, *supra* note 23, art. 10-3 2(1). For the meaning of the “specially related persons,” when the “person” concerned is a corporation or any other organization, see Enforcement Decree, *supra* note 23, art. 10-3 2(2).

⁷⁷ KSEA, *supra* note 12, art. 10-3(4); see Jong-Joon Song, *supra* note 53.

⁷⁸ In the case of an individual, “specially related persons” include a spouse, a paternal blood relative of not more than six degrees of relationship and the wife of paternal blood relative of not more than four degrees of relationship, the husband and children of a paternal blood relative of not more than three degrees of relationship, a maternal blood relative of not more than three degrees of relationship and the spouse and children of such person, a paternal blood relative of not more than two degrees of relationship of the spouse and the spouse of such person, a lineal ascendant of the birth parents of an adoptee, a person who enters a family as an adopted child and his spouse. See Enforcement Decree, *supra* note 23, art. 10-3(2).

⁷⁹ See *id.* art. 10-3(2).

⁸⁰ *Id.* art. 10-3(3).

more than 5% of a class of any equity security.⁸¹ SEC Rule 13d-3 provides that the definition of a beneficial owner includes “persons acting in concert.” Section 13(d)(3) defines the term “persons acting in concert,” as “two or more persons [who] act as a partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer.”⁸²

c. Comparison

The Williams Act does not regulate “specially related persons,” such as relatives and families. In contrast, under the KSEA, the notion of “specially related persons” is much broader than the notion of “persons acting in concert.” It is possible in Korea for a “specially related person,” to not realize he is a “specially related person” because the scope of the provision is so broad. For this reason, the meaning of “specially related person” should be narrowed, or merged with the definition of the “persons acting in concert” in order to make the scope of the tender offeror more clear.

3. Conditions that Trigger Disclosure Requirements

a. Korea

Under Article 21(1) of the KSEA, a person who possesses at least 5% of any class of voting stocks through purchase from at least ten people outside the securities market during the specified period shall acquire the stocks according to tender offer regulations.⁸³ The Enforcement Decree specifies that the period in which to apply tender offer regulations is six

⁸¹ See 15 U.S.C. § 78m(d); SEC Rule 13d-1(a), 17 C.F.R. § 240.13d-1(a). For information on the exceptions, see Rules and Regulations Under the Securities and Exchange Act of 1934, 17 C.F.R. § 240.13d-1(b)(1)(i)-(iii) (2000).

⁸² 15 U.S.C. § 78m(d)(3). However, it was not clear under Section 13(d) of the Exchange Act whether organizing a group of stockholders owning more than 5% of a class of equity securities with a view to seeking control of the company, but not acquiring any additional securities, was restricted. In *GAF Corp. v. Milstein*, 453 F.2d 709 (2d Cir. 1971), “the four Milsteins received 324,166 shares of GAF convertible preferred stock, approximately 10.25% of the preferred shares outstanding, when the Ruberoid Company, in which they had substantial holdings, was merged into GAF in May 1967.” *Id.* at 713. The courts have split as to whether “the agreement to act together constitutes an ‘acquisition’ by the ‘group,’ triggering the filing requirement of Section 13(d) of the Exchange Act.” *Id.* at 715. For a contrary view, see *Bath Indus. Inc. v. Bolt*, 427 F.2d 97 (2d Cir. 1970) (denying that Section 13(d)(3) applied to such a situation and holding that a group must agree to acquire more shares before the filing requirements of Section 13(d) are triggered). See *id.* at 109-10. Adopting the *GAF* view, SEC Rule 13d-5(b)(1) clearly states, “when two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer, the group formed thereby shall be deemed to have acquired beneficial ownership.” See 17 C.F.R. § 240.13d-5(b)(1).

⁸³ KSEA, *supra* note 12, art. 21(1).

months prior to the date on which the stock purchase is actually conducted.⁸⁴ The 5% refers to the percentage of holding stocks that the tender offeror will possess after the purchase of the stocks, including previously held and newly purchased securities. As the examples in Table 1 illustrate, if the cumulative number of shareholders involved in a given acquisition exceeds ten, and the percent of stock acquired exceeds five, for all transactions six months prior to the final transaction, then each transaction during the six month period is subject to tender offer regulations.

Table 1. Do the Tender Offer Regulations Apply?

Situation: Purchases occurred outside the securities market during a six-month period					
Stocks Owned Before the Period	Stock Purchases During Period		Stock Purchase At Close of Period		Mandatory Tender Offer?
	Stockholders	Stock (%)	Stockholders	Stock (%)	
0%	0	0%	10	5%	YES
0%	6	3%	5	1%	NO
			3	5%	NO
			4	3%	YES
			3	1%	NO
0%	10	3%	3	3%	YES
			3	3%	YES
5%	0	0%	10	1%	YES
3%	0	0%	10	1%	NO
			10	2%	YES

The purpose of setting up a six-month period may be to expose to shareholders take-over plans whereby persons seek to gain a controlling interest in a target company through a series of small securities transactions over time.⁸⁵ In general, acquisition of 5% of a company's total issued shares will not affect corporate management. Nonetheless, such information may seriously affect the market in terms of supply and demand. For this reason, such disclosures are considered important market information for

⁸⁴ Enforcement Decree, *supra* note 23, art. 10-2(1): "The term 'the period prescribed by the Presidential Decree' means the past six months prior to the date on which the purchase of the stocks is conducted."

⁸⁵ For more information, see YOUNG-MOO SHIN, SECURITIES AND EXCHANGE ACT, SEOUL, KOREA, 386 (1989).

investors.⁸⁶

b. United States

The Williams Act does not contain a time period analogous to Korea's six-month period. However, Exchange Act Section 13(d) performs the same function by requiring continuing disclosure of all take-over plans from purchasers of securities who own more than 5% of that class of securities.

c. Comparison

While shareholders of target companies often desire sufficient time to make decisions on offers, six months is far more than enough time to meet the objective of notifying shareholders and is too long to allow for the fast pace and rapidly changing conditions of today's capital market. Because of its impracticality, the six-month period should be shortened or abolished.

4. Applicable Securities

a. Korea

Under the KSEA, the applicable securities used in calculating when tender offer regulations apply are "voting stocks or any other securities as prescribed by the Presidential Decree."⁸⁷ The KSEA describes "equivalent-to-ownership" securities, which do not belong to the tender offeror or the "specially connected persons," but are included in calculating whether acquired stock equals or exceeds 5%.⁸⁸ Owning an "equivalent-to-ownership" security means owning the right to a legal action that will give rise to the acquisition of voting rights.⁸⁹

⁸⁶ Trading of listed stocks on the KSE and KOSDAQ markets also gives rise to disclosure obligations under the rules that govern trading within each market. The purpose of these rules is similarly to promote market transparency and to protect existing majority shareholders from hostile mergers and acquisitions.

⁸⁷ See KSEA, *supra* note 12, art. 21(1).

⁸⁸ See *id.* art. 21(1). The meaning of "the equivalent to ownership" is derived from the concept of "beneficial ownership" of the United States' securities laws. See Jong-Joon Song, *Major Securities Purchase's duty to Disclose under the United States Securities and Exchange Act*, 5 CHOONGBUK UNIV. L REV. 211 (1993). The meaning of the phrase "owning or its equivalents" is described in Enforcement Decree, *supra* note 23, art. 10-4. For more information about the phrase "option to purchase stocks," see KSEA, *supra* note 12, art. 189-4.

⁸⁹ "Equivalent-to-ownership" securities are included when one (1) holds stocks for one's own account irrespective of name; (2) has a claim for the delivery of stocks by the operation of law, sale and purchase agreement, or other contracts; (3) has a right of acquisition or disposal of the stocks by the

Additionally, the Enforcement Decree specifies that applicable securities include "potential securities." Potential securities are stock certificates, certificates representing preemptive rights, convertible bonds, certificates of bonds with warrants, and certificates of exchangeable bonds belong to the scope of applicable securities.⁹⁰ In some cases, preferred stocks may also be included.⁹¹

The inclusion of "potential securities" complicates the calculation of the percent of securities owned by a given purchaser. First, the number of the securities with attendant voting rights must be determined. When an investor owns only voting stocks, the percent of securities owned is simply equal to the number of voting stocks owned divided by the total number of voting stocks. When an investor owns potential securities, the number of the potential securities must be converted into the equivalent number of the voting stocks by the method shown in Table 2.

