Washington and Lee Law Review

Volume 38 | Issue 3 Article 13

Summer 6-1-1981

The Validity of 'State Tender Offer Statutes: SEC Rule 14d-2(b) and Post-Kidwell Federal Decisions

THE VALIDITY OF STATE TENDER OFFER STATUTES: SEC RULE 14d-2(b) AND POST-*KIDWELL* FEDERAL DECISIONS

In 1968, Congress enacted the Williams Act[1] to regulate tender offers.[2] Under the Williams Act, a tender offeror must disclose certain pertinent information to the target company's shareholders concurrently with the commencement of an offer.[3] The Williams Act and the regulations promulgated thereunder also contain substantive provisions that establish a minimum offer period[4] and govern withdrawals of tendered shares,[5] pro-rata purchases,[6] and increases in the purchase price during the offer period.[7] The Securities and Exchange Commission (SEC) recently promulgated rule 14d-2 to define the commencement date of a tender offer.[8] SEC rule 14d-2 provides that a bidder's public announcement which discloses certain information will commence the tender offer.[9] The specific commencement date of a tender offer under the Williams Act is significant because commencement of the offer triggers the Act's disclosure and substantive requirements.[10]

---

[1] 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976 & Supp. III 1979). The Williams Act amended the Securities Exchange Act of 1934 ('34 Act), 15 U.S.C. §§ 78a-78kk (1976 & Supp. III 1979), by adding sections 13(d)-(e) and 14(d)-(f).

[2] A general definition of a tender offer is a public invitation to all of the shareholders of a target company to sell their shares to the offeror at a specific price. *See* Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1251 (1973). *See generally* Note, *What is a Tender Offer?*, 37 WASH. & LEE L. REV. 908 (1980). Congress enacted the Williams Act to provide shareholders confronted with a cash tender offer adequate information and time to make independent, intelligent investment decisions concerning the offer. Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 35 (1977); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975); H.R. REP. No. 1711, 90th Cong., 2d Sess. 4, *reprinted in* [1968] U.S. CODE CONG & AD. NEWS 2811, 2812-14; S. REP. No. 550, 90th Cong., 1st Sess. 2-4 (1967).

[3] 15 U.S.C. § 78n(d)(1) (1976).

[4] Once commencement occurs, a tender offer must remain open continuously for a minimum of twenty business days. 17 C.F.R. § 240.14e-1 (1980).

[5] A tendering shareholder may withdraw tendered shares within fifteen business days and after sixty days from the commencement of an offer. 17 C.F.R. § 240.14d-7 (1980).

[6] Under the Williams Act, tender solicitors must purchase pro-rata all of the shares that investors tender during the first ten days of the offer, if the total number of shares tendered during the ten day period exceeds the number sought. 15 U.S.C. § 78n(d)(6) (1976).

[7] Where a bidder increases the consideration offered to tendering shareholders before the expiration of the offer, the bidder must pay the increased price to every tendering shareholder regardless of whether the shareholders tendered before or after the price increase. 15 U.S.C. § 78n(d)(7) (1976).

[8] 17 C.F.R. § 240.14d-2 (1980); *see* text accompanying notes 18-25 *infra*.

[9] 17 C.F.R. § 240.14d-2(b) (1980).

[10] *See* SEC Securities Exchange Act Release No. 34-16384 (Nov. 29, 1979), *reprinted in* [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,373, at 82,582 [hereinafter cited as SEC Release No. 34-16384]; notes 4-6 *supra*.

Tender offers are subject to additional regulation under various corporate takeover statutes in thirty-six states.[11] These state takeover statutes potentially impair the effectiveness and increase the expected cost of tender offers[12] by imposing on bidders disclosure and substantive requirements that differ significantly from the provisions of the Williams Act.[13] In particular, before a tender offer may begin under state

[11] *See* ALASKA STAT. §§ 45.57.010-.120 (1980); ARK. STAT. ANN. §§ 67-1264 to -1264.14 (1980); COLO. REV. STAT. §§ 11-51.5-101 to -108 (Supp. 1978); CONN. GEN. STAT. ANN. §§ 36-456 to -469 (West Supp. 1980); DEL. CODE ANN. tit. 8, § 203 (Supp. 1980); GA. CODE ANN. §§ 22-1901 to -1915 (1977); HAWAII REV. STAT. §§ 417E-1 to -15 (1976); IDAHO CODE §§ 30-1501 to -1513 (Supp. 1979); ILL. ANN. STAT. ch. 121 1/2, §§ 137.51 to .70 (Smith-Hurd Supp. 1980); IND. CODE ANN. §§ 23-2-3.1-1 to -11 (Burns Supp. 1979); IOWA CODE ANN. §§ 502.101 to .215 (Supp. 1979); KAN. STAT. ANN. §§ 17-1276 to -1285 (1974); KY. REV. STAT. §§ 292.570-.991 (Supp. 1980); LA. REV. STAT. ANN. §§ 51:1500-:1512 (West Supp. 1980); ME. REV. STAT. ANN. tit. 13, §§ 801-817 (West Supp. 1980); MD. CORP. & ASS'NS. CODE ANN. §§ 11-901 to -908 (Supp. 1980); MASS. GEN. LAWS ANN. ch. 110C, §§ 1-13 (West Supp. 1980); MICH. COMP. LAWS ANN. §§ 451.901-.917 (West Supp. 1980); MINN. STAT. ANN. §§ 80B.01-.13 (West Supp. 1980); MISS. CODE ANN. §§ 75-72-101 to -121 (Supp. 1980); MO. ANN. STAT. §§ 409.500 to .565 (1978); NEB. REV. STAT. §§ 21-2401 to -2417 (1977); NEV. REV. STAT. §§ 78-376 to .3778 (1973); N.H. REV. STAT. ANN. §§ 421-A:1 to :15 (Supp. 1977); N.J. STAT. ANN. §§ 49:5-1 to -19 (West Supp. 1979); N.Y. BUS. CORP. LAW §§ 1600-1614 (McKinney Supp. 1980); N.C. GEN. STAT. §§ 78B-1 to -11 (1979); OHIO REV. CODE ANN. § 1707.041 (1979); OKLA. STAT. ANN. tit. 71 §§ 414-21 (Supp. 1980); PA. STAT. ANN. tit. 70, §§ 71-85 (Purdon Supp. 1980); S.C. CODE §§ 35-2-10 to -110 (Supp. 1979); S.D. COMP. LAWS ANN. §§ 47-32-1 to -47 (Supp. 1980); TENN. CODE ANN. §§ 48-2101 to -2114 (1979); UTAH CODE ANN. §§ 61-4-1 to -13 (1977); VA. CODE §§ 13.1-528 to -541 (1980); WISC. STAT. ANN. §§ 552.01-.25 (West Special Pamphlet 1980). Texas regulates corporate tender offers through administrative rules rather than through a takeover statute. *See* Tex. Administrative Guidelines for Minimum Standards in Tender Offers §§ 065.15.00.100-.800, *reprinted in* 3 BLUE SKY L. REP. (CCH) ¶¶ 55,671 to 55,682.

[12] The cash tender offer is normally an extremely effective method of acquiring control of a "hostile" corporation because the tender offer combines speed and surprise. *See* Note, *The Constitutionality of State Takeover Statutes: A Response To* Great Western, 53 N.Y.U. L. Rev. 872, 872-73 n.2 (1978) [hereinafter cited as *A Response To* Great Western]. According to one statistical study, 80% of all tender offers during the period of 1956 to 1979 were at least partially successful. *See* Austin, *Tender Offer Update: 1978-1979*, 15 MERGERS & ACQUISITIONS 13, 14 (1980). State takeover statutes potentially impair the effectiveness of tender offers, however, by giving the target corporation's management time to take defensive actions. *See* MITE Corp. v. Dixon, 633 F.2d 486, 497 (7th Cir. 1980), *appeal filed sub nom.* Edgar v. MITE Corp., 49 U.S.L.W. 3533 (U.S. Jan. 15, 1981) (No. 80-1188); Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1278 (5th Cir. 1978), *rev'd on other grounds sub nom.* Leroy v. Great Western United Corp., 443 U.S. 173 (1979); E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 227-29 (1977); Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 27-28 (1978) [hereinafter cited as Fischel]; Tiger, *The Pennsylvania Takeover Disclosure Law: A Statute Waiting To Be Invalidated*, 25 VILL. L. REV. 458, 458-59 (1980) [hereinafter cited as Tiger]. Defensive tactics available to target management include advising shareholders not to tender their shares, commencing legal actions against bidders, repurchasing shares, issuing additional shares, negotiating a defensive merger, increasing dividends and entering into restrictive loan agreements. *See* E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 234 (1973) [hereinafter cited as ARANOW & EINHORN].

