Acquisition of Corporations: The Ramifications of Federal Regulation of State Tender Offer Statutes

John J. Winter

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I. INTRODUCTION

Over the last twenty years, a device known as the tender offer has become a frequently used method of acquiring corporations.\(^1\) As a transaction involving securities, it is now subject to federal regulation.\(^2\) Since it involves corporate activity, it is subject to state regulation as well. It is the purpose of this comment to illuminate the existing tensions between these bodies of law.

In a tender offer, the entity seeking to take over a corporation makes an offer directly to the corporation's shareholders for the purchase of their securities in the target company. This has the advantage of circumventing incumbent management and allowing the tender offeror to seize control of the target quickly, without the expense and turmoil of a bitter proxy contest,\(^3\) and without making any commitments to incumbent management.

The offeror's greatest tactical advantages are speed and secrecy. The initial blow is a public offer at premiums sometimes phenomenally exceeding the prevailing market price,\(^4\) which prompts shareholders to sell large blocks of their holdings within just a few days,


\(^2\) Prior to the Williams Act, adopted in 1968, tender offers were not subject to federal regulation. Chief Justice Burger later described the business conditions that necessitated the Act as follows: "The proliferation of cash tender offers, in which publicized requests are made and intensive campaigns conducted for tenders of shares of stock at a fixed price, removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities laws." Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 22 (1977).

\(^3\) A proxy contest has been described as "an internal struggle between two or more groups, one usually being the incumbent management and board of directors, for the control of the board of directors...", the purpose of which is to remove incumbent management and "replace them with a slate of directors nominated by the acquiring company..." Comment, Corporate Takeover Battles—Shark Repellent Charter and Bylaw Provisions that Deter Hostile Tender Offers or Other Acquisitions—A Comprehensive Examination, 27 How. L.J. 1683, 1684-85 n.3 (1984).

\(^4\) See, e.g., Brascan Ltd. v. Lassiter, Fed. Sec. L. REP. (CCH) ¶ 98,247 at 91,624 (E.D. La. May 3, 1979) (premium of 74.4% over current market price offered by Brascan Holdings, Inc. in its takeover bid for F.W. Woolworth Co.).
and, if enough shares are tendered, allows the offeror to quickly gain control of the target company and replace the incumbent management before it can take defensive action. For target management to mount any defenses requires time, and for this reason, it strives to delay the offer.6

Tender offers have been both hailed as playing “an important role in the health of the national economy”7 and criticized as the tool of corporate raiders.8 One universal concern has been the welfare of the target shareholders.9 As target management fights for what it believes to be in the best interest of the corporation, which usually involves retention of control,10 and the offeror fights to seize control of the corporation, the shareholder gets trapped in the middle. Congress, fearing that the seductive premiums and high-pressure tactics characteristic of tender offers would force shareholders into making hasty and uninformed investment decisions, promulgated regulations intended to ensure that the supply of information to investors would be adequate.12

Superimposed upon the disclosure-oriented federal law is a growing body of state law which purports to regulate tender of-


7. Id. “A tender offer . . . helps to maintain accountability of corporate management to its shareholders. Through this device . . . shareholders are given a chance to remove inefficient or sluggish management from office.” Id. at 8.


9. See infra notes 27-30 and accompanying text.

10. For actions that target management might take, possible justifications for such actions, and the insulating effect of the “business judgment rule,” see Reuben & Elden, How to Be a Target Company, 23 N.Y.L. SCH. L. REV. 423 (1978). See also supra note 5. For defensive measures before a hostile offer materializes, see, Comment, Corporate Takeover Battles, supra note 3, at 1683.


12. Senate Comm. on Banking and Currency, Full Disclosure of Equity Ownership and In Corporate Takeover Bids, S. REP. No. 550, 90th Cong., 1st Sess. 2-4 (1967). Some congressmen were also concerned about “looting” of target corporations by “raiders.” Id. at 46 (statement of Sen. Kuchel); 111 CONG. REC. 28, 257-58 (1967) (statement of Sen. Williams). See also Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947) (after purchasing controlling interest in the target, the offeror liquidated the company’s assets, taking advantage of the greatly appreciated value of the target’s inventory).
funders. These state laws, however, are generally parochial in nature, their purpose being to protect local business and industry. The trend in modern practice is toward the wholesale invalidation of state tender offer statutes on constitutional grounds. Initially, an overview of the applicable federal legislation is necessary in order to fully appreciate the nature of the constitutional conflicts involved.

II. FEDERAL TENDER OFFER LAWS

The definition is elusive, changing with the nature of the transaction involved. At the federal level, Congress has manifested its intent to use a flexible definition, leaving the Securities Exchange Commission (S.E.C.) and the federal judiciary to decide the issue on a case by case basis. Conversely, state tender offer regulation typically contains more objective definitions.

In 1979, the S.E.C. proposed a more objective, two-tiered definition of "tender offer" which would classify as tender offers any offers for securities made during any 45 day period to more than 10 persons for more than 5% of the class of securities, or any widely publicized, non-negotiable offers which provided for a certain premium over market price. Subsequently, the S.E.C. asked Con-


17. See, e.g., 8 DEL. CODE ANN. tit. 8 § 203(c)(2) (1983); 70 PA. CONS. STAT. ANN. § 73 (Purdon Supp. 1985) (defining "takeover offer").

18. The proposed definition provided:

(1) The term "tender offer" includes a request or invitation for tenders "and means one or more offers to purchase or solicitations of offers to sell securities of a single class, whether or not all or any portion of the securities sought are purchased which (i) during any 45 day period are directed to more than 10 persons and seek the acqui-
gress to legislatively define tender offer as the acquisition of ten percent or more of a company's voting securities. This was because the S.E.C. recognized that many tender offers were structured so as to evade the provisions of the Williams Act. The S.E.C.'s position has been that the term "tender offer" covers more than takeover attempts using public solicitation, and may even include privately negotiated or open market purchases.

Eight indicia of tender offers presently guide the S.E.C. in its rulings: (1) whether there has been widespread solicitation; (2) of public shareholders; (3) regarding a limited duration, non-negotiable offer; (4) for a substantial portion of the issuer's securities; (5) at a premium over current market price; (6) contingent upon the tender of a minimum number of shares; (7) whether the offerees are pressured to sell their stock; and, (8) whether there have been public announcements of a purchasing program either preceding or accompanying a rapid accumulation of stock. These factors, of course, are not engraved in stone. The Williams Act "was not intended to subject any . . . extensive market acquisition program to immediate characterization as a tender offer."

The most important of these factors has generally been whether

sition of more than 5% of the class of securities, except that offers by a broker (and its customer) or by a dealer made on a national securities exchange at the then current market or made in the over-the-counter market at the then current market shall be excluded if in connection with such offers neither the person making the offers nor such broker or dealer solicits or arranges for the solicitation of any order to sell such securities and such broker or dealer performs only the customary functions of a broker or dealer and receives no more than the broker's usual and customary commission or the dealer's usual and customary mark-up; or (ii) are not otherwise a tender offer under paragraph (b)(1)(i) of this section, but which (A) are disseminated in a wide-spread manner, (B) provide for a price which represents a premium in excess of the greater of 5% of or $2 above the current market price and (C) do not provide for a meaningful opportunity to negotiate the price and terms.