Table 2. Conversion of the Potential Securities to Equivalent Numbers of Voting Stock

Potential Securities	Conversion Formula (= Number of Voting Stock)	Note
CRPR: Certificate Representing Preemptive Rights	The number of voting stocks that are objects of the Certificates	
CB: Convertible Bonds	Par Price of CB divided by Price of Issuing Securities	Fractions of equivalent shares not included
BW: Certificates of Bonds with Warrants	The number of voting stocks that are the objects of the Certificates	
EB: Certificates of Exchange Bonds	The number of voting stocks that are objects of the Exchange Bonds	

b. United States

The Williams Act does not enumerate the applicable securities in detail.⁹² However, the SEC specifically excludes non-voting securities from

operation of law or a money trust contract, a security contract or other contracts; (4) has right to sale and purchase of stocks in accordance with the unilateral promise; and (5) has a securities option with regard to the sale and purchase of stocks. Enforcement Decree, *supra* note 23, art. 10-4.

⁹⁰ See *id.* art. 10.

⁹¹ There are different opinions about preferred stocks. Namely, even though the KSEA does not mention preferred stocks, preferred stocks must be included in the applicable securities of the tender offer if preferred stocks gain the voting right. See Hong-Yeol Chun, JEUNGGKONGORAEBOB [SECURITIES AND EXCHANGE ACT] 471 (1997). See also Kim, *supra* note 53, at 30.

⁹² However, Section 13(d)(1) of the Securities Exchange Act states:

[A]ny equity security of a class which is registered pursuant to Section 12 of this title, or any equity security of an insurance company which would have been required to be so registered

its definition of the term “equity security”⁹³ and has specifically included in its definition of “equity securities:”

[A]ny stocks or similar security, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest, interest in a joint venture, or certificate of interest in a business trust; or any security convertible, with or without consideration into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any put, call, straddle, or other option or privilege of buying such a security from or selling such a security to another without being bound to do so.⁹⁴

c. *Comparison*

Since the applicable securities for tender offer regulation in the United States includes only those classes with voting rights,⁹⁵ the calculation of the percentage of securities owned is much simpler than in Korea. The complicated calculation of the rate in Korea can cause the unexpected results whereby a transaction including potential securities causes a purchaser to unwittingly own more than 5% of that class of securities. Thus, the applicable securities of tender offers in Korea needs to be limited to the voting securities.

5. *Exceptions to the Application of Tender Offer Regulations*

a. *Korea*

The KSEA permits purchasers to acquire 5% or more of a corporation’s stock without following the tender offer procedure in special

except for the exemption contained in Section 12(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940 or any equity security issued by a Native Corporation pursuant to Section 37(d)(6) of the Alaska Native Claims Settlement Act.

15 U.S.C. § 78m(d)(1).

⁹³ 17 C.F.R. § 240.13d-1(i).

⁹⁴ 17 C.F.R. § 240.3a11-1.

⁹⁵ *See id.*

circumstances.⁹⁶ Those special circumstances are purchases: (1) for the purpose of cancellation; (2) of stocks affected in response to the exercise of appraisal rights; (3) from a "specially related person"; (4) by the exercise of preemptive rights, or rights to demand for conversion or exchange; and (5) as prescribed by the FSC, which do not infringe upon the rights and interests of other stockholders.⁹⁷

b. United States

The Williams Act also provides some exceptions to the application of the disclosure requirements of Section 13(d).⁹⁸ Those exceptions include:

(1) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933, (2) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 percent of that class, (3) any acquisition of an equity security by the issuer of such security, and (4) any acquisition or proposed acquisition of a security which the SEC shall exempt from this subsection.⁹⁹

c. Comparison

Although there are some exceptions listed in the Williams Act, not all of them apply to tender offers. However, application of the eight-factor *Wellman* test¹⁰⁰ allows for exceptions to the tender offer regulations on a case-by-case basis. Therefore, in practice, the scope of the exemptions in the United States is broader than those listed in the Williams Act, and can be broader than those listed in the KSEA.

In Korea, since the purpose of the KSEA is not only to protect

⁹⁶ See KSEA, *supra* note 12, art. 21(1).

⁹⁷ Enforcement Decree, *supra* note 23, art. 11.

⁹⁸ See Securities Exchange Act § 13(d)(6), 15 U.S.C. § 78m(d)(6).

⁹⁹ *Id.* For the contents of "SEC's exemption" provided by Section 13(d)(6) of the Exchange Act, see Rules and Regulations Under the Securities and Exchange Act of 1934, 17 C.F.R. § 240.13d-6.

¹⁰⁰ See *supra* Part III.A.1.b.

investors through the fair issuance, purchase, or sale of securities,¹⁰¹ but also to harmonize securities transactions by making it easy to acquire securities, expanding the scope of these exceptions would be a reasonable way to encourage the securities market.

B. Making a Tender Offer

1. The Tender Offer Procedure

a. Korea

A person who intends to propose a tender offer must file a tender offer statement with the FSC.¹⁰² The tender offer statement must conform to the standards prescribed by the FSC and must contain information regarding the purpose of the tender offer, details of funds for purchase, and conditions such as period, price, and settlement day.¹⁰³

A tender offer becomes effective ten days after the date the tender offer statement was filed with the FSC.¹⁰⁴ The purpose of the ten-day waiting period is to allow sufficient time for investors to avoid making hasty decisions to sell. However, the waiting period can cause some undesired results, including increasing the likelihood of insider trading.

The tender offer period is not less than twenty days and not more than sixty days from the end of the ten-day waiting period.¹⁰⁵ In the event that a counter tender offer is filed during the tender offer period concerned, the tender offer period may be extended to the last day of the counter tender offer period.¹⁰⁶

Under the language of the KSEA, the ten-day waiting period does not apply to the tender offeror. In fact, the tender offeror may make an offer to buy stocks, or solicit an offer to sell stocks by using a tender offer prospectus, as soon as she files a tender offer statement with the FSC.¹⁰⁷ Consequently, there is an apparent possibility of a tender offer transaction during the waiting period.¹⁰⁸ To limit this inconsistency, the waiting period

¹⁰¹ See KSEA, *supra* note 12, art. 1. "The purpose of this Act is to contribute to the development of the national economy by attaining wide and orderly circulation of securities, and by protecting investors through fair issuance, purchase, sale or other transactions of securities." *Id.*

¹⁰² Enforcement Decree, *supra* note 23, art. 11-4(4).

¹⁰³ KSEA, *supra* note 12, art. 21-2(1).

¹⁰⁴ See *id.* arts. 21-2, 23(1).

¹⁰⁵ See *id.* art. 23(1); Enforcement Decree, *supra* note 23, art. 11-5.

¹⁰⁶ Enforcement Decree, *supra* note 23, art. 11-5.

¹⁰⁷ *Id.* arts. 13, 24.

¹⁰⁸ *Id.*; *cf.* KSEA, *supra* note 12, art. 21(1).

has been interpreted so that the tender offeror may conduct a tender offer, but the stockholder may not accept the offer or solicitation until the waiting period is over.

Table 3. Tender Offer Procedure In Korea

Order	Procedure	Relevant Law	Days
1	Filing the Tender Offer Statement with the FSC	KSEA Art. 21-2	0
2	Sending a Copy of the Statement to the Issuer	KSEA Art. 22	0
3	Publishing the Statement to Newspapers Submitting the Copy of the Statement to KSE	KSEA Art. 22	0
4	Preparing a Prospectus for the Tender Offer	KSEA Art. 24	0-10
5	Tender Offering	EDKSEA ¹⁰⁹ Art. 11-5	20-60
6	Withdrawal of the Tender Offer ¹¹⁰	KSEA Art. 24-2	20-60
7	Purchase and Pay	KSEA Art. 25-2	3

When a tender offer is carried out, the price that is paid must be suitable consideration. The price, in the concept of the tender offer, means cash or securities, including a certain premium over the market price. There is no limitation on the premium rate in any related laws, but the purchase price of a tender offer must be uniform.¹¹¹ In addition, the full amount of the tendered stocks must be purchased immediately on or, the day following, the expiration date of the tender offer period.¹¹² However, the tender offeror does not have a duty to purchase all the stocks stated in the tender offer statement when the tender offeror publicly announces conditions to that effect.¹¹³ In that case, the conditions should be set forth in the tender offer statement, and should be publicly announced at the time of the commencement of the tender offer.¹¹⁴ When the proportional purchase rule applies under the announced conditions, purchases will be made in proportion to offers, up to the number of stocks scheduled to be purchased

¹⁰⁹ Here, EDKSEA means the Enforcement Decree of the KSEA.

