PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 19
Issue 3 *Symposium: Current Issues in Securities Regulation*

Article 4

4-15-1992

Regulatory Conflicts: International Tender and Exchange Offers in the 1990s

John C. Maguire

Follow this and additional works at: https://digitalcommons.pepperdine.edu/plr

Part of the Banking and Finance Law Commons, Business Organizations Law Commons, Comparative and Foreign Law Commons, Conflict of Laws Commons, International Law Commons, International Trade Law Commons, Jurisdiction Commons, Law and Economics Commons, Legislation Commons, Secured Transactions Commons, and the Securities Law Commons

Recommended Citation
John C. Maguire *Regulatory Conflicts: International Tender and Exchange Offers in the 1990s*, 19 Pepp. L. Rev. Iss. 3 (1992)
Available at: https://digitalcommons.pepperdine.edu/plr/vol19/iss3/4

This Symposium is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Regulatory Conflicts: International Tender and Exchange Offers in the 1990s

John C. Maguire*

I. INTRODUCTION

The beginning of the final decade of this century has seen tremendous changes not only in terms of the world political environment, but also in the developing international environment in which the U.S. capital markets operate.

For the past several years, the term "internationalization of the securities markets" has probably been one of the most publicized and discussed financial trends in the United States. During this time the internationalization of the securities markets have been driven by a number of factors. For instance, corporations sought to enter markets outside their state of incorporation or home country to compete in a global marketplace, to increase market share, revenues and profits. The most important factor, technological advances, has also provided a major thrust towards internationalization.[1] With technological advances, corporations have sought to increase their presence in foreign markets, and investors, whether individuals or institutions, have become acutely aware of and interested in acquiring the securities of the most profitable enterprises in order to diversify their own portfolio investments.

---

* Pepperdine University School of Law, J.D. (1988); LL.M in Securities Regulation (1991), Georgetown University Law Center. I would like to thank David Sirignano and Joseph Price for their help and insightful comments on an earlier draft of this article. I also would like to thank Patti, Patrick and Colin for their patience and understanding. The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author's colleagues upon the staff of the Commission.

1. Morck and Yeung, *Why Investors Value Multinationality*, 64 J. OF BUS. 165 (1991).

In many respects, the issues raised by the internationalization of the world's securities markets are the same for every market, regardless of size, complexity or volume. A markets supervisory, oversight and enforcement regulations, clearance and settlement systems, capital standards, and most important for purposes of this article, disclosure and financial reporting requirements should be fundamental aspects of every market. Although the standards for governing these elementary requirements arise in different contexts, both established and emerging markets face many of the same questions: What trading, clearance and settlement systems and reporting requirements will work most efficiently on a national and international foundation? What information should a bidder or issuer be required to disclose? What are the common prerequisites that must exist in order to facilitate international transactions, i.e., tender and exchange offers between issuers of different countries?

Both established and emerging markets also face broader questions as well. The most important question for our purposes, though, is: How much or how little governmental regulation is appropriate or politically feasible with respect to the facilitation of international tender and exchange offers.

In their quest for world dominance, corporations have used tender offers, whether friendly or hostile, as the predominant method for acquiring control of a corporation.[2] Since the financial stakes in an acquisition or takeover can be extremely high, the motivation to cultivate sophisticated offensive or defensive strategies becomes increasingly important. Such strategies may involve corporations attempting to increase their ability to control the outcome of an acquisition within the framework of applicable regulation.[3] One such defense that may be utilized in the future is a target company attempting to exploit its international shareholder base to defend against a hostile offer by invoking the takeover rules and regulations of more than one jurisdiction.

This article first briefly surveys the development of the international shareholder base of target corporations, the increased acquisitions and takeovers by foreign corporations in the United States and elsewhere, and the exclusion of U.S. securityholders from many of these international transactions in order to avoid what is perceived as the most burdensome regulator. It then describes the United States

2. Johnson & Millon, *Misreading the Williams Act*, 87 MICH. L. REV. 1862, 1864 (1989) (cash premium made to securityholders is the most efficient manner of acquiring a target company's shares, and proxy contests can also be used as a method of acquiring securities, but it is rarely used in the United States). *But cf.* Gavin, *Proxy Contests Emerge, Supplant Tender Offers in Seeking Corporate Change*, 204 N.Y.L.J. 7 (October 9, 1990).

3. *See* 1 M. LIPTON & E. STEINBERGER, TAKEOVERS & FREEZEOUTS § 1.01 (1991).

Securities and Exchange Commission's (the "Commission's") experience in attempting to facilitate the inclusion of U.S. securityholders in these international transactions. Included, is an analysis of the rules and regulations relating to such transactions by using the United States' Williams Act[4] and the United Kingdom's City Code on Takeovers and Mergers (the "City Code").[5]

Similar to the United States, foreign countries are now addressing the fundamental questions of whether and how to control the various interests involved in a transaction for control of a corporation.[6] Historically, most corporate control transactions of publicly held companies occurred in the United States and the United Kingdom, essentially as the result of their highly sophisticated and well-developed capital markets which can provide a purchaser with the source of funds necessary to institute and complete a takeover.[7] In addition, these countries have no significant constraints or barriers on the transfer of wealth.[8]

A. *Background*

The last decade, more than any other time in the world's economic and financial history, has seen an explosive and dramatic growth in the internationalization of the world's securities markets. Securities markets around the world have become increasingly global as foreign issuers expand their use of the U.S. capital markets, domestic issuers increase their access to foreign markets, and tender and exchange of-

4. The Securities-Corporate Equity Ownership-Disclosure (Williams) Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)-(e) and 78n(d)-(f) (1970)) (enacted in 1968 and amended in 1970, added sections 13(d), 13(e), 14(d), 14(e) and 14(f) to the Securities Exchange Act of 1934).

5. THE CITY CODE ON TAKE-OVERS AND MERGERS (1990) 2 Fin. Serv. Rep. (CCH Ltd).

6. *See* Proposal for a Thirteenth Council Directive on Company Law concerning takeovers and other general bids, 22 December 1988 (adoption by the EC Commission 19 January 1989), COM (88) 823 final—SYN 186 (Feb. 16, 1989), 14 O.J. Eur. Comm. (1989); Amended Proposal of 10 September 1990, COM (90) 416 final—SYN 186, 26 O.J. Eur. Comm. (1990) [hereinafter *EC Proposal*].

7. *See* 3C H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 15.05 (rev. 1989) (comparing the activity and size of various worldwide national markets).

8. *Id.*; *see also* Basaldua, *Towards the Harmonization of EC Member States' Regulations on Takeover Bids: The Proposal for a Thirteenth Council Directive on Company Law*, 9 NW. J. INT'L L. & BUS. 487, 492 (1989) (discussing the significant number of takeovers that occur in the United Kingdom as a result of the open and developed nature of their capital markets); Merril Stevenson, *The Shot Heard Round Europe*, THE ECONOMIST, Dec. 16, 1989 (In the Balance: A Survey of Europe's Capital Markets) at 10, col. 1 (revealing that the United Kingdom's capital markets are preeminent in Europe).

fers are made internationally. While at one time it was possible to discuss the U.S. capital markets from a predominately domestic vantage point, this really is no longer possible. And although the U.S. financial community would like to believe that the U.S. capital markets remain the largest, fairest and most innovative in the world, we must now recognize the driving force of international trends in the financial industry. For example, in FY 1990, 33 tender offers worth approximately $18 billion were commenced by foreign bidders in the United States[9] for securities of issuers registered with the Commission under the Securities Exchange Act of 1934 (the "Exchange Act").[10] U.S. investors purchased $130.9 billion in foreign equities in 1990, a more than ten-fold increase over 1980.[11] For the first nine months of 1991, U.S. investors made total net purchases of $25.3 billion.[12] This amount is nearly double the previous record of $13.1 billion set for all of 1989. With net purchases in the third quarter, U.S. investors have extended their succession of adding to their overseas equity holdings to 13 consecutive quarters.[13] Aggregate holdings by U.S. persons of overseas stocks rose 40% to almost $125 billion from $89.4 billion at year end 1990.[14]

The prospect of a unified European market this year also has led to a significant amount of multinational investing and acquisitions within the European Community ("EC"). In 1991, EC companies made $51.9 billion in acquisitions of other EC companies. In the past a significant majority of this activity was focused on the United Kingdom, but other countries, such as France and Germany, have begun to increase their cross-border purchases versus prior years. For example, French companies in 1991 entered into 220 cross-border transactions worth $12.5 billion.[15]

As noted earlier, advancements in computer capabilities and telecommunications during the 1980's has permitted instantaneous international securities trading, made international securities markets accessible to a greater number of investors, and increased international trading volume and liquidity.[16] Much of this liquidity in the

9. INTERNATIONAL TENDER AND EXCHANGE OFFERS, 56 Fed. Reg. 27582, 27583 n. 13 (1991) [hereinafter *International Tender Offer Release*].

10. The Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 77a *et seq.*).

11. *See supra* note 9, at 27583.

12. Michael R. Sesit, *Americans' Purchases of Foreign Stocks Soared in First 9 Months of 91*, WALL ST. J., Feb. 3, 1992, at c11, col. 4. (Net purchases is defined as total purchases minus total sales.)

