SPECIAL PROBLEMS OF FOREIGN BIDDERS IN ACQUISITIONS BY TENDER OFFER

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The tender offer is an increasingly important technique for acquisitions in the United States. Unlike other forms of acquisition, approval by the board of directors of the subject company (the target) is not required. Rather, a tender offer is a direct transaction between the acquiring corporation (the bidder or offeror) and the target's shareholders. The tender offer may be supported by the target's board of directors, or, if unfriendly, opposed by the board. In the last few years, an increasing number of foreign companies have utilized tender offers to acquire United States corporations, primarily on a friendly basis.

In making a tender offer for a United States corporation, a foreign corporation, like any domestic corporation, must comply with the applicable law. The regular difficulties that confront a bidder in a takeover apply as well to the foreign acquiror. There are, at the same time, additional barriers that the foreign bidder must overcome. After briefly outlining the law governing tender offers, this article will focus on the special problems that foreign bidders face under both federal and state securities laws as well as certain of the considerations relevant for the foreign corporation seeking to acquire a U.S. company.

1. The applicable law

A. The Williams Act

On the federal level, the Williams Act amendments to the Securities Exchange Act of 1934 [1], adopted in 1968, regulate the making of tender offers for any class of securities registered pursuant to Section 12 of the Securities Exchange Act [2], namely, listed companies and other companies with a certain minimum number of shareholders and minimum amount of assets. The primary purposes of the Williams Act are to provide investor protection by requiring disclosure of material

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information and by affording certain substantive protections to shareholders [3].

The main theme of the federal securities laws is disclosure and this theme is continued in the tender offer field. If a tender offer is made by an offering of the bidder's securities, the bidder must comply with the registration requirements of the Securities Act of 1933 [4], as in any offering of securities, and must provide extensive information about its operations, both financial and descriptive. However, exchange offers by foreign bidders are rare and we shall accordingly focus on the cash tender offer.

Any person who makes a tender offer for a specified class of securities [5] must file a Schedule 14D-1 [6] with the Securities and Exchange Commission at the same time as the offeror publishes or sends to the shareholders of the subject company facts relevant to the offer. The effect of the disclosure pattern is that the bidder must provide various data, including:

- its identity and background;
- past contacts, transactions or negotiations between the bidder and the subject company;
- the source and amount of funds to be used by the bidder in the offer and any plans for refinancing;
- the purpose of the tender offer and the bidder's plans and proposals for the target, including any plans to liquidate the target, sell its assets or otherwise effect material changes in the target;
- the extent of its holdings in the subject company;
- financial information concerning the bidder, where material;
- any additional information which would be material to a decision by a security holder whether to sell, tender or hold securities being sought in the offer.

Disclosure documents (the "offer to purchase") are reasonably extensive and can range from ten to twenty printed pages. From a practical point of view, counsel may recommend the inclusion of material that may not be explicitly required since litigation as to the adequacy of disclosure of offering documents is frequent. This course by the bidder may minimize disruption of the offering process [7].

In addition to these disclosure provisions, the Williams Act attempts to assist shareholders by providing certain substantive protections throughout the course of the offer. First, shareholders are permitted to withdraw their tendered stock during the first seven days following publication of the offer and, if the offeror has not purchased the securities, at any time after sixty days from the date of the offer's publication [8]. Second, if the offer is for less than all of the target's shares, all shares tendered during the first ten days must be accepted on a pro rata basis according to the number of shares deposited by each shareholder, rather than on a first-come, first-served basis [9]. This pro rata acceptance provision applies as well to securities deposited within ten days after an increase in the consideration offered [10]. Third, any subsequent increase in the offer price during the offer must also
be paid to those shareholders who have already tendered their stock [11]. Finally, Section 14(e) of the Williams Act [12] is a broad anti-fraud provision proscribing all false or misleading statements and fraudulent or manipulative conduct by anyone in connection with the offer. This section also grants the Securities and Exchange Commission power to prescribe rules and regulations designed to prevent fraudulent and deceptive acts and practices [13].

Under United States law, the market in the target's shares is in effect sterilized once a tender offer is announced. At this point, the bidder cannot buy any shares in the market [14]. The target, on the other hand, is permitted to acquire shares in the market only after it has mailed to its shareholders, and filed with the Securities and Exchange Commission, a statement containing certain data, including the purpose for any stock purchases [15]. All recommendations made by the target's board with respect to the tender offer (whether in the form of press releases, advertisements, letters, or other communications) must be accompanied by a filing of a Schedule 14D or an amendment to the schedule [16]. In addition, any statements made by the target in connection with the offer are subject to the anti-fraud prohibitions of Section 14(e) [17].

B. State law

In addition to the Williams Act, the law applicable to takeovers includes state regulation. As of May 1, 1979, 36 states have passed laws regulating corporate takeovers [18]. The stringency of these provisions differs from state to state and their administration varies in aggressiveness. Therefore, a threshold question is which, if any, state takeover laws apply to a particular target. In general, a target's incorporation in the state is a sufficient nexus to trigger the application of the state takeover law [19]. In some instances, a "principal place of business" and/or "substantial assets" within the state will invoke jurisdiction [20], and, in a few states [21], a specified number of shareholders would be a sufficient connecting factor [22].

Although the nature of the particular takeover statute varies from state to state, certain generalizations can be made about state regulation of tender offers. Unlike the Williams Act, many of the state statutes require advance notice to the target and public announcement of the proposed offer from ten to sixty days before the bid can be made [23]. The state statutes also frequently require a minimum duration of the offer itself or an extension of the withdrawal rights different from that provided by the Williams Act [24]. In addition, there are often extensive disclosure requirements, including disclosure of information not expressly called for by the Williams Act, such as business and financial information about the offeror [25]. Under most state takeover laws, regulatory agencies are authorized to hold hearings to determine whether a proposed bid meets certain standards, typically compliance with disclosure requirements and, in some states, a "fairness" test [26]. In general, the state takeover laws are not applicable if the board of directors of the target approves the offer [27].
A substantial controversy has developed over the constitutionality of state take-
over statutes [28]. The continued validity of state takeover laws was thrown into
doubt by a circuit court’s decision in Great Western United Corp. v. Kidwell [29].
In Kidwell, the Fifth Circuit upheld a Texas district court’s [30] declaration that
the Idaho takeover statute [31] was unconstitutional. In this case, the target was a
Washington corporation with substantial assets in Idaho. The circuit court held that
the Idaho statute was pre-empted by the Williams Act since it “stands as an obstacle
to the accomplishment and execution of the full purposes and objectives of the Wil-
liams Act” [32]. The court also ruled that the extraterritorial application of the
statute constituted an unconstitutional burden on interstate commerce [33].
The Supreme Court has granted an appeal of the Fifth Circuit’s ruling in Kidwell
[34]. An affirmation of Kidwell on the pre-emption grounds employed by the Fifth
Circuit would have the effect of invalidating all state takeover statutes. The Kidwell
decision has already had a substantial effect on the state takeover laws. Following
the Fifth Circuit’s reasoning, a district court in Illinois has declared the Illinois
Takeover Act unconstitutional [35] and a district court in Indiana has declared the
Delaware Takeover Statute unconstitutional as applied in the context of a particu-
lar tender offer [36]. District courts have temporarily restrained the invocation and
enforcement of the state takeover laws of Illinois, Indiana and Delaware [37]. In
addition, one district court judge has expressed “great doubt as to the constitu-
tionality of Ohio’s [takeover] statute under the best of circumstances” in light of
the Kidwell decision [38].
Two opinions in early 1979 seem to suggest a partial reversal of this trend. In
Tyco Laboratories’ bid for Ludlow Corporation, in denying a temporary restraining
order against the application of the Massachusetts takeover act, Judge Tauro stated
that the issue of constitutionality was a close one in the event of a bid for a com-
pany incorporated and having substantial assets and shareholders in the state of the
takeover statute [39]. A full hearing on the merits was ordered. In Sharon Steel’s
bid for UV Industries, Inc., Judge Gignoux indicated that a strong showing would
have to be made in order to establish unconstitutionality [40]. Accordingly, he
refused to strike down the Maine takeover act.
The decision for a bidder whether to comply with a state takeover statute or
whether to seek to have it adjudicated unconstitutional depends on a variety of
factors. These include an assessment of the costs and difficulties of compliance,
the probability of success in achieving a ruling of unconstitutionality and the timing
of success. In this connection, it should be observed that, to date, bidders have not
made an offer disregarding the state statutes without at the same time seeking some
expression of a judicial viewpoint on the state statute. Caution might seem particu-
larly appropriate in the instance of a state takeover statute that has not been the
subject of a court ruling.
2. Special problems for foreign bidders

In addition to the usual difficulties that any bidder confronts in a contested tender offer, the foreign offeror must overcome additional hurdles. First, there are substantive laws that specifically restrict or regulate the participation of foreign corporations in certain industries. Second, the foreign offeror is faced with a number of disclosure problems that arise as a result of its unique status as a foreign entity. Third, the tactics and pressures that can be brought to bear in a contested tender offer can be amplified with respect to a foreign bidder. These include adverse publicity, "literary" counter-attack by the target and congressional pressure.

To date, for a variety of reasons, foreign bidders generally appear to have been reluctant to become involved in contested takeovers. First, the bidder may view itself as heavily dependent on local United States management to run the target company and may not want to antagonize the target's board or its management by a contested bid. Second, the foreign corporation is frequently not accustomed to the costs and pressures of United States litigation and may not want to be exposed to process, extensive discovery and adverse publicity. Third, the fact of its "foreignness" may lead a bidder to believe that it is disadvantaged. Fourth, like some United States corporations, a foreign company may choose not to engage in hostile offers as a matter of policy. At the same time, foreign corporations have made a few successful contested bids that have been the subject of litigation [41].

3. Jurisdiction

In tendering an offer for an American company, a foreign acquiror will undoubtedly subject itself to both subject-matter jurisdiction under Section 27 of the Securities Exchange Act of 1934 [42] and to personal jurisdiction in the United States district courts. In addition, the foreign offeror will most likely subject itself to the personal jurisdiction of at least one state court, and, more likely, to the personal jurisdiction of a number of state courts. The foreign bidder will not be immune from the process of the United States courts and is subject to being served in the foreign country itself, even if it cannot be personally served in the United States [43]. Moreover, discovery of the bidder's activities can be conducted on a worldwide basis. All of the files of the foreign acquiror relevant to an evaluation of the bid are open to discovery and the directors of the bidder may find themselves subject to intensive examination. Accordingly, a foreign offeror must be prepared to litigate in the United States if it tenders an offer for shares of a U.S. corporation.

A. Federal jurisdiction

In order for a federal court to take jurisdiction over a particular action, two separate requirements must be met. First, there must be subject-matter jurisdiction, which means that the statute (in this case, the Williams Act) must be considered
applicable to the conduct or transaction in question. An offer to buy, made to shareholders in the United States, should satisfy the requirements for subject-matter jurisdiction. Second, there must be personal jurisdiction over the particular defendant, which means that there must be sufficient contacts between the jurisdiction in question and the defendant to warrant the exercise of the court's authority over that defendant. Many of the leading cases discuss both concepts, and there is some overlap in the principles involved, although generally it can be said that the requirements for imposing personal jurisdiction over a foreign defendant are more stringent than those required to establish subject-matter jurisdiction.

Section 27 is the jurisdictional provision of the Securities Exchange Act of 1934 and grants the district courts of the United States "exclusive jurisdiction of violations of this title or the rules and regulations thereunder" [44]. With regard to the application of this section to foreign defendants, the Second Circuit has interpreted this provision broadly, stating:

We believe that Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities [45].