[13] Unlike the Williams Act, most state takeover statutes require potential tender offerors to make specified advance disclosures before commencing the solicitation of shares.

law, many state takeover statutes require advance disclosure of the information that causes the commencement of a tender offer under SEC rule 14d-2.[14] Once a tender offer commences pursuant to rule 14d-2, a bidder will often be unable to comply with the substantive provisions of both the Williams Act and the applicable state takeover provisions.[15] Since state takeover statutes are extremely burdensome and often directly conflict with the Williams Act, tender offerors have challenged the constitutionality of the offending statutes on preemption[16] and commerce clause grounds.[17]

Under SEC rule 14d-2(a)(5), a tender offer commences on the date that the bidder first publishes or otherwise disseminates the offer to the

---

See, e.g., DEL. CODE ANN. tit. 8, § 203(a)(1) (Supp. 1980) (bidder required to give target not less than 20 nor more than 60 days advance notice); PA. STAT. ANN. tit. 70, § 72(a) (Purdon Supp. 1980) (bidder required to give 20 days advance notice); VA. CODE § 13.1-531(a) (1980) (bidder required to give 20 days advance notice). The practical effect of state advance disclosure requirements is to impose a waiting period on the potential offeror during which the target can take defensive measures. *See* note 12 *supra*. Additionally, while the Williams Act does not provide for pre-offer determinations of whether an offer may proceed, several state takeover statutes enable the target company and certain state officials to require time-consuming pre-offer hearings on whether a bidder's solicitation of shares may commence. *See, e.g.*, ILL. ANN. STAT. ch. 121 1/2 § 137.57 (Smith-Hurd Supp. 1980); OHIO REV. CODE ANN. § 1707.041(B)(1), (4) (1979); VA. CODE § 13.1-531(a)(iii) (1980). Although most state takeover statutes restrict these hearings to the issue whether the bidder has made full and fair disclosure, some statutes permit the parties to raise the issue of the offer's substantive fairness. *Compare* VA. CODE § 13.1-531(a)(iii) (1980) (pre-offer hearing confined to issue of whether offeror has given adequate advance disclosure) *with* ILL. ANN. STAT. ch 121 1/2, § 137.57(E) (Smith-Hurd Supp. 1980) (state official empowered to prohibit offer if offer appears substantively inequitable).

[14] *See* text accompanying notes 20 & 27 *infra*.

[15] *See* text accompanying notes 28-30 *infra*.

[16] The supremacy clause of the United States Constitution, U.S. CONST. art. VI, § 2, provides that federal law is the supreme law of the land. The supremacy clause provides the basis for the preemption doctrine. *MITE Corp. v. Dixon*, 633 F.2d 486, 490 (7th Cir. 1980). The Supreme Court in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), set forth general guidelines for determining whether a particular federal statute preempts a state law. Under *Jones*, a valid federal law that expressly or implicitly excludes all state regulation in a particular field preempts all state statutes governing that field. *Id.* at 525-26. Even in the absence of express or implicit preemption, however, federal legislation will preempt state laws that stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.*; *see* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 134 (1963).

[17] The commerce clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 3, grants Congress the power to regulate commerce among the several states. This affirmative grant of power also limits the power of the states to enact legislation that affects interstate commerce over which Congress has primary responsibility. *See* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370-71 (1976). The Supreme Court, in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), set forth the test for determining the validity of a state statute under the commerce clause. The *Pike* Court stated that where a state statute regulates even-handedly to effectuate a legitimate local interest with only incidental effects on interstate commerce, the statute is valid unless its burden on interstate commerce clearly exceeds the putative local benefits. *Id.* at 142.

target corporation's shareholders.[18] SEC rule 14d-2(b) further provides, with two exceptions, that a bidder's press release, newspaper advertisement, or other public statement which discloses certain information causes the tender offer to commence under rule 14d-2(a)(5).[19] The information that causes commencement of the tender offer under rule 14d-2(b) when publicly disclosed is the identities of the bidder and the target, the amount and class of shares sought, and the price offered.[20] The two exceptions under rule 14d-2(b) occur if, within five business days after the bidder's initial public announcement, the bidder either publicly withdraws the offer[21] or makes certain additional filings and disclosures.[22] If the bidder proceeds under the first exception by withdrawing the offer, the bidder's initial public announcement will not commence the tender offer.[23] Alternatively, if the bidder complies with the filing and disclosure requirements of the second exception, the tender offer commences on the date of such filings and disclosures, instead of on the date of the earlier public announcement.[24] The practical

---

[18] 17 C.F.R. § 240.14d-2(a)(5) (1980).

[19] *Id.* at § 240.14d-2(b). The SEC designed rule 14d-2(b) to prevent bidders from publicly announcing the material terms of tender offers prior to the formal commencement of an offer. SEC Release No. 34-16384, *supra* note 10, at 82,582. The Commission has stated that pre-offer public announcements of tender offers force investors to make premature investment decisions on the basis of incomplete information. *Id.* Moreover, the SEC has stated that advance public disclosures of tender solicitations cause the contest for corporate control to occur prior to the functioning of the Williams Act's shareholder protection provisions. *Id.* at 82,583.

[20] 17 C.F.R. § 240.14d-2(c) (1980). A bidder's public announcement that does not state the amount and class of shares sought or the consideration which the offeror will pay does not cause the tender offer to start. *Id.* § 240.14d-2(d). Moreover, the SEC has stated that a public announcement by the target company or by another person having no relationship with the bidder will not trigger the commencement of the tender offer under rule 14d-2(b). SEC Securities Exchange Act Release No. 34-16623 (March 5, 1980), *reprinted in* F. REG. 15521, 15521 (March 11, 1980) [hereinafter cited as SEC Release No. 34-16623]. *But see* Kennecott Corp. v. Smith, [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,835 (3d Cir. 1980) (indirect dissemination of price and quantity information by hostile target corporation held to constitute public announcement commencing tender offer). Practical circumstances, however, may force the offeror to confirm disclosures made in the target corporation's public announcement because a denial of the disclosures could result in liability for material misrepresentations under § 14(e) of the Williams Act, 15 U.S.C. § 78n(e) (1976). Public confirmation by the bidder would, of course, cause the tender offer to commence under SEC rule 14d-2(b). *See* SEC Release No. 34-16623, *supra*, at 15521.

[21] 17 C.F.R. § 240.14d-2(b)(1) (1980). The bidder may withdraw the tender offer by making a subsequent public announcement stating that the bidder has determined to discontinue the offer. *Id.*

[22] *Id.* § 240.14d-2(b)(2) (1980). To fall within the second exception to rule 14d-2(b), a bidder must comply with the filing requirements of rule 14d-3(a) and disclose to the target corporation's shareholders the information specified in rule 14d-6. Rule 14d-3(a) requires that the bidder file with the SEC and deliver to the subject company and any other bidder who has an offer outstanding for the subject company a Schedule 14D-1. 17 C.F.R. § 240.14d-3(a) (1980).

[23] 17 C.F.R. § 240.14d-2(b)(1) (1980).

