Shareholder Rights and Legislative Wrongs: Toward Balanced Takeover Legislation

John H. Matheson
University of Minnesota Law School, mathe001@umn.edu

Brent A. Olson

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John H. Matheson* and Brent A. Olson**

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* Associate Professor of Law, University of Minnesota. Of Counsel, Kaplan, Strangis and Kaplan, P.A.
** J.D., 1991, University of Minnesota; M.B.A. expected December, 1992, University of Minnesota. The authors wish to thank Alan Gilbert, Phil Garon, James T. Hale, and Bill Harder for their helpful comments on previous drafts.
Introduction

Nowhere are the tensions and infirmities in the current framework of corporate governance more apparent than in control transactions. As the legal landscape defining the contours of control transactions increasingly favors management discretion, sophisticated institutional shareholders feel increasingly estranged from corporate governance machinery. Before this corporate governance structure collapses to society's detriment, this Article proposes legislative reform aimed at corporate governance's structural soft spot: control-change transactions. It explores ways to harness the valuable input of sophisticated, expert, and increasingly active institutional shareholders when the conflict between management and shareholders is most acute: during control-change transactions. This Article's proposal seeks to assure that management and shareholders work as a team to determine whether a takeover should occur in the first instance and, in the event of a takeover, to assure that shareholders' voices are heard regarding both the takeover's form and substance and the corporation's future governance structure.

Contests for control of publicly held corporations can take many forms, including proxy contests, tender offers, stock for stock exchanges, open-market purchases, and privately negotiated transactions. Takeovers of public companies constitute a major facet of American business activity, and have become a primary method of corporate expansion and diversification. In recent years, scarcely a week has passed during which at least one major takeover bid has not been announced.2

The eight-year period from 1982 to 1989 saw more than 200 merger or acquisition transactions valued at one-billion dollars or

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1. According to defensive takeover specialist Martin Lipton, "the present system of corporate governance is an anachronism [and] is not suitable for the present era.... We need a new system of corporate governance. We need to strike a balance." Lipton, A Proposal For a New System of Corporate Governance: Quinquennial Election of Directors, in INSTITUTIONAL INVESTORS, PASSIVE FIDUCIARIES TO ACTIVIS T OWNERS 61, 64-65 (Practising Law Institute 1990) (proposing board terms of five-year duration).

more.\(^3\) In 1989 alone, there were nearly 3800 mergers or acquisitions representing a value of approximately 254 billion dollars.\(^4\) Although these figures represent a downturn in activity from 1988, when 500 more transactions occurred, the dollar volume in 1989 was the second highest in history.\(^5\) The volume of transactions fell three percent in 1990 to around 3600 completions, but significantly, the value of those completed transactions fell 35\% to 160 billion dollars.\(^6\)

Fueling the entire takeover market has been a virtually unlimited flow of capital to finance corporate acquisitions. The development of the controversial "junk bond" market allowed corporate acquirors to raise hundreds of millions and even tens of billions of dollars to purchase publicly held corporations.\(^7\) Although some of the takeover fever may have subsided with the problems in the junk bond market,\(^8\) substantial financing remains available. The most significant change in the market for corporate control may be that in the 1990s strategic deals are replacing the unbridled merger mania of the 1980s.\(^9\) Indeed, although the value of takeover activity

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3. MERGERS & ACQUISITIONS, 1989 Almanac, at 57 (May/June 1990) [hereinafter 1989 Almanac]. In 1990, 37 deals were closed valued at over $1 billion each. 1990 Almanac, supra note 2, at 6.
4. 1990 Almanac, supra note 2, at 5. These statistics include only those transactions that exceeded one million dollars and involved American companies. Id.
6. 1990 Almanac, supra note 2, at 5-6.
7. For background on the role of junk bonds in catalyzing the takeover frenzy, see CONGRESSIONAL RESEARCH SERV., 99TH CONG., 2D SESS., CORPORATE MERGERS AND HIGH YIELD [JUNK] BONDS: RECENT MARKET TRENDS AND REGULATORY DEVELOPMENTS (Comm. Print 1986).
9. See Rosenberg, Merger Mania Is Giving Way to Strategic Deals, Minneapolis Star Tribune, July 5, 1990, at 7B, col. 1; Smith, The Corporate Raider of the '90s: Big Business, Wall St. J., Dec. 4, 1990, at Cl, col. 1 (stating that "corporate takeovers are back. Only this time, its big, deep-pocketed corporations that are doing the buying, not the 1980s-style raiders and leveraged buy-out funds."). Experts expect an increasing number of big takeovers by large corporations. See id. at C20, col. 6.
slowed forty-seven percent in 1990 to roughly $200 billion, perhaps “the age of the strategic merger has arrived.”

The debate over the effects of corporate takeovers is equally controversial. Logical arguments have been advanced on both sides of the issue. Proponents of increased takeover activity argue that takeovers serve several important social and economic functions, including transferring resources to their most valued uses, replacing ineffective management with more efficient personnel, and allowing shareholders to receive a premium for their shares over the market price. On the other hand, defenders of the defensive activities of target companies assert that hostile takeovers allow companies to be purchased at prices that substantially undervalue corporate assets and divert resources from long-term projects that may not show a profit for several years to short-term projects that only temporarily increase the corporation’s stock price. Furthermore, antitakeover

10. After Merger Mania of the ’80s, Takeover Market Slowed in ’90, Minneapolis Star Tribune, Dec. 27, 1990, at 1D (figures include deals announced during the year). Takeovers peaked in late 1988 with the record $24.53 billion debt-financed takeover of RJR Nabisco Inc. by Kohlberg Kravis Roberts & Co. Inc. Id. at 7D.

11. The Era of the Strategic Merger, INSTITUTIONAL INVESTOR, Dec. 1990, at 175. In 1990, the 11 largest deals were completed by strategic buyers. Id.


From the available evidence, it appears that the market for corporate control has worked and is working well. . . . Both economic theory and the great weight of the available empirical evidence clearly demonstrate that takeovers have provided net benefits to the American economy. Admittedly, some forms of takeover activity, hostile, friendly or management buyouts, result in temporary social and economic dislocations. However, these dislocations are no less severe than unilateral actions taken by corporate managements that are totally divorced from takeover activity. Actions such as plant closings and relocations, headquarter relocations and job loss due to general economic conditions cause far more social and economic dislocation than corporate takeover activity. . . . It is clear that the federal government is less capable of distinguishing between beneficial and detrimental takeover activity than are the private parties who have better financial information and a substantial financial incentive to be right in making the judgments.

S. REP. No. 265, supra, at 159-60.

13. For a brief distillation of current antitakeover sentiment, see the legislative findings and intent of the recent Washington State antitakeover law:

(4) Hostile or unfriendly attempts to gain control of or influence otherwise publicly held corporations can cause corporate management to dissipate a corporation’s assets in an effort to resist the takeover by selling or
weapons are believed to protect such nonshareholders as bondholders and employees.\(^{14}\)

As the volume of takeover activity has increased over the years,\(^{15}\) the entire takeover arena has evolved. Corporate acquirors have developed new and more aggressive techniques to make any corporation a potential acquisition target,\(^{16}\) and target corporations have responded with innovative defensive tactics, the most potent of which has been the shareholder rights plan, or "poison pill."\(^{17}\)


15. See supra notes 2-5 and accompanying text.

16. The primary method has been the aggregation of substantial "junk" debt, permitting suitors to acquire large corporations, like RJR Nabisco. Use of unfinanced tender offers to put a corporation "into play" is another technique employed by suitors.

17. "Poison pills" are antitakeover mechanisms triggered when a hostile raider amasses a target's stock to gain control of the target corporation. See Note, An Examination of a Board of Directors' Duty to Redeem the Rights Issued Pursuant to a Stockholder Rights Plan, 14 DEL. J. CORP. L. 537, 539-44 (1989) [hereinafter Note, Duty to Redeem Rights Plans]. Poison pills are thought to be the most potent type of firm-specific antitakeover devices. See id. at 539. In keeping with current takeover parlance, the term "poison pill" or "pill" is used extensively throughout this Article. Where appropriate, the more cumbersome yet less disparaging term "shareholder rights plan" or "poison pill rights plan" is substituted. For a description of various poison pills and their equivalents, see id. at 539; Note, Defensive Tactics to Hostile Tender Offers—An Examination of Their Legitimacy and Effectiveness, 11 J. CORP. L. 651 (1986) [hereinafter Note, Defensive Tactics] (discussing various antitakeover mechanisms); Chittur, Wall Street's Teddybear: The "Poison Pill" as a Takeover Defense, 11 J. CORP. L. 25 (1985).

One of the more concise explorations of poison pills notes that poison pills grant shareholders

a warrant or other right, usually transferable itself, the operation of which typically is triggered by any significant transfers or concentrations of controlling stock or voting power. This warrant or right may enable the holder to do any one or more of the following things: to buy stock in the acquirer at low prices ("flip overs," e.g., at fifty percent of market value); to sell target stock to the target itself at high prices ("flip ins," e.g., at 200 percent of market value); to exchange stock of the target with a high-value package of the target ("back ends"); or to convert a special preferred stock of the target for a high-value package of cash and securities of the target. Such pills had become the antitakeover weapon of choice ... and are now being further refined and expanded because of their simplicity and effectiveness. Clearly most pills serve no conceivable corporate financing purpose.

Kozyris, Corporate Takeovers at the Jurisdictional Crossroads: Preserving State Authority Over
These defensive techniques have significantly increased the leverage of the board of directors in dealing with corporate bidders.

Probably the most significant development in the takeover arena in the past decade, however, has been the adoption by state legislatures of protectionist statutes. These provisions, often designed to aid the local target of a prominent takeover overture,\textsuperscript{18} have an impact reaching far beyond the initial target and lasting well beyond the battle that brought the legislation into being. The increasing potency and proliferation of such legislation have created a layer of corporate insulation that is slowly blanketing the whole country.\textsuperscript{19}

It is difficult today to find a publicly held company that is not shielded by a poison pill or antitakeover statute, or both.\textsuperscript{20} Indeed, the recent proliferation of these corporate-imposed\textsuperscript{21} and state-sponsored\textsuperscript{22} protectionist measures magnifies the need for critical analysis and possible reform.\textsuperscript{23} Although corporate managers and

\begin{itemize}
  \item Internal Affairs While Protecting the Transferability of Interstate Stock Through Federal Law, 36 UCLA L. REV. 1109, 1156-57 (1989) (footnotes omitted).
  \item 18. See infra notes 488-90 and accompanying text.
  \item 19. For an overview of state protectionist measures, see Appendix.
  \item 20. Roughly 85\% of all companies have some form of protection against unwanted takeover bids. Parker, \textit{Companies Not Ringed with Defensive Armor}, PENSIONS & INVESTMENT AGE, Sept. 17, 1990, at 21 (noting that some forms of governance protections remain "surprisingly rare," including supermajority amendments and lock-in provisions).
  \item 21. The trend toward pill adoption has recently escalated. A study by the Investor Responsibility Research Center (IRRC), an independent nonprofit research group, found that as of mid-June 1989, 43\% of the nation's largest public corporations have adopted poison pills; this compares to a 1986 Fortune 500 showing of less than 30\%. \textit{See Almost Half of Larger U.S. Companies Have Poison Pill Plans, Study Reports, 21 Sec. Reg. & L. Rep. (BNA), at 1630 (Nov. 3, 1989).} The IRRC released its updated study on November 26, 1990, finding that the percentage of large American companies with poison pills increased from 43\% in June 1989, to 51\% in August 1990. \textit{Majority of Large U.S. Corporations Have Adopted Poison Pills, IRRC Finds, 22 Sec. Reg. & L. Rep. (BNA), at 1659 (Nov. 30, 1990).} "If the recent trends continue, virtually all major corporations will be transformed into fortresses in the near future." Kozyris, \textit{supra} note 17, at 1125 n.59. The vast majority of these pills were adopted without shareholder approval. \textit{See Andre, Tender Offers for Corporate Control: A Critical Analysis and Proposals for Reform, 12 DEL. J. CORP. L. 865, 869 (1987).}
  \item 22. State sponsorship of poison pills may take one of two forms: (1) State antitakeover legislation whose practical impact is substantially similar to poison pills; or (2) state antitakeover legislation which specifically authorizes corporations to adopt poison pills. For purposes of this Article, "state sponsored poison pills" refers to the former type. Generally, state legislation mirrors corporate-level defenses. \textit{See Oesterle, The Rise and Fall of Street Sweep Takeovers, 1989 DUKE L.J. 202, 233.} Only six states have yet to adopt some form of antitakeover legislation. \textit{See Appendix at S.}
  \item 23. That legislative remedies for these broad problems are preferred over case law solutions cannot be gainsaid. First, although case law may provide some guidance as to the dimensions of the business judgment rule, its necessarily fact-specific approach is ill-suited to address broad takeover issues. Indeed, courts themselves are ill-equipped to balance the business and economic issues paramount in the takeover arena. Second, as a balanced legislative response precludes case law remedies only as regards fundamental parameters, case law is still necessary to fill in the skeletal framework with case-by-case considerations. \textit{See generally 1 R. BALOTTI & J. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS lxviii-lixix (Supp. 1989) (discussing the tendency of the Delaware courts to place limits on the liberal Delaware statutes).}
legislators justifiably may have sought to curb the abuses of the raider-driven takeover fever, their response has failed to achieve a balance between shareholder and nonshareholder interests.

The reservoir of recent commentary on current state antitakeover legislation is enormous. This wealth of scholarship appears inevitable given the profound economic and social impact of takeovers and antitakeover devices. This commentary touches on a multitude of conflicting goals: society’s interest in maximizing fairness,

24. The impact tender offers have on society has been likened to such crises as the national debt and defense spending. See Sommer, Hostile Tender Offer Is Critical Issue for Congress, Legal Times, Jan. 21, 1985, at 19; see, e.g., Veasey, Delaware’s Takeover Law: A Statute Was Needed To Stop Abuses, N.Y. Times, Feb. 7, 1988, § 3, at 2, col. 3; see also Nussbaum & Dobrzynski, The Battle for Corporate Control, Bus. Wk., May 18, 1987, at 102; Williams, It’s Time for a Takeover Moratorium, Fortune, July 22, 1985, at 133-34. Compare Goldman, Delaware Anti-Takeover Legislation Is Needed, Nat’l L.J., Feb. 8, 1988, at 31, col. 1 (noting that many states enacted takeover statutes in an effort to delay tender offers long enough to allow the necessary information to reach the shareholders in order for the shareholders to make informed decisions about the tender offer) with Mendelsohn & Berg, Anti-Takeover Bill Would Shift Balance of Power, Nat’l L.J., Feb. 8, 1988, at 38, col. 1 (arguing that, in fact, the Delaware antitakeover statute will shift power from the shareholders to management in tender offer situations).

25. Given both the ubiquity of these legislative and board-derived poison pills and the current trend toward their adoption, three questions face corporations, legislators, and courts: (1) by what process should poison pills be adopted; (2) by what process should corporations further shield themselves with state antitakeover legislation; and (3) when must an attractive tender offer be accepted despite the presence of a poison pill which would otherwise foreclose a takeover? This Article and proposed Model Act offer solutions for these fundamental questions.


economic efficiency, and long-term corporate growth; shareholders’ interest in wealth maximization; corporations’ and other nonshareholders’ interest in continued economic viability; and directors’ interest both in freely deciding their corporation’s future and in fulfilling their duties to shareholders and nonshareholders without incurring liability.

As yet, however, no scholar has proposed new or model legislation designed to resolve the concerns inherent in the current market for corporate control. This Article attempts to fill this void and proposes legislation providing directors with enhanced guidance and certainty by balancing shareholders’ and management’s input at those times when management’s inherent conflict of interest with shareholders.


28. For scholars who have suggested specific statutory proposals, see Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation, 83 COLUM. L. REV. 249 (1983) (proposing to amend the Williams Act: takeover bids must remain open for six months; target corporations cannot undertake a “structural change” upon becoming a target); McCord, Limiting Defensive Tactics in Tender Offers: A Model Act for the Protection of Shareholder Decisionmaking, 21 HARV. J. ON LEGIS. 489 (1984) (setting forth a Model Act that seeks to limit defensive tactics by: (1) restricting management’s ability to secure changes in the corporate charter that discourage tender offers; (2) prohibiting extraordinary transactions by a corporation amid tender offers; (3) imposing strict liability on directors for making misleading statements regarding tender offers; and (4) revising antitrust laws); Ferrara & Carroll, A Proposal for Legislation to Provide for Balanced State and Federal Regulation of Tender Offers, in ADVANCED SECURITIES LAW WORKSHOP 953 (Practising Law Institute 1988) (proposing to amend the Williams Act so that its underlying policies have the force of law, thereby preempting state statutes that intrude on the Williams Act’s balanced regime, including control share and business combination statutes).

Scholars recommending legislative change without proposing specific statutory language are more numerous. See Johnson & Siegel, Corporate Mergers: Redefining the Role of Target Directors, 136 U. PA. L. REV. 315 (1987) (recommending that statutes be amended to afford independent directors authority to reject offers); Loewenstein, Toward An Auction Market for Corporate Control and the Demise of the Business Judgment Rule, 63 S. CAL. L. REV. 65 (1989) (recommending both the adoption of a more bidder-oriented review standard and the amendment of the Williams Act to increase the open period for tender offers to 60 days); see also Siegel, Tender Offer Defensive Tactics: A Proposal for Reform, 36 HASTINGS L.J. 377 (1985); Note, Shareholder Rights Plans—Do They Render Shareholders Defenseless Against Their Own Management?, 12 DEL. J. CORP. L. 991 (1987) [hereinafter Note, Shareholder Rights Plans] (recommending the requirement of shareholder approval for rights plans); Note, State Takeover Statutes and a Proposal to Amend the Williams Act, 49 OHIO ST. L.J. 1129 (1989) [hereinafter Note, State Takeover Statutes] (recommending an amendment to the Williams Act to prohibit certain control share act provisions). Compare Bradley & Rosenzweig, Defensive Stock Repurchases, 99 HARV. L. REV. 1377 (1986) (proposing requirement that repurchase offers for self-tenders seek at least the number of shares sought by the raider and that the terms of such offers do not impede the suitor from tendering its holdings to target) with Gordon & Kornhauser, Takeover Defense Tactics: A Comment on Two Models, 96 YALE L.J. 295 (1986) (criticizing Bradley & Rosenzweig’s assumptions).
shareholders is most acute—during a battle for control of the corporation. In addition, the proposed legislation encourages shareholders to inform management of an optimal course of action for significant decisions affecting the company's potential for acquisition.

Accordingly, Part I traces the evolution of the market for corporate control, identifies the current corporate and legislative impediments to shareholder involvement in this arena and the dearth of current shareholder protection reform proposals for state legislation. Part II analyzes the identity and role of shareholders in the modern corporation. Part III explores the legal and economic justifications for enhancing shareholder input. Part IV delineates a paradigm for reform. Responsive to this new paradigm, Part V proposes a Model Act with Comments. These Comments summarize the justifications for enhancing shareholder input and permit the Model Act to stand alone.

I. The Evolution of the Market for Corporate Control

A. The Shifting Role of the Board of Directors

The corporate board historically has played, and still plays, a primary role in most significant corporate events. Significant corporate transactions, such as mergers or sales of assets, typically require board recommendation before they are considered by the shareholders.29 This requirement gives the board the ability to short-circuit fundamental changes, or, from a different perspective, protects the shareholders from the burdens of important decisions until their duly elected representatives have carefully considered the matter and have decided such a change is in the best interests of the corporation and its shareholders. Similarly, changes in the corporate charter are typically initiated by the directors. In addition, corporate management, sometimes through a nominating committee, almost always chooses whether individual directors should continue in office and who will replace them.

One significant transaction, a tender offer,30 need not involve the

29. See, e.g., Del. Code Ann. tit. 8, § 251 (Supp. 1991) (requiring approval by shareholders for mergers); id. § 271 (dealing with the sale of assets).
30. No consensus exists as to the definition of a tender offer. Courts usually consider eight factors proposed by the SEC in determining the existence of a tender offer: (1) Active and widespread solicitation of public shareholders for the shares of an issuer; (2) solicitation made for a substantial percentage of the issuer's stock; (3) offer to purchase made at a premium over the prevailing market price; (4) terms of the offer are firm rather than negotiable; (5) offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased; (6) offer open only for a limited period of time; (7) offeree subjected to pressure to sell his stock; [and (8)] public announcements of a purchasing program concerning the target company precede or accompany rapid accumulation of a large amount of target company's securities.

current management or board. Shareholders are given the opportunity to sell their shares directly to an offeror, thereby relinquishing their interest in the corporation. No vote is taken; no board approval is necessary. The transaction is fundamentally financial rather than corporate. Yet, if the offer is for a controlling number of shares, ultimate corporate control may shift. Therefore, the ease by which a tender offer may shift the fundamental ownership of a company embodies the whole concept of a market for corporate control.

Before the 1968 enactment of the Williams Act, tender offers

31. See 17 C.F.R. § 240.14d-9 (1990). Although Securities Exchange Act of 1934 Rule 14d-9 applies to recommendations made by the target company, Rule 14e-2 provides that the target company must, within ten business days from the dissemination of the tender offer, make a statement to its shareholders declaring that it (1) recommends acceptance of the offer, (2) recommends rejection of the offer, (3) is remaining neutral, or (4) is unable to take a position. 17 C.F.R. § 240.14e-2 (1990). Thus, Rule 14e-2 requires the target’s Board of Directors to consider and respond to all tender offers, although its response may be noncommittal.

32. In enacting antitakeover legislation effective November 2, 1989, Ohio’s General Assembly stressed its concern for the role of tender offers in transfers of control of Ohio corporations:

(1) Existing Ohio corporate law was designed to deal with traditional methods of transfer of control of Ohio corporations. The tender offer has evolved as an alternative device to acquire control of a public corporation that has been in widespread use in the past several decades. Numerous Ohio corporations have been the subject of tender offers and accumulations of significant blocks of securities.

(2) The accumulation of a large block of a corporation’s voting shares has not been subject to the normal corporate approval mechanisms involved in other typical types of acquisition transactions such as mergers, consolidations, combinations, and majority share acquisitions. Such accumulations, however, can result in shifts of effective corporate control and hence, from a business and financial perspective, directly or indirectly, can result in significant changes in a variety of basic corporate circumstances identical or substantially similar to those arising as a result of the above-mentioned transactions. For instance, a change in corporate control accompanying a large accumulation of shares will very often result in a fundamental change in the ongoing business of the corporation and a concomitant fundamental change in the nature of the shareholders’ investment in it. Thus the potential that such changes in corporate circumstances will occur gives rise to basic issues concerning the internal affairs of the corporation typical of those arising in mergers, consolidations, combinations, and majority share acquisitions. The form of the transaction in which such issues arise should not alter the basic corporate mechanisms by which such issues are presented and resolved.

(3) Tender offers almost always involve a change in corporate control and, therefore, give rise to these same basic issues concerning internal corporate affairs.


typically followed this scenario:

The prospective buyer offers a price far enough above the market to obtain the desired number of shares—usually an amount sufficient to gain operating control of the corporation. As an aid in carrying out his objective the buyer generally hires a brokerage house to manage the offer, arranges a loan to pay for the purchase, buys a few newspaper ads and issues press releases to shareholders of the “target” company. If the number of shares tendered by shareholders falls below the number desired, all of the shares are returned and the acquisition plan is canceled. If the tender offer brings in more stock than the specified number of shares bid for, the offeror may at his option, buy only the number of shares for which he has bid or may buy all of the stock tendered. 35

The unregulated cash tender offer had at least three advantages over other modes of corporate control acquisition. Although proxy contests and stock-for-stock exchanges required disclosure of certain pertinent information to the Securities and Exchange Commission (SEC) and target company shareholders,36 cash tender offers could be made in secrecy. 37 Cash tender offers also took less time to complete, and because they were unregulated, cash tender offers were administratively less expensive.

The advantages tender offers provided to takeover strategists were offset, it was argued, by disadvantages to the shareholders of target companies. 38 The lack of disclosure requirements forced

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shareholders to make hasty decisions, with a dearth of information, about whether to tender their shares or wait out the offer.\textsuperscript{39}

Congress passed the Williams Act\textsuperscript{40} because it recognized that unregulated cash tender offers often paralleled regulated proxy contests as a mechanism for changing corporate control.\textsuperscript{41} The Williams Act was also a congressional response to the perceived inequities of unregulated cash tender offers.\textsuperscript{42} The Act was designed to protect investors from sudden shifts in control brought on by an acquiror’s swift accumulation of shares.\textsuperscript{43} It requires, in the context of tender offers, full disclosure and equal treatment toward target shareholders\textsuperscript{44} similar to that required in proxy contests and stock-for-stock exchanges.\textsuperscript{45} The Act relieves the undue pressure on shareholders by ensuring investors have more time to make informed and rational decisions. The drafters of the Act, however, sought to avoid tipping the balance of power in favor of either the offeror or the target company’s management.\textsuperscript{46}

The passage of the Williams Act seems to have done little to prevent hostile takeovers. The Act interposed a period of delay and additional expense, but did not otherwise limit the offeror’s ability to proceed. Management continues to be bypassed as shares change hands in the market for corporate control. Despite the Williams Act, by the mid-1970s the takeover boom had begun an extended expansion that would carry through the megamergers of the late 1980s.\textsuperscript{47}

Corporate management, however, did not remain passive. Various defensive mechanisms have been adopted and are currently employed. From crude beginnings such as asset sales, defensive

\textsuperscript{39} Id.
\textsuperscript{43} See Senate Report, supra note 41, at 3-4; House Report, supra note 42, at 4.
\textsuperscript{44} See 15 U.S.C. § 78m(d). Senator Williams stressed that [e]very effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror. The purpose of the bill is to require full and fair disclosure for the benefit of shareholders while at the same time providing the offeror and management equal opportunity to present their case.
\textsuperscript{45} Id. at 2811.
\textsuperscript{46} See, e.g., 1990 Almanac, supra note 2, at 5 (noting that the “mergers and acquisition boom of the 1980s” tapered off in the 1990s).
acquisitions, and charter amendments, to the mid-1980s development of the poison pill, management resisted unfriendly overtures. The short-term goal of such defensive tactics is usually to defeat a particular bid. Many bids are seen as not only threatening management, but also harmful to shareholders.\(^4\) Bids are purportedly made at inadequate prices, are designed to dissolve the operating entity, or seek to pay a premium for minimal control shares and then squeeze out the remaining shareholders at a much lower price.\(^4\)

The long-term objective of antitakeover measures has always been to reassert the board's position as the primary decisionmaker in fundamental corporate transactions.\(^5\) The transfer of shares in a tender offer always threatens the continuity of management's control. Management seeks to manage the process of these share transfers so as to determine, if not defeat, the transfer of corporate control.

State legislatures also refused to sit by idly as takeover activity increased. As favorite local corporations came under attack, legislatures adopted protective provisions.\(^5\) In addition, increasing numbers of states put prophylactic statutes in place to provide the board with the power to guide the takeover process.\(^5\) The strength of these enactments has been growing along with the expanding group of states that have adopted them. Indeed, by the process of spreading state adoption of antitakeover legislation, a national takeover law is developing.

B. Current Protectionist Efforts

1. Legislation

The overwhelming majority of public corporations are protected by state antitakeover legislation.\(^5\) These antitakeover statutes have been enacted in three waves. First-generation statutes were enacted in response to the spell of takeover activity in the late 1960s,\(^5\) and

\(^{48}\) See Booth I, supra note 26, at 1640-43.

\(^{49}\) See id.

\(^{50}\) See Kanter, Judicial Review of Antitakeover Devices Employed in the Noncoercive Tender Offer Context: Making Sense of the Unocal Test, 138 U. P.A. L. Rev. 225, 226 (1989) (stating that "[t]he ability to enact an antitakeover device, or redeem an existing one, has granted to the target board a virtual veto power over tender offers" (footnote omitted)). Kanter further notes that antitakeover devices enable targets "in effect to defeat any unsolicited tender offer not approved by its board." Id. at 230 (footnote omitted); see also McBride, Conflicting Claims Remain an Issue in Delaware Cases, Nat'l LJ., Feb. 30, 1989, at S14.


\(^{52}\) See infra notes 53-205 and accompanying text; Appendix (surveying state antitakeover weaponry).

\(^{53}\) Johnson, supra note 26, at 909.

\(^{54}\) See Pinto II, supra note 26, at 700-14.
often paralleled the requirements of the Williams Act.\footnote{55} Second-generation statutes\footnote{56} were passed in response to the Supreme Court’s rejection of first-generation statutes announced in \textit{Edgar v. MITE Corp.}\footnote{57} Third-generation statutes are those that have been passed since \textit{CTS Corp. v. Dynamics Corp. of America},\footnote{58} where the Supreme Court upheld Indiana’s second-generation statute. By June 1, 1991, at least forty-four states had adopted antitakeover statutes of some kind.\footnote{59}

Although current antitakeover statutes take a variety of forms,\footnote{60} generally they reflect common elements. Primarily, state antitakeover legislation attempts to vest management with power to respond to tender offers.\footnote{61} Second, this legislation seeks to regulate hostile acquisitions, through corporate governance, which traditionally has been the province of state law.\footnote{62}

Many states have adopted more than one form of antitakeover statutes. These forms include: (a) business combination statutes;\footnote{63} (b) control share statutes;\footnote{64} (c) fair price statutes;\footnote{65} (d) disclosure

\footnote{55. \textit{See supra} notes 40-46 and accompanying text.}
\footnote{56. In general, second-generation statutes cover only takeovers of corporations chartered in their respective states. Unlike first-generation statutes, many second-generation statutes impose a nexus requirement beyond incorporation in the enacting state. For example, they may also require either a significant presence in the statutory forum or a large proportion of shareholders residing there. Similarly, some third-generation statutes apply to takeovers directed at corporations which have some other connection with the statutory forum (such as having substantial corporate facilities within the state or having a certain percentage of shareholder residents).
\footnote{57. 457 U.S. 624 (1982); \textit{see Coates, supra note} 26, at 846 n.241. Despite the \textit{MITE} Court’s holding that an Illinois antitakeover statute was an unconstitutional burden on interstate commerce, 22 states still had some form of first-generation statute at the end of 1986. \textit{See Booth I, supra note} 26, at 1637 n.8.}
\footnote{58. 481 U.S. 6P (1987).}
\footnote{59. \textit{See Appendix at S}; \textit{see also Coates, supra note} 26, at 849 (noting that 42 states had antitakeover statutes as of September 1, 1989). As of June 1, 1991, the only states without any antitakeover legislation are Alabama, California, Montana, Texas, Vermont, and West Virginia. \textit{See Appendix at S}. Thus, no less than 44 states currently possess some variety of antitakeover legislation.
\footnote{61. \textit{See, e.g., Macey, supra note} 26, at 468-69 (noting that all state statutes “share the common feature of serving to consolidate the ability to respond to tender offers in the hands of the incumbent managers of [target firms]”).}
\footnote{62. \textit{See Booth I, supra note} 26, at 1638.}
\footnote{63. \textit{See infra} text accompanying notes 72-85; \textit{Appendix at BCS}. Absent prior board approval, these statutes impose a three- to five-year freeze on certain “business combinations,” including “bust-up” liquidations. \textit{See, e.g., Del. Code Ann. tit. 8, § 203 (1988)}.}
\footnote{64. \textit{See infra} text accompanying notes 86-106; \textit{Appendix at CSAS}. CSASs sterilize the voting power of shares acquired in a “control share acquisition” which, in total, exceeded any of the enumerated control thresholds (e.g., 20\%, 33\%/4\%, 50\%). \textit{See, e.g., Ind. Code Ann. § 23-1-42-1 (West 1988)}.}
\footnote{65. \textit{See infra} text accompanying notes 107-21; \textit{Appendix at FPS}. Fair price statutes}
statutes; legislation expanding managerial discretion, including (e) directors’ duties statutes (sometimes termed constituency statutes) and (f) share rights plan endorsement statutes and (g) other legislation with antitakeover effects, including antigreenmail statutes and cashout-redemption rights statutes.

a. Business Combination Statutes

New York, Delaware and at least twenty-six other states have enacted business combination statutes. These statutes impose a moratorium on specified transactions between the target and a shareholder holding a certain percentage of stock unless the stock acquisition or the transaction is approved in advance of the stock acquisition by the target’s board of directors. The most common form of business combination statute sets the delay at five years and the triggering level at five percent. “Business Combination” is a comprehensive term encompassing virtually every conceivable significant change or transaction.

Aimed at “bust-up” takeovers and two-tier coercive bids, New York's business combination statute has served as a model act for several states. The New York law prohibits business combinations between resident domestic corporations and a twenty-percent
shareholder for five years unless board approval is obtained in advance.™ Unless the business combination complies with the provisions of the statute, or is subsequently approved by a majority of the disinterested shareholders after five years have passed since the stock acquisition date, a complicated “formula price” must be paid for each share.™

Delaware’s business combination statute is a modified version of New York’s takeover statute.™ Because more Fortune 500 firms reside in Delaware than in any other state,™ this statute is influential. The Delaware statute prohibits any business combination for three years between an “interested stockholder”™ and a Delaware corporation unless the acquisition of shares that causes the shareholder to cross the fifteen-percent threshold is approved in advance by the board of directors.™ In addition to gaining prior board approval, the Delaware statute provides two additional paths a suitor may follow to circumvent the three-year freeze. First, the suitor may override the freeze if the transaction that renders the suitor interested results in the suitor owning at least eighty-five percent of the target’s stock.™ Second, the suitor may override the freeze if upon the suitor becoming interested, the business combination is approved by both the board and two-thirds of the outstanding disinterested shares.™ The Delaware statute has withstood constitutional challenges.™

77. See N.Y. Bus. Corp. Law § 912(a)(10) (requiring that a 20% shareholder be deemed “interested”); id. § 912(b) (setting five-year freeze absent prior board approval).
78. See id. § 912(c); Federal Court Rejects Attack on New York’s Anti-Takeover Law, 21 Sec. Reg. & L. Rep. (BNA) 315 (Feb. 24, 1989); see also Appendix at FPP.
79. See Del. Code Ann. tit. 8, § 203 (Supp. 1990). Delaware’s statute is manifestly less restrictive than New York’s statute. Indeed, the Delaware statute is one of the mildest in the nation: it is applicable only to suitors who acquire between 15% and 85% of a target’s shares. See id. at § 203(a)(2) (noting that 85% share acquisitions disengage statute); id. § 203(c)(5) (defining “interested stockholder” as 15% share owner); Booth I, supra note 26, at 1675 n.148.
81. “Interested Stockholders” are defined as shareholders that possess 15% or more of the corporation’s voting stock. Del. Code Ann. tit. 8, § 203(c)(5) (Supp. 1990).
82. See id. § 203(a)(1). Pennsylvania has recently enacted a director-approval statute empowering directors to reject or “take no action” in the face of a tender offer. 15 Pa. Cons. Stat. Ann. § 1502(A)(18) (Purdon 1989). In this sense, the Pennsylvania law is essentially a business combination statute. See Johnson & Millon II, supra note 26, at 1867 n.22.
84. Id. § 203(a)(3).
b. Control Share Acquisition Statutes

At least twenty-seven states have enacted control share statutes as of June 1, 1991, most being modeled after Indiana's constitutionally acceptable control share law. Indiana's law is based on the more restrictive Ohio Control Share Acquisition Statute. Both these statutes are second-generation antitakeover legislation, promulgated in the wake of Edgar v. MITE Corp., in which the Supreme Court held Illinois' first-generation antitakeover statute to be an unconstitutional restriction on interstate commerce.

Control share acquisition statutes typically grant shareholders the right to determine whether bidders' "control shares" garner voting rights. Indiana's law prohibits the acquiror of twenty percent or more of a target's shares from voting those shares unless a majority of disinterested shareholders grant the acquiror voting rights. Indiana's law also requires approval by the noninterested shareholders before the acquiror's interest exceeds both one-third and one-

86. See Appendix at S and CSAS.


89. OHIo REV. CODE ANN. § 1701.831 (Anderson 1985). Ohio's control share law differs from Indiana's law in two important ways. First, the Ohio Statute requires advance shareholder approval for the bidder even to purchase shares that lift its ownership over the relevant thresholds (20%, 33%, 50%). See Booth I, supra note 26, at 1678 n.137. Second, the Ohio statute focuses on the stock itself (rather than the voting rights of the stock) in requiring the approval of disinterested shareholders. OHIO REV. CODE ANN. § 1701.831 (A), (E) (Baldwin 1989).


91. Justice White, for the majority, ruled that the Illinois Business Take-Over Act, ILL. REV. STAT. ch. 121'/2, para. 137.51-57 (1979) [hereinafter Illinois Act] is unconstitutional under the Commerce Clause and Supremacy Clause of the Federal Constitution. Edgar v. MITE Corp., 457 U.S. 624, 643 (1982). The Illinois Act was found unconstitutional under the Commerce Clause because it imposed burdens on interstate commerce that were oppressive in light of the local interests the Act purported to further. See id. at 640-46.

The Illinois Act applied to tender offers for any corporation for which 10% of the outstanding shares were held by Illinois residents. Illinois Act, supra, para. 137.52-10 (1979). The Act thus applied to foreign corporations whose internal affairs "Illinois has no interest in regulating." MITE, 457 U.S. at 645-46.

Illinois' purported interests in protecting local shareholders and in regulating the internal affairs of Illinois corporations did not outweigh the burdens imposed by the Illinois Act's nationwide reach: "While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders." Id. at 644. Accordingly, second generation statutes generally require that the issuing public corporation have some connection to the home state. See, e.g., ARiz. REV. STAT. ANN. § 10-1201(11) (stating that the statute applies to all domestic corporations meeting the specified nexus requirements).

Three justices found the Illinois Act to violate the Supremacy Clause because: (1) the Illinois Act's "precommencement notification provision frustrates the objectives of the Williams Act," MITE, 457 U.S. at 635; (2) the Illinois Act's hearing provisions allow management with 10% ownership "to delay the commencement of an offer by insisting on a hearing," id. at 637, and therefore "conflict with the Williams Act," id. at 639; and (3) the Illinois Act is preempted by the Williams Act by allowing Illinois Secretary of State to "pass on the substantive fairness of a tender offer, [a judgment the Williams Act reserves for shareholders]." Id. at 639 (citing ¶ 137.57.E of the Illinois Act).

92. Control shares typically are defined as voting shares acquired that, together with all shares previously owned, elevate a raider past one of three (usually 20%, 33%, and 50%) thresholds. See Appendix at CSAS.

half of the target’s total voting power. Upon filing an “acquiring person statement” with the target, the acquiror may request a vote to be held within fifty days. If the acquiror fails to garner adequate shareholder votes, the target may redeem her shares at fair market value. If the acquiror prevails in the vote and acquires a majority of the shares, dissenting shareholders may elect to be cashed out at the highest price per share paid by the acquiror in her control share acquisition.

The Supreme Court viewed Indiana’s control share acquisition statute as investor protection to the extent it allows shareholders to vote collectively, thereby mitigating coercion:

If, for example, shareholders believe that a successful tender offer will be followed by a purchase of nontendering shares at a depressed price, individual shareholders may tender their shares—even if they doubt the tender offer is in the corporation’s best interest—to protect themselves from being forced to sell their shares at a depressed price. . . . [Thus], the shareholders as a group, acting in the corporation’s best interest, could reject the offer, although individual shareholders might be inclined to accept it.

Control share acquisition statutes may also eliminate a subtler form of coercion: shareholders often tender to avoid holding shares of speculative value should the offer succeed. Specifically, collective shareholder consideration of a tender offer, via the mechanism of a shareholder vote, purportedly will allow them dispassionately to determine whether the offer represents their corporation’s best interests.

Post-MITE bills emphasize shareholder protection because of Justice White’s statement in MITE that protection of local shareholders

94. Id. §§ 23-1-42-1, -9.
95. Id. § 23-1-42-7.
96. Id. § 23-1-42-10(b) (West Supp. 1987); see Booth I, supra note 26, at 1678-79 & n.161.
98. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 83 (1987) (citations omitted); see Lowenstein, supra note 28, at 307-09.
100. See Booth I, supra note 26, at 1682. "In short, the shareholder vote has the beauty of allowing shareholders to indicate their desire to sell or hold out without having to risk a significant loss that goes with tendering the wrong way." Id. "It is precisely shareholders' inability to coordinate their response in a straightforward tender offer that gives the bidder its biggest advantage: Since target shareholders fear that if they hold out others will tender, all are inclined to tender." Id. at 1683 (emphasis in original) (footnote omitted).
is a legitimate state interest. Thus, the recent rush by state legislators to enact control share acquisition legislation has occurred not because of its purported shareholder protection possibilities but rather because a control share statute is the first type of protectionist legislation upheld by the Supreme Court.

Indeed, the fundamental purpose behind the enactment of control share acquisition statutes is to impose significant delays, if not insurmountable barriers, on potential offerors. By conditioning voting rights on approval of disinterested shareholders, control share statutes thwart hostile offerors by raising the costs and diminishing a raider's likelihood of success. For practical purposes a suitor will be "extremely reluctant to acquire stock above any of the [statutory] thresholds" lest she become permanently disenfranchised and unable to vote her stock. Moreover, because this legislation typically is applicable without shareholder approval, the shareholders themselves never have the opportunity to determine whether control share statutes on balance afford desired shareholder protection.


