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NOTES

"MAY WE HAVE THE LAST DANCE?" STATES TAKE AIM AT CORPORATE RAIDERS AND CRASH THE PREDATOR'S BALL

In 1968 Virginia became the first state to enact a state statute (Virginia Act) to regulate tender offers.[1] The Virginia Act required a person bidding to acquire a controlling interest in a target corporation[2] to disclose specific information[3] to the target corporation's shareholders before acquiring the shareholders' shares.[4] Four months after Virginia enacted its takeover disclosure legislation, however, Congress enacted the Williams Act,[5] which subjects tender offerors to advance disclosure requirements.[6] Even after

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1. VA. CODE ANN. §§ 13.1-528 to -541 (1973) (repealed). In the Take-Over-Bid Disclosure Act (Virginia Act) that Virginia enacted in 1968, the Virginia state legislature attempted to regulate numerous aspects of the tender offer process, including the duration of a takeover bid. *Id.; see* L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 601 (1983) (discussing Virginia's leading role in state regulation of tender offers). Additionally, the Virginia Act required persons attempting a tender offer to notify the Virginia State Corporation Commission (Commission) of the takeover bid and to disclose specific information, such as the terms and conditions of the takeover bid, to the Commission. VA. CODE ANN. §§ 13.1-528 to -541 (1973) (repealed); *see* L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 601 (1983) (discussing disclosure requirements of Virginia Act).

2. VA. CODE ANN § 13.1-529 (1973) (repealed). The Virginia Act defined a target corporation, or offeree company, as a corporation incorporated under the laws of Virginia and doing business in Virginia whose shares were the subject of a tender offer. *Id.*

3. VA. CODE ANN. § 13.1-531 (1973) (repealed). The Virginia Act required that the tender offeror disclose to the Commission and the target corporation, among other specifics, the terms of the takeover bid, the funding plan of the bid, any plans of liquidation that would dissolve the target corporation, and complete information on the organization and operations of the tender offeror. *Id.*

4. *Id.* Under the Virginia Act, the Commission or target corporation could call for a hearing, which would enable the Commission to determine whether the tender offeror proposed to make fair and effective disclosure, before the tender offer could proceed. *Id.*

5. Williams Act, Pub. L. No. 90-439, 82 Stat. 954 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982)).

6. *Id., see generally* Note, *The Constitutionality of Second Generation Takeover Statutes*, 73 VA. L. REV. 203, 205-207 (1987) (discussing Williams Act). Certain provisions of the Williams Act added sections 13(d) and 14(d) of the Securities and Exchange Act of 1934 ("1934 Act") that require tender offerors to provide detailed and timely disclosure of takeover bids to the shareholders of target corporations. *See* 1934 Act, 15 U.S.C. §§ 78a-78kk (1982) (provisions of 1934 Act); Williams Act, 15 U.S.C. § 78m(d) (1982) (incorporating provisions of Williams Act into 1934 Act); Note, *supra*, at 205-06 nn.12-15 (discussing codification of Williams Act and relation of Williams Act to provisions of 1934 Act). Section 13(d) of the 1934 Act requires a tender offeror that beneficially owns more than five percent of the outstanding shares of a publicly held corporation to file a statement with the Securities and Exchange Commission (SEC) within ten days after acquiring more than five percent of the target corporation's stock. Williams Act, 15 U.S.C. § 78m(d)(i) (1982); *see* 17 C.F.R. § 240.13d-1 (1988) (regulations for disclosure statement);

Congress passed the Williams Act, many states still continued to try to regulate takeovers.[7] Numerous individuals, however, challenged state efforts to regulate corporate tender offers, claiming that the state statutes were unconstitutional under the commerce clause of the United States Constitution or that the Williams Act preempted the state statutes.[8]

Throughout the 1970s and early 1980s, most courts that considered the constitutionality of state statutes regulating takeovers rendered the statutes unconstitutional.[9] The United States Supreme Court, in *Edgar v. MITE Corp.*,[10] first attempted to analyze the legitimacy of state regulation of takeovers in light of the Williams Act and the United States Constitution.[11] In *MITE* a plurality of the Supreme Court suggested that the Illinois Business Takeover Act (Illinois Act) was invalid by finding that the

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Note, *supra* at 205 nn.14-15 (discussing § 13(d) of 1934 Act). In the section 13(d) disclosure statement, the tender offeror must disclose five general items of information regarding the proposed acquisition, including the background, residence, and citizenship of the tender offeror, the extent of the tender offeror's holdings in the corporation, the source and amount of funds used in the acquisition, the purpose of the acquisition, and any additional information regarding the contracted stock purchase agreements. Williams Act, 15 U.S.C. § 78m(d)(l)(A)-(E) (1982); *see* Note, *supra*, at 206 (discussing § 13(d) provisions of 1934 Act).

While section 13(d) mandates certain disclosures when an acquisition results in ownership of more than five percent of a public target corporation's shares, section 14(d) of the 1934 Act (section 14(d)) also regulates tender offers that increase a tender offeror's holdings in a corporation to more than five percent of the equity securities at a corporation. Williams Act, 15 U.S.C. § 78n(d)(l); *see* 17 C.F.R. § 240.14d-3(2) (1986) (14(d) regulations of disclosure statement); Note, *supra* at 206 (discussing requirements of § 14(d)). Section 14(d) requires holders of a target corporation's stock to disclose certain information that is similar to the informational requirements of section 13(d) by filing a statement simultaneously with the target corporation and with the SEC to assist shareholders in making informed decisions and ensure that all shareholders receive equal treatment in the tender offer process. Williams Act, 15 U.S.C. § 78n(d)(l) (1982), 17 C.F.R. § 240.14d-3(b) to -8 (1986) (discussing regulations providing for shareholder rights against bidder in tender offer); Note, *supra*, at 206-07 nn.17-22 (discussing shareholder protections in § 14(d) tender offer situations).

7. *See* S. PAMEPINTO, CAN STATES STOP CORPORATE TAKEOVERS?, 3 (Investor Responsibility Research Center 1987) (noting that companies feeling unprotected by Williams Act turned to states for greater protection and that by 1982 thirty-seven states had enacted laws that required greater disclosure than Williams Act).

8. *See, e.g.*, Lewis v. McGraw, 619 F.2d 192, 195 (2d Cir.), *cert. denied*, 449 U.S. 951 (1980) (holding that Williams Act controls tender offer notice requirements and thus preempts state notice provisions); Canadian Pacific Enter. (U.S.) Inc. v. Krouse, 506 F. Supp. 1192, 1198-1203 (S.D. Ohio 1981) (finding early Ohio takeover statute preempted by Williams Act notice requirements); Crane Co. v. Lam, 509 F. Supp. 782, 786-90 (E.D. Pa. 1981) (finding Pennsylvania takeover statute unconstitutional as violation of commerce clause and Williams Act).

9. *See supra* note 8 (discussing cases rendering state takeover statutes invalid for violating commerce clause and provisions of Williams Act).

10. 457 U.S. 624 (1982).

11. Edgar v. MITE Corp., 457 U.S. 624 (1982); *see* U.S. CONST. art. I, § 8, cl. 3 (prohibiting states from interfering with interstate commerce and giving Congress full power to regulate commerce between states); ILL. ANN. STAT. ch. 121 1/2, para. 137.51-.65 (Smith-Hurd 1979) (repealed) (containing provisions of Illinois Business Take-Over Act); *supra* note 6 (discussing Williams Act); *infra* notes 24-40 and accompanying text (discussing provisions of Illinois Act that Supreme Court scrutinized in *MITE*).

Williams Act preempted the Illinois Act, while the Court concluded that the Illinois Act unconstitutionally burdened interstate commerce in violation of the commerce clause.[12] After the Court's decision in *MITE*, many states enacted laws, or amended existing laws, designed to avoid the constitutional problems that the Illinois Act created.[13] Lower federal courts, however, consistently invalidated those "second generation" statutes[14] by applying the Williams Act preemption test and commerce clause inquiry utilized by the Court in *MITE*.[15]

In 1987, however, the Supreme Court, in *CTS Corp. v. Dynamics Corp. of America*,[16] scrutinized another state effort to regulate tender offers and, for the first time, upheld as constitutional a state takeover statute.[17] Because the Supreme Court in *CTS* determined that provisions of state legislation regulating tender offers may be constitutional, many states attempting to regulate tender offers have adopted statutes that are similar to the Indiana Act.[18] Other states, however, have adopted fair price statutes[19] that require a bidder in a tender offer to offer shareholders

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12. Edgar v. MITE Corp., 457 U.S. 624, 640-46 (1982); *see* U.S. CONST. art. I, § 8, cl. 3 (prohibiting states from interfering with interstate commerce and giving Congress full power to regulate commerce between states); ILL. ANN. STAT. ch. 121 1/2, para. 137.51-.65 (Smith-Hurd 1979) (repealed) (containing provisions of Illinois Business Take-Over Act); *supra* note 6 (discussing Williams Act); *infra* notes 24-40 and accompanying text (discussing provisions of Illinois Act that Supreme Court scrutinized in *MITE*).

13. *See* P. PAMEPINTO, *supra* note 7, at 3 (discussing state attempts after *MITE* to regulate tender offers); *see, e.g.*, MD. CORPS. & ASS'NS CODE ANN. §§ 1-102(a), 3-601 to -603 (1985 & Supp. 1988) (containing Maryland's takeover statute); N.Y. BUS. CORP. LAW § 912(a)(13) (McKinney 1986 & Supp. 1988) (containing New York's takeover statute, which applies only to corporations incorporated under New York law); OHIO REV. CODE ANN. § 1701.01(Y) (Baldwin 1986 & Supp. 1987) (containing Ohio's takeover statute, which applies only to corporations with fifty or more shareholders and substantial place of business, principal executive offices, or substantial assets within Ohio).

14. *See* S. PAMEPINTO, *supra* note 7, at 3 (describing takeover laws enacted after *MITE* as "second generation" statutes); Romano, *The Political Economy of Takeover Statutes*, 73 VA. LAW REV. 111, 113-16 (1987) (describing post- *MITE* takeover statutes as second generation statutes).

15. *See* Fleet Aerospace Corp. v. Holderman, 637 F. Supp. 742, 754-56, 760-64 (S.D. Ohio 1986) (holding Ohio control share acquisition statute unconstitutional because statute interfered with interstate commerce and was preempted by Williams Act), *aff'd*, 796 F.2d 135 (6th Cir. 1986), *vacated*, 107 S. Ct. 1023 (1987); APL Ltd. Partnership v. Van Dusen Air Inc., 622 F. Supp. 1216, 1219-24 (D. Minn. 1985) (Minnesota Control Share Acquisition Act violated commerce clause since act applied not only to corporations incorporated in Minnesota with at least fifty shareholders residing in Minnesota but also to foreign corporations with assets in Minnesota valued at greater than one million dollars). *See generally* S. PAMEPINTO, *supra* note 7, at 25-31 (discussing court decisions that consistently have held state takeover statutes unconstitutional).

16. 107 S. Ct. 1637 (1987).

17. CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637, 1652 (1987); *see* IND. CODE ANN. §§ 23-1-42-1 to 23-1-42-11 (Burns Supp. 1988) (containing Indiana Control Share Acquisitions section of Indiana Business Corporation Law).

18. *See infra* notes 99-123 and accompanying text (discussing state takeover statutes that states adopted after Supreme Court upheld Indiana Act as constitutional).

19. *See infra* notes 144-172 and accompanying text (discussing fair price tender offer statutes).

of a target corporation the same tender offer price as the bidder paid throughout the entire acquisition.[20] Still other states have enacted "freezeout" laws that do not regulate takeovers as such, but prohibit statutorily-defined "business combinations" for a specific period of time after an acquisition.[21] In reviewing these state attempts at controlling takeovers, courts have attempted to analyze the Supreme Court's reasoning in *MITE* and *CTS* regarding the roles of the Williams Act and the commerce clause in relation to state takeover statutes.[22] By applying the Supreme Court's

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20. *Id.*

21. *See, e.g.*, ARIZ. REV. STAT. ANN. tit. 10, ch. 6 (1977 & Supp. 1987) (containing Arizona's business combination provisions); IND. CODE ANN. §§ 23-1-43-1 to 23-1-43-24 (Burns Supp. 1988) (containing Indiana's business combination provisions); KY. REV. STAT. ANN. § 271A.397 (Michie/ Bobbs-Merrill Supp. 1988) (containing Kentucky's business combination statute); MINN. STAT. ANN. § 302A.673 (West Supp. 1988) (containing Minnesota's business combination provisions); MO. ANN. STAT. § 351.459 (Vernon Supp. 1988) (containing Missouri's business combination provisions); N.J. STAT. ANN. § 14A-10-1 (West 1969 & Supp. 1988) (containing New Jersey's business combination provisions); N.Y. BUS. CORP. LAW § 912 (McKinney 1986 & Supp. 1988) (containing New York's business combination statute); WASH. REV. CODE ANN. tit. 23A, ch. 23A.20 (1969 & Supp. 1988) (containing Washington's business combination provisions); WIS. STAT. ANN. §§ 180.725(1)(mm), .725(5)-.725(6) (West Supp. 1988) (containing Wisconsin's business combination provisions). New York enacted a statute that forbids any "business combination" (as defined) between a target corporation and a twenty percent or more shareholder for five years after acquisition of the twenty percent or more block of stock unless, prior to the acquisition, the target corporation's management had approved either the stock acquisition or the proposed business combination. N.Y. BUS. CORP. LAW § 912 (McKinney 1986 & Supp. 1988). After five years, such a business combination requires approval of a disinterested majority of shareholders or payment of a statutorily-defined fair price. *Id.*

Most notably, on February 2, 1988, Delaware enacted a modified version of the New York statute. DEL. CODE ANN., tit. 8, § 203 (1988). Delaware's law prohibits any "business combination" (as defined) between a corporation and a fifteen percent or more shareholder ("interested stockholder") for three years following the date on which such shareholder became an interested stockholder. *Id.* The prohibition does not apply if (i) prior to the date of acquisition by the interested stockholder the board of directors approved either the proposed business combination or the acquisition of the stock, or (ii) the interested stockholder's holdings rise in one transaction from less than fifteen percent to eighty-five percent (excluding stock of certain insiders and employee stock plans) or more of all outstanding shares; or (iii) a business combination is approved by the board of directors and by an affirmative vote of at least 66 2/3% of the outstanding voting stock not owned by the interested stockholder. *Id.* The board of directors may decide to "opt out" of the statute within ninety days of its effective date. *Id.* After that, a corporation may opt out of the statute by amending its certificate of incorporation or bylaws by an affirmative vote of a majority of the shares entitled to vote. *Id.* The amendment will not be effective for twelve months, however. *Id.*

22. *See, e.g.*, Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837, 845, 848-52 (1st Cir. 1988) (court's Williams Act preemption test and commerce clause analysis based on *MITE* and *CTS* decisions); BNS Inc. v. Koppers Co., 683 F. Supp. 458, 463-72 (D. Del. 1988) (court's analysis of Delaware takeover statute focuses on *MITE* and *CTS*); TLX Acquisition Corp. v. Telex Corp., 679 F. Supp. 1022, 1030-34 (W.D. Okla. 1987) (Court's analysis of state takeover statute controlled by *MITE* and *CTS* decisions); *see infra* notes 26-40, 45-88 and accompanying text (discussing *MITE* and *CTS* constitutionality tests). The United States Supreme Court's decision in *Edgar v. MITE Corp.* and *CTS Corp. v. Dynamics Corp. of Am.* represent the Court's only two inquiries into the legitimacy of state involvement with and regulation of tender offers. *See* CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637, 1644-52 (1987) (focusing on two part

reasoning, courts might find that the takeover statutes that states enacted both before and after the *CTS* decision are constitutional.[23]

The MITE Decision

Prior to the *CTS* decision, *MITE* was the only decision in which the Supreme Court had analyzed the constitutionality of state tender offer regulations.[24] In *MITE* the Illinois state legislature enacted a state statute that required specific steps be taken by a bidder before a tender offer could proceed.[25] The Supreme Court, in invalidating the Illinois takeover legislation, determined in *MITE* that the Illinois Act had both jurisdictional and potentially substantive flaws.[26] A plurality of the Court suggested that the Illinois Act violated the provisions of the Williams Act, while the *MITE* Court conclusively held that the Illinois Act violated the commerce clause of the United States Constitution.[27]

In establishing the criteria that the Illinois Act needed to meet to pass constitutional scrutiny, the Supreme Court first looked to the provisions of the Williams Act.[28] A central concern of the Williams Act, a plurality of the *MITE* Court concluded, was that shareholders and tender offerors should be free to deal with one another without unreasonable delay.[29] The Illinois Act, however, delayed takeover bids by creating a waiting period before a bidder could proceed with a proposed tender offer and enabled Illinois further to delay a bid by requiring the Illinois Secretary of State to hold an administrative hearing to determine the fairness of the offer

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inquiry into provisions of Williams Act and interstate commerce analysis); Edgar v. MITE Corp., 457 U.S. 624, 630-46 (1982) (same).

23. *Compare infra* note 101 and accompanying text (discussing provisions of Minnesota Control Acquisition Act) *with* Gelco Corp. v. Coniston Partners, 652 F. Supp. 829, 839-45 (D. Minn. 1986) (prior to Supreme Court's decision in *CTS*, Minnesota takeover legislation held to be invalid), *aff'd in part and vacated in part*, 811 F.2d 414 (8th Cir. 1987) (vacating as moot District Court's finding of Minnesota statute as unconstitutional); *see infra* notes 46-90 and accompanying text (discussing qualities of Indiana's Control Share Acquisitions statute (Indiana Act) that, under *CTS*, render the Indiana Act constitutional and not subject to federal preemption).

24. *See CTS*, 107 S. Ct. at 1639, 1643, 1645 (basing decision on inquiries set forth in *MITE* and comparisons of Indiana Act in *CTS* to Illinois Act in *MITE*); S. PAMEPINTO, *supra* note 7, at 9 (*MITE* represented Supreme Court's initial inquiry into relationship between federal laws and state attempts at regulating tender offers).

25. Edgar v. MITE Corp., 457 U.S. 624, 634-40 (1982). *See infra* notes 30-35 and accompanying text (discussing notice requirements of Illinois Business Take-Over Act (Illinois Act)).

26. Edgar v. MITE Corp., 457 U.S. 624, 637-45 (1982).

27. *Id.* at 639, 643.

28. *Id.* at 632-38; *see supra* note 6 and accompanying text (discussing requirements of Williams Act).

29. *Id.* at 634-39. A plurality of the Court in *MITE* concluded that the legislative intent behind the Williams Act indicated that shareholders needed to be free to make their own decisions regarding the fairness of tender offers. *Id.* at 637-39. Delays in the tender offer process, the *MITE* Court plurality concluded, could hinder the shareholders' opportunities to make their own decisions regarding tender offers by allowing the target corporation to repurchase its own shares, issue additional shares of stock, arrange for a defensive merger, or institute litigation challenging, and thus effectively preempting, a tender offer. *Id.* at 638, n.13.

and adequacy of disclosure before a tender offer could proceed.[30] Additionally, the plurality of the Court suggested that the central goal behind the Williams Act was to protect shareholders by maintaining a balance between the target corporation's management, the tender offeror, and the target corporation's shareholders.[31] The Supreme Court in *MITE* recognized that the Illinois Act's requirement that the bidder disclose the tender offer terms to the target corporation in advance of the bid's effective date gave the target corporation's management an advantage over the bidder in communicating with the shareholders.[32] Of central importance to a plurality of the *MITE* Court, therefore, was that this advantage conflicted with the purported neutrality that the Williams Act mandates between the tender offeror, target corporation, and shareholders of the target corporation.[33] The plurality of the Supreme Court reasoned that the Williams Act and the Williams Act's legislative history indicate that Congress intended for shareholders to be free to make their own decisions.[34] The three justices of the plurality suggested, therefore, that the Williams Act preempted the Illinois Act insofar as the Illinois Act allowed the Secretary

30. *Id.* at 637. Under the Illinois Act, the Secretary of State of Illinois could call a hearing to determine the merits of a proposed tender offer. *Id.; see* ILL. REV. STAT. ch. 121 1/2, para. 137.57-A-.B (Smith-Hurd 1979), *repealed by* P.A. 83-365, § 1, eff. Sept. 14, 1983 (requiring tender offeror to apply for state hearing into merits of tender offer). If the Secretary called the meeting, the offer could not begin until the Secretary had completed the hearing. *MITE*, 457 U.S. at 637. In addition, the Illinois Act did not establish any deadline by which the Secretary of State had to complete the hearing. *See also* ILL. REV. STAT. ch. 121 1/2, para. 137.57-C-.D (Smith-Hurd 1979), *repealed by* P.A. 83-365, § 1, eff. Sept. 14, 1983 (no time limit for state hearing after initiation of tender offer); *see also MITE*, 457 U.S. at 637 (discussing provisions of Illinois Act). The Supreme Court in *MITE* concluded that the hearing provisions in the Illinois Act gave the Secretary the power to delay a tender offer indefinitely and gave the incumbent management of the target corporation an opportunity to delay tender offers. *MITE*, 457 U.S. at 637.

31. *MITE*, 457 U.S. at 632-34; *see supra* note 6 and accompanying text (discussing requirements of Williams Act).

32. *MITE*, 457 U.S. at 639-40. Under the provisions of the Illinois Act, the Illinois Secretary of State could refuse to register a takeover offer if the Secretary of State determined that the takeover offer was inequitable or that the tender offeror failed fully and fairly to disclose the details of intent behind a tender offer to stockholders. *Id.* at 639. *See also* ILL. REV. STAT. ch. 121 1/2, para. 137.57.E (Smith-Hurd 1979), *repealed by* P.A. 83-65, § 1, eff. Sept. 14, 1983 (allowing Secretary of State of Illinois to halt tender offers). *But see* CRTF Corp. v. Federated Dep't Stores, 679 F. Supp. 731, 732-34 (S.D. Ohio 1988) (Ohio provision mandating public disclosure of takeover bid twenty days before bid becomes effective did not violate commerce clause). In *CRTF Corp. v. Federated Department Stores* the United States District Court for the Southern District of Ohio considered whether the timing provisions of the Ohio takeover legislation conflicted with the Williams Act and thus were invalid. *Id.* at 734. The *CRTF* court reasoned that no per se restriction on state takeover statues exists. *Id.* at 734. Noting that a decision declaring the Ohio statute unconstitutional would invalidate the statute, the *CRTF* court instead chose to defer to the legislature's passage of the provisions. *Id.* at 735; *see also* OHIO REV. CODE ANN. § 1707.041 (Baldwin 1987) (providing for precommencement public disclosure).

33. *MITE*, 457 U.S. at 633-34.

34. *MITE*, 457 U.S. at 639; *see* Pipe v. Chris-Craft Indus. Inc., 430 U.S. 1, 26-37 (1976) (discussing legislative history of Williams Act, which indicates that Congress enacted Williams Act to provide full and fair tender offer disclosure for benefit of shareholders).

of State for Illinois to decide initially the substantive fairness of a tender offer before the shareholders could make that determination.[35]

In addition to contrasting the provisions of the Illinois Act with the provisions of the Williams Act, the Supreme Court in *MITE* considered whether the Illinois Act unconstitutionally burdened interstate commerce.[36] The Court recognized that the Illinois Act had a broad jurisdictional reach since target corporations incorporated outside of Illinois and subject to the takeover laws of other states potentially could be subject to the Illinois Act.[37] The *MITE* Court reasoned that the Illinois Act was unconstitutional since the Illinois Act indirectly regulated interstate commerce, including commerce that was entirely outside Illinois.[38] Since the Illinois Act purportedly gave Illinois the power to determine whether a tender offer could proceed outside the state as long as the target corporation had a substantial connection to Illinois, the Court held that the Illinois Act unconstitutionally burdened interstate commerce.[39] Furthermore, the Court adopted a balancing test to show that the burden the Illinois Act imposed on interstate commerce was excessive in light of the local interests the Illinois Act furthered.[40] The Court concluded that Illinois could have no interest in regulating the internal affairs of foreign corporations operating within Illinois' borders.[41]

35. *MITE*, 457 U.S. at 639-40.

36. *Id.* at 640-46.

37. *Id.* at 641-42. Under the terms of the Illinois Act, every tender offer for a corporation that had its principal executive offices in Illinois, its incorporation in Illinois, or at least ten percent of its stated capital and paid-in surplus in Illinois was subject to the provisions of the Act. *Id.* at 642; *see* ILL. REV. STAT. ch. 121 1/2, para. 137.52-10(2) (Smith-Hurd 1979), *repealed by* P.A. 83,65, § 1, eff. Sept. 14, 1983 (establishing qualifications that target corporations had to have to become subject to provisions of Illinois Act).

38. *Id.* at 641-42. The Supreme Court in *MITE* recognized that, although the commerce clause of the United States Constitution permits incidental regulation of interstate commerce between states, the commerce clause prohibits direct regulation of interstate commerce. *Id.* at 640; *see also* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (court must uphold state statute that consistently affects interstate commerce incidently unless burden imposed on interstate commerce is clearly excessive when weighed against benefits to state); Shafer v. Farmer's Grain Co., 268 U.S. 189, 199 (1925) (interference with interstate commerce by legitimate state statute can be only incidental). The Court in *MITE* determined that the Illinois Act directly regulated and potentially blocked interstate tender offers that could generate interstate transactions. *MITE*, 457 U.S. at 640. The Supreme Court concluded that the Illinois Act imposed an excessive burden on interstate commerce in light of the local interests that the Act protected. *Id.* at 640, 643-46.

