The Regulation of Tender Offers in the United States and the United Kingdom: Self-Regulation Versus Legal Regulation

Thomas Hurst

Follow this and additional works at: https://scholarship.law.unc.edu/ncilj

Part of the Commercial Law Commons, and the International Law Commons

Recommended Citation


Available at: https://scholarship.law.unc.edu/ncilj/vol12/iss3/4

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
The Regulation of Tender Offers in the United States and the United Kingdom: Self-Regulation Versus Legal Regulation

Thomas Hurst*

I. Introduction

The phenomenon of the unsolicited takeover bid or tender offer has, undoubtedly, been the preeminent issue in U.S. corporate law for almost a decade. While there has been no shortage of legal scholarship dealing with the tender offer, the treatment of this phenomenon in other countries has received infrequent attention by American commentators. This is unfortunate because the British regulatory system, in particular, has much to contribute to our background knowledge in many areas of tender offer regulation which are of particular concern in the United States today. Specifically, with respect to devices such as the two-tier tender offer, defensive tactics by target management, and equality of treatment of all shareholders, the British system has much to teach its U.S. counterpart.

This paper will compare the British, self-regulatory scheme of takeover bids with several key elements of the U.S. regulatory system. Following this comparison, the author will attempt to draw some conclusions concerning the applicability of several significant features of the British system to U.S. law in areas where the U.S. regulatory scheme has received considerable criticism.

II. Philosophy of Regulation

The tender offer regulatory schemes of both Britain and the United States purport to be intended primarily for the benefit of the individual shareholder of the target corporation. More specifically, both schemes are designed to ensure that it is the target’s shareholders who ultimately determine whether or not the takeover bid succeeds and that such shareholders are able to make this decision while in possession of all material facts relevant to the offer and in an atmosphere free of undue coercion and time pressure.

The British system articulates this concern in General Principle

---

* Professor of Law, University of Florida College of Law; B.A. 1966, University of Wisconsin; J.D. 1969, Harvard University.
4 of the City Code on Takeovers and Mergers, which provides:¹

Shareholders shall have in their possession sufficient evidence, facts and opinions upon which an adequate judgment and decision can be reached and shall have sufficient time to make an assessment and decision. No relevant information shall be withheld from them.²

The Introduction as well as General Principles 1 and 7, among other things, contain language which underscores this philosophy.³

This is not to say that the motives behind the adoption of the City Code were totally altruistic. There is much evidence indicating that the London financial community (the City) adopted the City Code and established the City Panel on Takeovers and Mergers largely to head off possible action by Parliament in the same area, the impetus for which developed from a number of perceived abuses in the 1950s and 1960s.⁴ Nonetheless, regardless of the motives underlying its adoption, it is clear that the City Code functions to protect the interests of the target shareholder without preventing the success of an offer which is favorable to most shareholders. In other words, the City Code does not allow the target management to successfully obstruct the hostile offer.⁵

The motivation underlying the Williams Act, the City Code’s U.S. equivalent, is similar in some respects, yet different in others.⁶ The legislative history surrounding passage of the Williams Act indicates that Congress primarily intended to “close a significant gap in investor protection under the federal securities laws by requiring the disclosure of pertinent information to stockholders when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securi-

¹ City Code on Takeovers and Mergers (Council in the Securities Industry 6th rev. ed. 1987) [hereinafter City Code].
² City Code, supra note 1, General Principle 3.
³ The Introduction to the General Principles requires the board of directors of both the offeror and offeree and their respective advisors to act in the best interests of their respective shareholders. General Principle 7 prohibits the board of the offeror from taking any defensive action after a bona fide offer has been made (or is reasonably perceived as being imminent) without the consent of the shareholders. This assures that all shareholders will have an opportunity to decide the offer on its merits. General Principle 7 requires that all shareholders of an offeree company be treated similarly by the offeror company.
⁵ Cf. City Code, supra note 1, General Principle 7, Rule 21, discussed infra in text accompanying notes 109-11.
ties." The legislative history of the Act also indicates that Congress intended the Act to be evenhanded, i.e., not to tip the balance of regulation either in favor of the target corporation or the offeror. In so doing, it rejected suggestions from a number of interested parties that the Act should be framed in a manner which would discourage tender offers on the grounds that they were not in the public interest. While those favoring an evenhanded approach may have appeared to carry the day when the Williams Act was passed, the Act, when combined with various provisions of state corporate law already in existence and state takeover laws subsequently enacted, appears to give the target management more opportunities actively to resist an unwanted takeover than exist in Britain. Indeed, this goal may have been one of the unstated motives underlying its passage, as populist pressures in favor of preserving local ownership of long-standing small and medium sized corporations of great significance to a given community were apparent from the legislative debates surrounding passage of the Act.

10 The procedural safeguards included in the Williams Act, ostensibly for the protection of the target shareholder, effectively delay the time period needed to consummate an offer. This gives the target corporation's management time to marshal any one of a number of defensive tactics designed to defeat the unwanted offer. Under SEC Rule 14d-7, 17 C.F.R. § 240.14d-7 (1986), a person who has deposited securities pursuant to a tender offer has the right to withdraw them at any time while the offer remains open. Also, SEC Rule 14e-1, 17 C.F.R. § 240.14e-1 (1986), requires an offer to remain open for at least twenty business days after any increase in the amount of the consideration has been made by the bidder. Also, section 13(d)(1) of the Williams Act requires any person who becomes the beneficial owner of more than five percent of any class of equity security to file a disclosure statement with the issuing corporation, the SEC, and any stock exchange on which such securities are traded. This must be done within ten days after such acquisition. This requirement effectively warns the potential target of a forthcoming hostile takeover.

Many state anti-takeover laws formerly contained delaying provisions significantly more stringent than the Williams Act. Following the Supreme Court's decision in Edgar v. MITE, 457 U.S. 624 (1982), holding the Illinois Business Take-over Act unconstitutional, it appeared that any state legislation containing provisions delaying a tender offer beyond the time periods specified in the Williams Act would be unenforceable. However, in CTS Corporation v. Dynamics Corporation, 107 S. Ct. 1637 (1987), the Court upheld Indiana's "control share acquisition" law which allows the target corporation to delay the offeror's right to vote any shares acquired for up to fifty days after the tender offer commenced. Thus, the current status of state laws delaying a tender offer beyond Williams Act time limits remains unsettled. The most significant impediment at the state level, however, remains unscathed. That is the "business judgment rule," which gives a heavy presumption of validity to decisions made by a target's board of directors, including engaging in defensive tactics to ward off unwanted takeover bids. Although the propriety of a board's decision dealing with a takeover bid is occasionally challenged successfully (see, e.g., Smith v. Van Gorkum, 488 A.2d 858 (Del. 1985)), such cases are the exceptions that prove the rule. See generally Cohn, Tender Offers and the Sale of Control: An Analogue to Determine the Validity of Target Management Defensive Measures, 66 Iowa L. Rev. 475 (1981).
A second philosophical precept common to both countries’ laws is that of shareholder equality. Both systems of regulation seek to accord all shareholders an equal opportunity to receive the premium price being offered by the offeror. This concept is implemented by the two countries in quite different ways, however. In Britain, first of all, the City Code requires that any person or group of persons acting in concert who acquire thirty percent of a company’s securities must offer to purchase all remaining outstanding shares at an amount equal to the highest price that the offeror paid within the past twelve months. Second, the City Code prohibits the offeror from purchasing or selling stock during an offer or when one is in contemplation on favorable terms which are not made available to all shareholders, unless the Panel specifically consents thereto. Third, the Code requires the Panel’s consent for any partial bid and indicates that consent will ordinarily be given if the partial bid is for less than thirty percent of the shares carrying voting rights. Consent will not normally be given for partial bids exceeding thirty percent, however, if the offeror has acquired significant numbers of shares in the twelve months preceding the application for the bid. Fourth, the Code provides for proration of purchases from shareholders during partial offers and prohibits open market purchases during such offers. Fifth, any offer for more than thirty percent of the voting shares of a company, even if approved by the Panel, must also be approved by the holders of shares carrying fifty percent of the voting rights of a company. The effect of these provisions is to severely disfavor partial bids and to prevent an offeror from obtaining enough shares to gain working control of a company, unless the holders of an absolute majority of the voting shares approve of the acquisition.

