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ACQUISITION

STRATEGIES FOR TAIWANESE ACQUIRERS

by

CHAO-YU HSU

B.S., National Taiwan University, 1981

A Dissertation Submitted to the Graduate Faculty

of The University of Georgia in Partial Fulfillment

of the

Requirements for the Degree

MASTER OF LAW

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1991

ACQUISITION

STRATEGIES FOR TAIWANESE ACQUIRERS

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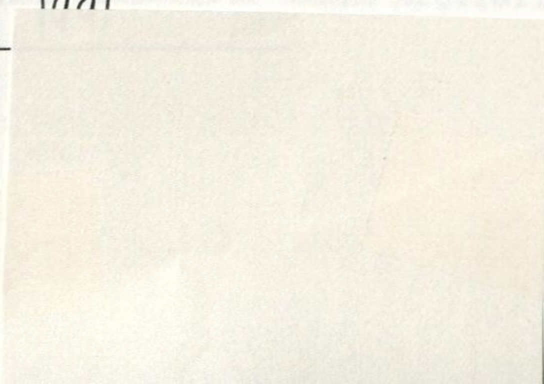

TABLE OF CONTENTS

PAGE

INTRODUCTION.. 1

I. THE BACKGROUND AND RESTRICTION OF TAIWANESE COMPANIES EXTERNAL ACQUISITION.................... 3

A. Now is the Time for Taiwanese Corporation to Invest Abroad.................................. 3

B. The Purpose of Taiwanese Corporation Investment in the U.S.......................... 5

C. Taiwanese Related Regulations................. 7

1. Statute for Foreign Exchange Control........ 7

2. Company Law................................ 10

3. Statute for Industries' Promotion........... 13

4. Fair Trade Law............................. 14

II. CONSIDERATIONS AND TECHNIQUES UNDER ACQUISITION.. 18

A. Prerequisite: Knowing Your Target............ 18

1. The Methods of Acquisition.................. 18

2. What Should be Considered in Choosing the Target.................................. 19

B. Techniques of Acquisition..................... 22

1. Friendly Acquisition......................... 22

2. Open-Market Purchases and Privately Negotiated Transactions..................... 24

3. Tender Offer.................................. 28

a. Cash Offer................................. 28

b. "Toehold" Policy and "Bear Hug"......... 30

c. Two-Tiered Tender Offer.................. 32

d. Exchange Offer............................ 35

4. Proxy Contests............................... 36

III. THE CORE REGULATIONS OF ACQUISITION............ 41

A. Williams Act.................................... 41

1. Legislative Purpose......................... 42

2. An Overview of Williams Act................ 45

B. Business Judgement Rule....................... 48

1. The Research of Takeover's Nature......... 48

2. The Application of Business Judgement Rule...................................... 52

IV. THE RESPONSES FROM TARGET: DEFENSIVE TACTICS..... 57

A. Shark Repellents.......................... 57

1. Fair Price and Staggered Board Provisions.. 60

2. Supermajority Voting Provision and Valid Cause Removal Requirement................. 62

3. Shareholder Action Without a Meeting....... 64

4. Others..................................... 65

B. Poison Pills.................................. 67

C. Golden Parachutes............................ 72

D. Greenmail..................................... 75

E. Stock and Crown Jewels Lock-ups.............. 80

F. Other Defensive Tactics...................... 83

V. TAKEOVER UNDER THE STATE STATUTES................. 86

A. First Generation of State Legislation.......... 87

1. The Provision of Illinois Act................ 88

2. Edgar v. MITE Corp.......................... 90

B. Second Generation of State Legislation......... 94

1. The Features of Second Generation State Statute..................................... 95

2. The Provisions of the Indiana Act........... 97

3. CTS Corp. v. Dynamics Corp. of America...... 99

C. Post-CTS: The legislative and Judicial Development.................................... 104

1. Delaware Statute and Its Judicial Decision.................................... 105

2. Recent Judicial Development.................. 110

3. Miscellaneous.................................. 114

VI. OTHER RELATED STATUTES THAT SHOULD BE
CONSIDERED.................................... 116

A. Antitrust Requirement on Acquisition.......... 116

B. Defensive Strategies to Against Foreign
Investment..................................... 123

CONCLUSION.. 129

INTRODUCTION

Corporate acquisitions have been a prevailing technique for takeovers in the U.S. for many years. Not only American companies, but also foreign companies, are eager to use this approach. Corporate acquisitions are just in their initial stages in Taiwan. Acquisitions between Taiwanese companies have not occurred frequently, and going abroad to acquire a company in a foreign country is an infrequent measure. But, following the international trend of acquiring U.S. corporations, Taiwanese companies are attempting to acquire U.S. corporations. The major purpose of this thesis is to introduce the techniques used in an acquisition of a U.S. corporation and the factors that should be considered before acquiring a U.S. company by a Taiwanese acquirer. This thesis will integrate both a legal and an economic analysis.

This thesis is divided into six sections. Section I will discuss a Taiwanese acquirer's formation of the takeover attempt, their incentives for a takeover, and the purposes of acquiring a U.S. company. Taiwan's regulations which related to investment aborad will also

be discussed. Section II will introduce several considerations and techniques which an acquirer must employ. This section is viewed from the prospective of a potential acquirer, the acquirer must consider and evaluate every methods and situations that will arise in a takeover attempt. Although the laws regulating an acquisition are numerous[1], ignorance of the basic regulations just like drawing a conclusion from incomplete data should be avoid. Therefore, Section III will scrutinize the Williams Act and Business Judgement Rule. After the acquirer's attack, incontrovertibly, responses, defensive tactics, will be implemented by target companies to resist outside "raider." Section IV will introduce those defensive tactics and examine their legality. Under the U.S. Constitution each state is authorized to enact its own regulation. Section V will examine the balance between federal law and state law. In Section VI two special regulations, the Hart-Scott-Rodino Antitrust Improvement Act and section 5021 of Omnibus Trade and Competitiveness Act of 1988, will be analyzed. Those regulations are specifically aimed at foreign acquirers who want to acquire American corporations.

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[1] In order to establish a basic concept of the important laws, this thesis will only introduce the Williams Act and Business Judgement Rule.

I. THE BACKGROUND AND RESTRICTIONS OF TAIWANESE COMPANIES EXTERNAL ACQUISITION

A. Now is the Time for Taiwanese Corporation to Invest Abroad

To invest abroad, sufficient capital is an obvious prerequisite. Under the guide of Export Policy, Taiwanese corporations have amassed much wealth which can support the corporations attempts to invest abroad.[2] However, since America is the major country to which Taiwan exports its products,[3] a trade imbalance exist between the two country.[4] Fear of retaliation from the U.S. regulations, Taiwan gradually opened its market and abolished its nontariff barriers. Taiwan does allow agriculture produces, insurance business, wine and beer, and distilled spirits imported to Taiwan, while

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[2]In April 1990, Samuel Shieh, a governor of the Central Bank of China, explain how part of the Taiwan's foreign exchange reserves will be used to support large Taiwanese corporations making acquisitions abroad. See, Euromoney, Oct. 1990, at 93.

[3]After years of manufacturing success that made Taiwan the Worlds 12th-Largest exporter, Taiwan was the 6th-Largest Trade Partner of the United States for a few years.

[4]In 1990, Taiwan, second only to Japan, is the second largest trade deficit country to U.S..

endeavoring to protect foreign Intellectual Property.[5] Under severe criticism from U.S. government for manipulating currency[6] and the threat of using Section 301 provisions of U.S. trade law on Taiwan,[7] since 1985, Taiwanese currency has appreciated more than 50%, from 40 Taiwan Dollar (NT$) : 1 Unites States Dollar (US$) to NT$ 27 : US$ 1. Moreover, since too much capital remained in Taiwan caused inflation,[8] the Taiwanese government is not

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[5]Taiwan revised its Copyright and Trademark Law in 1985 and adopted a new Patent Law the next year. However, Taiwan's protection of intellectual property is deemed in adequate, and was named to the "Priority Watch List" under Special 301 provisions by the U.S. Trade Representative. The so-called "special 301" require the Trade Representative to self-initiate some section 301 investigations in 1989 and 1990. The U.S. Trade Representative named seventeen countries to a "Watch List" and eight countries to a "Priority Watch List." See U.S. Trade Rep. Fact Sheet, "Special 301" on Intellectual Property 4 (May 25, 1989)(on file at U.S. Trade Rep.)

[6]Treasury Under Secretary-Designate, David Mulford, accused Taiwan of manipulating Currency by not letting it appreciate significantly in order to achieve a trade advantage over the United States. See International Finance: Foreign exchange rate policies not suitable for section 301 retaliation, Mulford says, 6 International Trade Reporter 633 (May 17, 1989)

[7]Section 301 was enacted in 1974 to help reach and enforce trade agreements, by providing for unilateral measures in response to foreign governments unfair trade practices. And expanding exported opportunities for America and third country. However, frustrated by a skyrocketing trade deficit, on Aug. 23, 1988 President Reagan of U.S. signed the Omnibus Trade and Competitiveness Act of 1988 in which section 301 is amended significantly. It increased pressure on the Executive to act against a foreign government's unfair trade practices. Thus, the Act indirectly, threatens the Taiwan's Export Policy.

[8]This phenomenon particularly reflected by the rocketing price of real estate and stock market in Taiwan.

presently stressing its export policy to the extent that it usually does. Although the situation as mentioned above will decrease the ability of Taiwanese corporation to compete with other country in international trade competition, the appreciation of Taiwanese currency provides the best opportunity to Taiwanese corporations to invest abroad. Meanwhile, Taiwanese corporations are suffering from domestic inflation, outside U.S. quota restriction, and antidumping challenges. These factors, in the long run, significantly encourage Taiwanese corporations to invest abroad.

B. The Purpose of Taiwanese Corporation Investment in the U.S.

Based on U.S. currency, Taiwan has 75.6 billion dollars in its Foreign Exchange reserves[9], second only to Japan.[10] The structure of Taiwanese corporations allowing them to invest abroad has significantly changed, just recently. Such a change will have an effect on the enthusiasm of acquisition by Taiwanese corporations.[11]

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[9]See, World Journal, March 13, 1991, at 14 (Chinese edition).

[10]Once, in March 1990, Taiwan's foreign exchange reserves surpassed Japan's.

[11]Normally merger and acquisition are equivalent in their importance and connected together. However, if the merger in foreign country will involve multinationality corporation, it is more complicate than an acquisition. Therefore, for the time being, Taiwanese corporations are

In general, the reasons that Taiwanese corporations employ the acquisition as an invest approach in U.S. can be summed up as following: (1) avoiding the international trade restriction and the impact from protectionism; (2) expanding the distribution network and the market;[12] (3) assuring the source of natural materials;[13] (4) procuring high technological experience;[14] (5) procuring the acquired company's brand and sale channels;[15] and (6) developing polyangular management.[16]

Taiwan corporations choose the acquisition, because an acquisition can be accomplished swiftly. Compared to

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hesitated to undertake such actions.

[12]For example, in 1990, President Enterprises Corp., Taiwan's biggest food conglomerate, spent 335 million dollars for San Francisco-based Wyndham Foods Inc. which sells Girl Scout cookies as well as several other types of cookies.

[13]For example, in the past decade, Formosa Plastic Group Corp., one of the largest Taiwan's industrial conglomerates, has acquired or built 13 petrochemical plants in the U.S.

[14]For Example, in 1987, Acer Computer Co., a Taiwanese company, acquired Counterpoint Computer Co.. In 1989 Continental Engineering Corp., a Taiwanese company, purchased American Bridge Co. for and estimated 200 millions dollars.

[15]For example, in 1989, China Trust Co. and Grand Pacific Petrochemical Corp., acquired Wyse Technology Inc., the second-largest U.S. maker of computer terminal; meanwhile, Wyse Technology Inc. is the first of a publicly listed U.S. firm acquired by Taiwanese Company.

[16]For example, in 1988, Pacific Electric & Cable Co., a Taiwanese Company, acquired eight ailing savings-and-loan associations in seven different Texas cities, renaming them Pacific Southwest Saving Bank.

establishing a new company in U.S., an acquisition costs less and saves much time. In addition, the acquiring company can be benefitted from the acquired company's existing accomplishment, such as brand, market, personnel etc.

C. Taiwanese Related Regulations

Taiwanese laws, has no single and special statute that entirely covers Taiwanese corporation's external acquisition. Related regulations about investing abroad are scattering in different laws or statutes. The four most relevant regulations concerning external acquisition will be analyzed. These regulations are the Statute for Foreign Exchange Regulation, the Company Law, the Statute for Industries' Promotion Industries, and the Fair Trade Law.

1. Statute for Foreign Exchange Control

With a view to attaining balance in international payment and thus achieve financial stability, the Statute for Foreign Exchange Control was enacted in 1948 and revised in 1970, 1978, 1986, and 1987. The latest amendment (1987) is the most significant. Owing to a successful Export Policy, Taiwan's foreign exchange reserves have been accumulated at a high rate. In order to promote Taiwan's economic development soundly and

accelerate Taiwan's internationalization, in the 1987 amendment, the restriction on foreign exchange remittance was relaxed.

The 1987 amendment has added a new Article 26-1 which ceased the application of Article 6-1, 7, 13, and 17. This Article has eliminated restriction on the individual and company to hold foreign exchange. Even though in international trade, the Central Bank of China and the Ministry of Fiance control the foreign exchange.[17] In order to comply with the revision of Statute for Foreign Exchange Control, the Central Bank of China issued or amended several foreign regulations. The outward remittance, a vital factor for investing abroad, is also within those new regulation. The new regulations allow any foreign exchange as payment for import goods or service by properly registered corporations. Foreign transactions can now be made freely, without any limitation on amount. The amount of outward remittance for an individual has been lifted to 5 million dollars per year without needing prior approval. The Taiwanese resident over 20 years of age who is a holder of the Taiwan National Identification Card or the alien residency certificate can make outward remittance in

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[17]Under the Statute for Foreign Exchange Control, the Ministry of Finance and the Central Bank of China are the authorities responsible for the administration and operation of foreign exchange control.

foreign exchange up to 5 million dollars (or its equivalent in other foreign currencies) per year. However, corporations remain subject to the usual government's approval and a limitation of up to 1 million dollars.[18] Thus, in securing approval from Taiwan's Investment Commission, a company must wait as long as four months. This waiting period can upset the timing of takeover and lead to costlier agreements as a result of added finance charges. Nevertheless, if a company wants to invest abroad, such an approval procedure is not a barrier. The company could generate the foreign exchange by three other ways: (1) by using their foreign exchange holding overseas, (2) by borrowing fund via an overseas subsidiary,[19] or (3) by using the personal fund.[20]

Although, Taiwan's foreign exchange reserves is still second largest in the world, the amount of outward remittance last year (1990), alone, was 20 billion

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[18]Nevertheless, once the investing plan is approved by Taiwan's Investment Commission, the foreign exchange is not a limitation on corporate transaction.

[19]The use of an overseas subsidiary is sometimes not feasible. Because under Taiwan's company law, the subsidiary is subject to a 40% reinvestment ceiling from its parent and, for large acquisitions, the subsidiary's ability to borrow from banks is often limited by this ceiling.

[20]Most Taiwan's companies are small to medium-sized entities and funding is not as difficult. Get ten members of a family to remit 5 million dollars each; this is enough to buy a 50 million dollar company. Even in the big companies, the family-operated enterprise style is still existing in most Taiwan's company.

dollars. Observing the huge capital exodus and considering the need for "Six Year National Construction Plan,"[21] the Ministry of Fiance, recently (March, 1991), announced a reduction in the outward remittance amount for individual from 5 million dollars to 3 million dollars. However, at the same time, Taiwan's Investment Commission further simplified the process of investing abroad and increased the amount to 3 million dollars, which when invested abroad does not need prior approval.[22]

2. Company Law

Taiwanese Company Law does not directly stipulate any rules for investing abroad. However, the Company Law is a basic regulation of corporations. The Company Law is applicable to any corporate behaviors. Therefore, any one of Taiwanese companies' external acquisitions should comply with the Company Law. There are two aspects of Company Law that relate to overseas investment. First, Article 185 of Company Law requires a special procedure for permitting the company to accept the transfer of their whole business or assets which has a great bearing

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[21]The purpose of "Six Year National Construction Plan" is to promote Taiwan's economy from a developing country to developed country; the budget of this Plan will be over 3 trillion and 500 billion Taiwanese dollars.

[22]See World Journal, March 19, 1991, at 14 (Chinese edition)

on the business operation of the company.[23] In order to accept the transfer of their whole business or asset, a company must have a resolution from the Shareholders' Meeting which shall be represented two-thirds of the total number of issued shares and shall be resolved by a majority of shareholder present. If a resolution was generated without such procedure, any shareholder can apply to the court to annul the resolution.[24]

Secondly, the Company Law regulates reinvestment Article 13 of Taiwan Company Law, forbids a company from being a shareholder of unlimited liability in another company or a partner of a partnership business. In other words, the Company Law does not allow a company reinvest its capital in such enterprises. Additionally, Article 13 of the Taiwanese Company Law restrict the amount the a company can reinvest. Concerning the reinvesting amount, the Company Law has been revised seven times since the Company Law was enacted in 1929. Every previous revision of Company Law had amended the amount of the reinvestment. The amount of reinvestment in those revision ranged from one fourth, to one third, to one-half, and to forty percent of the amount of a company's own paid-in capital. On November 10, 1990, the latest

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[23]Taiwan, R.O.C.,Company Law Article 185 paragraph 1 section (3) (1990).

[24]Taiwan, R.O.C., Company Law Article 189 (1990).

revision of Company Law was put in force. In 1990 revision, if a company becomes a shareholder of limited liability in other company, the total amount of such investments shall not exceed 40% of the amount of its own paid-in capital. However, in order to increase economic development, to increase invest ambitions, and to encourage polyangular management, the 1990 revision provides four exceptions which are not limited by 40% of their own paid-in capital. These exceptions are:

(1) if a company's exclusive business is to invest in other companies, the limitation is not apply;

(2) if a company's Article has special stipulation which allow its reinvestment of over 40% of its own paid-in capital;

(3) if a company obtains a permission of the shareholders or the resolution of Shareholders' Meeting, and which comply with the following:

(i) in an "unlimited company" and a "company limited by shares with shareholders of unlimited liability," having a unanimous agreement of all unlimited liability shareholders;

(ii) in a "limited company," having the unanimous agreement of all shareholder; and

(iii) in a "company limited by shares," having a resolution from Shareholder's Meeting which

shall be presented two-thirds of the total number of issued share and shall be resolved by a majority of the shareholder present; and

(4) if the amount over the limitation is caused by the dividends or shares which derivated from reserve fund from the invested company.

If a Taiwanese company wants to engage in an a overseas acquisition the company should consider previously mentioned procedures and the amounts of the restrictions.

3. Statute for Industries' Promotion

Recently, Taiwan's government enacted the Statute for Industries' Promotion in order to promote industries's standard, and up-grade economic development. According to the government's policy regulating the procedures in an overseas investment, which has been permitted by the Competent Authority having jurisdiction for such specific enterprise, a company can appropriate reserves up to twenty percent of the total external investing amount for external investing loses. When the loses have occurred, the company can deduct from the reserve. However, not every company investing abroad can use this right. Only when the total external investing share of investing company is above 20% of the invested

enterprise can the investing company benefit form that regulation.

4. Fair Trade Law

After the time-consuming legislative procedure, the Fair Trade Law was enacted on Feb. 4, 1991.[25] Article 6 of the Fair Trade Law define five situations as a "combination" in which section (2)(3)(5) will relate to the acquisition in foreign country. These situations occur when a enterprise

(1) holds or acquires over one third of the total number voting shares of another enterprise;[26]

(2) is transferred, or leases the whole or the major asset or business from another enterprise;[27] and

(3) controls another enterprise's business or personnel affairs of employment or termination either directly or indirectly.[28]

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[25]The Fair Trade Law was offered by the Ministry of Economic Affairs in April, 1985; however, its passage was impeded by interested enterprises in legislative procedure. Although the Fair Trade Law was enacted, it will not put in force until Feb. 6, 1992.

[26]Taiwan, R.O.C., Fair Trade Law Article 6 paragraph 1 section (2) (1991).

[27]Taiwan, R.O.C., Fair Trade Law Article 6 paragraph 1 section (3) (1991).