13. Wall Street Journal, Feb. 2, 1992, C11, col. 4.

14. *Id.*

15. Wall Street Journal, Jan. 13, 1992, A7A, col. 3.

16. *See, e.g.*, Mann & Mari, *Current Issues in International Securities Law Enforcement*, in A.B.A., THE SECTION OF INTERNATIONAL LAW AND PRACTICE AND THE SECTION OF BUSINESS LAW AND THE DIVISION FOR PROFESSIONAL EDUCATION PRESENT

United States during the 1980s was a result of foreign investment in the U.S.

The Commission in the past has approached international regulatory issues by attempting to encourage and accommodate initiatives by U.S. market participants and by working with foreign regulatory counterparts, both on a bilateral basis and in various international forums.[17] As the Commission has participated in these cooperative efforts with regulators from other countries, it has become increasingly clear that the decisions regulators make for their own markets will significantly affect other world markets.

The critical interests implicated for policy makers in dealing with the internationalization of the world's securities markets has been summarized by one securities expert as follows:

> The growth in the number of international [securities] transactions has been overwhelming .... Existing regulations, designed to maintain the integrity of the national markets, are being stretched beyond their boundaries in an effort to apply to the plethora of complex international securities transactions .... This globalization of the securities markets only serves to magnify the need for cooperation among securities regulators.[18]

B. *The Nature of the Problem*

With the globalization of the world's economies and securities markets, the potential for international fraud and illegal or criminal behavior is heightened. The enforcement of laws against international insider trading has become a top priority in the United States. In 1988, Congress passed the Insider Trading and Securities Fraud Enforcement Act of 1988,[19] for the purpose of preventing the "ever-increasing incidence of insider trading violations carried on through off-shore entities."[20] One Congressional report went so far as to state that, "[w]hen fraudulent trading from abroad is not comprehensively investigated and prosecuted, the integrity of U.S. equity markets is threatened, all investors are put at risk and a tougher standard of prosecution for domestic traders is created."[21]

The Commission recognizes that conflicting regulation of interna-

---

INTERNATIONAL SECURITIES TRANSACTIONS 51, 57 (1989); *see also* Sterngold, *Redrawing the Financial Map: U.S. Firms Look Abroad*, N.Y. Times, April 1, 1986, at D1, col.3.

17. *See infra* note 22 and accompanying text.

18. H. BLOOMENTHAL, EMERGING TRENDS IN SECURITIES LAW 10-1 (1989 ed.).

19. Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (1988) (codified at 15 U.S.C. § 78 (1988)).

20. HOUSE COMM. ON ENERGY AND COMMERCE, INSIDER TRADING AND SECURITIES FRAUD ENFORCEMENT ACT OF 1988, H.R. Rep. No. 910, 100th Cong., 2d Sess. 28 (1988).

21. HOUSE COMM. ON GOVERNMENT OPERATIONS, PROBLEMS WITH THE SEC'S EN-

tional tender and exchange offers is a significant and increasing problem.[22] As noted above, as corporations become international in their operations and marketing, their securityholder base in many instances has also become international in stature. A result of the globalization of the capital markets and the desire to expand into foreign markets is an increase in corporate acquisitions in order to accomplish the desired penetration into the foreign market. However, by penetrating a foreign market in this manner, a corporation necessarily implicates the laws of more than one country because of its international shareholder base and the foreign domicile of the potential target corporation.

At the core of the problem is the nature and degree of the legal protection that should be afforded to securityholders in international tender and exchange offers. For most of the 20th century, international security regulation, in general, has been perceived by U.S. market participants as offering a different and less desirable form of protection due to a perceived lack of quality. While the United States has favored regulation emphasizing rules governing the securities distribution, trading processes and disclosure,[23] most other countries, especially those in Western Europe, endorsed rules regulating the organization of corporations.[24]

Securities regulation by the various international regulatory authorities in the 1990s and beyond, will turn on the answers to two significant questions. First, how much and how quickly should the U.S. regulatory system change in response to the significant cross-border capital movements and the economic integration going on throughout the world. And second, with regard to regulating international capital movements and international transactions such as tender and exchange offers, what should the appropriate legal standards be, "national treatment," "reciprocity" or some other treatment.

FORCEMENT OF U.S. SECURITIES LAWS IN CASES INVOLVING SUSPICIOUS TRADES ORIGINATING FROM ABROAD, H.R. Rep. No. 1065, 100th Cong., 2d Sess. 2 (1988).

22. *International Tender Offer Release, supra* note 9; *Concept Release on Multinational Tender and Exchange Offers*, 55 Fed. Reg. 23751 (June 12, 1990); *See also, Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers*, 56 Fed. Reg. 30036 (July 1, 1991) [*MJDS Adopting Release*]; *Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canada*, 55 Fed. Reg. 46288 (November 2, 1990) [*MJDS Reproposal*]; and *Multijurisdictional Disclosure*, 54 Fed. Reg. 32226 (August 4, 1989) [*MJDS Original Proposal*].

23. Comment, *Does The European Community Have A Fatal Attraction For Hostile Takeovers? A Comparison Of The European Commission's Proposed Directive On Takeover Bids And The United States Experience*, 47 WASH. & LEE L. REV. 663 (1990).

24. *Id. But cf.* 3 COMMON MKT. REP. (CCH) p.60125 (June 1989) (discussing directives that the EC community has implemented under Article 54 of the European Economic Community Treaty to regulate mergers and acquisitions).

C. *Extraterritoriality—Jurisdiction—The Williams Act*

Securities regulation in the United States is conducted under laws adopted in the early 1930s with only minor amendment since. Historically, the U.S. capital markets have been viewed as self-contained and dominant, a view that today ignores reality. However, this historical view fostered a belief that U.S. investors, where ever they may be, need the protection afforded by the federal securities laws. With this in mind, the starting point for any discussion on international tender and exchange offers, is extraterritoriality and jurisdiction of the federal securities laws.

The U.S. courts, and specifically the Commission, have frequently been subject to criticism for their extraterritorial exercises of jurisdiction in the fields of antitrust, export controls, law enforcement, and the federal securities laws.[25] The extraterritorial application of jurisdiction can escalate into serious diplomatic conflicts[26] or pit a U.S. agency, the Commission, against the international banking community and what was believed to be well-established international banking law.[27] In addition, the Commission and other regulatory authorities who seek the extraterritorial assertion of its statutes will, it is anticipated, in the future more frequently come into conflict with other regulatory authorities around the world. As foreign countries either adopt or revise their regulations governing tender and exchange offers, such conflicts will inevitably occur unless the various regulatory authorities seek to implement cooperative regulation.

1. Jurisdiction Generally

The U.S. Supreme Court long ago determined that international law applies to the exercise of jurisdiction by the United States, partic-

25. Note, *SEC v. Standard Chartered Bank: Maintaining the Integrity of U.S. Capital Markets or Extraterritoriality Run Rampant?*, 22 LAW AND POL'Y IN INT'L BUS. 159 (1991) [hereinafter *Standard Chartered*] (stating that the Commission's position on the scope of the extraterritoriality of the federal securities laws in the context of this case was insupportable under international law). *See also*, Small, *Managing Extraterritorial Jurisdiction Problems: The United States Government Approach*, 50 LAW & CONTEMP. PROBS. 283 (1987) (providing a broad overview of extraterritorial conflicts and the U.S. Government's evolving attitudes towards extraterritoriality); Comment, *Extraterritorial Application of Securities Regulations: Territorialism in the Wake of the October 1987 Market Crash*, 1 TRANSNAT'L. LAW. 307 (1988).

26. Small, *supra* note 25 at 285-286 (discussing the controversy that arose when the United States broadened its sanctions in 1981 against the Soviet Union's Yamal natural gas pipeline).

27. *Standard Chartered*, *supra* note 25 at 159.

ularly in matters affecting the interests of foreign countries.[28]

The territorial principle of jurisdiction provides that a state has the power to prescribe, adjudicate and enforce rules of law for conduct that occurs within its own territory (the "conduct test") or for conduct which occurs outside its territory but has effects within the territory (the "effects test").[29] Personal jurisdiction of a state over a foreign entity by reason of the entity's organization within that state, on the other hand, does not necessarily give the state general jurisdiction over the worldwide actions or assets of that entity.[30] Personal jurisdiction, though, should be measured by its reasonableness in light of various factors, such as the parties' "contacts and links" to the forum court and their "justified expectations."[31] Unless this was the case, international corporations would be subject to potentially multiple conflicting rules of law. However, the focus of this section is on subject matter jurisdiction and personal jurisdiction is assumed.

2. Jurisdiction and the Application of the Williams Act

The Securities Act and the Exchange Act provide the initial basis for subject matter jurisdiction. Although the statutes grant fairly broad jurisdiction, they do not give specific authority to U. S. federal courts to apply the federal securities laws to claims arising from extraterritorial transactions.[32] Section 27 of the Exchange Act[33] establishes exclusive jurisdiction over violations of that Act in the federal courts. However, Section 27 states that the provisions of that Act and the rules and regulations thereunder do not apply to any person who transacts business in securities outside the jurisdiction of the United States, unless the activity violates rules and regulations that have

28. The Paquete Habana, 175 U.S. 677 (1900). It is well established that international law is part of the law of the United States and that U.S. courts are bound to give effect to international law. *Id.* at 700.

29. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITES STATES §§ 402, 403, 421 (1987) [hereinafter RESTATEMENT (THIRD)].

30. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1957; Hanson v. Denckla, 357 U.S. 235 253 (1958); World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980); Burger King Corp. V. Rudzewicz, 471 U.S. 462, 474 (1985) and Asahi Metal Ind. Co., Ltd. v. Superior Court, 107 S. Ct. 1026 (1987). In personam jurisdiction is a critical element that needs to be established in any litigation brought in the United States, this article assumes that such standards would be met. The recent decision of *Asahi*, contains a lengthy discussion of foreign corporate contact with the United States relative to the stream of commerce standards used in establishing personal jurisdiction. An analysis of this particular issue might involve a myriad of problems associated with international offerings or activity associated with international trading that is beyond the scope of this article.

31. *See* RESTATEMENT (THIRD), *supra* note 29, at Introductory Note to Part IV, Ch. 1, subch. A.

32. Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 29-30 (D.C. Cir. 1987). In promulgating the Securities Act, Congress granted United States District Courts jurisdiction over violations of the Securities Act. 15 U.S.C. § 77v (1933 as amended).

33. 15 U.S.C. § 78a (1934 as amended).

been enacted by the Commission to protect the integrity of market regulations in general.

The apparent focus of Section 27 is to exempt foreign brokers, dealers or investors who trade securities of U.S. based corporations on foreign markets. In subsection (a) of the Section, the language is clearly directed to transactions involving U.S. based issuers on foreign exchanges. Subsection (b) specifically provides an exemption to such activity on foreign markets. A plain reading of the statute appears to support the inference that apprehension over foreign transactions should be confined to those transactions that affect U.S. investors.[34] Therefore, in the absence of provisions that would extend the reach of Commission rules and regulations, U.S. courts have consistently applied Section 30 of the Exchange Act as an exemption of foreign activity from the United States jurisdiction. If Sections 27 and 30 of the Exchange Act preclude extraterritorial application, how have U. S. courts found jurisdiction beyond the statutory language in the context of international transactions?

With respect to the Williams Act, and for that matter the antifraud concepts of the Exchange Act[35] as applied to an international tender offer, the Commission, itself, has stated that jurisdiction will depend upon the facts and circumstances of each transaction.[36] As noted above, U. S. courts have found jurisdiction over extraterritorial conduct, in general, by using two standards: the "conduct" test, under which jurisdiction is predicated on conduct occurring within the United States; and the "effects" test, under which jurisdiction is predicated upon acts causing significant and foreseeable effects within the United States, regardless of where the conduct occurred.[37] The U.S. courts have given a broad interpretation to the jurisdictional provisions of the Exchange Act[38] in order "to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the ef-

34. *Zoelsch*, 824 F.2d at 32.

35. Sections 10(b) and 14(e) of the Exchange Act [15 U.S.C. §§ 78j(b), 78n(e) (1988)] and rules and regulations thereunder.

36. INTERNATIONALIZATION OF THE SECURITIES MARKETS, *Report of the Staff of the U.S. Securities Exchange Commission to the Senate Comm. on Banking, Housing and Urban Affairs and the House Comm. on Energy and Commerce*, section VII-6 (July 27, 1987).

37. *See* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir.) *cert. dismissed*, 110 S. Ct. 29 (1989); IIT v. Cornfeld, 619 F.2d 909, 918 (2d Cir. 1980); Schoenbaum v. Firstbrook, 405 F.2d 200, 208-09 (2d Cir.), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969).

38. 17 C.F.R. § 240.30 (1991); 15 U.S.C. § 78dd (1988).

fects of improper foreign transactions in American Securities."[39] The Commission, however, has recognized that the jurisdictional reach of the Williams Act is not unlimited and cannot require that a foreign bidder extend its offer into the United States.[40]

In enacting the Williams Act,[41] the U.S. Congress amended certain discreet sections of the Exchange Act.[42] In promulgating the Williams Act, Congress' main focus was to enable a target corporation's shareholders sufficient time and adequate information about the offeror and the offeror's intentions so as to provide shareholders with the ability to make an informed investment decision regarding the bid.[43]

In adopting the Williams Act rules, the Commission has never stated that the nationality of the target company or the bidder is determinative of whether the Williams Act or the Commission's rules and regulations are applicable to a particular foreign transaction.[44] In fact, Sections 13(e) and 14(e) do not include provisions requiring that the offer be conducted through the use of the jurisdictional means. Such a broad interpretation of Sections 13(e) and 14(e) should not necessarily permit those statutory provisions to reach transactions that are overwhelmingly foreign in character. In principle, courts have generally stated that jurisdiction should not extend beyond that reasonably contemplated by Congress. For instance, the Second Circuit Court of Appeals stated in *Leasco Data Processing Equipment Corp. v. Maxwell*,[45] in the context of the extraterritorial application of the antifraud provisions of the Exchange Act, "it would be . . . erroneous to assume that the legislature always means to go to the full extent permitted" by a literal interpretation of the statute in question.[46]

In the context of the Securities Act of 1933,[47] the Commission has declined to exercise its regulatory authority and jurisdiction since 1964 with respect to a securities distribution that "is to be effected in

39. *Schoenbaum*, *supra* note 37, at 206.

40. *See* S.10839, 101st Cong., 1st Sess. (1989) (Letter from SEC Chairman David S. Ruder to Congressman Harold Rogers regarding Hoylake Investments, Ltd., a Bermuda company for B.A.T. Industries PLC, a British company). *See also Amendments to Tender Offer Rules: All-Holders and Best-Price*, 51 Fed. Reg. 25873 (1986).

41. The Williams Act, *supra* note 4.

42. *See* 15 U.S.C. §§ 78m(d)-((e), 78n(d)-(f) (1988).

43. *See* H.R. REP. NO. 1711, 90th Cong., 2d Sess. 3, 4 (1968) (explaining that the intention of the Williams Act amendments to the federal securities laws is to fill a regulatory "gap" in those laws) *reprinted* in 1968 U.S. CODE CONG. & ADMIN. NEWS 2812 [hereinafter HOUSE REPORT].

44. Goelzer, Mills, Gresham & Sullivan, *The Role of the U.S. Securities and Exchange Commission in Transnational Acquisitions*, 3 TRANSNAT'L. LAW. 615 (1988) [hereinafter Goelzer].

45. 468 F.2d 1326 (2d Cir. 1972).

46. *Id.* at 1334.

47. 15 U.S.C. § 77a *et seq.* (1988).

a manner abroad," even where the federal securities laws may have been triggered by the use of the "jurisdictional means" (*i.e.*, the offer or sale of a security involving the instrumentalities of interstate commerce or the U.S. mails).[48] In light of this, the need for a cautious interpretation of the scope of a statutory provision is particularly true with respect to regulatory provisions such as those embodied in the Williams Act and the Commission's rules governing tender offers. In order to clarify the extraterritorial reach of its rules with regard to the registration of securities, the Commission recently adopted Regulation S under the Securities Act.[49] In adopting Regulation S, the Commission has taken a territorial approach to the enforcement of Section 5 of the Securities Act.[50] The Commission in adopting Regulation S established a non-exclusive safe harbor for the offer, sale and resale of securities viewed as arising outside of the United States, thereby viewing such offers, sales or resales as not being subject to the registration requirements of the United States. However, it should be noted that the Commission in adopting the regulation stated emphatically that this territorial approach to the registration of securities will not affect the broad reach of the antifraud provisions of the federal securities laws.[51]

In this same context, the regulatory framework for the application of the Williams Act to international tender and exchange offers, which also were conceived primarily for domestic application, should be understood in a fashion similar to the Commission's policy expressed in Regulation S. Consequently, when a foreign corporation extends a tender offer for the shares of another foreign entity, the applicability of the Williams Act should turn on the extent to which the conduct in question occurs in or affects the United States or its investors. Thus, a foreign bidder should be permitted to avoid the application of the federal securities laws if, and only if, permitted by

48. Registration of Foreign Offerings by Domestic Issuers; Registration of Underwriters of Foreign Offerings as Broker-Dealers, 29 Fed. Reg. 9828 (1964); (Securities Act Release No. 4708 contained therein stated that the Commission would not take any enforcement action for the failure to register securities of a U.S. corporation distributed abroad solely to foreign nationals, if the distribution is effected in a manner that would result in the securities coming to rest abroad, even if the instrumentalities of interstate commerce are implicated).

49. Offshore Offers and Sales, 55 Fed. Reg. 18306 (1990) [Regulation S Adopting Release]; *see also* Offshore Offers and Sales, 54 Fed. Reg. 30063 (1989) [Regulation S Reproposing Release] and Offshore Offers and Sales, 53 Fed. Reg. 22661 (1988) [Regulation S Proposing Release].

50. Regulation S Proposing Release, supra note 49, at 22662.

51. *Id.*

the home jurisdiction, by tailoring the terms of the transaction to minimize its contacts with the United States.