39. *MITE*, 457 U.S. at 643-46. The *MITE* Court conceded that Illinois had a legitimate state objective in protecting local shareholders. *Id.* at 644. The Court, however, determined that Illinois had no legitimate interest in protecting nonresident shareholders. *Id.* at 645-46.

40. *Id.* at 640.

41. *Id.* at 645-46. In rejecting the state's assertion that states traditionally can regulate the internal affairs of domestic corporations, the Court in *MITE* asserted only that tender offers are not representative of classic corporate internal affairs since tender offers only involve transfers of stock by shareholders to third parties and do not implicate directly the internal affairs of the target corporation. *Id.* at 645; *see* Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1280 n.53 (5th Cir. 1978) (tender offers do not involve internal operations justifying state involvement in target corporation).

By striking down the Illinois Act, the *MITE* decision also effectively invalidated the takeover laws of thirty-six other states.[42] Following the *MITE* decision, federal and state courts consistently struck down all state attempts at regulating tender offers.[43] States, however, sought to restructure their takeover laws after the *MITE* decision,[44] and, consequently, the Supreme Court again reviewed the constitutionality of tender offer legislation five years after *MITE* in *CTS Corp. v. Dynamics Corp. of America*.[45]

The CTS Decision

In *CTS* the Supreme Court analyzed the Indiana Control Share Acquisitions Act (Indiana Act) to see if the Indiana Act conflicted with the Williams Act or unconstitutionally burdened interstate commerce.[46] The essence of the Indiana Act is that an Indiana-based target corporation's shareholders have authority to grant the voting rights of controlling shares of the target corporations's stock that are acquired by the tender offeror.[47] Under the terms of the Indiana Act, a control share acquisition is an acquisition of stock by any tender offeror that would place the tender offeror in control of one-fifth, one-third, or a majority of the voting power of the target corporation's stock.[48] Under the Indiana Act, however, shares acquired causing the tender offeror to own each of these percentages

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42. *See* S. Pamepinto, *supra* note 7, at 13 (*MITE* effectively invalidated every state takeover statute existing in 1982).

43. *See supra* note 15 and accompanying text (discussing state and federal court decisions that struck down state takeover legislation after *MITE*).

44. *See* Ohio Rev. Code Ann. § 1701.831 (Baldwin 1986 & Supp. 1987), § 1701.832 (Baldwin 1986) (containing Ohio's control share acquisitions statute). Ohio restructured its takeover law in the form of control share acquisition statute (Ohio Act) less than six months after the Supreme court's decision in *MITE*. Ohio Rev. Code Ann. § 1701.831 (Baldwin 1986 & Supp. 1987); S. Pamepinto, *supra* note 7, at 13. The Ohio Act's provisions apply only to corporations incorporated in Ohio that had fifty or more shareholders, a principal place of business, principal executive offices, or substantial assets within Ohio. Ohio Rev. Code Ann. § 1701.831 (Baldwin 1986 & Supp. 1987); *see* S. Pamepinto, *supra* note 7, at 13 (Ohio legislature tailored Ohio Act to overcome *MITE* Court's objections to Illinois Act). In addition, the Ohio Act does not allow the state to intervene in any tender offers that might occur wholly outside of Ohio. Ohio Rev. Code Ann. § 1701.831 (Baldwin 1986 & Supp. 1987). The Ohio Act also requires shareholders to approve any proposed tender offer before the tender offeror can acquire any shares of the target corporation. Ohio Rev. Code Ann. § 1701.831 (Baldwin 1986 & Supp. 1987); *see* S. Pamepinto, *supra* note 7, at 13-14 (discussing shareholder involvement in tender offer under Ohio Act, per mandate of *MITE* Court); *see also infra* notes 99, 115 and accompanying text (discussing provisions of Ohio Act).

45. *See* CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637 (1987) (scrutinizing state takeover legislation); *infra* notes 46-90 and accompanying text (discussing Supreme Court's constitutional analysis in *CTS Corp*).

46. CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637, 1644, 1648 (1987).

47. *CTS*, 107 S. Ct. at 1641-42. *See* Ind. Code Ann. §§ 23-1-42-1 to 23-1-42-9(a) (Burns Supp. 1988) (defining Indiana Act's control share acquisition feature that allows shareholders to give voting rights to tender offeror's shares of stock).

48. Ind. Code Ann. § 23-1-42-1 (Burns Supp. 1988); *see CTS*, 107 S. Ct. at 1641 (discussing practical effect of control share mechanism in takeover statutes).

of stock only receive voting rights in the target corporation if shareholders voting a majority of the disinterested shares in the target corporation authorize the voting rights.[49] The Indiana Act requires that the tender offeror file a disclosure statement with the target corporation before such a shareholder vote is held.[50] The disclosure statement, the Indiana Act sets forth, must include information regarding the tender offeror's identity, the number of shares in the target corporation that the tender offeror owns or seeks to own, and the percentage of stock ownership that the acquisition would give or has given the tender offeror.[51] After receiving the tender offeror's disclosure statement, the Indiana Act further provides that the target corporation management must hold a special shareholders' meeting, at the tender offeror's request and expense, within fifty days after receiving the statement, to consider whether the tender offeror will have voting rights in the target corporation.[52] If the shareholder vote denies the tender offeror voting rights or the tender offeror does not file a disclosure statement within sixty days after the last acquisition of control shares, the target corporation may redeem the tender offeror's shares at a market price that the corporation determines is fair.[53]

The *CTS* Court first considered whether the provisions of the Williams Act preempted the Indiana Act's procedural requirements.[54] In *MITE* a plurality of the Supreme Court suggested that the overall goal of the Williams Act is to maintain equality between the target corporation's management, the tender offeror, and the target corporation's shareholders during the course of a tender offer.[55] The *CTS* Court, however, concluded only that the overriding concern to the *MITE* Court plurality was that the

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49. IND. CODE ANN. § 23-1-42-9 (Burns Supp. 1988); *see CTS*, 107 S. Ct. at 1641 (practical effect of granting voting rights to tender offeror only through shareholder vote is to condition acquisition of corporation on approval of majority of preexisting disinterested shareholders).

50. IND. CODE ANN. § 23-1-42-6 (Burns Supp. 1988).

51. *Id.*

52. IND. CODE ANN. § 23-1-42-7 (Burns Supp. 1988); *see CTS*, 107 S. Ct. at 1641-42 (noting effect of notice filing requirements and subsequent special shareholder meeting in shareholders' consideration of tender offeror's voting rights).

53. IND. CODE ANN. § 23-1-42-10 (Burns Supp. 1988).

54. *CTS*, 107 S. Ct. at 1644-48. In questioning whether the Indiana Act's procedural requirements conflict with the requirements of the Williams Act, the Court in *CTS* recognized that the Williams Act imposes two basic requirements on a tender offeror. *Id.* at 1644. The Court recognized that, first, the Williams Act requires the tender offeror to file a statement disclosing information about the offer. *Id.; see* Williams Act, 15 U.S.C. § 78n(d)(l) (1982) (establishing federal law disclosure requirements in tender offers); 17 C.F.R. §§ 240.13d-l, 240.14d-3 (1986) (providing requirements of disclosure statement under federal law). The *CTS* Court recognized that, second, the Williams Act and the regulations that govern the Williams Act establish procedural rules to govern tender offers. *CTS*, 107 S. Ct. at 1644; *see* Williams Act, 15 U.S.C. §§ 78n(d)(5)-(7) (1982) (establishing federal procedural rules governing tender offers); 17 C.F.R. §§ 240.14d-7(a)(l) (1986) (containing procedural requirements of tender offers).

55. *See supra* notes 31-34 and accompanying text (discussing *MITE* Court plurality's suggestion that goal of Williams Act is to place shareholders, target corporation management, and tender offeror on equal footing).

Illinois Act favored the target corporation's management against tender offerors, to the detriment of shareholders in violation of the Williams Act's mandate of neutrality between the shareholders, the tender offeror, and the target corporation's management.[56] The *CTS* Court noted that the Williams Act imposes two basic requirements on tender offerors.[57] The Court observed that, first, the Williams Act requires the tender offeror to file a statement with the Securities and Exchange Commission (SEC) disclosing information about the offer.[58] The Court recognized that the information on the SEC disclosure statement must include the tender offeror's background and identity, the source and amount of funds that the offeror will use in the purchase, the purpose of the purchase, and the extent of the offeror's holdings in the target corporation.[59] The *CTS* Court paralleled the disclosure requirements of the Indiana Act to the disclosure information that the Williams Act necessitates.[60] The Court stated that, second, the Williams Act imposes certain procedural rules to govern tender offers, including the length of time that a tender offer must remain open to shareholders.[61] The Court also recognized that the Williams Act requires that tender offers remain open for sixty days after the tender offeror makes the offer to the target corporation's shareholders.[62] The *CTS* Court determined that under the terms of the Indiana Act a bidder could receive full voting rights of a target corporation's stock within fifty days of the initial tender offer made by the bidder.[63] Additionally, the Court suggested that the *MITE* Court did not suggest that all delays that state regulation

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56. *CTS*, 107 S. Ct. at 1645. *See MITE*, 457 U.S. at 632-39 (plurality of Court concludes that purpose of Williams Act is to maintain neutrality and balance between shareholders, tender offerors, and target corporation management).

57. *CTS*, 107 S. Ct. at 1644; Williams Act, 15 U.S.C. § 78m(d) (1982); *see supra* note 6 and accompanying text (discussing requirements of Williams Act on tender offers); The *CTS* Court's focus on the Williams Act was critical to the constitutionality of the Indiana Act since the Williams Act would have preempted the Indiana Act if compliance with both the Williams Act and the Indiana Act had been impossible. *Id.; see* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (if state law makes execution of federal legislation impossible, federal law preempts state law).

58. *CTS*, 107 S. Ct. at 1644; Williams Act, 15 U.S.C. § 78m(d) (1982); *see supra* note 6 and accompanying text (discussing disclosure requirements of Williams Act on tender offerors).

59. *CTS*, 107 S. Ct. at 1644; Williams Act, 15 U.S.C. § 78m(d) (1982); *see supra* note 6 and accompanying text (discussing specific details that Williams Act disclosure requirement includes).

60. IND. CODE ANN. §§ 23-1-42-6, 23-1-42-7; *see CTS*, 107 S. Ct. at 1646-48 (recognizing that disclosure regulatory provisions Indiana Act places on tender offers consistent with text and purposes of Williams Act).

61. *CTS*, 107 S. Ct. at 1644; Williams Act, 15 U.S.C. § 78n(d)(5) (1982); *see supra* note 6 and accompanying text (discussing procedural rules set forth by the Williams Act to govern tender offers).

62. *CTS*, 107 S. Ct. at 1647; Williams Act, 15 U.S.C. § 78n(d)(5) (1982).

63. *CTS*, 107 S. Ct. at 1647; *see* IND. CODE ANN. § 23-1-42-7 (Burns Supp. 1988) (target corporation management must hold shareholder meeting to vote control share voting rights within fifty days of tender offeror's request of management).

of tender offers might cause necessarily conflict with the Williams Act.[64] The *CTS* Court determined that only unreasonable delays in the tender offer process are prohibited.[65] The Supreme Court in *CTS* recognized that, if potential time delays concerned a tender offeror, the tender offeror could make a conditional tender offer, offering to accept shares of a target corporation on the condition that the shares receive voting rights within a certain amount of time.[66] The *CTS* Court determined that time delays in tender offers that are not unreasonable are constitutionally valid since other state corporate laws already have the practical effect of limiting or delaying a successful tender offer.[67] If Congress intended to preempt all state laws that delay the acquisition of voting control following a tender offer, the Court concluded, then Congress would have done so explicitly.[68]

Aside from recognizing that the Williams Act places specific disclosure requirements on a tender offeror, the *CTS* Court focused on the fact that the Indiana Act protected independent shareholders against both the tender offeror and the target corporation's management by allowing the shareholders to vote as a group.[69] The Court determined that statutes like the Indiana Act that protect independent shareholders against potentially coercive tender offers also serve to further a basic purpose of the Williams Act, which is to place shareholders on equal footing with tender offerors.[70]

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64. *CTS*, 107 S. Ct. at 1647; *see* Edgar v. MITE Corp., 457 U.S. 624, 639 (1982) (recognizing that shareholders and the tender offeror must be able to deal with one another without unreasonable delay). In scrutinizing the plurality's approach in *MITE*, the *CTS* Court concluded that the bidder should be able to launch a tender offer without unreasonable delay. *CTS*, 107 S. Ct. at 1647.

65. *CTS*, 107 S. Ct. at 1647.

66. *CTS*, 107 S. Ct. at 1647. The *CTS* Court determined that the Williams Act permits a bidder to condition a tender offer on SEC approval and then subsequent shareholder approval. *Id.; see* MacFadden Holdings, Inc. v. JB Acquisition Corp., 802 F.2d 62, 70 (2d Cir. 1986) (bidder can condition tender offer to protect own interests if voting rights approval never vest in bidder).

67. *CTS*, 107 S. Ct. at 1647. The Supreme Court in *CTS* determined that the Williams Act, if read to preempt any state statute that effectively limits or delays a bidder's free exercise of power after the bidder's successful tender offer, would preempt many existing state corporate laws. *Id.* For example, some state corporate laws permit corporations to stagger the terms of the corporate directors and thus ensure that only a limited number of directors will be approved by shareholders each year. *Id.* at 1647-48. The *CTS* Court concluded that, by staggering the terms of directors, corporations may delay the time at which a successful offerer gains control of the board of directors by having annual elections for only one class of directors each year. *Id.* at 1648. In addition, the Court reasoned that cumulative voting provisions further can delay the ability of takeover bidders to gain control of target corporations. *Id.* The Court concluded that if Congress, in passing the Williams Act, had intended to preempt all state laws that delay the acquisition of voting control following a tender offer, then Congress would have explicitly done so. *Id.*

68. *Id.*

69. *Id.* at 1646. *But see* Edgar v. MITE Corp., 457 U.S. 624, 632-34 (1982) (plurality maintains that Williams Act protects shareholders, but key mandate of Williams Act is neutrality between target corporation management, shareholders, and tender offeror, not shareholder protection).

70. *Compare CTS*, 107 S. Ct. at 1645-46 *with supra* notes 31-34, 55, 56, 69 and

The *CTS* Court found that the Indiana Act allows shareholders, voting as a group, to decide whether the tender offeror gets voting rights in the target corporation.[71]

The Supreme Court determined that the shareholders' ability to act as a group in the corporation's best interests in deciding whether to accept or reject a takeover bid was essential to furthering the Williams Act's goal of giving equal communicative power to the target corporation's management and the tender offeror.[72] The Court determined that a key factor in matching the goals of the Williams Act to the provisions of the Indiana Act is that the Indiana Act, by giving neither the target corporation's management nor the tender offeror an advantage over the other in communicating with shareholders regarding an impending offer, allows shareholders to receive full information from both sides before deciding whether to sell stock in the target corporation.[73] Additionally, the *CTS* Court concluded that the Williams Act could not preempt the Indiana Act since the Indiana Act allowed shareholders to vote as a group and thus, the Indiana Act protects the shareholders from potentially coercive tender offers.[74]

After determining that the Williams Act did not preempt the Indiana Act, the Supreme Court in *CTS* considered whether the Indiana Act violated the commerce clause in article I of the United States Constitution.[75] Specifically, the Court scrutinized the Indiana Act to see if the Act discriminated against interstate commerce or adversely affected interstate commerce by subjecting out-of-state corporations to regulations potentially inconsistent with other state regulations.[76] Under the terms of the Indiana Act, a target corporation, to fall within the coverage of the Indiana Act, must meet several requirements.[77] The target corporation must be incor-

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accompanying text (*MITE* Court plurality focuses on neutrality between target corporation management, shareholders, and tender offeror, while *CTS* Court relies on shareholder protection to carry forth Williams Act goals).

71. *CTS*, 107 S. Ct. at 1646; *see* IND. CODE ANN. § 23-1-42-9 (Burns Supp. 1988) (shareholders acting as group can reject offer although individual shareholders might be inclined to accept tender offer).

72. *Compare CTS*, 107 S. Ct. at 1646 *with supra* notes 31-34, 55, 56, 69 and accompanying text (*MITE* Court plurality focuses on neutrality between target corporation management, shareholders, and tender offeror while *CTS* Court relies on shareholder protection to carry forth Williams Act goals).

73. *Id.; see* Piper v. Chris-Craft Indus., 430 U.S. 1, 31-35 (1977) (purpose of Williams Act is to protect shareholders confronted with tender offer, and to prohibit target corporation management or tender offeror from gaining advantage in communicating with shareholders).

74. *CTS*, 107 S. Ct. at 1646-48.

75. *CTS*, 107 S. Ct. at 1648, *see* U.S. CONST. art. I, § 8, cl. 3 (prohibiting states from interfering with interstate commerce and giving Congress full power to regulate commerce between states).

76. *CTS*, 107 S. Ct. at 1648-52; *see* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36-37 (1980) (legitimate state statute that burdens interstate commerce also must confer potential benefits on local interests).

77. *See infra* notes 78-81 and accompanying text (discussing qualifications that target corporation must have for Indiana Act to apply to corporation).

porated in Indiana[78] and have at least one hundred shareholders.[79] Additionally, the target corporation must have its principal place of business, its principal offices, or some substantial assets in Indiana.[80] Finally, more than ten percent of the target corporation's shareholders must reside in Indiana, Indiana residents must own more than ten percent of its shares, or at least ten thousand of the target corporation's shareholders must reside in Indiana.[81] In scrutinizing the Indiana Act's potential burden on interstate commerce, the Court recognized that every state has enacted laws regulating corporate activities.[82] The Court determined that since the Indiana Act applied not only to shareholders in Indiana but also in other states, the Indiana Act impacted upon interstate commerce.[83] The Court maintained, however, that the Indiana Act did not discriminate against interstate commerce since nonresident shareholders received the same status in relation to the target corporation's management and the tender offeror that the resident shareholders received.[84] Additionally, the Court in *CTS* recognized that Indiana has a legitimate state interest in regulating internal corporate affairs of corporations that the state of Indiana charters.[85] While the Court recognized that a state has no interest in protecting nonresident shareholders of foreign corporations,[86] the Court asserted that, since the Indiana Act only pertains to corporations that are incorporated in Indiana and that have substantial ties to Indiana, the Indiana Act's primary purpose is to protect the shareholders of Indiana corporations.[87] The Court determined that the Indiana Act would not hinder tender offers in Indiana since the control share provisions in the Indiana Act that regulate voting

78. IND. CODE ANN. §§ 23-1-17-3, 23-1-20-5 (Burns Supp. 1988) (Indiana Act only applies to corporations incorporated in Indiana).

79. IND. CODE ANN. § 23-1-42-4 (Burns Supp. 1988) (corporation subject to provisions of Act must have at least one hundred shareholders).

80. IND. CODE ANN. § 23-1-42-4 (Burns Supp. 1988) (corporation subject to provisions of Act must have substantial ties to Indiana).

81. IND. CODE ANN. § 23-1-42-4 (Burns Supp. 1988) (substantial number of shareholders owning stock in target corporation must reside in Indiana for target corporation to become subject to Act).

82. *CTS*, 107 S. Ct. at 1649-51.

83. *Id.* at 1649-52. While the Supreme Court in *CTS* recognized that the Indiana Act necessarily impacts upon both Indiana resident shareholders and nonresident shareholders, the Court recognized that each application of the Indiana Act would affect a substantial number of Indiana residents. *Id.* at 1652; *see supra* notes 78-81 and accompanying text (discussing corporations subject to provisions of Indiana Act). The *CTS* Court concluded that because the Indiana Act focuses primarily on Indiana corporations, shareholders, and residents, Indiana has a legitimate interest in protecting those Indiana constituents. *CTS*, 107 S. Ct. at 1652.

84. *CTS*, 107 S. Ct. at 1649.

85. *Id.; see supra* note 83 and accompanying text (discussing Court's recognition in *CTS* that each state has right to regulate internal corporate affairs of domestic corporations).

86. *CTS*, 107 S. Ct. at 1651; *see* Edgar v. MITE Corp., 457 U.S. 624, 642-44 (1982) (although state has legitimate interest in protecting local resident shareholders, state has no interest in protecting nonresident shareholders).

87. *CTS*, 107 S. Ct. at 1651.

rights only attempt to protect shareholders.[88] The Court in *CTS* asserted that Indiana only needed to provide that residents and nonresidents have equal access to Indiana corporation securities and receive equal treatment in tender offers.[89] Finally, the Supreme Court in *CTS* concluded that no significant detriment exists to interstate commerce if each state regulates voting rights only in the businesses incorporated in that state.[90]

Prior to the Supreme Court's decision in *CTS*, state and federal courts consistently struck down as unconstitutional state regulation of takeover attempts.[91] The *CTS* decision, however, legitimizes state involvement in tender offer regulation, at least to the extent that a state statute is similar to the Indiana Act.[92] The *CTS* decision increases the likelihood that second generation state tender offer legislation, as well as new state takeover legislation formulated as corporate governance statutes,[93] passed after the *CTS* decision, may be found constitutional.[94] To be constitutional under

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88. *Id.* at 1652.

89. *Id.* In *CTS* the Court reasoned that since corporations themselves are created and defined by state law, states do not have to define tender offers as other states define tender offers. *Id.* Under a commerce clause analysis, the court concluded, a state need only provide equal access to its corporations to all potential shareholders. *Id.*

90. *Id.* at 1649.

91. *See supra* notes 13-15 and accompanying text (discussing uniform state and federal court rejection of state takeover statutes after *MITE*).

92. *CTS*, 107 S. Ct. at 1652; *see supra* notes 46-90 and accompanying text (discussing *CTS* Court's review and approval of Indiana Act under Williams Act preemption inquiry and commerce clause analysis).

93. *See infra* notes 99-123 and accompanying text (discussing state statutes drafted and enacted after Supreme Court's approval of Indiana Act in *CTS*), *supra* note 21 and accompanying text (discussing state business combination statutes).

94. *See* S. PAMEPINTO, *supra* note 7, at 42 (discussing state statutes that lower federal courts invalidated after *MITE*, but that may be valid under *CTS* rationale); *supra* notes 13-15 and accompanying text (discussing judicial disapproval of second generation legislation based upon Supreme Court's reasoning in *MITE*). In *Terry v. Yamashita*, for example, the United States District Court for the District of Hawaii invalidated Hawaii's second generation control share acquisitions statute before the Supreme court in *CTS* determined that the Indiana Act was valid. Terry v. Yamashita, 643 F. Supp. 161, 165 (D. Haw. 1986); *see infra* note 99 and accompanying text (discussing Hawaii's control share legislation). The Hawaii legislature, however, repealed the control share provision in Hawaii's statute prior to the Supreme Court's decision in *CTS*. HAW. REV. STAT. § 416-171 (1985), *repealed by* L. 1987, c. 135, § 208; *infra* note 99 and accompanying text (discussing specifics of Hawaii control share provisions prior to repeal by legislature).

Like Hawaii's control share statute, Ohio's control share legislation was invalidated prior to the Supreme Court's decision in *CTS*. Fleet Aerospace Corp. v. Holderman, 637 F. Supp. 742, 754-56 (S.D. Ohio), *aff'd* 796 F.2d 135 (6th Cir. 1986), *vacated*, 107 S. Ct. 1623 (1987). Six days after deciding *CTS*, the Supreme Court vacated the Sixth Circuit's ruling invalidating the Ohio control share statute and ordered the Sixth Circuit court to reconsider the control share provision in light of *CTS*. Fleet Aerospace Corp. v. Holderman, 107 S. Ct. 1623 (1987). On remand the Sixth Circuit expressed no opinion regarding the constitutionality of the Ohio control share statute and remanded the dispute to the district court for the determination of whether the constitutionality question had been mooted by completion of the merger between the parties. Fleet Aerospace Corp. v. Holderman, 848 F.2d 720, 723-24 (6th Cir. 1988). *See supra* note 13 and accompanying text (discussing Sixth Circuit's invalidation of Ohio control share provision prior to Supreme

the rationale of *MITE* and *CTS*, however, state takeover legislation must apply only to corporations in the regulating state.[95] In addition, the *CTS* decision allows only shareholders, not state agencies and possibly not target corporation management, to rule ultimately on the merits of a tender offer.[96] Furthermore, under the rationale of *MITE* and *CTS*, a state cannot allow a target corporation indefinitely to delay a tender offer's completion.[97] Finally, under *CTS* the objective of valid state tender offer legislation must be to protect shareholders and must not favor either the target corporation's management or a tender offeror.[98]

Control Share Statutes

Since the Supreme Court in *CTS* concluded that the Indiana Act was constitutional, many states have adopted control share statutes that are nearly identical to the Indiana Act in that the control share provisions allow a target corporation's shareholders to grant the voting rights of controlling shares of the target corporation's stock to a tender offeror who acquires those shares.[99] Not all states, however, have adopted the

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Court's decision in *CTS*); *supra* note 32 and accompanying text (discussing *CRTF Corp. v. Federated Dep't Stores*, in which the Federal District Court for the Southern District of Ohio found constitutional Ohio provision calling for public disclosure prior to commencement of tender offer), *infra* note 115 and accompanying text (discussing validity of Ohio Act in light of *Veere, Inc. v. Firestone Tire & Rubber Co.*).

95. *CTS*, 107 S. Ct. at 1651; *see also* IND. CODE ANN. §§ 23-1-17-3, 23-1-20-5, 23-1-42-4 (Burns Supp. 1988) (Indiana Act only applies to corporations incorporated under Indiana Law).

96. *CTS*, 107 S. Ct. at 1646; *see also* IND. CODE ANN. § 23-1-42-9 (Burns Supp. 1988) (providing that only vote of shareholders can grant control share voting rights to acquiring party). *See* notes 68-72 and accompanying text (indicating that target corporation management may have authority to judge merits of tender offer if shareholder protection is key to Williams Act).