[28]Taiwan, R.O.C., Fair Trade Law Article 6 paragraph i section (5) (1991).

In response to the actual control of a enterprise, calculating the enterprise's shares under Article 6 section (2), the government will incorporate another shareholder who is under control or is a subsidiary of the enterprise.[29]

In order to prevent monopolistic concentration, if a "combination" has any one of following indicia, an enterprise should get a permission from the Competent Authority:

(1) post-combining, an enterprise has a market ratio over one third;

(2) either of the combined enterprises had the market ratio over one fourth; or

(3) either of the combined enterprise total assets or sales amounts, in last fiscal year, is over the amount which central Competent Authority has announced.[30]

In considering the application the Central Competent Authority will consider whether the "combination" will damage the gross economic profit. Having satisfied this criteria, the application of "combination" will be permitted.[31] Without such permission, in the above

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[29]Taiwan, R.O.C., Fair Trade Law Article 8 paragraph 2 (1991).

[30]Taiwan, R.O.C., Fair Trade Law Article 11 (1991).

[31]Taiwan, R.O.C., Fair Trade Law Article 12 (1991).

situation, a "combination" is illegal and the Central Competent Authority[32] can take the following steps:

(1) forbid the combination;

(2) order the enterprise, within certain time, to divide itself into separate enterprises, dispose its share in whole or in part, transfer part of its business to others, and dismiss its position in acquiring enterprise; and

(3) any other necessary dispositional measures.

Although, the Fair Trade Law will not put in force until next year (Feb. 6, 1992), and since Taiwan is the sixth largest trade partner of the U.S., in calculating the market ratio, maybe, the import products from United States companies which are acquired by Taiwanese company will be take into consideration.[33] Inevitably, in the future when the Fair Trade Law is put in force, the judge will be confronted by these kinds of new problems. In order to remedy the vacuum of precedent, according the Taiwanese Civil Procedure Article 283, the judge in Taiwan probably will refer to some American regulations or common law. Under these new situations, Taiwanese

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[32]The Ministry of Economic Affairs is the Central Competent Authority, see Taiwan, R.O.C., Fair Trade Law Article 9 (1991).

[33]From the standard of American Antitrust Law, the Fair Trade Law may have some defects, but, at least it will offer legal basis to restrain the behavior of anticompetition or monopoly.

companies, preparing to acquire an American company, should take precaution before it is too late.

II. CONSIDERATIONS AND TECHNIQUES UNDER ACQUISITION

If a takeover is a battle, "those who know their own situation and that of the enemy guarantee victory in every battle."[34] Taiwanese individuals or companies who want to acquire American corporations, must thoroughly know the pertinent American laws and target company's response to such a takeover bid. Most importantly the Taiwanese company must understand the attitudes held by court interpreting those related laws and the target's responses. This section will be divided into two parts, knowing your target and the techniques of acquisition.

A. Prerequisite: Knowing Your Target

1. The Methods of Acquisition

Acquisition can be divided into two categories, asset acquisition and stock acquisition. In an asset acquisition, the acquirer can pattern the transaction according to its need, and avoid the unknown liabilities from the target.[35] However, considering that complex

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[34]This is a Chinese proverb, from Sun Tzu, The Art of War.

[35]See infra note 188, at 23-22.

procedure and high state and local tax maybe imposed, the asset acquisition is not employed very often as a acquisition method. In contrast, the acquirer, employing the stock acquisition method, will risk the undisclosed liabilities and a strong resistance from target company. However, stock acquisition: (1) is simple to consummate; (2) can avoid the statutory and contractual restriction on a sale of asset; and most importantly (3) the acquirer can obtain control of the target company. Therefore, stock acquisition is a popular method. This thesis will discuss stock acquisition only.

2. What Should be Considered in Choosing the Target

An acquisition is a complicate and expensive mission. In particular, an acquirer, from a foreign country, will expand much more time and pay more money to complete it. To ensure a successful acquisition, an acquirer should assemble a working team. Typically, the team is composed of officer, counsel, investment banker, proxy solicitor, and public relation firm.[36] With complete information and investigation of the target company, a acquirer can correctly evaluate the risk from

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[36]Since confidentiality is so vital in a takeover, the working team should be as small as possible. See R. Ferrara, M. Brown, & J. Hall, Takeover: Attack and Survival: A Strategist's Manual, 15-16 (1987).

an acquisition.[37] Before proceeding with a takeover, the target's situation should be closely examined. Normally, the acquirer can not get sufficient information from the target, even in a friendly takeover. Sometimes the target company intentionally hides some disadvantage aspects from acquirer.[38] Since many different area must be researched in an acquisition and since each company is unique, a standard checklist can not be used.[39] An acquirer, however, in order to avoid being trapped, should scrutinize these following factors in advance.

- Income Analysis: In reviewing the target company,s financial statement, the aspect of consistency, comparability, and choice of accepted alternative accounting practice should be considered.
- Shareholder Analysis: This analysis is to make sure no concentrated blocks in a few

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[37]In addition to general and special takeover counsel to develop a strategy, the acquirer should procure extra sources for necessary consultations, e.g., lawyer and accountant.

[38]According to public conception, the raider always obtain the profit from acquisition; but there still are many cases in which the target became a burden for the acquirer. This is the result of insufficient investigation. For example, in 1979, Avon Cosmetic Inc. acquired Tiffany's Co., however, without precisely evaluating before acquiring the Tiffany's Co., Avon Cosmetic Inc. was forced to resell the target company.

[39]Leflcowitz, Preliminary Review of Financial and Other Data in Connection with A Acquisition, 651 Practicing Law Institute (PLI) 13, 13 (1989).

shareholders.[40] If the target company's share is concentrated in minority shareholders, the acquirer should find out those shareholders' names and the quantity of stock, and the relation between those shareholders and the management.

- Contract Review: To insure that a change of control will not result in termination of the target company's contractual right which is a important consideration for an acquirer to takeover of the target.[41]
- Assets Evaluation: To find out whether the target company's inventory is under-evaluated.[42]
- Taxes Consideration: The acquirer should consider whether the target has any tax attributes, and whether the acquisitions is taxable or taxfree.
- Balance-Sheet Review: Each assets and liability appearing on the balance sheet should be reviewed,

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[40] "However, large institutional or street holding are desirable, and large holdings by estates or other fiduciaries, even identified with insiders, may create vulnerability." See, Lipton & Steinberger, Takeover & Freeze Outs, Vol I 1-8 (1986).

[41] See supra note 36, at 16.

[42] Occasionally, closely held companies may set up an inventory "cushion", that is an intentional understatement of their inventory for the tax and accounting purposes.

especially the aspects of Taxes, Lawsuits, Leases, Stock Options and Warrants, and Long-Term Debt.[43]

Public relation is significantly important for a foreign acquirer in acquiring an American corporation; particularly, if the target company is specifically meaningful to the American people. A foreign acquirer should do his best to establish a good relation with the public and avoid irritating the public during or after the proposed acquisition. This will decrease the indigenous opposition, and indirectly help complete the acquisition.

B. Techniques of Acquisition

1. Friendly Acquisition

An acquisition can be classified either as friendly or hostile, depending on the response of target's management and board of directors.[44] Although hostile

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[43]See supra note 39, at 18, 19. In addition to the above factors, a prudent acquirer should also consider the target's cash flow, loan agreements, attitude of management to a an acquisition, environmental liabilities claim, products liability claim, unfunded pension obligations, and medical benefit liability. See supra note 36, at 16-18.

[44]Greene & Junewicz, A Reappraisal of Current Regulation of Mergers and Acquisitions, 132 U. Pa. L. Rev. 647, 693-94 (1984).

"In a friendly [acquisition] the target's board of directors has engaged in negotiation either the [acquirer and reached a agreement as to the proper offer price a hostile [acquisition] is an unsolicited [acquirer] which is either a surprise to the target company or the result of a failure of reach an agreement through negotiation." See Keliher, Anti-

acquisitions have attracted so much attention in recent years, the large majority of acquisition are the product of successful negotiations between the acquirers working team and the target company's management.[45] In a friendly acquisition, first, the acquirer should make a contract offer with target company's board of directors. Then the acquirer should tender its offer to the stockholder. Theoretically, the target's board of directs will recommend the shareholders to accept the offer. Finally, through the selection of directors, the acquirer will practically control the target.[46] Although some disadvantages exist in a friendly acquisition,[47] compared with a hostile acquisition, which challenged by the target company's many defensive weapons and that result in more damage during the acquisition battle, a friendly acquisition probably is a better way.

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takeover Measures- What Standard Should Be Used to Evaluate Them? 25 Hous. L. Rev. 419, 419-420 (1988).

[45]Hogg, Hostile Takeovers and Other War Games, in The Predator and the Predatee 1 (1988).

[46]See supra note 44, at 694-95.

[47]"For example, at the time [acquirer] buy the stockholder's stock, it can not know for certain whether it will be able to complete successfully the balance of the transaction and achieve 100% ownership, the [acquirer] therefore risk being left with a substantial investment, purchased at a premium, yet without control of the seller." Id. at 695.

acquisitions have attracted so much attention in recent years, the large majority of acquisition are the product of successful negotiations between the acquirers working team and the target company's management.[45] In a friendly acquisition, first, the acquirer should make a contract offer with target company's board of directors. Then the acquirer should tender its offer to the stockholder. Theoretically, the target's board of directs will recommend the shareholders to accept the offer. Finally, through the selection of directors, the acquirer will practically control the target.[46] Although some disadvantages exist in a friendly acquisition,[47] compared with a hostile acquisition, which challenged by the target company's many defensive weapons and that result in more damage during the acquisition battle, a friendly acquisition probably is a better way.

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[45]Hogg, Hostile Takeovers and Other War Games, in The Predator and the Predatee 1 (1988).

[46]See supra note 44, at 694-95.

[47]"For example, at the time [acquirer] buy the stockholder's stock, it can not know for certain whether it will be able to complete successfully the balance of the transaction and achieve 100% ownership, the [acquirer] therefore risk being left with a substantial investment, purchased at a premium, yet without control of the seller." Id. at 695.

acquisitions have attracted so much attention in recent years, the large majority of acquisition are the product of successful negotiations between the acquirers working team and the target company's management.[45] In a friendly acquisition, first, the acquirer should make a contract offer with target company's board of directors. Then the acquirer should tender its offer to the stockholder. Theoretically, the target's board of directs will recommend the shareholders to accept the offer. Finally, through the selection of directors, the acquirer will practically control the target.[46] Although some disadvantages exist in a friendly acquisition,[47] compared with a hostile acquisition, which challenged by the target company's many defensive weapons and that result in more damage during the acquisition battle, a friendly acquisition probably is a better way.

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takeover Measures- What Standard Should Be Used to Evaluate Them? 25 Hous. L. Rev. 419, 419-420 (1988).

[45]Hogg, Hostile Takeovers and Other War Games, in The Predator and the Predatee 1 (1988).

[46]See supra note 44, at 694-95.

[47]"For example, at the time [acquirer] buy the stockholder's stock, it can not know for certain whether it will be able to complete successfully the balance of the transaction and achieve 100% ownership, the [acquirer] therefore risk being left with a substantial investment, purchased at a premium, yet without control of the seller." Id. at 695.

2. Open-Market Purchases and Privately Negotiated Transaction[48]

An acquirer, by combining aggressive open-market purchases and privately negotiated transactions from sophisticated investor can also collect enough shares to gain the control of a company, the so-called "street sweep."[49] By Open-market purchases and privately negotiated transaction, the acquirer gathers stock from shareholders who sometimes do not know a control acquisition is imminent, this known as "Saturday Night Specials."[50] For example, in September 1985, Hanson Trust purchased 3.1 million share of SCM corporation stock in about 90 minutes.[51] In September 1987, Consolidated Gold Fields PLC, in 24 hours boosted its

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[48]Most open-market purchases and privately negotiated transactions are a response to management's refusal to sell their company. Acquirers accumulate stock from open market in order to form a control group that will replace the existing management. See Oesterle, The Rise and Fall of Street Sweep Takeovers, Duke L.J. 202, 254 (1989).

[49]For example, in Hanson's acquisition of SCM, Hanson made five privately negotiates cash purchase and open-market transaction, purchasing 25 percent of the SCM corporation's stock. See Hanson Trust PLC v. ML SCM, 774 F.2d 47, 52-53 (2d Cir. 1985). See also SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945 (9th Cir 1985); Crow Zellerbach Corp. v. Goldsmith, 609 F. Supp. 187 (D.C.N.Y. 1985).

[50]See supra note 48, at 212.

[51]Hanson Trust PLC v. ML SCM Corp., 774 F.2d 47, 52-55 (2d Cir. 1985).

share in Newnont Mining Corp. from 26 percent to 49 percent by acquiring 15.8 million share.[52]

As mentioned above, Congress' purpose in adopting the Williams Act, is to regulate tender offer, as it regulates another technique to acquire control, proxy contests.[53] Application of the Williams Act, however, depends on whether the acquisition are structured as a "tender offer." The Williams Act contains no definition of the term "tender offer." The Securities Exchange Commission ("SEC"), however, has always worried that if the open-market purchase and privately negotiated transaction become commonplace, it would nullify the tender offer restrictions imposed by the Williams Act and applied to so-called "unconventional" tender offer.[54] Since the legislative history of the Williams Act can not

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[52]See Ivanhoe Partners v. Newmont Mining Corp., 535 F.2d 1334, 1336-40 (Del. 1987).

[53]U.S. Code Cong. & Admini. News at 2813 (1968).

[54]See Note, Defining Tender Offers: Resolving a Decade of Dilemma, 54 St. John's L. Rev. 520, 531-33 (1980). The SEC formulated a three-part strategy to insure the application of Williams Act.

> "First, the Agency urged that courts broadly interpret the Act to cover "unconventional" tender offer.... Second, the agency urged courts to hold that [open-market purchases and privately negotiated transaction] undertaken on the heel of a withdraw tender offer violate SEC rules regulating market purchases of stock during the "pendency" of tender offer. Third, the agency proposed rules that would breach the symbiotic tie between tender offer and [open-market purchases and privately negotiated transactions]." See supra note 48, at 216-17.

offer much help to define the "tender offer," in 1979 the SEC suggested eight factors to determine whether or not a transaction was a "unconventional" tender offer.[55] However, the SEC's eight-factor test has not been accepted by a majority of the courts.[56] The courts employ the test as a shapeless authority, finding in it whatever they want to find.[57] Although defining the open-market purchases and privately negotiated

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[55]The factors are: (1) whether there is an active and widespread solicitation of public shareholder; (2) whether the solicitation is made for a substantial percentage of the issuer's stock; (3) whether the offer to purchase is made at a premium over the prevailing market price; (4) whether the terms of the offer are firm rather than negotiable; (5) whether the offer is contingent on the tender offer of a fixed minimum number of share, and, perhaps, is subject to the ceiling of a fixed number of share to be purchased; (6) whether the offer is open only for a limited period of time; (7) whether the offeree are subject to pressure to sell their stock, and (8) whether public announcements of a purchasing program concerning the target company precede or accompany a rapid accumulation of large amounts of target company securities.

[56]Though many courts have used the eight-factor test in considering whether a transaction constitutes a tender offer, they have weighed the factor according to their importance under the particular circumstance of each cases. See Wellman v. Dickinson, 475 F. Supp. 783, 824 (S.D.N.Y. 1979), aff'd, 682 F.2d 355 (2d Cir. 1982), cert. denied, 460 US, 1069 (1983). Other courts, however, have refused to be guided by the eight-factor test. See Brascan Ltd v. Edper Equities Ltd, 477 F. Supp. 773, 789 (S.D.N.Y. 1979)

[57]See, e.g., SEC v. Carter Hawley Hale Stores, Inc., 587 F. Supp 1248, 1252-57 (C.D. Cal. 1984); Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1206-07 (2d Cir. 1978).

transaction as a tender offer causes some problems.[58] Since open-market purchases and privately negotiated transaction, if consider as a tender offer, would violate most of requirement of Williams Act and SEC Rules.[59] Therefore, in Kennecott Copper Corp v. Curtiss-Wright Corp.[60] and Crown Zellerbach Corp. v. Goldsmith,[61] the courts held that a bidder's purchase in open-market or a privately negotiated bid did not, itself, constitute a tender offer subject to regulation under the Williams Act.[62] But, prior to a open-market purchase and privately negotiated transactions, if the acquirer

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[58]"Such as (1) fair competition in the marketplace for corporate control, (2) the need for certainty as to the scope of regulation, (3) the maintenance of fair and orderly markets for securities, and (4) the desirability of sharing control premium indicate that a wider range of transactions than was envisioned in 1968 should be conducted as tender offer." See supra note 48, at 674.

[59]To wit to prescribe: a twenty day minimum offering period; shareholder withdrawal rights coextensive with the offering period; withdrawal rights after sixty days from the initial offer if the offeror has failed to pay; nondiscrimination among offeree; pro rata acceptance for over subscribed offers; and the extension of any price increase during the tender offer to all shareholders who have already tendered. Also during the tender offer, the Acts offer a prohibition on purchasing "otherwise than pursuant to such tender offer" and "any short tenders." See 17 C.F.R. § 240.14e-1, 14d-7(a), 14d-8, 14d-10(a)(1)(2), 10b-13(a), 10b-4(b).

[60]584 F.2d 1195 (2d Cir. 1978).

[61]609 F. Supp. 187 (D.C.N.Y. 1985).

[62]See Hanson Trust PLC v. ML SCM Corp., 774 F.2d 47 (2d Cir. 1985). See supra note 36, at 27-35.

publicizes its intention to gain control of the target, courts view such publicity as too close to traditional tender offer.[63] The SEC also uses the standard of the number of direct solicitees to decide whether a privately negotiated transaction is a tender or not. That this standard was accepted by some courts should not be neglected.[64]

3. Tender Offer

a. Cash Offer

The tender offer, in recent year, was most frequently used as a acquisition technique. Similarly, a tender offer can also either be "hostile" or "friendly."[65] What is tender offer? The Williams Act does not define it. Apparently, Congress expected the SEC to define the boundaries of the Williams Act's

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[63]Publicity can take the following forms: (1) general press releases, (2) public announcements aimed at all shareholders, or (3) communication to large number of individual shareholder. See supra note 48, at 224.

[64]In Beaumont v. American Can Co., 621 F. Supp. 484, 502 (D.C.N.Y. 1985), solicitation of 6 out of over 2000 shareholders is not public solicitation. In University Bank & Trust Co. v. Gladstone, 574 F. Supp. 1006, 1011 (D. Mass. 1983), solicitation of 49 out of 650 shareholder is not a tender offer.

[65]A "hostile" tender offer is a offer without the support or authorization of the target corporation's board or management. Contrarily a "friendly" tender offer has the approval of the target company's board or management.

coverage.[66] The SEC has feared explicating such a precise definition of tender offer would enable purchasers, whose transaction should be regulated, to structure transaction that would avoid any definition the agency could provide.[67] Although the SEC designs the eight-factor test[68] and Rule 14d-2 (Rules Under Securities Exchange Act of 1934)[69] gives the SEC an extensive latitude in regulating many kinds of transactions under the Williams Act. However, Rule 14d-2[70] just assumes a definition of tender offer. Therefore, the SEC has not released what constitutes a

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[66]See, 113 Cong. Rec. 24,664 (1967).

[67]"In recognition of the dynamic nature of tender offers and the need for the Williams Act to be interpreted flexibly in a manner consistent with its purposes, the Commission affirms it position that a definition of the term "tender offer" is neither appropriate no necessary at this time." See Tender Offer: Securities and Exchange Commission Rule and Schedule Proposals, Exchange Act Release NO. 34-15,548, [Jan.-June] Sec. Reg. & L. Rep. (BNA) No. 489, at 7 (Feb.5, 1979).

[68]See supra note 55.

[69]17 C.F.R. § 240.14d-1 (1990).