[24] 17 C.F.R. § 240.14d-2(b)(2)(i) (1980). *But see id.* § 240.14d-2(b)(2)(ii) (notwithstanding rule 14d-2(b)(2)(i), § 14d-7 of '34 Act deemed to apply from date of initial public disclosure).

effect of rule 14d-2(b), therefore, is to require a tender offeror either to commence or withdraw the offer within five business days after publicly announcing the offer's material terms.[25]

SEC rule 14d-2(b) creates a direct and substantial conflict between federal law and many state takeover statutes.[26] State takeover statutes typically require pre-offer public statements or announcements that disclose the information which triggers commencement of the offer under rule 14d-2(b).[27] Compliance with these state advance disclosure requirements will commence the tender offer under the Williams Act despite state statutes prohibiting commencement of the tender offer until the conclusion of an applicable waiting period.[28] Conversely, by forcing bidders to commence their offers before the expiration of the state-mandated waiting period, SEC rule 14d-2(b) prevents the timely operation of state substantive provisions.[29] Therefore, where a state's pre-offer, post-disclosure waiting period exceeds rule 14d-2(b)'s five business day commence-or-withdraw period, tender offerors will be unable to comply with both state and federal law.[30]

Where the operation of a state's advance disclosure and pre-offer waiting period provisions conflict irreconcilably with SEC rule 14d-2(b), the valid federal rule[31] preempts the state statutes.[32] In *Kennecott Corp. v. Smith*[33] the Third Circuit Court of Appeals held that SEC rule 14d-2(b) directly conflicted with and, therefore, preempted New Jersey's advance disclosure and pre-offer waiting period provisions.[34] In *Smith*, Kennecott sought to acquire by cash tender offer a controlling interest in Curtiss-Wright Corporation, a company headquartered in New Jersey.[35] On November 21, 1980, Kennecott publicly announced the proposed tender offer for Curtiss-Wright.[36] Under SEC rule 14d-2(b), Kennecott had until

---

[25] *See* SEC Release No. 34-16623, *supra* note 20, at 15522. Upon commencement of the tender offer, the bidder must be willing to accept immediately tendered shares for deposit. *Id.*

[26] *See* SEC Release No. 34-16384, *supra* note 10, at 82,583; text accompanying notes 27-30 *infra.*

[27] *See* SEC Release No. 34-16384, *supra* note 10, at 82,583.

[28] *Id.* at 82,583-84; SEC Release No. 34-16623, *supra* note 20, at 15522; *see* note 13 *supra.*

[29] SEC Release No. 34-16384, *supra* note 10, at 82,584.

[30] *Id.* at 82,583-84; Rich & McSherry, *Conflict Between Federal and State Regulation of Tender Offers: The SEC's Challenge and New York's Response*, 52 N.Y.B.J. 466, 469 (1980).

[31] *See* text accompanying notes 66-106 *infra.*

[32] *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973) (proper approach to preemption question is to reconcile competing state and federal schemes if possible).

[33] [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,829 (3d Cir. 1980).

[34] *Id.* at 98,838; *see* N.J. STAT. ANN. § 49:5-3 (West Supp. 1978) (20 day waiting period provision); note 40 *infra.*

[35] [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,830.

[36] [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,830.

November 28, five business days later, to commence the solicitation of Curtiss-Wright shares.[37] New Jersey's takeover statute, however, required Kennecott to announce publicly the tender offer at least twenty days before commencing the solicitation of shares.[38] To protect its right to proceed under the Williams Act, Kennecott brought suit in the Federal District Court for the District of New Jersey seeking a declaratory judgment that the New Jersey takeover statute was unconstitutional as applied to Kennecott's tender offer.[39] Concluding that Kennecott had shown neither irreparable harm if an injunction did not issue nor a likelihood of success on the merits, the district court denied Kennecott's motion for preliminary injunctive relief.[40] Kennecott subsequently appealed.

Holding that Kennecott had shown the requisite probability of success on the merits and potential for irreparable harm,[41] the circuit court reversed the lower court's denial of preliminary injunctive relief.[42] With respect to the issue of Kennecott's probability of success on the merits, the *Smith* court reasoned that federal law required Kennecott to commence the tender offer at a time when New Jersey law prohibited commencement.[43] As a result of these differing time requirements, the *Smith*

---

[37] *Id.*; 17 C.F.R. § 240.14d-2(b) (1980).

[38] [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,830; *see* N.J. STAT. ANN. § 49:5-3 (West Supp. 1978). Even after the conclusion of New Jersey's twenty day pre-commencement waiting period, Kennecott's offer could not proceed under New Jersey law until the conclusion of a state pre-offer fairness hearing. [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,830; *see* N.J. STAT. ANN. § 49:5-8 (West Supp. 1978) (administrative approval necessary before tender solicitation can begin); N.J. STAT. ANN. § 49:5-4 (West Supp. 1978) (necessary administrative order cannot issue prior to completion of pre-offer hearing). New Jersey's takeover statute did not prescribe a specific completion deadline for the pre-offer hearing. *See* N.J. STAT. ANN. § 49:5 (West Supp. 1978).

[39] [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,831.

[40] *Id.* The district court reasoned that Kennecott's likelihood of success on the merits was minimal because Kennecott could have avoided the conflict between federal and state law by omitting from its announcement the number of shares sought and the offering price. *See id.*; N.J. ADMIN. CODE § 13:47A-25.3(b) (1980). By omitting this information, Kennecott would have fallen within the "safe harbor" provision of 17 C.F.R. § 240.14d-2(d). Under this safe harbor provision, a public announcement that does not disclose the price and number of shares sought does not trigger the five business day commence-or-withdraw period under rule 14d-2(b). 17 C.F.R. § 240.14d-2(b) (1980); *see* note 20 *supra.*

[41] The *Smith* court found that Kennecott had shown the necessary element of irreparable harm because New Jersey's takeover statute injured through delay both the plaintiff and the investing public. [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,836-37. The court reasoned that delays enhanced the ability of target companies to defeat tender offers. *Id.* at 98,836 (citing MITE Corp. v. Dixon and Great W. United Corp. v. Kidwell). The *Smith* court also observed that delay causes an offeror to incur substantial financial costs if the offeror has borrowed funds to support the offer. *Id.* Moreover, the court found that delay harmed investors by obstructing the free flow of essential investment information, thereby impairing investor decision-making freedom. *Id.* at 98,837.

[42] [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,838.

[43] *Id.* at 98,830 (citing 17 C.F.R. § 240.14d-2(b) (1980) and N.J. STAT. ANN. § 49:5-3 (West Supp. 1978)).

court found that Kennecott could not have simultaneously complied with both federal and state law.[44] The *Smith* court held, therefore, that SEC rule 14d-2(b) preempted the New Jersey waiting period requirements.[45] The *Smith* court, however, remanded to the district court for further consideration of issues concerning the validity of other New Jersey provisions that did not directly conflict with SEC rule 14d-2(b).[46]

In *Smith*, New Jersey argued that Kennecott had failed to show probability of success on the merits because the company could have complied with both federal and state law by using New Jersey's "safe harbor" provision.[47] Under this provision, Kennecott could have avoided triggering the preemptive time requirements of rule 14d-2(b) by excluding from the firm's advance public announcement the offer price or the number of shares sought.[48] Responding to this argument, the *Smith* court observed that Kennecott would still have had to disclose the price and quantity information to the target and that the target in turn would have had to disseminate the information to the public.[49] The *Smith* court also reasoned that the only issue before the court was whether the effect of New Jersey's statute on the course of action which Kennecott actually pursued conflicted with rule 14d-2(b).[50] The *Smith* court concluded, therefore, that New Jersey's safe harbor provision did not save the New Jersey takeover statute from impermissible conflict with SEC rule 14d-2(b).[51]

---

[44] *Id.* at 98,835.

[45] *Id.* at 98,838. The *Smith* court implicitly rejected New Jersey provisions, other than the state's pre-offer waiting period requirement, that also delayed commencement of Kennecott's tender offer under 14d-2(b). *See* note 38 *supra.*

[46] [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,838; *see* Kennecott Corp. v. Smith, 507 F. Supp. 1206 (D.N.J. 1981); text accompanying notes 179-191 *infra.* The *Smith* court indicated in dicta that the New Jersey takeover statute was unconstitutional under the recent line of federal cases adopting Great Western United Corp. v. Kidwell. [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,834-35 (citing *MITE Corp. v. Dixon, Great W. United Corp. v. Kidwell,* and *Hi-Shear Indus. Inc. v. Campbell*); *see* text accompanying notes 118, 124 & 157 *infra.*

[47] [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,835; *see* text accompanying note 48 *infra.*

[48] [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,835; *see* 17 C.F.R. § 240.14d-2(d) (1980); note 20 *supra.*

[49] [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,835; *see* note 20 *supra.*

[50] [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,835. Preemption analysis focuses on whether a state law obstructs the operation of federal law in the circumstances of the particular case, rather than in all cases. *Id.* (citing Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977)).

