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DOES THE EUROPEAN COMMUNITY HAVE A FATAL ATTRACTION FOR HOSTILE TAKEOVERS? A COMPARISON OF THE EUROPEAN COMMISSION'S PROPOSED DIRECTIVE ON TAKEOVER BIDS AND THE UNITED STATES EXPERIENCE

I. INTRODUCTION

Financial battles for control of public corporations generate controversy because the outcome of a takeover bid affects widespread and divergent interests.[1] Mergers and acquisitions alter the immediate financial interests of the offeror[2] as well as those of the target corporation's[3] shareholders, management, employees, enterprise-dependent local economies,[4] and, ultimately, the national economy.[5] Because the financial stakes of a takeover are so high, each of the parties involved in a takeover attempt has a strong incentive to develop strategies or responses to the bid that increase its ability to control the outcome of the contest.[6]

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1. *See* 1 M. LIPTON & E. STEINBERGER, TAKEOVERS & FREEZEOUTS § 1.01 (rev. 1989). A takeover occurs when a party (offeror) attempts to acquire control of a company (target company) through the purchase of some or all of the target company's outstanding shares. *Id.* Typically, the offeror makes an offer directly to the target's shareholders for the purchase of the target's shares at a substantial premium over the market price. *Id.* § 1.03. This process by the offeror is commonly known as mounting a tender offer. *Id.*

2. *See supra* note 1 and accompanying text (defining "offeror").

3. *See supra* note 1 and accompanying text (defining "target company").

4. *See* Bebel & Vert, *State Takeover Laws, Insider Trading, and the Interplay Between the Two: A New Perspective*, 91 W. VA. L. REV. 1001, 1008 (1989) (noting that hostile takeovers result in job losses in state where target company operates); Coffee, *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1, 70-73 (1986) (explaining that states often absorb costs of job losses and tax revenue declines that follow takeover); Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 25-26 (1987) (concluding that hostile takeovers lead to job losses and disrupt established economic relationships between target company and local community); Macey, *State Anti-Takeover Legislation and the National Economy*, 1988 WIS. L. REV. 467, 478-79 (conceding that hostile takeovers often lead to transfer of target's employees from one plant or state to another location). The financial effects of takeovers are more pronounced following a "bust-up" acquisition, in which the acquirer quickly moves to sell off portions of the target company's assets to repay the debt the acquirer assumed in purchasing the target's shares. *See* 1 M. LIPTON & E. STEINBERGER, *supra* note 1, § 1.05[1] (defining "bust-up" mergers).

5. *See* Bebel & Vert, *supra* note 4, at 1006 (explaining that 1980s witnessed largest wave of mergers, many on hostile basis, in United States history); Lipton, *supra* note 4, at 20-23 (emphasizing dramatic increase in use of debt in takeovers and resulting concern for health of national economy); Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 104-05 (1979) (noting that threat of disruption to national economy should be of paramount concern); Macey, *Externalities, Firm-Specific Capital Investments, and the Legal Treatment of Fundamental Corporate Changes*, 1989 DUKE L.J. 173, 173 (contending that disruptions caused by takeovers vary directly with size of target).

6. 1 M. LIPTON & E. STEINBERGER, *supra* note 1, § 1.01.

In the United States, offerors initially made tender offers[7] on short notice and for limited time periods in an attempt to coerce target shareholders to tender their holdings without a full evaluation of the offer's merits.[8] Target company managements responded by creating numerous defensive measures to block or delay the offeror's ability to complete the takeover.[9] Beginning in 1968, federal and state legislators in the United States intervened and enacted statutes governing takeover bids in an attempt to protect target shareholders from abusive takeover practices.[10]

Under the presumption that shareholders of the target company should determine the outcome of a bid, federal and state legislators sought to ensure a balance of power between the offeror and target management.[11] The legislators, however, were undecided whether takeovers normally would yield positive economic benefits.[12] Thus, federal regulation of takeovers expressed a generally free market philosophy concentrating on providing target shareholders with adequate financial disclosure and sufficient time to review the offer.[13]

States soon realized that the federal government's neutral policy on tender offers did not attempt to restrict the offeror's rationale for a bid

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7. *See id.* § 1.03[1] (explaining that tender offers are more effective than proxy battles because offeror can present bid directly to shareholders); 3B H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 13.24 (rev. 1989) (defining "tender offer); *infra* note 126 and accompanying text (same).

8. *See* 3B H. BLOOMENTHAL, *supra* note 7, § 13.28[2] (reviewing preregulation period objectives of offeror in tender offer).

9. *See id.* (outlining target managements' responsive actions to block unwanted tender offers); 1 M. LIPTON & E. STEINBERGER, *supra* note 1, § 6.03 (outlining introduction of defensive measures such as "poison pills," "golden parachutes," "lock-up" options, and "Pac-Man" defenses by target management to thwart takeover bids).

10. *See* 3B H. BLOOMENTHAL, *supra* note 7, § 13.28 (reviewing reasons for federal legislation regarding takeovers); 1 M. LIPTON & E. STEINBERGER, *supra* note 1, § 5.02[1] (reviewing reasons for state legislation regarding takeovers).

11. *See* Johnson & Millon, *Misreading the Williams Act*, 87 MICH. L. REV. 1862, 1897-99 (1989) (contending that in late 1960s both federal and state legislators took for granted assumption that state's primary role was to protect individual shareholder autonomy in deciding outcome of takeover bid).

12. *See* Johnson & Millon, *supra* note 11, at 1891-97 (explaining that Williams Act is neutral and is not an endorsement by federal legislators of takeovers); Karmel, *The Duty of Directors to Non-Shareholder Constituencies in Control Transactions—A Comparison of U.S. and U.K. Law*, 25 WAKE FOREST L. REV. 61, 69 n.46 (1990) (noting that federal legislators were uncertain over merits of takeovers in 1960s and remain so); *infra* note 94 and accompanying text (discussing reasons why some federal and state legislators believed takeovers could reinvigorate United States' industrial base).

13. *See* Johnson & Millon, *supra* note 11, at 1893-97 (noting that Congressional intent in enacting federal takeover laws was to provide target company shareholders with sufficient disclosure and procedural protections in face of tender offer). Johnson and Millon contend that commentators who attempt to find a pro-takeover policy in federal regulations are misreading the Williams Act's objectives. *Id.* at 1896-97. On the contrary, Johnson's and Millon's view is that the Williams Act adopted a policy of neutrality toward takeover activity as long as the offeror complied with all of the target shareholders' procedural protections. *Id.* at 1895-96.

and, therefore, could result in the takeover of resident corporations by speculative offerors more interested in short-term financial gains than in the long-term health of the target corporation.[14] To avoid disruption of local economies, states in the 1980s began to enact various types of stringent antitakeover statutes that effectively tipped the balance of interests in favor of target management.[15] Congress has refused to preempt the states' legislation.[16] As a result, no consensus exists between federal and state authorities, or even among state authorities on what interests are paramount in a takeover bid or what methods best regulate the competing interests.[17]

As federal and state regulatory agencies' experience with takeovers in the United States has grown, fundamental changes in the agencies' regulatory philosophies have led to the decentralization of takeover controls from the federal level to the state level.[18] In addition, regulatory goals have shifted toward an emphasis on collective shareholder welfare rather than protection of an individual shareholder's right to receive and to decide a tender offer.[19] Finally, there is a trend toward active state discouragement of hostile takeover bids.[20]

Similar to the United States, other countries are starting to address the fundamental questions of whether and how to control the various interests involved in a takeover bid. Traditionally, most corporate takeovers occur in the United States and the United Kingdom.[21] Corporate takeovers are common in the United States and the United Kingdom because these countries have highly sophisticated and well-developed capital markets that can provide an offeror with the funds necessary to launch and complete a takeover, and have no real or practical restrictions on share transfers.[22]

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14. *See* Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CALIF. L. REV. 29, 32 (1987) (noting that states enacted statutes to protect local interests because states found federal regulations ineffective).

15. *See* Kozyris, *Some Observations on State Regulation of Multistate Takeovers—Controlling Choice of Law Through the Commerce Clause*, 14 DEL. J. CORP. L. 499, 503 (1989) (contending that state legislation controls takeover activity in United States); *infra* notes 135-43 and accompanying text (discussing various methods that states have used to protect local interests from takeover disruption).

16. *See infra* notes 161-62 and accompanying text (explaining that Congress has not attempted to pass legislation that would preempt state antitakeover statutes).

17. *See infra* notes 129-43 & 149 and accompanying text (discussing different approaches that federal and state takeover statutes use and different interests that such statutes protect).

18. *See infra* notes 157-62 and accompanying text (reviewing effect of state antitakeover statutes in shifting control over success of takeover bid from federal to state level).

19. *See infra* notes 164-69 and accompanying text (outlining shift from shareholder autonomy to shareholder protection against coercive offers).

20. *See infra* notes 171-78 and accompanying text (reviewing shift from original neutrality toward takeovers to active discrimination against "unfriendly" transactions by state antitakeover statutes).

21. *See* 3C H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 15.05 (rev. 1989) (reviewing activity and size of major national stock markets worldwide).

22. *Id.*; *see also* Basaldúa, *Towards the Harmonization of EC Member States' Regulations on Takeover Bids: The Proposal for a Thirteenth Council Directive on Company Law*, 9 Nw.

Recently, many other countries have begun to deregulate their capital markets.[23] Deregulation is especially prevalent in the Member States of the European Economic Community (the Community).[24] As part of the Community's attempt to harmonize corporate law among its Member States prior to 1993,[25] the European Commission (the Commission)[26] has introduced

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J. INT'L L. & BUS. 487, 492 (1989) (commenting that large number of takeovers in United Kingdom stem from open and developed nature of United Kingdom's capital market); *In the Balance: A Survey of Europe's Capital Markets*, Economist, Dec. 16, 1989, at 10, col. 1 [hereinafter *Economist Survey*] (explaining that United Kingdom's capital markets are preeminent in Europe).

23. *See* Note, *Insider Trading and the Internationalization of the Securities Markets*, 27 COLUM. J. TRANSNAT'L L. 409, 415-17 (1989) (discussing deregulation and globalization of international securities markets); *Economist Survey*, *supra* note 22, at 5-9 (noting strong push for deregulation and competition among European countries); *Ruder Says Commission Should Oppose Expansion of Non-Shareholder Rights*, [July-Dec.] Sec. Reg. & L. Rep. (BNA) No. 39, at 1504, 1507-08 (Oct. 6, 1989) [hereinafter *Ruder Interview*] (stating that many foreign countries have approached SEC for information about SEC's regulatory policies).

24. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty] (establishing European Economic Community or European Community (the EEC, the EC, or the Community), which represents group of European countries that have agreed to achieve single market for Member States' goods and services). The goal of a single common market free of obstacles to movement of persons, services, and capital and the expected increase in the Member States' standard of living provided the rationale for the creation of the European Economic Community in 1957. *Id.* art. 3. Belgium, the Federal Republic of Germany, France, Luxembourg, and the Netherlands founded the Community in 1957. *See* Thieffry, Van Doorn, & Lowe, *The Single European Market: A Practitioner's Guide to 1992*, 12 B.C. INT'L & COMP. L. REV. 357, 357 n.3 (1989) (listing entry of Member States into Community). The United Kingdom, Denmark, and Ireland joined the Community in 1973, followed by Greece in 1981, and Portugal and Spain in 1986. *Id.*

25. *See* Single European Act, Feb. 17, 1986, 29 O.J. EUR. COMM. (No. L 169) 1 [hereinafter SEA] (modifying EEC Treaty to allow for majority voting under certain circumstances, rather than unanimous voting in decisions by Member States); A. WINTER, R. SLOAN, G. LEHNER, & V. RUIZ, EUROPE WITHOUT FRONTIERS: A LAWYER'S GUIDE (CORPORATE PRACTICE SERIES) 9-22 (1989) [hereinafter A. WINTER] (providing historical background, objectives, and present status of SEA). While the Member States' initial efforts at achieving the objectives of the EEC Treaty met with success, the rise of national interests and the requirement for unanimous approval of all Community legislation soon stalled progress. Jones, *Putting "1992" in Perspective*, 9 NW. J. INT'L L. & BUS. 463, 469-76 (1989). However, in February 1986 the Community adopted the SEA, which set December 31, 1992, as the first goal for initial harmonization of Member States' laws in numerous areas. *Id.* at 472-73. Additionally, under the SEA the Community modified the voting standard for passage of some Community legislation from unanimous approval to a qualified majority. *Id.* at 473-74. As a result of the SEA's amendments, harmonization of the Community's laws again is moving ahead quickly. *Id.* at 474-76; *see also* Hoffman, *The European Community and 1992*, 68 FOREIGN AFF. 27, 36-44 (1989) (outlining implications of 1992 harmonization process for Europe); Murphy, *European Political Cooperation After the Single European Act: The Future of Foreign Affairs in the European Community*, 12 B.C. INT'L & COMP. L. REV. 335, 347-55 (1989) (same).

