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Recommendations for Reform of Swedish Stock Exchange and Corporation Law

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RECOMMENDATIONS FOR REFORM OF SWEDISH STOCK EXCHANGE AND CORPORATION LAW

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In November 1986, Professor Steinberg was awarded a Fellowship by the Swedish Institute to lecture and to advise on Swedish and United States securities regulation. During his three-week visit, he lectured at the University of Stockholm, Gothenburg University, Lund University, Uppsala University, and The University of Helsinki. In addition, he addressed The Swedish Stock Market Board, the Stockholm Stock Exchange, and the Swedish Banking Lawyers Association.

During his Fellowship, Professor Steinberg was requested to present his Recommendations for reform of Swedish Stock Exchange and Corporation Law. These Recommendations received widespread coverage in Sweden. They were published in the Swedish Bar Journal, Advokaten (Vol. 57, No. 1, 1987), and appeared as a feature article in Sweden's financial daily, Dagens Industri (Nov. 20, 1986).

Generally, Professor Steinberg's Recommendations cover seven categories: (1) stock exchange regulation, (2) fiduciary duties of directors, officers, and controlling shareholders, (3) periodic reporting obligations, (4) remedies for fraudulent misconduct, (5) insider trading, (6) corporate control (and related) transactions, and (7) proposed limitations on monetary damages.

With respect to the Swedish regulatory framework, the following

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These recommendations were made by Professor Steinberg during his Fellowship to Sweden in November, 1986 for the purpose of lecturing and advising on Swedish and United States securities regulation. Professor Steinberg particularly wishes to thank The Swedish Institute, The University of Stockholm (and The Faculty of Law), Professor Carl Martin Roos, and Mrs. Britta Annby for their generous support.

introductory points may be useful:

(1) Sweden has no counterpart to the United States' Securities and Exchange Commission. Authority for taking enforcement action is vested largely in The Stockholm Stock Exchange. Although the Exchange serves as the principal Swedish securities marketplace, it is a private body with limited powers.

(2) With respect to monetary actions against corporate fiduciaries, such actions arise rarely in Sweden and derivative suits are discouraged by The Swedish Companies Act.

(3) Regarding the disclosure of information, although issuers in Sweden disseminate periodic reports, the type of disclosures elicited as well as the disclosure system in general are not nearly as extensive as those implemented in the United States.

(4) Insider trading is prohibited in Sweden with respect to corporate insiders and certain consultants or employees of the subject corporation. Current Swedish law, under certain circumstances, excludes such persons as misappropriators, quasi-insiders, and tippees from the insider trading prohibition. The breadth of the Swedish prohibition against insider trading, however, is unclear due to the ambiguity of the statute and the scarcity of judicial precedent.

(5) Tender offers are largely unregulated under the current Swedish regulatory framework. There are, however, certain exceptions. For example, under Swedish law, a corporation may not repurchase its stock and may issue shares only after receiving stockholder approval. Interestingly, both of the foregoing actions may be validly engaged in by corporations under United States law. Nevertheless, on the whole, the tender offer regimen in the United States is far more comprehensive than in Sweden.

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I am honored that I have been requested to present my recommendations regarding possible reform of Swedish Stock Exchange and Corporation Law. The following recommendations are not interdependent. Hence, academicians, attorneys, bankers, brokers, legislators, regulators and others may find only some of the recommendations proffered beneficial to the Swedish financial markets and investor protection. In any event, I hope that the following discussion will serve as a useful vehicle for assessing reforms.

I. Stock Exchange Regulation

1. The establishment of a Swedish Securities and Exchange Commission, patterned after the United States Securities and Exchange Commission (the SEC), apparently is not an acceptable alternative to

most Swedish corporate authorities. A government securities commission, according to the prevalent view, would entail overzealous regulation.[1]

2. Therefore, stock exchange regulation is the most feasible alternative. Currently, however, the Stockholm Stock Exchange (hereinafter referred to as the Exchange or self-regulatory organization (SRO)) may not have sufficient power to remedy problems that may arise, particularly situations which may implicate possible director or officer wrongdoing. Accordingly, the Exchange should be provided with the authority, with respect to both companies and individuals subject to its jurisdiction, to adopt rules to: investigate possible violations, subpoena witnesses and materials, compel testimony, hold adjudicatory proceedings, issue decisions in regard thereto, and impose penalties upon violators.[2] Sanctions should include, where appropriate, cease and desist orders, monetary penalties, suspensions, and bars. In addition, the Exchange should have the authority to make criminal referrals to the appropriate government agency.

