Since so much of the decision-making process relies on the advice a target company receives from its outside advisors, it is imperative that these issues be confronted and publicly debated.[174]

B. *External Standards Setters*

In unsolicited acquisition efforts, external standard setters include the SEC, other regulatory agencies, the various state legislatures and the Congress, the courts, and the President. The present development of the law by these external standard setters is uncoordinated, and does not readily permit the implementation of broad national goals, while paying appropriate deference to important local issues. Instead, because our present system is divided into fiefdoms, it discourages the development of overarching goals and policies.

1. The SEC

The SEC has been, and continues to be, a much-maligned player in the hostile takeover process.[175] A certain amount of the criticism the Agency's efforts have generated may be well-deserved, but the SEC has spent a fair amount of time attempting to vindicate its parochial (but religously held and pursued) interest in federal supremacy over state involvement in the takeover process,[176] instead

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174. Symposiums, such as the one recently conducted by the Hastings Law Journal, may provide the impetus for the recognition of, and response to, the conflicts that are thought to exist in the takeover setting. *See The Role of Counsel in Corporate Acquisition and Takeovers: Conflicts and Complications*, 39 HASTINGS L.J. 573 (1988).

175. The Commission recently suffered a stinging defeat in its effort to exert influence in the takeover process when the Court of Appeals for the District of Columbia invalidated the Commission's "one-vote, one-share" rule. In Business Roundtable v. SEC, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,291, at 96,338 (D.C. Cir. 1990), the court of appeals ruled that the Commission's attempt to mandate a one-vote, one-share role, 17 C.F.R. § 240.19(b)(4) (1989), was beyond the Commission's authority under the Securities and Exchange Act of 1934. The court ruled that the one-vote, one-share rule was a significant intrusion into the corporate governance affairs of public companies, an area, according to the court, that has been traditionally regulated by the states.

176. *See, e.g.*, *Moran*, 500 A.2d at 1349 & n.1 (SEC filed amicus curiae brief in opposition to adoption of poison pill defense, which is generally thought to be a state fiduciary issue); *Regulation Under Federal Banking and Securities Laws of Persons Involved in Corporate Takeovers: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. (1976) (statement of Phillip Loomis, Commissioner, Securities and Exchange Commission). *See also* Comment, *Creeping Federalization of Corporate Law*: Unocal Corp. v. Mesa Petroleum Co. *and the All-Holders Rule under the Federal Securities Laws*, 12 DEL. J. CORP. L. 563, 600-03 (1987) (noting SEC's intrusion in matters that should be left to state fiduciary law).

of focusing exclusively upon thoughtful contributions to the takeover process itself. But, even if the SEC were not obsessed with jurisdictional issues, its ability to be a meaningful participant in the takeover process is necessarily limited for several reasons.

First, as a purely pragmatic matter, developments in the hostile acquisition arena occur at a fairly furious pace, as the strategies of opposing counsel and investment bankers are amended to take account of the success or failure of the latest ploys in the most recent transactions.[177] By definition, and by statute, the SEC is simply incapable of keeping pace with these developments. It takes a certain amount of time for various takeover strategies to be understood by the players themselves, much less an agency that is often confined to the role of a spectator. And, of course, understanding a particular stratagem is not necessarily the same as understanding the implications of that stratagem. By the time the SEC's staff understands the implications of a particular takeover stratagem, however, the same stratagem probably has been refined several times over, to reflect the effects of various responsive stratagems. As a result, the SEC is often at least one to two years behind the marketplace, in terms of its comprehension of the activities of the participants in the takeover process.[178]

Second, the SEC must not only understand the implications of a particular stratagem, it must determine whether, and how, to respond to that stratagem. At least in recent years, the Agency's commissioners[179]—the individuals with decision-making authority at

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177. For example, the use of an ESOP as a takeover defense is in vogue in light of the Delaware Chancery Court's decision in *AC Acquisitions*. *See* Block & Hoff, *supra* note 8.

178. A stark example of this can be gleaned from the fact that the Commission promulgated so-called "Temporary Rules" under the Williams Act in 1968, after the Act first passed. Exchange Act Rel. No. 34-8,370, 33 Fed. Reg. 11,015 (July 30, 1968). Those temporary rules were not replaced with permanent rules for over a decade. *See* Exchange Act Rel. No. 15,548, 16 SEC Docket 973 (Feb. 5, 1979).

179. There are five commissioners who sit on the SEC, no more than three of whom may be from one political party. *See* § 4 of the Exchange Act, 15 U.S.C. § 78d(a) (1982). The President appoints each commissioner, with the advice and consent of the Senate, and commissioners serve for five year terms, or until their successors are nominated, confirmed and sworn in. *Id.* The President can designate the Chairman of the agency, pursuant to Reorganization Plan No. 10 of 1950. See 5 U.S.C. §§ 901-913 (1982), and the chairman serves as such (but not as a commissioner) solely at the pleasure of the President. *Id.* Commissioners once appointed cannot be removed except for cause. *See* Humphrey's Executor v. United States, 295 U.S. 602, 626 (1935). Each commissioner has one vote on every issue; a majority of commissioners present and voting carries the day on any given issue (assuming the existence of a quorum).

the SEC—have not always been of a single mind in attempting to respond to various takeover developments.[180] The Agency's failure to speak with a unified voice has deprived it of a fair amount of effectiveness.[181]

Third, even assuming that the Agency were able to determine whether and how to respond to a particular takeover development, and assuming further that a majority of the commissioners were prepared to support that response, the SEC only has two effective choices as to the vehicles to be utilized for its response. The first is to proceed by means of an enforcement action, arguing that a particular stratagem violates an *existing* rule or statutory requirement.[182] In general, the courts have been less than hospitable to the Agency when it has attempted this *ad hoc* enforcement approach to tender offer regulation.[183] The second vehicle available to the agency is to promulgate a rule or regulation to govern the conduct the Agency finds troublesome.[184] But, the difficulty with a regulatory response is that the Agency is committed to a course of *deregulation*, not *regulation*.[185] As a result, there is (and for the last decade has

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180. *See, e.g.*, SEC *amicus curiae* brief, Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985) (Commissioners were divided 3-2 on the issue of whether to intervene, and what position to espouse, in this state law case regarding a board's authority to adopt a poison pill); *SEC Approves Rule to Bar Companies from Diluting Investors' Voting Rights*, 20 Sec. Reg. & L. Rep. (BNA) 1051 (July 8, 1988) (noting that Commission adopted the "one-vote, one-share rule by a 4-to-1 vote).

181. *See, e.g.*, *Moran*, 500 A.2d at 1354 (Commission's views rejected by the Delaware Supreme Court).

182. *See* Chiarella v. United States, 445 U.S. 222, 235 n.20 (1980) (defendant must have notice of conduct that government believes constitutes violation of law); Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

183. *See, e.g.*, *Carter Hawley Hale Stores, Inc.*, 760 F.2d at 948 (rejecting Commission's position on whether target company's repurchase of shares constituted a tender offer); *Brascan, Ltd.*, 477 F. Supp. at 791 (rejecting Commission's test for determining whether an acquisition proposal constitutes a tender offer on grounds of vagueness).

184. There are numerous instances in which the Commission has taken this approach. For example, the "All-Holders" Rule was adopted in response to tender offers by target companies that discriminated against hostile bidders *qua* shareholders. *See* 17 C.F.R. § 240.14d-10 (1989).

The Commission also has proposed rules that would prohibit a bidder from mounting a "street sweep" within ten days of the scheduled expiration of a tender offer for 10% or more of the stock. *See SEC Proposed Rules on Substantial Securities Acquisitions During and Following A Tender Offer*, Exchange Act Rel. No. 24,976, 19 Sec. Reg. & L. Rep. (BNA) 1545 (Oct. 9, 1987).

185. *See, e.g.*, *The SEC Under Shad: Can A Deregulator Protect the Public?*, Bus. Wk., June 13, 1983, at 135; *SEC Chairman Notes Efforts to Streamline 50 Years of Rules, Statutes*, Daily Rep. for Exec. (BNA), Feb. 4, 1982, at A-1.

been) an institutional bias against regulating the takeover process.[186] This does not mean, however, that the SEC has not promulgated rules governing the takeover process in recent times; to the contrary, it has been moderately successful in developing regulations to govern certain aspects of the process which the Agency has found most troublesome.[187] Nevertheless, due to the requirements of law with which the SEC must comply,[188] the process of developing a regulatory response, even when the Agency is willing to consider such an approach, is unduly cumbersome and time consuming.

Finally, there is a significant question of just how far the Agency's authority could be extended, even if the Agency were desirous of assuming a more direct involvement in the takeover process. The Supreme Court has made quite clear that it views the Williams Act—the organic statutory enactment pursuant to which the SEC exercises its role in takeover issues[189]—as a disclosure statute, not a regulatory statute.[190] Moreover, questions of fiduciary duties and inherent fair-

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186. *See, e.g.*, *White House, SEC Oppose Bills to Overhaul Takeover Process*, 19 Sec. Reg. & L. Rep. (BNA) 941 (June 26, 1987); *White House Economists Say No Need for Additional Takeover Regulations*, 17 Sec. Reg. & L. Rep. (BNA) 247 (Feb. 8, 1985); *Reagan Administration Formally Opposes House Bill to Limit Tender Offer Abuses*, 16 Sec. Reg. & L. Rep. (BNA) 1546 (Sept. 28, 1984).

