Michigan Journal of International Law

Volume 22 | Issue 1

2000

The New Rules on Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings: Competition or Harmonization?

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STUDENT NOTE

THE NEW RULES ON CROSS-BORDER TENDER AND EXCHANGE OFFERS, BUSINESS COMBINATIONS AND RIGHTS OFFERINGS: COMPETITION OR HARMONIZATION?

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INTRODUCTION

The U.S. Securities and Exchange Commission (the "SEC" or the "Commission") adopted new tender offer and Securities Act of 1934 (the "Securities Act") registration exemptive rules for cross-border tender and exchange offers, business combinations, and rights offerings relating to the securities of foreign companies (the "Cross-Border Rules")[1] on January 24, 2000, in the hopes of facilitating U.S. investor participation in these types of transactions.[2] Capital market participants are subject to additional compliance costs due to multiple regulatory requirements.[3] Foreign issuers often exclude U.S. holders[4] from foreign tender offers,[5] exchange offers,[6] rights

1. Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings, Securities Act Release No. 7759, Exchange Act Release No. 42,054, Trust Indenture Act Release No. 2378, International Series Release No. 1208, [1999–2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,214 (Oct. 22, 1999) [hereinafter Cross-Border Release].

2. *Id.* at 82,536.

3. *See* John C. Coffee, Jr., *Competition Versus Consolidation: The Significance of Organizational Structure in Financial and Securities Regulation*, 50 BUS. LAW. 447, 470–73 (1995).

4. The term "U.S. holder" means any security holder resident in the United States of America, its territories and possessions, any State of the United States, and the District of Columbia. Cross-Border Release, *supra* note 1, at 82,564–65.

5. The term "tender offer" includes tender offers where either cash or stock is issued in the offer. Cross-Border Tender Offers, Business Combinations and Rights Offerings, 63 Fed. Reg. 69135, 69136 n.7 (Dec. 15, 1998) [hereinafter Proposing Release].

6. The term "exchange offer" means a tender offer where stock is issued as consideration in the offer. Cross-Border Release, *supra* note 1, at 82,564.

> Some of our U.S. retail clients are unhappy because they are presently being excluded from an exchange offer in a multibillion dollar international transaction. The issuer has a limited percentage of U.S. retail shareholders and is not registering the offer in this country. U.S. retail shareholders were offered $16 per share.

offerings,[7] and business combinations[8] to avoid compliance with U.S. securities laws, largely due to these compliance costs and a fear of litigation.[9] While U.S. institutional investors are nevertheless often able to participate in international mergers or exchange offers through their offshore offices, U.S. retail investors must sell their securities in the open market and incur transaction costs, or be "cashed out," recognizing a gain (or loss) for tax purposes.[10] A U.S. holder who wishes to acquire

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> International shareholders are being offered their choice of $16 per share OR stock in the successor company. Shortly after the offer was announced, the stock held by U.S. investors began trading slightly above $16 dollars. The legally favored international investors were able to purchase the shares from the unfortunate U.S. retail investors, recognizing the downside risk in the stock was to the cash offer of $16 but that as an international investor, they could participate in all of the upside potential of the successor company.
>
> If the shares of the successor company increase before the deal is consummated, there is the potential for a profitable arbitrage by international investors which can purchase the shares of the target company and convert them into shares of the successor company. This potential for international investors to take advantage of the U.S. shareholders by paying them less than the international value of their U.S. holdings, is caused by the U.S. securities regulations.

Letter from Michael W. Reinhardt, House Counsel, Ragen MacKenzie Incorporated, to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission (Dec. 14, 1998) *at* http://www.sec.gov/rules/proposed/s72998/reinhar1.txt [hereinafter Ragen MacKenzie Letter].

7. The term "rights offering" means offers and sales for cash of equity securities where:

> (1) The issuer grants the existing security holders of a particular class of equity securities (including holders of depositary receipts evidencing those securities) the right to purchase or subscribe for additional securities of that class; and
>
> (2) The number of additional shares an existing security holder may purchase initially is in proportion to the number of securities he or she holds of record on the record date for the rights offering. If an existing security holder holds depositary receipts, the proportion must be calculated as if the underlying securities were held directly.

Cross-Border Release, *supra* note 1, at 82,564.

8. Business combination means a statutory amalgamation, merger, arrangement or other reorganization requiring the vote of securities holders of one or more of the participating companies. It also includes a statutory short form merger that does not require a vote of security holders. *Id.*

9. *See, e.g.*, letter from James W. Lovely to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission (Dec. 30, 1998) *at* http://www.sec.gov/rules/proposed/s72998/lovely1.txt (offering that "foreign private issuers routinely use the veil of 'onerous and complex . . . laws' not only to avoid offering free rights, warrants and other securities to U.S. investors . . . , but also to avoid payment . . . of cash in lieu of such securities").

10. *See* Ragen MacKenzie Letter, *supra* note 6 (noting that U.S. investors must often make transactional decisions without the benefit of any disclosure required by foreign law).

> U.S. investors not only can be deprived of the opportunity to realize significant value on their investments in foreign securities by tendering into a favorable offer, they also must decide whether to retain their securities or sell into the secondary market without the disclo-

equity in the successor international entity must purchase shares on the open market, also incurring transaction costs, while international holders may convert their shares on a tax-free basis and without incurring such transaction costs.[11]

In 1997, the U.K. Panel on Takeovers and Mergers (the "Takeover Panel") reviewed 31 tender offers.[12]

> When the U.S. ownership of the target was less than 15% (30 offers), the bidders excluded U.S. persons in all of the offers. When the U.S. ownership was more significant, such as 38% (one offer), the bidders included U.S. persons. In the 30 offers that excluded U.S. persons, the ownership percentage was as follows: in 27 offers, U.S. persons held less than 5%; in the remaining three offers, U.S. persons held 7%, 8% and 10–15%, respectively.[13]

Fundamental changes in domestic and foreign securities markets due to internationalization put pressure on the sexagenarian U.S. securities regulatory system, originally developed during the New Deal.[14] The SEC acknowledges that some jurisdictions have permitted foreign issuers and bidders to exclude U.S. holders in spite of domestic requirements to treat all holders equally, on the basis that it would be impractical to require the issuer or bidder to include the U.S. holders.[15] By removing regulatory barriers, e.g., by reducing the registration requirements of cross-border transactions, the SEC hopes U.S. investors will be included in more transactions involving foreign issuers and U.S. holders will participate on an equal basis with foreign security holders.[16]

Many theorists argue that regulatory competition forces regulators operating independently to promulgate rules that they believe will make their domestic markets most attractive to participants.[17] Both investors and issuers of securities arguably benefit from this competition in the

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sure and procedural safeguards afforded by the regulatory scheme applicable in the U.S. or in the relevant foreign jurisdiction. Concept Release on Multinational Tender and Exchange Offers, Securities Act Rel. No. 6866, 55 Fed. Reg. 23751 (June 6, 1990) [hereinafter Concept Release].

11. Ragen MacKenzie Letter, *supra* note 6.

12. Cross-Border Release, *supra* note 1, at 82,539 n.8.

13. *Id.*

14. *See* Merritt B. Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom*, 95 MICH. L. REV. 2498, 2532 (1997).

15. Cross-Border Release, *supra* note 1, at 82,539.

16. *Id.*; *see also* Uri Geiger, *The Case for the Harmonization of Securities Disclosure Rules in the Global Market*, 1997 COLUM. BUS. L. REV. 241, 266 (arguing that foreign issuers participating in U.S. markets provide jobs and fees to the U.S. financial industry, increased liquidity, and leverage to influence world disclosure standards).

17. *See, e.g.*, Geiger, *supra* note 16, at 268.

form of a regulatory hierarchy that develops among international capital markets.[18] Market participants can migrate to jurisdictions imposing a preferred regulatory burden, producing a phenomenon known as "regulatory arbitrage."[19]

Some critics dispute whether a hierarchy of securities regulation is viable, however, arguing that regulatory arbitrage exerts a downward pressure on those jurisdictions that compete to retain the activity, hence a "race to the bottom."[20] They suggest that legislators and regulators ought to rely more heavily on harmonization as an alternative to regulatory competition.[21] Regulations may be harmonized through reciprocity or commonality; the former requires deference to the standards of another jurisdiction, while the latter requires regulators to develop substantially uniform standards to govern specific issues in different jurisdictions.[22] This note suggests that the Cross-Border Rules represent an early manifestation of a harmonization approach.

This note introduces the Cross-Border Rules in the context of the rapidly changing securities markets and highly competitive regulatory systems noted above. It addresses the elements and impact of internationalization on cross-border tender offers and the modern U.S. regulatory response. The SEC has avoided any public moves to harmonize the U.S. system with those of other major capital markets and has instead made incremental changes aimed at maintaining the system's perceived strengths. The Cross-Border Rules represent a somewhat ungainly attempt to placate U.S. investors by bending the Williams Act tender offer rules using exemptions for certain transactions.

The SEC will now exempt certain tender offers for the securities of foreign private issuers[23] from the provisions of the Exchange Act and the rules thereunder that govern tender offers.[24] Bidders may use the exemption when U.S. security holders hold of record ten percent or less of the subject securities. The subject company, or any officer, director, or other person who otherwise would be obligated to file Schedule 14D-9,

18. James D. Cox, *Regulatory Duopoly in U.S. Securities Markets*, 99 COLUM. L. REV. 1200 (1999).

19. Amir N. Licht, *Regulatory Arbitrage for Real: International Securities Regulation in a World of Interacting Securities Markets*, 38 VA. J. INT'L L. 563, 567 (1998).

20. The term "race [to] the bottom" was used to describe the competition for corporate charters by William L. Cary in *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 666 (1974).

21. Geiger, *supra* note 16, at 297–316.

22. *Id.* at 271–72.

23. "Foreign private issuer means the same as in § 230.405 of Regulation C." Cross-Border Release, *supra* note 1, at 82,564.

24. *See* 15 U.S.C. §§ 78m(e), 78n(d) (1994); 17 C.F.R. §§ 240.13e-4, 14d-1 to 14d-10, 14e-1, and 14e-2 (2000).

may also rely on this exemption. The SEC—and this note—refer to this relief as the Tier I exemption.

The SEC will offer limited exemptive relief from tender offer regulations when U.S. security holders hold of record more than ten percent, but not more than forty percent, of the subject class, to eliminate areas of frequent conflict between U.S. and foreign regulatory requirements. This represents a codification of current Commission exemptive and interpretive decisions, as well as an effort to harmonize U.S. regulations with tender offer regulation and practice in the United Kingdom.[25] The SEC—and this note—refers to this relief as the Tier II exemption.

Foreign private issuers may rely upon Rule 801 in certain rights offerings, whereby the equity securities they issue are exempt from the registration requirements of the Securities Act. An issuer may rely on this exemption when U.S. security holders hold of record no more than ten percent of its securities that are the subject of the rights offering. Under Rule 802, securities issued in exchange offers for foreign private issuers' securities are exempt from the registration requirements of the Securities Act of 1933 (the "Securities Act")[26] and the qualification act of the Trust Indenture Act of 1940 (the "Trust Indenture Act").[27] Securities issued in certain business combinations involving foreign private issuers are also exempt under Rule 802. This exemption similarly applies when U.S. security holders hold of record no more than ten percent of the subject class of securities.

Tender offers for the securities of foreign private issuers are exempt from new Rule 14e-5 (formerly Rule 10b-13)[28] under the Exchange Act. A bidder may make purchases outside a tender offer during the offer when U.S. security holders hold of record no more than ten percent of the securities subject to the offer.[29] Furthermore, the Directors of the Division of Corporation Finance and Market Regulation may exempt tender offers from specific tender offer requirements.[30] The U.S. antifraud and anti-manipulation rules continue to apply, as the SEC believes U.S. security holders participating in these cross-border transactions ought to retain a minimum level of protection. The Commission notes

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25. *See* Roberta S. Karmel, *Facilitation of Multijurisdictional Offerings*, N.Y.L.J., April 15, 1999, at 3.

26. 15 U.S.C. § 77a-aa (1994).

27. 15 U.S.C. § 77aaa-bbbb (1994).

28. Rule 10b-13 was revised and redesignated as Rule 14e-5 in Regulation of Takeovers and Security Holder Communications, Securities Act Release No. 7760, Exchange Act Release No. 42,055, Investment Company Act Release No. 24,107, [1999–2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,215, at 82,608 (October 22, 1999).

29. Cross-Border Release, *supra* note 1, at 82,539–40.

30. *Id.* at 82,540; 15 U.S.C. §§ 78mm(a) (Supp. V 1999).

that the omission of information required by U.S. forms to fulfill foreign disclosure requirements and practices will not necessarily violate U.S. disclosure requirements, however. The Commission and investors may bring anti-fraud actions if the omitted information is material in the context of the transaction and the omission makes the disclosure misleading.[31]

Part I of this note offers a modest analysis of the rapid internationalization of capital markets and its impact on tender and exchange offers, business combinations, and rights offerings. An appreciation of this trend is vital to a sophisticated understanding of regulatory competition and harmonization.

Part II takes a step back to review the applicability of U.S. securities laws to cross-border offers. Conventional wisdom views U.S. securities regulation as both strict and expansive. A certain amount of historical and statutory perspective will help the reader evaluate the merits of differing regulatory philosophies.

Part III presents the Cross-Border Rules in detail. While it is too early to determine their impact on cross-border tender offers, the SEC invested a great deal of effort in their drafting to strike a sensible balance of investor protection and regulatory flexibility.

Part IV develops a normative analysis of the U.S. regulation of cross-border offers and considers the new Cross-Border Rules within the regulatory competition and harmonization paradigms.

Part V describes tender offer regulation in Germany and contrasts U.S. tender offer rules with the German regulatory model to illustrate a non-governmental, self-regulatory alternative.

Part VI highlights Vodafone AirTouch's hostile offer for Mannesmann, which provides an excellent case study of the impact of various securities regulatory systems on a cross-border transaction.