[51] [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,835, 98,838; *see* text accompanying notes 111-14 *infra. See also* Canadian Pa. Enterprises, Inc. v. Krouse, 506 F. Supp. 1192, 1204 (S.D. Ohio 1981) (holding Ohio takeover statute preempted by 14d-2(b)). In addition to *Smith*, several state courts have found preemptive conflict between SEC rule 14d-2(b) and state takeover statutes that contain advance disclosure and pre-offer waiting period requirements. *See, e.g.*, G.M. Sub. Corp. v. Liggett Group, Inc. [1979-1980 Transfer binder] FED. SEC. L. REP. (CCH) ¶ 97,389, at 97,542 (Del. 1980) (Delaware's 20 day pre-offer

In addition to the incompatability of SEC rule 14d-2(b) and many state takeover statutes that require advance disclosures, rule 14d-2(b) potentially conflicts with state statutes that require advance administrative approval of tender offers involving regulated industries.[52] These conflicts may occur where the necessary application for administrative approval is made public and includes the information set forth in SEC rule 14d-2(c).[53] The filing of a public application containing the information set out in rule 14d-2 would trigger commencement of the tender offer under federal law despite the lack of necessary administrative approval under state law.[54] Recognizing the undesirability of this potential conflict,[55] the SEC has stated that bidders usually can avoid the conflict by conditioning their solicitations on subsequent regulatory approval.[56] In *Sun Life Group, Inc. v. Standard Life Insurance Co.*,[57] the District Court for the Southern District of Indiana upheld the use of the SEC's approach for harmonizing rule 14d-2(b) with statutes requiring administrative approval of shifts in corporate control.[58]

In *Sun Life*, the Indiana Insurance Commissioner interpreted Indiana's Insurance Holding Company Act[59] to permit commencement under SEC rule 14d-2(b) of a conditional tender offer for an Indiana insurance company without advance regulatory approval.[60] Relying on this interpretation, Sun Life Group, Inc. (Sun) applied for state administrative approval of a proposed tender offer for Standard Life Insurance Co. of Indiana (Standard).[61] Since Sun's application for administrative approval was a public document that contained the information set forth in SEC rule 14d-2, the filing required commencement of Sun's tender offer under SEC rule 14d-2(b).[62] In response to Sun's tender offer, Standard brought

---

waiting period preempted by SEC rule 14d-2(b)); Eure v. Grand Metro. Ltd. [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,383, at 97,528 (N.C. Super Ct. 1980) (North Carolina's 30 day pre-offer waiting period preempted by SEC rule 14d-2(b)).

[52] *See* SEC Release No. 34-16384, *supra* note 10, at 82,584.

[53] *Id.*; *see* 17 C.F.R. § 240.14d-2(c) (1980).

[54] *See* 17 C.F.R. § 240.14d-2(b) & (c) (1980).

[55] SEC rule 14d-2(b) potentially conflicts with federal statutes, as well as state statutes, that require public applications for advance administrative approval of tender offers for companies in regulated industries. *See* SEC Release No. 34-16384, *supra* note 10, at 82,584; *see, e.g.*, 15 U.S.C. § 1842 (1976) (regulatory approval for takeover of bank holding companies required by Bank Holding Co. Act); 49 U.S.C. § 1378 (1976 & Supp. III 1979) (regulatory approval for takeover of air carrier required by Federal Aviation Act).

[56] SEC Release No. 34-16384, *supra* note 10, at 82,584; SEC Release No. 34-16623, *supra* note 20, at 15522.

[57] [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,314, at 97,115 (S.D. Ohio 1980).

[58] *See id.* at 97,117-18.

[59] IND. CODE ANN. § 27-1-23-2 (Burns Supp. 1979).

[60] [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,314, at 97,117. Under Indiana law, the Indiana Insurance Commissioner must approve certain transactions, including tender offers, that shift control of Indiana insurance companies. *Id.* at 97,116.

[61] *Id.*

[62] *Id.* at 97,117.

suit seeking to enjoin Sun's solicitation of shares.[63] Sun argued that Indiana law prohibited the making of a tender offer conditioned upon subsequent regulatory approval until the Indiana Insurance Commission had approved the change of control.[64] Construing Indiana law as consistent with SEC rule 14d-2(b), the *Sun Life* court adopted the position of the Indiana Insurance Commissioner and denied Standard's motion for a preliminary injunction.[65]

Several states have reacted to the SEC's promulgation of rule 14d-2(b) by either amending their takeover statutes to conform with the new rule[66] or by challenging the validity of the SEC rule.[67] Two recent cases have involved challenges of rule 14d-2(b). In *State of Ohio ex rel. Krouse v. SEC*,[68] the Ohio Commissioner of Securities brought an action against the SEC and claimed that rule 14d-2(b) exceeds the rule-making authority of the SEC.[69] The district court in *Krouse* concluded that the Ohio Commissioner lacked standing to maintain the suit because private litigants could more properly challenge the rule.[70] In the second case in-

---

[63] *Id.*

[64] *Id.*

[65] *Id.* at 97,117-18.

[66] *See* notes 108-09, 115 *infra.*

[67] *See* text accompanying notes 68-79 *infra.*

[68] [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,688, at 98,614 (S.D. Ohio Oct. 15, 1980).

[69] *See* [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,286, at 97,003 (S.D. Ohio, filed Feb. 15, 1980) (Complaint, No. C-2-80-111). The Ohio Commissioner's complaint averred that the SEC, by promulgating rule 14d-2(b), deliberately planned to preempt state tender offer statutes and ignored less restrictive alternatives. *Id.* at 97,004. The Commissioner alleged that Congress did not give the SEC authority to promulgate a rule that effectively invalidates all state tender offer legislation. *Id.* Moreover, the Commissioner argued that the rule contravenes Article VI, clause 2, and the 10th amendment to the Constitution. *Id.* at 97,004-05; *see* note 16 *supra.*

The Ohio Commissioner sought a declaratory judgment that rule 14d-2(b) is invalid and that Ohio's tender offer commencement statutes are not invalidated by rule 14d-2(b). [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,286, at 97,003. The SEC moved to dismiss the action pursuant to Federal Rule of Civil Procedure 12 on the grounds that the rule had not injured Ohio. [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,688, at 98,614.

[70] *Id.* at 98,615-17. Ohio asserted two theories of standing that would permit the state to pursue the claim against the SEC. Ohio claimed a proprietary interest in Ohio's securities market. *Id.* A proprietary interest involves nongovernmental functions performed by a government for the best interests of its citizens. *Id.*; *see* Sarmiento v. Corpus Christi, ___ Tex. Civ. App. ___, ___, 465 S.W.2d 813, 816 (Civ. App. 1971). Ohio also relied on the parens patriae interest to gain standing to sue. The theory of parens patriae is used to protect quasi-sovereign interests such as the general economy of a state. [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,688, at 98,615; *see* Gibbs v. Titelman, 369 F. Supp. 38, 54 (E.D. Pa. 1973). The district court in *Krouse* held that Ohio's claim did not qualify as either a proprietary or a parens patriae interest. [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,688, at 98,617. The court explained that a state may sue under a proprietary theory only if the state's interest is analogous to that of the state's citizens. *Id.* at 98,615. Since Ohio's complaint involved a purely regulatory interest, the court rejected the proprietary interest

volving rule 14d-2(b), the Ohio Commissioner reasserted the invalidity of rule 14d-2(b) as a defense to a suit by a private litigant.[71]

In *Canadian Pacific Enterprises, Inc. v. Krouse*,[72] Canadian Pacific brought suit in the Federal District Court for the Southern District of Ohio to resolve the timing conflict between rule 14d-2(b) and the Ohio takeover statute.[73] Canadian Pacific had announced a tender offer for all the outstanding stock of Hobart Corporation.[74] To comply with rule 14d-2(b), Canadian Pacific had to commence or withdraw its offer within five days.[75] Ohio law, however, required Canadian Pacific to wait twenty days before commencing the offer.[76] Canadian Pacific consequently sought a judgment declaring that rule 14d-2(b) preempts the state rule and prayed for injunctive relief for complying with the state rule.[77] Intervening as a defendant, Hobart joined Ohio's Commissioner in raising the invalidity of rule 14d-2(b) as a defense.[78]. The district court held that rule 14d-2(b) is a valid exercise of the SEC's rule-making authority and that the rule preempts Ohio's takeover statute.[79]