19. This occurred three months after the S.E.C. proposed its two-tiered definition of "tender offer." T. HAZEN, supra note 16, at 348 n.11. According to the author, Congress has not yet responded. Id.


22. These factors have evolved over a period of time and are discussed in Wellman v. Dickinson, 475 F. Supp. 783 (S.D.N.Y. 1979).

the transactions are accompanied by high-pressure tactics.24 Further, the federal courts have been more inclined to hold that a tender offer has occurred when a publicly announced intention to purchase a large block of stock is followed by a rapid acquisition thereof.25 If none of the S.E.C.'s eight factors are present, the courts have been less inclined to hold that a tender offer has occurred and may characterize the purchasing scheme as merely "a particularly aggressive open market [or privately negotiated] stock buying program."26

The reason for the focus on the amount of pressure brought to bear in the stock purchase program is that, as far as privately negotiated purchases are concerned, any purchase pressure that interferes with a shareholder's "unhurried investment decision" and the "fair treatment of . . . investors" defeats the protections afforded by the Williams Act and will likely be considered a tender offer.27 Once an offer is identified as a tender offer, the filing,28 antifraud29 and disclosure30 provisions of the Williams Act apply.

The Williams Act amendments to the Securities Exchange Act of 193431 were enacted to protect investors from having to make an uninformed decision whether to tender their stocks when faced with a cash tender offer.32 Prior to the Act's passage in 1968, a cash tender offeror was not required to disclose its identity or its plans. Thus, it was the purpose of the Act to "correct the current gap [the disclosure requirements] in our [federal] securities laws."33

Underlying the Williams Act was a congressional determination that the investing public should be protected by a "market ap-

32. See SENATE COMM. ON BANKING AND CURRENCY, supra note 12.
33. Id. at 4.
proach” that generates a “free flow of information from both sides, so that knowledgeable shareholders can make an unfettered and knowledgeable choice whether to relinquish their shares for a cash premium.” Further, Congress was aware of and concerned about the phenomenon of the corporate raider. Yet Congress determined that such onerous burdens should not be placed on tender offers as would render them unavailable. Recognizing that takeover bids “serve a useful purpose in providing a check on entrenched but inefficient management,” Congress felt it necessary to avoid favoring either incumbent management or takeover bidders.

Neutrality in tender offer regulation was the legislative objective. As Senator Williams stated at the time: “We have taken extreme care to avoid tipping the scales either in favor of management or in

34. Kennecott Corp. v. Smith, 637 F.2d 181, 188 (3d Cir. 1980). As the Fifth Circuit has noted: “Under this approach, federal regulation functions to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then to let the investor decide for himself.” Great United Corp. v. Kidwell, 577 F.2d 1256, 1276 (5th Cir. 1978), rev’d on venue grounds sub nom. Leroy v. Great W. United Corp., 443 U.S. 173 (1979).

35. As Senator Kuchel, co-sponsor of the legislation, stated:

Today there are those in our financial community who seek to reduce our proudest businesses into nothing but corporate shells. They seize control of the corporation with unknown sources, sell or trade away the best assets, and later split up the remains among themselves. The tragedy of such collusion is that the corporation can be financially raped without management or shareholders having any knowledge of the acquisitions. . . . The corporate raider may thus act under a cloak of secrecy while obtaining the shares needed to put him on the road to a successful capture of the company.

113 Cong. Rec. 857-59 (1967). Senator Kuchel thus emphasized that tender offerors were not the intended beneficiaries. This quote was germane to the holding in Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977), which denied shareholder status with its affiliated protections to a tender offeror and further denied it a private cause of action for damages when the tender offer was defeated. See supra note 2.

The looting cases have often involved investment companies. See e.g., Insuranshares Corp. of Del. v. Northern Fiscal Corp., 35 F. Supp. 22 (E.D. Pa. 1940); Gerdes v. Reynolds, 28 N.Y.S. 2d 622 (1941). The Federal Investment Co. Act of 1940 requires honest and unbiased management of such companies that are subject to the Act; section 16(a), 15 U.S.C. § 80a-10 (1982).


38. See Bendix Corp. v. Martin Marietta Corp., 547 F. Supp. 522 (D. Md. 1982). The court interpreted congressional intent as seeking to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice. See MITE Corp. v. Dixon, 633 F.2d 486, 496 (7th Cir. 1980), aff’d sub nom. Edgar v. MITE Corp., 457 U.S. 624 (1982).
favor of the person making the takeover bids. [This legislation] is designed solely to require full and fair disclosure for the benefit of investors.\(^3\) Thus, Congress expressly denied any desire to provide management with a weapon to discourage takeover bids.\(^4\) Since, for example, any delay favors incumbent management, the federal government has refused to countenance any regulations that would serve to unduly delay the offer.\(^5\) The prevailing view, succinctly summarized by the Fifth Circuit in *Great Western United Corp. v. Kidwell*,\(^6\) is that investors have the right to hear a fair presentation of the offeror's proposal, and that such a right can only be protected by avoiding regulation that disadvantages an offeror in favor of target management.\(^7\) Any regulation of tender offers must be even-handed in its application and effect in order to be legitimate.

The most important provisions of the Williams Act have been

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40. Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975). "Congress intended to do no more than give incumbent management an opportunity to express and explain its position." *Id.*
41. *See supra* notes 3-6 and accompanying text. Congress and courts alike have recognized delay as target management's most potent weapon. *See Kennecott Corp.*, 507 F. Supp. at 1218. Delay is viewed as frustrating the purposes of the Williams Act in three ways: (i) delay of the commencement of a tender offer denies investors the critical information about both the offer and the offeror that is essential to making the kind of informed choice contemplated by the "market approach"; (ii) delay is inevitably used by the incumbent management of the target, through various defensive tactics, to deprive shareholders of the opportunity to choose at all . . . and (iii) delay harms an offeror whose offer may be frustrated 'not through adverse action of the shareholders, as Congress contemplates, but through barriers erected by target management.' *Id.*, *citing* Kennecott Corp. v. Smith, 637 F.2d at 188-89. *See also* Sheffield v. Consolidated Foods Corp., 302 N.C. 403, 276 S.E.2d 422 (1981) (protect public investor by providing otherwise unobtainable information); Natomas Co. v. Bryan, 512 F. Supp. 191 (D. Nev. 1981) (protect target investors by allowing both offeror and target management to present their respective arguments); Gunter v. Ago Intern B.V., 533 F. Supp. 86 (N.D. Fla. 1981) (Williams Act imposes neutrality among the parties to a tender offer by requiring full and fair disclosure for the investors' benefit while providing offeror and target management the chance to fairly present their cases); Edgar v. MITE Corp., 457 U.S. 624 (1982) (Congress intended to protect investors, but major aspect of this protection was to avoid favoring either the offeror or the target management).
43. *Id.* The corollary, of course, is evenhanded regulation. *Kennecott Corp.*, 597 F. Supp. at 1216. Cf. *Piper v. Chris-Craft Indus.*, Inc., 430 U.S. 1 (1977), in which Chief Justice Burger, writing for the Court, observed that while "Congress was indeed committed to a policy of neutrality in contests for control,. . . its policy of evenhandedness does not go . . . to the purpose of the legislation [but is] one characteristic of legislation directed toward a different purpose—the protection of investors." *Id.* at 29.
codified in sections 13(d)\textsuperscript{44} (essentially a disclosure provision keyed to neutrality\textsuperscript{48} and the preservation of investor autonomy\textsuperscript{46}), and 14(d)\textsuperscript{47} (also a disclosure provision). The primary difference between the two sections is that the former calls for disclosure after acquisition of beneficial ownership to inform the shareholders of the potential effects of the acquisition on the investment, while the latter calls for pre-acquisition disclosure to inform shareholders of such effects.\textsuperscript{48}