187. *See, e.g.*, 17 C.F.R. § 240.14e-1 (1989) (tender offer must remain open for 20 days on a pro-rata basis). *But see supra* note 175 (discussing D.C. Circuit's recent invalidation of Commission's one-vote, one-share rule, which sought to prohibit exchange listing where issuer issues securities, or takes other action, with effect of disparately reducing voting rights of existing common stock).

188. As an administrative agency, the SEC is, and since 1946 has been, required to comply with the requirements of the Administrative Procedure Act (APA). *See* 5 U.S.C. § 551 (1982). Pursuant to § 3 of that Act, codified at 5 U.S.C. § 553 (1982), the SEC must publish any proposed substantive rule for public comment, allowing at least thirty days within which interested persons may submit comments. *Id.* Then, the SEC must evaluate those comments, along with other factors prescribed by a number of statutes other than the APA. Finally, the SEC can publish a final rule, but that rule may not take effect (in the absence of a bona fide emergency) in less than thirty days from the date of publication of notice of the adoption of the rule in the Federal Register. 5 U.S.C. § 553(c) (1982). In a perfect environment, most tender offer related rules would require at least two months to promulgate *after* the initial proposal has been announced publicly. In point of fact, each of the substantive takeover rules adopted by the SEC in the past seven years has taken substantially longer than that.

189. *See generally* Note, *Proposed SEC Regulation of Market Sweeps: Should Market Sweeps Be Governed by the Williams Act?*, 56 FORDHAM L. REV. 797 (1988) (discussing the SEC's participation in the takeover process through the Williams Act).

190. *See, e.g.*, Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 11 n.11 (1985). *See also* Pitt & Shub, *Failed One-Share, One-Vote Rule Let SEC Intrude in Boardroom*, Nat'l L.J., Nov. 8, 1990, at 32 (discussing the SEC's proper role in regulating corporate governance).

ness are issues with which the SEC has very little practical experience, and away from which the SEC tends to shy. As an agency most comfortable with disclosure as its guiding principle, the SEC is not well-equipped to deal unilaterally with the important policy questions that arise in connection with hostile takeovers.

2. Other Regulatory Agencies

In addition to the SEC, there are other regulatory agencies, at both the federal and state levels, that may have an impact on the takeover environment. Thus, often without special reference to takeovers, either a federal or state legislative body has subjected particular types of corporations to special regulatory regimes that can affect the outcome of an unsolicited takeover attempt.[191] It is difficult to delineate every one of the departments, agencies, and commissions, or each of the types of companies, or each of the generic issues, that are the subject of special regulatory treatment.[192] Moreover,

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191. *See infra* note 196 and accompanying text.

192. Typical of the myriad companies that can be affected by special regulatory requirements are the following: communications companies (the Federal Communications Commission) and some state regulations; railroads (the Interstate Commerce Commission (ICC) and the Federal Railroad Administration); trucking companies (the ICC, the Federal Highway Administration, the National Highway Transportation Administration, and the National Transportation Safety Board); airlines (the Department of Justice (DOJ), the Department of Labor (DOL), Environmental Protection Agency (EPA), Federal Aviation Administration, Department of Transportation); securities and commodity firms (SEC, the Commodity Futures Trading Commission, state regulators); financial institutions (the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Office of Thrift Supervision, the SEC, and state banking regulators); insurance companies (state regulators); defense contractors (the DOJ, the Government Services Administration, the Comptroller General of the United States, and other defense procurement agencies); alcoholic beverage manufacturers (the Bureau of Alcohol, Tobacco and Firearms of the Department of the Treasury (BATF) and state regulators); tobacco companies (same); firearms companies (same); investment companies (the SEC and state regulators); energy companies (the Department of Energy, the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, state regulators); mining and quarrying companies (the Federal Mine Safety and Health Regulatory Commission, the EPA, the Department of Agriculture, the Mine Safety and Health Administration, and various state Natural Resources Commissions); agriculture product companies (the Department of Agriculture (DOA), the Food and Drug Administration (FDA) and various state regulators); health care companies (the Department of Health and Human Services, the FDA, and state regulators); drug companies (the FDA); housing and building companies (the Department of Housing and Urban Development and state regulators); retail product manufacturers (the Consumer Product Safety Com-

different aspects of takeover strategies may also be the subject of particularized regulation by one or more federal or state agencies.[193] But, the case has yet to be made convincingly that differences between various types of publicly-held corporations necessarily require the disparate takeover consequences that can arise by virtue of the regulatory powers that have been conferred on a variety of non-elected officials. It is one thing to say, for example, that a depository institution must protect the interests of federal insurance and the depositors who have entrusted their money to that institution.[194] It is quite another, however, to say that the new Office of Thrift Supervision, today's most popular whipping boy, and its predecessor—the Federal Home Loan Bank Board—should encourage the adoption of certain shark repellents[195] by thrift institutions which would preclude the hostile acquisitions of these institutions for several years after they become public entities.[196]

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mission and the Federal Trade Commission (FTC)).

In addition, a host of issues, including the following, can arise in any takeover, and cause federal and state regulatory intervention: antitrust issues (the FTC, DOJ, specialized agencies such as the SEC, and state regulators); environmental issues (the EPA and state regulatory bodies); labor issues (the DOL, the Occupational Safety and Health Administration, the National Labor Relations Board, the Department of Commerce and various state regulators); advertising and marketing issues (the FTC and various state regulators); international trade and policy issues (the Department of State, the Department of Commerce, and the United States International Trade Commission); educational issues (the Department of Education and various state regulators); pension issues (the DOL and the Pension Benefits Guaranty Corporation); and small business issues (the Small Business Administration and various state regulators).

193. For example, the use of employee stock option plans would invoke the coverage of the ERISA, and subject those strategists to the jurisdiction of the Department of Labor. *See* Comment, *Making a Prudent Response to a Tender Offer: The Corporation Trustee's Dilemma under ERISA*, 32 AM. U.L. REV. 839 (1983).

194. *See generally* Macey & Miller, *Bank Failures, Risk Monitoring, and the Market for Bank Control*, 88 COLUM. L. REV. 1153 (1988) (discussing the procedures used by the Federal Deposit Insurance Corporation and other adminisrative agencies to administer failed banks and alternative regulatory schemes).

195. The Office of Thrift Supervision has been created as a result of the recent legislation abolishing the Federal Home Loan Bank Board as the agency regulating savings and loan associations. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in various sections of 12 U.S.C.). "Shark-Repellents" are provisions in a company's articles of incorporation or bylaws which are designed to deter a prospective bidder's interest in the target. *See* Friedenberg, *Jaws III: The Impropriety of Shark-Repellent Amendments as a Takeover Offense*, 7 DEL. J. CORP. L. 32, 34 (1982).

196. *See* 12 C.F.R. § 563B.3(e)(i) (1989) (prohibiting for three years the acquisition of more than 10% of the voting stock of savings and loan institutions

As noted above, other administrative agencies can, and do, have a variety of effects on unsolicited takeover proposals.[197] It is, therefore, not inappropriate to ask whether the individuals who populate these regulatory agencies should be making decisions affecting the rights of third parties to acquire certain corporations, or the rights of the boards of the target companies to respond to such acquisitions?[198] Are government bureaucrats, either in the first instance or the final analysis, the best arbiters of what a corporation's business judgment ought to be?[199]

In any event, whether or not one thinks administrative agencies *should* play a role in the tender offer process, many agencies are compelled to do so by virtue of the regulatory and statutory schemes they administer, even though these agencies also are statutorily restricted in the perspective they can bring to bear on the process.[200] Combined frequently with a wooden reading of enabling statutes, these agencies can often be responsible for poor economic results and decisions, all in the name of their interpretation of their limited portion of the "public" interest.[201]

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that have been converted from mutual to stock form). *See also DOs: "Shark Repellent" Plans*, U.S. Banker, at 20 (Dec. 1987) (noting that the Federal Home Loan Bank regulations allow converting thrifts to adopt certain shark repellant plans).

197. *See supra* note 192 and accompanying text.

198. This is not meant to denigrate the personnel of these regulatory agencies. Nevertheless, the question remains whether these individuals—most often the staff of these agencies, who are neither elected nor responsible to any elected official—should be able to control or influence the outcome of major tender offer contests. To the extent that a takeover contest hinges on significant issues purely within the purview of the "normal" jurisdiction of such agencies, there is apt to be less objection to the staff of such agencies exercising actual influence or control over the outcome of the particular tender offer. But, in some situations, the issues within the regulatory jurisdiction of an administrative agency may have very little relevance to the overall operation of the target or bidding companies, and may have very little rational relationship to the merits of a particular takeover proposal. *See* FLEISCHER, *supra* note 2, at 102-11.

199. To raise the textual inquiry is to answer it. Government bureaucrats have no greater insight into business judgment that do the judges that created the business judgment doctrine in the first place. *See infra* note 213 and accompanying text.

200. For example, the SEC is allowed to consider issues of full and fair disclosure, but is not permitted to consider substantive issues, such as (i) the merits of a particular offer; (ii) the bona fides of a particular offeror; (iii) the effect of a proposed merger on national, or international, competition; and so on.

