BOOK REVIEW


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I. PERSPECTIVES ON AN ANALYTICAL FRAMEWORK

In a work more remarkable for its footnotes than for its text, Mr. Anisman conducts a provocative, albeit somewhat cumbersome, investigation of takeover regulation. Having set out not only to describe the law as it exists, but also to propose numerous revisions of Canadian statutes,1 he makes a convincing case, whether intentionally or not, for the thesis that current governmental and self-regulatory rules lack a sound and organized policy base. Though Anisman's focus is on Canadian law, both provincial and federal (that is, Dominion), his frequent references to state and federal regulation in the United States compel a similar conclusion with respect to our systems.

Takeover bids—especially the protracted, contested, exchange-offer variety—provide a superb factual medium for viewing many of the major policy issues that pervade securities regulation. Indeed, it might be possible to teach a respectable basic course in securities regulation from the Bangor Punta line of cases,2 properly dissected.

On the other hand, tender offers, particularly the hostile cash type, do raise sui generis policy questions. Notwithstanding existing regulatory answers, these problems are, in the minds of some implacable inquisitors, at least, awaiting further theoretical

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1 P. ANisman, TAKEOVER BID LEGISLATION IN CANADA: A COMPARATIVE ANALYSIS i-ii (1974) [hereinafter cited as ANisman].


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analysis and resolution. Matters worthy of additional basic evaluation include constraints on private bargaining and the exercise of corporate power—what Anisman calls "substantive requirements," as contrasted with "disclosure requirements." Also worthy of inquiry is compulsory disclosure of (1) the offeror's plans and intentions for the offeree business, (2) facts about the offeree business which are not derived from "inside" sources and which may have been gathered through the superior skill, foresight, and industry of the offeror, and (3) the offeror's analysis of all facts available to it about the offeree enterprise.

Anisman's survey extends beyond the United States and Canada to England, Australia, and New Zealand. His running comparison of diverse solutions to crucial policy conflicts supports the suspicion that we have been haphazardly groping for answers rather than developing them from a well constructed theoretical framework. This suspicion persists despite the wealth of literature on tender offers, all of which Anisman catalogues carefully and draws upon heavily. His book is orderly and thorough by traditional standards for legal treatises (so long as the reader diligently extracts the nectar of the footnotes). It does little, however, to slake the thirst for a deeper and more intellectually satisfying accommodation of the contentions typified in this country by the Cohen-Manne debate of the late 1960's.

Actually, legislators and agencies continue to rethink regulation of tender offers. The United States Securities and Exchange Commission is looking at takeover bids and issuer repurchases, the latter in light of the "going private" syndrome. Anisman's book antedates these United States reassessments and does not generally mention "going private" machinations, though he covers issuer repurchases from other perspectives. He does describe the proposed and actual revisions of Canadian regulation through December 28, 1973. But these official reappraisals

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3 Anisman, supra note 1, at 61, 147.
4 See text accompanying notes 17-22 infra.
5 A handy table of materials most often cited is included. Anisman, supra note 1, at xiii-xxviii.
9 See Anisman, supra note 1, at 24-26 n.24, 294-96.
10 Id. iv-viii, 353-56.
appear not to be de novo theoretical challenges. Instead, they
tend to favor extension of earlier regulatory trends, providing
for more disclosure and more outright controls over the
mechanics and tactics of tender offers.

Anisman's similar bias is evident in his introductory state-
ments of policy\textsuperscript{11} as well as in his weaving of reasoning between
the lines of regulatory detail. This is not to say that Anisman's
presentation lacks scholarly objectivity. One small but telling in-
dication of his balance is the way he shuns emotive descriptors
like "target company," the jargon prevalent in this country to
designate the hapless issuer whose shares are sought by the odi-
ous takeover bidder. (Oh, how the offeror's spears and arrows
tear the flesh of the poor target!)

Anisman does a good job of trotting out the traditional jus-
tifications for tender offer regulation,\textsuperscript{12} principally:

(1) \textit{Pressure}. Though the tender offer is a second-
ary market transaction in the offeree issuer's securi-
ties, unusual stimulants are at work on the offerees.
("Here's a chance for a premium over market; act now
while the offer lasts.") Dealer-managers and tender fees
drive the barometer still higher.

(2) \textit{The Securities Limbo}. Deposited securities are ir-
revocably consigned to inaccessibility while the offer
remains open and conditions on the offeror's obligation
to take up remain unmet.

(3) \textit{Offeree Disadvantage}. The offeror may have
superior capacities to gather and evaluate data about
the offeree issuer, even without access to "inside" in-
formation. Offeree management certainly has the in-
formational advantage over most offerees. Moreover,
offeree management's concern for offerees may be di-
luted when its power is jeopardized or when the offeror
dangles emoluments.

Anisman accepts these as cardinal points. He favors the
supply of maximum information to offerees (from both offeror
and offeree issuer) and ample time for offerees to digest it.
Anisman cautions that so-called substantive regulation\textsuperscript{13} should

\textsuperscript{11}Id. 9-19, 61, 147, 347-49.
\textsuperscript{12}Id.
\textsuperscript{13}Such regulation includes minimum and maximum periods for offers, offeree
withdrawal periods, offeror take-up waiting periods, pro rata take-up, and limitations on
variations, conditions, short tendering, purchases outside the offer, warehousing, and
defense tactics.
not unduly inhibit offers, but he approves an array of such controls and proffers a few of his own.

The reasoning, however, seems a bit too truncated; the invocations of "fairness" a mite too easy. Perhaps the treatise writer may be excused some abbreviation of fundamental policy analysis. But how are we to assay the wisdom of our rules except by a comprehensive, refined, and, above all, rigorous consideration of competing private and social economic objectives?

II. THE OFFEREES'S CONSUMPTION-INVESTMENT CHOICES AND THE INTERPLAY BETWEEN THE ECONOMICS OF INFORMATION AND FIDUCIARY IDEOLOGY

As an analytical prelude, a text on tender offers might profitably situate the regulatory issues in their economic context so that legal rules may be evaluated in terms of their economic impact.

First, the economic choices available to offerees should be fully delineated. A primary function of full disclosure, after all, is to promote productive decisionmaking by investors in purchasing or selling securities. Therefore, it is important to identify fully the alternatives open to the offeree under varying conditions. In a cash offer at a premium over market, the offeree is presented with a new return-over-time schedule for his security. After considering other possible courses of action (maintaining a commitment to his security or sitting still long enough to receive future offers), he may wish to switch to cash (accept the offer) for consumption or new investment. Under certain conditions, the offeree may wish to defeat the offeror, if possible. He may prefer to remain invested in the securities of the offeree issuer without a change of control, or he may feel that any plans proposed by the offeror can best be executed by current management of the offeree issuer without intrusion by the offeror. If there is no chance of defeating the offeror, or if defeat is not desired, the offeree will want to compare the immediate cash premium offer with the investment merits of the offeree issuer's securities under the nouveau regime.