Any adjudicatory hearing should be held before an impartial panel of the Exchange. The subject party should have the right to present a defense. Decisions handed down by the Panel should be in writing and enforceable. Defendants subject to an adverse Panel decision should have a right to appeal the decision to a court of competent jurisdiction.[3]

3. With respect to the Over-the-Counter (OTC) Market, the same type of self-regulation as proposed in recommendation 2 should be maintained.[4] As the Swedish regulatory framework currently recognizes, inadequate self-regulation in the OTC market may lead to significant market abuse and loss of investor confidence in that market.[5]

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1. *See* Hellner, *Stock Exchange Law. The Need for Legislation and Research*, in STOCK EXCHANGE LAW AND CORPORATION LAW 61, 62 (C. Roos ed. 1984) (stating that "the very detailed regulation contained in the American Securities Act is not attractive to us").

2. Currently, the Exchange has authority to levy certain penalties, such as fines and delisting, against subject companies. *See generally* Sandstrom, *Take-over Bids*, in STOCK EXCHANGE LAW AND CORPORATION LAW 39, 46 (C. Roos ed. 1984).

3. Under this recommendation, the Exchange would be given authority somewhat similar in certain respects to both the United States SEC and the United States self-regulatory organizations (*e.g.*, the New York and American Stock Exchanges). *See generally* M. STEINBERG & R. FERRARA, SECURITIES PRACTICE: FEDERAL AND STATE ENFORCEMENT (1985).

4. Such self-regulation in the OTC market has developed in the United States. *See, e.g.*, Smythe, *Government Supervised Self-Regulation in the Securities Industry and the Antitrust Laws: Suggestions for an Accommodation*, 62 N. C. L. REV. 475 (1984).

5. Indeed, this consequence in the United States OTC market prompted Congress

4. Complainants who can show that a company has been injured by a violation of Exchange or OTC rules should have a monetary remedy on behalf of the company. Implicit in this remedy should be the right to bring the action before a panel of the Exchange or the OTC, with a right of appeal before an appropriate court.[6]

5. If the SRO is provided with the authority recommended above, sufficient funding should be allocated, perhaps through assessments on SRO members and other subject persons.

II. Fiduciary Duties of Directors, Officers and Controlling Shareholders

6. As present Swedish law provides, directors, officers, and controlling shareholders owe the corporation the fiduciary duties of care and loyalty.[7]

7. The fiduciary duty of care, as contained in Chapter 15, § 1 of The Swedish Companies Act of 1975 (hereinafter referred to as The Companies Act), should be construed as requiring the fiduciary to exercise that degree of due care that a prudent person would exercise in similar circumstances. A stockholder who can show injury by such breach of due care should be able to bring a derivative action in an appropriate court and may recover if such breach was a substantial factor in causing the loss. However, the following requirement contained in Chapter 15, § 5 should be eliminated: that a derivative action may be initiated only if 10% of the authorized shares vote at the general meeting of shareholders to support the action. This requirement, along with the provision calling for reimbursement of expenses dis-

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in 1938 to enact the Maloney-Eicher Act, codified as amended at 15 U.S.C. §§ 78o, 78o-3, 78q, 78cc, 78ff (1982), which resulted in the creation of the National Association of Securities Dealers (the NASD). For further treatment, *see* Agreement Concerning (Swedish) OTC Listing § 12; Smythe, *supra* note 4.

6. Under United States securities law, the prevailing view is that there is not a private remedy for harm caused by violation of an SRO rule. *See, e.g.*, Walck v. American Stock Exchange, Inc., 687 F.2d 778 (3d Cir. 1982); Jablon v. Dean Witter & Co., 613 F.2d 677 (9th Cir. 1980). *But see* for a more liberal view, Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 410 F.2d 135 (7th Cir. 1969). *See generally* M. Steinberg, Securities Regulation: Liabilities and Remedies § 9.03 (1984) (and sources discussed therein).

7. The general concepts of duty of due care and loyalty are recognized in both Swedish and United States corporation law. *See, e.g.*, The Swedish Companies Act of 1975 (1975:1385), ch. 8, § 13; ch. 9, § 16; ch. 15, §§ 1, 3; Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (1939); Moberg, *Legal Problems Concerning the Auditors of a Corporation*, in Stock Exchange Law and Corporation Law 49, 52-55 (C. Roos ed. 1984) (discussing The Swedish Companies Act and the fault-liability rule).

cussed in recommendation 9, *infra*, make such actions, including those which may be meritorious, very difficult to institute.[8]

8. As current Swedish law implies, the fiduciary duty of loyalty should require the fiduciary to act primarily in the best interests of the corporation rather than in his personal interests. This fiduciary duty should apply, for example, in self-dealing transactions, corporate opportunity developments and unfair competition situations. Situations implicating the duty of loyalty normally should require disclosure to shareholders of the subject transaction or development. *See* recommendations 10-11, *infra*. Moreover, pursuant to the circumstances enumerated in recommendation 9, *infra*, a stockholder should have a cause of action for damages or injunctive relief in an appropriate court. The corporate fiduciary may defeat a stockholder action by showing that the transaction or development was fair and reasonable to the corporation.[9]