The movement to harmonize worldwide regulatory standards faces substantial political hurdles. While noting a number of weaknesses, this note largely endorses the SEC's recent efforts to allow U.S. investors to reap additional benefits of cross-border investment. Nonetheless, internationalization (especially in the form of technological innovation) will likely force the SEC to reassess its role as the "investor's advocate."[32]

31. Cross-Border Release, *supra* note 1, at 82,540.

32. U.S. Securities and Exchange Commission Web site *at* www.sec.gov (last visited February 15, 2001).

I. The Internationalization of Tender and Exchange Offers, Business Combinations, and Rights Offerings

A. *Global Change in Capital Markets*

As Uri Geiger notes, "[t]rade in foreign equity now amounts to about 35% of private sector cross-border capital flow in securities, as compared with 5% in the early 1980s."[33] Net purchases of foreign stocks by U.S. investors grew from less than $3 billion throughout the 1980s to more than $50 billion in 1995.[34] There were 441 foreign listings on NASDAQ, 392 on the New York Stock Exchange ("NYSE"), 62 on the American Stock Exchange, and 522 on the London Stock Exchange by the end of 1998.[35] While non-U.S. companies now make up thirteen percent of NYSE's listings, the exchange anticipates that it will grow to twenty-five percent of all listed companies in the next five years.[36] More than 1,100 foreign companies were reporting to the SEC under the Exchange Act by June 1998.[37] Furthermore, the number of European cross-border mergers and acquisitions increased from 1,434 in 1991 to 1,648 in 1997.[38]

Economic forces, technological innovation, and regulatory change have contributed to the internationalization of securities markets (which Uri Geiger defines as an increase in "transactions involv[ing] participants and financial assets from different nations").[39] The oil crisis of the 1970s, the U.S. deficit of the 1980s, the collapse of Communism, and economic reforms in China, Latin America, and Southeast Asia created capital market imbalances.[40] Furthermore, as an internationally diversified portfolio provides a significantly greater degree of risk reduction than a portfolio composed only of domestic shares, investors seek investment opportunities abroad.[41] Institutional

33. Geiger, *supra* note 16, at 249.

34. Office of the Secretary, U.S. Department of Treasury, *Treasury Bulletin*, tbl. CM-D (Net Purchases of Long-Term Securities by U.S. Investors) (Dec. 1996).

35. *See* London Stock Exchange Web site, *at* http://www.londonstockexchange.com/ (last visited on February 15, 2001).

36. New York Stock Exchange, Non-U.S. Listed Companies, *at* http://www.nyse.com/international/internationalco.html (last visited February 15, 2001) [hereinafter NYSE Non-U.S. Companies].

37. *See* Cross Border Tender Offerings, Business Combinations and Rights Offerings, Securities Act Release No. 7611, Exchange Act Release No. 40,678, International Series Release No. 1171, [1998 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,060, at 81,059 n.22 (Nov. 13, 1998).

38. *Id.* at 81,060 n.23.

39. Geiger, *supra* note 16, at 247.

40. *Id.* at 250.

41. *Id.* at 251–52; *see also* Henry Markowitz, *Portfolio Selection*, 7 J. FIN. 77 (1952) (proposing the portfolio theory).

investors and mutual funds, which benefit from greater sophistication and ability to trade internationally, dominate capital markets.[42] Technological advances in communications provide the basic conditions and liquidity for international securities markets, and the development of sophisticated analytical tools allows participants to manage risk exposure.[43]

B. *Regulatory Reform*

London's position as a major financial center was reinforced by the "Big Bang," a 1986 regulatory change that eliminated fixed commission rates, opened London Stock Exchange membership to foreign banks, and replaced old floor trading with the Stock Exchange Automated Quotation System (SEAQ).[44] U.K. regulators lowered the barriers to entry further in 1994 with the "Red Book" guidelines, which allowed foreign issuers that wished to list their Global Depositary Receipts to satisfy only minimal requirements based on home disclosure rules.[45]

The SEC reduced U.S. disclosure requirements for foreign issuers too.[46] Foreign issuers that offer securities in the United States need not prepare their financial statements in accordance with U.S. GAAP and may instead select any comprehensive body of accounting principles, as long as they reconcile the information to U.S. GAAP.[47] They may also limit their disclosure of directors' and officers' compensation.[48] First-time registrants are now only required to reconcile their financial statements for the last two years.[49] The SEC

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42. *See* Geiger, *supra* note 16, at 251.

43. *Id.* at 253.

44. *Id.* at 254.

45. *See* Cox, *supra* note 18, at 1226 n.90.

46. *See id.* at 1208–09 (stating that although the SEC has the authority to prescribe accounting and auditing standards that SEC documents must meet, it generally defers to the private sector).

47. The difference between U.S. GAAP and other standards may be significant. When Daimler-Benz, A.G. ("Daimler-Benz") listed on the NYSE, it was required to reconcile its German-prepared financial statements to U.S. GAAP. Liberal German accounting standards allowed Daimler-Benz's management to "smooth" its earnings; they concealed "reserve" earnings in good years to draw upon later in poor years. In the year of its listing, Daimler-Benz reported a $354 million profit under German accounting standards, and $1 billion loss under U.S. GAAP. The switch to U.S. GAAP increased the transparency of management activity, and led to wholesale changes in Daimler-Benz's structure. Holman W. Jenkins, Jr., *Before Chrysler, Daimler Was a Soap Opera*, WALL ST. J., June 10, 1998, at A19.

48. *See* EDWARD F. GREENE ET AL., U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS 2-103 to 2-104 (5th ed. 2000).

49. Simplification of Registration and Reporting Requirements for Foreign Companies; Safe Harbors for Public Announcements of Unregistered Offerings and Broker-Dealer Reports, Securities Act Release No. 7053, Exchange Act Release No. 33,918, International

adopted Rule 144A[50] and Regulation S,[51] which have had a significant effect on internationalization. Rule 144A created a market for securities offered to institutional investors, useful to foreign investors that wish to avoid the burden of complying with Securities Act registration requirements.[52] Without Rule 144A, shares that have not been registered with the SEC cannot be sold for a year, and then only pursuant to limitations regarding the availability of public information, volume of shares sold, and the manner of sale.[53] Regulation S eliminates the registration requirements for many offshore transactions and enhances the predictability of the application of U.S. securities laws to offshore offerings.[54] By lowering the standards for foreign issuers, however, the SEC invites criticism from domestic issuers who face the higher costs and greater risk of competitive injury.[55]

C. *Global Change Among the Participants*

1. Investors

Investors benefit from international diversification and the opportunity for increased risk-adjusted returns by investing in the securities of foreign issuers.[56] They can thereby reduce the systemic risk associated with domestic securities and exploit opportunities to outperform the domestic markets.[57] Nevertheless, Merritt Fox argues that the patterns of holding indicate that markets remain far from fully international.[58] In-

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Series Release No. 653, [1993–1994 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,331, at 85,206 (Apr. 19, 1994).

50. *See* 17 C.F.R. § 230.144A (2000); Resale of Restricted Securities; Changes to the Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145, Securities Act Release No. 6862, Exchange Act Release No. 27,928, Investment Company Act Release No. 17,452, [1989–1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,523, at 80,638 (Apr. 23, 1990).

51. Offshore Offers and Sales, Securities Act Release No. 6863, Exchange Act Release No. 27,942, Investment Company Act Release No. 17,458, [1989–1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,524, at 80,661 (Apr. 24, 1990).

52. *See* D. Rhett Brandon, *International Offerings*, *in* INTERNATIONAL SECURITIES REGULATION 15, 21–22 (Nis Jul Clausen ed., 1991).

53. *See* 17 C.F.R. § 144A(d) (2000).

54. *See* Brandon, *supra* note 52, at 19–21.

55. John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U.L. REV. 641, 696–97 (1999).

56. Geiger, *supra* note 16, at 260.

57. *Id.* at 260. Investors looking abroad naturally risk underperforming domestic markets as well. *Id.* n.79; *see also* RICHARD A. BREALEY & STEWART C. MYERS, PRINCIPLES OF CORPORATE FINANCE 368–77 (6th ed. 2000) (the efficient capital market theory suggests that the performance of domestic and foreign portfolios should be substantially equal in the long run).

58. Fox, *supra* note 14, at 2508.

vestors in different countries have access to significantly different information resources.[59] Market forces will continue to increase the percentage of foreign ownership of most corporations and increase the importance of cross-border transactions, however, putting pressure on existing securities regulatory systems.[60]

2. Issuers

Foreign issuers choose to list on U.S. exchanges to increase the marketability of their securities, to facilitate U.S. mergers and acquisitions through the use of a U.S.-listed security as an acquisition currency,[61] and to draw upon additional capital.[62] Some issuers are constrained by domestic markets that are unable to supply their capital requirements.[63] In addition to improved liquidity, decreased exposure to domestic market risk will often boost share value and reduce the cost of capital.[64] If an issuer lists its securities in both domestic and foreign markets, the influence of the foreign market on the firm's stock returns will likely increase and the influence of the domestic market will decrease. Unless the foreign and domestic markets are perfectly correlated, the issuer will benefit from a diversification effect.[65] Furthermore, a multiple listing is likely to create greater interest in the stock and increase the number of shareholders, spurring analysts to produce more information about the stock.[66]

A foreign firm's announcement of a dual listing on a U.S. exchange typically increases share value,[67] despite the costs of complying with U.S. regulation.[68] The U.S. securities market, with strict mandatory disclosure rules and a vast industry of securities houses and analysts, seems to operate as a powerful monitoring and pricing system relative to other

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59. *Id.* at 2512.

60. *Id.* at 2531.

61. Daimler-Benz stock would have been much less attractive to Chrysler holders in 1998 had Daimler not listed on the NYSE in 1993. Coffee, *supra* note 55, at 676–77. In contrast, Deutsche Bank, which was not listed on the NYSE, paid cash for Bankers Trust. *Id.* at 681 n.138.

62. NYSE Non-U.S. Companies, *supra* note 36.

63. Geiger, *supra* note 16, at 259. This may be the case for companies in developing markets, undergoing privatization, or from countries like Germany with small domestic equity markets. *Id.*

64. *Id.* at 258; *see* Coffee, *supra* note 55, at 674.

65. *See* Licht, *supra* note 19, at 584.

66. *Id.* at 600.

67. *See id.* at 582–83.

68. *See generally* Coffee, *supra* note 55, at 683–91 (exploring the costs of complying with U.S. regulation). Professor Fox estimates that compliance with U.S. securities system cost approximately $1.6 billion in 1995. Fox, *supra* note 14, at 2501 (citing NEW YORK STOCK EXCHANGE, FACT BOOK FOR THE YEAR 1995, at 9 (1996)).

markets.[69] A U.S. listing may represent a bonding mechanism, "a credible and binding commitment by [a foreign] issuer not to exploit whatever discretion it enjoys under foreign law to overreach the minority investor."[70] Investors reward an issuer that agrees to comply with U.S. disclosure standards with a higher share price. However, some critics question the investor protection value of mandating U.S. securities regulation for foreign issuers, since managers seeking to bond their actions would select the higher standard anyway.[71]

II. THE APPLICABILITY OF U.S. SECURITIES LAWS TO CROSS-BORDER OFFERS

The determination of which government may regulate a cross-border tender offer depends on whether the company is registered under the Exchange Act, where the bidder and the target company are incorporated, where the securities of the bidder are listed and traded, whether the securities of the bidder are owned in part by nonresident investors, and where the offer is made.[72] The SEC regulates offers and transactions in foreign securities that occur within U.S. borders, in addition to those where the United States is the target's home country or site of incorporation.[73] U.S. tender offer rules may violate the law or practices of foreign countries, however, and increase the cost and uncertainty of the offer.[74] Uncertainty in cross-border offers arises from the following areas of conflict: "(1) ownership reporting and mandatory offers, (2) commencement of the offering, (3) minimum offering periods, (4) withdrawal rights, (5) purchases outside the bid, (6) defensive tactics, and (7) disclosure obligations."[75]

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69. Licht, *supra* note 19, at 582–83.

70. Coffee, *supra* note 55, at 691.

71. *See* Fox, *supra* note 14.

72. *See* Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 Nw. U.L. REV. 523, 528–29 (1993).

73. International Tender and Exchange Offers, Securities Act Release No. 6897, Exchange Act Release No. 29,275, Trust Indenture Act Release No. 2266, International Series Release No. 285, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,803, at 81,746 (June 5, 1991).

74. *See* Fisch, *supra* note 72, at 529–30. Uncertainty may come in the form of litigation under the Williams Act, initiated by the target or investors. Even deliberately excluding U.S. shareholders may not avoid this, for a court may determine that the offer's effects on the United States are sufficient to justify imposition of U.S. laws. *Id.* at 534.

75. Edward F. Greene, Andrew Curran & David A. Christman, *Toward a Cohesive International Approach to Cross-Border Takeover Regulation*, 51 U. MIAMI L. REV. 823, 836 (1997).

A. *The Williams Act*

The SEC regulates tender offers pursuant to the Williams Act,[76] which amended the Exchange Act in 1968. Congress enacted the Williams Act to address the secretiveness of block purchases and significant rapid accumulations of stock and their perceived danger to corporate control.[77] The Williams Act aims to protect investors in proxy and takeover contests by requiring certain bidders to disclose their actions and provides investors with equal or fair rights to participate in the tender offer.[78] A target company or investors might bring suit to force a bidder to comply with the Williams Act's procedural or disclosure provisions or to obtain injunctive relief under Section 14(e). The defensive tactics some U.S. issuers use to repel active bidders and discourage potential ones are a phenomenon of state corporate law, and federal securities laws do not address a corporation's ability to adopt such measures.[79]

1. The Scope of Tender Offers

The SEC was unsuccessful in its attempts to convince Congress to codify the definition of "tender offer" as

> any offer to purchase more than five percent of a class of securities made to more than ten persons (except for certain brokers' transactions) or an offer that is disseminated in a wide-spread manner, provides for a price which represents a premium in excess of five percent or two dollars above the current market price, and does not provide for a meaningful opportunity to negotiate the price and terms.[80]

Courts have accepted an alternative definition comprising an eight-factor test,[81] which identifies a tender offer by the active and widespread solicitation of public shareholders for the shares of an issuer, solicitation

76. Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. § 78m(d)–(e), n(d)–(f) (1994)).