201. In essence, there are two discrete issues raised. *First*, should government regulators have the capacity and the mandate to exercise undue influence on the takeover process; and *second*, should government regulators have the opportunity to make public interest judgments. In the author's opinion, the first question should

The fact remains, however, that a variety of administrative agencies at both the federal and local levels can, and often should, have some impact on the tender offer process. But there is no single agency that can responsibly address the multiplicity of legal, actual, pragmatic, economic, and political issues that many of today's tender offers implicate. Nor can it be gainsaid that it will be very rare where a single administrative agency should be allowed to elevate a single legal or economic issue and have it determine the outcome of a particular hostile acquisition effort.

3. The States

The states, of course, have a substantial interest in the takeover process. Much of that interest stems from their traditional role of regulating the relationship which various segments of our society have with corporations.[202] The continuation of that role, with some exceptions, is a goal worth achieving. Unfortunately, some states have embarked upon a race to see which one (or ones) can enact the most protective legislation, in order to thwart unwanted hostile acquisitions of corporations having an important relationship to the state that enacts the protective legislation. Such protectionist legislation has, in some cases, been designed in an attempt to provide statutory authority for the so-called "just say no" defense to takeovers.[203] Delaware has risen to the top, by not joining this race to the bottom![204] This legislative push is troublesome, given the meth-

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be answered in the negative, while the second should be answered in the affirmative. An example of an agency that has made these distinctions reasonably well is the Federal Communications Commission. *See, e.g.*, *In re* Application: McFadden Acquisition Corp.; For Commission Consent to a Transfer of Control of John Blair & Company, 60 RAD. REG. 2d (P & K) 872 (June 6, 1986) (FCC avoids intrusion into takeover process by appointing a temporary trustee on behalf of bidder, but then makes substantive judgment in the public interest with respect to the finances of the broker before permitting bidder to take control of the target).

202. *See* J. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780-1970, at 7-25 (1970).

203. *See* Lipman, *Another Generation of Anti-Takeover Laws Beginning to Develop*, Nat'l L.J., Feb. 20, 1989, at S18. The "just say no" defense refers to a target board's refusal, in the face of a pending hostile offer, to redeem its poison pill or offer its shareholders an alternative transaction. *See infra* notes 240-57 and accompanying text (discussing the "just say no" defense in corporate takeovers).

204. It should be noted, however, that Delaware can "afford" not to enact overly restrictive legislation because few corporations incorporated in Delaware have principal places of business or substantial assets there. Thus, Delaware's lack of interest in such legislation derives in part from its unique position in corporate

odology by which some of those statutes are enacted. Indiana is a good example of this phenomenon.

Indiana recently amended its corporate code and enacted a statute designed to expand the discretion of directors in complying with their fiduciary duties to the corporation and its shareholders.[205] The statute also purports to limit judicial scrutiny of directorial decisions in change of control contests, by rejecting the enhanced business judgment rule test under *Unocal*.[206] Significantly, the statute provides that directorial decisions are to be given a "conclusive" presumption of validity, absent a demonstration of a lack of good faith and a reasonable investigation.[207] In essence, the plain-vanilla business judgment rule is now the standard of judicial review for the conduct of directors of Indiana corporations.[208]

The process by which statutes of this kind are crafted and enacted may be even more significant than their substance. With respect to Indiana's statute, an Indiana target company under attack hired a New York law firm to draft protective legislation.[209] Then the legislation was rushed through, without the benefit of hearings or legislative history.[210] There is nothing wrong with businesses lobbying

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law. *See generally* Macey & Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987) (discussing the different theories used to explain Delaware's system of corporate law). On the other hand, Delaware did adopt an antitakeover statute modeled after New York's freezeout statute. *See* DEL. CODE ANN. tit. 8, § 203 (1988). Delaware remains vulnerable to the seductive tactics of the new state takeover statutes currently in vogue.

205. *See* S. Enrolled Act No. 255, 106th Gen. Assembly, 1st Sess. (Feb. 1989) (amending IND. CODE § 23-1-35-1 (1984)).

206. *See Unocal*, 493 A.2d at 954-55. The amendment provides in part that

> [c]ertain judicial decisions in Delaware ... which might otherwise be looked to for guidance in interpreting Indiana corporate law, including decisions relating to potential change of control transactions that impose a different or higher degree of scrutiny on actions taken by directors in response to a proposed acquisition of control ... are inconsistent with the proper application of the business judgment rule under this article.

S. Enrolled Act No. 255, 106th Gen. Assembly, 1st Sess. (Feb. 1989).

207. S. Enrolled Act No. 255, 106th Gen. Assembly, 1st Sess. (Feb. 1989).

208. *See* Block & Hoff, *supra* note 42; Franklin, *Delaware at a Distance: Indiana, Others Adopt Laws to Ban Second-Guessing Directors*, N.Y.L.J., Mar. 2, 1989, at 5.

209. *See* Franklin, *supra* note 208, at 5.

210. Indiana is just one example. For examples of other similar legislative efforts, passed at the behest of local businesses that were either the subject of an immediate takeover threat or faced with a prospective threat, and without hearings or meaningful debate, see, e.g., Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709, 727 (1987) (Connecticut); Steinberg, *The Pennsylvania Anti-Takeover Legislation*, 12 SEC. REG. L.J. 184, 185 (1984) (Pennsylvania); Good-

a state legislature, or even proposing legislation. But, it is certain that many will find it objectionable when target companies draft legislation that appears designed to limit meaningful judicial inquiry into the reasonableness of directorial conduct. The spectre this creates is seemingly no better than the spectre of a federal agency adopting a regulation specifically designed to preempt some form of state statute or common law ruling.[211] Both approaches—which seem to evidence jurisdictional or turf considerations, rather than substantive policy concerns—are troublesome.

State courts, by necessity, must interpret state corporation law. And, as long as state corporation law applies to the target's response to tender offers, state courts will have a principal role in the setting of normative standards of conduct for target company directors. But, in acknowledging the preeminent role of the judiciary, and by definition, the preeminent role of the Delaware judiciary,[212] it should also be recognized that the courts are subject to certain inherent

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man, *State Takeover Legislation*, 1 Insights: The Corp. & Sec. L. Advisor No. 3, at 2 (1987) (North Carolina). *See also* Romano, *supra* note 139, at 459 n.11 (1988) (providing over 12 samples of takeover statutes which have been enacted rapidly and at the behest of local corporations); Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 120-28 (1987) (discussing the politics behind the enactment of state takeover statutes, using the Connecticut's statute as one example and noting its rapid and easy journey through the state legislature at the behest of a large Connecticut corporation); Macey, *State Anti-Takeover Legislation and the National Economy*, 1988 WIS. L. REV. 467, 470 (1988) (asserting that state antitakeover legislation appears to reflect the lobbying efforts of individual companies rather than a broder political concensus).

As noted above (*see supra* note 49), even some small towns have adopted ordinances purporting to protect local businesses. *See* Ehrbar, *supra* note 49 (discussing the town of Urbana's attempt to insulate the Taylor Wine Company).

211. For example, in 1986 the SEC adopted the "All-Holders Rule," which requires tender offers to be made to all holders of the same class of stock of the target company. Exchange Act Rule 14d-10, 17 C.F.R. § 240.14d-10 (1989). The impetus for the enactment of the rule was the Delaware Supreme Court's decision in *Unocal*, where the target company was permitted to make a self-tender that excluded the hostile bidder from participation. *Unocal*, 493 A.2d at 957. Courts and commentators, however, have appropriately questioned the SEC's authority to enact such a rule. *See, e.g.*, Unocal Corp. v. Pickens, 608 F. Supp. 1081, 1082 (C.D. Cal 1985) (expressing doubt that Commission has authority to promulgate such a substantive rule); Comment, *supra* note 176; Note, *SEC Takeover Regulation Under the Williams Act*, 62 N.Y.U. L. REV. 580 (1987). *But see* Polaroid Corp. v. Disney, 862 F.2d 987, 995 (3d Cir. 1988) (upholding SEC authority to enforce All-Holders Rule).

212. *See* Macey & Miller, *supra* note 204 (discussing the important role of Delaware courts in corporate law matters).

limitations, too. Among these are the judiciary's self-perceived limitations that gave rise to the business judgment rule in the first place.[213]

If there is not a fair degree of latitude for directors of a target company, there really has been a change in the control of *all* of America's corporations! Moreover, the state courts are duty-bound to uphold the handiwork of state legislatures if any legitimate basis exists for doing so.[214] As was previously discussed,[215] that can be a troublesome concept. Similarly, the creation of conflicting standards among various states is an omnipresent occupational hazard.[216] And, perhaps most importantly, states are ill-equipped to evaluate major domestic and international policies, such as macro-economic issues and international competitive concerns.