¹¹⁰ See *infra* Part III.B.2.

¹¹¹ KSEA, *supra* note 12, art. 25-2(2).

¹¹² *Id.* art. 25-2(1).

¹¹³ See Enforcement Decree, *supra* note 23, art. 13-2. The conditions are as follows: (1) All of the tendered stocks shall not be purchased where the total number of tendered stocks is less than the number of stocks scheduled to be purchased through tender offer; and (2) purchase will be made proportionally up to the number of stock scheduled to be purchased through tender offer and all or a part of excess will not be purchased where the total number of tendered stocks exceeds the number of stocks scheduled to be purchased through tender offer. See *id.*

¹¹⁴ See *id.* art. 13-2.

through the tender offer, and all or a part of the excess will not be purchased.¹¹⁵ Table 3 summarizes Korea's tender offer procedure.

b. United States

Under the Williams Act, no person may make a tender offer that would result in his owning more than 5% of a class of securities unless he has filed with the SEC, and furnishes to each offeree, a statement containing certain information required under Section 13(d) of the Exchange Act.¹¹⁶ Section 13(d) requires any person that acquires more than 5% of any class of securities registered under Section 12 of the Exchange Act to file with the issuer of the securities, and with the SEC, within ten days, a statement setting forth "(1) the background of such person; (2) the source of the funds used for the acquisition, (3) the purpose of the acquisition; (4) the number of shares owned, and (5) any relevant contract, arrangement, or understanding with any person with respect to any securities of the target company."¹¹⁷

A tender offer must remain open for at least twenty days from the date the offer is first published or otherwise given to security holders. If the tender offer involves a roll-up transaction,¹¹⁸ and the securities being offered are registered on Form S-4 or Form F-4, the offer must remain open at least sixty days.¹¹⁹ Where a greater number of securities is deposited than the offeror offered to purchase, the offeror must buy shares in proportion to the number of shares deposited by each depositor.¹²⁰ This is known as the "pro rata rule."¹²¹ Section 14(d)(7) of the Exchange Act outlines what is known as the "best price rule." According to the best price rule, the offeror who increases the price before the tender offer has expired must pay the increased consideration to each shareholder whose shares are tendered, not merely to those who tender after the increase.¹²²

Further, if the offeror increases the price during an offer, the offeror must keep it open for at least ten days after the announcement of the increase,

¹¹⁵ *Id.* art. 13-2-2.

¹¹⁶ See 15 U.S.C. § 78n(d)(1).

¹¹⁷ See *id.* § 78m(d).

¹¹⁸ A roll-up transaction is a transaction involving the combination or reorganization of one or more or partnerships in which some or all of the investors in any of such partnerships will receive new securities. 17 § C.F.R. 229.901. See 17 C.F.R. § 240.14e-7 for more about the unlawful tender offer practices in connection with roll-ups.

¹¹⁹ See 17 C.F.R. § 240.14e-1(a).

¹²⁰ See 15 U.S.C. § 78n(d)(6).

¹²¹ CLARK C. ROBERT, CORPORATE LAW 551 (1986).

¹²² *Id.*

even if the original offer period expires before the ten days have elapsed.¹²³ Rule 14e-1 is intended to reduce the pressure on shareholders to tender, but also gives the target company additional time to find a “white knight” or to make its own counter-proposal.¹²⁴

In addition, Section 14(e) of the Exchange Act provides a general anti-fraud provision that makes it unlawful for any person to omit or misstate a material fact, or to engage in any fraudulent, deceptive, or manipulative act, in connection with the tender offer.¹²⁵ Table 4 summarizes the tender offer procedure in the United States.

Table 4. Tender Offer Procedure In The United States

Order	Procedure	Relevant Law	Days
1	Filing the Schedule 14D-1 with the SEC	Section 14(d)(1); Rule 14d-3	0
2	<ul style="list-style-type: none"> ▪ Sending Copy of Statement to Target Company ▪ Publishing the Statement to Newspapers 	Rule 14d-4	0
3	Dissemination of the Tender Offer by the Target Company to Their Shareholders	Rule 14d-5(b)(3)	3 (B)
4	Shareholders' Rights to have their Shares Tendered on a Pro-Rata Basis	Section 14(d)(6)	10 (C)
5	Target Company's Duty to Disclose	Rule 14e-2	10 (B)
6	Tender Offering	Rule 14e-1(a)	At least 20 (B)
7	Withdrawal of the Tender Offer by the Issuers	Rule 14d-7	At least 20 (B)
8	Prohibition on Omissions, Misstatements, Fraud, Manipulation, and Deception	Section 14(e)	all

2. *Withdrawal and Cancellation of Tender Offers*

a. *Korea*

The KSEA provides a strict cancellation procedure because of the risk of confusion to the securities market, and particularly the target company, inherent in cancellation.¹²⁶ Generally, a tender offeror may not withdraw a tender offer after it has been made.¹²⁷ However, the Enforcement Decree of the KSEA provides exceptions for withdrawal of a tender offer¹²⁸ until the

¹²³ 17 C.F.R. § 240.14e-1(a); see ROBERT, *supra* note 121, at 551.

¹²⁴ See JENNINGS ET AL., *supra* note 1, at 744.

¹²⁵ See 15 U.S.C. § 78n(e).

¹²⁶ See KSEA, *supra* note 12, art. 23-2; Enforcement Decree, *supra* note 23, art. 12-6.

¹²⁷ *Id.* art. 24-2(1).

¹²⁸ See Enforcement Decree, *supra* note 23, art. 12-7.

last day of the tender offer period.¹²⁹

Since the cancellation and invalidity of the tender offer is limited to those exceptions stated in the regulation, it is clear that the tender offeror cannot cancel or nullify the tender offer simply after acquiring the number of securities that he needed. However, the tendering stockholder who accepts an offer to buy stocks may cancel such a subscription at any time during the tender offer.

b. United States

In the United States there is no provision for cancellation of a tender offer by the offeror. Section 14(d)(5)¹³⁰ and SEC Rule 14d-7¹³¹ provide only for withdrawal by the seller. Any person who has deposited securities pursuant to a tender offer has the right to withdraw their securities by written notice to the offeror during the offer period.¹³² The tender offeror may also impose other reasonable requirements.¹³³

Regarding over-subscribed tender offers, Section 14(d)(6) requires the bidder to prorate shares received during the first ten days, but SEC Rule 14-8 extends the proration period throughout the life of the offer.¹³⁴

C. Disclosure Obligations

In general, the corporate disclosure system is designed to provide investors with accurate information on a company's past, present, and future management and its financial status, including future project plans. Such

¹²⁹ When the counter tender offer is made, the tender offer can be withdrawn. It can also be withdrawn when a tender offeror falls under the following conditions: death; dissolution; bankruptcy; dishonor of bills or checks issued; merger; and transfer or acquisition of important business. *Id.* art. 12-7. See KSEA, *supra* note 12, art. 24-2(1).

¹³⁰ 15 U.S.C. § 78n(d)(5) states:

Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

Id.

¹³¹ 17 C.F.R. § 240.14d-7. This Rule is titled "Additional Withdrawal Right."

¹³² See 17 C.F.R. § 240.14d-7(a): "In addition to the provisions of section 14(d)(5) of the Act, any person who has deposited securities pursuant to a tender offer has the right to withdraw any such securities during the period such offer, request or invitation remains open." *Id.*

¹³³ See *id.* § 240.14d-7(b).

¹³⁴ For more information, see JENNINGS ET AL., *supra* note 1, at 745.

disclosures are intended to help investors make rational investment decisions, thereby ensuring fair securities practice.

1. *The Tender Offeror's Duty*

a. *Korea*

To enable investors to make rational investment judgments, both the Korean Commercial Act¹³⁵ and the KSEA¹³⁶ provide for a disclosure system. Also, the disclosure requirements of the KSEA make it compulsory for corporations to disclose major information on corporate management and assets during the process of securities trading. The KSEA features a variety of mechanisms to ensure promptness, updated value, accuracy, reliability and utility of use of the important corporate information.