26. *See* NOËL, WORKING TOGETHER: THE INSTITUTIONS OF THE EUROPEAN COMMUNITY 7 (1988) (discussing interplay and organization of Community's legislative process). The European Commission (the Commission) initiates and drafts proposed legislation. *Id.* The Commission then forwards the proposal to the Community's Council of Ministers, which after review rejects, amends, or approves the proposal. *Id.* In most circumstances controversial legislation

various proposals to regulate mergers and acquisitions.[27] The most recent is the Proposal for a Thirteenth Council Directive on Company Law concerning takeover and other general bids (the proposed Directive), which establishes guidelines for the conduct of tender offers in a takeover attempt.[28]

The objectives and underlying assumptions of the Commission's proposed takeover Directive reveal some fundamental differences between the regulatory philosophies prevailing in Europe and the United States.[29] These differences include the level of federal involvement in the enforcement of regulations concerning the bid process,[30] the regulatory agencies' balancing

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also requires review and amendments from the European Parliament and the Community's Economic and Social Committee before the Council of Ministers makes a final decision. *Id.* The Council of Ministers can adopt four types of proposals: regulations, directives, decisions, and recommendations. *Id.* A regulation is binding law and is legally enforceable against the Member States and third parties without a need for implementing national legislation. *Id.* A directive is binding law on the Member States as to the result achieved, but each Member State exercises discretion over the Member States' own national implementing legislation. *Id.* The Member States' national legislation cannot contradict a Directive's provisions, but can include additional requirements. *Id.* A decision binds only the parties that submit a dispute to Council for resolution. *Id.* A recommendation has no binding effect and is not a law. *Id.*; *see also* A. WINTER, *supra* note 25, at 25-49 (outlining separate branches of Community government and legislative process in general); Thieffry, Van Doorn, & Lowe, *supra* note 24, at 358 (outlining organization and procedures of Community's legal system).

27. *See* 3 Common Mkt. Rep. (CCH) ¶ 60,125 (June 1989) (discussing directives that Community has implemented under Article 54 of EEC Treaty to regulate mergers and acquisitions). At present, the Council of Ministers has approved the following Directives as part of the harmonization of Member States' company law: disclosure of share holdings, 31 O.J. EUR. COMM. (No. L 348) 88 (1988) [hereinafter Disclosure Directive]; qualification of auditors, 27 O.J. EUR. COMM. (No. L 126) 20 (1984) [hereinafter Eighth Company Law Directive]; 26 O.J. EUR. COMM. (No. L 193) 1 (1983) [hereinafter Seventh Company Law Directive]; requirements for spin-offs of divisions/subsidiaries, 25 O.J. EUR. COMM. (No. L 378) 47 (1982) [hereinafter Sixth Company Law Directive]; merger regulations, 21 O.J. EUR. COMM. (No. L 295) 36 (1978) [hereinafter Third Company Law Directive]; requirements for annual and consolidated accounts, 21 O.J. EUR. COMM. (No. L 222) 11 (1978) [hereinafter Fourth Company Law Directive]; minimum capital requirements, 20 O.J. EUR. COMM. (No. L 26) 1 (1977) [hereinafter Second Company Law Directive]; disclosure of corporate accounts and articles, 11 O.J. EUR. COMM. (No. L 65) 8 (1968) [hereinafter First Company Law Directive]. Basaldúa, *supra* note 22, at 488 n.6; *see also* A. WINTER, *supra* note 25, at 143-66 (reviewing all company law legislation in Community); Yates, *European Directives on Formation and Operation of Companies and the Role of the Lawyer*, in HARMONISATION OF LAWS IN THE EUROPEAN COMMUNITIES: PRODUCTS LIABILITY, CONFLICT OF LAWS, AND CORPORATION LAW [FIFTH SOKOL COLLOQUIUM] 113, 115 (P. Herzog ed. 1983) (describing intent and status of company law legislation); Dine, *The Community Company Law Harmonization Programme*, 14 EUR. L. REV. 322, 323-328 (1989) (same).

28. Proposal for a Thirteenth Council Directive on Company Law concerning takeover and other general bids, COM (88) 823 final—SYN 186 (Feb. 16, 1989) [hereinafter Proposal or proposed Directive]; Proposal, 22 BULL. EUR. COMMUNITIES 5 (Supp. Mar. 1989).

29. *See infra* notes 188-222 and accompanying text (reviewing fundamental differences between European Community and United States regarding regulation of takeovers).

30. *See infra* notes 189-98 and accompanying text (discussing centralized versus decentralized control of takeovers).

of shareholder autonomy and shareholder protection,[31] and the type of takeovers that the regulatory agencies authorize.[32]

Comparison of the two systems will focus on tender offer regulation because tender offers are the predominant method for acquiring control of a corporation in a hostile fashion[33] and because tender offers raise fundamental regulatory issues.[34] Overall, the European Community, in crafting the proposed Directive, relies on essentially the same rationales and philosophies toward hostile takeovers that the United States Congress used in enacting federal regulations more than twenty years ago.[35]

II. THE PROPOSED EUROPEAN TAKEOVER DIRECTIVE

The proposed Directive represents only one part of the Commission's attempt to harmonize company law among the Member States and to promote free movement of capital prior to 1993.[36] In formulating the

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31. *See infra* notes 200-11 and accompanying text (discussing balancing of shareholder autonomy and shareholder protection).

32. *See infra* notes 212-22 and accompanying text (discussing role of speculative bids).

33. Johnson & Millon, *supra* note 11, at 1864 (noting that direct appeal by offeror of financial premiums to shareholders is so effective that offerors rarely use proxy battles as means to assume control of target company in United States).

34. A complete comparison of all regulations affecting mergers and acquisitions (including antitrust and merger control issues) in the United States and in Europe is beyond the scope of this note. *See generally* 1 EUROPEAN MERGER CONTROL: LEGAL AND ECONOMIC ANALYSES ON MULTINATIONAL ENTERPRISES (K. Hopt ed. 1982) (summarizing antitrust policies for most of European countries and for Community); A. WINTER, *supra* note 25, at 167-82 (reviewing present structure of Community merger control laws); Fine, *EC Merger Control in the 1990s: An Overview of the Draft Regulation*, 9 NW. J. INT'L L. & BUS. 513 (1989) (outlining draft legislation regarding mergers in Community); Greenbaum, *An American Perspective on the European Commission's "Amended Proposals for a Council Regulation on the Control of Concentrations Between Undertakings" and Its Impact on Hostile Tender Offers*, 7 DICK. J. INT'L L. 195 (1989) (comparing draft legislation in Community for share disclosures with Hart-Scott-Rodino Act and Williams Act in United States); MacLachlan & Mackesy, *Acquisitions of Companies in Europe—Practicability, Disclosure, and Regulation: An Overview*, 23 INT'L LAW. 373 (1989) (outlining present merger regulations in each Member State and at European Community level); Vollmer, *The EC's Three-Pronged Bid to Ease Cross-Border Deal Making*, 1 J. EUR. BUS. 22 (1989) (outlining European legislation to encourage mergers in Community); *Europe's Single Market: At Last, a Merger Policy for Europe*, Economist, Oct. 7, 1989, at 89, col. 1 (reviewing progress of Community in implementing merger policy); *EC 'Victory' on Merger Controls*, Fin. Times, Jan. 4, 1990, at 7 (reviewing present status of Community's merger policy); *Getting Europe Ship-Shape to Compete in World Markets*, Fin. Times, Feb. 8, 1989, at 32, col. 6 (same).

35. *See infra* notes 184-87 and accompanying text (reviewing similarities between European Commission's approach to regulating takeovers and United States' original takeover control policies).

36. *See* Basaldúa, *supra* note 22, at 488 (explaining difference between mergers and takeovers under proposed Directive); MacLachlan & Mackesy, *supra* note 34, at 398-400 (noting likely expanded use of takeovers in Community over next several years); Vollmer, *supra* note 34, at 22-25, 40 (reviewing Community's legislative efforts to encourage standardization of takeover controls); *supra* note 27 and accompanying text (outlining company law harmonization program).

proposed Directive, the Commission's underlying premise is that takeovers and tender offers provide a constructive and positive outcome.[37] The Commission believes that takeovers will aid the restructuring of European industry, increase competition in the Community, and encourage European corporations to grow to an internationally competitive size.[38] In addition, cross-border holdings of companies brings the Community closer together and encourages European integration.[39] By establishing uniform takeover guidelines, the Commission seeks to encourage cross-border business combinations within the Community.[40]

Historically in the Community, only the United Kingdom has favored such a free market philosophy toward the use of takeovers as a means of fostering economic competitiveness.[41] In drafting the proposed Directive, therefore, the Commission drew heavily from the City Code on Take-Overs and Mergers (the City Code),[42] which regulates takeovers in the United Kingdom.[43] The primary difference between the proposed Directive and the City Code is that the proposed Directive imposes legal, rather than informal duties on all parties to the takeover bid.[44] Because the Commission decided to issue the takeover regulations as a directive, each of the Member States will have to enact enabling legislation that complies with the Commission's

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37. *See* Basaldúa, *supra* note 22, at 495 (contending that standardization of takeover regulations within Community will play important role in assisting restructuring of European industry).

38. *See id.* (explaining that preparation for 1992 will lead to use of takeovers by European corporations); Karmel, *supra* note 12, at 79 (noting that harmonization of company law should promote investment within Community); 3 Common Mkt. Rep. (CCH), *supra* note 27, ¶ 60,125 (noting role proposed Directive will play in streamlining European industry).

39. *See* Vollmer, *supra* note 34, at 22 (emphasizing Community's interest in encouraging cross-border deals).

40. *See id.* (explaining that Commission's legislation will encourage cross-border takeovers and mergers).

41. *See* MacLachlan & Mackesy, *supra* note 34, at 383-86 (outlining United Kingdom's preeminent experience with takeovers in Community).

42. THE CITY CODE OF TAKE-OVERS AND MERGERS 1968 (revised Apr. 19, 1985) [hereinafter the CITY CODE]. The United Kingdom's Panel on Take-Overs and Mergers devised the City Code in 1968 to regulate takeovers. *See* MacLachlan & Mackesy, *supra* note 34, at 386-92 (outlining City Code's main provisions and objectives). The City Code consists of 10 principles and 37 rules, which impose voluntary duties on all parties regarding the proper conduct of a takeover bid. *Id.* at 386 n.21. The City Code and the proposed Directive share many common provisions and assume the same objectives of shareholder autonomy and equal treatment of target company shareholders. *Id.* at 387-88.

43. *See European Capital Markets: Implementation Proves to be Minefield*, Fin. Times, July 5, 1989, at 34, col. 4 (noting that Commission used City Code as basis for proposed Directive).

44. *See Last Post for the Panel*, Economist, Oct. 7, 1989, at 89, col. 2 (noting that implementation of proposed Directive jeopardizes United Kingdom Takeover Panel's informal code); Alexander, *Takeovers: The Right Way to Regulate the Market*, Economist, Sept. 23, 1989, at 21, col. 1 (arguing against use of legal provisions by United Kingdom's government in supervising takeover bids).

original objectives.[45] As a result, Member State national laws will provide the substantive takeover regulations, but the Member States will have to satisfy the Commission's principles.[46] In addition, the Commission will require each Member State to create or empower supervisory agencies to enforce the provisions of the proposed Directive.[47] As a result of the Commission's proposals, parties to future bids in the Community will have recourse to the Member States' courts to contest the proposed Directive's legal requirements.[48] The Commission, therefore, combines the introduction of uniform minimum standards for takeover bids with flexibility in the manner in which each Member State achieves the objectives of proper oversight and enforcement: the result is harmonized rules with cooperative enforcement efforts.[49]

The proposed Directive imposes statutory duties of disclosure and fairness on the offeror, target management, and the supervisory agencies.[50] Under the proposed Directive the offeror, after deciding to make a tender offer for a target corporation, publicly must disclose the offeror's intentions[51] and distribute an offer document to the target's shareholders.[52] Additionally,

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45. *See supra* note 26 and accompanying text (reviewing process Community uses to implement directives).

46. *Id.*

47. Proposal, *supra* note 28, art. 6, at 10-11; *see also* MacLachlan & Mackesy, *supra* note 34, at 398 (contending that governmental body backed by legal rules more effectively enforces takeover guidelines than voluntary code); *infra* notes 70-76 and accompanying text (discussing role and organization of supervisory agencies under proposed Directive).

48. *See Last Post for the Panel*, Economist, Oct. 7, 1989, at 89, col. 2 (explaining that United Kingdom companies can take tender offer disputes to courts); Lambert, *Brussels Fights for Accord on Takeover Bids*, Fin. Times, Oct. 2, 1989, at 6, col. 1 (noting that bid parties may litigate takeover Directive in national courts and that European Court of Justice would be court of last resort in such instances).

49. Vollmer, *supra* note 34, at 24-25.

50. *See infra* notes 51-76 and accompanying text (outlining duties that proposed Directive imposes on offeror, target management, and supervisory agencies).