[70]Rule 14d-2 state that:
"(a) Commencement. A tender offer shall commence for the purposes of section 14d of the Act and the rules promulgated there under at 12:01 A.M. on the date when the first of the following occurs.... (b) Public announcement. A public announcement by a bidder through a press release, newspaper advertisement or public statement which includes the information in paragraph (c) of this section with respect to a tender offer shall be deemed to constitute the commencement of a tender offer."

tender offer.[71] The eight-factor test is so vague that courts rejected its use as a standard in defining whether a transaction is "tender offer," and stated that the eight-factor test introduces a crippling uncertainty in an area in which practitioners should be guided by a reasonably clear rule.[72] In a tender offer, the offer may be either cash or securities, or both; the offeror always invites the target company's shareholder to sell their share at a specified price, which is set above the market price as an inducement.[73]

b. "Toehold" Policy and "Bear Hug"

Once a bidder has publicly announced its offer, the offeror can not purchase share except pursuant to the tender offer.[74] Therefore, before commencing the offer the bidder often through open-market or privately negotiated transaction secretly acquires a "toehold." In order to avoid filing a Schedule 13D the "toehold" will just be a small amount of target company's share. The "toehold" policy has its advantages and disadvantages.

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[71] Oesterle, The Rise and Fall of Street Sweep Takeovers, Duke L.J. 202, 222 (1989).

[72] See Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 791 (S.D.N.Y. 1979).

[73] Anderson & Augspurger, Defensive Tactics to Hostile Tender Offer- An Examination of Their Legitimacy and Effectiveness, 11 J. Corp. L. 651, 659 (1986).

[74] See Rule 10b-13.

The advantages, first, the bidder can initially purchase stock more cheaply than it could after the announcement of a tender offer. Thus the bidder would have more money to proceed in a subsequent high price tender offer. Second, the "toehold" can deter the competition of potential bidders and the challenge of target company's defense. However, the "toehold" may increase the bidder's cost and risk of loss if the acquisition is not consummated, and the initial purchase will expose the bidder's intention before announcement.[75]

In addition to "toehold" policy, a bidder can employ a "bear hug" strategy.[76] A "bear hug" letter will create pressure to the target company's management in hope that management will make a mistake or negotiation with bidder. To avoid starting Rule 14d-2(b)'s five-day block, the bidder should write its "bear hug" letter carefully in order not to disclose the information that would trigger the public announcement of a proposed tender offer.[77]

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[75]See supra note 36, at 37-38.

[76]The "bear hug" is a test of target management's attitude to an acquisition; and it usually consists of a letter to the target making an offer of a fixed price to the target company. See supra note 36, at 64, and A. Fleischer, Tender Offers: Defense, Responses, and Planning, 57 (1980).

[77]See supra note 36, at 65.

c. Two-Tiered Tender Offer

Two-tiered tender offer is more frequently used in a hostile acquisition[78]. Before the two-tiered tender offer approach, many of the notable takeovers and attempts of 1980s were partial offers, which were not cash offers for all outstanding shares, but for fifty one percent of the target company's share. In a partial bid, if the bidder acquires 51 percent of the target company's share, it will acquire control of 100 percent of a target company's assets.[79] Partial takeover may cause the risk to the existing shareholders to occur after the partial takeover. They will find their corporation under new management with new strategies and objectives. This change will discourage potential purchasers of the shares. Therefore, the shareholders will be forced to either tender their share at a premium or fight with bidder.[80]

The two-tiered tender offer is the refinement of partial offer. A two-tiered tender offer is a attempt to acquire all of the target company's securities, with two

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[78]Crowder, Recent Developments in the Use of the Poison Pill Anti-Takeover Defense: Limiting the Business Judgement Rule, 31 St. Lousi U. L.J. 1083, 1083 (1987).

[79]See supra note 44, at 676-77.

[80]Id. at 676.

different prices to the target company's shareholders.[81] In the first tier ("front-end"), the offeror attempt to obtain a controlling position of the target company's securities by offering a high cash premium over the market price.[82] The second tier ("back-end"), commonly, is a merger involving the issuance of "junk bond,"[83] or cash payments in exchanging for the remaining securities of the target at a lower price than in the first tier.[84] Since the "front-end" is much more attractive than the "back-end," the shareholder is coerced[85] into tendering his or her shares in the first tier for fear of "missing the bus" and being relegated to the status of holder of

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[81]See General Comment, Two-Tiered Tender Offer and the Poison Pill: The Propriety of a Potential Takeover Defense, 17 Pac. L.J. 891, 894-96 (1986); Mirvis, Two-Tier Pricing: Some Appraisal and "Entire Fairness" Valuation Issues, 38 Bus. Law. 486, 486 (1982).

[82]Mick, Corporate Takeovers: Defensive Techniques Utilized Against Raiders, 22 Creighton L. Rev. 695, 698 (1989).

[83]A "junk Bond" is simply a debt instrument that is not of ordinary investment quality; carrying a high rate of return the expectation of purchase of a "junk Bond" is that the assets and cashflow of the acquired corporation will be used to satisfy these "junk bond." See Hamilton, Corporations Including Partnership and Limited Partnerships Cases and Materials, 786 (3rd ed. 1986).

[84]Finklstein, Antitakeover Protection Against Two-Tier and Partial Tender Offer: The Validity of Fair Price, Mandatory Bid, and Flip-over Provision Under Delaware Law, 11 Sec. Reg. L.J. 291-93 (1984).

[85]But coercion is inherent in the any tender offer process, not just in two-tier tender offer. See Radol v. Thomas, 534 F. Supp. 1302 (S.D. Ohio 1982).

"junk bond" securities following the implementation of the second tier.[86] By using the two-tiered tender offer, the offeror will have two advantages. The first one from the "front-end," because the shareholders are faced with difficult decision of tendering their shares in the first tier, or gambling on a potential loss in the second tier. This uncertainty will cause an influx of tendering shareholder[87], especially the professional investor. Thus making the acquisition more likely to succeed.[88] The second advantage is a lower acquisition cost. The two-tiered tender offer for 100% ownership of the target is less costly than a partial tender offer because of considerable low price of second tier.[89] However, the two-tiered tender offers have some shortcomings. The coercive effect from two-tiered tender offers may cause court to be more receptive to target company's defensive measures. The second step of a two-tiered tender offer

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[86]See supra note 45, at 277.

[87]See supra note 82, at 698.

[88]Lederman, Tender Offer Bidding Strategy, 17 Rev. of Sec. REG., 917 (April 18, 1984).

[89]"Once a partial offer is made and completed at high premium over the marker price, the market value of the security will reach a plateau between the offering and initial market price. Therefore, a subsequent merger to acquire the remaining would have to be accomplished at a price higher than the plateau, resulting in a second premium that could be avoid through the use of a two-tiered offer". See supra note 82, at 698.

raise question about the majority stockholder's fulfillment of its fiduciary duty to the minority shareholders who are being deprived of their holding in a freeze-out merger.[90] Although, two-tiered tender offer will result in the effect of coercing shareholders into selling share in the initial step before evaluating all aspect of the transaction which prevents other potential acquirers from bidding for the target company,[91] the federal laws, except Section 14(d)(6) of the Exchange Act providing a pro rata purchase for all share tendered, contain no express prohibition against two-tiered tender offers.

d. Exchange Offer

Besides a cash offer, an exchange offer is also being used.[92] However, several disadvantages will discourage the bidder to engage in an exchange offer. First, an exchange offer, which must be registered with

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[90]In Weonberger v. UOP; Inc., 457 A.2d 701 (Del. 1983), the Delaware Supreme Court held that in order to meet the fiduciary requirements, a merger must evidence "fair dealing" and "fair price." And this fair price will cause a dilemma in second tier offer.

[91]Wenger, Business Judgement Rule: A Bench Mark for Evaluating Defensive Tactics in the Storm of Hostile Takeovers, 31 Vill. L. Rev. 1439, 1433 (1986).

[92]For example, in April 1985, Turner Broadcasting System made a exchange offer for all outstanding shares of CBS. See Turner Broadcasting System Inc. v. CBS, INC., 627 F. Supp. 901 (N.D. Ga 1985).

the SEC under the Securities Act of 1933, becomes public upon the filing of a preliminary prospectus for the registration. Secondly, an exchange offer is subjected to broader disclosure requirements than are cash offer.[93] Thirdly, an exchange offer involves the comparison of two securities' prices which will take a bidder more time to consummate it. Lastly, the SEC staff will use stricter and more extensive criteria than used in the cash offer to examine exchange offer.[94] For these reasons, a foreign bidder should avoid using this way to tender its offer.

4. Proxy Contests

In essence, a proxy contest is a takeover strategy other than an acquisition measure. However, through proxy contests, an acquisition will be more easy to complete. So, proxy contests will be analyzed because of their relation to acquisitions. Proxy contests utilized as a means of obtaining control of a corporation are not a new path.[95] Before hostile tender offer gained

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[93]For example, an exchange offeror must fully describe the business of the bidder and the target, and must provide a complete set of pro forma financial statement.

[94]See A. Fleischer, Tender Offers: Defenses, Responses, and Planning, at 66 (1980).

[95]A proxy contest, in general, is "an internal struggle between two or more persons or groups, one usually being the incumbent management and board of the directors for the control of the board of

popularity during 1970s the proxy contest was the most common takeover tactics of 1960's and early 1970.[96] A proxy contest, through the solicitation of proxies for the election of its nominees as directors of the target company, the bidder gains control of target. A proxy contest, unlike a tender offer, does not require the bidder to purchase extra shares of the target in order to gain control of the company. Therefore, theoretically, a proxy contest does not bring any securities benefits to the bidder.[97] The proxy contest offers some advantage in the takeover battle. First, a proxy contest does not require the financing as a tender offer does; in other words, a proxy contest is a cheap way to gain control of a company, especially in a large corporation with a prodigious market value. Secondly, the defensive tactics from target company are reduced. Proxy solicitation is an exercise of fundamental corporate democratic right; there is relatively little that incumbent management can do to insulate itself against proxy contests. However, in order to keep their significant advantage, the incumbent management will use the privilege to collect information about the company and very probably use the

directors." See D. Austin & J. Fishman, Corporations in conflict: The Tender Offer, 29 (1970).

[96]Brownstein & Presser, Developments In Takeover Defense and Their Impact on Proxy Contests, 696 PLI 369, 448 (1990).

[97]See supra note 36, at 132.

company's properties to fund their campaign. Normally, the management will utilize the corporate charter and by-law provisions to defend against solicitation;[98] but while employing such defense, the management will risk violating its own fiduciary duties.[99]

A bidder should consider six aspects of the corporation while undertaking a proxy contest:

> "(1) How much stock do the bidder and its allies own? (2) How much stock do management and its allies own? (3) How many shares (or what percentage) of the outstanding stock are likely to be voted at meeting? (4) How can the bidder discredit the target's present management? (5) How can the target's present management discredit the bidder? (6) How much time does the bidder have?"[100]

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[98]For example, by:
"(a) prohibiting shareholder action by less their unanimous written contest; (b) restricting the right of shareholders to call special meetings; (c) requiring the filing of shareholder proposals and the information regarding shareholder nominees with the corporate secretary for a prescribed period of time before the meeting date (or the execution of written consent); (d) giving the board of directors latitude in the setting of the annual meeting rate; (e) requiring super-majority votes for shareholder action; (f) providing for a classified board; (g) authorizing the board of directors to fix size of the board and fill newly created seats; and (h) authorizing a second class of common stock or blank check preferred that may be issued into friendly hand." See Eppler & Scheuermann, Overview of the History and Current Uses of Proxy and Consent Solicitation Contests: Shareholder Challenges and Management Response, 696 PLI 9, 34-35 (1990).

[99]Id.

[100]See supra note 36, at 139. Reisner & Malaquin also listed the following items to be examine:
"1. Are the charter and by-law in conformity with the state corporation statute? 2. Does the state

In order to analyze and answer these questions, a bidder should obtain a shareholder list as soon as possible; then, the bidder should follow the requirement of 1934 Act Schedule 13D,[101] Schedule 14B,[102] and Schedule 14A[103] to file a solicitation of a proxy contest.

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corporation statute contain any provision that will advantage or disadvantage either side in a contest? 3. Are there any regulatory or contractual burdens attached to change of control? 4. What is the potential for voting dilution? 5. What types of voting and quorum requirements are applicable? 6. What are the notice and record date provisions? 7. Can action be taken by written consent of less than all stock holders? 8. Are there any anti-takeover statutes such as control share statutes, fair price statutes or statutes like Del. G.C.L. § 203 or N.Y. B.C.L. § 912? If so, will formation of an insurgent group have any consequence under the statute. Review any stockholder rights plan for similar provision. 9. Have insiders been trading? 10. What type of anti-takeover provision are contained in the charter (such as classified board, fair price provisions, super-majority voting requirements and anti-greenmail provision)? 11. Do insurgents have access to inside information? 12. Are there any potential disclosures that could prove embarrassing to the client?" See Reisner & Malaquin, Organization of Solicitation: The Lawyer's Function, 696 PLI 197, 199-201 (1990).

[101]Under Rule 13D of the Securities Exchange Act of 1934 ("Exchange Act"), any person who is conducting a proxy contest and owns more than five percent of the issuer's common stock must file a Schedule 13D within 10 days after such acquisition.

[102]Rule 14a-11(c) of the Exchange Rule require that, in a proxy contest, no solicitation shall be make by any person other than issuer unless at least within five business days a statement of Schedule 14B is filed by each participant in such solicitation.

[103]Rule 14a-11(c) of the Exchange Rule requires a written proxy statement containing the information required by Schedule 14A.

A few year ago the proxy contest was completely replaced by the hostile tender offer. Recently, however, recognizing that the tender offer is causing strong resistance from state anti-takeover laws, targets verified defensive tactics, and the financial environment, the tender offers is becoming less attractive,[104] and proxy contests have been used more often by stockholders who wish to stimulate fundamental change in corporate finance and governance.[105] By using proxy contest alone, a raider can take over the target company; moreover, a proxy contest may be an effective offensive weapon, used to repel the target company's effort to resist being acquired by a cash tender offer.

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[104]Id. at 651.

[105]Id.

III. THE CORE REGULATIONS OF ACQUISITION

A. Williams Act

Prior to the 1960s, the proxy contest was the traditional and widely used approach to procure the control of a corporation.[106] Compared with the proxy contest, tender offers are less regulated and more difficult to thwart. Therefore tender offers replace the proxy contests as the common method of a corporate takeover.[107] Tender offers initially were unregulated by both federal and state law. An offeror could acquire the stock without having to disclose information about the offer or about its plans for the target corporation.[108] As a result of this regulatory vacuum, the shareholder was exposed to a vulnerable situation. Congress,

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[106]Federal regulation of proxy contests is authorized under section 14 of the Securities Exchange Act of 1934. The Securities Exchange Act of 1934 made it unlawful for any person to solicit any proxies or consent or authorization from holders of registered securities in violation of SEC Rules. See 15 U.S.C. § 78n(a) (1982).

[107]Clark, Corporate Law, 379-89 (1986).

[108]See supra note 36, at 5.

however, perceived the danger of a tender offer takeover[109] and it passed the Williams Act in 1968.[110] By amending the Securities Exchange Act of 1934 ("Exchange Act") which brought the tender offer under federal regulation, the Williams Act was enacted.[111]

1. Legislative Purpose

Tender offers became a popular means used to gain control of corporations during the business growth years of 1960s.[112] Considering the economic advantages, tender offers required quick responses, leaving little time for target shareholders to make an informed decision

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[109] "In recent years we have seen proud old companies reduced to corporate shells after white-collar pirates have seized control with funds from sources which are unknown in many case, then sold or traded away the best assets, later to split up most of the loot among themselves.... A group of corporate raiders, collusively joined together, can buy up enough shares of a corporation's stock virtually to guarantee victory in a proxy fight without management or shareholders having any knowledge of there acquisitions. The purchase can be made in so-called street name or, even more furtively, by Swiss banks for an undisclosed account number." See 111 Cong. Rec. 28, 257-58 (1965).

[110] Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (amending 15 U.S.C. § 78m-n)) (coded as amended at 15 U.S.C. § 78m-n (1982)).

[111] Id. The Williams Act added five provisions to Exchange Act, two of which directly relate to tender offers. See 15 U.S.C. § 78n(d)-(e)(1982).

[112] Langevoort, State Tender-Offer Legislation: Interests, Effects, and Political Competencies, 62 Cornell L. Rev. 213, 214 (1977).

concerning the sale of shares.[113] In addition, management in target corporations generally lacked enough time in which to provide recommendations and advise their shareholders.[114] Absent regulation, abuses occurred.[115] To fill the vacuum, Congress passed the Williams Act with the major goal of protecting the investor of the target company in a tender offer. Congress objective is primarily achieved by requiring "fair and full disclosure."[116] Therefore, Congress decided, in adopting the Williams Act, to regulate tender offers just as it regulated another technique to acquire control, proxy contest. In addition to requiring each shareholder to be provided with the information and time necessary to decide whether to tender or vote his share, the Williams Act gives each shareholder the opportunity to have at least some of his shares purchased in the tender offer.[117] Although Congress wanted to protect individual shareholders, conceding that tender offers were beneficial to the economy, it did not want to discourage

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[113]See Piper v. Chris-Craft Industries., Inc., 430 U.S. 1, 27 (1977).

[114]Id.

[115]Id.

[116]113 Cong. Rec. 854-55 (1967) (remarks of Sen. William).

[117]See supra note 44, at 654-655.

takeover attempts.[118] The Williams Act reflects an effort on the part of Congress to provide some balance between the interests of the acquirer and the shareholders of the company to be acquired.[119] It is revealing in this respect to recall Senator Williams' statement that

> "we have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bid... The Bill at the same time provide the offeror and management equal opportunity to present their case."[120]

In short, confronted with sharply conflicting and unresolved problems about the existence of the tender offer, Congress took no position on whether to hinder or escalate takeover activity, or what level of takeover activity was desirable.[121] However, from the legislative history, "investor protection" was Congress' major policy objective in enacting the Williams Act.

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[118] See S. Rep. No. 550 (1967). Senator Williams, in discussions before the passage of the Act, noted that the Act was a worthwhile sacrifice to gain shareholder protection. 113 Cong. Rec. S24,664 (daily ed. Aug. 30, 1967). But, Senator Williams had earlier stated that he wished to prevent only those takeovers designed to make quick profit while sacrificing the business in the process. 112 Cong. Rec. S19,003 (daily ed. Aug. 11, 1966).

[119] See supra note 44, at 650-51.

[120] 113 Cong. Rec. 24,664 (1967) (remarks of Sen. Williams).

[121] Jhonson & Millon, Misreading the Williams Act, 87 Mich. L. Rev. 1862 (1988).

2. An Overview of Williams Act

The Williams Act, added to Exchange Act, imposed several disclosure and procedural requirements on a bidder making a tender offer.[122] Section 13(d) of the Exchange Act requires any person who acquires five percent or more of the outstanding share of a class of securities to register under section 12 of the Exchange Act[123] and to file a disclosure statement with both the SEC and the target company.[124] The purpose of section 13(d) of Exchange Act is to alert the market place about rapid accumulation of securities which might cause a potential shift in control. The disclosure statement includes:

(a) the background, identity, residence, and citizenship of the acquirer;

(b) the source and amount of the funds to be used in the purchase;

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[122]Application of the Williams Act depends entirely on whether the acquisition is structured as a "tender offer." However, the Williams Act does not define the term "tender offer." But the Securities Exchange Commission has set out eight factors to help determine what type of acquisition is a tender offer. See supra note 55. See also, Wellman V. Dickinson, 475 F. Supp. 783 (S.D.N.Y. 1979); Brancan Ltd. V. Edper Equities Ltd., 447 F. Supp. 773 (S.D.N.Y. 1979).

[123]15 U.S.C. § 781 (1982). Under § 12(g)(1), securities must be register if traded on a national exchange or if the offering is for more than $5 million dollars and there are 500 or more subscribers. 15 U.S.C. § 781(g)(1) (1982).

[124]15 U.S.C. § 78m(d)(1).

(c) the purpose of the purchase and any plans or proposals that the acquirer may have concerning possible liquidation of the issuer;

(d) the number of shares of the security that the acquirer or the acquirer's associate own; and

(e) information regarding contracts, arrangements, or understanding with any party concerning any of the shares of the issuer.[125]

This statement must be sent within ten days after the acquisition.[126]

Section 14(d) of the Exchange Act defines the commencement of a tender offer as the period when the material terms[127] of a tender offer are first published or advertised by the bidder, or sent or given to security holder;[128] and on the same day the bidder must file a tender offer statement on Schedule 14D-1. Section 14(d) of the Exchange Act also allows shareholders of the target corporation who have tendered their share to withdraw their offer during the first seven days after making agreeing to the tenders or sixty days after the date the offer is first published or given to the target company's shareholder. Thus the Act provides

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[125]15 U.S.C. § 78m(d)(1)(A)-(E) (1982).