102. See Note, supra note 99, at 265-66 (noting that Delaware has rejected this form of antitakeover legislation and recommending that Texas not enact a Control Share Acquisition law). The author also notes that control share statutes "may actually serve to encourage takeover activity." Id. at 265.

103. "Delay has been characterized as 'the most potent weapon in a tender-offer fight.'" MITE, 457 U.S. at 637 n.12 (quoting Langevoort, State Tender-Offer Legislation: Interests, Effects, and Political Competency, 69 CORNELL L. REV. 213, 238 (1977), and citing Wachtell, Special Tender Offer Litigation Tactics, 32 BUS. LAW. 1435, 1437-42 (1977); Wilner & Landy, The Tender Trap: State Takeover Statutes and Their Constitutionality, 45 FORDHAM L. REV. 1, 9-10 (1976)).

104. See Johnson & Millon I, supra note 26, at 852; Appendix at CSA.


106. "Whether the control shares statute 'protects shareholders of Indiana corporations ... or protects incumbent management seems to me a highly debatable question .... But a law can be both economic folly and constitutional." CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 95-97 (1987) (Scalia, J., concurring) (citation omitted).

A control share acquisition statute's essential purpose is to endow the target board with the power to dispose of tender offers. The powers granted directors are manifold: the power to opt into or out of statutory protection, see, e.g., IND. CODE ANN. § 23-1-42-5 (West 1987); the power to control the timing of the shareholder meeting, see, e.g., id. § 23-1-42-7(b) (requiring a meeting to be held within 50 days of a request by the acquiring shareholder); the power to approve unilaterally a merger, thereby bypassing the statute, see, e.g., id. § 23-1-42-2(d)(5) (stating that an acquisition of shares not deemed a control share acquisition if pursuant to a plan of merger or plan share exchange). Traditionally, management is unlikely to lose a voting contest. Judge Posner considered this ex ante deterrence so powerful he impugned Indiana's statute as a "lethal dose" for hostile takeovers. See Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250, 261-63 (7th Cir., 1986). In the final analysis, the intended beneficiaries of these statutes are nonshareholders thought likely to suffer from hostile bids, including, among others, dislocated employees, suppliers, and customers. See generally Johnson & Millon I, supra note 26. For a different view, see Boyer, When It Comes to Hostile Tender Offers, Just Say No: Commerce Clause and Corporation Law in CTS Corp. v. Dynamics Corp. of America, 57 U. CIN. L. REV. 539 (1988). Boyer hails control share statutes as empowering shareholders to defeat or accept hostile offers, arguing that the ultimate effect of control share statutes is to (1) give shareholders a voice, (2) provide a mechanism for making this voice heard, and (3) expand shareholders' role in corporate governance. Id.
c. Fair-Price Statutes

Fair-price statutes typically require a suitor to offer a "fair price" to all target shareholders unless the offer is approved by a supermajority of noninterested shareholders. Fair-price statutes are intended to eliminate the problems of "front-end loaded" two-tiered offers. Two-tiered offers unfold in two stages: the tender-offer stage, wherein the suitor attempts to acquire a controlling interest in the target; and the merger stage, wherein minority, nontendering shareholders are squeezed out—that is, forced to accept a lower price than the suitor initially offered during the first stage of the tender offer. To avoid losing their investment at a lower second-tier price, shareholders otherwise inclined to hold out are coerced into tendering during the first stage. Fair-price statutes force a suitor to pay a fair price for nontendered shares to ensure that nontendering shareholders in the first stage do not receive a lower price in the second stage.

Most fair-price statutes are based on Maryland's two-tier offer/cash-out merger model. Maryland's fair-price statute requires the target board to recommend shareholder approval of the business combination. The Maryland statute further requires both an eighty-percent vote of all shareholders and a two-thirds vote of all noninterested shareholders, or shareholders other than the suitor, to approve a cash-out merger. Alternatively, the "interested shareholder" may satisfy the statute's fairness requirement—by offering to the remaining minority the highest price paid any other

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107. See Note, "May We Have the Last Dance?" States Take Aim at Corporate Raiders and Crash the Predator's Ball, 45 WASH. & LEE L. REV. 1059, 1083-84 (1988). During the initial stage the suitor seeks a controlling interest, which enables her to merge with the target. Because only the suitor survives the merger, the suitor may force nontendering target shareholders to exchange their shares for a lower price. Id. at 1085.

108. One author summarized this coercion as follows:

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

Id. at 1085-86 (footnote omitted).


111. Id.
shareholder before the merger announcement—to avoid this prohibitive vote requirement.\textsuperscript{112} Maryland-type statutes attempt to eliminate coercive two-tier offers by compelling suitors either to perform a second-step merger at a fair price roughly equivalent to the first, or to announce a bid having that same effect wherein all nontendering shareholders will be cashed out at the same price.\textsuperscript{113} Although narrowly effective for limiting such coercion, such statutes arguably fail to prevent "abusive partial bid[s]."\textsuperscript{114}

Three principal variations on the Maryland theme surface on a recurring basis in other statutes. First, some statutes confer upon the board markedly more discretion than the Maryland statute.\textsuperscript{115} For example, whereas the Maryland statute permits the target board to approve a business combination only before a suitor becomes an interested shareholder, some statutes allow a target board to approve a business combination after a suitor becomes an interested shareholder.\textsuperscript{116} Second, in contrast to the Maryland law, some statutes restrict or eliminate the ability of a target to opt-out of the legislation's protection.\textsuperscript{117} Third, some statutes apply to foreign corporations.\textsuperscript{118}

Although price formulae vary somewhat, they typically require the suitor to pay the highest of: (1) the highest price paid for the target-company shares in a period (between two and five years) before the proposed business combination; or (2) the market value per share on the announcement date or determination date (the date when the suitor became an "interested shareholder") which is then multiplied by a value determined by averaging these two methods.\textsuperscript{119} Many "fair price" provisions essentially mandate that shareholders receive either the higher of the price the interested shareholder paid for any of its stock, the market value, or the price shareholders would be paid for the stock in the event of liquidation or dissolution of the corporation.\textsuperscript{120} Furthermore, the consideration paid must be

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{112} Id. § 3-603(b). Thus, "the price paid in the second step will often be higher than the average price for shares purchased earlier." See Booth I, supra note 26, at 1674.
\item \textsuperscript{113} See Booth I, supra note 26, at 1674.
\item \textsuperscript{114} See id. at 1675.
\item \textsuperscript{116} See, e.g., MISS. CODE ANN. § 79-25-7(c) (Supp. 1987).
\item \textsuperscript{117} Id. (footnote omitted).
\item \textsuperscript{118} See Appendix at FPS.
\item \textsuperscript{119} Id. (footnote omitted).
\item \textsuperscript{120} See, e.g., FLA. STAT. ANN. §§ 607.0901, .110 (West Supp. 1990); N.C. GEN. STAT. §§ 55-9-01 to -05 (Supp. 1990).
\item \textsuperscript{121} See, e.g., MD. CORPS. & ASS'NS CODE ANN. § 3-603(b)(1)(v) (1988).
\item \textsuperscript{122} See, e.g., id. § 3-603.
\end{enumerate}
\end{footnotesize}
in the same form as the interested shareholder previously paid to acquire the major portion of his shares.\textsuperscript{121}

d. Disclosure Statutes

Disclosure statutes are perhaps the least controversial of all antitakeover legislation in light of the fact that suitors are already required to disclose relevant information under the Williams Act. The key issue is whether these sometimes onerous disclosure requirements that extend beyond the coverage of the Williams Act advance corporate and shareholder interests or excessively deter bids \textit{ex ante}. This issue has not been dispositively addressed or resolved. The Authors feel that where statutes require only disclosure of essential information not available under federal law, and are narrowly limited to local companies with local interests, any resulting deterrence, on balance, appears justified. As to shareholder benefits from state level disclosure statutes, the Supreme Court in \textit{Edgar v. MITE Corp.}\textsuperscript{122} was

unconvinced that the Illinois Act substantially enhances the shareholders' position. The Illinois Act seeks to protect shareholders of a company subject to a tender offer by requiring disclosures regarding the offer, assuring that shareholders have adequate time to decide whether to tender their shares, and according shareholders withdrawal, proration, and equal consideration rights. However, the Williams Act provides these same substantive protections \ldots \quad \text{[T]he disclosures required by the Illinois Act which go beyond those mandated by the Williams Act \ldots may not substantially enhance the shareholders' ability to make informed decisions \ldots \quad \text{[W]e} conclude that the protections the Illinois Act affords resident security holders are, for the most part, speculative.}\textsuperscript{123}

Although some states still have pre-\textit{MITE} first-generation disclosure statutes in force,\textsuperscript{124} to the extent these conflict with the Williams Act or unduly burden interstate commerce, their

\begin{itemize}
  \item \textsuperscript{121} See, e.g., \textit{Md. Corps. & Ass'ns Code Ann.} § 3-603(b)(3) (stating that "(t)he consideration . . . is to be in cash or in the same form as the interested stockholder has previously paid"); \textit{N.Y. Bus. Corp. Law} § 912(c)(3)(C) (McKinney 1986); see also \textit{M. Lippton & E. Steinberger, Takeovers & Freezeouts}, § 5.03[1], at 5-26 n.2 (1989).
  \item \textsuperscript{122} 457 U.S. 624, 644-45 (1982).
  \item \textsuperscript{123} \textit{Id.} (citations omitted).
  \item \textsuperscript{124} Delaware, for example, still has a first-generation disclosure statute which has never been overturned. \textit{Del. Code Ann. tit. 8}, § 203 (1987); see \textit{Booth I}, \textit{supra} note 26, at 1672 n.121.
\end{itemize}
constitutionality remains doubtful. In order to avoid these constitutional infirmities, second-generation disclosure statutes attempt to comply with the Williams Act's disclosure requirements.

In 1984, Minnesota sponsored the first post-MITE disclosure statute. Although Minnesota's seminal disclosure statute more closely resembles pre-MITE statutes than most other second-generation antitakeover statutes, it overcomes MITE's barriers by avoiding preoffer notification requirements and by not requiring a third party to assess the merits of the offer. Rather, at the time of the tender offer, the statute requires the suitor both to file a statement with the Minnesota Commissioner of Commerce and to provide to shareholders information relating to the tender offer, including information relating to any plans to change employment policies, the location of business activities, charitable contributions or customer relations. Consonant with the requirements of the Williams Act, the statute does not delay the tender offer process beyond the federal time period. Although constitutional, the Minnesota statute appears to add little to the Williams Act.

Most disclosure statutes modify the amount and type of information required of the suitor under the Williams Act. These modified state-level disclosure requirements may be beneficial. For example, by requiring suitors to file an "impact statement," directors may have a better grasp as to when resisting an offer is appropriate. Furthermore, requiring suitors to furnish target shareholders with information facilitates informed shareholder decisionmaking.

e. Directors' Duties Statutes

In addition to specific antitakeover rules, states have recently...
modified traditional corporate law to expand a board's discretion,\textsuperscript{137} thereby bolstering the board's antitakeover decisions.\textsuperscript{138} These modifications not only further expand the already broad discretion granted directors by the business-judgment rule but also simultaneously limit directors' liability.\textsuperscript{139}

Typically, directors' duties statutes explicitly allow directors\textsuperscript{140} to consider nonshareholder interests when contemplating takeover offers and unleashing antitakeover weaponry.\textsuperscript{141} Many directors' duty statutes allow directors to virtually "consider the world"\textsuperscript{142} when making control-transaction decisions. The Minnesota statute is illustrative, stating that:

a director may, in considering the best interests of the corporation, consider the interests of the corporation's employees, customers, suppliers, and creditors, the economy of the state and nation, community and societal considerations, and the long-term as well as short-term interests of the corporation and its shareholders including the possibility that these interests may be best served by the continued independence of the corporation.\textsuperscript{143}

This legislation "help[es] shield directors from liability by expanding the criteria that directors may consider in reaching decisions on behalf of the corporation."\textsuperscript{144}

Although all directors' duties statutes employ similar language, they exhibit several strands of variation: (1) the breadth of factors directors may consider;\textsuperscript{145} (2) the contexts in which nonshareholder interests may be considered;\textsuperscript{146} (3) the corporate fiduciaries protected by the statute;\textsuperscript{147} (4) the nonshareholders specifically protected;\textsuperscript{148} (5) opt-in requirements;\textsuperscript{149} (6) mandatory versus...
permissive considerations; and (7) the level of protection accorded to a board's decision.

One scholar asserts that these statutes’ "vesting of such extraordinarily broad discretion in a board" likely affirms the "just say no" defense. Directors' duties statutes potentially provide directors with much greater leeway in rejecting tender offers than afforded under current case law.

f. Shareholder Rights Plan Endorsement Statutes

In general, these statutes grant directors express authority to adopt discriminatory shareholder rights plans or poison pills. These statutes are intended to clarify a board's authority to adopt shareholder rights plans or overrule court decisions which had restricted target implementation of rights plans. For example, Illinois' statute allows a corporation to create rights plans whose terms may be fixed by the board and may include restrictions or conditions on the exercise, transfer or receipt of such rights by any suitor, or invalidate such rights held by a suitor.

g. Other Statutes With Antitakeover Effects

Antigreenmail Statutes: "Greenmail" is the target's repurchase of its own stock— invariably at a substantial premium—from an uninvited suitor. Antigreenmail statutes seek to mitigate or eliminate potential abuses associated with a target's payment of greenmail. These abuses are obvious. First, remaining target shareholders are denied the opportunity to reap potentially sizeable premiums by tendering to the suitor. Second, target management invariably pays greenmail with corporate—that is, shareholder—funds. Third, target management is largely free to pay greenmail regardless of its impact upon shareholders—at least when the specter of a coercive tender offer exists.

149. Georgia, for example, requires that shareholders elect to be covered in the articles of incorporation. GA. CODE ANN. § 14-2-202(b)(5) (1990) (allowing the articles to "set forth" a directors' duty provision); see Appendix at DDS.
150. Connecticut, for example, requires directors to consider nonshareholder interests. CONN. GEN. STAT. ANN. § 33-313(e) (West Supp. 1991) (requiring a director to consider the listed factors); see Appendix at DDS.
151. Two states have enacted legislation enhancing protection for a board's decision. See IND. CODE ANN. § 32-1-35-1(f)-(g) (Burns 1990); 15 PA. CONS. STAT. ANN. § 1721(c) (Purdon Supp. 1991); Appendix at DDS.
152. Andre, supra note 105, at 575.
153. Id. at 576.
154. For a discussion of poison pills, see supra note 17.
156. See ILL. REV. STAT. ch. 32, para. 6.05 (1990).
157. See Cheff v. Mathes, 199 A.2d 548 (Del. 1964) (finding increased sales price appropriate where substantial block of stock involved; thus finding repurchase of stock legitimate); Booth I, supra note 26, at 1662.
158. Booth I, supra note 26, at 1662.
159. Id. at 1663.
However, greenmail can be beneficial to target shareholders. For example, greenmail may help buy time for management to seek superior bids. Furthermore, amid partial bids, greenmail may advance the interests of holdout shareholders who would lose more by transferring control than by appeasing an unwanted suitor. These benefits caused one commentator to conclude that it is "impossible to generalize about the benefits or harms of greenmail."

Six states have adopted antigreenmail statutes. Generally, these statutes prohibit a target from purchasing ten percent or more of its own stock from any shareholder who has held the shares for less than two years when the price to be paid exceeds fair market value. Most statutes provide that the restrictions do not apply if both the board and a majority of shareholders approve the repurchase.

Cashout Statutes: Patterned after the traditional "appraisal rights" given dissenting shareholders, two states currently have these "heightened" appraisal statutes which, following Pennsylvania's lead, grant remaining shareholders "appraisal rights" entitling holdout shareholders to receive "fair value" upon a suitor's acquiring a threshold percentage of the target's shares. Although cashout laws do not impose supermajority voting requirements, they explicitly provide that upon the parties disagreeing over the fair value of target stock, such value may be judicially determined. As such, cashout laws require a suitor to consummate a takeover at a judicially imposed price. Because the appraisal remedy requires outsiders to determine a "fair" price, it introduces costly

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160. "The fact that greenmail can be beneficial to shareholders is consistent with empirical evidence." Id. at 1662.
161. Indeed, Professor Ribstein argues that greenmail should be permitted to the extent it does not violate the business-judgment rule. See Ribstein, Takeover Defenses and the Corporate Contract, 78 Geo. L.J. 71, 132 (1989).
162. See Booth I, supra note 26, at 1662. Given partial and two-tiered tender offers, "greenmail can be beneficial [to shareholders]." Id. at 1663 (emphasis in original).
163. Id. at 1663. But see Gilson, Drafting an Effective Greenmail Prohibition, 88 Colum. L. Rev. 329, 329-30 (1988) (stating that "one element of virtual consensus has emerged: greenmail . . . is bad").
164. See Appendix at AGMS.
165. See id.
166. See, e.g., N.Y. Bus. Corp. Law § 513(e) (McKinney 1986).
167. These "cashout" statutes are also termed "appraisal statutes," "redemption rights statutes," or "fair value statutes."
risks into the bidding process—the judge’s determination of “fair value” will surely generate much litigation.\(^1\) As risk increases, bids will be deterred. Although cashout statutes grant shareholders the same protection as Maryland-type fair price statutes,\(^2\) cashout statutes effectively require the suitor to acquire full control of the target: the statutes’ mandatory redemption procedures guarantee all shareholders a fair price.\(^3\)

The stringent requirements of Pennsylvania’s cashout statute engage when a suitor acquires twenty percent of the shares of a covered Pennsylvania corporation—\(^4\) the suitor then becomes a “controlling person.”\(^5\) A controlling person must promptly notify target shareholders that a control transaction has commenced,\(^6\) and the controlling person must pay “fair value” to any shareholder who so demands.\(^7\) Corporations may opt-out of Pennsylvania’s provision by charter amendment at any time prior to the triggering event.\(^8\) Maine has adopted a similar statute.\(^9\)

**Director Removal Statutes:** In Delaware, directors may be removed without cause by vote of a majority of shareholders, unless the corporation has a staggered board.\(^10\) Directors on a staggered board cannot be removed without cause before their terms expire.\(^11\) Antitakeover statutes adopted in 1988 in Kentucky, Mississippi, and Pennsylvania provide that even unclassified directors cannot be removed before their terms expire if the corporation’s charter so provides.\(^12\) New Jersey’s updated law provides that directors serving on a classified board shall not be removed without cause (whether the board is staggered or not), unless the certificate of incorporation provides otherwise.\(^13\) Massachusetts has recently enacted a staggered board law requiring shareholders to elect each year one-third of a corporation’s directors for three-year terms.\(^14\)

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171. See Booth I, supra note 26, at 1677, 1678.

172. See supra notes 109-14 and accompanying text; see also Boyer, supra note 106, at 596.

173. Boyer, supra note 106, at 596.


175. Id.

176. Id. § 2545.

177. Id. § 2546.

178. Id. § 2541.


181. Id. § 141(k)(1); see Lipman, Another Generation of Anti-Takeover Laws Beginning to Develop, Nat’l L.J., Feb. 20, 1989, at S18, col. 3.


183. N.J. Stat. Ann. § 14A:6-6(d) (West Supp. 1991) (stating that “[s]hareholders of a corporation whose board of directors is classified . . . shall not be entitled to remove directors without cause”). Classified or staggered boards means boards where a fraction of the board gets elected each year such that their terms expire in different years (e.g., 1/3 of board members’ three-year terms expire on any given year). See, e.g., Miss. Code Ann. § 79-4-8.06 (1988).

State legislatures are constantly considering new antitakeover statutes. As states gain more confidence that their enactments will survive judicial scrutiny, such legislation will become bolder. Pennsylvania and Ohio have recently enacted controversial laws which force failed suitors to disgorge any profits from the ultimate sale of their stock. Pennsylvania’s harsh law provides that any trading profit realized by shareholders within eighteen months of gaining control or seeking control of twenty percent or more of a corporation shall be recoverable by the corporation.

If the 1989 Pennsylvania statute ushers in a new trend in state legislation, the shareholder dilemma may greatly amplify. Pennsylvania State Senator Fumo described the bill as “the fat cat protection and shareholder ripoff act of 1989.” One Pennsylvania newspaper described the Pennsylvania statute as “one of the stupidest attempts at legislation ever.” One commentator concluded that the bill “provides an all but impenetrable corporate sanctuary, particularly when combined with other provisions of Pennsylvania law.” Accordingly, numerous influential institutional investor groups vigorously lobbied against the bill, some treating Pennsylvania corporations to opt out of the statute’s

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185. For example, Massachusetts requires the board of public corporations be divided into three classes; only one class may be elected each year. See id. Massachusetts also enacted a unique “tin parachute” clause requiring raiders to make severance payments to terminated employees and honor collective bargaining agreements. Mass. Gen. Laws Ann. ch. 149, § 20E (West 1990); Franklin, Shifting Fight to the States on Hostile Bids, N. Y. L. J., Sept. 25, 1989, at 24, col. 1.

186. See Garfield, Evaluating State Anti-Takeover Legislation: A Broadminded New Approach to Corporation Law or “A Race to the Bottom”? 1990 Colum. Bus. L. Rev. 119, 129. “Indeed, since the Supreme Court upheld a takeover statute for the first time in 1987, states have been busily enacting increasingly potent takeover statutes.” Id. (footnotes omitted).


190. Id. (quoting The Philadelphia Inquirer). A recent survey indicated that roughly 25% of the public corporations subject to the Pennsylvania law have opted out, including some companies which supported the legislation. 42 States Currently Have Anti-Takeover Laws, ABA Group Told, 22 Sec. Reg. & L. Rep. (BNA) 1216, 1216-17 (Aug. 17, 1990).

191. See Andre, supra note 105, at 573-74 (footnotes omitted). Pennsylvania’s Act “appears to have given Pennsylvania public corporations the most extensive defensive arsenal in the country. [It] will not only make the acquisition of a Pennsylvania public
antishareholder provisions.\textsuperscript{192}

i. Summary

Current antitakeover provisions have received negative comments by shareholder groups for a variety of reasons. First, to the extent many of these statutes grant ultimate decisionmaking power to the target corporation's board rather than its shareholders, some tender offers will be rejected despite positive shareholder response.\textsuperscript{193} Second, by conferring upon the target board authority to consider nonshareholder interests, many of these statutes blur if not eliminate the importance of seeking shareholder input. Third, these statutes' "\textit{ex ante} chilling effect on the frequency of hostile tender offers may counteract" the benefits of management's stronger \textit{ex post} bargaining position.\textsuperscript{194} Fourth, because coercive offers today are all but extinct, there is little justification for many of these statutes.\textsuperscript{195} Furthermore, this anticoercion policy is overbroad;\textsuperscript{196} business combination statutes are generally not confined to those situations where coercion is possible.\textsuperscript{197} Fifth, by substantially reducing the threat of takeovers, these statutes diminish management's incentive to maximize ongoing shareholder value.\textsuperscript{198} Sixth, as with fair-price statutes, many of these statutes foster shareholder passivity.\textsuperscript{199} Finally and most fundamentally, by couching these statutes in terms of "shareholder protection acts" (and similar proshareholder corporation more complicated and more time consuming, but will ultimately and irrevocably alter the fundamental relationship between shareholders and directors which here-tofore had developed in the market for corporate control." Dauman, Walter & Budoff, \textit{Developments in Mergers and Acquisitions: The Offense}, in \textit{2 22ND ANNUAL INSTITUTE ON SE-CURITIES REGULATION 9, A-12} (Practising Law Institute 1990).

\textsuperscript{192} For example, the $55 billion California Public Employees Retirement System (CalPERS) has written "all Pennsylvania-based companies [requesting] them to opt-out of the bill . . . ." Vosti, \textit{Pennsylvania Puts Ball in Investors' Court}, \textit{PENSIONS \& INVESTMENT AGE}, May 14, 1990, at 44.

\textsuperscript{193} Johnson \& Millon II, \textit{supra} note 26, at 1876-77 (noting that directors, not shareholders, have "the central role in the takeover drama").

\textsuperscript{194} Johnson \& Millon I, \textit{supra} note 26, at 851; \textit{see also} Johnson \& Millon II, \textit{supra} note 26, at 1878 (shareholders thus "lose both the opportunity to realize immediate stock price premiums and the accountability mechanisms" that the threat of takeovers provides).

\textsuperscript{195} Johnson \& Millon II, \textit{supra} note 26, at 1878.
\textsuperscript{196} \textit{See} Johnson \& Millon I, \textit{supra} note 26, at 851.
\textsuperscript{197} Johnson \& Millon II, \textit{supra} note 26, at 1877.
\textsuperscript{198} \textit{See} Booth I, \textit{supra} note 26, at 1676 (asserting that "[o]n balance . . . . the New York statute is a reprehensible protectionist law").
\textsuperscript{199} To give shareholders the assurance of an ultimate fair price, no matter what action they take or do not take, favors the incumbent managers, because it reduces the incentive for the shareholders to take any action at all. It is one thing to reduce the coercion of hostile tenders by allowing shareholders to act—another thing entirely to give shareholders good reason to wait out the battle. Encouraging shareholder passivity may well tip the balance [sought by the Williams Act] significantly, and impermissibly, in management's favor.

Boyer, \textit{supra} note 106, at 593 (footnote omitted). Boyer thus stresses that fair-price statutes do not give shareholders any power which might be translated into a higher premium. \textit{See id.}
jargon), these acts greatly hamper the reform process by lulling decisionmakers into believing that the statutes do protect shareholders.

Current state antitakeover legislation is not designed primarily to benefit shareholders. Indeed, many statutes do not even purport to so endeavor. Although arguments can be made that fair-price statutes and cashout statutes are primarily designed to maximize shareholder value and minimize shareholder coercion, inasmuch as the suitor typically may avoid statutory requirements by attaining board consent, these statutes likely implicitly and indirectly seek to enhance the boards' negotiating position. Thus, the primary impact state legislation has upon shareholders qua shareholders is the veto power and leverage it affords management in attempting to achieve the highest possible price for the corporation. The fact is that these current efforts to "protect" corporations often protect nonshareholder constituencies at the expense of shareholders. The effect of these current "protection" efforts powerfully justifies legislative intervention which seeks to enhance shareholder input on takeover issues.

2. Case Law

State common law, embodying the fiduciary obligations concomitant with the traditional legal model of the corporation, arguably offers more protection for shareholder interests than recent antitakeover legislation. Under traditional principles, directors owe fiduciary duties to both shareholders and the corporation to act in

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200. See infra notes 469-93 and accompanying text (arguing that shareholder protection as the main motivating force behind antitakeover statutes is a pretextual facade).

201. "All recent state antitakeover statutes share a common purpose: To discourage hostile takeover attempts by creating obstacles that require approval by target managers, thereby causing delay, uncertainty, and increased costs." Johnson, supra note 26, at 909 (footnote omitted).

202. See infra notes 469-93 and accompanying text (discussing true legislative intent of these enactments).

203. Indeed, these statutes do not apply to friendly mergers. See, e.g., Md. CORPS. & Ass'NS CODE ANN. §§ 3-601(e), (j) (1985); see supra notes 107-21 and accompanying text.

204. This benefit is realized only after a takeover attempt commences and management either forces the suitor to bid higher or solicits competitive bids from alternative suitors. Because these statutes uniformly discourage suitors from pursuing takeovers, however, this benefit to shareholders is dubious.

205. See Johnson, supra note 26, at 909 (observing that "[m]any of these laws use the rhetoric of shareholder welfare, but their primary goal is to protect nonshareholder interests thought to be affected adversely by hostile takeovers").

206. See, e.g., Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 273 (2d Cir. 1986) (applying a reasonable diligence standard); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985). The Delaware Supreme Court stated in Van Gorkom that, "[i]n carrying out their managerial roles, directors are charged with an unyielding fiduciary duty to the corporation and its shareholders." Id. at 872 (citing Loft, Inc. v. Guth, 23 Del. Ch. 138, 2 A.2d 225 (1938), aff'd, 5 A.2d 503 (Del. 1939)). Van Gorkom is the seminal case holding
the best interests of both.\textsuperscript{207}

Courts generally have held, however, that a target board breaches its fiduciary duty only when its antitakeover tactics are motivated "solely or primarily" to perpetuate control of a corporation.\textsuperscript{208} Directors rarely have failed to demonstrate that they were at least partially motivated by legitimate corporate concerns.\textsuperscript{209}

Most of the cases involving directors' duty to shareholders arise from situations where management has attempted to resist unsolicited tender offers by deploying antitakeover devices without prior stockholder approval.\textsuperscript{210} Most early decisions applied the business judgment rule almost blindly to board-adopted defensive measures.\textsuperscript{211} In \textit{Minstar Acquiring Corp. v. AMF Inc.},\textsuperscript{212} however, the trial court in dicta wrestled with whether the business judgment rule should apply to the use of defensive tactics.\textsuperscript{213} Similarly, the Second Circuit, in \textit{Norlin Corp. v. Rooney, Pace Inc.},\textsuperscript{214} questioned whether fundamental decisions affecting a corporation's ultimate destiny are being made by shareholders or whether corporate power has in

that before directors may garner protection under the business judgment rule, a minimum level of care as evinced by their gathering and reviewing pertinent information is required. \textit{Id.}


\textsuperscript{208} E.g., \textit{Panter v. Marshall Field & Co.}, 646 F.2d 271, 293-95 (7th Cir.), cert. denied, 454 U.S. 1092 (1981); \textit{Treadway Cos. v. Care Corp.}, 638 F.2d 357, 380-84 (2d Cir. 1980).

\textsuperscript{209} See Lynch & Steinberg, \textit{The Legitimacy of Defensive Tactics in Tender Offers}, 64 CORNELL L. REV. 901, 926 (1979) (stating that "management can easily manufacture a 'legitimate' corporate purpose"). But see, e.g., \textit{Norlin Corp. v. Rooney, Pace Inc.}, 744 F.2d 255, 266-67 (2d Cir. 1984) (finding a board of director's attempt to foil a takeover by shifting voting stock to a subsidiary and an employee stock ownership plan (ESOP) not legitimate).

\textsuperscript{210} See Note, \textit{supra} note 26, at 485.

\textsuperscript{211} See, e.g., \textit{Panter}, 646 F.2d at 295. But note Judge Cudahy's dissent in \textit{Panter}: "I emphatically disagree that the business judgment rule should clothe directors, battling blindly to fend off a threat to their control, with an almost irrebuttable presumption of sound business judgment, prevailing over everything but the elusive hobgoblins of fraud, bad faith or abuse of discretion." \textit{Id.} at 299 (Cudahy, J., dissenting).


\textsuperscript{213} \textit{Id.} at 1259-60 & 1260 n.6. The court noted that, although its holding precluded consideration of the issue,

\[ [\text{the right of a shareholder to sell his stock is a private transaction between a willing seller and a willing purchaser and in no way implicates the business judgment rule. Therefore, a board of directors' assertion of a unilateral right, under the business judgment rule, to act as a surrogate for the shareholder's independent right of alienation of his stock is troublesome.} \]

\textit{Id.} at 1260 n.6; see Andre, \textit{supra} note 21, at 890 (noting that "because of the potential for conflict of interest, many urge that it is inappropriate to extend the protection of the business judgment rule to actions taken by target management in the context of an actual or threatened takeover" (footnote omitted)). Andre argues that "the business judgment rule remains an unsatisfactory standard by which to judge actions taken by target management in corporate control transactions." \textit{Id.} (footnote omitted).

\textsuperscript{214} 744 F.2d 255 (2d Cir. 1984).
some way been “wrested” away from the shareholders by the board.\textsuperscript{215}

Despite such sporadic musings, courts now generally acknowledge that some variation of the business judgment rule applies to all board responses to takeover bids.\textsuperscript{216} The business judgment rule normally immunizes management from liability for resisting tender offers, provided management reasonably believes there is a valid business reason for resisting a hostile offer.\textsuperscript{217}

Shielded by the business judgment rule, directors have implemented numerous defensive measures to resist hostile takeover bids, including poison pills,\textsuperscript{218} stock repurchases,\textsuperscript{219} golden parachutes,\textsuperscript{220} lock-up agreements,\textsuperscript{221} and no-shop provisions.\textsuperscript{222}

\textsuperscript{215} Id. at 258. Judge Irving R. Kaufman noted that, [T]he responsibility of the court is to insure that rules designed to safeguard the fairness of the takeover process be enforced. Our most important duty is to protect the fundamental structure of corporate governance. While the day-to-day affairs of a company are to be managed by its officers . . . decisions affecting a corporation’s ultimate destiny are for the shareholders to make in accordance with democratic procedures.

\textsuperscript{216} See, e.g., Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985). In applying the business judgment rule, courts focus on the procedures followed by directors and scrutinize the bases upon which directors’ takeover decisions were made. The Delaware Supreme Court has slightly modified the business judgment rule in the takeover context thusly:

Under the business judgment rule, directors’ decisions are presumed to have been made on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. This presumption and its underlying fiduciary duties are equally applicable in a takeover context. When directors oppose a hostile takeover there arises ‘the omnipresent spectre that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders . . .’. This Court has addressed that potential for conflict by placing upon the directors the burden of proving that they have not acted solely or primarily out of a desire to perpetuate themselves in office, that the threatened takeover posed a danger to corporate policy and effectiveness, and that the defensive measures adopted are reasonable in relation to the threat posed. The target directors must satisfy these prerequisites by showing good faith and reasonable investigation before enjoying the presumptions afforded by the business judgment rule.

Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1341 (Del. 1987) (citations omitted); see also Panter v. Marshall Field & Co., 646 F.2d 271, 293-95 (7th Cir.), cert. denied, 454 U.S. 1092 (1981) (holding that plaintiff must demonstrate that improper motive predominated directors’ decisionmaking to rebut the presumption that business judgement was exercised).

\textsuperscript{217} See, e.g., Buckhorn, Inc. v. Ropak Corp., 656 F. Supp. 209 (S.D. Ohio), aff’d, 815 F.2d 76 (6th Cir. 1987); Panter, 646 F.2d at 294; Gelco Corp. v. Coniston Partners, 652 F. Supp. 829 (D. Minn. 1986), aff’d in part and vacated in part, 811 F.2d 414 (8th Cir. 1987); Note, supra note 26, at 493.

\textsuperscript{218} See supra note 17; see also Note, Duty to Redeem Rights Plans, supra note 17; Note, Shareholder Rights Plans: Shields or Gavels?, 42 VAND. L. REV. 173 (1989).

\textsuperscript{219} Also known as greenmail, stock repurchases involve a target’s acquisition of a raider’s shares by paying a premium over the market price. See supra notes 157-66 and accompanying text.

\textsuperscript{220} These executive termination agreements are “contracts between corporations
Consistent with the broad latitude granted directors by the business judgment rule, courts have upheld a variety of defensive measures. Even under Delaware's modified business judgment rule, as adopted in *Unocal Corp. v. Mesa Petroleum Co.*, the Delaware Supreme Court upheld a self-tender that excluded the hostile second party, stating that,

[i]f a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed. This entails an analysis by the directors of the nature of the takeover bid and its effect on the corporate enterprise. Examples of such concerns may include... the impact on "constituencies" other than shareholders...

By allowing the target board to consider a takeover's "impact on


221. Lock-up options and bust-up fees involve the right to purchase target stock or assets on favorable terms. Without these favorable terms, potential friendly acquirors, or white knights, would not likely assist targets. "A 'white knight' is a third party, friendly to target management, which rescues the target from a hostile takeover...." Andre, *supra* note 21, at 869 n.20. A target corporation board may grant a white knight the option to purchase key corporate assets, a strategy known as the "crown jewel" defense.

Although some cases cast doubt on the viability of lock-ups under certain circumstances, see, e.g., Edelman v. Fruehauf Corp., 798 F.2d 882, 886-87 (6th Cir. 1986); Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264 (2d Cir. 1986); and Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986), courts today recognize that lock-ups are *sine qua non* for attracting white knights and thus are more likely to tolerate them. *See Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989); *In re Holly Farms Corps. Corp. Shareholders Litig.*, Fed. Sec. L. Rep. (CCH) ¶ 94,181 (Del. Ch. 1988). *But cf. In re RJR Nabisco, Inc. Shareholders Litig.*, Fed. Sec. L. Rep. (CCH) ¶ 94,194 (Del. Ch. 1989) (holding that the RJR Nabisco directors' decision to enter into a merger agreement with the investment firm of Kohlberg Kravis Roberts & Co. was made with due care).

222. White knights often demand that the target agree to a no-shop covenant, which prevents the target from soliciting or encouraging competing bids or other assistance to would-be acquirors. In *Macmillan*, the Delaware Supreme Court invalidated a no-shop provision, asserting that, "[a]bsent a material advantage to the stockholders from the terms or structure of a bid that is contingent on a no-shop clause, a successful bidder imposing such a condition must be prepared to survive the scrutiny which that concession demands." 559 A.2d at 1286 (citation omitted); *see Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1288 (Del. 1989) (stating that, "[w]here a board has no reasonable basis upon which to judge the adequacy of a contemplated transaction, a no-shop restriction gives rise to the inference that the board seeks to forestall competing bids").


224. 493 A.2d 946 (Del. 1985).

225. *Id.* at 955. *Unocal's* heightened standard engages only amid potential takeovers; the business judgment rule applies in all other contexts. *See supra* note 216. For example, a target's issue of a poison pill amid a raider's mere filing a disclosure statement required pursuant to Securities Exchange Act of 1934 § 13(d) (Form 13D) is not a response to a potential takeover. *See Doskocil Cos. v. Wilson Foods Corp.*, Civ. No. 10,095 (Del. Ch. 1988) (LEXIS, States library, Del. file); *see also Torchmark Corp. v. Bixby*, 708 F. Supp. 1070 (W.D. Mo. 1988) (finding that a pre-tender offer self-tender taken as part of a preexisting open market purchase is "not taken in apprehension of a challenged takeover"); TW Services, Inc. v SWT Acquisition Corp., Fed. Sec. L. Rep. (CCH) ¶ 94,334, at 92,181-82 (Del. Ch. 1989) (finding that a tender offer conditioned on merger, at bottom a mere invitation to negotiate, triggers the business judgment rule).
‘constituencies’ other than shareholders,” Unocal illustrates the degree to which the business judgment rule may be wielded to further broaden directors’ discretion to bypass shareholder input. As such, the business judgment rule in the takeover context may allow stakeholder interests to be furthered at the expense of shareholders.

The general parameters of the business judgment rule, however, although essential for preserving director discretion, provide only the starting point for determining the appropriateness of board actions in a takeover context. The focus must turn in a particular case to those specific measures, such as poison pills and state legislation, designed to reestablish the board of directors’ primacy in the share-transfer process. With this focus, analyzing the application of the business judgment rule to antitakeover decisions begins with judicial review of the adoption and redemption of poison pills.

In Moran v. Household International, Inc., the Delaware Supreme Court upheld a board’s adoption of a shareholder rights plan. After Moran it has become entirely clear that adoption of a poison pill is a routine matter that will easily survive judicial scrutiny. Moran’s importance, however, is that it sanctioned the authority of...
corporate boards to unilaterally inject themselves into the tender offer or control transaction process, thereby presumptively requiring director approval as a necessary step in the change of corporate control.

A corporate board's exercise of this power to preempt a direct takeover bid crystallizes the issue of the board's fiduciary role. The initial analysis of this issue derives from *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*\(^{232}\) *Revlon* involved a bidding war between hostile and friendly parties.\(^{233}\) Under these circumstances, that is, when the company is for sale, the Delaware Supreme Court held that the directors' duty is to maximize the economic value to the shareholders resulting from the transaction.\(^{234}\) According to *Revlon*, meeting this duty may require directors to act as neutral auctioneers and auction off the corporation.\(^{235}\) Thus, the key prerequisite that must be met before *Revlon*'s enhanced responsibilities\(^{236}\) apply is that the corporation is for sale, the focus of a bidding contest or, in response to an offer, it abandons its long term strategy.\(^{237}\)

Although the basic teaching of *Revlon* (and, indeed, of *Unocal* and *Moran*) is "simply that [directors] must act in accordance with their fundamental duties of care and loyalty,"\(^{238}\) *Revlon* caused an uproar in corporate boardrooms. The most important question arising after *Revlon* was and is, when does the duty to auction attach or, conversely, when can the board stand fast behind its various board-adopted and state-imposed defensive mechanisms?\(^{239}\)

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\(^{232}\) *Revlon* involved a bidding war between hostile and friendly parties.

\(^{233}\) *Revlon* involved a bidding war between hostile and friendly parties.

\(^{234}\) *Revlon* involved a bidding war between hostile and friendly parties.

\(^{235}\) *Revlon* involved a bidding war between hostile and friendly parties.

\(^{236}\) *Revlon* involved a bidding war between hostile and friendly parties.

\(^{237}\) *Revlon* involved a bidding war between hostile and friendly parties.

\(^{238}\) *Revlon* involved a bidding war between hostile and friendly parties.