4. The President

It may be surprising to include the President as a participant in the hostile takeover process. But the President's inclusion is warranted in light of the adoption of the Omnibus Trade and Competitiveness Act of 1988,[217] which adds the so-called Exon-Florio Amendment to the Defense Production Act of 1950.[218] The statute

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213. *See, e.g.*, Weiss v. Temporary Inv. Fund, 692 F.2d 928, 941 (3d Cir. 1982) (citation omitted) (noting that one objective of business judgment rule is to keep courts out of the role of making business decisions, something courts are ill-equipped to perform), *vacated on other grounds*, 465 U.S. 1001 (1984); Keyser v. Commonwealth Nat'l Fin. Corp., 675 F. Supp. 238, 256-57 (M.D. Pa. 1987) (citations omitted) (same); Dodge v. Ford Motor Co., 204 Mich. 459, 508, 170 N.W. 668, 684 (1919) ("The judges are not business experts.").

214. *See, e.g.*, *In re* Marriage of Harrison, 13 Kan. App. 2d 313, 769 P.2d 678 (1989) (recognizing that state courts are bound to follow legislative pronouncements of the state legislatures).

215. *See supra* notes 209-11 and accompanying text.

216. *See, e.g.*, Great W. United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds*, 443 U.S. 173 (1979).

217. Pub. L. No. 100-418, 102 Stat. 1107, 1425 (1988) (amending Title VII of the Defense Production Act of 1950, 50 U.S.C. app § 2158 (1982)).

218. The Amendment is codified at 50 U.S.C. app. § 2170 (1988). For a general discussion of the Amendment, see Ayres & Chubb, *Exon-Florio: US Power to Block Foreign Acquisitions*, 8 Int'l Fin. L. Rev. No. 4, at 19 (Apr. 1989); Birenbaum, Kashdan & Thornton, *The Exon-Florio Amendment: The Meaning of National Security and the Implications for Hostile Takeovers*, Fried, Frank, Harris, Shriver & Jacobson Client Memorandum (Nov. 14, 1989) (on file with Delaware Journal of Corporate Law).

gives the President or his designee[219] the authority to review the effects on national security of certain mergers, acquisitions, and takeovers by or with foreign entities that could result in foreign control of United States companies.[220] If the President finds that there is "credible evidence" that the proposed acquisition poses a threat to national security, he may act to suspend or prohibit the transaction in order to protect the national interest.[221]

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219. The President's designee under the Amendment is the Committee on Foreign Investment in the United States (CFIUS). Exec. Order No. 12,661, 54 Fed. Reg. 779 (1988). CFIUS is an interagency group established in 1975 that includes the Attorney General, the Director of the Office of Management and Budget, and representatives from the Treasury, Commerce, State and Defense Departments, the office of the U.S. Trade Representative and the Council of Economic Advisors. Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (1975).

220. The statute provides in relevant part that

> [t]he President or the President's designee may make an investigation to determine the effects on national security of mergers, acquisitions, and takeovers proposed or pending on or after August 23, 1988 by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States.
>
> * * *
>
> For purposes of [the above quoted provision], the President or the President's designee may, taking into account the requirements of national security, consider among other factors—
>
> (1) domestic production needed for projected national defense requirements.
>
> (2) the capability and capacity of domestic industries to meet national defense requirements . . . and
>
> (3) the control of domestic industries and commercial activities by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security.

50 U.S.C. app. §§ 2170(a), (e) (1988).

221. *Id.* § 2170(C). Although CFIUS has conducted a number of full-scale investigations since Exon-Florio amendment was passed in August 1988, see Fried, Frank, Harris, Shriver & Jacobson Client Memorandum, *supra* note 218, in only one instance has a CFIUS investigation resulted in a presidential order directing a foreign company to divest its interest in an American company. *See Chinese Company Told to Divest Purchase of U.S. Aircraft Parts Manufacturer*, 53 FED. CONT. REP. (BNA) 234 (Feb. 12, 1990). President Bush recently ordered the China National Ero-Technology Import and Export Corporation (CATIC), a company owned by the government of the People's Republic of China, to divest its recently acquired interest in MAMCO, an American aircraft parts manufacturer. *Id.* The acquisition took place during CFIUS' investigation. The Bush Administration stated that "CATIC's continued control of MAMCO might threaten to impair the national security. *Id.* *See also* Essaye & Turza, *The Next Step in Regulating Foreign Investments*, N.Y.L.J., Feb. 1, 1990, at 5 (discussing CFIUS' investigation of the purchase of General Ceramics, Inc. by Tokuyoma Soda Co. Ltd. of Japan, which resulted in the sale of a part of General Ceramics to an American company due to national security concerns).

C. *A Proposal to Coordinate Tender Offer Standing Setting*

The Exon-Florio legislation is, on a truncated basis, somewhat similar to Britain's Monopolies and Mergers Commission (MMC), which can reject a foreign acquisition of a U.K. company on the ground that it is not in the public interest.[222] There is no institution in this country comparable to the MMC, but the notion of a national interest in takeover activity is quite relevant to this discussion. How will this country compete after 1992 opens up the European economy?[223] How should the nation cope with the enormous investment by Japanese or other foreign companies in American technological companies?[224] The point is not that these developments are bad; they are often quite salutary,[225] and, this country always has attempted to make its markets attractive for foreign investment capital.[226] Rather, the point is that there is no mechanism, under the present system of standard-setting, to evaluate whether the impact of a hostile takeover bid on international competition, or on various facets of the national interest, is adverse or positive. It is one thing to promote open and free markets; but, it is another to eschew *reciprocal*, open and free markets.[227]

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222. *See generally* Wasserstein, *British Merger Policy from an American Perspective*, 82 YALE L.J. 656 (1973) (discussing the Monopolies Commission and the public interest standard).

223. The European Economic Community (EEC), through the Single European Act of 1985, has obligated itself to achieve internal harmony of Common Market Members through the removal of barriers and obstacles to the free movement of people, goods, services and capital in the markets by December 31, 1992. TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (official publication of the European Communities 1987).

224. Japanese investors have invested several billion dollars in U.S. technology companies in the last three years alone. *See* Levine, *Is the U.S. Selling Its High-Tech Soul to Japan?*, Bus. Wk., June 26, 1989, at 117. Moreover, Japanese companies have been acquiring U.S. companies at a tremendous pace. For example, Mitsubishi recently acquired Eastman Kodak Company's floppy disk and digital cassette tape business. *See* Kasei, *Kodak to Sell Verbatim to Mitsubishi*, L.A. Times, Mar. 28, 1990, § D, at 10, col. 3. Nippon Mining purchased Gould, a United States electronics maker, for $1.1 billion in 1988. Levine, *supra*, at 117. Recently, Cannon, Inc. announced a $100 million investment in Next Inc., Steven Jobs' new computer company. *Id. See also* Nasar, *Fomenting Fears of Flush Foreigners*, Time, Feb. 29, 1988, at 122.

225. *See Administration Opposes Bill Placing New Controls on Foreign Investment in U.S.*, 8 U.S. Import Weekly (BNA) 941 (Sept. 21, 1983).

226. *Cf. Foreign Investment in U.S.*, N.Y. Times, May 31, 1989, at D15, col. 1 (discussing reasons behind attractiveness of U.S. markets for foreign investment).

227. *See House Witnesses Praise Trade Zones, But Criticize Program's Deficiencies*, Daily Rep. for Exec. (BNA), Oct. 25, 1989, at A-2 (statement of Rep. Mary Kaptur (D. Ohio)).

The question posed is: who should, or can, make these decisions? It is certainly not the bidder, since the bidder lacks ultimate objectivity. Whether the bidder is a financial or a strategic buyer, its goals are reflected in what often constitutes a single-minded pursuit of the target at the cheapest price obtainable.[228] It also is not the target company, since the popular perception is that, left to their own devices, target companies will often seek to entrench existing management.[229] Regulatory agencies like the SEC do not make such decisions, nor are they equipped to do so.[230] Single purpose agencies, like the Antitrust Division of the Department of Justice, or the Department of Labor, or the Federal Communications Commission, are incapable of bringing to bear the proper perspective on these issues.[231] Nor can federal or state courts undertake what are essentially political judgments.[232]

A possible solution to the vacuum that currently exists with respect to these issues is to create a bipartisan, national, commission on the tender offer process. Representatives from the Administration, the federal government and various agencies thereof, state representatives, judicial representatives and some appropriate representatives of the private-sector, could attempt to articulate a comprehensive contextual framework for the takeover process—a set of cohesive standards that bidders, managements, boards of directors, and the courts could apply. These standards would recognize the legitimate sphere of each of the current participants in the process.

Of course, one of the difficulties inherent in the current system is not simply the lack of a contextual framework (a problem the proposal set forth above should help alleviate), but also the lack of any body to evaluate *particular* tender offers in the context of *particular* national and world situations, and in light of *particular* factual environments prevailing at the time. This decision whether to engage in such a process is largely a political one and would seem to be

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228. *See supra* note 82 and accompanying text.

229. *See* Easterbrook & Fischel, *supra* note 3, at 1175; Note, *Toward Standards for Managers Subject to Hostile Bids: The Tri-Level Model*, 50 U. PITT. L. REV. 269, 277 (1988) (noting that in defending against takeovers, target management has its own interests at stake).

230. *See supra* notes 175-90 and accompanying text.

231. *See supra* notes 191-201 and accompanying text.

