PRIVATE VERSUS PUBLIC REGULATION: A COMPARATIVE ANALYSIS OF BRITISH AND AMERICAN TAKEOVER CONTROLS

BRIAN E. ROSENZWEIG*

> "There is no financial system in the world which does not depend to a large extent on the moral standards and disciplines of self-regulation."[1]

INTRODUCTION

The hostile takeover is a powerful tool of corporate governance.[2] A hostile tender offer enables the shareholders of a target corporation to effect a change of control against the will of the incumbent board of directors.[3] The ability of the tender offer to alter the management of a corporation in such a drastic fashion led both the United Kingdom[4] and the United States to institute controls over hostile takeover transactions. Despite clear similarities between their business[5] and legal structures,[6] the United Kingdom and the United

---

* Brian E. Rosenzweig is a J.D. candidate at Duke University School of Law and serves as the Symposium Editor for the *Duke Journal of Comparative and International Law*. He graduated from Cornell University with a B.A. in 2005. He would like to acknowledge Professor Deborah A. DeMott for her thoughtful comments and advice throughout the writing process.

1. Sir Nicholas Goodison, *quoted in* THE PANEL ON TAKE-OVERS AND MERGERS, REPORT ON THE YEAR ENDED 31ST MARCH, 1987, at 3 (1987).

2. John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?-The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1733 (2007).

3. *See* JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS 646-47 (2d ed. 2003).

4. The United Kingdom, England, Britain, Great Britain and all derivations thereof are used synonymously. Any differences among the application of the City Code or other takeover regulations in the several parts of Great Britain are beyond the scope of this note.

5. *See* Geoffrey Miller, *Political Structure and Corporate Governance: Some Points of Contrast Between the United States and England*, 1998 COLUM. BUS. L. REV. 51, 51 (1998). The corporate cultures of both England and the United States feature unitary corporate board structures, disfavor employee codetermination, and place great emphasis on financing through public securities markets. These characteristics distinguish the English and American economies from those of other large developed nations, such as Germany that favors a two-tiered board structure, supports codetermination, and relies on banks for guaranteed financing,

States have pursued strikingly different models of corporate takeover regulation. In England, takeovers are regulated by the City Code on Takeovers and Mergers (City Code or Code), which is interpreted and enforced by the Panel on Takeovers and Mergers (Takeover Panel or Panel), a self-regulatory body appointed by bodies representing different segments of the British financial community.[7] In the United States, an overlapping system of state and federal laws and regulations controls bids for corporate control.[8]

This Note illustrates the differences and similarities between England's self-regulatory, standards-based system and America's more formal, rules-based system. Particularly, this Note will focus on the structural and procedural attributes of these systems, the "mode" of regulation,[9] as opposed to the substantive rules that govern takeovers. Part I describes the procedures and structures employed by the Takeover Panel to amend, interpret and enforce the City Code. Part II illustrates the system of overlapping state and federal authority in the United States. Part III contrasts the two systems and examines the prospect of convergence.

I. TAKEOVER REGULATION IN ENGLAND

A. Origins of the City Code on Mergers and Takeovers

In the early postwar era, the City of London (City)[10] was faced with a simple choice about controlling the burgeoning takeover

---

and Japan where keiretsu control corporations through extensive cross holdings of stock and maintain guaranteed financing relationships with banks. *Id.*

6. In the field of business law, similarities between English and American law are so common that the term "Anglo-American" is often used by scholars in comparative analyses of business law provisions. *See, e.g.*, Robert Weber, *Can the Sauvegarde Reform Save French Bankruptcy Law?: A Comparative Look at Chapter 11 and French Bankruptcy Law From an Agency Cost Perspective*, 27 MICH. J. INT'L L. 257, 283-84 n.115 (2006) (comparing the contract options available under the "Anglo-American" and French models with regard to bankruptcy proceedings); Cally Jordan, *The Conundrum of Corporate Governance*, 30 Brook. J. Int'l L. 983, 1002 (2005) (referring to the "Anglo-American securities industry").

7. LAURENCE RABINOWITZ, WEINBERG AND BLANK ON TAKEOVERS AND MERGERS § 4-1002 (5th ed. 2005). The Takeover Panel is now backed by the Financial Services Authority. This development will be discussed in Part I-B below.

8. CHRISTIN M. FORSTINGER, TAKEOVER LAW IN THE EU AND THE USA: A COMPARATIVE ANALYSIS 74-75 (European Monographs No. 41, 2002).

9. In their recent article, Professors Armour and Skeel use the term "mode" to refer to the procedural and structural elements of regulatory regimes. Armour & Skeel, *supra* note 2, at 1729.

10. The City of London refers to the close-knit community of financial institutions traditionally based in the area of London known by the same name. *Id.* at 1730.

market:[11] either submit to legal regulation by the government or adopt a system of self-regulation.[12] At that time, underutilization of assets and mismanagement made many British firms ripe targets for takeovers.[13] In the absence of specialized legislation, common law courts were left to settle disputes over the defensive measures taken by incumbent boards.[14] Due to concerns over timeliness and uncertainty, however, investors were not satisfied with the dependence on litigation.[15] The City Code [16] was first drafted in 1968 by a working party of City institutions as a solution to the perceived threat from hostile corporate bidders.[17] The Code was comprised of ten General Principles and thirty-five rules.[18] The Takeover Panel, a non-governmental body composed of representatives from British financial, industry and investor trade associations,[19] is responsible for regulating takeovers through the administration of the Code.[20]

In its earliest form, the Code lacked statutory authority and the only means of sanction available to the Takeover Panel was the public censure of violators.[21] In order to compel compliance with the Code, the Panel implored the investment banks that advised parties in takeover transactions to honor its rulings by holding the banks responsible for their clients' violations.[22] The threat of losing the professional services and capital of the City investment banks compelled bidders and target boards to follow the Code.[23]

---

11. *See* Alan Hughes, *The Impact of Merger: A Survey of Empirical Evidence for the UK*, *in* MERGERS AND MERGER POLICY 30, 37 (James Fairburn & John Kay eds., 1989) (indicating that merger activity increased significantly in the late 1950s and again in the late 1970s).

12. RABINOWITZ, *supra* note 7, § 4-1002.

13. James J. Fishman, *Enforcement of Securities Laws Violations in the United Kingdom*, 9 INT'L TAX & BUS. LAW. 131, 196 (1991). The Code was actually the second attempt at self-regulation by the City. In 1959, a working group organized by the Bank of England promulgated *Notes on Amalgamation of British Businesses*, a set of rules designed to instill fairness in the takeover market. These rules did not provide an adequate solution to the problem. *Id.*

14. *See* Andrew Johnston, *Takeover Regulation: Historical and Theoretical Perspectives on the City Code*, 66 CAMBRIDGE L.J. 422, 436 (2007).

