

HEINONLINE

Citation: 10 Minn. J. Global Trade 357 2001



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Wed Nov 11 18:24:50 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1944-0294](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1944-0294)

COMMENTARY

Korean Hostile Takeovers And The Friendly Internationalization of the Securities Market: An Investor Protection Perspective

Kwang-Rok Kim *

During the 1980s and 1990s, the trend towards internationalization transformed capital markets globally. Recently, the internationalization of world securities markets created a blast of corporate hunting in the Korean securities market. In the new economy, tender offers have become the most significant tactical development in the international corporate takeover arena.¹ To fully understand the extent of change, we must first remember the history of tender offers in Korea.

Korea established its first tender offer system in 1976. During the next twenty years no tender offer transactions occurred. Then, on October 26, 1994, Hansol Paper Manufacturing Company made a hostile tender offer to Donghae Banking Corporation. This was recorded as the first successful hostile tender offer in Korea. Since then, tender offers have often been used as the method to acquire control of corporations. Recently, Korea amended its tender offer regulations regarding corporate purchase provisions were amended so that tender offers will be more popular than ever.

* Visiting Scholar, Indiana University; Post-Doctorate Researcher, BK Law 21, Seoul National University, Seoul, Korea; J.S.D. 2001, Washington University; LL.M. 1999, Indiana University; Master of Law 1993, Soong Sil University, Seoul, Korea; LL.B. 1991, Soong Sil University, Seoul, Korea.

1. See Christopher B. Bernard, *Towards an International Market in Mutual Funds*, 36 VA. J. INT'L L. 467 (1996); See Joseph B. Cahill, *Circuits Spilt on the Elements of William Act "Manipulation" - Validity of Tender Offer Defenses Uncertain*, 60 CHI. KENT. L. REV. 935 (1984).

In the beginning of 1998, the Korean government amended the foreign stock exchange regulations and released a new policy for free foreign exchange and foreign investment. Moreover, the tender market has increased due to the amendments in the Korean Securities and Exchange Act (KSEA). The Korean government relaxed its limitations on foreign ownership of equity, abolished the limitation on foreign subscription for the public purchase of shares, eliminated the twenty-five mandatory tender offer system,² and granted full permission to foreign investors' hostile takeover activities in the secondary market. Notably, the government quickly created these vehicles for foreign investment in Korean securities market, only a short time right after the economic crisis in late 1997. These amendments were completed without sufficient scholarly research about securities regulation, and do not reflect the special situation and securities practices of Korean enterprises.

The rushed adoption in 1997 now requires that these amendments be carefully reconsidered to ensure that the Korean tender offer regulations to keep up with the securities regulations' ultimate purpose "to contribute to the development of the national economy by protecting investors through fair issuance, purchase, sale or other transactions of securities."³ Additionally, the law should allow Korea to catch up with the world securities market's fair internationalization. For this purpose, this Article analyzes the KSEA tender offer regulations. In addition, this Article assesses problematic issues arising from the tender offer and makes suggestions for improving Korean tender offer regulation in the securities practice.

I. THE HOSTILE TENDER OFFER UNDER KOREAN LAW

Under the KSEA, the tender offer is described as an offer to buy stock, or a solicitation of an offer to sell stocks against "many and unspecified persons," and as buying stocks "outside

2. Under the twenty-five percent mandatory tender offer system, shareholders wishing to hold twenty-five percent or more of outstanding voting shares were obligated to acquire them through tender offer. In addition, the number of shares for tender offer needed to be more than fifty percent of outstanding voting shares including their securities. This twenty-five percent mandatory tender offer system was abolished on Feb. 24, 1998. *See* WOON-YOUL CHOI & YEONG-HO WOO, CORPORATE GOVERNANCE AND DISCLOSURE: RECENT DEVELOPMENT IN KOREA 5 (1998).

3. *See* Korean Securities and Exchange Act, art. 1.

the securities market” or the intermediation market operated by the Korea Securities Dealers Association (KSDA).⁴ In addition, the tender offer is mandatory when a person intends to acquire five percent or more of voting stock or any other securities through purchase, exchange, bid or any other acquisition by transfer from more than ten shareholders in six months.⁵ This section of the article explains the Korean regulations governing these transactions, noting places reform or revision in Korean law is needed.