232. *Cf.* Massachusetts v. Mellon, 262 U.S. 447, 448 (1923) (court has jurisdiction only when a claimant has suffered or is threatened with a justiciable injury resulting from a governmental act).

antithetical to the policies of the current administration.[233] However, the grant of some authority to the Administration merely to *consider* whether a particular tender offer raises issues of national import does not mean that that authority need be invoked with any great frequency, or even at all.[234] But, unless this country is prepared to say, and to say for the foreseeable future, that it does not matter whether American industry is acquired piecemeal by foreign competitors, then the existence of some objective standards, and ultimately the existence of some politically-responsive standard-setting body, are possible solutions to a problem that is only vexing at present, but threatens to become serious fairly rapidly.[235]

Delaware, which has played such an important and beneficial role in the existing process, might look with disfavor on such a project. But, this proposal contemplates a different type of venture, one that would not displace Delaware's role, but rather, one that would harmonize the roles of all the standard setters, and permit the consideration of broad, macro-economic policies, all without, of course, necessarily dictating the result in any particular hostile acquisition context.

VI. RESOLVING SOME UNRESOLVED ISSUES

A. *The Development of a Cohesive Approach*

Whether or not a national commission, as described above, is established, the Delaware courts will continue to play a lead role in

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233. *Compare* GLICKMAN & WOODWARD, *supra* note 11, at 121-55 (foreign investment through takeovers is harming the United States economy and our standard of living) *with* Liebler, *Fallacies of Discouraging Foreign Investment in the U.S.*, Christian Science Monitor, Mar. 5, 1990, at 19, *and Foreign Investment in America: Xenophobia Rules*, The Economist, Aug. 26, 1989, at 56 (foreign investment is good for the U.S. economy). This proposal is not meant to suggest that the current philosophy of the Bush Administration—that is, a strong belief that our markets should remain free and open to all who are prepared to follow our legal standards—is incorrect. Quite to the contrary, the presumption applied by this Administration is sound and should be encouraged. The difficulty is that not all takeover efforts are identical, as the hypothetical (*see supra* note 98 and accompanying text) demonstrates. And, for those rare occasions when some overarching national interest demands at least some consideration of the merits of a particular takeover bid, there is a need for a standard setter other than those identified in the text (with the exception of the President).

234. *See supra* note 221 (discussing President Bush's order directing CATIC to divest its interest in MAMCO).

235. *See* Goodwin, *Sold Off by a Greedy Few, To Our Vast Harm*, L.A. Times, Sept. 29, 1989, § 2, at 7, col. 3 (foreign takeovers of American businesses continues unabated); *Japanese Takeovers of U.S. Firms Continue at Fast Pace, Data Show*, Daily Rep. for Exec. (BNA) (Aug. 7, 1989).

the development of standards, and they will have to take a broader view of the issues over the coming years.

The Delaware courts do not (and should not) render advisory judgments.[236] But, it is appropriate to articulate the operative framework by which takeover decisions can be made. The *Unocal* decision attempts to do this, by establishing its two-part test.[237] First, the target's directors must show that any defensive response is grounded in an informed, good faith, belief that the bid poses a danger to corporate policy and effectiveness.[238] Then, the defensive response must be shown to be reasonable in relation to the danger or threat posed by the bid.[239] As articulated, this standard is not troublesome. But what constitutes a danger to corporate policy and effectiveness? Are the Delaware courts saying that competitive issues, the bidder's ultimate goals for the company, or international aspects of the bid are irrelevant? Just how focused must the target board's analysis be? And, can an all-cash, any-and-all shares tender offer be considered a continuing threat under *Unocal*?

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236. *See, e.g.*, Stroud v. Milliken Enters., 552 A.2d 476, 480 (Del. 1989) (citing State v. Mancari, 223 A.2d 81, 82-83 (Del. 1966)).

237. The *Unocal* "enhanced" business judgment rule test is based on the courts' understanding that, "[b]ecause of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred." *Unocal*, 493 A.2d at 954. The "enhanced" *Unocal* test and its implications are discussed in Gilson & Kraakman, *supra* note 131, at 266-74.

238. *Unocal*, 493 A.2d at 955 (citation omitted). The enhanced *Unocal* test has its genesis in Cheff v. Mathes, 41 Del. Ch. 494, 199 A.2d 548 (Del. 1964). There, the Delaware Supreme Court articulated a test whereby the target's defensive actions would be sustained unless it was shown that the "sole or primary motive" of the directors' actions was to perpetuate their control. *Id.* at 556, 199 A.2d at 554. Under *Cheff*'s "primary purpose" test, the burden of proof remained on the directors. *Id.* This standard was, however, met by a routine application of the business judgment rule. Thus, the analytical framework set out in *Cheff* came under attack from commentators because many felt that the standard was too easily met. *See, e.g.*, Israels, *Corporate Purchase of its Own Shares Are There New Overtones?*, 50 CORNELL L.Q. 620, 623-24 (1965); Comment, *The Misapplication of the Business Judgment Rule in Contests for Corporate Control*, 76 NW. U.L. REV. 980 (1982). The court responded to these criticisms with the addition of the proportionality test, which attempts to add the element of balance to a judicial review of a target's defensive actions.

239. *Unocal*, 493 A.2d at 955-56. This step is referred to as the proportionality test, see Gilson & Kraakman, *supra* note 131, and is the heart of the *Unocal* test. Such a requirement entails, of course, an analysis of the effect of the hostile bid on the corporate enterprise and its various constituencies. *Unocal*, 493 A.2d at 955-56.

B. *The "Just Say No" Defense*

These questions are most significant in the context of the "just say no" defense.[240] It is surely not cynical to note that even Nancy Reagan, for whom the "just say no" defense was named,[241] said "yes" to some things, and "no" only to specific things! So the proponents of the "just say no" defense should not be permitted to argue successfully that a target corporation can assume a defensive posture that precludes shareholder autonomy irrespective of whom the bidder is, what the bidder is offering, and what the consequences of the offer are. If they do, the "just say no" defense likely will fail.

This necessarily puts added pressure on the target company's directors, and their advisors, to present a credible basis for saying "no." That basis can be predicated upon at least ten factors, many of which can be gleaned from existing Delaware cases, provided also

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240. The "just say no" defense has been hotly debated among the corporate bar after the chancery court's decisions in the *Pillsbury* and *Interco* takeover battles, where the court ordered the target company to redeem their poison pills. *See* Block & Hoff, *supra* note 158, at 5, col. 1. Although some commentators opined that these decisions brought into question the viability of the defense, McBride, *Conflicting Claims Remain an Issue in Delaware Cases*, Nat'l L.J., Feb. 20, 1989, at S14, in both cases the target had proposed some type of alternative transaction. Thus, the court was not faced with the situation where the target refused to redeem a pill and at the same time proposed no alternative transaction.

The Delaware Supreme Court interjected itself in the "just say no" debate in its opinion in the *Paramount Communications* case. Although that case did not directly address the redemption of a poison pill, the court seemingly endorsed in *dicta* the "just say no" defense where the decision not to redeem the pill is made in good faith and on an informed basis. The court rejected the proposition that an all-cash all-shares bid could not be deemed a threat under *Unocal* under appropriate circumstances. The court further opined that *Unocal* is not intended to lead to a simple mathematical exercise involving a comparison of the bidder's offer with a discounted value of a target's expected trading price at some future date. Instead, the court indicated that *Unocal* is intended to be a flexible analytical tool with respect to the board's determination of the scope of its strategic plan. Furthermore, the court noted that "[d]irectors are not obligated to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain corporate strategy. *Paramount Communications*, Nos. 284, 1989, 279, 1989, & 283, 1983, slip op. at 50. The decision strongly suggests the court's approval of the "just say no" defense provided the target board has acted in good faith and on an informed basis without an entrenchment motive. *See generally* Wall, *Time Says Yes to "Just Say No,"* 4 MERGERS & ACQUISITIONS L. RPTR. 1 (Mar. 1990); Mirvis, *Time/Warner; Delaware Supreme Court Speaks*, N.Y.L.J., Mar. 29, 1990, at 5, col. 1.

241. *See, e.g.*, *First Lady Honored For "Just Say No" Effort*, L.A. Times, Oct. 21, 1988, at 25, col. 2 (discussing Nancy Reagan's "just say no" campaign against drug abuse).

that there is substantial support for the board's analysis of these factors:

1. The adequacy and terms of the offer;[242]
2. The fairness of the offer;[243]
3. The feasibility of the offer;[244]
4. The proposed or actual financing for the offer, and the consequences of that financing;[245]
5. The bidder's identity, prior background, and other business venture experiences;[246]
6. The bidder's business plan;[247]
7. The effect of the acquisition on various, specifically delineated, corporate constituencies;[248]
8. The alternatives available to the corporation and its various constituencies, particularly the shareholders;[249]
9. Whether this is the right time to sell the company, or whether, over the long-term, the company's strategic plan can be expected to produce better benefits;[250] and
10. Special factors—such as the legality of the offer, the shareholder population of the target company, or special factors about the company or its other constituencies.[251] This is where our *New York Times* hypothetical,[252] and the macro-economic issues discussed above,[253] become relevant.

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242. *See, e.g., Ivanhoe*, 535 A.2d at 1345 (defensive tactics upheld in part because directors had reasonable grounds for believing that offer was inadequate).

243. *See, e.g., Unocal*, 493 A.2d at 956-57 (defensive tactics upheld in part because of "coercive" front-end loaded two-tier offer).