15. *Id.*

16. THE CITY CODE ON TAKEOVERS AND MERGERS (8th ed. 2006) (U.K.), *available at* http://www.thetakeoverpanel.org.uk/new/ [hereinafter CODE].

17. Fishman, *supra* note 13.

18. *See* Johnston, *supra* note 14, at 442.

19. CODE, *supra* note 16, § A(4)(a)(iv).

20. *Id.* § A(1).

21. *See* Johnston, *supra* note 14, at 444.

22. *Id.*

23. *See* Fishman, *supra* note 13, at 196-97.

B. The Structure and Activities of the Takeover Panel

The Code sets out the organizational structure of the Takeover Panel and its subcommittees.[24] The makeup of the Panel demonstrates its business-oriented, self-regulatory nature. Members of the Panel are appointed by various bodies such as insurers, investment companies, private and institutional investment management firms, banks, industry, accounting firms, investment banking houses and pension funds.[25] The Executive, which carries out the ground-level supervision of takeovers independent of the Panel,[26] is comprised of "employees and secondees from law firms, accountancy firms, corporate brokers, investment banks and other organsations."[27] Leading the Executive is the Director General, usually an investment banker who is concurrently an officer of the Panel.[28]

Each member of the Panel is assigned to one of two committees. The Code Committee is the rule-making arm of the Panel, responsible for proposing and reviewing amendments to the Code.[29] The Hearings Committee, on which the Chairman and Deputy Chairman sit, is responsible for reviewing the decisions of the Executive.[30] Assisting the Hearings Committee in this function is a Secretary, often a partner at law firm.[31] Appeals of the decisions of the Hearing Committee are heard by the Takeover Appeal Board (formerly known as the Appeal Committee), an independent body, usually led by former judges with experience in takeover law.[32]

1. Amending the Code. Rule-making and amendment responsibilities are delegated to the Code Committee.[33] Once the Code Committee decides to pursue an amendment to a certain provision, it releases a Public Consultation Paper (PCP), detailing the extent of the proposed amendment and soliciting views of interested

24. CODE, *supra* note 16, § A(4).
25. *Id.* § A(4)(a)(iv).
26. *Id.* § A(5).
27. *Id.*
28. *Id.*
29. *Id.* § A(4)(b).
30. *Id.* § A(4)(c).
31. *Id.*
32. *Id.* § A(8)(a).
33. *See id.* § A(4)(b).

parties.[34] After reviewing the position papers submitted by interested industry actors in response to the PCP, the Code Committee releases a final version of the amendment in the form of a Response Statement.[35] The Code Committee may amend the Code without going through the formal consultation process when the proposed amendment "does not materially alter the effect of the provision in question or is a consequence of changes to relevant legislation or regulatory requirements."[36]

2. Enforcing the Code. Traditionally, the Takeover Panel has relied in large part on community pressure to enforce its rulings.[37] In spite of the original absence of direct statutory authority, the Panel was successful in compelling compliance with its rulings. In 1987, Robert Alexander, Chairman of the Panel, explained in his personal statement to the Panel's Annual Report one reason why non-statutory regulation has been successful under the Code:

> It is sometimes said that the Panel lacks adequate power of sanction. In fact, the decisions of the Panel are in practice complied with. Almost all of those with whom the Panel deals are concerned to comply, and to be seen to comply with the Code. This reflects in very great part the grave damage to the reputation of individuals, advisers and companies which would result from a breach of the Code or a failure to accept our decisions.[38]

Alexander's statement illustrates that maintaining a strong reputation for honesty and fair dealing is important to success in the City business community. When the Panel determines that there has been a violation of the Code, it may issue a public statement of censure alerting the financial community to the misconduct.[39] Censure has particularly strong force because of the close-knit nature of the City financial community.[40]

Over time, the Government has also become more involved in enforcing the Code. As the European Union has moved toward convergence in takeover control, there has been increased pressure

34. *Id.*

35. *Id.*

36. *Id.*

37. *See supra* notes 21-23.

38. THE PANEL ON TAKE-OVERS AND MERGERS, REPORT ON THE YEAR ENDED 31ST MARCH, 1987, at 5-6 (1987).

39. CODE, *supra* note 16, § A(11)(b)(ii).

40. *See* Armour & Skeel, *supra* note 2, at 1771-72.

on Member States to become involved in takeover regulation.[41] England's first response to the rising tide of EU takeover control was the endorsement procedure. Under the Financial Services and Markets Act (FSMA) of 2000,[42] the Financial Services Authority (FSA) can endorse the Code, permitting the FSA to take action against parties or advisors who violate provisions or principles of the Code.[43] In April 2001, at the request of the Takeover Panel,[44] the FSA issued Consultation Paper 87, proposing the formal endorsement of the Code.[45] The endorsement was modified and adopted in a Policy Statement issued in October 2001.[46] Endorsement of the Code by the FSA had two significant effects.

First, the endorsement enabled the Takeover Panel to request that the FSA enforce the Code. Following a process termed "co-operation" by the FSA,[47] the Panel could refer a matter to the FSA after it determined that a party has committed a violation of the Code.[48] The FSA could then exercise its statutory mandate to compel compliance. These procedures enhanced the reliability of Code enforcement because it gave the Panel an additional means of compelling compliance beyond the "soft pressure" formally relied upon.

Second, the endorsement institutionalized the practice of "cold shouldering."[49] In general, "cold shouldering" is the adoption of a

---

41. *See* THE TAKEOVER PANEL, REPORT AND ACCOUNT FOR THE YEAR ENDED 31 MARCH 2006, at 7 (2006).

42. FINANCIAL SERVICES AND MARKETS ACT, 2000, c. 8, § 143 (Eng.), *available at* http://www.opsi.gov.uk/Acts/acts2000/00008—k.htm#143 [hereinafter FSMA 2000].

43. *See* RABINOWITZ, *supra* note 7, § 4-1030 n.1; *see also* FSMA 2000, *supra* note 42.

44. FIN. SERVS. AUTH., CONSULTATION PAPER 87: ENDORSEMENT OF THE CITY CODE ON TAKEOVERS AND MERGERS AND THE RULES GOVERNING SUBSTANTIAL ACQUISITIONS OF SHARES § 2.7 (2001), http://www.fsa.gov.uk/pubs/cp/cp87.pdf [hereinafter CONSULTATION PAPER]. The endorsement embodied in Consultation Paper 87 largely replicates the endorsement of the Code that existed under the Financial Services Act 1986, which was repealed upon passage of the Financial Services and Markets Act 2000. *See id.* § 1.2.

45. *Id.*

46. FIN. SERVS. AUTH., POLICY STATEMENT: ENDORSEMENT OF THE CITY CODE ON TAKEOVERS AND MERGERS AND THE RULES GOVERNING SUBSTANTIAL ACQUISITIONS OF SHARES, FEEDBACK ON CP87 AND MADE TEXT (2001), http://www.fsa.gov.uk/pubs/policy/ps87.pdf [hereinafter POLICY STATEMENT].