The Williams Act approaches the problem of equal treatment in a very different manner. The Act contains no limitations on the fundamental right of the offeror to make partial bids although it does regulate the manner in which such bids can be made. First, the Act requires the offeror to prorate acceptances from each shareholder tendering within a specified time period if the offer is oversubscribed, in effect prohibiting a partial offer from being made on a first-come first-served basis. This section is designed to prevent the shareholders from being stampeded into hastily accepting an of-
fer without giving it due consideration for fear of being left out entirely. Second, the Act contains a “most favored shareholder” provision requiring that any increase in the price made during an offer must be given to those shareholders who have previously tendered their shares.19 Third, the Act requires an offer to be kept open for a minimum period of twenty business days. This ensures that all shareholders will have an adequate opportunity to consider the terms of the offer and to avoid the advantage which professional arbitrageurs and other large shareholders may have in scrutinizing an offer more quickly.20 Finally, a shareholder is given the right to withdraw shares tendered at any time while the offer remains open.21

The Williams Act has been criticized for allowing partial offers which open the door to the making of “two-tier offers” in which an initial offer at a high price is followed by a subsequent offer for the remainder of the shares on much less attractive terms, either for a lower cash price or for low grade “junk bonds.” On the other hand, while the City Code’s discouragement of partial bids avoids this problem, it does so at the cost of discouraging many offers altogether by effectively increasing the cost of the offer since the offeror must tender for all of a company’s voting stock.

A third common philosophical precept is that both regulatory schemes are primarily disclosure oriented, i.e., they reflect the philosophy that the regulatory authority should have as its primary goal to ensure that the target shareholders are given access to all facts necessary for an informed decision on the merits of the offer, and that it is not for the regulators to pass on the substantive merits of the offer. General Principle 422 sets forth the basic goal that shareholders should be given all relevant information necessary to reach an informed decision on the merits of the offer.23 More specifically, the Board of the target company is required to publicize an offer immediately upon receipt.24 It is also required to send promptly a copy of its press statement summarizing the terms of the offer to its shareholders.25 Furthermore, the offeror is required to provide to the offeree shareholders a great deal of specific information under Rules 23 through 28 concerning the identity of the offeror and its officers and directors, its plans for the future, financing arrangements, and other information of interest to the shareholders.26

21 SEC Rule 14d-7(a), 17 C.F.R. § 240.14d-7(a) (1986), extends the statutory seven-day withdrawal right of shareholders to allow withdrawal during the entire period the offer remains open.
22 See supra note 2 and accompanying text.
23 City Code, supra note 1, General Principle 4.
24 Id. Rule 2.2(a).
25 Id. Rule 6.
26 Rule 23.2 states the general concept that “shareholders must be given sufficient
The Williams Act also contains detailed disclosure requirements. Section 14d-3 requires the filing of a “tender offer statement” by the offeror in any offer for more than five percent of any class of equity securities of a subject corporation. In short, the disclosure provisions of the Williams Act generally parallel those of the City Code; both have as their general goal the disclosure of all information which might reasonably be expected to be material to an investor in deciding whether to tender his shares.

III. Coverage Compared: What Is A “Tender Offer”?

The Williams Act, with one exception, only applies to a transaction which is deemed to be a “tender offer,” a term which is not defined in the Act itself. The exception is that anyone who acquires over five percent of any class of equity securities of a company subject to the Act is required to file a disclosure statement with the SEC and the target regardless of whether the acquisition is by way of tender offer or otherwise. The other provisions of the Act, including the anti-fraud provisions of section 14(e) and the various provisions designed to ensure equal treatment of shareholders and an adequate opportunity to consider the bid before tendering, apply only to a “tender offer.” The legislative history of the Act indicates that the term was purposely left undefined, largely due to congressional concern that a rigid definition might allow parties to structure...
transactions in a manner which would fall outside the scope of the definition while being within the purpose of the Act. The SEC in 1979 issued proposed regulations defining "tender offer" but these regulations have never been adopted.

The experience with judicial interpretations of the term "tender offer" has been mixed. In a number of cases, the courts have found a transaction to constitute a tender offer although it was lacking in one or more of the attributes of a traditional tender offer. Thus, in Cattle-men's Investment Co. v. Fears and Wellman v. Dickson, the courts found the Williams Act to be applicable where there was direct one-on-one solicitation of several holders of large blocks of stock but no general solicitation of the public. In most of the cases, the courts have applied a functional approach, asking whether in the particular transaction in question the shareholders have need for the protections provided by the Williams Act. In doing so, the courts seem to have focused more on the disclosure and anti-fraud purposes of the Act, as well as the need for shareholders to act without undue time pressure. The courts have paid less attention, however, to the objective of equal treatment of shareholders and the opportunity of all shareholders to share in a control premium. Thus, in a number of cases, purchases of a large block of stock have been held not to fall within the Williams Act although they may have had the effect of giving the offeror working control of the target company.

34 343 F. Supp. 1248 (W.D. Okla. 1972). In that case, defendant purchased a total of twelve percent of the target's stock after soliciting several shareholders both in person and by telephone in what the court deemed "an active and widespread" campaign. Id. at 1251. The court concluded that the transaction was a "tender offer" because it had the effect of forcing shareholders "into making a hurried investment decision without access to information in circumvention of the statutory purpose." Id. at 1252.
35 475 F. Supp. 783 (S.D.N.Y. 1979), aff'd, 682 F.2d 355 (2d Cir. 1982), cert. denied, 460 U.S. 1069 (1983). In Wellman, defendants had acquired thirty-four percent of the target's stock through purchases from thirty-three individual and institutional shareholders through individual telephone solicitations. The court concluded that the transaction more closely resembled a public tender offer than a privately negotiated purchase and in so doing enumerated eight factors which have been widely cited in making the determination of whether a transaction should be deemed a "tender offer." These are: (1) active and widespread solicitation of public shareholders in the shares of an issuer; (2) solicitation made for a substantial percentage of the issuer's stock; (3) offer to purchase made at a premium over the prevailing price; (4) terms of the offer are firm rather than negotiable; (5) offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased; (6) offer open only a limited period of time; (7) offeree subjected to pressure to sell his stock; (8) public announcements of purchasing program concerning target company precede or accompany rapid accumulation of large amounts of the target company's securities. Id. at 823-24.
36 Hanson Trust PLC v. SCM Corp., 774 F.2d 47 (2d Cir. 1985). In a case where the offeror completed substantial open market purchases of stock immediately following the announcement that it had terminated its tender offer, the court concluded that these open market purchases did not constitute a "tender offer," primarily relying on the fact that most of the shares purchased had been held by sophisticated investors, such as arbitrageurs, who did not need the protections of the Williams Act. Id. at 57-58.
The City Code, in contrast, contains a specific definition of the transactions to which it applies. Furthermore, it explicitly gives the City Panel discretion to apply the Code to all transactions within its spirit. The Introduction to the General Principles candidly recognizes that “[i]t is impracticable to devise rules in sufficient detail to cover all the various circumstances which arise in take-over or merger transactions. Accordingly, persons engaged in such transactions should be aware that the spirit as well as the precise wording of the General Principles and the ensuing Rules must be observed. Moreover, it must be accepted that the General Principles and the Spirit of the Code will apply in areas or circumstances not explicitly covered by any Rule.” Also, the term “offer” is defined as including, “wherever appropriate, take-over and merger transactions however effected . . . .” Thus, the City Panel appears to have a sweeping mandate to apply the Code at its sole discretion and without the restraint of judicial review since it is a self-regulatory organization. The SEC is, of course, given a much more limited mandate under the Williams Act, and according to normal principles of U.S. administrative law, its actions are always subject to judicial review. The few occasions where the Commission has attempted to expand its regulatory mandate beyond the bounds of the Williams Act have met with spirited criticism from both within and without the Commission.