51. Proposal, *supra* note 28, art. 7, at 11. To reduce the involved parties' opportunity for insider trading prior to publication of the bid terms, article seven of the proposed Directive requires the offeror publicly to announce the offeror's intention to bid for the target corporation once the offeror has decided to make a tender offer. *Id.*

52. Proposal, *supra* note 28, arts. 7, 10-11, at 11-15. Article seven of the proposed Directive requires an offeror to prepare and distribute an offer document immediately following the offeror's public announcement of the bid. *Id.* at 11. Additionally, article seven requires the offeror to send the offer documents to the controlling supervisory agency and the target corporation prior to public distribution. *Id.* at 12. Article 10 of the proposed Directive requires that the offer document contain, at a minimum, the following information: identification of the offeror and the target company (offeree); disclosure of the securities for which the offeror plans to tender; the amount of securities the offeror and those acting in concert with the offeror currently hold; the date of the purchase and price the offeror paid for the offeree's shares; the consideration the offeror will pay for the offeree's shares and the basis for valuation of any noncash securities the offeror will include as compensation for tendered shares; guarantees of the offeror's ability to finance the cash portion of the bid; the final dates and steps necessary for the offeree shareholders to comply with the offer's provisions regarding acceptance of the tender offer; the offeror's intentions for the offeree company, including

the proposed Directive requires the offeror to keep the offer open for at least four weeks, but no more than ten weeks from the date of publication of the offer document.[53] Under the proposed Directive, any revision in the offeror's bid terms, whether by public dissemination of new terms or by additional purchases of target shares on the open market at a price higher than the offer price, extends the offer period one week from the date of such action.[54] Finally, the proposed Directive prohibits the offeror from revising the bid during the last week of the offer period without the specific approval of the supervisory agency.[55] The proposed Directive also forbids the offeror from withdrawing the offer without the approval of the supervisory agency.[56] However, an unaffiliated third party's public announcement of a separate offer for the target company automatically provides the original offeror with a right to terminate the outstanding bid.[57]

The offeror also has a legal duty under the proposed Directive to make mandatory tender offers.[58] Under this provision if an offeror and any parties acting in concert with the offeror purchase or control one-third of a corporation's voting stock, the offeror must tender for 100 percent of the

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plans for the addition of debt on the offeree, the sale of the offeree's assets, and the dismissal of management and staff; any special agreements entered into between the offeror and offeree management regarding the bid; and any other provisions the relevant supervisory agency imposes on the offeror. *Id.* art. 10, at 12-14.

The offeror can distribute the offer document individually to each of the offeree's shareholders or collectively through publication in one or more national newspapers. *Id.* art. 11, at 14-15. The Commission's intent in requiring the publication of offer documents was to provide sufficient information for the target shareholders concerning the likely consequences of the takeover. Basaldúa, *supra* note 22, at 497-98.

53. Proposal, *supra* note 28, art. 12, at 15. This four to 10 week time period balances the target shareholders' need to review all of the bid's material information with the undue disruption of target management's control over operations during the bid period. *Id.*

54. *Id.*, arts. 15-16, at 17-18.

55. *Id.*, art. 15, at 17.

56. *Id.*, art. 13, at 15-16. To reduce the chance that an offeror may attempt to manipulate the target company's share price for speculative reasons, article 13 of the proposed Directive provides that once an offeror distributes the offer document the offeror cannot withdraw the bid except with the specific approval of the supervisory agency for cause. *Id.* The supervisory agency will allow an offeror to withdraw its bid: if an unaffiliated third party makes a competing bid; if the offeror fails to gain shareholder or stock exchange approval for the issuance of shares or debentures necessary for payment of the tendered shares; if merger authorities decide to reject the bid on antitrust or similar grounds; if the offeror fails to satisfy any of the controlling supervisory agency's requirements or special conditions; and for reasons of force majeure. *Id.*

57. *Id.*

58. *Id.*, art. 4, at 9-10; *see also* Basaldúa, *supra* note 22, at 496 (noting that, to protect shareholders from partial speculative bids, Commission included requirement that offeror make 100% bid once offeror holds one-third interest in target). The Commission's denial of partial bids above a 30% interest protects shareholders who fail to tender shares to an offeror in a partial bid from being placed in a minority position and having the value of their shareholding decline substantially. *Id.*; *see also infra* note 72 and accompanying text (explaining that supervisory agency can exempt offeror from mandatory bid when offeror passes legal threshold accidentally).

target's shares.[59] The Commission seeks to avoid situations in which a party has the ability to exercise control of a corporation without holding a majority of the shares.[60] As a result, the proposed Directive eliminates the opportunity for an offeror to make a partial bid for fifty-one percent of a target's shares at a premium over market value and then buy out the minority shareholders at a lower price in the future.[61] Additionally, by requiring an offeror to tender for 100 percent of the target's shares, the Commission intends to limit bids by parties financially not capable of tendering for complete control of the target.[62] The requirement for mandatory tender offers should help reduce offerors' use of coercive bids in the Community.

In addition to imposing duties on the offeror in a takeover bid, the Commission places important constraints on target management's response to a takeover bid.[63] Under the proposed Directive, target management must provide the target company's shareholders with an opinion of the bid,[64] inform the target company's employees of the progress of the bid,[65] and make public any prior or current agreements between the offeror and target management concerning the bid.[66] More significantly, target management cannot take any exceptional action[67] to frustrate the bid unless target management had decided to use such measures prior to the offer, or a majority of the shareholders approve the measures at a general shareholders'

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59. Proposal, *supra* note 28, art. 4, at 9-10.

60. *See* Basaldúa, *supra* note 22, at 496 (explaining that Commission attempted to limit possibility of coercive bids).

61. *Id.*

62. *Id.*

63. *See infra* notes 64-69 and accompanying text (outlining duties that Commission placed on target management).

64. Proposal, *supra* note 28, art. 14, at 16-17. Article 14 of the proposed Directive requires target management to respond to an offeror's offer document in a report outlining reasons why shareholders should accept or decline the bid. *Id.* If the takeover bid results from a prior agreement between the offeror and offeree management, target management must disclose the prior agreement to shareholders. *Id.* The supervisory agency will appoint an expert to evaluate the offeror's consideration and to state whether the consideration is adequate. *Id.* The proposed Directive requires target management to send management's opinion and the expert's report to shareholders directly or to publish the information in one or more national newspapers. *Id.* At all times, the target management's board of directors is under a duty to act in the best interests of the offeree company. *Id.*

65. *Id.*, art. 19, at 19-20. Article 19 mandates that target management keep its employees informed about the bid and provide employees with copies of all documents concerning the bid. *Id.* The Commission's requirements, however, do not allow employees to exercise independent control over the success of the bid. *Id.*

66. *Id.*, art. 14, at 17; *see also supra* note 64 and accompanying text (outlining requirement for shareholder notification of any agreement between offeror and target management concerning bid).

67. *See* Proposal, *supra* note 28, art. 8, at 12 (noting that proposed Directive prohibits "exceptional" actions by target management such as issuing new securities carrying voting rights, selling substantial corporate assets, or carrying out other activities not in normal course of company's business while bid is in progress).

meeting during the offer period.[68] Thus the Commission seeks to ensure that target management will act in the best interests of the company and confine itself to the normal operations of the corporation.[69]

To enforce the duties that the proposed Directive imposes on the offeror and on target management, the Commission mandates that each Member State create or authorize a national body to act as a supervisory agency for takeover bids.[70] The supervisory agency will serve as the repository for all information concerning the bid,[71] will review requests for exemptions from the rules,[72] and will ensure that all parties comply with the proposed Directive's provisions.[73] In the event of a cross-border takeover bid, the proposed Directive provides that the supervisory agency of the Member State in which the target corporation maintains the corporation's registered office will have final control over the conduct of the bid.[74] The proposed Directive also requires that all third parties to the bid (nonofferor or nonofferee) that acquire more than one percent of the target's shares have a continuing duty to disclose the amount of their third party holdings to

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68. *Id.*, art. 8, at 12. Article eight of the proposed Directive prohibits target management from taking any action to frustrate the bid while the offer remains open unless the target decides on the defensive measures prior to the bid or succeeds in getting shareholders to approve similar measures in a general shareholders' meeting during the bid. *Id.* The Commission is expected to publish a future Directive concerning the types of defensive measures a target company may use to thwart a takeover. Basaldúa, *supra* note 22, at 500.

69. Proposal, *supra* note 28, art. 8, at 12.

70. *Id.*, art. 6, at 10-11. Article six of the proposed Directive requires each Member State to appoint a supervisory agency to monitor compliance by the parties with the Directive's provisions. *Id.* The supervisory agency can be public or private, and can be a nationally or regionally organized body. *Id.* The supervisory agency must have the authority to prohibit the publication of an offer document until the offeror satisfies all disclosure requirements or to require the offeror later to revise the bid document. *Id.*

71. *Id.*, art. 17, at 19.

72. *Id.*, arts. 4-5, at 9-10. Article four of the proposed Directive empowers the supervisory agency to exempt a party that crosses the one-third shareholding threshold by mistake or by accident (through inheritance or donation of shares) from having to make a mandatory takeover offer for 100% of the target company's shares. *Id.* at 10. In addition, article five allows the supervisory agency to determine whether to exempt an offeror from complying with the Directive if the Fourth Company Law Directive classifies the target corporation as small or medium-sized. *Id.* Under the Fourth Company Law Directive, a company is small or medium-sized if the company fails to satisfy two of the following three criteria: a balance sheet that exceeds 6.2 million ECU (European Currency Unit) (approximately $7 million); total sales that exceed 12.8 million ECU (approximately $14.5 million); and a workforce that averages 250 employees during the financial year. Fourth Company Law Directive, *supra* note 27, art. 27, at 21-22; *see supra* notes 52, 56, & 70 and accompanying text (reviewing supervisory agency's ability to grant exemptions for change in bid time limits, bid withdrawals, and bid revisions during last week of offer).

73. *See supra* note 70 and accompanying text (outlining powers of supervisory agency).

74. Proposal, *supra* note 28, art. 6, at 11. The proposed Directive will provide offerors with greater certainty over which Member State will supervise the bid process and will reduce substantially the chances of contradictory rulings by different Member States' supervisory agencies during the bid period. *See* Vollmer, *supra* note 34, at 40 (contending that uniformity of regulations will simplify offeror's procedural hurdles in making tender offer).

the supervisory agency throughout the bid period.[75] Thus the proposed Directive insures that the supervisory agencies will have adequate information from the involved parties at all times during the bid period.[76]

While the Commission intended for the proposed Directive to provide minimum uniform regulations for takeovers throughout the Community, the Commission also granted each Member State the latitude to establish additional requirements for the offeror and target management.[77] For example, the proposed Directive allows the Member States to decide independently whether to add a reciprocity provision, which could be used to exclude takeover bids from parties located outside the Community.[78] In addition, the Commission provided each Member State with the discretion to impose national takeover regulations that are more stringent than the provisions of the proposed Directive.[79] Thus the Commission structured the proposed Directive with enough flexibility to encompass the Member States' varying levels of experience with takeovers.[80]

Although the Commission allows the Member States to enact complementary legislation that establishes additional requirements for the parties to a bid, the proposed Directive forbids Member State provisions that contradict the proposed Directive's objectives.[81] Similarly, while the Member

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75. Proposal, *supra* note 28, art. 17, at 19. Article 17 of the proposed Directive requires all parties who hold more than one percent of the target company's shares to disclose the amount of their holding and to report the date and price of any additional purchases by such parties during the bid period. *Id.*

76. *Id.*

77. *See supra* note 72 and accompanying text (discussing regulatory powers that Commission gives Member States' supervisory agencies).

78. Proposal, *supra* note 28, at 5-6. One of the Commission's most difficult issues concerned inclusion of a reciprocity clause in the proposed Directive. *See* Basaldúa, *supra* note 22, at 499-500 (explaining use of reciprocity clause). Reciprocity allows a Member State to prohibit a third country offeror from making takeover bids until that Member States' corporations can make equivalent tender offers in the third country. *Id.* The Commission decided to leave the question of reciprocity to the Member States individually rather than to impose a blanket restriction in the Directive. *Id.* Thus, varying levels of access will be available to non-Community offerors throughout the Community. *Id.* At present, because of strict Japanese restrictions on the use of takeovers, imposition of reciprocity most dramatically would affect access by Japanese corporations to the Community. *See also* A. WINTER, *supra* note 25, at 75-85 (outlining concept of reciprocity in Community legislation and present uses of provision).

79. *See* Proposal, *supra* note 28, art. 10, at 14 (noting that proposed Directive allows Member States to require additional disclosure from offeror in offer document); Basaldúa, *supra* note 22, at 498 (same); *Getting Europe Ship-Shape to Compete in World Markets*, Fin. Times, Feb. 8, 1989, at 32, col. 6 (same).

80. *See* Basaldúa, *supra* note 22, at 489-95 (reviewing Member States' experience with takeover bids and discussing improvements that enactment of proposed Directive will make possible). *But see* Greenbaum, *Tender Offers in the European Community: The Playing Field Shrinks*, 22 VAND. J. TRANSNAT'L L. 923, 932-33 (1989) (contending that Member States may exploit flexibility of proposed Directive to enact stringent and mandatory tender offer requirements).

81. Proposal, *supra* note 28, art. 21, at 40-41. Article 21 of the proposed Directive

States' supervisory agencies and national courts will make the majority of decisions interpreting the proposed Directive's provisions, the Commission and the Community's Court of Justice will retain ultimate control over takeover policy at the Community level.[82] After final approval of the proposed Directive, the Member States will have limited rights to object to these Community bodies' enforcement of the proposed Directive's provisions and subsequent takeover bid legislation.[83] The transfer of central coordination of takeover policy to the Commission by the Member States is one part of the 1992 harmonization of laws program.[84] The centralization of control over bids in Community organizations also should provide offerors with the advantage of consistent interpretations of takeover bid regulations throughout the Community and, therefore, may result in a continuing increase of Community-wide takeovers.[85]

Although the Commission limited the scope of the proposed Directive, the Commission's effort is noteworthy in providing the first comprehensive, common guidelines for tender offers among all of the Member States.[86] In

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establishes a Community-wide committee that will be responsible for ensuring that the Member States continue to apply the takeover regulations uniformly and in compliance with the proposed Directive's provisions. *Id.*

82. *See Policing Europe's Single Market*, Economist, Jan. 20, 1990, at 69-70, col. 1 (outlining process that Commission and Community's Court of Justice follow to ensure that Member States' enabling legislation correctly implements Directive's provisions); *Last Post for Panel*, Economist, Oct. 7, 1989, at 89, col. 2 (explaining United Kingdom's Takeover Panel concern that proposed Directive will lead to extensive litigation on takeovers that Community court may have to resolve); *Brussels Fights for Accord on Takeover Bids*, Fin. Times, Oct. 2, 1989, at 6, col. 1 (noting that statutory takeover regulations will allow involved parties to litigate contested interpretations of proposed Directive in national and possibly Community court and, therefore, will slow ability to complete takeovers); *Europe's Rhetoric and Reality*, Economist, Sept. 23, 1989, at 64, col. 2 (reviewing Member States' ability to complete timely implementation of Directives that Commission has approved previously).

