Article

A Comparative Study of the Underlying Policies behind the Taiwanese and U.S. Tender Offer Legislation

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I. INTRODUCTION

With the rise of globalization, enterprises often adopt different strategies to deal with the rapid development of the business environment. In this context, the tender offer (or "takeover bid") is an important strategy to acquire control of corporations, for purposes of pursuing such objectives as expansion, survival, or reaching efficiency equilibrium. In many countries such as U.S. and U.K., the tender offer has become a frequent phenomenon in the corporate takeover arena.[1]

Taiwan first established its tender offer system in 1988. However, there was no tender offer transaction until 1996.[2] Due to the complex procedure, special business culture of Taiwanese enterprises, and restrictions by the government, there have been few tender offer situations in Taiwan. In recent years, tender offer regulations in Taiwan have changed significantly as a result of amendments made to the Securities and Exchange Act ("SEA"). It relaxed the restrictions on tender offers, increased the investors' protection, and accelerated the internationalization of the Taiwanese securities market. Although the Taiwanese government amended the SEA and relevant regulations to further establish a sound tender offer system, problems regarding tender offers remain.

In contrast to tender offers in Taiwan, tender offers in the U.S. have existed for many decades. With the enactment of the Williams Act, the U.S. established its tender offer system in 1968.[3] Basically, the U.S. tender offer system contains the federal and state levels. At the federal level, the tender offer regulations include the Securities Exchange Act of 1934 ("1934 Act" or "Exchange Act")[4] and the relevant Rules promulgated by the United States Securities and Exchange Commission ("SEC" or "Commission"). At the state level, most states have their own tender offer statutes.[5] Because these state tender offer statutes are divergent, the discussion of the U.S. tender offer system in this article will only focus on the federal tender offer regulation.

This article attempts to identify the underlying policies of the regulatory approaches in Taiwan and the U.S. at federal level. In the

1. *See, e.g.*, LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 604 (5th ed. 2004); PAUL L. DAVIES, GOWER AND DAVIES' PRINCIPLES OF MODERN COMPANY LAW 706 (7th ed. 2003).

2. *See* In-Jaw Lai, *Gong-Kai Shou-Gou Di Fa-Li Gui-Fan, Regulation of Tender Offers*, 1(2) REVIEW OF FINANCIAL RISK MANAGEMENT 79 (2005).

3. *See, e.g.*, LOSS & SELIGMAN, *supra* note 1, at 615; THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 479 (4th ed. 2002).

4. 5 U.S.C. § 78a et seq.

5. In general, the development of these state tender offer statutes can be divided into three generations. For the further discussion of state tender offer statutes, please *see* HAZEN, *supra* note 3, at 538-59.

financial law area, because the Taiwanese tender offer system follows the U.S. model and because the U.S. tender offer system is well-established, an understanding of the underlying policies behind the Taiwanese and U.S. tender offer legislation and their current regulations may provide suggestions for improving Taiwanese tender offer regulations. Accordingly, this article aims at drawing lesson from the U.S. experience that might be adopted to the Taiwanese context.

The remainder of this article will be structured as follows: Section 2 discusses the current approaches of regulating tender offers. Then, section 3 analyzes the rationale for the Taiwanese and U.S. tender offer regulations and section 4 provides an overview of the current Taiwanese and U.S. tender offer systems. Section 5 offers suggestions for improving the Taiwanese tender offer system. Finally, the conclusion is in section 6.

II. APPROACHES OF REGULATING TENDER OFFERS

In general, the tender offer means a public offer to purchase a specified number of securities from the target company's security holders at a premium over the current market price.[6] The tender offer is generally open for a limited period of time and often has an effort to take control of the target company.[7] Tender offers can be friendly tender offers or hostile tender offers.[8] In addition, based on the consideration paid by the offeror (or "bidder"), tender offers can be cash tender offers or exchange offers (or "stock tender offers") or a mixture of both.[9]

When confronted with a tender offer, a security holder of the target company may tender his securities to the offeror and then get a premium over the market price. If the security holder tenders his securities and the tender offer fails, he can get his securities back.[10] The security holder may also choose to sell his securities on the securities market such as Stock Exchange or the OTC market because the market price of the target company's securities will rise rapidly after the announcement of a tender

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6. *See, e.g.*, WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 182 (8th ed. 2002); LEWIS D. SOLOMON ET AL., CORPORATIONS LAW AND POLICY: MATERIALS AND PROBLEMS 1170-71 (4th ed. 1998). According to Paragraph 1 of Article 2 of Regulations Governing Tender Offers for Purchase of the Securities of a Public Company promulgated by the FSC pursuant to Paragraph 4 of Article 43-1 of the SEA, the tender offer "means purchase of securities from unspecified persons bypassing the centralized securities exchange market or the over-the-counter (OTC) markets, and instead using public announcement, advertisement, radio broadcast, telecommunication, letters, telephone, presentation show, explanation delivering or other methods to make a public offer."

7. *See id*.

8. *See* KLEIN & COFFEE, *supra* note 6, at 183.

9. *See* LOSS & SELIGMAN, *supra* note 1, at 606; DAVIES, *supra* note 1, at 704.

10. *See* Henry F. Johnson, *Disclosure in Tender Offer Transactions: The Dice are Still Loaded*, 42 U. PITT. L. REV. 1, 2 (1980).

offer.[11] Besides, the security holder may still keep his securities. If the tender offer succeeds, he can invest in the new company and expect that the new company will provide him with a better benefit in the future.[12] No matter what the security holders choose, they need sufficient information to make their decision on how to respond to the tender offer. However, the security holders generally have a disadvantaged position in a tender offer. Therefore, as discussed later, investor protection is always the core of the tender offer regulation.

For the purpose of discussing the underlying policies behind the Taiwanese and U.S. tender offer legislation, it is necessary to comprehend approaches of regulating tender offers. Accordingly, this section will discuss why a tender offer occurs and explore the advantages and disadvantages of different approaches to regulate tender offers.

A. *Motives for Tender Offers*

As stated above, the tender offer often has a premium over the current market price. However, why does an offeror pay such a premium? That is, the tender offeror's motives for tender offers. In general, there are four major theories which may explain the offeror's motives for tender offers.[13] A tender offer made by the offeror is based on at least one of the following theories.

1. *The Disciplinary Theory*

The disciplinary theory considers that the offeror believes that the target company's facilities have not been well utilized because the incumbent management of the target company is inefficient. Besides, the offeror further believes that the target company's facilities will achieve their optimal value under the offeror's management. Therefore, the offeror makes a tender offer to remove the inefficient management and to install its own management.[14] Under this theory, the tender offer plays a role in

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11. *See id*. at 10. This is because arbitrageurs will purchase the securities of the target company from the securities market at a price below the offer price and then tender these securities to the offeror.

12. *See id*. at 6.

13. *See, e.g.*, ROBERT W. HAMILTON, CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES: CASES AND MATERIALS 1000-01 (6th ed. 1998); Gregory R. Andre, *Tender Offers for Corporate Control: A Critical Analysis and Proposals for Reform*, 12 DEL. J. CORP. L. 865, 871-75 (1987); Lucian Arye Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028, 1030-33 (1982).

14. The modern corporate model emphasizes the separation of ownership and control. In general, the owners of a company who are composed of a number of shareholders do not run the company. Nevertheless, the company performance will affect these investors directly. In a company, managers need incentives to work hard. That is, they must enjoy the benefits of their

monitoring the incumbent management. It may prompt the incumbent management to operate efficiently and cause the more efficient use of the target company's facilities.[15] From the viewpoint of this theory, the tender offer is beneficial to the offeror and the security holders of the target company.[16]

2. *The Synergistic Gains Theory*

The synergistic gains theory is another explanation of the tender offeror's motive for tender offers. According to this theory, the offeror intends to make a tender offer because the target company has a complementary character or a special value to the offeror. Through a tender offer, the offeror may achieve the so-called "synergistic gain".[17] The synergistic gains may derive from cost reductions, economies of scale, and so on.[18]

3. *The Firm Expansion Theory*[19]

Sometimes a tender offer made by the offeror is not based on the above reasons. On the contrary, the purpose of making a tender offer is to expand the size of the company because the corporate managers may increase their income and reputation with the expansion of the company.[20]

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efforts. However, most managers cannot gain all benefits of their efforts and sometimes they may find other ways to gain more benefits. These situations will increase the agency costs. Although the incumbent management may recognize that the agency costs can be reduced by improving their performance, most security holders who are passive investors do not have a strong incentive to monitor the company's managers because they cannot gain the profits even though they do it. Besides, most of individual security holders do not have a large number of securities and therefore they cannot compel the incumbent management to change its ways. Accordingly, each security holder will ignore it or choose to sell his securities. The tender offer can offer a solution to this problem. Prospective offerors may "monitor the performance of managerial teams by comparing a corporation's potential value with its value (as reflected by share prices) under current management. When the difference between the market price of a firm's shares and the price those shares might have under different circumstances becomes too great, an outsider can profit by buying the firm and improving its management. The outsider reduces the free riding problem because it owns a majority of the shares. The source of the premium is the reduction in agency costs, which makes the firm's assets worth more in the hands of the acquirer than they were worth in the hands of the firm's managers." Accordingly, the tender offer may play a role in monitoring the manager's performance. *See* Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1169-73 (1981). *See also* HAMILTON, *supra* note 13, at 1000; Andre, *supra* note 13, at 872; Bebchuk, *supra* note 13, at 1030-31.

15. *See* Andre, *supra* note 13, at 873.

16. *See* HAMILTON, *supra* note 13, at 1000.

17. *See id. See also* Andre, *supra* note 13, at 874; Bebchuk, *supra* note 13, at 1031.

18. *See id*.

19. Sometimes it is called the empire building theory. *See, e.g*., KLEIN & COFFEE, *supra* note 6, at 192-93; HAMILTON, *supra* note 13, at 1000-01.

20. *See* Andre, *supra* note 13, at 874-75; Bebchuk, *supra* note 13, at 1033.

In addition, the offeror may ensure its security from other corporate control contests and may increase its market power by means of expanding its company size.[21] Under this theory, a tender offer made by the offeror is based on the self-interests of the offeror's managers. The interests of the offeror's security holders are not the major consideration in a tender offer.[22] Under some situations, it will harm their interests because the offeror may overpay the premium of the tender offer or inefficiency of management may happen after the expansion of the company.[23]

4. *The Undervaluation Theory*

Under the undervaluation theory (or "the exploitation theory"), the offeror makes a tender offer because he considers that the current market price of the target company's securities is undervalued. The purpose of making a tender offer is to exploit the temporary underpriced securities.[24] Nevertheless, through a tender offer, it may stimulate the market to revise the target company's value and the market price of the target company's securities will reflect its true value.[25]

5. *Summary*

The above four theories may explain why a tender offer occurs. However, no one theory can exclusively explain the offeror's motives for tender offers. The tender offeror's motives for tender offers primarily result from the economic benefits by means of replacing the inefficient management of the target company or achieving the synergistic gain.[26] Sometimes the firm expansion theory may provide an explanation regarding the offeror's motives for tender offers. Finally, the undervaluation theory may also explain some special cases under certain circumstances.[27]

B. *Legal Regulation versus Self Regulation*

In order to promote what is beneficial and to abolish what is harmful,

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21. *See* HAMILTON, *supra* note 13, at 1000.
22. *See* Andre, *supra* note 13, at 875.
23. *See, e.g.*, KLEIN & COFFEE, *supra* note 6, at 192-93.
24. Some commentators indicate that this motive should not be discouraged because it gives the securities holders of the target company an opportunity to sell their securities at a fair price. *See* Andre, *supra* note 13, at 872.
25. *See id*. at 871-72. *See also* Bebchuk, *supra* note 13, at 1032-33.
26. *See* Andre, *supra* note 13, at 875-76; Bebchuk, *supra* note 13, at 1033.
27. *See id*.

a proper regulation of tender offers is required. From a legal viewpoint, tender offers involve various areas, especially securities laws. Since the transfer of the securities is the core of tender offers, most countries put the tender offer regulation into their securities laws.[28]

In general, approaches of regulating tender offers can be divided into two major models: the statutory model and the self-regulatory model.[29]

The former governs tender offers through formal statutes enacted by the legislature. The administration institution which is responsible for the supervision of tender offers is often a governmental institution, not a self-regulatory association, and has the rule-making power to promulgate relevant regulations or rules governing tender offers. Besides, the administration institution may have appropriate sanctions against the violator.[30] For example, both Taiwan and the U.S. adopt the statutory model. Both countries have relevant statutes enacted by the legislature and their administrative authorities supervising tender offers have the rule-making power. The major advantage of the statutory model is its enforcement power. Nevertheless, sometimes the statutory model cannot promptly reflect the change in tender offers due to the complex administrative procedures.[31]

In contrast, the latter emphasizes the spirit of self-regulation and often punishes the violator through a public or private reprimand. The advantage of the self-regulatory approach is its low cost, speed, and flexibility than the governmental institution.[32] However, the self-regulatory model often faces the difficulty of enforcing its sanctions which generally rely on the cooperation with other agencies such as the Stock Exchange or the association of which the violator is a member.[33] For example, the British tender offer system adopts the self-regulatory approach. Under the British tender offer system, tender offers are primarily regulated by the City Code on Takeovers and Mergers ("City Code").[34] The City Code is not a statute, but a voluntary self-regulatory code.[35] The Panel on Takeovers and Mergers ("the Panel"), which is a

28. *See, e.g.*, DAVIES, *supra* note 1, at 706.