\(^{239}\) *Revlon* involved a bidding war between hostile and friendly parties.
The "just say no" defense\(^\text{240}\) is a post-\textit{Revlon} concept used to generalize, distill, and clarify otherwise fact-specific holdings\(^\text{241}\) into an ostensibly coherent category of cases ultimately decreeing that a board need not abandon its antitakeover arsenal when such a surrender would defeat shareholders’ long-term interests. The proponents of this defense have advanced this proposition: a director may just say no to a hopeful suitor when doing so advances the corporation’s—and thus shareholders’—best interests.\(^\text{242}\) To the extent directors must know under what general circumstances they may just say no, this concept may serve as a convenient litmus test. Although much recent litigation has focused on the target directors’ duty to redeem rights plans,\(^\text{243}\) numerous (and various) cases grapple with a board’s ability to consummate corporate restructuring in an effort to just say no to would-be raiders.

\textit{Paramount Communications, Inc. v. Time, Inc.}\(^\text{244}\) is the leading case illustrating the contours of the just say no defense as it relates to preplanned long-term corporate restructuring. In \textit{Paramount}, the Delaware Supreme Court held that, absent \textit{Revlon’s} limited set of circumstances,\(^\text{245}\) a board of directors, though always required to act in an informed manner, “is not under any \textit{per se} duty to maximize shareholder value in the short term, even in the context of a takeover.”\(^\text{246}\)

One could argue that \textit{Paramount’s} reach is limited by its eminently fact-specific holding and, as such, arguably extends only to those

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\(^\text{240}\) For a definition and comprehensive analysis of the “just say no” defense, see Prentice & Langmore, \textit{Hostile Tender Offers and the “Nancy Reagan Defense”: May Target Boards “Just Say No”? Should They Be Allowed To?}, 15 DEL. J. CORP. L. 377 (1990). The authors define the just say no defense in terms of the nagging question: “Is it ever permissible for target management to refuse to provide an alternative, yet still oppose the hostile tender offer?” \textit{Id.} at 382.

\(^\text{241}\) \textit{See infra} notes 244-70 and accompanying text.

\(^\text{242}\) \textit{See Prentice & Langmore, supra} note 240, at 378-79.


\(^\text{244}\) 571 A.2d 1140 (Del. 1990).

\(^\text{245}\) \textit{See supra} notes 232-34 and accompanying text.

\(^\text{246}\) \textit{Paramount}, 571 A.2d at 1150 (footnote omitted).
unusual takeover contexts where the target corporation has reached a definitive restructuring plan and has taken all steps necessary to consummate the plan (the proxies had already been sent to shareholders). Commentators tend to discount the fact-specific focus of Paramount’s holding. The court’s broad, general language and approach has added much fuel to the just say no juggernaut. Additionally, Paramount illustrates that business planning not primarily designed as an antitakeover scheme may serve as a preplanning defensive strategy.

The just say no defense may be used not only to consummate

247. The court itself emphasized Paramount’s unique fact setting: We have purposely detailed the evidence of the Time board’s deliberative approach, beginning in 1983-84, to expand itself. Time’s decision in 1988 to combine with Warner was made only after what could be fairly characterized as an exhaustive appraisal of Time’s future as a corporation. . . . Time’s board was convinced that Warner would provide the best “fit” for Time to achieve its strategic objectives. The record attests to the zealousness of Time’s executives . . . in seeing to the preservation of Time’s “culture” . . . .

Id. at 1151-52.


249. For example, the court said: “Directors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy.” Paramount, 571 A.2d at 1154 (emphasis added). Although this is dicta in the factual setting of this case, such sweeping language demonstrates the court’s expansive approach.

250. See Kozyris, The Federal Role in Corporate Takeovers: A Framework for a Limited Second Congressional Intervention To Protect the Free Market, 51 OHIO ST. L.J. 263, 263 n.3 (1990) (asserting that Paramount dealt “[t]he ultimate blow against any serious judicial control over management oppositionism”). “Paramount v. Time shows how far the law has moved from the notion that corporate boards exist to serve shareholders.” Crovitz, Can Takeover Targets Just Say No to Stockholders?, Wall St. J., Mar. 7, 1990, at A19. Says Crovitz, “[t]he new rule says stockholders don’t get a chance to vote on a high bid for their shares if the board wants another merger and has a plan that might, maybe, someday nudge the share prices back up.” Id.

251. Chancellor Allen held that Time’s desire to combine with Warner was a legitimate “interest” that may be protected by defensive action.

In my opinion, where the board has not elected explicitly or implicitly to assume the special burdens recognized by Revlon, but continues to manage the corporation for long-term profit pursuant to a preexisting business plan that itself is not primarily a control device or scheme, the corporation has a legally cognizable interest in achieving that plan.


252. The Delaware Chancery Court in TW Services, Inc. v. SWT Acquisition Corp., Fed. Sec. L. Rep. (CCH) ¶ 94,334 (Del. Ch. Mar. 2, 1989) stated that it is “non-controversial” that directors, in managing the business and affairs of the corporation, may find it prudent (and are authorized) to make decisions that are expected to promote corporate (and shareholder) long run interests, even if short run share value can be expected to be negatively affected, and thus directors in pursuit of long run corporate (and shareholder) value may be sensitive to the claims of other “corporate constituencies.”

Id. at 92,178 (footnote omitted).

The recent Polaroid decision also buttresses the use of long-term planning as a defensive preplanning strategy. Focusing on long-term corporate goals, the Polaroid court found Polaroid’s preplanned employee stock-option plan “entirely fair” despite its highly antitakeover timing and effect. See Shamrock Holdings, Inc., v. Polaroid Corp., 559 A.2d 278, 290-91 (Del. Ch. 1989).
carefully negotiated plans like that found in Paramount, but also when: (1) the offer is coercive,\(^{259}\) inadequate,\(^{254}\) or conditioned on merger negotiations;\(^{255}\) (2) the board requires time sufficient to consider other alternatives or to otherwise promote shareholder value;\(^{256}\) (3) a raider insists that the target take decisive action, such

\(^{253}\) Whenever a suitor's coercive or inadequate offer poses a threat to a corporation, courts uphold the defensive measures as “reasonable in relation to the threat posed.” See, e.g., Shamrock Holdings, Inc. v. Polaroid Corp. (Polaroid II), 559 A.2d 278, 286-87 (Del. Ch. 1989) (finding an all-cash, all-shares offer coercive). For another case upholding directors’ decisions not to sell a company based on the coerciveness of the offer, see Desert Partners, L.P. v. USG Corp., 686 F. Supp. 1289 (N.D. Ill. 1988). Applying Delaware law, the court approved USG's decision to neither negotiate nor redeem its rights plan amid a hostile, two-tiered offer by Desert Partners. Id. at 1300; see also Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1345-46 (Del. 1987) (involving defenses intended to defeat coercive bids); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 958-59 (Del. 1985); cf. City Capital Assocs. Ltd. Partnership v. Interco Inc., 551 A.2d 787, 797-98 (Del. Ch. 1988) (finding an all-cash tender offer noncoercive, but stating that even when "an offer is noncoercive, it may represent a 'threat' to shareholder interests in the special sense that an active negotiator with power, in effect, to refuse the proposal may be able to extract a higher or otherwise more valuable proposal, or may be able to arrange an alternative transaction"), appeal dismissed, 556 A.2d 1070 (Del. 1988).

\(^{254}\) If the board in good faith determines that a bid is inadequate, that alone may justify leaving a poison pill in place. See Interco, 551 A.2d at 797. Inadequacy of price does not per se justify keeping the pill in place: “Applying the Unocal standards, I am unable to conclude that a board may in all instances preclude shareholder choice solely on the basis of its own perception of the inadequacy of the offer.” Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984, 1014-15 (E.D. Wis.), aff’d on other grounds, 877 F.2d 496 (7th Cir.), cert. denied, 110 S. Ct. 367 (1989).

Timing issues may be viewed as a subset of inadequacy. See Interco, 551 A.2d at 797 n.11. For cases involving a combination of (1) inadequacy of a cash tender offer for all shares, (2) likelihood of both further developments and higher shareholder value with a retention of rights plan, and (3) no showing of a lack of independence in the board's conduct, see BNS Inc. v. Koppers Co., 683 F. Supp. 458 (D. Del. 1988); MAI Basic Four, Inc. v. Prime Computer, Inc., Fed. Sec. L. Rep. (CCH) ¶ 94,179 (Del. Ch. 1988) (finding an all-cash tender offer noncoercive, but stating that even when "an offer is noncoercive, it may represent a 'threat' to shareholder interests in the special sense that an active negotiator with power, in effect, to refuse the proposal may be able to extract a higher or otherwise more valuable proposal, or may be able to arrange an alternative transaction"), appeal dismissed, 556 A.2d 1070 (Del. 1988).

\(^{255}\) See TW Servs., Inc., Fed. Sec. L. Rep. (CCH) ¶ 94,334 (stating that where a tender offer is conditioned on merger negotiations and the board has concluded that the offer is not in the long-term interests of the company, the board need neither negotiate nor redeem a rights plan).

\(^{256}\) See Polaroid II, 559 A.2d at 278. The Polaroid II court suggested that interim defensive measures are appropriate to allow a target corporation sufficient time to explore and present alternatives to shareholders. Id. at 289. The court indicated that Shamrock's all-cash, all-shares offer would not present a "continuing threat" so as to justify long-term defensive measures absent unusual circumstances. Id. (holding that Polaroid had proven unusual circumstances given Polaroid's patent infringement litigation against Kodak); see also Doskocil Cos. v. Griggy, 14 DEL. J. CORP. L. 682, 686-89 (Del. Ch. Oct. 7, 1988) (refusing to force redemption because the “auction [had] not yet concluded” and holding that the target of a bidding contest could redeem a rights plan for a lower bidder but leave it intact for a higher bidder). “[E]ven if the offered price is not inadequate, it may be appropriate to maintain the rights in order to promote the continuation of the auction.” Id. at 686; see also CRTF Corp. v. Federated Dep't Stores, Inc., 683 F. Supp. 422, 439 (S.D.N.Y. 1988) (stating that, during the auction process, poison pills provide directors “with a shield to fend off coercive offers, and with a gavel to run an auction”); infra note 543. The Doskocil court also noted that “when conducting a Revlon auction, the target board may favor one bidder over another ‘if in good faith and advisedly it believes shareholder interests would be thereby advanced.’” Doskocil
as auctioning the company upon the target’s receiving a bare-offer or upon merely negotiating with one bidder; or (4) resistance to the offer continues to serve a valid purpose, such as promoting shareholder value.

Alternatively, a judicial declaration that use of the just say no defense is invalid in a particular case may be regarded as a means of identifying those cases where target defensive measures fail Unocal’s “reasonable in relation to threat posed” test. In City Capital Associates Ltd. Partnership v. Interco, Inc., for example, the Delaware court forced redemption of a target’s poison pill, finding the threat of injury to target shareholders from an all-cash offer “mild.” In Grand Metropolitan Public Ltd. Co. v. Pillsbury Co., the Delaware court stressed that the only “real” threat was to shareholder value, which would decrease if the bid were withdrawn. Courts have analyzed Interco and Pillsbury as decisions coming at the conclusion of takeover battles in which the targets attempted to use poison pills to protect a board-approved restructuring. Paramount, however, explicitly rejected Pillsbury’s and Interco’s implication that an all-cash, 

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**Note:**

257. See, e.g., Amanda Acquisition Corp., 708 F. Supp. at 984. Applying Delaware law, the court stated that Unocal and its progeny do not require a target to place itself on the auction block. Id. at 1013. In distinguishing Pillsbury, see infra notes 260-66, 428-36 and accompanying text, the court stressed that only 27% of Universal’s shareholders had tendered (as compared with Pillsbury’s 87% tender); Universal was on an upswing, Pillsbury a downswing; and Universal’s board had made an informed decision as to the inadequacy of Amanda’s offer by considering 12 alternative responses to the offers. Amanda Acquisition Corp., 708 F. Supp. at 1013-14. Additional factors the court considered relevant in keeping the poison pill in place were that the bid posed a threat to the shareholders who did not tender if Amanda failed to obtain financing, and that there was a threat the offer contained false or misleading information given Amanda’s complex financing. Id. Apparently, Amanda requires that the offer must pose a real threat to shareholders, and thus the court does not suggest that a target may just say no in all circumstances.

258. See Buckhorn, Inc. v. Ropak Corp., 656 F. Supp. 209 (S.D. Ohio) (holding that Buckhorn’s board had no duty to sell merely because of preliminary negotiations with one potential bidder), aff’d, 815 F.2d 76 (6th Cir. 1987); see also Ivanhoe Partners L.P. v. Newmont Mining Corp., 535 A.2d 1334 (Del. 1987) (shareholder’s entering into a ten-year standstill agreement after raising its stake in Newmont to 49.7% [from 26%] did not amount to a sale of the company requiring Newmont to negotiate with possible bidder [but no bidding contest was yet underway]).

259. See, e.g., In re Holly Farms Corp. Shareholders Litig., 564 A.2d 342 (Del. Ch. 1989). In Holly Farms, the plaintiff Tyson and its competitor, ConAgra, were bidding for Holly Farms. The court refused to grant a preliminary injunction requiring Holly Farms to redeem its rights plan because the pill served the valid purpose of preventing Tyson from blocking ConAgra’s economically superior offer, which would leave Holly Farm’s shareholders with only Tyson’s inferior offer. Because there were no other bidders, the shareholders would be harmed if ConAgra withdrew its offer, rendering legitimate the unredeemed pill. Id.


261. 551 A.2d 787.

262. Id. at 798.

263. 558 A.2d 1049.

264. See id. at 1058.

all-shares offer at a reasonable price cannot constitute a "threat" to the corporation. This rejection is most significant given that Interco and Pillsbury are the only cases where Delaware courts required redemption of poison pills.

The just say no defense raises many questions and leaves most unanswered. Would the implementation of a preexisting "business plan" which practically precluded hostile bids pass the tests articulated in Unocal and Paramount? What is a "long-term business plan" and how well defined must it be? Although Paramount did not deal with poison-pill redemption, does its logic apply to such cases? May a board reject a tender offer in favor of preserving a corporate "culture" whose general focus is "long-term planning"?

The profound burden of reviewing appropriate courses of action amid control transactions seems to have fallen primarily on the Delaware courts. The fluid and ever-changing dimensions of the just

found that Interco and Pillsbury were cases where "management was presenting and seeking to 'cram down' a transaction that was the functional equivalent of the very leveraged 'bust up' transaction that management was claiming presented a threat to the corporation." Id. at 93,283. Some courts suggest that the just say no defense does not apply to cases in which the target's defensive measures amount to restructuring. See TW Servs., Inc. v. SWT Acquisition Corp., Fed. Sec. L. Rep. (CCH) ¶ 94,334 (Del. Ch. 1989); MAI Basic Four, Inc. v. Prime Computer, Inc., Fed. Sec. L. Rep. (CCH) ¶ 94,179 (Del. Ch. 1988).

Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1153 (Del. 1989). The Paramount court stressed that to accept Paramount's narrow view of the Unocal test "would involve the court in substituting its judgment for what is a 'better' deal for that of a corporation's board of directors." Id.

The court emphasized this point stating that it rejected Interco and its progeny. See Paramount, 571 A.2d at 1153.

Prentice & Langmore, supra note 240, summarize the current state of the just say no defense thusly:

A review of the case law clearly indicate[s] that these issues are still unsettled. The Delaware Supreme Court has given no clear answers...[and] room clearly exists to "just say no," at least in certain ill-defined special circumstances. Still, matters are in an obvious state of flux. It is clear that the final word on the "just say no" defense has not yet been spoken. Id. at 411.

For a glimpse at how Paramount "seems to imply the coming demise of Unocal and calls into question the normative basis of Revlon," see Johnson & Millon, The Case Beyond Time, 45 Bus. Law. 2105, 2125 (1990).

Consider, for example, a "white squire" defense which places voting control into friendly hands.

Chancellor Allen distinguished the Time bid for Warner from the use of a poison pill in Paramount: "Thus, in my view, a decision not to redeem a poison pill, which by definition is a control mechanism and not a device with independent business purposes, may present distinctive considerations than those presented in this case." Paramount Communications, Inc. v. Time, Inc., Fed. Sec. L. Rep. (CCH) ¶ 94,514, at 93,284 n.22 (Del. Ch.), aff'd, 571 A.2d 1140 (Del. 1989).

See Johnson, supra note 26, at 873 (noting that "the true locus of power has shifted from the legislative branch to the Delaware judiciary"). In his refreshing article probing the "meaning of corporate life," Lyman Johnson asserts that "a handful of
say no defense illustrate how little control of management discretion the business judgment rule and the Unocal test afford shareholders. As the Delaware judiciary continues to grapple with elusive takeover issues, attempting to balance conflicting corporate interests, states continue to enact antitakeover legislation that aggravate attempts to reach such a balance. Indeed, as legislative and judicial approval of defensive measures advance in tandem, each supporting the other, both become increasingly more supportive of director discretion.272

C. Current Reform Proposals

Optimal reform must come from state or federal legislation rather than case law. Because state takeover statutes are a recent phenomenon, it is not surprising that no commentators to date have proposed model state takeover statutes (or the equivalent). Given the importance and pervasiveness of state antitakeover legislation, merely amending the Williams Act seems inapposite.

Other than proposals to amend the Williams Act,273 most current reform efforts stem from the pressure shareholders place on management. For example, Honeywell shareholders recently sought to influence their corporation's antitakeover policy.274

Some activities surrounding second-generation shareholder rights plans offer wise paradigms. For example, Texaco, amid its emergence from bankruptcy proceedings, on March 16, 1989, announced its new rights plan, which effectively becomes “inactive” forty-five business days after an all-cash fully-financed “qualified”

judges are, in effect, empowered to shape (or reshape) the entire corporate landscape and to answer the most fundamental question of all—what is the meaning of corporate endeavor?” Id. He also notes that, “[g]iven the legislative public-law vacuum, the takeover dilemma falls squarely into the laps of the Delaware Judiciary. . . . [But] judges respond on an acute rather than a systemic basis, deciding specific cases for litigants while resolving bedrock issues for society at large.” Id. at 887 (footnote omitted).

272. E.g., Block & Hoff, Current Trends in Poison Pill Provisions, N.Y.L.J., Mar. 8, 1990, at 7, col. 4 (noting that the rationale for flip-in triggers as low as 15% “has been that it is consistent with Delaware’s takeover statute” which has a 15% business-combination trigger). For example, it was recently asserted that directors’ duty statutes “seem likely to strengthen the position of boards of directors that choose a ‘just say no’ defense to hostile offers.” Hart & Degener, Non-Stockholder Constituency Statutes, N.Y.L.J., Apr. 12, 1990, at 1, col. 1; see Committee on Corporate Laws, Other Constituencies Statutes: Potential for Confusion, 45 Bus. Lw. 2253, 2267 (Aug. 1990) (asserting that “the principal consequence of [other constituency statutes] will be the signal they send the courts to allow even greater discretion than that accorded by the business judgment rule” during hostile control-shifting transactions).

273. See supra note 28.

274. See Gross, Shareholders' Vote Sought on Honeywell 'Poison Pill' Plan, Minneapolis Star Tribune, Apr. 3, 1990, at 1D, 7D. Gross notes that the proposal comes one year after shareholders defeated two company-sponsored antitakeover measures. United Shareholders Association singled out Honeywell because the company has a poor record for responsiveness to shareholders. The instigating shareholder said in a proxy statement: Any action that has a(s) significant an impact upon the value of my investment as do ‘poison pills’ should be presented to shareholders for their consideration. I believe that the declaration of the plan, without shareholder consent, was contrary to the long-term interests of all shareholders, and offends notions of corporate democracy.

Id.
takeover offer.\textsuperscript{275} Several corporations have amended their rights plans at the behest of institutional investors.\textsuperscript{276} For example, Dayton Hudson Corporation and Great Northern Nekoosaa each agreed to redeem its rights plan by 1992 or submit it to shareholder vote.\textsuperscript{277} National Intergroup, Inc., adopted a 1989 institutional shareholder's proposal for the corporation to amend its rights plan so that it will expire in 1992 unless approved by shareholders.\textsuperscript{278} The proposal also requires that the plan be submitted for shareholder approval at three-year intervals thereafter.\textsuperscript{279} In 1986, the Council of Institutional Investors\textsuperscript{280} proposed a "shareholder bill of rights" recommending, inter alia, approval of poison pills by a majority of shareholders.\textsuperscript{281} Some new generation poison pills provide for a shareholder vote, but the vote requirement engages only for a narrow range of offerors.\textsuperscript{282}

One commentator suggests that the proper role of our "legal system is to facilitate the intra-firm contracting process."\textsuperscript{283} Professor

\textsuperscript{275} See Pitt, Tender Offers: Offensive and Defensive Tactics and the Business Judgment Rule, in 1 HOSTILE BATTLES FOR CORPORATE CONTROL 7, 107 (Practising Law Institute 1990) (stating that "[t]his 45 day window allows the board of directors 'a reasonable opportunity to explore the available alternatives to maximize stockholder value'.")

The Santa Fe Southern Pacific Corp., at the behest of the California Public Employees' Retirement Systems, has adopted a poison pill that mandates redemption if (1) "a bidder makes an all cash tender offer which remains open for at least 45 days and (2) after completion of the offer, the bidder beneficially owns at least 80% of the company's outstanding stock." \textit{Id.} at 106-07.

\textsuperscript{276} A number of other corporations have been confronted with institutional investors' proposals to redeem or amend shareholders' rights plans, but have not adopted the proposals. Most proposals come from a few large pension funds. See Lewkow & Groll, Poison Pills and other Structural Defenses: Uses and Abuses in the Age of Saying "No", in 2 HOSTILE BATTLES FOR CORPORATE CONTROL 219, 233-34 (Practising Law Institute 1990).

"The 19 proposals submitted in 1989 received favorable votes from an average of 39.5% of the votes cast, up from 38.7% in 1988 and 27.4% in 1987." \textit{Id.} at 233. Resolutions submitted to shareholders of Avon Products and Consolidated Freightways received more favorable votes than unfavorable votes, but did not garner a majority because of abstentions. \textit{Id.} at 234.

\textsuperscript{277} \textit{Id.}

\textsuperscript{278} \textit{Id.} The National Intergroup plan also requires that any new rights plan must be submitted for stockholder approval not later than the first annual meeting following its adoption. \textit{Id.}

\textsuperscript{279} \textit{Id.}

\textsuperscript{280} The Council of Institutional Investors is an organization of 36 pension funds controlling more than $160 billion in assets. \textit{See} Note, Shareholder Rights Plans, supra note 28, at 1036 n.308.

\textsuperscript{281} \textit{Id.; see} Vise, Bill of Rights Seeks to Boost Power of Shareholders, Wash. Post, Apr. 13, 1986, at F1, col. 1.

\textsuperscript{282} For example, MCA, Inc.'s rights plan allows stockholder vote on certain acquisition proposals, but only if the offeror does not own more than one percent of target stock during the year preceding the acquisition proposal. \textit{See} Block & Hoff, supra note 272, at 30, col. 1.

\textsuperscript{283} Macey, supra note 26, at 490 (arguing that the only laws necessary are enabling legislation permitting intra-firm agreements between shareholders and management for responding to tender offers).
Coffee advances a model of corporate directors as mediators between shareholders and stakeholders, seeking to protect their contractual expectations.\textsuperscript{284} Another commentator proposes adopting "interstate stock."\textsuperscript{285}

Numerous bills proposing takeover reforms have been introduced in both houses of Congress each year. Several have sought to amend the Securities and Exchange Act of 1934. Senator Shelby's Investor Equality Act of 1989 would have prohibited golden parachutes, greenmail, and poison pills without shareholder approval.\textsuperscript{286} Senator Metzenbaum's bill sought to amend the tender offer period to sixty days and to require majority shareholder approval before poison pills, golden parachutes, or greenmail payments are approved.\textsuperscript{287} Senator Specter also proposed legislation.\textsuperscript{288} Despite these attempts, federal takeover reform appears unlikely.\textsuperscript{289}

The American Law Institute (ALI) also has attempted to delineate the roles of directors and shareholders in control and tender situations.\textsuperscript{290} Section 6.01 of the ALI's \textit{Principles of Corporate Governance} requires that shareholders approve any "transaction in control" to which the corporation is a party.\textsuperscript{291} The drafters recommend that

\textsuperscript{284} See Coffee, supra note 14. Professor Coffee argues that the failure of the implicit contracting system to protect stakeholders has contributed to the need for state antitakeover legislation. \textit{Id.} at 450. Coffee posits the need to lessen the current barriers to more efficient systems of managerial compensation to better align managerial and shareholder interests. \textit{Id.} at 454. He confesses that managers will likely require substantially more compensation to be induced to manage the firm for shareholder interests. \textit{Id.} Such inducement could come from bonuses contingent on maximizing takeover gains. \textit{Id.} at 455. This compensation system suffers from numerous problems, however. \textit{Id.} at 455-58.

\textsuperscript{285} See Kozyris, supra note 250; Kozyris, supra note 17, at 1139-42.

\textsuperscript{286} S. 1658, 101st Cong., 1st Sess. (1989). S. 1658 is similar to Senator Proxmire's celebrated bill, S. 1323; when S. 1323 reached the Senate floor in June 1988, an amendment was offered which would prohibit golden parachutes, greenmail and poison pills without shareholder approval. For a discussion of the Proxmire bill, see supra note 12; infra notes 525-27 and accompanying text. See Goelzer, Quinn & Walter, \textit{Recent Developments in Tender Offer Regulation}, in \textit{2 Hostile Battles for Corporate Control} 465, 592-93 (Practising Law Institute 1990). The Senate voted to prohibit golden parachutes without shareholder approval but failed to table the poison pill provision, killing the bill. \textit{See id.} at 593.

\textsuperscript{287} S. 1244, 101st Cong., 1st Sess. (1989); see Goelzer, Quinn & Walter, supra note 286, at 593-94.

\textsuperscript{288} See S. 1794, 101st Cong., 1st Sess. (1989); see Goelzer, Quinn & Walter, supra note 286, at 594-95.

\textsuperscript{289} Johnson, supra note 26, at 870. In an effort to explain Congress' steadfast inaction, Professor Lyman Johnson asserts that Congress is "paralyzed by uncertainty," unable to resolve the key, highly divisive issue "on the overarching question of whether high levels of takeover activity are, overall, good or bad for the nation." \textit{Id.} at 869-70.


\textsuperscript{291} Section 6.01 reads:

Role of Directors and Holders of Voting Equity Securities with Respect to Transactions in Control Proposed to the Corporation

(a) The board of directors, in the exercise of its business judgment, may approve, reject, or decline to consider a proposal to the corporation to engage in a transaction in control.

(b) Any transaction in control of the corporation to which the corporation is a party should require approval by the shareholders.
Section 6.01(b) be implemented by statute, and that the definition of "transactions in control" be implemented by judicial decision.\textsuperscript{292} Section 6.01(b) applies to all mergers, de facto mergers, and to control transactions such as "lock-ups"\textsuperscript{293} but not to hostile tender offers, which are covered by section 6.02.\textsuperscript{294} Section 6.02 allows the board to consider nonshareholder interests "if to do so would not significantly disfavor the long-term interests of the shareholders."\textsuperscript{295} The draft does not cover adoption of shareholder rights plans\textsuperscript{296} or opting into state takeover legislation.

Although the ALI correctly identifies the need for remedying the deficiencies in the current corporate governance regime,\textsuperscript{297} the Authors believe the solution not only fails to achieve the goal of reducing the uncertainty directors confront in hostile tender offer situations,\textsuperscript{298} but actually undermines that goal in numerous ways. First, by allowing directors to consider nonshareholder constituencies,\textsuperscript{299} director uncertainty necessarily increases.\textsuperscript{300} Because the interests of other groups may be considered "if to do so would not not
significantly disfavor the long-term interests of the shareholders,”301 one need only momentarily ponder this standard before concluding that the vast expanse of possibilities for considering nonshareholders without materially disfavoring the shareholder’s long-term interests can only fuel director uncertainty. Second, the significantly disfavor the long-term interests standard itself is little improvement over the Unocal standard.302 Furthermore, the meaning of the ALI’s allowance for directors to focus on both corporate and shareholders’ long-term interests is far from apparent.

II. The Nature and Role of Shareholders in the Modern Corporation

The phenomenon of “control” is perhaps the most important single fact in the American corporate system. As the corporation increasingly is recognized as an institution of primary significance (even Mr. Justice Brandeis called it “a master instrument of American economy”), the importance of control will grow in law as it has grown in economic and social fact. Corporation law has never surrounded this phenomenon. Rules have been developed with respect to isolated aspects of it; but the rules derive chiefly from a time when corporations were still truly private and relatively small.

Historically, the shareholders of a corporation were joint owners with an implied right to exclude others and a right to common enjoyment.304 The corporation’s managers, it followed, were agents of the joint owners and governed by the law of agency.305 The board of directors was accountable to and conducted business for the benefit of the joint owners. Throughout, however, the joint owners (shareholders) exercised ultimate control.306

This description continues to apply to many aspects of the modern closely held corporation, but has little relevance to the publicly held corporation. Normal incidents of joint ownership do not inure to shareholders of the publicly held corporation.307 That is, shareholders of a publicly held corporation are not actively involved in managing the enterprise. Conversely, corporate managers usually have little or no proprietary interest in the corporation.308

In the modern legal model of the corporation, control over an

301. See ALI Draft 11, supra note 290, at 528.
302. See supra notes 224-27 and accompanying text.
enterprise is divided between three corporate groups: (1) the shareholders; (2) the board of directors; and (3) the officers and agents of the corporation. Management functions are not distributed evenly. Some duties are performed jointly by two or more of the organs while others are performed individually. Generally, management functions are delegated to the corporate officers by a board of directors that is elected and whose actions are sometimes ratified by the stockholders. In this narrow respect, then, it can be stated that the majority of the shareholders, through the board and elections, retain supreme authority for management.

Control by a person or group of affiliated persons holding a majority of the voting stock is atypical in the large publicly held corporation. Rarely does one person, family, or voting block own an actual majority of issued public stock. More common, but still unusual, is when one shareholder or shareholder group owns a "controlling minority" of shares. In these instances, it is quite common for ownership and management to be intertwined because of the overriding economic interest of the controlling shareholder(s).

More tenuous shareholder control results in corporations in which an active minority of stockholders exercise episodic control. These episodes arise when a group of investors attracts a sufficient amount of stock or proxies to constitute a majority at the stockholder meeting. While significantly more common than strict majority control, such control, by its very nature, is more difficult to maintain on a continuing basis. Rather, the interests represented, like insurgent groups of shareholders generally, may be pacified by relatively minor accommodations.

In the publicly held corporation, then, shareholder control exists only on a very superficial level. For the most part, it is the corporate officers who dictate corporate policy and exercise managerial control. Management in the publicly held corporation, therefore, typically has been allowed to perform its functions with very little oversight from the stockholders.

This separation of ownership from control has disturbed economists and legal scholars since Adolf A. Berle and Gardiner C. Means

309. See generally R. Clark, Corporate Law Ch. 3 (1986).
310. In 1986, only 17 of the top 100 shareholders in the nation owned over half of the stock in any given corporation. Most of those owning a majority were controlled by whole families who inherited stock in publishing and retail enterprises. See Who Owns Corporate America, U.S. News & World Rep., July 21, 1986, at 36-43.
311. See id.
312. Id.
313. See supra notes 276-79 and accompanying text (noting that corporations sometimes "voluntarily" concede to insurgent shareholders' proposals rather than fight them).
published their thesis *The Modern Corporation and Private Property* in 1932.\textsuperscript{314} They asserted that the interest of owners and of management diverge and often conflict.\textsuperscript{315} Although corporate owners seek maximization of profit from their investment, corporate management balances this goal with its own interests.

The Berle and Means thesis never has been universally accepted. Management, it is argued, will not be retained unless it produces efficiently. Thus, while not active in management itself, shareholders can exercise their ultimate authority to change the composition of the board of directors.

The problem with this response to the theory of management control lies in the power of management in many cases to choose and endorse candidates for board of director positions. In publicly held corporations, management controls the proxy machinery. It chooses the nominating committee (if one exists) and the committee (or management directly) in turn nominates members of the board.\textsuperscript{316} In this respect, the shareholder is given the opportunity to vote, but is limited in the choice of whom to elect because of the difficulty, complexity, and expense of presenting an alternate slate of candidates.

Significant changes, however, are well underway. Fewer and fewer shares are being held by small, passive investors and more are being held by institutional investors, particularly public-pension funds. The role of these funds and their managers as active shareholders and the changes in the corporate process they are seeking could cause substantial modification in the operation of the corporate franchise and the accountability of management.

**A. Overview**

When a corporation is first formed its shareholders, officers, and directors typically are the same people. For the sake of efficiency shareholders become directors, and thus, owners appoint and oversee management. When the corporation later goes public the stockholders dilute their ownership and may submit their interests to the control of outside sources.

As a result of this dilution, it is too easy and often incorrect to treat the interests and objectives of stockholders collectively. Formerly dismissed as too atomistic in their holdings to have any effect on management,\textsuperscript{317} shareholders of the publicly held corporation actually vary widely as to their ability to affect management policies. Thus, the Berle and Means hypothesis that stock ownership in the publicly held corporation is too fragmented and erratic to allow for shareholder control of management is subject to both theoretical


\textsuperscript{315} See *id.* at 119-25.


\textsuperscript{317} See, e.g., A. Berle & G. Means, *supra* note 307, at 86-87 (stating that “control will tend to be in the hands of those who select the proxy committee”).

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and empirical challenge.\textsuperscript{318} Indeed, instances of controlling shareholders or groups of shareholders appear with some regularity in big business and a few exercise their power with as little as five percent ownership of stock.\textsuperscript{319}

One of the factors that led to the stereotypical Berle and Means grouping of stockholders in the 1930s was the relative difficulty in identifying shareholders of publicly held corporations. This difficulty was one major impetus for the passage of the Securities Exchange Act of 1934,\textsuperscript{320} which requires disclosure of facts regarding corporate securities.\textsuperscript{321} Under this Act the public is able to monitor and identify investors who own at least five percent of outstanding stock.\textsuperscript{322}

In 1968, the Williams Act was passed as an amendment to the Securities Exchange Act of 1934.\textsuperscript{323} The Williams Act requires owners of five percent of the outstanding corporate stock of certain corporations to file a disclosure statement with the corporation and the SEC.\textsuperscript{324} This requirement, however, does not totally ameliorate the problem of shareholder identification. For example, it is still relatively difficult to ascertain ownership of persons holding less than five percent of issued stock.

Nevertheless, the identity of shareholders in today's publicly held corporations is in a state of substantial transition. A 1986 study showed that ownership of publicly held corporate stock was distributed so that individuals (or households) held sixty-three percent, pension plans held twenty-one percent, insurers, banks and brokers held six percent, and mutual funds and foreigners held five percent each.\textsuperscript{325} These numbers, even if accurate at the time, are certainly different today. The individual investor that disappeared after the October 1987 market crash is reappearing in the 1990s as a mutual-

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\textsuperscript{319} Glasberg & Schwartz, Ownership and Control of Corporations, 9 ANN. REV. SOC. 311, 312-19 (1983).


\textsuperscript{322} 15 U.S.C. § 78m(d).


\textsuperscript{325} Who Owns Corporate America, supra note 310, at 36-43.
}
Comparably, pension-funds have grown astronomically. Between 1985 and 1989, for example, pension-fund assets grew fifty-five percent to $1.59 trillion. Various estimates indicate that institutional investors will soon hold over two-thirds of the shares in all publicly held corporations.

Today the role of shareholders is as complex as their identity. Shareholder control of management generally consists of four elements: (1) election and removal of directors; (2) power to amend the corporate charter or sometimes adopt, repeal, and amend by-laws; (3) adoption of shareholder resolutions; and (4) power to vote on extraordinary corporate matters. Shareholders' voting rights can be straight, cumulative, class-based, disproportionate, or they can have no vote at all. Generally, however, shareholders exercise those rights only when electing a board of directors. It is the board that manages the corporation, determines policy, and appoints officers to execute managerial functions.

In analyzing the role of the shareholder in the publicly held corporation one must first ask: "Do shareholders expect they will assume responsibility for management?" The separation of ownership from control is partially a function of economics. As the number of stockholders in major companies can range into the millions, efficiency warrants that stockholders delegate their decision-making authority to the board. Investors choose whether to invest or to liquidate by gauging the competence of the management through the market value of the investment. Therefore, shareholders generally neither have nor want access to the day-to-day decision-making activities of the board and management.

This presumed modest role of the shareholders in corporate governance should not be underestimated. Directors and officers do not enjoy exclusive control of the corporation to the exclusion of the shareholder. On the contrary, different types of shareholders...

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328. For example, it is estimated that pension funds alone may own as much as 50% of all corporate equity by the year 2000. See Light, The Privatization of Equity, 67 HARV. BUS. REV. 62, 62-63 (1989) (estimating that pension funds control 40% of all equities); see also America's Shareholders Break into the Boardroom, ECONOMIST, Apr. 29, 1989, at 75.
329. REVISED MODEL BUSINESS CORP. ACT §§ 8.03(d), 8.08; CAL. CORP. CODE § 303 (Deering Supp. 1991); DEL. CODE ANN. tit. 8, §§ 211(b), 141(k) (1989); N.Y. BUS. CORP. LAW §§ 703(a), 706 (McKinney 1986).
331. REVISED MODEL BUSINESS CORP. ACT § 7.40; CAL. CORP. CODE § 800; DEL. CODE ANN. tit. 8, § 327; N.Y. BUS. CORP. LAW § 626 (McKinney 1986).
332. REVISED MODEL BUSINESS CORP. ACT § 11.03; CAL. CORP. CODE § 1201; DEL. CODE ANN. tit. 8, § 251(c), (l); N.Y. BUS. CORP. LAW § 903(a).
wield various amounts of control consistent with their distinct motives and varying levels of stock ownership. The market also acts as a check or monitor of management activity.

Many factors blend together to form the dynamics of the shareholder role in the publicly held corporation. Among these factors are the type and size of the corporation, and the extent and concentrations of ownership among shareholders. Generally, there are three major types of investors: (1) the smaller individual investor, (2) the larger shareholder or household investor, and (3) the institutional investor. The next sections will explore the roles of each of these types and their impact on the management and control of the publicly held corporation.

B. The Role of the Small Shareholder

In most publicly held corporations the most common shareholder historically has been the "small" shareholder, who owns a small equity interest and enjoys a negligible impact on managerial powers. The small shareholder's recourse for any of a variety of dissatisfactions—barring derivative suits and actions involving breach of fiduciary duty—is to vote with her feet. If she does not like management, she will usually sell rather than fight.

Corporations are not democracies in the sense of one person, one vote. Instead, they operate on the premise of one share, one vote. Thus, the small shareholder's power to change corporate policy is directly proportionate to her quantum of ownership. In this regard, the voice incident to typical individual share ownership is that of one crying out in a vast wilderness far removed from the corporate metropolis.334

This relative impotence is not altogether unfortunate. Most small stockholders have no more than a monetary interest or fleeting education in the governance of the particular corporation. They are "free riders"—apathetic with regard to daily management affairs in the hope of benefiting from the work and worries of large stockholders, directors, and officers.335 Their apathy, in turn, saves the company time, money, and headaches that would likely result from true shareholder education and democracy. This system of governance is not without its critics, however. Berle and Means first identified the problems that arise when management is separated from ownership.336 Since then, economists and legal scholars have addressed

335. R. Clark, Corporate Law § 3.1.1, at 94 (1986).
this central issue of conflict of interest.337

Nor are small shareholders encumbrances on the utility of corporate management. The wide dispersal of stock does not itself deny shareholders the opportunity to gain control or monitor management. Voting rights can be sold along with shares to present a group of holders or larger investors with the opportunity to replace incumbent management.338 Shareholders can coalesce to act together, as is commonly practiced in the context of proxy contests. Small shareholders may also bring suit against management and against majority shareholders for breach of fiduciary duty.339 The latter action, however, is more common in the closely held corporation. The threat of these actions may add to other programs designed to give small owners a voice in corporate governance.

In recent years the role of the small shareholder has changed in two significant ways so as to grant them a greater influence on corporate activities. First, the small investor may forsake individual ownership for the expertise and diversified portfolio associated with mutual funds, thereby transforming dispersed individual ownership into concentrated institutional ownership.340 Second, the small shareholder, dissatisfied with her investment, may decide to sell her shares. Today, however, the small shareholder may find an alternative to selling in the traditional "Wall Street option;" she may sell her shares at a premium to a tender offeror that is unfriendly to incumbent management. The ability of small shareholders as a group to act as the effective swing vote in the battle for corporate control has reinstated them as a force to be satisfied (or neutralized) by corporate management.

C. The Role of the Large Shareholder and Household Investor

An incident of ownership of a majority interest—and often of an interest substantially less than that—is control. Control will naturally be exercised in pursuit of the majority’s perceived interests. Indeed, pursuit of those interests may be judicially viewed as a right inherent in ownership of control.341


338. For a discussion on the requirement that voting rights be sold along with the stock, see Andre, supra note 105.

339. See, e.g., Crosby v. Beam, 47 Ohio St. 3d 105, 108, 548 N.E.2d 217, 221 (1989) (expressing a strong desire to protect minority shareholders in close corporations while probing the boundaries between individual and derivative suits).