9. In derivative suits, the following provision contained in Chapter 15, § 5 of The Companies Act should be eliminated: "The party who instituted the action shall be liable for the costs of the proceedings but is entitled to reimbursement from the company to the extent that the costs are covered by the amount falling to the company through the action." This provision, along with that discussed in recommendation 7, *supra*, strongly deters, if not precludes on a practical level, initiation of derivative actions. Only after a stockholder goes through the expense and time of obtaining 10% shareholder support can he initiate an action. Moreover, he must incur the risk that the action will not ultimately result in monetary compensation; if there is no monetary recovery, that shareholder must pay the costs of the proceedings. In short, even if the case is meritorious, there are few shareholders who would be willing to assume these burdens.

Instead, before pursuing a derivative action, a stockholder should be required to make a demand on the disinterested directors, unless a majority of the board of directors is interested, thereby excusing such demand. The action should be precluded if the disinterested directors

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8. *See, e.g.*, MD. CORPS. & ASS'NS CODE ANN. § 2-405.1 (1985). For current Swedish law, see the provisions cited in *supra* note 7.

9. *See* provisions cited in *supra* note 7. *See generally* Bulbulia & Pinto, *Statutory Responses to Interested Directors' Transactions: A Watering Down of Fiduciary Standards?*, 53 NOTRE DAME L. REV. 201 (1977) (and cases discussed therein); Peyron, *Corporation Law. The Need for Legislation and Research*, in STOCK EXCHANGE LAW AND CORPORATION LAW 69, 70 (C. Roos ed. 1984) ("The Swedish Companies Act closes its eyes almost completely to the [conflicts of interest] problem with the exception of dividend regulations.").

make a reasonable decision that the derivative action should not be brought. A director should be deemed interested if he financially benefitted from the transaction, if there is a substantial possibility that the director will be held liable for breach of the duty of care, or if the director will not render impartial judgment in evaluating the merits of the litigation.[10]

III. Periodic Reporting Obligations

10. Periodic reports issued by companies are required by the Swedish general corporation law and further information must be disclosed pursuant to the Exchange and OTC listing agreements. Yet, the question remains whether the present framework elicits sufficiently comprehensive information describing an issuer's financial condition and other general material information, including material information concerning the relationships of corporate fiduciaries with their companies. *See* recommendation 8, *supra*.[11] An inadequate periodic disclosure system results in the unequal delivery of information to the detriment of average investors. The practice also may encourage greater frequency in insider trading. Moreover, based upon this lack of adequate current information, a corporation's stock may not be accurately valued in the stock markets.[12]

11. The lack of a comprehensive periodic reporting framework not only may harm average investors, it also may reflect adversely on the perceived safety of the Swedish financial markets. Accordingly, as a condition for a company to continue being listed in the relevant market,

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10. *See generally* M. Steinberg, Corporate Internal Affairs: A Corporate and Securities Law Perspective 133-162, 233-250 (1983) (and cases discussed therein).

11. The Swedish Companies Act and the respective SROs impose certain financial reporting and other disclosure obligations. *See* The Companies Act, *supra* note 7, ch. 11 §§ 1-14; Stockholm Stock Exchange Listing Agreement § 10; Agreement Concerning OTC Listing § 12. *See also* The Swedish Accounting Act of 1976, (1976:125) §§ 11-21. In this regard, however, Professor Hellner has stated:

> In my opinion there is a need for better continuous information than is required at present. The Board of the Stockholm Stock Exchange is mostly concerned with information regarding special events, which is easily understood because of its duties. The requirements for continuous information seem at present to be mostly the concern of private organizations of shareholders and of journalists. These bodies are not very efficient in inducing information from companies that rely on their past results for making the shares attractive even when information is meager.

Hellner, *supra* note 1, at 63.

12. *See generally* Dennis, *Materiality and the Efficient Capital Market Model: A Recipe for the Total Mix*, 35 Wm. & Mary L. Rev. 373 (1984).

the Exchange and the OTC market should require the filing of comprehensive periodic reports by issuers on an annual and quarterly basis.[13] In this regard, the disclosures mandated by the United States SEC Regulations S-K and S-X should be considered. Moreover, consistent with current Swedish general practice, a report should be filed with the SRO upon the occurrence of a fundamental event such as the dismissal of the company's auditor or the receipt of a major contract.[14] Stockholders and financial intermediaries who request a copy of any such report should be entitled to receive a copy at the corporation's expense.