This process of defining the branches of the offeree's decision tree facilitates an orderly identification of the kinds of information that are of importance to the offeree. Such information may include the probabilities of events such as offer success,

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14 Anisman, supra note 1, at 347.

15 The process would be even more complex in the context of an exchange offer.
variations in offer terms, and competing offers, and the risk-return characteristics of securities under varying circumstances.

Second, the "economics of information" also deserves careful attention. To say that offerees want certain information to maximize their private wealth or even to make more socially productive investment choices is not to establish the need for government intervention to assure availability of the information. Other questions regarding net social cost and product must be asked, among them: What non-governmental mechanisms already generate and propagate the desired information? Do individual offerees underinvest in the procurement of information for themselves? Will the increased productivity of offeree investment choices offset the costs of information acquisition and dissemination? Will compulsory disclosure of information inhibit desirable economic production of another sort? Will the content of the information be certain or probable, present or future, original with the possessor or derived by him from another source?

Consider the application of these economic perspectives to the question whether an offeror, in making a contested cash offer, should be required to reveal his "plans and intentions" for the offeree issuer and his "analysis" of the offeree issuer's condition. Obviously offerees would benefit from receipt of such information; but should they have it? By answering "yes," might we not be stifling the origination of blueprints for the more efficient use of resources? The offer might well be hindered by offerees who, having been apprised of the offeror's designs, reach the decision-tree posture of refusing to tender. They might wish to defeat the offeror in the hope either that he can be forced, on the basis of his own disclosures, to make a higher bid or that his plans can be effectuated by those presently in control of the issuer. Alternatively, while wishing the offeror all good fortune, they might prefer to remain with the offeree issuer under new management.

Our common geographic boundary, according to Anisman's account of Canadian law, marks substantial divergences in policy choices concerning this issue of disclosure as well as numerous other problems. He protests the failure of Canadian statutes to go as far as the Williams Act\(^\text{16}\) and our state laws in eliciting the offeror's plans and intentions.\(^\text{17}\) Here we find one of his dispersed references to the offeree's decision tree. He justifies his


\(^{17}\) Anisman, supra note 1, at 171-79.
proposal for compulsory disclosure of plans and intentions primarily in terms of its usefulness to those offerees who might wish to sell their securities, assuming the offer is successful. But the statement carries no self-evident rationale.

The issue is still one of weighing more productive offeree investment choices against frustration of the offeror’s new and more productive ideas about the utilization of resources. We must realize, for instance, that forced disclosure of offeror-created analysis tends to neutralize the incentive to formulate creative strategies and judgments. To the extent of disclosure, the offeror no longer would have the benefit derived from his individual perception that the value of the assets may be different from their value as perceived by others. And the offeror’s “intentions and plans” and “analysis” are different from facts about the offeree which exist irrespective of the offeror’s state of mind. Therefore the balancing will produce different results, depending on the type of information. One could accept the proposition that there should be no compulsory disclosure of the plans, intentions, and analysis, and simultaneously reject the argument that forced publication of other types of facts is economically counterproductive.

One could find unpersuasive the undifferentiated argument that disclosure of any kind of facts would reduce the incentive to ferret them out by depriving the ferret of the opportunity to exploit his informational advantage. At the same time, one could agree that plans, intentions, and analysis should remain undisclosed in order to motivate the formulation of creative strategies and judgments.

Nonetheless, Anisman may ultimately be right, for unstated reasons, in suggesting that offerors, even in a contested cash offer, should disclose their plans and intentions. On its face, the hostile cash offer appears to be an arm’s length transaction. Indeed, this perception may explain why the American rules of trading disclosure, under corporate common law and rule 10b-5, seemed inapplicable to the offeror. (If the parties were in a standard bargaining posture, where was the duty to disclose?) Still, assuming the offer is made to acquire control, a disclosure requirement might be placed on a familiar fiduciary footing—that when one seeks to occupy a position of special trust and

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18 Id. 172.
19 See id. 176-79.
20 See, e.g., Fleischer & Mundheim, Corporate Acquisition by Tender Offer, 115 U. PA. L. Rev. 317, 328-32 (1967). Anisman misses this aspect of our experience with the tender offer, largely, it appears, because the experience has no parallel in Canada.
confidence, his duty of candor regarding the terms and conditions of his trusteeship is the same as if the relationship already existed. This concept of "anticipatory duty" was enunciated by Judge Learned Hand and approved by the SEC in the analogous context of sales by insiders or tippees to persons who are not already security holders of the issuer. Objections to this line of reasoning do exist, however. The offeror disavows any intention to create with offerees a special relationship of dependence; on the contrary, his very purpose is to displace the offeree—to cause the offeree to sever his ties with the business. This riposte is cogent in the case of a totally successful offer for all the shares of an issuer. It is less convincing as applied to a pro rata offering or an offering for all shares that is not likely to meet its goal. The offeror must, in such circumstances, foresee that he may become discretionary manager of the assets of some who will remain security holders after the offer.

Thus, another common theme of tender offer jurisprudence is the degree to which fiduciary concepts interact with economic theory to expand or contract disclosure obligations. To foster productive creativity, we may allow a purchaser in an arm's length transaction to exploit his own plans, intentions, and analysis with respect to property which he seeks to purchase. But, if the purchaser has undertaken to act in the best interests of the seller, then the purchaser's own inventiveness properly belongs to the seller and must be divulged.

As already implied, it is useful to distinguish various kinds of non-public factual material. One line that has been drawn is between offeror-generated and non-offeror-generated facts. But other useful distinctions may be made between "inside" and "outside" information and between "extrinsic" and "intrinsic" facts.

The "generation" label refers to the point of conception—the person who originally came to know the information. The inside-outside distinction rests on whether the information came from the offeree issuer's internal store of non-public information. The intrinsic-extrinsic dichotomy relates to the subject matter. Intrinsic information relates to the risk-return features of the offeree issuer; extrinsic, the supply-demand conditions in the market for the offeree issuer's securities.

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23 Cf. text accompanying note 19 supra.
24 This matrix is different from those offered previously. See, e.g., Fleischer, Mundheim & Murphy, An Initial Inquiry into the Responsibility to Disclose Market Information, 121 U. Pa. L. Rev. 798, 799, 809 (1973).
The simple fact that a potential offeror intends to make an offer would, for instance, be offeror-generated, outside, and extrinsic. This fact is different from the offeror's plans and intentions for the offeree issuer and his analysis of that issuer's condition, both of which are offeror-generated and outside, but intrinsic. It is also useful to classify persons as "insiders" or "outsiders," the former being those who have a special responsibility to act in the best interests of the security holders of an issuer and the latter being a residual class of all others.

Before the formal bid is made, the offeror's unpublicized intent to make it could be a significant piece of information for market traders. Anisman agrees with the Canadian rule that an offeror who is truly an outsider—that is, one who does not already occupy a fiduciary position within the offeree issuer—need not disclose his intent to make the bid when he makes pre-bid trades in the market. He suggests, however, that contrary to existing Canadian precepts, outsiders other than the offeror should be obliged to disclose their knowledge of an impending bid, if they have acquired such non-public information from the offeror and are not acting in his behalf.