II. FOREIGN RESPONSE TO THE APPLICATION OF THE WILLIAMS ACT

Where the number of U.S. holders of the foreign target corporation's securities are not substantial, foreign bidder's have attempted to avoid U.S. jurisdiction and the application of the federal securities law by minimizing their conduct in the United States concerning the offer by, for example, not mailing the offer into the United States, and by utilizing depository and transfer agents located outside the territorial boundaries of the United States. In *IIT v. Cornfeld*, the Court of Appeals for the Second Circuit held that there is "no reason to extend jurisdiction to cases where United States activities . . . are relatively small in comparison to those abroad."[52]

When a foreign entity makes a tender offer for the shares of another foreign entity, the application of the Williams Act should turn on the extent to which the conduct in question occurs in or affects the United States and its securityholders who hold the targeted shares. A former General Counsel for the Commission has stated that generally if a bidder, foreign or domestic, is careful to minimize its contacts with the United States in making its offer, by among other things, ensuring against distribution of tender offer material into the United States, or acceptance of securities tendered from within the United States, and by using depository and transfer agents located outside the United States, the offer should not be subject to the jurisdiction of the U.S. courts where U.S. securityholdings are inconsequential.[53] If this is true, then a domestic or foreign bidder purchasing shares of a foreign corporation that is not registered with the Commission, has few U.S. securityholders, and does not have securities listed on a national securities exchange or quoted on an interdealer quotation system, should not be concerned that the Williams Act will apply unless Section 14(e) and/or other antifraud provisions of the federal securities laws are deemed to encompass the transaction once the prescribed jurisdictional tests are met.[54]

In *Plessey Co. PLC v. General Elec. Co. PLC*,[55] the district court held that the Williams Act did not apply to an exchange offer by a British company for the securities of another British company, even though a class of the target corporation's securities were registered with the Commission and traded on the New York Stock Exchange.

52. 619 F.2d at 920 (citing Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 987 (2d Cir.)), *cert. denied*, 423 U.S. 1018 (1975).

53. Goelzer, *supra* note 44, at 621.

54. *Id.*

55. 628 F. Supp. 477 (D. Del. 1986).

In that offer, U.S. securityholders were expressly excluded from the tender offer and the transaction was structured in such a manner as to avoid the jurisdiction of the federal securities laws by prohibiting the mailing of materials into the United States and by permitting only the acceptance of shares tendered in envelopes postmarked from outside the United States. In addition, the American press were specifically excluded from press conferences and were not provided copies of the press releases. The court found this factor significant, even though the offer was immediately and widely reported in the U.S. press. However, of particular significance to the court was the predominately foreign nature of the offer (*i.e.*, only 1.6% of the target's potential voting shares were held by U.S. residents).

Foreign purchasers conducting a tender offer for the shares of another foreign corporation will often times provide foreign shareholders an election to receive either cash or securities of the acquiring corporation. On the other hand, U.S. purchasers will often conduct a cash tender offer for 51 percent of the outstanding shares to be followed by a registered exchange offer for the remaining securities of the target corporation, although cash elections are not uncommon. Foreign purchasers, though, restrict U.S. securityholders to receiving only cash, structuring the transaction in such a manner as to avoid the necessity of filing a Securities Act registration statement in the United States. Two questions arise when foreign purchasers attempt to structure the transaction in such a manner: (1) whether the offer to U.S. securityholders, even though limited to cash, constitutes an "offer to sell" securities within the meaning of Sections 2(3) and 5 of the Securities Act;[56] and (2) whether such a structure violates the provisions of Rule 14d-10 or 13e-4(f)(8) of the Exchange Act.[57] The staff of the Division of Corporation Finance at the Commission has previously stated that such a structure does not constitute an "offer to sell."[58] The staff's position appears predicated on the purchaser's representation that certain disclosures are included in the offering document sent to all securityholders to insure that the securities are not offered to U.S. securityholders and adequate safeguards are implemented to assure that no U.S. securityholders receive any of the

56. 15 U.S.C. §§ 77b(3), 77(e) (1988).

57. 17 C.F.R. §§ 240.14d-10, 240.13e-4(f)(8) (1991). *See also* Amendments to Tender Offer Rules: All-Holders and Best-Price, 51 Fed. Reg. 25873 (July 17, 1986) [hereinafter All-Holders and Best-Price Release].

58. Alberta Energy Co. Ltd. [1982-1983] Fed. Sec. L. Rep. (CCH) ¶ 77-335 (Feb. 23, 1983); Jamaica National Investment Company Ltd. (avail. November 29, 1979).

securities issued.[59] Counsel for the purchaser has also been required to represent that by taking the above safeguards, such a structure does not constitute an "offer to sell." This raises the question of whether such a structure violates the Commission's "All-Holders and Best-Price" rules. Attempts to provide U.S. securityholders with an alternative form of consideration are governed by these rules. The Commission in adopting the "All-Holders and Best-Price" rules stated that if sufficient conduct or effects occur in the United States, subjecting the offer to the Williams Act, any conditions that exclude shareholders in a particular country would violate the rules. On the other hand, the Commission also stated that the rules were not "intended to affect tender offers not otherwise subject to the Williams Act" and which "do not employ the jurisdictional means of the United States."[60] The Commission has, however, considered requests for exemptive relief from these provisions on a case-by-case basis, and on occasion, based upon specific facts and circumstances, granted exemptive relief.[61]

As a result, the application of the Williams Act to a tender offer for a foreign target corporation depends upon the facts and circumstances of each transaction.[62] The Commission recognized and em-

59. Generally, those safeguards include (1) a legend in bold-face type on the cover of the offering circular and any letters of transmittal that the securities are not offered to U.S. holders and have not been registered under the Securities Act; (2) a different letter of transmittal for the offer that is sent to the United States that allows only for the receipt of the cash portion of the transaction; (3) a certification that a tendering shareholder is a resident of the foreign country; (4) a direction to the depositary for the offer not to mail or otherwise deliver the foreign securities into the United States; and (5) a restrictive legend on the certificates that the securities many only be transferred to a resident of the foreign country. Alberta Energy Co. Ltd., *supra* note 58 (avail. July 19, 1982).

60. *All-Holders and Best Price Release*, *supra* note 57, at 25878.

61. *See* Alberta Energy Co. Ltd. [1989-1990] Fed. Sec. L. Rep. (CCH) ¶ 79,306 (March 21, 1990) (exemptive relief provided to allow U.S. securityholders of a Canadian target corporation to receive only cash in an exchange offer by a Canadian purchaser because of a Canadian law prohibiting foreign ownership of Canadian energy companies); Freeport-McMoran Energy Partners, Ltd. (June 19, 1989) (exemptive relief granted to allow Canadian securityholders of a U.S. target corporation to receive only cash in an exchange offer by a U.S. purchaser due to a U.S. law prohibiting foreign ownership of domestic oil and gas leases); Varity Corp., First Marathon Sec. Ltd. (July 19, 1991) (exemptive relief granted to a Canadian company, formed as a mutual fund corporation under Canadian tax law, which intended to make an exchange offer to certain Canadian resident securityholders of another Canadian company that was redomiciling in the United States on a showing that participation by U.S. securityholders of the Canadian target company would be harmed by their participation in the exchange offer); and Imperial Oil Ltd. [1989-1990] Fed. Sec. L. Rep. (CCH) ¶ 79,310 (Nov. 11, 1989) (exemptive relief denied to a Canadian purchaser that would have prevented U.S. securityholders of a Canadian affiliate of a U.S. corporation from choosing between alternate forms of consideration that were being offered the Canadian shareholders when no claim was made by the Canadian purchaser that such ownership would violate applicable Canadian law).

62. *Goelzer*, *supra* note 44, at 620-21.

phatically stated that the "All Holders and Best-Price" rule, requiring that tender offers must be made to all holders of the class of securities subject to the offer and on identical terms, would not require bidders to make offers to U.S. residents.[63] However, if the offer employs the jurisdictional means, the rule requires that the offer be made to U.S. residents on the same terms as other securityholders, absent a grant of exemptive relief by the Commission.[64] In addition, the Commission continues to believe that notwithstanding the lack of an affirmative act by a foreign bidder to invoke U.S. jurisdiction, "the requisite use of jurisdictional means can be established . . . where it is reasonably foreseeable that U.S. shareholders of a foreign issuer that have been excluded from an offshore offer will sell their shares into the market in response to that offer."[65] Such a view has raised considerable concern from a number of commentators on the Commission's *International Tender Offer Release* and the *Concept Release*.

III. CONFLICTING REGULATION IN INTERNATIONAL TENDER AND EXCHANGE OFFERS

As the frequency of international tender and exchange offers escalate, the legal and regulatory issues related to such transactions are becoming more complex. Purchasers that move beyond their national borders frequently find themselves in the position of being subject to more than one regulatory scheme—for acquisitions, generally, as well as for transactions in regulated industries[66]—that not

63. *All-Holders and Best-Price Release*, *supra* note 57, at 28577 (citing Plessey Co. PLC v. General Elect. Co. PLC, 628 F. Supp. 477 (D. Del. 1986)).

64. *See* Rule 14d-10(e), 17 C.F.R. § 240.14d-10(e) (1991).

65. *See Concept Release*, *supra* note 22, at 23752 n.2, (citing Schmuck v. United States, 109 S. Ct. 1443 (1989)); Carpenter v. United States, 484 U.S. 19 (1987). *See also* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989). *Cf.* Plessey Co. PLC v. General Elect. Co. PLC, 628 F. Supp. 477 (D. Del. 1986).

66. *See* Booth, *The Problem With Federal Tender Offer Law*, 77 CALIF. L. REV. 707, 710-715 (1989) (discussing the significance of the Williams Act in relationship to the federal regulatory structure for takeover controls); Brown, *Regulatory Intervention in the Market for Corporate Control*, 23 U.C. DAVIS L. REV. 1, 5-11 (1989) (same); Greenbaum, *An American Perspective on the European Commission's "Amended Proposals for a Council Regulation on the Control of Concentrations Between Undertakings" and Its Impact on Hostile Tender Offers*, 7 DICK. J. INT'L L. 195, 196-204 (1989) (discussing Hart-Scott-Rodino Act and Williams Act as primary federal takeover regulations). Congress also has enacted legislation that limits acquisitions by foreign offerors of companies that may affect the "national security" of the United States. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425-26 (codified at 50 U.S.C. § 2170 (1988)) (providing legislative restrictions on tender offers by foreign parties, the *Exon-Florio* provisions); *Regulations Pertaining to*

only differ but contradict the requirements in the home country of the target corporation. Complying with the tender offer regulation of two or more countries that contradict each other can be especially perplexing.