340. See infra text accompanying notes 345-83 (noting that shareholders increasingly entrust their share holdings with institutions, including mutual funds). On the other hand, when the stock market looks like a bad option generally, individual investors may flee stock mutual funds for other investments, such as money-market funds. See Stock Fund Sales Collapse, Marking Most Dismal Month Since 1987 Crash, Wall St. J., Aug. 31, 1990, at C1, col. 3.

The extent and prevalence of the large shareholder and family investor was ignored by the Berle and Means thesis in the 1930s.\footnote{See A. BEARLE & G. MEANS, supra note 307, at 112-16.} These holders are not as rare as once believed and when grouped with the institutional investor, may prove more the norm than the exception. Since 1951, surveys from the Brookings Institution, the New York Stock Exchange, Edwin Cox, and the SEC have reported that fewer than ten percent of stockholders controlled more than seventy percent of the value of outstanding common shares.\footnote{This figure includes institutional investors and program traders. See Eisenberg, Structure of the Corporation, supra note 337, § 5.2, at 44-45. Edwin Cox's study in 1963 found that 20% of the holdings accounted for 77% of the stock. Id. at 45.} These figures demonstrate that the "average" small individual stockholder has been shadowed by a more active and powerful investor.

The predicament for the large investor who is disappointed with management is more problematic than a similarly situated small investor. The large investor's holdings are more significant. Often a large investor owns over five percent of the total stock issued.\footnote{See Who Owns Corporate America, supra note 310, at 36.} Liquidation is therefore less attractive because a surge in the supply of a security on the open market may decrease its price. Accordingly, the sale option for the large investor is not as viable.

A large shareholder has other options to consider. If she does not own a majority of outstanding stock, she may launch a proxy campaign or combine her efforts with other owners in a proxy campaign. Such efforts, however, are extremely expensive and speculative at best. In addition to the expense, large investors engaged in a proxy battle face the problem of identifying shareholders and convincing them to vote. They also face the risk of declining security prices because of speculation that the corporation is experiencing management difficulty.

The problems do not end after the proxy contest. If successful in a proxy battle, the investor must deal not only with the replacement of upper-level management, but with middle- and lower-level management who may have pursued the same unprofitable course of business. Often the bottom line for the large private investor is the same as that for the small investor: if satisfied with the management, she will support them; if dissatisfied, she will sell, but maybe over a longer period of time.

D. The Role of the Institutional Investor

Ownership of publicly held corporations by institutional investors has ballooned in recent decades. Institutional investors control
roughly half the market value of all existing outstanding stock. In 1989, institutional shareholders owned forty-three percent of all publicly traded equities, with large institutional shareholders owning fifty-two percent of the equity of the top fifty American corporations. Indeed, American pension funds possess the largest pool of investment capital in the world, with assets rivaling the gross national product of Japan. Tripling in size since 1971, pension fund assets exceeded $2.6 trillion in 1989. Pension funds currently own approximately sixty percent of the stock of companies on the "Standard & Poor's 500." Comprised of bank trust departments, insurance companies, mutual and pension funds, and investment firms, institutional investors concentrate on the largest publicly held corporations. Furthermore, most of the shares of these corporations are held by a relatively small percentage of institutions. This, of course, means that significant corporate ownership is steadily declining to a relatively few investors.

Institutional investors differ from the small investor and the large individual investor in two respects. First, they are more likely to exercise their voting rights because they own more stock and have a systematized method of voting. Second, because of their duties to their beneficiaries, the size of their holdings, and the expertise of their staffs, the institutional investors' resources enable them to investigate and monitor management. This ability, in turn, allows them to vote effectively. Moreover, the size of their holdings discourages a sell-out for fear of depressed prices.

Unfortunately, although conscientious about their voting record, institutional investors have not always taken the active role in corporate governance one might expect. Their value often has proved greatest to takeover bidders who may conveniently purchase a large number of shares at inflated prices to gain control of

345. Id. at 37. In addition, most major corporations today are owned 50% or more by institutional investors and 80% of the dollar volume on the major stock exchanges is institutional in nature. Franco, Institutional Ownership in the U.S.: An Overview, in SHAREOWNER ACTIVISM: THE EMERGING ROLE OF INSTITUTIONAL INVESTORS 285, 288 (Practising Law Institute 1987).
348. Id. at 155.
350. It is estimated that 50% or more of all stocks listed on the New York Stock Exchange are held by institutions. Who Owns Corporate America, supra note 310, at 37.
353. The corporate charters of many institutional investors have contained provisions preventing them from seeking to exercise control of management. See, e.g., Sanger, Tame No More, Funds Seek More Say In Firms They Invest In, BARRONS, Feb. 16, 1987, at 56, col. 3.
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management.\textsuperscript{354}

The institutional investor has a duty to its own beneficiaries rather than its fellow stockholders.\textsuperscript{355} Institutional investors, therefore, cannot ignore their fiduciary obligations to their beneficiaries. In voting, the institutional investor is obligated to exercise its best business judgment.\textsuperscript{356} In this respect, the increased participation of institutional investors in the ownership of publicly held corporations serves as a countervailing force and a check on managerial control otherwise unavailable with small shareholder ownership.\textsuperscript{357}

Indeed, perhaps the most significant development of the second half of the 1980s was the increasing activism of institutional shareholders.\textsuperscript{358} Their size has grown tremendously\textsuperscript{359} and with that growth their inclination to activism has expanded.\textsuperscript{360} In fact, with such large holdings the option of selling out often is not realistic; the size of these funds may require them to take an active role in corporate affairs.\textsuperscript{361} This activism can result in a variety of interactions, ranging from informal contacts (or negotiated settlements),\textsuperscript{362} to proxy contests,\textsuperscript{363} to proposals for reform.\textsuperscript{364}

Institutional shareholders have been experimenting with various

\textsuperscript{354} Eisenberg, Structure of the Corporation, supra note 337, at 53-54. Interestingly, rather than serve as a watchdog of management, institutional investors often assumed a pro-management stance. Pickens Forms Shareholder Group to Focus on Corporate Voting Issues, 1 Corp. Couns. Weekly No. 34, Aug. 24, 1986, at 1. Reasons for this phenomenon include: (1) a desire to retain the business of the corporation in other areas, such as banking and financial, (2) the desire to access inside information; and (3) "obedience to the mores of the financial community." Eisenberg, Structure of the Corporation, supra note 337, at 57 (footnotes omitted); Heard, Pension Funds and Contests for Corporate Control, 29 Cal. Mgmt. Rev. 89, 92-95 (1987).

\textsuperscript{355} Eisenberg, Structure of the Corporation, supra note 337, at 58; Heard, supra note 354, at 89.

\textsuperscript{356} See Monks, Will the Corporation's Real Owners Please Stand Up?, Across the Board 52 (Feb. 1987).

\textsuperscript{357} See Shleifer & Vishny, Large Shareholders and Corporate Control, 94 J. Pol. Econ. 461 (1986).

\textsuperscript{358} See, e.g., The Revolt of the Institutional Shareholders, Institutional Investor, May 1987, at 131.

\textsuperscript{359} See White, supra note 327, at C1, col. 3.

\textsuperscript{360} See 1990 Almanac, supra note 2, at 4 (noting that these "‘activist shareholders’ have a growing interest in monitoring management performance and influence board decisions").


\textsuperscript{363} See, e.g., Feinberg, supra note 362, at 14.

approaches in an effort to translate their substantial stakes in corporations into power sufficient to influence corporate management. Enhanced communication with shareholders, management, and government is central to their efforts. Institutional shareholders now seek to influence the corporate governance regime and to participate in management "on an advisory basis."

Institutional investors have sought changes in corporate governance rules by making shareholder proposals, soliciting against management proposals, and attaining dissident concessions. For example, the California Public Employees Retirement System (CalPERS) has sponsored Analysis Group, Inc.'s Institutional Voting Research Service, which is designed to evaluate the corporate governance and economic performance records of major corporations. Stressing a variety of issues, institution-sponsored shareholder resolutions have risen markedly, with over 100 proposals being sponsored in 1990. Many institution-sponsored proposals have garnered plurality support, including Lockheed Corporation's opting out of Delaware's antitakeover legislation, shareholder approval requirements for poison pills at K Mart Corporation, Champion International Corporation, and National Inter- group, and an antigreenmail proposal at Gillette. Pressed by the growing discontent of institutional shareholders, management of many corporations have voluntarily supported shareholder proposals, including mandatory redemption of poison pills at Dayton Hudson Corp., Great Northern Nekoosa Corp., and Aluminum

366. See id. at 50. The Authors note some examples of enhanced dialogue among shareholders and managers: (1) In 1990, CalPERS and New York State demanded meetings with General Motors' outside directors and management; and (2) numerous pension funds met with Exxon's chairman to discuss Exxon's recent oil spill. Id. "These funds had threatened to begin a campaign to remove the board if it failed to meet their demands for a stronger commitment to the environment." Id. Several large pension funds also persuaded Exxon to elect a director with an environmental background. Id.
367. Examples of lobbying efforts by institutional shareholders include: (1) actively supporting the SEC's adoption of a "one share, one vote" rule, id. at 59; (2) CalPERS recently proposed forty-eight changes to proxy rules, id.; and (3) institutional shareholders' aggressive fight against Pennsylvania's recent antitakeover legislation. Id. Influenced by their efforts, at least twenty-two Pennsylvania corporations opted out of at least one of the Pennsylvania Antitakeover Act's provisions. Id. at 60.
368. Id. at 47.
369. For example, institutional investors solicited shareholders to defeat two management-backed proposals at Honeywell, Inc. Id. at 56.
370. For example, amid a proxy battle involving Armstrong World Industries, dissident First City Diversified, "controlled by the Belzberg family, proposed five shareholder rights resolutions that were endorsed by Institutional Shareholder Services." Id. at 56.
371. Id. at 51.
372. Among the issues addressed by these proposals: shareholder approval of shareholder rights plans, "golden parachute" severance agreements, and the placement of 10% or more of voting stock with any person or group; confidential voting; bylaws requiring the corporation to opt out of applicable state antitakeover legislation; and a referendum on dual class voting structure. Id.
373. Id. at 52. In contrast, 46 proposals were sponsored by institutions in 1987. Id. 374. See id. at 53-54.
Institutional shareholders increasingly seek formal involvement in corporate governance and decisionmaking. The shareholder advisory committee, a brainchild of CalPERS, may be the most interesting among them. Although these committees are an untested, evolving concept, as proposed by CalPERS to Avon, the no-less-than nine-member committee would be comprised of major, disinterested shareholders willing to serve a one-year term and would be limited to providing nonbinding, advisory counsel to the board. CalPERS has sponsored proposals for creating shareholder advisory committees at TRW Inc., Avon Products, Sears, and Occidental Petroleum Corp., among others. The value of shareholder advisory committees becomes acutely obvious when compared to the proxy statement alternative. CalPERS has recently advised the SEC that

[i]n many ways, the proxy rules discourage responsible, long-term investors from playing a meaningful role in the governance of public corporations. The proxy rules in their present form have evolved in and been shaped by an environment that reflects an underlying philosophy of protecting registrants from shareholder involvement, restricts shareholder access to the corporate proxy statement, and imposes a high cost on shareholders who seek to circulate their own proxy materials or to otherwise communicate with shareholders. [T]he current rules . . . are an impediment to better corporate governance to the extent that they suffocate shareholder input or insulate management.

Still, not every publicly held company has substantial institutional shareholders. Also, although the largest institutions are certainly a major market force, institutions often cannot focus on the myriad

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<td>378</td>
<td>Rosenbaum &amp; Korens, supra note 365, at 57.</td>
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<td>379</td>
<td>This proposal received approval from 45.5% of the votes cast at Avon Products in 1990. See id. at 57.</td>
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<td>381</td>
<td>See Rosenbaum &amp; Korens, supra note 365, at 58 (noting that Occidental Petroleum Corp. and TRW Inc. each agreed to meet periodically with CalPERS officials to discuss corporate policy).</td>
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<td>383</td>
<td>For example, the top 20 pension funds account for more than 25% of all pension assets and have roughly 10% or more equity in companies such as IBM and General Motors. See White, supra note 327.</td>
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of entities in which they hold stock. Thus, their ability to effectively initiate change rather than merely respond to management initiatives remains an open issue in the 1990s.

III. Justifications for Balanced Shareholder Input

Shareholders face two fundamental obstacles in their quest to maximize the value of their investment: (1) state and corporate sponsored protectionist measures; and (2) directors’ express authority to consider nonshareholder constituencies in takeover contexts as articulated in state legislation and case law. In 1989, tender offers, the primary means of hostile corporate takeovers, dropped 37.4% from the previous year. Hostile tenders, those where management at least initially opposed the offer, fell off 37.0% in 1989. Although certainly a multiplicity of factors contributed to this decline, corporate antitakeover measures and antitakeover legislation are designed to have this effect. Shareholders are beginning to cry out. For example, several Honeywell and First Bank shareholders demanded that those corporations’ current poison pills be put to a shareholder vote.

Four recurring themes interact to justify enhancing and equalizing shareholder input in control transactions. The first theme is centered on directors’ conflict of interest. Saddled with conflicting interests, directors may lack incentive to maximize shareholders’ best interests or to seek shareholder input on corporate takeover policy, thereby denying shareholders an opportunity to balance their input with management and other nonshareholder constituencies in a meaningful way. The second theme concerns the uncertainty resulting from the combined forces of the business judgment rule and directors’ duty legislation. This combination allows directors to consider nonshareholder constituencies, diluting and blurring any shareholder input that muscles its way beyond directors’ conflicting interests, further denying shareholders a meaningful voice in takeover matters. The third theme focuses on economic

384. See supra notes 21-22 and accompanying text.
385. For a description of this “directors’ duty legislation,” see Appendix at DDS and supra notes 137-53 and accompanying text.
386. The impact of the business judgment rule and the “just say no” defense are discussed supra notes 206-72 and accompanying text.
387. 1989 Almanac, supra note 3, at 25. The recent collapse of the “junk bond” market may be as important a factor in the reduction of tender offers and takeover activity generally as the recent proliferation of poison pills. See supra notes 7-11 and accompanying text. In 1990, the trend continued: only 40 offers were completed, compared with 117 in 1989. 1990 Almanac, supra note 2, at 13.
389. See Gilson I, supra note 27, at 841 (stating that “[t]he market for corporate control may be the only potentially serious force for limiting management discretion”); Woodward, How Much Indiana’s Anti-Takeover Law Cost Shareholders, Wall St. J., May 5, 1988, at 32, col. 3 (citing study that found that the Indiana law cost shareholders $2.65 billion, six percent of the total value of Indiana companies).
390. See supra note 274 and accompanying text.
391. See supra notes 137-53 and accompanying text; Appendix at DDS.
efficiency. As regard takeovers, only shareholders have an unim-
peded incentive to channel assets to their most productive, efficient, 
and profitable use. Unless shareholders are encouraged to have bal-
anced input with that of management, economically efficient oppor-
tunities may be lost. The fourth theme concerns shareholder 
fairness, and corporate and political theory. The motivations 
prompting current state antitakeover legislation demonstrate all too 
clearly that shareholders lack an equal voice in the enactment of an-
titakeover legislation. Worse yet, the legislation itself tends to mini-
imize shareholder input during a takeover by granting directors 
dispositive authority to hold shareholder concerns as sub-
paramount. This in turn impinges upon both notions of corporate 
democracy and the corporate contract.

A. Conflict of Interest

Amid control transactions, directors theoretically are well suited 
to maximize corporate profit, to deploy defensive measures re-
jecting inadequate or coercive bids, and to seek superior bids or de-
velop superior restructuring plans. Independent directors392 
arguably afford an appropriate central nervous system for a corpo-
ration besieged by a hostile raider: independent directors presumably 
will weigh dispassionately the various alternatives and arrive at an 
informed, optimal solution.393

The “independence” of directors, however, affords only minimal 
resolution of directors’ inherent conflict of interest in a takeover 
scenario.394 In adopting and unleashing takeover defensive tactics,
even the most "independent" of directors will experience conflict as regard: (1) loyalty to a management with which the board has worked closely and from which it receives pay and prestige as a board member; and (2) the proper constituency of the corporation, be they shareholders, managers, or other nonshareholders.

Directors' conflict of interest as between management and shareholders is at its zenith during a takeover context. Directors may not view a tender offer with sufficient equanimity to assure shareholder protection. Rather, directors may tend to favor results which preserve both their own and management's positions. The current process by which directors adopt poison pills provides powerful evidence of this conflict of interest: directors appear minimally receptive to shareholders yet exceedingly responsive to management.

The fuel for many hostile bids substantially derives from the perception by bidders that the current board and management are suboptimal. Facing the real possibility of losing both their jobs

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395. "The risk of management entrenchment is nowhere clearer." Palminter, Reshaping the Corporate Fiduciary Model: A Director's Duty of Independence, 67 Tex. L. Rev. 1351, 1412 (1989). Professor Brudney attests: “Whenever a takeover is attempted, the independence and judgment of outside directors are put to their severest tests. In these circumstances, the propriety of the independent directors’ decision to resist a takeover, if not also their own liability, should be least protected by the business judgment rule. Brudney, The Independent Director—Heavenly City or Potemkin Village?, 95 Harv. L. Rev. 597, 630 n.87 (1982), quoted in Palminter, supra, at 1422 n.10; see Andre, supra note 21, at 902. Managers’ conflict of interest exists even where board is predominantly outside and disinterested: “No one likes to be fired, whether he is just a director or also an officer. The so-called outsiders moreover are often friends of the insiders.” Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250 (7th Cir. 1986), rev’d in part, 481 U.S. 69 (1987). Furthermore, such outsiders are likely to defer to insiders as part of their routine of seeking knowledge about the corporation. Id.; see also City Capital Assocs. Ltd. Partnership v. Interco, Inc., 551 A.2d 787, 796 (Del. 1988) (asserting that “Unocal recognizes that human nature may incline even one acting in subjective good faith to rationalize as right that which is merely personally beneficial” (emphasis in original)); Unocal, 493 A.2d at 954 (when directors oppose a hostile takeover there is an “omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders”); Kozyris, supra note 250, at 264. Kozyris’ essay notes that antitakeover forces have swept under the rug the evil of management’s inherent conflict-of-interests and motive for self-perpetuation and have exacerbated the parochial fears of local communities and employees to produce a fundamental distortion of what is happening and what is at stake. The corporate fortifications have become so strong now that only an extraordinarily determined, patient, and powerful suitor dare challenge management. Even then, the battle for control is bound to be expensive, slow, and unpredictable . . . .

396. The “Catch 22” for shareholders is that transactions in control or tender offers typically are the most complex facing a corporation; shareholders thus have a heightened need for managerial expertise as regards the evaluation and negotiation of control transactions.

397. See McCord, supra note 28, at 492 (stating that defensive tactics primarily are designed to discourage any offer from being made, but in the event of an offer are used “to prevent shareholders from having a chance to accept the offer”); see also Palminter, supra note 395, at 1435 (noting that “the advantages of takeover defenses are available only through corporate transactions with necessarily entrenching effects. For example, golden parachute contracts can be purchased only from management.”).

398. See Gilson I supra note 27, at 841-42 (describing the theory of a corporate control market as a restraint on management’s ability to benefit itself at the expense of shareholders in transactions); Manne, Cash Tender Offers for Shares—A Reply to Chairman
and their ability to determine the corporate fate upon becoming a target, management often seeks to wield corporate governance machinery to assure continued control. Indeed, the pressure on independent directors to resist takeover threats may not differ materially from that on management.\textsuperscript{399} Independent directors face losing both their positions of “power, prestige and prominence” and their fees and perks.\textsuperscript{400} Some commentators argue that structural biases further compel independent directors to align cohesively with management.\textsuperscript{401}

Delaware courts have increasingly considered conflict of interest issues as fundamental.\textsuperscript{402} One recent Delaware case discerns an “unbroken line of cases that seek to prevent conflicts of interest that arise in the field of mergers and acquisitions by demanding that directors act with scrupulous concern for fairness to shareholders.”\textsuperscript{403} Delaware courts require that directors interested in both sides of a transaction or otherwise deriving a personal benefit not generally accruing to the corporation or shareholders must prove the “intrinsic fairness” of that transaction.\textsuperscript{404} This requirement attests to the importance Delaware courts place on minimizing conflicts of interest. The Delaware Judiciary, however, has yet to apply

\textsuperscript{399}. See Palmiter, supra note 395, at 1413. “For outside nonmanagement directors, the pressures to resist takeover attempts are remarkably similar [to managers’]... In general, their incentives are closely aligned with those of management. Moreover, some outside directors, such as outside lawyers and investment bankers, also may lose financially significant affiliations with the company.” \textit{Id.} (footnotes omitted).


\textsuperscript{402}. \textit{See} e.g., infra notes 403-04; \textit{cf.} Andre, supra note 21, at 866. Courts, for the most part, have not been sensitive to the inherent conflict of interest between management and shareholders and permit management entrenchment efforts to succeed in all but the most egregious cases. Legislative reform is therefore needed to eliminate conflicts of interest in the tender offer process and to provide shareholders with control over the ultimate destiny of the corporation in which the [sic] own stock.

\textit{Id.} (footnotes omitted).


\textsuperscript{404}. \textit{See} Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1341 (Del. 1987); \textit{see also} AG Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111.
this analysis to either corporate management or "independent" directors in change-of-control transactions.

Directors' duty legislation aggraves the fiduciary dilemma confronting directors by allowing or requiring them to consider nonshareholder interests when contemplating takeover decisions. How are directors to consider these constituencies consistent with their fiduciary duty owed shareholders? Although directors' consideration of stakeholder interests during a takeover may be appropriate in certain circumstances, when directors focus instead on the shareholders' best interests, shareholders and stakeholders simultaneously benefit. Thus, numerous problems emerge from a system allowing directors to consider stakeholder interests. First, most stakeholder problems stemming from takeovers are short term. Second, a successful tender offeror would harm itself by

(Del. Ch. 1986) (defining "entire fairness" doctrine). Under Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981), in interested transactions, "the directors, once the transaction is attacked, have the burden of establishing its 'intrinsic fairness' to a court's careful scrutiny." Id. at 788 n.17 (citation omitted). Weinberger v. UOP, Inc. 457 A.2d 701 (Del. 1983), sets out the modern formulation of the standard for intrinsic fairness: "[D]irectors . . . are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain." Id. at 710 (citation omitted). The intrinsic fairness standard does not apply where directors prove they acted independently of any of the bidders or management. See, e.g., In re RJR Nabisco, Inc. Shareholders Litig., Fed. Sec. L. Rep. (CCH) ¶ 94,194 (Del. Ch. 1989).

405. See Appendix at DDS. For a recent analysis of directors' duty legislation, see Other Constituencies Statutes: Potential for Confusion, 45 BUS. LAW. 2255 (1990) [hereinafter Other Constituencies].


407. See Note, supra note 26, at 478 (referring to situations involving the downward redrafting of employee contracts and leveraged acquisitions which result in a redistribution of wealth to the shareholders).

409. See Easterbrook & Fischel I, supra note 27, at 1190-92; cf. Other Constituencies, supra note 405, at 2269 (suggesting that a better interpretation of directors' duties statutes and related case law allows directors to take into account nonshareholder constituencies, but only "to the extent that the directors are acting in the best interests, long as well as short term, of the shareholders and the corporation").

410. For a broad, comprehensive analysis of stakeholder issues and the stakeholder model, see Note, supra note 26, at 488-502.

411. For example, employees or suppliers are usually only temporarily displaced; that
discarding valuable employees or suppliers;\footnote{12} arguably only suboptimal employees, suppliers, or creditors would be affected by new ownership.\footnote{13} Third, requiring accountability to constituencies with conflicting interests may ultimately harm both groups.\footnote{14} Managers free to consider nonshareholder interests would be less accountable to shareholders.\footnote{15} Fourth, many nonshareholder constituencies are already protected by other laws.\footnote{16} Finally, just as there is no gauge by which courts can assess whether a director breaches her duty to stakeholders,\footnote{17} the "standard" by which courts define a director's duty to shareholders during a takeover also defies containment.

The undefined parameters of this standard fuel directors' uncertainty regarding their allegiance to shareholders.\footnote{18} is, many constituencies have the capacity to find a replacement for their reliance on the target.

\footnote{12} See Easterbrook & Fischel I, supra note 27, at 1190-92.
\footnote{13} See id.
\footnote{14} See id. at 1192; Comment, supra note 227, at 869 (observing that "the interests of a firm's employees may often be antagonistic to those of its shareholders"); Note, supra note 26, at 478, 501; see also Andre, supra note 21, at 884-85 (asserting that "management should not be asked or allowed to attempt to carry out the impossible task of acting as fiduciaries for groups with competing interests"); Gilson, Just Say No to Whom?, 25 Wake Forest L. Rev. 121, 126 (1990) (stating that management's concerns for nonshareholder interests will cause shareholders to doubt management's genuine concern for their interests).
\footnote{15} In the narrowest sense, when managers are free to consider nonshareholder interests in takeover scenarios rather than focusing solely on maximizing shareholder wealth, management's accountability to shareholders is diminished to the extent their actions serve nonshareholders' concerns. See generally, Johnson, supra note 26, at 881-84 (discussing the belief shared by many commentators that if corporate management is permitted to consider other interests besides those of shareholders, management would become unaccountable to the shareholders).

Former SEC chairman Davis S. Ruder argued before the American Bar Association committee responsible for drafting the Revised Model Business Corporation Act that director accountability to a clearly defined group (such as shareholders) is a cornerstone of the corporate system: "If management duties to others are declared ... the process of corporate accountability will be thrown into disarray."\footnote{16} ABA Model Act Panel Reects Other-Constituencies Measures, 22 Sec. Reg. & L. Rep (BNA) 1217 (Aug. 17, 1990).
\footnote{16} See Andre, supra note 21, at 884 (noting that employees are protected by labor laws); Other Constituencies, supra note 405, at 2268 (discussing how creditors, management, employees, and unions have other means of protection). "Legislation governing hostile takeovers should not attempt to minimize noninvestors' risks at the expense of our free market system." Id.

\footnote{17} Directors' duty legislation affords no guidance as to how directors should consider nonshareholder constituencies. See Appendix at DDS; supra notes 137-53 and accompanying text; Block & Miller, The Responsibilities and Obligations of Corporate Directors in Takeover Contests, 11 Sec. Reg. L.J. 44, 69 (1983); Note, supra note 26, at 500.
\footnote{18} The Committee on Corporate Laws of the Section of Business Law of the American Bar Association understood the dangers that could flow from laws allowing directors to consider nonshareholder interests:

The issue [thus] becomes whether [directors' duties statutes] constitute an efficient and desirable way to provide protections for non-shareholder groups. The Committee has concluded that permitting—much less requiring—directors to consider these interests without relating such considerations in an appropriate fashion to shareholder welfare (as the Delaware courts have done) would conflict with directors' responsibility to shareholders and
B. Directors’ Uncertainty

The uncertainty facing directors regarding the optimal process for adopting and maintaining defensive measures exacerbates the uncertainty noted above regarding the directors’ proper constituency. The amorphous business judgment rule is the root cause of this uncertainty. Specifically, the business judgment rule has

could undermine the effectiveness of the system that has made the corporation an efficient device for the creation of jobs and wealth.

The Committee believes that the better interpretation of these statutes, and one that avoids such consequences, is that they confirm what the common law has been: directors may take into account the interests of other constituencies but only as and to the extent that the directors are acting in the best interests, long as well as short term, of the shareholders and the corporation. . . . The confusion of directors in trying to comply with such statutes, if interpreted to require directors to balance the interests of various constituencies without according primacy to shareholder interests, would be profoundly troubling. . . . When directors must not only decide what their duty of loyalty mandates, but also to whom their duty of loyalty runs (and in what proportions), poorer decisions can be expected.

Other Constituencies, supra note 405, at 2268-69 (emphasis added).

419. See Comment, supra note 227, at 869. Unocal’s expansive definition of the corporate enterprise to include [nonshareholders] seemingly gives directors an almost unlimited degree of discretion. When the interests of shareholders are the sole point of reference for assessing board action, there are at least some limitations on what a board may do. But the limitations largely disappear if the board is allowed to justify its actions by reference to [nonshareholder interests]. Id.; see Gilson & Kraakman, Delaware’s Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?, 44 Bus. Law. 247, 267 n.65 (1989) (asserting that managerial authority to consider nonshareholder interests may “render most of corporate law incoherent”); Other Constituencies, supra note 405, at 2269 (observing that “[t]he confusion of directors in trying to comply with [directors’ duties] statutes, if interpreted to require directors to balance the interests of various constituencies without according primacy to shareholder interests, would be profoundly troubling. . . . [Thus,] poorer decisions can be expected.”). 420. Even under Unocal’s heightened business judgment standard directors may consider nonshareholder interests. See supra notes 224-27 and accompanying text. Furthermore, application of the Unocal court’s “new” analytical approach “represents merely a continuation of the familiar business judgment rule.” Comment, supra note 227, at 864. The Unocal court’s rhetoric “reflects the continued permissiveness of the Delaware courts in reviewing the action of corporate officers.” Id. at 872; see Easterbrook & Fischel I, supra note 27, at 1192 (stating that “[a] manager responsible to two conflicting interests is in fact answerable to neither”); Feinberg, supra note 406, at 30; Kanter, supra note 50, at 260 (observing that “[t]he Unocal test contains several ambiguous elements which are susceptible to contradictory interpretations, thereby impeding the realization of consistent and uniform outcomes”); Ribstein, supra note 161, at 126 (asserting that “[t]he pill is effective to help the board run an auction only because, in light of the uncertainty inherent in the vague Unocal fiduciary duty approach, the bidder does not know what the court will do”); see, e.g., Gilson & Kraakman, supra note 419, at 260-72. Gilson and Kraakman argue that poison pill uncertainty will become “yet another rhetorical embellishment of the business judgment rule.” Id. at 260. For a more comprehensive analysis of the business judgment rule, see supra notes 206-72 and accompanying text.

Dissatisfaction with the business judgment rule was a strong impetus for the American Law Institute’s drafting § 6.02 of its Principles of Corporate Governance project. See ALI DRAFT 11, supra note 290, § 6.02 (setting forth a new standard that focuses on whether shareholders’ long-term interests would be “significantly disfavored” by board conduct).
become so flexible as to allow directors to all but ignore shareholders without legal repercussion.\textsuperscript{421} It is only when directors cross that ethereal line of blatant disregard for shareholder interests that liability attaches.\textsuperscript{422} But where is this line?\textsuperscript{423} Because the business judgment rule derives from case law, a look at how several court decisions differ as to its parameters illustrates its diffuse character in the takeover context.

Of all the ambiguity resulting from the vagueness and various manifestations of the business judgment rule,\textsuperscript{424} the greatest uncertainty directors generally face concerns when a poison pill must be redeemed.\textsuperscript{425} In \textit{City Capital Associates Ltd. Partnership v. Interco, Inc.},\textsuperscript{426} for example, the Delaware Court of Chancery held that although directors may unleash a poison pill to gain time in a battle for control, once the board has developed alternative proposals for control, the pill may not be used to discriminate against other bidders.\textsuperscript{427} Shortly thereafter, Delaware similarly dismantled Pillsbury's poison pill in the wake of an attractive offer by Grand Metropolitan,\textsuperscript{428} identifying certain relevant factors: the fairness and adequacy of Grand Met's offer; the lack of competitive bids during the offer's two month life span; the substantial percentage of Pillsbury shares tendered to Grand Met (87%); and the uncertainty of Pillsbury's plan which was based on future theoretical conditions and projections grounded on economic and competitive conditions beyond Pillsbury's control.\textsuperscript{429}

\begin{footnotes}
\footnotetext{421} "[E]xcept in cases that implicate the duty of loyalty, the infamous business-judgment rule's emphasis on the managerial-discretion strand of corporate law insulates most managerial behavior from meaningful judicial review." Johnson, \textit{supra} note 26, at 900 (footnotes omitted).
\footnotetext{422} \textit{See supra} text accompanying notes 208-09 (observing that the business judgment rule immunizes directors unless they are motivated "solely or primarily" to perpetuate control).
\footnotetext{423} Only when the shareholders' equity interests are the directors' paramount concern can courts determine whether a director has breached his duties; only by focusing on the readily discernable shareholders' interests can courts restrict the conduct of directors—lest their discretion become all but boundless. \textit{Accord} Comment, \textit{supra} note 227, at 868-69 (asserting that if a board justifies its actions based on various non-shareholder constituencies its duties are impalpably diffused).
\footnotetext{424} \textit{See, e.g., ALI DRAFT} 11, \textit{supra} note 290, § 6.02, comment (c), at 537. "[T]he validity of actions taken by the board to block tender offers cannot be judged by either the business judgment rule, on the one hand, or the duty of loyalty or the duty of fair dealing, on the other." \textit{Id}.
\footnotetext{425} \textit{See, e.g., Yablon, Poison Pills and Litigation Uncertainty}, 1989 \textit{Duke L.J.} 54 (arguing that litigation uncertainty inheres in poison pill regulation).
\footnotetext{426} 551 A.2d 787 (Del. Ch.), \textit{appeal dismissed}, 556 A.2d 1070 (Del. 1988).
\footnotetext{427} \textit{Id.} at 799-800. The court indicated that a poison pill's only role is to give the board time to investigate alternatives on the shareholders' behalf. Once this window of time has elapsed, only severe threats to shareholders will justify keeping the pill intact. \textit{Id}. The court held that the raider's cash offer did not pose a sufficient threat to shareholder interests to justify refusing to redeem the pill. \textit{Id}.
\footnotetext{429} \textit{Id.} at 1056-58. The court stressed that all previous Delaware cases validating
Manifestations of director uncertainty have culminated in the just say no defense, which allows directors threatened by hostile overtures to reject offers and wield fatal antitakeover defensive measures irrespective of short-term shareholder welfare. Currently, directors seeking guidance on how to maximize long-term corporate and shareholder value can look to both the business judgment rule and its progeny, including the just say no defense, and directors' duty legislation. Unfortunately, the combined impact of these guidelines obfuscate rather than clarify the directors’ appropriate role and strategy. The first permits directors to reject takeover attacks that do not serve their constituency's best long-term interests, but the second leaves directors puzzling over whom their proper constituency might be.

Director uncertainty was the American Law Institute’s key concern when it drafted section 6.02 of its Corporate Governance project. The drafters’ comment to section 6.02 begins by observing that: “Existing judicial decisions do not offer a clear or consistent guide to directors in responding to unsolicited tender offers.” Dissatisfied with both motivational standards of review and Unocal’s “enhanced” business judgment rule, the drafters devised a new standard of whether the board’s “action is a reasonable response to the offer.”

Given current trends in Delaware case law and state legislation, the only certainty facing directors is that they may endorse and perpetuate antitakeover measures without shareholder input, that is, the directors may largely ignore the shareholders’ voice in determining takeover matters. But what of the director seeking to balance optimally the needs of shareholders and nonshareholders? Such a director faces a quagmire of uncertainty unless and until she actively seeks and encourages shareholder input for fundamental

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decisions relating to antitakeover protectionism.\textsuperscript{437} By failing to encourage shareholder input, the current legal landscape effectively discourages directors from mitigating their uncertainty; it discourages directors from seeking shareholder guidance.

As courts and legislators wax and wane over the degree of shareholder involvement and management discretion in takeover decisions, directors seeking to balance constituency interests, and thus simultaneously to maximize both their corporation's and their economy's welfare, require a steadfast guidepost. Who better than shareholders to inform management decisionmaking? Directors need shareholder input lest their current suboptimal sources of guidance harm not only the corporation and nonshareholders, but the nation's economy as a whole. The issue is not shareholder supremacy—the issue is how best to facilitate meaningful shareholder input so that directors' judgment may be enhanced to society's benefit.

\subsection*{C. Economic Efficiency}

Takeovers have profound economic consequences;\textsuperscript{438} thus, any legislative intervention should seek to maximize economic efficiency. By maximizing long-term economic efficiency, shareholders, corporations, and nonshareholder constituencies benefit. By thwarting a free-flowing marketplace in which assets are channeled to and invested in their most productive uses, antitakeover devices and antitakeover legislation disfavored by asset owners (shareholders) may pervert the incentive system that is indispensable to an efficient economy. Only asset owners have the unfettered incentive to seek out economically efficient alternatives. Directors, lacking this incentive, while being saddled with conflicting economically inefficient prejudices,\textsuperscript{439} may fail to seek out optimal alternatives unless guided by shareholders.

Several factors must be weighed in determining the overall impact of takeovers and antitakeover legislation on the national economy: (1) shareholders' heightened premiums;\textsuperscript{440} (2) costs associated with

\textsuperscript{437} Granted, the director may discount shareholder input. After all, shareholders themselves suffer from a conflict of interest—an inherent short-sighted bias.

\textsuperscript{438} See supra note 27 and accompanying text.

\textsuperscript{439} See supra text accompanying notes 392-418 (discussing directors' conflict of interest).

shareholder coercion; a enhanced possibility of an auction market for the target firm; costs of launching tender offers; (5) harm to nonshareholder constituencies; and (6) other factors. Although empirical assessment of the overall effect of takeovers and antitakeover mechanisms has proven elusive, in the long run, if takeovers are allowed but thoughtfully controlled with an eye toward maximizing economic efficiency, everyone involved benefits. Research on the wealth effects of antitakeover legislation suggests that shareholder value is reduced. A study by Wilshire

441. Today, the problem of coercion is all but nonexistent. See Johnson & Millon I, supra note 26, at 846; accord Coffee, supra note 26, at 439 (observing that examples of coercion are exceedingly rare; this is so because of both shareholders' self-help remedies, such as "fair price" charter amendments, and competitive auction markets). But see Booth I, supra note 26, at 1640-43 (arguing that partial bids and two-tier bids are coercive and cause shareholders to earn less on tendering their shares than they otherwise would earn). Accordingly, optimal legislation should be sensitive to potential coercion. Because coercive tender offers are now universally regarded as not being in the shareholders' long-term interests, see generally Booth I, supra note 26, the Model Act proposed herein, see infra Part V, similarly acknowledges the benefit of board action narrowly designed to minimize or eliminate coercion.

442. See infra notes 457-60 and accompanying text (observing the auction market position).

443. See Macey, supra note 26, at 474 (arguing that the current "patchwork quilt" of state and federal laws "is likely to increase significantly the costs of launching tender offers; attending this, raiders will engage in fewer searches for poorly managed companies and will make fewer offers, further reducing efficiency").

444. Of course, in the short term nonshareholder constituencies may lose jobs or other economic benefits. To some extent, the magnitude of this short-term harm is mitigated by: (1) the existence of organized labor; and (2) subsidiaries that are spun-off by a raider who generally may retain nonadministrative employees (certain administrative employees become redundant after an efficient takeover and are accordingly wisely relieved). See id. at 479 (stating that "[a]t worst, the workers in a particular state will be displaced by workers in another state [thereby rendering] overall national employment [unaffected]").

In the long term, however, reduced efficiency and lower quality, higher priced products harm everyone. See id. at 474 (observing that "[u]ltimately consumers are harmed as well because the managerial entrenchment caused by state antitakeover laws leads to lower quality products being produced at higher prices by firms isolated from the discipline of the market for corporate control").

445. Some argue that takeovers reduce the incidence of bankruptcy to the extent takeovers are a low-cost substitute for insolvencies. See id. at 474-75 (arguing that "[t]he function so wastefully performed by bankruptcies and liquidations would be economically performed by mergers at a much earlier stage of the firm's life" (citation omitted)). Related to this, merged entities often realize economies of scale.

446. See Principles of Corporate Governance: Analysis and Recommendations pt. 6, at x (Discussion Draft No. 2 1989).

447. See Sprinkel, The Real Issue in Corporate Takeovers, Wall St. J., July 17, 1987, at 16, col. 3 (arguing that by maximizing the wealth of American shareholders, "we create benefits for the economy as a whole").

448. Many empirical studies measure the effects of antitakeover legislation on the market value of relevant shares. "None of these studies supports the view that shareholder value is enhanced." Davis, supra note 51, at 508 n.67. Most of these studies conclude that shareholder value is actually reduced. Id. Davis notes that the most dramatic results were reported in a working paper on the Indiana statute by J. Gregory Sidak and Susan Woodward who found that relevant Indiana shares declined between 4.5% and 6.13% amid enactment and subsequent adjudications of Indiana's antitakeover legislation. Id. (citing J.G. SIDAK & S. WOODWARD, CORPORATE TAKEOVERS, THE COMMERCE CLAUSE, AND THE EFFICIENT ANONYMITY OF SHAREHOLDERS 4-6 (Working Paper Mar. 17, 1988).

Examining the expanded Massachusetts and Minnesota control-share acquisition acts, one empirical study concluded that there is "substantial evidence that [these] third-generation control share acquisition acts . . . have adversely affected shareholder wealth."
Associates showed that the stock values of 140 Pennsylvania companies fell more than $1 billion amid the proposal and enactment of the Pennsylvania antitakeover bill. A study found that Pennsylvania companies underperformed the “Standard & Poor’s 500” stock index by an average of 6.9% between October 15, 1989, and January 2, 1990. Still, the impact of antitakeover legislation on the overall economy remains uncertain. Consequently, competing theories attempting to explain the economic role of antitakeover devices and antitakeover legislation have emerged.