29. *See* Thomas R. Hurst, *Self Regulation versus Legal Regulation*, 5 COMP. L. 161, 161 (1984).

30. *See id.* at 166.

31. *See id.* at 167.

32. *See id*.

33. *See id*. at 166.

34. The full text of the City Code on Takeovers and Mergers is available from the Panel on Takeovers and Mergers website at http://www.thetakeoverpanel.org.uk/new/codesars/DATA/code.pdf.

35. Although the City Code on Takeovers and Mergers is the primary rules governing tender offers, the Companies Act 1985 and Financial Services and Markets Act 2000 also play a supplementary role. *See* DAVIES, *supra* note 1, at 706.

non-statutory association, supervises tender offers in Britain.[36] The Panel may cooperate with the Department of Trade and Industry, the London Stock Exchange, or the Financial Services Authority. Accordingly, though the decision made by the Panel does not have the power of enforcement, it is widely accepted by the British courts.[37]

Basically, each regulatory model has its merits and demerits; however, different models inevitably reflect the methods adopted to achieve their regulatory goals. To appreciate the methods adopted in a given country, it is necessary to identify the rationale of the regulatory approach. Accordingly, next section will explore the rationale for the Taiwanese and U.S. tender offer regulations.

III. THE RATIONALE FOR THE TAIWANESE AND U.S. TENDER OFFER REGULATIONS

As discussed in section 2, though the tender offer regulation is required, there is usually a variance in the regulatory approaches of different countries. Nevertheless, there are some common objectives or principles among them. According to the International Organization of Securities Commissions' ("IOSCO") opinion, securities regulation shall be based on three major objectives: (1) the protection of investors, (2) ensuring that markets are fair, efficient and transparent, and (3) the reduction of systemic risk.[38] In general, the purpose of the Taiwanese and U.S. tender offer systems is to achieve these objectives.

A. *Background*

1. *The Development of the Taiwanese Tender Offer System*

In order to provide a legal basis for securities market regulations, the Taiwanese government enacted the SEA on April 30, 1968.[39] The SEA "is

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36. For more information regarding the Panel on Takeovers and Mergers, please see the Panel on Takeovers and Mergers website at www.thetakeoverpanel.org.uk.

37. "The Panel is now clearly recognized by the courts, the legislature and the Government as a public body performing public functions on behalf of the State." *See* DAVIES, *supra* note 1, at 709.

38. *See Objectives and Principles of Securities Regulation* 5, IOSCO Document (May 2003). *Available at* http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf (visited Jan. 18, 2006).

39. Before 1968, securities transactions in Taiwan were regulated by the Stock Exchange Law, enacted in Mainland China in 1929. Because the KMT party lost its power in Mainland China during the Chinese civil war, the central government moved to Taiwan in 1949. This old law became obsolete in Taiwan. The Taiwanese government subsequently promulgated the Rules Regulating Securities Traders in 1961. However, it was a temporary regulation and could not reflect the requirement of the securities market in Taiwan. Thus, the SEA was enacted in 1968. *See* SYUE MING YU, ZHENG-QUAN JIAO-YI FA, SECURITIERS REGULATION, 30-32 (4th ed. 2003).

enacted for the purpose of promoting the national economic development and the protection of investors."[40] However, no provision governed tender offers when the SEA was enacted in 1968. With the increase of proxy contests and takeovers in Taiwan, the Taiwanese government amended the SEA in 1988. The 1988 SEA amendment added Article 43-1 to govern the potential tender offers. According to this provision, any tender offer to purchase the securities of a publicly issued company required the Financial Supervisory Commission's ("FSC")[41] approval. Without the FSC's approval, any tender offer was prohibited. This provision also imposed a reporting requirement on any person who acquired more than ten percent of the outstanding securities of a publicly issued company. This report should contain the purpose and the sources of funds of the security acquisition and any other matters required by the FSC. Moreover, this provision also empowered the FSC to promulgate relevant regulations to govern tender offers.[42]

Pursuant to Paragraph 4 of Article 43-1 of the SEA, the FSC promulgated the Regulations Governing Tender Offers for Purchase of the Securities of a Public Company ("the Tender Offer Regulations") in 1995.[43] The Tender Offer Regulations contain the procedure regarding the application for and approval of tender offers and the proceeding of the tender offer process.

Although Taiwan established its tender offer system in 1988, there was no tender offer transaction in Taiwan until Pou-Chen Corporation's acquisition of its subsidiary, Bei-Li Company, in 1996 by means of the tender offer.[44] Another important case regarding tender offers was China Development Industrial Bank's tender offer for Grand Cathay Securities Corporation in 2001.[45] In this case, some issues relating to the Taiwanese tender offer regulation arose. First, some relevant definitions regarding tender offers were not clear. It caused the FSC or courts much trouble determining whether a particular transaction constituted a tender offer. Second, there was no clear punishment about insider trading in relation to tender offers. Third, the defensive tactics employed by the target company

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40. SEA, art. 1.

41. The Financial Supervisory Commission ("FSC") is the major official securities administration agency in Taiwan, which is responsible for supervising the Taiwanese securities markets. For more information regarding the FSC, please see the FSC website at www.fscey.gov.tw.

42. The original art. 43-1 of the SEA was amended in 2002 (Taiwan).

43. Regulations Governing Tender Offers for Purchase of the Securities of a Public Company (hereinafter "the Tender Offer Regulations") was promulgated on September 5, 1995 by the SEC (now FSC), last amended on June 22, 2005 (Taiwan).

44. *See* Lai, *supra* note 2, at 79.

45. *See* Stanley Chou, *Bank Says Tender Offer a Success*, TAIPEI TIMES, May 11, 2001. *Available at* http://www.taipeitimes.com/chnews/2001/05/11/story/0000085339 (visited Jan. 18, 2006).

faced with tender offers and the shareholder protection also resulted in significant questions.

In order to resolve problems arising from tender offers and to increase the international competition, the Taiwanese government passed a significant amendment to the SEA in 2002. The 2002 SEA amendment modified Article 43-1 and added Articles 43-2 to 43-5 to further contour the Taiwanese tender offer system. One of the most important characteristics of this amendment is that the offeror may file a statement with the FSC instead of the FSC's approval prior to a tender offer. Today, the offerors are required only to file a statement with the FSC for recordation of a tender offer. It simplifies the regulatory procedure of tender offers. The new provision also exempts this requirement under certain conditions.[46] In addition, the 2002 amendment also adopts the fair price principle. Under this principle, the offeror must pay all security holders of the target company the best price paid to any security holder.[47] Furthermore, it prohibits the offeror from purchasing securities through any other securities markets during the tender offer period and the offeror cannot cease the tender offer unless under certain conditions prescribed by the SEA or specified by the FSC.[48]

Owing to the 2002 SEA amendment, the FSC significantly amended the Tender Offer Regulations in August and October 2002 respectively. The new Tender Offer Regulations reflected the characteristics of the 2002 SEA amendment and simplified the tender offer procedures. Under the new Tender Offer Regulations, the tender offer application procedure changes from an approval system to a reporting system.[49] The required tender offer period is shortened from 20-60 days to 10-50 days.[50] Moreover, application documents and notice procedures are also simplified. It further emphasizes the principle of full disclosure.[51]

Recently, for the purpose of facilitating tender offers, the FSC further amended the Tender Offer Regulations in June 2005. This amendment

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46. According to Paragraph 2 of Article 43-1 of the SEA, the requirement of filing a statement with the FSC and making a public announcement can be exempted "under the following circumstances: (1) the number of securities proposed for tender offer by the offeror plus the total number of securities of the publicly issued company already obtained by the offeror and its affiliates do not exceed five percent of the total number voting shares issued by the publicly issued company (2) the securities purchased by the offeror through the tender offer are securities of a company of which the offeror holds more than fifty percent of the issued voting shares (3) other circumstances in conformity with the regulations prescribed by the Competent Authority (FSC)."

47. SEA, art. 43-2.

48. *Id*. arts. 43-3, 43-5.

49. The Tender Offer Regulations, art. 7.

50. *Id.* art. 18.

51. *See* Yu Fen Kuo, *Wo-Guo Gong-Kai Shou-Gou Zhi-Du Ji Li-Ci Xiu-Zheng Zhong-Dian Jian-Jie (A Brief Introduction of the Taiwanese Tender Offer System and Key Points of Its Previous Amendments*), 23(7) SECURITIES AND FUTURES MONTHLY 12, 13 (2005).

extends the scope of consideration for tender offers and prohibits an offeree from invoking its offer to sell after the offeror has made a public announcement that the conditions of the tender offer have been achieved, unless otherwise provided by law.[52] Meanwhile, Criteria for Information to be Published in Tender Offer Prospectuses[53] was also amended to enhance the disclosure requirement in a tender offer.

2. *The Development of the U.S. Tender Offer System*

As for the U.S. tender offer system, there was no provision governing tender offers under the federal securities law prior to 1968. Due to the increase of tender offers in the American securities markets and the lack of tender offer regulations, Senator Harrison Williams proposed a bill to regulate tender offers in October 1965.[54] Finally, the U.S. Congress enacted the Williams Act to deal with the tender offer in 1968.[55] The Williams Act added Sections 13(d), 13(e), 14(d), 14(e) and 14(f) to the 1934 Act.[56]

The Williams Act established the preliminary U.S. tender offer system. Following the enactment of the Williams Act, the U.S. Congress amended it several times. The first amendment was in 1970.[57] Originally, the Williams Act did not apply to the exchange offer registered under the Securities Act of 1933 ("1933 Act" or "Securities Act").[58] The 1970 amendment extended the application of the tender offer system to the exchange offer because the exchange offer has become an important part

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52. *See id.* at 16-19.

53. Criteria for Information to be Published in Tender Offer Prospectuses was promulgated pursuant to Paragraph 2 of Article 43-4 of the SEA on August 12, 2002, last amended on June 22, 2005.

54. When Senator Williams introduced the original proposal, he pointed out the lack of tender offer legislation as follows:

> In recent years we have seen proud old companies reduced to corporate shells after white-collar pirates have seized control with funds from sources which are unknown in many cases, then sold or traded away the best assets, later to split up most of the loot among themselves. Classic examples of this type of conduct have received much notoriety in the reports of criminal cases involving such persons as Alexander Guterma and Peter Crosby, in SEC reports relating to such as Lowell M. Birrell, and in the public press. The SEC has reported these and similar cases to the Congress in the past.
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> The ultimate responsibility for preventing this kind of industrial sabotage lies with the management and the shareholders of the corporation that is so threatened. But the leniency of our laws places management and shareholders at a distinct disadvantage in coming to grips with the enemy.

111 Cong. Rec. 28,257 to 28,258 (Oct. 22, 1965). *See* 5 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION, 2164 n. 94 (3d ed. 1990).

55. *See, e.g.*, HAZEN, *supra* note 3, at 479.

56. 15 U.S.C. § 78m(d)-(e), 78n(d)-(f).

57. Pub. L. No. 91-567 (1970).

58. *See* Meredith M. Brown, *The Scope of the Williams Act and its 1970 Amendments*, 26 BUS. L. 1637, 1645-46 (1971).

of tender offers and should be subject to the tender offer regulation.[59] In addition, the 1970 amendment modified the percentage of beneficial ownership which was required to report the relevant information from ten percent to five percent because five percent of a company's securities was an important level towards the control of a company.[60] It also modified Section 14(e) of the 1934 Act and gave the SEC a rule-making power to deal with the untrue statement or omission of material fact regarding tender offers.[61] Furthermore, the 1970 amendment extended the application of tender offer regulations to any equity security of an insurance company.[62]

In 1977, the U.S. Congress enacted the Domestic and Foreign Investment Improved Disclosure Act of 1977 which amended Section 13(d)(1) of the 1934 Act and added Section 13(g) to the 1934 Act.[63] The 1977 amendment strengthened the disclosure requirements.[64] Furthermore, the U.S. Congress amended the 1934 Act by adding Section 14(h) to govern tender offers in connection with limited partnership rollup transactions in 1993.[65]

3. *Investor Protection is the Primary Objective of the Taiwanese and U.S. Tender Offer Legislation*

With regard to the purpose of the Taiwanese tender offer legislation, Article 1 of the SEA clearly indicates that one of the purposes of enacting the SEA is to protect investors. Furthermore, the reasons of enacting Article 43-1 of the SEA declared by the FSC also emphasize that the purpose of the tender offer legislation is to regulate tender offers in Taiwan so as to protect investors.[66] Accordingly, investor protection is the primary purpose of the Taiwanese tender offer legislation.

As for the purpose of the U.S. tender offer legislation, when the U.S. Congress enacted the Williams Act, the sponsor, Senator Williams, made the following statement:

> This legislation will close a significant gap in investor protection

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59. *See id.* at 1646.
60. *See id*. at 1637.
61. *See id*. at 1647.
62. *See id*. at 1637.
63. Pub. L. No. 95-213 (1977).
64. *See* Jeffrey T. Haughey & Kevin M. Veler, *Blue Sky Laws and State Takeover Statutes: New Importance for an Old Battleground*, 7 J. CORP. L. 689, 730 n. 317 (1982). *See also* LOSS & SELIGMAN, *supra* note 1, at 616.
65. *See* LOSS & SELIGMAN, *supra* note 1, at 617.
66. *See Zheng-Quan Jiao-Yi Fa Xin-Jiu Tiao-Wen Dui-Zhao Shuo-Ming (Contrastive Explanations of New and Old Provisions of the Securities and Exchange Law)* 10, Securities And Futures Institute, 1988 (Taiwan).