Not having emphasized the intertwined economic and fiduciary significance of disclosure requirements, Mr. Anisman predictably marshals a more traditional "pressure" argument in support of the Canadian approach. He points out that the offeror has not yet begun to exert purchasing pressure and therefore has no duty to disclose. To be sure the offeror has not applied the full pressure that results from stating a premium price and a deadline for acceptance. Nonetheless, the troublesome possibility exists that the offeror may be exerting more subtle pressure on sellers through ordinary market mechanisms.

By drawing upon economic and fiduciary concepts, Anisman could have further developed his analysis of the offeror's duty to disclose his intent to make a formal bid. Specifically, economically useful ingenuity might be frustrated by forcing the outsider offeror prematurely to announce a piece of outside, extrinsic information originating with him. Of course, the right to exploit one's own creativity may be voluntarily limited by assumption of a fiduciary posture; the nagging problem involved in pre-bid offeror transactions is to determine the point at which

25 ANISMAN, supra note 1, at 115-24, 160-61.
26 Id. 139-41, 160.
27 Id. 115.
28 See text accompanying notes 79-80.
the offeror has begun to seek a control position in the offeree issuer.29

Anisman specifies "unfairness" as the basis for his criticism of Canadian permissiveness toward outsider non-offerors, who are allowed to engage in personal pre-bid trades of the offeree issuer's securities without disclosing their knowledge of the offeror's state of mind.30 Again, a useful economic observation would support his view: Permitting nondisclosure cannot be justified in terms of nurturing innovation for the very simple reason that the non-offeror is not the innovator.

In Canada, the absence of restrictions on the offeror and other outsider traders results from the lack of a well developed common law of trading disclosure at the federal or provincial levels. Even trading by insiders and trading on inside information originating from within the issuer are handled only imperfectly by Canadian case law, as Anisman explains in a 30-page passage, about two thirds of which is solid textual footnotes.31 Disclosure duties of insiders who trade in the securities of their issuer are covered by statutes, which presumably require an insider to disclose even extrinsic information originating outside the offeree issuer.32 Beyond that, however, Canadian decision-makers appear not to have wrestled with various combinations of informational classifications and trader status, as our courts have done under federal securities antifraud notions. Unfortunately, the book went to press before the SEC v. Campbell,33 SEC v. Sorg Printing Co.,34 and Magnavox35 episodes in this country, all of

29 At issue here is nothing less than the bedrock notion of when, in policy terms, a tender offer begins: When does the offeror's behavior leave the realm of ordinary trading and exhibit characteristics which call for regulatory intervention to assure disclosure? See SEC Securities Exchange Act Release No. 11003 (Sept. 9, 1974) (Topic B-2). Current concern over "creeping" tender offers—not treated extensively by Anisman—reflects a feeling that the conditions for imposition of special disclosure requirements arise before the making of the formal offer, especially where it follows closely on the heels of market or negotiated purchases by the offeror. On the other hand, certain regulation governing the mechanics of offers may not be necessary until the formal bid. See part IV.C. infra.
30 Anisman, supra note 1, at 139-40.
31 Id. 115-45.
32 Id. 116-27, 144.
which confront the problem of outsider use of at least partially extrinsic, outside information that was not generated by the offeree issuer. Sorg and Magnavox involved non-offeror outsiders who allegedly made pre-bid purchases without disclosing their knowledge of the impending offer. In Campbell, the writer of an advisory newspaper column purchased securities without disclosing that he was about to issue favorable analyses of the issuers. The defendant was an outsider with respect to the issuer and failed to disclose information that (1) originated outside the issuer, (2) had not been obtained from the issuer’s internal store of information, and (3) was at least partially extrinsic to the issuer as it related to the increased demand that was likely to result from the defendant’s favorable article.

Anisman appreciates and adequately portrays the controversial versatility of our federal antifraud rules. In fact, in closing he laments Canada’s lack of truly general antifraud prohibitions and the absence of a flourishing doctrine of implied private rights in the Canadian courts. He calls for a flexible statutory provision that would give the courts and agencies, upon the complaint of private parties, a mandate to find liability and fashion remedies for a broad range of unwanted behavior in connection with tender offers. Anisman, however, does not fully investigate the manner in which SEC rule 10b-5 and Securities Exchange Act section 14(e) have been employed judicially to extract information beyond that elicited by the itemized requirements contained in the disclosure schedules adopted under specific tender offer disclosure statutes. This burgeoning line of authority, somewhat humorously referred to as “schedule 14(e),” should surely be subjected to scrutiny in light of the economic considerations developed above.

The function of disclosure is not solely to facilitate the valuation and choice of investments in terms of their risk-return components and the supply-demand characteristics of the marketplace. Anisman identifies instances where the objectives of

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36 Anisman, supra note 1, at 333-38.
40 See Lewis, supra note 7, at 1, col. 3.
disclosure are (1) to discourage behavior that is, if not illegal, at best unappetizing to those who learn about it;\textsuperscript{41} (2) to uncover illegal conduct, either consummated or potential, so that countermeasures can be activated;\textsuperscript{42} and (3) to explain legal rights and options.\textsuperscript{43} SEC Commissioner A. A. Sommer, Jr., has propounded the "damper" theory of disclosure. The gist of this concept is that once a truthful disclosure is made, it serves as a standard of comparison for all other communications by anyone on the same subject. Thus, defective disclosure will be deterred because furnishers of information know their statements might be tested against the authentic publication.\textsuperscript{44}

III. "SUBSTANTIVE" REGULATION: ANCILLARY TO INFORMATIONAL RULES OR TRULY NON-INFORMATIONAL?

The foregoing discussion deals mainly with disclosure theory in the tender offer context. Certainly, however, the tender offer laws substantially limit the private bargaining of the participants, particularly the offeror. Why does the law so invade and readjust private arrangements and the exercise of corporate power? It may be suggested that such a healthy dose of regulation was possible, especially at the federal level, only with the sponsorship and lobbying efforts of the issuers who were the natural quarry of takeover bidders. But beyond this "special interest" explanation, we look for a more satisfying rationale. Simple invocations of fairness seem inadequate.

Some "substantive" rules, of course, are meant primarily to facilitate the disclosure process. Anisman notes that minimum offer periods, minimum offeree withdrawal periods, and minimum periods before offeror take-up (in partial offers) are all in some degree designed to afford offerees sufficient time to reflect upon information.\textsuperscript{45}

Once adequate disclosure and sufficient time to digest it have been assured, however, why is further regulatory meddling called for? First, we may be convinced that the average offeree, despite efforts to inform him, will not foresee or fully understand all the consequences of the contract formed when he deposits his shares. Second, we may fear that the tender contract, though lawful when made, creates an opportunity or a

\textsuperscript{41} Anisman, \textit{supra} note 1, at 160, 163.
\textsuperscript{42} Id. 155.
\textsuperscript{43} Id. 148-49.
\textsuperscript{45} Anisman, \textit{supra} note 1, at 67-74.
strong temptation to perform wrongful acts, and that the danger of such undesirable behavior is great. Third, we may believe that a special relationship of trust and confidence arises which implies not only a duty to disclose, but also an undertaking by the person in whom the trust is reposed to act in the best interests of the one reposing it. For any of these reasons, controls over bargaining may be justified, and we may find the law modifying the characteristics of private arrangements.