[126]15 U.S.C. § 78(m)(d)(1) (1982).

[127]17 C.F.R. § 240.14d-2(c).

[128]17 C.F.R. § 240.14-2(a).

shareholders with the time to evaluate the tender offer properly.[129] If the offeror makes an offer to purchase less than all the outstanding shares of a class of the target company's stock; or if the offer purchases less than the entire class of securities tendered during the first ten days of the offer; or if the offeror increases the consideration of the tender within ten days after notice, the offeror must purchase on a pro rata basis.[130] Also, if the offeror increase the amount of consideration paid for each security, those shareholder who tendered their share before the increase must be paid the difference.[131] Section 14(e) of the Exchange Act requires that tender offers must open for at least 20 business days from the commencement of the tender offer.[132] The target company must, within ten business days from the first day dissemination of offer, send or give its shareholders a statement disclosing its stance about the offer. Mostly, section 14(e) of the Exchange Act makes it illegal to engage in any fraudulent, deceptive, or manipulative act or practice in connection with a tender offer. The section also authorizes the SEC

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[129] 15 U.S.C. § 78n(d)(5) (1982).

[130] 15 U.S.C. § 78n(d)(6) (1982).

[131] 15 U.S.C. § 78n(d)(7) (1982).

[132] 17 C.F.R. § 240.14e-1(a)(i).

to promulgate rules that define and prescribe means reasonably designed to prevent such acts or practices.[133]

As noted above, the structure of Williams Act reflects the congressional view that the role of federal law is to legislate full disclosure rather than regulating the underlying fairness of any takeover attempt.[134] In short, the Williams Act place more emphasis on the investor protection through disclosure.

B. Business Judgement Rule

1. The Research of Takeover's Nature

Before analyzing the business judgement rule, the essence of hostile takeover should be discussed. Is hostile takeover bad? If it is bad, why does the public[135] still accept it as a remedy to restructure a

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[133]The SEC accordingly enacted Rule 14e-1 which requires that a tender offer must remain open for at least twenty business days from the time the offer is published or made. The management of the target company has ten business days to inform the shareholders whether management recommends that the shareholders accept or reject the offer.

[134]See supra note 45, at 40.

[135]However, Romano stated that

> "a plurality of public has consistently expressed a negative attitude towards corporate acquisitions, and a majority consistently reports disinterest in, and lack of knowledge about, such transactions." See Romano, The Future of Hostile Takeover: Legislation and Republic Opinion, 57 U. Cin. L. Rev. 457, 458 (1988).

collapsed company?[136] And, if it is good why do state statutes and corporations exhaust every approaches to resist outside tender offers?

The first benefit of hostile takeover which many authors stated in the 1980's is that hostile takeover can increase shareholder wealth, regardless of the success or failure of the corporate "raiders" takeover bids. If the "raider" succeeds in the takeover battle, he will remove the control of the corporation from the incumbent management to new management that should be able to produce the greatest economic return for the shareholder. If the "raider" fails in the takeover battle, current management will have greater incentive to maximize the economic return of the assets under its stewardship.[137] Whether a hostile takeover shall be resisted or not, the incumbent management must decided whether it has a fiduciary duty to repel the takeover. This decision will depend on the management's concept of the takeover. Will the hostile takeover benefit the shareholders or damage

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[136]The shareholders' ambition are not always consistent with management's. Economically, shareholders will welcome the occurrence of takeover; however, restricted by company charter, both shareholders and acquirer will be impeded to engage in an acquisition.

[137]See, for instance, Comment, Takeover Defense Tactics: A Comment on Two Models, 96 Yale L.J. 295, 295-96 (1986); Easterbrook & Fischel, The Proper Role of a Targets Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161, 1161 (1981); Gilson, A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offer, 33 Stan. L. Rev. 819, 819 (1981).

the shareholders? As to the benefits of a hostile takeover, first, shareholders will receive a premium from accepting the bidder's offer which is greater than the stock market price. This premium is one time windfall that may not be available for all shareholders.[138] In the view of long-term, hostile takeovers can also benefit shareholder by rearranging corporate assets more efficiently; this will be reflected by a higher stock price for shareholders in stock market. So, the nontendering shareholders still receive the advantage from the acquisition after the acquisition. Under this paradigm, a takeover is good for shareholder. Therefore, anything that discourages, deters, or increases the price of a takeover is bad.[139]

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[138]However, there is an opposing view.

"[T]here studies only examine stock price over short periods of time and typically do not cover the period after completion of a [acquisition]. These studies thus fail to examine the long-term effects of takeover on stock prices, and also fail to measure other important economic factors such as profitability. Furthermore, there is substantial disagreement as to whether stock price accurately reflect economic value. They can not measure the effects, if any, that the threat of takeover has on corporate management, nor do these studies conclusively measure the costs of takeovers.... In sum, the evidence as to the benefit and cost of takeover is, at best, debatable and inconclusive." See Fleischer testified in the field of takeover law on July 9, 1987 before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce of the U.S. House of Representatives.

[139]Easterbrook & Fischel, The proper Role of Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1164 (1981).

However, what is the real value of target's share? Does the market price reflect the real value of share? Sometimes, even though bidder offers a premium over prevailing stock market price, the shareholder still did not receive a true premium form the bidder, because the target's stock is undervalue in stock market. To say that hostile takeover is good to shareholders is not an absolute.

In the view of long-term, if the "raider's" purpose is to sell target important assets, to spinoff the value of target, or to use the target for tax purposes rather than to restructuring the target's management, a hostile takeover is not beneficial for shareholders. Moreover, in the two-tiered tender offer, the remaining shareholder will risk of receiving a "junk bond" or even further mismanagement.

In a takeover battle, a "raider" usually finds inefficient management in the target company. When incumbent management feels the pressure from the "raider," in order to keep control of the company besides employing defensive tactics, incumbent management will restructure or perform its management duties more efficiently. Thus, from this resulting change, the hostile tender offer is also beneficial to shareholders.

The incumbent management will spend large sums of money[140] to thwart the takeover, and the shareholders will pay the costs. The additional costs make the hostile takeover less beneficial to the shareholders. Therefore, there is no definite answer as to whether a hostile tender offer is good or bad for shareholders. The financial ramifications depend on the current target's management ability, the purpose of raider and raider's skill of management.

2. The Application of Business Judgement Rule

Although, hostile tender offers give shareholders an opportunity to sell their shares for a premium over the prevailing market price and promote the company's profit, target company's directors often oppose any hostile tenders offer. Thus, when confronted with resisting the raider's controlling contest, can we say that the director violates the fiduciary duty? In order to protect directors, themselves, the directors, traditionally, may assert the business judgement rule as

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[140] "Litigation against the offer, extensive mailings to and solicitation of shareholders, and other defensive tactics can quite costly to both the target and the bidder. For example, in the recent control for control of Pulhnan, the fees paid to lawyers, investment bankers, and similar participants in the fight were $17 million, when Mead Corporation defeated Occidental Petroleum's bid in 1979, the cost was $ 15 million." Id. at 1176.

a defense in shareholder's suit for damage.[141] But, it is questionable whether the business judgement rule can be employ by directors in takeover cases? Under the § 8.42 of the Revised Model Business Corporation Act ("RMBCA"), a director must perform his duties

> "(1) in good faith; (2) with the care an ordinarily prudent person in alike position would excise under similar circumstance; and (3) in a manner he reasonably believes to be in the best interest of the corporation."[142]

If the directors decide in good faith that to reject a tender offer that is in the best interest of the corporation, whatever defensive tactics they use, they will still can discharge their liability.[143] In other words, by demonstrating that the defensive tactics were used for a business reason unrelated to the contest for control, and by showing that the actions were employed to prevent the "raider" from achieving control, and that such a change in control will harm the corporation's

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[141] The business judgement rule was summarized as follow "a board of directors enjoys a presumption of sound business judgement and its decisions will not be disturbed if they can be attributed to any rational business purpose. A court under such circumstances will not substitute its own notions of what is or is not sound business." See, Sinclair Oil Corp. v. Levien, 280 A.2d. 717, 720 (Del. 1971). This concept of judicial deference to director's business decision originated in Percy v. Millaudon. See 8 Mart. (n.s.) 68, 78 (La. 1829).

[142] See RMBCA § 8.42 (1984).

[143] See Bodell v. General Gas & Elec. Corp. 15 Del. Ch. 420, 429-30, 140 A. 264, 268 (1927).

interest, the incumbent management can avoid all liability.[144] In other corporate areas, the use of the business judgement rule is an unquestionable practice. But takeover raise different concerns; takeover decisions are not ordinary business decisions.[145] Therefore, whether the business judgement rule can be employed by incumbent management as a safe harbor is questionable, the court's holdings vary widely. Normally, shareholders seek injunctive relief before the board's defense decision becomes effective.[146] In some cases, before deciding whether to apply the business judgement rule courts examine the directors' fiduciary duties to the corporation, the duty of care and the duty of loyalty.[147]

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[144] See supra note 94, at 88-25.

[145] "First, takeover decisions are different from ordinary business decisions because they involve the shareholder's interest in making personal investment decisions for himself and they create an inherent conflict of interest for direction. Second, the shareholders seek to enjoin a transaction before the directors consummate it, rather than seeking damages from directors after a deal prove to be unprofitable. Finally, while market forces effectively regulate nontender offer transactions, hostile tender offers are necessary to provide the most effective means for regulating and changing corporate control without the current board's support." See Notes: False Halo: The Business Judgement Rule in Corporation Control Contests, 66 Tex. L. Rev. 843, 853-54 (1988).

[146] See, e.g., Dynamics, Corp. of Am. v. CTS Corp., 794 F.2d 250, 251 (7th Cir. 1986).

[147] See, e.g., Sem Smith v. Van Gorkom, 488 A.2d 858, 872-73 (Del. 1985); Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983).

Furthermore, in Weinberger v. UOP. Inc.[148] the Delaware Supreme Court refused to apply the business judgement rule and applied an inherent fairness standard to examine the director's conduct. However, some courts recognize no distinction between ordinary business decision and takeover decisions, allowing the directors to utilize the business judgement rule as a defense.[149] But, some cases rather than applying the business judgement rule mechanically, apply the rule flexibly.[150] For example, some courts require: the "shifting the burden of proof to directors;"[151] the "shifting the burden of going

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[148]See 457 A.2d 701, 710-11 (Del. 1983).

[149]See, e.g., GAF corp. v. Union Carbide Corp., 624 F. Supp. 1016, 1034-35 (S.D.N.Y. 1985); Gearhart Industries v. Smith Intern., Inc., 741 F.2d 707, 723-24 (5th Cir. 1984); Pogostin v. Rice, 480 A.2d 619, 627 (Del. 1984).

[150]Recognizing the essence of takeover cases, the Delaware courts held that "a more flexible intermediate form of judicial review is appropriate." See AC Acquisition Corp. v. Anderson, Clayton & Co., 519 A.2d at 111 (Del. Ch. 1986).

[151]Since the business judgement rule frames the presumption in favor of the directors, the courts applying the rule have placed the burden of proof on the shareholders. See, Northwest Industries Inc. v. B.F. Goodrich Co., 301 F. Supp. 706, 712 (N.D. Ill. 1969). But some courts have shifted the burden of proof to the board to demonstrate the fairness of the defensive measures once shareholders have raised a inference of entrenchment. See, e.g., Norlin Corp. v. Rooney, Pace Inc., 744 F. 2d 255, 265 (2d Cir. 1984); Samuel M. Feinberg Testamentary Trust V. Carter, 652 F. Supp. 1066, 1081 (S.D.N.Y. 1987); Danaher Corp. v. Chicago Pneumatic Tool Co., 633 F. Supp. 1066, 1070 (S.D.N.Y. 1980).

forward;"[152] an "enhanced duty;"[153] and a "duty of care."[154] Although, the courts still accept the business judgement rule in takeover cases, a "raider" can use his or her shareholder's position or the standing of other shareholders to complain that the directors' defensive measures violate the business judgement rule.[155] Through the court's injunctive relief, those defensive measures may be held as void; especially the measures is used solely to protect the incumbent management.

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[152]See Moran v. Household International, Inc., 490 A.2d 1059 1067 (Del. Ch.) aff'd, 500 A. 2d 1346 (Del. 1985).

[153]In Unocal v. Mesa Petroleum Co., the Delaware Supreme Court imposed an enhanced duty on directors, faced with a takeover threat, to decide whether the business judgement rule can be used. The enhanced duty includes two points. First, "the directors may not [take defense] solely or primarily out of a desire to perpetuate themselves in office." Secondly, "the defensive tactics must be reasonable in relation to the threat posed." See 493 A. 2d 955 (Del. 1985). See also AC Acquisition Corp. v. Anderson, Clayton & Co., 519 A.2d 103 (Del. Ch. 1986). However, what is the enhanced duty is different in respective cases. See Revlon, Inc. v. Macandrews & Forbes Holdings, Inc., 506 A.2d 173 (Del 1986).

[154]The approach of duty of care is focusing on the process of director's making a decision. In Hanson Trust PLC v. ML SCM Acquisition, Inc., the court stated that

> "the business judgement doctrine is misapplied when.... there is an abundance of evidence strongly suggesting breach of fiduciary duty...." See 781 F.2d 264, 274 (2d Cir. 1986).

[155]When the directors claim the business judgement rule discharges their liability, a shareholder can propose four indicia, as following, in the court to repudiate director's cloak:

> "(1) perform of the target corporation; (2) bid premium; (3) structure of the bid; and (4) structure of the defensive tactics." See supra note 145, at 866-69.

IV. THE RESPONSES FROM TARGET: DEFENSIVE TACTICS

The goals of each defensive tactics may be different. However, to sum up, those defensive tactics will not go further than: (1) keeping the control of the target, (2) seeking the best interest of the corporation and its shareholder, (3) striking for sufficient time to consider and to implement other financial alternatives, (4) providing the corporation leverage vis-a-vis acquirer, (5) protecting the minority shareholders who have not tendered their share.[156] According to the various purpose, the target will select or design different defensive measure to resist a takeover. This section will analyze these defensive tactics.

A. Shark Repelents

The Chinese proverb, "not to rely on the likelihood of the enemy's not coming, but on our readiness to receive him,"[157] is the best description of why the board on directors wants to take precautionary measures,

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[156]Stephenson, Specific Defensive Devices and Strategies, 558 PLI 523, 526 (1987).

[157]Sun Tzu, The Art of War.

such as the "shark repellents." "Shark repellents" are designed to discourage unsolicited takeover attempts,[158] through the amendment of charter and bylaws.[159] In essence, corporate charter and by-laws are contractual, therefore, state corporate laws, which are generally recognized as enabling statutes, do not prohibit antitakeover amendment. Moreover, shareholders' acquiescence to the adoption of such amendments may be viewed as their acceptance of an increased chance that a tender offer will not be made or that a takeover attempt will be defeated.[160] Although "shark repellents" provision, may not eventually prevent a takeover attempt, they can effectively deter "raiders" from attempting a

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[158]Since the "shark repellents" were designed in advance, when they were confronted by a verified challenge they will reduce the board's flexibility to response to a tender. See 1 at 320. However, if a "shark repellent" provisions were adopted after the announcement, that will be inappropriate. See Advirosary Committee on Tender Offer, Report of Recommendations, 37 (1983).

[159]The amendment of the bylaw or the charter should subject the provisions to a shareholder vote. Because the bylaws or the charter

> "are the rules and regulations made by a corporations to regulate its affairs, to define and determine the rights and the duties of its stockholders in their relation to it and among themselves and the rights, powers and duties of the directors and officers." See 1 Corp. Guide (P-H), P1401 (Jan. 22, 1980).

[160]Baysinger & Butler, Antitakeover Amendment, Managerial Entrenchment, and the Contractual Theory of the Corporation, 71 Va. L. Rev. 1257, 1268-69 (1985).

takeover;[161] and they give the board of directors more time to prepare other defensive measures. The growing popularity of "shark repellents" has no doubt insulated some corporations from the takeover market. No matter what type of "shark repellent" provisions, those provisions usually have two common features. First, they require a supermajority vote of shareholders along with other requirements whenever there is a tender offer or other acquisition that the board of directors opposes.[162] Secondly, they make it difficult for a "raider" to replace the management of the company.[163] Although "shark repellents" have been criticized as offensive to corporate democracy, because they allow incumbent management to control a corporation after it has lost the support of its shareholders;[164] "shark repellents" have been upheld by several courts.[165]

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[161]See Robison, Strategy to Prevent a Takeover, 32 Bus. Law. 1361, 1361 (1977); Gilson, The Case Against Shark Repellent Amendments: Structural Limitations on the Enabling Concept, 34 Stan. L. Rev. 775, 776 (1982).

[162]See Stumpf & Hawkins, Shark Repellents and Golden Parachutes: A Handbook for the Practitioner, 3 (1983).

[163]Id.

[164]See A. Arranow, H. Einhorn, & G. Berlstein, Developments in Tender Offers for Corporate Control, 195 (1977).

[165]See, e.g., Seibert v. Milton Bradley Co., 380 Mass. 656, 405 N.E.2d 131 (1980); Russ v. Federal Mogul Corp., 316 N.W. 2d 454 (Mich. App. 1982); Roven v. Cotter, C.A. 9840 (Del. Ch. May 27, 1988).

1. Fair Price and Staggered Board Provisions

In order to deter a two-tiered tender offer, many companies have sought shareholders' approval of charter amendment to enact a "fair price" provision.[166] This provision is aimed at protecting shareholders, who do not tender their stock in a takeover bid, by ensuring them a minimum price[167] for their shares in any subsequent freeze-out merger.[168] In other words, a fair price provision requires that any prospective acquirer provides all shareholders with substantially equal consideration for their shares.[169] In general, the fair price mechanism is triggered when a tender offer is made for more than a pre-determined specified percentage of the corporations outstanding share.[170] Since fair price provisions ensure fair treatment of nontendering shareholders after a partial bid by restricting the price payable during the second-step of the proposed merger,

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[166]Stein, & Presser, Developments in Takeover Defense and Their Impact on Proxy Contests, 696 PLI 369, 427 (1990).

[167]"A minimum price provision provides that the amount of consideration that each stockholder receive be no less than equivalent of the highest consideration received by any stockholder for his stock." See supra note 44, at 704.

[168]See supra note 94, at 22.

[169]Flinkelstein, Antitakeover Protection Against Two-Tier and Partial Tender Offer: The Validity of Fair Price, Mandatory Bid, and Flip-over Provisions Under Delaware Law, 11 SEC. REG. L.J. 291, 295 (1984).

[170]Id. at 296.

the operative effect is to impede two-tiered tender offers and other hostile acquisitions by making the takeover extremely expensive for the acquirer.[171]

Many companies adopt a fair price provisions as well as a staggered board policy. By amending to their charters or by-laws the board of directors is divided into different classes with the term in office of each class concluding at a different interval.[172] Most companies with staggered boards elect one-third of the board at each annual shareholders' meetings.[173] This defensive measure will especially prevent an acquirer from gaining control of the board at any single Shareholders' Meeting. Even though the acquirer has accumulated enough shares, he must wait for subsequent annual meetings to effectively gain control of the target company.[174] The RMBCA section 8.06 and a number of state statutes[175] expressly permit the charter to provide for a staggered terms of directors. Adoption of a staggered board provision usually requires a shareholders' vote to

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[171] See supra note 44, at 704.

[172] See supra note 36, at 334. For example, a nine-number board may be classified into three separate groups of three members each; thus allowing at most three directors to be removed, at any one Shareholders' Meeting.

[173] Id. at 334.

[174] See supra note 82, at 706.

[175] See, e.g., Delaware General Corporation § 141(d); Massachusetts Governal Law § 50A, Ch. 156B.

approve the necessary charter amendment. In the current environment of active institutional involvement against defensive mechanisms, this may be difficult to achieve. Moreover, state law may restrict a company's ability to use this method.[176] Therefore, a staggered board is not used often as a defensive mechanism to counter a takeover bid.