47. CONSULTATION PAPER, *supra* note 44, § 1.3.

48. CODE, *supra* note 16, § A(11)(b)(iv). *See also* THE PANEL ON TAKEOVERS AND MERGERS, REPORT ON THE YEAR ENDED 31 MARCH 2001, at 10 (2001) [hereinafter 2001 REPORT] ("[T]he principal effect of endorsement is that if a firm fails to comply with the Code, the Panel can request the FSA to take enforcement action against that firm.").

49. *See* POLICY STATEMENT, *supra* note 46, at 21.

rule by an organization that prohibits its members (or those entities it regulates in the case of government body) from dealing with parties that have violated the rules of a different regulatory body.[50] Section 4.3 of the FSA Handbook codifies cold shouldering:

> A *firm* must not act, or continue to act, for any *person* in connection with a transaction to which the *Takeover Code* applies . . . if the *firm* has reasonable grounds for believing that the *person* in question, or his principal, is not complying or is not likely to comply with the *Takeover Code*.[51]

Cold-shouldering clearly lends additional weight to the Panel's decisions and statements.

In 2006, the legal relationship between the FSA and the Takeover Panel was modified to achieve compliance with the European Takeover Directive.[52] The Companies Act designates the Takeover Panel as the entity authorized to promulgate and enforce takeover rules for the British market.[53] This designation gives the Panel statutory authority to impose sanctions, a power previously unavailable to the Panel.[54] The new statutory regime replaces the endorsement arrangement that existed under FSMA 2000,[55] but retains the statutory cold shoulder mechanism.[56] The persistence of the statutory cold shoulder mechanism indicates that the FSA will continue to sanction regulated parties that engage in business or transactions with parties against whom the Panel has issued an adverse decision.

However, the new arrangement enables the FSA to take action in certain circumstances without the request of the Panel, such as in cases of market abuse.[57] While the FSA indicates that its routine practice will be to defer to the Panel with regard to sanctions and enforcement and that it will not take action until the Panel concludes

---

50. CONSULTATION PAPER, *supra* note 44, § 1.5.

51. FIN. SERVS. AUTH., FSA HANDBOOK, MARKET CONDUCT (MAR) § 4.3.2, *available at* http://fsahandbook.info/FSA/html/handbook/MAR/4/3 (last visited Dec. 20, 2007) [hereinafter MAR].

52. Johnston, *supra* note 14, at 446.

53. *See* Companies Act, 2006, c. 46, § 943(1) (Eng.).

54. *See id.* § 952; *see also* Johnston, *supra* note 14, at 447 n.112.

55. Section 4 of the FSA Handbook's MAR indicates that the Endorsement of the Code, § 4.2, ceased to be in force as of May 2, 2007. MAR, *supra* note 51, § 4, *available at* http://fsahandbook.info/FSA/html/handbook/MAR/4 (last visited Dec. 20, 2007).

56. *See id*. § 4.3.1, *available at* http://fsahandbook.info/FSA/html/handbook/MAR/4/3.

57. FIN. SERVS. AUTH., FSA HANDBOOK, DECISION PROCEDURES AND PENALTIES MANUAL (DEPP) § 6.2.26, *available at* http://fsahandbook.info/FSA/html/handbook/DEPP/6/2 (last visited Dec. 20, 2007) [hereinafter DEPP].

its inquiry,[58] the ability of the FSA to take unilateral action is a departure from the original operation of the Panel as a purely self-regulatory body.

These amendments clarify the ability of the FSA to both enforce the Code and to support the Panel in enforcing the Code. While the FSA has indicated that its working relationship with the Panel is unmodified by the statutory realignment,[59] there is a subtle difference from the endorsement procedure. Under the old mechanism, the FSA could not act absent a request from the Takeover Panel, whereas under the current scheme, the FSA has the authority to enforce without a request from the Panel. This subtle shift will not dramatically affect the independence of the Panel if the FSA chooses not to act unilaterally, but the arrangement may encourage the FSA to become increasingly involved in takeover regulation in the future.

3. Interpreting the Code. The Executive is responsible for interpreting the Code.[60] The Executive may "give rulings on points of interpretation, application or effect of the Code which are based on the particular facts of a case."[61] Further, as the Executive recommends that concerned parties address the Panel with questions of interpretation early in the bid process so as to avoid any later disputes,[62] the Panel is routinely able to review takeover proposals prior to their introduction.[63]

The Executive permits parties to seek *ex ante* clarifications of the Code on a "no names" basis, meaning that such a request need not identify the parties involved in the proposed transaction.[64] However, such interpretations are non-binding and do not immunize a party that acts in conformity therewith during any later Panel proceedings.[65] These rulings are confidential, can be rendered very quickly (often

58. *Id.* § 6.2.22.

59. E-mail from M. Ali, Consumer Contact Centre, Financial Services Authority, to Brian Rosenzweig, (Oct. 10, 2007, 12:16 EST) (on file with author).

60. CODE, *supra* note 16, § A(6).

61. *Id.*

62. RABINOWITZ, *supra* note 7, § 4-1020.

63. For example, in the year ended March 31, 2006, the Panel reviewed 151 takeover proposals, an increase from 114 the previous year. THE PANEL ON TAKEOVERS AND MERGERS, REPORT ON THE YEAR ENDED 31 MARCH 2006, at 9 (2006), http://www.thetakeoverpanel.org.uk/new/reports/DATA//Report2006.pdf.

64. CODE, *supra* note 16, § A(6)(a).

65. *Id.*

within twenty-four hours), and do not require formal proceedings.[66] The ability of parties to seek informal, confidential advice from the Panel Executive is a unique aspect of the Code.

Parties subject to the Code may also seek more formal interpretations from the Executive.[67] In order to obtain a decision upon which a party may legally rely, a party must give all relevant details of the proposed transaction, including all parties' names.[68] Mindful of the sensitivity of these details, the Panel strictly guards the information revealed.[69] The Code also provides that obtaining professional advice on the interpretation of the Code in lieu of an official ruling is not appropriate.[70] This instruction further encourages parties to consult the Panel directly and effectively limits the use of legal opinions rendered by professional service firms.