The scope of tender offer regulation is limited. First, the tender offer in Korea applies only to transactions “outside the securities market,” securities transactions at the Korea Stock Exchange (KSE), which is the only stock exchange in Korea, or at the intermediate market operated by the KSDA, cannot be recognized as tender offers. The reason why the tender offer is restricted to transactions “outside the securities market” is because transactions “outside the securities market” carry more risk than those on the KSE, which is secured by the nature of disclosure, equitability, and transferability, through self-regulation and other rules. Thus, the tender offer regulations of the KSEA need not apply to securities transactions at the KSE because its own laws and regulations already protect participating investors.

Second, the counterparts of the tender offeror must be “many and unspecified persons.” In other words, a solicitation of an offer to sell stocks does not apply to a limited number of people. It is very hard to define a tangible numerical criterion for “many and unspecified persons” however, when the tender offer applies to a group of people including many qualified shareholders who have sufficient knowledge and experience about a securities investment. In particular, when an offeror buys stocks several times from specific persons up to five percent, or from “many but specified persons,” the tender offer cannot be forced because the offeror did not buy from “unspecified persons.”

Therefore, the tender offer can be forced in limited circumstances. According to the KSEA, only when a person intends to acquire five percent or more of voting stocks, or any other securities through purchase outside the securities markets, by transfer from more than ten shareholders in six

4. See Korean Securities and Exchange Act, art. 21(3).

5. See Korean Securities and Exchange Act, art. 21(1); Enforcement Decree of the Korean Securities and Exchange Act, art. 10-2.

months,⁶ can the tender offer be forced. As seen above, the KSEA tries concretely to prescribe the meaning of the tender offer. In another words, it seems that the KSEA limits the scope of the tender offer is, and then ensures the legal stability of securities transactions by preventing the disputes over the formation of the tender offer. However, since the tender offer in Korea applies only when a person intends to acquire five percent or more of voting stocks, through purchase outside the securities markets by transferring from more than ten shareholders in six months,⁷ the securities transaction at the KSE cannot be recognized as a tender offer. Notably, a different result might occur under the SEC's eight-factor test.⁸

Application of the tender offer provision requires companies to determine how many people participated in the transfer. In addition, the numerical referent in the "many and unspecified persons" clause should be estimated by considering the conditions of each transaction rather than using a definite numerical standard. Consequently, the meaning of tender offer should be estimated by considering the conditions of each transaction rather than prescribing the definite standard.⁹ To address the lack of clarity in this area, Korean regulators should standardize legal treatment of the numerical criterion.

Generally, the tender offer is mandatory under the applicable conditions and the tender offer procedure. However, since KSEA Article 21(1) describes the scope of tender offer application in details, the tender offer must meet some conditions in order to be legally effective in the securities market. In order to complete a tender offer, the tender offeror

6. *See id.*

7. *See id.*

8. In the United States, the meaning of a tender offer can be defined by the eight-factors test. *See Wellman v. Dickinson*, 475 F. Supp. 783 (S.D.N.Y. 1979), *aff'd on other grounds*, 682 F. 2d 355 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983). The Wellman court suggested the eight elements of the tender offer as such: (1) active and widespread solicitation of public shareholders for the shares of an issuer; (2) solicitation made for a substantial percentage of the issuer's stock; (3) offer to purchase made at a premium over the prevailing market price; (4) terms of the offer are firm rather than negotiable; (5) offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased; (6) offer open only a limited period of time; (7) offeree subjected to pressure to sell his stock; and (8) whether the public announcements of a purchasing program concerning the target company precede or accompany rapid accumulation of large amounts of the target company's securities. *See id.* at 823-824.

9. Defining the meaning of the tender offer in the United States more likely depends on each situation. *See Hanson Trust PLC. v. SCM Corp*, 774 F 2d. 47, 57 (2d Cir. 1985).

ought to hold the stocks through purchase from not less than ten persons outside the securities market during the six months prior to the date on which the purchase of the stocks is conducted. In addition, the tender offer should involve five percent or more of the total number of the company's stocks.