Tender offer laws may provide, for instance, that an increase in the offer price must be paid to all whose securities are taken up, whether deposited before or after the increase. Such a provision seems fair because the pre-increase depositors irrevocably commit their securities (assuming the expiration of withdrawal periods) to the control of the offeror for the duration of the offer, while the offeror may not be bound to buy. On the other hand, do not the pre-increase depositors accept, in exchange for the possibility of a premium price, the risk that other offerees might receive a higher price? Fairness, then, does not seem to be an adequate rationale. An unduly suspicious soul could conjecture that this provision is just another hurdle created by those who wish generally to hobble tender offers.

More satisfying rationales for price equalization do exist. First, despite full and clear disclosure, the average offeree may not fully understand the opportunities lost by depositing his shares at the initial offering price, if by that act he also foregoes the chance to withdraw or receive a higher price when the offeror later raises the bid. Second, by accepting irrevocable pre-increase deposits, which need not be taken up until the offer becomes unconditional, the offeror may be voluntarily accepting the depositors' trust. The offer to take control of the offeree issuer might itself be viewed as creating a fiduciary posture for the offeror. Because an implication of fiduciary status is the duty not to show partiality among the beneficiaries, this analysis could explain the price equalization requirement.

Anisman considers another form of mandatory allocation of risk between contracting parties when he discusses prohibitions against conditions on the offeror's obligation to take up. He rejects strictures on the offeror's freedom to tailor his commitments, suggesting that the risks would be tilted unfairly against

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46 See text accompanying notes 20-22 supra.
47 ANISMAN, supra note 1, at 90-91.
48 See text accompanying notes 20-22 supra.
49 ANISMAN, supra note 1, at 82-87.
the offeror.\textsuperscript{50} Anisman recognizes here and throughout the book that many statutory constraints on the offeror-offeree contract also constitute strategic advantages for the offeree issuer's management, whose motives for staving off the bid may not coincide with the economic well-being of the offerees or anyone else affected by the operations of the offeree issuer. We therefore must scrutinize such constraints intensely and insist upon rigorous policy rationales.

Even in a price system of economics that recognizes consumer sovereignty, it could be argued that government intervention is appropriate to prevent persons from making economically irrational choices with respect to financial capital assets, especially where the social effects of such decisions disrupt other price system functions. It would appear, however, that the application of such a principle should be preceded by a very careful theoretical examination of the tender offer bargaining process. If it can be demonstrated that fully informed offerees would enter into economically inexplicable contractual relations regarding their securities, either in ignorance or out of perversity, an economic rationale may support overriding the private agreement.

Mr. Anisman's careful survey shows that Canadian statutes contain a number of substantive provisions not found in the Williams Act, most notably: a minimum offer period,\textsuperscript{51} a maximum term for partial offers,\textsuperscript{52} a minimum period before the offeror may take up in a partial offer,\textsuperscript{53} a pro rata take-up requirement with respect to all deposits in a partial offer,\textsuperscript{54} and a general "variation" provision that more readily triggers a new offeree withdrawal period.\textsuperscript{55} State laws in Colorado, Hawaii, Idaho, Indiana, Minnesota, Nevada, Ohio, South Dakota, Virginia, and Wisconsin track the Canadian patterns. On other matters, our federal regulation is more stringent than Canada's. For example, the Williams Act provides a withdrawal right after any offer, including one for all shares, has been open for 60 days,\textsuperscript{56} and SEC rule 10b-4 forbids short tendering.\textsuperscript{57} Anisman urges Canadian adoption of these two measures.\textsuperscript{58} Canada has no cog-

\textsuperscript{50} Id. 84-85.
\textsuperscript{51} Id. 68.
\textsuperscript{52} Id. 77.
\textsuperscript{53} Id. 71.
\textsuperscript{54} Id.
\textsuperscript{55} Id. 87.
\textsuperscript{57} 17 C.F.R. § 240.10b-4 (1975).
\textsuperscript{58} ANISMAN, supra note 1, at 80, 99.
nate of our SEC rule 10b-13,\textsuperscript{59} which prohibits purchases by the offeror "alongside the bid," in market or privately negotiated transactions. Anisman disagrees with both countries' solutions to this problem. He thoroughly canvasses the concerns that underlie rule 10b-13. A major consideration is that the offeror might make extra-bid purchases to interfere with terms of his own offer,\textsuperscript{60} for instance, to prevent fulfillment of the minimum share condition on his take-up obligation. Here certain private bargaining is circumscribed because it poses too great a threat of future unlawful behavior. Anisman quite appropriately seeks the least restrictive way of controlling this danger, namely, requiring that securities acquired outside the bid be counted toward the minimum deposit condition on the offeror's promise to buy.\textsuperscript{61} He also proposes timely disclosure, price equalization, and pro-rating provisions to govern outside purchases.\textsuperscript{62} In all, Anisman's treatment of this topic is one of the book's genuinely creative insights.

The section of the book on offer "variations" highlights the need for a thorough understanding of the contractual nature of tender offers.\textsuperscript{63} After more than a decade (counting the early laws in New Zealand and Australia), we still may not have a firm grasp of the precise promissory and conditional content of the relationship. Anisman, who is a skillful massager of statutory detail, pinpoints a series of interpretative puzzles that involve both standard contract analysis and the conflict of contractual notions with apparent legislative intent.\textsuperscript{64} He gives us enough examples to substantiate the conclusion that legislative drafters do not reflect upon the basic contractual structure of the typical bid. What occurs when an offeree deposits his securities? The consensus is that the offeror is to some extent conditionally bound in contract; but what are his promises and what are the conditions on those promises? One of the major undertakings is to take up securities under the original terms of the offer, if the minimum deposit condition is met. Therefore, the offeror appears obligated, absent other permissible express arrangements, to leave the offer open upon its original terms (so that the minimum deposit condition can be fulfilled) and to take up securities on the terms prevailing at the time of deposit, including

\textsuperscript{59} 17 C.F.R. § 240.10b-13 (1975).
\textsuperscript{60} ANISMAN, supra note 1, at 101.
\textsuperscript{61} Id. 106.
\textsuperscript{62} Id. 105-06.
\textsuperscript{63} Id. 87-96.
\textsuperscript{64} Id. 87-90.
provisions for payment. Thus, those who deposit in response to the original offer could presumably object to attempts of the offeror to vary his promises as to them, say, by converting from a total class offer to a partial one (with the possible statutory effect of prorating) or by extending the offer period and not paying depositors according to the original time schedule. Moreover, an obligation may exist not to vary terms as to those who have not yet deposited, unless such a prerogative is plainly reserved, since it can be argued that depositors bargain for continued uniformity of the offer.