Decisions of the Executive may be appealed. The first appellate level is the Hearings Committee.[71] A matter may reach the Hearings Committee in one of four ways. First, a party subject to a ruling by the Executive may appeal that ruling to the Hearings Committee.[72] Second, the Executive may request a ruling from the Hearings Committee without rendering a decision itself.[73] Third, the Executive may refer a case to the Hearings Committee where it believes a party has breached the Code or a prior ruling regarding the Code.[74] Finally, the Code provides the Executive the discretion to seek Hearings Committee review where it deems it appropriate.[75]

Hearings Committee proceedings are informal and are typically held in private maintaining the confidentiality of sensitive information.[76] Though parties may bring solicitors and financial advisors with them to hearings, they almost always represent themselves to the Committee.[77] Also, formal rules of evidence are

---

66. *See* RABINOWITZ, *supra* note 7, § 4-1020.
67. CODE, *supra* note 16, § A(6)(b).
68. *See Id.*
69. RABINOWITZ, *supra* note 7, § 4-1023 n.4.
70. CODE, *supra* note 16, § A(6)(b).
71. *See id.* § A(7)(a).
72. *Id.* § A(7)(a)(i).
73. *Id.* § A(7)(a)(ii).
74. *Id.* § A(7)(a)(iii).
75. *Id.* § A(7)(a)(iv).
76. *Id.* § A(7)(c).
77. RABINOWITZ, *supra* note 7, § 4-1023. According to Rabinowitz, "[i]n cases of special difficulty the Panel has, very exceptionally, allowed a barrister to put the case of one of the parties." *Id.* § 4-1023 n.2.

not employed during hearings.[78] Decisions of the Hearings Committee are typically published in a Panel Statement, a document released after the decision has been communicated to the parties involved.[79] The final forum of review for the interpretation of the Code is Takeover Appeal Board.[80] The Takeover Appeal Board publishes its decisions, also redacting confidential or commercially sensitive information.[81]

In certain circumstances, the Takeover Panel may be subject to judicial review by courts of law.[82] In *Ex Parte Datafin*,[83] the Court of Appeal established that the Panel is subject to judicial review because "it perform[s] or operate[s] as an integral part of a system which perform[s] public law duties."[84] "Judicial review" is a carefully selected term in this context, since, as Rabinowitz explains, "courts of law will [not] operate as a court of appeal from Panel decisions; rather they will operate as a court of review."[85] The courts will not review the Panel's findings of fact or evaluation of evidence.[86] The role of the court in such a case is limited to determining whether the Panel has committed "[an] illegality . . . [acted with] irrationality . . . or [committed] a procedural impropriety."[87] Judicial review might be possible when a party challenges the good faith basis of the Panel's exercise of its disciplinary powers[88] or where the Panel grants individual exceptions from the operation of the Code.[89] The Court of Appeal has expressed great deference towards the Panel's decisions, especially with regard to the interpretation of its own rules.[90] The

78. *See id.* The procedures described in reference to the Hearing Committee are also employed by the Takeover Appeal Board. *Id* at § 4-1026 n.5.

79. CODE, *supra* note 16, § A(7)(c).

80. *See id.* § A(8).

81. *Id.* § A(7)(b).

82. RABINOWITZ, *supra* note 7, § 4-1012.

83. [1987] Q.B. 815 (U.K.).

84. RABINOWITZ, *supra* note 7, § 4-1012 n.1.

85. *Id.* § 4-1012.

86. *Id.*

87. *See id.* (quoting *ex parte* Datafin, [1987] Q.B. at 842).

88. *See id.* § 4-1015 (referring to "bona fides").

89. *See id.* (suggesting that judicial review might be appropriate where the Panel "grant[s] dispensation[s] from the operation of the Code.").

90. *See id.* § 4-1014 (quoting Sir John Donaldson, Master of Rolls of the Court of Appeal, that "[w]hen it comes to interpreting its own rules, it must clearly be given considerable latitude both because, as legislator, it could properly alter them at any time . . . . Where there might be a legitimate cause for complaint and for the intervention of the court would be if the

general principle of *Datafin*, according to Rabinowitz, is that courts will not disturb Panel decisions, even where the Panel has overstepped its authority or acted unreasonably, if doing so is not in the public interest.[91]

C. Substantive Rules of the Code

Section B of the Code, entitled "General Principles," sets out the foundational concepts of the substantive rules contained within the Code.[92] Parties subject to the Code are required to honor the General Principles as well as the more detailed rules elaborated in the Code.[93] The Code further instructs that the rules, while expressed in more specific language than the General Principles, are still not technical in nature and "are to be interpreted to achieve their underlying purpose."[94] In this way, the Takeover Panel requires that parties follow not only the letter of the Code, but also its spirit. The FSA explains that "principles-based regulation means, where possible, moving away from dictating through detailed, prescriptive and supervisory actions."[95] The FSA argues further that the principles-based approach "foster[s] a more innovative and competitive financial services industry;"[96] and that "[i]n a quickly changing marketplace, principles are far more durable [than legal rules]."[97] When taken in the context of the strengthening of the Panel's statutory backing through the expansion of FSA authority described above, the goal of principles-based regulation suggests that the FSA is striving to maintain Britain's self-regulatory heritage. In addition to the preference for principles over rules, the Code includes several provisions, two of which are discussed here, that differ significantly from corresponding American provisions.

First, the Code requires target corporations to obtain shareholder approval before taking actions that might frustrate a

---

interpretation were so far removed from the natural and ordinary meaning of the words of the rules that an ordinary user of the market could reasonably be misled.").

91. *See id.* § 4-1016 (suggesting that the "general tenor" of *Datafin* is that "the court will only set aside a Panel decision if [doing so] is in the public interest," and that accordingly, "decisions will not be disturbed if to do so would be in the public interest.").

92. CODE, *supra* note 16, § B

93. *See id.* § A(2)(b).

94. *Id.*

95. FIN. SERVS. AUTH., PRINCIPLES-BASED REGULATION: FOCUSING ON THE OUTCOMES THAT MATTER 4 (2007), *available at* http://www.fsa.gov.uk/pubs/other/principles.pdf.

96. *Id.* at 2.

97. *Id.* at 6.

potential offer or prevent a shareholder vote on the merits of a bid.[98] In restricting defensive actions, the Code endorses the theory that hostile tender offers are beneficial transactions that offer shareholders an opportunity to remove entrenched management and receive fair value for their shares.

Second, the Code incorporates a mandatory offer rule. When a bidder seeks to acquire more than thirty percent of the outstanding shares of a target corporation, the Code requires not only that the bidder be able to finance the acquisition of all remaining shares, but also that the bidder make an offer to all shareholders at the highest price paid for any share in the thirty percent block.[99] This rule serves to protect shareholders of the target from "predatory" transactions that involve a tender offer for a substantial majority of shares, followed by a freeze-out merger of the remaining shares.

D. Conclusion

The defining characteristic of the British system is self-regulation based on general principles. The FSA has taken an increasingly influential role in the enforcement of the Code, but the development, interpretation and initial enforcement of the Code are all still squarely within the control of the Panel. The Code is the work of all of the stakeholders in the financial community, from service institutions like brokerage houses and investment banks, to institutional investors such as pension funds and insurers. What distinguishes the British system[100] is the proximity between the regulators and the regulated parties. Such a system undoubtedly lends credibility to the regulations and builds trust within the system.