83. *See supra* note 82 and accompanying text (discussing role of Commission in future takeover legislation and enforcement).

84. *See* Vollmer, *supra* note 34, at 22 (emphasizing that central control of Community organizations serves to promote uniform guidelines on takeover regulations).

85. *See* Basaldúa, *supra* note 22, at 495 (contending that proposed Directive will increase offeror's ability to make takeovers in Member States which presently have had limited experience with such transactions). Takeover activity in the Community has continued to accelerate over the last several years and reached a record level of $55 billion (50 billion ECU) in 1989. *European Mergers and Acquisitions: Bidding Business*, Economist, Jan. 20, 1990, at 96, col. 1. *But see* MacLachlan & Mackesy, *supra* note 34, at 374-83 (contending that European takeovers are still hampered by lack of financial accounting disclosure, concentration of corporate shareholdings in limited hands, and continuing differences among governmental antitrust enforcement agencies).

86. *See* MacLachlan & Mackesy, *supra* note 34, at 398-99 (discussing varying level of takeover legislation in Community). The United Kingdom has highly developed controls on takeovers and tender offers because of the large number of mergers and acquisitions that occur there. *Id.* Spain, France, and Portugal have enacted legal rules for takeover bids. Basaldúa, *supra* note 22, at 489. Belgium and Luxembourg rely on common-law jurisprudence. *Id.* Germany, Italy, The Netherlands, and the United Kingdom maintain voluntary codes of conduct. *Id.* Tender offers are practically unknown in Denmark and Greece, which have no relevant regulations. *Id.*

addition, the Commission envisioned that the proposed Directive will become the foundation for all subsequent takeover regulations in the Community.[87] In drafting the proposed Directive, the Commission sought to ensure two fundamental objectives: that shareholders have sufficient autonomy to decide the outcome of a bid;[88] and that all shareholders of the target corporation receive equal treatment during the bid process.[89] By imposing legal duties on both the offeror and target management to disclose relevant information regarding the bid terms, and by limiting the offeror's and target management's use of coercive or defensive tactics, the Commission protects the target shareholders' individual right to review the offer before the shareholder reaches a decision.[90] While the Community is just beginning the process of formulating regulatory controls over takeovers, the United States has had over twenty years of experience with hostile acquisitions.[91] The United States' first attempts at takeover regulation shared many common philosophies with the Commission's proposed Directive, but legislation over the last decade has changed dramatically the original policies.[92]

III. THE UNITED STATES' REGULATION OF TAKEOVERS

Until 1968 no statutory provisions existed in the United States regarding the use of tender offers in takeover bids.[93] Hostile takeovers still were fairly novel events and most commentators generally were supportive of their consequences.[94] However, federal and state legislators were concerned about

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87. *See* Vollmer, *supra* note 34, at 22-23 (noting that Community is attempting to simplify takeover procedures among Member States); Lambert, *Brussels Fights for Accord on Takeover Bids*, Fin. Times, Oct. 2, 1989, at 6, col. 1 (outlining present status of proposed Directive and discussing possibility that Commission will enact additional legislation to cover more controversial aspects of takeovers); *Getting Europe Ship-Shape to Compete in World Markets*, Fin. Times, Feb. 8, 1989, at 32, col. 6 (reviewing present status of Community's merger policy).

88. Proposal, *supra* note 28, art. 10 & 11, at 12-15; *see also* Basaldúa, *supra* note 22, at 499 (commenting that Commission, in formulating Proposal, expressly sought to ensure that target shareholders make final decision on bid's outcome). The proposed Directive places a strong emphasis on shareholder autonomy in deciding the outcome of a bid. *Id.*

89. *See* Proposal, *supra* note 28, art. 3, at 8 (explaining in article commentary that equal treatment of shareholders in same classes is fundamental principle of proposed Directive).

90. *See* 3 Common Mkt. Rep. (CCH), *supra* note 27, ¶ 60,125 (explaining that, by imposing legal duties on offeror and target management, Commission intended proposed Directive to establish standards of full disclosure, equal treatment of shareholders, and equality of opportunity).

91. *See infra* notes 93-96 and accompanying text (discussing history of United States takeover regulations, which date from 1968).

92. *See infra* notes 184-87 and accompanying text (contending that European Commission's underlying philosophy and objectives in enacting proposed Directive bear similarities to United States' takeover policies in 1960s and 1970s).

93. *See infra* note 96 and accompanying text (outlining passage of first federal and state takeover regulations in 1968).

94. *See* Manne, *Tender Offers & the Free Market*, 2 MERGERS & ACQUISITIONS 91, 92-93 (1966) (asserting that efficient capital markets will discount market value of corporation's

an offeror's ability to purchase a large block of a company's shares on the open market without any disclosure of such purchases to the target company's shareholders.[95] As a result, first Virginia and then the United States Congress passed legislation in 1968 requiring an offeror to comply with certain statutory provisions when purchasing large blocks of another company's shares.[96]

At the federal level, the United States Congress enacted the Williams Act,[97] which amended certain sections of the Securities Exchange Act of 1934.[98] In enacting the Williams Act, congressional legislators' main intent was to provide the target corporation's shareholders with adequate time and sufficient information about the offeror and the offeror's intentions to enable those shareholders to reach an informed decision about the bid.[99] The Williams Act's first provision requires any person or group that acquires more than a five percent interest in another company's voting shares to submit a disclosure report to the Securities and Exchange Commission (the

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shares to reflect poor management and to allow takeover by more efficient management group); Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 113 (1965) (asserting that merger threat serves as incentive for management to improve financial performance). Professor Manne provided the first effective rationale for the use of hostile takeovers as a means to overturn entrenched management groups. *See* Johnson and Millon, *supra* note 11, at 1892-93 (discussing original rationales for takeover regulations). Manne asserted that new management's post-takeover efficiency also would have a positive effect on the national economy. *Id.* Some congressional legislators relied on Professor Manne's theories when initially determining what level of tender offer controls to establish through the Williams Act. *Id.* Other commentators have continued to expound Manne's theories regarding the benefits of hostile takeovers. *See* Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1165 (1981) (explaining that tender offers provide positive benefits and that target management's role is not to block takeover attempts unilaterally).

95. *See* Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 55 (2d Cir. 1985) (reviewing takeover conditions prior to enactment of Williams Act); Johnson & Millon, *supra* note 11, at 1893-97 (outlining regulatory "gap" in federal securities laws from parties purchasing large blocks of company's shares without disclosure).

96. *See* 15 U.S.C. §§ 78m(d)-(e) & 78n(d)-(f) (1988) (enacting Williams Act, which mandated tender offer disclosure provisions); 1968 VA. ACTS ch. 119, §§ 13.1-528 to 13.1-540 (establishing first state restrictions on takeovers and tender offers). Both state and federal legislators were concerned with the dramatic increase in the use of tender offers. *See* H.R. REP. No. 1711, 90th Cong., 2d Sess. 3, 4 (1968) (stating that purpose of Williams Act was to fill regulatory "gap" in federal securities laws) *reprinted* in 1968 U.S. CODE CONG. & ADMIN. NEWS 2812 [hereinafter HOUSE REPORT]. In 1960 offerors in the United States made eight tender offers, which totaled $186 million. *Id.* By 1966 offerors made over 100 tender offers, which totaled over $1 billion. *Id.*

97. The Securities-Corporate Equity Ownership-Disclosure (Williams) Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)-(e) & 78n(d)-(f) (1988).

98. The Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a-kk (1988).

99. *See* HOUSE REPORT, *supra* note 96, at 2813 (stating that merits of takeovers were unknown and, therefore, federal legislators sought to balance interests of offeror and target management so that target shareholders would decide proper outcome).

SEC)[100] within ten days of reaching the five percent threshold.[101] The disclosure report must state the identity of the offeror,[102] the identities of all parties affiliated with the offeror,[103] the source and the amount of funds the offeror will use to purchase the tendered shares,[104] and the number of shares the offeror presently holds.[105] Additionally, the disclosure report must state whether the purchase is for investment or for control of the target company,[106] and, if for control, any plans by the offeror for the sale of the acquired company's assets or for major changes in its operations.[107] The disclosure report also must state whether the offeror has made any agreements with third parties concerning the bid.[108]

The second provision of the Williams Act requires any person or group intending to make a tender offer for more than five percent of a company's shares to file a disclosure report outlining the terms of the offer to the SEC prior to the commencement of the bid.[109] Under the Williams Act, the offeror must comply with all relevant filing requirements and must disseminate the offer terms to shareholders within five days after publicly announcing a bid.[110] Additionally, the Act authorizes the SEC to invoke sanctions ending the tender offer if the offeror fails to comply with the Williams Act's requirements.[111]

After publication of the bid terms, the offeror must hold the tender offer open for a minimum of twenty days.[112] However, each subsequent

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100. *See* 15 U.S.C. § 78d(a) (1988) (establishing Securities and Exchange Commission (SEC) as supervisory agency for federal securities law).

101. 15 U.S.C. § 78m(d)(1) (1988); Reg. 13D, 17 C.F.R. § 240.13d-1(a) (1989).

102. 15 U.S.C. § 78m(d)(1)(A) (1988); Reg. 13D, 17 C.F.R. §§ 240.13d-1 to 240.13d-101 (1989).

103. 15 U.S.C. § 78m(d)(1)(A) (1988); Reg. 13D, 17 C.F.R. §§ 240.13d-1 to 240.13d-101 (1989).

104. 15 U.S.C. § 78m(d)(1)(B) (1988); Reg. 13D, 17 C.F.R. §§ 240.13d-1 to 240.13d-101 (1989). The offeror must report any borrowings the offeror uses to finance the purchase of the target company's shares. *Id.*

105. 15 U.S.C. § 78m(d)(1)(D) (1988); Reg. 13D, 17 C.F.R. §§ 240.13d-1 to 240.13d-101 (1989). The Williams Act requires disclosure of the offeror's holdings and all those acting in concert with the offeror of the target company's shares on an aggregate basis. *Id.*

106. 15 U.S.C. § 78m(d)(1)(C) (1988); Reg. 13D, 17 C.F.R. §§ 240.13d-1 to 240.13d-101 (1989).

107. 15 U.S.C. § 78m(d)(1)(C) (1988); Reg. 13D, 17 C.F.R. §§ 240.13d-1 to 240.13d-101 (1989). The Williams Act requires notification by the offeror if plans exist for the liquidation of the target company, for sale of all the target's assets, or for any other major changes in the target's operations. *Id.*

108. 15 U.S.C. § 78m(d)(1)(E) (1988); Reg. 13D, 17 C.F.R. §§ 240.13d-1 to 240.13d-101 (1989). All agreements between the offeror and other parties concerning the tender offer must be disclosed. *Id.* These agreements include contracts, understandings, guaranties, options, loans, and any other information indicating joint efforts by the parties. *Id.*

109. 15 U.S.C. § 78n(d)(1) (1988); Reg. 14D, 17 C.F.R. §§ 240.14d-1 to 240.14d-101 (1989).

110. Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) (1989).

111. Rule 14d-3(a), 17 C.F.R. § 240.14d-3(a) (1989).

112. Rule 14e-1(a), 17 C.F.R. § 240.14e-1(a) (1989). The 20 day time limit under this rule begins from the date the offeror publishes or sends the tender offer proposal to the target shareholders. *Id.*

revision of the bid terms by the offeror will extend the offer ten business days from the date of the offeror's announcement of these revisions.[113] After a target corporation's shareholder tenders shares to the offeror, the Williams Act allows the shareholder to withdraw those tendered shares during the first fifteen calendar days from the date on which the offeror disseminates the bid terms.[114] Additionally, if the offeror has not completed the bid, the shareholder may withdraw the tendered shares after the end of sixty calendar days from the disseminating date.[115] In the event more shareholders tender shares than the offeror has offered to purchase (oversubscription of the offer), the Williams Act requires the offeror to purchase a pro rata percentage of each shareholder's tendered shares.[116] Finally, if the offeror later increases the consideration to the target corporation's shareholders, the Williams Act allows those shareholders that tendered shares prior to the increase to receive the increased compensation.[117]

The Williams Act's third provision requires target management publicly to set forth an opinion as to whether the target company's shareholders should accept or reject the tender offer.[118] The fourth provision of the Williams Act prohibits the offeror from using material misstatements, misleading omissions, and fraudulent or manipulative acts in connection with any tender offer.[119] The fifth and final provision of the Williams Act requires the target company to disclose publicly any change of a majority of the company's directors that the target company makes outside of general shareholders' meetings following the offeror's purchase of more than five percent of the company's shares.[120]

The Williams Act's main emphasis is focused on ensuring that adequate disclosure of information concerning a bid reaches the target company's shareholders.[121] The provisions of the Williams Act, coupled with the antitrust concerns of the Hart-Scott-Rodino Antitrust Improvements Act of

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113. Rule 14e-1(b), 17 C.F.R. § 240.14e-1(b) (1989).