> under the Federal securities laws by requiring the disclosure of pertinent information to stockholders when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities.[67]

Moreover, the Senator Williams also indicated:

> We have taken extreme care to avoid tipping the scale either in favor of management or in favor of the person making the takeover bids. S.510 is designed solely to require full and fair disclosure for the benefit of investors.[68]

From the above statements, it is clear that the major purpose of the enactment of the Williams Act is to protect investors. The Williams Act protects investors through full disclosure of relevant information regarding the tender offer and a neutral position between the offeror and management of the target company so that the investors can make reasonable decisions.[69] The SEC Advisory Committee on Tender Offers ("SEC Advisory Committee")[70] reaffirmed that the purpose of enacting the Williams Act was to protect investors in its Report of Recommendations.[71]

Therefore, the primary objective of the Taiwanese and U.S. tender offer legislation is to protect investors, especially the target company's security holders. Both countries recognize that the security holders of the target company shall be the ultimate persons determining the success or failure of the tender offer. They aim at ensuring that investors are protected in making their decision on how to respond to the tender offer.

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67. 113 Cong. Rec. 854 (1967). *See* LOSS & SELIGMAN, *supra* note 54, at 2164-65.

68. 113 Cong. Rec. 24664 (1967). *See* LOSS & SELIGMAN, *supra* note 54, at 2167.

69. *See, e.g.*, LOSS & SELIGMAN, *supra* note 54, at 2165-67.

70. The SEC Advisory Committee on Tender Offers ("SEC Advisory Committee") was established in February 1983 to reflect the significant change in takeover practice after the enactment of the Williams Act. The SEC Advisory Committee was responsible for analyzing the tender offers in the U.S. and the relevant laws or regulations. One of its most important accomplishments was the publication of its Report of Recommendations (hereinafter "Report of Recommendations") on July 8, 1983. *See e.g.*, Linda C. Quinn & David B. H. Martin, Jr., *The SEC Advisory Committee on Tender Offers and Its Aftermath -- A New Chapter in Change-of-Control Regulation*, *in* Tender Offers: Developments and Commentaries 9-21 (Marc I. Steinberg ed. 1985).

71. Recommendation 1 of the Report of Recommendations indicates that "the purpose of the regulatory scheme should be neither to promote nor to deter takeovers; such transactions and related activities are a valid method of capital allocation, as long as they are conducted in accordance with the laws deemed necessary to protect the interests of shareholders and the integrity and efficiency of the capital markets." The Report of Recommendations. at Recommendation 1. *See* Quinn & Martin, *supra* note 70, at 30.

B. *Underlying Principles of the Taiwanese and U.S. Tender Offer Regulations*

As discussed above, the primary objective of the Taiwanese and U.S. tender offer systems is to protect investors. In order to achieve this objective, both countries regulate tender offers through the following principles.

1. *Philosophy of Full Disclosure*

"Full disclosure of information material to investors' decision is the most important means for ensuring investor protection. Investors are, thereby, better able to assess the potential risks and rewards of their investments and, thus, to protect their own interests."[72] The philosophy of full disclosure is one of the most important principles under the Taiwanese and U.S. tender offer systems. As discussed in part A of this section, both countries recognize that security holders of the target company shall be the ultimate persons determining the result of the tender offer. In order to achieve this objective, these security holders shall have complete information regarding the tender offer. Then, based on the information the security holders possessed, they may make adequate decisions on whether to tender their securities or not. Nevertheless, the offeror or the target company may not automatically provide information to the security holders in a tender offer.[73] Therefore, both countries adopt proper measures to achieve this principle. Basically, this principle is fulfilled through three aspects: pre-tender offer disclosure requirements, tender offer disclosure requirements, and post-tender offer disclosure requirements. Besides, the Taiwanese and U.S. tender offer systems also have the antifraud provisions to support these disclosure requirements.

a. *Pre-Tender Offer Disclosure Requirements*

The pre-tender offer disclosure requirement is based on the premise that any person who purchases a large number of securities will cause a substantial step towards the control of a company, which will affect the investors' investment decision-making because a change in corporate control may change its existing form.[74] Accordingly, the pre-tender offer disclosure requirement is necessary. The purpose of the pre-tender offer

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72. *Objectives and Principles of Securities Regulation, supra* note 38, at 5.

73. *See* Tunde Idolo Ogowewo, *The Underlying Themes of Tender Offer Regulation in the United Kingdom and the United States of America*, 1996 J.B.L. 463, 467 (1996).

74. *See* Joseph D. Reid, *Comments: Senate Bill 510 and the Cash Tender Offer*, 14 WAYNE L. Rev. 568, 578 n. 56 (1968).

disclosure requirements is to notify the investors and the target company of a possible change in corporate control.[75]

Based on the above purpose, both the Taiwanese and U.S. tender offer systems require that any person who acquires a specified percentage of the outstanding securities of a publicly issued company shall disclose certain specified information.[76] Further, both countries also require that, if any material change occurs, such person shall promptly disclose this change.[77]

b. *Tender Offer Disclosure Requirements*

In addition to the pre-tender offer disclosure requirements, the full disclosure requirement during the tender offer period is necessary for investors. As discussed above, the tender offer often results in the change in corporate control. The security holders of the target company shall be the ultimate persons determining the result of the tender offer. For the purpose of making an informed decision in a tender offer, these security holders must have sufficient information relating to the tender offer. Therefore, during the tender offer period, the importance of information is that "the information given to security holders must be sufficient, and must be available to them early enough to enable them to reach a properly informed decision regarding the merits or demerits of an offer for their shares in good time."[78]

Generally speaking, the offeror has a dominant position in a tender offer because he can dictate the content of a tender offer.[79] Through imposing an obligation of disclosure on the offeror, the security holders of the target company may obtain the relevant information concerning the tender offer and then make an adequate decision based on the disclosed information.[80] Apart from the offeror, the target company also plays an important role in a tender offer. Sometimes its attitude will affect the result of the tender offer. Thus, the target company must disclose specified information concerning the tender offer and the information disclosed by the target company may contribute to the security holder's decision.[81]

Furthermore, because the information relating to the tender offer will affect the market price of the target company's securities, the tender offer

75. *See* HAZEN, *supra* note 3, at 481; JAMES M. BARTOS, UNITED STATES SECURITIES LAW: A PRACTICAL GUIDE 131 (2d ed. 2002).

76. SEA, para. 1 of art. 43-1 (Taiwan); 1934 Act §13(d), 15 U.S.C. § 78m(d) (U.S.A.).

77. *Id*.

78. Ogowewo, *supra* note 73, at 471-72.

79. *See, e.g.*, Reid, *supra* note 74, at 572.

80. *See, e.g.,* Ogowewo, *supra* note 73, at 467-68; Hurst, *supra* note 29, at 161-62.

81 . *See, e.g.*, MARC I. STEINBERG, *SEC Tender Offer Rules*, *in* TENDER OFFERS: DEVELOPMENTS AND COMMENTARIES 105 (Marc I. Steinberg ed. 1985).

disclosure requirement is also important for the investors.[82] The information disclosed "may also attract other bidders for the target, if only by informing potential rivals that they must move immediately to prevent another from acquiring the target, and by advertising the fact that at least one bidder considers the target attractive."[83]

Both the Taiwanese and U.S. tender offer systems recognize the importance of full disclosure in a tender offer and impose an obligation of disclosure on the offeror and the target company during the tender offer period. With regard to the offeror, both countries prohibit any person from making a tender offer unless he files a statement with the competent authority and discloses the specified information to the public.[84] If any material change takes place, the offeror must promptly disclose this change.[85] As for the target company, both countries require that the target company shall disclose the current status of the target company and its opinion regarding the tender offer.[86]

c. *Post-Tender Offer Disclosure Requirements*

After a tender offer, control of the target company may change. The outcome of a tender offer is important investment information. Based on this information, the investors may make their investment decision. Accordingly, in order to protect investors, the result of the tender offer shall be disclosed. Then, the investors can reasonably assess whether they shall invest in this company or not.

The Taiwanese tender offer system is based on the above reason and further requires that the result of the tender offer shall be disclosed within two days after the expiration of the tender offer.[87] Similarly, the U.S. tender offer system also requires that the offeror shall disclose the result of the tender offer by means of a final amendment to Schedule TO.[88] Nevertheless, though both countries impose an obligation of disclosure on the offeror at the post-tender offer stage, the disclosure requirements under the Taiwanese and U.S. tender offer systems seem to focus on the pre-tender offer and tender offer stages.

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82. *See, e.g.*, Deborah A. DeMott, *Current Issues in Tender Offer Regulation: Lessons from the British*, 58 N.Y.U.L. REV. 945, 968 (1983).

83. *Id*. *See also* Ogowewo, *supra* note 73, at 470.

84. SEA, para. 2 of art. 43-1 (Taiwan); 1934 Act §14(d)(1), 15 U.S.C. §78n(d)(1) (U.S.A.).

85. The Tender Offer Regulations, arts. 17, 21 (Taiwan); Rule 14d-3(b), 17 C.F.R. §240.14d-3(b) (U.S.A.).

86. The Tender Offer Regulations, art. 14 (Taiwan); Rule 14e-2, 17 C.F.R. § 240.14e-2 (U.S.A.).

87. The Tender Offer Regulations. art. 22.

88. Rule 14d-3(b)(2), 17 C.F.R. § 240.14d-3(b)(2).

d. *Antifraud Provisions*

Although both the Taiwanese and U.S. tender offer systems require full disclosure in a tender offer, misleading or false information may still occur. Besides, any material inside information in connection with the tender offer will affect the market price of the target company's securities. In order to ensure that the information given to the competent authority or security holders is correct and to prevent any fraudulent or manipulative acts in connection with tender offers, both countries enact the antifraud provisions against those who violate these disclosure requirements.[89] These antifraud provisions play a supplementary role in supporting the achievement of philosophy of full disclosure and aim at affirming "the fact that persons engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors of the outcome of the tender offer are under an obligation to make full disclosure of material information to those with whom they deal."[90]

2. *Neutrality between the Tender Offeror and Management of the Target Company*

In addition to philosophy of full disclosure, the U.S. tender offer system also protects investors through maintaining a neutral position between the offeror and the target company's management.[91] As the enactment of the Williams Act, the sponsor, Senator Williams, clearly stated that the U.S. Congress "has taken extreme care to avoid tipping the scale either in favor of management or in favor of the person making the takeover bids."[92] The SEC Advisory Committee further confirmed this principle in its Report of Recommendations.[93] Moreover, this principle also significantly affects the U.S. courts' decision regarding tender offer cases.

As for the Taiwanese tender offer system, it does not clearly emphasize this principle. According to the reasons of enacting Article

89. SEA, art. 20 (Taiwan); 1934 Act § 14(e), 15 U.S.C. § 78n(e) (U.S.A.)

90. S. Rep. No. 550, 90th Cong., 2d Sess. 10-11 (1968). *See* Mark J. Loewenstein, *Private Litigation under Section 14(e) of the Williams Act*, *in* Tender Offers: Developments and Commentaries 162 (Marc I. Steinberg ed. 1985).

91. Some commentators have argued that the current U.S. tender offer system does not achieve this purpose because it does not equally treat the offeror and the target company's management. The target company's management has an advantage over the offeror because it can use a wide range of defensive tactics against the tender offer. *See* Andre, *supra* note 13, at 886-87.

92. 113 Cong. Rec. 24664 (1967). *See* 5 LOSS & SELIGMAN, *supra* note 54, at 2167.

93. Recommendation 3 indicates that "takeover regulation should not favor either the acquirer or the target company but should aim to achieve a reasonable balance, while at the same time protecting the interests of shareholders and the integrity and efficiency of the markets." The Report of Recommendations. at Recommendation 3. *See* Quinn & Martin, *supra* note 70, at 31.

43-1 of the SEA declared by the FSC, one of the purposes of establishing the Taiwanese tender offer system is to prevent the offeror who makes a tender offer outside the Taiwan Stock Exchange ("TSE") and the over-the-counter ("OTC") market from affecting the market price of the target company's securities and from resulting in the adverse effect on the investors and the target company.[94] It implies that the investors and the target company are major subjects to be protected. Therefore, it seems to indicate that the Taiwanese tender offer system favors the incumbent management. It is probably based on the historical element. Traditionally, the Taiwanese government tends to protect the local industry. For the purpose of promoting the national economic development and protecting the local industry, the Taiwanese legal system imposed more impediments to the tender offer and favored the incumbent management. For example, before the SEA was amended in 2002, any person who intended to make a tender offer should have the competent authority's approval. Without the competent authority's approval, any tender offer was prohibited. Nevertheless, in response to the increase of international competition, as stated earlier, the tender offer application procedure changes from an approval system to a reporting system and the Taiwanese government gradually pays attention to this principle.