The Schedule 13D,\textsuperscript{49} as required by Section 13(d), must disclose the purchaser's identity and background, amount and source of funds for the purchase, extent of purchaser's holdings in the issuer, whether the purchase is effectuated for gaining control of the corporation and whether the purchaser plans to liquidate, merge, or make any other major changes in the target corporation’s business or structure.\textsuperscript{50}

Regulation 14D\textsuperscript{51} sets forth the S.E.C.'s filing and disclosure re-

\textsuperscript{44} See Rule 13d-1 which provides criteria triggering application of § 13. The rule requires:

(a) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is specified in paragraph (d), is directly or indirectly the beneficial owner of more than 5 percent of such class shall, within ten days after such acquisition, send to the issuer of the security . . . and to each exchange where the security is traded . . . a statement containing the information required by Schedule 13D.


45. The purpose of requiring any person acquiring more than five percent of any class of registered securities of a corporation to send to the issuer and to file with the S.E.C a disclosure of certain information is not to protect incumbent management or to discourage takeover bids, but to assure a fair fight between target management and tender offerors, Indiana Nat'l. Corp. v. Rich, 712 F.2d 1180 (7th Cir. 1983); to alert the marketplace to every rapid aggregation or accumulation of securities, Feldman v. Simkins Indus., Inc., 679 F.2d 1299 (9th Cir. 1982); and to protect the individual investor from making uninformed decisions in response to tender offers, S.E.C. v. World Wide Corn Inv. Ltd., 567 F. Supp. 724 (N.D. Ga. 1983); Chock Full O'Nuts Corp. v. Finkelstein, 548 F. Supp. 212 (S.D.N.Y. 1982); Jewel Co., Inc. v. Pay Less Drug Stores Northwest, Inc., 510 F. Supp. 1006 (N.D. Cal. 1981).

46. See United States v. Chiarella, 588 F.2d 1358 (2d Cir. 1978), rev'd on other grounds, 445 U.S. 222 (1980). In Chiarella the court indicated that the provisions of § 13(d), which place a five percent limitation on the amount of target stock that may be purchased by a would-be tender offeror prior to the offer, were not intended to interfere with an offeror's exercise of its economic judgment. Rather, the five percent limitation was intended to prevent the stampede effect that tender offer publicity has on shareholders. Id.


49. See supra note 44.


quirements under Section 14(d). Rule 14d-1\(^{52}\) gives a basic definition of tender offer and incorporates by reference all general definitions applicable under other provisions of the Exchange Act. Rule 14d-2 details how a tender offer is commenced.\(^{53}\) Section 14(d) requires the filing of Schedule 14D,\(^{54}\) which contains the same basic information as Schedule 13D plus additional information regarding any past negotiations or transactions with the target company, and any financial information about the offeror if such information is material to the offer.\(^{55}\) The Supreme Court has indicated that material information is that which a reasonable shareholder would likely consider important in deciding how to vote.\(^{56}\)

The Williams Act also provides certain substantive protections to tendering shareholders during the course of the offer. Shareholders must be allowed to withdraw their tendered shares during the first seven days following publication of the offer, or after sixty days if the offeror has not already purchased them.\(^{57}\) In addition, if the offer is for less than 100% of the target's shares, all shares tendered during the first ten days must be taken pro rata,\(^{58}\) and any subsequent increase in the offered price must also be paid to those shareholders who have already tendered their stock.\(^{59}\)

The broadest reaching provisions of the Exchange Act concerning tender offers are found in Section 14(e),\(^{60}\) which prohibit mate-

53. A tender offer begins at 12:01 a.m. on the earliest date of the following events: (1) first publication of the longform pursuant to Rule 14d-4(a)(1); (2) first publication of a summary advertisement pursuant to Rule 14d-4(a)(2); or (3) first public announcement of the tender offer unless withdrawn within five days or the "bidder" complies with the filing and disclosure requirements of Rules 14d-3(a), 14d-6 and 14d-4 which all require public dissemination. 17 C.F.R. § 240.14d-2 (1984).
55. The offer must disclose all material facts under § 14(d) of the Williams Act, 15 U.S.C. § 78n(d) (1982). Other facts which must be disclosed include whether the person filing has been convicted of criminal activity or has been a party to past S.E.C. proceedings, and whether any steps are required to be taken for any necessary administrative approval, as well as the applicability of antitrust laws margin requirements of 15 U.S.C § 78(g) (1982) and any pending legal proceedings.
60. Section 14(e) provides:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statement made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders
rial misstatements, omissions and fraudulent practices without regard to whether the target company is subject to the Exchange Act's reporting requirements.\textsuperscript{61} In conjunction with this section, the S.E.C. promulgated Regulation E,\textsuperscript{62} which sets forth acts and practices violative of Section 14(e) and applies to all tender offers. Covered are duration,\textsuperscript{63} modification,\textsuperscript{64} payment of consideration offered,\textsuperscript{65} and return of tendered securities upon withdrawal or termination of the offer.\textsuperscript{66} The S.E.C. has proposed that it be unlawful for a tender offeror not to offer the highest consideration to all shareholders solicited pursuant to the same tender offer\textsuperscript{67} (to prevent abusive two-tiered tender offers).\textsuperscript{68} The Commission has also proposed that it be unlawful for any participant in a tender offer to purchase securities subject to the tender offer (with an exception for securities purchased under a qualified employee benefit plan).\textsuperscript{69}

One of the most controversial issues involving tender offers concerns the proper role of management's response. Responses to tender offers are governed by Rule 14e-2,\textsuperscript{70} and insider trading is

\textsuperscript{61} All the other provisions of the Williams Act are limited to securities of issuers subject to the registration requirements of section 12. 15 U.S.C. § 78l (1982). Section 12 requires any corporation with assets of $1,000,000 or more and over 500 shareholders, as well as corporations whose securities are traded on a national exchange, to register with the S.E.C.