114. 15 U.S.C. § 78n(d)(5) (1988); Rule 14d-7, 17 C.F.R. § 240.14d-7 (1989).

115. 15 U.S.C. § 78n(d)(5) (1988); Rule 14d-7, 17 C.F.R. § 240.14d-7 (1989).

116. 15 U.S.C. § 78n(d)(6) (1988); Rule 14d-8, 17 C.F.R. § 240.14d-8 (1989). This provision of the Williams Act ensures that the offeror treats all shareholders equally in partial tender offers rather than allowing the offeror to choose between the parties that tendered shares under the offer. *Id.*

117. 15 U.S.C. § 78n(d)(7) (1988); Rule 14d-10(a)(2), 17 C.F.R. § 240.14d-10(a)(2) (1989). This provision of the Williams Act also ensures that the offeror treats all target shareholders equally. *Id.*

118. 15 U.S.C. § 78n(d)(4) (1988); Rule 14d-9, 17 C.F.R. § 240.14d-9 (1989). Under the Williams Act, the target company must state an opinion on the merits of the bid to target shareholders. *Id.* Target management is allowed to distribute a "stop-look-and-listen" announcement asking shareholders to defer a decision on the tender offer until target management can devise an opinion on the merits of the offer. 17 C.F.R. § 240.14d-9(e) (1989).

119. 15 U.S.C. § 78n(e) (1988); Rule 14e-3, 17 C.F.R. § 240.14e-3 (1989).

120. Rule 14f-1, 17 C.F.R. § 240.14f-1 (1989).

121. *See* Johnson & Millon, *supra* note 11, at 1895-97 (noting that Williams Act's main objective was to ensure disclosure of all relevant bid information to shareholders).

1976,[122] constitute the primary federal laws restricting takeovers and tender offers.[123] Because of the perceived weakness of these federal statutes in limiting abuses of the tender offer process, federal legislators have attempted numerous times to amend key provisions of the Williams Act.[124] Many of the reform proposals attempted to shorten the Williams Act's reporting limits or to provide clear definitions for some of the Williams Act's important provisions.[125] For example, the Williams Act does not define what constitutes a "tender offer."[126] In spite of the legislators' attempts, however,

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122. The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, as codified in 15 U.S.C. §§ 15c-15h, 16, 18a (1988). The Hart-Scott-Rodino Antitrust Improvements Act requires notification by an offeror of a contemplated acquisition to the Premerger Notification Department of the Federal Trade Commission and the Antitrust Division of the Justice Department. *Id.* These governmental agencies then review possible anticompetitive effects of the proposed combination. *Id.*; *see also* 1 M. LIPTON & E. STEINBERGER, *supra* note 1, § 7.01 (outlining provisions of Hart-Scott-Rodino Act and discussing implications on takeover offers).

123. *See* Booth, *The Problem With Federal Tender Offer Law*, 77 CALIF. L. REV. 707, 710-715 (1989) (noting importance of Williams Act in federal regulatory structure for takeover controls); Brown, *Regulatory Intervention in the Market for Corporate Control*, 23 U.C. DAVIS L. REV. 1, 5-11 (1989) (same); Greenbaum, *supra* note 34, at 196-204 (stating that Hart-Scott-Rodino Act and Williams Act are primary federal takeover regulations). Congress also has enacted legislation that limits acquisitions by foreign offerors of companies that may affect "national security". *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425-26 (1988) (providing legislative restrictions on tender offers by foreign parties); Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 54 Fed. Reg. 29, 744-55 (1989) [hereinafter Exon-Florio Amendment] (same); Bello & Holmer, *Exon-Florio Regs Give President Authority to Block Takeovers*, Nat'l L.J., Aug. 28, 1989, at 22, col. 2 (same); Greenbaum, *supra* note 80, at 951 (same).

124. *See* Lipton, *supra* note 4, at 59 (proposing federal legislation to limit use of coercive offers); Romano, *The Future of Hostile Takeovers: Legislation and Public Opinion*, 57 U. CIN. L. REV. 457, 470 (1988) (summarizing limitations of legislative proposals to amend Williams Act).

125. *See* 1 M. LIPTON & E. STEINBERGER, *supra* note 1, § 2.15 (outlining proposed changes to Williams Act that SEC and Congress submitted over last 15 years).

126. *See* Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 56-57 (2d Cir. 1985) (stating that Congress deliberately failed to define tender offer). Although the SEC and the federal courts have offered suggestions for the definition of a "tender offer," Congress has not accepted their proposals. The United States District Court for the Southern District of New York, for example, put forward an eight-part test to define "tender offer" in Wellman v. Dickinson, 475 F. Supp. 783, 823 (S.D.N.Y. 1979), *aff'd on other grounds*, 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983). The eight factors include:

> 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 for a limited period of time;
> 7) offeree subjected to pressure to sell his stock;
> . . .
> [8)] public announcements of a purchasing program concerning the target company

the Williams Act remains substantially unchanged from its original form.[127] Accordingly, parties intent on reform have turned to alternative forums to introduce new regulations concerning the use of takeovers.

Because the Williams Act never attempted to protect the interests of local communities from the effects of a takeover bid, state legislatures also enacted statutes to limit possible abuses during the takeover process.[128] The states' legislative efforts stemmed from concern that the absence of a clearly defined federal merger policy encouraged a free market approach to corporate takeovers that did not prohibit speculative transactions.[129] Consequently, beginning with Virginia in 1968, state legislatures began to enact legislation to prevent out-of-state parties from purchasing resident corporations and possibly disrupting established local business relationships.[130]

Many of the first state statutes required the offeror to provide a pre-bid notice to a state official, who then independently determined whether the tender offer was adequate.[131] In *Edgar v. MITE Corp.*,[132] however, the Supreme Court held that state statutes requiring pre-bid notice conflicted with the Williams Act and were unconstitutional.[133] At the time of the

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precede or accompany rapid accumulation of large amounts of the target company's securities.

Hanson Trust PLC, 774 F.2d at 56-57. This test, however, has not gained widespread support. *See* Note, *Defining "Tender Offer" Under the Williams Act*, 53 BROOKLYN L. REV. 189, 203-06 (1987) (reviewing attempts to provide statutory definition of "tender offer"). Similarly, Congress has not accepted the SEC's proposed definitions of the term "tender offer." *Id.*

127. *See* Booth, *supra* note 123, at 738-48 (contending that Congress would best protect shareholders' interests if Congress repealed Williams Act); Prentice, *The Role of States in Tender Offers: An Analysis of CTS*, 1988 COLUM. BUS. L. REV. 1, 82 (explaining lack of past amendment to Williams Act and discussing possible future amendment).

128. *See infra* notes 129-49 and accompanying text (reviewing history of state antitakeover statutes).

129. *See* Booth, *The Promise of State Takeover Statutes*, 86 MICH. L. REV. 1635, 1666-70 (1988) (noting reasons that states enacted antitakeover statutes following passage of Williams Act); Booth, *supra* note 123, at 724-27 (stating that federal legislation does not prohibit partial, two-tier tender offers that often apply coercive tactics to target shareholders); Lipton, *supra* note 4, at 15-20 (noting types of abusive offers that federal rules do not prohibit); Prentice, *supra* note 127, at 9-10 (explaining that states believed Williams Act required additional provisions to protect state interests); Comment, *State Takeover Legislation After CTS: Does It Give States a Free Hand to Regulate Tender Offers?*, 13 DEL. J. CORP. L. 1029, 1034-36 (1988) (discussing state concerns over limit of federal regulation).

130. *See* 1 M. LIPTON & E. STEINBERGER, *supra* note 1, § 5.02[1] (explaining that states' justifications for imposing state statutory restraints on tender offers resulted from fear that takeovers would adversely affect local economies); Prentice, *supra* note 127, at 9-12 (outlining states' original intent at limiting antitakeover activity).

131. *See* 3B H. BLOOMENTHAL, *supra* note 7, § 13.34[1] (reviewing states' original antitakeover provisions). Illinois was one of the first states to enact tender offer control legislation requiring pre-bid notice. *Id.*

132. 457 U.S 624 (1982).

133. Edgar v. MITE Corp., 457 U.S. 624 (1982). In *MITE* the United States Supreme Court considered whether the Illinois Business Take-Over Act (the Illinois Act) was unconstitutional under the commerce clause of the Constitution or preempted by the Williams Act. *Id.* at 630. The Illinois Act required an offeror to comply with the state's provisions if 10%

MITE decision in 1982, thirty-seven state legislatures had enacted antitakeover statutes that required pre-bid approval from a state agency.[134] As a result of the *MITE* Court's decision, the states again were left unprotected against hostile takeovers that complied with federal tender offer regulations.

Following the *MITE* decision, states developed alternative methods to limit takeover activity that did not interfere directly with the Williams Act's tender offer guidelines. For instance, to alter the ability of an offeror to exercise control over the target company in the aftermath of a successful tender offer, the states enacted control share acquisition acts (CSAs)[135] and business combination control acts (BCAs).[136] The CSAs deny the offeror the right to vote any newly acquired shares until the disinterested (nonofferor and nonofferee management) target company shareholders approve the transaction at a general shareholders' meeting.[137] Typically, if the offeror fails to gain approval of the transaction at that meeting, target management can repurchase the offeror's shares at the offeror's original purchase price or can require the offeror to return the tendered shares to the original shareholders.[138]

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of the target company's shareholders lived in Illinois, or if the target company satisfied at least one of the following three residency conditions: maintaining its principal executive office in the state, investing 10% or more of its total capital in the state, or incorporating in the state. *Id.* If the target corporation satisfied any of these conditions, the Illinois Act required the offeror to provide a 20 day notice of the offeror's impending bid to the Illinois Secretary of State. *Id.* Either the Secretary of State or representatives of 10% of the target's shareholders then could initiate a meeting to review the fairness of the offeror's bid before the offeror could proceed with a public tender. *Id.* at 627. The Illinois Act imposed no time limit for completion of such a meeting. *Id.* at 637.

MITE Corporation (MITE) refused to comply with the Illinois Act when MITE launched a tender offer for an Illinois corporation that was subject to the Illinois Act's provisions. *Id.* at 627-28. Instead, MITE sought to have the Illinois Act declared unconstitutional in federal court. *Id.* at 629-30. The *MITE* Court held that the Illinois Act infringed on the rights of out-of-state shareholders to receive MITE's tender offer. *Id.* at 643. The Illinois Act appeared unreasonable to the *MITE* Court because, as drafted, the Illinois Act would allow the Illinois Secretary of State to delay a bid even if the target corporation was incorporated in another state and had no shareholders in Illinois. *Id.* at 643, 645-46. In addition, the *MITE* Court held that the Williams Act provided shareholders with protection that was equivalent to the protection under the Illinois Act. *Id.* at 645. Based on this review, the *MITE* Court found that the Illinois Act's limitations on interstate commerce exceeded any benefits that the Illinois Act provided to shareholders. *Id.* Accordingly, the *MITE* court held the Illinois Act unconstitutional under the commerce clause. *Id.* at 647.

134. *Id.* at 631-32 n.6.

135. *See* 1 M. LIPTON & E. STEINBERGER, *supra* note 1, § 5.03[1] (explaining that states responded to *MITE* decision by enacting new types of state antitakeover statutes); 3B H. BLOOMENTHAL, *supra* note 7, § 13.34[4] (discussing control share acquisition acts (CSAs)).

136. *See* 3B H. BLOOMENTHAL, *supra* note 7, § 13.34[7] (discussing business combination control acts (BCAs)). Bloomenthal refers to BCAs as Shareholder Protection Acts (SPAs). *Id.*

137. *See* Booth, *supra* note 129, at 1678-85 (discussing CSAs); *supra* note 135 and accompanying text (same).

138. *See* 1 M. LIPTON & E. STEINBERGER, *supra* note 1, § 5.03[1][b] & 5.03[2] (reviewing standard provisions that CSAs contain and discussing how provisions operate).

In contrast, BCAs limit or forbid the offeror from selling the target company's assets or from dramatically changing the company's operations for a period of three to five years following a successful tender offer.[139] Exceptions to BCAs conditions are limited; for example, Delaware's statute allows the offeror to assume control over the target company if target management accepts the offeror's bid prior to the tender offer[140] or if the offeror purchases eighty-five percent of the target corporation's outstanding shares in one transaction.[141] Because CSAs and BCAs increase the offeror's incentive to satisfy target management's conditions prior to the announcement of the offer, CSAs and BCAs have encouraged "friendly" takeovers and discouraged "bust-up" transactions.[142] The states, therefore, by limiting the offeror's ability to exercise control over the target company following a successful tender offer, effectively have reduced the number of hostile takeovers of their resident corporations.[143]

Although the *MITE* decision cast doubt on the right of the states to enact antitakeover restrictions,[144] the Supreme Court in 1987 upheld the constitutionality of Indiana's CSA provisions (the Indiana Act) in *CTS Corp. v. Dynamics Corp. of America*.[145] The *CTS* Court found that Indiana had a valid right to control an acquirer's ability to vote the newly acquired shares because its antitakeover legislation fell within the states' traditional domain of corporate law powers.[146] Additionally, the *CTS* Court found that

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139. *See* Booth, *supra* note 129, at 1675 (discussing BCAs); *supra* note 136 and accompanying text (same).