Although all the transactions complained of in the above case took place in Canada and all the directors of one of the defendants apparently were not U.S. citizens, the court determined that a suit under Section 10(b) [46] and Rule 10b-5 [47] of the 1934 Act (the anti-fraud provision) could be maintained.

Therefore, in the case in which a foreign corporation tenders an offer in the United States to U.S. shareholders, so that the transaction in question takes place in the United States and will directly affect U.S. shareholders, there is little doubt that in doing so the foreign corporation subjects itself to subject-matter jurisdiction in a U.S. district court [48].

As noted previously, even if there is subject-matter jurisdiction, there also must be in personam or personal jurisdiction over the foreign offeror. While many of the factors discussed in connection with subject-matter jurisdiction are also pertinent to the question of personal jurisdiction, the fundamental requirement is that there be some minimal connection between the defendant and the state enforcing liability [49].

In determining the extent of a district court's exercise of personal jurisdiction for violation of the 1934 Act, the Second Circuit determined that, at a minimum, the foreign defendant's conduct must have caused an effect in the jurisdiction that occurred "as a direct and foreseeable result of the conduct outside the territory" [50]. Accordingly, in the case in which a foreign corporation makes a tender offer in the United States to U.S. shareholders for a United States target, such an offer will clearly have "minimum contacts" with, and a "direct and foreseeable result" in, the United States; therefore, the foreign offeror is likely to be subject to the personal jurisdiction of United States' courts.
B. State jurisdiction

A further consideration for the foreign offeror is the extent to which it will subject itself to the personal jurisdiction of various individual states. The pertinence of this depends primarily on the extent to which the state takeover statutes survive the present attacks being made upon them [51]. The standard for determining state jurisdiction over non-residents varies from state to state and is dependent on the nature of the particular state’s long-arm statute. The outside limit on a state’s extraterritorial reach is the “minimum contacts” standard required by the due process clause of the 5th and 14th Amendments of the United States Constitution. Some states exercise jurisdiction over non-residents to the full extent permitted by the due process clause, while others more narrowly confine their extraterritorial reach by specifying limits in their individual long-arm statutes. Accordingly, the particular state’s long-arm statute must be examined.

A number of state statutes arguably may be applicable to a single offer because of the diverse, and often conflicting, jurisdictional bases on which they rest. Although target companies have argued for multiple state forums, and multiple filings have been made, it has generally become the practice for states to defer, with respect to hearings and approvals, to the state having the greatest number of contacts with the target if that state has a statute providing for comparable procedures for reviewing the offer [52].

4. Unique industries that restrict or regulate foreign ownership

There are a number of federal and state statutes that prohibit or restrict the ability of foreigners to acquire control or to exceed a specific ownership interest in certain industries [53]. These include banking, shipping, nuclear energy, defense industries, and mineral and natural resources [54]. Once a regulated industry problem has been identified, the foreign bidder must then determine whether there are techniques for dealing with the issue. Resolution of this question will depend on the particular regulatory statute involved, as well as the intent of the bidder with respect to the regulated industry. If the regulated business does not constitute a significant part of the target’s operations or is not of interest to the bidder, the bidder may be able to avoid regulatory problems either by placing control of the regulated business in the hands of an independent trustee pending regulatory approval or divestiture, or by making a commitment to divest [55]. In each case, determination of the best technique for dealing with this issue will depend on the facts and circumstances of the particular offer and the requirements of the particular law.

5. Antitrust

A further consideration for the foreign bidder is the applicability of the United States antitrust laws. These laws apply to foreign companies if they do business in
the United States or if their activities have an effect on United States commerce.

In this respect, the foreign corporation should be particularly sensitive to the requirements of the Hart-Scott-Rodino Antitrust Improvement Act of 1976 (the "Act") [56]. On September 5, 1978, the rules promulgated pursuant to the Act [57] became effective. The Act generally requires that notification be given and a waiting period observed prior to the consummation of an acquisition by a company with sales or assets of $10 million, if, as a result of the acquisition, the acquiring person would hold at least: (i) fifteen percent of the acquired person's assets (if valued at more than $10 million); (ii) fifteen percent of the acquired person's voting securities if that would give control of an issuer with sales or assets of $10 million; or (iii) an aggregate of the acquired person's voting securities and assets valued in excess of $15 million regardless of the percentage acquired.

The Act created several exemptions, one of which is especially relevant to foreign companies. Section 802.51 of the rules deals with "acquisitions by foreign persons":

An acquisition by a foreign person shall be exempt from the requirements of the Act if:
(a) the acquisition is of assets located outside the United States;
(b) the acquisition is of voting securities of a foreign issuer, and will not confer control of:
   (1) an issuer which holds assets located in the United States (other than investment assets) having an aggregate book value of $10 million or more, or
   (2) a United States issuer with annual net sales or total assets of $10 million or more;
(c) the acquisition is of less than $10 million of assets located in the United States (other than investment assets); or
(d) the acquired person is also a foreign person, the aggregate annual sales of the acquiring and acquired persons in or into the United States are less than $110 million, and the aggregate total assets of the acquiring and acquired persons located in the United States (other than investment assets) are less than $110 million [58].

Accordingly, the acquisition by a foreign company of a United States company with annual net sales or total assets of $10 million or less is exempt from the reporting requirements and the waiting period. However, should a foreign company acquire a U.S. company above the $10 million threshold, the company must file and observe the waiting period requirements.

Attention should also be given to the notification form itself [59]. A review of that form indicates that Items 5, which seeks dollar revenue by industry, 7, which seeks to determine product overlap between the acquiring and acquired persons, 8, which seeks to determine the extent of any vertical relationship between the parties and 9, which requests information relating to mergers previously made by the acquiring person of companies in the same industry as the acquired person, are limited to "operations conducted within the United States". While there is no ruling on this subject, it is likely that the notification form does not seek information about imports delivered into the United States from operations conducted outside the United States. Rather, the notification form is apparently designed to track the information provided to the Bureau of the Census [60], which is generally
limited to United States businesses and businesses conducted in the United States from U.S. locations. Although the notification form itself is limited to U.S. operations, experience suggests that subsequent requests for information by the Federal Trade Commission or the Department of Justice need not necessarily be so limited.

In 1967 the United States reached an understanding with several foreign countries that antitrust related information will be sought from foreign companies through governmental channels [61]. Thus, when a foreign company attempts to acquire a substantial American company, diplomatic communication may be initiated by the American Embassy to the appropriate foreign governmental agency, such as the Department of Trade in England, advising the agency that a letter requesting additional information and documentary material pursuant to the Act will be forthcoming.

In addition to the requirements of Hart-Scott-Rodino, the foreign acquiror must carefully consider the potential antitrust effect of presentations made to the board of directors of the bidder. It is not unusual for marketing personnel to make extravagant claims about the market position of the target and/or the bidder in an attempt to justify the contemplated transaction. However, United States regulatory agencies could interpret these claims literally to the detriment of the foreign bidder. Accordingly, all such presentations should first be reviewed with antitrust counsel.

6. Margin restrictions

If cash to finance the acquisition of stock in a United States corporation is raised by borrowing, the loan transaction may be subject to the margin regulations of the Board of Governors of the Federal Reserve System [62]. In general, if a foreign corporation borrows the funds to make a bid from a foreign bank or foreign lender or from the foreign branch of a U.S. bank, the loan is not subject to any margin restriction. On the other hand, if for tax reasons or other considerations the foreign bidder creates a United States subsidiary to make the offer, borrowings for that U.S. subsidiary will be subject to the margin rules. Regulation X would apply to that loan transaction; it essentially requires that the loan be unsecured or collateralized with sufficient margin, at present fifty percent [63]. Finally, it should be noted that a United States broker dealer can arrange a loan for a bidder only if it is in compliance with the margin rules [64]. As a practical matter, the investment banker does not typically participate in securing financing for the bidder.

7. Disclosure issues

The typical disclosure problems of a contested tender offer are frequently exacerbated in the case of a bid by a foreign corporation. Two of the potentially most troublesome areas relate to disclosure of so-called “sensitive payments” and finan-
cial information. In addition, special problems can arise for the foreign bidder with regard to the applicability of foreign controls and foreign law, as well as in the disclosure of controlling persons.

A. Sensitive payments

In a tender offer contest, where there is a bid for control, the bidder may be required to make disclosure of any "illegal" or "sensitive" payments because of their perceived importance in assessing the integrity and competence of the management that is seeking control of the target company. Many United States corporations have gone through a process of self-cleansing and have typically undertaken a voluntary investigation as to their questionable payments or unauthorized perquisites. Once disclosure of these sensitive payments has been made, the only additional claim that a target can raise is that the disclosure is insufficient and that new or greater details must be revealed. In one case, the effect of the sensitive payment issues was to be a so-called "show-stopper" [65]. With most foreign bidders, there has been no investigation and disclosure of sensitive payments. Accordingly, a target company's attack on these grounds can be substantially more unsettling for a foreign bidder unaccustomed to extensive inquiry into its business methods, motives and integrity.

The critical issue with the questionable payment claim is the scope of discovery that would be permitted by the court. If there is no evidence that questionable payments have been made and if the bidder's management states that it is not aware of any such payments, it is possible that the target would be precluded from engaging in prolonged discovery in an attempt to discover such payments [66]. However, the law in this area is still relatively open and there is no law defining the scope of discovery to be permitted in the case of a foreign bidder [67].

B. Financial information

Another difficult disclosure problem in the foreign area is the question of disclosure of financial information respecting the bidder. Particularly in this regard, the offeror must consider two sets of rules, the state and the federal. If the bidder has to comply with the takeover statutes of certain states, financial statements must be provided; in certain cases, they must be prepared in accordance with generally accepted accounting principles in the United States (GAAP) [68].

Even if particular state laws do not apply, federal law requires the offeror to include financial statements if, as set forth in Item 9 of Schedule 14D-1, "the bidder's financial condition is material to a decision by a security holder of the subject company whether to sell, tender or hold securities being sought in the tender offer". In order to determine whether financial information is material, in SEC Release No. 34-13787 the Commission set forth in general terms pertinent factors to consider, which include: the terms of the offer; whether for any or all shares of
the target; whether the bid is for control; the plans and proposals of the bidder; and the ability of the bidder to pay for the securities [69]. There are no general rules in this area and, as with all disclosure problems, one must review the facts and circumstances of each situation. In general, if the bid is for any and all shares and the bidder has commitments for financing, there may be no need to include any financial statements, although, if a hotly contested defense is anticipated, from a counselling viewpoint, the disclosure of financial data may be suggested as sensible [70]. The case for inclusion is legally stronger in the instance of a partial bid, particularly if the bidder's ability to repay its financing is uncertain. In any case, the need to include financial statements must be anticipated and it would be extremely useful for the foreign corporation to consult a United States accounting firm that is familiar with SEC practice so that its assistance can be available throughout the transaction.

If financial statements are material, Form 20 [71] financial statements for a foreign offeror are adequate for Schedule 14D-1 disclosure (the “safe harbor” rule) [72]. Form 20 requires a foreign corporation to file financial statements, schedules and accountants' certificates which would be required to be filed if the registration statement were filed on Form 10 [73]. These statements may be prepared in accordance with the accounting practices of the foreign corporation's country [74]. However, if foreign accounting practices have been used, the foreign corporation must state any material variation in which these accounting principles or practices differ from Regulation S-X and, to the extent practicable, the effect of each such variation [75].