77. Fisch, *supra* note 72, at 525–26; Roberta S. Karmel, *Transnational Takeover Talk—Regulations Relating to Tender Offers and Insider Trading in the United States, the United Kingdom, Germany, and Australia*, 66 U. CIN. L. REV. 1133, 1135 (1998).

78. *See* 113 CONG. REC. 24,664 (1967) (remarks of Sen. Williams) ("S. 510 is designed solely to require full and fair disclosure for the benefit of investors.").

79. Greene, *supra* note 75, at 848. 15 U.S.C. § 78bb(a) (1994) provides: "Nothing in this chapter shall affect the jurisdiction of the securities commission . . . of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."

80. Proposed Amendments to Tender Offer Rules, Exchange Act Release No. 16,385, 44 Fed. Reg. 70,349, 70,349–52 (Dec. 6, 1979) (Proposed Rule 14d-1(b)(1)); Karmel, *supra* note 77, at 1136.

81. *See, e.g.*, Wellman v. Dickinson, 475 F. Supp. 783 (S.D.N.Y. 1979).

of a substantial percentage of the issuer's securities, offer of a premium over prevailing market price, fixed rather than negotiable terms, limited duration of offer, offer contingent on the tender of a fixed number of shares, offerees subject to pressure to sell their stock, and a public announcement preceded or followed by a rapid accumulation of stock.[82] A tender offer might include "any public invitation to a corporation's shareholders to purchase their stock," even if it is not a "hostile bid opposed by incumbent management."[83]

2. Disclosure Requirements

Section 13(d) of the Exchange Act requires any person who acquires a beneficial interest of five percent or more of any class of equity security subject to the annual and periodic reporting provisions of the Exchange Act (e.g., publicly traded issuers' common stock) to file a statement of ownership with the SEC, any exchange which lists the securities, and the issuer within ten days following the acquisition.[84] This applies whether or not the issuer of the securities is a U.S. company. Schedule 13D requires disclosure regarding the person or group making the five percent acquisition, its officers, directors, and principle business, as well as any financing arrangements supporting the purchase.[85] The purchaser must disclose its future intentions with regard to the target company, e.g., whether the purchaser intends to make a tender offer for the target or enter into some other control transaction.[86] This disclosure is "aimed at creeping acquisitions and open market or privately negotiated large block purchases."[87]

The bidder must also file a Schedule 14D disclosure statement containing certain information regarding the bid with the SEC[88] and must disclose any "material" financial information.[89] If a target's shares are

82. *See* 2 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 11.13 (3d ed. 1996).

83. Smallwood v. Pearl Brewing Co., 489 F.2d 579, 596–97 (5th Cir. 1974), *cert. denied*, 419 U.S. 873 (1974).

84. Exchange Act § 13(d), 15 U.S.C. § 78m(d) (1994).

85. *See* 17 C.F.R. § 240.13d-101 (2000).

86. *See id.*

87. Karmel, *supra* note 77, at 1136.

88. 17 C.F.R. § 240.14d-2 (2000).

89. Filing and Disclosure Requirements Relating to Tender Offer, Securities Act Release No. 5844, Exchange Act Release No. 13,787, Investment Company Act Release No. 9862, [1977–78 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,256 (July 21, 1977) (including, without limitation:

> (1) the terms of the tender offer, particularly those terms concerning the amount of securities being sought, such as any or all, a fixed minimum with the right to accept additional shares tendered, all or none, and a fixed percentage of the outstanding;

registered under Section 12 of the Exchange Act, a bidder must file Schedule 14D-1 and amend it to reflect material changes in information.[90] Though Section 14D is inapplicable if the shares are not registered under Section 12, the bidder must nevertheless prepare a disclosure document setting forth the terms of the offer for informational purposes.[91]

3. Procedural Regulation

Under Rule 14d-2(b) of the Exchange Act, a bidder for shares registered under the Exchange Act must commence its offer within five days of a public announcement that includes the price or a range of prices to be offered and the number of securities sought.[92] A tender offer must be held open for a minimum of twenty business days under Rule 14e-1(a), whether or not the securities are registered under Section 12 of the Exchange Act.[93] If the bidder changes the offer price, number, or percentage of outstanding securities, the offer must remain open for at least ten days following the change.[94] Although Section 14(d)(5) originally guaranteed that a shareholder who tenders shares registered under Section 12 pursuant to a bid may withdraw them at any time up to seven days from commencement or more than sixty days after commencement, the SEC extended these withdrawal rights until the tender offer expires.[95] If an offer is oversubscribed, shareholders must be treated on a pro rata basis.[96] To ensure that all holders are treated equally, bidders and their financial advisors may not purchase a target company's securities outside the tender offer, regardless of whether the securities are registered under Section 12 of the Exchange Act.[97]

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(2) whether the purpose of the tender offer is for control of the subject company;

(3) the plans or proposals of the bidder described in Item 5 of the Schedule; and

(4) the ability of the bidder to pay for the securities sought in the tender offer and/or to repay any loans made [to] the bidder . . . .)

90. 17 C.F.R. § 240.14d-3 (2000).

91. *Id.*

92. 17 C.F.R. § 240.14d-2(b) (2000).

93. 17 C.F.R. § 240.14e-1(a) (2000).

94. 17 C.F.R. § 240.14e-1(b) (2000).

95. 17 C.F.R. § 240.14d-7(a) (2000).

96. *See* 17 C.F.R. § 240.10(b)–13(c) (2000).

97. *See* 17 C.F.R. § 240.10(b)–13 (2000) (this prohibition applies to the advisors' market making affiliates as well).

4. Anti-fraud Provision

Section 14(e) of the Exchange Act[98] contains a general tender offer anti-fraud provision, prohibiting participants from using all fraudulent, deceptive, and manipulative acts and practices in connection with a tender offer. The provision applies to false statements by both the bidder and the target, statements contained in the tender offer documents, and other statements made in the course of a tender offer. Section 14(e) is aimed at misrepresentation or nondisclosure rather than the substantive fairness of a transaction.[99] If a party possesses material non-public information regarding the issuer's securities, the Exchange Act's anti-fraud provisions may require the party either to disclose the non-public information or to refrain from purchasing the securities.[100]

5. Exchange Offers

If the bidder offers the target's shareholders securities as part or all of the consideration, the bidder must register the offered shares with the SEC. A non-U.S. offeror must disclose "(1) a detailed description of the offer, (2) a business description of both the bidder and the target, (3) audited balance sheets for the two most recent fiscal years, and (4) audited income statements for the three most recent fiscal years (accompanied by the auditors' opinions and consents)."[101] If the acquisition is material to the bidder, it must prepare a pro forma income statement and balance sheet that presents the business that would result from a successful takeover.[102]

B. *Extraterritoriality*

U.S. courts have traditionally viewed jurisdiction expansively, applying jurisdiction to transactions with minimal U.S. contacts.[103] The territorial conduct test establishes jurisdiction based on location.[104] A court may look to a number of factors to determine the location of a securities transaction. The Second Circuit test[105] applies anti-fraud provisions to losses from sales of securities to U.S. residents in the United States, whether or not there were acts (or culpable failures to act)

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98. 15 U.S.C. § 78n(e) (1994).

99. *See* Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 12 (1985).

100. *See* 17 C.F.R. § 240.14d-3(b) (2000).

101. Greene, *supra* note 75, at 853–54.

102. *Id.*

103. *See* Fisch, *supra* note 72, at 523.

104. *See* American Banana Co. v. United Fruit Co., 166 F. 261 (2d Cir. 1908).

105. Bersch v. Drexel Firestone, 519 F.2d 974, 991–92 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975).

of material importance in this country, as well as to losses from sales of securities to American residents abroad if, but only if, acts (or culpable failures to act) of material importance in the United States have significantly contributed thereto. However, the test does not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses. "Merely preparatory" acts do not trigger jurisdiction, a test that was later adopted by the D.C. Circuit.[106] In a more expansive version of the test adopted by the Third, Eighth, and Ninth Circuits, jurisdiction exists "where at least some of the activity designed to further a fraudulent scheme occurs within this country." Here, even preparatory acts (e.g., phone calls, soliciting foreign investors in the United States) may trigger jurisdiction.[107] The Second Circuit test, on the other hand, requires substantial fraudulent activity in the United States. Other courts have more relaxed tests; e.g., a single meeting in the United States between foreigners in a transaction which is otherwise conducted abroad and involves no offer or sale in the U.S. markets may subject the transaction to domestic law by the application of a conduct test.

Schoenbaum v. Firstbrook established the extraterritorial effects test.

> [T]he district court has subject matter jurisdiction over violations of the Securities Exchange Act although the transactions which are alleged to violate the Act take place outside the United States, at least when the transactions involve stocks registered and listed on a national securities exchange, and are detrimental to the interests of American investors.[108]

A listing on a U.S. exchange is an important element in generating enough of an effect on the U.S. capital markets to justify jurisdiction.

Some critics believe SEC regulation of tender offers should be addressed as a matter of choice-of-law, not subject matter jurisdiction. The United States should apply its securities laws restrictively, based on an interest analysis.[109] A comity test requires not just balancing tests but also deferral to the objectives of a foreign state. The Supreme Court has defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the

106. Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 33–34 (D.C. Cir. 1987).

107. Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT'L L. & BUS. 207, 217 (1996).

108. Schoenbaum v. Firstbrook, 405 F.2d 200, 208 (2d Cir. May 29, 1968).

109. *See* Fisch, *supra* note 72, at 556–61.

rights of its own citizens or of other persons who are under the protection of its laws."[110]

Some argue that the rule of extraterritoriality should be a bright-line rule, whereby parties can make *ex ante* law choices from a variety of options available. Parties should be able to avoid their domestic laws if they want.[111] Alternatives to extraterritoriality include portable reciprocity, whereby issuers may follow the law of a country other than the country where the securities are actually traded. Investors can invest in companies on their home exchanges based on another country's rules. International company registration would register companies rather than transactions, but the question of how much information to require of a company remains.

C. *Transactional Options Before the Adoption of the Cross-Border Rules*

As noted above, cross-border offers often create tensions between various regulatory systems, particularly in the following areas: "(1) ownership reporting and mandatory offers, (2) commencement of the offering, (3) minimum offer periods, (4) withdrawal rights, (5) purchases outside the bid, (6) defensive tactics, and (7) disclosure obligations."[112] Offerors for securities of foreign issuers can structure their transactions in a number of ways, or seek exemptions from the SEC, to avoid violating U.S. and foreign securities laws. An offeror can make offers directly to all shareholders (including those in the United States) and comply fully with the Williams Act. If the percentage of U.S. ownership is small, the offeror can make an offer that was closed to U.S. residents, e.g., by not mailing offering documents into the United States, announcing the offer in the U.S. press, or accepting tenders made from the United States. U.S. investors are then barred from tendering directly to the offeror and must either tender from outside the United States or sell directly into the arbitrage market, not benefiting from any premium and incurring substantial transaction costs in either case. If the offer is an exchange offer, U.S. security holders are not able to participate in the resulting company. U.S. investors must make these decisions without the benefit of U.S.-style (Williams Act) disclosure, and sometimes without any disclosure at all.

In addition, an offeror could negotiate with the SEC for transaction structures that complied with both U.S. and foreign law—a very costly,

110. Hilton v. Guyot, 159 U.S. 113, 164 (1895).
111. *See* Choi, *supra* note 107, at 226.
112. Greene, *supra* note 75, at 836.

uncertain process that effectively subjects bidders to U.S. securities laws.[113] Typically, the SEC grants such relief in the form of "no-action" letters, which assure the recipient that the SEC will not recommend enforcement of activity that would otherwise constitute regulatory violations.[114] For example, the Ford-Jaguar[115] and Procordia-Volvo-Pharmacia[116] transactions were both structured as two separate tender offers, one made to U.S. holders, which complied with the Williams Act, and one made abroad, which complied with the applicable foreign law.[117] In the former transaction, Ford U.K. offered to buy Jaguar, a U.K. company. Americans owned approximately twenty-five percent of Jaguar stock in the form of ADRs[118] and owned a small portion directly. In the United Kingdom, the non-statutory Takeover Panel issues and administrates the City Code on Takeovers and Mergers (the "City Code"),[119] which contains a set of ten general principles expressed in broad terms and a set of more detailed rules that provide guidance in specific instances.[120] The Code's rules and principles, though lacking the

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113. *See* 15 U.S.C. § 78n(d)(8)(C) (1994) (authorizing the SEC to exempt transactions from the provisions of § 14(d) that are "not comprehended within the purposes of this subsection"); 15 U.S.C. § 78n(d)(5) (1994) (authorizing the SEC to modify statutory withdrawal rights).

114. Greene, *supra* note 75, at 834.

115. In the matter of the Ford Motor Company Limited Offer to Purchase the Ordinary Shares and American Depositary Receipts of Jaguar PLC, Exchange Act Release No. 27,425, 1989 SEC LEXIS 2161, at *2 (Nov. 7, 1989).

116. In the Matter of Procordia Aktiebolag and Aktiebolaget Volvo Offers to Purchase the Shares, Convertible Debentures and American Depositary Shares of Pharmacia Aktiebolag, Exchange Act Release No. 27,671, International Series Release No. 118, [1989–1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,514 (Feb. 2, 1990).

117. Fisch, *supra* note 72, at 534–35.

118. An American Depositary Receipt (ADR) is a certificate issued by a U.S. depositary bank that represents shares of a non-U.S. company that are deposited with the bank as a custodian. *See* Joseph Velli, *American Depositary Receipts: An Overview*, 17 FORDHAM INT'L L.J. S38, S39 (1994).

119. PANEL ON TAKEOVERS & MERGERS, THE CITY CODE ON TAKEOVERS AND MERGERS AND THE RULES GOVERNING SUBSTANTIAL ACQUISITION OF SHARES (5th ed. 1996) [hereinafter CITY CODE].