In addition to giving the Panel a plenary mandate to interpret the Code functionally, the City Code also contains rules designed to regulate specific types of transactions. Thus, the Panel’s consent is
required for any partial offer.\textsuperscript{43} A partial offer for more than thirty percent of the voting rights of a company is specifically disfavored.\textsuperscript{44} Where it is allowed, it is subject to certain restrictions set forth in Rule 36.\textsuperscript{45} Thus, the Code places more emphasis on regulation on a transactional basis than does the Williams Act and is more specific in the types of protections which it provides for shareholders against specified potential abuses. Because a partial offer which gives the offeror a controlling interest may be especially prejudicial to remaining minority shareholders, the Code deals specifically with this problem, but confines its treatment to those cases. In contrast, the Williams Act requirement of proration of share purchases applies across the board to any partial offer, and not merely to one which confers a controlling interest on the offeror.\textsuperscript{46}

Although the Panel appears to have plenary authority to regulate any transaction within the spirit of the Code, it has been curiously hesitant to use its authority to regulate novel transactions where it feels that asserting its jurisdiction without advance warning might constitute unfair surprise to the participants. An example of this is the phenomenon of the "dawn raid" which appeared in the late 1970s.\textsuperscript{47} In a dawn raid, one company, acting through its brokers, places an order for a large block of shares to be executed on the stock exchange on the opening of trading for a short period of time, at a price significantly above the last quotation. These transactions were complained of as being unfair to small investors who were often unaware that such an offer had been made until after it had expired.\textsuperscript{48} Typically, only large investors and other favored customers of brokers received notice of it before its time limit expired due to the short time period in which it took place and the impossibility of the broker individually notifying all of his small individual customers. Because the percentage of shares acquired was typically less than the thirty percent needed to trigger Rules 27 and 34, it was not explicitly subject to substantive regulation under the City Code, although arguably it was within its spirit. In 1980 the Council for the Securities Industry responded by issuing its \textit{Rules Governing Substan-}

\textsuperscript{43} City Code, \textit{supra} note 1, Rule 36.1.
\textsuperscript{44} See City Code, \textit{supra} note 1, Rule 36.4, which requires that an offer for between thirty and fifty percent of the voting rights of a company must state the precise number of shares sought, and provides that the offer may not be declared unconditional unless acceptances are received for not less than such number. Also, Rule 36.5 requires that an offer which could result in the offeror holding thirty percent or more of the voting rights of a company cannot be declared unconditional unless approved by shareholders holding over fifty percent of the voting rights not held by the offeror.
\textsuperscript{45} See text infra at notes 81 to 91.
\textsuperscript{46} SEC Rule 14d-8, 17 C.F.R. § 240.14d-8 (1986).
These Rules effectively require that such dawn raids either be accomplished through a partial offer subject to the requirements of the City Code or, if the shares are purchased on the Stock Exchange, the transaction must be announced publicly at least seven days prior to the close of the offer. The Rules Governing Substantial Acquisitions of Shares effectively ended the abuses associated with dawn raids. It is revealing to note, however, that action by the City Panel on an ad hoc basis was notably absent in the interval between the commencement of such raids in the later 1970s and the adoption of formal rules to deal with them. This reticence suggests that the Panel has been rather conservative in interpreting its broad mandate under the Code and prefers to operate on a rule-making basis in policing new types of transactions. In short, the broad mandate given the Panel to enforce the spirit of the Code, which should be one of the main advantages of a self-regulatory scheme, has not been exercised as effectively as it might have.

The U.S. history of regulating the “special bid” is similar. A special bid is an offer placed on a securities exchange to purchase a block of shares at a specified price, typically at a substantial premium to the market, for a limited period of time. The SEC has taken the position that such purchases constitute a “tender offer” under the Williams Act and become subject, among other things, to its withdrawal and proration requirements. These regulations have, for all practical purposes, eliminated the use of the special bid as a substitute for a tender offer since it is practically impossible to comply with the withdrawal and proration requirements in transactions executed on a securities exchange.

In concluding this Section, it appears at first blush that the Panel’s broad mandate to regulate in accordance with the spirit rather than the letter of the City Code would result in the Panel being more readily able to deal with novel situations as they occur. In practice, however, there seems to be something of a regulatory lag in both Britain and America in dealing with novel types of takeover bids which were not contemplated at the inception of the regulations. While the actions of the City Panel are not, strictly speaking, limited by any doctrine of due process, there has been an understandable tendency on the part of the Panel to adopt a “hands off” policy with respect to new types of activity, at least until the instiga-

50 Id. Rule 2.
51 E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 71 (1973).
IV. Differences in Nature of Regulation

A. Procedural differences

The differences between proceedings brought before the City Panel on the one hand and the SEC on the other are substantial, and they illustrate, more vividly than in any other area, the difference between a self-regulatory scheme and one with legal authority.

In the United States, proceedings before the SEC are subject, as with any administrative agency, to the Federal Administrative Procedure Act. Thus, a party involved with the SEC is entitled to formal legal representation by counsel. Formal rules of evidence are followed, and counsel may cross-examine witnesses and make opening and closing statements. Any transcripts made or opinions issued are matters of public record. With regard to rule-making proceedings, each rule must first be published as a notice of proposed rule-making with those affected being given a reasonable period of time to file statements with the Commission either opposing or favoring the rule. Any rule issued may be challenged by a person adversely affected on the grounds, among other things, that it exceeds the Commission's statutory authority or is unconstitutional.

Proceedings brought before the Panel are quite different. Hearings are normally held in camera. Although parties are entitled to bring attorneys or other counselors with them, no formal legal representation is allowed unless specifically permitted by the Panel, which is an infrequent occurrence. Thus, counsel may not act as an advocate for his client, cross-examine witnesses, or make formal statements on his behalf. This lack of full right to counsel has been criticized by some as denying due process of law to a party under investigation. The Panel's response has been that it tends to keep proceedings informal and flexible as well as save time. Also, it is said less convincingly that because members of the Panel themselves are experts in the securities industry they do not need the expertise of counsel to assist them in defining and resolving the issues. Finally, the Panel points out that in cases, such as disciplinary proceed-

54 Id. § 555(b).
55 Id. § 554(c).
56 Id. § 552(b).
57 Id. § 553.
58 Id. §§ 701-06.
60 Id. at 132-33.
61 Interview with Peter H. Lee, Deputy Director of the City Panel on Take-overs and Mergers (Nov. 29, 1983).
ings, where full legal representation does appear appropriate, it has permitted counsel to act as an advocate for his client. With respect to rule-making, since the Panel’s rules do not have the force of law it is entirely free to consider and adopt new rules and amendments or clarifications to existing ones with no notice whatsoever to interested parties.