Even at this point the complexity wrought by the statutory overlay is obvious. Conversion from a total to a partial offer seems impermissible. The tender offer statutes require prorating in the case of overdeposit in a partial offer. On the other hand, those who deposit while an offer is for a total class reasonably believe that all of their securities must be taken up. Such a conflict should militate against conversion. Behold! A Canadian provision specifically states the consequences of conversion. Does the provision, Anisman asks, imply that the normal contract response (that conversion is wrongful because it anticipates a failure of performance) is overruled? Or does the provision specifying the effects of conversion speak only to the case in which a conversion right is reserved by the offeror? The same questions can be asked about the Canadian statutes that grant an additional period of withdrawal rights to those who deposit before any variation. Suppose an offeror, though not expressly entitled to do so, extends the term of his offer and delays payment to those who deposited before the extension. In bestowing upon the depositor a new right to withdraw when a variation occurs, did the legislature intend also to invest the offeror with a right of modification not otherwise available? Is the right of withdrawal in lieu of all the contractual remedies of the depositor?

Much remains to be done in working out the fundamental contractual framework of tender offers, particularly in view of the many points of interaction between statutes and traditional contract theory. Until a plenary exegesis is undertaken, we can thank authors like Anisman for their spadework and exhort legislators and agencies to be more thorough and precise in their consideration of fundamental contract issues.

Anisman is reform-minded and sensitive to the need to offer justifications for the many revisions of Canadian law he

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65 See, e.g., E. Aranow & H. Einhorn, Tender Offers for Corporate Control 69 n.18 (1973); Fleischer & Mundheim, supra note 20, at 350-53.
proffers. This reviewer would prefer, however, to see the more traditional, sometimes venerable policy themes probed more deeply, systematically, and comprehensively, especially in light of related disciplines. To state this personal predilection is not to detract from the total quality of Anisman's presentation. Indeed, a more perceptive reader may find that Anisman has, by enthymeme, fathomed policy far more critically than this reviewer realizes.

IV. COMPARISONS

Anisman's animus is to be a comparativist. He is most intensely so when discussing provincial and dominion laws, which are the main topic of his text and the operation of which he scrutinizes to a fare-thee-well. The text, however, constitutes no more than one third the total page space; below the line the author cites and textually explains the approaches of other countries. Assiduous perusal of the footnotes is well worth the eye-strain; they are a wonderland of thought-provoking juxtapositions.

A. Pure Self-Regulation: England's City Code

Anisman's comparisons include extensive references to England's City Code on Takeovers and Mergers (City Code), which is a purely self-regulatory ethic of the English financial community administered by the Panel on Takeovers and Mergers (Panel).\(^6\) Sanctions exist, if at all, only to the extent that other self-regulatory bodies (for example, stock exchanges and investment banking associations) and the government Department of Trade and Industry (which administers broker-dealer licensing) are willing to heed the recommendations of the Panel.\(^6\) Anisman intimates that, from their inception in 1968, the City Code and the Panel have become increasingly effective and respected.\(^6\) Then he cryptically notes that self-regulation failed in Canada.\(^6\) One might have expected the contrast to spark further discussion. Anisman's view of the City Code is not shared in all quarters.\(^6\) Paradoxically, his many references show

\(^6\) ANISMAN, supra note 1, at 2 n.8. For an explanation of the role of the City Code, as contrasted with pertinent English statutes, see G. COOPER & R. CRIDLAN, LAW AND PROCEDURE OF THE STOCK EXCHANGE 90-98 (1971); R. PENNINGTON, COMPANY LAW 786-98 (1973).

\(^6\) ANISMAN, supra note 1, at 1-2 & n.6, 3-4 n.13.

\(^6\) Id. 3-4 n.13.

\(^6\) Id. 4.

the City Code to be substantively strong, while other sources suggest the Panel has some infirmities—perhaps the absence of power and resources or simple lack of fortitude.\footnote{Id. 474-78.}

B. Federalism

Anyone who reads this book, footnotes and all, must derive valuable insights about the different types of federalism in Canada and the United States. The division of governmental power in Canada may mandate tender offer legislation at the provincial level. Considerable doubt exists whether Parliament has the broad interstate commerce powers possessed by Congress,\footnote{ANISMAN, supra note 1, at 316 n.83; J.P. WILLIAMSON, SECURITIES REGULATION IN CANADA 189-95 (1960).} and so the dominion tender offer laws relate only to federally chartered corporations. Thus, provincial regulation is the only means to control tender offers for the securities of non-federal corporations. This relationship explains Anisman's apparent indifference to arguments for preemption in this country.

Canadian laws resemble our state legislation in some respects, but they do not display the clearly lopsided favoritism that one finds, for example, in the Ohio law. There the offeree issuer's management is given an opportunity to delay the offer and to activate a relatively lengthy hearing on the issue whether the offeror is providing full and fair disclosure to offerees.\footnote{OHIO REV. CODE ANN. § 1707.041(B)(1) (Anderson Supp. 1974).} In this country, we need not endure absurdly unbalanced special-interest legislation at the state level: There is ample federal power to restore the equilibrium, and this reviewer, for one, hopes that the yoke will soon be lifted. A Federal Securities Code provision, which Anisman's book antedates, would preempt all the state tender offer laws as they apply to bids for the securities of specified issuers—basically those who now file periodic reports under the Securities Exchange Act.\footnote{ALI FEDERAL SECURITIES CODE § 1603(c)(1) (Tent. Draft No. 3, 1974).}

Anisman generally favors a pre-bid filing and review requirement that would permit administrative agencies to measure the tender offeror's compliance with disclosure obligations, to detect defective information, and perhaps even to pass upon the merits of the offer.\footnote{ANISMAN, supra note 1, at 208-19.} In Canada no pre-offer filing and review exist even with respect to exchange offer materials. In this coun-
try the Williams Act contains no such feature. Anisman's proposals might, as he argues, furnish an element of prophylaxis and also strengthen enforcement. He would, however, limit pre-bid disclosure to administrative agencies on a confidential basis, and he presumably would not give the offeree issuer's management the right to institute a front-end hearing on the issue of disclosure.

C. When is a Takeover Bid in Progress?

Where should we place the boundary markers in the game of takeover bidding? What is the "essence" of takeover bid? Both functional and structural approaches are possible. Structuralism reduces doubt at the perimeter, but the functionalist becomes uneasy about situations in which the rigidities of formal tests do not jibe with policy objectives.

The structuralist depends on mechanical criteria to solve the larger problems of applicability. He would determine whether or not a takeover bid is in progress by reference to the conceptual content of old standby words of art like "offer to purchase" ("tender offer" in this country), and by giving nearly dispositive effect to the presence or absence of standard formalities—salient features distilled from the type of arrangement that drew the greatest attention in legislative deliberations. Such a stereotyped structure would specify characteristics like (1) public dissemination of a formal bid, (2) solicitation outside the organized trading market, (3) the absence of individual negotiations, and (4) the use of standardized terms. The functionalist entertains a more fluid view; he asks whether the facts and circumstances of varying transactions give rise to relevant policy concerns. Of course, he pays a price in terms of energies expended on ad hoc investigations.