IV. General Remedy for Fraud

12. A plaintiff who can show personal injury, as opposed to general corporate injury, by breach of the duty of care or loyalty or by untruthful or inadequate disclosure of information committed by a corporation or its fiduciaries, should be able to bring suit for monetary or injunctive relief in an appropriate court against those who negligently and substantially caused the violation. In order to have standing to bring an action for damages, the court may require that the plaintiff be a purchaser or seller of the securities, except in tender offers and proxy solicitations. This requirement helps to reduce the possibility of vexatious litigation.[15]

V. Insider Trading

13. Directors, officers, and shareholders who beneficially own more than 5% of an equity security issued by a corporation should be obligated to file accurate and timely reports with the Securities Register Centre disclosing the status of their stock ownership interest. Failure to adhere to the foregoing requirement should result in appropriate penal-

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13. Such a requirement is mandated by Sections 13(a) and 15(d) of the United States Securities Exchange Act of 1934, codified as amended at 15 U.S.C. §§ 78m(a), 78o(d) (1982). *See, e.g.*, SEC Securities Act Release No. 6235 (Sept. 2, 1980) and No. 6383 (March 3, 1982).

14. *See* Hellner, *supra* note 1, at 63; sources cited *supra* note 11. *See also* United States SEC Form 8-K (mandating disclosure of certain material events).

15. For cases handed down by United States courts on this general subject, *see, e.g.*, Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975); Shores v. Sklar, 647 F.2d 462 (5th Cir. 1981) (*en banc*); Sanders v. John Nuveen & Co., Inc., 619 F.2d 1222 (7th Cir. 1980); Gould v. American-Hawaiian S.S. Co., 535 F.2d 761 (3d Cir. 1976); Kittilson v. Ford, 93 Wash. 2d 223, 608 P.2d 264 (1980). For further discussion, *see* M. Steinberg, Securities Regulation §§ 6.07, 7.03, 7.05, 8.04 (1986).

ties.[16] Moreover, in order to ensure that corporate fiduciaries do not take undue advantage of their insider status, such directors, officers, and 5% shareholders should be prohibited from making purchase(s) followed by sale(s) or sale(s) followed by purchase(s) within a six-month period. Any profits derived from such transactions should be forfeited for the benefit of the corporation.[17]

14. Trading on material non-public information (insider trading) should continue to be illegal. Current Swedish law should be extended to prohibit insider trading by (a) corporate fiduciaries, (b) those who are knowingly conveyed (or "tipped") such information by a corporate source or other insider, (c) those who misappropriate the information, such as an employee of a financial printer entrusted to maintain secrecy of the information until public release thereof, and (d) those who enjoy a special relationship with the corporation and should be viewed as quasi-insiders, such as a lawyer or investment banker advising the corporation on a contemplated transaction.[18]

15. The relevant SRO or an injured party, who need not be in privity with the insider trader and who traded in the marketplace when the insider trading occurred, should be able to bring an action, with or without the consent of the Bank Inspection Board, for treble damages. Treble damages should be viewed as a necessary deterrent to the practice of insider trading and should be measured as three times the profit gained or loss avoided by the culpable party. If the damages assessed

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16. This recommendation is consistent with current Swedish law. *See* The Securities Market Act of 1985 (1985:571) (as amended in 1986), §§ 10, 29.

17. This recommendation generally adopts the position taken by § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (1982) and represents current United States law (except that shareholders, who are not officers or directors, must own 10% of an equity security to come within the statute).

18. Pursuant to current Swedish law, insider trading under certain circumstances is unlawful and may constitute a criminal offense. *See* The Securities Market Act, *supra* note 16, §§ 7, 8, 28. Present Swedish law appears to exclude "tippees" (those who are conveyed material nonpublic information), misappropriators, and "quasi-insiders" (unless such persons are deemed to be consultants or employees covered by the Act) from the prohibition against trading. *See id.* §§ 6-8.

For United States case law addressing this subject, *see, e.g.*, Dirks v. SEC, 463 U.S. 646 (1983); Chiarella v. United States, 445 U.S. 222, (1980); United States v. Newman, 664 F.2d 12 (2d Cir. 1981); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) (*en banc*), *cert. denied*, 394 U.S. 976 (1969). *See generally* Hiler, *Dirks v. SEC - A Study in Cause and Effect*, 43 MD. L. REV. 292 (1984); Langevoort, *Insider Trading and the Fiduciary Principle: A Post-Chiarella Restatement*, 70 CALIF. L. REV. 1 (1982); Wang, *Trading on Material, Nonpublic Information on Impersonal Stock Markets: Who is Harmed and Who Can Sue Whom Under SEC Rule 10b-5?*, 54 S. CAL. L. REV. 1217 (1981).

exceed the amount of losses claimed, the remaining amount should be allocated to the applicable SRO for appropriate purposes. In certain circumstances, such as when a court enunciates a new principle of law, the imposition of treble damages may not be equitable. In such situations, the court should have discretion to reduce the amount of damages.[19]