The lack of legal constraints are often cited as one of the major advantages of the British self-regulatory scheme in that they contribute to its speed, flexibility, and low cost. This advantage may be more apparent than real, however. Although there are, obviously, criticisms being made of the existing scheme of takeover regulation in the United States, lack of flexibility and speed are not among those commonly voiced. Concerning speed, the SEC possesses independent rule-making authority which does not require the approval of Congress for each specific edict it may issue. Thus, the administrative process is more expeditious in the United States than in Britain. As for flexibility, although the Panel is theoretically authorized to deal with novel situations not covered by a particular rule and is not subject to due process constraints in doing so, in practice it has not moved as boldly as it could have. Although the City Code expressly states that conduct within the spirit of the Code is subject to action by the City Panel even if not within a specific regulation, in fact the Panel has been sensitive to concerns of due process and fair warning and has been hesitant to deal with novel situations on an ad hoc basis. As the DeBeers case indicates, the Panel tends to tolerate novel actions which may violate the spirit of the Code and has only moved after the fact to adopt new rules to deal with such activities in the future. Finally, the lesser role which attorneys play in takeover regulation in Britain is consistent with the fact that attor-

---

62 Id.
64 The SEC Advisory Committee on Tender Offers, whose members included representa-
tives from all major constituencies affected by the takeover process, voiced no concerns over the expeditiousness with which the SEC handles tender offer proceedings. Securities and Exchange Commission Advisory Committee on Tender Offers, Report on Recommendations 34-46 (1983) [hereinafter Advisory Committee Report].
66 The introduction to the City Code, supra note 1, provides in part, that “persons engaged in such transactions should be aware that the spirit as well as the precise wording of these General Principles and of the ensuing Rules must be observed. . . .”
67 See Rider and Hew, supra note 4, at 168-71.
68 The acquisition by DeBeers Corp. of some thirteen million shares of Consolidated Goldfields, Inc., in February 1980 was one of the largest “dawn raids.” It and other trans-
actions of a similar nature were strongly criticized on the grounds that they distorted the workings of the market and resulted in unequal treatment of shareholders. However, the Stock Exchange and the other self-regulatory bodies, including the Council for the Securities Industry and the City Panel on Take-overs and Mergers were reluctant to interfere with what were essentially open market transactions without any more specific authority.
Regulation of Tender Offers

ney's do not play as significant a role in the securities industry in Britain as they do in the United States. Clearly, however, such limitations would be unacceptable in the United States where the bar is closely intertwined with the securities industry. Moreover, unless the United States adopted a self-regulatory scheme, any legal constraints on attorney participation would almost certainly be unconstitutional.

In short, while the procedural differences mentioned above are significant in illustrating how the mechanics of a self-regulatory scheme differ from one with a legal framework, pointing out these differences is not done with a view toward using the procedure of either system as a model for reform of the other. Structural differences between the British and U.S. schemes of regulation reveal basic conceptual variances between the two systems, and indicate that a marriage of the two would result in a mode of regulation hamstrung by conflicting priorities and methods. Study of differing British and U.S. procedures for governing tender offers, therefore, can do little to suggest eligible reforms of the U.S. rules.

B. Substantive regulation of terms of offer

Both systems of regulation have as their primary goal the placing of ultimate decision making authority in the hands of the target shareholders. The means by which this goal is implemented, however, are considerably different. While the City Code contains much more severe limitations on the substantive nature and content of the takeover bid, the Williams Act is primarily a disclosure and anti-fraud statute. The main substantive limitations which the Act places on the content of the offer consist of time limitations on the length of the offer, the requirement that purchases of oversub-

Thus, no action was taken until the Council for the Securities Industry formally adopted the Rules Governing Substantial Acquisitions of Shares in 1981.

69 Under section 13(d) of the Williams Act, 15 U.S.C. § 78n(d) (1982), persons who acquire five percent or more of any class of securities registered under section 12 of the Securities Exchange Act of 1934 must disclose that holding in a report filed with the SEC within ten days of the acquisition. This disclosure should contain certain specified information, including the backgrounds and identities of persons making the acquisition, the source of funds for making the acquisition, information concerning contracts which the acquiring person may have with respect to any securities of the issuer, and the purpose of acquiring the shares. If that purpose is to obtain control of the target, any plans which the person may have to make major changes in the target should also be disclosed. This disclosure statement must be filed with the SEC regardless of whether or not a tender offer is contemplated. If a tender offer is made, section 14(d)(3) of the Act requires that a "Tender Offer Statement" must be filed with the SEC and disseminated to each shareholder containing certain information specified in section 14(d)(6) of the Act. Section 14(e) of the Williams Act contains a broad anti-fraud provision prohibiting the employment of fraudulent, manipulative or deceptive devices in connection with a tender offer. 70 A tender offer must remain open for a minimum of twenty business days from the date it is first published or sent to shareholders. SEC Rule 14e-1(a), 17 C.F.R. § 240.e-1(a) (1986).
scribed partial offers must be prorated among all tendering shareholders\textsuperscript{71} and, third, the requirement that all shareholders tendering must be extended a higher price if the offeror raises the price during the course of the offer.\textsuperscript{72} Subject to these limitations, though, the Williams Act permits the offeror to make an offer for all or as many of a company's shares as it wishes at whatever price it deems desirable.

The City Code, on the other hand, circumscribes the offeror's freedom of action much more severely. Under the Code any offer for fifteen percent or more of any class of stock must be made at a price equal to or higher than the highest price which the offeror paid for any other shares purchased during the preceding twelve months.\textsuperscript{73} Second, partial offers are permitted only with the Panel's consent and then only on severely restricted terms.\textsuperscript{74} Third, the Code effectively requires that any offeror obtaining thirty percent or more of any class of shares must make an offer to purchase all remaining shares of the target.\textsuperscript{75} Fourth, an offeror purchasing shares controlling at least fifty percent of the equity voting rights of the corporation is required to purchase shares constituting at least fifty percent of the equity share capital of the company.\textsuperscript{76} Fifth, the Code contains rigid minimum and maximum time limitations governing an offer comparable to those in the Williams Act.\textsuperscript{77} Finally, the Code requires that the offer be disclosed privately to the target's Board of Directors prior to public announcement of the offer;\textsuperscript{78} moreover, the offer may not be withdrawn without the consent of the Panel.\textsuperscript{79} In one respect, however, the City Code circumscribes the options of the target shareholder more severely than does the Williams Act. Once a shareholder has tendered, he may not withdraw his shares until the expiration of twenty-one days from the first closing date of the initial offer.\textsuperscript{80} Since the offer itself must be kept open for a minimum period of twenty-one days under Rule 31.1, a shareholder may not have the right to withdraw his shares for as long as forty-two days. This provision discourages competitive bidding, on the one hand, and, on the other, encourages shareholders to hold onto their shares until

\textsuperscript{73} City Code, supra note 1, Rule 11.1.
\textsuperscript{74} Id. Rule 36.
\textsuperscript{75} Id. Rule 9.
\textsuperscript{76} Id. Rule 10.
\textsuperscript{77} Rule 31.1 requires that an offer must be kept open for at least twenty-one days after its posting. Rule 32.1 requires a revised offer to remain open for at least fourteen days after the date of posting notice of revision to shareholders. Rule 31.6 provides that an offer normally must not be declared unconditional after the expiration of more than sixty days from its commencement, unless the Panel's permission has been obtained.
\textsuperscript{78} Id. Rule 1.
\textsuperscript{79} Id. Rule 2.7.
\textsuperscript{80} Id. Rule 34.
the first offer has almost expired in order to retain the freedom to tender under a higher competing offer should one be made.