II. TAKEOVER REGULATION IN THE UNITED STATES

Takeover regulation in the United States is an amalgam of federal and state law. The U.S. Constitution limits the powers of the federal government, reserving the remaining authority to the states.[101] Federal government involvement in the control of hostile takeovers has taken the form of securities laws, most notably the Williams

---

98. CODE, *supra* note 16, § I(21)(1)(a).

99. *Id.* § F(9).

100. This is not to say that British system is unique, as it has served as a model for several other takeover control regimes, such as Ireland and Australia. *See* NICOLE E. CALLEJA, THE NEW TAKEOVERS PANEL- A BETTER WAY? 35-40 (2002).

101. FORSTINGER, *supra* note 8, at 16-17.

Act.[102] Limited federal jurisdiction leaves issues of general corporate activity and policy to the states.[103] Under the doctrine of internal affairs, the law of the state where a firm is incorporated governs the activities of the firm, the actions of its officers and directors and the relationship between the firm and its shareholders.[104]

A. Federal Regulation: The Williams Act

In response to the increasingly common use of the tender offer as a means of accomplishing corporate takeovers in the 1960s,[105] Congress passed the Williams Act amendments to the Securities Exchange Act of 1934 (1934 Act).[106] Prior to the passage of the Williams Act, unregulated tender offers were a popular alternative to statutory mergers.[107] Under the existing securities laws, bidders were required to make little disclosure to the shareholders of target corporations in the context of tender offers.[108] The Williams Act and the subsequent regulations promulgated under it set out general rules and procedures for tender offers,[109] including requirements for disclosure[110] and filing.[111] These federal provisions control the tender offer process by placing substantive obligations upon bidders. While the focus of federal takeover regulation is on the bidder's actions, some commentators have explained that intention of Congress was to create a system that was neutral as between the interests of hostile bidders and incumbent managers.[112] Nevertheless, it is important to

---

102. *Id.* at 74-75.

103. *Id.* at 17.

104. *Id.*

105. THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 478 (4th ed. 2002).

106. Pub. L. No. 90-439, § 2, 82 Stat. 454 (1968) (codified at 15 U.S.C. §§ 78m(d)-(e), n(d)-(f)).

107. HAZEN, *supra* note 105, at 478-79.

108. *Id.* at 479.

109. Rule 14d-7 provides for free withdrawal of tendered securities prior to the expiration of the offer. 17 C.F.R. § 240.14d-7 (2007). Rule 14d-8 provides for pro rata acceptance of shares in an oversubscribed tender offer. Rule 14d-10 provides for a best price rule. *See* HAZEN, *supra* note 105, at 496-501.

110. Section 13(d) of the Williams Act provides that any person who acquires beneficial ownership of more than five percent of the outstanding shares of any class of registered equity securities must file a disclosure statement, alerting investors to the buyer's identity and intentions. *See* HAZEN, *supra* note 105, at 484-85.

111. Section 14(d) of the Williams Act provides for the filing of materials fully and fairly describing the offer. *See Id.* at 493.

112. *See* FORSTINGER, *supra* note 8, at 75.

recognize how the mode of federal takeover regulation is limited in scope.

1. Refining Federal Takeover Rules. The Williams Act itself provides for certain substantive requirements and practices,[113] but in other areas the statute is ambiguous.[114] Congress, in fact, drafted the federal securities laws broadly, leaving room for the Securities and Exchange Commission (SEC) to clarify issues.[115] As Professor Hazen explains, "[t]he SEC has broad rule-making powers under the various statutes it administers and has exercised its authority by prescribing at least three different kinds of rules."[116] First, the SEC promulgates rules defining the procedures to be followed in Commission proceedings.[117] Second, the SEC promulgates rules that fill in the terms of statutes over which it has authority to regulate.[118] For example, § 14(d)(6) of the 1934 Act (added by the Williams Act) provides for pro rata acceptance of tendered shares even if the offer does not so require.[119] "Rule 14d-8, extends the pro rata requirements to the entire period of the tender offer,"[120] thereby preventing an offeror from extending an offer period in order to affect pro rata distribution.[121] Third, some SEC rules define general terms used in the statutes.[122] Interestingly, though the term "tender offer" is not explicitly defined in the Williams Act,[123] the SEC has continually refused to promulgate a rule clarifying the definition.[124] Outside of formal rules, the SEC can also create law through more informal means, most commonly though SEC releases.[125] While releases are

113. For example, § 13(d) of the Williams Act provides for disclosure. *See* HAZEN, *supra* note 105, at 484-85.

114. *See id*. at 3 (explaining that "[t]he statutes are, however, quite sketchy or ambiguous in many important areas").

115. *See id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 496.

120. *Id.*

121. *Id.*

122. *Id.* at 3.

123. *Id.* at 486.

124. *See id.* at 487-88 n.15 (explaining that what is used instead of a formal definition is an "eight factor test which is not contained in an official SEC release [but] has evolved over a period of time and is discussed in [several federal court cases]").

125. *Id.* at 3.

meant to be interpretive, they do have precedent value.[126] The SEC occupies an important role in clarifying and refining federal takeover rules.

2. *Enforcing the Williams Act Provisions.* The 1934 Act grants the SEC authority to investigate all potential violations of Williams Act.[127] The SEC also has subpoena power,[128] greatly enhancing its ability to investigate misconduct and build cases against violators. Accordingly, the SEC has the ability to file lawsuits in federal district courts to compel compliance with Williams Act provisions.[129]

The SEC always has standing to bring lawsuits under the Williams Act, but in certain circumstances, private parties may also pursue litigation to enforce Williams Act provisions.[130] While the Williams Act does not explicitly provide for any private right of action,[131] federal courts have interpreted certain provisions of the Williams Act to grant private rights of action.[132] For example, in *Polaroid v. Disney*, the Third Circuit held that a target corporation has standing to sue for an injunction to stop a tender offer under § 14(e) of the Williams Act for misrepresentation.[133] Though the Court also found that, in this case, the target corporation lacked a cause of action to sue for a violation of the All Holders Rule amendment to the Act,[134] it explained that a private right of action does exist for shareholders under that rule.[135] Private rights of action grant individual shareholders, and in some cases, target corporations, a powerful tool with which to resist (or merely delay) tender offers. Further, it is important to recognize that private rights of action may not be a realistic option for some potential plaintiffs due to the high cost of filing and pursuing lawsuits in federal court.

---

126. *Id.* at 31.

127. Securities Exchange Act of 1934 § 21, 15 U.S.C. § 78u(a) (2006).

128. 15 U.S.C. § 78u(b). *See also* HAZEN, *supra* note 105, at 878 (explaining that "the issuance of an order authorizing a formal investigation gives the SEC staff subpoena power.").

129. 15 U.S.C. § 78u(d).

130. HAZEN, *supra* note 105, at 518-19.

131. CHARLES R.T. O'KELLY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 1012 (5th ed. 2006).

132. Edward F. Greene, Andrew Curran & David A. Christman, *Toward a Cohesive Approach to Cross-Border Takeover Regulation*, 51 U. MIAMI L. REV. 823, 835 n.60 (1997).