140. DEL. CODE ANN. tit. 8, § 203(a)(1) (Supp. 1988).

141. *Id.*, § 203(a)(2).

142. *See* Johnson & Millon, *supra* note 11, at 1874 (noting that BCAs require offerors to approach target management to avoid triggering state statutory provisions); Pritchard, *The Case for the Constitutionality of State Business Combination Statutes*, 13 DEL. J. CORP. L. 953, 957-58 (1988) (noting that under New York's BCA, offeror must get approval of target management to avoid triggering statutory provisions).

143. *See* Johnson & Millon, *supra* note 11, at 1874-75 (explaining that "bust-up" bids become more difficult to execute in states that have approved antitakeover statutes).

144. *See* Note, *State Regulation of Tender Offers: Legislating Within the Constitutional Framework*, 54 FORDHAM L. REV. 885, 889-97 (1986) (discussing constitutional reasons for preemption of state law by federal statutes after *MITE*).

145. 481 U.S. 69 (1987).

146. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987). In *CTS* the United States Supreme Court considered whether the State of Indiana's statutory limits on the voting rights of an offeror making a tender offer for an Indiana corporation are preempted by the Williams Act or violate the commerce clause of the Constitution. *Id.* at 72. Indiana enacted a corporate law (the Indiana Act) that denied voting rights to a successful acquirer of shares in an "issuing public corporation" until disinterested (nonofferor and nonofferee management) shareholders could meet and approve the transfer. *Id.* at 73-74. The Indiana Act defined an issuing public corporation as requiring: incorporation in Indiana; 100 or more shareholders; a principal place of business, a principal office, or substantial assets in Indiana; and either more than 10% of the company's shareholders resident in Indiana, more than 10% of its shares owned by Indiana residents, or a minimum of 10,000 shareholders resident in Indiana. *Id.* at 73. The acquirer automatically lost the right to vote the acquired shares at various shareholding levels until disinterested shareholders approved the transaction at a general shareholders'

neither the Williams Act nor the commerce clause of the Constitution had any applicability to the Indiana Act.[147] Following the *CTS* decision, many states enacted antitakeover statues modeled after the Indiana Act.[148] At present, a majority of states have enacted some type of antitakeover legislation.[149]

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meeting. *Id.* at 73-74.

The *CTS* Court first found that, unlike the previous conflict in *MITE*, the Indiana Act did not conflict with the Williams Act's provisions. *Id.* at 79-81. The *CTS* Court also found that the Indiana Act protected shareholders from coercive bids because the shareholders collectively would decide whether to grant an offeror voting rights to the offeror's newly-acquired shares. *Id.* at 82-84. Because only a successful tender offer triggered the Indiana Act, the *CTS* Court found that allowing the Williams Act to preempt state control over voting rights would be an unlawful intrusion into a state's internal affairs. *Id.* at 85-87. The *CTS* Court also reviewed the Indiana Act to determine whether the Act conflicted with the commerce clause. *Id.* at 87. Because the Indiana Act only applied to corporations incorporated in Indiana and treated all potential offerors for the corporation equivalently, the *CTS* Court found no violation of the commerce clause. *Id.* at 87-93. Thus, the *CTS* Court held that the Indiana Act was constitutional. *Id.* at 94.

147. *Id.* at 94. Commentators have written numerous law review articles about the *CTS* decision. *See generally* Boyer, *When It Comes to Hostile Tender Offers, Just Say No: Commerce Clause and Corporation Law in CTS v. Dynamics Corp. of America*, 57 U. CIN. L. REV. 539 (1988) (discussing implications of *CTS* decision on states); Buxbaum, *supra* note 14, at 29 (discussing possible constitutional implications for state corporate law following *CTS* decision); Langevoort, *The Supreme Court and the Politics of Corporate Takeovers: A Comment on CTS Corp. v. Dynamics Corp. of America*, 101 HARV. L. REV. 96 (1987) (discussing implications for state takeover statues following *CTS* decision); Pinto, *The Constitution and the Market for Corporate Control: State Take Over Statutes After CTS Corp.*, 29 WM. & MARY L. REV. 699 (1988) (commenting that states have valid right to control traditional internal affairs questions such as voting rights).

148. *See* Coffee, *The Uncertain Case for Take Over Reform: An Essay on Stockholders, Stakeholders & Bust-Ups*, 1988 WIS. L. REV. 435, 458-465 (noting that passage of Delaware takeover statute protects roughly 80% of total United States business capital from threat of takeover); Millon, *State Takeover Laws: A Rebirth of Corporation Law?*, 45 WASH. & LEE L. REV. 903, 919-26 (1988) (noting that states have taken initiative on takeover laws following *CTS* decision).

149. *See States Enacting Takeover Laws Now Number 33, ABA Panel Told*, [July-Dec.] Sec. Reg. & L. Rep. (BNA) No. 33, at 1276 (Aug. 18, 1989) (reviewing passage of 33 state antitakeover provisions). The states largely have chosen either to use CSAs, BCAs, or some combination. *Id.* States adopting control share acquisition statutes include Arizona, Florida, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Utah, Virginia, and Wyoming. *See* ARIZ. REV. STAT. ANN. §§ 10-1211 to 10-1217 (1987) (defining CSA provisions); FLA. STAT. ANN. § 607.109 (West Supp. 1987) (same); HAW. REV. STAT. §§ 415-71 to 415-74 (1985) (same); IDAHO CODE §§ 30-1601 to 30-1614 (Supp. 1989) (same); IND. CODE ANN. § 23-1-42 (West 1989) (same); KAN. STAT. ANN. §§ 17-1286 to 17-1298 (1988) (same); LA. REV. STAT. ANN. §§ 12:135 to 12:140.2 (West Supp. 1990) (same); MD. CORPS. & ASS'NS CODE ANN. §§ 3-701 to 3-704 (Supp. 1989) (same); MASS. GEN. L. ANN. ch. 110D, §§ 1-8 (West 1990) (same); MICH. COMP. LAWS §§ 450.1790 to 450.1799 (1989) (same); MINN. STAT. ANN. § 302A.671 (West 1985 & Supp. 1990) (same); MO. ANN. STAT. § 351.407 (Vernon Supp. 1990) (same); NEB. REV. STAT. § 21-2439 (Supp. 1988) (same); NEV. REV. STAT. ANN. §§ 78.3765 to 78.3793 (Michie 1988) (same); N.C. GEN. STAT. §§ 55-9A-01 to 55-9A-09 (1990) (same); OHIO REV. CODE ANN. § 1701.831 (Anderson 1985) (same); OKLA.

For their antitakeover legislation to comply with the requirements the Court stated in *MITE*, state legislatures have altered significantly some traditional assumptions of state corporate law. These changes include a shifting in control over the outcome of a bid from individual shareholders to shareholders collectively[150] or, more commonly, to target management.[151] The state legislators' premise was that the antitakeover statutes redressed the unequal balance in the negotiation of bid terms between individual shareholders and the offeror and, therefore, acted to protect shareholders' interests.[152] The state statutes protect target shareholders by empowering target management to act as the representative of collective shareholder interests when negotiating the bid terms with an offeror.[153] However, because many states simultaneously expanded target management's fiduciary duties to include representation of nonshareholder interests and the long-term interest of the target corporation itself, target management can disregard shareholders' interests and reject a bid without fear of subsequent litigation

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STAT. tit. 18, §§ 1145-1156 (1988) (same); OR. REV. STAT. §§ 60.801 to 60.816 (1989) (same); S.C. CODE REGS. §§ 33-11-102 to 33-11-103 (Supp. 1988) (same); TENN. CODE ANN. §§ 48-35-101 to 48-35-113 (1988) (same); UTAH CODE ANN. §§ 61-6-1 to 61-6-12 (1988) (same); VA. CODE ANN. § 13.1-728.1 to 13.1-728.9 (1989); (same) WYO. STAT. §§ 17-18-102 to 17-18-401 (Supp. 1990) (same). States adopting business combination acts include Arizona, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, Virginia, Washington, Wisconsin, and Wyoming. *See* ARIZ. REV. STAT. ANN. §§ 10-1221 to 10-1223 (1987) (defining BCA provisions); CONN. GEN. STAT. § 33-374d to 33-374f (Supp. 1989) (same); DEL. CODE ANN. tit. 8, §203 (Supp. 1988) (same); GA. CODE ANN. § 14-2-1132 (Supp. 1989) (same); HAW. REV. STAT. §§ 415-81 to 415-172 (Supp. 1989) (same); IDAHO CODE §§ 30-1701 to 30-1710 (Supp. 1989) (same); ILL. ANN. STAT. ch. 32, para. 7.85 (Smith-Hurd 1987) (same); IND. CODE ANN. § 23-1-43 (West 1989) (same); KAN. STAT. ANN. §§ 17-12,100 to 17-12,104 (Supp. 1989) (same); KY. REV. STAT. ANN. §§ 271A.396 to 271A.399 (Michie/Bobbs-Merrill Supp. 1988) (same); MD. CORPS. & ASS'NS CODE ANN. §§ 3-602 to 3-603 (Supp. 1989) (same); MASS. GEN. L. ANN. ch. 110F, §§ 1-4 (West 1990) (same); MICH. COMP. LAWS §§ 450.1775 to 450.1784 (Supp. 1989) (same); MINN. STAT. ANN. § 302A.673 (West Supp. 1989) (same); MO. ANN. STAT. §§ 351.450 to 351.459 (Vernon 1986 & Supp. 1989) (same); NEB. REV. STAT. §§ 21-2452 to 21-2453 (Supp. 1988) (same); N.J. STAT. ANN. § 14A:10A (West Supp. 1988) (same); N.Y. BUS. CORP. LAW § 912 (McKinney 1986 & Supp. 1989) (same); N.C. GEN. STAT. §§ 55-9-01 to 55-9-05 (1990) (same); 15 PA. CONS. STAT. §§ 2551-2556 (1988) (same); S.C. CODE REGS. §§ 33-11-102 to 33-11-103 (Supp. 1988) (same); TENN. CODE ANN. §§ 48-35-201 to 48-35-209 (1988) (same); VA. CODE ANN. §§ 13.1-716 to 13.1-723 (1989) (same); WASH. REV. CODE ANN. § 23A.08.425 (Supp. 1988) (same); WIS. STAT. ANN. § 180.726 (West Supp. 1988) (same); WYO STAT. §§ 17-16-101 to 17-16-1621 (1987 & Supp. 1990) (same).

150. *See* Johnson & Millon, *supra* note 11, at 1870-71 (explaining that *CTS* Court failed to differentiate between ability of shareholders to decide tender offer individually and Indiana Takeover Act's provision that required collective shareholder vote).

151. *See* Gilson, *Just Say No to Whom?*, 25 WAKE FOREST L. REV. 121, 122-28 (1990) (stating that management entrenchment appears to be primary motivation for target management to deny takeover bid); Johnson & Millon, *supra* note 11, at 1876-78 (discussing how BCAs shift control over takeover bid from shareholders to target management).

152. *See* Booth, *supra* note 129, at 1646-49 (noting that all tender offers are arguably coercive and that shareholders may need management to serve as negotiating agent).

153. *Id.*

for breach of a fiduciary duty.[154] Many of the state antitakeover statutes have provided target management with absolute control over the success of a tender offer.[155] Thus the fundamental objectives and implicit assumptions regarding takeovers and tender offers in the United States now differ significantly from legislators' original conceptions and from the current orientation of the European Commission.

In evaluating the changes in takeover regulation that have occurred over the last decade in the United States, the most prominent feature is the shift toward decentralized control over takeover bids.[156] The federal statutory provisions in the Williams Act largely address procedural issues involving the disclosure of relevant bid information to shareholders and the establishment of time limits for each step of the tender offer process.[157] Substantive law addressing the offeror's ability to control the assets of a target company following a successful tender offer is now predominantly a state corporate law issue.[158] While each state has taken a different approach to protect its resident corporations and those corporations' relationships with the local community, the result is the imposition of effective restrictions on hostile takeovers.[159] Based on the *CTS* Court's reading of the commerce clause and the Williams Act, the Supreme Court is unlikely to find these recent state antitakeover statutes are unconstitutional.[160] In addition, the United States

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154. *See* Johnson & Millon, *supra* note 11, at 1906-07 (noting that states' inclusion of nonshareholder interests as valid part of management's fiduciary obligations expands scope of business judgment rule to point that little legal recourse is available to target shareholders if target management rejects bid); Karmel, *supra* note 12, at 68 (contending that target company's ability to consider nonshareholder interests is likely to become legal fiction which results in erosion of shareholder rights); *Ex-SEC Member Urges Action to Protect Shareholder Rights in Control Contests*, [July-Dec.] Sec. Reg. & L. Rep. (BNA) No. 39, at 1494, 1495 (Oct. 6, 1989) (contending that state statutes result in making target directors accountable to no one); *Ruder Interview*, *supra* note 23, at 1504, 1505 (stating that state statutes undermine essential shareholder rights); *infra* note 165 and accompanying text (discussing nonshareholder interests).