1) *The tender offer statement*

The KSEA requires any person who intends to conduct a tender offer to file a tender offer statement using the form prescribed by the FSC.¹³⁷ The tender offer statement shall contain the purpose of the tender offer, details of the funds to be used for purchase, conditions such as period, price and settlement day of purchase, and "other matters" that are listed in the Enforcement Decree of the KSEA, Article 11-4(2).¹³⁸ All required

¹³⁵ Disclosure under the Korean Commercial Act is an indirect disclosure system designed to protect the interest of shareholders and creditors. Namely, the Korean Commercial Act provides the maintenance and disclosure of articles of incorporation and minutes of meeting, obligation to send, maintain or disclose business performance report, B/S, P/L and audit reports by CPA, rights to watch the accounting records of minority shareholders, and so forth. See Sang Bop [Korean Commercial Act], arts. 373 (Minutes of general Meeting), 412-2 (Director's Duty to report), 414 (Auditor's Liability), 449 (Approval and Public Notice of Financial Statements), 466 (Shareholder's Right to Inspect Accounting Books) (S. Korea). The Act is sometimes referred to as "Korean Commercial Code," however, the term "Korean Commercial Act" will be used throughout this Article.

¹³⁶ See KSEA, *supra* note 12, arts. 3 (Registration of Issuer), 5 (Disclosure of Documents Filed for Registration), 12 (Preparation and Disclosure of Prospectus), 18 (Disclosure of Registration Statement and After-Report), 26 (Disclosure of Tender Offer Statements).

¹³⁷ Enforcement Decree, *supra* note 23, art. 11-4(4).

¹³⁸ KSEA, *supra* note 12, art. 21-2(1). For more information about "other matters" see Enforcement Decree, *supra* note 23, arts. 11-4(3), 11-4(2). In addition, for the importance of the information to be disclosed, the KSEA urges the tender offeror to attach additional documents, such as a transcript of resident registration, articles of association and a transcript of company register; documents proving the holding of the balance at financial institutions not less than the amount of money necessary for tender offer; documents proving the holding of securities that a tender offeror intends to deliver as a consideration; documents proving that the necessary permission, authorization or recognition was given in case such recognition is needed for the purchase of stocks; and a draft of the public notice of commencement of tender offer. *Id.* art. 11-4(3).

information in the tender offer statement is very important to ensure that all transactions in the securities markets are fair.¹³⁹

Once the tender offer statement has been filed with the FSC, the offeror must make the statement public. The tender offeror must immediately transmit a copy of the tender offer statement to the issuer of the stocks pertaining to the tender offer.¹⁴⁰ In addition, to inform minority shareholders, the tender offeror must publish the tender offer statement in at least two major daily newspapers.¹⁴¹ The tender offeror also must submit a copy of the statement to the KSE or the Association.¹⁴² Finally, the tender offer statement must be submitted simultaneously to the target company, for the benefit of the existing majority stockholders and the company itself, and to the FSC, for an inspection of accuracy.

2) *Amendment of the tender offer statement*

The tender offeror may change the conditions of the tender offer, subject to the KSEA's prohibition on amendments that are unfavorable to the tendering stockholders. Prohibited amendments include a reduction of the purchase price, a decrease in the amount of stocks that are intended to be purchased, an extension of the payment period, a reduction of the period of the tender offer, an alteration of the type of consideration to be paid to the tendering stockholder, and other amendments prescribed by the FSC that are unfavorable to the tendering stockholders.¹⁴³ Amendments to the tender offer statement that are favorable to the tendering stockholders can be carried out at any time. When a tender offeror intends to modify the purchase conditions, the tender offeror must file an amendment statement under the guidelines designated by the Ordinance of the Prime Minister by the date on which the tender offer expires.¹⁴⁴

The FSC may issue an order to amend the tender offer statement if the statement is incomplete in its form or inadequately states any required material information.¹⁴⁵ Where such an order is issued, the tender offer

¹³⁹ A key feature of the securities market lies in fairness, a major premise and an objective of the ideal securities market. The securities market can effectively fulfill its functions and roles only on the trust of investors. Therefore, unfaithful disclosure, insider trading, and price manipulation are three significant actions defined as "securities crimes."

¹⁴⁰ KSEA, *supra* note 12, art. 22(1).

¹⁴¹ *Id.* art. 22(2); Enforcement Decree, *supra* note 23, art. 6-8.

¹⁴² See KSEA, *supra* note 12, art. 22(2).

¹⁴³ *Id.* at art 23(2); Enforcement Decree, *supra* note 23, art. 12-6.

¹⁴⁴ KSEA, *supra* note 12, art. 23-2.

¹⁴⁵ See KSEA, *supra* note 12, arts. 11(1), 23-2(2).

statement is construed to have not been received by the FSC.¹⁴⁶ The order to amend the statement is issued at the discretion of the FSC and the KSEA does not hold the FSC responsible for any abuses regarding such orders. A provision should be added to the KSEA holding the FSC responsible for arbitrary abuses of amendment orders.

b. United States

In the United States, the Williams Act provides the basic framework for assessing disclosure obligations in the tender offer context.¹⁴⁷ Section 14(d)(1) requires the tender offeror to prepare and file a Schedule 14D-1 before commencing a tender offer for more than 5% of a target company's stock. The disclosure required in Schedule 14D-1 begins with the disclosure required by Schedule 13D.

1) SEC schedule 13D

Under Section 13(d)(1) of the Exchange Act, any person who directly or indirectly acquires more than 5% of any class of the securities registered pursuant to Section 12 of the Exchange Act must file a Schedule 13D statement with the SEC. Moreover, the investor must send a copy of the 13D statement to the issuer of the securities in question and to each exchange where the securities were traded. The information that must be disclosed on the 13D includes facts about the security and the issuer, the identity and background of the purchaser, the source and the amount of the funds or other consideration used in the acquisition, the purpose of the transaction, the interest in the securities of the issuer, the contracts, arrangements, understandings or relationships with respect to the securities of the issuer, and the materials to be filed as the exhibits.¹⁴⁸ Although Section 13(d) does not expressly require disclosure of any intent to acquire control, disclosure of the "purpose of the transaction" has been augmented by SEC regulations to require disclosure of further information regarding the purchaser's future plans for the issuer.¹⁴⁹

A loophole in Section 13(d) known as the ten-day window currently allows some abuse of the regulations by securities purchasers. During the

¹⁴⁶ See Enforcement Decree, *supra* note 23, art. 11(2).

¹⁴⁷ 15 U.S.C. §§ 78m(d), (e); 78n(d)-(f). See MARC I. STEINBERG, CORPORATE INTERNAL AFFAIRS 200 (1983).

¹⁴⁸ See 17 C.F.R. § 240.13d-101, items 1-7.

¹⁴⁹ See *id.* item 4.

ten-day period after a person crosses the 5% threshold of Section 13(d), thereby incurring disclosure obligations, the tender offeror may purchase securities up to an additional 20% of the class of the equity securities. By using this method, he might be able to pay less for that 25% stake than he would have to pay after his Schedule 13D disclosure.¹⁵⁰ Consequently, the SEC would like to eliminate the "ten-day window" by requiring the tender offeror to file the day after buying his first 5% and prohibiting the tender offeror from buying any more shares until the filing has been completed. However, Congress has not acted on the SEC's request.¹⁵¹

2) *SEC schedule 14D-1*

After nearly ten years of the federal tender offer regulation under the Williams Act, the SEC adopted a permanent tender offer disclosure schedule.¹⁵² SEC schedule 14D-1 mandates disclosure of substantially more information by the tender offeror than Schedule 13D.¹⁵³

In addition to the information required by Schedule 13D, 14D-1 requires disclosure of other specific items relating to the persons retained, employed, or to be compensated by the target company and the purchaser's financial statement and relationship with the target company.¹⁵⁴ Further, as of a 1977 SEC Release, most tender offerors believe it is necessary to include their own financial statements in their Schedule 14D-1.¹⁵⁵ This 1977 Release, which concerns Regulation 14D, states that all financial information must be included in a Schedule 14D-1 when it is "material."¹⁵⁶ Although the Release did not resolve all the ambiguities concerning materiality, it did point to several nonexclusive factors that the tender offeror should evaluate when disclosing financial information.¹⁵⁷ Although case law

¹⁵⁰ See *id.* § 240.13d-1(f)(2).