244. *See, e.g., Citron 1989*, No. 270, 1988, slip op. at 40, 41 (board justified in agreeing to accept lower of two offers in part because of concerns over feasibility of the higher offer).

245. *See, e.g., Macmillan*, 559 A.2d at 1282 n.29; *Unocal*, 493 A.2d at 955.

246. *See Macmillan*, 559 A.2d at 1282 n.29; *Ivanhoe*, 535 A.2d at 1342 (defensive tactics upheld in part because of bidder's reputation as a "greenmailer"); *Unocal*, 493 A.2d at 956-57.

247. *See MacMillan*, 559 A.2d at 1282 n.29 (citing this factor as well as listing several other factors that a board may consider in responding to a hostile bid).

248. *See Unocal*, 493 A.2d at 955.

249. *See MacMillan*, 559 A.2d at 1282 n.29.

250. *See Unocal*, 493 A.2d at 955 (listing the timing of an offer as a permissable board consideration).

251. *See* Cheff v. Mathes, 41 Del. Ch. 494, 199 A.2d 548 (Del. 1964).

252. *See supra* notes 97-99 and accompanying text.

253. *See supra* notes 223-27 and accompanying text.

If an inadequate bid is made, the target company should be under no obligation to make out a "just say no" case on the basis of any of the other ten factors.[254] Mere inadequacy is, and should be, enough. But, what if the bidder is willing to negotiate? Can the target's management simply refuse to negotiate *and* refuse to predicate its refusal to negotiate on one of the "Nancy Reagan" ten factors? The answer depends upon the circumstances. In some cases, the best way to receive a higher proposal is to refuse to negotiate.[255] The courts should not lightly deprive the target of that tactic. In other circumstances, however, a board may not be able to sit by idly. Instead, the directors should be prepared to justify their refusal to negotiate, when the inevitable litigation ensues, by establishing the company's entitlement to the "Nancy Reagan" defense, based upon one or more of the ten factors enumerated above.[256] For this reason, an inadequate all-cash, all shares bid with a commitment to freeze out minority shareholders at the same price in cash, should be deemed a continuing threat under the *Unocal* standard,[257] but only if the bidder is unwilling to negotiate, or the target company has other, substantial, premises for refusing to negotiate with a willing bidder. This is a difficult test to meet, but it can be met, and target

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254. *See, e.g.*, Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984 (E.D. Wis.), *aff'd on other grounds*, 877 F.2d 496 (7th Cir.), *cert. denied*, 110 S. Ct. 367 (1989). In this case, the district court, in deciding a pristine "just say no" case, refused to order the target company's pill redeemed, holding that the directors had met their burden under *Unocal* and that the poison pill defense was a reasonable response to the threat posed by a perceived inadequate offer. *Id.* at 1014-16.

255. *See, e.g.*, *id.* at 1011 (noting that board's refusal to negotiate resulted in a higher offer from bidder).

256. The critical inquiry is the level of scrutiny that a court should apply in deciding whether a board has pointed to one or more factors that constitute a threat under *Unocal* so as to justify defensive responses. Certainly vague justifications should not suffice. Gilson & Kraakman, *supra* note 131, at 268-71. However, requiring the directors to meet an overly stringent standard is contrary to well-accepted notions of the business judgment rule, even under *Unocal*. *See id.* at 270-71. Courts should find a middle ground, whereby a board is forced to present credible evidence that justifies the continued implementation of defensive tactics. *See id.* at 270-74.

257. Courts, however, have divergent opinions regarding this proposition. *Compare Shamrock Holdings*, Inc. 559 A.2d at 289 (opining that it is "difficult to understand" how such an offer is a continuing threat under *Unocal* so as to warrant the continued implementation of defensive tactics) *with BNS*, 683 F. Supp. at 475 (indicating that such an offer can be a continuing threat under *Unocal*). *See also supra* note 113 (discussing the Delaware Supreme Court's recent decision in *Paramount Communications*).

directors should be given appropriate deference under the *Unocal* formulation of the business judgment rule to do so.

C. *Redemption and Utilization of the Poison Pill*

The use of the "just say no" defense and the board's refusal to redeem a shareholder's rights plan[258] have been the subject of several recent court decisions.[259] Many companies use the poison pill

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258. For a detailed examination of shareholders rights plans, see, e.g., FLEISCHER, *supra* note 2, at 184.1-.25; P. RICHTER, CORPORATE ANTI-TAKEOVER DEFENSES: THE POISON PILL DEVICE (1988); Dawson, Pencé & Stone, *Poison Pill Defensive Measures*, 42 BUS. LAW. 423 (1987) (detailing the various types of plans available); Helman & Junewicz, *supra* note 8 (furnishing brief history of plans and factors to consider in the evaluation of a plan); Herzel & Shepro, *The Changing Fortunes of Takeover Defenses*, 15 SEC. REG. L.J. 116 (1987) (reviewing recent developments in the areas of discriminatory self-tender offers and poison pill defensive tactics); Note, *Protecting Shareholders Against Partial and Two-Tiered Takeovers: The "Poison Pill" Preferred*, 97 HARV. L. REV. 1964, 1968-72 (1984) (arguing that state courts using a "substantial business purpose" test should determine the validity of poison pill preferred stock); Note, *Recent Developments in the Use of the Poison Pill Antitakeover Defense: Limiting the Business Judgment Rule*, 31 ST. LOUIS U.L.J. 1083, 1100-01 (1987) (concluding that the Seventh Circuit's analysis in Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250 (7th Cir. 1986), *rev'd on other grounds*, 481 U.S. 69 (1987), should be utilized by other courts in their analysis of plans); Comment, *Share and Share Unalike: Judicial Response to Poison Pill Discrimination Among Shareholders of the Same Class*, 33 WAYNE L. REV. 1067 (1987) (discussing the judicial treatment of poison pills that discriminate among shareholders of the same class or series); Note, Dynamics Corp. of America v. CTS Corp.: *Posner's Plan for Poison Pills*, 1987 WIS. L. REV. 711 (1987) (focusing on the business judgment rule's application to poison pills); Note, *Shareholder Rights Plans—Do They Render Shareholders Defenseless Against Their Own Management?*, 12 DEL. J. CORP. L. 991 (1987) (suggesting that rights plans should be subject to shareholder approval).

259. *See, e.g.*, Desert Partners, L.P. v. USG Corp., 686 F. Supp. 1289 (N.D. Ill. 1988) (refusing to preliminarily enjoin rights plan, finding that target board acted reasonably in response to coercive, two-tier offer); *Southdown*, 686 F. Supp. at 602-03 (ordering redemption of rights to eliminate impediment to 100% cash offer, suggesting that plan may only be used to deter two-tier bids or to facilitate auction); BNS, Inc. v. Koppers Co., 683 F. Supp. 458 (D. Del. 1988) (refusing to preliminarily enjoin rights plan, finding that the refusal to redeem the rights in response to inadequate 100% cash offer was not unreasonable); CRTF Corp. v. Federated Dep't Stores, Inc., 683 F. Supp. 422, 439, 441 (S.D.N.Y. 1988) (refusing to enjoin rights plan, finding that it "provide[d] the directors with a shield to fend off coercive offers, and with a gavel to run an auction"; court held that target's board was not required to redeem rights plan in the course of an auction); *Grand Metro.*, 558 A.2d at 1059-60 (ordering redemption of rights to eliminate impediment to 100% cash tender offer, signifying that target corporation had, for a significant period of time, known of the offeror's interest in acquiring the target); City Capital Assocs. v. Interco, Inc., 551 A.2d 787 (Del. Ch.) (ordering redemption of rights to eliminate impediment to 100% cash tender offer after the target had had a

to pressure acquirors to negotiate with the target's board, and to provide adequate time to see if acceptable alternatives exist.[260] Once the target has found an alternative transaction, requiring a board to redeem the pill and permit shareholder choice is not necessarily troublesome, in the absence of special circumstances.[261]

A harder case is posed where the target company does not develop an alternative transaction, but rather chooses to "just say no." As indicated above,[262] the capacity of a target company to "just say no" should not be questioned, provided it is to a specific bidder, and for well-defined reasons, that withstand appropriate scrutiny. If those circumstances are met, and it may be difficult for the target company's board to sustain what is rightfully its burden (particularly in view of the normal presumption that shareholders have the right to sell their shares), then there is no apparent reason that would prohibit the target company from maintaining its poison pill in place to accomplish that result.

A certain amount of latitude must be afforded the target's outside directors.[263] In one recent case, it appears that the Delaware Chancery Court implicitly substituted its judgment for that of the target's directors, and concluded that a hostile offer was fair, based on the offering price as opposed to the pre-offer market price, and the

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reasonable opportunity to explore alternatives and did propose a recapitalization), *appeal dismissed*, 556 A.2d 1070 (Del. 1988); Facet Enterprises, Inc. v. Prospect Group, Inc., No. 9746 (Del. Ch. Apr. 15, 1988) (refusing to issue preliminary injunction forcing redemption of rights, finding that the target should be permitted to keep rights in place until the auction process that it had announced has reasonably run its course), *reprinted in* 14 DEL. J. CORP. L. 310 (1989). *See also* Block & Hoff, *supra* note 158 (reviewing the *Unocal* test in relation to the "just say no" defense); Russo, *Corporate Takeover Law: Duty of Loyalty and the "Just Say No" Defense*, N.Y.L.J., May 22, 1989, at 1, col. 1 (same).