97. *CTS*, 107 S. Ct. at 1646. *See generally supra* note 6 and accompanying text (describing Williams Act's general time requirements in tender offer process).

98. *Id. But see supra* notes 31-34, 55, 56, 59 and accompanying text (discussing *MITE* Court's plurality's recognition that Williams Act only mandates neutrality between shareholders, target corporation management, and tender offeror).

99. *See*:

HAWAII

Hawaii's control share statute (the Hawaii Act), repealed in 1987, was nearly identical to the Indiana Act. *See supra* notes 46-88 and accompanying text (discussing provisions of Indiana Act). Like the Indiana Act, the Hawaii Act applied to all target corporations that had at least one hundred shareholders and were incorporated in Hawaii. HAW. REV. STAT. § 416-171 (1985), *repealed by* L. 1987, c. 135, § 208. The target corporation also had to have either its principal place of business in Hawaii or substantial assets located in Hawaii to have been subject to the provisions of the Hawaii Act. *Id.* In addition, the control share ownership levels requiring majority shareholder approval of voting rights were ten percent, twenty percent, forty percent, and a majority of the outstanding shares. HAW. REV. CODE § 416-172 (1985), *repealed by* L. 1987, c. 135, § 208. The disclosure statement under the Hawaii Act required more information than the Indiana Act requires. *Id.; see supra* notes 50-51 and accompanying text (discussing requirements of Indiana disclosure statement). Furthermore, the special shareholder meeting, demanded by the tender offeror, called in order for the shareholders to vote on whether to confer control share voting rights upon the tender offeror, had to occur within fifty-five days after the target corporation's management received the information statement. HAW. REV. CODE § 416-172(1985), *repealed by* L. 1987, c. 135, § 208; *see supra* note 92 and accompanying text (discussing District

exact language of the Indiana Act.[100] Numerous states, although utilizing control share provisions, have modified the Indiana Act to include shareholder notice provisions that are more rigorous than the Indiana Act's notice provisions.[101] For example, after the *CTS* decision, the Arizona

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Court for District of Hawaii's invalidation of Hawaii Act prior to repeal of Act by Hawaii legislature and Supreme Court's decision in *CTS*).

LOUISIANA

In 1987 Louisiana enacted a state takeover statute that is substantially similar to the Indiana Act. LA. REV. STAT. ANN. §§ 12:135-:140.2 (West 1988); *see supra* notes 46-90 and accompanying text (discussing Indiana Act provisions).

OHIO

Ohio was the first state to try to tailor its control share acquisition statute to meet the concerns of the Supreme Court in *MITE. See* S. PAMEPINTO, *supra* note 7, at 13-15 (discussing Ohio's leading role in responding to *MITE* in enacting takeover legislation); OHIO REV. CODE ANN. § 1701.831 (Baldwin 1986 & Supp. 1987), § 1701.832 (Baldwin 1986) (containing provisions of Ohio control share statute); *supra* notes 25-40 and accompanying text (discussing Court's decision in *MITE*). Ohio passed its takeover statute (Ohio Act) six months after the Supreme Court's decision in *MITE.* OHIO REV. CODE § 1701.831 (Baldwin 1986 & Supp. 1987), § 1701.832 (Baldwin 1986). The Indiana legislature closely followed the provisions of the Ohio model four years later in drafting the Indiana Act. *See supra* notes 46-88 and accompanying text (discussing provisions of Indiana Act); *infra* note 113 and accompanying text (discussing districtcourt's analysis in *Veere, Inc. v. Firestone Tire & Rubber Co.*, comparing Indiana Act's provisions with provisions of Ohio Act). To become subject to the terms of the Ohio Act, a target corporation must be incorporated in Ohio, must have fifty or more shareholders, and must have its principal place of business, principal executive officer, or substantial assets within Ohio. OHIO REV. CODE ANN. § 1701.831 (Baldwin 1986 & Supp. 1987). The only significant, yet important, difference between the Ohio Act and the Indiana Act is that, under the Ohio Act, a majority of shareholders and a majority of disinterested shareholders must approve the tender offeror's purchase of the control shares instead of, as under the Indiana Act, approve granting the bidder voting rights with those shares. *Id.; see supra* notes 48-52 and accompanying text (discussing Indiana Act's meeting requirements and manner in which shareholders convey voting rights upon acquiring party); *see also supra* notes 13, 32, 94, 115 and accompanying text (discussing judicial activity, both prior to and subsequent to *CTS*, regarding Ohio's control shares legislation); *supra* notes 32, 94 and accompanying text (discussing validity, as determined by District Court for Southern District of Ohio, of Ohio provision mandating public disclosure of tender offer prior to commencement of tender offer).

OREGON

Oregon's version of the Indiana Act became effective on August 1, 1987. OR. REV. STAT. § 60.131, 60.787 (1987). Under the Oregon takeover statute (Oregon Act) only corporations incorporated within Oregon that have at least one hundred shareholders and that consider Oregon as their principal place of business qualify for protection. *Id.* Unlike the Indiana Act, however, the Oregon Act has a sunset provision under which the Oregon Act will expire on December 31, 1989. *Id.*

UTAH

Utah's Control Shares Acquisitions Act (Utah Act) became effective on May 29, 1987. UTAH CODE ANN. §§ 61-6-1 to -12 (Supp. 1988). The provisions of the Utah Act are substantially similar to the Indiana Act. *Id.; see supra* notes 46-90 and accompanying text (discussing Indiana Act's provisions).

100. *See infra* notes 101-123 and accompanying text (discussing control share acquisition statutes with provisions that differ significantly from Indiana Act).

101. *See*:

ARIZONA

state legislature enacted a control share provision (Arizona Act) that

On July 22, 1987, Arizona amended its corporate laws to include a control share acquisitions provision. ARIZ. REV. STAT. ANN. §§ 10-1211 to -1217 (Supp. 1987). Although Arizona's control share acquisitions statute contains most of the disclosure requirements of the Indiana Act, the Arizona statute also contains several additional requirements. ARIZ. REV. STAT. ANN. §§ 10-1211 to -1217 (Supp. 1987); *see infra* notes 102-106 and accompanying text (discussing Arizona's additional notice requirements that go beyond requirements of the Indiana Act), *infra* note 115 and accompanying text (discussing Arizona's attempt to include foreign corporations within its control share provisions).

MINNESOTA

Minnesota adopted a control share takeover statute (Minnesota Act) on June 25, 1987. MINN. STAT. ANN. §§ 302A.011, 302A.671 (West 1985 & Supp. 1988). While the Minnesota Act contains most of the disclosure requirements that the Indiana Act contains, the Minnesota Act also contains several additional disclosure standards. *Compare* MINN. STAT. ANN. § 302A.671 (West 1985 & Supp. 1988) (detailing information that offerer must include in information statement) *with* IND. CODE ANN. § 23-1-42-6 (Burns Supp. 1988) (detailing specific information that offerer must include in notice of control share acquisitions). The disclosure information statement that the Minnesota Act requires demands more information than the Indiana model, including, for example, financial arrangements and plans or proposals to sell assets of the target corporation, plans to change the location of a material portion of the target corporation's operations, and plans to make virtually any change in the target corporation's structure. MINN. STAT. ANN. § 302A.671 (West 1985 & Supp. 1988). For a corporation to qualify for protection under the Minnesota Act, a target corporation either must have at least fifty shareholders and have its principal executive office in Minnesota or must own or control assets in Minnesota that have a fair market value of at least one million dollars. MINN. STAT. ANN. § 302A.011 (West 1985 & Supp. 1988). Additionally, before the Minnesota Act will apply to regulate a tender offer, more than ten percent of the target corporation's shareholders must reside in Minnesota, Minnesota residents must own more than ten percent of its shares, or more than one thousand of the target corporation's shareholders must reside in Minnesota. *Id.* In addition to those provisions that are similar to Indiana Act provisions, the Minnesota Act also includes a provision concerning the tender offeror's financial arrangements for the proposed takeover. MINN. STAT. ANN. § 302A.671 (West 1985 & Supp. 1988). Prior to the special shareholder meeting, which must be called by the target corporation's management within fifty-five days of the management's receipt of the information statement, the tender offeror must submit financing agreements with financial institutions to show that the tender offeror has financial sources with which to initiate and complete the proposed purchase. *Id.*

MISSOURI

Missouri amended its control share acquisition provisions (Missouri Act) in 1987 to parallel the statute to the Indiana Act. MO. ANN. STAT. §§ 351.015-.407 (Vernon Supp. 1988); *see supra* notes 46-90 and accompanying text (discussing provisions of Indiana Act that Supreme Court specifically approved in *CTS*). The Missouri Act protects corporations incorporated under Missouri law that have their principal place of business, principal office, or substantial assets within Missouri. MO. ANN. STAT. § 351.015 (Vernon Supp. 1988). For a Missouri corporation to qualify under the Missouri Act, more than ten percent of the corporation's shareholders must reside in Missouri, Missouri residents must own more than ten percent of its shares, or at least ten thousand shareholders of the corporation must reside in Missouri. *Id.* The disclosure statement that tender offeror of a target corporation must prepare under the Missouri Act essentially mirrors the Indiana Act's disclosure requirements. MO. ANN. STAT. § 351.407 (Vernon Supp. 1988); *see* IND. CODE ANN. § 23-1-42-6 (Burns Supp. 1988) (setting forth details that Indiana Act's notice of control share acquisition requires). In contrast to the Indiana Act, however, the tender offerer must obtain an affirmative vote of at least two-thirds of all outstanding shares entitled to vote before the tender offerer can gain voting rights in the control shares acquired. MO. ANN. STAT. § 351.407 (Vernon 1987); *see* IND. CODE ANN. § 23-1-42-9 (Burns Supp. 1988) (requiring majority vote of disinterested shareholders to approve control share acquisition). The Missouri Act also gives

embodies the basic requirements of the Indiana Act.[102] Unlike the Indiana Act, however, the Arizona Act requires a tender offeror to include the specific financial arrangements of the tender offer in the tender offeror's notice to the target corporation and the corporation's shareholders.[103] The Arizona Act sets forth that the tender offeror must disclose plans or proposals to sell assets of the target corporation, plans to change the location of a material portion of the corporation, and plans to make changes in the target corporation's structure.[104] Under the Arizona Act, completion of the disclosure statement and tender offeror's request for a shareholder meeting is insufficient to call the shareholder meeting that may grant voting rights to the tender offeror's shares.[105] The tender offeror, in addition to the disclosure statement and request for a shareholder meeting, also must deliver to the target corporation definitive financing agreements with one or more financial institutions, indicating that the tender offeror will not sell the assets of the target corporation to help finance the tender offeror's acquisition of the shares.[106] Statutes like the

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extensive rights to a shareholder who dissents from a successful control share acquisition, including the right to demand that the corporation buy back the shareholder's shares at some fair price to be agreed upon by the parties. Mo. Stat. Ann. § 351.407 (Vernon Supp. 1988).

Nevada

Like the Indiana Act, the Nevada Takeover Act (Nevada Act) provides that a majority of a target corporation's shareholders must grant, by vote, the voting rights of shares acquired that give the tender offeror twenty percent, thirty-three percent, or fifty-one percent of the target corporation's shares. *See supra* notes 47-52 and accompanying text (discussing control share acquisition provision of Indiana Act); Nev. Rev. Stat. §§ 78.3785, 78.3791 (Mitchie 1987) (containing control share provisions of Nevada Act). The disclosure provisions of the Nevada Act are similar to the disclosure requirements of the Indiana Act. *Compare* Nev. Rev. Stat. §§ 78.376-78.3793 (Mitchie 1987) (containing provisions of Nevada Act) *with supra* notes 47-90 and accompanying text (discussing disclosure provisions of Indiana Act). Additionally, the Nevada Act only applies to offeree corporations, defined by the Nevada Act as corporations incorporated under Nevada law whose shares are the subject of a takeover bid. Nev. Rev. Stat. § 78.3765 (Mitchie 1987). In *Batus, Inc. v. McKey* the Federal District Court for the District of Nevada invalidated the Nevada Act by concluding that the Williams Act preempted the Nevada Act's requirement that shareholders only had sixty days to tender their shares to the offerer. Batus, Inc. v. McKey, 684 F. Supp. 637, 639-40 (D. Nev. 1988); *see supra* notes 6, 29, 34 and accompanying text (discussing Williams Act provisions and recognizing that goal of Williams Act is to allow shareholders alone to make investment decisions given mandated disclosure); *see also* 17 C.F.R. § 240.14d-7 (1988) (setting forth that there is no limit on how long offer may remain open to shareholders under Williams Act).

102. *Compare* Ariz. Rev. Stat. Ann. §§ 10-1211 to -1217 (Supp. 1987) (containing Arizona's control share provisions) *with supra* notes 47-90 and accompanying text (discussing provisions of Indiana Act).

103. Ariz. Rev. Stat. Ann. § 10-1214 (Supp. 1987). Under the terms of the Arizona control share legislation, the special shareholder meeting regarding the issuance of control share voting rights cannot proceed unless the tender offeror delivers to the target corporation definitive financing agreements with financial institutions regarding the proposed tender offer. *Id.*

104. Ariz. Rev. Stat. Ann. § 10-1212 (Supp. 1987).

105. Ariz. Rev. Stat. Ann. § 10-1214 (Supp. 1987).

106. *Id.; see supra* notes 103-04 and accompanying text (discussing financial reporting items that tender offeror must include in information statement).

Arizona Act, which add more rigorous shareholder notice requirements than the Indiana Act, will most likely be found to be constitutional despite difficulties under the *CTS* preemptive test.[107]

In the Supreme Court's Williams Act preemptive test analysis in *CTS* the court concluded that the primary purpose of the Williams Act is to protect shareholders from target corporation management and tender offerors.[108] Although notice requirements generally help protect shareholders from fraudulent or inadequate tender offer disclosure, state control share legislation notice requirements may be so extensive that the requirements actually operate to the shareholders' detriment.[109] If the increased notice requirements actually deter tender offers, or at least delay tender offers, that deterrent effect may outweigh the benefits accruing to shareholders from increased disclosure.[110] For example, the Williams Act requires that a tender offeror disclose the tender offeror's intent in purchasing shares whenever the tender offeror obtains more than five percent of a

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107. *See supra* note 6 and accompanying text (discussing Williams Act's notice requirements); *supra* note 85 and accompanying text (discussing *CTS* Court's recognition that state desire to protect shareholders may be consistent with intent of Williams Act).

108. CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637, 1645 (1987). *But see* Piper v. Chris-Craft Indus., 430 U.S. 1, 30 (1977) (basic purpose of Williams Act is to place shareholders on equal footing with bidder initiating tender offer); *supra* notes 31-34, 55, 56, 69 (discussing *MITE* Court plurality's recognition that Williams Act only mandates neutrality between shareholders, target corporation management, and tender offeror).

109. *See, e.g.*, Edgar v. MITE Corp., 457 U.S. 624, 634-640 (1982) (discussing William Act's preemption of Illinois takeover statute). In *MITE* the Illinois Act required a tender offeror to notify the Secretary of State of Illinois of its intent to make a tender offer and of the material terms of the offer twenty days before the offer became effective. *MITE*, 457 U.S. at 634-35; *see* ILL. REV. STAT. ch. 121 1/2, para. 137.54 E,B (Smith-Hurd 1979) (repealed) (requiring bidder to give advance notice of tender offer). The Supreme Court expressed concern that during the twenty-day advance period, the target corporation would be free to disseminate information to its shareholders concerning the impending tender offer. *MITE*, 457 U.S. at 635. The Court in *MITE* recognized that Congress, in enacting the Williams Act, specifically had rejected tender offer precommencement notification proposals that closely paralleled the notification requirements in the Illinois Act. *Id.* at 636; *see* H.R. 4285, 91st Cong., 2d Sess. (1970) (rejecting proposed lengthy period between notice to target corporation and target corporation's shareholders and commencement of tender offer). The Supreme Court in *MITE* cautioned that by allowing the target corporation additional time to take steps to combat a takeover offer, the notification requirement would provide a target corporation's management with an advantage over the tender offeror. *MITE*, 457 U.S. at 635. In addition, the Court in *MITE* expressed concern that provisions which allow a target corporation's management indefinitely to delay a tender offer beyond the period the Williams Act mandates would provide target corporation's management with an advantage over the tender offeror. *Id.* at 637; *supra* notes 31-34, 55, 56 and accompanying text (discussing *MITE* Court plurality's view that neither target corporation management nor tender offeror at advantage with each other); *see supra* notes 6, 99 and accompanying text (discussing time restraints on duration of tender offer under Williams Act).

110. *See* Edgar v. MITE Corp., 457 U.S. 624, 634-36 (1982) (discussing shareholders' right to pursue tender offer without unreasonable delay in light of Illinois Act's notification requirements that effectively delayed start of tender offer); H.R. 4285, 91st Cong., 2d Sess. (1970) (Congress rejects precommencement notification proposal during deliberation on 1970 amendments to Williams Act); *infra* note 115 and accompanying text (discussing Massachusetts Act's pre-tender offer notice requirement that First Circuit invalidated as interfering with Williams Act notice requirements).

corporation's shares.[111] At the five percent threshold point, Congress determined, shareholders benefitted from the information disclosed and, at the same time, the disclosure requirement did not deter bidders from making tender offers.[112] Courts must scrutinize the goals of the Williams Act in reviewing state control share statutes, like the Arizona Act, that provide shareholders with protection beyond the protection that the Indiana Act provides.[113] Even though states have an interest in protecting shareholders of their corporations, that protection must be consistent with the provisions of Williams Act.[114]

While some states have modified the notice provisions mandated by the Williams Act, other states have adopted control share statutes that differ from the Indiana Act by including foreign corporations operating in the states within the control share provisions.[115] For example, North

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111. Williams Act, 15 U.S.C. § 78m(d) (1982).

112. *See* Edgar v. MITE Corp., 457 U.S. 624, 634-36 (1982) (finding legislative intent that specific notice requirement at five percent ownership level represents point at which notification does not deter tender offers, yet provides shareholders with sufficient information regarding potential bid); Piper v. Chris-Craft Indus., 430 U.S. 1, 28-31 (1977) (recognizing that shareholder needs Congressional protection to ensure that shareholders receive full and fair disclosure from tender offeror).

113. *See supra* notes 75-90 and accompanying text (discussing Court's inquiries in *MITE* and *CTS* into relationship between state takeover statutes and intent and policies behind Williams Act); note 6 and accompanying text (discussing procedural requirements of Williams Act).

114. *See supra* notes 28-35, 47-74 and accompanying text (discussing Court's mandate in *MITE* and *CTS* that states' protection of shareholders can not conflict with procedural requirements under Williams Act); note 101 and accompanying text (discussing district court's finding of unconstitutionality of Nevada Act because bid must be completed within sixty days while Williams Act mandates limitless time period for completion of tender offer).

115. *See*:

ARIZONA

Arizona's control shares provisions extend to corporations that are not incorporated in Arizona, but that have assets of at least one million dollars located in Arizona and have more than five hundred employees who are Arizona residents. ARIZ. REV. STAT. ANN. § 10-1201 (Supp. 1987); *see supra* notes 100-104 and accompanying text (discussing additional notice requirement features beyond foreign corporation inclusion in Act); note 101 and accompanying text (discussing Arizona's control share legislation generally).

FLORIDA

After the Supreme Court approved the Indiana Act in *CTS*, Florida adopted a control share statute (Florida Act) that is substantially similar to the Indiana Act. *Compare* FLA. STAT. ANN. §§ 607.109 (West Supp. 1988) (Florida Act) *with* IND. CODE ANN. §§ 23-1-42-1 to 23-1-42-11 (Burns Supp. 1988) (Indiana Act). The Florida legislature, however, changed the number of resident shareholders that a target corporation must have to qualify under the Act from ten thousand to one thousand. FLA. STAT. ANN. § 607.109 (West Supp. 1988); *see* IND. CODE ANN. § 23-1-42-4 (Burns Supp. 1988) (for issuing corporation to qualify under Indiana Act, ten thousand shareholders of corporation must reside in Indiana). The Florida Act also contains provisions that bring some foreign corporations within the Florida Act's jurisdiction. FLA. STAT. ANN. § 607.110 (West Supp. 1988). To be subject to the requirements of the Florida Act, a foreign corporation must have authority to do business in Florida and have more than one hundred shareholders. *Id.* Additionally, the foreign corporation must have its principal place of business, its principal office, or substantial assets in Florida. *Id.* Furthermore, a foreign corporation must have more than five hundred Florida residents as employees and a gross annual payroll to Florida residents of more than five

Carolina enacted a control share statute (North Carolina Act) that applies

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million dollars. *Id.* Finally, for the foreign corporation to be subject to the Florida Act, the corporation must have more than ten percent of its shareholders residing in Florida, or more than ten percent of its shares owned by Florida residents, or more than one thousand shareholders that are Florida residents. *Id.* The Florida Act is, however, inapplicable to foreign corporations that otherwise may qualify under the Act if the laws of the foreign corporation's state of incorporation are expressly inconsistent with the Florida Act. *Id.*

MASSACHUSETTS

Massachusetts' control share acquisitions legislation (Massachusetts Act) applies to domestic corporations and parallels closely the Indiana Act. MASS. GEN. LAWS ANN. ch. 110D, §§ 1-8 (West 1987); *see supra* notes 47-90 and accompanying text (discussing provisions of Indiana Act). In addition to protecting domestic corporations, the Massachusetts control shares provisions protect foreign corporations that meet several conditions. MASS. GEN. LAWS ANN. ch. 110E, § 1 (West 1987). First, for a foreign corporation to qualify for protection under the Massachusetts Act, the corporation must have more than two hundred shareholders, its executive offices in Massachusetts, and more employees or more capital assets in Massachusetts than in any other state. *Id.* Additionally, for the foreign corporation to qualify under the Massachusetts Act, more than ten percent of the foreign corporation's shareholders must reside in Massachusetts, or Massachusetts' residents must own more than ten percent of the foreign corporation's stock. *Id.*

In addition to the Massachusetts Act's inclusion of foreign corporations within the Act's provisions, the Massachusetts Act also varies significantly from the Indiana Act in that the Act provides that tender offerors that fail to disclose their intent to bid for a target corporation and still accumulate five percent of the target corporation's stock may not make a bid for that target corporation until one year after the failure to disclose. MASS. GEN. LAWS ANN. ch. 110C, § 3 (West 1987). In *Hyde Park Partners, L.P. v. Connolly*, the United States Court of Appeals for the First Circuit determined that the disclosure provision of the Massachusetts Act may violate the United States Constitution, and additionally that the Williams Act probably preempts the disclosure section. Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837, 843-53 (1st Cir.1988). The court concluded that the notice requirements of section 3 of chapter 110C burdened interstate commerce to a degree that exceeded the local benefits that the notice provisions conferred on Massachusetts shareholders. *Id.* at 844-48; *see* MASS. GEN. LAW ANN. ch. 110C, § 3 (West 1987) (mandating precommencement notice disclosure to target company). Additionally, the First Circuit concluded that section 3 of chapter 110C intruded upon the disclosure requirements of the Williams Act. *Hyde Park Partners*, 839 F.2d at 853.

NORTH CAROLINA

North Carolina adopted a modified version of the Indiana Act on August 12, 1987. N.C. GEN. STAT. §§ 55-90 to -98.1 (1987); *see supra* notes 47-90 and accompanying text (discussing provisions of Indiana Act). The North Carolina control shares provisions (North Carolina Act) apply to target corporations that are incorporated under North Carolina law and that have substantial assets in North Carolina. N.C. GEN. STAT. § 55-90 (1987). For a North Carolina corporation to qualify for coverage under the North Carolina Act, the corporation must have five hundred or more shareholders. *Id.* Second, the corporation must have its principal place of business or principal office in North Carolina. *Id.* Finally, more than ten percent of the corporation's shareholders must reside in North Carolina or North Carolina residents must own more than ten percent of the corporation's shares. *Id.* In addition to protecting North Carolina corporations, the North Carolina Act also applies to foreign corporations that meet one of two criteria. N.C. GEN. STAT. § 55-90 (1987). First, a foreign corporation that has more than forty percent of the corporation's American assets located in North Carolina comes within the provisions of the North Carolina Act. *Id.* Alternatively, for a foreign corporation to qualify for coverage under the North Carolina Act, more than forty percent of the foreign corporation's workforce in the United States must be North Carolina residents. *Id.* The North Carolina Act, however, is inapplicable to foreign corporations that otherwise qualify under the North Carolina Act if the laws of the state in which the foreign corporation is incorporated are inconsistent with the North

to foreign corporations that either have located in North Carolina more than forty percent of their fixed assets in the United States or have North Carolina residents comprising more than forty percent of the corporation's United States workforce.[116] The Court in *CTS* expressly warned that state takeover legislation that applied to foreign corporations could restrict interstate commerce unconstitutionally.[117] Some states, however, have asserted that foreign corporations may have a substantial nexus with a

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Carolina Act. N.C. GEN. STAT. § 55-96 (1987). Finally, the North Carolina Act contains a severability clause which states that the invalidity of any individual provision of the North Carolina Act will not invalidate the other provisions of the Act. N.C. GEN. STAT. § 55-97 (1987).