C. Treatment of partial offers

The issue of the fairness of "two-tier" bids in which an initial tender offer for a portion of the target's shares is followed by a second offer, usually at a lower price and often not involving cash, has become a major concern in U.S. securities regulation.\(^8\) Because the City Code has dealt with this problem in some depth, a further examination of its treatment is useful in considering possible changes in the Williams Act to deal with the same matter. The Williams Act contains no provisions discouraging partial offers and grants the offeror complete freedom of action to determine the number of shares which it wishes to seek, subject only to the duty to prorate purchases among all shareholders in the event the offer is oversubscribed.\(^8\) The City Code, as discussed above, contains provisions which severely limit the making of partial offers. Most importantly, the Panel's consent is required for any partial offer.\(^8\) Such consent normally has been granted for offers to purchase less than thirty percent of the target's shares. Consent has not ordinarily been granted for a partial bid for thirty percent or more of the offeree's shares, however, if the offeror has acquired significant numbers of shares of the target during the preceding twelve months.\(^8\) In situations where the partial offer is allowed by the Panel, it will usually be subject to significant restrictions. First, it must be made to all shareholders and purchases must be prorated among them if the offer is oversubscribed.\(^8\) Second, open market purchases are prohibited during the offer and during the twelve month period following successful completion of the offer.\(^8\) Third, if the offer is made for thirty to fifty percent of the target's shares, the precise number of shares sought must be stated and the offer must not be declared unconditional unless at least that many shares are tendered.\(^8\) Fourth, such a partial offer requires that shareholders holding at least fifty percent of the voting rights not held by the offeror must consent to the making of the offer. This requirement may be waived by the Panel, however, if one shareholder holds more than fifty percent of such voting rights.\(^8\) Fifth, in cases where an offer for thirty percent or more of a

---


\(^8\) City Code, *supra* note 1, Rule 36.1.

\(^8\) Id. Rule 36.2.

\(^8\) Id. Rule 36.7.

\(^8\) Id. Rule 36.3.

\(^8\) Id. Rule 36.4.

\(^8\) Id. Rule 36.5.
company in which more than one class of equity shares exists, a comparable offer must be made for each class. Sixth, if the offer could result in one offeror holding more than forty-eight percent of the voting rights of the target, the offer document must contain a warning statement indicating that fact. Also, the offer document must disclose that the offeror will be free to acquire further shares without being subject to the mandatory offer obligations of Rule 9 of the City Code. Closely allied in purpose is the mandatory bid requirement of Rule 9. Unless the Panel otherwise consents, this rule requires that any person owning shares representing thirty percent or more of the voting rights of a company, or any person or group who holds between thirty and fifty percent of the voting rights of a company and within a twelve month period acquires an additional two percent of the voting rights, must make an offer to all equity shareholders to purchase all remaining shares of the company at a price at least equal to the highest price which he paid for any shares during the preceding twelve months. Significantly, this requirement has no equivalent in the Williams Act.

In effect, the City Code deals with the potential problems arising from partial offers, such as the resulting unfair treatment of minority shareholders, by strongly discouraging these offers. These restrictions were adopted as a response to the perceived unfairness to minority shareholders of partial bids, where severely plunging share prices followed completion of the bid, leaving these shareholders holding the bag. The absence of significant protection available to minority shareholders under British company law exacerbated the problem. Although the Williams Act does not deal specifically with this problem, existing American case law dealing with the subject of freezeouts does provide, at least in some jurisdictions, some measure of protection to the minority shareholder. However, because par-
tial offers need not be cleared in advance by the SEC, such protections necessarily come in an ex post facto manner and then only if the minority shareholder possesses significant motivation and resources to institute litigation against the controlling shareholders or the directors of the target. Nonetheless, the British approach is not without cost since it may discourage partial offers, which are economically advantageous for both minority shareholders and society at large.

Mindful of this cost, the United States Congress enacted comparatively minor restrictions on the making of partial bids. The SEC Advisory Committee on Tender Offers carefully considered whether special provisions for partial offers should be included in the Williams Act. In the end, the Committee recommended only the relatively modest reform of requiring that partial offers should remain open for two weeks longer than full bids, in order to provide shareholders with the opportunity to carefully examine the implications of such partial bids. In so doing the Committee was concerned lest it discourage partial bids which may have any or all of the following advantages: Allowing companies to invest in one or more industries while limiting their financial exposure; facilitating technology exchange relationships; permitting change of control and reducing management entrenchment in large companies; facilitating private venture capital investment; encouraging foreign investment in U.S. companies and allowing acquirors to get to know a potential acquiree gradually with a view toward eventual total ownership.

Thus, it appears likely that something close to the status quo will be maintained in the United States with respect to partial bids. Perhaps it is significant that, if anything, the British position has become more receptive to partial bids over the years, thus implicitly recognizing their potential benefits.

V. Defensive Tactics by Management

In no area of tender offer regulation are differences between the two countries’ approaches more striking than in that of limitations on management conduct during the offer. In several respects, the City Code clearly evinces a philosophy that management of the target should act in a manner primarily designed to assist the shareholders in making the decision as to whether or not to tender to the

---

94 This is not always true, since the plaintiff may seek a preliminary injunction barring consummation of the transaction complained of. Because of the need to prove that the plaintiff will suffer irreparable injury, however, the request for the injunction may not be granted even if the plaintiff proves that he is reasonably likely to succeed on the merits.

95 Advisory Committee Report, supra note 64, at 23-26.

96 Id. at 26, Recommendation 16.

97 Id. at 25.
offeror.\textsuperscript{98} In the United States, however, the regulatory treatment seems somewhat dualistic, reflecting both the desirability of management's taking an active role in the decision making process, and the City Code's philosophy of shareholder sovereignty.\textsuperscript{99}

Both countries' regulatory treatment gives management a free hand prior to the announcement of a tender offer, subject only to those normal regulatory constraints governing management conduct in general. In both situations, management is free to engage in conduct designed to minimize the possibility of an unfriendly bid. This behavior may range the gambit from nonobstructive tactics such as improving management-shareholder relations by following a liberal dividend policy or increasing communication with the shareholders, to more active measures such as "shark-repellent" amendments, mergers with other companies likely to raise antitrust issues with potential offerors, reincorporating in states with corporate codes which are more management-oriented, and changes in the corporation's financial structure designed to diminish its attractiveness as a takeover target.\textsuperscript{100}

Once an offer has been made or is reasonably perceived to be imminent, however, the treatment of the two schemes diverges dramatically. The announcement of an offer triggers several duties upon management of the target in Britain. First, once management receives notice of "any firm intention to make an offer" it must publicize it by press notice without delay.\textsuperscript{101} The offeror must also make a statement announcing the offer without undue delay.\textsuperscript{102} Second, the target must promptly send a copy of the press notice or other circular to its shareholders.\textsuperscript{103} Third, the target must obtain competent independent legal advice on any offer and must communicate this to its shareholders.\textsuperscript{104} Fourth, any information given by management to a preferred offeror must also be furnished, on request, to any other "less welcome but bona fide offeror or potential offeror."\textsuperscript{105} Fifth, management must take a position on the offer and must promptly notify its shareholders whether it favors or opposes the of-

\textsuperscript{98} See supra text accompanying notes 2-5.
\textsuperscript{99} See supra text accompanying notes 6-10.
\textsuperscript{100} The literature cataloguing the vast array of defensive tactics which may be employed is extensive. See, e.g., E. Aranow, H. Einhorn & G. Berstein, Developments in Tender Offers for Corporate Control (1977) [hereinafter Developments in Tender Offers]; M. Lipton & E. Steinberger, Takeovers and Freezeouts (1978); A. Fleischer, Tender Offers, Defenses, Responses and Planning (1979).
\textsuperscript{101} City Code, supra note 1, Rule 2.3. The Code also provides, however, that the target's board "is entitled to be satisfied that the offeror is or will be in a position to implement the offer in full." \textit{Id}. Rule 1(c).
\textsuperscript{102} \textit{Id}. Rule 2.2.
\textsuperscript{103} \textit{Id}. Rule 2.6.
\textsuperscript{104} \textit{Id}. Rule 3.1.
\textsuperscript{105} \textit{Id}. Rule 19.4.
fer or whether it is neutral.\textsuperscript{106}

The only comparable affirmative duty imposed on the target management in the United States is the requirement that management take a position whether for, against, or neutral, and advise its shareholders of this fact.\textsuperscript{107} No provisions comparable to the other requirements of the City Code exist. Thus, target management has much more freedom of action in deciding how to respond to an unwelcome offer in the United States. Rather than placing a duty to assist the target shareholders upon management, as does the City Code, the U.S. regulatory scheme essentially places both management of the target and the offeror at arms length from the shareholders and offers them an equal opportunity to wage war for the target shareholders' favors.