133. 862 F.2d 987, 1003 (3d Cir. 1988).

134. *Id.* at 1001-02. The court explained that "[t]he All Holders Rule states that a bidder's tender offer must be open to 'all security holders of the class of securities subject to the tender offer.'" *Id.* at 991-92 (citing 17 C.F.R. § 240.14d-10(a)).

135. *Id.* at 993.

3. Interpreting Federal Takeover Rules. Interpretation and development of federal takeover regulation is a combination of SEC clarification and common law jurisprudence. Along with formal rule-making and issuing informal policy statements, the SEC also interprets the law through the "no action" letter process.[136] No action letters are private requests for *ex ante* indications of the legality of a proposed action under the federal securities laws.[137] No action letters reflect the personal interpretation of SEC staff members, and they do not bind the SEC to any particular position in a subsequent formal proceeding and the existence of a no action letter in favor of an action does not preclude a party from challenging such an action in a privately initiated suit.[138]

Further, the federal courts routinely hear cases brought under Williams Act provisions, either by the SEC or by private parties. These rulings create federal common law precedent within their respective federal jurisdictions and provide persuasive authority in other federal districts and circuits.

B. State Law Concerning Takeovers

State regulation of corporate takeover activity takes two distinct forms: state corporation laws, which govern the activities of corporate entities chartered within that state[139] and state anti-takeover statutes, which operate in a fashion similar to the Williams Act.[140] The practical effect of this overlapping system is that actions of target boards are constrained by state corporation law, while the actions of bidders are constrained by federal law.[141]

1. State Corporation Law. States control takeovers through constraints on the activities of target corporations. As the seat of many of America's largest corporations, Delaware is by far the most influential state with regard to corporate law.[142] Disputes involving corporate takeovers most often find their way to Delaware's Chancery Court in the form of a suit for injunction.[143] In this type of

136. HAZEN, *supra* note 105, at 31.
137. *Id.*
138. *Id.* at 31-32.
139. FORSTINGER, *supra* note 8, at 17.
140. *Id.* at 87.
141. *See* Armour & Skeel, *supra* note 2, at 1743.
142. *See* FORSTINGER, *supra* note 8, at 17; *see also* Armour & Skeel, *supra* note 2, at 1755.
143. Armour & Skeel, *supra* note 2, at 1743.

suit, bidders contest the defensive actions of the incumbent board of directors, often alleging violations of fiduciary duty.[144] Accordingly, dissatisfied parties may look to state law to contest either the actions of a bidder or the defensive measures taken by a target in the context of a tender offer. Through a series of prominent cases, the Delaware courts have elaborated several concepts through which takeover defenses are analyzed. When compared to the British system under the Code, Delaware law provides target boards with far more latitude in crafting defenses to hostile bids.[145]

In *Unocal v. Mesa Petroleum*,[146] the Delaware Chancery Court upheld the self-tender offer of a target corporation that was designed to defeat a hostile bid.[147] Under *Unocal*, defensive measures are permitted where directors act "in good faith and upon a reasonable investigation"[148] and the measures taken are "reasonable in response to the threat posed."[149] In permitting Unocal's self-tender, the Court permitted a tender offer that was specifically designed to exclude a particular party, the hostile offeror. This kind of disparate treatment, however, was effectively outlawed by a subsequent amendment to the Williams Act, the All Holders Rule.[150] It is important to realize that Unocal's shareholders were not given the opportunity to decide the merits of the hostile bid.

Shareholder rights plans, often known as "poison pills," are a common defensive measure utilized by corporations to fend off hostile tender offers. Under Delaware law, corporations may endow shares with special rights or privileges.[151] These rights plans may be created by the board of directors without the need for a vote by the shareholders.[152] A poison pill plan allows shareholders to purchase additional securities upon the occurrence of a certain event, often the purchase of a substantial number of shares by a hostile bidder.[153] Poison pill plans come in several varieties, but the common effect of such plans is that the holdings of a hostile bidder are diluted,

144. FORSTINGER, *supra* note 8, at 17.
145. *See* Armour & Skeel, *supra* note 2, at 1756.
146. 493 A.2d 946 (Del. 1985).
147. *See id.* at 958.
148. *Id.*
149. *Id.* at 955.
150. COX & HAZEN, *supra* note 3, at 683.
151. *See, e.g.*, DEL. CODE ANN. tit. 8, § 157 (2001).
152. COX & HAZEN, *supra* note 3, at 658.
153. *Id.* at 655.

increasing the cost of a takeover transaction.[154] The legality of shareholder rights plans and other defensive measures taken by incumbent management have been litigated heavily in the Delaware courts. In *Moran v. Household International, Inc.*,[155] the Delaware Supreme Court upheld a poison pill rights plan as a permissible defensive measure under the *Unocal* doctrine.[156] *Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.*[157] further refined the *Unocal* doctrine by holding that the reasonableness of defensive measures is to be assessed in terms of obtaining the most valuable consideration for target shareholders, not guarding the risk of a change in control.[158]

Some commentators argue that the Delaware cases exemplify an "absolute expansion in the freedom of directors to adopt defensive measures in response to hostile takeovers."[159] However, Professor Ventoruzzo suggests that the Delaware cases "reflect a difficulty in developing clear rules to govern at such a delicate intersection between protecting against management's self-interest and allowing strategic management decision-making."[160] This theory questions the utility of fiduciary duty to achieve the goals of corporate takeover regulation. Litigation of fiduciary duty claims is inherently fact-dependent, an *ex post* assessment that does not generate clear or simple rules to instruct future actions. While it is clear that target boards in the United States have an enhanced ability to utilize takeover defenses, this does not indicate that the American system disfavors takeover in general.

2. State Anti-Takeover Statutes. Since the passage of the Williams Act in 1968, many states have adopted anti-takeover laws specifically regulating tender offers.[161] Some of these provisions go beyond protecting investors from manipulation by bidders and are aimed at deterring takeover activity to protect incumbent management and the local business community.[162] Such provisions

---

154. *Id.* at 655-56.

155. 500 A.2d 1346 (Del. 1985).

156. COX & HAZEN, *supra* note 3, at 656.

157. 506 A.2d 173 (Del. 1986).

158. COX & HAZEN, *supra* note 3, at 664.

159. *See* Marco Venturouzzo, *Europe's Thirteenth Directive and U.S. Takeover Regulation: Regulatory means and Political and Economic Ends*, 41 TEX. INT'L L.J. 171, 188 (2006).

160. *Id.*

161. *See* HAZEN, *supra* note 105, at 538.

162. *Id.*

are known colloquially as "shark repellents."[163] State anti-takeover statutes have evolved over time in response to federal legislation and federal-court litigation regarding the constitutionality of such state laws.