\textsuperscript{63} Rule 14e-1 requires that a tender offer be held open for at least twenty business days from the date of first publication of the offer, unless the tender offer is by the issuer and is not made in anticipation of, or in response to, another person's takeover attempt. 17 C.F.R. § 240.14e-1(a) (1984). If the length of the offer is extended, notice of such extension must be made by press release or other public announcement. Id. at § 240.14e-1(d).

\textsuperscript{64} A tender offeror may not increase the offer's terms, type of consideration, or dealer's soliciting fee without keeping the offer open for at least ten business days from the publication of the notice of such increase. This does not apply to tender offers by the issuer of securities which are not made in anticipation of or response to another person's tender offer for securities of the same class. 17 C.F.R. § 240.14e-1(b) (1984).

\textsuperscript{65} Failure to do so is prohibited by 17 C.F.R. § 240.14e-1(c) (1984).

\textsuperscript{66} Failure to do so is prohibited by 17 C.F.R. § 240.14e-1(c) (1984).

\textsuperscript{67} [1979 Transfer Binder] Fed. Sec. L Rep. (CCH) ¶ 24,298 (1979). This rule has not been adopted but is known as proposed rule 14e-4. Id.

\textsuperscript{68} In a two-tiered tender offer, only those shareholders tendering control shares pursuant to the offer receive a premium price. Late tendering shareholders receive a lower consideration. See also infra note 79 and accompanying text.

\textsuperscript{69} Proposed rule 14e-5. See supra note 67. This rule would parallel the antitrust provisions currently found in rule 10b-3, 17 C.F.R. § 240.10d-13 (1984).

\textsuperscript{70} After a tender offer is made, a target company has ten business days from the date of first publication of the offer during which it must make (1) a recommendation of the acceptance or rejection, (2) an expression of no opinion or of neutrality toward the offer, or
prohibited by Rule 14e-3, as is trading with inside information. The issue of target management’s response is complicated by the frequent eventuality of incumbent management’s replacement following the takeover. Tender offers often contain agreements on this issue, known as control transfers. These transfers can create problems under state fiduciary as well as other laws invalidating control premiums. The Williams Act thus imposes disclosure requirements on control transfers under Section 14(f) of the Exchange Act. The purpose of this section is to keep shareholders informed of changes in management control effected without a shareholder vote, and to provide the shareholders with all such material information.

Two rules under Section 10(b) of the Exchange Act also affect conduct during a tender offer. Rule 10b-13 prohibits the purchase of target securities by a tender offeror, other than through the tender offer, during the period the offer is open. Rule 10b-4 prohibits the tendering or guaranteeing of securities by a person not owning those securities. Moreover, market professionals may not sell on the open market that portion of their holdings in the target which they estimate will not be accepted by the tender offeror. Finally, the S.E.C. has announced plans to curtail suspected unfairness and abuses arising from two-tiered tender offers, but these proposals have not been enacted into law.
III. STATE TENDER OFFER LAWS

Because the Williams Act is silent regarding substantive defensive measures, states retain the authority to regulate relations between shareholders and management under Section 28(a) of the Securities Exchange Act of 1934.80 Most state tender offer statutes purport to be enacted to decrease pressure on shareholders to tender hastily, thus allowing a more reasoned and informed evaluation of tender proposals.81 To the contrary, however, investor protection was not the motivating factor behind most state regulation. Rather, it was usually the protection of incumbent management of local companies subject to takeover that provided the impetus. Such regulations acted as impediments to takeovers, and generally hindered or slowed the process.82 If the state regulation becomes overly restrictive, however, such that it conflicts with the basic policy of the Williams Act, it may be held to be an invalid and unconstitutional burden on interstate commerce83 or to be preempted by the supremacy clause.84

end loaded" tender offer, the shareholders selling the controlling shares receive more for their stock than do the remaining shareholders who are bought out in a subsequent merger. Compare the position of the S.E.C. espoused in this release with that taken by the court in Martin Marietta Corp. v. Bendix Corp., 547 F. Supp. 522 (D. Md. 1982), in which it was held that section 14(e) was exclusively a disclosure provision and that Congress had not given the federal courts authority to scrutinize the substantive fairness of a tender offer once adequate disclosure had been made. 547 F. Supp. at 528.

On July 8, 1983, the S.E.C. Tender Offer Advisory Committee presented its recommendations to the S.E.C. See 1 D.J. BLOCK & H.L. PITT, HOSTILE BATTLES FOR CORPORATE CONTROL 559 (Practicing Law Institute 1985). The Committee felt that the current scheme gave rise to four problems: (1) disincentives to undertaking an exchange offer (exchange of securities of target for securities of acquirer); (2) use of open market purchases and other methods to acquire control of issuers that deny shareholders the opportunity to share in the control premium; (3) the potentially coercive effects that two-tiered or partial tender offers have on target shareholders; and, (4) the need to afford an equal opportunity for all target shareholders to participate in an offer. Id. at 565. See also supra notes 67-68 and accompanying text.

80. 15 U.S.C. § 78bb(a) (1982) states: "Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." Id. This is essentially a savings clause which explicitly legitimizes concomitant state regulations. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 292 n.3 (2d ed. 1983).


82. T. HAZEN, supra note 16, § 11.21 at 386.


Nearly all state statutes apply to tender offers for corporations incorporated under the laws of the state and most apply to offers for corporations that have substantial assets and/or a principal place of business within the state. Where the statute establishes jurisdiction over the target, an offeror is subject to the regulating state's law in its transactions with all shareholders living in that state and elsewhere. This prevents the offeror from avoiding a state's requirements by excluding its residents from the offer.

The state acts typically impose disclosure and substantive requirements on the offeror. Some jurisdictions require the same disclosure as that provided under the Williams Act. Several, such as Pennsylvania, New York and Ohio require additional disclosure. Disclosures must be filed anywhere from ten days to sixty days before the offer can become effective. A twenty day requirement is the most common. The imposition of additional filing requirements by various state acts that require more detailed disclosures than under the Williams Act is generally upheld by the courts because such provisions are deemed to supplement, rather than conflict with the federal scheme.

The state agency which regulates securities is usually empowered to enforce the disclosure provisions and can order a hearing on its

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85. For a comprehensive review of all the currently effective state provisions that regulate tender offers, see 1 LIPTON & STEINBERGER, supra note 13, at § 504.
87. See generally E. ARANOW & H. EINHORN, supra note 86 at 234; IDAHO CODE § 30-1506(1) (1980) (requiring that tender offer to regulating state's resident shareholders be made on same terms as offer to out-of-state shareholders).
89. 70 PA. CONS. STAT. ANN. § 75 (Purdon Supp. 1984) (requiring disclosure by offeror of its capital structure, any pending legal or administrative proceedings, and its financial statements for the current and prior three years).
90. N.Y. BUS. CORP. LAW § 1603(a) (McKinney Supp. 1984).
93. HAWAI. REV. STAT. § 417E-3(f) (1976).
own motion, or, as often happens, at the request of the target company. Most states limit the hearings to whether there has been a full and fair disclosure by the offeror. Where many state acts go awry is in exceeding the disclosure policy of the Williams Act. These acts give the state agency the ability to pass not just upon the adequacy of disclosure, but also upon the substantive merits or fairness of the offer.