Presumably, financial information not in compliance with these forms and not meeting the “safe harbor” rule, may still meet the materiality standards. A review of filings by foreign bidders indicates that practice varies as to financial data furnished [76].

In one recent case of a tender offer by a French entity for fifty-one percent of the common stock of a U.S. target, the SEC staff gave informal advice as to the type of financial disclosure that might meet minimum standards of acceptability in certain partial tender offer situations involving a change of control. The staff indicated that financial information should include the following:

1. Attaching, to the Schedule 14D-1, three years of complete annual reports of the foreign bidder and its parent group in the French language [77].
2. Including in the tender materials, in summary fashion, three years of financial data [78].
3. Stating the summary financial statements in both French francs and U.S. dollars, with a specified conversion ratio.
4. Briefly describing the basis upon which the foreign bidder's financial statements have been prepared and the significant accounting differences between this basis (French statutory practice) and GAAP. In addition, the staff required the offer to include a statement that the differences set forth were not sufficient to fully
reconcile French accounting principles with GAAP.

(5) Stating the extent to which the application of GAAP principles would materially affect the financial statements of the offeror in terms of assets, liabilities and income [79].

It should be observed that the above procedure reflects a dialogue between the staff of the SEC and a foreign offeror in response to a particular situation involving no borrowed funds, supervision by a state regulatory agency, approval by the target’s board, and entities of disproportionate size. Obviously, the type of disclosure required will vary with the facts and circumstances surrounding each individual situation.

If, in the unlikely event, the foreign corporation is subject to the reporting requirements of the 1934 Act, these filings can be incorporated by reference in the Schedule 14D-1 [80] and financial statements along the lines of Guide 59 [81] can be included in the offer to purchase [82]. In general, this information consists of net sales, net income, working capital, total assets, total indebtedness, shareholders’ equity, and income per share both before and after extraordinary items.

With regard to foreign bidders which are not subject to the periodic reporting requirements of the 1934 Act, incorporation by reference to 1934 Act filings is obviously not available as a “safe harbor” under Item 9. In one instance under case law, decided before the adoption of Item 9, a foreign bidder’s incorporation by reference to otherwise available financial information was held satisfactory [83]. Whether this is still the law is unclear.

In instances in which an offeror’s financial statements were not readily available, as in the case of some foreign and non-public bidders, the courts have ruled in two cases that financial disclosure is necessary in the tender offer materials.

In *Corenco Corporation v. Schiavone and Sons, Inc.* [84], the district court held that the failure of the defendant corporation to disclose any financial information about itself was a material omission in violation of the Williams Act and therefore enjoined the tender offer. The court reasoned that, where the offeror is a closely held corporation whose financial information was not otherwise available to the investing public, where the offer was for less than all of the shares of the target and where the offeror contemplated a second step merger, the financial information pertaining to the offeror was material to shareholders of the target corporation desiring to make an informed decision on whether or not to tender [85]. It also appears that a representative of the bidder had testified that, if stockholders of the target possessed the financial statements, they might not tender their shares [86].

On appeal, the circuit court noted *in dicta* that the district court’s order to disclose financial information was the first time that the Williams Act had been construed as such [87]. However, since the bidder did not challenge that portion of the court’s order, the circuit court did not rule on the question of whether and to what extent disclosure of financial information was required [88].

In *Missouri Portland Cement Co. v. Cargill, Inc.* [89], the district court ruled
that Cargill's submission of two years of financial statements was sufficient to comply with the requirements of 14(d) and 14(e) of the Securities Exchange Act of 1934. The court quoted Corenco Corporation v. Schiavone and Sons, Inc. [90], approvingly, and analogized Cargill's situation to that of Schiavone's. In both cases, the offeror was a privately held company whose financial statements were not readily available to the investing public. Although, unlike Schiavone's partial offer, Cargill's tender offer was for any and all shares, the court reasoned that in both bids a change of control was being sought and therefore the record of the bidder was relevant [91]. If the bidder's financial picture was good, a shareholder might not tender; if gloomy, he might be happy to sell his investment [92]. Finally, the offeror's financial picture bears upon its ability to pay the tender offer price, and in the absence of a firm commitment for financing, this factor tends toward a finding of materiality [93].

C. Foreign controls

Another issue with special concerns for the foreign bidder is that relating to foreign controls and foreign law. Item 10(b) of Schedule 14D-1 requires, where material and to the extent known by the bidder after reasonable investigation, disclosure of any "regulatory requirements which must be complied with or approvals which must be obtained in connection with the tender offer". In addition to securing approval from certain United States regulatory agencies [94], a foreign bidder might also be subject to regulatory controls emanating from its home country. This would include the obtaining of consents under exchange control regulations. Moreover, certain foreign jurisdictions may place restrictions on the manner in which a company controls a foreign entity.

For example, in General Host Corporation v. Triumph American, Inc. [95], the court held that the failure of Triumph American to reveal applicable foreign controls constituted a material omission and therefore, in the context of a motion for a preliminary injunction, violated § 14(e). Triumph American was an eighty-two percent owned subsidiary of Triumph Investment Trust, Ltd., an English corporation. In March of 1973, Triumph American tendered for approximately fifty-one percent of the outstanding shares of stock of General Host Corporation. While the offering material mentioned that eighty-two percent of Triumph American's outstanding common stock was owned by Triumph Investment Trust, Ltd. (putting Host shareholders on notice that a foreign parent was involved), Triumph omitted certain facts with respect to British law which the court deemed to be material. Specifically, the court noted that, in the Statute Law of England, there are at least two provisions which assert authority over corporate residents (such as Triumph Investment) and companies not residents of England over which corporate residents have direct or indirect control [96].

First, the British Exchange Control Act of 1947 conferred power on the United Kingdom Treasury to compel Triumph Investment to cause its non-resident com-
panies to declare and pay dividends specified by the Treasury and to compel Triumph Investment to cause its non-resident companies to realize any of their assets as directed by the Treasury. Second, the Income and Corporation Taxes Act, 1970, required the consent of the Treasury before Triumph Investment could permit any of its nonresident companies to issue any shares or debentures. In the court's view, the existence of the Treasury's authority to affect the operations and business decisions of a company such as Host, and a factually-based opinion as to the probability or lack of probability of adverse consequences, were facts that the reasonable investor should have in order to make an informed decision to tender or not to tender, or to tender some and withhold some shares. The court stated:

Foreign controls, particularly when they differ in extent and kind from controls the U.S. investor has come to expect from the U.S. government in relation to domestic operations, are matters which should be called to the attention of shareholders in a tender offer [97].

D. Disclosure of corporate controls

Item 2 of Schedule 14D-1 calls for, inter alia, the identity of the offeror and its place of organization and principal business. This information must also be given with respect to each person controlling the offeror [98]. This can raise special problems for the foreign corporation since identification of the controlling persons of a foreign bidder may be obscured by Lichtenstein holding companies or by the existence of bearer shares.

In Ronson Corporation v. Liquifin Aktiengesellschaft [99], the court upheld the granting of a preliminary injunction against Liquifin for failure adequately to disclose its controlling persons. Liquifin was a wholly-owned subsidiary of Liquigas, a large Italian company with 250 million outstanding shares of voting stock. Liquifin characterized one Raffaele Ursini, who was the managing director of Liquigas, a member of its board of directors, and the largest Liquigas stockholder with control over ninety million shares of common stock or thirty-five percent of the outstanding common shares of Liquigas, as "the person in control of Liquigas". Ronson argued, and the court agreed, that the corporate structure of Liquigas was substantially more complex and therefore a number of other relevant parties should be deemed "control persons". Since Liquifin failed to disclose these other parties, its offer was preliminarily enjoined [100].

***

In conclusion, experience indicates that foreign bidders can meet the regulatory burdens imposed by the federal and state securities laws. The reluctance by foreign corporations to engage in contested takeovers appears to have arisen primarily from business and, perhaps, "cultural" considerations.
THE HONGKONG AND SHANGHAI BANKING CORPORATION

General Description. The Hongkong and Shanghai Banking Corporation, which was established in 1865 under the laws of the British Crown Colony of Hong Kong, has its principal executive offices at 1 Queen's Road, Central, Hong Kong. It is a publicly-owned banking corporation with approximately 65,000 shareholders. No person has record ownership or, to the best knowledge of HSBC, beneficial ownership of more than 3% of the shares of HSBC. Its shares are listed on the Hong Kong Stock Exchange and The Stock Exchange, London.

HSBC and its subsidiary and associated companies ("The Hongkong Bank Group") provide a comprehensive range of banking and related financial services through a network of more than 435 offices in over 40 countries throughout the Middle and Far East, India, Southeast Asia, Australasia, Europe and North America.

HSBC also has investments in companies which are engaged in various non-banking activities.

Background Information. HSBC believes that the strengths of the Corporation and HSBC in differing geographic sectors of the world will serve to complement one another and that the acquisition of the Common Stock as contemplated by the Investment Agreement will broaden the base of operations of The Hongkong Bank Group. Correspondent banking relationships in the ordinary course of business have existed between the Corporation and HSBC for a number of years. Apart from the proposed transaction, there has not been any prior relationship between the two parties other than in the ordinary course of business.

Financial Description. The table following the letter from HSBC's auditors set out below shows consolidated assets and shareholders' equity at December 31, and profits for the years ended December 31, 1973 through 1977 for The Hongkong Bank Group. The information presented in Hong Kong dollars in the table was taken from the consolidated financial statements of The Hongkong Bank Group contained in the Annual Reports of HSBC for each of the five years ended December 31, 1973 through 1977. The consolidated financial statements were prepared in compliance with the provisions of the Hong Kong Companies Ordinance applicable to banking companies rather than United States generally accepted accounting principles. The provisions of the Ordinance and the stated policies of the Hong Kong Government regulatory authorities do not require HSBC to disclose in its financial statements certain financial information which would be disclosed if its financial statements were prepared in accordance with United States generally accepted accounting principles. Following discussions between HSBC and Hong Kong Government regulatory authorities concerning departure from the disclosure pattern reflected in the published financial statements of HSBC, the Hong Kong Government regulatory authorities indicated in a letter to HSBC that they would oppose a departure from this disclosure pattern. A copy of this letter was furnished to the Commission.

The following letter from HSBC's auditors describes some of the more significant differences between the accounting principles used in the preparation of HSBC's financial statements and those of United States generally accepted accounting principles:
The Chairman,
The Hongkong and Shanghai Banking Corporation,
1, Queen's Road Central,
HONG KONG.

Dear Sir,

We are writing this letter at your request in connection with the proposed acquisition by a wholly owned subsidiary of The Hongkong and Shanghai Banking Corporation ("HSBC") of 51% of the outstanding shares of Marine Midland Banks, Inc. We understand that this letter will be included in the Proxy Statement prepared by Marine Midland Banks, Inc. in connection with the special meeting of its shareholders at which the proposed acquisition will be submitted for their approval. We hereby consent to the inclusion of this letter in such Proxy Statement.

Peat, Marwick, Mitchell & Co. acted as auditors of The Hongkong and Shanghai Banking Corporation for each of the five years ended December 31, 1977 together with Price Waterhouse & Co. from 1st May 1974 and prior to that with their correspondents, Lowe, Bingham & Matthews who assumed the name of Price Waterhouse & Co. from that date.