To determine the validity of rule 14d-2(b), the court in *Canadian Pacific* adopted the standard for judicial review enumerated in the Administrative Procedure Act (APA).[80] Under the APA, a court may set aside final agency action if the action exceeds the agency's statutory authority or if the action is arbitrary and capricious.[81] Measuring rule 14d-2(b)'s statutory authority, the court in *Canadian Pacific* recognized

---

theory. *Id.* The court stated that under the parens patriae theory, the state's ability to sue an agency of the federal government depends upon the extent of the state's interest and the ability of private parties to obtain relief otherwise. *See id.* (citing Pennsylvania v. Kleppe, 533 F.2d 688, 675 (D.C. Cir. 1976)). Explaining that private parties in Ohio will have both the motivation and the resources to litigate the issue of rule 14d-2's validity, the court considered the state's involvement unnecessary, rejected the parens patriae interest and denied Ohio standing to sue. *Id.* at 98,617.

[71] *See* Canadian Pac. Enter., Inc. v. Krouse, 506 F. Supp. 1192 (S.D. Ohio 1981); text accompanying notes 73-79 *infra*.

[72] 506 F. Supp. 1192 (S.D. Ohio 1981).

[73] *Id.* at 1193.

[74] *Id.* at 1194.

[75] *Id.*; *see* 17 C.F.R. § 240.14d-2(b) (1980).

[76] 506 F. Supp. at 1194; *see* OHIO REV. CODE § 1707.04(b)(1) (1980).

[77] 560 F. Supp. at 1194.

[78] *Id.*

[79] *Id.* at 1197 & 1204; *see* text accompanying notes 80-96 *infra*.

[80] 506 F. Supp. at 1197-98; *see* 5 U.S.C. §§ 701-706 (1976). The Administrative Procedure Act (APA) provides the appropriate guidelines of judicial review for statutes that do not otherwise provide for or preclude review. *See* 5 U.S.C. § 701(a)(1)-(2) (1976). Although several sections of the '34 Act are subject to review under standards within the '34 Act, *see, e.g.*, 15 U.S.C. § 78y(b), rule 14d-2(b) was adopted under sections that do not provide for review. *See* text accompanying note 83 *infra*.

[81] 5 U.S.C. § 706(2)(A) & (C) (1976). In addition to voiding agency action that is beyond statutory authority or that is arbitrary and capricious, courts may set aside agency action that is contrary to a constitutional right, is unsupported by evidence, is unwarranted by the facts, or lacks the proper procedure. *See id.* § 706(2)(B), 2(D)-(E) (1976).

the breadth of the rule's enabling statutes.[82] The SEC promulgated rule 14d-2(b) pursuant to sections 3(b), 14(d), 14(e), and 23(a) of the '34 Act.[83] Examining the rule's enabling statutes, the *Canadian Pacific* court observed that section 3(b) empowers the SEC to define terms consistent with the purposes of the '34 Act.[84] The court also sanctioned the SEC's reliance on section 23(a), which confers upon the SEC general rule-making powers to implement all of the Act's provisions.[85] The district court in *Canadian Pacific* explained that any rule promulgated under a general rule-making provision will be sustained if the rule is reasonably related to the purposes of the enabling statutes.[86] In light of the protective purposes of the Williams Act, the *Canadian Pacific* court concluded that rule 14d-2(b) is reasonably related to the general rule-making provision of section 23(a) and is therefore valid.[87]

In *Canadian Pacific* the court next considered whether the SEC's enactment of rule 14d-2(b) was arbitrary and capricious.[88] The Supreme Court has held that the scope of review under the arbitrary and capricious standard is narrow[89] because courts are not empowered to substitute

---

[82] 506 F. Supp. 1199. The court in *Canadian Pacific* noted that administrative action has a presumption of regularity. *Id.* at 1198 n.12 (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971)); *see* notes 85 & 86 *infra*.

[83] *See* 44 F. Reg. 9956 (1979). Sections 14(d) and 14(e) apply specifically to tender offers. The court in *Canadian Pacific* concluded that § 14(d)(4), which allows the SEC to make rules regarding solicitation of tender offers, supports rule 14d-2 because it gives the SEC plenary power to regulate the conduct of all who solicit acceptances of tender offers. 506 F. Supp. at 1199; *see* 15 U.S.C. § 78n(d)(4) (1976). The court also found that the tender offer fraud prohibitions of § 14(e) would support promulgation of rule 14d-2 in light of the potential for manipulation if a tender offer was announced but not yet regulated by the Williams Act. 506 F.2d at 1200; *see* 15 U.S.C. § 78n(e) (1976). *See also* notes 84 & 85 *infra*.

[84] *See* 506 F. Supp. at 1198; 15 U.S.C. § 78c(b) (1976). The Ohio Commissioner in *Canadian Pacific* argued that the SEC had exceed its authority in promulgating rule 14d-2 because the rule defines "commencement," a word that is not used in the '34 Act itself. 560 F. Supp. at 1199. The court found, however, that the definition interpreted § 14(d)(1), which refers to the initial publication of a tender offer. *Id.*; *see* 15 U.S.C. § 78n(d)(1) (1976).

[85] 560 F. Supp. at 1199. The Ohio Commissioner argued that § 23(a) could not support the validity of rule 14d-2 because the rule is unnecessary and impermissibly preemptive of state law. *Id.* The Commissioner also claimed that the SEC has no function that would justify promulgation of the rule. *Id.* The court in *Canadian Pacific* found that the preemptive nature of the rule has no bearing on the rule's validity. *Id.* The SEC's functions of investor protection and promotion of the public interest were broad enough, the court decided, to sanction a definitional rule. *Id.* The *Canadian Pacific* court also took notice of the Supreme Court's standard of judicial review for rules promulgated under a general rule-making provision. *Id.*; *see* text accompanying note 87 *infra*.

[86] 560 F. Supp. at 1199; *see* Mourning v. Family Publ. Serv., Inc., 411 U.S. 356, 369 (1973). The Court in *Mourning* ruled that if an administrative regulation furthers a legitimate statutory purpose, the regulation is valid. *Id.* (quoting Thorpe v. Housing Auth. of the City of Durham, 393 U.S. 268, 280-81 (1969)). *See also* Touche Ross & Co. v. SEC, 609 F.2d 570, 582 (2d Cir. 1979) (*Morning* test applied to securities rules).

[87] 560 F. Supp. 1199.

[88] *Id.* at 1200.

[89] Bowman Transp. Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974).

their judgment for that of an administrative agency.[90] In order for a rule to be valid, the agency must have considered factors relevant to the statutory purpose[91] and must have rationally related those factors to the rule.[92] The *Canadian Pacific* court concluded that the SEC had considered the appropriate factors necessary for a rule's validity because the rule went through six years of study and revision prior to enactment.[93] Moreover, the court found a rational relationship between the rule and the SEC's stated purpose to equalize protection of shareholders and offerors.[94] Reasoning that state takeover statutes impose delays on tender offers that benefit target companies to the detriment of offerors, the court found that rule 14d-2(b) prevents such delays and balances the interests of shareholders and offerors.[95] Accordingly, the court in *Canadian Pacific* concluded that the SEC's promulgation of rule 14d-2(b) was neither arbitrary and capricious, nor in excess of statutory authority and, therefore, held that rule 14d-2(b) is valid and preempts Ohio's conflicting statute.[96]

The court in *Canadian Pacific* correctly held that rule 14d-2(b) is a valid exercise of the SEC's rule-making authority. The rule not only conforms to the scope of the enabling statutes,[97] but also promotes the aims of the Williams Act.[98] Congress conferred broad rule-making authority on the SEC through section 23(a) of the '34 Act.[99] Moreover, as the *Canadian Pacific* court emphasized, rule 14d-2(b) preserves the balance between offerors and targets that the Ohio statute had tipped in favor of targets.[100] Despite rule 14d-2(b)'s devastating preemptive effect on state takeover statutes,[101] the rule should remain unassailable in light of the SEC's broad rule-making authority[102] and the rational nexus between the rule and the purpose of the Williams Act.[103]

Given the validity and preemptive impact of SEC rule 14d-2(b), states should amend or otherwise interpret their advance disclosure and pre-offer waiting period provisions to avoid invalidating conflicts with SEC rule 14d-2(b). Several methods exist whereby states can reconcile

---

[90] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

[91] *Id.*

[92] Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

[93] 560 F. Supp. at 1201-02.