2. Supermajority Voting Provision and Valid Cause Removal Requirement

The staggered board and fair price provisions may also related to the adoption of supermajority voting provision or valid cause removal requirement to make the removal of directors more difficult.[177] If a majority of target's share, over 51% of a company's stock, can approve a merger, the acquirer will easily freeze out the minority shareholders in the company. Therefore, the board of directors may suggest that the shareholders adopt a supermajority provision in the charter. The provision mandates that a vote consisting of more than the minimum vote (usually a majority of two-thirds) be obtained to approve any merger or sale of all or substantially all of the target company's assets to an

[176]See supra note 36, at 334.

[177]Lautzenhiser, State and Federal Regulations of Shark Repellent Provision: How Much Is Needed? 11 N.Ky. L. REV. 481, 486 (1984).

entity owning more than a certain percentage of the target company's stock (usually ten percent).[178] In order to protect this supermajority voting provision, the target also require a supermajority vote to remove this provision; even though, this provision is enacted by a vote of simple majority, the so-called "lock-up" provision.[179] Courts generally hold that the supermajority voting provision is lawful. In Morrissey v. County Tower Corp.,[180] the court held that certain charter and bylaw changes that require supermajority voting for any merger is proper.[181] In Seibert v. Gulton Industries, Inc.,[182] the court upheld a supermajority voting provision which required a vote of 80 percent of

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[178]See supra note 44, at 703.

[179]Id. at 703. However, in 1981, the SEC explained, the provision requiring a supermajority vote for the adoption of a supermajority provision,

> "since the effect of supermajority provision is to permit a minority to block the will of the majority in perpetuity, the Committee believes the vote for its adoption should be by the same supermajority in order to ensure that the provision had widespread shareholder support proportionate to the restriction being imposed." See Change in the Model Business Corporation Act- Amendment Respecting Increases in Proportion of Vote for Shareholder Approval, ABA, Sec. Corp. Banking & Bus. L., Comm. on Corp. Law, 36 Bus. Law. 1988, 1901 (1981).

[180]559 F. Supp. 115 (E.D. Mo.), aff'd, 717 F.2d 1227 (8th Cir. 1983).

[181]Id.

[182]No. 5631 (Del. Ch. June 21, 1979), aff'd, No. 219 (Del. Jan. 4, 1980).

the corporation's shares to approve hostile mergers but only of a simple majority to ratify mergers approve by the board.[183] Although supermajority voting provisions can discourage hostile takeover bid and coercive partial and "front-end" tender offers, it has little effect on other types of offers. Especially, if the acquirer has a strong financial position, the supermajority voting provision will produce little effect.

Additionally, under RMBCA § 8.08, the shareholders may remove one or more directors with or without cause unless the article of incorporation provide that directors may be removed only for cause. The board of directors can amend the charter to solidify its position; plus the "classified of board" and "cumulative vote,"[184] make the removal of directors more difficult.

3. <u>Shareholder Action Without a Meeting</u>

Some states, such as California, Delaware, Florida, and New Jersey, authorize the holder of a majority of a company's stock to act by written consent without a meeting, unless the articles provide otherwise. Thus, the written consent in the takeover area may enable an acquirer to move swiftly to amend the target's articles, resulting in the elimination of a classified board of

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[183] <u>Id</u>.

[184] <u>See</u> RMBCA § 8.08(b)(c) (1985).

director or other "shark repellents." Therefore, a potential target will consider amending its article to prohibit the taking of a action without meeting; unless the written consent is made unanimously.[185] However, under RMBCA § 7.04, the potential target companies do not even need to amend the article, because the Act requires unanimous written consent of the shareholders to be valid without a meeting. Similarly, some states, such as Connecticut, Louisiana, Michigan, and Rhode Island, authorize the majority-consent procedure but only if the articles so provide. Furthermore, some states prohibit majority written consent for certain action, e.g., mergers and reorganizations.

4. Others

In addition to "shark repellents," there are many techniques which the board of directors can use through the amendment of the by-laws or the charter. First, they can use "cumulative voting" to compete with a acquirer if the acquirer owns a large percentage of stock in the target. Utilizing both staggered board and cumulative voting, the target company can effectively extend the time for the board of directors to obtain actual

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[185]See supra note 36, at 327.

control.[186] Secondly, the target company may seek a "blank check" consisting of preferred stock[187] or increase the number of issued share of common stock to dilute any existing stock interest of the acquirer; and simultaneously increasing the difficulty for a acquirer to amass enough outstanding stock.[188] Thirdly, the target company's board of directors can also restrict the holding of special meetings to keep their position until the annual Shareholders' Meeting.[189] Furthermore, the potential target company may amend its charter authorizing the board of directors to consider non-financial factors; thus giving the board of director an abstract and extensive power to resist the takeover. Those non-financial factors include the social and economic effect of the takeover on the target company's

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[186]Freindenburg, Jaws III: The Impropriety of Shark-Repellent Amendments as a Takeover Defense, 7 Del. J. Corp. L. 32, 40 (1982).

[187]"Blank check" preferred is stock authorized by shareholders, the detail of the rights are determined by the board of directors at a later date, normally when a target is threatened by a acquirer. The purpose for a board to create a "blank check" preferred stock traditional was to give the board flexibility in securing financing for the corporation.

[188]B. Fox & E. Fox, 13A Business Organizations Corporate Acquisitions and Mergers, 27-227 (1989).

[189]For example, in GAF Corp. v. Union Carbide Corp., the court approved Union Carbide's action about the restriction of holding a special meeting, which only allowed the majority of shareholder, the board, the chairman, and the president to call a special meeting. See 624 F. Supp. 1016, 1022 (S.D.N.Y. 1985).

customers, employees, suppliers and the community where the target company is located.[190] However, the consideration of non-financial factors are not without limitations. They must be rationally related to the benefits accruing to the stockholders; and they must help to protect or to maintain the corporate enterprise.[191]

B. Poison Pills

With numerous defensive tactics, perhaps, the so-called "poison pill"[192] is still the most significant and powerful measure. Therefore, the "poison pill" has been adopted by more than four hundreds of the American major corporation. The "poison pill" plan, in general, can be categorized into two types, the "call plan" and "put plan." A "call plan" gives the holder the right to buy securities at a discount under specific circumstances. A "put plan" gives a holder the right to require the target company or the acquirer to purchase securities under specific circumstance.[193] Those specific circumstances, the so-called "triggering event," under the "call plan"

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[190]See supra note 94, at 24-2, 24-3.

[191]See Revlvon, Inc. v. MacAndrews Fovbes Holding, Inc., 506 A.2d, 182(Del. 1986).

[192]The first occurrence of poison pill is in June 1983, when Lenox, Inc. adopted a pill during its battle with Brown-Forman Distillers Corp. See Wall St. J. June 16, 1983, at 2, col. 2.

[193]See supra note 36, at 337.

and "put plan," normally refer to an acquisition by a single entity when they tender a offer for a specific percentage of shares.[194] In general, a "poison pill" plan is operated through the issuance of pro rata dividend consisting of a right to each common stockholder of stock.[195] Since 1983, the "poison pill" has developed five basic features: (1) flip-over provision, (2) flip-in provision, (3) back-end provision, (4) convertible preferred stock provision, and (5) voting provision.[196]

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[194] See Melman & Junewicz, A Fresh Look at Poison Pills, 42 Bus. Law. 771, 772 (1987). As to the triggering percentage in "poison pills," a 20% trigger for acquisition and a 30% trigger for tender offer announcements have been uniformly adopted.

[195] Dawson, Pence, & Stone, Poison Pill Defensive Measures, 42 Bus. Law. 423, 423 (1987).

[196] To wit,

"(i) Flip-over provisions permitting rights holders to purchase stock in an Acquiring Person or surviving corporation at a bargain price following a business combination. (ii) Flip-in provisions permitting rights holders, except Acquiring Persons, to purchase stock and/or debt of the issuer at a bargain price prior to, or regardless of, a subsequent business combination. (iii) Back-end provisions entitling stockholders, except Acquiring Persons, to receive stock and/or debt of the issuer and/or cash generally valued (together with stock retained by the issuer's stockholders, if not required to be tendered to the issuer) at a premium over market for the issuer's stock. (iv) Convertible preferred stock provisions entitling stockholders, except Acquiring Persons, to voting stock in the Acquiring Person as part of any business combination and to redeem their preferred stock for cash payments from the issuer if there is no business combination. (v) Voting provisions involving the issuance of stock with supervoting rights not available to a Acquiring Person." See supra note 195, at 424.

Within these provisions, the major disadvantages of "poison pill" plan are a potentially severe economic loss from flip-in and flip-over provisions. A flip-over provision allows each holder of the right to exercise it, when a business combination involving the issuer and the acquirer is consummated. The holder of the right then has a contractual right to obtain a number of acquirer's or target's share at a pre-determined discount.[197] This provision results in a substantial dilution of the acquirer's shareholders interest to the extent the rights are exercised. It can also impede the acquirer proceeding to a second tiered merger in an attempt to utilize the cashflow or assets of the target to finance his takeover bid. Therefore, the acquirer will be forced to give up two-tiered tender offer.[198] With a flip-in provision, each holder of a right excluding the acquirer, is allowed to pay specific exercise price and purchase stock in the issuer at a discount.[199] Since the acquirer is excluded from capitalizing on this provision, flip-in

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[197]See supra not 195, at 429. For example, if an exercise price is $50, the Flip-over provision would require that, in order for the issuer to accomplish a merger into an acquirer, the merger agreement must provide the right holders can purchase $100 worth of the acquirer's common stock for $50.

[198]See supra note 82, at 709.

[199]See supra note 194, at 773. For example, if the exercise price of the right is $50, a holder may pay this price and obtain $100 worth of securities of the combined entity.

provision also have the effect of diluting the investment and voting power of an acquirer in the issuer. Therefore, the flip-in provision may significantly prevent any acquirer from purchasing a large amount of the issuer's stock through open-market purchase, negotiated sales, or partial tender offer.[200] Although the "poison pill" has many forms, the overall objective of it is to make the acquisition by hostile tender offer less attractive to the acquirer. Each plan has its special function. Some of the plans aim at increasing the cost of a takeover, deterring substantial accumulations of stock by acquirer. Other plans focus on creating substantial uncertainty in the pricing of a tender offer, while providing bargaining power to the issuer's board of director.[201] Finally, a "poison pill" may effectively prevent a hostile acquisition by "bring a would-be hostile bidder to the bargaining table."[202] Under the section 6.02 of RMBCA, the board of directors is authorized to issue "poison pill" stock.

Most of the cases will allow the target to use the "poison pill" as a defensive measure. In Moran v.

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[200]see supra note 195, at 428.

[201]Id. at 431.

[202]See supra note 36, at 337.

Household International, Inc.,[203] the paradigmic case of "poison pill" technique, the Household's board perceived to be threatened in the market place because of a coercive two-tiered tender offer.[204] Household employed the poison pill is a reasonable defensive measure to protect the corporation. The court approved the flip-over "poison pill" designed by Household International's board.[205] Recently, in CRTF Corp. v. Federated Department Stores, Inc.,[206] the Federated's board provide a flip-in and a flip-over provision which provided for the purchase of stock at an exercise price equal to one-half the market value.[207] In this case, the court held that the "poison pill" was utilized as reasonable

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[203] 500 A.2d 1346 (Del. 1985). In this case, the triggering events are (1) the announcement of a tender offer for at least 30% of Household's outstanding common shares; or (2) the accumulation by any single party of at least 20% of Household's stock.

[204] Id. at 1356.

[205] In this case, the Delaware Supreme Court also considered the following factors to approve the poison pill: (1) whether the plan would destroy the assets of the issuer; (2) whether the plan would dilute earnings per share; (3) whether the plan would result in an outflow of money from the issuer and impaired the issuer's financial flexibility; (4) whether the plan would have any adverse tax consequences to the issuer or its shareholders; (5) whether the plan would adversely affect the market price of the issuer's stock, and (6) whether the plan would prevent proxy contests or stockholders from banding together into a group to solicit proxies. Id. at 1354-57.

[206] 683 F. Supp. 422 (S.D.N.Y. 1988).

[207] Id. at 437.

response to a perceived threat.[208] However, not all courts have ruled that the board may employ an unreasonable "poison pill." In Minister Acquiring Corp. v. AMF Inc.,[209] and Asarco Inc, Court,[210] the court held that those "poison pill" were invalid due to their unreasonable requirements.

C. Golden Parachutes

"Golden parachutes," as defined in Schreiber v. Burlington Northern, Inc.,[211] are compensation agreements, comprised of several contracts between a corporation and its top executives providing benefits upon the termination of executives' employment.[212] In other words, a golden parachute is a severance contract design to compensate high-level corporate officials for losing their job if their company is taken over. Moreover, recently, companies have enter into similar contracts with key employees, the so-called "tin parachute."[213] Basically, "golden parachutes" have two

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[208]Id. at 443.

[209]621 F. Supp. 1252 (D.C.N.Y. 1985).

[210]611 F. Supp. 468 (D.C.N.J. 1985).

[211]472 U. S. 3 (1985).

[212]See supra note 36, at 451.

[213]For example, in Worth v. Huntington Babcshares, the plaintiff was a middle-level manager who was covered by a "golden parachute" contract prior to a merger. The court

functions. First, they are a defensive tactic against hostile takeover.[214] Secondly, they provide insurance to executives from an uncertain future.[215] As to the content, a "golden parachute" typically has three substantive clauses: (1) a trigger clause based on a change of control; (2) a termination clause; and (3) a compensation clause.[216] Economically, "golden parachute" can create a reduction in agency costs and the attraction

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held that "golden parachute" contract was valid and enforceable. See Worth v. Hunting Bancshares, No. 52861 (Ohio Ct. App. Cuyahoga County, Nov. 25, 1987).

[214]Hood & Benge, Golden Parachute Agreements: Reasonable Compensation or Disguised Briery? 53 UMKC L. Rev. 199, 200-01(1985).

[215]See Comment, Golden Parachute and the Business Judgement Rule: Toward a Proper Standard of Review, 94 Yale L.J. 909, 909 (1985).

[216]See Graeter, Golden Parachute: Safe Landings Into Ohio and Elsewhere, 57 U. Cin. L. Rev. 699, 699 (1988). In general,

> "[t]he change-of-control clause defines when a golden parachute becomes operative. Typically, a change of control is defined as an outside party's acquisition of a certain percentage of stock or as a change in the composition of the board of directors. The termination clause defines when executives may terminate their employment contracts and receive their golden parachute payment once a change in control has occurred. The terms of such clause vary widely; some require that the executive actually be dismissed, while other give the executive an unconditional right to terminate employment after a takeover has occurred. The compensation clause provides executives with a lump-sum payment or a continuation of base salary and benefit for a specified period. These payment are intended to compensate executive for displacement losses." See Johnson, Golden Parachutes and the Business Judgement Rule: Toward a Proper Standard of Review, 94 Yale L.J. 910 (1985).

of executives to industries with displacement risk. So, the "golden parachute" is still popular.[217] However, the "golden parachute," by definition, is a protection for certain employees other than target company's shareholders. While a "golden parachute" offers extravagant benefits to the executives, it can cause corporate waste and moral hazard[218] that can damage the shareholder's position. Although one of functions of golden parachute is deterring the hostile takeover, sometimes, a properly and reasonably constructed "golden parachute" will adversely reduce the resistance from the board of directors. With the financial protection afforded by a "golden parachute," the incumbent management would be less likely to thwart a takeover attempt.[219] Even though, the SEC's adoption of Termination Agreement Disclosure Rules[220] and Congress' enactment of provision in Deficit Reduction Act of 1984,

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[217] Id. Johnson at 914-18.

[218] See Bress, Golden Parachutes: Untangling the Ripcords, 39 Stan. L. Rev. 955, 964-72 (1987).

[219] See McGee, Mergers and Acquisitions: An Economic and Legal Analysis, 22 Creighton L. Rev. 665, 676-77 (1989). However, a potential target company always create a heavy burden with the "golden parachute."

[220] 17 C.F.R. § 229.402(e)(1986) require disclosure of plan or arrangements for additional compensation to a firm's top five managers that will be triggered by a change of control of the issuer or a change in the executives' responsibilities as well as those triggered by the termination of employment.

restrict the size of future parachutes,[221] the courts to date still approve not only the adoption of "golden parachutes," but also the adoption of "tin parachutes."[222] In GAF Corp. v. Union Carbide Corp.,[223] the court held that

> "Labor, at whatever level, should not be victimized or go unrequited by control contests. It is entirely reasonable for a band to take such steps as will assure works against such a possibility arising from the necessity for financing the obligations incurred in a control contest."[224]

D. Greenmail

"Greenmail" is a payment from the target company to the acquirer for shares at a premium in order to prevent a change in control of the corporation. The premium is not limited to cash; it can be a combination of cash and

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[221]Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 67, 98 Stat. 494, 585-87 (codified at I.R.C. §§ 280G, 4999 (Supp. 1985). This Act provides that those benefits that are in excess of three times the executives' annual salary are pressed to be unreasonable.

[222]See, e.g., Royal Crown Corp. v. McMahon, 183 Ga. App. 543 S.E.2d 379 (1987)(the court held that the executive's right to the benefit under the contract was absolute); Buckhorn, Inc. v. Ropak Corp., 656 F. Supp. 209 (S.D. Ohio 1987)(the court held that the validity of the golden parachute even though they were adopted after the threat of a takeover); Worth v. Huntington Bancshare, No. 52861 (Ohio Ct. App. Cuyahoga County, Nov. 25. 1987)(the court held that the golden parachute reasonable and, therefore valid).

[223]624 F. Supp. 1016 (S.D.N.Y. 1985).

[224]Id. at 1022. In 1989, Massachusetts adopted similar statutory provision to protected employee.

warrants whose value equals the repurchased stocks prevailing market value. The premium price is usually substantively higher than the market price. "Greenmail" is a bribe or compromise per se rather than a defensive tactic.[225] The employment of "greenmail" has been increasingly rejected by the court, by the media, and in Congress.[226] The first objection is that "greenmail" must be prohibited because it is unfair to the shareholder who do not benefit from the payment.[227] Although a shareholder usually has no right to have a corporation buy back his shares, selective repurchase implicates a violation of the duty management owes to all shareholders. Therefore, the favoring of one shareholder over another is not a simple question of business policy, but a discrimination among shareholders.[228] The second objection is that when management pays "greenmail" it is a self-serving attempt, at the expense of the shareholders to prevent a shift in corporate control that

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[225]McGee, Mergers and Acquisitions: An Economic and Legal Analysis, 22 Creighton L. Rev. 665, 675 (1989).

[226]Comment, Greenmail: Can the Abuse Be Stopped? 80 Nw. U. L. Rev. 1271, 1273 (1986).

[227]Macey & MaChesney, A Theoretical Analysis of Corporate Greenmail, 95 Yale L.J. 13, 14 (1985).

[228]Matheson & Norberg, Hostile Share Acquisition and Corporate Governance: A Framework for Evaluating Antitakeover Activities, 47 U. Pitt. L. Rev. 407, 466 (1986).

would threaten their job.[229] Furthermore, the purpose of "greenmail" which is to deter a takeover has dubious result. After all, once a company has paid "greenmail" to one acquirer, the corporations response may compel another acquirer to demand same premium.[230] Unlike other defensive tactics, "greenmail" only stops one acquirer from acquiring control of target. Thus, this situation may happen continuously, and eventually the target will exhaust its asset by repeatedly paying a large sum to thwart a takeover bid. Then, the target company's stock price will decline in value.[231] Therefore, in order to protect shareholders' interests some state have already adopted legislative prohibitions.[232] Since 1984, a

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[229]See supra note 227, at 15.

[230]See supra note 36, at 413.

[231]"All existing studies display a consistent pattern, on the announcement of the investment, the stock's price increase significantly, and the increase is particularly pronounced when the announcement state that the potential acquirer is considering additional purchased of the company's stock. Empirical studies also uniformly show that the price of company's stock decrease sharply following the announcement that the company has purchase the potential acquirer's stock and the entire original increase is lost if the company is not subsequently the subject of a successful takeover." See 88 Colum L.Rev. at 338.
However, Macey & McChesney stated that "[latter] loss to be less than the price increase that occurred when the [acquirer] initially purchase [target] stock." See supra note 227, at 44.