3. *Equality of Treatment*

Equality of treatment is also one of the most important principles behind the Taiwanese and U.S. tender offer legislation. For the purpose of ensuring that all security holders of the target company may receive fair treatment, both countries impose some restrictions on the terms of the tender offer. These restrictions are designed to provide a circumstance in which all security holders will not suffer any inequitable treatment or undue coercion and to further protect the security holders.[95] In general, the offeror has a dominant position in a tender offer. He may avoid some risks regarding the tender offer by describing the terms of the tender offer.[96] In contrast to the offeror and the incumbent management of the target company, the security holders of the target company have a disadvantaged position in a tender offer. Any inequitable treatment will reinforce this disadvantaged position and will cause the offeror to "structure the tender offer process in a manner calculated considerably to reduce the possibility of competition, thereby resulting in a situation where there is no competitor to better its terms."[97] Therefore, both

94. *See* Securities and Futures Institute, *supra* note 66, at 10.
95. *Cf*. Ogowewo, *supra* note 73, at 473; Hurst, *supra* note 29, at 162.
96. *See, e.g.*, Reid, *supra* note 74, at 572.
97. Ogowewo, *supra* note 73, at 474.

countries emphasize the importance of equal treatment among security holders of the target company.

Basically, the Taiwanese and U.S. tender offer systems perform this principle through the following three aspects.

a. *The All Holders Requirement*

In order to achieve equality of treatment, all security holders of the target company shall have an equal opportunity to tender their securities in a tender offer. The all holders requirement may assure that a tender offer shall be open to all security holders of the target company. That is, all security holders may equally participate in the tender offer.[98]

In the light of this, both countries require that a tender offer shall be made to all security holders of the target company. Besides, the all holders requirement applies to both third party tender offers and issuer tender offers.[99] Furthermore, both countries also prohibit the offeror from purchasing the securities of the target company outside the tender offer.[100]

b. *The Best Price Requirement*

Although the all holders requirement assures that all security holders of the target company have an opportunity to tender their securities in a tender offer, it does not indicate that all security holders will receive the same payment. Thus, the all holders requirement can only achieve part of equality of treatment. The best price requirement may resolve this shortcoming and further assure equality of treatment. It indicates that all security holders who tender their securities at any time during the tender offer period will get the highest consideration paid to any other security holder.[101] The best price requirement can eliminate the price discrimination among security holders of the target company. Because the offeror probably increases the consideration offered during the tender offer period, the best price requirement assures that the increase in consideration will also apply to these security holders who tender their securities earlier.[102] Nevertheless, the best price requirement does not prohibit the offeror from providing different forms of consideration. Accordingly, the offeror may pay different forms of consideration if the payment conforms to the best price requirement.[103]

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98. *See id*.

99. The Tender Offer Regulations, para. 1 of art. 2 (Taiwan); Rule 14d-10, 17 C.F.R. §240.14d-10 (U.S.A.). *See* HAZEN, *supra* note 3, at 498.

100. SEA, art. 43-3 (Taiwan); Rule 14e-5, 17 C.F.R. § 240.14e-5 (U.S.A.)

101. *See, e.g.*, Ogowewo, *supra* note 73, at 474; Reid, *supra* note 74, at 574.

102. *See id.*

103. *See, e.g.*, HAZEN, *supra* note 3, at 499; BARTOS, *supra* note 75, at 140-41.

Based on the above reasons, both the Taiwanese and U.S. tender offer systems prescribe that the offeror shall adopt the uniform purchase conditions and shall pay the highest consideration to all security holders of the target company.[104] Moreover, if the offeror increases the consideration during the tender offer period, he must pay the increase to the securities holders who tender their securities earlier.[105]

c. *Pro Rata Acceptance of Tendered Securities*

As stated earlier, the offeror often requires a specified number of securities in a tender offer. Once an excessive number of securities are tendered, the offeror may reserve the right to purchase these additional securities. Therefore, it is easy to cause the so-called "first come first served pressure."[106] From the offeror's standpoint, the first come first served pressure may stimulate security holders of the target company to tender their securities quickly and therefore it will be easier for the offeror to succeed in a tender offer.[107] However, from the security holders' standpoint, the first come first served pressure will preclude some security holders from participating in the tender offer and will violate the principle of equal treatment.[108]

In order to further achieve equal treatment among security holders of the target company, both countries require that the offeror shall accept the securities tendered during the tender offer period on a pro rata basis when there are more securities tendered than the offeror proposes to acquire.[109] The pro rata acceptance eliminates "[d]iscrimination among tendering target security holders based on the order of receipt of their securities or on the relative number of securities tendered by individual security holders. The requirement also discourages discrimination in favor of large and well-informed security holders, who can respond promptly to first come, first served offers and who are obviously favored as well if a bidder accepts the largest blocks of securities tendered first."[110] It further ensures that the security holders who tender their securities can participate in the tender offer and can receive the payment equally if the tender offer succeeds.[111] Furthermore, as discussed later, the pro rata acceptance of tendered securities may also eliminate undue coercion.

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104. SEA, para. 2 of art. 43-2 (Taiwan); 1934 Act § 14(d)(7), 15 U.S.C. § 78n(d)(7) (U.S.A.).

105. *Id.*

106. *See* HAMILTON, *supra* note 13, at 988.

107. *See id*.

108. *See, e.g.*, Reid, *supra* note 74, at 576.

109. The Tender Offer Regulations, art. 23 (Taiwan); Rule 14d-8, 17 C.F.R. § 240.14d-8 (U.S.A.).

110. Ogowewo, *supra* note 73, at 474-75.

111. *See, e.g.*, Reid, *supra* note 74, at 576.

4. *Elimination of Coercion*

Due to the unequal position between the offeror and the security holders of the target company in a tender offer, the offeror may make an advantageous tender offer by dictating the content of the tender offer and thus the security holders may easily suffer the undue pressure.[112] For example, the offeror may make a tender offer for a very short time period. The offeror may propose to acquire less than all of the outstanding securities in a tender offer. These situations always result in undue coercion on the security holders of the target company. Accordingly, both the Taiwanese and U.S. tender offer systems intend to eliminate any undue coercion. In order to achieve this purpose, both countries take the following measures.

a. *Minimum Time Periods*

In principle, an offeror may decide the duration of a tender offer. However, when the security holders of the target company face a tender offer, they have to make a decision within a limited time because the tender offer is often open for a short time period.[113] Therefore, based on investor protection, the minimum duration requirement is necessary. The requirement of a minimum time period imposes the restriction on "the ability of the bidder to determine how long the offer would be open."[114] It gives the security holders of the target company sufficient time to obtain relevant information and then make their decisions.[115] Moreover, the minimum duration requirement may also encourage the competitive tender offer because it gives the potential offeror sufficient time to evaluate whether he shall make a tender offer.[116]

The Taiwanese and U.S. tender offer systems uphold the above viewpoint and require that a tender offer shall be open for a minimum time period from the date of the commencement.[117] Besides, the U.S. tender offer system also requires that, when the offeror changes any material conditions during the tender offer period, the tender offer shall remain open for a certain time period after this change takes place.[118] In contrast, the Taiwanese tender offer system does not have any relevant requirement. Although Article 17 of the Tender Offer Regulations

112. *See id*. at 572.
113. *See, e.g.*, HAMILTON, *supra* note 13, at 988.
114. Ogowewo, *supra* note 73, at 475.
115. *See id*. at 475-76.
116. *See* DeMott, *supra* note 82, at 995.
117. The Tender Offer Regulations, art. 18 (Taiwan); Rule 14e-1, 17 C.F.R. § 240.14e-1 (U.S.A.).
118. Rule 14e-1(b), 17 C.F.R. § 240.14e-1(b).

provides that before making any modifications to conditions other than those set forth in Paragraph 1 of Article 43-2 of the SEA,[119] the offeror shall file a report with the FSC and make a public announcement, and each offeree, mandated institution and the public company whose securities are being acquired shall be notified, this provision does not require that the tender offer shall remain open for a certain time period after the material condition changes. Once the offeror changes any material conditions other than those set forth in Paragraph 1 of Article 43-2 of the SEA, the security holders of the target company may not have sufficient time to assess information disclosed. Accordingly, though the Taiwanese tender offer system intends to eliminate undue coercion by means of the requirement of a minimum time period, it does not fully consider this issue in this respect.

b. *Withdrawal Rights*

As discussed earlier, the security holders of the target company have to make a decision on whether to tender their securities or not within a limited time because a tender offer is often open for a short time. Under some circumstances, the security holders may not fully assess the information they obtain and therefore may make a wrong decision. Moreover, following a tender offer, another offeror may make a competing offer. Sometimes the security holders who have tendered their securities in the first tender offer will find that the consideration of the second tender offer is more attractive.[120] However, when the security holders tender their securities to the offeror, these securities will be locked during the tender offer period. That is, the security holder cannot further handle his securities.[121] Accordingly, the security holders will face trouble if they tender their securities to the offeror quickly.

In order to overcome this difficulty faced by the security holders of the target company, the Taiwanese tender offer system allows a security holder who tenders his securities during the tender offer period to withdraw his tendered securities before the offeror makes a public announcement declaring that the conditions of the tender offer have been achieved.[122] Similarly, the U.S. tender offer system allows a security holder who tenders his securities during the tender offer period to

119. Paragraph 1 of Article 43-2 of the SEA provides that "a tender offeror shall adopt uniform purchase conditions in the tender offer, and may not make any of the following modifications to the purchase conditions: (1) lower the tender offer price; (2) lower the proposed number of securities to be purchased through the tender offer; (3) shorten the tender offer period; (4) other particulars as prescribed by the Competent Authority."

120. *See* DeMott, *supra* note 82, at 996.

121. *See, e.g.*, Reid, *supra* note 74, at 572.

122. The Tender Offer Regulations, art. 19 (Taiwan).

withdraw his tendered securities at any time when the tender offer is still open.[123] Through the withdrawal rights, both countries intend to give the security holders an opportunity to correct their wrong decisions and to eliminate undue coercion.

c. *Pro Rata Acceptance of Tendered Securities*

As discussed earlier, pro rata acceptance of tendered securities may promote the achievement of equal treatment. Without the pro rata principle, the security holders may easily suffer the first come first served pressure and they have to make a decision on whether to tender their securities or not quickly because a tender offer is often open for a short time period. The first come first served pressure will also result in undue coercion and affect the security holder's decision.[124]

For the purpose of protecting investors, both the Taiwanese and U.S. tender offer systems require that the offeror shall accept the tendered securities on a pro rata basis. On the one hand, the pro rata requirement may promote equality of treatment among the security holders of the target company. On the other hand, it may eliminate undue coercion.[125]

IV. Overview of the Current Taiwanese and U.S. Tender Offer Regulations

As discussed in Section 2 of this article, the regulatory framework regarding the Taiwanese and U.S. tender offer systems is statutory. This section will provide an overview of the current Taiwanese and U.S. tender offer systems. Without an understanding of the Taiwanese and U.S. tender offer regulations, it is difficult to comprehend these problems under the Taiwanese tender offer system and to offer possible solutions to these problems.

A. *Regulation of Tender Offers in Taiwan*

The current Taiwanese tender offer system is based on the SEA and the Tender Offer Regulations promulgated by the FSC. The regulatory framework of the Taiwanese tender offer system can be divided into the pre-tender offer stage, the tender offer stage, and the post-tender offer stage.

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123. Rule 14d-7, 17 C.F.R. §240.14d-7 (U.S.A.).

124. *See* DeMott, *supra* note 82, at 988-89. *See also* Ogowewo, *supra* note 73, at 474-75.

125. The Tender Offer Regulations, art. 23 (Taiwan); Rule 14d-8, 17 C.F.R. § 240.14d-8 (U.S.A.).

1. *Disclosure Obligation before Making a Tender Offer*

In order to notify investors of a possible change in corporate control and to perform the principle of full disclosure, Paragraph 1 of Article 43-1 of the SEA requires that any person who acquires more than ten percent of the outstanding shares of a publicly issued company shall file a statement with the FSC within ten days after such acquisition, stating the purpose and the sources of funds and any other information required by the FSC. If any material change occurs in the statement filed with the FSC, the person who filed the statement shall promptly file with the FSC an amendment disclosing this change.[126]

For the purpose of fulfilling the disclosure requirement under Paragraph 1 of Article 43-1, the FSC promulgated the Guidelines for Filing Reports on Acquisitions of Shares in Accordance with Paragraph 1 of Article 43-1 of the Securities and Exchange Act ("the Guidelines") in 1995.[127] The Guidelines further specify information required to be reported to the FSC in accordance with Paragraph 1 of Article 43-1 and clarify some ambiguous languages under Paragraph 1 of Article 43-1 of the SEA.[128] Apart from filing a statement with the FSC, Article 7 of the Guidelines further requires that the statement filed with the FSC shall be sent to the publicly issued company whose shares have been acquired in the TSE (or the OTC market).

Although Paragraph 1 of Article 43-1 of the SEA requires that any person who acquires more than ten percent of the outstanding securities of a publicly issued company must file a statement with the FSC, Article 27 of the Tender Offer Regulations indicates that a person will be precluded from this duty if he acquires these securities through a tender offer.

2. *The Tender Offer Procedure*

In Taiwan, securities of a publicly issued company which are listed on the TSE shall be traded on the TSE except under certain situations prescribed by laws or regulations promulgated by the FSC.[129] According to Paragraph 2 of Article 43-1 of the SEA, any person who proposes to

126. SEA, para. 1 of art. 43-1.

127. Guidelines for Filing Reports on Acquisition of Shares in Accordance with Paragraph 1 of Article 43-1 of the Securities and Exchange Act (hereinafter "the Guidelines") promulgated on September 5, 1995 by the SEC (now FSC), last amended on May 19, 2006. (Taiwan)

128. For example, Article 2 of the Guidelines provides that the shares acquired by the person "shall include those acquired by his spouse, minor children, and those beneficially held under the name of some other persons" and Article 3 of the Guidelines clarifies that "other persons" in the language "acquiring shares jointly with other persons" under Paragraph 1 of Article 43-1 of the SEA means those who acquire shares through contract, agreement, or other expression of intention.