155. *See* Fay, *State Takeover Laws: Shareholder Protection, the Constitution, and the Delaware Approach*, 24 GONZ. L. REV. 249, 284-85 (1989) (noting that Delaware's BCA specifically intends to allow management to control bid outcome and therefore violates *MITE*); Johnson & Millon, *supra* note 11, at 1873-82 (reviewing how states' control over corporation's internal voting affairs provides basis for states to install antitakeover provisions that largely subvert federal securities law); Pritchard, *supra* note 142, at 973-75 (explaining that BCAs place control over bid's outcome in management's hands).

156. *See infra* notes 157-62 and accompanying text (reviewing change in regulatory control from federal to state level).

157. *See supra* notes 94-120 and accompanying text (outlining Williams Act's provisions regarding disclosure of information and other requirements during tender offer); Note, *SEC Takeover Regulation Under the Williams Act*, 62 N.Y.U. L. REV. 580, 583-87 (1987) (same).

158. *See* Kozyris, *supra* note 15, at 503 (noting that states now control takeover activity in United States).

159. *See* Note, *"May We Have the Last Dance?" States Take Aim at Corporate Raiders and Crash the Predator's Ball*, 45 WASH. & LEE L. REV. 1059, 1073 (1988) (reviewing different state statutory approaches to antitakeover provisions); *supra* note 149 and accompanying text (outlining different states' antitakeover statutes).

160. *See* CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) (holding that

Congress has not given any serious indication that it wishes to enact new legislation to preempt present state antitakeover statutes.[161] One explanation for the legislative inertia at the federal level is that Congress always has been uncertain about the presumed benefits of takeovers.[162] Until a clear direction emerges at the federal level, the states will continue to play the pivotal role in determining the amount of takeover activity in the United States.

An additional change in United States takeover laws involves the shift in the balance between shareholders and target management regarding control over the outcome of a bid.[163] Congress' original intent in enacting the Williams Act was to ensure shareholder participation in tender offer decisions by balancing the offeror's and target management's ability to influence the outcome of a tender offer.[164] However, some state antitakeover statutes allow target managements to consider the effects of a takeover on the long-term stability of the target corporation, the target corporation's employees, local suppliers, and the local community.[165] Because the target company's management usually has a sizeable vested interest in remaining independent, target management often decides unilaterally to reject a bid.[166]

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states had valid right to address takeover regulation issues); Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 367 (same); Pinto, *supra* note 147, at 779 (contending that Supreme Court has left resolution of takeover control to federal and state legislatures); Prentice, *supra* note 127, at 41-63 (noting that courts are unlikely to overturn state statutes following *CTS*); Pritchard, *supra* note 142, at 963-83 (same).

161. *See* Booth, *supra* note 129, at 1666-67 (contending that any future amendment of federal securities law by Congress will not directly overturn state statutes, but will continue to follow traditional disclosure-related issues); Romano, *supra* note 124, at 458-70 (same).

162. *See* Booth, *supra* note 129, at 1700-02 (concluding that Congress will not preempt state regulation of acquirer's ability to control acquired company); Prentice, *supra* note 127, at 86-89 (same); Herzel & Shepro, *Takeovers Hit by U.S. State Laws*, Fin. Times, May 11, 1989, at 21 (noting that Congress presently has no interest in ensuring free-market protection of takeovers through amendment of federal law because of uncertainty over merits takeovers provide). *But see* Kozyris, *supra* note 15, at 1161-66 (arguing that Congress should modify federal law to allow free transferability of stock without constraint by state law).

163. *See infra* notes 164-69 and accompanying text (discussing states' use of antitakeover statutes to place control over takeover bid's outcome in management's hands).

164. *See* Booth, *supra* note 123, at 710-713 (noting that congressional legislators' intent was to balance interests of offeror and target management); Johnson & Millon, *supra* note 11, at 1883-84 (same).

165. *See* Johnson, *Corporate Takeovers and Corporations: Who Are They For?*, 43 WASH. & LEE L. REV. 781, 783 n.11 (1986) (discussing nonshareholder interests); Johnson & Millon, *supra* note 11, at 1906-07 (stating that shift in state corporate law from protecting shareholder interests to allowing management to consider nonshareholder issues represents dramatic departure from orthodox principles of shareholder primacy); Karmel, *supra* note 12, at 67-68 (stating that over dozen states have enacted statutes that allow consideration of nonshareholder interests).

166. *See Ruder Interview*, *supra* note 23, at 1504 (discussing SEC Chairman Ruder's view that SEC should actively seek to reverse situation where management can use nonshareholder interests as basis for decisionmaking because of fear that accountability to shareholders would decline); *supra* notes 150-55 and accompanying text (discussing effect on shareholders from change in management fiduciary duties).

Under several state antitakeover statutes, target management can reject the tender offer solely on the grounds of nonshareholder interests without violating their fiduciary duties to shareholders.[167] By empowering target management to act as a negotiator for shareholders' interests with the offeror on bid terms, these state antitakeover statutes reduce independent shareholders' autonomy over the outcome of a bid under the guise of shareholder protection from coercive offers.[168] Therefore, the state statutes' protection of shareholders actually results in a significant decline in a shareholder's autonomy and should be paralleled by a reduction in takeover bids by offerors for corporations within that state.[169]

The third and final shift in the United States' policies toward takeover regulations concerns legislators' attitudes regarding the merits of takeovers.[170] Federal takeover laws never have attempted to control an offeror's objectives in making a takeover attempt.[171] Takeover regulations in the United States do not discourage speculative acquisitions as long as the offeror is willing to satisfy shareholders' procedural protections, to pay a sufficient premium over market price for the target company's shares, and to wait for the asset control time limit (under BCAs) to expire.[172] In addition, an offeror is under no obligation to tender for any certain amount of shares in the target company.[173] Both state and federal law in the United States allow an offeror to tender for fifty-one percent of a company's shares as easily as 100 percent.[174] The impartial nature of the tender offer process regarding the offeror's intentions reflects legislators' and courts' uncertainty over the merits of takeovers.[175] However, states have structured antitakeover statutes to reduce hostile transactions by forcing the offeror to pay a substantially

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167. *See* Johnson & Millon, *supra* note 11, at 1876-78 (noting that management does not have to heed requests or intentions of shareholders under some state antitakeover provisions).

168. *See* Booth, *supra* note 129, at 1643-59 (reviewing effects on shareholders of possible coercive bids); Johnson & Millon, *supra* note 11, at 1873-82 (explaining that BCAs give management autonomy to control bid outcome); Karmel, *supra* note 12, at 68 (same).

169. *See* Johnson & Millon, *supra* note 11, at 1878 (noting that offerors are less likely to tender for corporations that state antitakeover provisions protect).

170. *See infra* notes 171-78 and accompanying text (reviewing legislators' concern over merits of takeovers).

171. *See* Booth, *supra* note 123, at 724-27 (stating that federal securities laws do not prohibit partial bids on coercive terms); Johnson & Millon, *supra* note 11, at 1895-97 (noting that Williams Act's main objective was to ensure that offerors disclose all relevant bid information to shareholders).

172. *See* Booth, *supra* note 129, at 1643-59 (discussing various types of coercive offers); Lipton, *supra* note 4, at 11-20 (outlining various types of abusive takeover practices United States law presently allows).

173. *See supra* note 172 and accompanying text (noting that United States federal and state law allow offerors to make partial offers).

174. *Id.*

175. *See* Johnson & Millon, *supra* note 11, at 1907-09 (discussing change in legislators' views on merits of takeovers); Herzel & Shepro, *Another Step Backwards for U.S. Takeovers*, Fin. Times, Jun. 8, 1989, at 23 (reviewing post-*CTS* court decisions regarding preemption of state statutes).

higher premium for the target company to receive target management's approval of the takeover[176] and often by requiring the offeror to wait a substantial time period before being able to take control of the target company.[177] These state measures, therefore, discourage bidders that lack the financial ability to pay the higher premium or to wait for the requisite time period to expire.[178] Generally however, the United States' policies remain neutral toward an offeror's motivations and continue to provide the offeror with flexibility in structuring a tender offer.

IV. Comparison of Takeover Regulations in the European Community and the United States

The most important distinction in the approaches that the United States and the European Community follow in regulating takeover bids is the position of each system in the merger and acquisition life cycle.[179] Takeover regulations in the United States have had over twenty years to evolve and adapt to the increasing size and complexity of corporate acquisitions.[180] Consequently, the United States' present regulations attempt to protect a set of interests different than those protected in the early stages of the merger cycle during the 1960s.[181] In comparison, the European Community has not witnessed a great deal of takeover activity outside the United Kingdom, and very few hostile tender offers.[182] Rather the Community is in the early stages of the life cycle and is focusing on the fundamental issue of providing uniform takeover guidelines that its Member States will accept.[183]

Although the two systems' regulatory philosophies start from different historical backgrounds and different positions in the merger life cycle, the United States and the European Community share many assumptions regarding takeover bid controls. For example, both systems expressly agree that takeover regulations should rely on enforcement by governmental supervisory agencies applying a statutory system with judicial review.[184] Additionally, both systems expressly agree that takeover regulations should

176. *See* Johnson & Millon, *supra* note 11, at 1873-82 (discussing methods state statutes use to reduce hostile takeovers).

177. *Id.*

178. *Id.*

179. *See Id.* at 1909-13 (noting that life cycle for takeovers exists in United States and that states modified laws to address changes in life cycle).

180. *Id.*

181. *Id.* at 1897-1903 (stating that legislators' fundamental assumptions regarding proper regulations over takeovers have changed dramatically over time).

182. *See* Basaldúa, *supra* note 22, at 492 (commenting that large number of takeovers in United Kingdom stem from open and developed nature of United Kingdom's capital market); *Economist Survey*, *supra* note 22, at 10, col. 1 (explaining that United Kingdom's capital markets are preeminent in Europe).

183. Basaldúa, *supra* note 22, at 495.

184. *See* Karmel, *supra* note 12, at 82 (noting similarity between proposed Directive and Williams Act).

protect target company shareholders from coercive offers,[185] and should allow federal and state concerns to play a role in determining which interests the regulations will protect.[186] Finally, both systems implicitly agree that, if properly regulated, takeovers can have a positive economic outcome.[187] However, fundamental differences in the objectives and underlying assumptions of tender offer control are apparent.

The first difference between takeover regulations in the United States and the European Community concerns the amount of federal involvement and control over the regulatory process.[188] Originally, in the United States, federal securities laws provided the principal basis for regulation of tender offers.[189] The Williams Act imposed a national standard that bound all parties in a tender offer to compliance with the Act's provisions.[190] The states, however, with the approval of the United States Supreme Court, effectively usurped this federal authority through enactment of varying types of antitakeover legislation.[191] As a result, the United States has moved to a system of decentralized control over takeover bids and has adopted legal requirements that differ from state to state.[192]

In contrast, the Member States of the European Community appear more willing to centralize control over takeover bids in Community-wide

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185. *See* HOUSE REPORT, *supra* note 96, at 2813 (stating that Congress sought to reduce chances for coercive tender offers); MacLachlan & Mackesy, *supra* note 34, at 387-88 (noting basic premises of City Code, which Commission adopted in drafting proposed Directive).

186. *See* CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 86-87 (1987) (holding that states had valid right to address takeover regulation issues); Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496, 502-05 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 367 (same); Proposal, *supra* note 28, art. 10, at 14 (stating that Member States will share regulatory enforcement duties with Commission).

187. *See* Vollmer, *supra* note 34, at 22 (emphasizing Community's interest in encouraging cross-border deals); Easterbrook & Fischel, *supra* note 94, at 1165 (contending that takeovers serve useful economic purpose in United States).

188. *See infra* notes 189-98 and accompanying text (reviewing approaches United States and European Community take on question of centralized bid control).

189. *See* Johnson & Millon, *supra* note 11, at 1869-70 (contending that *MITE* Court strongly endorsed view that federal securities laws on takeovers preempted state statutes); Herzel & Shepro, *supra* note 175, at 23 (same).

190. *See* Johnson & Millon, *supra* note 11, at 1895-96 (noting that federal legislators enacted Williams Act to impose uniform national standards of disclosure of tender offer terms).

191. *See* CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 86-87 (1987) (holding that Indiana's CSA was within constitutional limits that states maintain over resident corporations' voting procedures). The United States Court of Appeals for the Seventh Circuit recently held that Wisconsin's BCA provisions also satisfy constitutional requirements. Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496, 502-05 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 367. The United States Supreme Court's refusal to review the Wisconsin takeover statute surprised many pro-takeover commentators. *See High Court Refuses to Review Constitutionality of Wis. Takeover Act*, [July-Dec.] Sec. Reg. & L. Rep. (BNA) No. 44, at 1672 (Nov. 10, 1989) (reviewing Supreme Court's refusal to hear appeal on Wisconsin's takeover laws); Herzel & Shepro, *supra* note 175, at 23 (reviewing Seventh Circuit's holding in *Amanda*).

192. *See supra* note 149 and accompanying text (reviewing various state antitakeover statutes).

government agencies in an attempt to foster a standard approach for bid procedures.[193] To achieve centralized control, the Member States ceded authority over the formulation and ultimate enforcement of takeover provisions to the European Commission and the Community's Court of Justice.[194] The Commission drafted the proposed Directive with the intent of providing uniform provisions for takeover bids throughout the Member States.[195] In addition, the Commission likely will initiate the bulk of the Community's subsequent takeover bid legislation, especially for fundamental guidelines and principles.[196] Thus, the European Community is adopting the same type of federally centered regulatory structure that the United States used originally.