OHIO

Ohio adopted its control shares provisions (Ohio Act) before Indiana adopted its Act. *See* OHIO REV. CODE ANN. § 1701.831 (Baldwin 1986 & Supp. 1987), § 1701.832 (Baldwin 1986) (containing provisions of Ohio's control shares section of Ohio takeover legislation); *supra* note 99 and accompanying text (discussing Ohio Act). The Ohio Act parallels the Indiana Act, except that under the terms of the Ohio Act, the tender offeror cannot receive the control shares themselves unless the shareholders vote to approve the acquisition. OHIO REV. CODE ANN. § 1701.831 (Baldwin 1986 & Supp. 1987); *see* IND. CODE ANN. § 23-1-42-9 (Burns Supp. 1988) (under terms of Indiana Act, shareholders vote to give control shares voting rights). In *Veere Inc. v. Firestone Tire & Rubber Co.* the Federal District Court for the Northern District of Ohio scrutinized the provisions of the Ohio Act and upheld the Act as constitutional in relation to the goals of Williams Act and the commerce clause. Veere Inc. v. Firestone Tire & Rubber Co., 685 F. Supp. 1027, 1029, 1033 (N.D. Ohio 1988). The *Veere* court concluded that the Ohio Act provision that requires a tender offeror to hold open the tender for longer than the minimum period provided by the Williams Act was not preempted by the Williams Act, since the provision allowed shareholders to collectively mandate the fairness of the tender offer and vote as a group. *Id.* at 1031-32. Under the court's commerce clause analysis, of utmost importance for constitutional validity was the text that the Ohio Act applies only to domestic corporations located within Ohio. *Id.* at 1033. *Cf.* n.120 and accompanying text (Ohio Foreign Business Acquisition Act struck down by District Court for Southern District of Ohio because out-of-state corporations subject to potentially inconsistent Ohio provisions). *See supra* note 32 and accompanying text (discussing additional analysis upholding Ohio provision that mandates disclosure of tender offer to target corporation prior to commencement of tender offer).

In February 1988 Ohio amended the Ohio Act to include foreign corporations within the Ohio Act's jurisdiction. *See* Sub. S.B. 359, 1988 Ohio Legis. Serv. S 283 § 1 (creating §§ 1710.01-05 of Ohio Code); *infra* note 118 and accompanying text (discussing court decision invalidating Ohio Act's provision allowing foreign corporations to take advantage of legislation).

OKLAHOMA

The Oklahoma Control Shares Acquisition Act (Oklahoma Act) adopted the essential provisions of the Indiana Act. OKLA. STAT. ANN. tit. 18, §§ 1145-1155 (West 1987); *see supra* notes 46-88 and accompanying text (discussing provisions of Indiana Act). Unlike the Indiana Act, however, the Oklahoma Act applies to any corporation with one hundred or more shareholders, its principal place of business or substantial assets in Oklahoma, and ten percent of its shareholders residing in Oklahoma. OKLA. STAT. ANN. tit. 18, § 1148 (West 1987); *see supra* notes 47-90 and accompanying text (discussing provisions of Indiana Act). Thus, a foreign corporation may be subject to the Oklahoma Act if more than ten percent of the foreign corporation's shareholders reside in Oklahoma, Oklahoma residents must own more than ten percent of the corporation's stock, or additionally, ten thousand shareholders must reside in Oklahoma. OKLA. STAT. ANN. tit. 18, § 1148 (West 1987); *see infra* note 120 and accompanying text (discussing court decision invalidating Oklahoma's inclusion of foreign corporations in Oklahoma Act).

116. N.C. GEN. STAT. § 55-90 (1987).

117. CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637, 1651-52 (1987).

controlling state and that the state, therefore, has a sufficient interest in protecting resident shareholders and, in turn, effectively regulating nationwide tender offers.[118] The Supreme Court in *MITE* and *CTS*, however, recognized that state takeover legislation could not burden out-of-state transactions by applying to both in-state and out-of-state corporations.[119] Statutes that apply to foreign corporations directly can regulate and potentially may prevent interstate tender offers.[120] North Carolina and other states that include foreign corporations within their takeover legislation, however, have attempted to draft their statutes so that the statutes do not unconstitutionally interfere with interstate commerce.[121] Under the North Carolina Act, for example, a foreign corporation that is incorporated in a state that has a corporate takeover statute that differs from the North Carolina Act is exempted from the North Carolina Act's provisions.[122] As a further safety, states attempting to bring foreign corporations within their control share legislation may add severability clauses to the statutes to ensure that the sections mirroring the Indiana Act remain free from judicial scrutiny.[123]

Because most states that have enacted control share statutes like the Indiana Act either have adopted language that is similar to the Indiana Act's language or have included provisions that protect the statutes from invalidity, most control share statutes appear to be constitutional under the rationale of the Court in *CTS*.[124] For state takeover statutes to survive judicial scrutiny, however, the statutes must further the goals of the Williams Act.[125] Although states have an interest in protecting shareholders

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118. *See supra* notes 115-23 and accompanying text (discussing state statutes that include foreign corporations within control share provisions).

119. *See supra* notes 37-41, 84-90 and accompanying text (discussing Supreme Court's determination in *MITE* and *CTS* that state takeover legislation, in order to not unconstitutionally burden interstate commerce, cannot apply to both in-state and out-of-state corporations).

120. *See, e.g.*, Campeau Corp. v. Federated Dept. Stores, 679 F. Supp. 735, 739 (S.D. Ohio 1988) (Ohio Foreign Business Acquisition Act discriminates against foreign commerce and burdens interstate commerce by creating risk of inconsistent state regulation); TLX Acquisition Corp. v. Telex Corp., 679 F. Supp. 1022, 1029-34 (W.D. Okla. 1987) (invalidating Oklahoma statute that applied control shares provisions to foreign corporations even where state could show substantial nexus between foreign corporations and Oklahoma since Court concluded state had no interest in protecting nonresident shareholders of nonresident corporations).

121. *See supra* note 115 and accompanying text (discussing provisions exempting foreign corporations from control share provisions if competing state laws exist as to tender offers); *see also* FLA. STAT. ANN. § 607.110 (West Supp. 1988) (exempting foreign corporation from Florida's control share provisions if competing state laws exist); N.C. GEN. STAT. § 55-96 (1987) (if foreign corporation's state of incorporation has competing tender offer regulations, foreign corporation, otherwise subject to terms of North Carolina Act, is not subject to terms of North Carolina Act).

122. N.C. GEN. STAT. § 55-96 (1987).

123. *See supra* note 115 and accompanying text (discussing North Carolina Act's severability clause); *see also* N.C. GEN. STAT. § 55-97 (1987) (providing that invalidity of individual provisions of North Carolina Act will not affect validity of other provisions).

124. *See supra* notes 47-90 and accompanying text (discussing Supreme Court's determination that Indiana Act is constitutional under Williams Act and commerce clause).

125. *See supra* notes 54-74 and accompanying text (discussing *CTS* Court's recognition of

of their corporations, this protection cannot interfere with other states' rights to organize and protect their own corporations and shareholders.[126] As state legislative attempts begin to differ from the type of state takeover statute that the Supreme Court upheld in *CTS*, courts will analyze new state takeover legislation, like fair price statutes and freezeout laws, according to the two-part scrutiny that the *MITE* and *CTS* Courts mandated.[127] State attempts at regulating takeovers must not interfere with the purposes of the Williams Act and cannot unjustly discriminate against interstate commerce.[128] The tests to be applied under a Williams Act preemption analysis and commerce clause violation inquiry may not be entirely well-defined, though, based upon the subtle inconsistencies between the *MITE* and *CTS* decisions.[129]

Fair Price Statutes

Numerous states have adopted a form of second generation takeover legislation referred to as fair price statutes. [130] Unlike control share statutes,

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importance of Williams Act in regulating tender offers); *supra* notes 28-35, 54-74 and accompanying text (discussing need for state legislation to coexist with Williams Act).

126. *See supra* notes 36-41, 75-90 and accompanying text (state takeover legislation cannot interfere with interstate commerce by subjecting national corporate tender offers to inconsistent state regulation).

127. *See infra* notes 176-241 and accompanying text (discussing constitutional analysis of fair price statutes in light of Supreme Court's decisions in *MITE* and *CTS*).

128. *See supra* notes 28-35, 54-74 and accompanying text (discussing Court's conclusions in *CTS* and *MITE* that, under Williams Act, state regulation of tender offers cannot interfere with federal regulation of tender offers); *supra* notes 36-40, 75-90 and accompanying text (discussing Court's conclusions in *CTS* and *MITE* that state takeover legislation cannot subject national tender offers to inconsistent state regulation).

129. *See supra* notes 31-34, 55, 56, 59, 69-73 and accompanying text (discussing *MITE* Court plurality's view that Williams Act mandates neutrality between shareholders, target corporation management, and tender offeror while *CTS* speaks to shareholder protection); *supra* notes 38-41, 83-90 and accompanying text (discussing *MITE* Court's balancing of state interest in protecting state corporations and shareholders with harm to interstate commerce while *CTS* Court looked to extraterritorial affect of legislation and determined that state tender offers could not discriminate between in-state and out-of-state shareholders).

130. *See* CONN. GEN. STAT. ANN. §§ 33-374a to -374c (West 1987) (regulating business combinations); FLA. STAT. ANN. §§ 607.108, .110 (West Supp. 1988) (same); GA. CODE ANN. §§ 14-2-232 to -235 (Supp. 1988) (effective until July 1, 1989) (recodified as amended at GA. CODE ANN. §§ 14-2-1131 to -1133 (Special Pamphlet 1988) (effective July 1, 1989) (same); ILL. ANN. STAT. ch. 32, para. 7.85 (Smith-Hurd Supp. 1988) (same); KY. REV. STAT. ANN. §§ 271B.12-200 to 271B.12-230 (Michie/Bobbs-Merrill Supp. 1988) (same); LA. REV. STAT. ANN. §§ 12:132 to :134 (West Supp. 1988) (same); MD. CORPS. & ASS'NS CODE ANN. §§ 3-601 to -603 (1985 & Supp. 1988) (same); MICH. COMP. LAWS ANN. §§ 450.1775-.1784 (West Supp. 1988) (same); MISS. CODE ANN. §§ 79-25-1 to -9 (Supp. 1987) (Mississippi Shareholder Protection Act) (regulating business combinations); N.C. GEN. STAT. §§ 55-75 to -80 (Supp. 1987) (North Carolina Shareholder Protection Act) (regulating business combinations); PA. STAT. ANN. tit. 15, § 1409.1 (Purdon Supp. 1988) (Pennsylvania Shareholder Protection Act) (regulating business combinations); VA. CODE ANN. §§ 13.1-725 to -727.1 (1985 & Supp. 1988) (regulating affiliated transactions); WASH. REV. CODE ANN. § 23A.08.425 (West Supp. 1988) (same); WIS. STAT. ANN. § 180.725 (West Supp. 1988) (same); *supra* notes 13-15 and accompanying text (describing second generation

which affect the voting rights of a shareholder that acquires specified percentages of a corporation's stock, fair price statutes contain provisions which attempt to ensure that minority shareholders of a target corporation receive a fair price for the target corporation's shares in a two-tiered takeover.[131] A two-tiered takeover consists of two phases, the tender offer

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takeover legislation).

Some states have enacted a variation of fair price statutes that, like fair price statutes, require a tender offeror to pay minority shareholders a fair price for their shares (freezeout statutes). *See* ARIZ. REV. STAT. ANN. §§ 10-1221 to 1223 (Supp. 1987) (requiring tender offeror to pay minority shareholders a fair price for shares of target corporation under certain conditions); 1988 CONN. ACTS 88-350 (Reg. Sess.) (same); DEL. CODE ANN. tit. 8 § 230 (1988) (same); GA. CODE ANN. §§ 14-2-236 to -238 (Supp. 1988) (effective until July 1, 1989) (recodified as amended at GA. CODE ANN. §§ 14-2-1131 to -1133) (Special Pamphlet 1988) (effective July 1, 1989) (same); IND. CODE. ANN. §§ 23-1-43-1 to -24 (Burns Supp. 1988) (same); KY. REV. STAT. ANN. § 271B.12-210 (Michie/ Bobbs-Merrill Supp. 1988) (same); MINN. STAT. ANN. § 302A.673 (West Supp. 1988) (same); MO. ANN. STAT. §§ 351.450 to -.459.459 (Vernon 1966 Supp. 1988) (same); N.J. STAT. ANN. § 14A:10A-1 (West Supp. 1988) (same); N.Y. BUS. CORP. LAW § 912 (McKinny 1986 & Supp. 1987) (same); WIS. STAT. ANN. § 180.716 (West Supp. 1988) (same); *also* VA. CODE ANN. §§ 13.1-725 to 727.1 (1985 & Supp. 1988) (requiring tender offeror to pay minority shareholders a fair price for their shares and imposing different supermajority voting requirements depending on length of time interested shareholder has held shares of corporation). Generally, freezeout statutes are substantively similar to fair price statutes. *See infra* notes 139-72 and accompanying text (describing mechanics of various fair price statutes). The freezeout statutes, however, require a shareholder that holds a certain percentage of the target corporation's stock to wait a specified period of time before attempting to consummate a business combination. *See generally* S. PAMEPINTO, *supra* note 7, at 22-24 (describing mechanics of freezeout statutes).

Other states have adopted a variation of both the fair price statutes and control share statutes, referred to as control share cashout statutes. *See* ME. REV. STAT. ANN. tit. 13-A, § 910 (Supp. 1987) (specifying right of minority shareholders to receive fair price for their shares in target corporation after consummation of control transaction); PA. STAT. ANN. tit. 15, § 1910 (Purdon Supp. 1988) (same); UTAH CODE ANN. § 61-6-12(l) (Advance Code Serv. 1988) (same); *see also infra* notes 173-75 and accompanying text (describing control share cashout statutes). Unlike fair price statutes, control share cashout statutes impose no requirements on a tender offeror other than to pay minority shareholders a fair price for their shares in the target corporation. *See* ME. REV. STAT. ANN. tit. 13-A, § 910 (Supp. 1987) (specifying procedure that controlling person must follow to ensure minority shareholders receive fair price for shares in target corporation); PA. STAT. ANN. tit. 15, § 1910 (Purdon Supp. 1988) (same); UTAH CODE ANN. § 61-6-12(l) (Advance Code Serv. 1988) (same). Further, control share cashout statutes, unlike freezeout statutes, do not require the tender offeror to wait a specified period of time before attempting to consummate a business combination. *See infra* notes 173-75 and accompanying text (discussing mechanics of control share cashout statutes).

As a result of the Supreme Court's 1987 decision in *CTS* upholding Indiana's control share takeover statute, state legislatures have enacted, amended and supplemented various forms of takeover statutes. Accordingly, the provisions of the takeover statutes reported in this Note may no longer be applicable in whole or in part.

131. *See* Scriggins & Clarke, *Takeovers and the 1983 Maryland Fair Price Legislation*, 43 MD. L. REV. 266, 266-67 (1984) (discussing mechanics of two-tiered tender offers or frontend loaded offers). *Compare supra* notes 47-53, 77-81 and accompanying text (describing mechanics of control share statutes) *with infra* notes 139-72 and accompanying text (discussing mechanics of fair price statutes) *and supra* note 132-38 and accompanying text (discussing mechanics of two-tiered tender offer). While no state had adopted a fair price statute before 1983, the idea of ensuring that minority shareholders receive a fair price for their shares during a merger originated

phase and the merger phase.[132] During the first phase, the bidder announces

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during the 1960's. *See* Kelly, *The Origin and Development of the Fair Price Clause*, 15 SEC. REG. L.J. 267, 268 & n.2 (1987) (discussing origin of fair price clause). Ordinarily, state corporate laws require a majority of shareholders in a corporation to approve any merger between a corporation and some other corporation or entity. *See* MODEL BUSINESS CORP. ACT ANN. §§ 11.01 (1985 & Supp. 1986-88); Scriggins & Clarke, *supra*, at 267-68 (discussing historical background of corporate law and laws applicable to mergers). Most state corporate laws, however, enable corporations to include supermajority voting requirements in their corporate charters, which make mergers more difficult to consummate. *See* Kelly, *supra*, at 268 (discussing supermajority voting requirements). Many corporations have taken advantage of the supermajority voting requirements and included the requirements in their corporations' charters. *Id.* at 267-68. The supermajority voting requirements make a takeover more expensive for a tender offeror because the voting requirements force the tender offeror to purchase a larger percentage of the corporation's stock. *Id.* at 269. As a result, the supermajority voting requirements may force the offeror to pay more for the target shares than the tender offeror would be willing to pay without the voting requirements. *Id.* at 267. While supermajority voting requirements attempt to protect shareholders from the possibility of a freezeout in a corporate takeover, supermajority voting requirements still leave minority shareholders unprotected from the possibility of a tender offeror freezing them out in a two-tiered merger. *See infra* notes 135-38 and accompanying text (describing freezeout of minority shareholders).

The supermajority voting requirements, which some corporations' charters contained, became less effective in deterring takeovers after the 1960's. Kelly, *supra*, at 269-70. Because of changes in the financial market and business attitudes, tender offerors have found takeovers of corporations, including corporations with supermajority voting requirements in their charters, easier to accomplish. *See id.* at 268-70 (describing factors that made corporate charter supermajority requirements less effective at deterring takeovers). As a result, in 1975, some corporations began to amend their corporate charters to include fair price clauses. *Id.* at 280 & n.23. Regardless of the price that a successful tender offeror offers minority shareholders in the second stage of a two-tiered tender offer, the tender offeror must comply with any supermajority clause included in a corporate charter. *Id.* at 274-76; *infra* notes 132-38 and accompanying text (describing mechanics of two-tiered tender offer). The provisions of a fair price clause, however, enable shareholders of the corporation to waive the supermajority voting requirements if the tender offeror offers a fair price to the minority shareholders. Kelly, *supra*, at 274-76.

In addition to provisions in corporate law enabling corporations to include supermajority voting requirements and fair price clauses in their charters, state legislatures generally include appraisal procedures in the corporate law to ensure that minority shareholders obtain a fair price for their shares in the corporation. *Id.* at 293. Under an appraisal procedure, a minority shareholder who believes that the amount which the majority shareholders elected to receive in exchange for their shares in a corporation is unfairly low may dissent. *Id.* The dissenting shareholder has the right to have a third party appraise the value of the shares of the target corporation. *Id.* If the appraiser finds that the value of the stock is higher than the amount that the majority elected to receive, the dissenting shareholder can require the corporation to pay the dissenting shareholder the appraised price. *See id.* (describing dissenting shareholder's appraisal procedure). By including dissenting shareholders' appraisal procedures in state corporate laws, state legislatures recognize that majority shareholders should not determine all corporate matters because the majority shareholders' decisions may work to the detriment of shareholders. *Id.*; *see infra* note 173 and accompanying text (listing and describing takeover statutes referred to as control share cashout statutes that include dissenting shareholder's appraisal procedure).

In addition to adopting statutory provisions that specifically protect minority shareholders, most state corporate laws contain provisions that require interested shareholders to explain to the other directors the nature of the interested shareholders' interest in a transaction that requires the directors' approval. *See* MODEL BUSINESS CORP. ACT ANN. § 8.31 (1985 & Supp. 1986-88) (requiring interested shareholder to explain its interest in proposed transaction); *infra* note 146 and accom-

the tender offer and the bidder's intention to purchase with cash a controlling interest of the target corporation's voting shares.[133] The bidder typically induces shareholders to tender the target corporation's shares by offering to pay a premium price for the shares.[134] A critical component of the bidder's strategy is to notify the shareholders that during the second phase of the takeover, the bidder will exercise the controlling interest acquired during the tender offer to obtain complete ownership of the corporation by merging the target corporation into the bidder.[135] Additionally, during the first phase, the target corporation's shareholders learn that the bidder, which will survive the merger, will force any remaining target corporation shareholders to exchange their shares for less consideration than the bidder is willing to pay during the tender offer.[136] Because

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panying text (defining interested shareholder). Some states have incorporated similar provisions in their fair price statutes by authorizing the directors that are not interested shareholders to approve a proposed business combination. *See infra* note 166 (listing states that have enacted fair price statutes that confer greater discretion to disinterested directors); Scriggins & Clarke, *supra*, at 267 (fair price statutes incorporate traditional notions of conflict of interest and self dealing in new framework); Romano, *supra*, 14, at 113 (questioning why states enact takeover statutes when corporate law provides self-help provisions of which corporations may elect to take advantage).

132. *See infra* notes 133-38 and accompanying text (describing mechanics of two-tiered tender offer).

133. *See* 1 M. LIPTON & E. STEINBERGER, TAKEOVERS & FREEZEOUTS § 1.08[1], at 1-85 (1987) (describing mechanics of two-tiered takeover); R. Ferrara, T. Carroll & R. Dozier, *Tender Offers: Toughing It Out*, in MERGERS AND ACQUISITIONS IN THE 1980S: ATTACK AND SURVIVAL 9, 98 (1987) (Practicing Law Institute Corporate Law and Practice Course Handbook Series No. 558) (same). While most mergers involve two independent corporations, the tender offeror in a two-tiered takeover attempt is an interested shareholder that acquired a controlling interest in the target corporation during the first phase of the takeover. *See* Note, *Second Generation State Takeover Legislation: Maryland Takes a New Tack*, 83 MICH. L. REV. 433, 442 n.52 (1984) (unlike tender offerors in most mergers, successful offerors in merger phase of two-tiered takeovers are interested shareholders). Because the interested shareholder can insure that the interested shareholder will receive preferential treatment, the minority shareholders do not receive the favorable treatment that the interested shareholder does. *Id.*

134. *See* 1 M. LIPTON & E. STEINBURGER, *supra* note 133, § 1.08[3][c], at 1-89 (describing premium price that tender offeror offers target shareholders during tender offer in actual takeover battle). Critics of two-tiered takeovers find a tender offeror's strategy to obtain control of a corporation under a two-tiered takeover coercive because the tender offeror typically offers a high premium price for the shares of the target corporation forcing the shareholders in a target corporation (target shareholders) to rush to tender their shares and take advantage of the offeror's pro rata offer. Kelly, *supra* note 131, at 273. As a result many shareholders rush to tender their shares in the target corporation to take advantage of the tender offeror's premium price without considering the independent merits of retaining ownership in the stock. *Id.*; *see* Johnson, *Corporate Takeovers and Corporations: Who Are They For?*, 43 WASH. & LEE L. REV. 781, 818 & n.159 (1986) (noting that while corporate takeovers may maximize shareholder wealth, corporations and communities may suffer). Moreover, many shareholders fear that if they do not tender their shares during the tender offer, the tender offeror later will use the controlling interest that the offeror acquires during the tender offer to force the remaining shareholders to accept consideration with a value that is less than the shares' fair market value. Kelly, *supra* note 131, at 273.

135. Note, *supra* note 133, at 441 n.48.

136. *See id.* at 441-42 & n.49 (shareholders that do not tender target corporation's shares during tender offer must accept consideration for shares that is less than amount that offeror paid during tender offer).

the target corporation's shareholders realize that they will receive less for their shares if they hold the shares until the bidder acquires a controlling interest in the corporation, and because the shareholders can not assume that fellow shareholders will refrain from tendering their shares, most of the target corporation's shareholders feel pressure to tender their shares immediately after the bidder makes the offer.[137] A bidder's announcement of a two-tiered takeover attempt, therefore, creates a stampeding effect among the shareholders of a target corporation to tender their shares and take advantage of the tender offer price.[138]

In an attempt to ameliorate the coercive effects that two-tiered takeover attempts have on shareholders, state legislatures have enacted fair price statutes.[139] While fair price statutes apply only to situations in which a bidder has commenced a two-tiered takeover bid, fair price statutes do not regulate a bidder's tender offer.[140] Rather, fair price statutes impose certain restrictions during the merger phase of a two-tiered takeover.[141] Fair price statutes require an "interested shareholder," a tender offeror who acquires a specified percentage of a target corporation's shares during the merger phase, to pay the minority shareholders a price for their shares that at least equals the amount that the offeror paid for the shares during the tender offer phase.[142]

In 1983 Maryland enacted the first fair price statute.[143] The provisions of the Maryland Act apply to Maryland corporations, other than invest-

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137. *Id.* at 442 n.49; *see* R. Ferrara, T. Carroll & R. Dozier, *supra* note 133, at 98-99 (shareholders tender target corporations' shares during first phase of tender offer because most shareholders are certain that offeror will consummate tender offer). At least one commentator has noted that, because most of the shareholders generally rush to take advantage of a high tender offer price, a bidder actually may be able to offer a lower price for the target corporation's shares in a two-tiered tender offer than the shares' fair market value. *See* Scriggins & Clarke, *supra* 133, at 273.

138. *See* Scriggins & Clarke, *supra* note 131, at 270 (two-tiered tender offers create stampeding effect among shareholders). At least one commentator has referred to the shareholders' stampede to take advantage of a tender offer in a two-tiered takeover as "prisoner's dilemma." *See* Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297, 337 (1974) (discussing prisoner's dilemma in takeover attempt).

139. *See supra* notes 132-38 and accompanying text (describing mechanics of two-tiered takeovers and coercive effect that two-tiered takeovers have on minority shareholders).

140. *See supra* notes 5-6, 28-35, 54-74 and accompanying text (stating that Williams Act regulates tender offers and explaining purpose of Williams Act).

141. *See* CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1636, 1650 (1987) (stating that state corporate laws legitimately may regulate mergers). *But see* Edgar v. MITE Corp., 457 U.S. 624, 645 (1982) (Illinois statute regulating tender offer was invalid because tender offer does not constitute internal affair of target corporation).

142. *See supra* notes 135-36 and accompanying text (describing merger phase of two-tiered takeovers); *infra* notes 150-54 and accompanying text (describing how fair price statutes ensure minority shareholder fair price for shares of target corporations).