260. *See* Lipton, *A Sensible Deterrent To Takeover Mania*, N.Y. Times, Dec. 14, 1986, § 3, at 2, col. 1.; Note, *"Poison Pills" As a Negotiating Tool: Seeking a Cease-Fire in the Corporate Takeover Wars*, 1987 COLUM. BUS. REV. 459 (1987).

261. The Delaware Chancery Court seems to have taken this approach in recent cases. *See, e.g.*, *Grand Metro.*, 558 A.2d at 1060 (ordering redemption to permit shareholder choice between hostile offer and board sponsored restructuring); *Interco*, 551 A.2d at 800 (ordering redemption to permit shareholder choice between hostile offer and board sponsored recapitalization).

262. *See supra* notes 258-60 and accompanying text.

263. *See generally* Pease, *Outside Directors: Their Importance to the Corporation and Protection from Liability*, 12 DEL. J. CORP. L. 25, 47-53 (1987) (advocating a less stringent standard for imposition of liability on a company's outside directors); Note, *Outside Directors and the Modified Business Judgment Rule in Hostile Takeovers: A New Test for Director Liability*, 62 S. CAL. L. REV. 645 (1989) (noting that courts generally are more deferential to board decisions made by outside directors).

number of shares that tendered into the offer.[264] This appears to be something of a departure from prior Delaware decisions, since the chancery court found no bad faith, or gross negligence on the part of the target's directors.[265]

If the second prong of the *Unocal* decision requires courts to determine for themselves whether an allegedly inadequate tender offer is in fact inadequate, judicial decision-making will enter the corporate boardroom. The proper implementation of *Unocal* seemingly requires the courts to ascertain just what procedures were utilized by the target, and whether there are any clear abuses of process, somewhat akin to the presumption of regularity that attends governmental action on judicial review.[266] This does not mean that

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264. *See Grand Metro.*, 558 A.2d at 1058. In *Grand Metropolitan*, Grand Metropolitan Public Limited Company (Grand Metropolitan) commenced an all-cash, all-shares, tender offer for the common stock of The Pillsbury Company (Pillsbury) at $63 per share. *Id.* at 1052. The Pillsbury Board determined that the offer was inadequate and not in the best interests of the Company and its shareholders. *Id.* at 1052. The Pillsbury Board also refused to redeem the rights attached to its previously adopted shareholder rights plan. *Id.* Furthermore, in response to the offer, Pillsbury proposed a restructuring whereby it would spin-off one of its principal divisions and sell its remaining operations over the next five years. *Id.* at 1057.

Naturally, Grand Metropolitan initiated litigation against Pillsbury, requesting the court to order the Pillsbury Board to redeem the rights so that Grand Metropolitan could complete its tender offer, which was conditioned on the redemption of the rights. *Id.* at 1052. Grand Metropolitan argued that Pillsbury's refusal to redeem the rights constituted a breach of fiduciary duty to its shareholders because the offer posed no threat to the company or its shareholders. *Id.* at 1053-54. Pillsbury argued that the board's decision was protected by the business judgment rule because it was made in good faith, by independent directors, after reasonable investigation, and to protect the corporation from harm reasonably perceived. *Id.* at 1054.

In ordering Pillsbury to redeem the rights, the court justified its decision by noting that the $63 offer price represented a 60% premium over the closing price of Pillsbury stock immediately prior to the commencement of the offer, and that, if the rights were not redeemed and the offer were withdrawn, the price of Pillsbury stock would fall to the high $30's, a drop of about $25 per share. *Id.* at 1058. Moreover, the court found that 87% of Pillsbury shares had tendered into the offer, thus convincing the court that the "real threat" would have been the loss that Pillsbury shareholders would have sustained had the rights not been redeemed and the stock price fallen back to its pre-offer price. *Id.*

In sum, the court implicitly judged the merits of the offer, finding that since it was in a range of what the court perceived to be fair, the shareholders should have the choice to evaluate its merits. Most importantly, however, the court failed to find any bad faith or gross negligence on the part of the directors, *id.* at 1056, although the court held that the board's decision not to redeem the rights could not pass muster under *Unocal*'s proportionality test. *Id.* at 1060.

265. *Id.* at 1056.

266. The Delaware Supreme Court's decision in *Paramount Communications* ex-

target companies have carte blanche in rejecting an unsolicited acquisition proposal.[267] But, it does mean that the courts should tread carefully in ascertaining whether the directors exercised reasonable judgment regarding the true value of the company.

D. The "Auction" Process

In *Revlon*, the Delaware Supreme Court stated that, once it becomes "inevitable" that the target company will be sold, the directors of the target have a fiduciary duty to do what is best for the shareholders of the target.[268] This principle is eminently sensible. The shareholders are the lawful owners of the corporation, and once a decision is made to sell the company, they deserve the *primary* benefit of the exercise of the board's fiduciary duties.[269] And yet, the application of this principle raises some significant issues.

First, must an actual auction be conducted, or does it suffice if the target company is made available for sale? Second, should *Revlon* be interpreted as requiring the directors to get the best possible "*price*" for shareholders, or should it be interpreted to permit the best possible "*transaction*" for shareholders?[270] Third, to what extent

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plicitly rejected the notion that the second prong of *Unocal* requires courts to evaluate for themselves the adequacy of a bid. *See* Paramount Communications, Inc. v. Time, Inc., Nos. 284, 1989, 279, 1989, & 283, 1983, slip op. at 48-52 (Del. Feb. 26, 1990). *See generally* 2 C. KOCH, ADMINISTRATIVE LAW AND PRACTICE § 9.7 (1985) (describing the judicial doctrine of presumption of regularity in the context of administrative rulemaking).

267. As the *Unocal* court suggested, "A corporation does not have unbridled discretion to defeat any perceived threat by any Draconian means available." *Unocal*, 493 A.2d at 955. Furthermore, the *Moran* court, in upholding the target's right to adopt a shareholder rights plan, also reminded target boards that their decision whether to redeem the rights would be reviewed under the fiduciary standards of the enhanced *Unocal* standard. *See Moran*, 500 A.2d at 1356-57.

268. *See Revlon*, 506 A.2d at 182.

269. *See* Reder, *supra* note 109, at 278-79. As this commentator has stated:

> The directors are responsible only to the shareholders when it becomes clear to the directors that the corporation as an effective business entity will not survive in recognizable form. From the moment the directors perceive that clarity, their role shifts from beneficent fiduciaries for a wide range of constituencies to auctioneers with the solitary goal of achieving the highest price for shareholders.

Id.

270. *Compare Revlon*, 506 A.2d at 182 (duty of board in an auction process was to get the best price or highest value shareholders at a sale for shareholders benefit) *and In re* Holly Farms Corp. Shareholders Litig., [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,181, at 91,641, 91,643 (Del. Ch. Dec. 30, 1988)

can other constituencies still be taken into account when a target company is up for sale?

These are not easy questions, but they deserve careful reflection. An auction is not necessarily the only way to sell a company,[271] and the language in the *Revlon* opinion does not mandate the auction procedure.[272] In some circumstances, the conduct of an auction may produce materially weaker bids than if the company negotiated a sale, and then opened that transaction up to better bids.[273] In other situations, a modified auction, in which the target's management and the investment bankers develop a list of potential acquirors and a public announcement is made of the company's intention to negotiate, may make more sense.[274]

(directors' duty is to get the highest price at a sale for the benefit of shareholders); *and* Doskocil Cos. v. Griggy, No. 10,095, slip op. at 1 (Del. Ch. Oct. 7, 1988) ("directors have a fiduciary duty to obtain best possible price for stockholders"), *reprinted in* 14 DEL. J. CORP. L. 682, 684 (1989); *and* Freedman v. Restaurant Assocs. Indus., Inc., [1987-88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,502, at 97,214, 97,218 (Del. Ch. Oct. 16, 1987) (directors' duty is to maximize the amount to be received by shareholders); *with* Edelman v. Freuhauf Corp., 798 F.2d 882, 885 (6th Cir. 1986) (board is obligated to "negotiate the best deal for the shareholders"); *and* Citron v. Fairchild Camera & Instrument Corp., [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,915, at 90,091, 90,102 n.17 (Del. Ch. May 19, 1988) ("Revlon duty" is not to get best price but to strive in good faith to get the best available transaction for benefit of shareholders), *aff'd*, No. 270, 1988 (Del. Dec. 22, 1989); *and Interco*, 551 A.2d at 803 ("[T]he board's duty is to act ... so as to encourage the best possible result from shareholders' point of view."); *and In re Fort Howard Corp.*, No. 9991, slip op. at 29-30 (board's duty is to seek best transaction available), *reprinted in* 14 DEL. J. CORP. L. at 719.

271. *See generally* Herzel & Shepro, *Negotiated Acquisitions: The Impact of Competition in the United States*, 44 BUS. LAW. 301, 314 (1989) (opining that since an auction is not a goal, but rather is a procedure, directors should be afforded latitude in deciding the best way to obtain the highest price for the company).