16. In egregious situations, insider trading should continue to be a criminal offense. The determination of whether to institute such a criminal proceeding should be left to prosecutorial discretion with judicial oversight to correct any abuses that may develop. If insider trading is to be deterred effectively, criminal prosecution, where appropriate, must become a reality.[20]

VI. Corporate Control and Related Transactions

17. In mergers and other fundamental transactions which affect a stockholder's investment (for example, a sale of substantially all assets), a stockholder, irrespective of whether the security is traded on the Exchange or in the OTC market, should have the right to demand an appraisal of his stock and thereby receive "fair value." The procedures necessary for the stockholder to perfect the appraisal remedy should be clear and not onerous. In determining fair value, all relevant ascertainable valuation factors should be considered, including the future earnings of the company.[21]

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19. This recommendation expands present Swedish law. Currently, public prosecution for insider trading can be initiated only with the consent of the Bank Inspection Board. Although fines and forfeiture of ill-gotten profits may be ordered, there is no provision for treble monetary damages. *See* The Securities Market Act, *supra* note 16 §§ 28-32.

A law authorizing the imposition of a civil monetary penalty amounting to three times the profit received or loss avoided due to the wrongful transaction(s) was enacted in the United States in 1984 and called the Insider Trading Sanctions Act (ITSA). For further discussion, *see* M. Steinberg, *supra* note 15, at 625-629 (and sources cited therein).

20. This recommendation basically is consistent with current Swedish law. *See* The Securities Market Act, *supra* note 16, §§ 28-29, 32. Under certain circumstances, insider trading is a crime under United States securities law. *See, e.g.*, The Securities Exchange Act of 1934, § 32(a), 15 U.S.C. § 78ff(a) (1982); United States v. Newman, 664 F.2d 12 (2d Cir. 1981).

21. This recommendation expands current Swedish law. *See* Chapter 14 of The Companies Act, *supra* note 7. §§ 9-11. For United States law on this subject, *See* Del. Code Ann. tit. 8, § 262(h) (1974); Alpert v. 28 Williams St. Corp., 63 N.Y.2d 557, 473 N.E.2d 19, 483 N.Y.S.2d 667 (1984); Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983); Steinberg & Lindahl, *The New Law of Squeeze-Out Mergers*, 62 Wash.U.L.Q. 351 (1984); Weiss, *The Law of Take Out Mergers: A Historical Per-*

18. In potential (as well as actual) change of control and going-private situations involving lack of disclosure or breach of fiduciary duty, the plaintiff should have a remedy for damages or injunctive relief in an appropriate court. *See* recommendations 6-9, 12 *supra*.[22]

19. When any person or entity, or group thereof, beneficially owns 5% or more of an equity security of a company, that person, entity, or group should have a duty to disclose in writing such ownership interest to the company and to the market in which the security is traded. No purchases above the 5% level should be permitted until such disclosure is made. All purchasers who violate this provision should be compelled to divest all purchases over the 5% level. The SRO and the subject corporation should have standing to enforce this mandate in an appropriate court. The provision is necessary to avoid rapid transfers in corporate control without notice to investors and the financial markets.[23]

20. Once a person or entity, or group thereof, owns 25% of a corporation's stock, any additional purchases which would result in the subject party increasing its percentage of ownership more than 2% per annum should be permitted only by means of a tender offer or by related transaction such as a merger. Adoption of this provision would avoid the problems inherent in unorthodox transactions such as privately negotiated purchases which, depending on the circumstances under United States law, may or may not constitute a tender offer.[24]

21. Upon making a tender offer, the offeror (bidder) should be required to provide to the relevant SRO, the target company, and the shareholders of the target, a suitable disclosure document describing

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spective, 56 N.Y.U.L. REV. 624 (1981).

22. *See supra* notes 7-10, 15. *Compare* recommendation 22 *supra*. *See generally* Ferrara & Steinberg, *A Reappraisal of* Santa Fe: *Rule 10b-5 and the New Federalism*, 129 U. PA. L. REV. 263 (1980).

23. This recommendation expands current Swedish practice. *See* Stock Exchange Committee Recommendation Concerning Substantial Acquisition of Shares (ownership of 10% must be disclosed). *Compare* Section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(d) (1982) which provides that a beneficial owner of more than 5% of a subject security need not disclose such ownership until ten days after attaining that status. This ten-day "window" period has been severely criticized due to its "loophole" which permits additional acquisitions during the ten-day period so long as such purchases do not constitute a "tender offer". *See* SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS, 96TH CONG., 2D SESS., SECURITIES AND EXCHANGE COMMISSION REPORT ON TENDER OFFER LAWS 55, 56 (Comm. Print 1980). *See generally* Treadway Co. v. Care Corp., 638 F.2d 357, 380 (2d Cir. 1980).