The "first generation" of state takeover laws granted state regulators great authority to analyze the substantive merits of takeover bids.[164] State regulators could initiate hearings or hold hearings at the request of interested parties.[165] Such hearings and statutory waiting periods served to slow the tender offer process. In *Edgar v. MITE Corp.*,[166] the Supreme Court held that the Illinois anti-takeover statute violated the Commerce Clause of the U.S. Constitution because "the State has no legitimate interest in protecting nonresident shareholders."[167]

In response to the *Edgar* case, some states modified or adopted new anti-takeover provisions.[168] A theme among the second generation of statutes is reliance on the state's authority to monitor corporate governance, as opposed to the state's authority to regulate the trading of securities.[169] Indiana, for example, passed a "control share acquisition" statute, which provides for restricted voting by shareholders whose ownership exceeds twenty percent of the outstanding shares.[170] The statute further provides for a mandatory meeting of shareholders to vote on the offer within fifty days,[171] a term longer than the Williams Act requires.[172] The bidders challenged the Indiana statute in *CTS Corp. v. Dynamics Corp. of America*[173] to no avail, as the Supreme Court upheld the statute on the grounds that the delay was not unreasonable and that the bidder was not disadvantaged.[174] Professors Cox and Hazen comment that the Court was loathe to invalidate the statute for fear of undermining the long-

163. *Id.*
164. COX & HAZEN, *supra* note 3, at 691.
165. *Id.*
166. 457 U.S. 624 (1982).
167. *Id.* at 644.
168. FORSTINGER, *supra* note 8, at 76.
169. *See* COX & HAZEN, *supra* note 3, at 692.
170. *See id.* at 692-93.
171. *Id.*
172. Rule 14e-1 requires that a tender offer must held open for at least twenty business days. 17 C.F.R. § 240.14e-1 (2007).
173. 481 U.S. 69 (1987).
174. *See* COX & HAZEN, *supra* note 3, at 693.

standing internal affairs doctrine.[175] As a regulation of the activities of corporations and not as a control on transactions in shares, the Indiana statute was able to pass constitutional muster.

In the wake of the *CTS Corp.* decision, several states have passed further anti-takeover provisions. Third generation statutes are geared towards preventing freeze-outs of minority shareholders after a tender offer is made to gain control. New York's "freeze" statute prohibits a cash-out merger within five years of a change of control tender offer if the tender offer was not approved by incumbent management.[176] Delaware's statute requires a three year waiting period.[177] Since these freeze statutes are based on the states' authority to regulate the internal affairs of state charted corporations, they are protected from constitutional Commerce Clause scrutiny under *CTS Corp*.

C. Conclusion

The American system of takeover regulation is a combination of federal statutes and regulations, state anti-takeover statutes and state fiduciary duty concepts. At times the doctrines intersect, as with state anti-takeover statutes and the federal Williams Act. In other instances, the interpretation of one body of law will drive the development of another, as when the *Unocal* case prompted the adoption of the "All Holders" provision of the Williams Act.

Even though American takeover law has many sources, several themes underlie the system in general. First, there is a clear desire for minimum standards of fairness in the tender offer process. Since the protection of investors has always been a principal goal of federal securities regulation, it is unsurprising that fairness and equity for all shareholders is a primary concern. However, the focus on minimum standards has necessitated regulation through strict rules, which can enable creative directors to evade the spirit of the regulation. In order to check director creativity, regulators need to monitor current practices and adjust regulations to keep up with innovation. This puts pressure on regulators, such as the SEC, as well as state judiciaries and legislatures, to make sure that their respective systems are well

175. *Id.*

176. N.Y Bus. Corp. Law § 912 (McKinney Supp. 2002). *See also* COX & HAZEN, *supra* note 3, at 694.

177. DEL. CODE ANN. tit. 8, § 203 (2001). *See also* COX & HAZEN, *supra* note 3, at 694.

situated to serve those constituencies who rely on them for protection.

III. ANALYSIS

The British and American models differ significantly in the means through which takeover regulations are promulgated, interpreted and enforced. British takeover rules are promulgated by a single entity acting with jurisdiction to control nearly all aspects of the tender offer process. Regulated entities are required to follow the letter as well as the spirit of the Code. The self-regulatory structure of the Panel reduces the incidence of litigation between adverse parties, while the proximity between the regulators and the industry players means that the Panel has enhanced credibility. In the United States, decentralized regulation based on legal rules leaves room for market actors to seek innovative solutions to takeover problems. In order to keep up with market innovation, regulators, courts and legislatures need to continue to refine takeover provisions so as to ensure protection of shareholders while providing an efficient market for corporate control. Also, the availability of defensive actions in the United States can make hostile transactions more complicated and costly.

Professors Armour and Skeel explain that the prohibition of defensive measures in the British market increases the frequency and the rate of success of hostile bids.[178] In analyzing the effects of the differing modes of regulation, they argue that the American system is less shareholder-friendly.[179] They argue that the shareholder-friendly regime developed in Britain because institutional investors were better organized and more powerful in Britain at the time that takeover regulation was taking hold.[180] By contrast, institutional investors were far less prominent in the United States, due to high rates of share ownership by individuals[181] and laws restricting the ability of certain entities, such as banks, from becoming significant

178. *See* Armour & Skeel, *supra* note 2, at 1738 (indicating that 0.85% of takeover bids in the United Kingdom are hostile, compared to 0.57% in the United States, and that 43% of such bids are completed in the United Kingdom, as opposed to 24% in the United States).

179. *Id.* Armour and Skeel further explain that high personal dividend income taxes in Britain, combined with tax relief for collective investment schemes, such as pension funds, fueled institutional share ownership. *Id.* at 1768-69.

180. *Id.* at 1793.

181. *See id.* at 1768 (indicating that in 1970, shortly after the passage of the Williams Act, nearly eighty percent of shares were own by individual investors).

shareholders.[182] Now that institutional share ownership has increased significantly in the United States and may even outpace institutional share ownership in Britain,[183] the question is no longer why the shareholder-friendly regime developed in Britain, but whether the American system actually disadvantages American investors.

The American approach to takeover regulation appears to be more costly than the British system. First, in the United States, the duration of takeover bids is not limited by law, while British takeover bids must be completed in a limited timeframe.[184] Second, American takeover disputes are often litigated in court, resulting significant legal fees, whereas in Britain the Panel is quick to respond to takeover disputes and legal fees are minimized due to the general absence of lawyers at Panel proceedings.[185] One possibility is that the efficiency and reduced costs of the British system, coupled with freer shareholder choice, result in a more favorable system for shareholders. However, it is also possible that the availability of takeover defenses and the more deliberate, rule-based adjudication of disputes can actually prove beneficial to shareholders.