The Consolidated Financial Statements of The Hongkong and Shanghai Banking Corporation and its subsidiaries ("The Hong Kong Bank Group") comply with the Hong Kong Companies Ordinance applicable to banks. HSBC is not subject to United States generally accepted accounting principles or the reporting requirements of the United States Securities and Exchange Commission. The Financial Statements of HSBC are not required to, and do not, comply with either United States generally accepted accounting principles or regulation S-X of the United States Securities and Exchange Commission. Briefly, the more significant areas of difference are as follows:

(1) Each year, prior to determining published profit, the Board of Directors transfers an undisclosed amount of net operating profit to inner reserves, an unallocated account accumulated to meet abnormal contingencies. Profit or loss for any one year in accordance with United States generally accepted accounting principles can not be determined by an investor because transactions which would be reported as a part of profit or loss under such principles are recorded directly to inner reserves. The amounts of such transactions are not disclosed.

(2) It is not the policy of HSBC to make transfers from inner reserves to published profits and during the five years ended December 31, 1977 no such transfers were made. However, unrealized foreign exchange gains and losses, realized and net unrealized gains and losses arising from investments and realized gains and losses arising from sales of fixed assets are accounted for by direct transfers to inner reserves and are not reflected in the published profits.

(3) The nature and amounts of revenue and expenses that enter into the determination of published profits are not required to be disclosed. The accounting policies of HSBC used in determining profits are essentially the same as United States generally accepted accounting principles with the exception of those identified in this letter.

(4) The equity method of accounting for associated companies is not used. The income therefrom is dealt with in the Accounts of HSBC only to the extent of dividends received. Quoted
shares held in associated companies are stated at cost, which at December 31, 1977 was less than market value. The majority of unquoted shares held in associated companies are stated at Directors' valuation which is equal to the net asset value thereof. The remainder of unquoted shares held in associated companies are stated at cost.

(5) Aggregate cost and market value of investments are not specified. At December 31, 1977 the aggregate stated value of quoted investments, other than associated companies, was below cost (see (2) above) and below market value.

(6) The premises of HSBC and its Mercantile Bank Limited subsidiary are stated at Directors' valuations which are less than cost. Premises of other subsidiary companies are stated at cost less depreciation. Fixed assets comprising furniture, fittings and equipment are written off in the year of acquisition. The aggregate of cost (or Directors' valuation), accumulated depreciation and net book value of fixed assets are not specified.

(7) HSBC uses the closing rate method of accounting for conversion of all foreign exchange balances and translating the Financial Statements of overseas entities.

(8) The Balance Sheet of HSBC includes contingent liabilities and equal and offsetting contingent assets arising from acceptances, confirmed credits, guarantees and endorsements. If the Consolidated Balance Sheet were restated in accordance with United States generally accepted accounting principles such contingent liabilities (other than in respect of acceptances) and the related contingent assets would be omitted.

In our opinion presentation of the Financial Statements of The Hongkong Bank Group in accordance with United States generally accepted accounting principles for the five years ended December 31, 1977 would not result in the aggregate in any reduction of consolidated profits for such period; however, published profit for any one year may be greater or less than the amount that would have been reported if profit had been determined in accordance with United States generally accepted accounting principles. Additionally, in our opinion, such presentation as at December 31, 1977 would not result in any reduction in consolidated shareholders' equity or consolidated assets (other than any reduction resulting from elimination of contingent assets as described in (8) above) as reported in HSBC's published Financial Statements. We hereby confirm that inner reserves of HSBC at December 31, 1977 were higher than at any other year end during the five years ended December 31, 1977.

Yours faithfully,

/s/ Peat, Marwick, Mitchell & Co.
Peat, Marwick, Mitchell & Co.

/s/ Price Waterhouse & Co.
Price Waterhouse & Co.

The United States dollar amounts shown in the table below have been converted from Hong Kong dollars at US $1 equals HK $4.6175, the exchange rate prevailing at December 31, 1977. Such conversions have been included for convenience only and no assurance can be given that such assets, shareholders' equity or profits could have been converted into United States dollars at such rate in the years in question.

<table>
<thead>
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<tbody>
<tr>
<td></td>
<td>(In millions)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Consolidated Assets</td>
<td>HK $44,393.4</td>
<td>$49,404.0</td>
<td>$57,722.4</td>
<td>$66,261.7</td>
<td>$80,479.4</td>
</tr>
<tr>
<td></td>
<td>US $ 9,614.2</td>
<td>$10,699.3</td>
<td>$12,500.8</td>
<td>$14,350.1</td>
<td>$17,429.2</td>
</tr>
<tr>
<td>Consolidated Shareholders' Equity</td>
<td>HK $ 1,508.4</td>
<td>$ 1,841.3</td>
<td>$ 1,971.4</td>
<td>$ 2,272.8</td>
<td>$ 2,486.4</td>
</tr>
<tr>
<td></td>
<td>US $ 326.7</td>
<td>$ 398.8</td>
<td>$ 426.9</td>
<td>$ 492.2</td>
<td>$ 538.5</td>
</tr>
<tr>
<td>Consolidated Profits</td>
<td>HK $ 279.4</td>
<td>$ 300.9</td>
<td>$ 333.2</td>
<td>$ 393.6</td>
<td>$ 522.0</td>
</tr>
<tr>
<td></td>
<td>US $ 60.5</td>
<td>$ 65.2</td>
<td>$ 72.2</td>
<td>$ 85.2</td>
<td>$ 113.1</td>
</tr>
</tbody>
</table>
Activities. HSBC, which makes the largest single contribution to the profits of The Hongkong Bank Group, conducts a general banking business through more than 235 offices in the Far East, Southeast Asia, Europe and North America. HSBC, whose presence in the United States dates from 1875, today maintains two branches in New York, branches in Chicago and Seattle, a representative office in Houston and agencies in San Francisco and Los Angeles. At December 31, 1977 HSBC had reported assets of approximately HK $48.9 billion (US $10.6 billion).

HSBC is one of the two banks in Hong Kong which are authorized by the Hong Kong government to issue Hong Kong currency. It is principal banker to the Hong Kong government but has no official central bank role.

HSBC's principal commercial banking subsidiary companies are its wholly owned subsidiaries, The British Bank of the Middle East ("BBME") and Mercantile Bank Limited ("Mercantile"), and Hang Seng Bank Limited ("Hang Seng"), in which HSBC has a 61% interest. Wardley Limited ("Wardley"), another wholly owned subsidiary of HSBC, is engaged in merchant banking, primarily in the Far East.

Originally established by Royal Charter in 1889 as the Imperial Bank of Persia, BBME was acquired by HSBC in 1959. It had reported assets of approximately UK £2.2 billion (US $4.2 billion) at December 31, 1977. BBME provides a full range of banking services, including investment and trade advice concerning the Middle East. Headquartered in London, BBME's branch network includes over 80 offices located throughout the Middle East, particularly in the major oil-producing countries, in addition to offices in India and Switzerland. On July 1, 1978, BBME's operations in Saudi Arabia were contributed to a joint venture with Saudi Arabian partners. The Hongkong Bank Group holds 40% of the equity in the resulting bank, which is known as "The Saudi British Bank".

Mercantile, a British bank which was acquired by HSBC in 1959, is the oldest bank in India, having commenced operations in Bombay in 1854. Mercantile is registered in London, where it has a branch, and has its headquarters in Hong Kong. It also has 20 branches in the main commercial centers of India and branches in Mauritius, Thailand and Japan. At December 31, 1977 Mercantile had reported assets of approximately UK £248 million (US $473 million).

Hang Seng, which was acquired by HSBC in 1965 and which is the second largest bank incorporated in Hong Kong, has 35 branches throughout Hong Kong and is engaged in general banking business. At December 31, 1977 Hang Seng had reported assets of HK $10.1 billion (US $2.2 billion).

Wardley, HSBC's merchant bank, was formed in 1972. Through its head office in Hong Kong and its branches in Bangkok, Singapore and the New Hebrides and its representative office in Tokyo, Wardley provides a comprehensive range of financial advisory services to companies, individuals and government agencies, including advice on the management and investment of funds, the financing of development plans and the consolidation and disposal of companies. Wardley also has an interest in a merchant bank in the Philippines. At December 31, 1977 Wardley had reported assets of approximately HK $1.9 billion (US $404.4 million).

In addition to its United States branches and representative offices mentioned above, HSBC has a wholly owned subsidiary bank headquartered in San Francisco, The Hongkong Bank of California ("HKBC"). At December 31, 1977 HKBC had assets of US $150 million. In order to secure the Board of Governors' approval of the acquisition of the Corporation's Common Stock as contemplated by the Investment Agreement, HSBC expects to dispose of its interest in HKBC prior to the First Closing. HSBC has entered into an agreement to sell HKBC to Central Bank, N.A. of Oakland. The transaction is subject to the approval of Federal and California bank regulatory authorities.

HSBC has additional subsidiaries and associates which engage in a wide variety of investment banking, trustee, insurance and other financial activities. HSBC also has investment interests in a number of companies which are engaged in non-financial activities including transportation, publishing, and printing.

Source of Funds. At the present time, it is expected that all of the funds required to pay for the Common Stock to be purchased as contemplated by the Investment Agreement will come from HSBC's general corporate funds. HSBC may, however, decide to increase its general corporate funds prior to December 31, 1980 by selling new equity or debt securities, publicly or privately, outside the United States.
Acquiring Subsidiary. HSBC plans to assign to HSBC Holdings B.V. ("HSBC Holdings") its right to acquire shares of Common Stock of the Corporation as contemplated by the Investment Agreement. HSBC Holdings is a wholly owned Netherlands subsidiary of Kellett N.V., a wholly owned Netherlands Antilles subsidiary of HSBC. It is expected that the Subordinated Note will be surrendered to the Corporation in payment of the purchase price of the Common Stock of the Corporation to be purchased by HSBC Holdings at the First Closing. It is expected that the funds required by HSBC Holdings to purchase shares of Common Stock in the Tender Offer, at the Second Closing and through additional purchases, will be provided by HSBC from its general corporate funds in the form of equity investments in and loans made to HSBC Holdings by subsidiaries of HSBC.

Source of Information. All of the above information which describes HSBC and its subsidiary and associated companies (including HSBC Holdings) has been furnished to the Corporation by HSBC. The 1977 Annual Report of HSBC, which contains financial statements and additional information concerning The Hongkong Bank Group, is available to the Corporation's shareholders on request to the Corporation. On May 30, 1978 HSBC filed a Statement on Schedule 13D with the Commission in compliance with the requirements of the Securities Exchange Act of 1934. The Statement on Schedule 13D contains information concerning the Note Purchase and Investment Agreements, the transactions contemplated thereby, and executive officers and directors of HSBC. Prior to the commencement of the Tender Offer, HSBC Holdings will file a Statement on Schedule 13D, a Statement on Schedule 14D-1 and a copy of its Offer to Purchase shares of Common Stock and subsequent to the Tender Offer HSBC and HSBC Holdings will file Statements on Forms 3 and 4 with the Commission. Such Statements and Offer may be amended from time to time; and copies of such material is or will be available for inspection at the Commission's office in Room 6101, 1100 L Street, N.W., Washington, D.C. Copies may also be obtained by mail, upon payment of the Commission's customary fees, from the Commission's principal office, 500 North Capitol Street, Washington, D.C. 20549. Such material should also be available for inspection at the library of the NYSE, 20 Broad Street, New York, New York 10005 and the Public Reference Room of the PSE, 360 Pine Street, 5th Floor, San Francisco, California 94104. However, neither HSBC nor HSBC Holdings is, and neither HSBC nor HSBC Holdings expects that it will be, otherwise subject to the informational requirements of the Securities Exchange Act of 1934.