272. *Revlon* does not stand for the proposition that an auction per se is the best way of maximizing shareholder value. Rather, while *Revlon* uses the term "auction," the court was merely addressing a situation in which an ongoing auction existed. Johnson & Siegel, *supra* note147, at 372. *See also* Yanow v. Scientific Leasing, Inc., [1987-88 Transfer Binder] Fed. Sec. L. Rep. ¶ 93,660, at 98,030, 98,034 (Del. Ch. Feb. 5, 1988) (noting that specific methods used to elicit bids from potential acquirors are normally a matter of business judgment); *TW Servs.*, Fed. Sec. L. Rep. ¶ 94,334, at 92,179 (opining that the "Revlon duty is not necessarily a duty to conduct an 'auction' ... rather, it is the duty to exercise judgment (in good faith and prudently) in an effort to maximize immediate share value").

273. *See, e.g.*, *In re Fort Howard Corp.*, No. 9991, slip op. at 32 (special committee negotiated management buy-out of company; special committee then negotiated a provision that allowed it to receive and consider alternative transactions, thus providing a "market check"), *reprinted in* 14 DEL. J. CORP. L. at 720.

274. *See generally* McAfee & McMillan, *Auctions and Bidding*, 25 J. ECON. LIT.

What is critical is that the process of selling the company *not* be conducted solely under the aegis of management.[275] Rather, a board (where the target has a majority of outside directors) and a special committee of outside directors (where there is either a majority of inside directors on the board or management itself is a contestant for corporate control) should be established and, together with outside counsel and investment bankers, should assume responsibility for the negotiations.[276] This does not mean that management has no role to play; management knows the company better than anyone else. What it does mean, however, is that the management cannot be responsible for decisions that might chill some bids, or possibly lead some bidders to conclude that only certain types of proposals will be acceptable.

Once a company is for sale, it is difficult to say that the directors do not have an obligation to obtain the "best price." But, this sounds easier than it is in actual practice. What is the "best price"?

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669 (1987) (discussing the various types and uses of auctions); Landefeld, *Business Auctions Take Hold*, Nat'l L.J., May 15, 1989, at 52 (discussing the auction process).

275. The *MacMillan* opinion gives target boards a stern lecture on the Delaware Supreme Court's attitude regarding the sale of the target company under management's direction in a situation where management is interested in the transaction. *See Macmillan*, 559 A.2d at 1279-80. *See generally* Gilson, MacMillan: *Was it Worth the Wait?*, 2 MERGERS & ACQUISITIONS L. REP. 623 (1989) (discussing the *Macmillan* decision). Although *MacMillan* involved unique facts, it is quite instructive and its suggestions are sure to be closely adhered to in the future.

276. Since the Delaware Supreme Court expressly sanctioned the concept of a committee consisting of independent directors as a vehicle to safeguard the interests of public shareholders in freezeout transactions, *Weinberger*, 457 A.2d at 709 n.7, the utilization of special committees in the sale of companies is occurring with increasing frequency. *See, e.g.*, *In re* Envirodyne Indus., Inc., No. 10,702 (Del. Ch. Apr. 20, 1989) (special committee used to negotiate and approve merger agreement with a non-management group), *reprinted in* 15 DEL. J. CORP. L. 45 (1990); *In re* Formica Corp. Shareholders Litig., [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,362, at 92,384 (Del. Ch. Mar. 22, 1989) (special committee used to consider a buy-out by a management group); *In re* RJR Nabisco, Inc. Shareholders Litig., [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,194, at 91,700 (Del. Ch. Jan.31, 1989) (same); *In re* Resorts Int'l Shareholder Litig., Nos. 9470 & 9605 (Sept.7, 1988), *reprinted in* 14 DEL. J. CORP. L. 830 (1989); *In re* Amsted Indus., Inc. Litig., No. 8224 (Del. Ch. Aug. 24, 1988), *reprinted in* 14 DEL. J. CORP. L. 611 (1989). *See also* Simpson, *The Emerging Role of the Special Committee—Ensuring Business Judgment Rule Protection in the Context of Management Leveraged Buyouts and Other Corporate Transactions Involving Conflicts of Interest*, 43 BUS. LAW. 665, 678-89 (1988) (setting forth a "special committee model" for use in management conflict of interest transactions); Warden & Feit, MacMillan: *Outside Directors' Duties and Other Observations*, 2 MERGERS & ACQUISITIONS L. REP. 617 (1989) (discussing the use of special committees after the Supreme Court's decision in *MacMillan*).

Is it an all-cash, fully-financed bid, or is it a higher dollar value attributable to a "junk bond" financed proposal? Is it a proposal that gives the public some upside potential in the future performance of the target company, or is it one that basically pays the public off up front? Is it a proposal that takes account of a target's special factors and constituencies, or is it one that basically offers a price for the opportunity to sell off pieces of the company?

There are no clear answers to these questions, except that the board's obligation, in a sale situation, should be to maximize value, *and to produce the best transaction possible.* Competing bids, differently structured, can give the board greater latitude than it clearly would have if it were confronted by two all-cash bidders.[277] Apart from questions of feasibility, it is not quite as much an intrusion on the board's business judgment for the courts to look at two all-cash bids and decide which one was higher.

Nonetheless, given the *New York Times* hypothetical above,[278] the board can look at factors other than price in arriving at the right sales decision. As noted earlier, corporations do have other constituencies.[279] For example, if a defense contractor is being sold, would a board breach its fiduciary duties if it responded to subtle, and not so subtle, pressures from its major customer, the United States

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277. In Citron v. Fairchild Camera & Instrument Corp., [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,915, at 90,091 (Del. Ch. May 19, 1988), *aff'd*, No. 270, 1988 (Del. Dec. 22, 1989), the court declined to find fault with a target board that had opted for an all-cash offer of $66 over a part-paper offer of $70, which was subject to uncertain financing. The court took into consideration the time value of money, recognizing that it "would require some time to get cash into the shareholders' hands" if the latter offer was accepted. *Citron*, [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,915, at 90,103. The lower court's decision was recently affirmed, where the supreme court pointed out that the higher bid was neither firm nor unconditional. *See Citron 1989*, No. 270, 1988, slip op. at 44.

Similarly, the chancery court in *Fort Howard* recognized that "[e]ven in the auction context, if one deal is all cash and more likely to close and sooner, a disinterested board might prefer it to a deal that may be thought to represent a somewhat higher price, but is not all cash and not capable of closing as quickly." *In re Fort Howard*, No. 9991, slip op. at 35, *reprinted in* 14 DEL. J. CORP. L. at 722. Finally, in *In re* J.P. Stevens & Co. Shareholders Litig., 542 A.2d 770 (Del. Ch. 1988), the court noted that in achieving the best possible transaction for shareholders, factors such as form of consideration, timing of the transaction and the risk of non-consummation may be considered. *Id.* at 781 n.6. *See also In re RJR Nabisco Shareholders Litig.*, [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,194, at 91,712.

278. *See supra* notes 98-101 and accompanying text.

279. *See supra* notes 31-49 and accompanying text.

Government? Such should be permissible.[280] Although the board should have the clear burden to justify why it accepted a lower price, if it chooses such a proposal, the law should not make that an impossible burden to satisfy.

VII. CONCLUSION

The frenetic pace of takeover contests makes it very difficult for each of the participants in that process to step back and reflect on the processes by which tender offers occur, the standards that are applied, and the identities of those who significantly influence the process. But, these facts should not conceal the reality of our present situation: tender offers for American public companies occur in an environment that encourages each of the individual standard-setters and participants to ignore what other standard-setters are doing, and to pursue potentially divisive and conflicting standards toward the development of takeover law and lore.

While the current system of state and federal law has not produced aberrational results very often, it cannot be gainsaid that the current system is fragmented and lacks a unifying set of principles that can be applied to the resolution of takeover issues. The Delaware courts should be encouraged to articulate appropriate standards of directoral behavior, but that process, standing by itself, or even in conjunction with other existing processes, cannot address and resolve macro-economic or international competitive issues, to name just two major concerns.

The time has come, therefore, for the creation of a bipartisan, national committee whose function would be to establish a cohesive and coherent framework within which to evaluate takeover contests. Under this proposal, each of the current standard-setters would continue to function largely as at present, with the notable difference being that this proposed bipartisan commission would articulate broad standards to be applied, depending on the facts and circumstances, to individual takeover situations. Moreover, there may well be a significant need for a mechanism designed to explore, and give effect to, national issues of a "political" nature—that is, issues relating to

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280. *See, e.g.*, Potts, *Goodbye Global Analytics: Stealth Stock Evaporates*, Wash. Post, Nov. 21, 1983, at D1, col. 1 (reporting that Global Analytics Inc., a company engaged in the production of the stealth bomb technology, decided to cancel a stock offering after discussions with Department of Defense regarding the sensitivity of its work).

the reciprocity of takeover regulation in other countries, the need to insure American industrial competitiveness in the decades ahead, and similar issues. That is a power that should be sparingly granted, and even more sparingly employed (if ever). But, in the decade ahead, the failure to equip the Administration with the power to apply administration policies to domestic corporate transactions would be a serious and potentially disastrous failure. There is no need to exercise such a power once granted, but the need for the power is not diminished at all by the recognition that it is unlikely to be utilized with any degree of frequency.