129. SEA, art. 150.

make a tender offer for the securities of a publicly issued company may do so only after filing a statement with the FSC and making a public announcement, except under certain circumstances specified by the SEA.[130] Article 26 of the Tender Offer Regulations further indicates the methods of a public announcement. With regard to a non-public company, it shall publish the announcement in a newspaper and submit a copy to the FSC. With regard to a public company, it shall publish the announcement on the market observation post system.

a. *The Role of the Tender Offeror*

With regard to the offeror's duty in a tender offer, the offeror must file a report with the FSC and make a public announcement before making a tender offer.[131] In the case of a competitive tender offer for securities issued by the same target company, the offeror shall do so at least five trading days before the expiry date of the original tender offer period.[132] The report filed by the offeror shall include the Tender Offer Report Form and the following documents: (1) "[t]ender offer prospectus (2) the mandated contract entered into between the offeror and the mandated institution [responsible for the taking offeree's deposit of securities, the delivery of the tender offer prospectus, and the receipt and payment of the tender offer funds or securities, etc.] (3) the power of attorney to the offeror's designated representative for litigious and non-litigious matters if the offeror does not maintain any domicile or business place in the Republic of China (4) other documentation required by the FSC."[133]

In addition, the offeror shall simultaneously send a copy of the Tender Offer Report Form and relevant documents as stated above to the target company on the reporting date of the tender offer.[134] Once the offeree requests the tender offer prospectus or deposits his securities in the appointed institution, the offeror shall deliver the tender offer prospectus to him.[135] If the offeror makes the false statements on the documents provided by the offeror, he shall be punished with imprisonment for not

130. Paragraph 2 of Article 43-1 of the SEA indicates that a tender offer shall be reported to the FSC and publicly announced "except under the following circumstances: (1) the number of securities proposed for tender offer by the offeror plus the total number of securities of the publicly issued company already obtained by the offeror and its affiliates do not exceed five percent of the total number voting shares issued by the publicly issued company (2) the securities purchased by the offeror through the tender offer are securities of a company of which the offeror holds more than fifty percent of the issued voting shares (3) other circumstances in conformity with the regulations prescribed by the Competent Authority (FSC)."

131. The Tender Offer Regulations, para. 1 of art. 7.

132. *Id*. para. 2 of art. 7.

133. *Id*. para. 1 of art. 9.

134. *Id.* para. 3 of art. 9.

135. SEA. para 1 of art. 43-4.

less than one year and not more than seven years and a fine of not more than NT$20 million.[136]

After the offeror makes a tender offer, he cannot suspend the tender offer "[e]xcept in any of the following circumstances, where the Competent Authority (FSC) has granted approval: (1) the publicly issued company whose securities are being purchased encounters major changes in its financial or business condition and the offeror has presented evidence of the changes; (2) the offeror becomes bankrupt, dies, is judicially interdicted, or is required by a court ruling to undergo reorganization; (3) other circumstances specified by the Competent Authority (FSC)."[137] Once the FSC approves the termination of a tender offer, the offeror shall announce this information and notify offerees, appointed institutions, and the target company within two days after receiving the FSC's approval for termination of a tender offer.[138] Besides, in order to protect the public interest, the FSC may ask the offeror to amend his report and republish it if the content reported by the offeror violates laws or regulations.[139]

Moreover, Paragraph 1 of Article 22 of the Tender Offer Regulations requires that the offeror shall report the result of the tender offer to the FSC and disclose relevant information to the public within two days after the completion of the tender offer.[140] Further, the offeror shall also notify each security holder who tendered his securities of the sale-related matters simultaneously.[141]

Based on equal treatment and prevention of price discrimination among security holders of the target company, the SEA adopts the fair price principle as stated earlier. Under Article 43-2 of the SEA, the offeror "[s]hall adopt uniform purchase conditions in the tender offer, and may not make any of the following modifications to the purchase conditions: (1) lower the tender offer price, (2) lower the proposed number of securities to be purchased through the tender offer (3) shorten the tender offer period (4) other particulars as prescribed by the Competent

136. *Id*. art. 174.

137. *Id*. para. 1 of art. 43-5.

138. The Tender Offer Regulations, art. 21.

139. SEA. para. 2 of art. 43-5.

140. Paragraph 1 of Article 22 of the Tender Offer Regulations indicates that, within two days after the completion of the tender offer, the offeror shall report to the FSC and publicly announce the following matters: (1) the name or trade name and domicile or location of the offeror; (2) the name of the public company whose securities are being acquired; (3) the type of the securities acquired; (4) the tender offer period; (5) if the tender offer purchase is conditioned upon that the shares number to be sold has reached the projected shares number to be acquired, the description of whether such condition has been satisfied; (6) the number of the securities to be sold and the actual number sold; (7) the time, manner, and place for payment of the purchase consideration; (8) the delivery time, manner, and place for the transacted securities.

141. The Tender Offer Regulations, para. 2 of art. 22.

Authority (FSC)."[142] If the offeror violates uniform purchase conditions, he "shall be liable for the damages to the offeree up to the amount of the difference between the highest price paid under the tender offer and the price paid to the offeree, multiplied by the number of shares subscribed."[143] Once the offeror proposes to make any modification to conditions other than those set forth in Article 43-2 of the SEA, Article 17 of the Tender Offer Regulations requires that he shall file a statement with the FSC, make a public announcement, and notify each offeree, appointed institution, and the target company before this modification occurs.

Under the current Taiwanese tender offer system, the tender offer period shall not be less than ten days and more than fifty days.[144] However, if there is a legitimate reason, the FSC may allow the offeror to extend the tender offer period. Nevertheless, the extension period shall not exceed thirty days.[145] In addition, the offeror shall appoint the securities firms, banks, or other institutions approved by the FSC to be responsible for the taking offeree's deposit of securities, the delivery of the tender offer prospectus, and the receipt and payment of the tender offer funds or securities, etc.[146] During the tender offer period, the security holders who tender their securities are allowed to withdraw their tendered securities before the offeror makes a public announcement declaring that the conditions of the tender offer have been achieved.[147]

Besides, Article 43-3 of the SEA prohibits an offeror from purchasing the securities of the target company other than through the tender offer when a tender offer is announced. Under Article 43-3, during the tender offer period, the offeror and its affiliates cannot purchase the same type of securities of the target company through the TSE, the OTC market, or any other markets. If the offeror violates it, he "shall be liable to the offeree for damages up to the amount of the difference between the price paid for the securities purchased through other means and the price under the tender offer, multiplied by the number of shares subscribed."[148]

Furthermore, as stated in Section 3 of this article, because a tender offer only requires a limited number of securities, the target company's security holders must respond it quickly. It often causes the first come, first served pressure. In order to prevent this pressure, Paragraph 1 of Article 23 of the Tender Offer Regulations stipulates that the offeror must purchase securities in proportion from each security holder tendering securities and must return the remaining securities to each security holder

142. SEA. para. 1 of art. 43-2.
143. *Id*. para. 2 of art. 43-2.
144. The Tender Offer Regulations, para. 1 of art. 18.
145. *Id*. para. 2 of art. 18.
146. *Id.* art. 15.
147. *Id.* art. 19.
148. SEA. para. 2 of art. 43-3.

if the securities number received has exceeded the securities number which the offeror intends to acquire.

b. *The Role of the Target Company*

As discussed above, the offeror must send the Tender Offer Report Form and relevant documents to the target company on the reporting date of the tender offer. Article 14 of the Tender Offer Regulations requires that, within seven days after receiving these documents, the target company shall publicly announce the following items and send a copy to the FSC and the Securities Related Entities:[149] "(1) [t]he types, number, and amount of shares currently held by the current directors, supervisors, and any shareholders with more than ten percent of the [target] company's stocks [including those held by their spouse and minor children and held under the name of other persons] (2) the recommendation made to the company's shareholders on such tender offer purchase, wherein the names and reasons of every objecting director shall be recorded (3) whether there were major changes on the company's financial conditions after the delivery of its most recent financial statements, and the contents of such changes (4) the types, number and amount of shares of the offeror or its affiliated enterprises…… held by the current directors, supervisors, or the major shareholders having over ten percent of the shareholding of the target company [including those held by their spouse and minor children and held under the name of other persons] (5) other relevant important information."[150]

c. *Prohibition against Inside Information*

In the tender offer context, insider trading often occurs before or during a tender offer because "[o]n the one hand, a bid is invariably launched at a premium to the market price obtaining before the bid was announced. On the other, the preparation of a large-scale bid invariably involves fairly widespread discussions within the offeror company and with its various advisers (bankers, brokers and lawyers) and sometimes with the target company itself or with third party companies which, for example, propose to buy some of the target's assets if the bid is successful. There is, thus, a high risk that someone privy to these discussions, or who learns about them, will take advantage of the knowledge to buy shares in the target company in advance of the public

149. According to Article 5 of the Tender Offer Regulations, the term "Securities Related Entities" means securities dealer associations, Securities and Futures Institute, the TSE or OTC market, centralized securities depository enterprises, and other entities designated by the FSC.

150. The Tender Offer Regulations, art. 14.

announcement of the bid."[151] Recognizing this problem, most countries have enacted the relevant law or regulation to deal with this problem.

In order to prevent insider trading, Article 157-1 of the SEA requires that corporate insiders or any person who has learned any material inside information from a corporate insider cannot buy or sell securities on the basis of inside information unless this inside information has been disclosed over twelve hours. Any person who violates it shall compensate the bona fide trading counterparts for damages suffered. For a severe violation, the bona fide counterpart may further request the treble damages payable by the said violators.[152]

Furthermore, Article 13 of the Tender Offer Regulations provides that, during the period between the determination of the tender offer and the public announcement of the tender offer, any person who knows or has reason to know any information in connection with a forthcoming tender offer because of his job or any other reasons must keep it secret until its disclosure.

3. *Issuer Tender Offers*

Article 28-2 of the SEA provides that an issuer based on the approval of a majority of the directors may purchase its own securities through a tender offer.[153] As a third-party tender offer made by an ordinary offeror,

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151. Paul L. Davies, *The Take-over Bidder Exemption and the Policy of Disclosure*, *in* European Insider Dealing 243 (Klaus J. Hopt & Eddy Wymeersch ed., 1991).

152. According to Paragraph 2 of Article 157-1, though the court may, upon the request of the bona fide trading counterparts, treble the damages payable by the said violators should the violation be of a severe nature, the court may also reduce the damages where the violation is minor.

153. In 2000, the Taiwanese government added Article 28-2 to the SEA. Article 28-2 is the so-called "treasury stock system" which allows a company whose stocks are listed on the TSE or traded on the OTC market may repurchase their own securities from the TSE or OTC market, or through tender offers. Article 28-2 provides that:

> In any of the following situations, a company whose stocks are either listed on a stock exchange or traded on the over-the-counter market may, upon the approval of a majority of the directors present at a directors meeting attended by two-thirds or more of directors, buy back its shares from the centralized securities exchange market or over-the-counter market or in accordance with Paragraph 2 of Article 43-1, without being subject to the provisions of Paragraph 1 of Article 167 of the Company Law:
>
> 1. Where the buyback is for transferring shares to its employees;
> 2. Where the buyback is for equity conversion in coordination with the issuance of corporate bonds with subscription right, special shares with subscription right, convertible corporate bonds, convertible special shares or stock/ subscription warrants; or
> 3. Where the buyback is required to maintain the company's credit and shareholders' equity and the shares so purchased are cancelled.
>
> The number of shares bought back under the preceding paragraph shall not be more than ten percent of the total number of issued and outstanding shares of the company. The total amount of the shares bought back shall not be more than the amount of retained earnings plus premium on capital stock plus realized capital reserve.

the issuer shall make a public announcement and shall file the Tender Offer Report Form with the FSC before the commencement of a tender offer.[154] However, in contrast to a third-party tender offer, Article 10 of the Tender Offer Regulations requires that the issuer shall further provide additional documents in an issuer tender offer.[155]

Furthermore, an issuer tender offer shall also comply with the rules which apply to the third-party tender offer such as the pro rata acceptance of tendered securities and the best price rule. In order to prevent insider trading and manipulative conducts through an issuer tender offer, Paragraph 1 of Article 20 of the Tender Offer Regulations prescribes that securities "held by its affiliated enterprises…, or directors, supervisors, or managers themselves or spouses or minor children thereof, or held under the name of another person shall not be sold in response to the offer during the period of share buyback by the offeror."[156]

The procedure, price, quantity, method, conversion method, and public announcement to be reported in connection with buyback of shares by a company in accordance with Paragraph 1 above shall be prescribed by an order of the Competent Authority.

The shares bought back by a company in accordance with Paragraph 1, except for the portion referred to in Item 3 for which amendment registration shall be effected within six months from the date of buyback, shall be transferred within three years from the date of buyback. The shares not transferred within the said time limit shall be deemed as not issued by the company, and amendment registration shall be processed.

The shares bought back by a company in accordance with Paragraph 1 shall not be pledged. Before transfer, the shareholder's rights shall not be enjoyed.