It is with respect to post-offer defensive tactics, however, that the most significant differences of all appear. The City Code prohibits management from engaging in any obstructive defensive tactics which could effectively result in any bona fide offer being frustrated or in the shareholders of the offeree being denied the right to decide on the success of the offer on its merits.\textsuperscript{108} This concept is so fundamental that it is stated as a General Principle of the Code as well as being more specifically codified in the Rules. While the target management may seek out a white knight to make a competing bid it must, on request, make available all information which it provides to such a favored suitor to an unwelcome suitor as well.\textsuperscript{109} Furthermore, it must not take any substantive action that interferes with the right of the shareholders to decide which of the competing bids should be accepted.\textsuperscript{110}

In striking contrast, the management of an American corporation is free to engage in any number of defensive tactics designed to ward off an unwelcome takeover, limited only by the doctrine known as the business judgment rule. This doctrine generally gives action of corporate management a heavy presumption of validity absent a showing of fraud or conflict of interest.\textsuperscript{111} Such tactics today commonly include instituting litigation challenging the validity of the of-

\textsuperscript{106} Id. Rule 25.1.
\textsuperscript{107} SEC Rule 14e-2, 17 C.F.R. § 40.14e-2 (1986), requires that, within ten business days from the date a tender offer is first made, the target company shall publish or send to its shareholders a statement either recommending acceptance or rejection of the offer, expressing no opinion and remaining neutral towards the offer, or stating that it is unable to take a position with respect to the offer, together with the reasons for whichever of these three alternatives is chosen.
\textsuperscript{108} City Code, supra note 1, General Principle 7 & Rule 21.
\textsuperscript{109} Id. Rule 19.4.
\textsuperscript{110} Id. General Principle 7.
fer under the antitrust laws or alleging Williams Act violations, the adoption of "poison pill" charter amendments, sale of highly desirable "crown jewel" assets to a third party or giving a third party "lock-up" rights to purchase in the event of an unfriendly takeover, repurchase of its own stock at a premium price, payment of a large dividend, merger with a "white knight," and awarding "golden parachute" contracts to management in the event of their dismissal by a hostile offeror.

Rule 38 of the City Code, on the other hand, has been quite successful in preventing this type of conduct from occurring in Britain. One study reported no use of obstructive defensive tactics by management during a recent eighteen month survey period.\textsuperscript{112} Thus, although Rule 38 is not without its exceptions, it does seem to limit management's freedom of action much more severely than does the business judgment rule in the United States. Nonetheless, studies indicate that despite the confines of Rule 38, tender offers opposed by management succeed in a significantly lower percentage of cases than do those which are supported or unopposed by incumbent management.\textsuperscript{113} This difference most likely stems from the fact that Rule 38 does not prohibit management from opposing any offer with a vigorous publicity campaign, which is likely to be given considerable credence by the shareholders. Second, management is free to encourage competing friendly offers which may have the effect of defeating hostile offers. Third, Rule 38 does not prohibit pre-offer tactics which may make unwelcome offers less likely to succeed.

The other side of the coin is that, even with the free hand given management in the United States, once a company has come "into play," i.e., has received an unwelcome bid, in most cases the odds are that sooner or later, some action will result which will give the target's shareholders an opportunity to reap a significant increase in the value of the shares prior to the announcement of the bid.\textsuperscript{114} While this may consist of some action more to the liking of management, such as "white knight" merger, repurchase of the corporation's shares, or leveraged buyout, it is undeniable that, from the standpoint of the average shareholder it may be irrelevant whether

\textsuperscript{112} Danziger, Remedial Defensive Tactics Against Take-overs, 4 COMPANY LAW. 3 (1983).

\textsuperscript{113} One study of the effect of management opposition to tender offers indicated that, in the two year period under study, only two per cent of unopposed takeover bids in the United Kingdom failed while forty-four percent of those bids which were opposed by target corporations' management were unsuccessful. G. NEWBOULD, MANAGEMENT AND MERGER ACTIVITY (1970). The study also showed that the final bid price in unopposed bids was thirty-three percent above the pre-offer price of the target company's shares while it was seventy-seven percent higher where management opposed the initial bid. Id.

the initial hostile bid succeeds or whether some other transaction takes place which is of equal or greater value to the shareholder than the hostile offer. Furthermore, even those commentators who are generally critical of management defensive tactics concede that in a significant number of cases defensive tactics, by keeping the target "in play" for a longer period of time, encourage higher competing bids, and result in shareholders reaping a larger premium than they would have received had they accepted the initial offeror's bid.\textsuperscript{115}

Nonetheless, because management's defensive tactics do substantially thwart shareholder sovereignty they seem in principle to be undesirable. It would appear to be possible to combine the best of both the British and American systems by prohibiting obstructive tactics on the part of management while, at the same time, encouraging competing bids by lengthening the minimum time duration allowable for a tender offer as well as the minimum proration period.\textsuperscript{116} In this way, the shareholders' ultimate freedom of choice would be preserved, while at the same time encouraging higher competing bids for the target company's shares.

VI. Sanctions

Perhaps the most often named detriment of the British self-regulatory scheme is the problem of developing significant sanctions for those found to have breached the City Code.\textsuperscript{117} Because the Panel has no legal authority, it has no power to impose any sanctions backed by the force of law itself, nor does it have the authority to petition the court of law to impose any sanctions on a party breaching the Code. In practice, then, the Panel's primary sanction is a formal reprimand, either public or private, depending on the circumstances. Also, it may recommend to any professional association of which the violator is a member that it discipline the individual in instances where violation of the City Code would constitute unprofessional action under the rules of that organization. Finally, the Panel may recommend that the stock exchange cease trading in the shares of any company found to have violated the Code.\textsuperscript{118}

In contrast, the SEC, being a federal administrative agency created by Act of Congress, has express authority to enforce its orders in a court of law or equity. Thus, in appropriate circumstances, the

\textsuperscript{115} Gilson, Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense, 35 Stan. L. Rev. 51 (1982).

\textsuperscript{116} For an example of a legislative proposal along the lines recommended by the author, see Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation, 83 Colum. L. Rev. 249, 317 (1979).