The tender offeror includes not only the purchaser himself (including an individual, a corporation, and any other organization) but also the "specially connected persons" who are "specially related persons" and "persons acting in concert."¹⁰ Here, the "persons acting in concert" are those who (1) acquire or dispose of stocks by agreement or contract with the person concerned, or (2) who have agreed to exercise voting rights, including the right to give instructions as to the exercise of voting rights, together with the person concerned, and the "specially related person" is someone who possesses the number of stocks less than 1,000, or (3) he presents evidence that he is not a person in concert; he shall not be regarded as a specially related person in the application of the tender offer.¹¹ Thus, in order to be a "person acting in concert" under the KSEA, a person must jointly acquire or dispose of stocks through an agreement or contract with a tender offeror, or make an agreement with a tender offeror to exercise the voting right or right in concert.¹²

The notion of "specially related persons" is much broader than the notion of the "persons acting in concert" under the KSEA. Therefore, there might be a situation in which a specially related person, who may not realize he is a specially related person because the scope of the specially related person is so broad, violates the tender offer regulation without his notice. In order to make the scope of the tender offer clearer, regulators should unite the notion of the "specially related person" with the notion of the "persons acting in concert."

A person who intends to purpose a tender offer should file the tender offer statement with the Financial Supervisory Commission (FSC), one of the main government bodies regulating securities in Korea. The tender offer statement, which is subject to a form prescribed by the FSC, should contain

10. See Korean Securities and Exchange Act, art. 21(1); Enforcement Decree of the Korean Securities and Exchange Act, arts.10-3, 10-3(2), & 10-3(4).

11. See Enforcement Decree of the Korean Securities and Exchange Act, arts. 10-3(3) & 10-3(4).

12. See Jong-Joon Song, *The Legal Principal of Compulsory Tender Offer and Future Legal Problems*, 76 HANKUK BUBHAK WONBO 11 (1997).

the purpose of the tender offer, details of funds for purchase, conditions such as period, price and settlement day of purchase, and other matters.¹³ The tender offer goes into effect ten days after the date on which the tender offer statement has been filed.¹⁴ The objective of the ten day waiting period is to allow sufficient time for investors to avoid making a hasty decision to sell. However, the ten days waiting period can also cause some unreasonable results such as dangerous of insider trading. Therefore, to fulfill the purpose of the tender offer, the waiting period may not be necessary.

Note that the tender offeror does not have a duty to purchase all the stocks stated in the tender offer statement when the tender offeror publicly notifies conditions. In that case, the conditions should be written in the tender offer statement, and should be publicly announced at the time of public notice of commencement of tender offer.¹⁵ What about not purchasing the securities at all after the public notice of the tender offer? If the tender offeror has the ability to cancel the tender offer without any restriction after the disclosure of the tender offer, it may cause confusion not only to the target company but also to the securities market. Therefore, basically, a tender offeror may not withdraw a tender offer after it has been made, while the tendering stockholder who accepts an offer to buy stocks may cancel such a subscription at any time during the tender offer.¹⁶

If someone intends to acquire voting stocks through purchase outside the securities market during the specific period, he shall acquire the stocks through the method of the tender offer.¹⁷ Here, the period in which to apply the tender offer is a six month period from the date on which the purchase of the stocks is conducted.¹⁸ The purpose of setting up a six month period may be to provide transparency for transactions made to gain a controlling interest, thereby restraining a large volume of securities transactions traded without sufficient information to the shareholders.¹⁹ However, in the real world, even though the shareholders or investors of a target company would like to have

13. See Korean Securities and Exchange Act, art. 21-2(1).

14. See Korean Securities and Exchange Act, arts. 21-2 & 23(1)

15. See Enforcement Decree of the Korean Securities and Exchange Act, art. 13-2.

16. See Korean Securities and Exchange Act, arts. 24-2(1) & 24-2(3).

17. See Korean Securities and Exchange Act, art. 21(1).

18. See Enforcement Decree of the Korean Securities and Exchange Act, art. 10-2(1).

19. See YOUNG-MOO SHIN, SECURITIES AND EXCHANGE ACT 386 (1989).

sufficient time to a make decisions on the tender offer, the six month period is too long to secure the objectives of the tender offer. Thus, since the six month period of the tender offer is unreasonable to keep up with the function of a capital market, it should reasonably be revised, or abolished.