Under the market-efficiency theory, managers shield themselves behind antitakeover devices without proper accountability to shareholders, usurping for themselves undue market power while defeating any incentive to run a more efficient corporation. Proponents of this view argue that tender offers maximize an outsider’s ability to monitor target management performance. Thus, takeovers maximize efficiency either by allowing suboptimal directors


449. See Vosti, Pennsylvania Puts Ball in Investors’ Court, Pensions & Investment Age, May 14, 1990, at 44.


452. See Easterbrook & Fischel I, supra note 27, at 1173; McCord, supra note 28, at
and managers to be taken over\textsuperscript{453} or by motivating directors to run the corporation more efficiently\textsuperscript{454}—essentially, the “market” monitors managerial performance while shareholders hold management accountable for profit performance.\textsuperscript{455} Furthermore, this enhanced efficiency generates more wealth for both shareholders and nonshareholder constituencies.\textsuperscript{456} The bottom line of this theory: directors should remain “passive” amid control-change transactions.

A more moderate approach focuses on the use of defensive antitakeover weaponry such as a poison pill to facilitate an auction market amid hostile overtures. The primary justification for a pill’s existence is its ability to facilitate superior bids by affording directors adequate time to assess competing offers and alternatives;\textsuperscript{457}

\textsuperscript{453} See Macey, supra note 26, at 471-75. Macey supports the wealth-enhancing view and argues that given efficient markets, takeovers are likely to occur because raiders realize gains by reorganizing the firm and its management (rather than because assets are undervalued). \textit{Id.} at 471-72. Some evidence supports the wealth-enhancing theory: 62\% of top managers lose their jobs within three years of a hostile takeover (versus a 21\% rate following failed takeover attempts). \textit{Id.} at 472.

\textsuperscript{454} See \textit{id.} at 472. As is inevitably the case when economics is at issue, commentators do not agree as to the nature and magnitude of the economic impact of antitakeover devices. At one extreme, Easterbrook and Fischel argue that managers can best maximize shareholder wealth by remaining passive during a takeover battle rather than by deploying defensive tactics. Stressing shareholder welfare, they argue the importance of not discouraging takeovers because “the number of offers affects the efficiency with which corporations are managed.” Easterbrook & Fischel I, supra note 27, at 1164.

Professors Ronald J. Gilson and Lucian A. Bebchuk augment this extreme minimalist position by recognizing that, despite the overall beneficial impact of tender offers, some are inadequate and must be rejected (especially when the auction market would increase shareholder wealth). By enhancing economic efficiency, takeovers usually improve the position of all who deal with the corporation; directors, by adequately protecting the interests of shareholders, assure that the groups affected by the corporation’s operation are protected as well. Bebchuk, supra note 27, at 1050; Easterbrook and Fischel I, supra note 27, at 1191. In addition, even if management is performing to its full potential, its performance may not be as efficient as that of another group of managers. See Bebchuk, supra note 27, at 1031; Gilson I, supra note 27, at 852-53; Gilson II, supra note 27. Defensive tactics, therefore, are undesirable because they deter prospective offers and frustrate actual offers. McCord, supra note 28, at 494.

At the other extreme, proponents of defensive tactics argue that: (1) pills force the bidder to offer higher prices; (2) the premiums of offers accrue mostly to speculators, not long-term investors; and (3) pills facilitate competing bids, thereby allowing shareholders to garner higher premiums. See Lipton I, supra note 27 (arguing that the discretion granted directors in the nontakeover context should be extended to takeover bids and thus urges that stakeholder interests be considered); Lipton II, supra note 27; Lipton III, supra note 27; Lowenstein, supra note 28. Commentators counter that a takeover threat encourages managers to commence long-term planning (designed to increase profitability). See McCord, supra note 28, at 494-95.

\textsuperscript{455} Professor Gilson has noted succinctly that although “[m]anagement monitors the performance of components of the enterprise . . . the performance of management must also be monitored.” Gilson I, supra note 27, at 834-35 (arguing that tender offers foster the monitoring of managerial performance).

\textsuperscript{456} Professor Johnson questions this ostensibly “happy congruence” by contending that support for the focus on “shareholders must be rooted in exogenous and broad-based social norms” rather than within the confines of corporate law. Johnson, supra note 26, at 885-87.

\textsuperscript{457} Thus, some form of antitakeover defenses benefit shareholders and, collateral, society in general. Indeed, without corporate or statutory defenses, targets will often
thus, any reform measures should encourage corporate implementation of pills narrowly designed for such a purpose.\textsuperscript{458} The existence of an auction market can generate greater premiums for shareholders.\textsuperscript{459} More significantly, an auction market will maximize the likelihood of assuring the most productive match between raider and target. This optimal "match" maximizes long-term economic efficiency. Delaware courts appear to embrace the modified "auction model" for corporate control.\textsuperscript{460}

Although strong, the naked "market efficiency" and "auction market" positions provide only partial resolutions to the economic tug-of-war permeating control transactions. At bottom, one must recognize that by granting shareholders a meaningful role in takeover matters, economic efficiency is maximized. First, poison pills will more likely be reasonably designed to serve legitimate corporate interests, better positioning the corporation to maximize long-term profits. Second, corporations will steer clear of opting into those state antitakeover statutes that tend to hinder rather than advance corporate interests. Third, directors seeking shareholder guidance on the desirability of accepting a tender offer will shed their fall to the first low bidder. See Whitehill, \textit{Institutional Ownership}, in \textit{INSTITUTIONAL INVESTORS, PASSIVE FIDUCIARIES TO ACTIVIST OWNERS} 75, 83 (Practising Law Institute 1990). Nevertheless, it is highly appropriate to enhance shareholder input on the nature and severity of the antitakeover weaponry to be adopted in the corporate arsenal. Without this input, there will always be a bias in favor of excessive protection.

\textsuperscript{458} See infra Part V at subdivision I (noting that by requiring shareholder approval, the pill ultimately adopted presumptively will be designed to maximize shareholder and corporate interests); cf. \textit{Dynamics Corp. of Am. v. CTS Corp.}, 794 F.2d 250, 255-56 (7th Cir. 1986) (Posner, J.) (stating that "we have grave doubts about poison pills"), rev'd \textit{in part}, 481 U.S. 69 (1987).

\textsuperscript{459} See \textit{Jarrell, Wealth Effects}, supra note 440, at 165-72 (contending that if a target initially resists a takeover but is later acquired, its performance is superior to targets which are not later acquired); \textit{Lipton I, supra} note 27, at 106 (noting that it cannot be said with certainty that "shareholders are always disadvantaged by rejection [of a tender offer]"); \textit{Oesterle, supra} note 27, at 64-72 (observing the value of defensive measures); \textit{Haddock, Macey & McChesney, Property Rights in Assets and Resistance to Tender Offers}, 73 \textit{Va. L. Rev.} 701, 719-26 (1987) (stating that shareholders benefit when target management has time to search for alternate bidders and to negotiate the best price with the initial bidder).

\textsuperscript{460} This justification for poison pills has been endorsed in \textit{Facet Enters. v. Prospect Group, Inc.}, No. 9746, slip op. at 6 (Del. Ch. Apr. 15, 1988) (WESTLAW, 1988 WL 46064) (recognizing the validity of the auction market); and \textit{City Capital Assocs. Ltd. Partnership v. Interco, Inc.}, 551 A.2d 787 (Del. Ch. 1988), where the court held that a board's good faith determination that a noncoercive offer is inadequate justifies leaving a pill in place "for a period while the board exercises its good faith business judgment to take such steps as it deems appropriate to protect and advance shareholder interests." \textit{Id.} at 798; see \textit{Johnson & Millon I, supra} note 26, at 856 n.37. For the New York Judiciary's approach, see \textit{CRTF Corp. v. Federated Dep't Stores, Inc.}, 683 F. Supp. 422, 441 (S.D.N.Y. 1988) (stating that "with respect to a poison pill, the teachings of \textit{Revlon} require directors to enhance the bidding in an auction as best they can").
conflicts of interest in favor of accepting offers that, in their share-
holder-enhanced judgment, best serve the interests of the corpo-
ration, the shareholders and, collaterally, of society.

In sum, shareholders need not be given a primary voice in take-
over matters to maximize economic efficiency. Rather, they merely
need a voice powerful enough to inform directors of the optimal
course of conduct. In other words, shareholder input need merely
be balanced with that of management. In this way, directors can
chart the best course for their corporation to maximize gains for all
relevant parties.

D. Shareholder Fairness: Corporate and Political Theory

"[I]t seems doubtful that most informed shareholders would volun-
tarily bargain for the present round of state [antitakeover] statutes.
Thus, it is difficult to justify the current [antitakeover] statutes on
anything other than an opt-in basis."461

1. Shareholder Democracy and the Corporate Contract

It has become quite popular to refer to the corporation as a
“nexus of contracts.”462 To some extent this term connotes a posi-
tive statement, namely, that many (or all) of the relationships that
define what we reify as the corporation are simply the product of an
explicit or implicit bargaining process. To some extent the term
connotes a norm, namely, those who interact within the ambit of the
corporation define their own relationships and corporate law should
facilitate that process by defining gap-filler or default terms when
the parties do not address an issue.

This normative formulation of the contract approach to corporate
law recognizes that not all aspects of the corporate contract are ne-
gotiated in the classic model of contract formation. Indeed, the re-
lationship between managers and investors may be the area least
likely to generate actual negotiation. The premise of this view, how-
ever, is that market forces provide an adequate alternative mecha-
nism to bargaining or negotiating. Thus, the market sets (and
sometimes discounts) the price of shares of stock offered in light of
the contractual provisions chosen by management. If the provisions
chosen are not investor friendly, the failure of capital to flow to the
firm will hinder it or cause its competitive demise.463

A substantial debate surrounds the role of corporate law in light
of the nexus of contracts view. One of the most contested areas has
involved the extent to which corporate law should be mandatory,

461. Davis, supra note 51, at 509.
462. The term was first used in Jensen & Meckling, Theory of the Firm: Managerial Be-
havior, Agency Costs and Ownership Structure, 5 J. FIN. ECON. 305, 310-11 (1976). The mod-
ern use of the concept may have originated in Alchian & Demsetz, Production, Information
463. For a statement of this position, see Easterbrook & Fischel, The Corporate Con-
tract, 89 COLUM. L. REV. 1416, 1428-34 (1989); see also Coase, The Problem of Social Cost, 3
J.L. ECON. 1 (1960).
enabling, or suppletory.\textsuperscript{464} In particular, the issue has been joined on whether and which corporate law principles should be freely variable. For example, to the extent that corporate statutes provide any principles or parameters for fiduciary duties and actions by corporate actors, including shareholders, should a given group of corporate actors be able to opt out of those principles for their corporate enterprise?

The recent adoption of a wide variety of antitakeover legislation runs directly contrary to portions of both the contractarian and the regulatory views. With respect to the contractarians, these mandatory laws do not provide for variation by agreement and at the same time serve to decrease the market’s ability to effectively monitor corporate activities. For the regulators, the recent wave of antitakeover statutes do not embody principles which implicitly or explicitly enhance the fiduciary obligations of managers to their primary constituency, the shareholders. Indeed, much of this legislation minimizes the traditional relationships in favor of protecting other constituencies or, indirectly, the managers themselves.\textsuperscript{465}

With respect to management-adopted protectionist measures, such as shareholder rights plans, distinct but related problems arise. Because these measures are usually adopted without shareholder approval, they are not the product of negotiation between management and the shareholders. In addition, there is evidence that their adoption does not represent the type of arrangement that would hypothetically result from such bargaining, given the frequent negative shareholder reaction to adoption and recent attempts to repeal such measures.\textsuperscript{466} Moreover, to the extent that share transfers historically have not been within the board of directors’ purview, the ability of the board, through a shareholder rights plan, to inject itself into the tender offer process is seen by the regulators as an opting out from otherwise mandatory principles of corporate governance.

Both statutory and board-adopted antitakeover measures suffer from another significant drawback in relation to shareholder expectations. The contractarian or opt-out position is strongest with respect to variations from the corporate blueprint, the initial articles of incorporation. Under this view, the market evaluates and prices the shares representing ownership in relation to the charter and other applicable provisions so that the initial investment reflects the package. Even the staunchest contractarian proponents have yet to

\textsuperscript{464} See generally Contractual Freedom in Corporate Law, 89 COLUM. L. REV. 1395 (1989) (discussing the extent to which corporations should be allowed to adopt charter provisions to opt out of corporate law).

\textsuperscript{465} See Appendix at DDS.

\textsuperscript{466} See supra notes 389-90 and accompanying text.
come to grips with what might be referred to as midstream changes in the corporate contract. 467

In addition, the changes in the corporate contract imposed by legislation or board action completely circumvent the shareholders' role in the contracting process. In contrast, assuming one could rationalize shareholder-adopted charter amendments varying previously applicable principles, possibly on a shareholder democracy theory, corporate law currently recognizes the rights of shareholders not only to attempt to defeat such measures, but also sometimes to dissent from them and seek to be bought out of their investment by the corporation. 468 Although this latter right may not be particularly effective, it implicitly recognizes that in certain circumstances the contract under which the shareholders bought their shares has been substantially changed.

Legislative and board-imposed antitakeover measures do not even allow for shareholder involvement. These measures are adopted outside of the contracting process. The shareholders do not participate and do not have statutory rights to have their shares repurchased. The shareholders are thus subject to a resulting ex post, ex parte revaluation (and likely devaluation) of their investment.

2. Shareholders' Political Impotence

As evidenced by the character and pervasiveness of the recent waves of antitakeover legislation, shareholders are not a favored constituency of legislators. Yet it is precisely the legislature to which shareholders must turn for needed protection. Shareholders are not concentrated within any single state, which suggests that their interests systematically will be underrepresented. 469 Because the expected gains of nonshareholder antitakeover forces generally exceed those of shareholders, nonshareholders have far more incentive to direct resources toward supporting antitakeover legislation. 470


469. See Macey, supra note 26, at 488-89; see also Coffee, supra note 26, at 458 (noting that only in Delaware are there both "proshareholder" interests groups [Coffee mentions the large local bar whose future earnings depend on takeovers] and weak antitakeover constituencies [because few Delaware-chartered corporations have local plants that could relocate]). Professor Coffee notes that: "Not surprisingly, Delaware has enacted one of the weakest statutes of the second generation . . . ." Id.; cf. Oesterle, supra note 80, at 880-81 (noting that although Delaware's mid-course statute is the "mildest" Business Combination Act, pure control share acquisition provisions are less intrusive).

470. See Davis, supra note 51, at 501. Professor Davis further notes that "because the activities of the antitakeover interests tend to be more local, these interests are more likely to be well-organized at the state level. Labor unions and municipalities typically have statewide associations; institutional investors do not." Id.
In this age of pension funds and other institutional investors, can it be said that shareholders are politically powerless? Actually, this powerlessness cannot be denied. Consider the Delaware Business Combination statute: despite active opposition by both the United Shareholders Association and several large pension funds, shareholder lobbyists garnered only one legislator’s vote. There is more evidence to support this contention: takeover statutes are often hastily enacted without notice to, or input from, the public.

Looking beyond the stated purpose of current state antitakeover legislation and focusing on the real policies motivating its enactment ineluctably compels the conclusion that shareholders qua shareholders are impotent in influencing legislators. What motivates states to enact antitakeover legislation? Wary of raiders’ tendency to liquidate companies, close plants, and layoff workers, state legislators seek to protect home-based businesses. More specifically, the impetus likely derives from two sources: (1) the enacting state’s desire to protect nonshareholder constituencies, including its desire to assist managers unable or unwilling to persuade shareholders of the value of internal defensive measures; and (2) financial

471. See supra notes 345-83 and accompanying text (noting the explosive growth, power, and sophistication of institutional shareholders).


473. See Oesterle, supra note 80, at 881 n.19, (noting that the vote was 39-0 in the Delaware House and 19-1-1 in the Delaware Senate); see also id. at 920 (noting that proxy fights by institutional investors “have consistently failed”).

474. Romano, supra note 26, at 138; see Kozyris, supra note 250, at 263 (stating that despite the “unprecedented” transfer of power from the shareholders to management, antitakeover legislation is “enacted without any substantive debate”).

475. “[F]or economic and political reasons, the states’ chief motivation in passing takeover laws has been to deter tender offers, not to promote shareholder welfare.” Johnson, supra note 26, at 910; see supra notes 201-05 and accompanying text.

476. See Macey, supra note 26, at 487-88 (asserting that “if there is one clear lesson to be drawn from the state anti-takeover law experience, it is that the legislatures passing these laws care [most] about maximizing political support from the interest groups lobbying for passage of the laws”); cf. Davis, supra note 51, at 499 (the author believes “that many [legislators] sincerely see these statutes as necessary to protect the long-accepted allocation of claims against [all corporate constituencies] . . . from the disruptive effects of what is perceived as market caprice”).

477. See Johnson & Millon II, supra note 26, at 1863-66 (asserting that the deterrence of takeovers, not “investor protection,” is a state’s primary motivation); cf. Macey, supra note 26, at 476 (asserting that “managerial self-interest remains the sole explanation for state anti-takeover legislation.”); see also Garfield, supra note 186, at 126.

[A] study of takeover statutes suggests that these statutes are not employee protective but management protective. By attempting to stop takeovers, the statutes serve only one purpose: to entrench current management in power. Nothing in the legislation ties the hands of current managers from engaging in the same dislocative conduct attributed to acquirors. The legislators are simply hoping that by protecting current managers, they will perpetuate current management policies, including the current deployment of corporate assets and jobs.

Id. Garfield notes that even directors’ duty legislation provides no real protection to nonshareholders but rather merely “fosters management entrenchment.” Id. at 127.
protectionism, where states desire to retain and maximize tax-generating resources.

Although state antitakeover statutes may facially appear to protect shareholders, protectionism, where states desire to retain and maximize tax-generating resources. Although state antitakeover statutes may facially appear to protect shareholders, because target shareholders derive the most gains from the threat and result of takeovers, antitakeover statutes often primarily protect nonshareholder constituencies, such as employees, creditors, and the community as a whole. If the stated purpose underlying "shareholder protection" legislation is a pretextual facade, what is the true legislative intent? A statute amending North Carolina's "Shareholder Protection Act" states it is designed to protect various tax-generating constituencies, but fails even to mention shareholders. Recent Wisconsin legislation was the product of organized labor and other nonbusiness interests; New York's business combination statute also received support from organized labor.

Most significant, over half the states have adopted provisions that expressly allow directors to consider nonshareholder interests in responding to takeover bids. For example, Minnesota's directors'

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479. Coffee, supra note 26, at 108; accord Johnson & Millon II, supra note 26, at 1863; cf. Macey, supra note 26, at 468 (statutes are passed "to protect the interests of individual firms rather than the interests of the public or the shareholders").
480. Professor Gilson bluntly answers this question: "management entrenchment." Gilson, supra note 414, at 127.
481. 1987 N.C. Sess. Laws 124. For example, the preamble reads in pertinent part:
Whereas, takeovers . . . of corporations in North Carolina have been occurring with increasing frequency; and
Whereas, such activity can be highly disruptive to communities within North Carolina by causing, among other things, high unemployment and erosion of the State and local economy and tax base; and
Whereas, these corporations offer employment to a large number of North Carolina citizens who pay . . . taxes . . . ; and
Whereas, these corporations pay significant amounts of income taxes to North Carolina; and
Whereas, these corporations [pay substantial property taxes, sales taxes, and employee benefits]; and
Whereas, these corporations and their employees contribute greatly to community projects in North Carolina; and
Whereas, North Carolina has a vital interest in providing to these corporations the benefits of the provisions of the North Carolina Shareholder Protection Act . . .

Id.; see also Johnson & Millon II, supra note 26, at 1863; cf. Act of Apr. 25, 1984, ch. 488, 1984 Minn. Laws 470. In its prelude to enacting § 80B.01-13 (Minnesota's "Corporate Takeover Statute"), while noting that takeovers "are often inconsistent with the economic interests of shareholders," the Minnesota Legislature stressed in eight enumerated points such detrimental takeover phenomena as: lost jobs, plant closings, lost customer and supplier relationships, and stifled entrepreneurial spirit. Id.
483. N.Y. BUS. CORP. LAW § 912 (McKinney 1986).
485. See Appendix at DDS.
duty statute allows a director to consider the interests of the target’s employees, customers, suppliers, and creditors, the economy of the state and nation, and community and societal considerations, among others. As of June 1991, at least twenty-nine states had enacted some form of these statutes.

State antitakeover legislation can be viewed in part as a response to the needs of managers unable to adopt adequate defenses without legislative assistance. Professor Romano has argued that state takeover statutes may be adopted at the request of potential target corporations reluctant to propose to their own shareholders the defenses embodied in the statutes. Management of home-based corporations may have feared that shareholders would not approve so stringent a defensive mechanism. For example, when The Dart Group sought to acquire one of Minnesota’s premier corporations, the Minnesota legislature promptly responded by enacting one of the toughest antitakeover statutes in the nation. Other legislatures have similarly acquiesced to the earnest pleas of home-based corporations.

487. See Appendix at DDS; see also Johnson and Millon I, supra note 26, at 850 (surveying state directors’ duty statutes as of February 1989).
488. Romano, supra note 26, at 122-34. Professor Romano noted that the Aetna Life and Casualty Company had persuaded the Connecticut legislature to enact an antitakeover statute despite the likelihood that Aetna’s own shareholders would have rejected a similar proposal. Id. at 122-23. Romano also noted that numerous other statutes were similarly passed, including those of Maine, Illinois, Missouri, and Pennsylvania. Id. at 137.
489. See Macey, supra note 26, at 470 (stating that “[i]n perhaps the most shameless transfer of wealth from shareholders to incumbent management, Dayton Hudson Corporation prevailed upon the Governor of Minnesota to call a special legislative session so that a law could be passed to protect the firm from takeover by [Dart]”); Fiedler, Dayton Hudson’s Pyrrhic Victory, CORP. REP. MINN., Sept. 1987, at 59.
490. New York Senator Alfonse D’Amato notes 16 statutes that were enacted at the behest of one corporation, including Arizona (Greyhound Corp.); Connecticut (Aetna Life and Casualty Co.); Florida (Harcourt Brace Jovanovich, Inc.); Hawaii (International Holding Capital Corp.); Kentucky (Ashland Oil); Maryland (Martin Marietta Corp.); Massachusetts (Gillette Co.); Minnesota (Dayton-Hudson Corp.); Missouri (Trans World Airlines); New York (Central Broadcasting Systems); North Carolina (Burlington Industries, Inc.); Ohio (Goodyear); Oklahoma (Unocal); Pennsylvania (Scott Paper Co.); Washington (Boeing Co.); Wisconsin (Heileman Brewing Co.). See SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, TENDER OFFER DISCLOSURE AND FAIRNESS ACT OF 1987, ADDITIONAL VIEWS OF SENATOR ALFONSE M. D’AMATO, S. REP. NO. 265, 100th Cong., 1st Sess. 99, 130 (1987); see also Bandow, Are Hostile Takeovers Good for the Economy?, 63 BUS. & SOC’Y REV. 45 (1987) (arguing that state regulation of hostile takeovers harms the free market by preventing the takeovers of inefficient firms); Fiedler, supra note 489, at 59; Macey, supra note 26, at 470. Macey notes that the Indiana legislature similarly acquiesced to local corporations’ pleas. Id. In addition, Ohio enacted another statute in February 1988 at the behest of Federated Department Stores. Davis, supra note 51, at 492 n.4. Thus, at least 18 antitakeover statutes have been enacted at the request of a single corporation.

Macey views legislation adopted in this fashion as problematic: “The possibility of states passing such legislation at short notice upon the request of [management] means that no shareholder is safe from having her wealth appropriated by an opportunistic
How "protectionist" are state antitakeover statutes? Justice Powell has stated:

Inevitably there are certain adverse consequences in terms of general public interest when corporate headquarters are moved away from a city and State.* [The text of the footnote reads:]

* The corporate headquarters of the great national and multinational corporations tend to be located in the large cities of a few States. When corporate headquarters are transferred out of a city and State into one of these metropolitan centers, the State and locality from which the transfer is made inevitably suffer significantly. Management personnel—many of whom have provided community leadership—may move to the new corporate headquarters. Contributions to cultural, charitable, and educational life—both in terms of leadership and financial support—also tend to diminish when there is a move of corporate headquarters.491

No one denies that states seek to protect their economic base of local corporations. Some commentators, however, take this protectionism theory one step further, arguing that state takeover statutes are motivated by the enacting state's desire to gain financially at the expense of other states: states either want domestic corporations to remain independent under current management or seek to raise disproportionately the premiums gained by resident shareholders.492

Given the current pervasiveness of takeover legislation, a state without this legislation may be disadvantaged in relation to states with takeover statutes. Thus, as a matter of either survival or strategy, all states will likely enact some form of antitakeover legislation by decade's end.493

**IV. A Paradigm for Shareholder Involvement and Director Decisionmaking**

In attempting to balance competing interests in takeover contexts, legislators must resolve numerous issues and ask difficult questions: Whose interests must be weighed? How best to allocate

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492. See Booth I, supra note 26, at 1669; see also Macey, supra note 26, at 475 (stating that "[t]he problem is that many state legislators would prefer to see a firm languish or die at home rather than thrive in some other state").
493. Consider Joint Hearings of the House and Senate Judiciary Comms. on House Substitute No. 1 to House Bill 396, 100th Cong., 2d Sess. 6 (Jan. 20, 1988) (testimony of Delaware Secretary of State Michael E. Harkins), reprinted in C. SMITH & C. FURLOW, GUIDE TO THE TAKEOVER LAW OF DELAWARE. App. Q at 259 (1988): I distributed to each of you the correspondence I have received from over 170 corporations, all of whom have paid a maximum franchise tax of $130,000. Each [of which supports Delaware's proposed antitakeover statute and at least a half a dozen have stated that they would look seriously at the question of changing their Delaware incorporation.}

*Id.*
priorities among competing constituencies? What factors most demand recognition in weighing those interests? What is the role of states, courts, and the federal government? If the federal government does intervene, should the legislation be on a full- or a minimum-standards basis?

Although numerous tensions in corporate governance surface in the takeover context, the pivotal tension stems from the shareholder-manager axis:

The challenge for corporate law is to facilitate the development of a corporate structure that allows management the discretion to utilize its expertise on behalf of shareholders, but at the same time guards against situations in which management might utilize that discretion to favor itself at the expense of shareholders.494

From this perspective, takeover legislation requires granting to managers sufficient direction to enable them to unleash their creativity and expertise while limiting that discretion as needed to protect shareholder welfare.495

A better perspective focuses on the role of shareholders as guides for and teammates of management. The pertinent question is: how can directors, managers, nonshareholders, and society best harness the value of shareholder input and guidance without compromising meaningful director discretion? The focus is thus not shareholders’ power over management. Rather, the focus should be the shareholders’ power as a meaningful team member with management. The focus is the power of shareholders’ voices to be heard above the dissonance of both directors’ conflicts of interest and suffocating legislation styled to minimize shareholder input. One must thus ask: by what mechanism and under what circumstances should shareholders be afforded the right or opportunity to exert meaningful input sufficient to balance their voice with that of management and other nonshareholder constituencies?

A. Toward Balanced Policy

Optimal takeover reform should reconcile and balance several concerns: (1) the tendency for corporate management to entrench itself and the attendant shareholder vulnerability to this predilection;496 (2) the desire for shareholders to achieve maximum value both for their ongoing stock ownership and for shares tendered in a

494. ALI Draft 11, supra note 290, at Introductory Note, 501.
495. See Johnson, supra note 26, at 880 (noting that “[t]hese dual strands of management discretion and shareholder welfare are in constant tension, and each is poised on any given issue to check, if not negate and overwhelm, the other” (footnote omitted)).
496. See supra notes 392-418 and accompanying text.

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takeover context;\textsuperscript{497} (3) the likely increased long-term economic efficiency stemming from both the threat and result of takeovers;\textsuperscript{498} (4) the vulnerability of corporations and their constituencies to hostile or destructive takeovers;\textsuperscript{499} (5) the need for corporations freely to tailor their own takeover defense mechanisms while retaining the option to seek additional or substitute protection under stringent state legislation; and (6) the need for directors to be certain their decision to decline a takeover offer, when actually and justifiably believed to advance shareholders’ best interests, is protected under the business judgment rule.

Optimal takeover reform resulting in increased shareholder protection would serve three related goals. First, given a tender offer for a corporation, reform should seek to maximize the likelihood that directors would advance shareholders’ best interests\textsuperscript{500} rather than further entrench management or protect other constituencies. Meeting this goal requires further honing the broad concept of the business judgment rule: a director will not be protected by the business judgment rule and will breach her fiduciary duties to shareholders when, by declining a tender offer, she fails to act in the shareholders’ best interests. Yet, reform must recognize both the need for directors to have breathing space in determining whether to accept an offer and the problems inherent in defining rigid parameters beyond which directors may not stray. Reform must give directors guidance when their conflicting constituencies most impair their objective judgment—during a battle for control of their corporation.

Second, reform should seek to maximize economic efficiency by: (1) maximizing a corporation’s freedom to adopt shareholder rights plans tailored to its unique requirements and to opt for protection under the states’ takeover legislation; (2) allowing takeovers to occur when, inter alia, management’s conduct has so depressed the price of a corporation’s stock as to compel a substantial majority of

\textsuperscript{497} See supra notes 438-60 and accompanying text.

\textsuperscript{498} See id.; see also supra note 12 and accompanying text.

\textsuperscript{499} See supra note 15 and accompanying text.

\textsuperscript{500} The term “best interests” is used in recognition that the concepts of long-term versus short-term imply a dichotomy that does not neatly exist. In attempting to define the phrase “the corporation and its shareholders,” the Delaware court in TW Services, Inc., v. SWT Acquisition Corp., Fed. Sec. L. Rep. (CCH) ¶ 94,334, at 92,178 n.5 (Del. Ch. Mar. 2, 1989), equated “shareholder long-term interests” with “multi-constituency interests”:

The knowledgeable reader will recognize that this particular phrase masks the most fundamental issue: to what interest does the board look in resolving conflicts between interests in the corporation that may be characterized as “shareholder longterm interests” or “corporate entity interests” or “multi-constituency interests” on the one hand, and interests that may be characterized as “shareholder short term interests” or “current share value interests” on the other?

\textit{Id.}

In addition, directors’ duties statutes require consideration of time frame elements as one factor in formulating an appropriate response. See Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989). Thus, the occasional use of “long term” serves the sole function of underscoring the deemphasis of the “short term.”
shareholders to tender their shares; and (3) militating against takeovers when, inter alia, a corporation has a promising long-term plan underway that has not yet come to fruition.

Third, reform should seek to emphasize the significance of shareholders' input and shareholder rights by: (1) minimizing the vulnerability shareholders typically and historically experience in a takeover context by mandating that shareholders approve both rights plans and coverage under antitakeover legislation; (2) militating against takeovers when the value of the offer to the shareholders is demonstrably impaired; and (3) grounding a director's duty to accept an offer largely on whether the shareholders themselves deem an offer to be in their best interests as evinced either by their shareholder-approved committee's advice or by their tendering shares.

The board is well equipped to inform and persuade shareholders when their best interests are served by approving antitakeover measures. By enhancing accountability, this communication will help ensure that shareholder rights plans and other defensive mechanisms are principally and reasonably designed to advance shareholders' best interests and only incidentally designed to entrench management. The information provided shareholders, however, must be evenhanded.

The board is in the best position to persuade shareholders that voting for current management rather than tendering their shares will maximize the value of their shares. It is argued that shareholders, overcome by greed, will far sooner accept quick profits. That argument misses the point. What ought to be compared is the present value of probable outcomes: if the shareholders tender their shares in a noncoercive context despite vigorous appeals by management, their tendering perforce suggests they concluded that the present value of their return is maximized by tendering. The shareholders are in the best position to weigh the competing alternatives; given substantial, if not perfect, information from both sides, the shareholders' vote must be afforded great weight.

Optimal reform must also recognize that, for a board and corporation to function properly, the board must be allowed to exercise its business judgment independent of the conduct of shareholders if the circumstances so demand. Thus, the board should be protected by the business judgment rule when it has compelling evidence showing that the offer must be rejected (1) because the present

501. See supra notes 392-93 and accompanying text.
value of the corporate stock, given the probable outcome of concluding a current long-term plan, exceeds the offer price, (2) because the value of the offer is substantially impaired, or (3) because superior alternatives appear imminent.

To summarize:

1. Reform of takeover legislation should recognize that directors are well suited to make initial decisions in a takeover situation. The directors should also inform and persuade shareholders on both the adoption and redemption of shareholder rights plans and the relative long-term value of their shares in relation to an acquirer's offer.

2. Reform of takeover legislation should harness the benefits of meaningful shareholder input, not by asserting the primacy of shareholders but by recognizing the evolving interests and aggressiveness of shareholders, particularly institutional investors. To this end, shareholder input in all aspects of takeover-related decisions should be enhanced. This requires the conclusion that a shareholder vote is neither onerous nor impractical.502

3. Reform of takeover legislation should remain flexible enough to assure its vitality given the many inevitable changes in corporate and case law treatment of takeovers. As such, optimal legislation must acknowledge the logic of well-reasoned case law without sacrificing adaptability.503

B. The Dynamic Environment of Takeover Reform: Uncertainties, Constraints and Opportunities

Because optimal takeover legislation must remain flexible so as to readily adapt to a fluid takeover landscape, and because takeover legislation is a relatively new phenomenon with many of its contours untried and untested, reform legislation proposed herein leaves open the following parameters: whether reform should come from the state or federal level; the scope of such reform; and the dynamics of the shareholders' new voice.

502. Commentators have questioned the efficacy of shareholder consent by voting. See, e.g., Eisenberg, The Structure of Corporation Law, 89 COLUM. L. REV. 1461, 1474-80 (1989). The authors, however, believe that the changing pattern of shareholder growth, with the emphasis on institutional investors, will result in a more informed and active shareholder group generally. There is evidence to support such a conclusion. See, e.g., Berss, One Hand Dirties the Other, FORBES, June 25, 1990, at 63 (noting that at the behest of Wisconsin state employee pension fund, shareholders at K Mart and Champion adopted proposals calling for a shareholder vote on shareholder rights plans).


504. See infra Part V.
1. State or Federal Legislation?

Optimal takeover legislation should be adaptable to both state and federal enactments. Ideally, reform would be suited to federal enactment by setting minimal parameters while heightening both uniformity and state experimentation by leaving intact all state legislation into which corporations opt for protection.\(^{505}\) Consistent with federalism, states thereby remain free to experiment by drafting legislation tailored to their unique business environments. For state enactments, proposed reform should take the form of a Model State Takeover Act; for federal enactments, reform should enact the neutral principles of the Williams Act.\(^{506}\) By enhancing shareholder input, the proposed Model Act seeks a level playing field while striking that elusive balance between state and federal regulation.\(^{507}\) Because the proposed Model Act necessarily focuses on the theoretical, delving into the intricacies of Supremacy and Commerce Clause analyses based on possible extensions and infinite permutations of its basic precepts is wisely beyond the scope of this article.\(^{508}\) Facialy, the proposed legislation appears easily to pass constitutional muster.\(^{509}\)

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505. It is simply unrealistic to expect state legislatures, with limited staff resources, short sessions and competing commitments, to undertake the kind of comprehensive study and synthesis necessary to confront these problems in a meaningful way. The only plausible case to make for state statutes in this context is that of preserving the status quo. In other words, given the strong difference of opinion on the long-term economic consequences of hostile takeovers, it is appropriate for the states to maintain the traditional relationships among the various constituents of the corporations within their sovereign boundaries pending definitive federal resolution of the matter. The ultimate solution, however, rests with Congress.

506. See Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 29 (1977) (asserting that in enacting the Williams Act, Congress attempted to follow a "policy of neutrality in contests for control"). The drafters of the Williams Act took "extreme care to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." Senate Report, supra note 41, at 3. For a discussion of the Williams Act, see supra notes 326-47 and accompanying text. But cf. Andre, supra note 21, at 887 (arguing that rules governing takeovers should seek to facilitate rather than remain neutral toward takeovers, thereby achieving what is most beneficial for the corporation, shareholders, and the economy: "[R]eform aimed at achieving neutrality and even-handedness would be misdirected.").

507. The challenge is accomplishing this goal "without veering toward the scylla of stifling innovation by the state or the charybdis of balkanizing tender offer regulation." Ferrara & Carroll, supra note 28, at 959.

508. The Authors, however, are quite confident that a federal enactment of their proposed balanced reform would not disturb state legislation if such state legislation were slightly modified to allow for federal supremacy where necessary.

Partially because corporate law is a quintessentially state controlled creature, and partially because hostile takeovers result in fundamental changes in corporate structure, state rather than federal legislation has predominated. The Supreme Court has noted that "'[c]orporations are creatures of state law, and . . . except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.'" 510

A number of scholars have explored the possibility of federal takeover legislation. 511 One rationale supporting federal tender offer regulation acknowledges that tender offers at bottom are stock transactions rather than purely corporate transactions and thus preempt state antitakeover legislation. 512 Several recurring themes pervade the arguments of advocates of federal legislation: (1) economic theories of federalism, 513 (2) regulation of antitakeover devices such as poison pills, golden parachutes, and greenmail is not a "traditional" state function; 514 (3) even if such state regulation is traditional, there are many examples of federal intervention into securities matters "traditionally" regulated by the states; 515 and (4)

simplest formulation of the current test for Supremacy and Commerce Clause analysis of state antitakeover legislation may be:

So long as a bidder can run its tender offer by the timetable of the Williams Act, the management and the bidder enjoy equal opportunities to communicate with the shareholders, and no state official can intervene, the law should withstand supremacy clause attack. So long as the law treats nonresidents and residents alike, and does not conflict with the laws of other states, it should withstand commerce clause scrutiny.

Boyer, supra note 106, at 589 (footnote omitted) (surveying the constitutionality of second-generation state antitakeover legislation).


513. See Romano, supra note 484, at 465-70.

The economic theory of federalism focuses on the extent of the externality, or the localness of the public good, to identify which level of government, if any, is the appropriate one to intervene in a market. A government should have control over an activity whose externalities fall completely within its borders, for then the costs and benefits will accrue solely to the citizens to which that government is accountable and the allocation of resources will be efficient.

Id. at 466 (footnote omitted).


515. Id. (asserting that "federal regulation of corporate matters may not be necessary, and if necessary, should be used most judiciously, but waving the flag and citing state's rights is a red herring and tends to obscure that fundamental policy issue").
state chartering is anachronistic and artificial because national corporations are, in all material respects, interstate in ownership without any real connection to their chosen state of incorporation. Critics of federal legislation cite hurdles to an otherwise most desirable uniform federal takeover policy: (1) federalization of corporate law may lead to piecemeal federal constitutional tender offer law; (2) historically, states have chartered nearly all corporations and state law has always governed the internal affairs of a corporation, therefore, federal measures should not intrude into the general domain of corporations; and (3) federal legislation beyond or amending the Williams Act must address preemption, federalism, and other constitutional concerns.

As a practical matter, federal legislation seems unlikely. Between 1963 and 1987, over 200 takeover bills were introduced in Congress. Recently, several bills have been introduced in Congress seeking to amend or expand the Williams Act. Prominent among them, Senator Proxmire’s Tender Offer Disclosure and Fairness Act proposed to hold tender offers open for thirty-five rather than twenty business days. Although numerous bills continue to be introduced in both houses to amend provisions of the Securities Exchange Act relating to tender offers, none appear likely

516. Kozyris, supra note 250, at 265. Kozyris further comments that state chartering is harmful “because it encourages a race to the bottom in search for state revenues rather for [sic] than for best rules.” Id.
517. See Johnson & Millon II, supra note 26, at 1867.
518. See Shipman, supra note 511, at 510-11.
519. Kozyris, supra note 250, at 265.
520. Federalism stresses that states should be allowed to function as laboratories experimenting with different approaches. However, this “laboratory” argument supports only local experimentation with local affairs, not local control over national concerns. See Kozyris, supra note 17, at 1136 (“Balkanizing the treatment of unitary transactions that take place over the national markets, however, does not fit within any reasonable extension of the ‘laboratory’ theory.”).
521. See Johnson & Millon II, supra note 26, at 1865-66 (arguing against the SEC's claim that the Williams Act preempts state tender offer regulation).
522. See Belt, supra note 514, at 408. Belt concludes that

[For substantive and political reasons, it is unlikely that Congress will enact any major legislation affecting the battle for corporate control in the first half of the 101st Congress. However... should states continue to Balkanize takeover laws or engage in a regulatory race to the bottom then a federal reaction may be likely and perhaps even desirable [sic].]

Id.
523. Romano, supra note 484, at 470; see Romano, The Politics of the Brady Report: A Comment, 74 CORNELL L. REV. 865, 869 (1989) (noting that “[t]he demand for additional federal legislation to restrict hostile takeovers has been extraordinarily intense, with over 100 bills introduced over the past four years”).
524. See supra notes 286-89 and accompanying text.
525. S. 1323, 100th Cong., 1st Sess. (1987); see Proxmire Introduces Tender Offer Bill, Announces Hearings for Later This Month, Corp. Couns. 2 Weekly No. 23, at 2 (BNA) (June 10, 1987); supra notes 286-89 and accompanying text.
526. S. 1323, 101st Cong., 1st Sess. 4 (1987). Proxmire’s bill also requires bidders seeking more than 25% of a target to acquire shares through tender offers and prohibits
2. **Scope of Coverage: Dynamics of Antitakeover Mechanisms and Antitakeover Legislation**

Perhaps the greatest uncertainty facing legislators seeking to grant shareholders a meaningful voice in takeover matters is which of the myriad of antitakeover mechanisms should require shareholder approval. The best that can be done may be to avoid being either overly general or overly specific. Poison pills demarcate the brightest line among the infinite array of possible foci: poison pills are the most pervasive, potent and litigated antitakeover defense, and in contrast to ESOPs and restructuring, poison pills do not serve legitimate corporate purposes outside of takeover contexts. As such, the proposed Model Act limits coverage to "shareholder rights plans and their equivalent." This approach affords both needed specificity and possibilities for expansion.