\textsuperscript{118} A. Johnson, supra note 59, at 151.
SEC may seek and obtain injunctive relief, including orders to cease and desist from conduct violating the Williams Act, orders to make specific corrective disclosures in materials distributed to investors under the Williams Act, and the like. These orders are, of course, enforceable under the contempt power of the courts.¹¹⁹

Nonetheless, the differences in the enforcement powers of the SEC and the Panel are probably less significant in practice than in theory. Although the SEC has the authority to seek legal sanctions, in practice finding an appropriate sanction to fit the offense may be difficult, except when one is seeking prospective relief or corrective disclosures during a tender offer. This problem was illustrated in Rondeau v. Mosinee Paper Company¹²⁰ where the defendant was found to have violated the Williams Act by inadvertently failing to report that he had acquired more than five percent of the shares of the offeree corporation.¹²¹ Although finding the defendant guilty of violating the Act, the Court refused to order him to divest himself of the shares acquired or to enjoin him from voting the shares so acquired.¹²² The Court’s majority opinion stressed the fact that the violation was not willful and that defendant had promptly filed the appropriate disclosure statement under section 13(e) when informed of his breach.¹²³ A vigorous dissent criticized the majority, arguing that it had effectively emasculated the reporting requirements of the Williams Act by denying any meaningful remedy unless plaintiff could show that it had been prejudiced by the violation, a showing that would be extremely difficult to make in most situations.¹²⁴ The common remedy for disclosure violations, i.e., the issuance of an injunction prohibiting defendant from engaging in similar violations in the future, is essentially meaningless since most takeover bids are one-shot transactions.

While the significance of the legal enforcement powers of the SEC may easily be overemphasized, the powers of moral suasion exercised by the Panel over the years have probably been more effective than its critics generally admit. The Panel encourages negotiation between itself, the offeror, and, wherever possible, the offeree concerning the conduct of the offer. This format, together with the disclosure statements filed with the shareholders, has generally worked effectively in providing meaningful information to the shareholders without the need for litigation. Also, the tight-knit nature of the City of London financial community has had the effect of

¹²⁰ 422 U.S. 49 (1975).
¹²¹ Id. at 57.
¹²² Id. at 65.
¹²³ Id. at 60.
¹²⁴ Id. at 66.
rendering the moral sanctions and reprimands quite effective in deterring conduct violating the City Code by those for whom the maintenance of an impeccable reputation in the City is essential to their livelihood. This is vividly illustrated by the Jim Rapier case, in which a financier who initially refused to abide by the Panel's sanctions recently relented and advised the Panel that he would honor its wishes after discovering that the smirch on his reputation resulting from the Panel's sanctions had seriously impaired his ability to do business in the City.125

It is undeniable, though, that a number of cases have occurred in which the Panel was not able to deal satisfactorily with the offenders.126 The fact that the Panel has had to depend in many instances on the action of a third party, i.e., the stock exchange or a professional association, means that it has no direct control over the sanction invoked; such a body may take a different view of the severity of the member's offense and therefore refuse to enforce the Panel's recommended sanction if it feels that it was too severe. Also, the sanctions available to those bodies may be inappropriate to cover the nature of the offense involved as, for example, where restitution of money to injured shareholders would be the most appropriate sanction, but one which the professional association has no power to decree.127 In one instance, that of insider trading, the Panel itself recognized the need for legal enforcement mechanisms and recommended amendment of the Companies Act of 1980 to accomplish this end.128

The situation with respect to private rights of action is also one

126 One of the most controversial incidents involving the Panel in recent years involved the takeover bid in August 1985 by the Burton Group PLC for Debenhams PLC, a British department store chain. A number of irregularities occurred in the course of the bid including last minute changes in the terms of the offer, and a last minute extension of the closing date of the offer when it appeared that the requisite number of shares had not been tendered. This was followed by the tendering of a sufficient number of shares to satisfy the terms of the offer and cause it to be declared unconditional. There were allegations, which were never proven, that short tendering had taken place (an action illegal under the Code) in amounts sufficient to affect the success of the offer. The Panel, however, was unable to uncover any proof of these allegations and ultimately gave the offer a clean bill of health. The incident has been cited by some as indicating that, in the increasingly cut-throat atmosphere prevailing in the City financial community, the Panel lacks sufficient resources and authority to cope successfully with the growing wave of hostile takeovers. See Morse, The Burton/Debenhams Affair, Frustrating Actions, Closing of the Offer, and Short Selling, 1985 J. Bus. L. 480; The Times (London), Aug. 11, 1985, at 48, col. 1.
127 Takeover bids by parties residing overseas with no local connection with the City financial community are an example. See The Panel on Take-overs and Mergers, Report on the Year ended 31 March, 1981, at 4 (discussing the “St. Piran affair”); Lazarides, Acquiring Companies: Problems of Ownership and Control, 4 COMPANY LAW. 66 (1983) (discussing the DeBeers case as an example of the inability of the Panel to satisfactorily deal with the phenomenon of “dawn raids” prior to the adoption of the Rules Governing Substantial Acquisitions of Shares).
128 Rider, Self-Regulation, The British Approach to Policing Conduct in the Securities Business,
in which an American shareholder is much more favorably situated. U.S. courts have found that implied private rights of action exist under the Williams Act in favor of, for example, the target shareholders against the target by the target corporation itself, against the offeror and by the offeror against the target corporation. While injunctive relief is most commonly awarded, a money damage remedy is available in appropriate instances as well. Similarly, a private cause of action may also exist for violations of the state corporate codes of either the offeror or the target, as well as a common law action for breach of fiduciary duty.

In Britain, by contrast, little private litigation arises out of the takeover process. A number of factors may explain this striking absence of litigation. First, the fact that the City Code is a voluntary code of self-regulation means that its breach does not create a cause of action in favor of anyone. Indeed, the Panel itself has indicated that it does not welcome the use of the courts as a means of defeating takeover bids and has stated that it should be consulted prior to instituting judicial action. At the same time, however, the Panel has recognized that directors might be in violation of their fiduciary duty to shareholders if they failed to seek judicial redress of clear-cut violations of law which injured their company, and in such instances the Panel could not and would not stand in their way.

Second, British common law dealing with the protection of minority shareholders is more limited than that in the United States. The shareholder derivative suit is available only in limited circumstances since, under the doctrine of Foss v. Harbottle, it is unavailable if the matter complained of could be remedied by a majority vote of the shareholders. While there has been some increasing recognition of minority shareholder rights in Britain the situation is still a far cry from that in the United States. The prohibition of contingent

---

132 The Panel itself is not entitled to injunctive relief to enforce provisions of the City Code. P. Davies, supra note 117, at 43. In addition, the courts have looked with disfavor on private parties seeking injunctive relief for violations of the City Code and have indicated that even the act of seeking injunctive relief by a target could be considered a violation of General Principle 4 of the City Code since it constitutes action designed to frustrate a takeover bid. See Dunford & Elyoitt Ltd. v. Johnson and Firth Brown, Ltd., 1 Lloyd's Rep. 505 (1977).
134 2 Hare 461, 67 Eng. Rep. 189 (Ch. 1843). See DeMott, supra note 38, at 993.
135 See Gower's Principles, supra note 92, at 675-79.
fees and the rule imposing liability for attorney fees on the losing party undoubtedly also serve to discourage shareholder litigation.

Other substantive shortcomings exist as well. Although the British antitrust laws apply to mergers which would have anticompetitive consequences, they cannot be enforced by private parties. Thus, an antitrust challenge to a merger, common in the United States, cannot be instituted by the target or one of its shareholders in a derivative action in Britain. Only the Department of Trade has this authority, and, while management or the shareholders may bring a potentially anticompetitive takeover to the attention of the Monopolies and Mergers Commission of the Department of Trade, private litigants are powerless to force it to act. Furthermore, if the tender offer itself is lucrative enough, financially interested shareholders cannot be relied upon to initiate official action, regardless of the takeover company's antitrust violations. In fact, the reference of such matters to the Monopolies and Mergers Commission is not resorted to as frequently as one might expect, given that such a move can effectively delay the consummation of a takeover, if not lead to its abandonment. Finally, the close socio-economic ties within the City financial community and British industry and the absence of a history of litigation in the corporate area are significant, if intangible, factors that contribute to the absence of litigation as well.