Under the KSEA, the applicable securities of the tender offer should be the securities issued by a listed corporation. Alternatively, they should be a corporation registered with the KSDA, those securities which are related to voting stocks, such as stock certificates, a certificate representing preemptive rights, convertible bonds, certificates of bonds with warrants, and certificates of exchangeable bonds belong to the scope of applicable securities.²⁰

Then, how to calculate the five percent of the possessed securities? Since the potential securities are included in the applicable securities of the tender offer in addition to the class of securities that have voting rights, the way to calculate is very complicated. Moreover, variety of the applicable securities is unreasonable not only because of the complicated calculation, but also because of the fact that convertible bonds and certificates of bonds with warrants, including preferred stocks, those which are issued for a corporation's capital increment by a corporation itself, are included in the applicable securities of the tender offer. The complicated calculation of the rate can cause the unexpected exceeding rate of the possessed securities. Thus, there may be unforeseen burdens placed on the tender offeror that would impede the free securities transaction. Hence, the applicable securities of the tender offer in Korea need to be limited on the securities themselves, which have the voting rights to secure the free securities transaction in Korea.

As seen the above, if anyone, including a specially connected person, who possesses five percent of stocks, and intends to acquire voting stocks through purchase from more than ten stockholders of the target company outside the securities market during the six months period, must acquire the stocks through the method of the tender offer.

Generally, acquisition of five percent of the total issued shares may not be important information affecting corporate management. However, since it may seriously affect the market situation in terms of supply and demand, this information is

20. See Enforcement Decree of the Korean Securities and Exchange Act, art. 10. Those stocks will be referred as "potential stocks" throughout this Article.

considered important market information for investors. Furthermore, it might threaten the management rights of the existing management or affect the management rights. Therefore, companies must disclose such information, and the tender offer shall be forced when the total number of securities after the purchase outside the securities market during the tender offer period is five percent or more of the total number of the target company's stocks.²¹ Note that the five percent refers to the percentile of holding stocks that the tender offeror will possess after the purchase of the stocks, including the already held securities and newly purchased securities.²² Also, the number of ten or more persons is an essential element of the mandatory tender offer, and the legislators, perhaps, have judged that there is no need to protect shareholders through the tender offer if the number of persons is less than ten.²³

Therefore, when someone possesses none of the target company's stock, did not purchase any of the target company's stock during the tender offer period, but purchased five percent of the target company's stocks from the ten shareholders just before ending the period, the tender offer is mandatory. When someone possesses no stock of the target company before the tender offer period, purchases three percent of the target company's stocks from six shareholders, and then he purchases an additional five percent of the target company's stocks from three shareholders just before ending the period, the tender offer is not mandatory because he did not purchased stocks from more than ten shareholders of the target company. In addition, the KSEA provides the notion of the "equivalent-to-ownership" securities, which do not belong to the tender offeror, but belong to the notion of the number of five percent.²⁴ Namely, when the specially connected persons have the "equivalent to ownership," his possessed securities are included in the number of five percent of the total stocks.

21. See Korean Securities and Exchange Act, art. 21(1).

22. The Williams Act in the United States also provides the five percent rule, and the KSEA clarified the meaning of five percent of the Securities Exchange Act §13(d)(1). See 15 U.S.C. 78m(d)(1) (1988).

23. See KON-SIK KIM, TENDER OFFER SYSTEM UNDER THE REVISED SECURITIES AND EXCHANGE ACT 32 (1997). Also see Jong-Joon Song, *supra* note 12, at 13.

24. See Korean Securities and Exchange Act, art. 21(1); Enforcement Decree of the Korean Securities and Exchange Act, art. 10-4. The meaning of "the equivalent to ownership" is introduced from the notion of "beneficial ownership" of the United States securities laws. See Jong-Joon Song, *Major Securities Purchase's duty to Disclose under the United States Securities and Exchange Act*, 5 CHOONGBUK UNIV. L REV, 211 (1993).