Accordingly, reform should rely on a fluid, flexible definition of poison-pill rights plans for obvious reasons: (1) the concept of a poison pill is inherently flexible and protean; (2) certain otherwise legitimate, nontakeover motivated corporate plans may, under certain circumstances, take on the character and function of a poison pill and therefore should be subject to the Model Act's shareholder approval requirements.

One potential area of controversy focuses upon the extent to which optimal reform should recognize the importance of facilitating an auction market for corporate control—that a primary purpose of a rights plan is to allow management time both to search out alternatives most likely to maximize shareholders' long-term value and to better assess the value of the offer, including the degree of impairment. Arguably, a rights plan which automatically terminates forty business days or less after a fully-financed cash "qualified" tender offer is prima facie in the shareholders' best long-term interests and should be exempt from shareholder voting requirements.

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527. S. 1658, 101st Cong., 1st Sess. (1989). S. 1658 prohibits golden parachutes, greenmail and poison pills without shareholder approval. S. 1658 is similar to S. 1323; when S. 1323 reached the Senate floor in June 1988, an amendment was offered that would prohibit golden parachutes, greenmail and poison pills without shareholder approval. See Goelzer, Quinn & Walter, supra note 286, at 592-93. The Senate voted to prohibit golden parachutes without shareholder approval, but failed to table the poison pill provision, killing the bill. See id.


529. See infra Part V.

530. For example, when an ESOP is "placed under director or management control during the course of a tender offer ... the same conflict of interest which arises in more obvious defensive measures [such as poison pills] is also inherent in the creation of an ESOP." Buckhorn, 656 F. Supp. at 231 (citations omitted) (emphasis added).
This forty-day window will generally be sufficient to allow management to assess the offer and weigh competing alternatives. In the same vein are "chewable pills," that is, rights plans that automatically disengage upon a target's receiving a qualified all-cash, all-shares offer remaining open for no less than forty-business days. This type of rights plan should easily garner shareholder approval, however, and therefore similarly deserves rendering an exemption. To avoid the disadvantages of drafting a generally applicable standard riddled with exceptions, the Authors decided against outlining exemptions from the shareholder voting requirement.

Determining the scope of coverage for antitakeover legislation poses few problems. The Authors believe that shareholders should be required to vote on the applicability of any state antitakeover legislation in which shareholders may logically prefer to decide for themselves whether to opt in or opt out. Thus, most statutes which currently have opt out provisions would require shareholder approval. These include business-combination statutes, control-share acquisition statutes, fair-price statutes, and to a lesser extent, directors' duties statutes and share rights plan endorsement statutes. In some respects, certain provisions of disclosure statutes may be repugnant to shareholders. This remains an open question. As currently drafted, most shareholders would have little cause to oppose antigreenmail statutes, though some may. Accordingly, this also remains an open question.

3. **Dynamics of Shareholder Involvement**

It must be stressed that the goal of balanced reform should be to provide shareholders and directors with mutually meaningful roles in takeover contexts; the goal is neither shareholder primacy nor blind, myopic maximization of shareholder well being. Thus, shareholder involvement must initially seek to balance tensions inherent in the shareholder-manager axis, tensions which intensify and peak in takeover matters. Certainly, shareholders are expected to display potent self-interest at first. Ultimately, shareholder involvement
with management will take on the character of team members striving for the same goal: maximization of the long-term gains to the corporation and the shareholder. As the method of shareholder involvement adapts and conforms to the many varying and unique corporate environments, shareholders' voices will become increasingly meaningful, if not indispensable.

The uncertainty legislators would face in addressing the issue of optimal shareholder involvement has several facets, including: (1) the nature, composition, application, and power of shareholder advisory committees; and (2) the propriety of considering shareholder tender as a relevant factor.

Shareholder Advisory Committees: A shareholder advisory committee, if properly created, structured and implemented, offers many opportunities for shareholder involvement and solves most of the problems typically associated with shareholder approval requirements. Although the concept of shareholder advisory committees is very new, at least one major pension fund actively endorses the concept. Still, many questions must be answered. First, should a shareholder advisory committee serve as a substitute for a shareholder vote in all takeover related matters, including the adoption and redemption of poison pills and opting into state legislation; or should it, as the Authors believe, substitute for a shareholder vote only when requiring a shareholder vote is impractical, such as amid a hostile battle for control where time is of the essence and where directors must decide quickly whether to redeem a rights plan? Second, should a shareholder advisory committee be given dispositive power, or should its role merely be informative and nonbinding, informing the directors' business judgment? If the committee's role is merely advisory, how much weight should directors afford the committee's input? If the committee's decision is binding on the directors, what duties would the committee have to shareholders? Third, how would a shareholder advisory committee be selected? Should directors select committee members for subsequent shareholder approval? Should the committee be composed of current shareholders? Long-term or institutional shareholders?

The Authors believe reliance on the input of a shareholder advisory committee in lieu of a full shareholder vote should be limited to situations where requiring a shareholder vote is impractical. Furthermore, this committee's conclusion should be nonbinding on directors. However, the directors should weigh the committee's conclusion by considering factors such as: (1) the extent to which

539. See Schwadel, supra note 380, at A7, col. 1. Francine Schwadel notes that CalPERS "has notified Sears that it intends to propose the creation of a shareholders' advisory committee at the annual meeting next spring. [CalPERS] suggested that a nine-member shareholder committee give the Sears board nonbinding advice on matters such as major restructurings or acquisitions, mergers and executive compensation." Id. at A7, col. 2.
the committee represents long-term shareholders;\textsuperscript{540} (2) the degree of deliberation supporting their conclusion and the degree to which such deliberation approximates that typically found in collective shareholder decisions; and (3) the nature of the committee, including the members’ expertise and conflicts of interest. The Authors believe that an optimal shareholder advisory committee would be comprised generally of shareholders with the largest stake in the company; this assures that the committee will be most assiduous in improving corporate performance.\textsuperscript{541}

Dynamics of Shareholder Tender: In assessing a board’s duty to redeem a rights plan amid hostile overtures, recent Delaware court decisions have considered the extent of shareholder tender a relevant factor.\textsuperscript{542} Moreover, Delaware’s antitakeover statute disengages given an eighty-five percent disinterested shareholder tender.\textsuperscript{543} But does shareholder tender equate with shareholder vote? The Authors believe that the tendering process may be sufficiently coercive for shareholders as to militate against such a conclusion.\textsuperscript{544} Still, the percentage of shareholders who tender should be afforded some weight. Indeed, the more shareholder tender approximates shareholder vote, the more weight shareholder tender garners. Thus, more weight would be assigned to shareholder tender given an all-cash, all-shares tender offer with a back-end commitment at the same price in cash\textsuperscript{545} than an offer without a back-end commitment.

\textsuperscript{540} See generally Matheson & Olson, Corporate Law and the “Longterm Shareholder” Model of Corporate Governance (unpublished manuscript, on file with The George Washington Law Review).

\textsuperscript{541} Dent, Toward Unifying Ownership and Control in the Public Corporation, 1989 Wis. L. Rev. 881, 907.


\textsuperscript{544} See Lowenstein, supra note 28, at 307 (noting that “[i]t has frequently been said that tender offers owe their high rate of success to the fact that arbitrageurs and even institutional investors, unlike ‘real’ shareholders, have an interest only in a quick sale at a profit” (footnotes omitted)).

\textsuperscript{545} See Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 278 (Del. Ch. 1989). It is difficult to understand how, as a general matter, an inadequate all cash, all shares tender offer, with a back end commitment at the same price in cash, can be considered a continuing threat under Unocal. Certainly, an inadequate coercive tender offer threatens injury to the stockholders. . . . An inadequate, non-coercive offer may also constitute a threat for some reasonable period of time after it is announced. . . . However, where there has been sufficient time for any alternative to be developed and presented and for the target corporation to inform its stockholders of the benefits of retaining their equity position, the “threat” to the stockholders of an inadequate, non-coercive offer seems, in most circumstances, to be without substance.

Id. at 289 (citations omitted). The Polaroid court nevertheless declined to enjoin a coercive management self-tender because of “unusual circumstances.” See id. at 289-90; supra note 256 (stating that Kodak patent litigation constituted the unusual circumstances).
The proposed Model Act attempts to solve this dilemma in two ways: first, shareholder tender becomes relevant only for those corporations that have not yet instituted "Qualified Shareholder Advisory Committees." In this way, corporations are encouraged to support shareholder advisory committees. Second, shareholder tender of less than 80% does not give rise to any presumptions, thereby freeing directors to decide their corporation's fate largely within current business judgment rule parameters.

V. The Model Act

SUBDIVISION 1. ADOPTION OF SHAREHOLDER RIGHTS PLANS

No corporation shall adopt a shareholder rights plan or its equivalent unless the plan has been approved by the disinterested shareholders. Any shareholder rights plan adopted prior to the effective date of this statute is invalid unless ratified by the shareholders within two years of the effective date of this statute. After initial adoption or ratification, a shareholder rights plan becomes invalid unless reaffirmed by the disinterested shareholders within each subsequent period of two years thereafter. The shareholders shall take all action pursuant hereto by the affirmative vote of a majority of the disinterested voting power of the shares entitled to vote.

SUBDIVISION 2. OPTING INTO STATE ANTITAKEOVER LEGISLATION

No state antitakeover provision shall apply to a corporation unless application of the provision has been adopted by the disinterested shareholders. Any state antitakeover provision in effect prior to the effective date of this statute ceases to apply to a corporation unless ratified by the disinterested shareholders within two years of the effective date of this statute. After initial adoption or ratification, a state antitakeover provision ceases to apply to a corporation unless reaffirmed by the disinterested shareholders within each subsequent period of two years thereafter. The shareholders shall take all action pursuant hereto by the affirmative vote of a majority of the voting power of the disinterested shares entitled to vote.

SUBDIVISION 3. DIRECTORS' DUTIES IN CONTROL TRANSACTIONS

A director breaches a fiduciary duty if the director either attempts to defeat or advises the shareholders to decline a tender offer when supporting or accepting said offer is, in the director's view, in the shareholders' best interests. The factors to be considered in determining whether an offer is in the shareholders' best interests include:

(1) Whether a Qualified Shareholder Advisory Committee concludes that the tender offer should be accepted. For
corporations without Qualified Shareholder Advisory Committees: whether a substantial majority of the shareholders tender their shares. Tender by 80% or more of disinterested shareholders is presumed to constitute a "substantial majority."

(2) Whether the board has competent and persuasive evidence demonstrating any of the following:

(a) that the present value of the corporation's stock, given the probable outcome of consummating a current, bona fide, long-term plan demonstrably exceeds the value of the tender offer.

(b) that the value of the offer to the shareholders is substantially impaired. Among the factors to be considered in assessing the magnitude of "impairment" are:

(i) The nature and risk of the offeror's financing, including the degree of leverage.

(ii) The nature and character of the offeror, including the likelihood that the offeror will merely liquidate or "bust-up" the corporation.

(iii) The nature and character of the resulting merged entity.

(iv) The character and timing of the offer, including the extent to which the board reasonably believes the corporation may be vulnerable to coercive acquisition tactics.

(c) that another bidder is both imminent and likely to better advance shareholders' best interests or that shareholders' best interests will otherwise be advanced by declining said offer.

**Subdivision 4 Definitions**

(1) Scope. The following definitions apply only to this Act.

(2) Corporation. "Corporation" means "publicly held corporation," as defined in [relevant state statute].

(3) Disinterested Shareholder. "Disinterested Shareholder" means a shareholder that is not an "interested shareholder." In a takeover context, "interested shareholders" include: (1) persons who are directors or officers; (2) the offeror or "affiliates" [as defined in relevant state statute]; (3) participants in employee stock option plans in which employee participants do not have the right to determine confidentially whether shares held subject to the plan will be tendered in a tender or exchange offer.

(4) Shareholder Rights Plan. "Shareholder rights plan" means
an action whereby a corporation authorizes and issues rights or options (or their equivalent) which include conditions that prevent or limit the holder of a specified percentage of the outstanding shares of the corporation from exercising those rights or which invalidate or limit any rights or options beneficially owned by a holder of a specified percentage of the outstanding shares of a corporation.

(5) **State Antitakeover Provision.** “State antitakeover provision” means the state’s business combination statute, control share acquisition statute and all other statutory antitakeover provisions from which shareholders may reasonably seek to opt out or otherwise decline protection. [Additional provisions should be provided on a state-by-state basis.]

(6) **Qualified Shareholder Advisory Committee.** Qualified Shareholder Advisory Committee means any shareholder-approved committee composed of shareholders and designed to represent the shareholder interests.

**NOTES AND COMMENTS**

**CHANGE FROM FORMER LAW:**

This Act complements as much of [this state’s] current law as relates to takeover situations. This Act is to be interpreted as augmenting, supporting, refining, or defining current legislation.

This Act supersedes [a state’s] takeover legislation only insofar as such state legislation covers all public corporations which have not opted out. Subdivision 2 of this Act makes it clear that for a corporation to be protected under [the state’s] takeover statutes, a majority of the disinterested shareholders must approve said protection. The protection granted by the state’s takeover legislation remains unchanged from prior law for those corporations meeting this requirement.

**THE ACT:**

Under subdivision 1, a majority of disinterested shareholders must approve a rights plan or its equivalent for the plan to be valid. A court reviewing a particular challenged corporate action should interpret the term “shareholder rights plan” to include all measures having like effect.

A majority of 51% of shareholders entitled to vote is required. The underlying rationale for the 51% benchmark is to balance the input of shareholders equally with that of management and the board. The board is well equipped to inform and persuade shareholders that their best interests are maximized by approving the plan. This will help ensure that rights plans are principally and reasonably designed to advance shareholders’ best interests and only incidentally designed to entrench the current management. However, the information provided shareholders must be even handed.

Under subdivision 2, corporations are no longer automatically protected by the state’s takeover provisions; rather, such protection
is available only when no less than 51\% of the disinterested shareholders entitled to vote ratify the board’s option. This affords corporations more freedom to decline or accept state legislative protection. Equally important, this provides shareholders with the option to decline protection under the Act because, among other reasons (1) subdivision 1 already provides adequate protection; (2) subdivision 1 more closely fits the unique needs of the corporation, rendering subdivision 2 either excessive or disadvantageous; (3) such protection otherwise militates against shareholders’ best interests. This modified “opt in” requirement is preferred over “opt out” requirements to maximize corporate freedom and render meaningful the shareholder approval requirement in subdivision 1.

Subdivision 3 mandates that directors regard shareholders’ best interests as paramount. Under factor 1 of subdivision 3, a tender offer is presumed to be in shareholders’ best interests when the terms of the bona fide offer are so favorable that either (1) a Qualified Shareholder Advisory Committee recommends acceptance of the offer; or (2) 80\% of the shareholders tender their shares irrespective of the Board’s support. Consistent with this, a director has a duty to seek out and weigh shareholder input before attempting to defeat such offer.

The board is in the best position to persuade the shareholders that, to maximize the present value of their shares, they are best served to vote for current management rather than tender their shares. The shareholders are in the best position to weigh the competing alternatives; given perfect information from both sides, the shareholders’ vote must be afforded great weight.

Absent conclusive shareholder support, this Act recognizes that for a board and corporation to properly function, the board must be allowed to exercise its business judgment independent of the conduct of shareholders if the circumstances so demand. Thus, the board will be protected by the business judgment rule when the board has compelling evidence showing that the offer must be rejected (a) because the present value of the corporate stock, given the probable outcome of concluding a current long-term plan, exceeds the offer price, (b) because the value of the offer is substantially impaired, or (c) because the realization of superior alternatives appears imminent.

However, the evidence before the board must be compelling: it must be both competent (e.g., reasonably certain, accurate, and reasonably free of objection) and persuasive. The test is both objective and subjective: whether a reasonable board member under the same or similar circumstances would have rejected the offer given the evidence before the board member irrespective of substantial
shareholder approval and whether that board member in fact so ac-
ted. The more a target’s plan is based on future hypothetical value 
and the more its projections stem from economic and competitive 
conditions outside its control, the less persuasive the evidence. 

Factor 1 is presumed to possess great weight; the weight assigned 
to factor 2 depends upon the facts and circumstances of each case. 

For purposes of factor 1, 80% of disinterested shareholders pre-
sumptively constitutes a substantial majority. Whether a showing of 
less than 80% constitutes a substantial majority depends on the 
facts and circumstances of each case. Relevant factors for determi-
ning when a lesser showing constitutes a substantial majority or for 
rebutting the 80% presumption include: (1) whether large blocks of 
stock are voted or withheld; (2) whether some of the stock voted or 
withheld is in “friendly” (albeit “disinterested”) hands; (3) recent or 
typical voting patterns of the shareholders (e.g., unusually passive 
voters).

Conclusion

Both corporate-adopted takeover preemption devices and current 
antitakeover legislation undermine a board’s incentive to maximize 
meaningful shareholder input in control transactions. This is a 
costly development: (1) shareholders derive less value from their 
stock ownership; (2) economic efficiency is reduced because benefit-
cial takeovers will be reduced and management may become more 
lax; (3) as one state develops more stringent, protectionist legisla-
tion, others will be compelled to follow lest their corporations feel 
relatively less secure; (4) corporate freedom and corporate con-
tracting is impaired; (5) director uncertainty and potential for con-
licts of interest escalate; and (6) unfairness to shareholders 
increases.

This Model Act goes far to solve these problems by requiring that 
corporations grant shareholders an enhanced voice in that area of 
corporate law their voice is most needed: in the corporate takeover 
context where directors and management have an intrinsic conflict 
of interest with shareholders. As such, the Model Act promises to 
assure that management and shareholders dove-tail their sometimes 
inconsistent objectives, thereby working as partners toward the mu-
tual goal of long-term corporate profitability. In this way, the ineffi-
ciencies, conflicts of interest, uncertainties, and manifestations of 
unfairness that otherwise inhere in corporate-control transactions 
are minimized to society’s benefit.
Appendix*

I. Summary of State Antitakeover Legislation

A. Overview

Thirty-seven states had enacted first-generation tender offer regulations before the Supreme Court's 1982 decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), invalidating Illinois' antitakeover statute. Today, roughly eighty percent of the states have antitakeover legislation. Only six states have yet to enact some form of antitakeover legislation: Alabama, California, Montana, Texas, Vermont, and West Virginia. In addition to these six states, four states appear actively not to endorse antitakeover legislation: Alaska, Arkansas, New Hampshire, and North Dakota. Pre-MITE disclosure statutes are not considered further.

Steering clear of MITE's pitfalls, several general approaches have evolved in the new generations of state antitakeover legislation. Each expands upon the traditional terms of corporate governance to avoid the Williams Act's preemption and Commerce Clause concerns lethal to first-generation statutes. Given both the constitutionality of these statutes and the recent case law developments in Delaware, a new wave of state statutes has emerged armored with the harshest of antitakeover weapons. This Appendix summarizes and analyzes this legislative antitakeover landscape.

* For ease in reference, the tabular portion of this Appendix does not cite state statutes according to the Uniform System of Citation. These tables contain all information necessary to locate each statute. Because of space limitations, tables contained in this Appendix use abbreviations where appropriate.
### B. State Antitakeover Legislation (S)

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<td>Wisconsin</td>
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</tbody>
</table>

**TOTALS:** 28 27 29 24 25 7 19 8
Definitions Used Throughout This Appendix

Noninterested vs. Disinterested

Noninterested shareholder means a shareholder who is not an “interested” shareholder as defined in state statute. Typically, “interested” shareholders are limited to the suitor and her affiliates.

Disinterested shareholder is a term of art uniquely defined by each statute. “Disinterested” shareholders typically exclude all shareholders who are “interested,” officers, and directors.

Articles of Incorporation at all times is synonymous with “charter” and “certificate of incorporation.”

Announcement Date means the date the interested shareholder announced a tender offer.

Determination Date means the date the interested shareholder became interested.

Secondary sources were used to support portions of this Appendix.

II. State Business Combination Statutes (BCS)

A. Introduction

Business Combination (or freeze-out) statutes represent the simplest form of antitakeover legislation. These statutes essentially prohibit “interested” investors who purchase more than a minimum threshold interest (typically 10%) in a target corporation from engaging in any type of business combination with the target for a specified period of years (typically 3-5 years) after the acquisition of such shares unless, prior to the acquisition of such shares, the share acquisition is approved by either the board or, in certain states, by an independent committee of the board.

Business combination statutes often are closely linked to fair-price statutes. Combined, they generally require approval of a majority of disinterested voting shares even after the specified time period has elapsed: the acquiror must still comply with a fair-price provision when attempting a cash-out merger.

B. Legislative Intent

On December 16, 1985, Governor Cuomo stated that New York’s newly amended Business Corporation Law is “aimed at abuses in certain takeovers, but isn’t designed to protect entrenched management.” The Wall Street Journal, Dec. 17, 1985, at 39. The statute is directed at minimizing highly leveraged takeovers where an acquiror pays for the takeover by liquidating the target’s assets.

New Jersey’s business-combination statute declares in part:
Takeovers of public corporations financed largely through debt to be repaid in the short-term by the sale of substantial assets of the target corporation, in other states, have impaired local employment conditions and disrupted local commercial activity. These takeovers prevent shareholders from realizing the full value of their holdings through forced mergers and other coercive devices. The threat of these takeovers also deprives shareholders of value by forcing the adoption of short-term business strategies as well as defensive tactics which may not be in the public interest.


The public policy for Tennessee’s business combination statute reads in relevant part:

(4) Present Tenessee laws facilitate business combinations which left unbalanced could harm the economy of this state by weakening corporate performance . . . .


C. Typical Terminology

Business Combinations: The term business combination is defined broadly in the statutes to typically include mergers, consolidations, sales of assets, and transfers of stock. Consider Delaware’s definition:

[“Business combination” means]
(i) any merger or consolidation . . . if the merger is caused by the interested stockholder . . . ;
(ii) any sale, lease, exchange, mortgage, pledge, transfer or other disposition . . . of assets of the corporation [having] an aggregate market value equal to 10% . . . ;
(iii) any transaction which results in the issuance or transfer by the corporation . . . of any stock [to interested stockholder] except [various exceptions] . . . ;
(iv) any transaction involving the corporation . . . [which increases] the proportionate share of the stock of any class . . . of the corporation. . . ;
(v) any receipt by the interested stockholder of . . . [various] financial benefits. . . .

DEL. CODE ANN. tit. 8 § 203(c)(3) (1988).

Override Provisions: The moratorium on business combinations imposed by many of these statutes does not apply if: (1) the business combination subsequently is approved by the target’s board and by a vote of at least \( \frac{2}{3} \) of the outstanding voting stock not owned by the interested shareholder; or (2) the interested shareholder acquires at least 85% of the target’s voting stock as part of the transaction that results in its becoming an interested shareholder.

Opt Out Provisions: Some statutes allow a corporation to “opt out” through a charter or bylaw amendment adopted by shareholders. Of those states that do allow a corporation to opt out, many of the
statutes impose a time limit after which a corporation may no longer opt out.

For example, Idaho’s business combination statute does not apply if:

1. The interested shareholder was an interested shareholder before effective date of the Act.
2. The original articles or bylaws of the issuing public corporation contain a provision expressly electing not to be subject to the chapter.
3. The issuing public corporation, by action of its board of directors, adopts an amendment to its bylaws expressly electing not to be subject to the provisions of the chapter.
4. The issuing public corporation, by action of its shareholders, adopts an amendment to its articles of incorporation or bylaws approved by the shareholders holding \( \frac{2}{3} \) of the outstanding voting power of all noninterested shares; and such amendment provides that it is not to be effective until eighteen months after the effective date of this chapter.


**Application:** States vary widely as to which corporations are covered by the statute. *Domestic Corporation* means any corporation incorporated in that state. Some statutes cover all domestic corporations without imposing any nexus requirements. Some statutes also cover foreign corporations.

**Sunset Provisions:** In the past, some business combination statutes had a limited life span as indicated by a sunset date after which the statute became ineffective. Because business-combination statutes are now common, sunset provisions no longer are legislated.


**Years of Restriction** is synonymous with “freeze-out” period.

**Continuing Directors** are those directors whose tenure does not expire prior to an interested stockholder’s stock acquisition date.

### D. Constitutionality

U.S. Supreme Court has not ruled on the constitutionality of business combination statutes
### E. Summary of State BCSs

<table>
<thead>
<tr>
<th>State</th>
<th>Domestic Coverage/Nexus</th>
<th>Opt Out Provisions</th>
<th>Yrs</th>
<th>%</th>
<th>Prior Approval</th>
<th>Concurrent/Subsequent Override</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>All; no nexus requirement</td>
<td>opt out in original articles or bylaws or by amending articles by majority of noninterested voting shares.</td>
<td>3</td>
<td>10%</td>
<td>Disinterested Committee</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>§§ 10-1221 to 10-1223</td>
<td>(1) principal place of business or principal executive office in Arizona;</td>
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<td></td>
<td></td>
<td>(2) more than 500 Arizona residents employed; and</td>
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<td></td>
<td></td>
<td>(3) $1 million Arizona assets.</td>
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<tr>
<td>Conn</td>
<td>(1) principal executive offices or significant business operations in Connecticut or</td>
<td>no opt out provisions</td>
<td>5</td>
<td>10%</td>
<td>Board and majority of at least 2 non-employee continuing directors</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>to 33-374f</td>
<td>(2) “significant financial relationships” with Connecticut businesses</td>
<td></td>
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<tr>
<td>Delaware</td>
<td>All; no nexus requirement</td>
<td>opt out in original articles or by board amended bylaws within 90 days of enactment or majority shareholder vote</td>
<td>3</td>
<td>15%</td>
<td>Board</td>
<td>(1) 85% disinterested share tender; or (2) approval by board and ½ noninterested shareholders</td>
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<td></td>
<td>Title 8 § 203</td>
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<tr>
<td>Georgia</td>
<td>(1) at least 100 Georgia shareholders and</td>
<td>opt <em>IN</em> by bylaws; such bylaw may be repealed by ½ continuing director vote AND majority of noninterested voting shares</td>
<td>5</td>
<td>10%</td>
<td>Board</td>
<td>(1) 90% disinterested share tender; (2) 90% subsequent ownership and approval by majority of noninterested shareholders</td>
</tr>
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<td></td>
<td>to 14-2-1110 to 14-2-1133</td>
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<td></td>
<td>(2) principal office in Georgia, 10% Georgia shareholders or 10% of shares owned by Georgia residents, or $25 million or substantially all of its assets in Georgia</td>
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<tr>
<td>Idaho</td>
<td>All (50 shareholders); no nexus requirement.</td>
<td>opt out in original articles or bylaws; or director amendment; or ½ noninterested shareholder vote with 18 month lag from Act’s effective date.</td>
<td>3</td>
<td>10%</td>
<td>Disinterested Committee</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>§§ 30-1701 to 30-1710</td>
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<tr>
<td>State</td>
<td>Domestic Coverage/Nexus</td>
<td>Opt Out Provisions</td>
<td>Yrs</td>
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<td>Prior Approval</td>
<td>Concurrent/Subsequent Override</td>
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<tr>
<td>Illinois</td>
<td>(1) principal place of business or principal executive office in Illinois or $1 million Illinois assets and (2) 10% or 2,000 Illinois shareholders or 10% Illinois shares.</td>
<td>opt out in original articles; director amendment within 90 days; majority shareholder approval with 12 month lag from vote.</td>
<td>3</td>
<td>15%</td>
<td>Board</td>
<td>85% disinterested share tender; board and ⅔ noninterested shareholder approval</td>
</tr>
<tr>
<td>Indiana</td>
<td>All (100 shareholders); No nexus requirement</td>
<td>opt out in original articles; or 30 days after board resolution or bylaw amendment or article amendment approved by majority noninterested vote with 18 month lag after the vote;</td>
<td>5</td>
<td>10%</td>
<td>Board</td>
<td>None</td>
</tr>
<tr>
<td>Kansas</td>
<td>All; no nexus requirement; (inapplicable to corporations with less than 2000 voting shareholders); possible foreign application</td>
<td>opt out in original articles; or director amendment to bylaws within 1 year of Act or amendment approved by majority of voting power</td>
<td>3</td>
<td>15%</td>
<td>Board</td>
<td>85% disinterested share tender; or board and ⅔ disinterested shareholder approval</td>
</tr>
<tr>
<td>Kentucky</td>
<td>(1) 500 shareholders and principal executive office in Kentucky and (2) 200 Kentucky shareholders, 10% Kentucky shares, 100 Kentucky employees or $1 million in Kentucky assets</td>
<td>opt out in original articles; or 80% share agreement and ⅔ noninterested shareholder vote</td>
<td>5</td>
<td>10%</td>
<td>Majority of continuing independent directors or compliance with fair price provisions (see FAS)</td>
<td>None</td>
</tr>
<tr>
<td>Maine</td>
<td>All; No nexus requirement</td>
<td>no opt out provisions</td>
<td>5</td>
<td>25%</td>
<td>Board</td>
<td>After 25% acquisition, board and majority disinterested shareholder approval</td>
</tr>
<tr>
<td>Maryland</td>
<td>All (100 shareholders); no nexus requirement</td>
<td>opt out in original articles or amendment by 80% of all or ⅔ of noninterested shareholders.</td>
<td>5</td>
<td>10%</td>
<td>Board and 80% of all voting power and ⅔ of noninterested voting power</td>
<td>None</td>
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<tr>
<td>Mass.</td>
<td>(1) principal executive office or substantial assets in Massachusetts and (2) 10% Massachusetts shareholders or 10% Massachusetts shares</td>
<td>opt out in original articles, by board amendment within 90 days of Act, or by majority shareholder amendment with 12 month lag</td>
<td>3</td>
<td>5%</td>
<td>Board</td>
<td>90% disinterested share tender; board and ⅔ disinterested shareholder approval</td>
</tr>
<tr>
<td>State</td>
<td>Domestic Coverage/Nexus</td>
<td>Opt Out Provisions</td>
<td>Yrs</td>
<td>%</td>
<td>Prior Approval</td>
<td>Concurrent/Subsequent Override</td>
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<tr>
<td>Michigan</td>
<td>All (100 shareholders); No nexus requirement</td>
<td>opt out in original articles or by amendment approved by 90% of total and 2/3 of noninterested shareholders</td>
<td>5</td>
<td>10%</td>
<td>Board</td>
<td>Approval by 90% shareholders and 2/3 disinterested shareholders</td>
</tr>
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<td>Minnesota</td>
<td>(1) 50 shareholders.</td>
<td>opt out by board amendment prior to 9-1-87 or by majority noninterested shareholder amendment with 18 month lag therefrom</td>
<td>4</td>
<td>10%</td>
<td>committee of disinterested directors</td>
<td>None</td>
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<td>(2) principal place of business, principal executive office or at least $1 million Minnesota assets; and (3) 10% Minnesota shares or 10% or 1,000 Minnesota shareholders.</td>
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<td>Missouri</td>
<td>(1) 100 shareholders;</td>
<td>opt out in articles before 8/1/86 or by noninterested share vote with 18 month lag therefrom</td>
<td>5</td>
<td>20%</td>
<td>Board</td>
<td>None</td>
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<tr>
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<td>(2) principal place of business, principal office or substantial assets in Missouri and (3) 10% or 10,000 Missouri shareholders or 10% Missouri shares.</td>
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<td>Nebraska</td>
<td>(1) 100 shareholders; and</td>
<td>opt out in original articles or by board amendment within 45 days of enactment</td>
<td>5</td>
<td>10%</td>
<td>Board</td>
<td>None</td>
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<tr>
<td></td>
<td>(2) $10 million in assets, principal executive offices in Nebraska or 10% Nebraska shareholders or shares. (3) Foreign corporations with 500 Nebraska employees</td>
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<tr>
<td>New Jersey</td>
<td>(1) principal executive offices or</td>
<td>no opt out provisions</td>
<td>5</td>
<td>10%</td>
<td>Board</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>(2) &quot;significant business operations&quot; in New Jersey</td>
<td></td>
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<tr>
<td>New York</td>
<td>(1) principal executive offices and &quot;significant business operations&quot; in New York; or 250 employees or 25% New York employees; and (2) 10% New York shares.</td>
<td>opt out in original articles; bylaw prior to 3-31-86; majority shareholder bylaw amendment with 18 month lag</td>
<td>5</td>
<td>20%</td>
<td>Board</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>§ 912</td>
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<td>State</td>
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<td>Opt Out Provisions</td>
<td>Yes %</td>
<td>Prior Approval</td>
<td>Concurrent/Subsequent Override</td>
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<tr>
<td>Ohio</td>
<td>(1) 50 shareholders, and (2) principal place of business, principal executive office, &quot;assets having substantial value,&quot; or substantial percentage of assets within Ohio.</td>
<td>opt out in original articles or by amendment if such amendment (a) was adopted prior to shareholder becoming an interested shareholder, or (b) was approved by the affirmative vote of ⅔ both all outstanding shares and disinterested shares</td>
<td>3</td>
<td>10%</td>
<td>Board</td>
<td>None</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>All; no nexus requirement</td>
<td>opt out by 85% board approved bylaw amendment prior to 6-21-88; or by original articles or amendment by majority non-interested shareholders</td>
<td>5</td>
<td>20%</td>
<td>Board</td>
<td>Acquiring person owns 80% of shares, satisfies fair price test and transaction approved by majority of disinterested shareholders at least 3 months after acquiring person became 80% shareholder; or unanimous shareholder approval.</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>(1) principal executive offices and significant business operations in RI; or 250 or 25% RI employees; and (2) 5% RI shares or shareholders</td>
<td>opt out in (1) orig articles; (2) amendment before 5-31-91 or (3) ⅔ shareholder approved amendment with 12 month delay</td>
<td>5</td>
<td>10%</td>
<td>Board</td>
<td>None</td>
</tr>
<tr>
<td>S. Carolina</td>
<td>100 shareholders; no nexus requirement; FOREIGN: (1) principal place of business, principal office or 40% South Carolina assets; and (2) 10% or 10,000 South Carolina shareholders or 10% South Carolina shares</td>
<td>opt out in original articles or by amendment thereto</td>
<td>2</td>
<td>10%</td>
<td>Majority disinterested directors</td>
<td>None</td>
</tr>
<tr>
<td>S. Dakota</td>
<td>(1) 50 shareholders and principal place of business or principal executive office in South Dakota, $1 million South Dakota assets and more than 100 South Dakota employees or (2) 250 or 5% South Dakota shareholders or 5% of shares owned by South Dakota residents</td>
<td>opt out in original articles or by ⅔ noninterested voting share approval; 18 month lag therefrom</td>
<td>4</td>
<td>10%</td>
<td>Board</td>
<td>Acquiring person owns 80% of shares, satisfies fair price test and transaction approved by majority of disinterested shareholders at least 3 months after acquiring person became 80% shareholder; or unanimous shareholder approval.</td>
</tr>
<tr>
<td>State</td>
<td>Domestic Coverage/Nexus</td>
<td>Opt Out Provisions</td>
<td>Yrs</td>
<td>%</td>
<td>Prior Approval</td>
<td>Concurrent/Subsequent Override</td>
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<tr>
<td>Tenn.</td>
<td>2 or more of (1) 10,000 or 10% Tennessee shareholders or 10% Tennessee shares;</td>
<td>opt out in original articles or by board amendment within</td>
<td>5</td>
<td>10%</td>
<td>Board</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>(2) principal office or place of business in Tennessee;</td>
<td>90 days of enactment of Act.</td>
<td></td>
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<tr>
<td></td>
<td>(3) principal office of significant subsidiary in Tennessee;</td>
<td></td>
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<td></td>
<td>(4) 250 Tennessee employees or $5 million Tennessee payroll;</td>
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<td></td>
<td>(5) $10 million annual Tennessee production and</td>
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<tr>
<td></td>
<td>(6) $10 million Tennessee assets; certain foreign corporations that meet similar criteria</td>
<td></td>
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</tr>
<tr>
<td>Virginia</td>
<td>All; no nexus requirement</td>
<td>opt out in original articles or by amendment approved by</td>
<td>3</td>
<td>10%</td>
<td>Majority of disinterested directors and ¾ of disinterested shareholders</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td></td>
<td>majority noninterested shares with 18 month lag after vote</td>
<td></td>
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<tr>
<td>Washington</td>
<td>As of share acquisition date: (1) principal executive office in Washington and</td>
<td>no opt out provisions</td>
<td>5</td>
<td>10%</td>
<td>Majority board</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>(2) either a majority or 1,000 employees resident in Washington;</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td>(3) FOREIGN corporations with a majority or $50 million Washington assets; and 1,000 or 10%</td>
<td></td>
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<tr>
<td></td>
<td>Washington shareholders or 10% Washington shares.</td>
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<tr>
<td>Wisconsin</td>
<td>principal offices, significant business operations or 10% Wisconsin shares or shareholders</td>
<td>no opt out provisions</td>
<td>3</td>
<td>10%</td>
<td>Board</td>
<td>None</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Substantial business operations in Wyoming</td>
<td>opt out in articles, bylaws or by filing statement with secretary</td>
<td>3</td>
<td>15%</td>
<td>Board</td>
<td>Board and ¾ noninterested shareholder approval</td>
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</table>
III. Control Share Acquisition Statutes (CSAS)

A. Introduction

Control Share Acquisition Statutes (CSAS) require acquirors of a specified percentage of a target's shares to obtain shareholder approval before exercising the voting rights attributable to shares in excess of that percentage. Typically, shareholder approval is required by disinterested shareholders. An acquiror seeking to make a CSA has the right to request a special shareholder meeting within a specified time period (typically fifty days) to determine her voting rights. If authorized by bylaws or articles, the target may purchase from an acquiror lacking voting power her shares at "fair value," and all shareholders (other than acquiror with full voting power) have dissenters' rights to receive "fair value."

B. Legislative Intent

The stated purpose of most CSASs is to require approval of a takeover by disinterested shareholders so as to mitigate the likelihood of shareholder coercion.

C. Typical Terminology

Initial Threshold Percentages vary from 10% to 20%.

Shareholder Approval Percentages vary from a majority to 2/3.

Interested Shares generally include the acquiror, target officers, and target employees who are also directors.

Control Shares are shares acquired through the direct or indirect acquisition by any person which would bring her target voting power within a statutorily defined threshold range.


"CONTROL SHARES" means shares that, except for this chapter, would have voting power with respect to shares of an issuing public corporation that, when added to all other shares of the issuing public corporation owned by a person or in respect to which that person may exercise or direct the exercise of voting power, would entitle that person, immediately after acquisition of the shares, ... to exercise or direct the exercise of the voting power of the issuing public corporation in the election of directors within any of the following ranges of voting power
(1) One-fifth (1/5) or more but less than one-third (1/3) of all voting power.
(2) One-third (1/3) or more but less than a majority of all voting power.
(3) A majority or more of all voting power.

Standard Information Statement/Acquiring Person Statement. An offeror seeking to acquire more than a threshold percentage of voting stock must deliver to the target a statement which includes the offeror's identity, owned shares of target, range of voting power under which
the control share acquisition falls, and, if the CSA has not taken place:

(A) a description in reasonable detail of the terms of the proposed CSA; and

(B) representations of the acquiring person, together with a statement in reasonable detail of the facts upon which they are based, that the proposed control share acquisition, if consummated, will not be contrary to law, and that the acquiring person has the financial capacity to make the proposed control share acquisition.


Some statutes require that within ten days after the target's receipt of an “acquiring person statement,” the target directors must call a meeting within fifty days.

Voting Rights of acquiror generally require approval of shareholders by:

(1) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class being entitled to vote as a separate voting group if the proposed control share acquisition would, if fully carried out, result in any [certain specified fundamental changes].

(2) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that group, excluding interested shares.


Redemption

If authorized in a corporation's articles of incorporation or bylaws before a control share acquisition has occurred, control shares acquired in a control share acquisition with respect to which no acquiring person statement has been filed with the issuing public corporation may, at any time during the period ending sixty days after the last acquisition of control shares by the acquiring person, be subject to redemption by the corporation at the fair value thereof pursuant to the procedures adopted by the corporation.


Dissenters' Rights

Unless otherwise provided in a corporation's articles of incorporation or bylaws before a control share acquisition has occurred, in the event control shares acquired in a control share acquisition are accorded full voting rights and the acquiring person has acquired control shares with a majority or more of all voting power,
all shareholders of the issuing public corporation have dissenters' rights as provided in this chapter.

(c) [Fair value] means a value not less than the highest price paid per share by the acquiring person in the control share acquisition.