The two theories are employed and challenged in various ways. At the statutory design stage, it is necessary to decide what use shall be made of exemptions and definitional exclusions. If the application of formal criteria will produce overcoverage so inconsistent with policy that it cannot be justified in the name of interpretative convenience or predictability, how do we cut back? Do we carve out equally formalistic exceptions? Consider a bid that clearly fits the mechanical description of what is understood

“in the trade” as a takeover bid—that is, the culprit that most legislatures were quite consciously pursuing. Suppose, however, it is suggested that the offer is not made for the purpose of giving the offeror control? In some instances the offeror may be no more than a passive investor. Most takeover statutes handle this problem by threshold exclusions or exemptions expressed in terms of a minimum percentage of equity securities to be held after a successful completion of the offer. Only at the level of the stated percentage, and above, is there a presumption of power to control. It is further assumed that such power will be exercised. (The structuralist is seeking the comforts of objectivity.) Anisman argues that policy considerations (particularly, one assumes, the “anticipatory” duties owed by one who seeks a fiduciary position) require more flexibility below the minimum. He proposes the use of an objective percentage (above which control is presumed) plus coverage for any smaller bid that would “materially affect control.”77 (Here is the functionalist asking for interpretative trouble.)

Still in the legislative design stage, the structuralist may try to excise unwanted applicability by expressly paring away certain forms of purchasing, such as “market purchases” or “private negotiations,” from statutory coverage. Unlike our federal law, the Canadian codes exempt these two types of transactions from takeover-bid regulation.78 These exemptions follow the pattern of placing regulatory emphasis on the type of transaction that was uppermost in the minds of legislators.

Lopping of this sort may be dangerously indiscriminate, however, because, as mentioned briefly earlier, market and negotiated transactions are not necessarily free of circumstances that justify the imposition of special disclosure requirements.79 Though market purchases do not create pressure of the same intensity as that generated by the announcement of a formal bid, unusual buying activity can cause the market price to move to a new level, which may tempt holders to sell and non-holders to buy. Besides, if the takeover aspirant is already in the process of accumulating control as he makes his market purchases, the anticipatory fiduciary duty to disclose may be activated, especially as regards a market seller who keeps some of his securities.80 These observations are especially pertinent when private negoti-

77 ANISMAN, supra note 1, at 21-34.
78 Id. 37-44, 51-58.
79 See text accompanying notes 28-29 supra.
80 See text accompanying notes 21-22 supra.
ations and market purchases are followed immediately by a formal takeover bid that is indisputably subject to regulation. Integrated, such a chain of events is sometimes aptly described as a “creeping” takeover.

We are bothered by these problems in this country, where there are no statutory dispensations. Can private negotiations or market purchases be the headwaters or “tag-beginnings” of a bid in a sense substantial enough to draw them under the regulatory umbrella? The accumulation reports provisions of the Securities Exchange Act have tended to discourage integration of pre-bid acquisitions with a subsequent formal offer, although it is not clear that this is the wisest approach.

Though he strives mightily to weave a statute starched with certainty, the structuralist is inevitably abandoned when his formalism begins to fray at the edges. Even if a public bid possesses most of the features of the classic takeover bid with which the solons have been most clearly concerned, the bidder may still have some latitude to finesse regulation by surgically planning around certain statutory language which carries a heavy traditional content. Anisman gives a good example of this mutiny of mechanics. The Canadian legislation speaks of a takeover bid in terms of “an offer to purchase.” Suppose the “offeror” just chaffers—saying, in effect, to shareholders of the acquired issuer: “Make me an offer to sell.” In Canada, this pattern may not be subject to regulation, even if the invitation has most of the other stereotyped trappings that situate it well within the boundaries of the takeover bid concept. Some may argue that we have avoided the problem in the United States by expanding our phraseology to include “requests or invitations for tenders.” But quaere: If the “offeror” solicits offers to sell without an immediate deposit requirement, has he made a request for tenders?

In addition, even the structuralist has to deal with the “gun-jumping” question. If an offeror announces in a press release that he will later make a formal public offer, and if the release details the likely terms of the offer and gives other data about the offeror or offeree issuer, does the press release create a need for regulatory compliance? It may not be an offer to buy in the strict contract law sense, but may we not read an “attempt to acquire” notion into the tender offer laws? A plausible argument based on statutory construction could be proffered against such

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83 ANISMAN, supra note 1, at 58-59.
a result: The legislatures knew how to state a broad concept of offer from their experience with distributional regulation. But if we are serious about the undesirable effects of unregulated psychological preconditioning, why should our solicitude slacken with respect to takeover bids?

D. Dissemination of Information to Offerees

In sharp contrast with the American approach is the Canadian requirement that bid circulars be sent by offerors to each offeree. Management of the offeree issuer must make a similar distribution if it recommends acceptance or rejection of the offer. Neither the Williams Act nor our state statutes requires delivery of disclosure materials to all offerees. But if we seriously believe that disclosure is directly assimilable by average investors, perhaps we should require dissemination to individual offerees. The SEC probably has the power to require such dissemination under its authorization to promulgate rules designed to prevent deceptive practices or to regulate recommendations regarding rejection or acceptance.

E. Compulsory Response by the Offeree Issuer

Anisman wants to force management of the offeree issuer to respond to the offer, whether it wants to or not. In addition to furnishing certain factual material, management would be required to make a recommendation or say why it has no position. Again, the SEC probably has the authority to draw the offeree issuer’s management out of silence.

Existing American federal law, it may be argued, already goes part of the distance toward Anisman’s objective. An issuer may have a duty to correct erroneous statements made about it by others and to make regular disclosure of any internal development that is “ripe” (that is, accurately known in terms of its dimensions and impact on the issuer) unless an adequate business reason exists for not publishing it. Moreover, if insiders or

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84 Id. 61-66.
85 Id. 243-44.
88 ANISMAN, supra note 1, at 247-53. For a similar view, see Note, A Proposal for Affirmative Disclosure by Target Management During Tender Offers, 75 COLUM. L. REV. 190 (1975).
89 ANISMAN, supra note 1, at 272-73.
persons in possession of inside information accept the offer, they would have a duty to disclose to the offeror. To avoid a tipping charge, they would also have to publicize whatever they reveal. None of these antifraud obligations would appear to extract as much information as Anisman believes ought to be forthcoming from the offeree issuer’s management. He would demand, under certain circumstances, financial statements, current asset values, corrections of offeror statements, projections of earnings, management intentions, and ultimately the attitude of management toward the offer.92

The pros and cons of such regulation should be weighed carefully. Anisman begins with the proposition that management knows the issuer best, and he intimates that management has a duty to inform its shareholders as soon as someone seeks to purchase their securities. But management may legitimately wish to avoid exposure to antifraud liability, especially for the projections and estimates93 which Anisman would require. Management may also justifiably fear exposure to claims that it has improperly used enterprise assets to perpetuate its ascendancy, especially where, if compelled to speak, it would recommend against the offer.94 Anisman would seek to allay fears of shareholders’ suits against offeree directors for misuse of corporate assets by providing a statutory allowance of costs incurred in the preparation of management’s circular. A “reasonableness” limitation, however, would have to be imposed on expenses to prevent this device from being exploited as a free tool for fending off the bidder.95 Thus, management might still tend toward silence rather than face possible litigation on the issue of “reasonableness.” Finally, a forced response might elicit premature disclosure of plans and developments that are the product of management’s inventiveness. Even if, assuming the primacy of fiduciary duties, management of the offeree issuer has no right generally to keep its designs and projects private in the hope of earning later shareholder approbation, enterprise values might be lost by premature disclosure of proprietary matters.