120. The ten General Principles of the City Code require that

> (1) all shareholders of the same class be treated similarly; (2) during an offer, the offeror, offeree and their advisors provide all shareholders with the same information; (3) an announcement should only be made when the offeror is sure it can implement the offer; (4) shareholders should be given, and allowed, sufficient time to consider all relevant information; (5) any document or advertisement for shareholders be prepared with great care and accuracy; (6) all parties to an offer act to prevent the creation of a false market in the securities of any party to that offer; (7) if a bona fide offer has been made or is imminent, no action should be taken to frustrate that offer without approval of the shareholders; (8) rights of control be exercised in good faith; (9) directors only have regard to shareholder, employee and creditor interests when giving advice to shareholders; and (10) where control of a company is acquired by persons acting in concert or con-

force of law, play a central role in takeover regulation.[121] The Williams Act and the U.K. City Code conflicted sufficiently to prevent a tender offer by Ford that met the procedural requirements of both statutes.[122] Ford made two different offers: one to U.S. shareholders, in compliance with the Williams Act, and another to non-U.S. Jaguar shareholders on the same terms, in compliance with the U.K. City Code.[123] The SEC approved this bifurcated procedure and granted no-action relief from the "all-holders" provision of Rule 14d-10 and other provisions governing withdrawal rights.[124] The SEC granted the Procordia-Volvo-Pharmacia transaction similar no-action relief based on a bifurcated tender offer. Although all three were Swedish companies, Pharmacia was registered under Section 12 of the Exchange Act, as U.S. investors held approximately eight percent of its equity directly or indirectly (as ADRs).[125]

D. *Early Reform Efforts*

The Cross-Border Rules have their genesis in the 1990 Concept Release on Multinational Tender and Exchange Offers.[126] In response to cross-border tender offers such as Jaguar and Pharmacia, the SEC proposed an approach that would encourage foreign bidders to include U.S. investors in their tender offers and facilitate the making of such offers in cases where the number of U.S. investors was small.[127] The SEC sought to insure that investors would have the opportunity to participate and that they would receive adequate information to make a decision.[128] The SEC implemented the multijurisdictional disclosure concept ("MJDS")

> solidating their interest, the persons involved be normally required to make a general offer to the other shareholders.

Greene, *supra* note 75, at 830 n.29 (citing CITY CODE, *supra* note 119, at B1–B2).

121. Greene, *supra* note 75, at 832. The Panel may discipline violators of the Code, which "severely diminish[es]" their professional standing. *Id.* n.43 (citing William Staple, *The Takeover Panel*, *in* A PRACTITIONER'S GUIDE TO THE CITY CODE ON TAKEOVERS AND MERGERS 1, 11 (1996)).

122. "[A]lthough U.S. tender offer regulations require the bidder to provide withdrawal rights throughout the offering period, the rules in the United Kingdom do not permit withdrawal rights during the initial twenty-one days of the offer. The U.K. provisions also require the offer to be extended for an additional fourteen day period after it becomes 'unconditional as to acceptances.'" Fisch, *supra* note 72, at 535 (citing CITY CODE, *supra* note 119, Rules 31.4, 34, at M2, M13).

123. *See* Fisch, *supra* note 72, at 535 (citing Ford Release, *supra* note 115, at *4).

124. *See id.* at 535–36.

125. *See id.* at 536 (citing In the Matter of Procordia Aktiebolag and Aktiebolaget Volvo Offers to Purchase the Shares, Convertible Debentures and American Depositary Shares of Pharmacia Aktiebolag, Exchange Act Release No. 27,671, [1989–1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,514, at 80,586 (Feb. 2, 1990)).

126. Concept Release, *supra* note 10.

127. *Id.*

128. *Id.* at 23,752.

in 1991, providing U.S. and Canadian companies with a predetermined set of disclosure rules. Offers for Canadian issuers may proceed under Canadian law, as long as U.S. investors hold less than forty percent of the securities subject to the tender offer and the offer is open to all U.S. holders with terms and conditions no less favorable than those offered elsewhere.[129]

The 1991 Tender Offer Release proposed detailed exemptive rules and registration procedures designed to facilitate the inclusion of U.S. investors.[130] The SEC aimed to establish uniform jurisdictional regulation of offers for target securities with less than ten percent U.S. holders. The proposal contained exemptions from virtually all the procedural and disclosure requirements, including the filing and dissemination requirements, and the rules concerning proration, minimum offering period, and withdrawal rights, if the offer met certain minimal requirements.[131] Furthermore, the proposal contained an exemption from Securities Act registration for certain exchange offers. As the anti-fraud provisions of the Exchange Act would continue to apply to exempted transactions, the 1991 Tender Offer Release did not address the perceived risk of U.S. litigation, which deters offers by foreign bidders.[132]

III. The Cross-Border Rules

A. *The Tier I Exemption*

Tier I exempts tender offers for the securities of foreign private issuers from Rules 13e-3, 13e-4, Regulation 14D, or Rules 14e-1 and 14e-2 when U.S. securities holders hold ten percent or less of the foreign company's securities that are subject to the tender offer.[133] The Exchange Act provisions relate to "disclosure, filing, dissemination, minimum offering period, withdrawal rights and proration requirements."[134] The offers that fall under this exemption remain subject to the applicable rules of the target's home jurisdiction, which includes both the entity's home and main trading market for its

129. *Id.*

130. International Tender and Exchange Offers, Securities Act Release No. 6897, Exchange Act Release No. 29,275, Trust Indenture Act Release No. 2266, International Series Release No. 285, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,803 (June 5, 1991).

131. Concept Release, *supra* note 10, at 23,753–54.

132. *See id.*

133. Cross-Border Release, *supra* note 1, at 82,541; *see* 15 U.S.C. §§ 78m(e), 78n(d) (1994); 17 C.F.R. §§ 240.13e-3, e-4, 14d-1 to 14d-10, 14e-1, and 14e-2 (2000).

134. Cross-Border Release, *supra* note 1, at 82,541.

securities. U.S. securities holders participate in the offer with terms at least as favorable as those offered to other holders, including price, type of consideration, and choice among various alternatives offered by the bidder, with certain exceptions for exchange offers. Even if non-U.S. security holders are offered consideration consisting at least partly of securities, U.S. holders may be offered only cash, but the bidder must have a reasonable basis to believe that the cash is substantially equivalent to the value of the securities and any cash or other consideration offered to non-U.S. holders.[135] However, a bidder may continue to offer a "loan note" installment payment alternative to U.K. security holders only; this allows taxpayers to defer the recognition of income and capital gains on the sale of securities (a benefit unavailable to U.S. holders).[136] Both U.S. and foreign bidders are exempted under Tier I, and the bidder's domicile or reporting status is not determinative.

The Commission considered extending this exemption to a higher eligibility percentage, but declined in favor of creating a separate type of exemptive relief, Tier II. The Commission set Tier I and Securities Act registration exemption limits on U.S. ownership at the same percentage to level the playing field for stock and cash tender offers. Once a bidder commences a tender offer or business combination for securities of the same class that is the subject of the tender offer, a subsequent bidder is eligible to use the same exemption (Tier I, Tier II, or Rule 802) as the initial offeror, as long as it also satisfies all the exemption conditions other than the U.S. ownership limitations. This provision protects the availability of this exemption for competing bidders from any movement of securities into the United States in response to the initial offer.

For securities subject to Rule 13e-4 or Regulation 14D under the Exchange Act, bidders submit, rather than file, an English language translation of the offering materials to the SEC under cover of Form CB, and foreign bidders must also file a consent to service on Form F-X. The person submitting the materials would therefore not be subject to the express liability provisions of Section 18 of the Exchange Act. A bidder must provide its offering information, such as the tender offer circular, to U.S. security holders in English and on a basis comparable

135. 17 C.F.R. §§ 240.13e-4(h)(8)(ii)(C), 14d-1(c)(2)(iii) (2000). The bidder's determination that the consideration is substantially equivalent to that offered non-U.S. holders should be made at the commencement of the offer, and need only be adjusted if the bidder no longer has a reasonable basis to believe the values are substantially equivalent. Cross-Border Release, *supra* note 1, at 82,543 n.26.

136. "Loan notes . . . are short-term notes that may be redeemed in whole or in part for cash at par on any interest date in the future." Cross-Border Release, *supra* note 1, at 82,544.

to other security holders. If the foreign subject company's[137] home jurisdiction[138] permits dissemination solely by publication, the offeror must simultaneously publish the offering materials in the United States in a manner reasonably calculated to inform U.S. investors and may in addition mail the materials directly to U.S. holders.[139]

Rule 13e-3 mandates the filing of a Schedule 13E-3, which requires disclosure about the fairness of the transaction to unaffiliated securities holders regarding the loss of a security's public trading market. Since it would be impractical to impose the procedural, disclosure, and filing requirements of Rule 13e-3 in the absence of other U.S. requirements, Tier I transactions are exempt. The home jurisdiction determines the basic disclosure and dissemination requirements for the offer. In cases of predominantly foreign transactions, where Rule 13e-3 compliance has been difficult, Commission staff has permitted modified disclosure focusing on how the board determined its offering price, rather than requiring a fairness determination.

If the transaction is exempt from registration under the Securities Act pursuant to Tier I, the offeror may exclude target company security holders residing in any state that does not provide an exemption from "blue sky" law. Furthermore, if the offeror registers securities under the Securities Act, the offeror may exclude target company security holders residing in any state that refuses to register or qualify the offer and sale of securities in that state after a good faith effort by the offeror. In either event, however, the offeror must offer the securities holders cash consideration instead of excluding them if it has offered cash consideration to securities holders in another state or in a jurisdiction outside the United States.

The beneficial ownership reporting requirements of Sections 13(d), 13(f), and 13(g) of the Exchange Act remain in effect for Tier I transactions, as the Commission has determined that the need for disclosure of ownership and control of both domestic and foreign reporting companies outweighs any burdens related to filing reports under these rules.[140]

137. "Foreign subject company means any foreign private issuer whose securities are the subject of the exchange offer or business combination." *Id.* at 82,564.

138. "Home jurisdiction means both the jurisdiction of the foreign subject company's (or, in the case of a rights offering, the foreign private issuer's) incorporation, organization or chartering and the principal foreign market where the foreign private company's (or in the case of a rights offering, the issuer's) securities are listed or quoted." *Id.*

139. 17 C.F.R. § 240.14d-4 (2000).

140. Cross-Border Release, *supra* note 1, at 82,544.

B. *The Tier II Exemption*

Tier II exempts tender offers from limited provisions of the Exchange Act and the tender offer rules when U.S. security holders hold more than ten percent, but not more than forty percent, of a foreign private issuer's securities that are targets of the offer.[141] The Commission intends Tier II to offer relief from a number of common impediments that bidders face when considering whether to extend offers in the United States. As with the Tier I exemption, domicile or reporting status of the bidder is not relevant, as this exemption is available to both U.S. and foreign bidders. Due to Tier II's limited scope, it is unnecessary to pass judgment on the tender offer rules and practices of another jurisdiction.

If an offeror "relies on the Tier II exemption to make a tender offer, a subsequent competing bidder [is] not . . . subject to the 40 percent ownership limitation condition . . . ."[142] A tender offer "commences once the bidder disseminates transmittal forms or discloses instructions on how to tender into an offer,"[143] whereupon the bidder is required to file Schedule TO in place of Forms CB or F-X. Bidders relying on the Tier II exemption will satisfy the Regulation M-A requirements regarding "subsequent offering periods" if the bidder pays for tendered securities and makes the announcement in accordance with the law or practice of the bidder's home jurisdiction. The subsequent offering period will commence immediately after the announcement.[144]

In no case will the Commission waive the application of the anti-fraud and anti-manipulation provisions, including Section 14(e), which prohibits a person from making a material untrue statement or material omission or from engaging in fraudulent, deceptive, or manipulative acts in connection with any tender offer.[145] Therefore, even if an offeror could gain exemption from the Rule 14e-1(b) requirement to provide ten days' notice if the offeror increases or decreases the consideration offered under Tier II, the anti-fraud provision may still require notice of material changes to the offer. The bidder will continue to be subject to keeping an offer open for at least twenty business days, making an SEC filing, disseminating offering material, and providing withdrawal rights.

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141. *Id.*

142. *Id.*

143. 17 C.F.R. § 240.14d-2 (2000); Cross-Border Release, *supra* note 1, at 82,554 n.35.

144. 17 C.F.R. § 14d-1(d)(2)(v) (2000); Cross-Border Release, *supra* note 1, at 82,545. Regulation M-A requires bidders that include a subsequent offering period to promptly pay for tendered securities and directs them to announce the approximate number and percentage of outstanding securities that were deposited by the close of the initial offering period.

145. 15 U.S.C. § 78n (1994).

The "all holders" rule requires that a bidder open the tender offer to all security holders of the class,[146] while the "best price" rule requires that the consideration paid to any security holder be as high as the consideration paid to any other security holder.[147] The Commission offers exemptive relief by allowing a bidder to split its offer into two separate offers, whereby the U.S. offer would comply with the U.S. regulatory system and the foreign offer would comply with its home jurisdiction's rules. The offer to U.S. holders must be made on terms at least as favorable as those offered any other holder of the same class of securities subject to the offer.[148]

The Tier II exemption does not provide any relief from the duration and extension requirements of the U.S. tender offer rules, which provide that all tender offers must remain open for a minimum of twenty business days, subject to mandatory extensions for changes in the terms of the offer.[149] The Commission anticipates no conflict with foreign jurisdictions to allow a bidder to keep an offer open or to extend the offer for a longer period. Under U.S. tender offer rules, a bidder who wishes to extend its offer beyond a scheduled expiration date must publish a notice of its extension by the start of the following business day.[150] Tier II would allow bidders to comply with their home jurisdiction's law or practice.[151]

After its offer expires, current U.S. tender offer rules require an offeror to pay for or return tendered securities. Payment standards vary between jurisdictions; under the T+3 settlement requirements, the normal settlement period in the United States is three days, while in the United Kingdom bidders must normally pay within fourteen calendar days.[152] Tier II would allow the bidder's home requirements to apply.[153]

U.S. tender offer rules require that a bidder's offer remain open for five days following the waiver of the minimum tender condition, providing investors with a reasonable opportunity to respond to this

146. 17 C.F.R. § 240.14d-10 (2000) (e.g., a bidder may not limit its tender offer to institutional shareholders or target management).

147. 17 C.F.R. § 240.14(d)-10(a)(2) (2000).