**IND. CODE ANN. § 23-1-42-11 (West 1989).**

**Cashout Rights:** Five states (Nevada, North Carolina, South Dakota, Wyoming, and Utah) have adopted CSASs that are linked to "cashout" statutes, wherein dissenting shareholders may demand that the controlling person purchase their shares at a judicially determined fair price. These CSAS/cashout statutes are distinct from stand-alone cashout statutes. *Compare S.D. CODIFIED LAWS § 47-33-16 (1988) with 15 PA. CONS. STAT. ANN. § 2541-2548 (1983, rev. Oct. 1, 1989); ME. REV. STAT. ANN. tit. 13A, § 910 (1986).*

*Fair Value* is never less than the highest price paid in CSA.

**Opt Out.**

RIGHT TO OPT OUT OF CHAPTER A corporation's articles of incorporation or bylaws may provide that this chapter does not apply to control share acquisitions of shares of the corporation. To be effective, any such provision must have been adopted prior to the control share acquisition. Absent such provision, control shares of an issuing public corporation acquired in a control share acquisition have only such voting rights as are conferred by [voting rights approval requirements].

**UTAH CODE ANN. § 61-6-6 (1989).**

**Wait Period:** Twenty-five states follow Indiana's fifty day wait period before which a board need not call a special CSA meeting. Effective 9-27-90, Arizona amended its CSAS to extend the maximum time period in which a board must call a CSA meeting from fifty-five days to ninety days—this is the first CSAS to extend the wait period beyond the sixty day period of the Williams Act.

**D. Constitutionality**

The United States Supreme Court upheld Indiana's CSAS in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987). Indiana's Control Share Acquisition Act neither conflicts with the Williams' Act under the Supremacy Clause nor violates the Commerce Clause. The Indiana Act provides that, without the affirmative noninterested majority vote of each class, CSA shares lack voting rights.
<table>
<thead>
<tr>
<th>State</th>
<th>Domestic Coverage/Nexus</th>
<th>Control Share Thresholds</th>
<th>Shareholder Approval Percentages &amp; Approval Requirements</th>
<th>Target's Rights Given Noncompliance of CSAS</th>
<th>Disclosure Requirements</th>
<th>Opt Out</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>(same as BCS)</td>
<td>1) 20%-33.3%</td>
<td>majority disinterested voting shares</td>
<td>REDEMPTION at market value</td>
<td>std info stmt; definitive financing stmt prerequisite for shareholder mtg</td>
<td>OPT OUT with majority noninterested shareholder amendment or by board amendment within 45 days of effective date</td>
</tr>
<tr>
<td></td>
<td>§§ 10-1201, 10-1211 to 10-1217</td>
<td>2) 33.3%-50%</td>
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<tr>
<td>Florida</td>
<td>100 shareholders and (1) principal place of business or principal office or substantial assets within Florida; and (2) 1,000 or 10% Florida shareholders or 10% Florida shares; (3) (foreign) 500 Florida employees and $5 M payroll</td>
<td>3) majority</td>
<td>majority noninterested voting shares</td>
<td>REDEMPTION at fair value; DISSENTERS' rights at fair value</td>
<td>std info stmt</td>
<td>OPT OUT in articles or bylaws prior to CSA</td>
</tr>
<tr>
<td></td>
<td>§§ 607.0901 - 607.1101</td>
<td></td>
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</tr>
<tr>
<td>Hawaii</td>
<td>100 shareholders and principal place of business or substantial assets in Hawaii.</td>
<td>(1) 10%-20%</td>
<td>majority noninterested voting shares</td>
<td>Cannot vote or transfer shares for one year; REDEMPTION “either at the price at which the shares were acquired or at book value per share”</td>
<td>std info stmt</td>
<td>OPT OUT in articles</td>
</tr>
<tr>
<td></td>
<td>§§ 415-171, 415-172</td>
<td>(2) 20%-30%</td>
<td></td>
<td></td>
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<tr>
<td>Idaho</td>
<td>(same as BCS)</td>
<td>(3) 30%-40%</td>
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<tr>
<td></td>
<td>§§ 30-1601 to 30-1614</td>
<td>(4) 40%-50%</td>
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<td></td>
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<td>(5) at least a majority</td>
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<tr>
<td>Indiana</td>
<td>100 shareholders and (1) principal place of business, principal office, or substantial Indiana assets; and (2) 10% or 1,000 Indiana shareholders, or 10% Indiana shares</td>
<td>(1) 20%-33.3%</td>
<td>Majority all voting power and majority noninterested voting power</td>
<td>REDEMPTION at fair value</td>
<td>std info stmt</td>
<td>To OPT OUT, bylaws or articles must so provide before the CSA.</td>
</tr>
<tr>
<td></td>
<td>§§ 23-1-42-1 to 23-1-42-11</td>
<td>(2) 33.3%-50%</td>
<td></td>
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<td></td>
<td></td>
<td>(3) majority or more of all voting power</td>
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<tr>
<td>State</td>
<td>Domestic Coverage/Nexus</td>
<td>Control Share Thresholds</td>
<td>Shareholder Approval Percentages &amp; Approval Requirements</td>
<td>Target's Rights Given Noncompliance of CSAS</td>
<td>Disclosure Requirements</td>
<td>Opt Out</td>
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<tr>
<td>Kansas</td>
<td>100 shareholders and (1) principal place of business, principal office, or substantial assets within Kansas; and (2) 10% or 10,000 Kansas shareholders or 10% of its shares owned by Kansas residents or 2,500 Kansas shareholders</td>
<td>(1) 20%-33.3% (2) 33.3%-50% (3) majority or more of all voting power</td>
<td>Majority all voting power and majority of noninterested voting shares entitled to elect directors</td>
<td>REDEMPTION at market value</td>
<td>std info stmt</td>
<td>OPT OUT in bylaws or articles before the CSA.</td>
</tr>
<tr>
<td>La.</td>
<td>100 shareholders and (1) principal place of business, principal office, or substantial assets within Louisiana; (2) 10% or 10,000 Louisiana shares; (3) (foreign only) 2,000 Louisiana employees</td>
<td>(1) 20%-33.3% (2) 33.3%-50% (3) majority or more of all voting power</td>
<td>Majority all voting power and Majority noninterested voting shares entitled to be cast by voting group</td>
<td>REDEMPTION at fair cash value</td>
<td>std info stmt; commitment for financing before CSA meeting</td>
<td>OPT OUT in bylaws or articles before the CSA (or by amendment for foreign corporations)</td>
</tr>
<tr>
<td>Md.</td>
<td>100 shareholders</td>
<td>(1) 20%-33.3% (2) 33.3%-50% (3) majority or more of all voting power</td>
<td>⅞ noninterested voting shares</td>
<td>REDEMPTION at fair value</td>
<td>std info stmt; definitive financing statement prerequisite for shareholder meeting</td>
<td>OPT OUT in bylaws or articles before the CSA.</td>
</tr>
<tr>
<td>Mass.</td>
<td>200 shareholders and (1) principal executive office or substantial assets in Massachusetts; and (2) 10% Massachusetts shareholders, or 10% of shares owned by Massachusetts residents. (3) (foreign) majority employees or assets in Massachusetts.</td>
<td>(1) 20%-33.3% (2) 33.3%-50% (3) majority or more of all voting power</td>
<td>Majority noninterested shares entitled to vote generally in the election of directors.</td>
<td>REDEMPTION at fair value</td>
<td>std info stmt</td>
<td>OPT OUT in bylaws or articles before the CSA (or by amendment)</td>
</tr>
<tr>
<td>Mich.</td>
<td>100 or more shareholders; (1) principal place of business, principal office, or substantial assets within Michigan; (2) 10% or 10,000 Michigan shareholders or 10% of Michigan shares</td>
<td>(1) 20%-33.3% (2) 33.3%-50% (3) majority or more of all voting power</td>
<td>Majority all voting power and majority of noninterested voting shares entitled to elect directors</td>
<td>REDEMPTION at fair value</td>
<td>std info stmt; or definitive financing statement</td>
<td>OPT OUT in bylaws or articles before the CSA.</td>
</tr>
<tr>
<td>Minn.</td>
<td>50 shareholders and (1) principal place of business, principal executive office, or at least $1 million Minnesota assets and (2) 10% or 1,000 Minnesota shareholders, or 10% Minnesota shares</td>
<td>(1) 20%-33.3% (2) 33.3%-50% (3) majority or more of all voting power</td>
<td>Majority all outstanding voting power and majority disinterested voting power</td>
<td>REDEMPTION at market value.</td>
<td>std info stmt; definitive financing agreement required for CSA meeting</td>
<td>OPT OUT in bylaws or articles approved by shareholders</td>
</tr>
<tr>
<td>State</td>
<td>Domestic Coverage/Nexus</td>
<td>Control Share Thresholds</td>
<td>Shareholder Approval Percentages &amp; Approval Requirements</td>
<td>Target’s Rights Given Noncompliance of CSAS</td>
<td>Disclosure Requirements</td>
<td>Opt Out</td>
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</tr>
<tr>
<td>Miss.</td>
<td>All; no nexus requirement</td>
<td>(1) 20%-33.3% &lt;br&gt;(2) 33.3%-50% &lt;br&gt;(3) majority or more of all voting power</td>
<td>Majority all outstanding voting power entitled to vote at meeting; and majority all noninterested voting power entitled to vote at such meeting</td>
<td>REDEMPTION at fair value &lt;br&gt;DISSENTERS’ RIGHTS at fair value</td>
<td>std info stmt</td>
<td>OPT OUT in articles before CSA</td>
</tr>
<tr>
<td>Mo.</td>
<td>(same as BCS)</td>
<td>(1) 20%-33.3% &lt;br&gt;(2) 33.3%-50% &lt;br&gt;(3) majority</td>
<td>Majority all voting power and majority noninterested voting power</td>
<td>REDEMPTION at fair value; &lt;br&gt;DISSENTERS’ RIGHTS at fair value.</td>
<td>std info stmt</td>
<td>OPT OUT in articles or bylaws before CSA</td>
</tr>
<tr>
<td>Neb.</td>
<td>(same as BCS)</td>
<td>(1) 20%-33.3% &lt;br&gt;(2) 33.3%-50% &lt;br&gt;(3) majority or more of all voting power</td>
<td>Affirmative vote of majority of noninterested shares</td>
<td>none</td>
<td>std info stmt</td>
<td>OPT OUT in original articles or by board amendment within 45 days of Act’s enactment</td>
</tr>
<tr>
<td>Nevada</td>
<td>200 shareholders, at least 100 of whom are shareholders of record AND residents of Nevada and “does business” in Nevada</td>
<td></td>
<td>Majority of outstanding shares or affected class</td>
<td>REDEMPTION at average price paid for control shares; &lt;br&gt;DISSENTERS’ RIGHTS at fair value; &lt;br&gt;CASHOUT RIGHTS at fair price</td>
<td>std info stmt</td>
<td>OPT OUT in bylaws or articles before CSA.</td>
</tr>
<tr>
<td>§ 55-9A-01 to 55-9A-09</td>
<td>(1) substantial assets in North Carolina; &lt;br&gt;and (2) principal place of business or principal office in North Carolina; and &lt;br&gt;(3) either 10% North Carolina shares or shareholders</td>
<td>(1) 20%-33.3% &lt;br&gt;(2) 33.3%-50% &lt;br&gt;(3) majority of all voting power</td>
<td>Majority of noninterested shares entitled to vote for directors</td>
<td>REDEMPTION at fair value &lt;br&gt;CASHOUT RIGHTS at fair price</td>
<td>std info stmt</td>
<td>OPT OUT in director-adopted bylaw (or in original articles for corporations formed after 8-12-87)</td>
</tr>
<tr>
<td>State</td>
<td>Domestic Coverage/Nexus</td>
<td>Control Share Thresholds</td>
<td>Shareholder Approval Percentages &amp; Approval Requirements</td>
<td>Target's Rights Given Noncompliance of CSAS</td>
<td>Disclosure Requirements</td>
<td>Opt Out</td>
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</tbody>
</table>
| Ohio    | See BCS (50 or more shareholders and principal place of business, principal executive offices, or substantial assets within Ohio) | (1) 20%-33.3%  
(2) 33.3%-50%  
(3) majority of voting power | Affirmative vote of majority of voting power represented at the meeting and majority of noninterested voting power; CSA must occur within 360 days therefrom | none                                        | std info stmt            | OPT OUT in articles or bylaws by shareholder amendment; majority voting shares may further require director consent for CSA |
| Okla.   | 1,000 or more shareholders; (1) principal place of business, principal office, or substantial assets within Oklahoma; and (2) 10% Oklahoma shares or shareholders or 10,000 Oklahoma shareholders. | 1) 20%-33.3%  
2) 33.3%-50%  
3) majority or more of all voting power | Majority noninterested voting share approval | REDEMPTION at fair value  
DISSENTERS' RIGHTS at fair value | std info stmt            | OPT OUT in articles or bylaws |
| Oregon  | 100 or more shareholders; (1) principal place of business, principal office or substantial assets in Oregon; (2) 10% or 10,000 Oregon shareholders or 10% Oregon shares. | 1) 20%-33.3%  
2) 33.3%-50%  
3) majority or more of all voting power | Majority all voting power; and Majority of noninterested voting power | DISSENTERS' RIGHTS at fair value | std info stmt            | OPT OUT in original articles or bylaws or by an amendment therefrom with majority shareholder approval |
| Pa.     | (see BCS)                                                                               | 1) 20%-33.3%  
2) 33.3%-50%  
3) 50% or more of all voting power | Majority of all voting power and majority of disinterested shares at a CSA meeting | REDEMPTION at prevailing market price | std info stmt            | OPT OUT in bylaws within 90 days of enactment, in original articles, or by amendment within 90 days of registration |
| S.C.    | Either registered or (1) $25 million gross assets, or (2) 100 shareholders and principal place of business, principal office or substantial assets in South Carolina, and (3) 10% South Carolina shares/stockholders, or 10,000 South Carolina shareholders. | 1) 20%-33.3%  
2) 33.3%-50%  
3) majority or more of all voting power | Majority of noninterested shares | REDEMPTION at fair value  
DISSENTERS' RIGHTS at fair value | std info stmt            | OPT OUT in bylaws before CSA |
<table>
<thead>
<tr>
<th>State</th>
<th>Domestic Coverage/Nexus</th>
<th>Central Share Thresholds</th>
<th>Shareholder Approval Percentages &amp; Approval Requirements</th>
<th>Target's Rights Given Noncompliance of CSA</th>
<th>Disclosure Requirements</th>
<th>Opt Out</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Dakota</td>
<td>(see BCS)</td>
<td>1) 20%-33.3%</td>
<td>Majority all voting power; and majority noninterested voting power</td>
<td>REDEMPTION at market value; DISSENTERS' RIGHTS / CASHOUT RIGHTS at fair value</td>
<td>std info stmt</td>
<td>OPT OUT in articles or by amendment proposed by board and approved by majority voting power before CSA</td>
</tr>
<tr>
<td></td>
<td>§ 47-53-8 to 47-53-16</td>
<td>2) 33.3%-50%</td>
<td></td>
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</tr>
<tr>
<td></td>
<td>Tenn.</td>
<td>3) majority or more of all voting power</td>
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</tr>
<tr>
<td></td>
<td>§ 48-35-301 et seq.</td>
<td>1) 20%-33.3%</td>
<td>Majority of noninterested shares</td>
<td>REDEMPTION at fair value</td>
<td>std info stmt</td>
<td>OPT IN required in charter or bylaws</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2) 33.3%-50%</td>
<td></td>
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<td></td>
<td></td>
<td>3) majority or more of all voting power</td>
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<td></td>
<td>100 shareholders and (1) principal place of business, principal office, or substantial assets in Tennessee; and (2) 10% or 10,000 Tennessee shareholders or 10% Tennessee shares</td>
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</tr>
<tr>
<td></td>
<td>§ 61-6-1 et seq.</td>
<td>1) 20%-33.3%</td>
<td>Majority of noninterested shares</td>
<td>REDEMPTION at fair market value</td>
<td>std info stmt</td>
<td>OPT OUT in articles or bylaws prior to CSA</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2) 33.3%-50%</td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td>3) majority or more of all voting power</td>
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<tr>
<td></td>
<td>100 or more shareholders; (1) principal place of business, principal office, or substantial assets in Utah; and (2) 10% or 10,000 Utah shareholders; or 10% Utah shares.</td>
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</tr>
<tr>
<td>Va.</td>
<td>Domestic corporation with 300 or more shareholders</td>
<td>1) 20%-33.3%</td>
<td>Majority of all noninterested voting shares which may elect directors</td>
<td>REDEMPTION at average price per share paid by acquiror; DISSENTERS’ RIGHTS at fair value</td>
<td>std info stmt</td>
<td>OPT OUT in articles or bylaws “by midnight of the fourth day” following announcement of tender offer</td>
</tr>
<tr>
<td></td>
<td>§ 13.1-728.1 to 13.1-728.9</td>
<td>2) 33.3%-50%</td>
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<td></td>
<td></td>
<td>3) majority or more of all voting power</td>
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<tr>
<td>Wisc.</td>
<td>(1) Total assets exceeding $1 million and 500 shareholders; and (2) 100 Wisconsin shareholders</td>
<td>shares in excess of 20% of voting power shall be limited to 10% voting power</td>
<td>majority of voting power</td>
<td>none</td>
<td>std info stmt</td>
<td>OPT OUT in articles</td>
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<td>180.1150</td>
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</tr>
<tr>
<td>Wyoming</td>
<td>All</td>
<td>1) 20%-33.3%</td>
<td>Majority of both (i) all outstanding shares; (ii) all noninterested shares</td>
<td>REDEMPTION at fair value</td>
<td>std info stmt</td>
<td>OPT OUT in articles of bylaws before or at time target receives acquiring person stmt</td>
</tr>
<tr>
<td></td>
<td>§ 17-18-301</td>
<td>2) 33.3%-50%</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>3) majority or more of all voting power</td>
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</tbody>
</table>
IV. Directors' Duties Statutes (DDS)

A. Introduction

Directors' Duties Statutes (DDS) or "non-stockholder constituency" statutes provide directors with a legal basis for considering nonshareholder interests in change-of-control contexts. Thus, collateral, in the event of shareholder litigation, these statutes afford directors breathing room for reasonably rejecting a takeover offer that might be in the best interests of the shareholders.

B. Legislative Intent

Most legislatures enact these statutes to facilitate directors' consideration of long-term corporate interests and societal welfare rather than solely or primarily short-term shareholder welfare. For example, the committee comment accompanying Ohio's 1984 amendments authorizing directors to consider nonshareholders stated that the legislature believed that existing law permitted directors to consider nonshareholders' interests and that the amendment was intended to "specify and clarify the breadth of the interests" which directors could consider. Corporation Law Committee, Comment, 1984 Ohio St. Bar Ass'n Rep. 540.

Indiana's general assembly has stated:

In enacting this article, the general assembly established corporate governance rules for Indiana corporations . . . . The general assembly intends to reaffirm certain of these corporate governance rules to ensure that the directors of Indiana corporations, in exercising their business judgment, are not required to approve a proposed corporate action if the directors in good faith determine, after considering and weighing as they deem appropriate the effects of such action on the corporation's constituents, that such action is not in the best interests of the corporation . . . . Therefore, the general assembly intends:

(1) to reaffirm that this section allows directors the full discretion to weigh [nonshareholder constituency] factors . . . .

(2) to protect both directors and the validity of corporate action taken by them in the good faith exercise of their business judgment after reasonable investigation.


C. Typical Terminology

Nonshareholder interests: The statutes vary greatly in the degree of discretion given to directors. Among the factors directors are allowed to consider:

- short-term and long-term interests of the corporation and its subsidiaries
- interests of, or effects on, current and retired employees, customers, creditors, and suppliers
- communities in which the corporation and its subsidiaries operate
— interests of, or effects on, the local, state, and national economies

*Opt in:* Georgia requires that shareholders elect to be covered by amending articles of incorporation.

**D. Constitutionality**

The constitutionality of DDSs is not currently in question.
## E. Summary of State DDSs

<table>
<thead>
<tr>
<th>State &amp; Citation</th>
<th>Nonshareholder Interests to Consider</th>
<th>Limits on Scope of Judicial Review</th>
<th>Express Duties or Limits of Board Duties</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Arizona § 10-1202</strong></td>
<td>A director shall consider the long term as well as short term interests of the corporation and its shareholders, including the possibility that long term interests may be best served by the continued independence of the corporation</td>
<td>none</td>
<td>— mandatory consideration</td>
</tr>
</tbody>
</table>
|                  |                                      |                                   | — "this section shall not modify the duties of the position of directors in any matter outside the scope of this chapter."
| **Connecticut § 33-313(e)** | In takeover context: (1) the long-term as well as short-term interests of corporation; (2) the long-term as well as short-term interests of shareholders; (3) Employees, suppliers, creditors, and customers; (4) Community and society; (5) the possibility that long term interests may be best served by the continued independence of the corporation; (6) Any other factors director reasonably believes to be in the best interests of the corporation | none | mandatory consideration in a takeover context (director "shall consider...") |
| **Florida § 607.0830(3)** | (a) long-term prospects and interests of the corporation and its shareholders, and the (b) Social, economic, legal, or other effects of any action on: (1) employees, suppliers and customers; (2) communities and society; (3) economy of state and of the nation. *** [shareholders also mentioned] | none | none |
| **Georgia § 14-2-202(b)(5)** | (1) employees, customers, suppliers, and creditors (2) communities (3) "All other factors directors consider pertinent" | none | These provisions "shall be deemed solely to grant discretionary authority to the directors and shall not be deemed to provide to any constituency any right to be considered."
<p>| <strong>Hawaii § 415-35</strong> | A director may consider: (1) employees, customers, suppliers, and creditors (2) economy of the state and nation; (3) community and societal considerations (without limitation) (4) the long-term as well as short-term interests of the corporation, including, without limitation, the possibility that long term interests may be best served by the continued independence of the corporation | none | none |</p>
<table>
<thead>
<tr>
<th>State &amp; Citation</th>
<th>Nonshareholder Interests to Consider</th>
<th>Limits on Scope of Judicial Review</th>
<th>Express Duties or Limits of Board Duties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Idaho § 30-1702</td>
<td>(1) employees, suppliers, customers, and community; (2) the long-term as well as short-term interests of the corporation, including, without limitation, the possibility that these interests may be best served by the continued independence of the corporation</td>
<td>none</td>
<td>mandatory consideration of long-term interests</td>
</tr>
<tr>
<td>Illinois Ch. 32, para. 8.85</td>
<td>Board of directors, committee of board, individual directors and individual officers may consider: (1) employees, suppliers, and customers (2) communities (3) all other pertinent factors</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Indiana § 23-1-35-1(F)</td>
<td>In any matter, a board may consider both the short term and long term best interests of the corporation; A director may consider: (1) Employees, suppliers and customers (2) Communities (3) &quot;Any other factors directors consider pertinent&quot;</td>
<td>Determination of a majority of the interested directors of the board of directors &quot;shall conclusively be presumed to be valid unless it can be demonstrated that the determination was not made in good faith after reasonable investigation.&quot;</td>
<td>Directors are not required to consider the effects of a proposed corporate action on any particular corporate constituency as controlling If the board of directors determines to reject an offer it deems not in the best interest of the corporation, the board of directors has no obligation to refrain from opposing offer</td>
</tr>
<tr>
<td>Iowa § 490.1108</td>
<td>In takeover context, a director may consider: (1) employees, suppliers, creditors, and customers; (2) communities (3) the long term and short term interests of the corporation, including the possibility that long term interests may be best served by the continued independence of the corporation</td>
<td>&quot;Consideration of any or all of the community interest factors is not a violation of the business judgment rule or of any duty of the director to the shareholders...&quot;</td>
<td>&quot;If the board of directors determines to reject [an offer it deems not in the best interest of the corporation], the board of directors has no obligation to [refrain from opposing offer].&quot;</td>
</tr>
<tr>
<td>Kentucky § 271B.12-210(4)</td>
<td>(1) employees, customers, suppliers, and creditors (2) economy of the state and nation; (3) community and societal considerations (4) the possibility that long term interests may be best served by the continued independence of the corporation</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>State &amp; Citation</td>
<td>Nonshareholder Interests to Consider</td>
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<tr>
<td>Louisiana § 12:92(G)</td>
<td>In takeover context, directors may consider: (1) offeror's consideration; estimated future and liquidation prices; premiums paid other corporations in similar transactions; political, economic, and other factors bearing on stock prices and corporation’s financial condition and future prospects. (2) social and economic effects on employees, customers, creditors, and communities; (3) offeror's financial condition, competence, experience, and integrity.</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Maine Title 13A § 716</td>
<td>The directors and officers may consider: (1) effects on employees, customers, creditors, and communities; (2) all other pertinent factors</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Massachusetts Ch. 156B § 65</td>
<td>A director may consider: (1) employees, customers, suppliers, and creditors (2) economy of the state, region, and nation, community and societal considerations (3) the possibility that long term interests may be best served by the continued independence of the corporation *** [shareholders also mentioned]</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Minnesota § 302A.251</td>
<td>A director may consider (1) employees, customers, suppliers, and creditors (2) economy of the state and nation, community and societal considerations (3) the possibility that long term interests may be best served by the continued independence of the corporation *** [shareholders also mentioned]</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Missouri § 351.347</td>
<td>In takeover context, the board of directors may consider (1) social, legal, and economic effects on employees, suppliers, customers and others having similar relationships with corporation; (2) communities; (3) offeror's price in relation to board's estimate of current and future value of corporation; (4) political, economic and other factors bearing on security prices generally or the current market value of the corporation's securities in particular; (5) offeror's integrity, financial wherewithal and competence. *** [shareholders also mentioned]</td>
<td>none</td>
<td>Directors not required to respond to any particular acquisition proposal</td>
</tr>
<tr>
<td>State &amp; Citation</td>
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<tr>
<td>Nebraska § 21-2035(1)</td>
<td>A director may consider Employees, suppliers and customers of corporation and communities</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>New Jersey § 14A:6-14(4)</td>
<td>Where change of control is involved, directors may consider long and short term interests of corporation and shareholders</td>
<td>none</td>
<td>If the board of directors determines to reject an offer it deems not in the best interest of the corporation, the board of directors has no obligation to refrain from opposing offer</td>
</tr>
<tr>
<td>New Mexico § 53-11-35(D)</td>
<td>A director may consider: (1) employees, customers, suppliers, and creditors (2) economy of the state and nation, (3) impact on community (4) the possibility that long term interests may be best served by the continued independence of the corporation</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>New York § 717(b)</td>
<td>Corporation's (1) growth prospects; (2) employees, customers and creditors; (3) ability to contribute to communities as a going concern *** [shareholders also mentioned]</td>
<td>none</td>
<td>This DDS does not “create any duties owed by any director to any person...or abrogate any duty of the directors...”</td>
</tr>
<tr>
<td>Ohio §§ 1701.13 and 1701.59</td>
<td>A director may consider: (1) employees, suppliers, creditors, customers; (2) community and societal considerations; economy of Ohio and of the nation; (3) the possibility that long term interests may be best served by the continued independence of the corporation (4) effect of any future indebtedness</td>
<td>Directors may resist a change or potential change in control of the corporation if they, by a majority vote of a quorum determine that the change or potential change is opposed to or not in the best interests. — clear and convincing evidence standard used for changes in control — directors will be scrutinized solely under the ordinary business judgment rule (i.e., Ohio rejects heightened Unocal std)</td>
<td>— Time frame at directors' discretion</td>
</tr>
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<tr>
<td>Oregon § 60.357</td>
<td>In takeover context, directors may consider:</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td></td>
<td>(1) social, legal, and economic effects on employees, suppliers, customers and on the communities and areas in which corporation operates;</td>
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<td></td>
<td>(2) economy of Oregon and of the nation;</td>
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<td>(3) the possibility that long term interests may be best served by the continued independence of the corporation</td>
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<tr>
<td></td>
<td>(4) other relevant factors  *** [shareholders also mentioned]</td>
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</tbody>
</table>
| Pennsylvania § 1721(c) | The board, a committee of the board, or individual directors may consider:                         | Board actions affecting an acquisition to which a majority of disgruntled directors assent are presumed to be in the best interests of the corporation (clear and convincing evidence standard) -- nonshareholder constituencies denied standing; -- absent a breach of fiduciary duty, lack of good faith, or self-dealing, a director will not be subject to Unocal's heightened burden of proof | § 1721 “does not impose upon the board of directors . . . any legal . . . duties . . .”
|                   | (1) employees, suppliers, customers;                                                               |                                   | — “directors shall not be required . . . to regard any corporate interests [as dominant].”
<p>|                   | (2) community                                                                                        |                                   | — directors not required to redeem poison pills or to take any action solely because of the effect on potential acquisitions. |
|                   | (3) the effects of changes in control on all constituencies (including creditors);                  |                                   |                                        |
|                   | (4) benefits from long term plans and the possibility that the interests may be best served by remaining independent. |                                   |                                        |
|                   | (5) resources, intent and conduct of suitor                                                         |                                   |                                        |
| Rhode Island § 7-5.2-8 | The board or committees therefrom, or individual directors may consider:                          | none                              | “If the board of directors determines that any business combination is not in the best interests of the corporation, it may reject such business combination. [T]he board shall have no obligation to facilitate, to remove any barriers to, or to refrain from impeding, the business combination.” |
|                   | (1) employees, suppliers, creditors, customers;                                                     |                                   |                                        |
|                   | (2) community                                                                                        |                                   |                                        |
|                   | (3) the possibility that long term interests may be best served by the continued independence of the corporation |                                   |                                        |</p>
<table>
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</thead>
<tbody>
<tr>
<td>South Dakota § 47-33-4</td>
<td>In takeover context, board and individual directors may consider:</td>
<td>&quot;The consideration of those factors shall not constitute a violation of the director's fiduciary duty to the corporation or its shareholders. . .&quot;</td>
<td>If the board of directors determines to reject an offer it deems not in the best interest of the corporation, the board of directors has no obligation to refrain from opposing offer</td>
</tr>
<tr>
<td></td>
<td>(1) employees, suppliers, creditors, customers;</td>
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<tr>
<td></td>
<td>(2) community and societal considerations; economy of South Dakota and of the nation;</td>
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<tr>
<td></td>
<td>(3) the possibility that long term interests may be best served by the continued independence of the corporation</td>
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</tr>
<tr>
<td>Tennessee § 48-35-204</td>
<td>In takeover context, resident corporations, its officers, and its directors shall not be held liable for considering:</td>
<td>Corporation, directors, officers not liable</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(1) employees, customers, suppliers, communities;</td>
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<td></td>
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<td></td>
<td>(2) any other relevant factor</td>
<td></td>
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<tr>
<td>Virginia § 13.1-727.1</td>
<td>A director may consider:</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td></td>
<td>(1) employees, suppliers, creditors, customers;</td>
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<tr>
<td></td>
<td>(2) community and societal considerations; economy of Virginia and of the nation;</td>
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</tr>
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<td></td>
<td>(3) the possibility that long term interests may be best served by the continued independence of the corporation</td>
<td></td>
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</tr>
<tr>
<td>Wisconsin § 180.305</td>
<td>A director or officer may consider:</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td></td>
<td>(1) employees, customers, suppliers,</td>
<td></td>
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<td></td>
<td>(2) communities;</td>
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<td></td>
</tr>
<tr>
<td></td>
<td>(3) any other relevant factor</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wyoming § 17-16-830</td>
<td>A director may consider:</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td></td>
<td>(1) employees, suppliers, creditors, customers;</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(2) communities;</td>
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<td></td>
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<td></td>
<td>(3) economies of Wyoming and of the nation;</td>
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<tr>
<td></td>
<td>(4) the possibility that long term interests may be best served by the continued independence of the corporation</td>
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<tr>
<td></td>
<td>(5) &quot;any other factors relevant to promoting or preserving public or community interests.&quot;</td>
<td></td>
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</tr>
</tbody>
</table>
A. Introduction

Fair price statutes (FPS) require that certain business combinations be approved by a supermajority vote of the target’s shareholders unless a statutorily determined fair price is paid. A bidder failing to offer a fair price to all target shareholders cannot proceed with a business combination unless the business combination receives the approval of a supermajority (typically 66.6%) of disinterested outstanding shares.

Although these statutes impose supermajority voting requirements for mergers, sales of assets, liquidations and recapitalizations, they are silent on tender offers. The supermajority requirements generally include both eighty percent outstanding share vote and \( \frac{2}{3} \) disinterested vote.

Relation to business combinations: Typically, a shareholder vote is required for approval of a business combination by \( \frac{2}{3} \) of the outstanding disinterested shares (some states require additional approval by 80% of all outstanding shares). Also, because FPSs are often adopted by states in conjunction with BCSs, the supermajority voting requirement of the FPS may not engage until after the expiration of the moratorium imposed by the BCS.

B. Legislative Intent

The statute is intended to limit inadequate or coercive two-tiered and freeze-out bids by regulating the “second-step” of two-tier transactions.

C. Typical Terminology

Interested Shareholder generally includes ten percent beneficial owners of voting stock.

Opt out provisions allowing a corporation to elect not to be governed usually require the same supermajority vote.

Fair Price Formulas, although relatively complex and varied, seek to assure fair prices to shareholders at least as high as the highest price paid by the interested shareholder for any shares within the past two years. Typically, fair price formulae require a bidder to pay the highest of: (1) the highest price paid for the company shares in a period (e.g., 2 years) before the proposed business combination is announced; (2) the market value per share on the date the proposed business combination is announced or the date on which the bidder crosses the threshold from a disinterested to an interested shareholder; or (3) a value determined by averaging these two formulae. FPSs may also impose procedural criteria for nonapproved tender offers (e.g., no self-dealing transactions).

Market Value: Most states define market value as the highest closing sale price “during the 30 day period immediately preceding the
date in question [of a share]” or “during the period beginning with and including the determination date and for 30 days prior to such date.”

_Determination date_ means the date on which an interested shareholder became an interested shareholder.