F. Exchange Offers

Exchange offers are handled quite differently under Canadian and American systems. Our statutes governing primary dis-

92 Anisman, supra note 1, at 261-73.
93 Id. 269-72.
94 Id. 258.
95 Id. 258-61.
tributions are, generally speaking, simply superimposed on the tender offer. For the most part, therefore, the Securities Act of 193396 and the Blue Sky laws are applied as usual, including filing and agency review and the imposition of the Blue Sky administrator's judgment as to fairness. The "fairness hearing" statutes of some states, which Anisman fails to discuss, enable an offeror to initiate a proceeding in which the Blue Sky administrator is asked to find that the terms of an exchange offer are fair.97 Upon the entry of a fairness order, the offeror may be entitled to an exemption from the Securities Act of 1933 as well as from the registration requirement of the Blue Sky laws under which the hearing was held.98 This scheme makes it possible for offerees in an exchange bid to be deprived of substantial information about the offeror that would have otherwise been provided under the Securities Act and the normally operative state securities provisions.

Canadian statutes, on the other hand, begin by exempting a takeover bid from the normal securities offering process and then require that the exchange offer include prospectus-type information.99 This approach shortcuts the filing, review, and substantive judgment phases of ordinary securities registration. As already observed, Anisman contends that pre-offer filing and review, on a confidential basis, would be beneficial. Anisman would also opt to have both exchange offers and cash offers subject to the substantive fairness standards currently applied by provincial administrators to other types of distributions.100 While fairness concepts might at first seem alien to the takeover bid context, one can envisage an exchange offer which involves the basic Blue Sky problems of dilution, non-voting stock, and cash-flow sufficiency (where fixed payment senior securities are issued).101

G. Informational Lacunae

Those who advocate maximum disclosure can find gaps in tender offer laws on both sides of the border. The Williams Act arguably fails, in exchange offers and even in cash offers, to elude from the offeror enough information about the offeree

99 Anisman, supra note 1, at 180-85.
100 Id. 214-15.
101 Id. 215 n.347.
issuer, particularly where the facts fall beyond the sphere of plans, intentions, and business analysis. Even where the offeror has gathered little known “outside” facts not generated from within the offeree issuer, the case for requiring disclosure is strong, on several grounds. The standard “pressure” and “offeree disadvantage” arguments\(^\text{102}\) may be advanced. Furthermore, the goal of protecting offeror creativity, where information is other than the original plans, intentions, and analysis of the offeror, seems less exigent than in other contexts. If the offeror has already garnered the data, the further cost of dissemination may be small. (It is, of course, not urged that the offeror has a duty to collect the data.) Add to this the fiduciary aura that arguably pervades the offeror-offeree relationship, and the scales tip more decisively. In this country, these lacunae may well be filled by agency rules\(^\text{103}\) and judicial interpretations of antifraud doctrines.\(^\text{104}\)

Anisman also criticizes Canadian law for not adequately eliciting pro forma financial data about the offeror in an exchange offer.\(^\text{105}\) This problem is created in part by the peculiar way in which Canada’s statutes first exempt offers from regular registration and prospectus requirements and then demand specific prospectus-like disclosures.\(^\text{106}\) The practice in this country is much more satisfactory as our state and federal securities registration provisions continue to function.\(^\text{107}\)

H. Offeror Identification and Treatment of Foreign Investors

Blind cash offers, offers by unidentified offerors, are allowed in Canada but not in the United States. Nonetheless, we may still be in the dark about who the real takeover bidders are. Devising methods of unveiling the puppeteers is a current item on the agendas of the SEC\(^\text{108}\) and the Treasury Department.\(^\text{109}\)

\(^{102}\) See text accompanying notes 12-13 supra.


\(^{105}\) Anisman, supra note 1, at 197-203.

\(^{106}\) See text accompanying note 99 supra.

\(^{107}\) See text accompanying note 96 supra.


The goals of these efforts seem to extend beyond concern for offerees to larger national interests, such as shielding key industries from foreign control and combating the exercise of corporate power as an instrument of ethnic discrimination.110 Worthy as these goals may otherwise seem, creating roadblocks for tender offerors reduces the vulnerability of reigning managers—an effect not always in the best interests of shareholders or the nation. The questions to be asked are: Can national objectives be attained without tinkering with the tender offer laws? And, if changes must be made, can we use a scalpel instead of an ax? Surely we should avoid creating a statutory defense technique that potential offeree issuers can routinely invoke even when no real likelihood of unwanted social and economic behavior exists.

I. Sanctions: Deterrence and Compensation

Anisman’s chapter on liabilities exposes the striking dissimilarities between limited Canadian sanctions and the broad patterns of relief under American federal law. Only a sea change could eliminate the differences. Anisman is convinced that Canadian criminal penalties do not deter, primarily because no agency formally reviews the takeover bid process and consequently the likelihood of official detection of violations is remote.111 The book makes no mention of civil enforcement by Canadian administrative agencies (injunctive actions or disciplinary proceedings), but it does include a fine description of the halting development of common law notions of negligent misrepresentation and implied private rights in the English and Canadian courts.112 It is interesting to observe a Canadian lawyer’s reaction to the vibrant judicial trends in the area of implied private rights for violations of rule 10b-5 and the Williams Act. Though he slights some of the refinements, Anisman captures the basic ideology of our great experiment in supplemental enforcement and statutory tort. He admires the way the United States federal courts mold the implied private right to

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110 Senator Harrison A. Williams, Jr., has introduced a bill that would, inter alia, require the filing of pre-acquisition statements by foreign investors who would, after the intended acquisition, own more than five per cent of the equity securities of certain United States issuers. The President could prohibit an acquisition on grounds related to national security, foreign policy, or the domestic economy. S. 425, 94th Cong. 1st Sess. § 2(b) (1975). An amendment to forbid investment by those who engage in business boycotts has been offered. 121 CONG. REC. 2892 (daily ed. Mar. 3, 1975) (remarks of Senator Williams). See also Hearings on S. 425 before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs, 94th Cong., 1st Sess. (1975).