The substantive provisions of the state statutes cover minimum and maximum offering periods, withdrawal rights of tendering shareholders, and the period during which an offeror must accept all tendered shares on a pro rata basis. These, too, can pose problems, but perhaps the greatest conflict between state and federal tender offer legislation has arisen in the context of state-imposed waiting periods between the filing of the tender offer and its effective date. Statutory provisions requiring such a pre-commencement waiting period were preempted in 1979 by the S.E.C.’s promulgation of Rule 14d-2(b). Thus, any state statutes purporting to delay the commencement of an offer past the date of filing or first publication are invalid.

As with the Williams Act, a key issue in state takeover legislation is the extent to which the requirements of such statutes apply to acquisitions falling outside the conventional definition of tender offers. Various state statutes define a tender offer as consisting

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97. Wis. Stat. Ann. § 552.05(5) (West Special Pamphlet 1984). For a review of standards under the state legislation, see Lipton & Steinberger, supra note 13, at 5-35.


102. 17 C.F.R. § 240.14d-2(b) (1984). This section states in pertinent part:

A public announcement by a bidder through a press-release, newspaper advertise-
of one or more of the following: (1) an offer; (2) an offer to acquire or an acquisition pursuant to a tender offer, or request or invitation for tenders; (3) an offer to purchase or invitation to tender for purchase; (4) purchases made pursuant to a cash tender offer; and (5) a purchase program involving either open-market or privately negotiated purchases, or both. As a result, some state statutes are applicable to open-market or privately negotiated purchases from selected shareholders while others are not; a particular transaction may be classified as a tender offer in one state and not in another.

IV. CONSTITUTIONAL CHALLENGES TO STATE TENDER OFFER STATUTES

Challenges to state tender offer legislation are frequently based on the supremacy and commerce clauses of the Constitution. Usually, supremacy clause analysis focuses on conflicts between state and federal regulation. Preemption under the supremacy clause is largely a matter of congressional intent. State laws are

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103. \textit{Lipton} & \textit{Steinberger}, supra note 13, at 5-35.
104. See supra notes 23-25 and accompanying text.
107. \textit{See also In re EZ Painter Corp. & Newell Cos. Inc., \textit{Blue Sky L. Rep. (CCH) ¶ 71,063, at p. 67,316 (Wis. Comm’r Sec. 1973), wherein the court noted that there are six criteria to be considered in characterizing purchases as a tender offer. As the court stated, these include: (1) the number of persons approached; (2) the period of time in which purchases occur; (3) the characteristics of the shareholders approached; (4) the nature of contacts made with the shareholders; (5) the terms and specificity of the proposals; and, (6) whether the application of the state takeover statute’s substantive protections of offerees is applicable.}
109. “The Congress shall have the power . . . [t]o regulate commerce . . . among the several states.” \textit{U.S. Const.} art. I, § 8 cl. 3. State legislation will be upheld only if its regula-
preempted when federal legislation expressly provides or when the state regulation directly conflicts with the federal enactments.\textsuperscript{109} Such conflict is particularly apparent where state statutes favor local incumbent management by delaying offers, while federal policy, in contrast, requires even-handed regulation.\textsuperscript{111}

Because corporate regulation is not traditionally a federal concern\textsuperscript{112} and because the Williams Act provides minimum standards of disclosure rather than detailing a comprehensive regulatory scheme,\textsuperscript{113} it cannot be inferred that Congress intended to preempt all state regulation. This was the conclusion reached by the Supreme Court in \textit{Piper v. Chris-Craft Industries, Inc.}.\textsuperscript{114} The Piper Court found the sole purpose of the Williams Act to be protection of investors confronted with a tender offer.\textsuperscript{115}

Although the Williams Act does not expressly preclude the states from regulating tender offers, preemption may still be implied by an overriding federal interest in the subject,\textsuperscript{116} or when federal regulation of an area is so pervasive as to imply that Congress intended to completely "occupy the field,"\textsuperscript{117} or when state regulation prevents the fulfillment of federal regulatory objectives.\textsuperscript{118} Whether or not state tender offer statutes are preempted

\textsuperscript{110}. See, e.g., Rice v. Santa Fe Elevator, 331 U.S. 218 (1947) (concurrent state regulation prohibited by the Federal Warehouse Act).
\textsuperscript{111}. See, e.g., Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) ("[F]ederal exclusion of state law is inescapable. . . . where compliance with both federal and state regulations is a physical impossibility. . . .") Id. at 142-43.
\textsuperscript{112}. See \textit{Corporate Takeovers: Hearings Before the Senate Comm. on Banking, Housing & Urban Affairs, 94th Cong., 2d Sess. 94 (1976); Langevoort, State Tender Offer Legislation: Interests, Effects and Political Competency, 62 \textit{CORNELL L. REV.} 213, 246-54 (1977).}
\textsuperscript{113}. However, because of the federal securities legislation, a body of federal corporate law has been emerging. \textit{See generally} W. \textit{CAREY} & M. \textit{EISENBERG}, \textit{CASES AND MATERIALS ON CORPORATIONS} 13-14 (5th ed. 1980).
\textsuperscript{114}. 430 U.S. 1 (1977). The Court held that the unsuccessful tender offeror had no implied cause of action for damages under \S\ 14(e) of the Securities Exchange Act of 1934, 15 U.S.C \S\ 78(e) (1982), which prohibits fraud in connection with tender offers. The offeror was not a member of the class for whose special benefit the statute was enacted.
\textsuperscript{115}. 430 U.S. at 3.
\textsuperscript{117}. \textit{See City of Burbank v. Lockheed Air Terminal, Inc.}, 411 U.S. 624 (1973) (local anti-noise ordinance preempted by federal regulations concerning aircraft and airports).
\textsuperscript{118}. \textit{Id.}
by the Williams Act "depends upon a determination [of] whether they merely supplement or are inconsistent with the purposes of the federal enactment." Such a determination necessarily involves a balancing of state and federal objectives.

Of course, even when a state law is not preempted by federal legislation under the supremacy clause, it is still open to constitutional challenge if it imposes excessive burdens upon interstate commerce. State tender offer statutes risk conflict with the commerce clause primarily because of the extraterritorial coverage that enables the state to control transactions between nonresident offerors and nonresident shareholders. The offer might not have sufficient contacts with the regulating state to justify the state's exercise of jurisdiction. The problem is that the legitimate state interest in extraterritorial coverage is difficult to identify, since a state can have no interest in protecting out-of-state residents or in regulating out-of-state tender offers. One commentator has suggested that such coverage is probably "intended to insulate local target companies from takeovers, thereby preventing the possible liquidation or relocation of corporate assets and the consequent loss of local revenue and employment." This protection of local commerce has been declared to be an illegitimate state interest.