148. 17 C.F.R. §§ 240.13e-4(i)(2)(i), 13e-4(i)(2)(ii), 14d-1(d)(2)(i), 14d-1(d)(2)(ii) (2000); *see, e.g.*, In the matter of Incentive AB and Gambro AB, Exchange Act Release No. 36793 (Jan. 31, 1996).

149. 17 C.F.R. § 240.14e-1(a), (b) (2000).

150. 17 C.F.R. § 240.14e-1(d) (2000).

151. 17 C.F.R. §§ 240.13e-4(i)(2)(iii), 14d-1(d)(2)(iii) (2000); Cross-Border Release, *supra* note 1, at 82,545 n.39.

152. 17 C.F.R. § 240.15c6-1(a) (2000); CITY CODE, *supra* note 119, Rule 31.8, at M6.

153. 17 C.F.R. §§ 240.13e-4(i)(2)(iv), 14d-1(d)(2)(iv) (2000); Cross-Border Release, *supra* note 1, at 82,545 n.40.

material change.[154] While some might choose to withdraw their securities in response to a lower minimum condition, others may opt to tender. Under the U.K. City Code, a bidder that lowers the minimum condition for its offer must then keep the offer open for fourteen days, known as a "Subsequent Offering Period."[155] Bidders anticipate that sufficient tenders will come in during the Subsequent Offering Period to reach the ninety percent threshold required for a compulsory acquisition. The Commission permits a bidder in a tender offer to reserve the right to reduce the ninety percent condition by press release and advertisement in a U.S. newspaper five days before the reduction goes into effect. Bidders may, unless Rule 14e-1 requires an extension, reduce or waive the minimum acceptance condition without also extending withdrawal rights for the remaining duration of the offer under Tier II if a number of conditions are met:

> [1] The bidder must announce that it may reduce the minimum condition five business days prior to the time that it reduces the condition. A statement at the commencement of the offer . . . is insufficient;
>
> [2] The bidder must disseminate this announcement through a press release and other methods reasonably designed to inform U.S. security holders, which could include placing an advertisement in a newspaper of national circulation in the United States;
>
> [3] The press release must state the exact percentage to which the acceptance condition may be reduced and state that a reduction is possible. The bidder must declare its actual intentions once it is required to do so under the regulations of its home jurisdiction;
>
> [4] During this five-day period, security holders who have tendered their shares in the offer will have withdrawal rights;
>
> [5] This announcement must contain language advising security holders to withdraw their tenders immediately if their willingness to tender into the offer would be affected by a reduction of the minimum acceptance condition;
>
> [6] The procedure for reducing the minimum condition must be described in the offering document; and

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154. Interpretive Release Relating to Tender Offer Rules, Exchange Act Release No. 24,296, 52 Fed. Reg. 11,458 (Apr. 3, 1987).

155. CITY CODE, *supra* note 119, Rule 32.1, at M8–M9.

[7] The bidder must hold the offer open for acceptances for at least five business days after the revision or waiver of the minimum acceptance condition.[156]

C. *Other Tender Offer Rules*

Rule 14e-5 (former Rule 10b-13), which prohibits a bidder in a tender or exchange offer from purchasing the targeted security outside the offer, will now contain an exception for Tier I tender or exchange offers where less than ten percent of the subject securities are held by U.S. securities holders. U.S. security holders would otherwise be disadvantaged in certain situations, as bidders might decide to exclude U.S. security holders from the offer when Rule 10b-13 would preclude purchases outside the offer and the participation of U.S. security holders is not critical to the success of the offer. Purchases outside the tender or exchange offer that comply with the tender offer regulations of the home jurisdiction will be permitted in a Tier I tender offer, as long as the U.S. offering documentation prominently discloses the possibility of such purchases and the manner in which any information about such purchases will be disclosed and the bidder discloses to U.S. security holders information regarding the purchases in a manner comparable to disclosure made in the home jurisdiction.[157]

The Commission will not extend this exception to Tier II offers, because of their greater U.S. interest, but it will review requests for relief on a case-by-case basis.[158] In making such a review, the Commission will consider several factors:

[1] proportional ownership of U.S. security holders of the [target] security in relation to the total number of shares outstanding and to the public float;

[2] whether the offer will be for "any-and-all" shares or will involve prorationing;

[3] whether the offered consideration will be cash or securities;

[4] whether the offer will be subject to a foreign jurisdiction's laws, rules, or principles governing the conduct of tender

156. Cross-Border Release, *supra* note 1, at 82,545.

157. *See* 17 C.F.R. § 240.13e-4(i) (2000). *See generally* Paul, Weiss, Rifkind, Wharton & Garrison, *SEC Proposes New Rules for Cross-Border Tender Offers, Exchange Offers, Business Combination and Rights Offerings*, Mondaq Business Briefing (Nov. 27, 1998) *available at* http://www.mondaq.com.

158. Cross-Border Release, *supra* note 1, at 82,547.

offers that provide protections comparable to Rule [10b-13]; and

[5] whether the principle trading market for the target security is outside the United States.[159]

The Cross-Border Rules codify the class exception from Rule 10b-13 previously granted to "connected exempt market makers" and "connected exempt principal traders," as defined by the U.K. City Code.[160] The exemption applies to purchases or arrangements to purchase if they are "effected by a connected exempt market maker or a connected exempt principal trader"; "the issuer of the [target] security is a foreign private issuer"; "the tender offer is subject to the City Code"; and "the tender offer documents disclose the identity of the . . . market maker or . . . principal trader and . . . describe how U.S. security holders can obtain information regarding . . . purchases by such market maker or principal trader" outside the offer.[161] The SEC believes U.K. regulatory requirements and oversight are sufficient to minimize the risk posed by connected exempt market makers and connected exempt principal traders to U.S. security holders. Forcing such eligible traders to withdraw from trading in U.K. target securities would have threatened the liquidity of those securities.[162]

D. *Exemptions from the Securities Act for Exchange Offers, Business Combinations, and Rights Offerings*

The Cross-Border Rules also contain "exemptions from Securities Act registration requirements for securities issued to U.S. security holders of a foreign private issuer in exchange offer, business combinations, and rights offerings."[163] Rule 800 provides common definitions for both rules. Offerors may rely on these exemptions when U.S. securities holders hold of record ten percent or less of the subject class of securities, as U.S. participation is generally not necessary for the success of an offering below this level and offerors commonly exclude U.S. security holders.[164] Offerors made seventy-eight rights offerings to U.S. share-

159. *Id.*

160. "[C]onnected exempt market makers and connected exempt principal traders are market makers or principal traders that are affiliated with the bidder's advisors (Eligible Traders)." *Id.* n.47.

161. Cross-Border Release, *supra* note 1, at 82,547.

162. Cross-Border Release, *supra* note 1, at 82,547 n.48.

163. *Id.* at 82,548.

164. The Commission notes that U.S. holders are included in a significant number of transactions where U.S. ownership exceeds 10 percent (31 of 54 requests for exemptive relief between 1990 and 1998). *Id.* n.53.

holders holding American or Global depositary receipts held by the Bank of New York between 1994 and 1998, but excluded U.S. shareholders entirely in thirty of the offerings (39%). The Bank of New York sold the rights and provided shareholders with cash, after costs, in the remaining forty-eight (61%).[165]

Securities Act exemptive Rule 801 exempts securities issued in certain rights offerings by foreign private issuers[166] and is only available for rights offerings of equity securities[167] made on a pro rata basis to existing security holders of the same class, including holders of ADRs. Foreign companies typically make rights offerings only with respect to outstanding equity securities of the same class and Rule 801 is similarly limited to the offer of securities of the same class as those held by offerees. The rights granted to U.S. security holders must not be transferable except offshore in accordance with Regulation S.[168]

Securities Act exemptive Rule 802 exempts securities issued in exchange offers by U.S. or foreign offerors for foreign private issuers' securities. Securities issued in certain business combinations involving foreign private issuers may also be exempt. If a second bidder commences a tender offer or a business combination during an ongoing offer or combination subject to Rule 802 for the same class of securities, the second bidder may also use Rule 802 if all the conditions other than the limitation of U.S. ownership are satisfied.

The securities acquired in a Rule 801 or 802 transaction will have the same restricted characteristics as the securities originally subject to the rule, i.e., restricted securities under Rule 144 held by a U.S. investor will yield restricted securities, and unrestricted securities will yield

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165. Letter from Peter B. Tisne, Emmet, Marvin & Marvin, to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission (Feb. 17, 1999) *at* http://www.sec.gov/rules/proposed/s72998/tisne1.txt. Costs include transaction fees, ADR cash distribution or issuance fees, and potential liquidity costs if the foreign market is small. Cross-Border Release, *supra* note 1, at 82,548 n.54.

166. *Id.* at 82,549–50.

167. Equity security means the same as in § 240.3a11-1 . . . , but for purposes of this section only does not include:

(1) Any debt security that is convertible into an equity security, with or without consideration;

(2) Any debt security that includes a warrant or right to subscribe to or purchase an equity security;

(3) Any such warrant or right; or

(4) Any put, call, straddle, or other option or privilege that gives the holder the option of buying or selling a security but does not require the holder to do so.

Id. at 82,564.

168. 17 C.F.R. §§ 230.901–905 (2000).

unrestricted securities.[169] Unrestricted securities are freely tradable by non-affiliate security holders, as long as they do not participate in the offer under circumstances under which they could be deemed statutory underwriters. Neither Rule 801 nor 802 imposes a dollar limitation on the value of securities sold to U.S. investors in an exempt transaction.[170] The rules do not impose specific informational requirements; rather, "when any document, notice or other information is provided to offerees, copies (translated into English) must be provided to U.S. security holders in a similar manner," must contain a "legend regarding the foreign nature of the transaction and the issuer's disclosure practices," and must "state that investors may have difficulty in enforcing rights against the issuer and its officers and directors."[171] The offeror must provide the notice or offering document to U.S. security holders at the same time it provides the information to offshore offerees. An offeror must submit a notification to the Commission on Form CB and a foreign company must simultaneously file a Form F-X to appoint an agent for service of process in the United States.

Both Rules 801 and 802 are available for securities issued by closed-end investment companies that are registered under the Investment Company Act,[172] which the Commission views as consistent with its previous decision to permit closed-end investment companies to rely on the Regulation S safe harbor to issue unregistered securities abroad.[173]

E. *Internet Disclosure*

An offeror conducting a tender or exchange offer may post materials on a Web site, as long as the offeror prominently discloses that the offer is made to persons in countries other than the United States and implements precautionary measures that are reasonably designed to guard against sales to persons in the United States or to U.S. persons in an offshore Internet offer.[174] The SEC foresees particular danger with the

169. *See* 17 C.F.R. § 230.800–802, General Notes, n.8 (2000).

170. Cross-Border Release, *supra* note 1, at 82,550.

171. *Id.*

172. The proposed rules would not have allowed securities issued by investment companies to gain exemption because the Investment Company act generally prohibits foreign investment companies from publicly offering their securities in the U.S. or to U.S. persons, and domestic investment companies generally must register the securities they offer or sell outside the United States. Proposing Release, *supra* note 5, at 69151 n.126 (Dec. 15, 1998).

173. Cross-Border Release, *supra* note 1, at 82,551 n.67; *see* Offshore Offers and Sales, Securities Act Release No. 6863, 55 Fed. Reg. 18,306, 18,320–21 (Apr. 24, 1990).

174. *See* Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore, Securities Act Release No. 7516, 63 Fed. Reg. 14,806 (March 27, 1998).

use of Web sites to publish materials relating to tender and exchange offers and rights offerings by offerors, subject companies, or third parties, as U.S. holders will have a greater incentive to find indirect means to participate in the offer.[175] The Cross-Border Release advises offerors to prevent sales to U.S. holders by determining whether holders are persons in the United States or U.S. persons and to avoid material in a Web site designed to induce U.S. investors to find an indirect means to participate in the offer, e.g., through offshore nominees.[176] If a simultaneous private offering in the United States accompanies an offshore Internet offering, the offeror must take particular care to prevent the use of the Internet offering as a general solicitation to find qualified private investors. An offeror conducting an offshore exchange offer or rights offering on the Internet must institute means to provide reasonable assurance that its Web site will not be used to solicit U.S. investors for the private U.S. offering.[177]

F. *U.S. Security Holder Status*

Relief under both Tier I and II exemptions and the availability of the Rules 801 and 802 Securities Act exemptions for cross-border rights offerings and exchange offers depend on the percentage of the target company's securities held by U.S. holders not exceeding a certain threshold.[178] A company claiming "foreign private issuer" status must

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175. *See* Cross-Border Release, *supra* note 1, at 82,556.

176. *Id.*

177. These measures include:

> not placing U.S. investors that respond to the offshore Internet offering in the U.S. private offering;
>
> extending the U.S. offer only to U.S. investors who were solicited before, or independently from, the posting of offering materials on the Internet;
>
> using separate contact persons for the Internet solicitation from that for the U.S. offering; and
>
> not referring to the private U.S. offering in the Web site materials, except to the extent mandated by foreign law.

Id. at 82,556–57.

178. To determine the percentage of outstanding securities held by U.S. holders:

(1) Calculate percentage of outstanding securities held by U.S. holders as of the record date for a rights offering, or 30 days before the commencement of an exchange offer or the solicitation for a business combination.

(2) Include securities underlying American Depositary Shares convertible or exchangeable into the securities that are the subject of the tender offer when calculating the number of subject securities outstanding, as well as the number held by U.S. holders. Exclude from the calculations other types of securities that are convertible or exchangeable into the securities that are the subject of the tender offer, such as warrants, options and con-

now look through certain bank, broker-dealer, and other nominees to determine the residence of the nominee's client accounts.[179] The standard for determining the amount of securities held by U.S. holders is a modification of Rule 12g3-2(a) of the Exchange Act.[180] The Commission requires issuers to "'look through' the record ownership of broker, dealers, banks, or nominees appearing on the issuer's books or those of the transfer agents, depositaries, or others acting on the issuer's behalf," but only to the extent the securities are "held of record (1) in the United States, (2) in the issuer's home jurisdiction, and (3) in the primary trading market for the issuer's securities if different from the issuer's home jurisdiction."[181] This standard requires issuers to ask nominees to provide the aggregate amount of the nominee's holdings that are represented by U.S. accounts, rather than the number of U.S. holders or their names.[182] If an issuer is unable to obtain information about a nominee's customer accounts after "reasonable inquiry," the issuer may "rely on a presumption that the customer accounts are held in the nominee's principal place of business."[183]

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vertible securities. Exclude from those calculations securities held by persons who hold more than 10 percent of the subject securities, or that are held by the offeror in an exchange offer or business combination;

(3) Use the method of calculating record ownership in Rule 12g3-2(a) under the Exchange Act (§ 240.12g3-2(a) of this chapter), except that your inquiry as to the amount of securities represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in the United States, the subject company's jurisdiction of incorporation or that of each participant in a business combination, and the jurisdiction that is the primary trading market for the subject securities, if different from the subject company's jurisdiction of incorporation;

(4) If, after reasonable inquiry, you are unable to obtain information about the amount of securities represented by accounts of customers resident in the United States, you may assume, for purposes of this provision, that the customers are residents of the jurisdiction in which the nominee has its principal place of business.