MISCELLANEOUS

The solicitation of proxies is made by and on behalf of the management of the Corporation. The cost of preparing, assembling and mailing the proxy, this Proxy Statement, and any other material in connection therewith, will be borne by the Corporation. The Corporation may reimburse brokers or other persons holding stock in their names or in the names of their nominees for their charges and expenses in forwarding proxies and proxy material to the beneficial owners of such stock. In addition to solicitation by mail, certain officers or regular employees of the Corporation and its subsidiaries may solicit certain shareholders by written or oral communication. The Corporation has retained Georgeson & Co. to assist in the solicitation of proxies for a fee of $15,000 plus out-of-pocket expenses. The cost of such further solicitation will be borne by the Corporation.

The Corporation is subject to the informational filing requirements of the Securities Exchange Act of 1934 and in accordance therewith is obligated to file reports and other information with the Commission relating to its business, financial statements and other matters. Information, as of particular dates, concerning the Corporation's directors and officers, their remuneration, options granted to them, the principal holders of the Corporation's securities and any material interest of such persons in transactions with the Corporation is required to be disclosed in certain proxy statements distributed to shareholders of the Corporation and filed with the Commission. Such reports, proxy statements and other information may be inspected at the Commission's office in Room 6101, 1100 L Street, N.W., Washington, D.C., and copies may be obtained upon payment of the Commission's customary charges by writing to the Commission's principal office at 500 North Capitol Street, N.W., Washington, D.C. 20549. Such material should also be available for inspection at the library of the NYSE, 20 Broad Street, New York, New York 10005 and the Public Reference Room of the PSE, 360 Pine Street, 5th Floor, San Francisco, California 94104.
Representatives of Price Waterhouse & Co., independent accountants, are expected to be present at the Meeting and will have an opportunity to make a statement (if they so desire) and to respond to appropriate questions.

By order of the Board of Directors.

August 31, 1978

FRANK J. LASKI
Secretary

Exhibit II: Examples of financial disclosure by foreign bidders in recent tender offers

1. Offer to purchase 300,000 shares of common stock of Olga Corp. by Wacoal Corp. (a Japanese corporation) expiring July 26, 1978

The Offeror is subject to the informational filing requirements applicable to certain "foreign private issuers" under the Securities Exchange Act of 1934, as amended, and in accordance therewith files Annual Reports on Form 20-K with, and furnishes periodically under cover of Form 6-K other information as to material developments in its business or relating to its financial condition and other matters to, the Commission. Such information may be inspected at the Commission's Public Record Office located in Room 6101, 1100 L Street, N.W., Washington, D.C. 20549.

The following financial information has been extracted from the Offeror's unaudited consolidated financial statements for the six-month periods ended February 28, 1978 and 1977 and from the audited consolidated financial statements contained in the Offeror's Annual Report on Form 20-K for the fiscal year ended August 31, 1977, filed with the Commission on February 28, 1978.

<table>
<thead>
<tr>
<th>Millions of Yen, except per share amounts</th>
<th>Thousands of Dollars, except per share amounts</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Six months ended</strong></td>
<td><strong>Year ended</strong></td>
</tr>
<tr>
<td>(unaudited)</td>
<td>(unaudited)</td>
</tr>
<tr>
<td>Net Sales</td>
<td>¥35,284</td>
</tr>
<tr>
<td>Cost of sales</td>
<td>19,642</td>
</tr>
<tr>
<td>Selling, general and administrative expenses</td>
<td>9,463</td>
</tr>
<tr>
<td>Interest</td>
<td>525</td>
</tr>
<tr>
<td>Income before taxes on income</td>
<td>6,063</td>
</tr>
<tr>
<td>Taxes on income</td>
<td>3,288</td>
</tr>
<tr>
<td>Net income</td>
<td>2,775</td>
</tr>
<tr>
<td>Per share of common stock:</td>
<td></td>
</tr>
<tr>
<td>Net income</td>
<td>¥23.22</td>
</tr>
<tr>
<td>Weighted average number of common shares outstanding (in thousands)</td>
<td>119,520</td>
</tr>
</tbody>
</table>

(Table cont'd)
### Table cont'd

<table>
<thead>
<tr>
<th></th>
<th>At February 28, 1978</th>
<th>At August 31, 1977</th>
</tr>
</thead>
<tbody>
<tr>
<td>Working capital</td>
<td>¥ 16,563</td>
<td>¥ 19,135</td>
</tr>
<tr>
<td>Property, plant</td>
<td>23,115</td>
<td>19,661</td>
</tr>
<tr>
<td>and equipment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(less accumulated</td>
<td></td>
<td></td>
</tr>
<tr>
<td>depreciation)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Assets</td>
<td>70,636</td>
<td>68,069</td>
</tr>
<tr>
<td>Long-term debt</td>
<td>4,124</td>
<td>6,443</td>
</tr>
<tr>
<td>Shareholders'</td>
<td>41,823</td>
<td>37,752</td>
</tr>
<tr>
<td>equity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Assets</td>
<td>70,636</td>
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<td>Shareholders'</td>
<td>41,823</td>
<td>37,752</td>
</tr>
<tr>
<td>equity</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The foregoing financial information is derived from financial statements prepared in accordance with generally accepted accounting principles prevailing in the United States, which financial statements differ in certain respects from financial statements prepared in accordance with accounting principles generally accepted in Japan. The financial statements in yen for the fiscal year ended August 31, 1977 from which the above data have been extracted are audited. The Offeror prepares its financial statements in Japanese yen, and the United States dollar amounts set forth above have been translated solely for the convenience of the reader at the rate of ¥239 = $1.00, the approximate actual exchange rate prevailing on February 28, 1978. Such translations should not be construed as representations that the Japanese yen could have been, could be, or could in the future be, converted into United States dollars at such rate or any other rate. On June 21, 1978, the last business day prior to the commencement of the Offer, the noon buying rate for yen in New York, New York was approximately ¥210 = $1.00.

### 2. Offer to purchase all shares of common stock of Browning by F.N. International, a subsidiary of Fabrique Nationale Herstal S.A. (a Belgian corporation), expiring on August 11, 1977

At June 30, 1976, the assets of F.N. were BFr. 9,677,354,000 ($275,369,000). The sales and net earnings of F.N. for the three fiscal years ended June 30, 1974, 1975 and 1976 were as follows: 1974—sales of BFr. 4,181,000,000 ($118,970,000) and net loss of BFr. 40,134,000 ($1,142,000); 1975—sales of BFr. 6,129,307,000 ($174,409,000) and net earnings of BFr. 48,839,000 ($1,390,000); 1976—sales of BFr. 8,234,947,000 ($234,325,000) and net earnings of BFr. 263,419,000 ($7,496,000). The unaudited, preliminary amounts of F.N.'s sales and net earnings for the year ended June 30, 1977 are BFr. 10,400,000,000 ($295,932,000) and BFr. 185,000,000 ($5,264,000), respectively. The foregoing financial information has been arrived at by F.N. in accordance with accounting principles generally accepted in Belgium as described in F.N.'s annual reports, and is not represented to be in accordance with accounting principles generally accepted in the United States. F.N. publishes its accounts in Belgian Francs. The above U. S. dollars amounts are presently solely for convenience at the arbitrarily selected rate of BFr. 1 = $0.028455, the noon buying rate for Belgian Francs in New York City as reported by the Federal Reserve Bank of New York on July 28, 1977. The foregoing presentation does not give effect to changes in currency exchange rates which occurred during the applicable periods. On June 30, 1976, the date of the most recent audited financial data included above, the exchange rate between the Belgian Franc and the U. S. dollar was BFr. 1 = $0.025190.

The Purchaser has attached as an exhibit to its Schedule 13D filed with the Commission on July 29, 1977 the annual reports of F.N. for its last three fiscal years and of Societe Generale de Belguique for its most recent fiscal year. Such annual reports may be inspected at the Commission's office and copies thereof may be obtained upon payment of the Commission's customary charges as explained in Section 6 hereof.

### 3. Offer to purchase all shares of Interpool Limited by Thyssen-Bornemisza N.V. (a Netherlands Antilles company), expiring on July 18, 1978

The following information, which is published in the 1977 Annual Report of the Purchaser (the "Annual Report"), was prepared in accordance with accounting principles generally accepted in The Netherlands, which practices are specified in the notes to the Annual Report and are not necessarily
in accordance with accounting principles generally accepted in the United States:

<table>
<thead>
<tr>
<th>December 31, 1976(a)</th>
<th>1977(b)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consolidated sales</td>
<td>$1,043,000</td>
</tr>
<tr>
<td>Consolidated net income</td>
<td>$49,000</td>
</tr>
<tr>
<td>Consolidated total assets</td>
<td>$866,000</td>
</tr>
<tr>
<td>Consolidated total liabilities</td>
<td>$567,000</td>
</tr>
</tbody>
</table>

(a) The amounts for 1976 were translated from Dutch Guilders into U.S. Dollars at an exchange rate of $1.00 = Guilders 2.460.

(b) The amounts for 1977 were translated from Dutch Guilders into U.S. Dollars at an exchange rate of $1.00 = Guilders 2.280.

The Purchaser has filed the English language copy of the Annual Report with the Commission and the American Stock Exchange as an exhibit to the Statement on Schedule 14D-1 with respect to the Offer. The Annual Report may be inspected at the offices of the Commission and the American Stock Exchange, and copies thereof may be obtained from the Commission upon payment of its customary charges, in the manner set forth in the first paragraph of Section 8.

4. Offer to purchase all shares of Dymo Industries Inc. by Oxford Pendaflex Development Corp. (Del.), a subsidiary of Oxford Pendaflex (N.Y.) which is in turn a subsidiary of Esselte A.B. (a Swedish corporation) expiring on May 25, 1978

There is set forth below certain summary consolidated financial information for Esselte and its subsidiaries extracted from the English language version of Esselte's annual reports to stockholders for each of the five fiscal years ended March 31, 1977 and from Esselte's interim report to stockholders for the six months ended September 30, 1977. Such annual and interim reports to stockholders have been filed as Exhibits to the Statement on Schedule 14D-1 with respect to the Offer filed by the Purchaser with the Commission, and are available for inspection and copying at the offices of the Commission and the NYSE and PSE, and in the manner, set forth in Section 8 of this Offer to Purchase.

Esselte's consolidated financial statements have been prepared in accordance with Swedish accounting practices, which practices are specified in the notes to such statements. Swedish accounting practices are not the same as generally accepted accounting principles in the United States. The conversion of Esselte's consolidated financial statements to generally accepted accounting principles in the United States would not result in any reduction in reported net profit or reported stockholders' equity. Esselte has been advised by its independent auditor, Sigurd Löfgren, Authorized Public Accountant, that such consolidated financial statements of Esselte and its subsidiaries comply with international accounting standards currently in force, except that in arriving at income before taxes special allocations to untaxed reserves have been made to secure certain tax benefits and except for certain other differences which are immaterial to Esselte's reported results of operations and financial position.