In the event that a company buys back shares from the centralized securities exchange market or over-the-counter market, the shares held by its affiliated enterprises defined under Article 369-1 of the Company Law, its directors, supervisors, managers, their spouses, minor children, or shares held in the name of other persons shall not be sold during the buyback period.

The resolution referred to in Paragraph 1 and the implementation thereof shall be reported in the most recent shareholders meeting. This provision shall also apply if the shares are not bought back for any reason.

With regard to the discussion of Article 28-2, please see YU, *supra* note 39, at 106-10.

154. The Tender Offer Regulations, art. 10.

155. Article 10 of the Tender Offer Regulations prescribes that the issuer shall provide the following documents: "(1) [t]he document referred to in Subparagraph 2 of Paragraph 1 of the preceding article [The consignment contract entered into between the offeror and the mandated institution.] (2) the meeting minutes recording the resolution by the board of directors to buy back the shares (3) a declaration from a board of directors meeting, stating that, taking into consideration of the company's financial condition, there will be no effect on the company's maintenance of capital (4) the most recent duly disclosed financial report audited or reviewed by a certified public accountant before the board resolution (5) the opinions of a certified public accountant or securities underwriter on the reasonableness of the buyback price (6) the documentation required under Article 10 of the Regulations Governing Share Repurchase by Listed and OTC Companies regarding methods for transferring shares to employees or under Article 11 regarding methods for converting shareholding or subscribing shares (7) effect on unappropriated retained earnings of the company (8) other documentation required by the FSC."

156. The Tender Offer Regulations. para. 1 of art. 20.

4. *Post-Tender Offer Regulation*

In order to avoid the influence on the market price of the target company's securities by way of a tender offer, the SEA prohibits the offeror from making a tender offer on the same company within one year if the offeror does not acquire the proposed number of securities within the tender offer period or suspension of the tender offer is approved by the FSC, unless he has legitimate reasons and has obtained the approval from the FSC.[157]

After a tender offer, if the offeror and his affiliates own more than fifty percent of the outstanding securities of the target company, Paragraph 4 of Article 43-5 of the SEA provides that the offeror may request the board of directors to hold a special meeting of shareholders. It precludes the restrictions in Paragraph 1 of Article 173 of the Company Law which stipulates that "[a]ny or a plural number of shareholder(s) of a company who has (have) continuously held more than three percent of the total number of outstanding shares for a period of one year or a longer time may, by filing a written proposal setting forth therein the subject for discussion and the reasons, request the board of directors to call a special meeting of shareholders."[158] Basically, this provision enables an offeror holding a given percentage of securities of the target company after the tender offer to exercise the corporate control.

B. *Regulation of Tender Offers in the U.S.*

The current federal tender offer system in the U.S. is based on the 1934 Act, particularly the Williams Act, and the relevant rules promulgated by the SEC. In principle, Section 13(d) of the 1934 Act deals with the potential tender offer and Sections 14(d), (e), and (f) regulate tender offers directly.[159]

1. *Disclosure Obligation before Making a Tender Offer*

Under the federal regulation of tender offers in the U.S., Section 13(d)(1) of the 1934 Act prescribes that any person who directly or indirectly acquires more than five percent of any class of securities subject to the 1934 Act's reporting requirements shall file a statement with the SEC and shall inform the issuer and each exchange where the security is traded within ten days after such acquisition.[160] Rule 13d-1 further

157. SEA, para. 3 of art. 43-5.
158. Company Law, para. 1 of art. 173 (Taiwan).
159. *See, e.g.*, HAZEN, *supra* note 3, at 482.
160. 15 U.S.C. § 78m(d)(1).

specifies that any person who becomes the beneficial owner of more than five percent of any class of equity security shall file with the SEC a statement on Schedule 13D within ten days after the acquisition.[161] Schedule 13D requires that any person subject to Section 13(d)'s reporting requirement shall provide the background of the person who files Schedule 13D, the source of the funds, the purpose of transaction, and any relevant contracts, arrangements, understandings or relationships between this person and the issuer.[162] Moreover, once any material change occurs, such person shall promptly disclose this change.[163]

Although Section 13(d)(1) requires that any person who acquires more than five percent of any class of securities subject to the 1934 Act's reporting requirements shall file a Schedule 13D with the SEC, some institutional investors acquiring more than five percent of the outstanding securities due to the ordinary course of their business and passive investors[164] who own more than five percent of the outstanding securities do not intend to control the target company. Based on the above reasons, Section 13(d)(5) empowers the SEC to allow these institutional investors who do not have the purpose of changing the control of the issuer to file a simplified statement with the SEC.[165] Rule 13d-1 further provides that these institutional investors or passive investors may file a short-form statement on Schedule 13G instead of Schedule 13D under certain circumstances.[166] In addition, Rule 13d-2 indicates that the person who files the statement on Schedules 13D or 13G shall promptly file an amendment when any material change occurs.[167] For example, the increase or decrease of one percent or more of the securities is regarded as a material change.[168] Moreover, Rule 13d-7 requires that Schedules 13D or 13G and its amendments filed by the beneficial owner shall be sent to the issuer and Schedule 13D "shall also be sent to each national securities exchange where the security is traded."[169]

Nevertheless, Section 13(d)(6) of the 1934 Act provides some exceptions under Section 13(d) of the 1934 Act and empowers the SEC a rule-making power to exempt the reporting requirement under Section 13(d).[170] Pursuant to this rule-making power, the SEC promulgated Rule

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161. 17 C.F.R. § 240.13d-1(a).
162. 17 C.F.R. § 240.13d-101.
163. 15 U.S.C. § 78m(d)(2).
164. Under the U.S. tender offer system, the term "passive investor" generally means that the beneficial owners of less than twenty percent of the outstanding securities of a company do not intend to control this company. *See, e.g.* LOSS & SELIGMAN, *supra* note 1, at 619.
165. 15 U.S.C. § 78m(d)(5). *See* 5 LOSS & SELIGMAN, *supra* note 54, at 2196.
166. 17 C.F.R. § 240.13d-1.
167. 17 C.F.R. § 240.13d-2.
168. 17 C.F.R. § 240.13d-2(a).
169. 17 C.F.R. § 240.13d-7.
170. Section 13(d)(6) of the 1934 Act indicates that Section 13 (d) "[s]hall not apply to (A)

13d-6 which further exempts a beneficial owner of more than five percent of the outstanding securities from the requirements under Section 13(d) if "(a) the acquisition is made pursuant to preemptive subscription rights in an offering made to all holders of securities of the class to which the preemptive subscription right pertain; (b) such person does not acquire additional securities except through the exercise of his pro rata share of the preemptive subscription rights; and (c) the acquisition is duly reported, if required, pursuant to section 16(a) of the Act and the rules and regulations thereunder."[171]

Apart from the Williams Act, Section 13(f) of the 1934 Act governs the disclosure requirement of institutional investment managers.[172] Under Section 13(f)(1), if an institutional investment manager exercises investment discretion with respect to accounts holding securities having an aggregate fair market value over $100,000,000, he shall file Form 13F with the SEC.[173] However, Section 13(f)(2) provides that the SEC may promulgate relevant rules to exempt any institutional investment manager from this reporting requirement.[174] Besides, Section 13(f)(3) further provides that "any such information identifying the securities held by the account of a natural person or an estate or trust (other than a business trust or investment company) shall not be disclosed to the public."[175] Therefore, under Section 13(f), some institutional investors who can file a Schedule 13G instead of Schedule 13D may also need to file Form 13F with the SEC.[176]

Furthermore, in order to close the gaps in Section 13(d),[177] Section 13(g) of the 1934 Act requires that any person who is the beneficial owner of more than five percent of a class of securities described in Section 13(d)(1) shall send the issuer and file with the SEC a statement disclosing

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any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933; (B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class; (C) any acquisition of an equity security by the issuer of such security; (D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection." 15 U.S.C. § 78m(d)(6).

171. 17 C.F.R. § 240.13d-6.

172. 15 U.S.C. § 78m(f).

173. 15 U.S.C. § 78m(f)(1).

174. 15 U.S.C. § 78m(f)(2).

175. 15 U.S.C. § 78m(f)(3).

176. *See* HAZEN, *supra* note 3, at 484.

177. Section 13(g) of the 1934 Act "applies to every person who is a 5 (by rule, now less than 20 percent) percent beneficial owner, regardless of when he or she achieved that status, or of the exemptions in §13(d)(6) for acquisitions made pursuant to a 1933 Act registration statement or totaling not more than 2 percent of the class in 12 months." *See* LOSS & SELIGMAN, *supra* note 1, at 616.

certain specified information.[178] Basically, "[S]ections 13(d) and 13(g), Rules 13d-1 to 13d-7, and Schedules 13D and 13G provide an integrated disclosure requirement for any person who, after acquiring the beneficial ownership of an equity security…, becomes directly or indirectly the beneficial owner of more than 5 percent of the class."[179]

In addition to the 1934 Act, one must pay attention to certain provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"). The HSR Act requires that any person who will acquire more than $50 million of voting securities or assets of a company must report this transaction to the Antitrust Division of the Department of Justice and the Federal Trade Commission before the purchase of the target company's securities and shall follow a waiting period unless an exemption is met.[180] Therefore, anyone who meets the notification requirements under the HSR Act has an obligation to report the Antitrust Division of the Department of Justice and the Federal Trade Commission prior to his purchase, even if this transaction does not meet the requirement of filing a Schedule 13D under Section 13(d) of the 1934 Act.[181]

2. *The Tender Offer Procedure*

With regard to the tender offer procedure in the U.S., Sections 14(d), (e), and (f) of the 1934 Act are principal provisions governing tender offers directly.[182] Basically, Section 14(d) contains the procedure for making a tender offer and empowers the SEC to promulgate relevant rules to implement it.[183] However, Section 14(d) generally applies to third-party tender offers rather than issuer tender offers,[184] which are regulated by Section 13(e) of the 1934 Act.

Under the current U.S. tender offer system, any person cannot make a tender offer that will cause him to become the beneficial owner of more than five percent of a class of securities unless certain information is filed with the SEC and sent to security holders of the target company.[185] With regard to the commence of a tender offer, Rule 14d-2(a) provides that a tender offer begins "at 12:01 a.m. on the date when the bidder has first

178. 15 U.S.C. § 78m(g).

179. *See* LOSS & SELIGMAN, *supra* note 1, at 619.

180. *See* BARTOS, *supra* note 75, at 157-59. If any person fails to notify the Antitrust Division of the Department of Justice and the Federal Trade Commission and does not comply with the requisite waiting period, he will be punished with a fine of not more than $11,000 per day until he complies with these prescriptions. *See id*. at 159.

181. *See id*.

182. *See, e.g.*, HAZEN, *supra* note 3, at 482.

183. 15 U.S.C. § 78n(d).

184. 15 U.S.C. § 78n(d)(8)(B).

185. 15 U.S.C. § 78n(d)(1).

published, sent or given the means to tender to security holders."[186]

a. *The Role of the Tender Offeror*

Due to its important role in a tender offer, the U.S. tender offer system emphasizes the regulation of the offeror during the tender offer period. Section 14(d)(1) requires that an offeror who proposes to acquire more than five percent of a target company's securities must file a Schedule TO statement with the SEC before the commencement of the tender offer.[187] Rule 14d-3(a) further requires that as soon as practicable on the date of the commencement of the tender offer, the offeror must file with the SEC and deliver to the target company, any other offeror, and each national securities exchange or the National Association of Securities Dealers, Inc. ("NASD") on which the target company's securities trades, a Tender Offer Statement on Schedule TO.[188] In addition, if any material fact changes in Schedule TO, the offeror must file with the SEC an amendment to Schedule TO and send a copy of such amendment to the target company and any exchange and/or NASD.[189] Besides, Rule 14d-4 provides that the offeror must disclose relevant information to security holders of the target company through any of three ways: long-form publication, summary publication, or use of stockholder lists and security position listings.[190]

With regard to the withdrawal right, Section 14(d)(5) provides that the security holders who have tendered their securities may withdraw them within the first seven days after the commencement of the tender offer or at any time after sixty days from the commencement of the tender offer.[191] Pursuant to the rule-making power under Section 14(d)(5), the SEC promulgated Rule 14d-7 which indicates that the security holders may withdraw their securities tendered during the entire period the tender offer remains open, except during a subsequent offering period.[192]

When an offeror seeks less than all outstanding securities and more

186. 17 C.F.R. §240.14d-2(a). However, Rule 14d-2(b) indicates that the following communications by the bidder do not "[c]onstitute commencement of a tender offer if: (1) it does not include the means for security holders to tender their shares into the offer; and (2) all written communications relating to the tender offer, from and including the first public announcement, are filed under cover of Schedule TO with the Commission no later than the date of the communication. The bidder also must deliver to the subject company and any other bidder for the same class of securities the first communication relating to the transaction that is filed, or required to be filed, with the Commission." 17 C.F.R. § 240.14d-2(b).

187. 15 U.S.C. § 78n(d)(1).

188. 17 C.F.R. § 240.14d-3(a).

189. 17 C.F.R. § 240.14d-3(b).

190. 17 C.F.R. § 240.14d-4.

191. 15 U.S.C. § 78n(d)(5).