However, since the KSEA added the notion of a “beneficial ownership” as the “equivalent-to-ownership,” to calculate the number of securities, the notion of ownership is much expanded, causing complicated calculations of the number of the possessed securities of the tender offer that will be seen in the next Section. Thus, the KSEA needs to more clearly regulate the notion of the “equivalent-to-ownership.”²⁵

II. THE TENDER OFFER DUTIES

In general, the corporate disclosure system forming the core of the securities market information is a system intended to accurately provide investors with important corporate information on the company’s past, present and future management and financial status, including future project plan. The objective of disclosure is to help investors make rational investment judgment, ensuring fair practice at the securities market. To enable investors to make rational investment judgment, the KSEA and Korean Commercial Act (KCA) ensure a disclosure system, prescribing a basic corporate disclosure system through the KCA.²⁶

In order to protect investors who are faced with a tender offer, the tender offeror must disclose the complete and just information on the tender offer for helping investors make their investment decision. Under the KSEA, the tender offeror must file a tender offer statement with the FSC.²⁷ The tender offer statement shall contain accurate and particular information, such as the purpose of the tender offer, details of funds for purchase, conditions such as period, price and settlement day of purchase, and so forth.²⁸ The KSEA restrictively enumerates some material information.²⁹ At the same time, the tender offer

25. The SEC Rule 13d-3, which is as a mother regulation of the “equivalent-to-ownership” in Korea, shows the determination of the beneficial owner very clearly. See SEC Rule 13d-3, 17 C.F.R. 240.13d-3(a)-(c).

26. See Korean Commercial Act, arts. 373 (Minutes of general Meeting); 412-2 (Director’s Duty to report); 414 (Auditor’s Liability); 449 (Approval and Public Notice of Financial Statements); & 466 (Shareholder’s right to inspect Accounting Books).

27. See Enforcement Decree of the Korean Securities and Exchange Act, art. 11-4(4).

28. See Korean Securities and Exchange Act, art. 21-2(1). For more information about “other matters” see the Enforcement Decree of the Korean Securities and Exchange Act, art. 11-4(3).

29. See Enforcement Decree of the Korean Securities and Exchange Act, art. 11-4(2). In addition, for the importance of the information to be disclosed, the KSEA urges the tender offeror to accompany the additional documents. See Enforcement

statement shall be submitted to the FSC for an inspection of possible falseness, and shall be submitted to the target company for the existing majority stockholders' interest and the interests of the company itself. All these duties to submit the tender offer statement are to promote the transparency of the tender offer.

The tender offeror can freely change the conditions of the tender offer, but the KSEA prohibits modifying conditions, unfavorable to the tendering stockholders, to protect investors. The prohibited unfavorable modifications are reduction of purchase price, and a decrease in the number of stocks, which are intended to be purchase, extension of payment period, purchase amount, reduction of the period of the tender offer, alteration of the type of consideration to be paid to the tendering stockholder, and other cases prescribed by the FSC as the modification of tender offer which is unfavorable to the tendering stockholders.³⁰ As a result, the KSEA prohibits only conditions unfavorable to the tendering stockholders. Thus, the modifications that are favorable to the tendering stockholders, could be carried out at any time for the investor's benefit.

However, the FSC may issue an order to amend the tender offer statement when the statement is incomplete in its form or inadequate in any material information required to be stated therein.³¹ In the case where an order is issued, the tender offer statement shall not be construed as received by the FSC after the date on which the order is issued.³² So, the tender offer will go into effect when ten days have passed from the date on which the amendment statement is filed.³³ The amendment statement order is issued only by the Commission's decision, and the KSEA does not provide the FSC's responsibility for the abuse of an order to amend a statement. Thus, a provision related to the FSC's order to amend a statement should be established by the KSEA to prevent the FSC's arbitrary abuse of an amendment order. Especially, the scope of the information, which should be stated in the tender offer statement, is so numerous and complicated under the KSEA, that it should be, at least, limited

Decree of the Korean Securities and Exchange Act, art. 11-4(3).

30. See Korean Securities and Exchange Act, art. 23-2; Enforcement Decree of the Korean Securities and Exchange Act, art. 12-6.

31. See Korean Securities and Exchange Act, arts. 23-2(2); Enforcement Decree of the Korean Securities and Exchange Act, art. 11(1).

32. See Enforcement Decree of the Korean Securities and Exchange Act, art. 11(2).

33. See Korean Securities and Exchange Act, art. 23(1); Enforcement Decree of the Korean Securities and Exchange Act, art. 11(5).

items, and the details should be mandated to the FSC.