The means in which rules and regulations relating to acquisitions can differ from one jurisdiction to another are almost as numerous as the types of conduct regulated in acquisitions.[67] The international purchaser of the 1990s invariably must walk a legal tightrope to satisfy the contrasting demands of regulatory authorities. Some of the more significant differences relate to: (i) the types of accumulations of a target company's shares that must be made by way of a formal offer or takeover bid; (ii) whether a compulsory acquisition is required (as is required in the United Kingdom and a number of other countries, and under the proposed EC Directive on takeovers[68]); (iii) whether the bidder is required to pay public shareholders the same price it has paid other securityholders in acquiring a minority interest in the target corporation (as is now required in a number of European countries); (iv) whether the use of securities as part or all of the consideration offered will require the bidder to register securities in the target corporation's country of incorporation (such as in the United States); (v) whether there is a minimum offering period (now required in most mature markets); (vi) whether all securityholders as a class are permitted to participate in the transaction; (vii) whether securityholders will be permitted to withdraw, and if so, when (the U.K. City Code provides for withdrawal rights only if the offer fails to go "unconditioned as to acceptances"); (viii) whether the bidder is permitted to purchase shares during the tender or exchange offer or whether such purchases are prohibited by regulation (such purchases being prohibited in the United States[69]); (ix) whether a partial offer is authorized or prohibited or authorized with a regulator's consent; and (x) the type of financial disclosure that will be required in a disclosure document, if any. As the above list demonstrates, already

Mergers, Acquisitions, and Takeovers by Foreign Persons, 54 Fed. Reg. 29 (1989) (proposing regulations to implement the *Exon-Florio* provisions). The *Exon-Florio* provisions lapsed, but were re-authorized by the president. Defense Production Act Extension and Amendments of 1991, Pub. L. No. 102-99 (1991) (exempts section 721 of the Defense Production Act, which incorporates the Exon-Florio provisions, from termination even if the Act were to lapse again). *See also* 49 U.S.C. § 1301(1), 1301(13), 1378(f) (regulating foreign ownership of air carriers); 14 U.S.C.§ 802(a) (regulating coastal shipping); and 47 U.S.C. § 310(b) (regulating foreign ownership of broadcasting licenses).

67. *See, e.g.*, SECTION ON BUSINESS LAW OF THE INTERNATIONAL BAR ASSOCIATION, *Constraints on Cross Border Takeovers and Mergers— A Catalogue of Disharmony*, 19 INT'L BUS. LAW. 49 (Feb. 1991). *See also* INTERNATIONALIZATION OF THE SECURITIES MARKETS, *supra* note 36, §§ III-246 - III-297.

68. *See* City Code Rule 9.1 [1990], 2 Fin. Serv. Rep. (CCH Ltd.), F-1, at ¶¶ 140,481; *EC Proposal*, *supra* note 6, art. 4, at 9-10.

69. *See* Rule 10b-13, 17 C.F.R. 240.10b-13 (1991).

complex problems may be compounded if the target has a substantial number of shareholders that are citizens of other countries. Moreover, this problem can rankle corporations even when both the purchaser and target corporations are incorporated in the same country, simply as a result of the internationalization of the target corporation's share ownership.

A. Resolution of Conflicting Regulation—Alternative Approaches

When confronted with conflicting legal requirements, there appear to be only a handful of procedures available for accomplishing the transaction. For various reasons, no one procedure has provided purchasers, target corporations and regulators sufficient comfort. Presently there have been four principal approaches taken by purchasers in making an international tender or exchange offer.

1. Prevention of an Offer

One approach to the problem requires the bidder to abandon the tender or exchange offer completely when faced with significant legal conflicts in reconciling two or more sets of requirements. This may occur if the bidder concludes that the regulatory authorities in the target jurisdiction require full compliance with that regulatory scheme and are unwilling to waive any of the conflicting requirements. This generally occurs when there are no alternatives to avoiding the application of the laws of the second jurisdiction, if the requirements of the bidder are diametrically opposed to the requirements of the target's jurisdiction, and if each of the other jurisdiction's regulators are unwavering in their belief as to the applicability of their regulations.

Such a resolution, however, is far from ideal for shareholders. This solution prevents securityholders from considering an acquisition that may be advantageous to them. Because tender offers are typically made at a substantial premium over the current market price for a target corporation's stock, shareholders would prefer that a takeover offer be presented to them. This kind of an approach by regulatory authorities may cause corporations to become takeover proof by "internationalizing their shareholder base."[70]

70. Brown & MacLachlan, *Legal Headaches for Buyers Going into Foreign Lands*, INT'L MERGERS & ACQUISITIONS 57, 59 (March/April 1991).

2. Avoidance of the Conflicting Jurisdiction

Another approach by a bidder in an international tender or exchange offer is to resolve conflicting regulatory requirements by trying to avoid the particularly burdensome requirements of one jurisdiction. This may be accomplished by failing to meet those standards[71] that are likely to bring the transaction within the confines of the more oppressive regulatory scheme.[72] In this approach, a bidder's offer generally is not presented to shareholders who reside in the jurisdiction with the most difficult regulatory scheme. Such a disparate result is problematic for securityholders of the target corporation in the jurisdiction with the burdensome regulatory scheme, since these securityholders will be forced to make difficult investment decisions on whether to tender, hold or sell into the marketplace based upon inadequate information and disclosure.

In the United States, a purchaser is required to make an offer to all securityholders,[73] thereby rendering it impossible to avoid a jurisdictional standard in another country. Moreover, minority acquisitions or "squeeze-out" provisions may require that, before non-tendering securityholders may be compulsorily acquired, the offer must be made to all securityholders and a certain percentage of the outstanding shares have been accepted in the tender offer.[74] Not surprisingly, U.S. regulation is considered the most onerous, and as a result, a pro-

---

71. Assuming personal jurisdiction, the United States generally requires that there be an offer or sale of a security involving the instrumentalities of interstate commerce or the United States mails. The United Kingdom, on the other hand, requires that the target of a takeover offer or exchange offer be chartered in the United Kingdom or have its principal place of business in the United Kingdom. *See* City Code Introduction [1990], 2 Fin. Serv. Rep. (CCH Ltd.), A-7, at ¶¶ 140, 243.

72. Purchasers may seek to avoid the jurisdiction of one country even though it is foreseeable that the takeover offer will affect the market price of the target corporation's stock as arbitrageurs purchase shares in the jurisdiction with the most stringent regulatory scheme in order to sell into the jurisdiction in which the target corporation resides. In so doing, shareholders are forced to make investment decisions based on inadequate information. *See Concept Release, supra* note 22, at 23752 n.2.

73. Rule 14d-10, 17 C.F.R. § 240.14d-10 (1991). *See also All-Holders and Best-Price Release*, supra note 57. In adopting the All-Holders Rule, the Commission stated that the all-holders requirement would realize the disclosure purposes of the Williams Act by ensuring that "all members of the class subject to the tender offer receive information necessary to make an informed decision regarding the merits of the tender offer." *Id.* at 25875. In addition, the Commission specifically pointed out that the language of the Williams Act envisions tender offers for a "class" of equity security and that such language reflects Congress' intent that *all* securityholders have the occasion to participate in the tender offer (emphasis added). *Id. But cf. Id.* at 25877 (noting that the all-holders requirement would not affect an international tender offer where the purchaser was not a citizen of the United States and did not use the jurisdictional means, thereby rendering the federal securities laws applicable to the transaction).

74. *See* 1985 Companies Act § 428. The United Kingdom compulsory acquisition statutes require that the offer be made to all shareholders and the purchaser must acquire 90 percent of the outstanding shares otherwise the purchaser must wait one year before acquiring the remaining minority interest.

cedure has developed in transactions in which foreign acquisitions of non-U.S. corporations with insignificant U.S. shareholders have avoided the application of the Williams Act for tender offers and the Securities Act for exchange offers. For instance, Section 14(d) of the Exchange Act[75] prohibits a purchaser from making a tender offer "by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise" without compliance with Commission rules and regulations. Section 5 of the Securities Act[76] prohibits a person from offering or selling securities if the activities make use of any means or instrumentalities of interstate commerce and compliance has not been made with the Securities Act's registration requirements.

Billions of dollars in international tender and exchange offers have been structured in such a manner so as to avoid the use of the jurisdictional means, especially when seeking to avoid application of the above statutory provisions.[77] In order to avoid the application of the federal securities laws, bidder's in their offering circular generally will specify that the offer is not being made in the United States; that copies of the offering document are not being mailed or otherwise distributed or sent into the United States; that envelopes containing forms of acceptances should not be sent from the United States and each securityholder must certify that they have not used the instrumentalities of interstate commerce in receiving information or in mailing the letter of transmittal back to the purchaser.

The restrictions imposed by many of these transactions raise a fundamental question of whether such restrictions are consistent with the home country takeover law. For instance, the United Kingdom and Canadian takeover law have requirements similar to the Com-

---

75. 15 U.S.C. § 78n(d) (1988).