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<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>United States dollars in millions</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sales</td>
<td>885</td>
<td>1,268</td>
<td>1,299</td>
<td>1,528</td>
</tr>
<tr>
<td>Income before extraordinary items</td>
<td>23</td>
<td>42</td>
<td>75</td>
<td>85</td>
</tr>
<tr>
<td>Income before appropriations and</td>
<td>75</td>
<td>51</td>
<td>284(b)</td>
<td>88</td>
</tr>
<tr>
<td>taxes</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Income before taxes</td>
<td>54</td>
<td>18</td>
<td>199</td>
<td>39</td>
</tr>
<tr>
<td>Net profit</td>
<td>49</td>
<td>13</td>
<td>193</td>
<td>14</td>
</tr>
</tbody>
</table>

(Table cont'd)
A. Fleischer, Jr., W.H. Feder / Acquisitions by tender offer 371

(Table cont'd)

Balance Sheet (at March 31, 1977)

<table>
<thead>
<tr>
<th></th>
<th>$</th>
<th>$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Liquid assets</td>
<td>416</td>
<td>99</td>
</tr>
<tr>
<td>Other current assets</td>
<td>913</td>
<td>217</td>
</tr>
<tr>
<td>Total assets</td>
<td>1,958</td>
<td>466</td>
</tr>
<tr>
<td>Current liabilities and taxes accrued</td>
<td>537</td>
<td>128</td>
</tr>
<tr>
<td>Long-term debt</td>
<td>620</td>
<td>148</td>
</tr>
<tr>
<td>Untaxed reserves</td>
<td>373</td>
<td>89</td>
</tr>
<tr>
<td>Stockholders' equity</td>
<td>422</td>
<td>100</td>
</tr>
</tbody>
</table>

(a) The amounts for the fiscal year ended March 31, 1977 were translated from Swedish kronor into U.S. dollars on the basis of the exchange rate prevailing at March 31, 1977 of 4.20 Swedish kronor for each U.S. dollar. At May 11, 1978 such exchange rate was 4.63 Swedish kronor for each U.S. dollar.

(b) During the fiscal year ended March 31, 1975, Esselte realized an extraordinary capital gain of 208 million Swedish kronor relating to Esselte's sale of a paper mill.

For the six months ended September 30, 1976 and 1977 Esselte reported sales of 1,011 million Swedish kronor and 1,108 million Swedish kronor (U.S. $230 million), respectively, and income before appropriations and taxes of 55 million Swedish kronor and 52 million Swedish kronor (U.S. $11 million), respectively. Appropriations and taxes are not calculated for interim periods and, therefore, net profit is not available for such periods. The amounts for the six months ended September 30, 1977 were translated from Swedish kronor into U.S. dollars on the basis of the exchange rate prevailing at September 30, 1977 of 4.825 Swedish kronor for each U.S. dollar. Esselte's consolidated financial statements for the fiscal year ended March 31, 1978 are not yet available, but Esselte expects its sales and net profit for such year will exceed those for the fiscal year ended March 31, 1977 and that sales and income before appropriations and taxes for the six months ended March 31, 1978 will exceed those for the six months ended September 30, 1977.

5. Offer to purchase all shares of Wells Management Corporation by BIS America Corporation, a subsidiary of BIS S.A. (a French corporation) expiring on February 10, 1978

The following financial information which is published in the 1976 annual report of BIS referred to below has been prepared in accordance with accounting principles generally accepted in France and not in accordance with accounting principles generally accepted in the United States. BIS publishes its financial statements in French Francs (“FF”). The exchange rate between the FF and the Dollar has varied substantially for the periods shown. On December 30, 1977 the exchange rate was approximately FF = $0.213.

<table>
<thead>
<tr>
<th></th>
<th>1975</th>
<th>1976</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>FF</td>
<td>$*</td>
</tr>
<tr>
<td>Net Revenue</td>
<td>486,759,477</td>
<td>103,680,557</td>
</tr>
<tr>
<td>Net Earnings</td>
<td>19,919,878</td>
<td>4,242,966</td>
</tr>
<tr>
<td>Total Assets</td>
<td>206,578,016</td>
<td>44,001,452</td>
</tr>
<tr>
<td>Net Worth</td>
<td>112,616,557</td>
<td>23,987,327</td>
</tr>
</tbody>
</table>

* Dollar amounts are presented for convenience only and are translated at the rate of FF = $0.213.

BIS is not subject to the informational reporting requirements of the Exchange Act; however, in connection with its filing of a Tender Offer Statement on Schedule 14D-1 referred to in Section 19, the Purchaser has transmitted to the Commission the 1976 annual report of BIS, which is in the French language. Such annual report may be inspected at the Commission's offices and copies thereof may be obtained upon payment of the Commission's customary charges in the manner stated in Section 7.
6. Offer to purchase all shares of Disston, Inc. by Viksa, Inc., a wholly-owned subsidiary of Sandvik, Inc. which in turn is a wholly-owned subsidiary of Sandvik Aktiebolag (a Swedish corporation), expiring on February 11, 1976

At December 31, 1974, Sandvik's stockholders' equity was U.S. $176,057,630. A summary of Sandvik's audited consolidated profit and loss account for the year ended December 31, 1974 (the most recently published) in U.S. dollars follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Invoiced sales</td>
<td>$833,336,940</td>
</tr>
<tr>
<td>Profit before appropriations permitted by Swedish law and taxes</td>
<td>113,346,300</td>
</tr>
<tr>
<td>Profit before taxes</td>
<td>55,108,128</td>
</tr>
<tr>
<td>Profit attributable to minority interests</td>
<td>1,303,694</td>
</tr>
<tr>
<td>Net profit</td>
<td>33,275,862</td>
</tr>
</tbody>
</table>

The foregoing financial information has been arrived at in accordance with Swedish accounting practice. The amounts stated were translated into U.S. dollars on the basis of the exchange rate prevailing at year end 1974 of 4.06 Swedish Kronor for each U.S. dollar. At year end 1975, such exchange rate was 4.385 Swedish Kronor for each U.S. dollar.

The English-language version of Sandvik's 1974 Annual Report is an Exhibit to the Statement on Schedule 13D with respect to the Offer filed with the Commission and the NYSE and should be available at the office of the Commission and at the library of the NYSE, as described in Section 6.

7. Offer to purchase 1,250,000 shares of Appalachian National Corporation by La Participation (a French company) and a member of Mutuelles Unies (a French company) and a member of Mutuelles Unies (a French mutual insurance group) expiring on January 19, 1979

The Purchaser and Mutuelles Unies are not subject to the informational reporting requirements of the Exchange Act; however, in connection with the filing of a Tender Offer Statement on Schedule 14D-I referred to in Section 18 ("Miscellaneous"), the Purchaser has filed the Annual Reports of Mutuelles Unies for the years ended December 31, 1975, 1976 and 1977 with the Commission. Such Annual Reports, which are in the French language and contain the complete financial statements of the members of Mutuelles Unies for the years 1975-1977, may be inspected at the offices of the Commission, and copies thereof may be obtained upon payment of the Commission's customary charges, as indicated in Section 11 ("Certain Information Concerning the Company").

The financial statements of the Purchaser, as well as of the other Member and Affiliated Companies, contained in Mutuelles Unies' Annual Reports, are prepared in accordance with statutorily mandated accounting principles applicable to French insurance companies. The statements of the individual Member and Affiliated Companies are reported upon annually as required by law by a certified French auditor (Commissaire Aux Comptes) and examined by the insurance regulatory authorities in France. The consolidated financial statements of Mutuelles Unies are prepared by the group's management on the basis of, and in accordance with the statutory principles applied in, the official statements of the separate group members. Such consolidated statements have not been certified or officially reviewed by the group's outside auditors or by the insurance regulatory authorities in France.

Set forth below is certain financial information regarding the Purchaser Individually and Mutuelles Unies as a whole at and for the years ended December 31, 1975, 1976 and 1977 which is based on the information contained in the Annual Reports filed with the Commission. The French statutory accounting principles applicable by the Purchaser and the other Member and Affiliated Companies in connection with their respective financial statements differ from U.S. generally accepted accounting principles. A summary of the most material differences is set forth in Exhibit B to this Offer to Purchase. Such Exhibit does not, however, set forth all of the differences which would be required to reconcile French statutory accounting principles with U.S. generally accepted accounting principles.
A. Fleischer, Jr., W.H. Feder / Acquisitions by tender offer 373

### LA PARTICIPATION

**Year Ended December 31**

(000's omitted)

<table>
<thead>
<tr>
<th>Year</th>
<th>FF</th>
<th>$</th>
<th>FF</th>
<th>$</th>
<th>FF</th>
<th>$</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1977</td>
<td></td>
<td>1976</td>
<td></td>
<td>1975</td>
<td></td>
</tr>
<tr>
<td>Current Assets</td>
<td>97,523</td>
<td>22,164</td>
<td>106,040</td>
<td>24,100</td>
<td>89,168</td>
<td>20,265</td>
</tr>
<tr>
<td>Investments</td>
<td>275,954</td>
<td>62,717</td>
<td>253,418</td>
<td>57,595</td>
<td>242,902</td>
<td>55,205</td>
</tr>
<tr>
<td>Long-term Notes</td>
<td>11,160</td>
<td>2,536</td>
<td>11,000</td>
<td>2,500</td>
<td>6,610</td>
<td>1,502</td>
</tr>
<tr>
<td>Real Estate (at cost) less amortization</td>
<td>85,606</td>
<td>19,456</td>
<td>94,699</td>
<td>21,522</td>
<td>80,226</td>
<td>18,233</td>
</tr>
<tr>
<td>Reinsurance Recoverable</td>
<td>34,271</td>
<td>7,789</td>
<td>33,242</td>
<td>7,555</td>
<td>26,210</td>
<td>5,957</td>
</tr>
<tr>
<td><strong>Total Assets</strong></td>
<td>504,514</td>
<td>114,662</td>
<td>498,399</td>
<td>113,272</td>
<td>445,116</td>
<td>101,162</td>
</tr>
<tr>
<td>Current Liabilities</td>
<td>19,866</td>
<td>4,515</td>
<td>35,466</td>
<td>8,060</td>
<td>19,370</td>
<td>4,402</td>
</tr>
<tr>
<td>Insurance Reserves</td>
<td>389,759</td>
<td>88,581</td>
<td>375,474</td>
<td>85,335</td>
<td>343,366</td>
<td>78,038</td>
</tr>
<tr>
<td>Capital and Surplus</td>
<td>94,889</td>
<td>21,566</td>
<td>87,459</td>
<td>19,877</td>
<td>79,826</td>
<td>18,722</td>
</tr>
<tr>
<td><strong>Total Liabilities</strong></td>
<td>40,732</td>
<td>9,041</td>
<td>74,947</td>
<td>16,527</td>
<td>63,442</td>
<td>13,924</td>
</tr>
<tr>
<td><strong>Net Premium Income</strong></td>
<td>179,995</td>
<td>40,908</td>
<td>149,967</td>
<td>34,083</td>
<td>142,596</td>
<td>32,408</td>
</tr>
<tr>
<td><strong>Total Income</strong></td>
<td>214,929</td>
<td>48,848</td>
<td>174,849</td>
<td>39,738</td>
<td>165,455</td>
<td>37,603</td>
</tr>
<tr>
<td>Pre-tax Net Income</td>
<td>7,521</td>
<td>1,709</td>
<td>5,954</td>
<td>1,353</td>
<td>7,034</td>
<td>1,599</td>
</tr>
<tr>
<td>Net Income After Tax</td>
<td>7,406</td>
<td>1,683</td>
<td>5,241</td>
<td>1,191</td>
<td>6,716</td>
<td>1,526</td>
</tr>
</tbody>
</table>

### MUTUELLES UNIES

*(Member and Affiliated Companies)*

**Year Ended December 31**

(000's omitted)