The test by which commerce clause analysis proceeds is one balancing the impact of the statute on interstate commerce against the legitimate state interests being served by the law. A state statute will generally be struck down under this analysis if it substantially impedes the free flow of interstate commerce or if it af-

119. Kennecott Corp. v. Smith, 507 F. Supp. 1206, 1216 (D.N.J. 1981). "However, a determination that the state act supplements the federal act does not necessarily require a conclusion that such act does not frustrate the federal act." Id.


121. This sets state tender offer statutes on a separate ground than state blue sky laws that are wholly within the competency of states "to protect the public against the imposition of unsubstantial schemes and the securities based upon them." Hall v. Geiger-Jones Co., 242 U.S. 539, 550 (1917) (upholding Ohio blue-sky law against commerce clause challenge because such laws regulate wholly intrastate transactions).

122. See E. Aranow, supra note 81, at 231-32.

123. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935). "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." Id.


ffects an area of commerce requiring national uniformity.\textsuperscript{127}

Courts have preferred to apply commerce clause analysis to each separate provision of a statute, rather than to the statute as a whole, so as to avoid the wholesale invalidation of entire statutes.\textsuperscript{128} If only burdensome provisions are eliminated, the state statute could continue to protect investors. This can be done if "it appears both that, standing alone, legal effect can be given to [a provision] and that the legislature intended the provision to stand in case others included in the act and held bad should fall."\textsuperscript{129}

Even if extraterritorial coverage is justifiable, the offeror is still significantly burdened by conflicts between regulations of the several states that may assert jurisdiction over an offer.\textsuperscript{130}

Decided in 1978, \textit{Great Western United Corp. v. Kidwell}\textsuperscript{131} was the first case in which a federal court ruled on the constitutionality of a state tender offer statute. In that case, the Fifth Circuit held that the Idaho act at issue was both preempted by the Williams Act and repugnant to the Constitution.\textsuperscript{132} The Fifth Circuit decision in \textit{Great Western} led to the subsequent invalidation of several state statutes.\textsuperscript{133} Other cases recognized the possibility of success of such a claim based on \textit{Great Western} without ruling on the merits of the constitutional challenge.\textsuperscript{134}


\textsuperscript{128} Note, \textit{supra} note 124, at 527.

\textsuperscript{129} Dorchy v. Kansas, 264 U.S. 286, 290 (1924). This task may be simplified where severability clauses are included in the statute. \textit{See}, e.g., N.J. STAT. ANN. § 49:5-18 (West Supp. 1978); N.Y. BUS. CORP. LAW § 1613 (McKinney Supp. 1977).


\textsuperscript{131} 577 F.2d 1256 (5th Cir. 1978), aff'd, 439 F. Supp. 420 (N.D. Tex. 1977).

\textsuperscript{132} Id. For an in-depth discussion of the Williams Act and preemption of state statutes, see generally, Moore, \textit{Preemption and the Constitutionality of State Tender Offer Legislation}, 54 \textit{Notre Dame Law.} 725 (1979).


\textsuperscript{134} S-G Sec., Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114 (D. Mass. 1978) (court refused to issue a preliminary injunction against offeror's alleged violation of Massachusetts takeover law because there was no likelihood of success on the merits); Occidental Petroleum
One year later, the Supreme Court reversed the Fifth Circuit decision on venue grounds, but declined to address the question of the constitutionality of state takeover laws. Following this reversal, a split of opinion developed, some courts continuing to follow the reasoning of the Fifth Circuit to invalidate state statutes or grant preliminary injunctions against their enforcement, others simply refusing to invalidate state statutes, and some refusing to decide their constitutionality. It was amidst this prevailing judicial uncertainty that the S.E.C. promulgated Rule 14d-2(b), which was designed to invalidate many state statutory provisions. As the Commission noted at the time:

[B]y deeming commencement to occur on the date of the publication or filing required by these [state] statutes, the minimum periods, best price, and withdrawal and pro rata rights provided under these [state] statutes could not function since they are usually predicated on the effective date of the tender offer which cannot occur until after the conclusion of the waiting period and hearing process.

On October 17, 1980, the Seventh Circuit Court of Appeals held an Illinois takeover statute unconstitutional in *MITE Corp. v. Dixon*.

The court avoided the issue of congressional preemption, finding instead that the state law frustrated the Williams Act's

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137. *See* Telvest, Inc. v. Bradshaw, 618 F.2d 1029 (4th Cir. 1980) (reversing preliminary injunction against enforcement of Virginia statute); AMCA Int’l. Corp. v. Krouse, 482 F. Supp. 929 (S.D. Ohio 1979) (rejecting AMCA’s challenge to the Ohio Tender Offer Act on preemption and commerce clause grounds). The court was of the opinion that the Ohio Act was consonant with the Williams Act policy of investor protection, did not conflict with its operation and that Congress had not evinced a desire to restrict non-conflicting state takeover legislation. *Id.* at 937-38.
140. *Id.* at 82,584.
“market approach” to investor protection.\textsuperscript{142} Furthermore, the Seventh Circuit balanced “Illinois’ tenuous interest in protecting resident shareholders and regulating control transfers” against the statute’s “significant potential to cause commercial disruption” of interstate commerce, and concluded that the Illinois statute violated the commerce clause.\textsuperscript{143} On June 23, 1982, in \textit{Edgar v. MITE Corp.},\textsuperscript{144} the United States Supreme Court found the “Illinois Business Takeover Act” to be unconstitutional under the commerce clause by a five-to-four vote, reasoning that the burden on interstate commerce outweighed the putative local benefits of the statute.\textsuperscript{145}

The final step in the invalidation of state tender offer regulation came with the decision of the Sixth Circuit in \textit{Bendix Corp. v. Martin Marietta Corp.},\textsuperscript{146} in which the court held that a Maryland statute was unconstitutional even if applied only to enjoin purchases from state residents.\textsuperscript{147} The court reasoned that the Maryland statute indirectly burdened interstate commerce by preventing Maryland shareholders from participating in nationwide tender offers, and effectively defeated tender offers of out-of-state residents that needed the shares of Maryland shareholders to make the tender offer successful.\textsuperscript{148}

When a state statute regulates or burdens interstate commerce indirectly, the burden imposed must not be excessive in relation to the local putative benefits of the state statute.\textsuperscript{149} Because an inci-

\textsuperscript{142} MITE Corp. v. Dixon, 633 F.2d at 491-98. The court felt that the provision allowing the Secretary of State to pass upon the substantive fairness of the tender offer conflicted with the Williams Act aim of promoting an unfettered choice among informed investors; that this aim was also hampered by the provision granting target management the right to call hearings; and, that the twenty-five day precommencement notice and hearing provisions gave target management a powerful weapon with which to cause delay. \textit{Id.}

\textsuperscript{143} \textit{Id.} at 502.

\textsuperscript{144} 454 U.S. 624 (1982).

\textsuperscript{145} \textit{Id.} The Supreme Court felt that the most obvious burden of the Illinois Act arose from its extraterritorial effect which empowered the state to block nationwide tender offers. \textit{Id.} at 643. Furthermore, the local benefits supposed to flow from this Act were of questionable value since the Williams Act provided the same substantive protections. \textit{Id.} at 644. Finally, the possible benefits of the delays imposed by the Act were outweighed by the increased risk that the offer would fail due to incumbent management’s defensive tactics. \textit{Id.} at 645.