76. 15 U.S.C. § 77e (1988).

77. *See* Plessey Co. PLC v. General Elect. Co. PLC, 628 F. Supp. 477 (D. Del. 1986) (bid by General Electric PLC, a British company, for the Plessey Company PLC, also a British company); Hiram Walker Resources Ltd. v. Gulf Canada Corp., C.A. No. 86-0780 (D.D.C. 1989) (acquisition of a controlling block of Hiram Walker, a Canadian corporation, by Gulf Canada Corporation, also a Canadian corporation); Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir.), *cert. denied*, 110 S. Ct. 29 (1989) (bid by Minorco, S.A., a Luxembourg corporation, for Consolidated Gold Fields PLC, a British company); Letter of Chairman David S. Ruder to Congressman Harold Rogers, Sept. 6, 1989, Cong. Rec. (Sept. 7, 1989), S.10839 (explaining why the bid by Hoylake Investments Limited, a Bermuda company, for B.A.T. Industries PLC, a British company did not fall within the jurisdiction of the federal securities laws); Williams Holdings PLC recent unsuccessful exchange offer for all outstanding ordinary shares of Racal Electronics PLC.

mission's All-Holders Rule.[78] In addition, in the United Kingdom, a bidder acquiring 90 percent of the shares of a target corporation may only effect a second step compulsory acquisition if the original transaction was extended to *all* securityholders of the target corporation and securityholders had the opportunity to receive the same consideration.[79] The Take-Over Panel in the United Kingdom, however, has taken the position that even if a tender offer includes restrictions on the manner in which the offer is made and the manner in which it may be accepted, the Take-over Panel will view the offer as having been extended to *all* securityholders.[80] This is permitted even though significant restrictions are included essentially barring U.S. holders from participating in the offer. The offer is not considered by U.K. and Canadian regulatory authorities as a violation of the applicable foreign country's takeover code. It seems anomalous, however, that such a clear departure from a significant precept of fundamental fairness included in the United Kingdom and Canadian rules is permitted, and has the blessing of the regulatory authority. By placing significant restrictions on an offer, in essence, to have the offer *not* made to *all* holders, since certain investors may not overcome the restrictions imposed in order to participate in the transaction, simply allows purchasers to avoid the intent of the statutory scheme.

Avoiding a more burdensome jurisdiction (the United States in most instances) usually is not satisfactory to a bidder or the securityholders excluded and is not conducive to cooperative regulation. The securityholders excluded in these transactions generally know nothing of the details of an offer or, because they may not participate directly in the offer, even if they know of the offer, they will not receive the full offer price for their securities. In order to obtain any benefit from an offer, securityholders must instead sell shares into the marketplace, but incur a transaction cost which reduces the full benefit of an offer. In either event, securityholders are making fundamental investment decisions about their securities on the basis of inadequate information and without ready access to the bidder's offering document. The bidder, on the other hand, can never be certain that it has successfully avoided the use of the jurisdictional

78. *See* THE CITY CODE ON TAKE-OVERS AND MERGERS, General Principle No. 1 (1910), 2 Fin. Serv. Rep. (CCH Ltd), B-1 at ¶¶ 140, 261 (General Principle No. 1 requires that all shareholders of the same class be treated "similarly" by an offeror); ONTARIO SECURITIES ACT § 94(1) (a bid must be made to all holders of the same class of target shares residing in the province); QUEBEC SECURITIES ACT § 145 (same).

79. CITY CODE, *supra* note 74.

80. Brown & MacLachlan, *supra* note 70, at 78. *See also* Letter of Comment on the *Concept Release on Multinational Tender and Exchange Offers*, 55 Fed. Reg. 23751, from The Take-over Panel to Jonathan G. Katz, Commission File No. S7-10-90.

means and the requirements to comply with that jurisdiction's take-over scheme.

3. Case-by-case Accommodation—Modifications to the Legal Requirements to Reconcile Differing Systems

A third approach to conflicting requirements involves careful hand-tailored accommodations to differing legal requirements. Purchaser's using this approach, work on a case-by-case basis with regulators in the different countries to tailor accommodations to or seek waivers from the conflicting requirements. This approach has worked with certain transactions considered by the Commission and the Take-over Panel in the United Kingdom on four occasions.[81] In addition, the Commission worked with counsel to a Swedish company to structure a transaction so that it would comply with both U.S. and Swedish regulatory schemes.[82]

This approach, however, has the disadvantage of unpredictability, potential loss of confidentiality in the planning stages of the acquisition proposal, and the need for substantial interaction with the relevant regulatory authorities and their staffs.[83] Moreover, in a hostile offer, such hand-tailored accommodations have not been tested and may prove unworkable.

The case-by-case hand-tailored accommodations have been most

81. *See In the Matter of Ford Motor Company, PLC*, Securities Exchange Act Release No. 27425 (November 2, 1989) (cash offer by Ford for shares of Jaguar PLC—two offers were made, one to U.S. residents and one to all other shareholders); *Letter regarding Manpower PLC and Manpower Inc.*, (February 15, 1991) (an exchange offer by a newly formed U.S. company for all the shares of a company chartered in the United Kingdom in order to change the domicile of the parent company. Approximately 75 percent of Manpower PLC's ordinary shares were held in the United States and most of its executive offices and operations were in the United States, thus disqualifying the target from the status of a foreign private issuer. In the transaction, a single offer was extended to both U.S. and U.K. holders) In re Hanson PLC, Securities Exchange Act Release No. 29835 (October 18, 1991) (an exchange offer by a U.K. company for the shares of a U.K. company with significant U.S. securityholders. The Commission granted relief from 14d-10 which allowed Hanson not to extend an alternative form of consideration. In addition, a single offering document was used in both countries); Letter regarding Blockbuster Entertainment Corporation (December 20, 1991) (cash and exchange offer by U.S. company for all ordinary shares of a U.K. company).

82. *See In the Matter of Aktiebolaget Volvo and Procordia Aktiebolag*, Securities Exchange Act No. 27671 (February 2, 1990) (exchange and cash offers of Aktiebolaget Volvo, a Swedish company with shares traded on the National Association of Security Dealers Automated Quotation system, and Procordia Aktiebolag, a company controlled by the Swedish government, for all shares of another Swedish company, Pharmacia Aktiebolag, a Swedish company reporting in the U.S. and affiliated with Volvo).

83. Brown & MacLachlan, *supra* note 70, at 60.

successful in friendly acquisitions (*i.e.*, Ford/Jaguar, Manpower, Hanson/Beazer, Blockbuster/Citivision and Volvo/Procordia) and where the regulatory scheme applicable to the target corporation prevents the target corporation from creating impediments to the transaction (*i.e.*, Ford/Jaguar).[84] Where this approach was used in a hostile transaction, the Hoylake Investments Ltd. offer for B.A.T. Industries, the Take-Over Panel did grant relief from a City Code provision regulating the number of days a bid may remain open before it lapses. Ordinarily under the City Code, if a bid does not become wholly unconditional twenty-one days after its posting, a takeover bid lapses, and may not be renewed for one year.[85] The Take-Over Panel granted an exemption in Hoylake because the obtaining of a required approval from nine U.S. state insurance regulators would have taken months.

4. Deferral to another Regulatory Authority

The last approach to facilitate international tender and exchange offers, and one that is being explored by a number of regulators, is for a bidder to seek the deferral by those regulatory authorities with relatively little connection to the transaction in favor of the regulatory authority of the target corporation or the regulatory authority with the closest nexus to the transaction. This is the approach that most commentators believe should be taken.[86]

Such an approach may have several advantages, such as predictability, no hand-tailored case-by-case relief required and a greater likelihood that offers will be extended to all holders. If a bidder can rely on the jurisdiction of the target corporation, a bidder can comply with the appropriate regulatory scheme in advance. In addition, a bidder's concern that the confidentiality of the acquisition will be breached is alleviated if only one regulator supervises the transaction. Moreover, regulatory authorities can avoid large staff commitments in attempting to accommodate differing legal systems on a case-by-case basis. Last, and most important, is the belief that international tender and exchange offers can be extended to U.S. holders if the Williams Act and the Securities Act do not apply to the trans-

84. Because U.S. residents held more than 25 percent of the Jaguar securities, the success of the transaction, and the ability to accomplish a compulsory acquisition at the conclusion of the takeover in the United Kingdom, would have been extremely difficult without the inclusion of U.S. securityholders in the transaction, thereby necessitating accommodations. *See also* In re Hanson PLC, *supra* note 81.

85. City Code Rules 31.6, 35.1 (1990) 2 Fin. Serv. Rep. (CCH Ltd.) M-4 at ¶¶ 140, 904 N-1 at ¶¶ 140, 981.

86. Brown & MacLachlan, *supra* note 70, at 60; Greene, *Regulation of Multinational Tender Offers*, 4 INSIGHTS 25 (December 1990); *Extraterritorial Application of Securities Regulation*, *supra* note 25; Demott, *Comparative Dimensions of Takeover Regulation*, 65 WASH. U.L.Q. 69 (1987).

action. If the Williams Act and the Securities Act are not applicable, a foreign bidder's concern over the Williams Act's tender offer rules and regulations, the Securities Act's registration requirements, or the antifraud provisions of the Exchange Act and the civil liability provisions of the Securities Act will be alleviated. Foreign purchaser's have shown tremendous reluctance to incur the expense and trouble of complying with U.S. regulation when confronted with the impact of the antifraud provisions and the liability provisions of the federal securities laws.