143. MD. CORPS. & ASS'NS CODE ANN. §§ 3-601 to -603 (1985 & Supp. 1988); *see* Scriggins & Clarke, *supra* note 131, at 272 (noting that primary purpose of Maryland Act is to correct inequities that result from two-tiered takeovers). Before the Maryland General Assembly enacted its fair price statute, Maryland had adopted a form of first generation takeover legislation that

ment companies and corporations having less than one hundred shareholders with voting rights, involved in a two-tiered takeover attempt.[144] Specifically, the Maryland Act defines certain transactions between an interested shareholder and a Maryland corporation, including a merger, as a "business combination."[145] An interested shareholder under the Mary-

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required a tender offeror to notify the secretary of state twenty days before the date that the offeror intended to make a tender offer. 1976 Md. Laws 1712 (codified at MD. CORPS. & ASS'NS CODE ANN. §§ 11-901 to -908 (Supp. 1984)). After the United States District Court for the District of Maryland determined in 1982 that Maryland's first generation takeover statute was unconstitutional, the Maryland Bar Association, not wanting to leave Maryland corporations unprotected from hostile takeovers, drafted a form of second generation takeover legislation. S. PAMEPINTO, *supra* note 7, at 6; *see* Bendix Corp. v. Martin Marietta Corp., 547 F. Supp. 522, 532 (D. Md. 1982) (Maryland's first generation takeover statute was unconstitutional under Williams Act and commerce clause). After Maryland's General Assembly passed the proposed takeover legislation, some of Maryland's corporations began to express their opposition to the bill to Governor Hughes of Maryland. *See* Note, *supra* 133, at 441 n.47. Governor Hughes vetoed the bill because Maryland wanted to build a pro-business image and because some Maryland corporations feared that tender offerors might acquire corporations through hostile takeovers. S. PAMEPINTO, *supra* note 7, at 16. The Maryland Act, which the legislature passed after vetoing the original bill, is a concession by Governor Hughes to critics of the earlier bill who were concerned about the future of their corporations. *See id.* (arguing that original form of Maryland's takeover bill would interfere with corporations' normal business affairs). *Id.* Other critics, however, condemned the Maryland Act for entrenching corporations' existing managements at the expense of shareholders. *Id.* at 16-17. The professed intent of the legislature in enacting the Maryland Act, however, was to protect minority shareholders against hostile tender offerors in the merger phase of a two-tiered takeover. *See* Letter from Stephen H. Sachs, Att'y Gen. to Harry Hughes, Governor of Maryland (June 13, 1983) (indicating that purpose of Maryland Act is to protect minority shareholders in two-tiered takeover attempt). *See generally* Scriggins & Clarke, *supra* note 131, at 266-279 (detailing legislative history and mechanics of Maryland Act).

144. *See* MD. CORPS. & ASS'NS CODE ANN. §§ 3-601(e), -601(h), -603(e) (1985 & Supp. 1988) (describing entities that are subject to provisions of Maryland Act and describing corporations that are exempt from Maryland Act); *also infra* notes 161-62 (describing opt out provision of Maryland Act).

145. MD. CORPS. & ASS'NS CODE ANN. § 3-601(e) (1985 & Supp. 1988). The Maryland Act describes a business combination as including one of five transactions between a target corporation and an interested shareholder. *Id.*; *see infra* note 146 and accompanying text (defining interested shareholder). First, a business combination under the Maryland Act includes any merger of, consolidation of, or share exchange between the target corporation and the interested shareholder. MD. CORPS. & ASS'NS CODE ANN. § 3-601(e)(1) (1985 & Supp. 1988). Second, a business combination may include any extraordinary sale, lease, or other disposition of at least ten percent of the corporation's stock to any interested stockholder. *Id.* § 3-601(e)(2). If the Maryland Act did not include this definition, the interested shareholder could avoid the requirements of the Act by exercising its controlling interest in the target corporation and forcing the target corporation to give up the corporation's assets. Scriggins & Clarke, *supra* note 131, at 275. By forcing the target corporation to sell the target corporation's assets, the interested shareholder effectively could squeeze out the minority shareholders. *Id.* Third, a business combination under the Maryland Act includes the target corporation's issuance or transfer to any interested shareholder of equity securities having an aggregate market value of five percent of the total market value of the corporation's outstanding stock. MD. CORPS. & ASS'NS CODE ANN. § 3-601(e)(3) (1985 & Supp. 1988). By including the third definition of a business combination in the Maryland Act, the legislature intended to prevent a tender offeror from purchasing enough of a target corporation's authorized but unissued stock, or treasury stock, to enable the acquiring corporation to satisfy

land Act includes any person, o'her than the Maryland corporation that is the tender offeror's target, that owns a minimum of ten percent of the outstanding voting shares of the corporation.[146] The Maryland Act requires the board of directors of a Maryland corporation to recommend to the shareholders that the shareholders approve a transaction satisfying the Maryland Act's definition of a business combination.[147] Moreover, the Maryland Act requires that, before effectuating a business combination, eighty percent of all shareholders holding outstanding voting shares and two-thirds of the disinterested shareholders must approve the proposed business combination (supermajority voting requirements).[148] If the interested shareholder satisfies the fairness requirements that the Maryland Act sets forth, however, the Maryland Act exempts the business combination from the supermajority voting requirements.[149]

To satisfy the Maryland Act's fairness requirements and thus, to exempt the business combination from the Maryland Act's supermajority voting requirements, the interested shareholder must satisfy a two-prong fairness test.[150] The fairness requirements include stock price conditions and nonprice conditions.[151] The Maryland legislature designed the stock price conditions to ensure that minority shareholders receive at least the same cash value for their stock during the second stage of a two-tiered

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the Maryland Act's supermajority requirement. Scriggins & Clarke, *supra* note 131, at 275-76; *supra* note 148 (discussing supermajority voting requirements). Fourth, a business combination includes any liquidation or dissolution of a Maryland corporation in which the interested shareholder will receive any consideration other than cash. MD. CORPS. & ASS'NS CODE ANN. § 3-601(e)(4) (1985 & Supp. 1988). Last, the Maryland Act defines a business combination as any reclassification, recapitalization, or other transaction or series of transactions that has or have the effect of increasing by at least five percent the interested shareholder's total number of shares of the corporation. *Id.* § 3-601(e)(5).

146. MD. CORPS. & ASS'NS CODE ANN. § 3-601(j) (1985 & Supp. 1988). In addition to defining an interested shareholder as including any person owning a minimum of ten percent of the voting stock of a corporation, the Maryland Act defines certain affiliates of a corporation as interested shareholders. *Id.* The Maryland Act defines an affiliate of a corporation as a person that at least one intermediary controls. *Id.* § 3-601(b). Accordingly, an affiliate of a corporation satisfies the Maryland Act's definition of an interested shareholder if the affiliate beneficially owns at least ten percent of the corporation's voting stock during all or any part of the two year period before the affiliate announces the proposed business combination. *Id.* § 3-601(j)(1)(ii). Generally, the Maryland Act defines a beneficial owner as a person that has the right, by agreement or other arrangement, to acquire voting shares of a corporation or that directly or indirectly owns voting stock. *Id.* § 3-601(d).

147. *Id.* § 3-602; *see supra* note 145 and accompanying text (describing definition of business combination under Maryland Act). In addition to requiring the board of directors to recommend that the shareholders approve a business combination, the Maryland Act requires eighty percent of the shareholders holding outstanding voting shares and two-thirds of the disinterested directors to approve the consummation of a business combination (supermajority voting requirements). *Id.*

148. MD. CORPS & ASS'NS CODE ANN. § 3-602 (1985 & Supp. 1988).

149. *Id.* § 3-603; *see infra* notes 150-57 and accompanying text (discussing Maryland Act's fairness requirements as alternative to satisfying supermajority voting requirements).

150. MD. CORPS. & ASS'NS CODE ANN. § 3-603 (1985 & Supp. 1988).

151. *See* Scriggins & Clarke, *supra* note 131, at 276-77 (referring to two prongs of Maryland Act's fairness test as stock price and nonprice conditions).

takeover as the offeror paid the tendering shareholders during the first phase of the takeover attempt.[152] To obtain an exemption from the supermajority voting requirements under the stock price conditions, the interested shareholder must offer the minority target shareholders the highest of three possible prices for the target shares, determined by a specific price formula that the Maryland Act sets forth.[153] The pricing formula essentially requires the interested shareholder to pay the minority shareholders an amount that is equal to the highest price that the interested shareholder paid for the target corporation's shares before the announcement of the proposed merger.[154]

In addition to complying with the pricing provisions of the Maryland Act, the interested shareholder must comply with certain nonprice conditions.[155] The Maryland legislature included the nonprice conditions in the Maryland Act to avoid any self-dealing between the corporation and the interested shareholder that would harm minority shareholders.[156] One of the nonprice conditions requires the target corporation to pay in full all

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152. *See id.* at 277-78 (describing stock price conditions in Maryland Act and discussing legislative purpose of including stock price conditions in Maryland Act). In addition to requiring the interested shareholder to pay the holders of common shares of stock an amount that at least equals the amount that the tender offeror paid for the corporation's stock during the tender offer, the pricing formula in the Maryland Act requires that minority shareholders receive cash in exchange for their shares in the target corporation. MD. CORPS. & ASS'NS CODE ANN. §§ 3-603(b)(3) (1985 & Supp. 1988). The interested shareholder, however, may choose to pay minority shareholders the same form of consideration that the interested shareholder paid for the largest block of the target corporation's stock. *Id.*

153. MD. CORPS. & ASS'NS. CODE ANN. §§ 3-603(b)(1)-(3) (1985 & Supp. 1988). To ensure that the interested shareholder will pay minority shareholders a fair price for their shares in the target corporation, the Maryland Act requires the interested shareholder to pay the minority shareholders the highest price for the target corporation's common shares of stock determined as follows: (1) the highest price that the interested shareholder paid for the target corporation's stock during the tender offer or during the two year period before the interested shareholder announced the proposed business combination, (2) the higher of the stock's value on the date the interested shareholder announced the proposed business combination, or the date on which the tender offeror became an interested shareholder, or (3) the product of the stock's price as determined in number two above, multiplied by the highest price that any interested shareholder paid for the target shares during the two year period before the interested shareholder announced the proposed business combination divided by the market value of the common stock on the first day that the interested shareholder acquired the stock during the same two year period. *Id.*

While the Maryland Act requires that an interested shareholder comply with the Act's formula in purchasing common shares of the target corporation's stock, the Act contains a separate formula for valuing shares other than common stock. *Id.* § 3-603(b)(2). The pricing formulas, however, contain nearly the same calculations and require the interested shareholder to pay minority shareholders the highest of three possible prices. *See* Scriggins & Clarke, *supra* note 131, at 277-78 (describing mechanics of price formula for both common stock and shares other than common stock).

154. MD. CORPS. & ASS'NS CODE ANN. § 3-603(b)(1) (1985 & Supp. 1988).

155. *Id.* § 3-603(b)(4); *see infra* notes 156-57 and accompanying text (describing nonprice conditions of Maryland Act).

156. *See* S. PAMEPINTO, *supra* note 7, at 17 (stating that Maryland Act contains nonprice conditions to prevent self-dealing).

dividends on the corporation's preferred shares from the time that the tender offeror becomes an interested shareholder until the interested shareholder consummates the business combination.[157]

While an interested shareholder, to consummate a business combination, must comply with the supermajority voting requirements or, alternatively, the fairness provisions of the Maryland Act, the Maryland Act exempts certain business combinations from the Act's requirements.[158] The Maryland Act allows a board of directors to exempt a business combination from the Maryland Act's requirements so long as the board of directors approves of the business combination before the date that the tender offeror becomes an interested shareholder.[159] In allowing the board of directors to exempt certain business combinations from the Maryland Act's requirements, the legislature intended to prevent the Act from deterring friendly mergers.[160] Moreover, the Maryland Act provides that the shareholders may adopt a charter amendment that completely exempts the corporation from the provisions of the Maryland Act.[161] A Maryland corporation may "opt out" of the Act's coverage by amending its charter so long as the shareholders voting to approve the amendment satisfy the same supermajority voting requirements necessary to effectuate a business combination.[162]

In addition to Maryland, other states have enacted fair price statutes that contain provisions comparable to the Maryland Act's provisions.[163] While states like Connecticut, Louisiana, and Michigan have adopted fair price statutes that are nearly identical to the Maryland Act, other states

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157. MD. CORPS. & ASS'NS CODE ANN. § 3-603(b)(4)(i)(1) (1985 & Supp. 1988). In addition to requiring the target corporation fully to pay all dividends on preferred shares of stock, the nonprice conditions prevent the target corporation from reducing the annual rate of dividends payable on any class of the corporation's stock other than preferred stock. *Id.* § 3-603(b)(4)(i)(2)(A). In addition the Maryland Act requires that the target corporation increase the annual rate of dividends as necessary to reflect any recapitalization or similar transaction that would reduce the number of outstanding shares of stock. *Id.* § 3-603(b)(4)(i)(2)(B). Moreover, the Maryland Act prevents any interested shareholder from acquiring additional shares of stock unless the interested shareholder obtains the stock from a stock split or dividend payment. *Id.* § 3-603(b)(4)(i)(3). Finally, the Maryland Act prevents the corporation from making any loans, guarantees, or other financial assistance that would benefit the interested shareholder. *Id.* § 3-601(5).

158. *See id.* § 3-603(c)-(e) (exempting, under specified conditions, certain corporations and companies from provisions of Maryland Act); *infra* notes 159-62 and accompanying text (describing corporations and companies that are exempt from Maryland Act's requirements).

159. MD. CORPS. & ASS'NS CODE ANN. § 3-603(c)(1)(ii) (1985 & Supp. 1988); *see* Scriggins & Clarke, *supra* note 131, at 273 (discussing purpose of allowing board of directors to approve exempting certain business combinations from Maryland Act's requirements).

160. *See* Scriggins & Clarke, *supra* note 131, at 274-75 (stating that Maryland Act does not affect friendly takeovers so long as parties negotiate terms before tender offeror becomes interested shareholder).

161. MD. CORPS. & ASS'NS CODE ANN. § 3-603(e)(iii) (1985 & Supp. 1988).

162. *Id.*

163. *See supra* note 130 (listing states, including Maryland, that have adopted fair price statutes).

have enacted fair price statutes that contain some material differences.[164]

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164. *See* CONN. GEN. STAT. ANN. §§ 33-374a to -374c (West 1987) (fair price statute containing provisions substantively similar to Maryland Act); LA. REV. STAT. ANN. §§ 12:132-:134 (West Supp. 1988) (same); MICH. COMP. LAWS ANN. §§ 450.1775-.1784 (West Supp. 1988); WIS. STAT. ANN. § 180.725 (West Supp. 1988) (same). Throughout this footnote, which describes fair price satutes that contain nearly identical provisions as the Maryland Act, certain defined terms are used. Unless otherwise indicated, the reader may assume that the statutes described below contain the same supermajority voting requirements that an interested shareholder must satisfy to consummate a business combination under the Maryland Act. *See supra* notes 148-57 and accompanying text (describing mechanics of supermajority voting requirements and fairness requirements under Maryland Act). In addition the reader may assume, unless otherwise indicated, that the provisions of the statutes only apply to the state's domestic corporations, which corporations may opt out of the states' fair price statutes in the manner described in the Maryland Act. *See supra* notes 161-62 and accompanying text (describing opt out provisions under Maryland Act). Unless otherwise indicated, the reader may assume that the following terms have the same meaning as the meaning ascribed to the term in the discussion of the Maryland Act: business combination, interested shareholder, nonprice conditions, price conditions and supermajority voting requirements.

CONNECTICUT

In 1984 Connecticut enacted a fair price statute (Connecticut Act) that is substantively similar to the Maryland Act. CONN. GEN. STAT. ANN. §§ 33-374a to -374c (West 1987); *see supra* notes 144-162 and accompanying text (discussing provisions of Maryland Act). In addition Connecticut enacted a freezeout statute. 1988 Conn. Acts 88-350 (Reg. Sess.); *see supra* note 130 and accompanying text (describing freezeout statutes). Like the Maryland Act, the Connecticut Act authorizes a corporation to opt out of the Act's provisions by amending the corporate charter so long as the shareholders satisfy the same supermajority voting requirements that are necessary to approve a proposed business combination. CONN. GEN. STAT. ANN. 33-374(d) (West 1987); *supra* note 148 and accompanying text (describing supermajority voting requirements); *infra* note 169-70 and accompanying text (discussing opt out provisions in certain fair price statutes).

In enacting the Connecticut Act, the Connecticut legislature was influenced greatly by Aetna Life and Casualty Insurance (Aetna), a Connecticut corporation. Romano, *supra* note 14, at 122-23 & n.33. Highly ranked among publicly traded corporate stocks, Aetna represented a considerable influence in Connecticut's economy. *Id.* at 123 & n.34. Aetna and other proponents of the bill, which became the Connecticut Act, avoided adverse publicity for the bill by introducing the bill as an amendment to a minor bill. *Id.* The Connecticut legislature, therefore, enacted the fair price statute with little opposition. *See id.* at 125-26 (stating that even if bill's proponents had opened bill to public discussion, fair price bill would have faced little opposition). Professor Romano, who is a professor of law at Yale University, infers from the bill's lack of publicity that Aetna had a reason for insuring that the public remain uninformed of the bill's contents. *See id.* at 128-131 (discussing possible reasons for Aetna's motivation in avoiding publicity for bill). Professor Romano suggests that Aetna was concerned that Aetna might be a likely target for a takeover. *See id.* at 129 (reasoning that because insurance industry was suffering, financial reports advised investors not to purchase Aetna's stock). Moreover, Professor Romano reasons that Aetna chose not to recommend an amendment to Aetna's charter to add a fair price clause because institutional investors, which tend to disapprove of any charter provisions that deter possible takeovers, held a majority of Aetna's stock. *Id.* at 129-30; *see supra* note 131 (describing fair price clauses in corporate charters). Moreover, Aetna did not want to amend its charter to include a fair price clause because such charter provisions tend to signal to corporate tender offerors that a company perceives itself as a candidate for a takeover. *Id.*

LOUISIANA

In 1984 the Louisiana legislature enacted a fair price statute (Louisiana Act) that is substantively similar to the Maryland Act. LA. REV. STAT. ANN. §§ 12:132-:134 (West Supp. 1988); *see supra* notes 144-62 and accompanying text (discussing provisions of Maryland Act). In addition to

The differences that exist between the Maryland Act and other fair price statutes fall into three general categories.[165] First, a number of states have enacted fair price statutes that confer upon incumbent boards of directors

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adopting a fair price statute, the Louisiana legislature adopted a control share statute. *Id.* §§ 12:135-:140.2 (West Supp. 1988); *see supra* note 99 and accompanying text (describing mechanics of Louisiana's control share statute). Like the Maryland Act, the Louisiana Act allows a corporation to opt out of the Act's provisions by amending the corporation's charter if the shareholders satisfy the supermajority voting requirements necessary to approve a proposed business combination. LA. REV. STAT. ANN. § 12.134E(l)(b) (West Supp. 1988); *see supra* note 148 and accompanying text (describing supermajority voting requirements); *see infra* notes 169-70 and accompanying text (discussing opt out provisions in certain fair price statutes).

MICHIGAN

In 1984 Michigan enacted a fair price statute (Michigan Act) that is substantively similar to the Maryland Act. MICH. COMP. LAWS ANN. §§ 450.1775-.1784 (West Supp. 1988). The pricing formula in the Michigan Act, however, is slightly less complex than the Maryland Act's formula. *Compare* MICH. COMP. LAWS ANN. §§ 450.1781(1)(a)-(b) (West Supp. 1988) (describing pricing formula in Michigan Act) *with* MD. CORPS. & ASS'NS CODE ANN. § 3-603(b)(3) (1985 & Supp. 1987) (describing pricing formula in Maryland Act) *and supra* note 153 and accompanying text (describing pricing formula in Maryland Act). Like the Maryland Act, the Michigan Act allows a corporation to opt out of the Act's provisions by amending the corporate charter if the shareholders satisfy the same supermajority voting requirements necessary to approve a proposed business combination. MICH. COMP. LAWS ANN. § 450.1784(l)(b) (West Supp. 1988); *see infra* notes 169-70 and accompanying text (discussing opt out provisions in certain fair price statutes).

WISCONSIN

In 1984 Wisconsin adopted a fair price statute (Wisconsin Act) that is substantially similar to the Maryland Act. WIS. STAT. ANN. § 180.725 (West Supp. 1988). Wisconsin also adopted a control share statute and a three year freezeout statute. *See id.* § 180.25(9) (control share statutes); *id.* § 180.726 (West Supp. 1988) (three year freezeout statute); *supra* notes 47-53, 77-81 and accompanying text (describing mechanics of control share statutes); *supra* note 131 (describing mechanics of freezeout statute). The Wisconsin Act, however, applies not only to issuing public corporations, but to corporations that elect to have the provisions of the Wisconsin Act apply to it. WIS. STAT. ANN. § 180.725(1)(d), (3)(c) (West Supp. 1988). The Wisconsin Act applies to any business combination between an issuing public corporation and a significant shareholder. *Id.* § 180.725(1)(d). The Wisconsin Act defines a significant shareholder as two or more individuals owning ten percent or more of the voting shares of an issuing public corporation. *Id.* § 180.725(1)(lm).

The Wisconsin Act imposes the same supermajority voting requirements on a corporation before consummating certain business combinations as the Maryland Act does. *Id.* § 180.725(3a); *supra* note 148 and accompanying text (describing supermajority voting requirements). Similarly, the Wisconsin Act waives the supermajority voting requirements, if the significant shareholder agrees to pay a certain price for the issuing public corporation's stock. WIS. STAT. ANN. § 180.725(3a). If the significant shareholder waives the supermajority voting requirements by agreeing to pay a certain price for the shares, the Wisconsin Act does not impose nonprice conditions on the significant shareholder as a prerequisite to consummating the business combination. *Compare id.* (Wisconsin Act imposes no nonprice requirements on significant shareholder before consummating business combination) *with supra* notes 155-57 and accompanying text (describing Maryland Act's nonprice fairness requirements). Like the Maryland Act, the Wisconsin Act allows a corporation to opt out of the Wisconsin Act's provisions by amending the corporate charter if the shareholders satisfy the same supermajority voting requirements necessary to approve a proposed business combination. WIS. STAT. ANN. § 180.725(3)(b)3; *see infra* notes 169-70 and accompanying text (discussing opt out provisions in certain fair price statutes).

165. *See infra* notes 166-72 and accompanying text (discussing material differences between Maryland Act and fair price states in other states).

considerably more discretion than the Maryland Act.[166] For example, under

166. *See* FLA. STAT. ANN. §§ 607.108, .110 (West Supp. 1988) (fair price statute conferring more discretion to disinterested board of directors than interested directors); GA. CODE ANN. §§ 14-2-232 to -235 (Supp. 1988) (effective until July 1, 1989) (same) (recodified as amended at GA. CODE ANN. §§ 14-2-1131 to -1133 (Special Pamphlet 1988) (effective July 1, 1989); ILL. ANN. STAT. ch. 32, para. 7.85 (Smith-Hurd Supp. 1988) (same); KY. REV. STAT. ANN. §§ 271B.12-200 to 271B.12-230 (Michie/Bobbs-Merrill Supp. 1988) (same); MISS. CODE ANN. §§ 79-25-1 to -9 (Supp. 1987) (Mississippi Shareholder Protection Act) (same); N.C. GEN. STAT. §§ 55-75 to -80 (Supp. 1987) (North Carolina Shareholder Protection Act) (same); PA. STAT. ANN. tit. 15, § 1409.1 (Purdon Supp. 1988) (Pennsylvania Shareholder Protection Act) (same); VA. CODE ANN. §§ 13.1-725 to -727 (1985 & Supp. 1988) (same). Throughout this footnote, which describes certain fair price statutes that confer upon certain members of the board of directors considerably more discretion than the Maryland Act does, certain defined terms are used. Unless otherwise indicated, the reader may assume that the statutes described below contain the same supermajority voting requirements that an interested shareholder must satisfy to consummate a business combination. *See supra* notes 148-57 and accompanying text (describing mechanics of supermajority voting requirements and fairness requirements under Maryland Act). In addition, the reader may assume, unless otherwise indicated, that the provisions of the statutes only apply to the domestic corporations, which corporations may opt out of the states' fair price statutes in the manner described in the Maryland Act. *See supra* notes 169-70 and accompanying text (describing opt out provisions under Maryland Act). Unless otherwise indicated, the reader may assume the following terms have substantially the same meaning as the meaning ascribed the term in the description above of the Maryland Act: business combination, interested shareholder, nonprice conditions, price conditions and supermajority voting requirements.

FLORIDA

In 1987 Florida adopted a fair price statute (Florida Act). FLA. STAT. ANN. §§ 607.108, .110 (West Supp. 1988). In addition, Florida enacted a control share statute. *Id.* § 607.109 (Florida Control Share Acquisition Statute); *see supra* note 115 (describing mechanics of Florida control share statute).

Unlike the provisions of most fair price statutes, which apply only to domestic corporations, the Florida Act applies to domestic corporations and certain foreign corporations. FLA. STAT. ANN. § 607.110 (West Supp. 1988); *see infra* notes 171-72 and accompanying text (discussing fair price statutes that apply to foreign corporations). The Act's requirements essentially apply to foreign corporations that have authority to do business in Florida, that have a minimum of one hundred shareholders that maintain a principal place of business or substantial assets in Florida, that employ over five hundred residents, that pay over $5,000,000 in payroll to Florida employees and that have a certain number of Florida residents that hold shares of stock in the foreign corporation. FLA. STAT. ANN. § 607.110 (West Supp. 1988).