\textsuperscript{146} 547 F. Supp. 522 (D. Md. 1982).

\textsuperscript{147} \textit{Id.} at 532.

\textsuperscript{148} \textit{Id.}

\textsuperscript{149} Edgar v. MITE Corp., 457 U.S. at 643. \textit{See also} Pike v. Bruce Church, 397 U.S. 137, where the Court intimated that a statute which has only an incidental effect on interstate commerce is valid “unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” \textit{Id. See also} LIPTON & STEINBERGER, \textbf{supra} note
dental effect on interstate commerce is unavoidable, *MITE* and *Martin Marietta* seem to indicate that all state takeover legislation is unconstitutional, even if applied to wholly intrastate offers and purchases.150

Yet states persist in their attempts to regulate tender offers affecting their residents and local businesses, thus illustrating the parochial nature of such legislation and posing familiar problems regarding the proper balance between state and federal power.151

V. INVALID STATE TENDER OFFER LEGISLATION

The following areas of state tender offer legislation have been found to be preempted by federal law:

1. Disclosure requirements. The imposition of additional disclosure requirements under state tender offer legislation, even though supplemental to the Williams Act,152 has been declared unconstitutional.153 It has been pointed out that “[e]xcessive disclosure requirements may accomplish more harm than good by confusing shareholders,” and that “[d]isclosure of a mass of irrelevant data can confuse the investor and obscure relevant disclosures.”154

2. Precommencement Waiting Periods. Without having expressly decided the preemption issue of Rule 14d-2(b),155 the Supreme Court has held nevertheless that waiting periods between the filing date and an offer’s effective date imposed under state law may

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13, at § 5.01, 5-3.


151. *See supra* note 95 and accompanying text.

152. *See* National City Lines, Inc. v. LLC Corp., 687 F.2d 1122 (8th Cir. 1982) (the Missouri Act required substantially more disclosure than the Williams Act, including “such additional information as the Commissioner may require as necessary in the public interest or for the protection of investors,” *Id.* at 1131); Dart Indus., Inc. v. Conrad, 462 F. Supp. 1 (S.D. Ind. 1978) (provision requiring disclosure of the offeror’s financial condition and history invalidated).

153. *National City Lines*, 687 F.2d at 1132. The court stated: “The S.E.C. has attempted to write disclosure requirements that provide enough material information without producing reports so detailed and complicated that few shareholders would want to read them. . . . That judgment is a legislative one.” *Id.* (citing Great W. United Corp. v. Kidwell, 577 F.2d at 1280-81 (citations omitted)). Missouri’s attempt to second guess that judgment was invalid, *National City Lines, Inc.*, 687 F.2d at 1132. *See supra* note 152 and accompanying text.


155. *See supra* note 100 and accompanying text.
contribute to a state statute being held unconstitutional as creating an undue burden on interstate commerce. The requirements imposed by such a provision may “prevent prompt disclosure of crucial information to the shareholders and through delay, . . . shift the advantage in [the] struggle to incumbent management.”

3. Offer Duration Provisions. Provisions extending the time an offer must be kept open beyond that period required under the Williams Act are preempted because they directly conflict with the Williams Act and serve to delay completion of the offer.

4. Administrative Hearing Provisions. State provisions requiring an administrative hearing at the target’s request have been held invalid. Such provisions allow target management, interested in preserving control, to use the state tender offer statutes to delay and defeat the offer. It follows from this that these hearings are unlikely to provide shareholders with much protection since they are called pursuant to the interests of incumbent management and tend to substitute administrative judgment for that of informed shareholders.


Congress specifically considered and rejected the requirement that an offeror make a public disclosure of a proposed tender offer prior to the commencement of the offer because it might delay the offer when time is of the essence. S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1967). Moreover, there is no federal requirement of disclosure before the offer commences. See also National City Lines, Inc. v. LLC, Corp., 687 F.2d 1122 (8th Cir. 1982) (striking down a twenty day precommencement waiting and notice provision because it and associated provisions upset the balance between target and offeror by granting target management time to take defensive action); Natomas Co. v. Bryan, 512 F. Supp. 191 (D. Nev. 1981) (invalidating thirty day precommencement notice provision).

158. See Dart Indus., Inc. v. Conrad, 462 F. Supp. 1 (S.D. Ind. 1978). The stricken Delaware provision required the offer to be kept open for at least twenty days (DEL. CODE ANN. tit. 8 § 203(a)(2), (a)(3) (Supp. 1979)) while the Williams Act requires an offer to remain open for seven or ten days (15 U.S.C. § 78(d)(5), (6) (1982)).

159. See Bendix Corp. v. Martin Marietta, 547 F. Supp. 522, 529 (D. Md. 1982). See also Edgar v. MITE Corp., 457 U.S. 624 (1982) (allowing the Secretary of State to pass upon a the substantive fairness of a tender offer protects the investor at the expense of his own autonomy and is thus at odds with the congressional intent behind sections 13(d) and (e) of the Williams Act); Abella v. Universal Leaf Tobacco Co., Inc., 546 F. Supp. 795 (E.D. Va. 1982) (“The purpose of the 1934 Act is to insure full and fair disclosure, not the fairness of any transaction.” Id. at 803).


shareholders, contrary to the purposes of the Williams Act.\textsuperscript{162} Hearing and automatic stay provisions which allow the target's incumbent management to unilaterally stop or delay an offer are also preempted.\textsuperscript{163}

5. Withdrawal Rights of Tendering Shareholders. Those state provisions addressing withdrawal rights are problematic due to increased offeror uncertainty in evaluating the probability of the offer's success.\textsuperscript{164} Because the federal objective of the disclosure requirements is to benefit all shareholders, the avowed objective behind these withdrawal provisions of protecting unsophisticated investors (who are more likely to tender early) is too attenuated to survive commerce clause analysis.\textsuperscript{165} Moreover, withdrawal provisions which delay the completion of a tender offer beyond the period prescribed by federal law only benefit target management and contravene the mutual policy of the Williams Act.\textsuperscript{166}

6. Proration Provisions. These provisions, which delay consummation of a tender offer to the advantage of incumbent management, are invalid because they conflict with the policy of neutrality underlying the Williams Act.\textsuperscript{167} Like withdrawal provisions, they tend to delay the completion of a tender offer beyond the period prescribed by federal law.\textsuperscript{168}

\textsuperscript{162} See Gunter v. Ago Int'l B.V., 533 F. Supp. 86 (N.D. Fla. 1981) (the Florida Act required approval of the Department of Insurance before any form of tender offer could be made to security holders).


\textsuperscript{164} See Beckman, supra note 124, at 530 n.125.

\textsuperscript{165} Id. at 531.