IV. COMMISSION INITIATIVES

Since the late 1980s the Commission has made a concerted effort to address the globalization and integration of the financial markets taking place around the world. The Commission through its rule making authority has attempted to accommodate the various international policy issues that have arisen as the world's securities markets have become interdependent.[87] Inasmuch as complete cooperative regulation may be a long term goal, requiring a long period of transition by the international regulatory community, more immediate measures should be considered which resolve current problems and point in the direction of cooperative regulation and the harmonization of the various methods of regulating securities markets. The Commission in the 1990s has taken small strides to cooperative regulation and a more territorial approach to the application of the federal securities laws.

A. Rule 144A and Regulation S

The Commission in April 1990, after a two year process, adopted Rule 144A and Regulation S.[88] Rule 144A liberalized the regulations governing the private placement market by creating a safe harbor for the resale of certain securities. Regulation S, on the other hand, governs the distribution of corporate securities that are issued overseas without requiring registration in the United States.

Rule 144A establishes an exemption from the registration requirements of the Securities Act for resales to certain "qualified institutional buyers" (QIBs) of securities that at the time of issuance were not "fungible" with a class of securities publicly traded in the United States. One of the principal effects of Rule 144A was to increase the

87. *See supra* notes 22 and 49.
88. Rule 144A, 55 Fed. Reg. 17933; *Regulation S Adopting Release, supra* note 49.

liquidity of the secondary market in the United States for eligible securities that are not publicly registered with the Commission. Prior to the expiration of the Rule 144 holding period,[89] resales of most privately placed securities could only be made in further private placements, which frequently involved investment representations, legended securities and opinions of counsel. Resales of securities among QIBs that satisfy the rules's conditions will now be free of these types of restrictions and will benefit from the certainty of the safe harbor exemption.

Increased access to the U.S. secondary markets also should result since qualified securities initially offered by issuers (whether domestic or foreign) in offshore transactions that are not subject to the registration requirements of the Securities Act, including transactions using Regulation S to which the registration requirements do not apply, could be resold immediately to QIBs in the United States in reliance on Rule 144A.

One of the primary effects of the rule has been the expansion of the United States capital markets to the debt and equity securities of non-U.S. corporations. This liberalization of the United States private placement market is, in fact, a reflection and confirmation of certain significant trends that have transformed this market from a small, illiquid, and conservative source of capital at the beginning of the 1980s to an extremely large, more liquid, and increasingly international capital market in the 1990s.[90]

Regulation S consists of preliminary notes and new rules under the Securities Act and supersedes the Commission's prior release on the territoriality of the Securities Act[91] and related no-action and interpretive letters. Regulation S includes two non-exclusive safe harbor provisions under which transactions meeting all of the applicable conditions will be deemed to occur outside the United States and, therefore, will not be subject to the registration requirements of Section 5 of the Securities Act.

The issuer safe harbor[92] applies to offers and sales by issuers, distributors, their respective affiliates and persons acting on their behalf. The resale safe harbor[93] applies to resales by persons other than the issuer, a distributor, their respective affiliates, and persons acting on their behalf.

89. 17 C.F.R. § 230.144(d) (1991).

90. Chu, *The U.S. Private Market for Foreign Securities*, THE BANKERS MAGAZINE, at 55, Jan./Feb. 1991.

91. *Registration of Foreign Offerings by Domestic Issuers; Registration of Underwriters of Foreign Offerings as Broker-Dealers*, 29 Fed. Reg. 9828 (1964); Securities Act Release No. 4708 (avail. July 9, 1964).

92. 17 C.F.R. § 230.903 (1991).

93. 17 C.F.R. § 230.904 (1991).

Regulation S addresses only the applicability of the registration requirements of Section 5 of the Securities Act. The regulation does not affect the application of the antifraud rules or other provisions of the federal securities laws.[94]

As a result of Rule 144A and Regulation S, it is now relatively simple for non-U.S. companies to launch equity offerings targeted at U.S. institutional investors, thus providing the foreign firms with a readily available U.S. source of equity financing. Moreover, foreign issuers can also target a private U.S. tranche of equity in an international equity offering. Equity offerings can be made on a multitranche basis, with an offering in the United States and offerings in the Euromarket and in the issuer's domestic market. This offering strategy enables the issuer to market securities to a much larger investor universe.

B. Multijurisdictional Disclosure System with Canada

Another example of cooperative regulation is the recent adoption of the MJDS with Canada which attempts, among other things, to harmonize minimum disclosure and procedural requirements for simultaneous multinational securities offerings, tender and exchange offers, and business combinations in the United States and Canada.[95] In adopting the MJDS, the Commission took a significant step in the regulation of international transactions in that the MJDS permits a Canadian corporation to use the disclosure and offering documents adopted by the Canadian authorities for compliance with the Williams Act and the Commission's tender offer regulation. This step is unprecedented in the Commission's history, since, except for the foreign integrated disclosure system, the Commission has always mandated that issuers comply with the federal securities laws. With the adoption of the MJDS with Canada, however, the Commission adopted Canadian rules and regulations as their own.

C. International Tender and Exchange Offer Release

More specifically for international tender and exchange offers, the Commission on June 5, 1991 published for comment proposed rules, forms and a proposed exemptive order that would permit tender offers for a foreign issuer's securities to proceed in the U.S. on the basis of the applicable regulation of the target company's home jurisdic-

94. *Regulation S Proposing Release*, *supra* note 49, at 22662.
95. *MJDS Release*, *supra* note 22.

tion, where a small percentage of the shares sought are held by U.S. holders.[96] The rules, forms and exemptive order permit single-jurisdiction regulation with respect to both the tender offer and registration requirements, so that multijurisdictional cash tender offers, exchange offers and business combinations may be made more efficiently and at less expense.

The *International Tender Offer Release* suggests that the Commission is very concerned with adopting an approach that would permit international tender and exchange offers to proceed without the exclusion of U.S. shareholders. The most troublesome aspect of the *International Tender Offer Release*, though, is the extent to which the antifraud provisions of the Exchange Act apply to a transaction governed by the laws of another jurisdiction.[97] As presently set forth in the proposal, the antifraud provisions would apply, much as they continue to apply to any transaction that relies on Regulation S. Foreign purchasers may well continue to avoid extending offers into the United States because of concerns about the U.S. antifraud provisions, rather than concerns about certain line item disclosure requirements, of which there will be none if the proposed rules and forms are adopted.

V. Continued Application of the Antifraud Provisions

The two most often cited reasons for excluding U.S. investors in international tender and exchange offers is the general antifraud provisions and the civil liability provisions of the federal securities laws.[98] The Commission, through the above initiatives, has attempted to reduce foreign corporations apprehension over the applicability of the civil liability provisions by permitting the sale of securities offshore through Regulation S; by allowing for the resale of securities through the use of private placements with the adoption of Rule 144A; and by permitting securities to be registered and tender or exchange offers to be made by use of the home country disclosure document of the target corporation.

The Commission appears to recognize that subjecting an exchange

---

96. *International Tender Offer Release*, *supra* note 9.

97. *See* Letters of Comment on the *Concept Release* from the American Bar Association, Sullivan & Cromwell, The Take-over Panel and the City of London Law Society, among others, to Jonathan G. Katz, Commission File No. S7-10-90; and Letters of Comment on the *International Tender Offer Release*, from the American Bar Association, Pepper, Hamilton & Scheetz, Sullivan & Cromwell, the City of London Law Society and The Take-over Panel, among others, to Jonathan G. Katz, Commission File No. S7-18-91.

98. Sections 11 and 12(2) and 17(a) of the Securities Act [15 U.S.C. §§ 77k, 77*l*(2) and 77q(a) (1988)]; Sections 10(b), 15(c)(1) and 18 of the Exchange Act [15 U.S.C. § 78j(b), 78o(c)(1) and 78r (1988)] and Rules 10b-5 and 15c1-2 [17 C.F.R. §§ 240.10b-5 and 240.15c1-2 (1988)] thereunder.

offer to the express civil liability provisions under the Securities Act may expose a foreign bidder or issuer to liability that is stricter than that which is prescribed in the bidder's home country, thereby creating a deterrent to registering exchange offers with the Commission.[99] However, the Commission appears to continue to believe that the antifraud provisions of the Williams Act are broader in scope then the tender offer provisions.[100] Even if U.S. residents had purchased insignificant amounts of the foreign target corporation's stock that is the subject of an international tender offer, subject-matter jurisdiction over such a transaction may exist under the Williams Act if the international tender offer involves fraud, deception or manipulative acts.[101] Since fraud is universally proscribed and the Commission's antifraud provisions were conceived to enforce fundamental notions of honesty, the Commission appears to believe that this same impediment should not accrue with respect to the general antifraud provisions that would be applicable to an international cash tender offer.[102]

This position of the Commission's appears predicated on a belief, as noted by the court in *Consolidated Gold Fields PLC v. Minorco, S.A.*,[103] that "the antifraud provisions of American securities laws have broader extraterritorial reach than American filing requirements."[104] In *Consolidated Gold Fields*,[105] the Commission urged the Court of Appeals for the Second Circuit to overturn the district court's dismissal of the target's securities fraud claims. The Commission, on the other hand, argued that a U.S. court has subject-matter jurisdiction over such claims where the bidder, by delivering allegedly *fraudulent* tender offer materials to the recordholders of stock beneficially owned by U.S. residents, could foresee that the allegedly

99. *Concept Release*, *supra* note 22, at 23752; *International Tender Offer Release*, *supra* note 9, at 27583.