**D. Constitutionality**

The constitutionality of FPSs is not currently in question.
### E. State FPSs

<table>
<thead>
<tr>
<th>State</th>
<th>BCS</th>
<th>Price Formula</th>
<th>Vote Required</th>
<th>Interested Shareholder</th>
<th>Other (Opt Out) (override)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>Yes</td>
<td>For common shares, the higher of: (1) highest per share price paid by interested shareholder at time she owned 5% of voting shares (a) within prior 3 years or (b) in the transaction in which shareholder became interested; plus interest net of dividends paid; (2) MV on announcement date or determination date, whichever is higher; plus interest net of dividends paid</td>
<td>Unless FP requirements are met: (1) prior board approval; (2) majority noninterested shareholder approval</td>
<td>10%</td>
<td>3 year freeze</td>
</tr>
<tr>
<td>Connecticut</td>
<td>YES</td>
<td>For common shares, the higher of: (1) highest per share price paid by interested shareholder (a) within prior 2 years or (b) in the transaction in which shareholder became interested (2) MV on announcement date or determination date, whichever is higher (3) AVERAGE: Result from (2) times fraction of: highest price per share paid by interested shareholder over 2 years OVER MV on first day of 2 year period</td>
<td>(1) Board, and (2) 80% voting power; and (3) 66.6% noninterested voting power.</td>
<td>10%</td>
<td>OPT OUT in orig articles or both (1) 80% shareholder vote and (2) 66.6% noninterested shareholder vote.</td>
</tr>
<tr>
<td>Florida</td>
<td>NO</td>
<td>The highest of: (1) highest per share price paid by interested shareholder in prior 2 years of announcement date or determination date; (2) FMV on announcement date or determination date, whichever is higher (3) AVERAGE: “Ratio FMV” over prior 2 years (4) highest preferential amount per share</td>
<td>2/3 noninterested s/h vote</td>
<td>10%</td>
<td>override: majority disinterested directors; OPT OUT in original articles or amendment by majority noninterested voting power.</td>
</tr>
<tr>
<td>Georgia</td>
<td>YES</td>
<td>For common shares, the higher of: (1) highest per share price paid by interested shareholder (a) within prior 2 years of announcement or (b) in the transaction in which shareholder became interested, whichever is higher (2) MV on announcement date or determination date, whichever is higher</td>
<td>(1) unanimous approval by continuing directors or (2) ⅔ continuing directors' approval and majority noninterested S/H approval</td>
<td>10%</td>
<td>opt in in bylaws; repeal bylaw with ⅓ board and maj s/h approval</td>
</tr>
<tr>
<td>State</td>
<td>BCS</td>
<td>Price Formula</td>
<td>Vote Required</td>
<td>Interested Shareholder</td>
<td>Other (Opt Out) (override)</td>
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</tr>
<tr>
<td>Idaho</td>
<td>YES</td>
<td>For common shares, the higher of:</td>
<td>(1) prior board or (2) 5/3 noninterested S/H approval</td>
<td>10%</td>
<td>see BCS</td>
</tr>
<tr>
<td>§§ 30-1701 to 30-1710</td>
<td></td>
<td>(1) highest per share price paid by interested shareholder at time she owned 5% of voting shares (a) within prior 3 years of announcement or (b) in the transaction in which shareholder became interested; plus interest net of cash dividends; (2) MV on announcement date or determination date, whichever is higher</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Illinois</td>
<td>YES</td>
<td>For common shares, the higher of:</td>
<td>80% voting shares and majority disinterested shares OR 2/3 disinterested directors</td>
<td>10%</td>
<td>80% voting power and majority disinterested vote</td>
</tr>
<tr>
<td>Ch. 32, 7.65</td>
<td></td>
<td>(1) highest per share price paid by interested shareholder (a) within prior 2 years of announcement date or (b) in the transaction in which shareholder became interested (2) MV on announcement date or determination date, whichever is higher</td>
<td></td>
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</tr>
<tr>
<td>Indiana</td>
<td>YES</td>
<td>For common shares, the higher of:</td>
<td>(1) prior board approval; (2) majority shareholder vote 5 years after business combination</td>
<td>10%</td>
<td>OPT OUT in original articles or 30 days after a board resolution or bylaw amendment or amendment to articles approved by disinterested shareholders with 18 month delay</td>
</tr>
<tr>
<td>§§ 23-1-43-1, 23-1-43-24</td>
<td></td>
<td>(1) highest per share price paid by interested shareholder at time she owned 5% of voting shares (a) within prior 5 years of announcement date or (b) in the transaction in which shareholder became interested; plus interest net of dividends paid; (2) MV on announcement date or determination date, whichever is higher; plus interest net of dividends paid</td>
<td></td>
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</tr>
<tr>
<td>Kentucky</td>
<td>YES</td>
<td>For common shares, the higher of:</td>
<td>Business Combination approved by the affirmative vote of: (1) 80% total voting power; (2) 66.6% noninterested voting power</td>
<td>10%</td>
<td>OPT OUT in articles</td>
</tr>
<tr>
<td>§§ 271B.12-200 to 271B.12-220</td>
<td></td>
<td>(1) highest per share price paid by interested shareholder (a) within prior 5 years of announcement date or (b) in the transaction in which shareholder became interested, whichever is higher; or (2) MV on announcement date or determination date, whichever is higher (3) Result from (2) times fraction of highest price per share paid by interested shareholder over 5 years OVER MV on first day of 5 year period</td>
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<td></td>
</tr>
<tr>
<td>State</td>
<td>BCS</td>
<td>Price Formula</td>
<td>Vote Required</td>
<td>Interested Shareholder</td>
<td>Other (Opt Out) (override)</td>
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</tr>
<tr>
<td>Louisiana</td>
<td>NO</td>
<td>For common shares, the higher of:</td>
<td>(1) 80% of all</td>
<td>10%</td>
<td>orig. art.; or 80% all voting power and ½ non-interested vote</td>
</tr>
<tr>
<td>§§ 12.132 to 12.134</td>
<td></td>
<td>(1) highest per share price paid by interested shareholder (a) within prior 2 years or (b) in the transaction in which shareholder became interested (2) MV on announcement date or determination date, whichever is higher (3) Result from (2) times fraction of: highest price per share paid by interested shareholder over 2 years OVER MV on first day or 2 year period</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maryland</td>
<td>YES</td>
<td>For common shares, the higher of:</td>
<td>After 5 year freeze, business combination must be (1) recommended by board; and (2) approved by both 80% total voting power and ½ noninterested voting power.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>§§ 3-601 to 3-603</td>
<td></td>
<td>(1) highest per share price paid by interested shareholder at time she owned 5% of voting shares (a) within prior 5 years of announcement date or (b) within 5 years prior to determination date or in transaction in which shareholder became interested; plus interest net of dividends paid; (2) MV on announcement date or determination date, whichever is higher; plus interest net of dividends paid. (3) AVERAGE: result from (2) times fraction of: highest price per share paid by interested shareholder over 5 years OVER MV on first day or 5 year period</td>
<td></td>
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</tr>
<tr>
<td>Michigan</td>
<td>YES</td>
<td>For common shares, the higher of:</td>
<td>(1) 90% of total and (2) ½ of noninterested shares (see also BCS)</td>
<td></td>
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</tr>
<tr>
<td>§ 21,200(776) et seq.</td>
<td></td>
<td>(1) highest per share price paid by interested shareholder (a) within prior 2 years or (b) in the transaction in which shareholder became interested (2) MV on announcement date or determination date, whichever is higher</td>
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</tr>
<tr>
<td>Mississippi</td>
<td>NO</td>
<td>For common shares, the higher of:</td>
<td>(1) 80% of total, and (2) ½ of noninterested</td>
<td>20%</td>
<td>maj s/h amendment within one year from date of incorp.</td>
</tr>
<tr>
<td>§§ 79-25-1 to 79-25-7</td>
<td></td>
<td>(1) highest per share price paid by interested shareholder (a) within prior 2 years of announcement date or (b) in the transaction in which shareholder became interested (2) MV on announcement date or determination date, whichever is higher (3) AVERAGE: Result from (2) times fraction of: highest price per share paid by interested shareholder over 2 years OVER MV on first day or 2 year period</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>BCS</td>
<td>Price Formula</td>
<td>Vote Required</td>
<td>Interested Shareholder</td>
<td>Other (Opt Out) (override)</td>
</tr>
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<tr>
<td>Missouri</td>
<td>YES</td>
<td>For common shares, the higher of:</td>
<td>(1) prior board approval;</td>
<td>20%</td>
<td>see BCS</td>
</tr>
<tr>
<td>§ 351.459</td>
<td></td>
<td>(1) highest per share price paid by interested shareholder at</td>
<td>(2) majority noninterested</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>time she owned 5% of voting shares (a) within 5 years of</td>
<td>shareholder approval after 5</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>announcement date or (b) within 5 years prior to the</td>
<td>year freeze</td>
<td></td>
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<tr>
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<td></td>
<td>transaction in which shareholder became interested; plus interest net</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>of dividends paid;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>YES</td>
<td>For common shares, the higher of:</td>
<td>(1) prior board approval;</td>
<td>10%</td>
<td>see BCS</td>
</tr>
<tr>
<td>§§ 14A:10A.1 to 14A:11A</td>
<td></td>
<td>(1) highest per share price paid by interested shareholder at</td>
<td>(2) ½ noninterested</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>time she owned 5% of voting shares (a) within 5 years of</td>
<td>shareholder approval;</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>announcement date or (b) within 5 years prior to the</td>
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<tr>
<td></td>
<td></td>
<td>transaction in which shareholder became interested; plus interest net</td>
<td></td>
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</tr>
<tr>
<td></td>
<td></td>
<td>of dividends paid;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td>YES</td>
<td>For common shares, the higher of:</td>
<td>(1) prior board approval;</td>
<td>20%</td>
<td>OPT OUT in (1) original</td>
</tr>
<tr>
<td>§ 912</td>
<td></td>
<td>(1) highest per share price paid by interested shareholder at</td>
<td>(2) majority noninterested</td>
<td></td>
<td>articles; (2) pre 3-31-86 bylaw</td>
</tr>
<tr>
<td></td>
<td></td>
<td>time she owned 5% of voting shares within 5 years of</td>
<td>shareholder approval after 5</td>
<td></td>
<td>amendment; (3) bylaw</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(a) announcement date, or (b) in the transaction in which</td>
<td>(years</td>
<td></td>
<td>approved by noninterested</td>
</tr>
<tr>
<td></td>
<td></td>
<td>shareholder became interested; plus interest net of</td>
<td></td>
<td></td>
<td>shareholder vote with 18</td>
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<td></td>
<td></td>
<td>dividends paid;</td>
<td></td>
<td></td>
<td>month lag</td>
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<td></td>
<td></td>
<td>(2) MV on announcement date or acquisition date,</td>
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<td></td>
<td></td>
<td>whichever is higher; plus interest net of dividends paid</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>N. Carolina</td>
<td>NO</td>
<td>(1) cash received by shareholders / immediately prior</td>
<td>95% of total</td>
<td>20%</td>
<td>original articles or board</td>
</tr>
<tr>
<td>§§ 55-75 to 55-79</td>
<td></td>
<td>market price equals or exceeds highest per share price /</td>
<td></td>
<td></td>
<td>bylaw within 90 days of</td>
</tr>
<tr>
<td></td>
<td></td>
<td>market price immediately prior to acquisition;</td>
<td></td>
<td></td>
<td>Act</td>
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<tr>
<td></td>
<td></td>
<td>(2) cash received equals or exceeds highest per share price and</td>
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<td></td>
<td></td>
<td>“EPS multiple.”;</td>
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<td></td>
<td></td>
<td>(3) other procedural requirements</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>YES</td>
<td>For common shares, the higher of:</td>
<td>½ voting power</td>
<td>10%</td>
<td>see BCS</td>
</tr>
<tr>
<td>§ 1704.03</td>
<td></td>
<td>(1) FMV on either announcement date or share acquisition date;</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>(2) highest price paid by interested shareholder within 3</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>years immediately before and including either (a)</td>
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<tr>
<td></td>
<td></td>
<td>announcement date or (b) share acquisition date. N.B.: Above determinations</td>
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<tr>
<td></td>
<td></td>
<td>shall include interest net of dividends</td>
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</tr>
<tr>
<td>State</td>
<td>BCS</td>
<td>Price Formula</td>
<td>Vote Required</td>
<td>Interested Shareholder</td>
<td>Other (Opt Out) (override)</td>
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</tr>
<tr>
<td>Pennsylvania</td>
<td>YES</td>
<td>For common shares, the higher of:</td>
<td>see BCS</td>
<td>20%</td>
<td>see BCS</td>
</tr>
<tr>
<td>§§ 2551-2556</td>
<td></td>
<td>(1) highest per share price paid by interested shareholder at</td>
<td></td>
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<td></td>
<td>time she owned 5% of voting shares within prior 5 years of</td>
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<td>(a) announcement date, or (b) in the transaction in which</td>
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<td></td>
<td>shareholder became interested; plus interest net of</td>
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<td>dividends paid;</td>
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<td>(2) MV on announcement date or determination date,</td>
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<td></td>
<td></td>
<td>whichever is higher; plus interest net of dividends paid</td>
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</tr>
<tr>
<td>Rhode Island</td>
<td>YES</td>
<td>For common shares, the higher of:</td>
<td>(1) prior board approval;</td>
<td>10%</td>
<td>see BCS</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(1) highest per share price paid by interested shareholder at</td>
<td>(2) 2/3 noninterested</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>time she owned 5% of voting shares within prior 5 years of</td>
<td>shareholder approval after 5 year freeze</td>
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<td>(a) announcement date, or (b) in the transaction in which</td>
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<td></td>
<td></td>
<td>shareholder became interested; plus interest net of</td>
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<td>dividends paid;</td>
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<td>(2) MV on announcement date or acquisition date,</td>
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<tr>
<td></td>
<td></td>
<td>whichever is higher; plus interest net of dividends paid</td>
<td></td>
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</tr>
<tr>
<td>S. Carolina</td>
<td>YES</td>
<td>For common shares, the higher of:</td>
<td>(1) prior board approval;</td>
<td>10%</td>
<td>see BCS</td>
</tr>
<tr>
<td>§§ 35-2-201</td>
<td></td>
<td>(1) highest per share price paid by interested shareholder at</td>
<td>(2) majority noninterested</td>
<td></td>
<td></td>
</tr>
<tr>
<td>to 35-2-226</td>
<td></td>
<td>time she owned 5% of voting shares within prior 2 years of</td>
<td>shareholder approval after 2 years.</td>
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<td>(a) announcement date, or (b) in the transaction in which</td>
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<td>shareholder became interested; plus interest net of</td>
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<td>dividends paid;</td>
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<td>(2) MV on announcement date or determination date,</td>
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<tr>
<td></td>
<td></td>
<td>whichever is higher; plus interest net of dividends paid</td>
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</tr>
<tr>
<td>S. Dakota</td>
<td>YES</td>
<td>For common shares, the higher of:</td>
<td>majority outstanding</td>
<td>10%</td>
<td>see BCS</td>
</tr>
<tr>
<td>§ 47-33-18</td>
<td></td>
<td>(1) highest per share price paid by interested shareholder within prior 3</td>
<td>shareholder approval after 4 years.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>years of (a) announcement date, or (b) in the transaction in which</td>
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<tr>
<td></td>
<td></td>
<td>shareholder became interested; plus interest net of</td>
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<td>dividends paid;</td>
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<td>(2) MV on announcement date or acquisition date,</td>
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<tr>
<td></td>
<td></td>
<td>whichever is higher; plus interest net of dividends paid</td>
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</tr>
<tr>
<td>State</td>
<td>BCS</td>
<td>Price Formula</td>
<td>Vote Required</td>
<td>Interested Shareholder</td>
<td>Other (Opt Out) (override)</td>
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</tr>
<tr>
<td>Tennessee</td>
<td>YES</td>
<td>For common shares, the higher of:</td>
<td>1/6 noninterested shareholder approval after 5 years</td>
<td>10%</td>
<td>see BCS</td>
</tr>
<tr>
<td>§§ 48-35-201 to 48-35-209</td>
<td></td>
<td>(1) highest per share price paid by interested shareholder within prior 5 years of (a) announcement date, or (b) in the transaction in which shareholder became interested; plus interest net of dividends paid; (2) MV on announcement date or determination date, whichever is higher; plus interest net of dividends paid; (3) The highest preferential amount per share plus dividends</td>
<td>see BCS</td>
<td>10%</td>
<td>see BCS</td>
</tr>
<tr>
<td>Virginia</td>
<td>YES</td>
<td>For common shares, the higher of:</td>
<td></td>
<td>10%</td>
<td>see BCS</td>
</tr>
<tr>
<td>§§ 13.1-726 to 13.1-728</td>
<td></td>
<td>(1) highest per share price paid by interested shareholder within prior 2 years of (a) determination date or (b) in the transaction in which shareholder became interested; plus interest net of dividends paid; (2) FMV on announcement date or determination date, whichever is higher; plus interest net of dividends paid; (3) Result from (2) times fraction of: highest price per share paid by interested shareholder over 2 years OVER MV on first day or 2 year period; (4) highest preferential amount.</td>
<td>see BCS</td>
<td>10%</td>
<td>see BCS</td>
</tr>
<tr>
<td>Washington</td>
<td>YES</td>
<td>Highest fair market value of the consideration paid by any interested shareholder within 24 months of the proposed transaction.</td>
<td>majority board</td>
<td>20%</td>
<td>orig art; 1/6 non-interested shareholder amendment</td>
</tr>
<tr>
<td>§§ 23A.08.425</td>
<td></td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Wisconsin</td>
<td>YES</td>
<td>For common shares, the higher of:</td>
<td>80% of total;</td>
<td>10%</td>
<td>orig art; 80% all votes and 1/6 non-interested votes; a corporation that is not &quot;an issuing public corporation&quot; may OPT IN in articles.</td>
</tr>
<tr>
<td>§§ 180.1151 to 180.1132</td>
<td></td>
<td>(1) highest share price paid by the &quot;significant shareholder&quot; within two year period immediately before tender offer or in transaction in which shareholder became interested (2) market value on announcement date or determination date or on acquisition date (3) The highest preferential amount per share plus dividends</td>
<td>1/3 of noninterested</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
VI.  Share Rights Plan Endorsement Statutes (SRPES)

A.  Introduction

Share rights plan endorsement statutes (SRPES) endorse a domestic target's use of poison pill rights plans (PPRPs). PPRPs typically involve the grant of rights to target shareholders to purchase target shares at a substantial discount from the market price (typically fifty percent) absent board redemption/approval.

B.  Legislative Intent

To the extent there is some judicial uncertainty as to the legality of adopting PPRPs, these statutes are intended to minimize that uncertainty.

C.  Typical Language

Most statutes contain language allowing a corporation to limit or void the rights of acquiror: The terms of rights may include conditions that "preclude or limit the exercise . . . of such rights . . . or may void any rights . . . ."

D.  Constitutionality

The constitutionality of SRPESs is not currently in question.
E. State SRPESs

<table>
<thead>
<tr>
<th>State</th>
<th>Critical Language</th>
<th>Opt out Provisions</th>
<th>Review</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colorado</td>
<td>A corporation with registered voting shares may create and issue &quot;rights, options, or other securities which contain, without limitation, restrictions or conditions that preclude or limit&quot; the exercise of such rights by any person who acquires &quot;a specified number or percentage of the corporation's outstanding voting shares or that invalidate or void such [rights]&quot;</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Georgia</td>
<td>The terms of rights may include conditions that &quot;preclude or limit the exercise . . . of such rights . . . or may void any [rights] . . . .&quot;</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Hawaii</td>
<td>&quot;[A] corporation may create and issue . . . rights or options entitling the holders thereof to purchase from the corporation shares of any class . . . [and] may include conditions on the exercise of such rights or options, including conditions that preclude the holder . . . of at least a specified percentage of the common shares . . . from exercising such rights or options.&quot;</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Idaho</td>
<td>This act does not restrict or limit directors' &quot;authority to adopt [plans] that deny rights, privileges, power or authority to the holder . . . of at least a specified number of shares or percentage of share ownership or voting power in certain circumstances.&quot;</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Illinois</td>
<td>&quot;[A] corporation may create and issue . . . rights or options entitling the holders thereof to purchase from the corporation, upon such consideration, terms and conditions as may be fixed by the board, shares of any class or series . . . [and] may include, without limitation, restrictions or conditions that preclude or limit the exercise, transfer or receipt of such rights or options by any [persons] owning or offering to acquire a specified number or percentage of the outstanding common shares or other securities of the corporation . . . or that invalidate or void such rights or options held by any such [persons].&quot;</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Indiana</td>
<td>&quot;directors are not required to . . . redeem any rights under or to render inapplicable a shareholder rights plan . . . .&quot; The board of directors shall determine the terms upon which the rights, options, or warrants are issued, their form and content, and the consideration for which the share or other securities are to be issued. The rights . . . may be issued with or without consideration, and may (but need not) be issued pro rata.&quot;</td>
<td>none</td>
<td>see DDS (majority disinterested directors' approval of any antitakeover matter is presumed to be valid given good faith)</td>
</tr>
<tr>
<td>State</td>
<td>Critical Language</td>
<td>Opt out Provisions</td>
<td>Review</td>
</tr>
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</tr>
<tr>
<td>Iowa</td>
<td>&quot;The terms and conditions of stock rights or options issued by the corporation may include, without limitation, restrictions, or conditions that preclude or limit the exercise, transfer, or receipt of such rights or options by a person, or group of persons, owning or offering to acquire a specified number or percentage of the outstanding common shares or other securities . . . or that invalidate or void such stock rights or options held by an offeror . . .&quot;</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Directors may create rights containing &quot;provisions which adjust the option price or number of shares issuable under such rights or options in the event of an acquisition of shares or a reorganization, merger, . . . [or] other occurrence involving such corporation. Such rights or options may also include conditions that prevent the holder . . . of at least a specified number or percentage of shares of the corporation . . . from exercising those rights or options.&quot;</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>The terms and conditions of any rights or options issued by the corporation may &quot;include, without limitation, restrictions or conditions that preclude or limit the exercise, transfer, receipt or holding of such rights or options by any person owning or offering to acquire a specified number or percentage of the outstanding stock or other securities . . . or that preclude or limit such actions based on such other factors, including the nature of identity of such persons, as the director determine to be reasonable and in the best interests of the corporation. . . .&quot;</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Michigan</td>
<td>&quot;A corporation may issue rights, options, or warrants for the purchase of shares of the corporation. The board shall determine the terms upon which the rights, options, or warrants are issued, their form and content, and the consideration for which the share are to be issued.&quot;</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Nevada</td>
<td>Target may &quot;impose stricter requirements on the acquisition of controlling interest in the corporation than [Nevada’s Control Share Acquisition Statute] to protect the interests of the corporation and its stockholders, including, but not limited to, adopting or executing plans, arrangements or instruments that deny rights, privileges, power or authority to a holder of a specified number of shares or percentage of share ownership.&quot;</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>State</td>
<td>Critical Language</td>
<td>Opt out Provisions</td>
<td>Review</td>
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</tr>
<tr>
<td>New Jersey</td>
<td>A corporation may create and issue rights or options entitling the holders thereof to purchase from the corporation &quot;shares of any class or series for such consideration and upon such terms and conditions as may be fixed by the board. *** The rights or options may contain provisions which adjust the rights or options in the event of an acquisition of shares ***&quot;</td>
<td>OPT OUT in articles of incorporation BEFORE the authorization and issuance of rights</td>
<td>none</td>
</tr>
<tr>
<td>New York</td>
<td>&quot;***[T]he terms and conditions of [rights] may include, without limitation, restrictions or conditions that preclude or limit the exercise, transfer or receipt of such [rights] by an interested shareholder . . . or that invalidate or void such [rights] held by any such interested shareholder. . . .&quot;</td>
<td>none</td>
<td>provides for judicial review</td>
</tr>
<tr>
<td>North Carolina</td>
<td>The terms and conditions of stock rights or options issued by the corporation may include, without limitation, restrictions or conditions that preclude or limit the exercise, transfer or receipt of such rights or options by a person, or group of persons, owning or offering to acquire a specified number or percentage of the outstanding common shares or other securities or that invalidate or void such stock rights or options held by an offeror</td>
<td>none</td>
<td>provides for judicial review</td>
</tr>
<tr>
<td>Ohio</td>
<td>The securities may contain any terms for the protection of the holders of options including provisions &quot;concerning rights in the event of reorganization, merger, consolidation or sale of the entire assets of the corporation. *** [and including] conditions that preclude the holder[s] of at least a specified number or percentage of the outstanding common shares of a corporation from exercising the options.&quot;</td>
<td>A corporation may &quot;resist a change or potential change in control of the corporation if the directors by a majority vote of a quorum determine that the change or potential change. . . is not in the best interests of the corporation.&quot;</td>
<td>none</td>
</tr>
<tr>
<td>Oregon</td>
<td>Rights may include &quot;restrictions or conditions that: (a) Preclude or limit the exercise, transfer or receipt of [rights] by any person owning or offering to acquire a specified number or percentage of the outstanding stock or other securities of the corporation. . .; or (b) Invalidate or void the [rights] held by any such person. . .&quot;</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>The securities may contain any terms for the protection of the holders of options including provisions &quot;concerning rights or adjustments in the event of reorganization, merger, consolidation or sale of assets, . . . or other fundamental changes.&quot;</td>
<td>none</td>
<td>standard of care unaffected</td>
</tr>
<tr>
<td>State</td>
<td>Critical Language</td>
<td>Opt out Provisions</td>
<td>Review</td>
</tr>
<tr>
<td>----------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>--------------------</td>
<td>-------------------------------------------</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>The terms and conditions any rights or options issued by the corporation may include, without limitation, restrictions or conditions that preclude or limit the exercise, transfer, receipt or holding of such rights or options by any person owning or offering to acquire a specified number or percentage of the outstanding stock or other securities or that preclude or limit such actions based on such other factors, including the nature of identity of such persons, as the director determine to be reasonable and in the best interests of the corporation.</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>South Dakota</td>
<td>“The terms and conditions of such rights or options may include, without limitation, provisions which adjust the option price or number of shares issuable under such rights or options in the event of an acquisition... “ and may preclude or limit acquirer’s entitlement to &quot;exercise or transfer&quot; such rights upon owning or offering to acquire a specified number or percentage of the outstanding common shares or other securities or that invalidate or void such stock rights or options held by an offeror.</td>
<td>none</td>
<td>board has no duty to redeem rights plan</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Rights or options may contain terms and conditions, including conditions that preclude or limit the exercise, transfer, or receipt of such rights or options by a holder owning or offering to acquire a specified number or percentage of the outstanding common shares or other securities.</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Utah</td>
<td>Terms of rights plans may &quot;preclude or limit the exercise, transfer, or receipt of the [rights]&quot; or may void the rights.</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Virginia</td>
<td>&quot;[T]he terms and conditions of rights . . . may include . . . restrictions or conditions that preclude or limit the exercise [of] or void such rights . . . held by designated persons . . . .&quot;</td>
<td>none</td>
<td>none</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>&quot;[A] corporation may create and issue . . . rights or options entitling the holders thereof to purchase from the corporation shares of any class . . . . . . . The rights or options may contain provisions which adjust the rights or options in the event of an acquisition of shares . . . .&quot;</td>
<td>&quot;[U]nless otherwise provided in the articles of incorporation before the creation or issuance of the rights or options . . . . .&quot;</td>
<td>none</td>
</tr>
<tr>
<td>Wyoming</td>
<td>&quot;A corporation may issue rights, options, or warrants for the purchase of shares of the corporation. The board of directors shall determine the terms upon which the rights, options, or warrants are issued, their form and content, and the consideration for which the shares are to be issued.&quot;</td>
<td>none</td>
<td>none</td>
</tr>
</tbody>
</table>
VII. Antigreenmail Statutes (AGMS)

A. Introduction

Antigreenmail statutes (AGMS) restrict a target's ability to pay "greenmail" to shareholders. Greenmail is the target's purchase of its own shares—invariably at a substantial premium—from an uninvited suitor. These statutes typically direct that corporations shall not purchase any voting shares from a person who owns more than a certain percentage of the target's voting power for more than "market price" (typically) if the shares have been owned by such person for less than a specified period of years, unless (1) such purchase is approved at a meeting of shareholders by the affirmative vote of a majority of target's voting power, excluding interested shares or (2) the target makes an offer to all holders of shares.

B. Legislative Intent

When corporations pay out "greenmail" to raiders, only the raider benefits: corporate assets are channeled from productive corporate uses to raiders' personal gain. Not only does this harm the corporation and its shareholders, but the frequent pay out of large sums encourages raiders to seek out "greenmail."

C. Typical Terminology

Average Market Price means the average closing sale price during the thirty trading days immediately preceding either (1) the purchase of the shares in question or, (2) given a tender offer, the earlier of the commencement of the tender offer or the making of the announcement of the tender offer.

Market Value means either (1) the average of the highest and lowest closing market price for relevant shares during the thirty day period preceding the purchase and sale of the shares or, (2) given a tender offer, the average of the highest and lowest closing price for relevant shares during the thirty trading days preceding the commencement of tender offer or the announcement of the tender offer.

D. Constitutionality

The constitutionality of these provisions is not currently in question.
E. State Legislation

<table>
<thead>
<tr>
<th>State</th>
<th>Maximum Repurchase Price</th>
<th>Applicable % of Share Ownership</th>
<th>Applicable Time Period of Ownership</th>
<th>Override Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>Average market price</td>
<td>5%</td>
<td>Less than 3 years</td>
<td>Majority shareholder vote or equal offer by offeror to all shareholders</td>
</tr>
<tr>
<td>§ 10-1204</td>
<td></td>
<td></td>
<td></td>
<td>Purchase on open market, shareholder vote or equal offer by offeror to all shareholders</td>
</tr>
<tr>
<td>Michigan</td>
<td>Average market price</td>
<td>3%</td>
<td>Less than 2 years</td>
<td></td>
</tr>
<tr>
<td>§ 450.1368</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Minnesota</td>
<td>Market value</td>
<td>5%</td>
<td>Less than 6 months</td>
<td>Majority shareholder vote; equal offers to all shareholders</td>
</tr>
<tr>
<td>§ 302A.553</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td>Market Value</td>
<td>10%</td>
<td>Less than 2 years</td>
<td>Board and shareholder approval or equal offer by offeror for all shares</td>
</tr>
<tr>
<td>§ 515(e)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tennessee</td>
<td>Market Value</td>
<td>3%</td>
<td>Less than 2 years</td>
<td>Majority shareholder approval or equal offer by offeror to all shareholders</td>
</tr>
<tr>
<td>§§ 48-35-501 to 48-35-505</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Market Value</td>
<td>3%</td>
<td>Less than 2 years</td>
<td>Repurchase of less than 5%, approval by majority of outstanding shares or same offer made for all shares</td>
</tr>
<tr>
<td>§ 180.725(5)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

VIII. Disclosure Statutes (DS)

A. Introduction

Disclosure statutes require bidders to disclose certain information regarding their offer for a target. Typical statutes prescribe specific waiting periods between disclosure and offer and grant state officials the authority to hold hearings and the discretion to determine the adequacy of the disclosure.

B. Legislative Intent

As to legislative intent, Indiana's statute is typical:

The general assembly finds that it is often difficult for corporate shareholders to obtain sufficient information to make an informed and timely decision when faced with the questions of accepting or rejecting a takeover offer.

By enacting this chapter, it is the intent and purpose of the general assembly to provide for full and fair disclosure of all material information concerning takeover offers to shareholders of Indiana corporations, so that the opportunity of each shareholder to make an informed and well-reasoned investment decision may be secured. It is also the purpose of the general assembly to protect shareholders of Indiana corporations from being disadvantaged by [such practices as multiple proration pools and two-step transactions].

C. Typical Terminology

Before a tender offer becomes effective, the offeror must file a registration statement, usually with the state commissioner, detailing prescribed information. These registration statements and their accompanying schedules are often required to contain, inter alia, the following information:

1. **Items sent to offeree:** Copies of all prospectuses, brochures, advertisements, circulars, letters, or other matter used by the offeror to disclose to offerees all information material to a decision to accept or reject the offer;

2. **Offeror's identity:** the identity and background of all persons on whose behalf the acquisition of any equity security of the target has been or is to be effected;

3. **Offeror's funds:** the source and amount of funds or other considerations used or to be used in acquiring any equity security of the target;

4. **Offeror's plans:** a statement of any plans which the offeror, upon gaining control of target, would pursue, including plans to liquidate, sell assets, effect a merger or consolidation, or make any other major change in its business, corporate structure, management personnel, or policies of employment;

5. **Offeror's interest in target—shares:** the number of shares of any equity security of the target of which each offeror is beneficial owner or has the right to acquire;

6. **Offeror's interest in target—contracts:** particulars as to any contracts, arrangements, or understandings to which each offeror is party with respect to any equity security of the target, including without limitation transfers of any equity security, joint ventures, loan or option arrangements, puts and calls, guarantees of loan, guarantees against loss, guarantees of profits, division of losses or profits;

7. **Offeror's interest in target—recent transactions:** the approximate amount of any material interest of any director, officer, ten percent shareholder, affiliate, partner or associate of the offeror in any recent material transaction (e.g., during the past three years) or in any proposed material transactions with the target to which the offeror was or is to be a party;
Arrangement between offeror and target: a description of any direct or indirect arrangement or understanding between each offeror and the target with respect to future employment of offeror or target, service by any such person on either board and compensation paid for such service;

Annual reports: its latest annual report and proxy materials or “substantially comparable” information;

Constituency impact statement: information that discloses to employees, creditors and other interested persons in the state any significant impact upon them that may result from the consummation of the tender offer;

Various other requirements: other requirements that vary among the states.

D. Constitutionality

Many disclosure statutes or provisions thereof have been declared unconstitutional based on violation of the Commerce Clause, see Edgar v. MITE Corp., 457 U.S. 624 (1982), or the Supremacy Clause, e.g., National City Lines, Inc. v. LLC Corp., 687 F.2d 1122 (8th Cir. 1982).

MITE held that the Illinois Business Takeover Act (the Illinois Act) violated the Commerce Clause because the indirect burdens that it imposed on interstate commerce were excessive in relation to the local interest the statute purported to protect. Thus, the constitutionality of first-generation disclosure statutes following the Illinois Act invalidated in MITE may be in question. These first-generation statutes generally required tender offer open periods longer than those required of the Williams Act. Many statutes often provided for a state hearing and review of the terms and fairness of the transaction. Second-generation disclosure statutes which steer clear of these MITE pitfalls have generally been upheld. See, e.g., Cardiff Acquisitions Inc. v. Hatch, 751 F.2d 906 (8th Cir. 1984) (upholding Minnesota’s Ch. 80B).
### E. State Legislation

<table>
<thead>
<tr>
<th>State &amp; Cite</th>
<th>Required Disclosure</th>
<th>Waiting Period/open period</th>
<th>Power of Comm’r</th>
<th>Terms of Tender Offer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arkansas</td>
<td>registration statement containing: (1) copies of everything to be sent to offerees; (2) identity of offeror; (3) source and amount of funds; (4) liquidation plans; (5) target shares offeror owns or has right to acquire; (6) offeror’s contracts involving target’s shares; (7) material interests in target; (8) employment arrangements with target; (9) annual reports; (10) constituency impact statement; (11) other information.</td>
<td>10 days/10 days</td>
<td>Hearing within 20 days of filing; determination within 30 days of filing</td>
<td>all equal terms</td>
</tr>
</tbody>
</table>

Conn.  

| §§ 36-458 to 36-461 | registration statement containing: (1) copies of everything to be sent to offerees; (2) identity of offeror; (3) source and amount of funds; (4) liquidation plans; (5) target shares offeror owns or has right to acquire; (6) offeror’s contracts involving target’s shares; (7) material interests in target; (8) employment arrangements with target; (9) annual reports; (10) constituency impact statement; (11) other information. | (1) Federal Waiting period, where appropriate, delay effective date of the offer; (2) hold hearing within 20 days of filing; (3) determination 10 days after hearing | (1) summarily all holders same terms |

Hawaii  

| §§ 417E-2 to 417E-5 | registration statement containing: (1) copies of everything to be sent to offerees; (2) identity, background, and description of offeror; (3) source and amount of funds; (4) liquidation plans; (5) target shares offeror owns or has right to acquire, (6) material terms of any contract or arrangement regarding target’s shares. | none | (1) suspend effective date of the offer within 3 days of filing; (2) hold hearing within 10 days of suspension; (3) decision within 3 days of hearing but not more than 16 days after suspension | all holders substantially same terms |

Indiana  

<p>| §§ 25-2-3.1-0.5 to 25-2-3.1-10 | If takeover offer is subject to any federal law, required statement must consist of each document required to be filed with the SEC; otherwise, offeror must file a registration statement containing: (1) information to be sent to offerees &amp; solicitation materials; (2) identity of and material information concerning offeror; (3) source and amount of funds; (4) liquidation plans; (5) target shares offeror owns or has right to acquire; (6) offeror’s contracts involving target’s shares; (7) other information. | 20 bus. days / none | (1) Hearing all shares within 20 business days after registration | substantially same terms |</p>
<table>
<thead>
<tr>
<th>State &amp; Cite</th>
<th>Required Disclosure</th>
<th>Waiting Period/ open period</th>
<th>Power of Comm'r</th>
<th>Terms of Tender Offer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iowa</td>
<td>registration statement containing: (1) copies of all documents required to be filed with the SEC; (2) identity of and material information concerning offeror; (3) source and amount of funds; (4) liquidation plans; (5) target shares offeror owns or has right to acquire; (6) offeror's contracts involving target's shares; (7) solicitation materials &amp; information to be sent to offerees.</td>
<td>none/7 days</td>
<td>(1) suspend effective date of the offer within 3 days of filing; (2) hold hearing within 10 days of suspension; (3) decision within 3 days of hearing but before 16 days after suspension</td>
<td>substantially same terms</td>
</tr>
<tr>
<td>Mass.</td>
<td>registration statement containing: (1) copies of everything to be sent to offerees; (2) identity of offeror; (3) source and amount of funds; (4) liquidation plans; (5) shares offeror owns or has right to acquire; (6) offeror's contracts involving target's shares; (7) &quot;complete information&quot; on operations of offeror; (8) government proceedings (9) other tender offers within past 5 years.</td>
<td>none/15 days</td>
<td>hold hearing within 20 days of filing; adjudications within 45 days of filing</td>
<td>all same terms</td>
</tr>
<tr>
<td>Minn.</td>
<td>registration statement containing: (1) copies of everything to be sent to offerees; (2) identity and description of offeror; (3) source and amount of funds; (4) any plans to materially change corporation, including material changes in management policies, charitable or community contributions, or relationship with suppliers or customers; (5) shares offeror beneficially owns directly or indirectly.</td>
<td>none/7 days</td>
<td>Commissioner must review filing within 3 days, subject to her right to hold a hearing within 10 days; final decision within 19 days after filing; Commissioner's powers limited to determining propriety of disclosure (not fairness of transaction)</td>
<td>all same terms</td>
</tr>
<tr>
<td>Miss.</td>
<td>Disclosure statement shall be filed on SEC's schedule 14D-1 and copies of all materials published by the bidder.</td>
<td>none 15/20 bus. days</td>
<td>Commissioner must review filing within 3 days, subject to her right to hold a hearing within 10 days; final decision within 19 days after filing; Commissioner's powers limited to determining propriety of disclosure (not fairness of transaction)</td>
<td>not specified substantially equivalent terms</td>
</tr>
<tr>
<td>State &amp; Cite</td>
<td>Required Disclosure</td>
<td>Waiting Period/open period</td>
<td>Power of Comm’r Offer</td>
<td>Terms of Tender Offer</td>
</tr>
<tr>
<td>-------------------</td>
<td>--------------------------------------------------------------------------------------</td>
<td>----------------------------</td>
<td>--------------------------------------------------------------------------------------</td>
<td>-----------------------</td>
</tr>
</tbody>
</table>
| Missouri §§ 409.500 to 409.566 | registration statement containing: 
(1) copies of all solicitation materials; 
(2) identity and description of offeror; 
(3) title and numbers of share sought; 
consideration offered; 
(4) source and amount of funds; 
(5) any plans to materially change corporate structure, management, 
personnel, or policies of employment; 
(6) target shares offeror beneficially owns directly or indirectly; 
(7) offeror’s contracts involving target’s shares; 
(7) “complete information” on operations of offeror; 
(8) statement of impact offeror’s plans may have on residents of state; 
(9) Offeror’s community activities and charitable contributions. | none/30 days               | schedule hearing within ten days of filing; hold within 20 days of filing            | all same terms        |
| Nevada §§ 78.376 to 78.3793 | repealed by Ch. 21, L. ‘83, iff. 2-28-83. See § 78-3771 (Disclosure) 
(requires offeror's depositing shares; requires filing any written solicitations with target). | repealed                   | repealed                                                                             | repealed              |
| N.H. §§ 421-A:1 to 421-A:17 | registration statement containing: 
(1) copies of everything to be sent to offerees; 
(2) identity and complete description of offeror; 
(3) source and amount of funds; 
(4) plans to make any major change; 
(5) target shares offeror owns or has right to acquire; 
(6) offeror’s contracts involving target’s shares; 
(7) government proceedings (8) other tender offers within past 5 years 
(9) other information. | none/15 days                | order hearing within 20 days of filing; commence hearing within 25 days of filing; 
determination within 55 days of filing                                                                                     | all same terms        |
| New Jersey §§ 49:5-1 to 49:5-19 | registration statement containing: 
(1) copies of everything to be sent to offerees; 
(2) identity and complete description of offeror; 
(3) source and amount of funds; 
(4) plans to make any material change in corporate structure; 
(5) target shares offeror owns or has right to acquire; 
(6) offeror’s contracts involving target’s shares; 
(7) other information. | 20 days/3 days before term. date | Hold hearing within 20 days of filing; determination within 60 days after conclusion of such hearing | all same terms        |
<table>
<thead>
<tr>
<th>State &amp; Cite</th>
<th>Required Disclosure</th>
<th>Waiting Period/open period</th>
<th>Power of Comm'r Offer</th>
<th>Terms of Tender Offer</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York §§ 1600</td>
<td>registration statement containing: (1) copies of everything to be sent to offerees; (2) identity and description of offeror; (3) title and numbers of share sought; consideration offered; (4) source and amount of funds; (5) any plans to materially change corporate structure, management, personnel, or policies of employment; (6) target shares offeror beneficially owns directly or indirectly; (7) offeror's contracts involving target's shares; (7) &quot;complete information&quot; on operations of offeror; (8) statement of impact offeror's plans may have on residents of state; (9) Offeror's community activities and charitable contributions.</td>
<td>none/30 days</td>
<td>schedule hearing within 10 days of filing; held within 20 days of filing.</td>
<td>all same terms</td>
</tr>
<tr>
<td>to 1613</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Carolina §§</td>
<td>registration statement containing: (1) copies of everything to be sent to offerees; (2) identity and description of offeror; (3) source and amount of funds; (4) any plans to materially change corporate structure, management, personnel, or policies of employment; (5) target shares offeror beneficially owns directly or indirectly; (6) offeror's contracts involving target's shares; (7) concurrent public notice.</td>
<td>30 days/21 days</td>
<td>not specified</td>
<td>all same terms</td>
</tr>
<tr>
<td>78B-1 to 78B-11</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio § 1707.041</td>
<td>registration statement containing: (1) copies of everything to be sent to offerees; (2) identity and description of offeror; (3) source and amount of funds; (4) any plans to materially change corporate structure, management, personnel, or policies of employment; (5) target shares offeror beneficially owns directly or indirectly or has a right to acquire; (6) offeror's contracts involving target's shares; (7) &quot;complete information&quot; on operations of offeror. Information required under Securities Act of 1933 may substitute for above.</td>
<td>none</td>
<td>hearing held within 10 days of suspension; determination within 16 days of suspension.</td>
<td>all same terms</td>
</tr>
<tr>
<td>State &amp; Cite</td>
<td>Required Disclosure</td>
<td>Waiting Period/open period</td>
<td>Power of Comm’r Offer</td>
<td>Terms of Tender Offer</td>
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</tr>
<tr>
<td>Oklahoma</td>
<td>registration statement containing: (1) copies of everything to be sent to offerees; (2) identity and description of offeror; (3) source and amount of funds; (4) any plans to materially change corporate structure, management, personnel, or policies of employment; (5) target shares offeror beneficially owns directly or indirectly or has a right to acquire; (6) offeror’s contracts involving target’s shares; (7) “complete information” on operations of offeror.</td>
<td>none</td>
<td>hearing ordered within 5 days; held within 40 days; adjudicated within 60 days.</td>
<td>all same terms</td>
</tr>
<tr>
<td>Pa.</td>
<td>registration statement containing either copy of federally required § 13(d) statement or: (1) copies of everything to be sent to offerees; (2) identity and description of offeror; (3) title and numbers of share sought; consideration offered; (4) source and amount of funds; (5) any plans to materially change corporate structure, management, personnel, or policies of employment; (6) takeovers during prior 3 years; (7) target shares offeror beneficially owns directly or indirectly; (8) offeror’s contracts involving target’s shares; (9) “complete information” on operations of offeror; (10) offeror’s community activities and charitable contributions.</td>
<td>none/20 days</td>
<td>not specified</td>
<td>all same terms</td>
</tr>
<tr>
<td>South Dakota</td>
<td>registration statement containing either copy of federally required § 13(d) statement or: (1) copies of everything to be sent to offerees; (2) identity and description of offeror; (3) title and numbers of share sought; consideration offered; (4) source and amount of funds; (5) any plans to materially change corporate structure, management, personnel, or policies of employment; (6) takeovers during prior 3 years; (7) target shares offeror beneficially owns directly or indirectly; (8) offeror’s contracts involving target’s shares; (9) “complete information” on operations of offeror; (10) offeror’s community activities and charitable contributions.</td>
<td>none/7 days</td>
<td>not specified</td>
<td>all same terms</td>
</tr>
<tr>
<td>Tennessee</td>
<td>registration statement containing: (1) copies of all solicitation materials; (2) identity and complete description of offeror; (3) source and amount of funds; (4) plans to make any major change; (5) shares offeror owns or has right to acquire; (6) offeror’s contracts involving target’s shares; (7) material information about offeror’s operations during past 3 years.</td>
<td>none</td>
<td>hearing ordered within 5 days; held within 40 days; adjudicated within 60 days.</td>
<td>all same terms</td>
</tr>
</tbody>
</table>
### IX. Parachute Statutes (PS) (some examples)

1. **Tin Parachute Statutes**

   **A. Introduction**

   These plant closing statutes attempt to mitigate unexpected and sudden layoffs resulting from plant closures, partial plant closures, and relocations.

   **B. Legislative Intent**

   See, e.g., *Wash. Bus. Corp. Act. § 23B.10.010* (Supp. 1991): “Hostile or unfriendly attempts to gain control” of Washington corporations can (1) cause corporate management “to dissipate a corporation’s assets in an effort to resist the takeover by selling or distributing” assets to increase the short term gain to shareholders and to
dissipate energies required for strategic planning, market development, capital investment decisions, assessment of technologies, and evaluation of competitive challenges that can damage the long-term interests of shareholders and the economic health of the state by reducing or eliminating the ability to finance investments in research and development, new products, facilities and equipment, and by undermining the planning process for those purposes.

(2) harm the state’s economy by weakening corporate performance and causing unemployment and plant closings.
C. Typical Terminology

The terminology is varied and straightforward.

D. Constitutionality

The constitutionality of these statutes is not currently in question.

E. State Legislation (some examples)

Hawaii's tin parachute statute requires Hawaii's director of labor and industrial relations to: (1) identify job opportunities for which dislocated workers could be retrained and assisted in securing; (2) establish programs to assist dislocated workers to obtain employment through training, assistance, and supportive services; and (3) provide relocation assistance.

The statute requires employers to (1) provide forty-five days prior notice of closings or relocations; (2) provide eligible employees with unemployment compensation. See Haw. Rev. Stat. § 394B (Supp. 1990).


Massachusetts' law entitles eligible employees after a transfer of control to a one-time lump sum payment from the “control transferee.” Upon assuming control, the “control transferee” is responsible for providing written notice to employees and unions of their rights. See Mass. Gen. Laws Ann. ch. 149, § 183 (West 1989).

2. Golden Parachute Statutes

Arizona's statute prohibits targets from entering into or amending agreements containing provisions “that increase, directly or indirectly, the current or future compensation of any officer or director” of the target during any tender offer “or request or invitation for tenders” of target shares. Routine increases in compensation are excepted. See Ariz. Rev. Stat. Ann. 10-1202 (b) (1989). Other states have nearly identical language. See, e.g., Minn. Stat. § 302A.255 subd.3 (1989).