¹⁵¹ See ROBERT, *supra* note 121, at 553.

¹⁵² Arthur M. Borden & Jeffrey M. Weiner, *An Investment Decision Analysis of Cash Tender Offer Disclosure*, 23 N.Y. L. SCH. L. REV. 553 (1978).

¹⁵³ *Id.* at 553-54.

¹⁵⁴ See 17 C.F.R. § 240.14d-100, items 1-11.

¹⁵⁵ JENNINGS ET AL., *supra* note 1, at 686-87.

¹⁵⁶ Filing and Disclosure Requirements Relating to Tender Offers, Exchange Act Release 13,787, [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,256, at 88,371 (July 21, 1977).

¹⁵⁷ These included, with limitation:

- (1) the terms of the tender offer, particularly those terms concerning the amount of securities being sought, such as any or all, a fixed minimum with a right to accept additional shares tendered, all or none, and a fixed percentage of the outstanding;
- (2) whether the purpose of the offer is for control of the subject company;
- (3) the plans or proposals of the bidder described in Item 5 of the Schedule; and
- (4) the ability of the bidder to pay for the securities bought in the tender offer and/or to repay any loans made to the bidder.

provides few clear guidelines concerning disclosure requirements,¹⁵⁸ courts have affirmed the heightened disclosure of 14D-1, reasoning that the required financial information may be material to a target shareholder in determining whether to tender because the shareholder may decide that it is more attractive to remain a minority shareholder under a new, and possibly more efficient, management.¹⁵⁹

c. *Comparison*

Disclosure of the intent to acquire control is required in the tender offer statement by both SEC regulations in the United States¹⁶⁰ and the Enforcement Decree in Korea¹⁶¹

In both the United States and Korea the tender offeror must file additional tender offer disclosures if a material change occurs in the information set forth in the original tender offer statement.¹⁶² However, in Korea, an outside party, namely the KFSC, may issue an order to amend the tender offer statement when the FSC determines that the statement is incomplete in its form or inadequately states any required material information.¹⁶³ To prevent the FSC's arbitrary abuse of an amendment order, a provision giving guidance to the FSC in its use of the order to amend should be added to the KSEA.

2. *Target Company's Duty*

a. *Korea*

In the case of a hostile tender offer, the target company's approval, objection, or neutrality of the takeover bid is very important information for shareholders when making the decision whether or not to tender their shares.

Id. (citing JENNINGS ET AL., *supra* note 1, at 740-41).

¹⁵⁸ See *Corenco Corp. v. Schiavone & Sons Inc.*, 362 F. Supp. 939 (S.D.N.Y. 1974, *aff'd* 488 F.2d 207 (2d Cir. 1973)); *Alaska Interstate Co. v. McMillian*, 402 F. Supp. 532 (D.Del. 1975); *Copperweld Corp. v. Imetal*, 403 F. Supp. 579 (W.D.Pa. 1977).

¹⁵⁹ See JENNINGS ET AL., *supra* note 1, at 740. The SEC Schedule 14D-1 also requires that the tender offeror must state the purpose of the tender offer. See 17 C.F.R. § 240.14d-100, item 6.

¹⁶⁰ See *supra* note 149 and accompanying text.

¹⁶¹ See Enforcement Decree, *supra* note 23, art. 11-4(2).

¹⁶² SEC Rules and Regulations Under the Securities and Exchange Act of 1934, 17 C.F.R. § 240.14d-3(b); KSEA, *supra* note 12, art. 23-2. In Korea, such material changes are enumerated in the Act, such as the reduction of purchase price, the decrease of the number of stocks, the extension of the payment period, the purchase amount and other purchase conditions. For more about the other conditions, see Enforcement Decree, *supra* note 23, art. 12-6.

¹⁶³ See KSEA, *supra* note 12, arts. 11(1), 23-2(2).

Nevertheless, the KSEA does not require the target company to disclose such material information. The target company may pro-actively voice its opinion on the tender offer, but is not required to do so by the KSEA.¹⁶⁴

However, the Korean Commercial Act has been interpreted to require the target corporation in the midst of a tender offer to disclose material information as a part of the director's duty to the company.¹⁶⁵ Consequently, even though the KSEA does not specifically create a duty for the target company to disclose information, the target company's board of directors should voice its opinion about a hostile takeover, and disclose other information related to the tender offer, in accordance with the general director's duty to the company under the Korean Commercial Act.¹⁶⁶ When the target company presents its opinion, the target company must immediately submit a written statement describing its opinion of the tender offer with the FSC and the KSE or the Association.¹⁶⁷ Once this is done, the issuer of stocks may present the opinion through means of advertisement, correspondence or other documentation in order to raise awareness regarding the tender offer.¹⁶⁸

b. *United States*

Under the Exchange Act, the target company must publish or transmit to shareholders a statement disclosing whether it accepts, rejects, or is unable to take a position with respect to the tender offer.¹⁶⁹ The statement

¹⁶⁴ See *id.* art. 25.

¹⁶⁵ Korean Commercial Act, *supra* note 135, arts. 399(1)-(3).

¹⁶⁶ See *id.* arts. 399(1)-(3).

¹⁶⁷ KSEA, *supra* note 12, art. 25, provides:

An issuer of stocks, etc. for which a tender offer statement has been filed, may present his opinion on the tender offer concerned under the conditions as prescribed by the Presidential Decree. In this case, the issuer shall file a written statement describing the contents of such opinion without delay with the Financial Supervisory Commission and the Korea Stock Exchange or the Association, as the case may be.

Id.

¹⁶⁸ See Enforcement Decree, *supra* note 23, art. 13. The issuer of stocks "may present his opinions on the said tender offer by means of advertisement, correspondence or other documents. In this case, the important matters shall not be omitted and the contents shall be such that no misunderstanding may be caused therefrom." *Id.*

¹⁶⁹ 17 C.F.R. § 240.14e-2(a) provides:

As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, the subject company, no later than 10 business days from the date the tender offer is first published or sent or given, shall publish, send or give to security holders a statement disclosing that the subject company: (1) Recommends acceptance or rejection of the bidder's tender offer; (2) Expresses no opinion and is remaining neutral toward the bidder's tender offer; or (3) Is unable to take a position with respect to the

must include the reason for the target company's position, including the inability to take a position, and must be sent to shareholders within ten business days from the date the tender offer was first published.¹⁷⁰

A Schedule 14D-9 must also be filed by the target company's management.¹⁷¹ The information to be disclosed on the 14D-9 includes a description of the security, target company, and tender offeror, the solicitation or the recommendation, the persons retained, employed, or to be compensated, the recent transactions and the intent with respect to the securities, certain negotiations and transactions by the target company, and any additional material information.¹⁷²

c. *Comparison*

In Korea, unlike in the United States, the target company does not have a statutory duty to disclose information material to a tender offer, most notably its opinion of any takeover bid.¹⁷³ Accordingly, a less specific and less enforceable duty has been read into the director's obligation to the company under the Korean Commercial Act.¹⁷⁴ However, this needs to be expanded to also cover the target company's duty to disclose material information. Yet, the most effective solution would be to amend the KSEA to require the target company to disclose all material information for the investor's protection, including its opinion of any impending takeover bids.

3. *Prohibition Against Using Non-Public Information*

a. *Korea*

Material, non-public information related to the tender offer can directly or indirectly influence the market price of securities. Traditionally, this non-public information was a tool for insider trading. Thus, securities regulations in both Korea and the United States prohibit using non-public information in an attempt to prevent manipulations of the market price. Under the KSEA, any person who obtains undisclosed information relating

bidder's tender offer. Such statement shall also include the reason(s) for the position (including the inability to take a position) disclosed therein.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² 17 C.F.R. § 240.14d-9(d).

¹⁷³ *Id.* § 240.14d-100, items 1-9.

¹⁷⁴ See KSEA, *supra* note 12, art. 25.