100. *See* Brief of the Securities and Exchange Commission, *Amicus Curiae*, Consolidated Gold Fields, PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir. 1989) [hereinafter *Brief of the S.E.C.*].

101. *Id.*

102. For instance, in the United Kingdom Section 422 of the Financial Services Act of 1986 provides that the circulation of offer documents relating to multinational tender offers may under certain circumstances give rise to liability for untrue or misleading statements.

103. 871 F.2d 252 (2d Cir. 1989), *cert. denied*, 423 U.S. 1018 (1975).

104. *Id.* at 262, *citing* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 986 (2d Cir. 1975). *See also* RESTATEMENT (THIRD) § 416 comment a, reporters note 2 (1987) ("[A]n interest in punishing fraudulent or manipulative conduct is entitled to greater weight than are routine administrative requirements.").

105. *Id.*

false statements would have an effect in the United States. In reversing the district court's dismissal of the target corporation's securities claims (while upholding the lower court's grant of a preliminary injunction on antitrust grounds), the Court of Appeals for the Second Circuit agreed with the Commission that the transmittal by the nominees was a direct and foreseeable result of the bidder's extraterritorial conduct, and therefore gave rise to the requisite "effects" necessary to support jurisdiction by a U.S. court. The Second Circuit, though, declined the Commission's suggestion that it abstain from issuing a world-wide remedy on the basis of principles of comity for the securities law violations, due to what the court discerned as an inadequate record, and remanded the antifraud claims for further fact-finding by the district court on the abstention issue.[106]

In an earlier case, also decided by the Second Circuit, *IIT v. Cornfeld*,[107] the court stated that a foreign country should not be offended by the assertion of jurisdiction related to the antifraud provisions of the federal securities laws since "[t]he problem of conflict between our laws and that of a foreign government is much less when the issue is the enforcement of the anti-fraud sections of the securities laws than with such provisions as those requiring registration of persons or securities."[108] Moreover, the Second Circuit particularly noted in *IIT v. Cornfeld*, that the United States would find it troubling if foreign courts "stood silently and permitted misrepresented securities to be poured into the United States" especially when the securities in question were those of "the pourer's own nationals."[109] Generally then, United States jurisdiction is more likely to be applied in a case that involves enforcement of the antifraud provisions than provisions relating to the registration of securities or broker-dealers.[110] On the other hand, an international tender or exchange offer that involves some conduct in the United States, but lacks fraudulent conduct, is less likely to be subject to the requirements of the federal securities laws.[111]

As noted earlier, the courts have taken several approaches in applying the jurisdictional tests to actions concerning conduct that is minimally a part of securities violations perpetrated primarily abroad. The result seems to be that, depending on which circuit the action happens to lie, any significant domestic activity, no matter how

---

106. 871 F.2d at 262.

107. 619 F.2d at 909, 921 (2d Cir. 1980).

108. *Id.* at 921.

109. *Id.* at 920.

110. *Goelzer, supra* note 44 at 619; *accord* Plessey Co. PLC v. General Elec. Co., PLC, 628 F. Supp. 477, 494 (D. Del. 1986).

111. *See* Note, *The Extraterritorial Application of U.S. Securities Laws in the Absence of Fraud Charges*, 18 LAW POL'Y INT'L BUS. 649, 655-64 (1986).

remotely connected to the primary transaction, can provide the basis for U.S. jurisdiction over the domestic actor if the conduct furthers a *fraudulent scheme*.[112] Furthermore, simply because an offer extended into the United States will be subject to the general antifraud provisions of the federal securities laws does not necessarily presuppose that a court will automatically look to U.S. law in deciding the controversy.[113] For instance, the Commission recently emphasized in connection with the adoption of the MJDS, and in issuing for comment the *International Tender and Exchange Offer Release* and the *Cross-border Rights Offering Release*[114] its belief that a registration statement, rights offering or tender offer that is prepared in accordance with foreign requirements or practice, but accepted pursuant to the new disclosure system or one of the other proposed rules, would not be considered misleading simply because the information required by a different Commission form or schedule is omitted.[115] By permitting transactions to proceed on the basis of the foreign country disclosure documents, rules and practices, the Commission, in effect, adopts those requirements as its own. Moreover, the court stated in *Consolidated Gold Fields, plc v. Minorco, S.A.*, that "[i]t is a settled principle of international and our domestic law that a court may abstain from exercising enforcement jurisdiction when the extraterritorial effect of a particular remedy is so disproportionate to harm within the United States as to offend principles of comity."[116]

Assuming that the Commission and the courts are correct in their belief that the extraterritorial reach of the antifraud provisions are broader in scope than the filing or registration requirements, the question then becomes whether the Commission can and should carve out certain transactions in order to permit those transactions to proceed in the United States subject only to the rules and regulations of a foreign country. Since the antifraud provisions are embodied in the statutory sections of the federal securities laws, the United States Congress would have to amend the Securities Act and the Exchange Act to permit such transactions to occur without being subject to the antifraud and civil liability provisions.[117] Sections 10(b) and 14(e) of

112. *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, at 30-31; Tamari v. Bache & Co. (Lebanon) S.A.L., 547 F. Supp. 309 (N.D.Ill. 1982); and Plessey Co. PLC v. General Elec. Co. PLC, 628 F. Supp. 477 (D.Del. 1986).

113. *See* Brief of the S.E.C., *supra* note 101.

114. *See supra* note 22.

115. *Id.*

116. 871 F. 2d at 263.

117. *See supra* note 99.

the Exchange Act[118] grant to the Commission the authority to "define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." Without express statutory authority, the Commission rule making authority appears limited to those actions that have been granted by Congress. In this instance, Congress has granted limited authority to the Commission to define only fraudulent, deceptive, or manipulative acts or practices, not to exempt specific transactions from these provisions. Congress itself, on the other hand, has had numerous opportunities to address the issue of the extraterritoriality of the federal securities laws and, specifically the broad reach of the antifraud provisions,[119] and has so far taken no action to restrict the Commission's jurisdictional reach or overrule the various courts interpretation of the broad reach of the antifraud provisions. In addition, with the scandals that have plagued not only the United States but other foreign markets, going to the integrity of those markets, Congress will probably be disinclined to do so.

The question then arises whether the retention of the antifraud provisions will serve to inhibit foreign bidders from including U.S. securityholders in foreign transactions, and whether for policy reasons the Commission should assert some influence on the U. S. Congress to permit certain foreign transactions to occur while rendering the antifraud provisions inapplicable to those provisions. The Commission, though, should not assert any influence in this area, since U.S. antifraud provisions should not deter foreign bidders and issuers. These provisions are merely intended to impose on such parties an obligation to conduct an honest, forthright transaction. All international regulatory systems should reasonably be expected to provide a minimum amount of protection against fraud and other unfair practices, if only to promote reliance on statements made by issuers of and traders in securities. Moreover, while fraudulent and manipulative conduct can give rise to litigation, the plaintiff must proffer sufficient conduct in violation of the antifraud provisions in order to be successful in its suit. Since it is easier to initiate litigation alleging material misstatements or non-disclosure, or violations of procedural rules than it is to show facts supporting manipulative behavior and thus violations of the Commission's antifraud provisions, frivolous or merely obstructive litigation in this area should be dealt with by the

118. 15 U.S.C. §§ 78j and 78n(e) (1988).

119. *See* HOUSE COMM. ON ENERGY AND COMMERCE, INSIDER TRADING AND SECURITIES FRAUD ENFORCEMENT ACT OF 1988, H.R. REP. NO. 910, 100th Cong., 2d Sess. 28 (1988) and HOUSE COMM. ON GOVERNMENT OPERATIONS, PROBLEMS WITH THE SEC'S ENFORCEMENT OF U.S. SECURITIES LAWS IN CASES INVOLVING SUSPICIOUS TRADES ORIGINATING FROM ABROAD, H.R. REP. NO. 1065, 100th Cong., 2d Sess. 2 (1988).

courts who have full power to dismiss such actions and sanction the offending participants.

V. CONCLUSION

As this article demonstrates, corporations and their shareholders have become international in character during the 1980s and countries vary widely, not only in their requirements as to takeovers but also in their application of their takeover requirements to offers for target corporations incorporated in another jurisdiction. Some regulators take the view that investors from their country need the same protection they would be entitled to had the offer been made entirely in that country—the American Viewpoint. Other regulators consider that if investors from their country have determined to make investments in a corporation located outside their territorial boundaries, those securityholders should be prepared to be governed by the rules and regulations of the country of incorporation—the European Viewpoint.

Until there is greater international harmonization of policies, international tender and exchange offers will continue to be a legal nightmare for purchasers, but a rich source of employment for international corporate lawyers.

The recent initiatives by the Commission, the Take-over Panel and the Canadian authorities have been helpful in solving the regulatory conflicts caused by an international tender or exchange offer, but they are first steps in what will surely be a long process. The Commission is reticent to accept the European Viewpoint towards international tender and exchange offers because of significant policy and statutory constraints. However, as the Commission gains further knowledge and understanding that the rules and regulations provided by these foreign countries are sufficient to afford all securityholders certain minimal protection, these policy and statutory constraints may well begin to fall.