While the Florida Act generally contains provisions that are similar to the Maryland Act, the Florida Act, unlike the Maryland Act, confers to the disinterested directors the power to exercise greater discretion in certain matters than the Florida Act grants other directors on the board. *Id.* § 607.108(3)-(4)(a). Specifically, the Florida Act enables an interested shareholder to avoid satisfying the Act's supermajority voting requirements or fairness requirements if a majority of the disinterested directors vote to exempt the proposed "affiliated transaction" from the Act. *Id.* § 607.108(4)(a). The Florida Act uses the term "affiliated transactions" rather than "business combinations" to define certain transactions that are subject to supermajority voting or fair price requirements. *See id.* § 607.108(1)(b) (Florida Act's definition of affiliated transactions is substantively similar to definition of business combination under Maryland Act); *supra* note 145 and accompanying text (describing Maryland Act's definition of business combination). The Florida Act also gives the disinterested directors, upon majority approval, the authority to determine whether aperson satisfies the Florida Act's definition of an interested shareholder, and whether other provisions under the Act are satisfied. FLA. STAT. ANN. § 607.108(1)(j), (3) (West Supp. 1988). The Florida Act defines a disinterested director as any member of the board of directors who served on the board of

the Mississippi and Virginia fair price statutes, a board of directors may

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directors before the tender offeror became an interested director. *Id.* § 607.108(1)(h). Moreover, the definition of a disinterested director includes any director that a majority of the disinterested directors elected to be a director of the board. *Id.* While the Florida Act's definition of an interested shareholder is substantively similar to the Maryland Act's definition, the Florida Act specifically excludes from the definition of an interested shareholder any of the corporation's savings, employee stock ownership, or other employee benefit plans. *Id.* § 607.108(k).

In addition to conferring greater discretion to the disinterested directors, the Florida Act requires an affirmative supermajority vote of two-thirds of the disinterested shareholders to approve an affiliated transaction. *Id.* § 607.108(2). The Florida Act allows an interested shareholder to avoid the supermajority voting requirements under the Act as long as the interested shareholder satisfies certain price and nonprice fairness provisions. *Id.* § 607.108(4)(f)1-4; *supra* notes 151-57 and accompanying text (defining nonprice conditions and price conditions). The Florida Act specifies that the corporation must satisfy the nonprice conditions during the three year period ending on the date that the interested shareholder announces the proposed transaction. FLA. STAT. ANN. § 607.108(4)(d)3 (West Supp. 1988). The Florida Act requires the board of directors to mail proxies to the shareholders prior to the consummation of the affiliated transaction, notifying the shareholders of the affiliated transaction. *Id.* § 607.108(4)(f)5. The Florida Act's requirements, however, do not apply to a corporation with less than three hundred shareholders, to an interested shareholder that owns at least eighty percent of the corporation's outstanding voting shares for a minimum of five years preceding the announcement date, to an investment company, or to certain interested shareholders described under the Act. *Id.* § 607.108(4)(b)-(e). Further, the provisions of the Florida Act do not apply if a majority of the disinterested directors approve the interested shareholder's acquisition of the shares, or if an interested shareholder owns a minimum of ninety percent of the outstanding voting shares of the corporation. *Id.* § 607.108(4)(d). Moreover, the corporation may elect to opt out of the Florida Act's requirements if a majority of the disinterested directors vote to approve the affiliated transaction. *Id.* § 607.108(4)(a). In addition the Florida Act allows a corporation to opt out of the Act's provisions by amending the corporate charter if a majority of the shareholders approve the amendment. *Id.* § 607.108(6). The Florida Act, however, provides that the opt out amendment shall not apply to any interested shareholder's affiliated transaction until eighteen months after the shareholders approve the amendment. *Id.*; *see infra* notes 169-70 and accompanying text (discussing opt out provision in fair price statutes).

GEORGIA

In 1985 Georgia adopted a fair price statute (Georgia Act). GA. CODE ANN. §§ 14-2-232 to -235 (Supp. 1988) (effective until July 1, 1989) (recodified as amended at GA. CODE ANN. §§ 14-2-1131 to -1133 (Special Pamphlet 1988) (effective July 1, 1989). While the Georgia Act substantively is quite similar to the Maryland Act, the Georgia Act significantly differs from the Maryland Act by conferring to the disinterested directors, which the Georgia Act defines as continuing directors, greater discretion in certain matters. *Id.* § 14-2-232(6). Under the Georgia Act, a continuing director may be a member of the board of directors that served on the board before the tender offeror became an interested shareholder. *Id.* § 14-2-233(1). Moreover, a continuing director also may be any director of the board that a majority of the continuing directors elected to serve on the board. *Id.* The Georgia Act has two alternative requirements for approving business combinations. *Id.* § 14-2-233(1). First, the Georgia Act requires that at least three continuing directors remain on the board of directors of a Georgia corporation at the time of the approval and that the continuing directors unanimously approve any proposed business combination. *Id.* Alternatively, the Georgia Act requires that two-thirds of the continuing directors and a majority of the disinterested shareholders affirmatively vote to approve the business combination. *Id.* § 14-2-233(2).

In addition to conferring greater discretion on the continuing directors, the Georgia Act allows the interested shareholder to avoid the supermajority voting requirements so long as the interested shareholder complies with certain stock price and nonprice conditions. *Id.* § 14-2-234(b); *supra* notes 151-57 and accompanying text (describing price and nonprice conditions). The interested shareholder can avoid satisfying certain nonprice conditions so long as a majority of the continuing

approve a business combination after a tender offeror becomes an inter-

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directors approve the interested shareholder's proposed business combination. GA. CODE ANN. § 14-2-234(b)(3)(A) (Supp. 1988). Moreover, once a shareholder assumes the status of an interested shareholder, the Georgia Act prohibits any interested shareholder from acquiring more than one percent of the stock in the target corporation in any year unless a majority of the continuing directors approve of the acquisition. *Id.*

The provisions of the Georgia Act apply only to corporations that amend their bylaws specifically to include the fair price provisions. *Id.* § 14-2-235(a). If a corporation desires to opt out of the Georgia statute after amending its bylaws, the corporation may repeal the bylaw provisions so long as two-thirds of the continuing directors and a majority of the disinterested shareholders approve. *Id.* § 14-2-235(b). Moreover, the Georgia Act does not apply to interested shareholders that continuously have retained the status of interested shareholders for the three-year period prior to the proposed business combination and that have not increased their holdings in any single class of stock by greater than one percent. *Id.* § 14-2-235(c).

ILLINOIS

In 1985 Illinois adopted a fair price statute (Illinois Act) that contains a number of variations from the Maryland Act. ILL. ANN. STAT. ch. 32, para. 7.85 (Smith-Hurd Supp. 1988). The Illinois Act confers upon the disinterested directors the power to exercise greater discretion than the other directors of the board may exercise. *Id.* ch. 32, para. 7.85B(l), B(2)(d), C(ll). Specifically, the Illinois Act enables an interested shareholder to avoid satisfying the supermajority voting requirements or fairness provisions if two-thirds of the disinterested directors approve of the proposed business combination. *Id.* ch. 32, para. 7.85B(1). Moreover, the Illinois Act authorizes the disinterested directors, upon majority approval, to determine whether a person satisfies the Act's definition of an interested shareholder and whether certain other provisions under the Act are satisfied. *Id.* ch. 32, para. 7.85C(ll). The Illinois Act essentially defines a disinterested director as either a member of the board of directors who served on the board before the tender offeror became an interested shareholder or any director that a majority of the disinterested directors elects to serve as a director on the corporation's board. *Id.* ch. 32, para. 7.85C(7)(b). The Illinois Act specifically excludes any directors that an interested shareholder nominates to run in an Illinois corporation's election of directors. *Id.* ch. 32, para. 7.85C(7)(c).

In addition to conferring greater discretion to the disinterested directors than to the interested directors of the board, the Illinois Act requires a majority of the disinterested shareholders with voting rights to approve any business combination. *Id.* ch. 32, para. 7.85A(e)(ii). Moreover, the Illinois Act requires that eighty percent of the holders of outstanding voting stock approve a business combination. *Id.* ch. 32, para. 7.85A(l)(e)(i). The Illinois Act, however, allows an interested shareholder to avoid the supermajority voting requirements so long as the interested shareholder satisfies certain stock price and nonprice conditions. *Id.* ch. 32, para. 7.85B; *supra* notes 151-57 and accompanying text (describing price conditions and nonprice conditions); *supra* note 148 and accompanying text (describing supermajority voting requirements). Unlike the nonprice conditions that most fair price statutes contain, the Illinois Act requires the target corporation to mail a proxy statement to the shareholders describing the proposed business combination at least thirty days before the business combination becomes effective. ILL. ANN. STAT. ch. 32, para. 7.85B(2)(f) (Smith-Hurd Supp. 1988).

The Illinois Act applies to all Illinois corporations that must register with the SEC pursuant to the Securities Exchange Act of 1934. *Id.* ch. 32, para. 7.85A. The Illinois Act allows a corporation to opt out of the Act's coverage by amending its corporate charter if the shareholders satisfy the same supermajority voting requirements necessary to consummate a business combination. *Id.*

KENTUCKY

In 1984 Kentucky enacted a fair price statute (Kentucky Act). KY. REV. STAT. ANN. §§ 271B.12-200 to 271B.12-230 (Michie/Bobbs-Merrill Supp. 1988). Ashland Oil, Inc. (Ashland Oil), which was Kentucky's largest corporation when the legislature enacted the Act, was primarily responsible for the passage of the Kentucky Act. S. PAMEPINTO, *supra* note 7, at 22. Before the

ested shareholder.[167] Under the Maryland Act, however, a board of direc-

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Kentucky Act's passage, Canadian investors threatened to takeover Ashland Oil. *Id.* Ashland Oil and other proponents of the bill that became the Kentucky Act urged the legislature to pass the bill, arguing that a successful takeover of Ashland Oil would destroy the state's economy and would result in possible employee layoffs and plant closings. *Id.* The proponents of the bill contended that, if the bill did not pass, the Canadians would profit at the expense of employees' wages. *Id.* Accordingly, the proponents of the bill urged Kentucky's legislature to pass the bill and argued that passage would protect other Kentucky corporations and their employees from the threat of future hostile takeovers. *Id.*

While the Kentucky Act substantively is similar in .most aspects to the Maryland Act, the Kentucky Act significantly differs from the Maryland Act by conferring to the disinterested directors, which the Kentucky Act defines as continuing directors, considerably more discretion in certain matters. KY. REV. STAT. ANN. §§ 271B.12-200(ll), -210(3),(4), -220(4) (Michie/Bobbs-Merrill Supp. 1988). The Kentucky Act defines a continuing director as a member of the board of directors who served on the board before the tender offeror became an interested shareholder. *Id.* § 271B.12-200(6). Moreover, the definition of a continuing director includes any director that a majority of the continuing board of directors affirmatively approved at a meeting in which a quorum of the disinterested directors was present. *Id.* Specifically, the Kentucky Act enables an interested shareholder to avoid the supermajority voting requirements or fairness conditions if a majority of the continuing directors approve of the proposed business combination at a meeting in which a majority of the continuing directors are present. *Id.* § 271B.12-220(4)(a).

In addition to conferring greater discretion to the continuing directors, the Kentucky Act, like the Maryland Act, imposes supermajority voting requirements to approve a business combination. KY. REV. STAT. ANN. § 271B.12-210(l)(a)-(b), (Michie Bobbs-Merrill Supp. 1988); *see supra* note 148 and accompanying text (describing supermajority voting requirements). The Kentucky Act, however, disallows an interested shareholder from completing any business combination unless the interested shareholder has held its stock in the corporation for a five-year period that commences on the day that the tender offeror became an interested shareholder. KY. REV. STAT. ANN. § 271B.12-210(3) (Michie/Bobbs-Merrill Supp. 1988). The Kentucky Act provides an exception to the five year requirement if the board of directors approves the business combination before the tender offeror becomes an interested shareholder. *Id.* Moreover, the Kentucky Act enables the shareholders of a corporation to avoid the supermajority voting requirements under the Kentucky Act if the interested shareholder satisfies certain stock price and nonprice conditions. *Id.* § 271B.12-220(2); *supra* notes 151-57 and accompanying text (describing price conditions and nonprice conditions). In addition, the Kentucky Act allows a corporation to opt out of the Act's requirements if the shareholders satisfy the same supermajority voting requirements necessary to consummate a business combination. KY. REV. STAT. ANN. § 271B.12-220(5)(a)(2) (Michie/Bobbs-Merrill Supp. 1988).

MISSISSIPPI

In 1985 Mississippi adopted a fair price statute that the legislature named the Mississippi Shareholder Protection Act (Mississippi Act). MISS. CODE ANN. §§ 79-25-1 to -9 (Supp. 1987). While the Mississippi Act generally contains provisions that substantively are similar to the Maryland Act, the Mississippi Act, unlike the Maryland Act, confers to the continuing directors of target corporations the power to exercise greater discretion than the other directors of the board may exercise. *Id.* § 79-25-7(c). Specifically, the Mississippi Act enables an interested shareholder to avoid satisfying the supermajority voting requirements or fairness conditions of the Act if eighty percent of the continuing directors of the target corporation approve of the business combination. *Id.*; *see supra* note 148 and accompanying text (describing supermajority voting requirements). Under the Mississippi Act, continuing directors are either members of the board of directors who served on the board before the tender offeror became an interested shareholder or any directors on the board that a majority of the disinterested board of directors elects. MISS. CODE ANN. § 79-25-7(g) (Supp. 1987). The Mississippi Act defines an interested shareholder as an owner of at

tors may approve a business combination only before the tender offeror

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least twenty percent of the outstanding voting stock of the corporation. *Id.* § 79-25-3(l).

In addition to conferring greater discretion to the continuing directors than to other members of the board of directors, the Mississippi Act authorizes a corporation to opt out of the Act's requirements by a shareholder amendment. *Id.* § 79-25-7(d)(ii). To opt out of the Mississippi Act, a majority of the shareholders must vote to approve the amendment. *Id.* The Mississippi Act, however, disallows the corporation from opting out of the Act's requirements after the first year of the corporation's existence. *Id.* Further, the Mississippi legislature specifically included a severability provision in the Mississippi Act. *Id.* § 79-25-9. The severability provision provides that if the Mississippi Act is found invalid, the fair price provisions are severable from the rest of Mississippi's corporate law, leaving the remainder of the Mississippi Act fully effective. *Id.* § 79-25-9; *see supra* note 123 and accompanying text (discussing severability of provisions from state takeover laws).

NORTH CAROLINA

In 1987 North Carolina enacted a fair price statute that the legislature named the North Carolina Shareholder Protection Act (North Carolina Act). N.C. GEN. STAT. §§ 55-75 to -80 (Supp. 1987). The North Carolina Act expires on June 30, 1989. N.C. Sess. Laws 1987, ch. 124, S.3. In addition North Carolina adopted a control share statute. *Id.* § 55-90; *see supra* note 115 and accompanying text (describing North Carolina's control share statute).

Unlike the provisions of most fair price statutes, which apply only to domestic corporations, the North Carolina Act applies both to domestic corporations and certain foreign corporations. N.C. GEN. STAT. § 55-75(b)(3a) (Supp. 1987); *see infra* notes 171-72 and accompanying text (discussing fair price statutes that apply to foreign corporations). The Act's requirements essentially apply to foreign corporations that have their principal place of business in North Carolina, maintain a substantial percentage of their assets in North Carolina, and employ a substantial number of North Carolina residents. N.C. GEN. STAT. § 55-75(b)(3a)(2) (Supp. 1987).

While the North Carolina Act generally contains provisions that are similar in substance to the Maryland Act, the North Carolina Act, unlike the Maryland Act, confers to the continuing directors the power to exercise greater discretion than the other directors of the board may exercise. *Id.* § 55-78(c). The North Carolina Act confers to the continuing directors, subject to majority approval, the authority to determine certain matters. *Id.* For example, the North Carolina Act authorizes the continuing directors to determine whether a person owns twenty percent of the voting shares and to determine the fair market value of certain assets that the corporation plans to acquire. *Id.* Under the North Carolina Act, a continuing director includes both a member of the board of directors who served on the board before the tender offeror became an interested shareholder and any director of the board a majority of the disinterested board of directors approves as a director. *Id.* § 55-75(b)(3). The North Carolina Act's fairness provisions are not triggered unless a business combination involves an entity owning twenty percent of the corporation's voting stock. *Id.* § 55-76. Unlike the Maryland Act, however, the North Carolina Act does not define an interested shareholder. *See id.* §§ 55-75 to -80 (failing to define interested shareholder); *supra* note 146 and accompanying text (Maryland Act defines interested shareholder as person owning more than twenty percent of corporation's stock).

In addition to conferring greater discretion upon the continuing directors than the other members of the board of directors, the North Carolina Act requires that ninety-five percent of the voting shares of a corporation affirmatively vote to approve any proposed business combination with an entity holding more than twenty percent of the corporation's voting shares. N.C. GEN. STAT. § 55-76 (Supp. 1987); *supra* note 148 and accompanying text (describing supermajority voting requirements). The North Carolina Act allows a business combination triggering the supermajority voting requirements to avoid satisfying the voting requirements if the interested shareholder satisfies certain stock price and nonprice conditions. *Id.* § 55-77; *supra* notes 151-57 and accompanying text (describing price conditions and nonprice conditions). Unlike most fair price statutes, the North Carolina Act includes a nonprice condition that requires the interested shareholder to ensure that the corporation maintains a number of continuing directors on the

becomes an interested shareholder.[168] Second, certain states have adopted

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board of directors equal to the percentage of outstanding stock that the disinterested shareholders hold. N.C. GEN. STAT. § 55-77(3) (Supp. 1987). Moreover, the North Carolina Act requires the board of directors unanimously to approve any reductions in dividend rates. *Id.* Further, the North Carolina Act requires that the corporation mail proxy statements to solicit shareholder approval of the business combination and notify the shareholders of the fairness of the terms of the business combination. *Id.* § 55-77(5). The proxy statement must include a fairness opinion prepared by an investment banking firm that the continuing directors selected. *Id.*

In addition to allowing business combinations to avoid the supermajority voting requirements, the North Carolina Act exempts from the Act's provisions any sale or lease of the corporation's assets valued at less than $5,000,000. *Id.* § 55-75(b)(l). The North Carolina Act, however, disallows an existing corporation from exempting itself from the North Carolina Act. *See id.* § 55-79(ii) (corporation had to opt out of North Carolina Act's provisions within ninety days of Act's effective date). A newly formed corporation, however, may opt out of the North Carolina Act's provisions if the corporation affirmatively states in its charter that the provisions of the North Carolina Act do not apply. *Id.* § 55-79(iii).

In addition to the North Carolina Act's exemption provisions, the North Carolina legislature specifically included a severability provision in the North Carolina Act. *Id.* § 55-80. The severability provision provides that if a court finds that the North Carolina Act is invalid, the fair price provisions are severable from the rest of the North Carolina Act, leaving the remainder of the North Carolina Act fully effective. *Id.*; *see also id.* § 55-79.1 (describing conflict of law provision in North Carolina Act).

PENNSYLVANIA

In 1983 Pennsylvania adopted a fair price statute referred to as the Pennsylvania Shareholder Protection Act (Pennsylvania Act). PA. STAT. ANN. tit. 15, § 1409.1 (Purdon Supp. 1988). At the same time, Pennsylvania adopted a control share cashout statute. *Id.* § 1910. The advocates of the Pennsylvania Act, particularly the Pennsylvania Chamber of Commerce, introduced the bill to the state legislature in November 1983. *See* Newlin & Gilmer, *The Pennsylvania Shareholder Protection Act: A New State Approach to Deflecting Corporate Takeover Bids*, 40 BUS. LAW. 111, 112 (1984) (discussing legislative history of Pennsylvania Act). With little legislative discussion and no public debate, the Pennsylvania legislature approved the bill, and the state's governor signed the bill into law in December 1983. *Id.*; Statement of Senator Lloyd, Senate's Consideration to Concur in House Amendment of S. 1144 (December 14, 1983) (according to Senator Lloyd, bill seemed important even though bill's proponents hurriedly were attempting to win legislature's approval of bill); Statement of Senator Zemprelli, Pennsylvania's State Senate's Consideration on S. 1144 (December 6, 1983) (during hearings, Zemprelli noted importance of bill and stated that legislature did not understand how bill applies to corporations); Steinburg, *State Law Developments: The Pennsylvania Anti-Takeover Legislation*, 12 SEC. REG. L.J. 184, 184-85 & n.5. While the legislative history indicates that the legislators understood that the bill would protect shareholders, the history of the Pennsylvania Act denotes a larger concern, which is the protection of the state's economy from the disruptive effects of hostile takeovers. *See* Statement of Senator Fumo, Pennsylvania State Senate's Consideration on S. 1144, at 1431 (Dec. 6, 1983) (bill's enactment would have chilling effect on takeovers and protect state residents that had invested time and money in Pennsylvania corporations). When the bill was pending in the legislature, foriegn corporations were attempting to takeover Gulf Oil Corporation and Scott Paper Co., both Pennsylvania corporations. *See* S. PAMEPINTO, *supra* note 7, at 18-19 (discussing legislative history of Pennsylvania Act). One of the senator's advocating the bill's enactment, however, denied knowing whether Scott Paper's continued existence depended on the bill's passage. *See* Interrogation between Senators Fisher and Zemprelli, Pennsylvania State Senate's Consideration on S. 1144 (Dec. 6, 1983) (during hearings, Senator Zemprelli denied knowing that bill would save Scott Paper from corporate takeover).

Although the Pennsylvania Act operates similarly to the Maryland Act, the form of the Pennsylvania Act is simpler than the Maryland Act. *Compare* PA. STAT. ANN. tit. 15, § 1409.1

fair price statutes either that do not allow corporations to opt out of the

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(Purdon Supp. 1988) *with* MD. CORPS. & ASS'NS CODE ANN. § 3-601 to -603 (1985 & Supp. 1988). *See generally* Newlin & Gilmer, *supra*, at 112-13 (because of bill's hurried passage, Pennsylvania Act probably will require legislative amendments and judicial clarification). The Pennsylvania Act confers the authority to approve a transaction with an interested shareholder upon a majority of the members of the board of directors who do not have an equitable interest in the interested shareholder or that served on the board of directors two years before the proposed transaction. PA. STAT. ANN. tit. 15, § 1409.1(C)(2) (Purdon Supp. 1988). The Pennsylvania Act defines an interested shareholder as a shareholder that is a party to a transaction or that is treated differently from other shareholders. *Id.* § 1409.1(C). The Pennsylvania Act's definition of an interested shareholder, however, excludes bankers, trustees, and shareholders that in good faith do not intend to circumvent the purposes of the Pennsylvania Act. *Id.*

In addition to conferring greater discretion to the disinterested directors than the other members of the board of directors, the Pennsylvania Act requires a majority of the disinterested shareholders to approve a business combination. *Id.* § 1409.1(C). The Pennsylvania Act allows an interested shareholder to avoid the voting requirements if the interested shareholder pays the shareholders of the target corporation consideration in an amount that at least equals the consideration that the interested shareholder paid the shareholders for the shares during the tender offer. *Id.* § 1409.1(C)(2). In addition the Pennsylvania Act does not contain nonprice conditions. *See id.* § 1409.1 (Pennsylvania Act contains no nonprice fairness requirements); *supra* notes 151-57 and accompanying text (describing price and nonprice conditions). *See generally* Note, *The 1983 Amendments to Pennsylvania's Business Corporation Law: Unconstitutional: MITE Be*, 89 DICK. L. REV. 401, 401-40 (1985) (describing legislative history, mechanics, and constitutionality of Pennsylvania Act).

VIRGINIA

In 1985 Virginia enacted a fair price statute (Virginia Act). VA. CODE ANN. §§ 13.1-725 to -727.1 (1985 & Supp. 1988). While the Virginia Act substantively is quite similar to the Maryland Act, the Virginia Act significantly differs from the Maryland Act by conferring more discretion to the disinterested board of directors in certain matters. *Id.* Specifically, the Virginia Act enables the interested shareholders to avoid the supermajority voting requirements and fairness provisions if a majority of the disinterested directors vote to exempt a business combination, defined as an affiliated transaction, from the requirements of the Act. *Id.* § 13.1-727.A(1). Additionally, the Virginia Act gives the disinterested directors, upon majority approval, the discretion to determine whether a person satisfies the Act's definition of an interested shareholder or of an affiliate of some other entity, and to determine other matters concerning satisfaction of the Act's definitions. *Id.* § 13.1-726.1. Under the Virginia Act, a disinterested director can be either a member of the board of directors who served on the board before the tender offeror became an interested shareholder or any director that a majority of the disinterested board of directors approves to act as a director. *Id.* § 13.1-725.