24. *Compare* Hanson Trust PLC v. SCM Corporation, 774 F.2d 47 (2d Cir. 1985) *and* SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945 (9th Cir. 1985) *with* Wellman v. Dickinson, 475 F. Supp. 785 (S.D.N.Y. 1979), *aff'd on other grounds*, 682 F.2d 355 (2d Cir. 1982).

mandated material information. Once the tender offer commences, the bidder should be prohibited from making any purchases outside of the offer. Moreover, within ten days after the tender offer is made, the target company should provide to its shareholders, the SRO, and the bidder a disclosure document which describes, among other items, whether target management favors, opposes, or is neutral toward the offer and the reasons why. In this regard, the information required to be disclosed by United States SEC Schedules 14D and 14E should be considered.[25]

22. Tender offers should remain open for at least twenty business days and should be made on equal terms to all shareholders. If a bidder changes a material term in the offer, such as a change in price, the offer should be held open for at least an additional ten business days from the date of the change. Shareholders should be permitted to withdraw their shares during the duration of the offer. If a tender offer is for less than all the outstanding shares, all stockholders should receive *pro rata* treatment (*i.e.*, shareholders should be able to have a proportionate number of their shares purchased during the entire offering period). The maximum price paid to any stockholder during the tender offer period should be paid to any other tendering security holder.[26]

23. If a bidder engages in a tender offer for less or purchases less than all of the outstanding stock of the target company and thereby acquires control, any subsequent tender offer, merger or similar transaction between the two companies should provide that remaining disinterested target shareholders receive the same price or a higher price per share as was paid in the initial tender offer. Payment of a fair price reduces the coercive effect of cash-out transactions and helps to ensure that minority shareholders will receive fair value without having to invoke the appraisal remedy. An exception to this provision should permit a lower price to be paid in a subsequent tender offer, merger or similar transaction if a disinterested majority of shares, *i.e.*, those shares not beneficially held by the bidder or its affiliates, approve the lower price.[27]

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25. This recommendation is in accordance with current United States securities law disclosure requirements. *See* Securities Exchange Act of 1934, § 14(d)-(e), 15 U.S.C. § 78n(d)-(e) (1982) and SEC rules and regulations promulgated thereunder. *See also* Sandstrom, *supra* note 2, at 42-47.

26. This recommendation follows current United States securities law requirements except that enforcement under the Swedish framework would be left solely to the applicable SRO and to private parties. *See* sources cited *supra* note 25. *Compare* recommendation 28 *infra*.

27. Although not identical to the recommendation proffered, a number of jurisdic-

24. Recommendations 22 and 23 should apply equally to going-private transactions engaged in by the issuer, including an issuer's tender offer for its outstanding stock. Moreover, the issuer should be required to provide a mandated disclosure document to its stockholders and the relevant SRO. In this regard, the information required to be disclosed by United States SEC Schedules 13E-3 and 13E-4 should be considered.[28]

25. Adoption of provisions or amendments to a corporation's Articles of Association or By-Laws which have the effect of significantly deterring an offeror from making a takeover bid should be permitted only if approved by a majority of all disinterested outstanding shares, *i.e.*, those shares not held by corporate fiduciaries or by persons or entities controlled by or affiliated with such fiduciaries. Any such provision should remain in effect only if approved by a majority of all outstanding disinterested shares every three years. Because of the massive consequences of such anti-takeover provisions and the likely result of incumbent management entrenchment, these provisions should be permitted only if approved on a periodic basis by a majority of the disinterested outstanding shares.[29]

26. Once a tender offer is made, the target corporation's board of directors, upon making a reasonable and informed decision, should be permitted to take defensive measures to thwart the offer, provided that

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tions in the United States have enacted "fair price" statutes. *See, e.g.*, MD. CORPS. & ASS'NS CODE ANN. §§ 3-601, 8-301(14) (1985); 15 PA. CONS. STAT. ANN. §§ 1409.1, 1910 (Purdon 1987 Supp.). Although not yet resolved, these statutes are likely constitutional under the United States Constitution. *See* CTS Corporation v. Dynamics Corp. of America 107 S. Ct. 1637 (1987). *See generally* Goelzer & Cohen, *The Empires Strike Back - Post* MITE *Developments in State Antitakeover Regulation*, in TENDER OFFERS: DEVELOPMENTS & COMMENTARIES 49 (M. Steinberg ed. 1985); Sargent, *Do the Second Generation State Takeover Statutes Violate the Commerce Clause? A Preliminary Inquiry*, in TENDER OFFERS: DEVELOPMENTS AND COMMENTARIES 75 (M. Steinberg ed. 1985); Steinberg, *The Pennsylvania Anti-Takeover Legislation*, 12 SEC. REG. L.J. 184 (1984).