<table>
<thead>
<tr>
<th>Year</th>
<th>FF</th>
<th>$</th>
<th>FF</th>
<th>$</th>
<th>FF</th>
<th>$</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1977</td>
<td></td>
<td>1976</td>
<td></td>
<td>1975</td>
<td></td>
</tr>
<tr>
<td>Current Assets</td>
<td>615,191</td>
<td>139,816</td>
<td>531,743</td>
<td>120,851</td>
<td>360,589</td>
<td>81,952</td>
</tr>
<tr>
<td>Investments</td>
<td>1,356,708</td>
<td>308,343</td>
<td>1,199,020</td>
<td>272,505</td>
<td>1,080,895</td>
<td>245,658</td>
</tr>
<tr>
<td>Long-term Notes</td>
<td>137,334</td>
<td>31,212</td>
<td>92,977</td>
<td>21,131</td>
<td>75,671</td>
<td>17,198</td>
</tr>
<tr>
<td>Real Estate (at cost) less amortization</td>
<td>543,264</td>
<td>123,469</td>
<td>475,527</td>
<td>108,074</td>
<td>399,567</td>
<td>90,811</td>
</tr>
<tr>
<td>Reinsurance Recoverable</td>
<td>153,825</td>
<td>34,960</td>
<td>137,061</td>
<td>31,150</td>
<td>128,572</td>
<td>29,221</td>
</tr>
<tr>
<td><strong>Total Assets</strong></td>
<td>2,806,322</td>
<td>637,800</td>
<td>2,436,328</td>
<td>553,711</td>
<td>2,045,294</td>
<td>464,840</td>
</tr>
<tr>
<td>Current Liabilities</td>
<td>210,730</td>
<td>47,893</td>
<td>209,349</td>
<td>47,579</td>
<td>123,255</td>
<td>28,013</td>
</tr>
<tr>
<td>Insurance Reserves</td>
<td>2,145,484</td>
<td>487,610</td>
<td>1,842,236</td>
<td>418,690</td>
<td>1,579,135</td>
<td>358,894</td>
</tr>
<tr>
<td>Consolidated Capital and Surplus</td>
<td>450,108</td>
<td>102,297</td>
<td>384,743</td>
<td>87,442</td>
<td>342,904</td>
<td>77,933</td>
</tr>
<tr>
<td><strong>Net Premium Income</strong></td>
<td>2,045,294</td>
<td>464,840</td>
<td>2,045,294</td>
<td>464,840</td>
<td>2,045,294</td>
<td>464,840</td>
</tr>
<tr>
<td><strong>Total Income</strong></td>
<td>2,045,294</td>
<td>464,840</td>
<td>2,045,294</td>
<td>464,840</td>
<td>2,045,294</td>
<td>464,840</td>
</tr>
<tr>
<td>Pre-tax Net Income</td>
<td>43,025</td>
<td>9,778</td>
<td>32,793</td>
<td>7,453</td>
<td>20,207</td>
<td>4,592</td>
</tr>
<tr>
<td>Net Income After Tax</td>
<td>41,759</td>
<td>9,491</td>
<td>29,904</td>
<td>6,796</td>
<td>16,384</td>
<td>3,724</td>
</tr>
</tbody>
</table>

The Purchaser and Mutuelles Unies publish their accounts in French francs ("FF"). The above financial information has been translated into United States dollars, solely for convenience, at the arbitrarily selected rate of 4.40 FF to U.S. $1.00, the buying rate for French francs in effect in New York City at 3:00 P.M. on December 6, 1978 as reported by the Wall Street Journal. The exchange rate between French francs and the U.S. dollar has varied substantially for the periods shown in the foregoing presentation of financial information.
EXHIBIT B

Summary of Certain Significant Differences Between Accounting Principles Applied By Members of Mutuelles Unies and Generally Accepted Accounting Principles Applied By United States Insurance Companies

La Participation prepares its financial statements in accordance with statutorily mandated accounting principles applicable to French insurance companies. Such financial statements are reported upon annually by a certified French auditor (Commissaire Aux Comptes) and examined by the insurance regulatory authorities in France. The consolidated financial statements of the Mutuelles Unies group are prepared by the group's management on the basis of the official statements of the separate group members. The consolidated statements of Mutuelles Unies are not certified or officially reviewed by the group's outside auditors or the insurance regulatory authorities in France.

The statutory accounting principles applied by La Participation and Mutuelles Unies differ in various respects from insurance company accounting principles generally accepted in the United States ("GAAP"). Briefly, the most material areas of difference are as follows:

1. U.S. insurance companies, under GAAP, generally carry their bond investments at either cost or amortized value. The members of Mutuelles Unies carry their bond investments—except indexed bonds—at the lower of cost or market.

2. U.S. insurance companies, under GAAP, generally carry their marketable common stock, and non-redeemable preferred stock, portfolio investments at market. Investments in unconsolidated subsidiaries and in 20 percent or more owned unconsolidated affiliated companies are generally carried on the equity method. French insurance companies generally carry their marketable common stock and non-redeemable preferred stock investments in unconsolidated companies, as well as their indexed bond and mortgage loan portfolio investments, at cost.

3. U.S. insurance companies, under GAAP, generally carry their real estate investments at cost less accumulated depreciation (except that land is not depreciated). The same method is generally followed by Mutuelles Unies (except that the depreciation period is generally longer in France than in the U.S. and French principles allow the depreciation of land at the rate of one percent per year). However, if the aggregate cost (less depreciation/amortization) of the total real estate, marketable stock, indexed bond and mortgage loan portfolio of a Mutuelles Unies member company is more than the aggregate current market value of such portfolio, the difference is reflected in such company's balance sheet and charged to income.

4. U.S. insurance companies, under GAAP, defer certain commissions, underwriting expenses and variable agency costs relating to the issuance of new life insurance policies. These items are amortized over a period of years to reflect the rates of expected annual premium revenue to expected total revenue. Such policy costs are not, on the other hand, capitalized by the Mutuelles Unies group and instead are, as permitted by French statutory principles, expensed when incurred.

5. Under French statutory practices, reinsurance recoverable is shown as an asset item on the balance sheet rather than as a deduction from the anticipated policy liability reserve accounts to which such reinsurance relates. Under GAAP, reinsurance recoverable is generally netted against the related reserve and not shown separately as an asset item on the balance sheet.

6. With respect to life insurance policies, under GAAP, U.S. insurance companies calculate their reserves for future policy benefits in accordance with the so-called net level premium reserve method, taking into account anticipated interest and mortality rates, and policy withdrawals and lapses. Under French statutory accounting methods, such reserves are similarly calculated without, however, taking anticipated lapses and withdrawals into account. In addition, under applicable French statutory principles, the Mutuelles Unies group assumes an investment yield of approximately 3.5 percent and a life expectancy rate based on 1960-1964 mortality tables. U.S. insurance companies often assume a greater yield and a more current mortality table.

7. U.S. insurance companies, under GAAP, generally provide a deferred tax reserve to reflect the difference in timing between income determined for financial reporting purposes and income determined for income tax reporting purposes. This timing difference is principally attributable to the
deferral (i.e., capitalization) of insurance policy acquisition costs and the calculation of reserves for future policy benefits. Under French statutory principles, tax reserves are created only for taxes due currently.

8. The financial statements of the members of the Mutuelles Unies group are presented in a format that varies from the format used in the United States. Numerous reclassifications would be required to present the group's financial statements in conformity with the U.S. format.

La Participation believes that the presentation of its financial statements, as well as the consolidated financial statements of Mutuelles Unies, in accordance with generally accepted accounting principles applied by U.S. insurance companies would not result in a reduction in the net income of La Participation or of the group for the period 1975-1977. La Participation also believes that such a presentation would not result in any decrease in its net assets or in the net assets of Mutuelles Unies.

Exhibit III: Examples of disclosure of controls imposed by foreign bidder's country

1. Offer to purchase 300,000 shares of common stock of Olga Company by Wacoal Corp. (a Japanese corporation) expiring July 26, 1978

The Offeror's obligation under the Offer is subject to the condition, among others, that the approval of the Ministry of Finance of Japan of the transactions contemplated by the Offer and the Agreement described in Section 8 shall not have been withdrawn or rescinded. Approval by the Ministry of Finance, based on communications between the Ministry and the Offeror, was obtained on April 3, 1978. This approval permits the Offeror to obtain the dollar amount mentioned in Section 13 and to transfer said dollar amount to the Depositary.

2. Offer to purchase all shares of common stock of The McKee Corporation by DM Holdings Inc., an indirect wholly-owned subsidiary of Davy Corporation Limited (an English company), expiring on November 13, 1978

Because the Purchaser is indirectly controlled by Davy, an English company, the Purchaser and Davy are subject to certain controls by the United Kingdom governmental authorities under the Exchange Control Act, 1947, of the United Kingdom. Under that Act, the purchase of Shares pursuant to the Offer requires approval of the Bank of England, which approval has been obtained and remains in effect. The United Kingdom Treasury (the "Treasury"), either itself or through the Bank of England, has authority to direct Davy as to the exercise of its rights as a stockholder of its controlled subsidiaries, including the Company, if the Purchaser should obtain control of the Company. It could, among other things, cause the Company or any company controlled by it (a) to declare and pay such dividends as may be specified by the Treasury, (b) to realize any of their assets in a manner directed by the Treasury, (c) to engage in currency transactions as directed by the Treasury, (d) to provide the Treasury with such particulars as to its assets and business as the Treasury may determine, and (e) to refrain from disposing of such securities as may be directed by the Treasury.

In order to prevent avoidance of United Kingdom taxes by the Purchaser's Parents, Section 482 of the Income and Corporation Taxes Act of 1970 of the United Kingdom requires that Davy and Holdings secure consent from the Treasury prior to either entering into or permitting its subsidiaries resident outside of the United Kingdom to enter into certain transactions (unless at the relevant times those transactions fall within any general exemptions then in force). In accordance with the requirements of Section 482, Davy has obtained consent for the creation and issue of the necessary capitalization by the Purchaser and Contractors in order to implement the Offer and Merger. In addition, if the Purchaser obtains control of the Company, similar consents would be required in respect of further issues or transfers of shares or debentures by the Company or any of its subsidiaries.
3. Offer to purchase all shares of Disston, Inc. by Viksa, Inc., a wholly-owned subsidiary of Sandvik, Inc. which in turn is a wholly-owned subsidiary of Sandvik Aktiebolag (a Swedish corporation), expiring on February 11, 1976

10. Swedish Exchange Controls. Sandvik is subject to certain controls by Sveriges Riksbank (the “Swedish National Bank”). The acquisition by the Purchaser of the Shares requires approval of the Swedish National Bank, which approval has been obtained and remains in effect. The approval is based on the assumptions that (i) the Purchaser will not sell any of the Shares acquired in the Offer without prior permission from the Swedish National Bank; (ii) the Purchaser will not, without permission of such Bank, vote its Shares or otherwise exercise any control it has over the Company so as to cause the Company to acquire shares of any other company; and (iii) Sandvik will arrange a medium or long-term loan outside of Sweden, the proceeds of which will be used to repay the short-term borrowing incurred in connection with this Offer. See Section 8.

4. Offer to purchase all shares of Dynmo Industries Inc. by Oxford Pendaflex Development Corp. (Del.), a subsidiary of Oxford Pendaflex (N.Y.) which is in turn a subsidiary of Esselte A.B. (a Swedish corporation) expiring on May 25, 1978

11. Swedish Exchange Controls. Esselte is subject to certain controls by Sveriges Riksbank (the “Bank of Sweden”). The guarantee by Esselte of the borrowings by Oxford referred to in Section 10 of this Offer to Purchase required approval of the Bank of Sweden, which approval has been obtained. In connection with obtaining such approval, Esselte undertook to the Bank of Sweden, among other things, that (i) in the event that it has to make payments pursuant to the guarantee, it will without unreasonable delay finance such payments by borrowings outside of Sweden with an average term of at least five years; (ii) none of the Shares acquired pursuant to the Offer and in any related acquisition of Shares will be sold or transferred without the approval of the Bank of Sweden; and (iii) Oxford will assure that the Company does not retain earnings to a greater extent than is reasonable for operations of the sort now conducted by the Company.