The two systems' opposite approach to the question of centralized control will affect the level of takeover activity. The European Community's standardized bid regulations are simpler for potential offerors to comply with than the patchwork regulatory system of federal and state regulations in the United States.[197] Therefore, the trend toward decentralized control over takeovers in the United States is a clear signal that the states want to reduce takeover activity, while the opposite result is likely to occur in the Community.[198]

The United States' current emphasis on state control over takeovers follows from the states' strong belief that federal regulations failed to take account of a takeover's effect on nonshareholder interests.[199] The second

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193. *See* Basaldúa, *supra* note 22, at 495 (contending that standardization of takeover regulations within Community will play important role in assisting restructuring of European industry).

194. *See Policing Europe's Single Market*, Economist, Jan. 20, 1990, at 69-70, col. 1 (outlining process that Commission and Community's Court of Justice follow to ensure that Member States' enabling legislation correctly implements Directive's provisions); *Last Post for Panel*, Economist, Oct. 7, 1989, at 89, col. 2 (explaining United Kingdom's Takeover Panel concern that proposed Directive will lead to extensive litigation on takeovers that Community court may have to resolve); *Europe's Rhetoric and Reality*, Economist, Sept. 23, 1989, at 64, col. 2 (reviewing Member States' ability to complete timely implementation of Directives that Commission has approved previously).

195. *See* Vollmer, *supra* note 34, at 22-23 (noting that Community is attempting to simplify takeover procedures among Member States).

196. *See* Lambert, *Brussels Fights for Accord on Takeover Bids*, Fin. Times, Oct. 2, 1989, at 6, col. 1 (noting that statutory takeover regulations will allow involved parties to litigate contested interpretations of proposed Directive in national and possibly Community court and, therefore, will slow ability to complete takeovers).

197. *See supra* notes 189-96 and accompanying text (comparing United States' and European Community's approaches to centralized control over bids).

198. *See* Kozyris, *supra* note 15, at 503 (noting that states now control takeover activity in United States); Basaldúa, *supra* note 22, at 495 (explaining that preparation for 1992 will lead to use of takeovers by European corporations); Karmel, *supra* note 12, at 79 (noting that harmonization of company law should promote investment within Community); *Almost Half of Larger U.S. Companies Have Poison Pill Plans, Study Reports*, [July-Dec.] Sec. Reg. & L. Rep. (BNA) No. 43, at 1630-31 (Nov. 3, 1989) (noting that nearly half of all United States' companies have taken active measures to avoid takeovers).

199. *See* Johnson & Millon, *supra* note 11, at 1862-67 (contending that state's main intent in enacting antitakeover statutes is to protect nonshareholder interests).

difference between the United States and the European Community on takeover regulations involves the question of nonshareholder interests and the amount of autonomy each system affords target shareholders in deciding a tender offer.[200] Federal and state legislators in the United States originally assumed that individual shareholders were the proper body to control the outcome of a bid.[201] As a result, federal securities laws adopted a policy of neutrality between the offeror and target management and simply required both parties to disclose the merits of the bid to target shareholders.[202] However, because tender offers provided target shareholders with an attractive premium over the shares' original market value prior to the bid, states found that shareholders were very likely to tender shares to an offeror.[203] While the target shareholders earned a large return from tendering their shares, the states increasingly were concerned about the disruption that takeovers caused in the target company's local community.[204] Consequently, the states enacted antitakeover legislation that empowered target management to decide the outcome of a tender offer and simultaneously expanded management's fiduciary duties to include consideration of nonshareholder interests.[205] This shift in state legislation substantially has eroded shareholders' autonomy because the target company's management controls the bid's outcome.[206]

In contrast to the United States, shareholder primacy over the success or failure of a bid was the Commission's principal assumption in drafting

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200. *See infra* notes 201-11 and accompanying text (discussing United States' and European Community's balancing of shareholder autonomy and shareholder protection).

201. *See* Johnson & Millon, *supra* note 11, at 1897-99 (contending that both federal and state legislators emphasized shareholder autonomy in 1960s).

202. *See id.* at 1893-97 (stating that Congress' intent in enacting federal securities laws was to adopt policy of neutrality toward takeovers).

203. *See id.* at 1864-66 (noting that shareholders likely will accept large premium provided by offeror in takeover bid).

204. *See* 1 M. LIPTON & E. STEINBERGER, *supra* note 1, § 5.02[1] (explaining that states' justifications for imposing state statutory restraints on tender offers resulted from fear that takeovers would adversely affect local economies); Prentice, *supra* note 127, at 9-12 (outlining states' original intent at limiting antitakeover activity).

205. *See* Johnson & Millon, *supra* note 11, at 1906-07 (noting that states' inclusion of nonshareholder interests as valid part of management's fiduciary obligations expands scope of business judgment rule to point that little legal recourse is available to target shareholders if target management rejects bid); Karmel, *supra* note 12, at 68 (contending that target company's ability to consider nonshareholder interests is likely to become legal fiction that results in erosion of shareholder rights); *Ex-SEC Member Urges Action to Protect Shareholder Rights in Control Contests*, [July-Dec.] Sec. Reg. & L. Rep. (BNA) No. 39, at 1494, 1495 (Oct. 6, 1989) (contending that state statutes result in making target directors accountable to no one); *Ruder Interview*, *supra* note 23, at 1504, 1505 (stating that state statutes undermine essential shareholder rights); *supra* note 165 and accompanying text (discussing nonshareholder interests).

206. *See* Gilson, *supra* note 151, at 127-28 (contending that management entrenchment appears to be primary motivation for target management to deny takeover bid); Karmel, *supra* note 12, at 68 (stating that state statutes' expansion of company board's fiduciary responsibility to include nonshareholder interests provides basis for board to disregard shareholders' rights).

the proposed Directive.[207] In requiring the offeror and target management to provide target shareholders with sufficient disclosure on the merits of the bid, the Commission's proposed Directive follows the lead of the United States' federal securities laws.[208] Significantly, the Commission also chose to limit target management's role during a takeover bid to the supervision of the company's normal operations.[209] Thus the proposed Directive does not attempt directly to protect the nonshareholder interests of the target company's local communities.[210] Based on target shareholders' typically positive view of tender offers, the European Community's emphasis on individual shareholder autonomy likely will encourage takeover activity as target shareholders capitalize on the premiums that bidders offer.[211]

In addition to differences in shareholder autonomy, the United States and the European Community take different views on the type of takeover activity that each will permit. The United States never has made a concerted effort at the federal level to restrict highly leveraged or coercive bids.[212] As banks began to provide large loans for highly leveraged takeovers, offerors in the United States were able to shift focus from acquiring companies suffering from poor management to companies which were efficient and well-run concerns.[213] Additionally, the United States' takeover regulations allow offerors to take control of a company by tendering for less than the full amount of a target's shares.[214] When an offeror tenders for less than 100 percent of a company's shares, the remaining minority shareholders must choose to sell their shares to the offeror at less than the original tender offer amount or litigate for a higher amount.[215] Recognizing that partial tender offers are unfair to minority shareholders and that "bust-

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207. *See* Basaldúa, *supra* note 22, at 499 (stating Commission's intent to ensure shareholder autonomy through proposed Directive).

208. Proposal, *supra* note 28, art. 10, at 12-14; *see also supra* note 37 and accompanying text (reviewing Commission's objectives in drafting proposed Directives).

209. *See* Basaldúa, *supra* note 22, at 499 (discussing proposed Directive's limitations on target management's ability to use defensive measures to thwart takeover bids).

210. *See* Karmel, *supra* note 12, at 75-77, 79-81, & 82-83 (noting that in United Kingdom duty of target management and board still is primarily for shareholders and that while Community legislation exists to expand fiduciary duties to include nonshareholder interests, legislation has not made any progress toward enactment).

211. *See* Vollmer, *supra* note 34, at 22 (explaining that Commission's legislation will encourage cross-border takeovers and mergers).

212. *See* Booth, *supra* note 129, at 1643-59 (discussing various types of coercive offers); Lipton, *supra* note 4, at 11-20 (outlining various types of abusive takeover practices United States law presently allows).

213. *See* Johnson & Millon, *supra* note 11, at 1908-09 (reviewing transfer of hostile bidders' attention from poorly managed companies to well-run companies that offerors can then "bust-up").

214. *See* Booth, *supra* note 123, at 724-27 (stating that federal securities laws never forbade partial tender offers).

215. *See* 1 M. Lipton & E. Steinberger, *supra* note 1, § 1.08[1] (discussing two-tier, partial tender offers).

ups" endanger the target company's local communities, state statutes attempt to ban all takeovers of state corporations.[216]

In contrast, the European Community's proposed Directive requires that if an offeror controls or seeks to tender for more than a one-third interest in the target company, the offeror must tender for a full 100 percent holding in the target company.[217] Because this provision eliminates parties that lack the funds to make an offer for all of a target company's shares and denies the use of partial tenders, the proposed Directive encourages bids from parties that have large financial resources and, therefore, are more likely to be large industrial concerns making a long-term investment.[218] However, assuming that funds are available to an offeror, a target company in the Community still may be subject to a hostile takeover as long as the offeror satisfies the proposed Directive's requirements.

On the whole, the United States allows bidders much more flexibility in designing tender offers, and supervisory agencies in the United States are less likely to review the offeror's intentions if the offeror pays an adequate premium to the target shareholders.[219] The United States' approach, therefore, is not to review the merits of a takeover independently, but only to ensure that the offeror satisfies all legal obligations concerning the bid.[220] In contrast, the European Community is more interested in encouraging the use of takeovers by parties able to provide sound long-term economic justifications for the combination, rather than by those parties seeking short-term financial gains.[221] The Community does not see takeovers as an end in themselves, but as a means toward the restructuring of European industry in a more efficient form.[222]

V. CONCLUSION

The European Community's approach to harmonizing Member States' laws concerning the use of takeover bids bears many similarities to the

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216. *See* Booth, *supra* note 129, at 1666-70 (1988) (noting reasons that states enacted antitakeover statutes following passage of Williams Act); Booth, *supra* note 123, at 724-27 (stating that federal legislation does not prohibit partial, two-tier tender offers that often apply coercive tactics to target shareholders); Lipton, *supra* note 4, at 15-20 (noting types of abusive offers that federal rules do not prohibit); Prentice, *supra* note 127, at 9-10 (explaining that states believed Williams Act required additional provisions to protect state interests).

217. Proposal, *supra* note 28, art. 4, at 9-10; *see also* Basaldúa, *supra* note 22, at 496 (noting that, to protect shareholders from partial speculative bids, Commission included requirement that offeror make 100% bid once offeror holds one-third interest in target).

218. *See* Basaldúa, *supra* note 22, at 496 (explaining that Commission attempted to limit possibility of coercive bids).

219. *See* Booth, *supra* note 129, at 1643-59 (noting that United States federal and state law allow offerors to make partial offers); Lipton, *supra* note 4, at 11-20 (same).

220. *See supra* note 219 and accompanying text (discussing use of partial bids in United States).

221. *See* Basaldúa, *supra* note 22, at 495 (contending that standardization of takeover regulations within Community will play important role in assisting restructuring of European industry).

222. *Id.*

approach Congress took in drafting federal securities laws in 1968.[223] An emphasis on adequate disclosure to shareholders by both the offeror and target management, the adoption of regulations that attempt to balance the interests of the offeror and target management, and the premise that individual shareholder autonomy should be of primary concern are common to both federal systems.[224] In the United States, the initial consensus toward regulation of takeovers broke down as states realized that hostile tender offers affected local nonshareholder interests that federal regulations failed to protect.[225] The states quickly reacted by enacting statutes that will lead to a reduction in hostile takeovers.[226] In this respect, the United States has passed from a free market philosophy regarding takeovers to a policy of more active controls over the type of transactions that government supervisory agencies will allow.[227]

In contrast, the European Community's enactment of the proposed Directive and other company law legislation under its 1992 program should provide fairly uniform regulations throughout the Community.[228] While these actions would appear to place the Community on the brink of a large increase in takeover activity, the Commission has included provisions in the proposed Directive to thwart the possibility of offerors making hostile and coercive bids.[229] Based on additional legislation pending in the Community, the possibility that takeovers will ever rise to the level of importance the corporate world experienced in the United States during the 1980s appears unlikely.[230] However, the Community likely will witness an increase in takeover bids over the coming decade.[231]

As the Community advances on the merger and acquisition life cycle, there is a strong possibility it will follow the United States' lead and act to protect a different set of interests than just that of the individual shareholder who receives a tender offer. Therefore, a policy of including consideration of nonshareholder interests prior to allowing a takeover should also play a greater role in the Community as bids increase.

VINYARD V COOKE, III

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223. *See supra* notes 184-87 and accompanying text (outlining similarities between United States and European Community regulation of takeovers).

224. *Id.*

225. *See supra* notes 128-30 and accompanying text (reviewing breakdown of consensus on interests that regulatory agencies should protect in takeover bids).

226. *Id.*

227. *See supra* notes 157-62 and accompanying text (noting that states control substantive law regarding takeovers and have sought to discourage such activity).

228. *See supra* notes 37-40 and accompanying text (contending that European Community wanted to create regulations that allow for cross-border acquisitions).

229. *See supra* notes 51-62 and accompanying text (reviewing proposed Directive's provisions for protection of target shareholders).

230. *See supra* note 34 and accompanying text (outlining Community legislation concerning merger control regulations).

231. *See supra* notes 37-40 and accompanying text (predicting some increase in Community's takeover activity).