[232]See Minn. Stat. Ann. § 302A. 553, subdivision 3 (West. 1987); Nev. Rev. Stat. Ann. Ch. 463.512-.515 (Michie 1987); N.Y. Bus. Corp. Law § 513(e) (Mckinney 1986); Wis.

significant number of corporation have amended their charter to that prohibit the board of directors from paying "greenmail," the so-called "anti-greenmail" provision.[233] Although the "anti-greenmail" provisions can prevent a "raider" from obtaining this benefit, and it can prevent directors from abusing their authority; it can not deter the acquirer who wants to gain the control of the target. Therefore, the "greenmail" is an unpopular defensive tactic.[234] Nonetheless, if the cost

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Stat. Ann. § 180.715(5) (West. 1987); Ariz. Rev. Stat. Ann. § 10-1204 (Supp. 1987).

[233]Gilson, Drafting an Effective Greenmail Prohibition, 88 Colum. L. Rev. 331 (1988). Following the lead of International Minerals & Chemicals and Perkin-Elmer in 1984, many companies, for examples, Alcoa, Anheuser-Busch, B.F. Goodrich, Mobiol and NYNEX amended their article of incorporation to add a prohibition of "greenmail."

[234]Fleischer outlines reasons why "greenmail" may not be popular:

> "In recent years the tactic has been attacked on several fronts, and courts have in fact recently exhibited distaste for greenmail. First, a recent accounting bulletin states that where a share repurchase occurs at a price "significantly in excess of the current market", the premium portion should be attributed to the value of standstill agreements or the avoidance of a takeover contest rather than allocated to the acquisition cost of the shares. The result of this accounting treatment would be to reduce earning.... Second, a few state corporation acts require shareholder approval of greenmail transactions involving certain domestic companies.... Third, prohibiting or restricting greenmail had been the subject of periodic legislative initiatives on the national level, including several bills in Congress, in 1987." See Fleischer testified on July 9, 1987 before the Subcommittee of Telecommunications and Finance of the Committee on Energy and Commerce of the U.S. House of Representatives, at 32.

of paying "greenmail" is less than the cost of engaging in a takeover battle, the "greenmail" defense will be the correct selection. Particularly, when the "greenmail" compared to other defensive tactics, is the least expensive and an effective defense.

As to the judicial decision concerning the legality of "greenmail," basically, the courts agree as to the legality of "greenmail," but the courts still might challenge it under the business judgement rule. In Cheff v. Mathes,[235] the Supreme Court held that the board would be permitted to repurchase its stock at a premium for the proper corporate purpose.[236] But the directors have to prove that the repurchases were made in good faith and in order to protect the interests of corporation.[237] Recently, in Viacon Intern. Inc. v. Icahn,[238] the court again held that "greenmail" is not a means which is inherently unlawful.[239] However, in Heckmann v.

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[235] 41 Del. Ch. 494, 199 A.2d 548 (Del. 1964).

[236] Id. at 551.

[237] Id.

[238] 747 F. Supp. 205 (S.D.N.Y. 1990).

[239] Id at 211. See also, e.g., Edelman v. Phillips Petroleum Co., No. 7899, slip op. (Del. Ch. Feb. 12, 1985); Polk v. Good, 507 A.2d 531 (Del. 1986). Those courts held that "greenmail" is reasonable in relation to the immediate disruptive effect and the potential long-term threat posed by the "raider."

Ahmanson,[240] the court affirmed a preliminary injunction prohibiting the "raider" from spending the "greenmail" payment, because the Steinberg Group the corporation (director), breached its fiduciary duties to the Disney shareholders. In a recent case, Fry v. Trump,[241] the court held that the directors breached their fiduciary duty owed to the corporation. Therefore, the court rescinded the "greenmail" payment.[242]

E. Stock and Crown Jewel Lock-ups

Traditionally, in a lock-up of "crown jewels" or stock, the target company will seek a "white knight"[243] to purchase its authorized but unissued stock or valuable assets under certain circumstances. Lock-up options will provide a friendly acquirer or "white knight" assurances that the planned transaction will be partially insulated from the interference of other hostile offers; and/or that they will be compensated if the deal is not consummated. Without such assurance many acquirers may

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[240]168 Cal. App. 3d 119, 214 Cal. Rptr. 177 (2d Dist. 1985).

[241]681 F. Supp. 252 (D.N.J. 1988).

[242]Id. at 260.

[243]A "whit knight" is a corporation that comes to save another corporation which is suffering from a hostile takeover attempt. The Knight rescues the target by agreeing to acquire it on better terms than other acquirers would provide.

be unwilling to enter into negotiations with the target company. The use of stock lock-up requires advanced planning, because the shareholder of target must approve any increase of authorized shares; otherwise, a charter amendment will be necessary, the so-called "Blank check."[244] Another restriction is that a company listed on the New York Stock Exchange may not increase its amount of outstanding common stock by more than 18.5 percent without the shareholders' approval.[245] The lock-up of stock is often the first step toward a merger with the "white knight."[246] However, stock lock-ups may alternatively be granted by "white squires" who do not enter the bidding contest but rather become continuing presences in the target company's shareholder constituencies.

The "crown jewels"[247] is the most attractive assets or division of a target company. Thus, in a "crown Jewel" lock-up the corporation will sell this assets to encourage the acquirer to withdraw his tender offer, because the target company is no longer an attractive

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[244]See supra note 187 and accompanying text.

[245]NYSE listed Manual § 312.00.

[246]See supra note 188, at 27-223.

[247]The "crown jewels" lock-up was first used in the takeover battle for Marathon Oil company. For details, see Mobil Corp. v. Marathon Oil co., 669 F.2d 366 (6th Cir. 1981).

acquisition.[248] This defensive measure is very effective if an acquirer is primarily interested in one division or assets. Under the section 3.02 and section 8.01 of RMBCA, unless a company's article of incorporation provide otherwise, the board of directors is given the power to sell all or any part of its assets. Thus, the shareholders will not attack the board of directors who have the right to sell assets. Instead, they will criticize that: (1) the sale of "crown jewel" was unnecessary; (2) the price of sale was unreasonable; or (3) the board of directors breached their fiduciary duty and the duty of care and loyalty. However, state laws are vary as to "crown jewels" lock-up. For example, in Delaware, the Delaware General Corporation Law section 271 empowers the board of directors to sell all or substantially all of a corporation's assets upon the term, that it deems expedient and for the best interest of corporation. But, in New York, section 909 of the Business Corporation Law requires approval by the shareholders of two-thirds of all outstanding shares of a corporation for the sale of all or substantially all of a corporation's assets, unless the sale is in the usual course of the business actually conducted by such corporation.

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[248] See Advisory Committee on the Tender Offers, Report of Recommendations, 122, 140 app. 3 (1983).

Although the use of lock-ups have caused some disadvantages to shareholders,[249] it is generally agree that lock-ups are not per se illegal.[250] The courts usually apply the business judgement rule to examine the legality of lock-ups. In Hanson Trust PLC v. ML SCM Acquisition, Inc.[251] and Revlon, Inc. v. MacAndrew & Forbes Hodlings, Inc.,[252] the courts granted a preliminary injunction to prevent the exercise of a lock-up option. The court held that the use of lock-up should be carefully reviewed to determine whether the directors' grant of the lock-up fulfills both their duties of care and loyalty.

F. Other Defensive Tactics

Besides the previously mentioned defensive tactics, many other defensive techniques are available to the target company's board; those defensive tactics include:

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[249]Because lock-ups are usually granted at a bargain price, and if the acquirer is deterred from further bidding for stock purchase, a lock-up will preclude the acquirer from obtaining a premium price that a competitive atmosphere would have encouraged. See Prentic, Target Board Abuse of Defensive Tactics: Can Federal Law Be Mobilized to Overcome the Business Judgement Rule? 8 J. Corp. L. 337, 342 (1983).

[250]See, e.g., Hastings-Murtaugh v. Texas Air Corp., 649 F. Supp. 479 (S.D. Kla. 1986); Buffalo Forge Co. v. Ogden Corp., 555 F. Supp. 892 (W.D.N.Y.), aff'd, 717 F.2d 757 (2d Cir.), cert. denied 464 US 1018 (1983); Treadway Companies v. Care Corp., 638 F.2d 357 (2d Cir. 1980).

[251]781 F.2d 264 (2d Cir. 1986).

[252]506 A.2d 173 (Del. Supr. 1986).

"employment compensation,"[253] "defensive acquisition,"[254] "Pac-Man,"[255] "scorched earth,"[256] "self-tender,"[257] "defensive merger,"[258] "recapitalization,"[259]

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[253]See GAF Corp. v. Union Carbide Corp., 624 F. Supp. 1016 (S.D.N.Y. 1985).

[254]"Defensive acquisition" is a target company that engages in a acquisition that will cause antitrust or peculiar problems for bidder if the bidder takes over the target. See Pantry v. Marshall Field & Co., 646 F.2d 271 (2d Cir. 1981).

[255]The "Pac-Man" defense is a response by the target company to a hostile tender offer or an anticipated tender offer, consisting of a tender offer for the acquirer's stock. See Martin Marietta Corp. v. Bendix Corp., 549 F. Supp. 623 (D. Md. 1982).

[256]The "scorched earth" defense is an attempt by the incumbent management to liquidate the company in whole or in part. See Joseph E. Seagram & Sons, Inc. v. Abrams, 510 F. Supp. 860 (S.D.N.Y. 1981).

[257]The "self-tender" defense is a purchase by the target company to buy back its own stock, so that the offeror will be unsuccessful in gaining control. The approval of shareholders is not necessary for a corporation self-tender offer. See Delaware General Corporation Law § 160 and New York Business Corporation Law § 202(14). See also GAF Corp. v. Union Carbide Corp., 624 F. Supp. 1016 (S.D.N.Y. 1985).

[258]"Defensive merger" is a merger between the target company and "white knight", but there is no guarantee that the "white knight" will win the contest with the raider. See Crouse-Hinds Co. v. Internorth, Inc., 634 F.2d 690 (2d Cir. 1980).

[259]A "recapitalization" often offers benefits to shareholder who have a financial attraction to a hostile bid; and the target company can control a large block of stock, thereby repealing the acquirer. See Turner Broadcasting System, Inc, v. CBS, Inc., 627 F. Supp. 901 (N.D. Ga. 1985).

"restructured voting rights,"[260] and the "leveraged buy-out."[261] A company may formulate its own policy by gauging the "raider's" ability and measure of attack to decide which defensive tactic(s) is/are the most effective weapon(s) to defeat the "raider."

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[260]By restructuring the of shareholder's voting right, a target company concentrate voting power in friendly hand. The restructured voting rights may include dual-class common stock and super-voting preferred stock. See Unilever Acquisition v. Richardson-Vicks, 618 F. Supp. 407 (S.D.N.Y. 1985).

[261]"Leveraged buy-out" are similar to "self-tender" and a sale to a "white knight" in that they seek to outbid the hostile offeror for outstanding shares. See Hanson Trust PLC v. ML SCM Acquisition Inc., 781 F.2d 264 (2d Cir. 1986).

V. TAKEOVER UNDER THE STATE STATUTES

The American Constitution was designed to allocate power between the national government and state government.[262] The dual system, inevitably, will have some overlaps.[263] In 1968, Congress enacted the Williams Act, which imposes new disclosure obligations designed to help target companies' stockholder make informed decisions about whether to tender their shares. On account of the prompt and the broad development of hostile takeover activity, many states have adopted their own form of takeover legislation in order to protect the local economy from being disrupted. The first takeover law was enacted in Virginia in 1968, at approximately the same time as the federal government enacted the Williams Act. From that point in time, the question of whether

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[262]Chandler, Enslen & Renstron, The Constitution Law Dictionary 22 (1985).

[263]U.S.C.A. Const. Article VI § 2.
"The Constitution, and the laws the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or law of any state to the contrary notwithstanding."

the state statute, legislating takeovers, conflicts with the Williams Act has been a continual source of judicial debate. Therefore, in this section, the judaical development, concerning the validity of the state anti-takeover statute rather than the interpretation of respective state statutes, will be analyzed. This section will focus on the evolution and ramification of the Supreme Court's decisions.

A. First Generation of State Legislation

Although the Williams Act provides some protection for the shareholders from tender offers, responding to the target corporation need, some state legislation believed that their corporations and investors required even greater protection.[264] The anti-takeover statutes vary from state to state, but they have the following common features:

(1) they require that acquirers, prior to commencing a tender offer, make more extensive disclosure than those mandated by the Williams Act;

(2) they authorize that state securities regulators conduct hearings concerning the tender offer to delay the offers pending the confirmation of the adequacy of disclosure, and even, in some

[264] Grimm, The Tender Offer Regulation Battle Continues: Should States Regulate Only Local Companies? 60 Ind. L.J. 721, 721 (1985).

states, blocking offers entirely upon an finding of unfairness; and

(3) they broadly defined target corporation in order to extend their jurisdictions in this area.[265]

Impeded by such state anti-takeover statutes, acquirers began to challenge the constitutionality of many state anti-takeover statutes. Many lower federal and state courts held that the anti-takeover statutes were unconstitutional on either Commerce Clause grounds or preemption grounds, or both.[266] Attacks on these statutes, culminated in Edgar v. MITE Corp.,[267] under which any state attempt to regulate tender offer activity must be judicial tested.[268]

1. The Provisions of Illinois Act

The Illinois takeover statute was the first anti-takeover statute challenged in the United State Supreme Court. The Unites State Supreme Court struck down an

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[265]Warren, Developments in State Takeover Regulation: MITE and Its Aftermath, 40 Bus. Law. 671, 677 (1985).

[266]See, e.g., Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1279 (5th Cir. 1978) (Idaho statute unconstitutional on the ground of Commerce Clause and Supremacy Clause); Kennecott Corp. v. Smith, 637 F.2d 181, 191 (3rd Cir. 1980) (New Jersey statute unconstitutional on preemption grounds); Natomas Co. v. Bryan, 512 F. Supp. 191, 193 (D. Nev. 1981) (Nevada statute unconstitutional on preemption grounds).

[267]457 U.S. 624 (1982).

[268]See supra note 36, at 501.

Illinois Business Takeover Act (Illinois Act) as a violation of the Commerce Clause for imposing excessive burden on interstate commerce.[269]

In this case, the Illinois Act required that a tender offeror notify the Secretary of State and target company of the offeror's intent to make a tender offer and the terms and conditions of the offer twenty days before the offer became effective.[270] Within those twenty days, the offeror was not permitted to communicate with the shareholders of the target company regarding the offer. However, the target company was free to provide the shareholder with information concerning the impending offer. A hearing was necessary if either a majority of the target company's outside directors or ten percent of the Illinois shareholders of the class of securities subjected to the offer request it.[271] At the hearing, if the Secretary of State determined the offer to be unfair, the tender offer could not be consummated. The Illinois Act also required registration of the tender offer with the Secretary of State. Furthermore, the statute empowered the Secretary of State to block registration

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[269] MITE, 457 U.S. 624, 624-25 (1982).

[270] Ill. Rev. Stat. Ch. 121 1/2, p137.54.E, 137.137.54.13 (1979) (repealed 1983) (Supp. 1988); MITE, 457 U.S. 624, 634-35 (1982).

[271] Ill. Rev. Stat. Ch. 121 1/2, p137.57.A (1979) (repealed 1983) (Supp. 1988); MITE, 457 U.S. 624, 627 (1982).

and thus end the offer, if he found that the offeror had not disclosed all material information or that the offer was inequitable or fraudulent. In addition, the statute defined a target company as a corporation in which either Illinois shareholders or a "specified company"[272] owned ten percent of the class of securities targeted in the tender offer.

2. Edgar v. MITE Corp.

Basically, Congress did not intend for the Williams Act to prohibit states from making their own statutes regulating tender offers; it left the courts to decide the appropriateness of the state statutes.[273] State statutes may regulate to the extent that they do not conflict with the federal statutes. In MITE case, since three provision of the Illinois Act destroyed the balance among the parties involved in a takeover attempt; the Supreme Court invalidated the Act.[274] First, the pre-commencement notice provision furnished incumbent

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[272]A specified company was defined as one that met any two of the following three conditions: the corporation had its principal office in Illinois, was organized under Illinois law, or had at least 10 percent of its stated capital represented within the state. See Ill. Rev. Stat. Ch. 121 1/2 p137.52-10 (1979) (repealed 1983) (Supp. 1988); MITE, 457 U.S. 624, 627 (1982).

[273]MITE, 457 U.S. 624, 631 (1982).

[274]Id. at 624-25. See Note, Edgar v. MITE Corp.: Supreme Court's First Substantive Ruling on State Takeover Legislation, 29 Corp. J. 171, 172 (1982).

management with too much additional time to take steps to resist the offer.[275] Secondly, the discretion afforded the Secretary of State to call a hearing on the offer, indefinitely delayed the offer.[276] Thirdly, the Illinois Act authorized substantive review of offer fairness, an authority inconsistent with the Williams Act policy of permitting target shareholders a free choice to accept an offer.[277] However, a majority of the Court could not agree that Illinois Act was preempted by federal legislation.[278]

Further, the Supreme Court invalidated the Illinois statute on the ground that it impermissible regulated extraterritoriality, in violation of the Commerce Clause.[279] In this respect, Illinois sough to justify these nationwide effects by stressing its need to protect resident shareholders, and its right to exercise its

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[275]See supra note 267, at 634-35.

[276]Id. at 637.

[277]Id. at 639-40. But, Justice Stevens expressly refuse to join this Supreme Clause analysis. In a separate opinion, he observed:

> "I am not persuaded... that Congress' decision to follow a policy of neutrality in its own legislation is tantamount to federal prohibition against state legislation designed to provide special protection for incumbent management." Id. at 655.

[278]Only Justice White and Blackmun and Chief Justice Burger concluded that the Illinois Act was preempted by the Williams Act (three Justices did not reach the issue). Id. at 630-40.

[279]Id. at 641-43.

traditional authority over the internal affairs of Illinois corporation.[280] In reaching its decision, the Supreme Court applied the principle, established in Pike v. Bruce Church, Inc.,[281] that "a state statute must be upheld if it regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental...unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[282] Under the Illinois Act, a potentially regulated one in which: corporation was defined as

(1) the corporation has its principle executive office in Illinois,

(2) the corporation is organized under Illinois law, or

(3) the corporation has at least 10 percent of its stated capital and paid-in-surplus represented in Illinois.[283]

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[280]Id. at 644.

[281]397 U.S. 137, 142 (1970).

[282]See supra note 267, at 640.
"If a legitimate local purpose is fond, the question becomes on of degree. And the extent of the burden that will be tolerate will of course depend upon the nature of local interest involved, and or whether it could be prompted as well with a lesser impact on interstate activities." See supra note 281, at 142.

[283]See supra note 267, at 642.

Thus, the Illinois Act gave the state power to block a nationwide tender offer in which Illinois had no legitimate interest in protecting out of state shareholders. Obviously, the Illinois Act attempt to directly regulate and prevent, unless its terms are satisfied, takeovers which would generate interstate transaction.[284] Therefore, the Supreme Court held that Illinois Act offended its sister states rights and exceeded the limits of the its state powers.[285] In addition, the Supreme Court held that, under the test of Pike v. Bruce Church, Inc., the Illinois Act imposed an excessive burden on interstate commerce. Thus, the Illinois Act generated the following disadvantageous effects: it deprived the shareholders of the chance to sell his share at a premium,[286] it hindered an efficient reallocation of resources,[287] and it discouraged the

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[284]Id. at 640.

[285]Id. at 643. The Commerce Clause of United State Constitution gives Congress the power "to regulate Commerce among the several states." Under the Commerce Clause, Congress has the sole authority to regulate the field of interstate commerce and direct regulation of interstate commerce by a state is prohibited.

[286]Id. at 643. Since the Secretary of State could unilaterally disallow a tender offer to proceed, a shareholder could be denied the chance to sell to an offeror at what usually would be at a price higher than the market value of the stock.

[287]Id.

incentives for the target company's management to maximize its performance.[288]

B. Second Generation of State Legislation

Following the decision in MITE, courts continued to invalidate state anti-takeover statutes as a violation of the Supremacy Clause, Commerce Clause, or both.[289] In order to avoid being invalidated under the decision of MITE, state legislatures began to restructure their statutes in an attempt to eliminate the burdens on interstate commerce and the conflicts with the Williams Act.[290] Although these new anti-takeover statutes have been revised, these statutes also come under attacks;[291] including those with provisions requiring pre-purchase

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[288] Id.