In addition to conferring greater discretion to the disinterested directors than the other directors of the board, the Virginia Act imposes supermajority voting requirements to approve an affiliated transaction. *Id.* § 13.1-725.1. Accordingly, the Virginia Act requires that a supermajority of two-thirds of the disinterested shareholders and the greater of a majority or two of the disinterested directors affirmatively vote to approve an affiliated transaction. *Id.* § 13.1-725.1. If an interested shareholder, however, has held its stock in the corporation for a three year period, the Virginia Act applies a different supermajority voting requirement. *Id.* §§ 13.725.1 to .726; *see infra* note 131 (describing freezeout statutes). If a tender offeror holds the stock of a corporation for a three year period that commences on the day the tender offeror becomes an interested shareholder, the Virginia Act requires that a supermajority of two-thirds of the disinterested shareholders affirmatively vote to approve the transaction (the three year supermajority vote) or a majority of the disinterested directors affirmatively vote to approve the transaction. *Id.* §§ 13.1-726, -727.A.1. So long as an interested shareholder has held the stock of the corporation for three years, the Virginia Act also allows an interested shareholder to avoid the three year supermajority

fair price requirements or that limit the ability of corporations to opt out of the statute.[169] Because the Maryland Act, like the majority of fair price

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voting requirements. *Id.* § 13.1-727. Accordingly, the interested shareholder may avoid the three year supermajority voting requirements if the shareholder satisfies certain stock price and nonprice conditions. *Id.* § 13.1-727; *see supra* notes 151-57 and accompanying text (describing price and nonprice provisions). The Virginia Act specifies that the corporation must satisfy the nonprice conditions during the three-year period ending on the date that the interested shareholder announces the proposed affiliated transaction. VA. CODE ANN. § 13.1-727 (1985 & Supp. 1988). Moreover, the Virginia Act allows a corporation to opt out of the Act's requirements by amending the bylaws or corporate charter if a majority of the disinterested shareholders approve the amendment. *Id.* § 13.1-727.B.5.; *see supra* notes 169-70 and accompanying text (listing states that have enacted fair price statutes containing opt out provisions). The Virginia Act, however, disallows the amendment from becoming effective until eighteen months after the day the shareholders approved the amendment. VA. CODE ANN. § 13.1-727.B.5 (1985 & Supp. 1988). *See generally* Joynes & Keeler, *Virginia's Affiliated Transaction's Statute: Indulging Form over Substance in Second Generation Takeover Legislation*, 21 U. RICH. L. REV. 489, 489-519 (1987) (discussing mechanics and constitutionality of Virginia Act); Note, *Virginia's Affiliated Transactions Article: The Death of Two-Tiered Takeovers in Virginia*, 44 WASH. & LEE L. REV. 1103, 1105-1111, 1122-1127 (1988) (discussing mechanics and constitutionality of Virginia Act).

WASHINGTON

In 1985 Washington adopted a fair price statute (Washington Act) that is substantively similar, but less complex in form, than the Maryland Act. WASH. REV. CODE § 23A.08.425 (Supp. 1988). The Washington Act refers to a transaction between an interested shareholder and a domestic corporation as an interested shareholder transaction. *Compare id.* § 23.08.425(l)(a) (interested shareholder transaction triggers Washington Act) *with supra* notes 144-47 and accompanying text (business combination triggers Maryland Act). Unlike the Maryland Act, the Washington Act requires an affirmative two-thirds vote of the disinterested shareholders to approve an interested shareholder transaction (supermajority voting requirement). WASH. REV. CODE § 23A.08.425(2) (Supp. 1988); *see supra* note 148 and accompanying text (defining supermajority voting requirements). Alternatively, however, a majority of the corporation's disinterested directors may vote to approve an interested shareholder transaction. WASH. REV. CODE §23A.08.425(1)(b) (Supp. 1988). Moreover, under the Washington Act, unlike the Maryland Act, an interested shareholder does not have to satisfy nonprice fairness requirements to avoid satisfying the supermajority voting requirement. *See id.* (Washington Act includes no nonprice conditions). In conjunction with the fair price requirements, the Washington Act confers upon the disinterested directors the authority to determine whether the value of the consideration that the interested shareholder proposes to pay the minority shareholders at least equals the highest market value of the consideration paid for shares of the same class acquired within the previous two years. *Id.* § 23A.08.425(3)(c). In addition the Washington Act allows a corporation to opt out of the provisions of the Act by amending its corporate charter if the shareholders satisfy the same supermajority voting requirements necessary to effectuate a business combination. *Id.* § 23A.08.425(3)(d); *see infra* notes 169-70 and accompanying text (discussing fair price statutes with opt out provisions).

167. *See* MISS. CODE ANN. §§ 79-25-1 to -7(c) (Supp. 1987) (affirmative vote of 80% of disinterested directors will exempt business combination from Mississippi Act's requirements); VA. CODE ANN. § 13.1-727A(1) (1985 & Supp. 1988) (affirmative vote of majority of disinterested directors will exempt business combination from Virginia Act's requirements); *supra* note 166 (listing and describing all state fair price statutes that confer additional discretion to disinterested directors).

168. *See* MD. CORPS. & ASS'NS CODE ANN. § 3-603(c)(l)(ii) (1985 & Supp. 1988) (authorizing board of directors of Maryland corporation to exempt business combination from Act's requirement before tender offeror becomes interested shareholder).

169. *Compare* FLA. STAT. ANN. § 607.108(5)(c) (West Supp. 1988) (opt out amendment does not apply to affiliated transaction until eighteen months after shareholders approve amendment)

statutes, allows corporations to opt out of the Act's provisions, shareholders of those corporations who opt out of the Act's requirements may remain unprotected from the coercive effect of two-tiered takeovers.[170] Third, a few states, like Florida and North Carolina, have adopted fair price statutes that apply to corporations other than domestic corporations.[171] The Maryland Act, however, like the majority of fair price statutes, only applies to certain companies incorporated in Maryland.[172]

While a number of states have enacted fair price statutes, a few states—Maine, Pennsylvania, and Utah—have enacted a hybrid form of a fair price statute referred to as a control share cashout statute.[173] Like

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and MISS. CODE ANN. § 79-25-7(d)(ii) (Supp. 1987) (prohibiting corporations from opting out of Mississippi Act's requirements after corporations' first year of incorporation) *and* N.C. GEN. STAT. § 55-98.1 (Supp. 1987) (corporation must opt out of North Carolina Act's provisions within ninety days of Act's effective date) *and* PA. STAT. ANN. tit. 15, § 1910.A(l) (Purdon Supp. 1988) (same) *and* VA. CODE ANN. § 13.1-727.B.5 (Supp. 1988) (opt out amendment does not apply to affiliated transaction until eighteen months after shareholders approve amendment) *with* CONN. GEN. STAT. ANN. § 33-374c(d)(B) (West 1987) (containing opt out provisions) *and* GA. CODE ANN. § 14-2-235(a)-(b) (Supp. 1988) (corporation must amend bylaws to state that corporation elects to have Georgia Act apply to it) *and* ILL. ANN. STAT. ch. 32, para. 7.85.A (Smith-Hurd Supp. 1987) (containing opt out provisions) *and* KY. REV. STAT. ANN. § 271B.12-220(5)(a)2 (Michie/Bobbs-Merrill Supp. 1988) (same) *and* MICH. COMP. LAWS ANN. §§ 450.1775-.1784(B) (West Supp. 1988) (same) (opt out amendment does not apply to affiliated transaction until eighteen months after shareholders approve amendment) *and* WASH. REV. CODE § 23A.08.425(3)(d) (West Supp. 1988) (same) *and* WIS. STAT. ANN. § 180.725(3a) (West Supp. 1988) (same). *See generally supra* note 166 (describing Florida's, Mississippi's, North Carolina's, Pennsylvania's, and Virginia's state fair price statutes that either limit corporations' ability to opt out of fair price statute or do not contain opt out provisions).

170. *See* S. PAMEPINTO, *supra* note 7, at 43 (if corporations opt out of Maryland Act's requirements, shareholders are unprotected from coercive two-tiered takeovers). *But see supra* note 160 and accompanying text (purpose of opt out provision in Maryland Act is to encourage friendly takeovers).

171. *See* FLA. STAT. ANN. §§ 607.108, .110 (West. Supp. 1988) (Florida Act's provisions apply to certain foreign corporations); N.C. GEN. STAT. §§ 55-75 to -80 (Supp. 1987) (North Carolina Act's provisions apply to certain foreign corporations); *supra* note 166 (describing Florida Act's application to certain foreign corporations); *supra* note 166 (describing North Carolina Act's application to certain foreign corporations).

172. *See* MD. CORPS. & ASS'NS CODE ANN. §§ 3-601 to -603 (1985 & Supp. 1988) (Maryland Act's provisions apply to domestic corporations); *see also* CONN. GEN. STAT. ANN. §§ 33-374a to -374c (West 1987) (Connecticut Act applies to domestic corporations); GA. CODE ANN. §§ 14-2-232 to -235 (Supp. 1988) (effective until July 1, 1989) (recodified as amended at GA. CODE ANN. §§ 14-2-1131 to -1133 (Special Pamphlet 1988) (effective July 1, 1989) (Georgia Act applies to domestic corporations); ILL. ANN. STAT. ch. 32, para. 7.85 (Smith-Hurd Supp. 1988) (Illinois Act applies to domestic corporations); KY. REV. STAT. ANN. §§ 271B.12-200 to 271B.12-230 (Michie/Bobbs-Merrill Supp. 1988) (Kentucky Act applies to domestic corporations); LA. REV. STAT. ANN. §§ 12:132 to -134 (West Supp. 1988) (Louisiana Act applies to domestic corporations); MICH. COMP. LAWS ANN. §§ 450.1775-.1784 (West Supp. 1988) (Michigan Act applies to domestic corporations); MISS. CODE ANN. §§ 79-25-1 to -7 (Supp. 1987) (Mississippi Act applies to domestic corporations); PA. STAT. ANN. tit. 15, § 1409.1 (Purdon Supp. 1988) (Pennsylvania Act applies to domestic corporations); VA. CODE ANN. §§ 13.1-725 to -727.1 (Supp. 1988) (Virginia Act applies to domestic corporations).

173. *See* ME. REV. STAT. ANN. tit. 13-A, § 910 (Supp. 1987) (control share cashout statute);

fair price statutes, control share cashout statutes require a tender offeror

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PA. STAT. ANN. tit. 15, § 1910 (Purdon Supp. 1988) (same); UTAH CODE ANN. § 61-6-12(l) (Advance Code Serv. 1988) (same). The control share cashout statutes resemble heightened dissenter's right of appraisal statutes. *See* S. Shapiro & J. Strauss, *Breathing New Life into State Takeover Statutes* 457, 482 (1987) (referring to control share cashout statutes as heightened appraisal statutes); *supra* note 131 (discussing dissenting shareholders' right to appraisal).

MAINE

In 1985 Maine adopted a control share cashout statute (Maine Control Share Cashout Act). ME. REV. STAT. ANN. tit. 13-A, § 910 (Supp. 1987). The provisions of the Maine Control Share Cashout Act apply to any domestic corporation unless the corporation does not have any voting shares registered on a national securities exchange or with the SEC. *Id.* § 910.14.A. A shareholder's acquisition of twenty-five percent of the shares of a Maine corporation (control transaction) triggers the requirements of the Maine Control Share Cashout Act. *Id.* § 910.2. The Maine Control Share Cashout Act defines any shareholder or group of shareholders having voting power of at least twenty-five percent of the shares of a target corporation as a controlling person. *Id.* § 910.2.A. When a shareholder assumes the status of a controlling person, in a control transaction, the Maine Control Share Cashout Act requires the controlling person to notify the shareholders within fifteen days of the date of the control transaction that a control transaction has taken place. *Id.* § 910.3. The Maine Control Share Cashout Act requires that the controlling person inform the shareholders that the shareholders have thirty days to exercise their right to demand, in writing, that the control person pay the shareholders cash for the target shares. *Id.* § 910.4. The control person must pay any shareholder demanding payment for its shares an amount equal to the fair value of the shares based on the value of the shares the day before the control transaction occurred. *Id.* § 910.5. The control person has ten days to make a written offer to pay the shareholder for the shares. *Id.* § 910.7. If the control person and the shareholder demanding payment for the shares of the target corporation cannot agree as to the fair value of the shares within thirty days, the Maine Control Share Cashout Act authorizes a state court to determine the value of the shares. *Id.* § 910.9.

PENNSYLVANIA

In 1983 Pennsylvania adopted a control share cashout statute (Pennsylvania Control Share Cashout Act). PA. STAT. ANN. tit. 15, § 1910 (Purdon Supp. 1988); *see supra* note 166 (discussing legislative history of Pennsylvania Act). In addition, Pennsylvania adopted a fair price statute. *See supra* note 166 (describing provisions of Pennsylvania's fair price statute). The Pennsylvania Control Share Cashout Act generally applies to any domestic corporation. PA. STAT. ANN. tit. 15 § 1910.G (Purdon Supp. 1988). The Pennsylvania Control Share Cashout Act, however, does not apply if the corporation does not have any voting shares registered with the SEC, is a subsidiary of the target corporation, or is a shareholder that inadvertently acquires enough shares of stock to become a control person. *Id.* § 1910.G. A shareholder's acquisition of thirty percent of the shares of a Pennsylvania corporation triggers the requirements of the Pennsylvania Control Share Cashout Act. *Id.* § 1910.B. The Pennsylvania Control Share Cashout Act defines any shareholder or group of shareholders having voting power of at least thirty percent of the shares of a target corporation as a controlling person. *Id.* § 1910.B. When a shareholder assumes the status of a controlling person in a control transaction, the Pennsylvania Control Share Cashout Act requires the controlling person promptly to notify the shareholders that a control transaction has taken place. *Id.* § 1910.C. The Pennsylvania Control Share Cashout Act requires the controlling person to state in the notice that the shareholders are entitled to demand payment for their shares within a certain period of time. *Id.* § 1910.C,.D. In addition the Pennsylvania Control Share Act requires the controlling person to file a petition with the court of common pleas located in the county where the corporation has a registered office for a definition of the fair value of the shares. *Id.* § 1910.C. The controlling person must pay any shareholder demanding payment for the shares in the target corporation cash in an amount equal to the fair value of the shares. *Id.* § 1910.E. The Pennsylvania Control Share Cashout Act fixes the fair value of the shares based on the value of the shares on the day before the control transaction took place. *Id.* The Pennsylvania Control

to pay minority shareholders of a target corporation a fair price for shares of the target corporation, but only to any shareholder that demands a fair price.[174] Control share cashout statutes do not impose supermajority voting requirements or nonprice conditions on the tender offeror, but explicitly provide that if the parties disagree over the fair value of the shares of a corporation, a court may decide the value of the shares.[175]

Although numerous states have enacted fair price statutes, the United States Supreme Court has not yet addressed the constitutionality of fair price statutes.[176] The reasoning of the Supreme Court in *CTS* and *MITE*,

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Share Cashout Statute also provides that the fair value of a share must be a value at least as high as the price the controlling person paid for the shares within ninety days of the control transaction. *Id.* If the control person and the shareholder demanding payment for the shares of the target corporation cannot agree on the fair value of the shares, the Pennsylvania Control Share Cashout Act authorizes the court to appoint an appraiser to determine the value of the shares. *Id.* § 1910.E. Once the shareholders have surrendered the shares, the controlling person must pay cash for the shares. *Id.* § 1910.E.

UTAH

In 1987 Utah adopted a simplified control share cashout statute that the legislature incorporated in Utah's control share statute. *See* UTAH CODE ANN. § 61-6-12 (Advanced Code Serv. 1988) (containing Utah's control share cash out statute); *supra* note 99 (describing mechanics of Utah's control share statute). The cashout component of Utah's control share statute applies if a tender offeror becomes a controlling person by acquiring at least a majority of the voting shares of the corporation. UTAH CODE ANN. § 61-612(l) (Advance Code Serv. 1988). Once the tender offeror acquires a majority interest in the corporation, the Utah Act requires the board of directors of the target corporation to notify the shareholders that they are entitled to demand that the tender offeror pay them the fair value for their shares in the corporation. *Id.* §§ 61-6-12(2); *see id.* §§ 16-10-75 to -76 (describing shareholders' right to dissent under Utah law). The Utah Act defines a share's fair value as the highest price that the tender offeror paid for the shares before the tender offeror became a controlling person. *Id.* § 61-6-12(3).

174. *See supra* note 173 (listing states that have enacted control share cashout statutes and describing provisions of control share cashout statutes that require tender offeror to pay fair price to minority shareholders for shares of target corporation). While control share cashout statutes require a tender offeror to pay minority shareholders a fair price for their shares in the target corporation, control share cashout statutes do not require the tender offeror to comply with any pricing formula to determine the fair value of the shares of the target corporation. *Compare supra* and accompanying text (stating that control share cashout statutes require tender offeror to pay shareholder fair price for shares if shareholder demands payment for shares) *with supra* notes 153-154 and accompanying text (stating that fair price statutes require interested shareholders to pay fair price based on pricing formula). Unlike the requirements of fair price statutes, the requirements of control share cashout statutes do not apply unless a target shareholder demands payment of the fair value of the shares of the target corporation. *Compare supra* note 153 and accompanying text (stating that fair price statutes require interested shareholders to pay fair price for shares unless interested shareholder satisfies supermajority voting requirement) *with supra* and accompanying text (stating that control share cashout statutes require tender offeror to pay fair price if shareholder demands to be paid fair price).

175. ME. REV. STAT. ANN. tit. 13-A, § 910.9 (Supp. 1987) (if parties disagree over fair value of stock, court shall determine stock's value); PA. STAT. ANN. tit. 15, § 1910.E (Purdon Supp. 1988) (same); UTAH CODE ANN. § 61-6-12 (Advance Code Serv. 1988) (same).

176. *See* Scriggins & Clarke, *supra* note 131, at 279 (noting that Supreme Court has not yet addressed constitutionality of fair price statutes). *But see* CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637, 1652 (1987) (upholding constitutionality of Indiana's control share statute); Edgar

however, suggests that most of the states' fair price statutes will survive a preemption test analysis under the Williams Act and do not impermissively burden interstate commerce.[177] The Williams Act does not preempt state fair price statutes because the Williams Act and the fair price statutes apply to two distinct aspects of two-tiered takeovers.[178] The Williams Act regulates and governs tender offers in two ways.[179] First, a tender offeror must file a statement with the SEC disclosing certain substantive matters, including the tender offeror's identity, financial arrangements for the proposed takeover, and purpose of the purchase.[180] Second, the Williams Act establishes certain procedural rules aimed at making the tender offer process more equitable.[181] In form at least, fair price statutes, however,

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v. Mite Corp., 457 U.S. 624, 646 (1982) (holding Illinois' first generation takeover statute unconstitutional); *also* Gunter v. AGO Int'l B. V., 533 F. Supp. 86, 90 (N.D. Fla. 1981) (Florida takeover statute found unconstitutional); Natomas Co. V. Bryan, 512 F. Supp. 191, 193 (N.D. Nev. 1981) (Nevada takeover statute found unconstitutional); Seagram & Sons Inc. v. Marley, Fed. Sec. L. Rep. § 98,246 (W.D. Okla. 1981) (Oklahoma takeover statute found unconstitutional); Crane Co. v. Lam, 509 F. Supp. 782, 788 (E.D. Pa. 1981) (granting preliminary injunction to plaintiff on finding that plaintiff substantially likely to succeed in constitutional challenge to Pennsylvania takeover statute found unconstitutional); AMCA Int'l Corp. v. Krouse, 482 F. Supp. 929, 941 (S.D. Ohio 1979) (Ohio takeover statute found constitutional); Brascan Ltd. v. Lassiter, Fed. Sec. L. Rep. § 98,247 (E.D. La. 1979) (Louisiana takeover statute found unconstitutional); Dart Indus., Inc. v. Conrad, 462 F. Supp. 1, 14 (S.D. Ind. 1978) (Delaware takeover statute found unconstitutional).

177. *See infra* notes 178-196, 209-225, 233-241 and accompanying text (describing why Williams Act generally does not preempt fair price statutes). *But see infra* notes 197-208, 226-232 and accompanying text (discussing constitutional problems with certain states' fair price statutes).

178. *Compare infra* notes 179-81 and accompanying text (discussing application of Williams Act to tender offeror during tender offer) *with infra* notes 184-85 and accompanying text (discussing application of fair price statutes to interested shareholder). In addition to applying to different aspects of a two-tiered tender offer than the Williams Act, the provisions of fair price statutes encompass state fiduciary law principles. *See* Sante Fe Indus. v. Green, 430 U.S. 462, 478-79 (1977) (freezeout of subsidiary by parent corporation constituted corporate conduct that most states traditionally regulate).

179. *See infra* notes 180-82 (describing how Williams Act governs tender offers).

180. 15 U.S.C. § 78n(d)(6) (1982); *see supra* notes 5-6 and accompanying text (discussing requirements of Williams Act). Under the Williams Act, a tender offeror must accept tendered shares on a pro rata basis. 15 U.S.C. § 78n(d)(6) (1982). In requiring a tender offeror to accept the shares on a pro rata basis, Congress intended to reduce the pressure that a shareholder feels during a tender offer to tender his shares before the other shareholders close him out and take advangage of the premium price. *See* 114 CONG. REC. 24664 (daily ed. Aug. 30, 1967) (statement of Sen. Williams) (Congress intended full disclosure requirements to protect investors during tender offers). Moreover, the SEC has promulgated rules to extend the time that shareholders have to decide whether to tender their shares. 17 C.F.R. § 240.14d-8 (1984). The SEC, in promulgating the rules, intended to give shareholders more time to consider the independent merits of tendering shares to the raider. Proposed Pro Rata Rule, SEC Securiting Exchange Act Release No. 18761 [1982 Transfer Binder] FED. SEC. L. REP. (CCH) § 83222 (May 25, 1982); *supra* notes 28-35, 54-74 and accompanying text (describing purposes of Williams Act). The Williams Act attempts to ensure that investor-shareholders obtain all relevant information to make informed decisions as to whether to tender their shares in a target corporation to a tender offeror. *Id.*

181. *See supra* notes 5-6, 180 and accompanying text (describing procedural requirements of Williams Act).

typically regulate post-acquisition mergers between an interested shareholder and a corporation.[182] If a tender offeror, however, attempts a two-tiered takeover, the offeror must comply only with the Williams Act during the first phase of the takeover attempt by fully disclosing the terms of the tender offer.[183] If the tender offeror successfully acquires a controlling interest in the target corporation during the tender offer, and then desires to consummate a two-tiered tender offer by effectuating a merger, the tender offeror then must comply with the requirements of the fair price statute.[184] If the tender offeror decides not to proceed to the merger phase of the two-tiered takeover, or the tender offeror does not satisfy the fair price statute's definition of an interested shareholder, the provisions of the fair price statute do not apply to the offeror.[185] At least facially, fair price statutes do not conflict with the provisions of the Williams Act because fair price statutes impose neither procedural nor substantive requirements on tender offerors or the process of tender offers.[186] As a result, tender offerors can comply with both the Williams Act and any applicable fair price statute because the Williams Act and fair price statutes are designed to regulate two distinct aspects of a takeover attempt.[187]

While fair price statutes directly regulate only the merger phase of a two-tiered takeover, fair price statutes indirectly may regulate tender offers by making takeovers more expensive for tender offerors, thus reducing the aggregate level of takeover activity.[188] Fair price statutes, therefore, may deter some takeover attempts by requiring a tender offeror to pay

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182. *See* Scriggins & Clarks, *supra* note 131, at 287 & n.122 (Maryland's fair price statute makes no attempt to regulate tender offers); *supra* notes 142-62 and accompanying text (describing mechanics of fair price statutes). *But see* 1 M. Lipton & E. Steinberger, *supra* note 133, § 9.04(1), at 9-25 to -26 (discussing SEC's contemplation that SEC's rules regulate merger phase of two-tiered takeover). In *Radol v. Thomas* the United States District Court for the Southern District of Ohio noted that case law as well as SEC rules and regulations contemplate that two-tiered tender offers take place. Radol v. Thomas, 534 F. Supp. 1302, 1312 (S.D. Ohio 1982). While the *Radol* court refused to find that SEC rule 13e-3 validated two-tiered tender offers, the court also refused to find financing of the two-tiered takeover manipulative. *Id.*

183. *See supra* notes 5-6, 179-82 and accompanying text (describing disclosure and other procedural requirements of Williams Act).

184. *See supra* notes 144-62 and accompanying text (describing mechanics of fair price statutes and conditions with which interested shareholder must comply to effectuate merger).

185. *See* Scriggins & Clarke, *supra* note 131, at 272-273 & n.27 (noting that purpose of fair price statutes is to ameliorate inequities of two-tiered takeovers, and that fair price statutes apply only to transactions involving conflict of interest or requiring shareholder approval).

186. *See* CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637, 1648 (1987) (Williams Act does not preempt Indiana takeover statute because statute regulates traditional functions of state common law); Scriggins & Clarke, *supra* note 131, at 289 (concluding that Maryland fair price statute does not preempt Williams Act).

187. *See* CTS Corp. v. Dynamics Corp. of America, 107 S. Ct. 1637, 1644 (1987) (Williams Act preempts state law if tender offeror finds compliance with both federal and state law impossible); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (same).

188. *Cf. supra* notes 140-42 and accompanying text (Maryland Act only regulates merger phase of two-tiered takeover).

more for a corporation's shares than the tender offeror otherwise would be willing to pay.[189] Consequently, shareholders may receive fewer opportunities for the premiums associated with hostile bids.[190] Moreover, fair price statutes may lessen the role that takeovers play in enhancing diligence and accountability.[191]

In spite of the benefits of takeover activity, the Supreme Court in *CTS*, in upholding Indiana's control share statute, reasoned that even though state takeover statutes may make a tender offer more expensive and, therefore, deter takeovers, the Williams Act does not preempt state takeover statutes so long as the statute does not unduly favor management.[192] The Court in *CTS* noted that Congress intended the Williams Act to protect investor-shareholders, while the plurality in *MITE* implied that state takeover statutes should treat evenhandedly shareholders, tender offerors and management of target corporations.[193] While the Williams

189. *See* Toms, *Compensating Shareholders Frozen Out in Two-Step Mergers*, 78 COLUM. L. REV. 548, 571-72 (1978) (fair price statutes deter two-tiered takeovers).

190. *See id.* at 566-568, 572 & n.83 (noting that mergers may benefit shareholders and promote efficient management); *infra* note 225 (noting benefits of takeover activity).

191. *See supra* note 190 and accompanying text (noting benefits of takeover activity).