The tender offer regulations should guarantee the secure and fair disclosure of the tender offer information in order to protect investors' benefits through forcing a tender offeror and a target company to disclose all the information related to the tender offer. Especially in case of a hostile tender offer, the presentation of a target company's opinion, such as approval, objection, or neutrality, is very important for investors to make their investment decision. Nevertheless, while the KSEA provides the tender offeror's duty to disclose information,³⁴ it does not prescribe the target company's duty to disclose information, even though the information is material to the tendering stockholders' investment decision. On the contrary, the target company has only the right to present its opinion on the tender offer instead of having a duty to disclose information related to the tender offer.³⁵ When the target company exercises the right to present its opinion, the issuer should file a written statement describing the contents of such opinion without delay with the FSC and the KSE or the KSDA, but there is not a specific scope of the opinion prescribed.³⁶ Thus, in order to impose a duty to disclose on a target company, the KCA, as it relates to the director's liability to the company, can be used to interpret the target company's duty to disclose information instead of the KSEA.³⁷ Consequently, even though the KSEA does not require the target company to disclose information, the target company's board of directors should positively present its opinion, or disclose the information related to the tender offer in order to protect its shareholders under the general director's duty to the company under the KCA.³⁸ When the target company presents its opinion, the target company should immediately submit a written statement describing the opinion on the tender offer with the FSC and the KSE or the Association.³⁹ In this case, the issuer of stocks may present his opinion by means of advertisement, correspondence or other document in order to raise the transparency of the tender

34. See Enforcement Decree of the Korean Securities and Exchange Act, art. 11-4(2).

35. See Korean Securities and Exchange Act, art. 25.

36. See *id.*; Enforcement Decree of the Korean Securities and Exchange Act, art. 13.

37. See Korean Commercial Act, arts. 399(1)-(3).

38. See *id.*

39. See Korean Securities and Exchange Act, art. 25.

offer.⁴⁰ In addition, as long as the target company keeps silent with relation to the undisclosed information, there is no way to disclose the information. Thus, the target company's right to present an opinion must be a duty and not a right, contrasts with the tender offeror's duty to disclose information for the investor's protection.

III. SUGGESTIONS TO MAKE KOREAN LAWS COMPLY WITH THE TREND OF INTERNATIONALIZATION

Traditionally, the hostile take over is not reasonably estimated by a corporate climate and the public opinion in Korea. Actually, the Korean economy has been composed of some limited large family-run corporations, so called "*Chaebols*," which have operated in every industry, from the agriculture to media corporations. For instance, four big *Chaebols* have taken over forty-seven percent of the total sales and more than half of exports. In the past, *Chaebols* had contributed to the outstanding economic growth of Korea. It is true that the Korean government and *Chaebols* have been in companionship for a long time with respect to rapid economic development. However, since the philosophy of *Chaebols* has been to create wealth for their family, and they do not want to lose their vested rights in the Korean market, this side effect of the Korean economy had been occurred as the feature of economic crisis in late 1997.

Since the economic crisis, the government has tried to make the Korean capital market fit with the standard of the international capital market. In the beginning of 1998, the government amended the foreign stock exchange regulations, and released a new policy for free foreign exchange and foreign investment such as relaxation of the limitations on foreign ownership of equity. As a result of a series of opening the financial market to foreign countries abolishing or amending some restrictions on foreign investments and introducing new securities market systems, foreign investors are treated similarly, as domestic residents under the certain circumstances. Thus, it is expected that changes in the Korean securities market will contribute to improving the Korean economy with the government's endeavor to keep up with the

40. See Enforcement Decree of the Korean Securities and Exchange Act, art. 13.

world securities market's internationalization. Furthermore, as information that is more detailed becomes available to public investors, efficiency of accessing information in the securities market will be enhanced. On the contrary, it is also expected that the domestic investors face with a flood of opportunities to invest in foreign securities, thus, the government also needs to enhance vehicles for an investor protection from "not-knowing foreign companies" as well.

However, in spite of the some amendments, the tender offer regulation under the KSEA is still very complicated, especially the provisions related to the applicable securities and to the calculation and the disclosure requirement provisions. In order to enhance the role of the tender offer, to protect the investors' benefits, and to create a free market order against a high corporate competition under the new trend, the tender offer regulation under the KSEA should be amended.

In order to prevent an abuse of the tender offer, such as acquiring a controlling power through a sudden tender offer, the KSEA provides the clear meaning of the tender offer. However, as for the scope of the tender offeror, the meaning of "specially related persons" is not clear. Thus, these pieces of legislation about the scope of the tender offeror indirectly cause confusion to the tender offer mechanism in securities transactions in Korea. Consequently, it is reasonable to suggest that the scope of the "specially related persons" should be abolished, and the meaning of the "persons acting in concert" should be concretely described as it is in the United States.