111 ANISMAN, supra note 1, at 213, 306-07; see id. 305-06.

112 Id. 308-18.
grant varying forms of relief to different interest groups seeking to redress a wide range of undesirable behavior. Though Anisman enthusiastically embraces the judicial flexibility of the American approach, a different prescription could be written for a country in a position to try an alternative. Our experiences with implied right doctrines have not been free from headaches. Severe strains on rule 10b-5 were created by the claims of non-purchasing and nonselling participants in tender offer battles. While section 14(e) relegates this problem to history, the debate shifts to more fundamental notions of standing. (Anisman understandably passes over the mechanistic aspects of the purchaser-seller controversy; even the common law of deceit may give standing to one who refrains from action.) The courts of appeals are also still grappling with issues such as scienter, and we continue the Procrustean struggle to fit fundamentally different forms of conduct into a general antifraud framework. Fashioning relief after an acquisition is frequently a complex task. Rondeau v. Mosinee Paper Co. demonstrates the need for rationalizing the deterrent and compensatory features of implied private civil actions. Instead of codifying a blank-check authorization of the courts to promote good and deter evil in takeover bids, a jurisdiction could first try a vigorous program of governmental surveillance and enforcement—including intensive criminal prosecutions, stiff fines, and extensive use of agency civil enforcement mechanisms to obtain prompt injunctions and remedial ancillary relief. In the long run, the costs of deterrence and compensation might be lower.

113 Id. 333-38.
116 Compare Lanza v. Drexel & Co., 479 F.2d 1277 (2d Cir. 1973), with White v. Abrams, 495 F.2d 724 (9th Cir. 1974).
117 When an offeree issuer induces its shareholders to avoid the offeror's bid, something basically different from the standard fraud pattern is presented. In 1970, this reviewer analyzed the situation as tortious interference with economic relationships. Coffey, Post Acquisition Relief, 3 Rev. of Sec. Reg. 907, 910 (1970). This theory was later espoused by the Second Circuit in Chris-Craft Indus., Inc v. Piper Aircraft Corp., 480 F.2d 341, 360 (2d Cir.), cert. denied, 414 U.S. 910 (1973).
118 See, e.g., Coffey, supra note 117.
119 95 S. Ct. 2069 (1975) (showing of irreparable harm necessary for a private party to receive injunctive relief under Securities Exchange Act of 1934 § 13(d), 15 U.S.C. § 78m(d) (1970)).
than when private parties engage in protracted litigation over difficult issues of liability and relief. Moreover, if government enforcement were swift and sure, potential violators might not gamble against being brought to task, as they probably do when their principal exposure is to private suit.

J. Corporation Law

Anisman's work also contrasts a number of British-Canadian and American corporate law concepts pertinent to the takeover bid process. Anisman is no pasticheur, however; he has a sharp sense of relevance and organization and does a good job of selecting locations for his excursions into corporate law. In his mini-treatise footnotes throughout the book, and in his text on defense tactics, the author covers: (1) inspection rights;\(^{120}\) (2) sale of control;\(^{121}\) (3) bootstrap bids—offers financed out of the assets of the offeree issuer;\(^{122}\) (4) compulsory buy-up—the statutory process through which an offeror can force a non-depositing minority to accept the tender offer when the percentage of voluntary deposits has been very high;\(^{123}\) (5) special arrangements with managers of the offeree issuer;\(^{124}\) and (6) limitations on the perpetuation of management by exercise of corporate power.\(^{125}\)

Within the last category is the question of repurchases of securities by the offeree issuer. Repurchases are a familiar defense tactic. Anisman, like others,\(^{126}\) criticizes the way courts have allowed directors to defend their personal power under the guise of policy conflicts.\(^{127}\) He suggests that shareholder approval should be required for all repurchases after a bid has begun.\(^{128}\) Under the Williams Act, SEC rule 13e-1\(^{129}\) requires only a modicum of disclosure by management in connection with a repurchase during a tender offer.

This reviewer believes that under Securities Exchange Act sections 13(e)\(^{130}\) and 14(e)\(^{131}\) the SEC can by rule expand the

\(^{120}\) **ANISMAN, supra** note 1, at 61-63.

\(^{121}\) Id. 37-40 n.65.

\(^{122}\) Id. 9-11 n.3.

\(^{123}\) Id. 77-78 & nn.90-91.

\(^{124}\) Id. 155 & n.55.

\(^{125}\) Id. 288-96.


\(^{127}\) **ANISMAN, supra** note 1, 292.

\(^{128}\) Id. 296.


disclosure requirements to the dimensions of a prospectus regarding the repurchasing issuer and forbid the repurchase unless certain conditions are fulfilled. A valid business purpose might even be required. A valid "business purpose" would be defined to exclude fighting to save one's skin, which could always be framed as defending some general business policy. The Commission might even make shareholder approval a condition. If the SEC has acted within bounds in its promulgation of other heavily substantive preventive rules pursuant to general antifraud statutes, the preceding proposals seem valid. Relying on section 14(e) alone, the Commission could also regulate sales of securities by the offeree issuer during takeover bids.\(^\text{132}\)

As noted earlier, Anisman gives no separate treatment to the behavior pattern known as "going private." The objective of the process is to terminate public holdings in the issuer and concomitant responsibilities. The popularity of the practice postdates Anisman's publication. Although the mechanics often include an issuer's tender offer for its own shares, the technique might not be considered a takeover bid. On the other hand, going private may involve the acquisition or consolidation of proprietary control by an issuer's own management shareholders. Even where none of the issuer's officers and directors are shareholders, the act of going private may reduce management's vulnerability to a takeover from outside. Moreover, non-shareholder management has a fiduciary duty not to show partiality among shareholders without a good business reason. Going private often results in the shrinkage or destruction of the market for shares still outstanding after the issuer makes its repurchases. Therefore, those who sell their shares back to the issuer may benefit from management's exercise of corporate power at the expense of remaining shareholders. Thus, without embellishing the fact pattern, to fulfill its fiduciary responsibilities, management arguably must have a valid business purpose for a going-private repurchase. Again, sections 13(e) and 14(e) would support the SEC's adoption of disclosure and substantive rules.\(^\text{133}\)

The SEC, under its prophylactic rulemaking power, can supplement or overshadow state law limitations on the exercise of corporate power, even though no deceptive element is clearly in the forefront of the transactional context.

\(^{132}\) Cf. ANISMAN, supra note 1, at 292-93.

V. Conclusion

Anisman's writing is crisp, compact, and sometimes disconcertingly terse. He moves quickly in the text; elaboration is found in the footnotes, where he does most of his comparative work. Many references to actual offers add realism to the author's intricate analysis of regulatory specifics.

The organizational schema is excellent. Material is arranged to facilitate a sequential development of concepts and rationales. The reader should realize, however, that Anisman is more of a Beethoven than a Chopin in the integration of his discussion. The content of each analytical segment is not tightly compartmentalized or self-contained. The reader is expected to remember what happened pages ago. This characteristic may reduce the book's value as a quick-reference treatise.

Mr. Anisman's goal was not to create a treatise in the strictly traditional sense. He wants us to take a look at others so that we can look at ourselves differently. Anyone who carefully reads this book will rethink takeover bids from the ground up. We can thank Anisman for his leading thoughts.