192. 17 C.F.R. § 240.14d-7.

securities are tendered than the offeror intends to accept, Section 14(d)(6) adopts the so-called "pro rata principle."[193] Under Section 14(d)(6), "[w]here any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor."[194] Although the purpose of section 14(d)(6) is to remove the first come, first served pressure, the ten-day proration period does not provide sufficient time for security holders of the target company to obtain sufficient information and to make an informed decision.[195] Therefore, based on the rule-making power, the SEC extends the pro rata acceptance to the entire tender offer period.[196] Under Rule 14d-8, the offeror shall purchase securities tendered during the tender offer period on a pro rata basis.[197]

Moreover, the U.S. tender offer system also adopts the "all holders" and "best price" rules.[198] Section 14(d)(7) provides that, if the offeror increases the consideration offered to the security holders of the target company during the tender offer period, he must pay the increased consideration to all security holders including those who have tendered their securities before the variation of the tender offer.[199] Rule 14d-10 further requires equal treatment of security holders. i.e., the tender offer shall be open to all security holders of the target company and the consideration paid to any security holders shall be the highest price during the tender offer period.[200]

Furthermore, Rule 14e-1(a) requires that a tender offer shall be open for at least twenty business days from the date of the commencement. However, when a tender offer involves a roll-up transaction and the securities offered are registered on Form S-4 or Form F-4, the offer shall remain open for more than sixty calendar days.[201] If there is a change in the percentage of securities sought, the consideration offered, or the

193. *See, e.g.*, LOSS & SELIGMAN, *supra* note 1, at 642; HAZEN, *supra* note 3, at 496.

194. 15 U.S.C. § 78n(d)(6).

195. *See* Peter Brennan, *SEC Rule 14d-8 and Two-Tier Offers*, *in* Tender Offers: Developments and Commentaries 109-10 (Marc I. Steinberg ed., 1985).

196. Although Section 14(d)(6) does not provide the SEC with the rule-making power, the SEC has used its authority under Section 14(e) to extend the pro rata acceptance to the entire tender offer period. *See* LOSS & SELIGMAN, *supra* note 1, at 642.

197. 17 C.F.R. § 240.14d-8.

198. *See, e.g.*, HAZEN, *supra* note 3, at 497-500.

199. 15 U.S.C. § 78n(d)(7).

200. 17 C.F.R. § 240.14d-10(a).

201. 17 C.F.R. § 240.14e-1(a).

dealer's soliciting fee, the tender offer shall remain open for at least ten business days from the date of the change.[202] Besides, the offeror must "pay the consideration offered or return the securities deposited by or on behalf of security holders promptly after the termination or withdrawal of a tender offer."[203]

Finally, during the tender offer period, Rule 14e-5 prohibits the offeror from purchasing the target company's securities outside the tender offer.[204]

b. *The Role of the Target Company*

With regard to the target company's duty, when the offeror requests a stockholder list, Rule 14d-5 indicates that the target company must reply to the offeror's request within two business days of the offeror's written request and decide to mail the tender offer materials to shareholders or deliver a stockholder list to the offeror.[205]

Furthermore, Rule 14e-2(a) requires that the target company, within ten business days from the commencement of the tender offer, must provide its security holders with a statement containing "[t]hat the subject company: (1) recommends acceptance or rejection of the bidder's tender offer; (2) expresses no opinion and is remaining neutral toward the bidder's tender offer; or (3) is unable to take a position with respect to the bidder's tender offer. Such statement shall also include the reason(s) for the position (including the inability to take a position) disclosed therein."[206] Besides, when any material change occurs in the statement, the target company must promptly provide its security holders with a statement disclosing such material change.[207]

According to the SEC's viewpoint, because a Rule 14e-2(a) statement constitutes a solicitation or recommendation under Section 14(d)(4) and Rule 14d-9, the target company shall comply with Section 14(d)(4) and Rule 14d-9.[208] Section 14(d)(4) indicates that the SEC may promulgate relevant rules and regulations regarding any solicitation or recommendation to security holders to accept or reject a tender offer.[209] Rule 14d-9(f) further provides that, before the target company sends its security holders a recommendation, the target company may deliver its security holders a "stop-look-and-listen" communication which may

202. 17 C.F.R. § 240.14e-1(b).
203. 17 C.F.R. § 240.14e-1(c).
204. 17 C.F.R. § 240.14e-5(a).
205. 17 C.F.R. § 240.14d-5.
206. 17 C.F.R. § 240.14e-2(a).
207. 17 C.F.R. § 240.14e-2(b).
208. *See* 5 LOSS & SELIGMAN, *supra* note 54, at 2224 n.319.
209. 15 U.S.C. § 78n(d)(4).

request them to defer to make a decision regarding the tender offer and the target company will advise them its position within ten business days from the commencement of the tender offer.[210] Rule 14d-9 also requires that the target company which makes a solicitation or recommendation regarding the tender offer to security holders shall file with the SEC a Tender Offer Solicitation/Recommendation Statement on Schedule 14D-9.[211] In addition, the target company shall promptly disclose any material change in information required by Schedule 14D-9.[212]

c. *Prohibition against Inside Information*

Under the Williams Act, Section 14(e) is the general antifraud provision, which applies to all tender offers and is not limited to section 12's registration requirement.[213] Section 14(e) stipulates that "[i]t shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation."[214] Besides, Section 14(e) empowers the SEC to promulgate relevant rules and regulations to prescribe fraudulent, deceptive, or manipulative acts.[215]

Rule 14e-3(a) requires that any person who owns inside information in connection with the tender offer cannot use this information to purchase or sell the target company's securities, unless this information is publicly disclosed within a reasonable time.[216] Rule 14e-3(d) also indicates that the offeror and the insiders of the target company cannot communicate inside information regarding the tender offer to any other person, where it is reasonably foreseeable that such communication may violate Rule 14e-3 except the communication made in good faith.[217] However, if a person who is not a natural person makes an investment decision which is not based on inside information to purchase or sell the target company's securities and also has adopted policies and procedures to prevent the violation of this rule, such person will not constitute the violation of Rule

210. 17 C.F.R. § 240.14d-9(f).
211. 17 C.F.R. § 240.14d-9.
212. *Id.*
213. 15 U.S.C. § 78n(e). *See also* HAZEN, *supra* note 3, at 481 & 503.
214. 15 U.S.C. § 78n(e).
215. *Id*.
216. 17 C.F.R. § 240.14e-3(a).
217. 17 C.F.R. § 240.14e-3(d).

14e-3.[218] Besides, a broker or any agent on behalf of the offeror purchases or sells the target company's securities will not violate Rule 14e-3.[219] Furthermore, in order to prevent a security holder from trading securities which he is not the actual owner during a tender offer, Rule 14e-4 prohibits short tendering and hedged tendering.[220]

3. *Issuer Tender Offers*

With respect to the issuer's purchase of its own securities, Section 13(e) of the 1934 Act prohibits an issuer from purchasing any security issued by itself unless the purchase complies with rules and regulations promulgated by the SEC.[221] Pursuant to Section 13(e) of the 1934 Act, the SEC promulgated Rules 13e-1, 13e-3, and 13e-4. According to Rule 13e-1, once a third party makes a tender offer, an issuer cannot purchase its own securities during the tender offer period unless the issuer files a statement with the SEC containing relevant information required by Rule 13e-1.[222] Moreover, Rule 13e-3 regulates the so-called "going private transaction" by the issuer or its affiliates.[223] Under Rule 13e-3, the issuer or its affiliates who purchase its own securities, make a tender offer, solicit proxies, or distribute information statements to its security holders in connection with a significant corporate transaction and therefore cause the securities to be hold of record by less than 300 shareholders or to be neither listed on any national securities exchange nor quoted on an inter-dealer quotation system of any registered national securities association shall file a Schedule 13E-3 with the SEC and disclose information prescribed by Rule 13e-3 to its security holders.[224]

Finally, Rule 13e-4 regulates the issuer tender offer including filing, disclosure and dissemination requirements.[225] Furthermore, the requirement of a minimum time period for tender offers by the issuer and the third party is the same and the "pro rata acceptance," "all holders" and "best price" rules also apply to the issuer tender offer.[226]

4. *Post-Tender Offer Regulation*

Because tender offers often result in the transfer of control, Section

218. 17 C.F.R. § 240.14e-3(b).
219. 17 C.F.R. § 240.14e-3(c).
220. 17 C.F.R. § 240.14e-4. *See* HAZEN, *supra* note 3, at 509-10.
221. 15 U.S.C. § 78m(e).
222. 17 C.F.R. § 240.13e-1.
223. 17 C.F.R. § 240.13e-3. *See* LOSS & SELIGMAN, *supra* note 1, at 647-49.
224. 17 C.F.R. § 240.13e-3.
225. 17 C.F.R. § 240.13e-4.
226. *Id*. *See also* HAZEN, *supra* note 3, at 517-18.

14(f) prescribes certain disclosure requirements when a majority of the target company's directors will change after a tender offer. Under Section 14(f) of the 1934 Act, if a tender offer contains the arrangement of designating new directors of the issuer other than at a formal meeting of security holders, and if this designation constitutes a majority of the directors of the issuer, the issuer must disclose this information before any such person becomes a director.[227] Rule 14f-1 further indicates that the issuer must disclose such information not less than 10 days prior to the date any such person takes office as a director.[228] The purpose of Section 14(f) and Rule 14f-1 is to ensure that all security holders of the target company may receive material information regarding the change in the majority of directors when this change will take place without a formal vote from a meeting of security holders.[229]

Furthermore, the SEC amended Rule 14d-11 to allow a subsequent offering period in 1999. According to Rule 14d-11, under certain conditions, the offeror may provide a subsequent offering period of three business days to twenty business days after the completion of a tender offer.[230] However, security holders tendering their securities during the subsequent offering period do not have withdrawal rights.[231]

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227. Section 14(f) of the 1934 Act indicates that "if, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to subsection (d) of this section or subsection (d) of section 13 of this title, any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the issuer, then, prior to the time any such person takes office as a director, and in accordance with rules and regulations prescribed by the Commission, the issuer shall file with the Commission, and transmit to all holders of record of securities of the issuer who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by subsection (a) or (c) of this section to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders." 15 U.S.C. § 78n(f).

228. Rule 14f-1 provides that "if, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to section 13(d) or 14(d) of the Act, any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the issuer, then, not less than 10 days prior to the date any such person take office as a director, or such shorter period prior to that date as the Commission may authorize upon a showing of good cause therefor, the issuer shall file with the Commission and transmit to all holders of record of securities of the issuer who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by Items 6(a), (d) and (e), 7 and 8 of Schedule 14A of Regulation 14A to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders. Eight copies of such information shall be filed with the Commission." 17 C.F.R. § 240.14f-1.

229. *See, e.g.,* LOSS & SELIGMAN, *supra* note 54, at 2169 n.108.

230. 17 C.F.R. § 240.14d-11. *See also* HAZEN, *supra* note 3, at 501.

231. 17 C.F.R. § 240.14d-7(a)(2).

V. SUGGESTIONS FOR IMPROVING TAIWANESE TENDER OFFER REGULATIONS

The previous sections have provided an overview of the Taiwanese and U.S. tender offer systems and their rationale for tender offer regulations. The foregoing discussion illustrates that the tender offer systems in both countries are similar. The primary objective of both systems is to protect investors, i.e., the security holders of the target company shall be the ultimate persons determining the result of the tender offer. Both countries achieve this objective through the philosophy of full disclosure, equality of treatment, and elimination of coercion. Although the Taiwanese and U.S. tender offer systems are similar in many aspects, there are some important differences between them. This section will discuss these differences and offer suggestions for improving Taiwanese tender offer regulations.

A. *Increase Public Disclosure Requirements*

As stated earlier, Paragraph 1 of Article 43-1 of the SEA requires that any person who acquires more than ten percent of the outstanding securities of a publicly issued company shall file a statement with the FSC within ten days after such acquisition. Its purpose is to notify the investors and the target company of a possible change in corporate control. With the transformation from traditional labor intensive industries to capital intensive industries, more and more Taiwanese companies, especially high-tech companies, expand their company size in response to the rapid development of the global business environment. The expansion of the company size inevitably results in the separation of its shareholders. Furthermore, individual investors are the major participants of the Taiwanese securities market. In general, these individual investors do not own a large number of securities of a particular company. Accordingly, the ten percent threshold becomes a high threshold and cannot fully reflect the current situation in the Taiwanese securities market. It may undermine the original purpose of the pre-tender offer disclosure requirements. In view of this, some scholars have argued that the percentage threshold in Paragraph 1 of Article 43-1 of the SEA should be reduced from ten percent to five percent because the acquisition of five percent of the target company's securities may cause a substantial step towards the control of a company under the current business environment in Taiwan.[232] As

232. *See Zheng-Quan Fa-Xing Shi-Chang-Zu Fen-Zu Jie-Lun Bao-Gao (Report of the Taiwanese Securities Market)* 142-43, Ministry of Finance (National Securities Conference), 1991 (Taiwan).

discussed in Section 3 of this article, the philosophy of full disclosure is one of the most important principles under the Taiwanese tender offer system. Through full disclosure of relevant information, on the one hand, it may reduce the opportunity for insider trading. On the other hand, it may provide investors with securities information and further achieve investor protection. Therefore, in order to fulfill the philosophy of full disclosure and reflect the current business environment in Taiwan, it shall be considered that the percentage threshold in Paragraph 1 of Article 43-1 of the SEA shall be reduced from ten percent to five percent.