[94] *Id.* at 1203.

[95] *Id.*; *see* Brief Amicus Curiae for SEC at 14, 57-58, Leroy v. Great W. United Corp., 443 U.S. 173 (1979).

[96] 506 F. Supp. at 1203-04.

[97] *See* text accompanying notes 83-88 *supra.*

[98] *See* text accompanying notes 93-97 *supra.*

[99] *See* text accompanying note 86 *supra.*

[100] *See* text accompanying notes 76-77, 97 *supra.*

[101] *See* text accompanying note 80 *supra.*

[102] *See* text accompanying notes 85-87 *supra.*

[103] *See* text accompanying note 96 *supra.*

their takeover statutes with rule 14d-2(b).[104] The most obvious means of reconciliation is the repeal by amendment of advance disclosure requirements altogether.[105] Similarly, states can empower their public officials to waive all advance disclosure and pre-offer waiting period requirements.[106] Of course, authorizing state officers to waive unacceptable state requirements will only prevent preemptive conflicts with rule 14d-2(b) where the applicable official actually exempts the transaction in question.[107]

Short of totally eliminating advance disclosure requirements, states can attempt to harmonize their takeover statutes with rule 14d-2(b) by limiting the amount of information that a bidder must publicly disclose in advance of the offer.[108] SEC rule 14d-2(b) provides that a public announcement of a bidder's intent to make a tender offer in the future which does not specify the amount of securities sought or the price offered does not commence a tender offer under rule 14d-2.[109] A state takeover statute, therefore, that permits the bidder to omit from required advance public disclosures either the quantity of shares sought or

---

[104] *See* text accompanying notes 105-114 *infra*. The SEC has argued that states can harmonize their takeover statutes with rule 14d-2(b) by interpreting the statutes to allow commencement pursuant to rule 14d-2(b), but to delay the bidder's actual purchase of the shares. *See* Brief Amicus Curiae for SEC at 8, GM Sub. Corp. v. Liggett Group, Inc., *reprinted in* [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,389, at 97,542 (Del. 1980). Under this method, a bidder would commence an offer by disseminating tender offer materials and receiving shares in a depository. *Id.* at 8 n.12. The actual purchase ("takedown") of the tendered shares would not occur until the end of a reasonable waiting period, however. *Id. See also* SEC Securities Exchange Act Release No. 34-16623, *supra* note 20, at 15522.

[105] *See* N. Y. BUS. CORP. LAW § 1602 (McKinney Supp. 1980) (amended in 1980 to eliminate 20-day disclosure requirements). New York law now mandates disclosure as soon as practicable on the date the tender offer commences. *Id.*

[106] *See* MD. CORP. & ASS'NS. CODE ANN. § 11-902 (Supp. 1980) (amended in 1980 to give Commissioner of Securities power to waive advance notice requirements); MINN. STAT. ANN. § 80B.07(3) (West Supp. 1980) (Commissioner can exempt tender offer from any statutory requirement).

[107] *See* Hi-Shear Indus. Inc. v. Neiditz [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,805, at 90,034 (D. Conn. 1980) (Connecticut takeover act preempted by SEC rule 14d-2(b) when Connecticut official refused to exempt tender offer).

[108] Several states have responded to the adoption of SEC rule 14d-2(b) by interpreting their takeover statutes to allow limited public disclosures that do not trigger rule 14d-2(d)'s five-business-day commencement period. *See, e.g*, Georgia Commissioner of Securities Release No. 3 (July 17, 1980), *reprinted in* Pozen & Lamb, *Rule 14d-2(b) Under The Securities Exchange Act And State Law Regulation of Takeover Bids*, TWELFTH ANN. INST. ON SEC. REG. 337, 339-43 (1980) (Georgia's takeover statute construed to allow omission of tender offer price information from pre-offer disclosure); Maryland Securities Act Release No. 22 (Apr. 18, 1980), *reprinted in* 1A BLUE SKY L. REP. (CCH) ¶ 30,563, at 25,578 (state advance disclosure requirements interpreted as requiring only identities of bidder and target and statement of intent to make offer); Wisconsin Administrative Rules SEC 21.01(6), *reprinted in* 3 BLUE SKY L. REP. (CCH) ¶ 65,001, at 56,801 (bidder not required to disclose either price offered or number of shares sought).

[109] 17 C.F.R. § 240.14d-2(d) (1980); *see* note 20 *supra*.

the consideration offered will be compatible with rule 14d-2(b),[110] so long as the information is not otherwise made public.[111] Similarly, states can attempt to reconcile their takeover statutes with rule 14d-2(b) by replacing pre-offer public disclosure requirements with pre-offer non-public disclosure requirements.[112] Rule 14d-2(b) only applies to public announcements or public statements that disclose the information specified in SEC rule 14d-2(c).[113] Thus, advance non-public disclosures to the regulating state will not trigger commencement of the tender offer under rule 14d-2(b).[114]

Although states can amend or re-interpret their takeover statutes to void impermissible conflicts with SEC rule 14d-2(b), state tender offer acts are subject to additional constitutional challenges based on preemp-

---

[110] 17 C.F.R. § 240.14d-2(c) (1980); *see* text accompanying note 20 *supra*.

[111] *See* [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,835; note 49 *supra*. States that attempt to reconcile their respective takeover statutes with 14d-2(b) by limiting the information which the bidder must disclose in pre-offer public announcements may also have to limit the mandatory disclosures in tender offer registration statements filed with the state and the target. If a tender offer registration statement that contains the information set out in SEC rule 14d-2(c) is a public document, the statement will initiate rule 14d-2(b)'s five day commencement requirement. *See* 17 C.F.R. § 240.14d-2(b) (1980); SEC Release No. 34-16623, *supra* note 20, at 15522. Similarly, disclosure of the information set forth in SEC rule 14d-2(c) at pre-offer hearings may cause the tender offer to commence under 14d-2(b) if the hearings are open to the public. *See* text accompanying note 13 *supra*. Even if a state limits its advance disclosure requirements to the information set out in rule 14d-2(d), a preemptive conflict with rule 14d-2(b) may arise where a tender offer is subject to regulation under more than one state takeover statute. Consider the following example. Assume the X Co.'s tender offer for Y Co. is subject to takeover statutes in both state A and state B. State A requires X Co. to announce publicly the material terms of the tender offer 20 days in advance of the offer, but allows X Co. to omit the price to be offered from the announcement. State A's takeover statute, therefore, appears to be compatible with SEC rule 14d-2(b). *See* text accompanying notes 108-110 *supra*. State B requires X Co. to disclose publicly the material terms of the tender offer 20 days before the offer begins, but permits X Co. to omit from the announcement the number of shares sought. Standing alone, state B's takeover statute is also consistent with SEC rule 14d-2(b). *Id.* Taken together, however, the takeover statutes of state A and state B operate so as to conflict with rule 14d-2(b). X Corp's simultaneous compliance with the two otherwise valid takeover statutes will result in the disclosure of all of the information set out in SEC rule 14d-2(c). This combined disclosure will trigger rule 14d-2(b)'s five-business-day commencement requirement and, therefore, render unenforceable the respective 20 day waiting-period requirements of both state statutes.

[112] In 1980, Idaho amended its takeover statute to require advance public disclosures only when the state's Director of Securities so orders. *See* IDAHO CODE § 30-1503(1) (1980). Although Idaho law no longer requires advance public disclosures, the state's takeover statute still mandates advanced disclosure to the target company. *Id.* This disclosure to the target company could cause commencement under 14d-2(b) if the target disclosed the information publicly. *See* note 49 *supra*.

[113] 17 C.F.R. § 240.14d-2(c) (1980).