(5) Count securities as owned by U.S. holders when publicly filed reports of beneficial ownership or information that is otherwise provided to you indicates that the securities are held by U.S. residents.

Id. at 82,564–65.

179. International Disclosure Standards, Exchange Act Release No. 41,936, 64 Fed. Reg. 53,900 (Oct. 5, 1999).

180. 17 C.F.R. § 240.12g3-2(a) (2000) (based on Rule 12g5-1 defining "securities held of record").

181. Cross-Border Release, *supra* note 1, at 82,552.

182. *Id.*

183. *Id.*

The percentage of U.S. holders is determined at the commencement[184] of a tender offer, rights offering, or exchange offer. For a business combination such as a merger, where the acquiring company issues securities, the calculation is based on U.S. ownership of the target company at the commencement of the solicitation of the merger.[185] For a combination such as an amalgamation, where a successor company issues the securities to all participating companies, the calculation is made as if immediately following completion of the combination. All participants in an amalgamation must be foreign private issuers.[186]

As it is difficult for third-party offerors to determine eligibility for an exemption without information on the foreign subject company's[187] U.S. ownership,[188] a third-party bidder in an unsolicited or "hostile" tender offer may rely upon a presumption that the Tier I, Tier II, and Rule 802 U.S. ownership percentage limitations are not exceeded unless:

(1) the aggregate trading volume of the subject class of securities on all national securities exchanges in the United States, on the NASDAQ market or on the OTC market, as reported to the NASD, over the 12-calendar-month period ending 30 days before commencement of the offer, exceeds ten percent in the case of Tier I offers and Rule 802, and 40 percent in the case of Tier II offers, of the worldwide aggregate trading volume of that class of securities over the same period;

(2) the most recent annual report or other informational form filed or submitted by the issuer or security holders to securities regulators in its home jurisdiction or elsewhere (including with the Commission) indicates that U.S. holdings exceed the applicable threshold; or

184. The term "commencement" means the same as in 17 C.F.R. § 240.14d-2(a) (2000).

185. Large U.S. holders are excluded from the calculation of U.S. ownership, as they do not need the protections of the securities laws and may easily go abroad to participate in the transaction or participate on a private transaction basis. *See* Cross-Border Release, *supra* note 1, at 82,553–54.

186. Cross-Border Release, *supra* note 1,at 82,553.

187. The bidder may presume the foreign subject company is a foreign private issuer if the subject "files reports with the Commission under the foreign integrated disclosure system or has claimed an exemption from reporting under Exchange Act Rule 12g3-2(b), unless the bidder knows the . . . company is not a foreign private issuer." Cross-Border Release, *supra* note 1, at 82,554.

188. This is not a concern if the offer follows a competing tender offer or business combination eligible for the exemption, since a second bidder may rely on the first bidder's exemption as long as all the other conditions are satisfied. *Id.* n.79.

(3) the bidder knows or has reason to know from other sources that the level of U.S. ownership of the subject class exceeds the thresholds.[189]

IV. A Normative Look at the U.S. Regulation of Cross-Border Offers

A. *The Cross-Border Rules Within the Regulatory Competition Paradigm*

Regulators must strike a delicate balance when formulating rules governing tender offers to maintain the liquidity of U.S. markets. They face a Hobson's Choice: weak regulation increases the risk, and strong regulation the cost, of investing, so that in either case high-quality companies and investors will shift their capital towards safer, or cheaper, markets to the extent possible.[190] Internationalization may create an environment of regulatory competition among nations, though it need not be a "race to the bottom."[191] Investors will likely bargain around the rules[192] by discounting the price of securities in markets they believe pose greater risks of fraud, manipulation, unfairness, or general uncertainty regarding the trustworthiness of financial information.[193] An alternative policy of harmonization could be a more efficient way to reduce the costs and risks of international finance. The SEC would defer to the standards of another jurisdiction (reciprocity) or would work with regulators in other jurisdictions to produce a substantially uniform standard (commonality).[194] Some question whether investors would be able to deal with multiple standards in a single market and whether recognition of foreign-based standards would raise serious administrative and enforcement issues, potentially weakening the SEC's political force.[195]

Many scholars advocate the availability of multiple standards for disclosure in the United States. Professors Merritt Fox and Roberta

189. *Id.* at 82,554. The presumption does not apply to offers "made pursuant to an agreement" with the issuer. 17 C.F.R. §§ 230.802(c)(1) (2000); 17 C.F.R. 240.14d-1(c)–(d), Instruction 3(i) (2000); Cross-Border Release, *supra* note 1, at 82,554 n.80.

190. Joel Seligman, *Another* Unspecial *Study: The SEC's* Market 2000 *Report and Competitive Developments in the United States Capital Markets*, 50 Bus. Law. 485, 495 (1995).

191. Cox, *supra* note 18, at 1201; *cf.* Cary, *supra* note 20.

192. *See generally*, Ronald Coase, The Firm, the Market & the Law (1988).

193. *See* Cox, *supra* note 18, at 1200, 1221 (arguing that investors might accept a lower return for owning shares with financial statements reconciled to U.S. GAAP than if less information were disclosed).

194. *See* Geiger, *supra* note 16, at 271.

195. Cox, *supra* note 18, at 1229.

Romano argue for the state or nation of the issuer's domicile to determine disclosure standards.[196] On one end of the spectrum, Professors Stephen Choi and Andrew Guzman set forth a radical system of "portable reciprocity," whereby issuers may select any regulatory system's disclosure requirements.[197] On the other, Professor Paul Mahoney believes that the exchange that lists a security should regulate the issuer's disclosure. This note will consider to what extent the debate regarding multiple disclosure standards is relevant to the regulation of cross-border tender offers.

B. *Commentary on the Cross-Border Rules*

When the Cross-Border Rules were in their proposal stage, the SEC sought public comment on procedural and substantive elements. Commentators generally supported the implementation of the exemptive relief provided by the Rules, but proposed a number of refinements, many of which were reflected in the final Rules. Professor Roberta Karmel described the Rules in their proposal form as

> reluctant and incremental . . . . Although the SEC claims a preeminent role in raising global disclosure standards, it appears to be far more interested in preserving its jurisdiction over U.S. issuers and markets than in fostering globalization or recognizing any merit in foreign regulatory systems. Instead of attempting to harmonize its regulations with foreign regulations, or engaging in the line drawing that selective mutual recognition would entail, the SEC simply creates exemptions from its regulations when confronted with the reality that its efforts to protect investors are contrary to their interests and desires.[198]

Goldman, Sachs noted that it often experiences the reluctance of bidders to subject cross-border tender offers to U.S. regulation and believes that the adoption of the exemptive relief would encourage non-U.S. companies to arrange for participation in more cross-border transactions.[199] Of lingering concern, however, was the liability that custodians and intermediaries face in their dealings with foreign private issuers in cross-border transactions. Goldman, Sachs believes that the

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196. *See* Fox, *supra* note 14, at 2582; Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2408–10 (1998).

197. Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903 (1998).

198. Karmel, *supra* note 25, at 3.

199. Letter from Michael L. Crowl et al., Goldman, Sachs & Co., to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission *at* http://www.sec.gov/rules/proposed/s72998/goldman1.htm (Feb. 25, 1999)[hereinafter Goldman, Sachs Letter].

SEC should raise the U.S. ownership ceiling for tender offers to twenty percent, in line with the percentage of U.S. ownership of an issuer's debt securities that qualifies as "substantial U.S. market interest" under Regulation S.[200] The bank supports the SEC's exclusion of U.S. holders of more than ten percent of the subject class of securities from the calculation of the percentage of the class held by U.S. holders, since such holders are likely sufficiently sophisticated and familiar with the issuer not to require protection from the U.S. securities laws. Ragen, MacKenzie similarly supports the exclusion of large holders such as mutual funds from the calculation. If the combined total of retail and institutional holders exceeds the threshold, the institutions will be able to participate through their offshore offices, while retail investors will continue to be excluded.[201] Goldman, Sachs believes that the Commission should additionally exempt transactions where the number of U.S. holders is small (e.g., no more than 300), regardless of the percentage of shares held by U.S. holders. A special ABA committee advocated raising the threshold for the Tier I, Rule 801, and Rule 802 exemptions to fifteen percent, but without excluding large non-U.S. holders from the calculation of ownership by U.S. persons.[202]

The SEC notes in the Cross-Border Release that the omission of the information called for by U.S. forms in the context of foreign disclosure requirements and practices would not necessarily violate U.S. disclosure requirements. The Commission or investors could bring an anti-fraud action "if the omitted information is material in the context of the transaction and the disclosure provided is misleading as a result of the omission . . . ."[203] Goldman, Sachs supports the continued application of the general anti-fraud provisions of the Exchange Act to cross-border offers but believes that the SEC should clarify that neither a Rule 801 rights offering nor a Rule 802 exchange offer would be a "public offering" per § 12(a)(2) of the Securities Act[204] and that neither would subject an issuer to potential liability or enforcement proceedings under § 17(a)(2) of the Securities Act.[205] The ABA committee encouraged the Commission to note that U.S. courts, in considering the extraterritorial

200. *See id.*; *see also* 17 C.F.R. § 230.902(j) (2000).

201. *See* Ragen MacKenzie Letter, *supra* note 6.

202. Letter from John M. Liftin et al., Chairman of the Committee on Federal Regulation of Securities of the American Bar Association, to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission *at* http://www.sec.gov/rules/proposed/s72998/liftin1.htm (Mar. 2, 1999) [hereinafter ABA Letter].

203. Cross-Border Release, *supra* note 1, at 82,540.

204. *See* Gustafson v. Alloyd Co., 513 U.S. 561 (1995).

205. *See* Goldman, Sachs Letter, *supra* note 198.

application of U.S. securities laws, have been mindful of principles of comity.[206]

In response to concern that foreign offerors would continue to exclude U.S. holders absent a cash-only alternative in Tier I offers,[207] the SEC amended the Cross-Border Rules to allow such offers without violating the equal treatment requirements.[208] This condition is satisfied if the bidder has a reasonable basis to believe that the cash is substantially equivalent to the value of the securities and any cash or other consideration offered to non-U.S. holders. The ABA objected to the SEC's requirement of a valuation opinion, arguing that the need to obtain formal legal and financial opinions about the equivalence of the amount of consideration is likely to be prohibitively expensive.[209] The SEC dismissed this objection, arguing that an issuer "seeking to use this exemption to avoid issuing securities to U.S. holders would not find the valuation requirement excessively burdensome" and that the opinion "would provide reasonable reassurance that U.S. security holders [would] receiv[e] equivalent value to that offered to non-U.S. holders."[210]

Based on transactions filed with the Commission, relatively few offers for the securities of foreign issuers will be ineligible for the Tier I exemption. The Commission therefore considered omitting the Tier II exemption entirely in favor of case-by-case relief, but commentators supported its inclusion in the Cross-Border Rules.[211] The ABA cited the value of a clear standard that is known in advance and permits easy identification of offers that may need additional no-action or exemptive relief.[212] Based on the similarity of U.S. and U.K. disclosure standards, Goldman, Sachs believes the SEC should allow a U.K. tender offer under the City Code to proceed under Tier II on the basis of U.K. disclosure documents.[213]

The SEC adopted exemptions to new Rule 14e-5 for Tier I offers to permit "connected exempt market makers" and "connected exempt principal traders," as defined by the City Code, to continue their U.K. market making activities during cross-border offers that are subject to the City Code. The exemption for transactions subject to the City Code demonstrates the SEC's willingness to recognize the substantial

206. ABA Letter, *supra* note 201.
207. *Id.*
208. *See* Cross-Border Release, *supra* note 1, at 82,543.
209. ABA Letter, *supra* note 201.
210. *See* Cross-Border Release, *supra* note 1, at 82,543.
211. *See* Cross-Border Release, *supra* note 1, at 82,547.
212. ABA Letter, *supra* note 201.
213. Goldman, Sachs Letter, *supra* note 1.

protection to investors provided by regulatory oversight in the United Kingdom[214] and was enthusiastically supported by commentators.[215] Goldman, Sachs argued that the application of Rule 14e-5 to U.K. trading activities significantly disrupts normal market practice by inhibiting an offeror's ability to make open market purchases and by precluding market making activities by affiliates of the offeror's financial advisor.[216] The SEC rejected the suggestion of Goldman, Sachs to extend this relief to all Tier II offers, however, citing the greater U.S. interest in those offers.