28. This proposal generally follows current United States securities law requirements except that enforcement under the Swedish framework would be left solely to the applicable SRO and to private parties. *See* The Securities Exchange Act of 1934, § 13(d)-(e), *supra* note 20, and the SEC rules and regulations promulgated thereunder. *See generally* Comment, *Regulating Going-Private Transactions: SEC Rule 13e-3*, 80 COLUM. L. REV. 782 (1980).

29. Under the United States framework, provided that disclosure is adequate, the validity of such anti-takeover provisions normally is determined under state corporation law. Generally, a number of state courts, particularly in Delaware, have upheld these provisions. *See, e.g.*, Moran v. Household International, Inc., 500 A.2d 1346 (Del. 1985).

such measures do not materially impede or preclude target shareholders from tendering their stock to the bidder. Such defensive tactics may include, for example, recommending to shareholders that they reject the takeover bid and finding a "white knight" who will make a competing offer, provided that stockholders may tender to whichever bidder they prefer. Approval of such defensive maneuvers should be given somewhat greater deference when made exclusively by a majority of outside directors, *i.e.*, those directors not otherwise having a significant relationship with the corporation. The inherent presence of structural bias, however, should be recognized because directors, though they may be outside directors, are more likely to agree with the inside directors with whom they may well have developed friendly relationships. Inside directors are those individuals who also are officers of or who otherwise derive a substantial monetary benefit from their relationship with the corporation. In this regard, the grant of generous severance remuneration packages for the target company's management (which are common in the United States and generally become effective upon a change in corporate control) should be rigorously scrutinized if challenged. Moreover, any such actions taken by the target corporation's board of directors should be disclosed to the target's stockholders, the applicable SRO, and the bidder.[30]

27. The target corporation's board of directors, absent shareholder approval by a disinterested majority of all outstanding shares, should not be permitted either before or during the occurrence of a takeover bid to take defensive actions that materially impede or preclude shareholders from tendering their stock to the bidder of their choice. Such actions include, for example, the adoption of anti-takeover provisions (see recommendation 25 above), the sale of or option to sell a valuable asset (a "crown jewel") to another party, and defensive maneuvers, including acquisitions, which have the effect of creating an insurmountable antitrust obstacle. These maneuvers, called "showstoppers," should be permitted only if a majority of disinterested outstanding shares approve after adequate disclosure (including disclosure of the material effects of any such maneuvers).[31] Alternatively, consideration may be

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30. Generally, under current Swedish law, an issuance of a corporation's shares requires stockholder approval (The Companies Act, *supra* note 7, ch. 4, §§ 1-2, 14-15) and a company may not purchase its own shares (*id.*, ch. 7, § 1). Hence, under the present Swedish framework, the foregoing are not viable defensive tactics. *See generally* Lynch & Steinberg, *The Legitimacy of Defensive Tactics in Tender Offers*, 64 CORNELL L. REV. 901 (1979).

31. *See generally* Bebchuck, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028 (1982); Gruenbaum, *Defensive Tactics and the Business Judg-*

given to authorizing the undertaking of "showstopper" maneuvers if prior to taking such actions the target corporation's board of directors can demonstrate to a court that the offeror poses a clear threat to the corporation's business.[32]

28. Provided that recommendation 27 is adopted, the tender offer time frame should be lengthened. If a "showstopper" maneuver is attempted, the target corporation's board of directors should be provided with the opportunity to seek shareholder approval, which normally calls for the holding of a stockholder's meeting, the solicitation of proxies, and the delivery of disclosure documents. Due to the time necessary to complete the foregoing measures, the minimum period for which a tender offer should be held open in such circumstances should be increased to ninety business days.[33]

VII. LIMITATION ON MONETARY DAMAGES

29. Although seldom experienced in Sweden, if liability is established in a legal proceeding, the amount of monetary damages theoretically may be astronomical, amounting to several million SEK. In the United States, the effect of multi-million dollar judgments or settlements[34] has been the onslaught of an insurance crisis, whereby director and officer insurance is difficult to procure, even with limited coverage. Under such circumstances, it is not surprising that prospective outside directors in the United States are reluctant to accept invitations to serve on corporate boards of directors.[35]

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ment Rule, 4 CORP. L. REV. 263 (1981); Easterbrook & Fischel,*The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819 (1981).

32. *See* Steinberg, *Some Thoughts on Regulation of Tender Offers*, 43 MD. L. REV. 240 (1984).

33. *See* Goldberg, *Regulation of Hostile Tender Offers: A Dissenting View and Recommended Reforms*, 43 MD. L. REV. 225 (1984); Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 COLUM. L. REV. 249 (1983); Sandstrom, *supra* note 2, at 42-47.