[114] A state takeover statute that requires advance public disclosures which bring about commencement under 14d-2(b) would nevertheless be compatible with rule 14d-2(b) if the state's pre-offer, post-disclosure waiting period did not exceed five business days. *See* 17 C.F.R. § 240.14d-2(b) (1980).

tion and commerce clause rationales. In *Great Western United Corp. v. Kidwell*,[115] the Fifth Circuit Court of Appeals held Idaho's takeover statute[116] unconstitutional on both preemption[117] and commerce clause grounds.[118] Although the Supreme Court reversed *Kidwell* in 1979 on grounds of improper venue,[119] several 1980 and 1981 federal decisions have adopted the *Kidwell* court's analysis and rejected the constitutionality of various state takeover statutes.[120]

In *MITE Corporation v. Dixon*,[121] The Seventh Circuit Court of Ap-

---

[115] 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979).

[116] IDAHO CODE §§ 30-1501 to -1513 (Supp. 1979).

[117] 577 F.2d at 1274-81. In holding that the Williams Act preempted Idaho's takeover statute, the *Kidwell* court stated that Congress adopted a market approach to tender offer regulation. *Id.* at 1276-77. Under this market approach, investors are free to evaluate for themselves the adequacy of tender offers. *Id.* The *Kidwell* court then reasoned that a neutral regulatory scheme which gives both the target and the offeror an equal opportunity to persuade the investor is essential to the operation of Congress' market approach. *Id.* at 1279-80. The *Kidwell* court found that Idaho's takeover statute disrupted this indispensable neutrality by requiring advance disclosure of the offer, by giving the target the right to a pre-offer hearing, and by favoring the target corporation in other ways. *Id.* The *Kidwell* court concluded that since the Idaho statute stood as an impermissible obstacle to the accomplishment of the federal market approach to investor protection, the Idaho statute was preempted. *Id.* at 1281.

[118] *Id.* at 1281-86. In *Kidwell*, Idaho advanced several state interests in support of its contention that the state takeover statute did not unduly burden interstate commerce. The *Kidwell* court rejected Idaho's first asserted local interest, retention of state industry, as impermissible state favoritism. *Id.* at 1282 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970)). The *Kidwell* court found Idaho's second alleged interest, encouragement of good corporate citizenship, legitimate but of minimal weight. *Id.* at 1282-1286. Finally, the *Kidwell* court accepted Idaho's asserted interest in shareholder protection, but discounted the substantiality of the state interest by reasoning that the interest extended to resident shareholders only. *Id.* at 1283, 1285. Since enforcement of the Idaho takeover statute halted a 31 million dollar transaction in interstate commerce to protect only minimal state interests, the *Kidwell* court held the Idaho statute violative of the commerce clause. *Id.* at 1286.

[119] Leroy v. Great W. United Corp., 443 U.S. 173 (1979). By reversing *Kidwell* for improper venue, the Supreme Court avoided any discussion of the constitutionality of Idaho's takeover statute. *See id.*

[120] *See, e.g.*, MITE Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980) (Illinois takeover statute invalidated); Hi-Shear Indus., Inc. v. Neiditz [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,805, at 90,034 (D. Conn. Dec. 16, 1980) (enforcement of Connecticut Tender Offer Act enjoined); Hi-Shear Indus., Inc. v. Campbell, [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,804 at 90,027 (D.S.C. Dec. 4, 1980) (enforcement of South Carolina takeover statute enjoined). Prior to 1980, the federal courts that considered the constitutionality of state takeover statutes reached divergent results. *Compare* Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1286 (5th Cir. 1978) (Idaho statute invalidated); *and* Dart Indus., Inc. v. Conrad, 462 F. Supp. 1, 13-14 (S.D. Ind. 1978) (Delaware takeover statute held unconstitutional) *with* AMCA Int'l Corp. v. Krouse, 482 F. Supp. 929, 941 (S.D. Ohio 1979) (Ohio takeover statute held constitutional); *and* City Inv. Co. v. Simcox, 476 F. Supp. 112, 116 (S.D. Ind. 1979), *aff'd on other grounds*, 633 F.2d 56 (7th Cir. 1980) (Indiana takeover act held constitutional).

[121] 633 F.2d 486 (7th Cir. 1980), *appeal filed sub nom.* Edgar v. MITE Corp., 49 U.S.L.W. 3533 (U.S. Jan. 15, 1981) (No. 80-1188).

peals used the rationales set forth in *Kidwell* to hold the Illinois Business Takeover Act[122] unconstitutional on preemption and commerce clause grounds.[123] In *MITE*, the plaintiff sought to gain control of a publicly held Illinois corporation, Chicago Rivet & Machine Co. (Chicago Rivet), by making a cash tender offer for all of the outstanding shares of Chicago Rivet common stock.[124] In connection with the tender offer for Chicago Rivet, MITE brought suit in the Federal District Court for the Northern District of Illinois seeking a declaratory judgment that the Illinois takeover act was unconstitutional and a permanent injunction against enforcement of the state act.[125] The Illinois takeover statute authorized Illinois' Secretary of State to determine whether MITE's tender solicitation was substantively fair and to prohibit the offer if the offer appeared inequitable.[126] Additionally, the Illinois takeover act required MITE to disclose certain information in advance of the offer[127] and indirectly permitted Chicago Rivet to request a mandatory pre-offer hearing on whether MITE's offer could commence.[128] The district court entered a final order permanently enjoining enforcement of the Illinois act against MITE's offer on the grounds that the state statute violated the commerce clause and was preempted by the Williams Act.[129]

On appeal, the Seventh Circuit initially addressed the issue of whether the Williams Act preempted Illinois' takeover act.[130] The *MITE* court acknowledged that while the Williams Act does not expressly or

---

[122] ILL. ANN. STAT. ch. 121 1/2 § 137.51 to .70 (Smith-Hurd Supp. 1980).

[123] 633 F.2d at 498-99, 502; *see* notes 117 & 118 *supra*.

[124] 633 F.2d at 488.

[125] *Id.*

[126] ILL. ANN. STAT. ch. 121 1/2 § 137.57E (Smith-Hurd Supp. 1980). The Illinois takeover statute granted jurisdiction over tender offers for any corporation that met two out of three specified conditions. *Id.* (citing ILL. REV. STAT. ch. 121 1/2 § 137.52-10 (1979)). The first specified condition was that the target company have its principal place of business in Illinois. ILL. REV. STAT. ch. 121 1/2 § 137.52-10(a) (1979). The second requirement was that the target be an Illinois corporation. *Id.* at § 137.52-10(b). The third condition was that the target have at least 10% of its stated capital and paid in surplus represented in Illinois. *Id.* at § 137.52-10(c).

[127] ILL. ANN. STAT. ch. 121 1/2 § 137.54A, B, E (Smith-Hurd Supp. 1980). The Illinois takeover statute required tender offerors to file registration statements with the state and the target company at least twenty business days before commencing the solicitation of shares. *Id.* Under the Illinois, act, tender offerors also have to disclose publicly the material terms of the offer contemporaneously with the filing of the registration statements. *Id.*

[128] ILL. ANN. STAT. ch. 121 1/2 §137.57A (Smith-Hurd Supp. 1980). Section 137.57A provided that a majority of the target's outside directors or any Illinois shareholder or group of shareholders owning at least 10% of any class of the target's equity securities could call a mandatory hearing within fifteen business days of the bidder's pre-offer filing. *Id.*; *see* note 127 *supra*. Illinois' Secretary of State also had the discretion to call a pre-offer hearing. ILL. ANN. STAT. ch. 121 1/2 § 135.57A (Smith-Hurd Supp. 1980).

[129] 633 F.2d at 490; *see* MITE Corp. v. Dixon, No. 79-C-200 (N.D. Ill. Feb. 9, 1979), *aff'd*, 633 F.2d 486 (7th Cir. 1980).