[289] See, e.g., Mesa Petroleum Co. v. Cities Serve. Co., 715 F.2d 1425 (10th Cir. 1983) (Oklahoma takeover statute violated Commerce Clause); Telvest, Inc. v. Bradshaw, 679 F.2d 576 (4th Cir. 1983) (Virginia takeover statute violated Commerce Clause); Esmark v. strode, 639 S.W. 2d 768 (Ky. 1982) (Kentucky takeover statute violated Commerce Clause).

[290] Maichl, The Constitutionality of State Regulations Allowing Withdrawal of Voting Rights of Control Share in a Tender Offer: CTS Corp. v. Dynamics Corp. of America, 57 U. Cin. L. Rev. 789, 801 (1988).

[291] See, e.g., Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906 (8th Cir. 1984) (Minnesota Corporate Takeover Act held to be consistent with the Williams Act and not impermissible burdensome on interstate commerce): Icahn v. Blunt, 612 F. Supp. 1400 (D.C. Mo. 1985) (Missouri Control Share Acquisition Statute violated Commerce and Supremacy Clauses).

disclosure requirements,[292] post-announcement delays,[293] and shareholder requirements.[294] The court invalidated these second generation anti-takeover statutes on the grounds that these law upset the specific balance between the tender offer participants that the Williams Act wanted to establish.[295]

1. The Features of Second Generation State Statutes

In general, the second generation statutes fall into four categories:[296] control share statutes; dissenters' rights statutes; fair price statutes; and business combination or freeze statutes. First, control share statutes typically provide that before a bidder can exercise the voting rights that would otherwise attach to

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[292]See Terry on Behalf of C. Herman Terry v. Tamashita, 643 F. Supp. 161, 166 (D. Haw. 1986) (holding that the state statute violated the federal purpose disclosure requirement before the actual purchase).

[293]See L.P. Acquisition Co. v. Tyson, 772 F.2d 201, 209 (6th Cir. 1985) (striking down state anti-takeover statute for violating purpose of Williams Act through excessive delays).

[294]See Fleet Aerospace Corp. v. Holderman, 796 F.2d 135 (6th Cir. 1986) (striking state statutes for allowing a shareholder vote that denied each investor has independent right to sell share).

[295]Garden, CTS Corp. v. Dynamics Corp. of America: A State's Right to Tend to Its Tender Offers, 37 Am. U. L. Rev. 947, 963 (1988).

[296]Bogen, Harari, & Surman. Selected 1988 Developments in State Law Pertaining Mergers and Acquisitions, 631 PLI 763, 789 (1989).

the control of shares, a special Shareholders' Meeting must be convened at which time the disinterested shareholders will decide whether the control shares will be allowed to retain their normal voting right.[297] The states, adopting this type of statute, include: Arizona, Florida, Idaho, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee and Utah. Secondly, dissenters' right statutes extend the appraisal remedy to cover acquisitions of a controlling block of a corporation's stock, providing that once the specified percentage of stock has been acquired, any stockholder may serve a demand on the acquirer for payment of the fair value of his or her shares. This kind of statute has been adopted by Pennsylvania and Maine. Thirdly, fair price statutes require an offeror to pay a fair price to shareholders who are forced to sell their shares in the second step of a two-tiered tender offer. Thus, fair price statutes affect the acquirer's ability to perform a second step freeze-out transaction on terms less favorable than those by which the controlling interest was obtained. Statute of this kind have been enacted in: Arizona, California, Connecticut, Florida, Georgia, Indiana, Illinois,

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[297] In 1982, Ohio enacted a statute that became the prototype for the control share approach. See Ohio Rev. Code Ann. § 1701. 831.

Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, New Jersey, New York, North Carolina, Pennsylvania, Virginia, Washington, and Wisconsin. Finally, the business combination statutes typically prohibit an interested shareholder from engaging in a business combination with the target for a specified of period of years unless the transaction has been approved by the target's board. This kind of statute has been adopted by: New York, Indiana, Idaho, Arizona, Connecticut, Delaware, Georgia, Maine, Kentucky, Minnesota, Nebraska, New Jersey, South Carolina, Tennessee, Virginia, Washington, and Wisconsin.

2. The Provisions of the Indiana Act

A second generation Indiana anti-takeover statute, Control Share Acquisition Act ("Indiana Act"), became effective on August 1, 1987.[298] The Indiana Act only applied[299] to an "issuing public corporation," incorporated in Indiana, which must have more than 100 shareholders and its principle place of business, its

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[298]See Ind. Code Ann. § 23-1-17-3(a). But, under the Indiana Act, domestic corporation of Indiana with the permission of the board of directors, can choose the statute's protection prior to August 1, 1987. See Ind. Code. Ann. § 23-1-17-3(b).

[299]Through the amendment of the corporate article or bylaw, a corporation can avoid applying the Indiana Act before a control share acquisition take place. See Ind. Code. § 23-1-42-5 (Supp. 1987).

principle office, or a substantial assets in Indiana, and either 10% of its shareholders residing in Indiana, or 10,000 shareholders residing in Indiana.[300] Basically, Indiana Act was framed with the purpose of giving the shareholders of the corporation an opportunity to vote as a class and by that vote to determine whether the takeover should be accepted or rejected.[301] If a bidder acquires one-fifth, one-third, or a majority or more of the total shares of the corporation, he can acquire voting rights for those control shares only if the rights are approved by the shareholders of the issuing public corporation. To receive voting rights, the resolution must be approved by a majority of all disinterested shareholder. The issue of voting rights is determined at the next special or annual Shareholders' Meeting.[302] But, the bidder may file an optional request for a special meeting for the determination of the voting rights of the bidder's acquired share. An "acquiring person statement" is required when the bidder presents such a request to an "issuing public corporation."[303] If a bidder fails to file an "acquiring person statement," or if the shares are subsequently not accorded full

[300] Id. at § 23-1-42-9(b).

[301] See supra note 45, at 41.

[302] Ind. Code Ann. § 23-1-42-9(b).

[303] Id. at § 23-2-42-6.

voting rights, the corporation may, but is not required to, redeem the bidder's shares, during a sixty day period following the last acquisition of the shares by the acquiring person at their "fair value."[304] After presentation of the "acquiring person statement," a special meeting must be held within fifty days receipt of the request by the corporation unless the acquiring person agrees, in writing, to another date.[305]

3. CTS Corp. v. Dynamics Corp. of America

The Indiana Act, the first of the second generation anti-takeover statutes to face scrutiny in the United State Supreme Court, was attacked on the same grounds that led the Supreme Court to invalidate the statute at issue in MITE; its conflict with the Williams Act and its alleged violation of the dormant Commerce Clause doctrine. In CTS, the United Stated District Court for the Northern District of Illinois held the Indiana Act invalid on both Supremacy and Commerce Clause grounds.[306]

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[304] Id. at § 23-1-42-11. The corporation can only exercise the redemption provision if it has been authorized in the corporation's articles of incorporation or bylaws before a control share acquisition has occurred. The fair value is determined pursuant to the procedures adopted by the corporation. However, the Indiana Act does not provide guidelines for establishing such procedures.

[305] Id. at § 23-1-42-7(b).

[306] Dynamics Corp. of Am. v. CTS Corp., 637 F. Supp. 389, 399 (N.D. Ill. 1986)

Affirming the judgment of the district court, the United States Court of Appeal for the Seventh Circuit held that the Indiana Act impermissibly delayed tender offers beyond the period required by the Williams Act, and thereby, upset the balance struck by Congress under the Williams Act.[307] Further, the Seventh Circuit concluded that the Indiana Act directly, intentionally, and substantially affected the interstate market in securities and corporate control; thus, violating the Commerce Clause.[308] But, on appeal, the United States Supreme Court reversed. The Supreme Court held that Indiana Act could be distinguished from the unconstitutional Illinois Act in MITE; the courts distinction was consistent with the purpose and provisions of Williams Act and the limitation of Commerce Clause.

As to the argument of preemption, the Supreme Court, first, indicated it was not bound by the plurality opinion in MITE because it did not present the opinion of a majority of the Supreme Court.[309] In addition, the Supreme Court analyzed the differences between the Indiana Act and Illinois Act. By distinguishing both

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[307]Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250, 256-63 (7th Cir. 1986).

[308]Id. at 264.

[309]MITE, 457 U.S. 624, 644 (1982).

Acts, the Supreme Court concluded that the Indiana Act did not frustrate the congressional intent behind the enactment of Williams Act. As previously noted, the Illinois Act provided for a twenty-day pre-commencement waiting period during which time management could comment on the offer; but the offeror could not commence the offer. Such a statute frustrated the neutrality that the Williams Act was intended to achieve. Conversely, the Indiana Act in CTS, without requiring such a pre-commencement period, was neutral in its effect in that it protects the independent shareholder both from management and from being forced by an acquirer to tender their shares.[310] Regarding the date to hold a meeting, the Indiana Act mandates that a Shareholders' Meeting be called within fifty days of the request by the bidder,[311] however, the Illinois Act in MITE did not require a upper time limit on when the meeting must take place. In addition, the Supreme Court indicated that a tender offeror was free to purchase shares as soon as allowed under the federal law. If the acquirer was afraid of not gaining voting rights as a result of the shareholders' vote, he could make his tender offer conditioned on

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[310]Id. at 635.

[311]Ind. Ann. § 23-1-4-27 to 23-1-42-9.

obtaining voting rights within a certain period of time.[312]

Therefore, the Supreme Court held the Indiana Act did not cause a absolute delay on the tender offer.[313] Even if the Indiana Act imposes some additional delays on an acquirer's purchase of shares, the MITE decision did not suggested that any reasonable delay resulting from state regulation would create a conflict with Williams Act, but only unreasonable delays.[314] If the Williams Act were construed to preempt any state statute that may limit or delay the free exercise of power after a successful tender offer, the Williams Act would preempt a variety of state Corporation Law.[315] For example, staggered the term of directors and cumulative voting provision allowed in most state, may delay the time when a successful bidder gains control of a corporation. The Supreme Court concluded that fifty-day delay was not a unreasonable delay because it is within the sixty-day maximum period established by Congress in the Williams Act.[316] Finally, the Illinois Act authorizing the Secretary of State to rule on the fairness of the tender

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[312]CTS, 107 S. Ct. 1637, 1647 (1987).

[313]Id.

[314]Id.

[315]Id. at 1647.

[316]Id.

offer was inconsistent with the congressional objectives of the Williams Act. The Indiana Act does not include a provision of this type.[317]

The Supreme Court also upheld the Indiana Act over the Commerce Clause challenge. The Supreme Court evaluated the dormant Commerce Clause challenge under three tests:

(1) did it Indiana Act discriminates against interstate commerce,

(2) did the Indiana Act subjects interstate activities to inconsistent regulation and thereby affects interstate commerce, and

(3) did the Indiana Act places burden on interstate commerce that are clearly excessive when compared to putative local benefits.[318]

The Supreme Court held that the Indiana Act does not discriminate against interstate commerce, because it had the same effects on interstate commerce whether or not the acquirer is a domiciliary or resident of Indiana.[319] The Indiana Act does not impose a greater burden on out-of-state acquirers than exist for Indiana acquirers. However, the Illinois Act had no such limitation. Indiana had a interest in protecting both resident and

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[317]Id. at 1645.

[318]U.S.C.A. Const. Art. 1, § 8, cl. 3.

[319]See supra note 312, at 1648-49.

nonresident shareholders of the Indiana corporations if the corporation was a domestic corporations. Regarding the issue of whether the Indian Act adversely affected interstate commerce by subjecting activities to an impermissible risk of inconsistent regulation, the Supreme Court conclude that the Indiana Act, because it applied only to domestic corporation, did not present such problem.[320] As long as each state regulates only the voting rights only in the corporations it has created, each corporation will be subjected to the law of only one state.[321]

C. Post-CTS: The Legislative and Judicial Development

Regardless of whether the justification in CTS decision is sufficient or not,[322] the decision will have a significant impact in two respects. First, CTS places

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[320]Id. at 1649.

[321]Id.

[322]Some commentators argued that the Supreme Court decision is incorrect in four aspects.

> "First, the majority misinterpreted congressional intent regarding the Williams Act. Second, the Court erroneously concluded that the Indiana statute achieved a proper balance among the parties in a tender offer: the investor, the offeror, and target management. Third, the decision in CTS Corp. jeopardizes a shareholder's ability to sell his stock at a premium. Fourth, the majority incorrectly emphasized the state's role in regulating its corporation." See Garden, CTS Corp. v. Dynamics Corp. of America: A State's Right to Tend to Its Tender offers, 37 Am. U. L. Rev. 947, 947 (1988).

excessive power within the realm of the state by the use of the "internal affairs doctrine." Secondly, the decision justified state legislative authority enacting more stringent laws, eschewing conflicting federal laws, and protecting their corporations. Thus, the decision of CTS has caused a revolutionary change which impacts on an acquirer's ability and intent to takeover a target corporation. After the CTS, a number of states rushed to enact or to revise their statutes, by using the Indiana Act as a model. These states, including Delaware, had originally declined to follow Indiana's law.[323] Furthermore, these statutes now impose more constraints on acquirers than the Indiana Act.[324] Meanwhile, the Indiana Act has been used as the basis for the draft of the Model State Control Share Acquisition Statute.[325]

1. Delaware Statute and Its Judicial Decision

As a standard in the Corporation Laws area, the Delaware statute with respect to takeovers will be introduced hereafter. In response to the Supreme Court's

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[323] See Barrette, Delaware Move Closer to Adopting Law to Deter Hostile Takeover, Wall St. J., Dec. 9, 1987 at 41 col. 3.

[324] See, e.g., Mo. Ann. Stat. § 351, 407.(Vernon 1987); Del. Code Ann. tit. 8, § 203 (1988).

[325] See UASAA-ABA Joint Committee Proposes Model Takeover Statute [Feb. 12, 1987] Sec. Reg. & L. Rep. (BNA), No. 6, at 236.

decision in CTS, section 203 of the Delaware General Corporation Law ("Delaware Act") was adopted and signed into law on February 2, 1988. The Delaware statute may qualify as a "third generation" statute. Section 203 encompasses a wide variety of transaction between a stock holder who owns at least fifteen percent of the voting shares and the corporation.[326] The Delaware Act prevents "business combination"[327] between "interested stockholder"[328] and the target company for a three-year period; unless they meet one of exception in the Delaware Act.[329] By broadly defining the business combination, the Delaware Act extends its coverage to restrict the takeover. The Delaware Act is applied to Delaware corporation which have a class of voting stock listed on a national securities exchange or quoted in an inter-dealer quotation system, or which have over 2,000 holders of record of the corporation's stock.[330] The Delaware Act seems to stipulate stringent limitation in a takeover; however, the Delaware Act is a narrowly circumscribed provision which regulates only certain

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[326]See BNS Inc. v. Koppers Co., Inc., 683 F. Supp. 464 (D. Del. 1988).

[327]Del. Code Ann. tit. 8 § 203(c)(3).

[328]Id. at § 203 (c)(5).

[329]Id. at § 203(a)(b).

[330]Id. at § 203 (b)(4).

self-dealing transactions between a corporation and large stockholder. Moreover, numerous methods are built into the Act whereby even an interested stockholder can benefit from a merger or sale of a corporation's assets during the first three years after becoming an interested stockholder.[331]

After the enactment of Delaware Act, two cases, BNS Inc. v. Kopper Co., Inc. (BNS)[332] and RP Acquisition Corp. v. Staley Continental, Inc. (RP)[333] were challenged under the Act. In BNS, the district court of the Delaware found that the Delaware Act was constitutional, rejecting attacks based on the Supremacy Clause and the Commerce Clauses. In examining the Delaware Act's viability in via-a-via the purpose of Williams Act, the court held that the rational for requiring disclosure was the shareholder's protection. By mandating disclosure, Congress deliberately contemplated requirements that would have a neutral effect on the balance of power between target management and acquirer.[334] The Delaware Act provides an advantage to target management in fighting an unwanted takeover. CTS suggests that

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[331]Sparks, Hamermesh, Nachbar, Grim, Houghton, & Valihura, State Law Consideration in Undertaking Acquisition: Delaware, 609 PLI 399, 483 (1988).

[332]683 F. Supp. 454 (D. Del. 1988).

[333]686 F. Supp. 476 (D. Del. 1988).

[334]See supra note 326, at 466-67.

incidental pro-management measures undertaken to benefit shareholders do not offend Williams Act policies.[335] Further, the Delaware Act permits incumbent management and a minority of the stockholders to impose their views of fairness at their discretion; thus, the Delaware Act does not interpose the state government's views of fairness between the offeror and the offeree.[336] As to the delay three years for full control following the acquisition, compared to a delay caused by shifting the control for two years in staggered board, the additional theoretical one-year delay is not troublesome for preemption purpose.[337] Perhaps, the Delaware Act alters the balance between target management and the offeror significantly; but it benefits stockholders, and the legislature presumably has balanced the countervailing effects and found the degree of stockholder protection to offset potential harm to stockholders. Therefore, the court concluded that the Delaware Act will be all likelihood constitutional and not preempted.[338]

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[335]Id. at 470.

[336]Id.

[337]Id.

[338]Id. at 472.

As to the second attack, the violation of Commerce Clause, the court applied a three-part test used in CTS.[339] Finding the Delaware Act may regulate its own domestic corporations, and it does not discriminate against corporations which were incorporated in Delaware, they concluded that Delaware Act did not discriminate against interstate commerce. In addition, many of Delaware's corporation do not have their main office in Delaware or many resident shareholders did not prevent Delaware from regulating tender offers affecting these corporations; thus the Act did not create a risk of inconsistent regulations.[340] Moreover, the Delaware Act reflects both a stable corporate relationships while protecting shareholders. Finally, the Court concluded that the Delaware Act is constitutional.

In RP, the District court of the Delaware reaffirmed BNS's decision, and held that the Delaware Act is constitutional.

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[339] Id. at 472-73. The three-part test includes: "(1) are the effects of the statute discriminatory? (2) does the statute create an impermissible risk of inconsistent regulation? (3) does the statute promote stable corporate relationships and protect shareholders?" See also CTS, 107 S. Ct. 1637, 1648-52 (1987).

[340] Id. at 472-73.

2. Recent Judicial Development

Recently, the Wisconsin's Business Combination Act (Wisconsin Act), in Amanda Acquisition Corp. v. Universal Foods Corp.,[341] examined whether the Wisconsin Act was preempted by the Williams Act[342] and in violation of the Commerce Clause. Before Amanda, in RTE Corp. v. Mark IV Industries, Inc.,[343] the Wisconsin Act was originally struck down as preempted by the Williams Act. In RTE, the court held that "the Wisconsin does not promote investor choice and instead give to the management of target companies a virtual veto power over the outcome of a tender offer contest. The Wisconsin statute is the kind of parochial economic protectionism that can not stand."[344] But the judge who struck down the Wisconsin Act, finally, vacated his opinion without an explanation. By discussing the holding in Amanda, the reason why the Wisconsin Act is constitutional will become evident. The Wisconsin Act restricts a business combination between a resident domestic corporation and an interested

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[341]Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984 (E.D. Wis. 1989).

[342]15 U.S.C. § 78m(d), 78n(d)-(e).

[343]Fed. Sec. L. Rep. (CCH) ¶ 93,789 (E.D. Wis. May 6, 1988).

[344]Id.

stockholder[345] of the resident domestic corporation for 3 years after the interested stockholder's stock acquisition date.[346] Regarding the violation of Supremacy Clause, the court held that the Wisconsin Act does not mandate its views of fairness by virtue of having passed the Act. The Act by its term does not directly impede a tender offer in any respect. Apparently, the Wisconsin Act was just intended to deter a hostile takeover for Wisconsin corporations. It did not prohibit any entity from purchasing or offering to purchase share in Wisconsin corporation, or from attempting thereby to gain.[347] In addition, Wisconsin Act does not ban takeovers per se; but merely delays for three years the successful bidder's ability to attain

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[345]An "interested stockholder" of a resident domestic corporation is a person other than the resident domestic corporation or a subsidiary of the resident domestic corporation who is a

> "the beneficial owner of at least 10% of the voting power of the outstanding voting stock or the resident domestic corporation,[or] and affiliate or associate of that resident domestic corporation and at any time within 3 years immediately before the date in question was the beneficial owner of at least 10% of the outstanding voting stock of that resident domestic corporation." See Wis. Stat. § 180.726(1)(j)1.

[346]Wis. Stat. § 180.726(2). However, if permitted by the board of directors of the resident domestic corporation, before the interested stockholder's stock acquisition date, and satisfying Wis. Stat. § 180.726(5), a business combination can, go beyond the these restrictions.