34. *E.g.*, Smith v. Van Gorkum, 488 A.2d 858 (Del. 1985) (subsequent settlement of litigation amounted to over $23 million).

35. As stated by the commentary accompanying Delaware's 1986 amendments to its General Corporation Law:

> Section 102(b)(7) and the amendments to Section 145 represent a legislative response to recent changes in the market for directors' liability insurance. Such insurance has become a relatively standard condition of employment for directors. Recent changes in that market, including the unavailability of the traditional policies (and, in many cases, the unavailability of any type of policy from the tradi-

In light of the above, several courts in the United States have ruled in favor of defendant corporate fiduciaries in situations which a number of experts view as questionable.[36] Moreover, the state of Delaware, the most popular state of incorporation for publicly-held companies,[37] recently enacted legislation permitting a corporation in its Articles of Association to eliminate monetary liability against directors based on a breach of the duty of care. Under the Delaware legislation, damages may still be imposed if the subject director failed to act in good faith, engaged in intentional misconduct, or breaches the duty of loyalty.[38]

Given the foregoing, although this problem does not currently exist in Sweden, a limitation on monetary damages should be formulated except in cases involving deliberate misconduct. Because outside directors do not have a significant financial interest in the company and because their membership on boards of directors promotes corporate accountability,[39] such directors normally should not be subject to exhorbitant damages. Hence, absent deliberate misconduct, the liability of outside directors should be limited to 500,000 SEK.

30. Inside directors normally have a significant financial interest in the corporation. Moreover, they are the individuals who should have the greatest knowledge of corporate developments, events, and trends. Accordingly, the limitation on damages should be high enough so as to avoid the temptation to view the limitation simply as a cost of doing business. It is therefore recommended that, absent deliberate misconduct, the liability of inside directors should be limited to the higher of the following: (1) 1 million SEK or (2) one-year gross income derived

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tional insurance carriers) have threatened the quality and stability of the governance of Delaware corporations because directors have become unwilling, in many instances, to serve without the protection which such insurance provides and, in other instances, may be deterred by the unavailability of insurance from making entrepreneurial decisions. The amendments are intended to allow Delaware corporations to provide substitute protection, in various forms, to their directors and to limit director liability under certain circumstances.

36. *See, e.g.*, Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981) (damages of $200 million sought); discussion in M. STEINBERG, *supra* note 15, at 769.

37. *See* Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 705 (1974) (describing state corporation law as a "race for the bottom" that Delaware had won).

38. Delaware Senate Bill No. 533, amending *inter alia*, DEL. CODE ANN. tit. 8, § 102 (1986).

39. *See, e.g.*, SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS, 96TH CONG., 2D SESS., SECURITIES AND EXCHANGE COMMISSION STAFF REPORT ON CORPORATE ACCOUNTABILITY 28-29, 587 (Comm. Print 1980).

from the insider's corporate salary.[40]

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Although certain of the provisions stated above basically retain current practice,[41] the fundamental purpose of the recommendations proffered is an effort to introduce innovative concepts which will help satisfy the emerging needs of the Swedish financial markets. Accordingly, these recommendations hopefully will facilitate the dialogue now taking place for possible reform of Swedish Stock Exchange and Corporation Law. There is little doubt that the Stockholm Stock Exchange has become one of the more important exchanges in the world.[42] I am therefore honored that I have been provided with this opportunity. If appropriate I will be pleased to render further assistance.

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40. *Cf.* AMERICAN LAW INSTITUTE RESTATEMENT ON CORPORATE GOVERNANCE § 7.16(f) (Tentative Draft No. 6 1986) (establishing a limitation on damages in duty of care cases in the absence of culpability akin to recklessness); AMERICAN LAW INSTITUTE FEDERAL SECURITIES CODE § 1708(c) (limiting damages for false filings and publicity); Perkins, *The ALI Corporate Governance Project in Midstream*, 41 BUS. LAW. 1195, 1221-1224 (1986). With respect to both inside and outside directors, the limitation on damages should be adjusted per annum according to the rate of inflation or other appropriate standard.

41. *See, e.g.*, recommendations 6, 13 (part thereof), and 16 *supra*.

42. *See* Bredin, *Stock Exchange Law. The Need for Legislation and Research*, in STOCK EXCHANGE LAW AND CORPORATION LAW 65, 66 (C. Roos ed. 1984). Approximately 170 companies, having a total of two million public shareholders, are listed on The Stockholm Stock Exchange. Since 1980, the turnover in shares per annum has developed as follows: 1980 - 7.5 billion SEK, 1981 - 18.5 billion SEK, 1982 - 29.0 billion SEK, 1983 - 76.0 billion SEK, 1984 - 70.6 billion SEK, 1985 - 83.3 billion SEK, and through June 1986 - 82.6 billion SEK.