V. An Alternative Tender Offer Regulatory Model: The German Takeover Code

As commercial banks are major shareholders of the most significant German public companies, equity capital plays a much smaller (but growing) role in Germany than in the United States.[217] German law gives controlling shareholders formidable discretionary powers, in contrast with the dispersed power common in the United States.[218] Share ownership among German adults is estimated at only 13%.[219] German bank borrowing is more than twice that of the United States, while stock market capitalization is four times higher in the United States than the capitalization of all the stock exchanges of the euro area.[220] Market capitalization in terms of gross domestic product is approximately 55% in Germany, but well over 100% in the United States and the United Kingdom.[221] Blue chip stocks have traditionally dominated the Frankfurt Stock Exchange; DAX companies account for 80% of trading volumes, and Deutsche Telekom alone represents 19% of the German equity market.[222] However, Germany experienced a retail equity revolution in 1996 with Deutsche Telekom's historic privatization, which began to replace popular suspicion of share ownership with a shareholding cul-

214. *See* Cross-Border Rules, *supra* note 1, at 82,547.
215. Goldman, Sachs Letter, *supra* note 198.
216. *Id.*
217. *See* Karmel, *supra* note 77, at 1140.
218. *See* Coffee, *supra* note 55, at 643.
219. *Frankfurt's Deutsche Börse Emerges as a Global Player*, FINANCIAL NEWS, Aug. 23, 1999 (ownership is up from 9% in 1997).
220. *The Case for Capital Markets*, EUROPEAN BANKER, Nov. 23, 1999, at 15.
221. FINANCIAL NEWS, *supra* note 219.
222. *Unfortunate Few Caught in the Steps of Giants: Small Countries and Fund Managers Are Being Left Behind by the Super Companies Dominating European Bourses*, FINANCIAL TIMES, Feb. 17, 2000, at 37.

ture.[223] Equities turnover at the Frankfurt Stock Exchange increased from € 1 trillion ($1.06 trillion) in 1996 to € 2.25 trillion in 1998.[224]

The most important securities laws in Germany are the Securities Trading Act,[225] the Sales Prospectus Act,[226] and the Stock Exchange Act.[227] The Federal Securities Supervisory Office (*Bundesaufsichtsamt für den Wertpapierhandel*, or *BAWe*) supervises all public offers of unlisted securities only. The German stock exchanges (*Wertpapierbörsen*), most notably the Frankfurt Stock Exchange (*Frankfurter Wertpapierbörse*), regulate the public offering of listed securities. The markets are divided into a primary segment known as the Official Market (*amtlicher Handel*), a segment for smaller companies known as the Regulated Market (*geregelter Markt*), and a broker-dealer segment known as the Free Market (*Freiverkehr*). Each segment imposes different disclosure requirements.[228] Listed corporations must disclose or publish their annual financial statements, and those listed on the Official Market must also publish or agree to furnish on demand a report semi-annually. These issuers must announce significant shifts in voting rights; the thresholds considered significant are 5, 10, 25, 50, and 75%.[229] Furthermore, issuers whose securities are listed on the Official or Regulated Markets must disclose any information that may be material to their share prices.[230]

The German Federal Ministry of Finance appoints the Exchange Expert Commission (*Börsensachverständigenkommission*) to advise the government regarding capital markets and exchanges. The Exchange Expert Commission is composed of representatives of the exchanges, the credit sector, industry, the insurance sector, investors, the German central bank (*Deutsche Bundesbank*), federal states with authority over

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223. *See* FINANCIAL NEWS, *supra* note 219.

224. *Id.*

225. *Gesetz über den Wertpapierhandel* (Securities Trading Act) (WpHG), v. 26.7.1994 (BGBl. I S.1749), BGBl. III 4110–14.

226. Wertpapier-Verkaufsprospektgesetz (VerkProspG) (Sales Prospectus Act) v. 17.7.1996 (BGBl. I S.1047), together with *Verordnung über Wertpapierverkaufsprospekte* (VerkProspVO) (Sales Prospectus Regulation) BGBl. III 4110-3-1.

227. *Börsengesetz* (BörsG) (Stock Exchange Act) v. 17.7.1996, BGBl. III 4110-1, together with *Verordung über die Zulassung von Wertpapieren zur amtlichen Notierung an einer Wertpapierbörse* (BörsZulVO) (Stock Exchange Admission Regulation) v. 17.7.1996 (BGBl. I S.1052), BGBl. III 4110-1-1. For a detailed summary of German securities regulation, see Mark I. Steinberg & Lee E. Michaels, *Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity*, 20 MICH. J. INT'L L. 207, 221–24 (1999).

228. Steinberg, *supra* note 227, at 222.

229. Steinberg, *supra* note 227, at 224 (citing Securities Trading Act, *supra* note 225, § 21).

230. *Id.* at 224 (citing Securities Trading Act, *supra* note 225, § 15).

exchanges, and academia. The Exchange Expert Commission in turn appoints members of the Takeover Commission,[231] which supervises public tender offers and exercises the authority to provide binding interpretations of (and grant exemptions from) the provisions of the Takeover Code (*Übernahmekodex*).[232] The Takeover Commission's Executive Office reviews public tender offers within two weeks of publication to determine the participants' compliance with the Takeover Code[233] and may exempt the offeror[234] or the target company in part or in whole from individual provisions if the application would harm the legitimate interests of the offeror, the target company, or its security holders.[235]

The "Guidelines for Public Voluntary Purchase and Exchange Tender Offers, as well as Invitations to Issue Such Offers, for Shares or Rights Traded on the Official Market or the Regulated Free Market" laid the Code's foundation in the late 1970s.[236] Though public tender offers were legally possible, they were essentially unknown. The Exchange Expert Commission sought to formulate rules ensuring the equal treatment of (and the provision of equal information to) the target's shareholders and the orderly and fair execution of takeover offer proceedings. The Guidelines recommended that credit institutions facilitate takeover proceedings, which would establish contact with shareholders and function as clearing and exchange agents. It became clear, however, that the Guidelines suffered from incompleteness and a lack of transparency.[237] The Exchange Expert Commission prepared the Code in 1995 to recommend rules of conduct for parties involved in voluntary public tender offers, to prevent market manipulation, and to ensure that principles of good faith govern all transactions.[238] The Takeover Code is

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231. The Takeover Commission is an independent, autonomous institution with final decision-making authority, and consists of between seven and fifteen members, each of whom serves a renewable five-year term. Explanatory Memorandum of the Takeover Commission of July 1996 Concerning the Takeover Code, art. 20, at 15, *at* http://www.kodex.de (last visited February 15, 2001) [hereinafter Explanatory Memorandum].

232. *Id.* at 3.

233. *Id.* art. 22, at 16.

234. Within the meaning of the Takeover Code, an offeror is any natural or legal person having its seat in Germany or abroad that, either alone or together with other persons, makes a public tender offer. *See id.* at 2.

235. *Id.* art. 23, at 16.

236. STEPHAN SCHUSTER & CHRISTIAN ZSCHOCKE, TAKEOVER LAW 47 (Bilingual ed. 1996) (Leitsätze für öffentliche freiwillige Kauf- und Umtauschangebote bzw. Aufforderungen zur Abgabe derartige Angebote in amtlich notierten oder im geregelten Freiverkehr gehandelten Aktien bzw. Erwerbsrechten).

237. *Id.* at 47–48.

238. *See* Explanatory Memorandum, *supra* note 231, at 1. The Takeover Code entered into force on October 1, 1995. *Id.* art. 24, at 17. The Code was amended on January 1, 1998. *See* Explanatory Remarks on the Amendments to the Takeover Code Effective as of January

modeled on the "internationally recognized Anglo-Saxon model of the City Code."[239]

The Takeover Code applies to all public tender offers that fall outside the purview of the German corporation law provisions regarding minority shareholders, e.g., those concerning the conclusion of control and profit transfer agreements.[240] It primarily addresses offers for the voting rights of the target, which are typically common shares, but also includes ADRs and the conversion rights of convertible bonds.[241] For a tender offer to be subject to the Takeover Code, a target company must have its registered office in Germany, and its shares must be registered on a German exchange or over-the-counter market. Foreign target companies are therefore exempt.[242] The Exchange Expert Commission requests that potential offerors, target companies, and investment services enterprises accede to the provisions of the Takeover Code,[243] assuming voluntary self-regulation provides a more flexible structure than rigid law. The Takeover Commission may comment on offers that fail to comply with the Code, even if the participating parties have not submitted accession declarations.[244] The Exchange Expert Commission may adapt the Takeover Code to reflect developments in the capital markets.[245] The Commission has developed a special accession declaration for investment services enterprises, in addition to the standard declaration.[246]

The Takeover Code requires offerors to treat all holders of the same class of security equally[247] and imposes a duty on parties in a transaction to provide security holders of the target company with sufficient information to make an appropriate and timely decision regarding the merits of the offer. The target company is required to provide the same information to any third parties demonstrating a serious interest.[248] The offeror and the target company must avoid causing market distortions by refraining from making statements or other acts that could cause unusual price movements. In particular, all participants must remain silent

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1, 1998, *at* http://www.kodex.de (last visited February 15, 2001) [hereinafter Explanatory Remarks].

239. SCHUSTER & ZSCHOCKE, *supra* note 236, at 53.
240. Explanatory Memorandum, *supra* note 231, at 2.
241. *Id.* at 2–3.
242. *Id.* at 2; *cf.* Cross-Border Release, *supra* note 1.
243. *See* Explanatory Memorandum, *supra* note 231, art. 21, at 16.
244. SCHUSTER & ZSCHOCKE, *supra* note 236, at 65.
245. Explanatory Memorandum, *supra* note 231, at 1.
246. SCHUSTER & ZSCHOCKE, *supra* note 236, at 63.
247. Explanatory Memorandum, *supra* note 231, art. 1, at 4.
248. *Id.* art. 2, at 4.

before the public announcement of a takeover offer.[249] The Takeover Code explicitly notes a preference for "friendly" offers by recommending discussions between the offeror and the target company.[250]

Before making a tender offer, the offeror must notify the domestic exchanges that list the target securities and any securities offered in exchange, the BAWe, and the Takeover Commission of the terms of the tender offer and must then publish the offer in a national newspaper.[251] The offeror must hire a European Union investment services enterprise[252] that possesses expertise in European capital markets, advises compliance with the Takeover Code, assists the offeror in interpreting the Takeover Code, and is able to execute its technical legal procedures.[253]

The Takeover Code requires an offeror to disclose all facts and intentions necessary for the holders of the target company's securities to evaluate the offer.[254] An offeror must prepare any publication directed to

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249. *Id.* art. 3, at 5.

250. *Id.* art. 4, at 5–6.

251. *Id.* art. 5, at 6.

252. While this role was once restricted to banks, the European Union Financial Services Directive required the Takeover Code to expand the definition to include enterprises licensed to provide investment services. *Id.* art. 6, at 6.

253. *Id.*

254. This includes the following information:

(1) Firm name or personal name of the offeror and of any facilitating enterprise, pursuant to Article 6 of the Takeover Code;

(2) Firm name of the target company;

(3) The securities that are the subject of the tender offer;

(4) The highest and/or the lowest number of securities that the offeror commits to purchase as well as explanations concerning the allocation procedure pursuant to Article 10;

(5) Information regarding both the purchase price and other consideration and the settlement of the tender offer;

(6) Information regarding the principal factors that were decisive in determining the consideration;

(7) An indication whether the tender offer will be deemed accepted upon a declaration of acceptance by the shareholder of the target company or whether the shareholders of the target company are merely invited to offer securities of the target company to the offeror;

(8) Information regarding the number of securities of the target company purchased by the offeror prior to the tender offer, and the time of such purchase(s), as well as information regarding agreements to purchase such securities that have been concluded but not yet performed;

(9) If applicable, information regarding the target company's direct and indirect holdings in the offeror (if known);

(10) Comment by the target company, if any;

(11) Offer period;

holders of the target company's securities with the highest standards of care and accuracy, which refers to the diligence of a prudent businessman (*ordenlicher Kaufmann*). This requirement seeks to ensure that the published information is comprehensive, accurate, and generally understandable.[255]

An offeror may not make its tender offer contingent on conditions within its discretion, a circumstance that would jeopardize a fair takeover process and a serious evaluation and valuation of the offer by the target company and the holders of its securities. Similar to Rule 13 of the City Code, under the Takeover Code an offeror may condition its offer on acquiring a minimum percentage of securities of the target or adopting the necessary resolutions for entering the offeror in the share register for shares with registered transfer.[256] If the holders tender more securities than the offeror committed to purchase, the offeror must purchase the securities on a pro rata basis according to the amount each holder agreed to sell. An offeror can also offer to purchase a portion of the share capital of the target, in which case the offeror is not obligated to purchase more securities.[257] A tender offer must remain open for at least twenty-eight, but no more than sixty calendar days, to ensure the holders have a reasonable time to examine the terms of the offer.[258]

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(12) Conditions of the tender offer, if any, and reservation by the offeror of the right to withdraw the tender offer, if any;

(13) Information regarding the objectives and intentions which the offeror seeks to accomplish through the tender offer with respect to the target company, as well as the possible consequences of a successful tender offer, in particular with respect to the financial position of the offeror and the target company;

(14) An indication that the holders of securities of the target company can withdraw their declaration of acceptance of the tender offer pursuant to the terms of Article 14;

(15) An indication of [when] the results of the tender offer will be made public;

(16) Information regarding the status of antitrust clearance procedures, if applicable;

(17) Reference to any exemption from provisions of [the Takeover] Code which may have been granted by the Takeover Commission; [and]

(18) the commitment of the offeror to comply with the provisions of [the Takeover] Code.

Id. art. 7, at 6–7.

255. *Id.* art. 8, at 8.

256. *Id.* art. 9, at 8. An issuer should consult the Executive Office regarding specific conditions. *Id.*

257. *Id.* art. 10, at 8–9. The tender offer must explain the allocation procedure. *Id.*

258. *Id.* art. 11, at 9.

If an offeror, or someone on the offeror's behalf, engages in any transactions[259] involving the target company's securities after it publishes its tender offer, the offeror must notify the Executive Office no later than the next business day and must announce the transactions publicly. This requirement originates with any prior public notice of such an offer.[260] An offeror may purchase target company securities from third parties during the offer period outside the scope of the tender offer but must offer more favorable conditions to all holders of securities of the same class, including those who have already tendered their securities. More favorable conditions include advantages such as unconditional or unlimited purchases of securities when the public tender offer is subject to conditions or a limited quota, in addition to a higher price.[261] If an offeror improves the terms of its offer during the offer period (e.g., if a third party makes a more competitive bid), the offeror may extend the initial offer period by a period negotiable with the Takeover Commission but must then provide equal treatment to holders who have already tendered their securities. The holders who have already tendered may withdraw from the first offer to accept the more favorable second offer.[262] If the offeror extends a more favorable voluntary tender offer following its initial offer, and no third party has extended a competing offer, the offeror must grant a subsequent improvement to holders who tendered in the initial offer. This requirement applies to a period determined by the offeror in its offer but may not be less than twelve months.[263] If a third party makes a more favorable public tender offer within the period, the initial offeror may submit a competing offer but is not obligated to extend the improved offer to holders who have already tendered.[264]

The Takeover Code requires anyone who obtains control over a target company to extend immediately a tender offer for the remaining securities of a target company to all other holders in certain circumstances, known as a mandatory offer.[265] Anyone who (1) controls a

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259. This includes exchange offers within the meaning of § 2(1) of the Securities Trading Act and the purchase of option rights in the securities of the target company. *Id.* art. 12, at 9.