Nonetheless, when all is said and done, it is difficult to assess the significance of this factor in weighing the relative success or failure of the self-regulatory scheme in Britain. If the infrequency of litigation is interpreted to mean that the City Code and the Panel have been successful in preventing those abuses for which shareholders regularly seek redress in the courts in the United States, then it is clearly a plus for self-regulation. However, if the lack of litigation results from the procedural obstacles to redress as well as from the lack of strong substantive legal protection available to shareholders, then there may be a substantial number of shareholders who have what would under U.S. law be recognized as legitimate grievances but who are unable to obtain satisfactory resolution of those grievances. If this is the case it marks a serious deficiency in the British scheme. Although the Panel has occasionally succeeded in obtaining mone-

---


137 In the past few years, some target companies have successfully persuaded the Monopolies and Mergers Commission to block unwanted bidders for quasi-political or nationalistic reasons. Takeover bids for other banks by the Royal Bank of Scotland were blocked because the Commission decided that Scotland needed Scottish-controlled companies. In 1983, the Commission investigated several bids for Sotheby Parke Bernet, the famous art auctioneer, as the target attempted (unsuccessfully, in the end) to persuade it that Sotheby's was a national treasure of Britain which should not be allowed to fall into American hands. See Wall St. Journal, Dec. 17, 1985, at 36, col. 1.
tary redress for individuals who have suffered harm from a violation of the City Code, this event has not occurred frequently.

VII. Summary and Conclusions

An examination of the British regulatory system in light of the most frequently made criticisms of the U.S. system leads the author to the following conclusions:

(1) The City Code is significantly more protective of the small shareholder of a corporation which is the target of a tender offer than is its U.S. counterpart. This greater solicitude is largely due to three facts. First, the City Code discourages partial offers. Second, the City Code requires that subsequent purchases by the offeror following a partial acquisition must be at a price at least as high as the highest price paid by the offeror during the preceding twelve months. This limitation effectively removes the incentive for the offeror to make a “two-tier offer” such as has often been used in the United States. Third, the City Code’s prohibition on obstructive defensive tactics effectively prevents management of a target from employing many of the tactics used in the United States to defeat or delay an unwanted offer. In most situations, this is to the target shareholder’s advantage, although it can be argued that, in a few cases, defensive tactics have resulted in the target shareholders eventually receiving a better offer from a second bidder, or a higher offer on a negotiated basis, from the first bidder than would otherwise have occurred.

On the other hand, neither country’s regulatory system deals effectively with the problem of anticipatory defensive measures taken prior to the announcement of a tender offer, such as “poison pills” and other “shark repellant” amendments, defensive mergers, and the like. Furthermore, recent judicial and regulatory developments in the United States, such as the SEC regulations prohibiting selective repurchases by a target of its shares, the decision in Revlon v. Pantry Pride,138 which effectively forces management to remain impartial and not favor one bidder over another, and Smith v. Van Gorkom,139 which effectively limits the scope of the business judgment rule in protecting management from liability in a tender offer context, bring the state of the law in the United States closer to the norms imposed by the City Code. These cases indicate that the judicial and legislative systems may be becoming more sensitive to the need to protect shareholders from their own management as well as from a hostile raider.

(2) The City Code is not only more solicitous of the interests of small shareholders than is the Williams Act, but it applies to a

139 488 A.2d 858 (Del. 1985).
potentially broader variety of takeover activity as well. The lack of any strict statutory definition of "takeover" makes it theoretically more difficult for offerors to avoid the jurisdiction of the City Panel by a novel structuring of the takeover bid. Under the City Code what is important is the determination whether, in fact, control of a large corporation will pass from one group of shareholders to another rather than how the transfer in shareholdings will be effectuated. Consequently, even gradual open market purchases of large amounts of stock would bring the purchaser within the jurisdiction of the City Panel while this would not be true under the Williams Act. Notwithstanding the above, however, it would appear that the City Panel has been somewhat more reluctant than necessary to extend its jurisdiction to cover new types of activities without prior notice to market participants. Thus, the fact that the City Code gives the Panel the authority to assert jurisdiction over acts which are covered by the spirit of the Code although not expressly within its letter, is less significant in practice than might first appear.

(3) Several aspects of the British system appear to cause less litigation to be instituted in connection with tender offers than is generally the case in the United States. Since the City Code is a voluntary code of self-regulation, actions for violation of it are brought to the Panel's attention as opposed to winding up in court as is true of Williams Act violations. Furthermore, the prohibition of defensive tactics by the target corporation discourages the use of litigation as a defense mechanism. Also, the fact that antitrust violations do not create a private right of action in the United Kingdom means that this cause of action is simply unavailable. Whether this absence of litigation is on the whole positive, however, is difficult to assess. If it means that the British are able to resolve disputes between the interested parties to a hostile takeover satisfactorily in a nonadversarial manner, then this is a mark of the system's success. On the other hand, if the absence of litigation is a result of the lack of appropriate legal remedies for minority shareholders and target corporations so that important rights remain unvindicated, then the absence of litigation is not the benefit that it first appears to be.

(4) Finally, although much has been made over the self-regulatory nature of the British system vis-à-vis the legal regulatory scheme in the United States, this distinction is not critical when comparing the relative advantages and disadvantages of each. First, the most advantageous features of the British scheme are not inherent in a self-regulatory system but could be accommodated within the U.S. scheme as well. Thus, certain substantive features of the City Code discussed previously, such as its prohibition on defensive tactics and severe treatment of partial offers, could easily be accommodated within the framework of the Williams Act or SEC regulations.
promulgated thereunder. Similarly, the flexibility the Panel has in deciding whether to invoke its jurisdiction over a transaction which has most, but not all, of the characteristics of a tender offer could be largely given to the SEC merely by issuing expansive regulations which broadly define the term "tender offer" as it appears in the Williams Act.

Second, those features of self-regulation that are not easily accommodated within a legal regulatory scheme do not seem terribly significant when compared with the most criticized features of the present U.S. scheme of regulation. A 1974 Department of Trade survey listed the main advantages of self-regulation to be the following: flexibility in interpreting the City Code; ability to deal with the spirit as well as the letter of the law; speed of response; development of expertise in dealing with the area being regulated; and its relative low cost. None of these factors loom large in the criticism of the current regulation of tender offers by the SEC and the courts.

In short, then, the mere fact that the British scheme is self-regulatory in nature should not deter either the SEC or Congress from attempting to incorporate its most desirable features. Indeed, in Britain, the City Panel itself, is now being cloaked with legal authority by bringing it under the umbrella of the new Securities and Investments Board, thereby giving it quasi-legal status.

---

140 See Gower, supra note 63, at 53. On January 28, 1987, the Secretary of State's Office announced that it would commence a review of the regulation of takeovers in Britain. On May 11, 1987, the Secretary announced that the review had been completed and that measures would be recommended which would improve the monitoring and investigative capabilities of the Take-over Panel, adding further to the arrangements already made by the Panel with the London Stock Exchange to use the Exchange's new information systems. The measures are also expected to make available to the Panel the sanctions of the Securities and Investments Board and recognized self-regulating organizations. They will also require authorized investment businesses to cooperate with the Panel's investigations. Detailed amendments implementing these recommendations are expected to be formally proposed late in 1987. Letter from Peter Frazer, Deputy Director-General of the Panel on Take-overs and Mergers to the author (July 13, 1987) (available from author).