[347]Amanda, 708 F. Supp. 984, 999 (E.D. Wis. 1989).

complete control over the corporation.[348] The Wisconsin Act may deter some tender offers, but it also appears to design careful choices concerning the allocation of economic resource to maximize managerial efficiency.[349] Since the Act neither affects disclosure or timing, nor forbids tender offers themselves, the Act did not impairs shareholder decision-making in the tender offer process. Furthermore, under the Wisconsin Act meaningful opportunity for success, stated in BNS v. Koppers Co., Inc.,[350] can be controlled by a shareholder's vote in light of board's response to a potential acquirer. However, the board of directors remains subject to the scrutiny of fiduciary standards for decisions made on behalf of the corporation.[351] Finally, the court concluded that under the Supreme Court's careful analysis of Williams Act's purpose in MITE and CTS, the Wisconsin Act did not frustrate the Williams Act legislative purpose, to wit, providing information to shareholders.

Concerning the possible violation of the Commerce Clause, pragmatically, the Wisconsin Act, frequently affects out of state entities, because most hostile tender offers for the Wisconsin corporation comes from

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[348] Id.

[349] Id. at 1004.

[350] 683 F. Supp. 454, 469 (D. Del. 1988).

[351] See supra note 341, at 1001.

acquirers outside of Wisconsin.[352] Nevertheless, the Wisconsin Act treats both interstate and local business equally, because it does not impose any greater burden on out-of-state offerors than it does on Wisconsin offerors; it does not discriminate against interstate commerce.[353] In addition, the Wisconsin Act only regulates corporations chartered in Wisconsin; thus, it creates no impermissible risk of inconsistent regulation by different states.[354] The court also held that the CTS decision is applicable to the Wisconsin Act, because the Wisconsin Act does not prohibit any entity, resident or nonresident, from offering to purchase, or from attempting thereby to gain control.[355] Unlike the Indiana Act only protecting shareholder from coercive tender offers, the Wisconsin Act goes further by protecting against highly leveraged buyouts that threaten to strip the target's assets without necessarily improving economic efficiency or the shareholder's benefit.[356] Clearly, the Wisconsin Act focuses on legitimate state interests. Accordingly, the court

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[352]Id. at 1003.

[353]Id.

[354]Id.

[355]See supra note 312, at 1652.

[356]See supra note 341, at 1004.

concluded that the Wisconsin Act does not effectively burden interest commerce in violation of Commerce Clause.

3. Miscellaneous

Many state's takeover statutes, post-CTS, have passed the challenge of Supremacy and Commerce Clauses. However, a few states takeover statutes have failed to withstand the attacks. In Hyde Park Partners, L.P. v. Connolly,[357] the United State Court of Appeals, in the First Circuit held that the penalty provision of the Massachusetts Take-Over Bid Regulation Act,[358] which precluded any takeover attempt for one year after a failure of a prospective offeror to disclose the intent to gain control of the target company before acquiring 5% of its stock, violated the Commerce Clause.[359] Further, the First Circuit held the disclosure and penalty provision of Massachusetts Take-Over Bid Regulation Act was preempted by the Williams Act, because it does not impose any delay upon the commencement or completion of a tender offer.[360] In Tyson Foods, Inc. v. McReynolds,[361]

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[357] 839 F.2d 837 (1st. Cir. 1988).

[358] M.G.L.A. C. 110c, § 3.

[359] See supra note 357, at 839.

[360] Id. at 848-53.

[361] 700 F. Supp. 906 (M.D. Tenn. 1988).

the court finds that "Tennessee Act"[362] violated the Commerce Clause, because this Act extends the application to target corporation organized under the law of state other than Tennessee.[363]

Significantly, the Supreme Court's decision in MITE an CTS have had a profound influence on the court when it confronts a state anti-takeover statute.

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[362]The Tennessee Act in here includes Tennessee's Investor Protection Act, Business Combination Act, Control Share Acquisition Act, and Authorized Corporation Protection Act.

[363]See supra note 361, at 907.

VI. OTHER RELATED STATUTES THAT SHOULD BE CONSIDERED

A. Antitrust Requirement on Acquisition

A corporate acquirer seeks to acquire the target because the target's business will complement or support his own. Therefore, an acquisition, theoretically, will increase the acquirer's competitive ability in the market after the completion of an acquisition. In order to prevent effectively an acquisition which may cause an anticompetitive effect in market, or tend to create a monopoly,[364] in 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvement Act ("HSR Act") to equip and to entrust these duties to the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ"). Title II of the HSR Act provides for notification and waiting period for a planned acquisition. Its major purpose is to give FTC and DOJ sufficient time and information so that they can review the anticompetitive effects of the proposed mergers and acquisitions prior to their consummations.[365] The HSR

[364]See Section 7 of the Clayton Act of 1914, as amended by the Celler-Kefauver Anti-Merger Act of 1950.

[365]See supra note 188, at 20b-4.

Act applies only if the acquisition satisfies following three standards:

(1) The commerce test: either the acquirer or the acquired person is engaged in United States commerce or in some activity affecting United Stated commerce;[366]

(2) The size of parties test: the transaction between parties, one with total assets or net sales of $100 million or more is acquiring voting securities or assets of the other one with total assets, or net sales if a manufacturer, of $10 million or more, or one with total assets or net sales of $10 million or more is acquiring voting securities or assets of the other one with total assets or net sales of $100 million or more;[367] and

(3) The size of transaction test: as a result of the transaction, the acquirer will hold either more than $15 million of the acquired person's voting securities and assets or 50 percent or more of the voting securities of an issuer that, together with all entities it controls, has annual sales or gross assets of $25 million or more.[368]

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[366] 15 U.S.C. § 18a(a)(1); 16 C.F.R. § 801.1(1), 801.3 (1990).

[367] 15 U.S.C. § 18a(a)(2); 16 C.F.R. § 801.1(j) (1990).

[368] 15 U.S.C. § 18a(a)(3); 16 C.F.R. § 802.20 (1990).

Concerning the size of transactions test, the $15 million dollar threshold is often reached by a purchase; but, often that purchase is less than 5 percent of target's voting securities. Thus, even though it is a purchase, since it is for less than 5 percent of a target voting securities, this type of purchase is exempt from the filing disclosure requirements under Rule 13(D) of the Exchange Act. But, the participants still have to notify the FTC and the DOJ about the acquisition under the HSR Act. Such a premerger notification will cause a price increase in the target company's stock prior to the required filing of a Schedule 13D, thus making the acquisition more costly.

As to the waiting period, if a corporate control transaction meets the HSR's Act requirements mentioned above, the acquirer and the acquired company must give preacquisition notice to the FTC and the DOJ. They may not consummate the transaction until the HSR's 30 day (15 days for cash tender offers) waiting period expires.[369] If necessary the FTC and the DOJ can also extend the waiting period for an additional period up to 20 days (10 days for cash tender offer).[370] Any person who fails to

[369] 15 U.S.C. § 18a(e); 16 C.F.R. § 803.10 (1990).

[370] 15 U.S.C. § 18a(e); 16 C.F.R. §§ 803.10, 803.20 (1990).

comply with the HSR Act is liable for civil penalties of up to $10,000 per day of the violation.[371]

The notification requirement and the waiting period, doubtlessly, will delay an acquirer in completing the acquisition. Additionally, the acquisition may be stymied by the FTC's and the DOJ's investigation which may impair fair competition in the takeover bid. However, the HSR Act also provides a number of exemptions, such as: "acquisitions of good or realty in the ordinary course of business;" "federal agency approval;" "acquisitions solely for investment;" etc.[372] Two of these exemptions are particularly stipulated for an acquisition by foreign person or government.[373] An acquisition by a foreign person[374] is exempt if any of the following are true:

> "(a) The acquisition is of assets located outside the United States;
> (b) The acquisition is of voting securities of a foreign issuer, and will not confer control of:

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[371] 15 U.S.C. § 18a(g).

[372] For details, see Clayton Act section 7, 15 U.S.C. § 18; 16 C.F.R. § 802 (1990).

[373] 16 C.F.R. §§ 802.51, 802.52 (1990).

[374] The definition of foreign person is "a person the ultimate parent entity of which- (A) Is not incorporated in the United States, is not organized under the laws of the United States and does not have its principal offices within the United States; or (B) Is a natural person, neither is a citizen of the United States nor resides in the United States." See 16 C.F.R. § 801.1(e)(1)(i) (1990).

(1) An issuer which holds assets located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(c)(2)) having an aggregate book value of $15 million or more, or

(2) A U.S. issuer with annual net sales or total assets of $25 million or more;

(c) The acquisition is of less than $15 million of assets located in the United States (other than investment assets); or

(d) The acquired person is also a foreign person, the aggregate annual sale of the acquiring and acquired persons in or into the United States are less than $110 million, and the aggregate total assets or the acquiring and acquired person located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(c)(2)) are less than $110 million."[375]

Otherwise, an acquisition is exempt if the ultimate parent entity of either the acquiring person or the acquired person is controlled by a foreign government or his agency; and the person acquires assets located within the foreign state or the person acquires voting securities of an issuer organized under the laws of a foreign country.[376]

Whether an acquisition by foreign acquirer will impair the fair competition principle, is another complicated and intricate problem that will not be discussed in this essay. However, a foreign acquirer should follow several guidelines in evaluating the antitrust effect, those guidelines includes: (1) the U.S.

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[375] 16 C.F.R. § 802.51 (1990).

[376] 16 C.F.R. § 802.52 (1990).

Department of Justice Merger Guidelines 1982 and 1984;[377] (2) the Horizontal Merger Guidelines of the National Association of Attorneys General (1987),[378] and (3) the Antitrust Enforcement Guidelines for International Operations (1988)("1988 International Guideline").[379] Although some differences exist in the different guidelines, all of those guidelines aid to an acquirer during the acquisition process. The 1988 International Guidelines is significantly important to a foreign

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[377]The first Merger Guidelines was issued by DOJ in 1968 in order to help clarify when the effects of a merger "may be substantially to lessen competition, or to tend to create a monopoly" as stated in section 7 of the Clayton Act. Recognizing that 1968 Guidelines is no longer appropriate, the DOJ revised it substantially in 1982 (see 42 Antitrust & Trade Reg. Rep. (BNA) No. 1069, (Special Supp. June 17, 1982)) and modified it again in 1984 (see 46 Antitrust & Trade Reg. Rep. (BNA) No. 1169 (Special Supp. June 14, 1984)). The 1982 Merger Guidelines introduced a new index, the Herfindahl-Hirschman index ("HHI"), to calculate market concentration, and a new set of market concentration standards. See Johnson & Smith, Antitrust Division Merger Procedures and Policy, 1968-1984, 32 The Antitrust Bulletin 967, 973 (1987). The 1984 Merger Guidelines increased the number of deciding factors and defenses; these were probably expanded in order to undercut its concentration standard and to bring the guidelines more in conformity to the DOJ's flexible enforcement policy.

[378]See 52 Antitrust & Trade Reg. Rep. (BNA) No. 1306 (Special Supp. Mar. 12, 1987).

[379]See 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391 (Special Supp. Nov. 17, 1988). These Guidelines replace the "Antitrust Guide for International Operations," issued in June 1977. See Antitrust & Trade Reg. Rep. (BNA) No. 799 at E-1 (Feb. 1, 1977). The 1988 International Guidelines amended, the 1984 Merger Guidelines with respect to challengeable HHI Quotients.

acquirer. In the 1988 International Guidelines, the DOJ states that

> "[c]ompetition by foreign firms that are not involved in a merger may make the exercise of market power in the United States following a merger impossible if those foreign firms would increase their sale in the United States significantly in response to a significant price increase."[380]

But, under the import quotas and foreign export restraints stipulated by U.S., such responses will not occur very often.[381] Moreover, the 1988 International Guidelines lists a few hypothetical merger Cases to explicate its application. In Case 1, Merger of a U. S. Firm and a Foreign Firm,[382] Case 2, Merger Analysis Involving Trade Restraints,[383] and Case 4, Merger of Two Foreign Firms,[384] of the 1988 International Guidelines, products imported into the United States by the foreign country of the acquirer will be taken into consideration in defining the relevant product market and relevant geographic market of the target company.

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[380]See 1988 International Guidelines, at S-10-11.

[381]Fugate, The New Justice Department Antitrust Enforcement Guidelines for International Operations-A Reflection of Reagan and, Perhaps, Bush Administration Antitrust Policy, 29 Virginia Journal of International Law 295, 319 (1989).

[382]See 1988 International Guidelines, at S-25.

[383]Id. at S-27.

[384]Id. at S-28.

B. Defensive Strategies to Against Foreign Investment

Facing the increasing number of acquisitions from foreign countries, the United States government has established statutory and regulatory schemes to response to these foreign acquirers, including both hostile and friendly acquisitions. The most far-reaching of the statutes is the section 5021 of the Omnibus Trade and Competitiveness Act of 1988 ("Omnibus Act"),[385] usually referred to as the "Exon-Florio Amendment." Under Omnibus Act, the President of United States is given the unprecedented power to investigate an acquisition, mergers, or takeovers by a foreign investor in order to determine the effects on national security. Any investigation of a transaction must begin within 30 days of the President's receiving written notice of the proposed merger, acquisition or takeover. Once the President of United States decides to investigate a merger, acquisition, or takeover, the investigation shall be completed within 45 days. If the President wants to take any action, the action must be announced 15 days after the investigation closed. In order to proceed the investigation expeditiously, any information or documentary material filed with President or the

[385]Pub. L. 100-418, 102 Stat. 1107. On August 23, 1988 President Ronald Reagan signed into law the Omnibus Trade and Competitiveness Act of 1988. This Act is an amendment of section 721 of Title VII of the Defense Production Act of 1950.

President's designee pursuant to section 5021 shall be exempt from disclosure under section 552 of title 5, United States Code.[386] In order to determine whether a merger, acquisition, and takeover will impair national security, the President of United States will consider the following factors:

"(1) domestic production needed for projected national defense requirements,
(2) the capability of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other suppliers and services, and
(3) the control of domestic industries and commercial activity by foreign citizens it effects the capability and capacity of the United States to meet the requirements of national security."[387]

Under the current scheme, the President, the Secretary of Defense, the Secretary of State and the Secretary of Commerce play important and interrelated roles.[388] On July 11, 1989, the Department of Treasury

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[386] Id.

[387] Id.

[388] The Department of Defense, under the authority of the Defense Investigative Service, implements the authority of the Secretary of Defense through the Industrial Security Regulation, DOD 5220.22-R, and the Industrial Security Manual for Safeguarding Classified Information, DOD 5220.22-M. The Secretary of State is authorized to control the export of classified technical data to foreign nationals under the Arms Export Control Act of 1976, as a amended Codified as amended at 22 U.S.C.A. § 2751-2779 (Supp. 1989). The Secretary of Commerce is authorized to control the export of non-classified technical data to foreign nationals under the Export Administration Act of 1979, as amended. Codified as amended at 50 U.S.C.A. App. 2401-2420 (Supp. 1988). The Office of Export Administration implements the

enacted the Regulations Pertaining to Mergers, Acquisition, and Takeovers by Foreign Persons, pursuant to section 5021.[389] Authorized by the President, the Committee on Foreign Investment in the United States ("CFIUS") oversees the investigation of foreign person's mergers, acquisitions, and takeovers. Beside the Secretary of the Treasury, who chairs the CFIUS, the members in the CFIUS include the Secretary of State, the Secretary of Commerce, the Secretary of Defense, the Chairman of the Council of Economic Adviser, and the U.S. Trade Representatives. If the investigation show that:

> "(1) there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security, and (2) provision of law, other than [section 5021] and the International Emergency Economic Powers Act (50 U.S.C. 1701-1706), do not in the President's judgement provide adequate and appropriate authority for the President to protect the national security in the matter before the President."[390]

The President may suspend or prohibit any acquisition, merger, or takeover by foreign person. Statistics reveal the Committee is more likely to conduct a formal investigation if the attempted takeover is hostile, and

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Secretary's authority through the Export Administration Regulation. See 15 C.F.R. § 768-799 (1989).

[389] Regulations Pertaining to Mergers, Acquisitions, and Takeovers by foreign Persons, 54 Fed. Reg.2,744 (1989).

[390] Id.

less likely to investigate if the attempted takeover is friendly.[391]

If the target company in a friendly bid by a foreign company is a government contractor, the Defense Investigative Service ("DIS") will likely advise the government contractor about a satisfactory plan of action to mitigate the deleterious effect of foreign acquisition. Derivatively, a defensive tactic is created, the so-called "Pentagon Ploy."[392]

Since Department of Defense has representatives on the CFIUS who will vote on whether to conduct a formal investigation and, eventually, whether to recommend to the President that the attempted takeover should be stopped, the government contractor can deter the foreign acquirer's attempt by first reporting the proposed takeover to the DIS. Indirectly, the DIS can devalue the contractor as a target company by revoking the contractor's facility security clearance or preventing its renewal; this action by the DIS will also prevent the foreign acquirer from acquiring the government contractor. In addition, since the DIS can delay the investigation of a government contractor concerning the attempted takeover by foreign person, this governmental

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[391]Conway & Savarino, Defense Strategies to Protect Against Foreign Investment, The Nation Law Journal, Monday, September 25, 1988, at S11.

[392]Id.

delay will also deter the acquisition. For example, in late April 1989, Tokuyama Soda, a Japanese chemical company, attempted to acquire General Ceramics Inc., a government contractor with the U.S. Department of Energy. General Ceramics Inc. supplies various specialized ceramics products used in making nuclear weapons. CFIUS advised the parties that CFIUS was strongly opposed to the acquisition and was prepared to recommend that President Bush block the acquisition. Based on CFIUS's threat of intervention, Tokuyama Soda withdrew the acquisition.[393]

Besides the "Pentagon Ploy," a government contractor can intentionally block the takeover if it is involved in a special program referred to as "black program." A "black program" is a among the sensitive United States defense project. The Defense Department is most concerned about any possible foreign procurement of these programs. Such an acquisition would significantly increase the likelihood of DIS's and CFIUS's intervention; thus, decreasing the target company's attraction to a foreign acquirer. Additionally, the United States Export Control Law and Regulation that protect the transfer of technical data from the contractor to the foreign country can also be used as a

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[393]See, Ferrera, Reynolds, & Shapiro, Tender Offers: Toughing it Out, 683 PLI 261, 414 (1990).

part of defensive tactics. The Export Administration Regulation and the International Traffic in Arm Regulations treat the acquisition of a United State's corporation by a foreign company as an export of the technology, the export of which is controlled, restricted, and possible prohibited under Export Administration Regulation and the International Traffic in Arm regulation. Thus, these statutes will frustrate some Taiwanese corporation whose goal of acquisition is the procurement of high technology from United States.

CONCLUSION

If the techniques of a acquirer are a sword, then the defensive tactics of a target are a shield. There is no absolute answer as to whether the sword or the shield is more powerful. In the conflict, inevitably, some shareholders of target company are victims, and some shareholders of target company are beneficiaries. Takeover victory depends on who has the better skill in the battle, the acquirer or the target company. However, the battle is not waged on equal terms because the target has the additional protection of state and federal anti-takeover statutes. Some of those statutes are specifically aimed at preventing foreign company's acquisitions. So far, most of acquisitions by Taiwanese companies are friendly acquisition. But following in the footstep of other countries acquiring through hostile acquisition, Taiwanese companies will adopt the hostile acquisition in the near future.

Any acquisition of a American company by a foreign acquirer will undoubtedly evoke a great deal of attention

from the public[394] and cause an adverse response from target company's employees. Acquisition, in essence, is a means and not a end. The completion of acquisition does not guarantee that the acquirer will benefit from the target company. The post-acquiring problems are exigent and troublesome. Owing to different cultural and social backgrounds, Taiwanese company, after accomplishing an acquisition, will be challenged in every aspects of managing the American company. To efficiently overcome such obstacles and properly manage the target company is the next challenge facing a Taiwanese acquirer.

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[394]For example, in Sep. 1989, Sony Corp, a Japanese company, acquired Columbia Records & Entertainment Corp.. The acquisition was the focus of American media which conjectured whether Japan will gradually acquire all of America, even thought the Japanese amount of aggregate investment in America is not the largest, it is fifth behind the Dutch, British, Canada, and Germany.