The scope of applicable securities of the tender offer includes the potential securities, such as stock certificates, a certificate representing preemptive rights, convertible bonds, and certificates of exchangeable bonds. Since these securities do not have voting rights at the moment of the tender offer, but they will acquire voting rights sometime in the future, adding these potential securities to the scope of applicable securities might impose a heavy burden on the tender offeror. In addition, the complicated scope of the securities severely complicates calculations of the possessed securities rate. As a result, potential securities, such as a certificate representing preemptive rights, convertible bonds, certificates of bonds with warrant, and certificates of exchangeable bonds, should be excluded from the scope of the applicable securities.

In case of a hostile tender offer, the target company's opinion, whether it is approval, dissent, or neutrality, is very

important to investors for making investment decisions. Especially, the presentation of a dissenting opinion about the tender offer can be very effective action for a target company's defense. Therefore, the KSEA provides the target company's right to present its opinion. Namely, the target company is not duty-bound to disclose information, but has the right to present an opinion about the tender offer.⁴¹ Thus, this right to present its opinion on the tender offer may depend on the director's discretion.

Since there is no provision about the target company's duty to disclose the information, it is needed to apply with the director's duty to the company under the KCA,⁴² which needs to be enhanced to cover the target company's duty to disclose the information. Yet, the better way is to impose the target company's duty to disclose information on the KSEA for the investor's protection. Thus, it is desirable that the presentation of opinion should be a duty, not a right, in order to protect investors. In addition, due to the importance of the presentation of the target company's opinion, the contents of the opinion are also very important to investors. Therefore, the contents of the opinion should be concrete and detailed. Yet, the KSEA provides that "the important matters shall not be omitted, and the contents shall be such that no misunderstanding may be caused therefrom,"⁴³ which can be interpreted many different ways from different perspectives. In conclusion, the KSEA should provide the target company's duty to disclose information, and prescribe the scope of information in detail as well.

The restricted period on exercising voting rights extends from the date on which the stocks concerned are purchased to six months after disposal of the stocks.⁴⁴ According to the language of the Act,⁴⁵ when the purchaser who is ordered by the FSC to dispose of the stocks sells the stocks to the third party, the third party also may not exercise voting rights for six months from the date after the purchase of the stocks. Thus, it should be effective until the expiration of the tenth day from the date of the filing of the statement because, from that day, the

41. See Korean Securities and Exchange Act, art. 25

42. See Korean Commercial Act, arts. 399(1)-(3).

43. See Enforcement Decree of the Korean Securities and Exchange Act, art. 13.

44. See Enforcement Decree of the Korean Securities and Exchange Act, art. 12.

45. See *id.*

tender offeror can legally purchase the securities through the tender offer.⁴⁶ Moreover, in order to ensure and enhance the free securities transaction, the restriction on the voting rights of the third party should be revised or abolished.

Since the Korean economy urgently needed foreign currencies just after the Korean economic crisis at the end of 1997, the government intentionally forwarded the Korean securities market to the trend of world securities market's internationalization. As part of the government's endeavor to open the Korean securities market to the new trend, the tender offer system was tremendously amended to induce foreign investment funds. However, if a domestic economy is not stable and various related laws and regulations are not improved in such a way to meet the realistic needs of current securities market practices, the internationalization may cause many problems for the domestic investor's protection. Especially, the securities market's internationalization needs each nation's unaffected and spontaneous participation to the new trend in order to be globally well formed.

In case of the Korean's participation to the new trend, the securities market's internationalization, it was not spontaneously initiated by the corporations, which form the Korean economy, but was forced into existence by the government's imminent plans. As a result, legislators of the Korean tender offer regulation have not had enough time to consider every legal factor and practical matters of the tender offer in the Korean securities market. Therefore, the tender offer regulation under the KSEA should be carefully reconsidered to ensure the secure and fair securities transactions in the Korean securities market, and to enhance the role of the tender offer, protect the investors' benefits and create a free market order against a high corporate competition under the pressure of the trend of the world securities market's internationalization.

46. See Korean Securities and Exchange Act, art. 23; Enforcement Decree of the Korean Securities and Exchange Act, art. 11-5.