\textsuperscript{166} See Kennecott Corp. v. Smith, 507 F. Supp. at 1220-21. While the Williams Act and the regulations promulgated thereunder provide that a shareholder depositing shares with an offeror may withdraw them within fifteen business days of the commencement of the offer, the New Jersey Takeover Law allowed shareholders to withdraw their shares up to three days prior to the conclusion of the offer and was thus invalid. \textit{Id.} at 1221-22. \textit{See also} Dart Indus., Inc. v. Conrad, 462 F. Supp. 1 (S.D. Ind. 1978) (invalidation of a Delaware provision granting withdrawal rights to shareholders throughout the duration of the offer). Cf. 15 U.S.C. § 78n(d)(5) (1982) (tendered securities may only be withdrawn within seven days after the offer is first published or at any time after sixty days).


\textsuperscript{168} \textit{Kennecott Corp.}, 507 F. Supp. at 1221-22. ("It is clear that the short ten day period for proration required by § 14(d)(6) of the Securities Act of 1934 was founded on congressional concern that a longer period would unduly favor target management.") Edgar
7. **Subsequent Offer Provisions.** A state provision discriminates against an offeror if it allows subsequent or competing offerors to purchase securities pursuant to their competing offer at the same time the original offeror is permitted to purchase them, without requiring the subsequent offeror to comply with the same waiting requirement applicable to the original offeror. 169 This contravenes the policy of not discouraging tender offers which underlies the Williams Act. 170

8. **Exceptions for Target Management Approved Tender Offers.** A state provision which excepts from the disclosure requirements those tender offers approved by target management impermissibly favors the target company, and allows tender offers to proceed completely without disclosing any information to investors. 171 Such provisions are wholly inconsistent with the federal regulatory objective of protecting the shareholder through disclosure requirements.

9. **Exceptions for Self Tenders.** Edgar v. MITE 172 held that since the Illinois Act exempted from coverage a corporation’s acquisition of its own shares, the argument that the purpose of the Illinois Act was to protect investors was undermined. The MITE court reasoned that a local corporation would be able to make a competing tender offer for its own stock without complying with the state Act and that its shareholders would be left with only the protections afforded them by federal securities law. 173 Because this allows target management to initiate a self tender to defeat an outside offer without providing disclosure to target shareholders, such an exception for self tenders would unfairly benefit incumbent management.

In brief, all the state provisions that have been invalidated have tended to delay completion of tender offers, and have thus supplied an undue advantage in the takeover struggle to incumbent management. Some invalid provisions conflict so directly with the Williams Act that they cannot stand as originally enacted. Nonetheless, the states have persisted in their efforts to regulate tender offers, and have employed a variety of tactics to protect the effectiveness of such legislation.

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v. MITE Corp., 457 U.S. at 638.


170. *See supra* notes 35-36 and accompanying text.


173. *Id.* at 644.
Two of the most common measures that have been taken to protect the enforceability of state takeover statutes are reinterpretation and statutory amendment aimed at avoiding conflict with the federal law. One approach required the offeror not to disclose the amount of consideration to be paid or the class of securities addressed by the offer in the filing required under state law. The purpose behind this approach was to bring the announcement of the offer within the "safe harbor" provision of the S.E.C.'s 1979 rules so that the offeror would not have to commence its offer within five days of the filing.

Another approach was to provide for confidential treatment of all materials filed so as to prevent the occurrence of a "public announcement" under the S.E.C. rules. An offer could also be allowed to commence without prior registration or a pre-commencement waiting period provided the purchases were conditioned upon subsequent registration and hearings.

Other states have amended their regulations or statutes to eliminate the waiting period before commencement of the offer altogether, with the hope that this would avoid the direct conflict with the Williams Act and the S.E.C. rules.

One state even enacted emergency legislation to allow the state securities commissioner to exempt transactions from the state takeover law if necessary to make its application reasonably compatible with federal law. Under this approach, the Commission would require only a limited short-form registration twenty days prior to the commencement of the offer, with a full registration statement to be filed by the date on which the offer would have commenced under Rule 14d-2.


175. Rule 14d-2(d) provides that a public announcement does not commence a tender offer if it only identifies the offeror or the target and states an intention to make a tender offer in the future. See 17 C.F.R. § 240.14d-2(d) (1984).

176. Wisconsin used this approach in conjunction with its "safe harbor" approach. See supra note 169 and accompanying text.

177. The S.E.C. takes the position that nothing in its rules prohibits an offer from being conditioned upon the offeror receiving regulatory approval. SEC Release No. 34-16623, Fed. Sec. L. Rep. (CCH) ¶ 24,284 I, at 17,758 (Mar. 5, 1980)(Question 5). Nevertheless, an offeror must be prepared at all times to accept shares for deposit. Id. (Question 7).

178. Massachusetts, Mississippi and New York have statutorily eliminated the precommencement waiting period.

179. Maryland enacted this bill on April 8, 1980. See BLUE SKY L. REP. (CCH) ¶ 30,563, at 25,577 (April 18, 1980).

180. This approach and the Maryland statute were invalidated on commerce and
VI. CONCLUSION

The current status of the law is that no state may regulate tender offers in such a way as to affect securities transactions between out-of-state offerors and out-of-state shareholders. A state cannot enforce a takeover statute unless the target has very strong contacts with that state. Even then, state regulations must comport with Rule 14d-2 under the 1934 Act; they must not preclude or postpone the commencement of the offer. Further, the state regulatory process must be completed prior to termination of the offer in order to avoid conflicting with the federal regulatory scheme.

Because tender offers typically involve shares traded on national exchanges, they are "commercial transactions taking place in a national market." Since state regulation protects only the interests of the residents within that state, yet (impermissibly) infringes on the rights of extraterritorial parties, there is a need for even-handed, unbiased regulation. National regulation would eliminate the problem of an offeror's required compliance with several possibly conflicting state regulatory processes when the offer affects shareholders in several states.

In view of these considerations, it would appear likely that federal regulation of tender offers will continue to expand, displacing still more state regulation in this area. The clearly established position of the Securities Exchange Commission is that takeover regulation should favor neither acquiror nor target, and should reflect that takeovers take place in a national securities market. Further, the Commission has advised that state regulation of takeovers should be confined to local companies. Thus, while state


182. For the most recent proposed amendments to the Securities Exchange Act of 1934 and the Williams Act, known as the Tender Offer Reform Act of 1984, see D.J. Block supra note 79 at 666-68.
183. Id. at 572.
184. Id. at 574. The authors note that "to the extent necessary to eliminate abuses or interference with the intended functioning of federal takeover regulation, federal takeover regulation should not preempt or override state corporate law. Essentially, the business judgment rule should continue to govern most such activity." Id. at 574-75. Additionally, the authors note:

[F]ederal takeover regulation should not preempt substantive state regulation of banks, utilities, insurance companies, and similar businesses, where the change of control provisions of such state regulation are justified in relation to the overall objectives of the industry being regulated, do not conflict with . . . federal takeover regulation and relate to a significant portion of the issuer's business.
corporate law is not yet wholly preempted, we may expect continued expansion of federal regulation as it concerns market participants, offerors seeking control and the use of tender offer defensive tactics.

*John J. Winter*