¹⁷⁵ See Korean Commercial Act, *supra* note 135, arts. 399(1)-(3).

to the tender offer in the course of performing his duties shall not use or have another person use the information in connection with the tender offer.¹⁷⁵ The KSEA defines the term non-public material information as any information that may have an important effect on an investors' judgment about the investment and is not disclosed to the public by the concerned corporation.¹⁷⁶

b. United States

Under the Exchange Act, any person who is in possession of material information relating to the tender offer cannot use the information, unless the information and its source are disclosed within a reasonable time.¹⁷⁷ In addition, Section 14(e) contains a general antifraud provision, which applies to all statements made and acts done in connection with the tender offer.¹⁷⁸

The Exchange Act does not have a statutory definition of the term "materiality." Instead, the general standard of materiality was established by the United States Supreme Court in *TSC Industries v. Northway*.¹⁷⁹ In *TSC Industries*, the Court held that "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."¹⁸⁰ Similarly, the Supreme Court in *Basic, Inc. v. Levinson*,¹⁸¹ used the "substantial likelihood" test established in *TSC Industries* for determining materiality¹⁸² under Rule 10b-5, the SEC's general anti-fraud provision. Thus, material information in the United States may be defined as anything that "a reasonable [person] would attach importance to . . . in determining his course of action."¹⁸³

¹⁷⁵ See KSEA, *supra* note 12, art. 188-2(1).

¹⁷⁶ See KSEA, *supra* note 12, art. 188-2(2). Facts that require disclosure are provided in art. 186(1).

¹⁷⁷ 17 C.F.R. § 240.14e-3(a)(3).

¹⁷⁸ ROBERT, *supra* note 121, at 551.

¹⁷⁹ *TSC Industries, Inc., v. Northway, Inc.*, 426 U.S. 438 (1976).

¹⁸⁰ *Id.* at 449.

¹⁸¹ *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988).

¹⁸² *Id.* at 232.

¹⁸³ RESTATEMENT (SECOND) OF TORTS § 538(2)(a) [Tentative Draft No. 10, Apr. 20, 1964]; AMERICAN LAW INSTITUTE, FEDERAL SECURITIES CODE § 256(a) [Tentative Draft No. 2, 1973] (quoting from CHARLES R. O'KELLY, JR. & ROBERT B. THOMPSON, CORPORATION AND OTHER BUSINESS ASSOCIATION: CASES AND MATERIALS 1047 (2d ed. 1996)).

D. *Defense Against the Tender Offer and Directors' Potential Liability to Shareholders*

1. *Korea*

When the tender offer occurs, the KSEA prohibits defensive action by the target company in order to prevent any undue advantage to majority shareholders of the target company.¹⁸⁴ According to these provisions, during a tender offer, the issuer of the target company's stocks shall not issue securities that are related to the voting rights of target company's shareholders. In addition, the issuer may not make a resolution of the board of directors or hold a general meeting of stockholders regarding such issuance.¹⁸⁵ However, if the issuer makes a resolution of the board of directors or holds a general meeting of stockholders before the tender offer statement is filed, the issuer of the stock can issue new equity securities, even though the issuance could change the number of voting rights.¹⁸⁶

Since directors of the company have a duty of neutrality during a hostile tender offer, the directors are jointly responsible for the damages to the corporation, and to any third party, when damages arise from a stockholders' defensive action.¹⁸⁷ However, because the KSEA prohibits stockholders' defensive acts that may change the number of voting rights,¹⁸⁸ if the issuance of a new voting stock is exercised, the issuance should be automatically nullified.¹⁸⁹

Generally, in Korea, directors of a company who negligently fail to perform their duties are jointly and severally liable for damages to a third party.¹⁹⁰ However, it is unclear whether stockholders fall within the

¹⁸⁴ Song, *supra* note 53, at 29. A defensive action of the target company can take many forms, including a presentation of a dissenting opinion about the tender offer, the issuance of voting stocks, such as stock certificates, a certificate representing preemptive rights, convertible bonds, certificates of bond with warrants, and certificates of exchangeable bonds, a the resolution of the board of directors, or a general meeting of stockholders concerning the tender offer. Under the KSEA, defensive actions are defined as those actions that may change the number of voting rights. *See* Enforcement Decree, *supra* note 23, art. 12-5.

¹⁸⁵ *See* KSEA, *supra* note 12, art. 23(4); Enforcement Decree, *supra* note 23, art. 12-5.

¹⁸⁶ KSEA, *supra* note 12, art. 23(4); Enforcement Decree, *supra* note 23, art. 12-5.

¹⁸⁷ *See* Korean Commercial Act, *supra* note 135, arts. 399(1), 401(1). "If directors have neglected to perform their duties willfully or by gross negligence, they shall be jointly and severally liable for damages to third person." *Id.*

¹⁸⁸ *See* KSEA, *supra* note 12, art. 23(4).

¹⁸⁹ *See* Korean Commercial Act, *supra* note 135, art. 431(1). "When a judgment nullifying the issuance of new shares becomes final and conclusive, such new shares shall be invalidated for the future." *Id.*

¹⁹⁰ *See* Korean Commercial Act, *supra* note 135, art. 401(1).

definition of a third party.¹⁹¹ Thus, during a defensive action against the tender offer, the company director could potentially be liable for both the stockholders' direct and indirect damages when they negligently fail to perform their required duties.

2. *United States*

In the United States, when a corporation becomes the subject of a hostile tender offer, the target company usually tries to improve the tender offer, repel the offer, or remain independent. The target company has complete discretion when deciding to accept or reject the tender offer. The United States does not have a specific provision prohibiting a target company's defensive action, although companies must abide by the Section 14(e) prohibitions on material omissions, misstatements, deception, and fraud.

There are differing opinions¹⁹² regarding directors' defensive actions against tender offers. However, the business judgment rule, as described below, is generally used to evaluate the defensive actions of the target company's directors.¹⁹³

In *Aronson v. Lewis*,¹⁹⁴ the Delaware Supreme Court defined the business judgment rule as "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and

¹⁹¹ Since stockholders may suffer from independent losses aside from the damage to the corporation, it is likely that stockholders will fall within the definition of a third person. However, the Korean Supreme Court disagreed. See Judgment of Jan. 26, 1993, 91 Da 36093 (S. Korea). For more information, see Joo-Chan Son, SANGBOP (SANG) [THE COMMERCIAL CODE(I)], SEOUL, 773-76 (1998).

¹⁹² See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161(1981) (a negative opinion on the director's defensive action). But cf. Ronald J. Gilson, *Just Say No to Whom?*, 25 WAKE FOREST L. REV. 121 (1990) (in support of the directors' defensive action).

¹⁹³ See ROBERT, *supra* note 121, at 579-82. Professor Clark suggests five rules that could be adopted to govern the behavior of the target company's directors: (1) Pure passivity; (2) Modified passivity; (3) Differential regulation; (4) Primary purpose test; and (5) Business judgment rule. As for the business judgment rule, he explains,

the decision to commit corporate resources to takeover defense is a matter within the normal business discretion of the target's directors and officers, and could not be successfully challenged unless the plaintiff could prove some serious failure on the defendant's part—such as gross negligence or palpable overreaching. Since target managers usually go through the forms of carefulness—they hire expensive counsel and investment bankers, hold many meetings, and leave a justificatory paper trail—and since they can and do allege the corporate good as a basis for their defensive maneuvers, this rule makes it impossible to attack any but the most outrageous defensive maneuvers.

Id. at 581-82.

¹⁹⁴ *Aronson et al. v. Lewis*, 473 A.2d 805 (Del. 1984).

in the honest belief that the action taken was in the best interests of the company.”¹⁹⁵ However, the same court later held, in *Unocal Corp. v. Mesa Petroleum Co.*,¹⁹⁶ that “if a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed.”¹⁹⁷ The court went on to explain that, “this entails an analysis by the directors of the nature of the takeover bid and its effect on the corporate enterprise.”¹⁹⁸ Defensive actions are acceptable when they entail “a defensive measure to thwart or impede a takeover is indeed motivated by a good faith concern for the welfare of the corporation and its stockholders, which in all circumstances must be free of any fraud or other misconduct.”¹⁹⁹ In finding for the board of directors, the *Unocal* court stated that the board had “reasonable grounds for believing there was a danger to corporate policy and effectiveness, a burden satisfied by a showing of good faith and reasonable investigation.”²⁰⁰

In *Revlon v. MacAndrews*,²⁰¹ the court addressed the extent to which a corporation can consider the “impact of a takeover threat on constituencies other than shareholders.”²⁰² The court concluded that the directors have a fiduciary duty of care and loyalty only to the corporation and its shareholders.²⁰³ “Post-*Revlon* common law increasingly demands that the target company act in a manner that will extract the highest possible value for its shareholders.”²⁰⁴ However, many state laws authorize directors to act not only for the benefit of the shareholders, employees, and customers, but also for the local community in which the company is located.²⁰⁵

¹⁹⁵ *Id.* at 812.