192. *See supra* notes 82-90 and accompanying text (discussing *CTS* Court's reasoning in finding that Williams Act does not preempt certain takeover statutes).

193. *See Full Disclosure of Corp. Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcommittee on Securities of the Senate Committee on Banking and Currency*, 90th Cong., 1st Sess. 178, 184 (1967) (discussing legislative history of Williams Act and stating that Williams Act's purpose is to protect investor-shareholders from being pawns to tender offeror and management), *quoted in* Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 33-35 (1977); *supra* notes 28-35, 54-74 and accompanying text (describing purposes of Williams Act). Courts and commentators interpret the Williams Act's purpose in protecting investor-shareolders differently. *See* Note, *supra* note 133, at 449 (noting that disagreement exists as to meaning of investor-shareholder protection under Williams Act). The proponents of the market approach contend that Congress, in part, intended for the Williams Act to protect the investor-shareholders. *See* Note, *supra* note 133, at 452-54 (describing market view of Williams Act). Proponents of the market view approach, however, contend that protection of investor is intermingled and on the same parity as Congress' intent to maintain a neutral balance between the tender offeror and target management. *Id.* The market view approach, therefore, suggests that states must play a narrower role in regulating tender offers because state regulation threatens to upset the balance among management, tender offeror, and investor-shareholders under the Williams Act. *Id.* at 454. On the other hand, some commentators advocate the need for more state regulation in order to provide sufficient investor protection under the Williams Act. *See* Scriggins & Clarke, *supra* note 133, at 286-87 (stating need for Maryland Act, in addition to Williams Act, to protect investor-shareholders).

In addition to courts and commentators disagreeing over the meaning of investor-shareholder protection and, accordingly, the need for state takeover legislation, commentators criticize the requirements of fair price statutes that enable the interested shareholder to pay the minority shareholder a price that at least equals the amount which the interested shareholder paid the shareholder during the tender offer. Note, *supra* note 133, at 464. Critics of fair price statutes argue that the pro rata provision of the Williams Act and SEC rule 14d-8 attempt to insure that all shareholders participate equally in the tender offer phase of a two-tiered takeover. *Id.*; *see* Green, Nathan & Gelford, *The SEC Adopts a More Rational Proration Rule*, in NEW TECHNIQUES IN ACQUISITIONS & TAKEOVERS 79, 82-113 (1983) (discussing Rule 14-d-8). Fair price statutes attempt

Act attempts to give shareholders the time and information that investors require to evaluate the merits of a tender offer, fair price statutes recognize that shareholders resume an inferior position after the tender offer occurs.[194] In allowing minority shareholders to vote as a group during the second phase of a takeover attempt, fair price statutes protect shareholders against cohesive bids and maintain the equal positions that shareholders, corporate management, and tender offerors have during a tender offer throughout the merger phase of a two-tiered takeover.[195] Accordingly, based on the preemption test analysis of *CTS*, fair price statutes do not conflict with the provisions of the Williams Act because the statutes confer to shareholders the right to vote as a group to decide the merits of a proposed merger if a tender offeror does not comply with the fairness requirements.[196]

While the Williams Act does not appear to preempt most of the fair price statutes, courts may find that the Williams Act does preempt state fair price statutes that confer upon disinterested directors more discretion

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to ensure that a tender offeror will pay the shareholders the same price for a target corporation's shares during the merger phase as the tender offeror paid the shareholders during the tender offer. Scriggins & Clarke, *supra* note 131, at 277-278. To the critics of fair price statutes, the fair price requirements deter tender offerors from commencing a two-tiered takeover. Note, *supra* note 133, at 465. As a result, critics contend that fair price statutes violate the neutrality effect that the Williams Act attempts to achieve because management benefits at the tender offeror's expense. *Id.*

194. *See supra* notes 28-35, 54-74 and accompanying text (describing how Williams Act attempts to protect investor-shareholders and place shareholders on parity with management and tender offeror); *supra* notes 135-38 and accompanying text (stating that two-tiered takeovers pressure shareholders to tender their shares); *supra* notes 139-42 and accompanying text (describing how fair price statutes attempt to eliminate coercive effect of two-tiered tender offers on shareholders by requiring interested shareholder to pay fair price or satisfy supermajority voting requirement).

195. *Compare* notes 144-162 and accompanying text (describing mechanics of fair price statutes); *with supra* notes 28-35 and accompanying text (discussing Court's reasoning in *MITE* holding Illinois' first generation takeover statute unconstitutional because statute imposes certain timing and disclosure requirements on bidder in conflict with Williams Act). While fair price statutes do not seem to conflict with the provisions of the Williams Act, the control share cashout statutes may violate the preemption doctrine. S. PAMEPINTO, *supra* note 7, at 43. Courts may find that control share cashout statutes violate the preemption doctrine because the statutes do not allow shareholders to vote as a group to determine the fairness or independent merits of a tender offeror's offer. *Id.*; *see supra* note 173 (citing Pennsylvania, Maine and Utah as control share cashout statutes). Rather, the control share cashout statutes enable each shareholder to determine the fairness of the price. *See supra* notes 173-175 and accompanying text (control share cashout statutes require tender offeror only to pay fair price to shareholders so demanding). Because the *CTS* Court emphasized the importance of shareholders voting as a group, courts may find control share cashout statutes unconstitutional. *See* S. PAMEPINTO, *supra* note 7, at 43 (stating that control share cashout statutes may violate preemption doctrine). As a result, courts applying the analysis of the *CTS* Court may find that the Williams Act preempts control share cashout statutes because the cashout statutes do not provide shareholders with investor protection by allowing the shareholders to vote collectively. *Id.*

196. *See supra* notes 148-57 and accompanying text (describing mechanics of supermajority voting requirements and fairness provisions).

than the Maryland Act confers.[197] Courts applying the analysis of the plurality in *MITE* may find that these statutes upset the balance that the Williams Act establishes between management and the tender offeror and, therefore, strengthen management's position in an offeror's takeover attempt.[198] In addition courts may find that management's strengthened position under these fair price statutes erodes investor-shareholder's autonomy, which the *CTS* Court stated shareholders should maintain under takeover statutes.[199] For example, the Georgia Act disallows an interested shareholder from consummating a business combination unless all of the disinterested directors in the target corporation approve the business combination or, alternatively, two-thirds of the disinterested directors and a majority of the disinterested shareholders approve the business combination.[200] Moreover, several state fair price statutes confer upon disinterested directors of target corporations the discretion to determine certain matters, such as whether a person holds ten percent or more of the corporation's stock and, therefore, constitutes an interested shareholder.[201]

While certain fair price statutes contain provisions that confer upon disinterested directors greater discretion than the Maryland Act confers, any increase in the disinterested director's position over the tender offeror's seems slight.[202] The tender offeror always may attempt to take over a

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197. *See supra* notes 165-68 and accompanying text (discussing fair price statutes that confer additional discretion to disinterested directors); *infra* notes 198-205 and accompanying text (discussing constitutionality of fair price statutes that confer greater discretion to disinterested directors).

198. *Compare supra* notes 178-87 and accompanying text (noting that Williams Act does not preempt fair price statutes because Williams Act and fair price statutes regulate two distinct aspects of two-tiered takeovers, and fair price statutes foster purpose of Williams Act because fair price statutes protect investor-shareholders) *with infra* notes 206-208, 226-32 and accompanying text (discussing why provisions that some fair price statutes contain may preempt Williams Act).

199. *See supra* notes 54-74 and accompanying text (discussing *CTS* Court's analysis of Williams Act and noting that purpose of Act is to protect investor-shareholder).

200. *See supra* notes 165-68 and accompanying text (describing provisions in Georgia Act, and other states' fair price statutes, that confer greater discretion to disinterested directors than to other members of board of directors).

201. *See supra* note 166 (describing provisions in certain fair price statutes that confer to disinterested directors authority to determine whether certain provisions and definitions of statute are satisfied).

202. *Cf.* S. PAMEPINTO, *supra* note 7, at 43 (noting that takeover statutes may have constitutionality problems if statutes fail to provide shareholder protection). While the elevation in a disinterested director's position in relation to a tender offeror's may seem slight under certain fair price statutes, the Supreme Court in *CTS* emphasized the importance of shareholders collectively voting to determine the merits of a change in voting control of the corporation. CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637, 1646 (1987); *supra* notes 54-74 and accompanying text (emphasizing importance of collective voting of shareholders). Because the disinterested directors obtain more discretion than the directors who the interested shareholder elected to serve on the board obtain, the tender offeror and the shareholders both may be at a disadvantage in attempting to effectuate a business combination. *See supra* notes 165-68 and accompanying text (describing additional discretion conferred to disinterested directors under certain fair price statutes). A court may be more likely to find such a fair price statute unconstitutional if the statute's supermajority voting requirements require the disinterested directors, as well as the shareholders, to approve the

corporation by satisfying the fairness requirements of a state fair price statute and, therefore, avoid confronting management's strengthened position under the statute.[203] Alternatively, the tender offeror may effectuate a friendly takeover so that the directors will approve the merger, or the tender offeror may offer to purchase enough stock to satisfy the supermajorityvoting requirements.[204] Fair price statutes that confer additional discretion to disinterested directors, therefore, do not appear to conflict with the intent of the Williams Act, suggested under the analysis of the plurality in *MITE*, because fair price statutes do not substantively upset the balance of power between the tender offeror and management.[205]

In addition to those fair price statutes which contain provisions that may favor the management of a target corporation, some fair price statutes enable corporations to opt out of the statutes' coverage.[206] In allowing corporations the opportunity to opt out of fair price statutes, those statutes protect only shareholders of corporations involved in two-tiered takeovers that have not opted out of the statutes' provisions.[207] Accordingly, courts applying the analysis of the plurality in *MITE* could find that fair price statutes which include opt out provisions fail to provide evenhanded protection to all shareholders and, therefore, contravene the Williams Act's purpose of equalizing the position of shareholders with the positions of the management of target corporations and tender offerors.[208] Con-

business combinations. *See supra* note 166 (discussing supermajority voting requirements contained in fair price statutes conferring greater discretion to disinterested directors); *supra* note 131 (discussing corporate law provisions concerning interested transactionsand directors' conflict of interest). In finding such a fair price statute unconstitutional, a court might reason that a statute providing the disinterested directors with additional discretion preempts the purpose of the Williams Act to provide an evenhanded approach to management and tender offerors. *See supra* notes 28-35 and accompanying text (purpose of Williams Act is to provide evenhanded approach).

203. *See supra* notes 150-57 and accompanying text (describing how interested shareholder can avoid satisfying supermajority voting requirements if interested shareholder complies with price and nonprice conditions).

204. *See* Scriggins & Clarke, *supra* note 131, at 275 (legislature included opt out provision in fair price statute to encourage friendly negotiations of takeover); *supra* note 148 and accompanying text (discussing requirement that interested shareholder satisfy supermajority voting requirement before consummating business combination).

205. *See supra* notes 202-204 and accompanying text (explaining why Williams Act does not preempt fair price statutes that confer additional discretion to disinterested directors).

206. *See supra* notes 169-170 and accompanying text (listing and describing fair price statutes with opt out provisions).

207. *See* S. PAMEPINTO, *supra* note 7, at 43 (suggesting that fair price statutes with opt out provisions may violate preemption doctrine because such fair price statutes fail to provide evenhanded approach to all shareholders).

208. *See supra* notes 206-207 and accompanying text (suggesting that, because opt out provisions in fair price statutes do not provide evenhanded approach to management and tender offeror, Williams Act preempts those fair price statutes); *supra* notes 28-35, 54-74 and accompanying text (discussing purpose of Williams Act). At least one commentator has determined that the Williams Act preempts fair price statutes because fair price statutes impose substantive requirements on the corporation rather than allowing the corporation the election of amending the charter to include similar requirements. *See* Note, *supra* note 133, at 462-63 & n.60 (concluding that Williams

versely, under the supermajority voting requirements of a fair price statute, shareholders vote as a group during the merger phase of a two-tiered takeover to pass judgment on the fairness of a tender offeror's proposed price.[209] Accordingly, a state defending the constitutionality of its fair price statute might apply the preemption analysis of the *CTS* Court and contend that the shareholders also should be able to decide as a group whether they want the protection of a fair price statute.[210] Courts, therefore, could find that the Williams Act does not preempt fair price statutes with opt out provisions because the shareholders vote as a group to determine whether they want the protection of fair price statutes, just as the shareholders vote as a group to determine the fairness of a tender offeror's proposed offer.[211]

In addition to withstanding constitutional scrutiny under the preemption analysis, fair price statutes also appear to withstand scrutiny under the commerce clause analysis of the *CTS* Court.[212] Even though fair price statutes seem to withstand scrutiny under the commerce clause, however, fair price statutes arguably do hamper takeover transactions taking place in interstate commerce.[213] A potential tender offeror may be reluctant to initiate a two-tiered takeover of a corporation incorporated in a state that has enacted a fair price statute, particularly if the statute confers greater discretion to a corporation's disinterested directors, because the tender offeror realizes that obtaining a controlling block of shares will be more difficult to achieve than if the state had not enacted a fair price statute.[214]

Act preempts Maryland Act because Maryland Act violates investor-shareholders' autonomy by imposing supermajority voting requirements on corporations); *supra* note 131 (describing certain provisions allowed by states' corporate law, that corporations traditionally have elected to include in their charters). Conversely, fair price statutes with opt out provisions may provide shareholders with investor autonomy. *Cf.* Note, *supra* note 133, at 462-63 (although concluding that Maryland Act does not provide shareholder with investor autonomy, failing to comment on opt out provision in Maryland Act).

209. *See supra* note 148 and accompanying text (discussing supermajority voting requirements that fair price statutes contain).

210. *See* CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1636, 1646 (1987) (emphasizing that shareholders should vote as group to ensure their protection from coerciveness of two-tiered takeover).

211. *See supra* notes 28-35 and accompanying text (explaining how Williams Act applies evenhandedly to management and tender offeror and provides protection to investor-shareholders). If courts address the issue of whether the Williams Act preempts fair price statutes with opt out provisions, courts may find that the statutes do not conflict with the Williams Act or the Williams Act's purpose because fair price statutes regulate the merger phase of a takeover and not the tender offer. *See supra* notes 178-87 and accompanying text (discussing how fair price statutes and Williams Act apply to two distinct aspects of two-tiered takeover attempts).

212. *See infra* notes 213-232 and accompanying text (discussing constitutionality of fair price statutes under commerce clause).

213. *See infra* notes 214-16, 226-32 and accompanying text (describing how fair price statutes burden interstate commerce).

214. *See supra* notes 212-13 and accompanying text (explaining how fair price statutes make takeovers more difficult and expensive for tender offerors); *supra* note 166 (listing and describing fair price statutes that confer greater discretion upon disinterested directors than to interested directors of board).

In addition fair price statutes increase the costs of two-tiered takeovers because a tender offeror must pay all shareholders a premium price for the corporation's shares during the second phase of a two-tiered takeover.[215] Fair price statutes, therefore, place a burden on interstate commerce by making a takeover more difficult and expensive for a tender offeror.[216]

Although fair price statutes may burden interstate commerce, the Supreme Court in *CTS* specifically stated that even if takeover legislation deters takeovers, takeover legislation does not necessarily violate the commerce clause.[217] While fair price statutes may hinder interstate commerce, the statutes hinder it by governing shareholders' voting rights, which is a legitimate exercise of states' established authority to govern domestic corporations' internal affairs.[218] Moreover, like state corporate laws that provide dissenting shareholders with a right of appraisal, fair price statutes and fair price cashout statutes attempt to ensure that shareholders receive fair prices for their shares.[219] Applying the reasoning of the *CTS* Court, fair price statutes do not discriminate against interstate commerce because the provisions of the statutes apply to both resident and nonresident persons attempting to effectuate two-tiered takeovers of corporations governed by the statutes.[220] Fair price statutes protect shareholders by insuring that shareholders have the opportunity independently to evaluate the merits of the merger proposal of a two-tiered takeover.[221] States traditionally have had an interest in promoting stable relationships among parties involved with domestic corporations and in ensuring that share-

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215. *See supra* note 153 and accompanying text (describing price conditions under fair price statute that ensure that interested shareholder does not freezeout minority shareholders by forcing them to accept price in merger phase of tender offer that is less than price offered shareholders during tender offer).

216. *See supra* notes 212-15 and accompanying text (fair price statutes burden interstate commerce by making takeovers more difficult for tender offerors).

217. *See supra* notes 75-90 and accompanying text (discussing Court's holding in *CTS* that Indiana's takeover legislation was consistent with commerce clause even though legislation burdened interstate commerce).

218. *See supra* note 131 (describing provisions of states' corporate laws and noting that state corporate laws traditionally have regulated mergers and shareholders' voting rights); *supra* notes 171-72 and accompanying text (discussing state statutes that apply to foreign corporations).

219. *See supra* note 131 (corporate law traditionally has regulated mergers and shareholders' voting rights); *supra* notes 173-75 and accompanying text (control share cashout statutes, like corporate law that provides for dissenters' right to appraisal, provide for courts to determine fair value of shares of corporation when parties are unable to agree).

220. *See supra* notes 85-87 and accompanying text (discussing Court's holding in *CTS* that Indiana takeover statute did not discriminate against interstate commerce because statute's provisions applied equally to resident and nonresident tender offerors).

221. *See supra* notes 135-39 and accompanying text (noting that legislatures enact fair price statutes to enable shareholders independently to evaluate merits of corporate takeover). In allowing shareholders to evaluate the independent merits of a takeover proposal, shareholders may consider the disruptive effect a takeover may have on a state's economy. *See* Sargent, *Do the Second Generation Takeover Statutes Violate the Commerce Clause?*, 8 CORP. L. REV. 3, 16-17 (discussing states' interest in regulating internal affairs of corporations).

holders maintain an effective voice in corporate affairs.[222] Fair price statutes also do not create a risk that states inconsistently will regulate tender offers because fair price statutes directly regulate only the merger phase of two-tiered takeovers.[223] States historically have regulated mergers between their domestic corporations and foreign corporations.[224] Consequently, under the reasoning of the plurality in *MITE*, fair price statutes generally should withstand a commerce clause analysis because the states' legitimate interests in protecting shareholders outweigh the burdens that fair price statutes impose on interstate commerce.[225]

While states traditionally have had an interest in promoting stable relationships among parties involved with domestic corporations, the provisions of the Florida and North Carolina Acts apply to foreign corporations as well as domestic corporations.[226] In the event that a tender offeror attacks the constitutionality of a fair price statute that applies to foreign corporations, the state probably would contend that the statute only applies to foreign corporations with substantial assets and influence in the state.[227] The state accordingly might argue that the state has a

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222. *See supra* note 75-90 and accompanying text (in upholding takeover statute, *CTS* Court noted that states traditionally have interest in ensuring that investor-shareholders maintain effective input in corporate affairs).

223. *See supra* notes 75-90 and accompanying text (discussing Supreme Court's holding in *CTS* that Indiana Act did not overly burden interstate commerce because Act did not impose inconsistent regulations on tender offerors).

224. *See supra* note 131 (stating that states historically have regulated mergers).

225. *See supra* notes 75-90 and accompanying text (explaining why fair price statutes do not violate commerce clause). Some commentators reject the argument that fair price statutes requlate a legitimate state interest and, therefore, do not violate the commerce clause on the basis of the efficient capital market hypothesis. *See* Easterbrook & Fischel, *The Proper Role of Target Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1165 (1981) (assuming that efficient capital markets exist, shareholders will be better off if management does not resist tender offer). The efficient capital market hypothesis postulates that stock prices accurately reflect the value of a corporation's stock based on all available public information. *Id.* at 1165-66. The proponents of the efficient capital market hypothesis argue that shareholders benefit from a tender offer because a tender offeror pays them a premium price for the shareholders' shares and reallocates corporate resources that incumbent management has misapplied. *See id.* at 1173 (stating that tender offerors monitor management of corporations to insure corporate efficiency). Even though the tender offeror may force minority shareholders to accept a price for their shares less than the premium paid during the tender offer, the proponents of the efficient capital market hypothesis contend that the price difference is the cost of the tender offeror monitoring the efficiency of the corporation's management for the shareholder. *See id.* at 1173 n.33 (referring to cost of tender offerors monitoringcorporation's efficiency as agency costs). *But see* CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1636, 1651 (1987) (stating that Constitution does not bind states to adhere to any particular economic theory in enacting takeover statutes).

226. *See supra* note 166 (discussing application of Florida Act to certain foreign corporations); *supra* note 166 (discussing application of North Carolina Act to certain foreign corporations); *infra* notes 227-32 and accompanying text (discussing constitutional ramifications of North Carolina and Florida Acts' potential application to certain foreign corporations).

227. *See supra* notes 75-90 and accompanying text (discussing reasoning of Supreme Court in *CTS* that takeover statutes which apply to foreign corporations burden interstate commerce and are unconstitutional); *supra* note 166 and accompanying text (Florida Act applies to foreign

legitimate interest in regulating takeovers of those foreign corporations because a takeover significantly would affect the state's economy.[228] Because states traditionally have not regulated foreign corporations, however, courts probably will find that fair price statutes which apply to foreign corporations per se violate the commerce clause.[229] Notably, the Supreme Court in *CTS* stated in dicta that state takeover legislation which applies to foreign corporations would restrict interstate commerce.[230] If courts uphold fair price statutes that apply to foreign corporations, some corporations potentially would be subject to the corporate laws of the corporation's resident state, as well as the laws of any other state that has enacted a fair price statute that applies to foreign corporations.[231] Courts, therefore, probably will invalidate fair price statutes that apply to foreign corporations because the statutes potentially will subject the corporation to varying and possibly conflicting state regulations.[232]

Although fair price statutes that apply to foreign corporations might fail constitutional scrutiny, other fair price statutes appear constitutional under both a preemption test analysis and a commerce clause analysis.[233] The Williams Act does not appear to preempt fair price statutes because the Williams Act regulates tender offers and fair price statutes regulate mergers.[234] A tender offeror can comply with both the Williams Act and a fair price statute in the offeror's attempt to take over a corporation.[235]

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corporation that has authority to do business in Florida, that has minimum of one hundred shareholders, that maintains principal place of business or substantial assets in Florida, that employs over five hundred Florida residents, that pays over $5,000,000 in payroll to Florida employees and that has certain number of Florida residents holding stock in foreign corporation); *supra* note 166 and accompanying text (North Carolina Act applies to foreign corporations that maintain principal places of business and substantial assets in North Carolina, that employ significant number of North Carolina residents and that at least ten percent of corporations' shares are held by North Carolinia residents).

228. *See* Sargent, *supra* note 221, at 22-24 (suggesting that states have significant interest in regulating internal affairs of corporation if corporation has substantial influence in state).

229. *See supra* note 86 and accompanying text (discussing Supreme Court's reasoning in *CTS* that corporate laws which apply to foreign corporations are unconstitutional).

230. *See supra* note 86 and accompanying text (discussing Supreme Court's reasoning in *CTS* that corporate laws which apply to foreign corporations are unconstitutional).

231. *See supra* note 76 and accompanying text (discussing Supreme Court's decision in *CTS* that states cannot impose inconsistent regulations on corporations).

232. *See supra* notes 226-31 and accompanying text (explaining why fair price statutes that apply to foreign corporations may be unconstitutional under commerce clause analysis). In finding fair price statutes unconstitutional, courts may note that in *CTS*, the Court found that states have an interest in regulating shareholders' affairs in domestic corporations. S. PAMEPINTO, *supra* note 7, at 44. Accordingly, courts that find fair price statutes that apply to foreign corporations unconstitutional may reason that the state's interest rest solely in domestic corporations rather than its resident shareholders. *Id.*

233. *See supra* notes 176-232 and accompanying text (analyzing constitutionality of fair price statutes under supremacy clause and commerce clause).

234. *See supra* notes 178-87 and accompanying text (while Williams Act regulates tender offer, fair price statutes regulate merger phase of two-tiered tender offer).

235. *See supra* note 187 and accompanying text (noting that if party can comply with both state and federal law, Williams Act does not preempt state statute).

The Williams Act, therefore, does not appear to preempt fair price statutes.[236] In addition fair price statutes do not seem to violate the commerce clause by overly burdening interstate commerce.[237] While fair price statutes burden interstate trade by making a tender offer more expensive for the offeror, fair price statutes attempt to protect shareholders by ensuring that minority shareholders receive consideration for the shares of the target corporation that at least equals the amount the offeror paid for the shares during the tender offer.[238] Moreover, the provisions of fair price statutes incorporate protective features, such as dissenters' rights to appraisal and supermajority voting requirements, that state corporate laws traditionally have allowed corporations to elect to include in their charters.[239] The states' legitimate interests in protecting shareholders appear to outweigh any burden that fair price statutes impose on interstate commerce and do not discrimination between resident and nonresidentshareholders.[240] Accordingly, most fair price statutes should survive constitutional challenges.[241]

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236. *See supra* notes 178-87 and accompanying text (noting that Williams Act does not preempt fair price statutes).

237. *See supra* notes 212-225 and accompanying text (analyzing constitutionality of fair price statutes under commerce clause, in light of burden that statutes place on interstate commerce).

238. *See supra* note 153 and accompanying text (explaining how fair price statutes ensure that minority shareholders receive fair price for shares of target corporation).

239. *See supra* note 131 (fair price statutes protect shareholders with regulations that are analogous to areas of corporate law that states traditionally have regulated, such as supermajority voting requirements and dissenters' right to appraisal).

240. *See supra* notes 217-25 and accompanying text (fair price statutes protect shareholders, which is legitimate state interest that outweighs certain burdens on interstate commerce that fair price statutes may have in deterring takeover attempts).

241. *See supra* notes 176-240 and accompanying text (analyzing constitutionality of fair price statutes).