260. *Id.*

261. *Id.* art. 13, at 10.

262. *Id.* art. 14, at 10.

263. *Id.* art. 15, at 10–11 (bringing the Takeover Code closer in line with the six-month time limit for subsequent improvements in Great Britain).

264. *Id.*

265. The 1998 amendment to the Takeover Code replaced the original majority shareholder standard with a more inclusive controlling shareholder standard. Furthermore, a mandatory offer must now be extended immediately, rather than within 21 months. Explanatory Remarks, *supra* note 238, at 2.

majority of the target company's voting rights;[266] (2) is entitled to exercise the majority of voting rights alone or jointly, based on an agreement with other holders; (3) has the right to appoint or remove the members of the administrative, managing, or supervisory body of the target company; or (4) reaches a share of voting rights that would have constituted a percentage of voting rights equal to at least three-quarters of the share capital present and entitled to vote for the first resolution passed at each of the three preceding target company shareholder meetings, has obtained control.[267]

If a holder obtains control of a company with its corporate seat in Germany or abroad and thereby obtains remote control over another company with a registered seat in Germany and whose securities are admitted for trading on a German exchange, the holder need not make a mandatory offer to the minority shareholders of the remotely acquired company, unless the main purpose of the transaction was to obtain control of the remote company. Furthermore, the mandatory offer requirement does not apply if the controlling holder obtains control temporarily (to place the securities with third parties) or unintentionally (and immediately relinquishes it) or if the controlling holder and the target company intend to approve specified corporate resolutions within eighteen months after the holder obtains control.[268] If the resolutions are not passed, or if the parties abandon their intention, the controlling holder must extend the mandatory offer immediately.[269]

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266. Including the voting rights attributable to the holder by applying § 22(1) of the Securities Trading Act, *mutatis mutandis*. *Id.* at 1.

267. *Id.* at 1–3. The holder obtains control at the moment of closing of the legal transaction which grants the purchaser the ability to exercise the rights arising from the securities, i.e., the moment of acquisition of the last share (or other influential possibility) that confers control. *Id.* at 2.

268. The parties must declare their intention to the Executive Office immediately after the holder obtains control. The specified resolutions include the following:

> an agreement between enterprises (*Unternehmensvertrag*) pursuant to §§ 291 et seq. of the Stock Corporations Act;
>
> the integration of the target company pursuant to §§ 319 et seq. of the Stock Corporations Act;
>
> the change in the corporate form of the target company pursuant to §§ 190 et seq. of the Transformation Act;
>
> the merger of the target company pursuant to §§ 2 et seq. of the Transformation Act;
>
> or [resolutions] of the target company with respect to an exemption from the obligation to make a mandatory offer, provided that in this last case the controlling holder of securities may not exercise his voting rights;

Id.

269. *Id.*

If the controlling holder has not purchased any additional securities after obtaining control and before extending the mandatory offer, the mandatory offer price must be reasonably related to the highest German stock exchange price within the three months before the holder obtained control.[270] If the controlling holder has purchased additional securities of the target company in that period, the mandatory offer price must be the weighted average of the prices of those purchases.[271]

A target company must publish its reasoned comment regarding the tender offer within two weeks of the offer announcement.[272] Following the publication of a public tender offer, the executive or managing body of the target company[273] may not take any measures that might be adverse to the interest of the security holders until the publication of the offer outcome.[274] The security holders' interest in taking advantage of an offer demands that the target company's administration remain neutral. Prohibited measures include resolutions regarding "the issuance of new securities[,]" "a substantial change in the assets or liabilities of the target company[,]" or "the conclusion of agreements outside the scope of ordinary business activities[,]" but does not include "ongoing capital measures," the fulfillment of pre-existing contracts, or "measures expressly approved by the general assembly in the event of a public tender offer."[275]

VI. A Case Study: The Impact of Securities Regulation on the Vodafone AirTouch Offer for Mannesmann

With a leading presence in the telephone markets of twenty-four countries and more than ten percent of a global mobile market that analysts expect to reach one billion subscribers by 2003, the merger of Anglo-American Vodafone AirTouch ("Vodafone") and German Mannesmann ("Mannesmann") creates a world telecommunications leader.[276]

270. *Id.* at 3. The 1998 amendment changed this calculation. The old calculation was based on the current market price, with a floor not less than 25 percent below any price that the controlling shareholder paid in a 6-month period before the shareholder reached the threshold. Explanatory Memorandum, *supra* note 231, art. 17, at 12–13.

271. Explanatory Remarks, *supra* note 238, at 3 (to the extent that this weighted average price is higher than the three-month calculation noted above).

272. Explanatory Memorandum, *supra* note 231, art. 18, at 14.

273. This includes the executive or managing bodies of companies related to the target. *Id.* art. 19, at 14–15.

274. *Id.*

275. *Id.* The catalog of defensive measures that would substantially change the value of the target company (*e.g.*, poison pills, dilution of capital, substantial changes in the company's assets, the conclusion of unusual agreements) is not intended to be exhaustive. *Id.*

276. *Vodafone-Mannesmann: What Next?*, ECONOMIST, Feb 12, 2000, at 68.

The merged Vodafone-Mannesmann ("Vodafone-Mannesmann") will soon offer wireless Internet access and continental single-rate charging to the seventy-million-consumer European mobile phone market, at least two years ahead of the United States.[277] The merger company accounts for thirteen percent of the FTSE All Share index.[278] In addition to providing interesting insight into the future of mobile telephony, the Vodafone-Mannesmann merger illustrates the structure of a sophisticated hostile cross-border offer.[279]

Vodafone announced an interest in strengthening its existing long-standing relationship with Mannesmann on November 12, 1999. Chris Gent, Vodafone's CEO, met with Klaus Esser, chairman of Mannesmann's management board, to set forth the strategic case for combining the two companies and various terms of a proposed offer. Dr. Esser rejected the offer, and Mannesmann released a statement describing it as inadequate, not in the best interests of its shareholders, and not strategically attractive. Mannesmann filed an application with the U.K. High Court to block Goldman Sachs International from acting on behalf of Vodafone, claiming the bank had promised not to act for a third party seeking to acquire Mannesmann and had a conflict of interest. The High Court later dismissed the application, calling it "completely hopeless." After the failure of further negotiations, Vodafone put the proposal directly to Mannesmann shareholders in a November 19 press release, whereupon Mannesmann's supervisory board recommended that its shareholders not tender their shares in the offer.[280]

To avoid violating securities laws in the various jurisdictions, Vodafone used two separate offer documents for its exchange offer. All holders of Mannesmann shares and ADSs in the United States received a U.S. prospectus, while holders of Mannesmann shares who were not U.S. persons or were not in the United States received an international offer document.[281] German law governed Vodafone's offer for Mannesmann shares. Vodafone acceded to the Takeover Code,[282] and the

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277. *Id.* (the first wave will come in the form of GPRS (general packet radio service), which is twice as fast as 56k dial-up modems; the second will be EDGE (enhanced data rate for GSM evolution), seven times as fast; the third will be UMTS (universal mobile telecommunications system), which will offer genuine broadband capacity).

278. *See* FINANCIAL TIMES, *supra* note 222.

279. *See generally Vodafone AirTouch Offer for Mannesmann AG Exchange Offer Prospectus* (Dec. 23, 1999), *at* http://www.vodafone-update.com [hereinafter Exchange Offer Prospectus].

280. Under the German Takeover Code, Mannesmann was required to promptly publish its recommendation regarding the offer, but no later than two weeks after the publication of the German offer document. Explanatory Memorandum, *supra* note 231, art. 18, at 14.

281. Exchange Offer Prospectus, *supra* note 279, at 63.

282. Explanatory Memorandum, *supra* note 231, art. 21, at 16.

Takeover Commission confirmed that the terms of the offer complied with the Code.

The SEC granted Vodafone and its investment banks exemptive relief from the provisions of Rule 10b-13, allowing Vodafone and its banks to purchase Mannesmann shares during the offer.[283] The SEC conditioned its relief on the following conditions:

> [1] [there would be] no purchases or arrangements to purchase Mannesmann shares otherwise than pursuant to the offer being made in the United States;
>
> [2] if any purchases [were] made that [were] not pursuant to the offer, the disclosure of the possibility of such purchases [had to be] included prominently in the offer documents;
>
> [3] Vodafone AirTouch and financial institutions acting on its behalf [had to disclose] in the United States information regarding such purchases to the extent such information [was] made public in Germany pursuant to the German Takeover Code;
>
> [4] Vodafone AirTouch and financial institutions acting on its behalf [had to provide] to the SEC, upon request, a daily schedule of all purchases of Mannesmann shares made by any of them during the offer including size, price per share and manner of purchase; and
>
> [5] Vodafone AirTouch and financial institutions acting on it behalf [had to comply] with any applicable rules of German

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283. The banks, Goldman Sachs and Warburg Dillon Read, also sought permission to engage in

> [1] effecting brokerage transactions on an agency or riskless principal basis for customers,
>
> [2] purchasing and selling Mannesmann shares as part of their portfolio and asset management activities, subject to certain restrictions,
>
> [3] certain hedging activities in connection with positions in derivative contracts in place prior to the announcement of the offer, certain index-related activities and their market-making in derivative securities relating to the Mannesmann shares,
>
> [4] certain index arbitrage and program trading transactions,
>
> [5] borrowing and lending Mannesmann shares, to the extent that such transactions are not in substance a purchase by the dealer [managers] or their affiliates, and
>
> [6] certain market-making activities in derivative securities relating to Mannesmann shares.

Exchange Offer Prospectus, *supra* note 279, at 64.

authorities, including the German Takeover Code and the rules of the Frankfurt Stock Exchange.[284]

The 10b-13 exemption addressed Vodafone's intent to comply with the Takeover Code.[285] Pursuant to the Takeover Code and U.S. law, the offer had to remain open for an initial offering period of not less than twenty business days, and no more than sixty calendar days.[286] No withdrawal rights were available, and the Takeover Code would only have required such rights had a third party made a more favorable offer for the target which the bidder did not match within ten business days.[287] The SEC granted Vodafone relief concerning compliance with the notice extension requirements of Rule 14e-1(d) and the prompt payment requirements of Rule 14e-1(c) promulgated under the Exchange Act.[288] Vodafone had to publish the outcome of the offer without undue delay, which the Takeover Commission generally views as five business days after the end of the offer period.[289]

Vodafone commenced its exchange offer to U.S. holders on December 24. U.S. holders received 53.7 Vodafone ordinary shares,[290] which are traded on the London Stock Exchange, for each Mannesmann share or ADS tendered. Mannesmann shares are listed on the Frankfurt Stock Exchange and various other European stock exchanges, and its ADSs are traded on the over-the-counter market in the United States, but are not listed on NASDAQ or any U.S. national securities exchange.[291] The offer closed on March 27, 2000. Approximately 98.62% of Mannesmann issued share capital tendered, and the listing office of the Frankfurt Stock Exchange admitted Vodafone shares for trading.[292]

284. *See* Exchange Offer Prospectus, *supra* note 279, at 63–64.

285. Explanatory Memorandum, *supra* note 231, art. 21, at 16.

286. Explanatory Memorandum, *supra* note 231, art. 11, at 9; 17 C.F.R. 240.14e-1(a) (2000).

287. Explanatory Memorandum, *supra* note 231, art. 14, at 10.

288. Exchange Offer Prospectus, *supra* note 279, at 64.

289. *See* Explanatory Memorandum, *supra* note 231, art. 7, at 8.

290. While Vodafone only offered U.S. holders ordinary shares in exchange for Mannesmann shares or ADSs, holders could later exchange them for Vodafone ADSs. Dividends on Vodafone's ADSs are paid in U.S. dollars, whereas dividends on the ordinary shares are paid in pounds sterling, the ADSs trade on the New York Stock Exchange, whereas the ordinary shares do not trade on any U.S. exchanges, and unlike the ordinary shares, trading of the ADSs in the U.S. is not subject to U.K. stamp tax.

291. Exchange Offer Prospectus, *supra* note 279, at 46–50.

292. Press Release, Vodafone AirTouch, Final Results of Offer for Mannesmann (Mar. 30, 2000) *at* http://www.vodafone-update.com.

CONCLUSION

The Cross-Border Rules are one of the SEC's recent efforts to maintain the competitiveness of the U.S. securities markets while upholding its mandate of investor protection and have met with cautious enthusiasm from most commentators. The U.S. system's reliance on the statutory regulation of the Williams Act stands in contrast with the German approach of self-regulation. Interestingly, German practitioners note that the self-regulatory Takeover Code has found considerable acceptance and application since its implementation as well, despite (or perhaps as a result of) the lack of detailed rules.[293] While mandatory regulations provide a clear legal framework and more efficient protection by courts, proceedings can be particularly costly to a target company's shareholders. Incumbent management often benefits from the delays associated with the legal proceedings.[294]

As the internationalization of capital markets continues apace, national systems of securities regulation compete and interact with one another.[295] Sophisticated U.S. market participants have been able to circumvent the U.S. regulatory structure by going abroad, and less sophisticated investors have often been simply excluded from tender offers. The Cross-Border Rules are an unequivocal attempt to satisfy these U.S. investors and to adapt securities regulation to the changing realities of capital markets. Though the problem of conflicting tender offer procedural requirements will likely continue until the SEC makes greater strides towards regulatory harmonization, the exemptions contained in the Cross-Border Rules will undoubtedly benefit many U.S. investors and may marginally reduce some of the compliance costs for participants.

293. *See* SCHUSTER & ZSCHOCKE, *supra* note 236, at 72.
294. *Id.* at 56.
295. Licht, *supra* note 19, at 635.