¹⁹⁶ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

¹⁹⁷ *Id.* at 955.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* The court added, “if the board of directors is disinterested, has acted in good faith and with due care, its decision in the absence of an abuse of discretion will be upheld as a proper exercise of business judgment . . . Thus, unless it is shown by a preponderance of the evidence that the directors’ decisions were primarily based on perpetuating themselves in office, or some other breach of fiduciary duty such as fraud, overreaching, lack of good faith, or being uninformed, a Court will not substitute its judgment for that of the board.” *Id.* at 959.

²⁰¹ *Revlon, Inc. v. McAndrews & Forbes Holdings*, 506 A.2d 173 (Del. 1986).

²⁰² *Id.* at 176.

²⁰³ *Id.* at 179; *Aronson et al. v. Lewis*, 473 A.2d 805, 811 (Del. 1984).

²⁰⁴ Lyman Johnson, *The Eventual Clash Between Judicial and Legislative Notions of Target Management Conduct*, 14 J. CORP. L. 35, 81 (1988).

²⁰⁵ *Id.* at 83. Some states prescribe a “stakeholder provision,” which allows the board to take a much broader view of corporate purpose and management duty. See *id.* at 81. See also FLA. STAT. ANN. § 607.0830(3) (West 1993):

In discharging his duties, a director may consider such factors as the director deems relevant, including the long-term prospects and interests of the corporation and its shareholders, and the social, economic, legal, or other effects of any action on the employees, suppliers, customers of

In order to obtain the personal liability protection of the business judgment rule for defensive actions in an attempted takeover, the target company's directors must demonstrate that they had reasonable grounds for believing that there was a danger to the corporation's welfare from the takeover attempt; that the defensive measures were reasonable in relation to the threat posed; that they acted in good faith based upon reasonable investigation; and that the majority of the directors were disinterested.

3. *Comparison*

Since the KSEA specifically prohibits the target company's defensive action, it is difficult to compare defensive actions in Korea with those the United States. However, the KSEA does allow the target company the right to present its opinion.²⁰⁶ If the target company strongly presents a dissenting opinion, the effect will be the same as employing a defensive action that is currently prohibited. Therefore, it is not necessary to prohibit the target company's defensive action by the law.

E. Penalties for Violations of Disclosure Requirements and Tender Offer Regulations

1. *Korea*

Considering the usual objective of the tender offer, that is, takeover of a company, restrictions on voting rights are the most effective way to regulate violations of tender offer regulations. Consequently, when a person purchases stocks in violation of tender offer regulations, she may not exercise the voting rights of those stocks.²⁰⁷ One obvious problem is that the KSEA does not state specifically which securities will have restricted voting rights.²⁰⁸ According to the language of the Act, the scope of securities that have restricted voting rights includes all stocks acquired in violation of the tender offer.²⁰⁹ However, since the tender offer regulations apply only when more than 5% of the stocks are purchased,²¹⁰ the securities comprising the

the corporation or its subsidiaries, the communities and society in which the corporation or its subsidiaries operate, and the economy of the state and the nation.

Id.

²⁰⁶ KSEA, *supra* note 12, art. 25.

²⁰⁷ *See id.* art. 21-3.

²⁰⁸ *See id.* art. 21-3.

²⁰⁹ Kim, *supra* note 53, at 47.

²¹⁰ KSEA, *supra* note 12, art. 21(1).

first 5% are arguably not covered by the tender offer regulations. Thus, it is reasonable to suggest that only the surplus securities over 5% should have restricted voting rights.

The period in which the voting rights restriction applies extends from the purchase date of the stocks until six months after the disposal of the stocks to a third party.²¹¹ In addition, the FSC may order the disposal of stocks purchased in violation of the regulations.²¹² While the KSEA does not regulate the methods of disposal, the securities in question may not be sold to "specially connected persons."²¹³ Even in the case of a forced disposal, the KSEA²¹⁴ prohibits the third party from exercising voting rights for six months from the date of purchase.

The KSEA also imposes criminal sanctions on any person who violates the tender offer regulations. When an individual violates a compulsory tender offer provision,²¹⁵ fails to file the tender offer statement,²¹⁶ restricts purchases by tender offer,²¹⁷ or violates any other provisions,²¹⁸ he may be punished by imprisonment for not more than two years, or by a monetary fine that does not exceed ten million won.²¹⁹ Additionally, a person who makes a false statement with regard to material facts disclosed in the tender offer statement, or tender offer amendment statement, shall be punished by imprisonment for not more than one year or by a fine of not more than five million won.²²⁰ However, omissions of material facts, and false statements with regard to material information made by target company representatives, are not currently regulated by the KSEA.

2. *United States*

During the ten-day period after a person crosses the 5% threshold of Section 13(d), thereby incurring disclosure obligations, the tender offeror may purchase securities up to an additional 20% of the class of the equity securities. From the time of the acquisition of the 20% of the securities until the expiration of the ten-day period, he shall not vote or direct the voting of

²¹¹ Enforcement Decree, *supra* note 23, art. 12.

²¹² KSEA, *supra* note 12, art. 21-3.

²¹³ Because the "specially connected persons" are treated as the tender offerors under the KSEA. See KSEA, *supra* note 12, art. 21(1); Enforcement Decree, *supra* note 23, art. 10-3.

²¹⁴ See Enforcement Decree, *supra* note 23, art. 12.

²¹⁵ See KSEA, *supra* note 12, art. 21(1).

²¹⁶ *See id.*

²¹⁷ *See id.* art. 23.

²¹⁸ *See id.* art. 23-2(2).

²¹⁹ *See id.* art. 209(4). The currency exchange of ten million won in U.S. dollars is about \$8340.

²²⁰ *Id.* art. 210(6). The currency exchange of five million won in U.S. dollars is about \$4170.

the securities, or acquire an additional beneficial ownership interest in any equity securities.²²¹ As in Korea, the Exchange Act does not specifically describe the scope of the securities that will have voting right restrictions. However, also as in Korea, since those possessing securities totaling less than 5% are not forced to file a statement, it may be inferred that only the surplus of 5% should have restricted voting rights.

The United States has only a general anti-fraud provision against violation of the tender offer.²²² It does not mention a private action for the violation but can lead to criminal sanctions.²²³

3. *Comparison*

The restriction period on voting rights in Korea, when compared to the United States, is unreasonably long because the tender offeror can legally purchase the securities after the statement filing date. Thus, the restriction period should be in effect until the expiration of the tenth day after the statement filing date. Further, Article 12 of the Enforcement Decree of the KSEA, which restricts the third party's voting rights for six months, should be revised to ensure free securities transactions, since it currently hinders swift and harmonious securities transactions.

As for criminal sanctions in Korea, the KSEA prescribes only limited punishments for some violations.²²⁴ By contrast, the United States has a general anti-fraud provision for any person and for any omission, misstatement, manipulation, deception, or fraud.²²⁵ Korea should also adopt a general anti-fraud provision with corresponding criminal sanctions in order to enforce a fair and secure disclosure system in the Korean securities market. Moreover, the penalty for all violations should be increased because the present penalty is insufficient to effectively deter potential violators.

IV. SUGGESTIONS FOR IMPROVING KOREAN LAW

The Korean government must amend the KSEA. Despite two major amendments,²²⁶ tender offer regulation under the KSEA remains complicated, especially the provisions relating to securities calculation and

²²¹ See 17 C.F.R. § 240.13d-1(f)(2).

²²² 15 U.S.C. § 78n(e).

²²³ *Id.*

²²⁴ See *supra* notes 219-220 and accompanying text.

²²⁵ 15 U.S.C. § 78n(e).