The increased costs of launching a hostile takeover in the United States, generated principally by defensive tactics and the possibility of takeover litigation, should encourage more negotiated transactions.[186] An increased number of friendly transactions may actually be beneficial to shareholders. In principle, corporate boards are in an ideal position to value merger consideration because they know their businesses and have access to the most current and relevant information. Permitting target boards to shape the tender offer process can allow competent boards to veto poor offers and increase the likelihood of more favorable offers. In short, the preference for director involvement in shareholder decision making may represent a positive value judgment, despite the overwhelming appeal of shareholder choice. This theory does have overtones of paternalism, which is logical given Armour and Skeel's explanation of the origins

182. *Id.* at 1752.

183. *See id.* at 1768-69.

184. *Id.* at 1746-47.

185. *Id. See also supra* Part I.B.3.

186. Certain features of the British system also increase costs compared to the American system. One notable example is the mandatory offer rule, requiring bidders to line up financing for a full takeover where more than thirty percent of the outstanding shares are sought. *See supra* Part I.C.

of the American policy. However, this paternalism is not necessarily outdated, despite the change in share ownership patterns.

While hostile takeovers are less frequent in the United States, they are still a very real threat to delinquent corporate boards.[187] Additionally, the rise of institutional share ownership in the United States has not resulted in any significant changes in takeover regulation. In fact, some institutional shareholders have embraced their independent, detached role in corporate governance. For example, the California Public Employees' Retirement System (CALPERS) Focus List Program, which identifies underperforming corporations, has had a positive effect in improving the performance and governance of highlighted companies.[188] The increased numbers of highly sophisticated shareholders does not diminish the capacity of responsible corporate boards to determine the value of takeover offers. It is the role of the board of directors to help shareholders decide and understand the merits of takeover proposals, thus increasing the number of negotiated offers should serve to better educated shareholders about their options. Finally, a recent study concluded that the shareholders of American corporations receive greater premiums for shares of corporations involved in merger and acquisition transactions.[189] The study indicates that the average share price premium paid in American merger and acquisition transactions (both friendly and hostile) exceeded the average premium paid in British M&A transactions by approximately six percent.[190] These data indicate that the U.S. market demands a higher premium, perhaps in part because the American takeover regime promotes higher-priced, negotiated deals.

The notion that American takeover regulation favors incumbent management at the expense of shareholders must be considered against the general backdrop of comparative corporate governance. As explained earlier, the threat of a hostile takeover has the effect of keeping incumbent managers honest, but it is by no means the only tool available to shareholders. Derivative litigation, which is a more

---

187. *See supra* note 186.

188. *See* Julie Earle, *Laggards that are brought into line*, FINANCIAL TIMES (U.K.), April 14, 2003, at 1, *available at* http://search.ft.com/nonFtArticle?id=030414003023.

189. Gregory Jackson & Hideaki Miyajima, *Varieties of Capitalism, Varieties of Markets: Mergers and Acquisitions in Japan, Germany, France, the UK and USA* 50 (Research Inst. of Econ., Trade & Indus., Discussion Paper Series 07-E-054, 2007), *available at* http://ssrn.com/abstract=1012210.

190. *Id.* These data reflect premiums paid during the period of 2000-2005. *Id.*

robust remedy in the United States than in the United Kingdom, also provides a mechanism through which shareholders can exert pressure on incumbent managers.[191] Contingent attorney fees for plaintiffs increase the ability of shareholders to pursue derivative suits in America,[192] whereas the "loser pays" system and the absence of contingent fee arrangements make derivative litigation more difficult in England.[193] And while Miller argues that derivative litigation and hostile takeovers are not perfect substitutes for one another because they address different forms of mismanagement,[194] the specter of derivative suits must provide additional protection to American shareholders. If takeover law is viewed as a piece of the larger corporate governance system, it is possible that the American system may provide comparable protection to shareholders, despite the appearance of reduced shareholder choice in hostile takeover transactions.

CONCLUSION

The rising influence of the FSA may suggest a certain degree of convergence between the British and American models of takeover regulation. While the Panel continues to operate independently, the addition of a firmer statutory foundation to the British system enhances the reliability of enforcement. The ability of the FSA to target Code violators for market abuse provides an extra layer of protection for the British financial markets. In the past, the augmented role of the FSA and its insistence that it will not disturb the Panel's activities were met with some skepticism. Shortly after the endorsement procedure was implemented, uncertainty was reported among the London bar about whether the arrangement would result in the FSA taking a more active role in takeover regulation.[195] According to the Panel itself, cooperation between the

---

191. *See* Miller, *supra* note 5, at 61-68.

192. *See id.* at 75-76.

193. *See id.* Miller explains that the legal doctrines also differ significantly. American courts have clearly recognized the right of shareholders to bring derivative suits, whereas British courts have permitted such suits only as an exception to the general rule that a company, and not its shareholders, may pursue actions for damages caused to the company. *See id.* at 60-65.

194. *Id.* at 78.

195. *See Lawyers question hands-off role for FSA on takeovers*, 21 INT'L FIN. L. REV. 3, 3 (2002) (quoting Chris Bright of Shearman & Sterling that "[o]ne can expect tension and it seems likely that the oversight of the FSA will be increasingly required. In the abstract, the FSA can be hands off, but when hard cases come along . . . you will have to ask if the authority can maintain this stance").

FSA and the Panel under the endorsement mechanism was successful[196] and the Panel remains hopeful that the relations with the FSA will continue to be positive under the new regime.[197] However, the possibility still remains that the new statutory system will enable increased litigation or result in the FSA's involvment in actual regulation of takeovers.

Just as the British are incorporating principles of statutory backing, the American system stands to benefit from an exchange of ideas and best practices. The theory of principles-based regulation that is promoted by the FSA serves an equally beneficial purpose in the context of American regulation. Promoting fairness and positive outcomes through principles-based regulation would be a positive step for American regulators. Principles are not adverse to statutory regulation; it is possible to encourage market participants to meet general standards of fairness without discouraging innovation or market efficiency. The Chairman of the Federal Reserve, Ben Bernanke, recently suggested that the United States would benefit from incorporating British principles-based concepts.[198] Furthermore, encouraging market players and regulators to work together could prove important for the continued vitality of American markets. It is essential for all involved to recognize that regulation is not a zero sum game; enforcing sensible rules creates benefits for all participants and provides reliability and security to a domain that, if left alone, would likely be chaotic and unfair.

---

196. THE TAKEOVER PANEL, REPORT ON THE YEAR ENDED 31 MARCH 2002, at 9 (2002), *available at* http://www.thetakeoverpanel.org.uk/new/reports/DATA%5CReport2002.pdf.

197. THE TAKEOVER PANEL, REPORT ON THE YEAR ENDED 31 MARCH 2007, at 9 (2007), *available at*http://www.thetakeoverpanel.org.uk/new/reports/DATA//Report2007.pdf.

198. *See* Jeremy Grant, *Bernanke calls for UK-style regulation*, FINANCIAL TIMES (U.K.), May 15, 2007, at 1.