Moreover, the Taiwanese tender offer system requires that a tender offer shall be open for a minimum time period from the commencement of the tender offer.[233] The minimum duration requirement gives the security holders of the target company sufficient time to obtain relevant information regarding the tender offer. However, unlike the U.S. tender offer system, the Taiwanese tender offer system does not require that, when the offeror changes any material conditions during the tender offer period, the tender offer shall remain open for a certain time period after this change occurs. This situation may undermine the function of the minimum duration requirement. Accordingly, for the purpose of protecting investors, the Taiwanese government shall require that the tender offer shall remain open for a certain time period if the offeror changes any material conditions during the tender offer period by amending Article 18 of the Tender Offer Regulations, so as to perfect the full disclosure requirement.

B. *Squeeze-Out and Sell-Out Rights*

The most important distinction between the Taiwanese and U.S. tender offer systems is the mandatory tender offer. Although both systems emphasize equal treatment of the security holders of the target company, the Taiwanese tender offer system adopts the mandatory tender offer to further ensure that all security holders of the target company may have fair treatment.

In general, most tender offers are voluntary. However, the minority security holders in a company usually have a disadvantaged position. Their interests are often ignored when a change of corporate control will probably take place. In order to protect these minority securities holders, some countries such as Taiwan and the U.K. adopt the so-called "mandatory tender offer." The mandatory tender offer is based on the premise that all security holders of a company, regardless of whether they are large or small, shall be treated equally when a change of corporate

233. The Tender Offer Regulations, art. 18.

control will occur.[234] It provides an equal opportunity for all security holders of the target company to tender their securities and further ensures that all security holders shall be treated equally by the offeror.[235]

As discussed above, unlike the U.S. tender offer system, the Taiwanese tender offer system adopts the mandatory tender offer. Under the SEA, Paragraph 3 of Article 43-1 requires that any person who intends to purchase a certain percentage of the outstanding securities of a publicly issued company must purchase the securities by way of a tender offer unless under certain exception prescribed by laws or regulations promulgated by the FSC. The Tender Offer Regulations further clarify the certain percentage and conditions in detail. According to Article 11 of the Tender Offer Regulations, when any person proposes to acquire more than twenty percent of the outstanding securities of a publicly issued company within fifty days, he shall do so by way of a tender offer.[236] These provisions are designed to avoid the influence on the market price of a certain security due to the purchase of a large number of certain company's securities from the TSE or the OTC market and give all security holders of the target company an opportunity to tender their securities when a change of control of the company will probably occur. The mandatory tender offer may avoid the effect on the market price of a certain security due to the purchase of a large number of certain company's securities from the TSE or OTC market and may give all security holders of the target company an opportunity to tender their securities when a change of control of the company will probably occur.[237]

However, those countries which adopt the mandatory tender offer also accept the squeeze-out and sell-out rights. The squeeze-out right allows a successful offeror who acquires a substantial percentage of the target company's securities to require the remaining security holders to sell him

234. *See* DAVIES, *supra* note 1, at 730.

235. *See id*.

236. Paragraph 2 of Article 11 of the Tender Offer Regulations provides that "where the following conditions are met, the requirement to employ a tender offer as set forth in the preceding paragraph shall not apply: (1) transfer of shares between affiliates mentioned in Article 3; (2) shares obtained under the Taiwan Stock Exchange Corporation Regulations Governing Auction of Listed Securities by Consignment; (3) shares obtained under the Taiwan Stock Exchange Corporation Regulations Governing Purchase of Listed Securities by Tender Offer or under the OTC Market Regulations Governing Purchase of OTC Securities by Tender Offer; (4) shares obtained under Subparagraph 3 of Paragraph 1 of Article 22-2 of the SEA; (5) implementing a share exchange under paragraph 6 of Article 156 of the Company Law or under the Business Mergers and Acquisitions Act, in which new shares are issued to serve as the consideration for acquiring the shares of another public company; (6) other conditions in conformity with FSC regulations."

237. *See* Lai, *supra* note 2, at 82; Ta-Ying Liaow, *Jie-Xi Zheng-Quan Jiao-Yi Fa Zhi Bu-Fen Xin Xiu-Zheng: Gong-Kai Shou-Gou Yu Si-Mu Zhi-Du (An Analysis of the New Amendment of the Securities and Exchange Law: Tender Offer and Private Placement)*, 83 TAIWAN L. Rev. 254, 266-67 (2002).

their securities at a fair price and the sell-out right gives the remaining security holders of the target company the right to require the offeror to purchase their securities at a fair price after the tender offer.[238]

For example, the British tender offer system adopts mandatory tender offer and the squeeze-out and sell-out rights. Section 979 of the Companies Act 2006 provides a right for the offeror acquiring more than 90 percent of the target company's shares to notify the remaining shareholders to sell him their shares at a fair price. Section 983 further provides that a minority shareholder can request the offeror who has acquired 90 percent of the target company's shares to purchase his shares at a fair price. Similarly, the EU Takeover Directive[239] also requires that Member States shall introduce the squeeze-out and sell-out rights.[240]

Although the current Taiwanese tender offer system adopts the mandatory tender offer, it lacks similar mechanism to allow the successful offeror who has acquired a substantial percentage of the target company's securities to require the remaining security holders to sell him their securities at a fair price and to give the remaining security holders the right to require the offeror to purchase their securities at a fair price after the tender offer. Accordingly, the squeeze-out and sell-out rights shall be introduced into Taiwan so as to perfect the Taiwanese tender offer system.

C. *The Extent of Managerial Resistance in the Tender Offer Context*

As stated earlier, both the Taiwanese and U.S. tender offer regulations impose some obligations on management of the target company regarding

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238. In general, the justification for the squeeze-out and sell-out rights includes that (1) minority security holders may lead to costs and risks; (2) the squeeze-out right may make tender offers more attractive for potential offerors; (3) the majority security holder may abuse his dominant position; (4) the minority shareholders' protection is no longer available below a certain level; and (5) the fair price is difficult to obtain in illiquid markets. *See* REPORT OF THE HIGH LEVEL GROUP OF COMPANY LAW EXPERTS ON ISSUES RELATED TO TAKEOVER BIDS (Jan. 10, 2002). *Available at* http://europa.eu.int/comm/internal_market/company/docs/takeoverbids/2002-01-hlg-report_en.pdf (visited March. 28, 2006).

239. Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on Takeover Bids, 2004 OJ (L142/12). The full text of the EU Takeover Directive is available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_142/l_14220040430en00120023.pdf (visited March 28, 2006).

240. The EU Takeover Directive also adopts squeeze-out and sell-out rights. Article 15 of the Takeover Directive accepts the right of squeeze-out and provides that "Member States shall introduce that right in one of the following situations: (a) where the offeror holds securities representing not less than 90% of the capital carrying voting rights and 90% of the voting rights in the offeree company, or (b) where, following acceptance of the bid, he/she has acquired or has firmly contracted to acquire securities representing not less than 90% of the offeree company's capital carrying voting rights and 90% of the voting rights comprised in the bid." Further, Article 16 of the EU Takeover Directive indicates that, following a tender offer, a minority security holder can request the offeror to purchase his securities at a fair price when the offeror has obtained more than 90 percent of the target company's capital carrying voting rights and 90 percent of the voting rights in the target company.

its required action in a tender offer. However, when faced with a hostile tender offer, management of the target company often takes defensive tactics against it. Under the company law, though management of the target company is generally granted wide powers, they also owe a fiduciary duty to the shareholders, i.e., duty of care and duty of loyalty.[241] Thus, once incumbent management of the target company adopts these defensive tactics in a hostile tender offer, they may face a lawsuit asserting that they breached the fiduciary duty because these defensive tactics sometimes result in the abuse of corporate assets or mismanagement and the security holders of the target company may lose an opportunity to tender their securities at a premium over the current market price.[242]

Basically, the extent of managerial resistance in a hostile tender offer varies in different countries. For example, most European countries require that any defensive tactics shall be authorized by the general meeting of the security holders of the target company.[243] This is because these countries consider that the board of the target company may take the defensive tactics for its self-interest.

In contrast, the U.S. federal securities laws do not prohibit incumbent management of the target company from taking any defensive tactics against hostile tender offers. When faced with this problem, most U.S. courts have adopted the so-called "business judgment rule" to evaluate whether these defensive tactics adopted by management of the target company are adequate.[244] The business judgment rule presumes that the decision made by incumbent management of the target company is based on the best interests of the company.[245] Accordingly, the business judgment rule may prevent management of the target company from unsuitable liability if the business decision is made in good faith, with due care, and within the management's authority.[246] Generally speaking, in order to invoke the protection of the business judgment rule in the tender offer context, management of the target company must prove two major conditions. First, incumbent management of the target company shall have reasonable grounds to believe that the tender offer will endanger the corporate policy or its operation.[247] Second, the defensive tactic adopted

241. *See, e.g.,* BARTOS, *supra* note 75, at 162.

242. *See* HAZEN, *supra* note 3, at 527; FRANKLIN A. GEVURTZ, CORPORATION LAW 679 (2000).

243. Article 9 of the EU Takeover Directive requires member states to ensure that the board of the target company cannot take any defensive action during the tender offer period unless the board of the target company obtains the prior authorization of the general meeting of shareholders.

244. *See, e.g.*, KLEIN & COFFEE, *supra* note 6, at 194; BARTOS, *supra* note 75, at 161-62.

245. *See id*.

246. *See id*.

247. *See* LOSS & SELIGMAN, *supra* note 1, at 668.

by management of the target company shall be reasonable.[248]

Although the Taiwanese law recognizes the existence of fiduciary duty and does not prohibit incumbent management of the target company from taking defensive tactics, it does not well develop an adequate way to evaluate whether the management's action violates the fiduciary duty. Accordingly, some Taiwanese scholars asserted that the courts might refer to the business judgment rule when determining whether the management's action was adequate in a hostile tender offer.[249] Indeed, the business judgment rule is a good way to resolve the lack of a consistent standard of examining whether the management's action violates the fiduciary duty in a hostile tender offer. However, the courts must recognize the difference between tender offers and ordinary securities transactions. In determining the applicability of the business judgment rule to a hostile tender offer, the Taiwanese courts have to consider whether the management of the target company has reasonable grounds to believe that the tender offer will harm the target company and whether the defensive tactic employed by management of the target company is reasonable. If the two preconditions are satisfied, the Taiwanese courts may apply the business judgment rule to the case in connection with the hostile tender offer.

VI. CONCLUSION

Earlier sections of this article have presented a comparative analysis of the Taiwanese and U.S. tender offer systems. The general overview of the Taiwanese tender offer system reveals a strong influence from the U.S. tender offer system. Through a comparative study of the Taiwanese and U.S. tender offer systems, it is clear that the current Taiwanese law pertaining to tender offers has its merits and demerits. First, as stated earlier, the ten percent threshold of the pre-tender offer disclosure requirements cannot fully reflect the current situation in the Taiwanese securities market. Besides, the Taiwanese tender offer regulations do not require that the tender offer shall remain open for a certain time period after the material condition changes. Once the offeror changes any material conditions other than those set forth in Paragraph 1 of Article 43-2 of the SEA during the tender offer period, the security holders of the target company may not have sufficient time to assess information disclosed. In order to fulfill the philosophy of full disclosure and reflect the current business environment in Taiwan, it is reasonable to reduce the percentage threshold in Paragraph 1 of Article 43-1 of the SEA from ten

248. *See id*. at 669.
249. *Cf.* WEN YU WANG, GONG-SI FA LUN (CORPORATION LAW) 126 (2003).

percent to five percent and the Taiwanese government shall require that the tender offer shall remain open for a certain time period if the offeror changes any material conditions during the tender offer period by amending Article 18 of the Tender Offer Regulations, so as to perfect the full disclosure requirement. Second, the comparative analysis of regulation demonstrates one of the major differences between the Taiwanese and American conceptions of shareholder equality. As discussed earlier, countries which adopt the mandatory tender offer also accept the squeeze-out and sell-out rights. However, though the Taiwanese tender offer system adopts the mandatory tender offer, it does not give a successful offeror who acquires a substantial percentage of the target company's securities the squeeze-out right and the remaining security holders the sell-out right. In order to perfect the Taiwanese tender offer system, the squeeze-out and sell-out rights shall be introduced into Taiwan. Finally, though the Taiwanese tender offer regulations do not prohibit incumbent management of the target company from taking defensive tactics against a hostile tender offer, a consistent standard of examining whether the management's defensive action is adequate in a hostile tender offer is inexistent under the Taiwanese tender offer system. The acceptance of the business judgment rule will be a good way to resolve this problem.

Basically, the tender offer is generally seen as beneficial if there is a proper regulation. Since the Taiwanese tender offer system chooses to emulate the U.S. model, this article considers that the debate about the regulatory reform in Taiwan can benefit from a comparative study of the Taiwanese and U.S. tender offer regulations. However, scholars clearly point out that "[a] 'ready-made' law used and tested in industrialized countries would not guarantee success if it is copied and employed by a developing country. These models should be used as a guideline, but nothing more. The initial formulation of the regulation should be realistic and not overly ambitious. Social, economic, and legal differences between industrialized countries and developing countries should be considered carefully."[250] Therefore, this article attempts to draw lesson from the U.S. experience that might be adopted to the Taiwanese context, but avoids any direct transplantation of U.S. laws.

250. Joseph J. Norton & Hani Sarie-Eldin, *Securities Law Models in Emerging Economies*, *in* EMERGING FINANCIAL MARKETS AND THE ROLE OF INTERNATIONAL FINANCIAL ORGANIZATIONS 348 (Joseph J. Norton & Mads Andenas ed., 1996).

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