In connection with obtaining Bank of Sweden approval in 1976 for its acquisition of the capital stock of Oxford, Esselte undertook to the Bank of Sweden, among other things, that (i) it would not transfer shares of capital stock of Oxford without the consent of the Bank of Sweden and (ii) it would cause Oxford to pay reasonable dividends to it out of profits except to the extent that the retention of profits was necessary for the operations of Oxford.

Investments in or loans to the Company or Oxford by Esselte require approval of the Bank of Sweden. In general, the Bank of Sweden would require any such investments or loans to be obtained from borrowings by Esselte outside of Sweden with an average term of at least five years. It is likely that payment of such loans would be required to be made from funds derived from the Company or Oxford or additional foreign financing.

Exhibit IV: Example of disclosure of control

1. Offer to purchase all shares of Disston, Inc. by Viksa, Inc., a wholly-owned subsidiary of Sandvik, Inc. which in turn is a wholly-owned subsidiary of Sandvik Aktiebolag (a Swedish corporation), expiring on February 11, 1976

To the best of Sandvik’s knowledge, Korsnaes-Marma AB (“Korsnaes-Marma”) and Investment AB Kinnevik (“Kinnevik”), Swedish corporations whose respective addresses are Box 592, 801 11 Gavle 1 and Strandvagen 7A, 114 36 Stockholm, each own 12.5% of the voting stock and may be deemed controlling persons of Sandvik. Kinnevik is an investment company and holds 30% of the voting stock of Korsnaes-Marma, which is principally engaged in the business of manufacturing pulp and paper. Hugo Stenbeck, Chairman of the Board of Sandvik, Hugo Stenbeck Jr., Vice Chairman of the Board of Sandvik, and Elisabeth Stenbeck-Silfverstolpe, Deputy Member of the Board of Sandvik, own, directly or indirectly, minority interests in Sandvik, Kinnevik and Korsnaes-Marma. Such persons may be deemed controlling persons of Sandvik as a result of their positions and ownership interests in Sandvik, Kinnevik and Korsnaes-Marma.
Notes


[10] Id.


[13] See also Proposed Rule 14e-1, 2 Fed. Sec. L. Rep. (CCH) ¶24,295, at 17,727-9, discussed in Exchange Act Release No. 34-15548 (Feb. 5, 1979) under which the SEC has proposed certain major substantive changes in the tender offer rules, including proposals that offers remain open for thirty business days and expanding upon withdrawal rights.


[18] As of May 1, 1979, state takeover statutes have been enacted in Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, and Wisconsin. Texas has adopted takeover regulations.

[19] Most of the state statutes apply in such a situation. However, some statutes do not apply unless the company is “doing business” in the state of incorporation. See, e.g., Haw. Rev. Stat. §417E-1(5) (1976). The Federal District Court in Delaware held that both that court and a Delaware Court of Chancery were without jurisdiction to order a bidder (not a Delaware resident) to divest itself of stock acquired in a tender offer allegedly illegal under Delaware law when the target’s only contact with Delaware was the fact that it was incorporated there. See Barber-Green Co. v. Walco Nat’l Corp., 428 F. Supp. 567 (D. Del. 1977).


[22] The factors that a state considers in its exercise of jurisdiction under its takeover statute will have added significance if the Supreme Court decides Great Western United v. Kidwell,
557 F.2d 1256 (5th Cir. 1978), prob. juris. noted, 47 U.S.L.W. 3450 (U.S. Jan. 9, 1979) on Commerce Clause grounds alone (as opposed to pre-emption) since Commerce Clause analysis requires a balancing of the burden on interstate commerce against the local interests served by state regulation. See text accompanying notes 28 to 40, supra.


[33] Id. at 1286.

[34] Id.


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tit. 8, sec. 203), and "any other state statute purporting to regulate the terms and conditions of interstate tender offers"). In the spring of 1979, three more decisions cast doubt on the constitutionality of the state takeover statutes as applied to the facts under consideration. See Sharon Steel Corporation v. Durham, No. CV 79-181 (Superior Ct., Maine, March 26, 1979) (temporary restraining order); Hunt International Resources Corporation v. Sachs, No. B-79-493, consolidated with Sunshine Mining Company v. Hunt International Resources Corporation, No. B-79-502 (D.C. Md., March 12, 1979) (transcript of proceedings on motion for temporary restraining order); in Brascan's bid for Woolworth, it appears that application of the Louisiana takeover statute was restrained (Wall St. Journal, April 27, 1979).

[38] Occidental Petroleum Corporation v. Hurd, No. C-2-78-1100 (S.D. Ohio, October 31, 1978) (opinion and order). The SEC believes that the Williams Act has pre-empted some provisions of the state statutes. This was the position essentially taken by the Commission in its amicus brief to the Fifth Circuit in Kidwell. See also, Loss, A.L.I. Federal Securities Code (Proposed Official Draft, March 15, 1978) §1904(c), in which it is suggested that the Federal Securities Code pre-empts state law with respect to tender offers:

except with respect to the law of any state in which (A) the registrant to whose security holders the tender offer is directed has its principal place of business and (B) more than 50 percent of the record or beneficial holders of its outstanding voting securities holding more than 50 percent of those securities are resident.


[41] E.g., Dainippon's bid for Polychrome (March, 1979) (supported by target, opposed by large shareholder); Grand Union's bid for Colonial Stores (August, 1978); Esselte's bid for Dymo Industries (May, 1978). For an examination of the practice and psychology of defense, see Fleischer, Tender Offers: Defenses, Responses and Planning (1978).


[43] Id. See n. 44 infra.

[44] Section 27 reads, in relevant part:

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder... Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found....


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[51] See text accompanying notes 28 to 40 supra.


[53] For example, the United States maritime laws provide that no more than twenty-five percent of the stock of certain American shipping companies may be owned or controlled by aliens.


[55] This technique was employed by Tiger International in its offer for shares of Seaboard World Airlines pending approval by the Civil Aeronautics Board. Similarly, in its offer for the Signal Companies' shares, the CEMP, Loeb-Rhoades "group" agreed to place control of certain defense facilities in trust. In other instances, the government agency (including the Interstate Commerce Commission) has rejected the use of the trust arrangement.


[58] Id. at 33546.

[59] Id. at 33552.

[60] Id. at 33527.

[61] See Fugate, Foreign Commerce and the Antitrust Laws (2d ed. 1973) 462–463, 554–555, referring to the 1967 recommendation for antitrust cooperation by the Council of the Organization for Economic Cooperation and Development. See also Speech by Michael J. Egan, Associate Attorney General, to Business Law Section, International Bar Association (Atlanta, Ga., Nov. 3, 1977) in which he states that the Justice Department will notify any foreign government any time that an Antitrust Division official wishes to conduct investigative interviews or other official business within its territory.


[67] Compare Financial General Bankshares, Inc. v. Lance, No. 78-0276 (D.D.C. July 19, 1978) (order and memorandum), in which the district court judge ruled that questions about the alleged sensitive payments by a United States corporation to Kuwait Airways Corporation and the investment practices of Kuwait International Finance Company were beyond the scope of discovery in an action challenging the accuracy of the foreign corporation's Schedule 13D disclosure.

financial statements for the current period and for the three most recent annual accounting periods. Ga. Code Ann. §22-1902(6)(B) (1977) requires a bidder to furnish a copy of its balance sheet for its most recent fiscal year and statements of income and source and application of funds for the three preceding years, all prepared in accordance with GAAP.


[A] determination as to whether disclosure of financial information is material is dependent on the facts and circumstances concerning the tender offer. These may include, but are not limited to: (1) the terms of the tender offer, particularly those terms concerning the amount of securities being sought, such as any or all, a fixed minimum with the right to accept additional shares tendered, all or none, and a fixed percentage of the outstanding; (2) whether the purpose of the tender offer is for control of the subject company; (3) the plans or proposals of the bidder described in Item 5 of the Schedule; and (4) the ability of the bidder to pay for the securities sought in the tender offer and/or to repay any loans made by the bidder to its affiliates in connection with the tender offer or otherwise. It should be noted that the factors described above are not exclusive nor is it necessary that any or all of such factors be present in order to trigger the materiality test.

[70] Compare Prudent Real Estate Trust v. Johnson Realty, Inc., No. 79-7215 (2d Cir. April 12, 1979) in which the court held, in reversing a denial of a temporary injunction against the continuation of a tender offer for any and all outstanding shares of the target, that disclosure of financial information concerning a party supplying 20% of the financing for the bid was material where that party, if the bid were successful, would have the right to vote the acquired target shares and manage the target's properties and where financial information concerning that party was not otherwise readily available to the target's shareholders. See Copperweld Corporation v. Imetal, 403 F.Supp. 579 (W.D. Pa. 1973).


(1) an audited balance sheet as of the end of the corporation's most recent fiscal year,
(2) audited statements of income and source and application of funds for each of the three fiscal years preceding the date of the corporation's most recent balance sheet, required in (1) above,
(3) audited consolidated information for the corporation and its subsidiaries containing the same information required in (1) and (2) above, and
(4) information required in (1) and (2) above for each majority-owned subsidiary not consolidated and each 50 percent or less owned person for which the investment is accounted for by the equity method by the registrant or a consolidated subsidiary of the registrant, unless excepted by other provisions in the Form.

[76] Of 26 filings inspected:

- 6 contained no financial information about the bidder;
- 4 included limited financial information but made no reference to the accounting principles by which they were prepared;
- 12 included limited financial information, stating the accounting principles by which they were prepared, often noting that these practices "differ" from GAAP; and
- 4 included financial information with a more elaborate explanation of the difference between the accounting principles used in the preparation of the financials and GAAP.
However, these statistics are not entirely informative in the absence of further information as to the particular facts and circumstances surrounding each offer, such as whether a bid was for control or partial or for any and all.

[77] Although the staff had initially requested that all reports be certified and translated into English, after being informed that (i) certified financial statements for the parent group did not exist, and (ii) an accurate and "meaningful" translation of the financials into English did not exist, were not ordinarily prepared, and would involve unreasonable time, cost and expense, the staff concluded that it would not object if annual reports in French for three years were attached.

[78] The staff stated that, in view of the standard accounting practices of the offeror, it was not necessary that the summary financial data be audited, nor was it necessary for the summary financials to be reviewed by the company's outside auditors.

[79] In addition, although the staff had initially requested that interim financial statements be provided, upon being informed that such interim reports did not exist and were not ordinarily prepared, the staff decided it was not necessary to prepare them in connection with the proposed offer.


[85] Id. at 949.
[86] Id.
[88] Id.
[92] Id. See also Prudent Real Estate Trust v. Johncamp Realty, Inc., supra n. 70.
[93] See Exhibits I and II, attached hereto, for examples of recent financial disclosure by foreign corporations.

[94] See text accompanying notes 53 to 55 supra.
[96] Id.
[97] Id. at 758. For examples of disclosure of controls imposed by the country of a foreign bidder, see Exhibit III, attached hereto.
[98] 17 C.F.R. § 240.14d-100 (1978), General Instruction C.
[100] See Exhibit IV, attached hereto, for an example of disclosure of corporate control by a foreign offeror.

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