²²⁶ See *supra* Part II.A.2.

disclosure requirements. Amending the KSEA would enhance the efficacy of the tender offer as a viable option for Korean business, protect individual investors, and facilitate a free market in securities. Among the many suggestions for improvement of Korean tender offer regulations listed in this article, the following five recommendations represent the areas in the most urgent need of reform.

A. Clarify the Definition of the Tender Offeror

The KSEA fails to adequately define the term “specially related persons.” Specifically, the meaning of “specially related persons” in Article 10-3(2) of the Enforcement Decree of the KSEA is vague and much broader than its equivalent in the United States. Further, the KSEA fails to define “equivalent to ownership.”²²⁷ Thus, these pieces of legislation regarding the scope of the tender offeror indirectly cause confusion to the tender offer process during securities transactions in Korea. Consequently, to eliminate this confusion the term “specially related persons” should be abolished and the meaning of “persons acting in concert” should be concretely defined, as it is in the United States.

B. Remove Potential Securities from the Scope of Applicable Securities

In Korea, the scope of applicable securities of the tender offer currently include potential securities, such as stock certificates, certificates representing preemptive rights, convertible bonds, and certificates of exchangeable bonds. Since these securities do not have voting rights at the moment of the tender offer, adding them to the scope of applicable securities creates a heavy burden on the tender offeror. In addition, including potential securities in the scope of determination of whether tender offer regulations apply severely complicates calculations of the percent of securities owned. As a result, potential securities should not count towards the 5% threshold that triggers tender offer regulations.

C. Shorten the Six-Month Period

The applicable period to calculate whether tender offer regulations

²²⁷ While the Williams Act does not specifically define either “specially related persons” or “equivalent to ownership,” it does provide the meaning of the “beneficial owner,” which, under Article 10-3(4) of the Enforcement Decree, is related to the meaning of “equivalent to ownership.”

apply is the six months prior to the date of the purchase of stocks.²²⁸ In comparison, in the United States the applicable period of the tender offer is twenty business days from the date the tender offer is first published, sent, or given to security holder.²²⁹ Generally, while stockholders of target companies would like to have sufficient time to make decisions regarding the tender offer, the tender offeror usually wants to complete the transaction as soon as possible. Ideally, the tender offer should be completed quickly in order to maintain its function in a capital market. For this reason, Korea's six-month period is too long to keep up with the function of the securities market. Consequently, the six-month period is not reasonable and should be shortened.

D. Require Disclosure of the Target Company's Opinion Regarding a Tender Offer

The target company's opinion concerning a hostile take over, whether it approves, dissents, or is neutral, is very important to investors when making investment decisions. The presentation of a dissenting opinion about the tender offer can be an effective action in a target company's defense against the tender offer. The KSEA does not require the target company to disclose such information, although the target company has the right to present an opinion about the tender offer.²³⁰

Korea currently relies on the director's duty to the company under the Korean Commercial Act²³¹ to encourage target company disclosure. The KSEA should follow the United States' pattern and require, not simply allow, the target company to disclose material information, including its opinion of the tender offer.

Further, due to the importance of the target company's opinion to investors, the contents of the opinion should be accurate and detailed. The KSEA only provides vague guidelines on the context of opinions, stating that "the important matters shall not be omitted, and the contents shall be such that no misunderstanding may be caused therefrom."²³² However, this can be interpreted many different ways. Consequently, the KSEA should require the target company's disclosure, and prescribe the scope of information in detail as well.

²²⁸ Enforcement Decree, *supra* note 23, art. 10-2(1).

²²⁹ See 17 C.F.R. § 240.14c-1(a) (2001).

²³⁰ See *id.*

²³¹ See Korean Commercial Act, *supra* note 135, arts. 399(1)-(3).

²³² See Enforcement Decree, *supra* note 23, art. 13.

E. *Reduce the Limitation on Voting Rights Associated with Securities Acquired in Violation of Regulations*

In Korea, the restricted period on exercising voting rights for securities purchased in violation of tender offer regulations extends from the date that the stocks are purchased to six months after disposal of the stocks.²³³ According to the language of the KSEA,²³⁴ when the purchaser who is ordered to dispose of the stocks by the FSC, sells the stocks to the third party, the third party may not exercise voting rights for 6 months from the date of purchasing the stocks.

Furthermore, Article 12 of the Enforcement Decree of the KSEA, which currently restricts voting rights for six months, should be effective only until the expiration of the tenth day from the date of the filing of the statement. From that day, the tender offeror can legally purchase the securities through the tender offer.²³⁵ These changes would enhance and improve securities transactions in Korea.

V. CONCLUSION

When comparing Korean tender offer regulation with that of the Williams Act in the United States, it is clear that the KSEA is in need of reform. Even though KSEA's tender offer regulations are based on related laws from other countries, including the Williams Act, Korea retains some unreasonable regulations when compared to the United States. Despite two major amendments, the tender offer regulation in Korea is still very complicated, particularly provisions concerning applicable securities, calculation of securities, and the disclosure requirements.

Under the KSEA, the tender offer is an offer to buy stocks or a solicitation of an offer to sell stocks against many and unspecified persons, including buying stocks outside the KSE or KOSDAQ.²³⁶ The tender offer is mandatory when a person intends to acquire 5% or more of the voting stocks through purchase, exchange, bid, or any other acquisition by transfer of more than ten shareholders in six months.²³⁷

The purpose of the KSEA is to protect investors by ensuring fairness

²³³ See Enforcement Decree, *supra* note 23, art. 12.

²³⁴ *Id.* art. 12.

²³⁵ See *id.* art. 11-5; KSEA, *supra* note 12, art. 23.

²³⁶ See KSEA, *supra* note 12, art. 21(3).

²³⁷ See *id.* art. 21(1); Enforcement Decree, *supra* note 23, art. 10-2.

in securities transactions. Consequently, the KSEA provides similar provisions to those of the U.S. SEC Rules: the twenty-day tender offer period,²³⁸ the withdrawal and cancellation of the tender offer provision,²³⁹ and the proportional purchase rule.²⁴⁰ However, the KSEA does not impose a duty to disclose information on the target company.²⁴¹ From the perspective of investor protection, the failure to require the target company to disclose material information is unreasonable.

The Williams Act ensures "that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information."²⁴² Section 13(d)²⁴³ is designed to provide target shareholders with knowledge of a bidder's identity and intentions. Section 14(d)²⁴⁴ contains both disclosure requirements and substantive restrictions for tender offers. Section 14(e)²⁴⁵ is a general antifraud provision, which requires persons engaged in the tender offer to automatically disclose all material information. Section 13(e)²⁴⁶ regulates an issuer from purchasing its own securities that are subject to the Securities Exchange Act in contravention of the SEC rules. To accomplish the objectives of the Williams Act, the SEC provides some significant rules, including the twenty-day offer period rule,²⁴⁷ the shareholder's withdrawal rule,²⁴⁸ the pro rata acceptance rule,²⁴⁹ and the target company's disclosure rule.²⁵⁰

In comparison to their counterparts in the United States, the Korean regulations are unclear and complicated. A legacy of hasty amendments has left complex regulations that lack the necessary provisions to ensure secure and fair securities transactions in the Korean securities market. Thus, to enhance the role of the tender offer, to protect investors' benefits, and to create a free market order against a high corporate competition, the tender offer regulation of the KSEA should be carefully reconsidered using the U.S. regulations as a model.

²³⁸ See Enforcement Decree, *supra* note 23, art. 11-5.

²³⁹ See KSEA, *supra* note 12, art. 24-2(3).

²⁴⁰ See Enforcement Decree, *supra* note 23, art. 13-2-2.

²⁴¹ See KSEA, *supra* note 12, art. 25.

²⁴² *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 8 (1985) (quoting *Rondeau v. Mosine Paper Corp.*, 422 U.S. 49, 58 (1975)).

²⁴³ 15 U.S.C. § 78m(d).

²⁴⁴ *Id.* § 78n(d).

²⁴⁵ *Id.* § 78n(e).

²⁴⁶ *Id.* § 78m(e).

²⁴⁷ See 17 C.F.R. § 240.14e-1(a).

²⁴⁸ See *id.* § 240.14d-7.

²⁴⁹ See *id.* § 240.14d-8.

²⁵⁰ See SEC Rule 14e-2, 17 C.F.R. § 240.14e-2 (2001).