[130] 633 F.2d at 490-98.

implicitly bar state regulation of tender offers,[131] the Act, as federal law, does preempt any state takeover statute which interferes with Congress' investor protection purpose.[132] The court in *MITE* then observed that Congress enacted the Williams Act to protect investors through a market approach.[133] This market approach enables both the offeror and the target's management to present fully their proposals to the target's shareholders and then allows these investors to evaluate the tender offer individually.[134] The *MITE* court reasoned that Illinois' paternalistic approach to shareholder protection conflicted with the federal market approach by depriving target shareholders of the unfettered decision-making ability which the Williams Act contemplates.[135] The *MITE* court concluded, therefore, that the Williams Act preempted the Illinois

---

[131] 633 F.2d at 491; *see* note 16 *supra*. In enacting the '34 Act, Congress did not expressly prohibit state regulation of tender offers. 633 F.2d at 491; *see* Langevoort, *State Tender Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213, 247-48 (1977) [hereinafter cited as Langevoort]; Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L.J. 510, 519 [hereinafter cited as *State Tender Offer Statutes Reconsidered*]. Furthermore, congressional regulation of tender offers is neither so pervasive nor of such paramount federal importance that preemption is implicit. 633 F.2d at 491; Note, *Statutory Comments: Take-Over Bids in Virginia*, 26 WASH. & LEE L. REV. 323, 334 (1969). *But see* Dart Indus., Inc. v. Conrad, 462 F. Supp. 1, 12 (S.D. Ind. 1978) (Williams Act and rules promulgated thereunder held to constitute pervasive scheme of federal regulation preempting state takeover statutes); Tiger, *supra* note 12, at 472-74. Section 28(a) of the '34 Act, 15 U.S.C. § 78bb(a) (1976 & Supp. 1979), indicates congressional acceptance of concurrent federal and state securities regulation. 633 F.2d at 491 (citing Leroy v. Great W. United Corp., 433 U.S. 173, 182 (1979)). Nevertheless, § 28(a) neither directly nor indirectly legitimizes the coexistence of the Williams Act and state takeover statutes. Congress enacted § 28(a) to preserve state blue sky laws, the purpose of which is different from state tender offer acts. *See* 577 F.2d at 1281; Langevoort, *supra*, at 247. Additionally, § 28(a) does not evidence congressional intent to sustain state takeover statutes because Congress enacted § 28 long before states enacted tender offer legislation. *See* Langevoort, *supra*, at 247; Tiger, *supra* note 12, at 466.

[132] 633 F.2d at 492 (citing Hines v. Davidowitz, 312 U.S. 52, 61 (1944)). Preemption of state statutes by conflict with federal law occurs if the application of a particular state statute obstructs the accomplishment of the purposes and policies that a federal statute serves. *Id.* at 491; *see* Florida Lime & Avocodo Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963); note 12 *supra*.

[133] 633 F.2d at 492 (citing *Kidwell*).

[134] *Id.*; *see* note 15 *supra*. The reason for the adoption of a market approach to investor protection was the congressional recognition that tender offers benefit shareholders and that prevention of tender offers could harm shareholders. 577 F.2d at 1277; *see* H.R. REP. No. 1711, 90th Cong., 2d Sess. 3, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2811, 2813 (Williams Act designed to make relevant facts known to shareholder so that shareholder has fair opportunity to decide).

[135] 633 F.2d at 494 (citing *Kidwell*); *see* text accompanying note 126 *supra*. Unlike Illinois' takeover statute, the Idaho act at issue in *Kidwell* did not authorize state officials to judge the fairness of tender offers. *See* IDAHO CODE §§ 30-1501 to -1513 (Supp. 1979). The Illinois statute challenged in *MITE*, therefore, imposed more stringent requirements on tender offerors than did the Idaho statute that the Fifth Circuit invalidated in *Kidwell*.

takeover statute to the extent that Illinois substituted the judgment of its Secretary of State for the judgment of fully informed investors.[136]

The *MITE* court also rejected on preemption grounds Illinois' advance disclosure requirement and pre-offer hearing provision.[137] With respect to the hearing provision, the *MITE* court recognized that mandatory pre-offer hearings obstruct the congressional goal of insuring investor decision-making autonomy because hearings afford the target a method of indefinitely surpressing takeovers.[138] The *MITE* court further found that pre-offer hearings as well as advance disclosure requirements unduly delay tender solicitations to the detriment of investors.[139] The *MITE* court reasoned that delay potentially injures investors by giving the target's management time to take defensive measures that may deprive shareholders of an opportunity to tender their shares at a premium.[140] By delaying tender offers, Illinois' takeover statute disrupted the regulatory neutrality between bidders and targets that Congress considered essential to its goal of investor protection.[141] Thus, the *MITE* court held Illinois' advance disclosure and pre-offer hearing provisions unconstitutional.[142]

In determining the constitutionality of the Illinois takeover statute under the commerce clause, the *MITE* court balanced Illinois' state interest in regulating MITE's tender offer against the resultant burden on interstate commerce.[143] In *MITE*, Illinois Secretary of State Dixon asserted two local interests in support of the state's regulation of tender solicitations. First, Dixon maintained that the Illinois takeover statute advanced a legitimate state interest in protecting resident investors.[144]

---

[136] 633 F.2d at 494. The *MITE* court noted that even the SEC did not seek authority to evaluate the substantive equity of a tender solicitation. *Id.* at 494 n.14. Congress' failure to adopt tender offer provisions that require substantive fairness, however, is consistent with the general scheme of the federal securities laws which regulate through disclosure rather than by requiring fiduciary duties of fairness. *Cf.* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 478-79 (1977) (unfairness and equitable fraud not actionable under § 10(b) of '34 Act and SEC rule 10b-5).

[137] *See* text accompanying notes 127 & 128 *supra.*

[138] 633 F.2d at 494-95. The *MITE* court noted that a state takeover statute which merely allows optional pre-offer hearings upon requests could be constitutional in some cases. *Id.* at 495 n.18.

[139] 633 F.2d at 495-98.

[140] *Id.* at 497 (citing *Kidwell*).

[141] *Id.* at 496; *see* H.R. REP. No. 1711, 90th Cong., 2d Sess. 3, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2811, 2813 (balance between offerors and target necessary for investor protection). The *MITE* court observed that a shift in the regulatory balance between bidders and targets would deny shareholders their right to tender their shares at a premium price. 633 F.2d at 496.

[142] *Id.* at 498. The *MITE* court noted that the Illinois Act was in direct conflict with SEC rule 14d-2(b). *Id.* at 499 n.25; *see* text accompanying notes 26-30 *infra.* The *MITE* court, however, did not base its finding of preemption on SEC rule 14d-2(b) because the rule did not apply retroactively to the tender offer in question. 633 F.2d at 499 n.25.

[143] 633 F.2d at 500; *see* note 17 *supra.*

[144] 633 F.2d at 500.

Second, Dixon argued that tender offers are analogous to internal shifts of corporate control which Illinois had a valid local interest in regulating as intracorporate matters.[145] Responding to Dixon's first argument, the *MITE* court acknowledged that shareholder protection was a legitimate state concern, but observed that Illinois' takeover act afforded only questionable benefits to local investors.[146] The *MITE* court further reasoned that Illinois' concern for protecting participants in securities transactions extended only to resident shareholders[147] and, therefore, did not justify the significant extra-territorial impact of the state's takeover statute.[148] The *MITE* court then rejected Illinois' second alleged local interest by reasoning that, even if a tender offer is an intracorporate matter,[149] Illinois had shown no interest in regulating the offer in question.[150]

Having discounted Illinois' asserted state interests in tender offer regulation, the *MITE* court examined the state takeover statute's burden on interstate commerce. The *MITE* court initially observed that the Illinois statute's most obvious effect on interstate commerce was the potential to halt securities transactions executed outside of Illinois.[151] The *MITE* court then reasoned that enforcement of the Illinois act against MITE would have delayed and possibly prevented a transaction in interstate commerce of over twenty-three million dollars.[152] Since Illinois lacked a state interest that justified the burdensome impact of the state's takeover statute on interstate commerce, the *MITE* court held the Illinois act unconstitutional under the commerce clause.[153]

Citing *Kidwell* and *MITE*, the South Carolina Federal District Court in *Hi-Shear Industries, Inc. v. Campbell*,[154] enjoined enforcement of South Carolina's Takeover Act[155] on both preemption and commerce

---

[145] *Id.* at 501.

[146] *Id.* at 500; *see* text accompanying note 140 *supra.*

[147] 633 F.2d at 500.

[148] *Id.* at 501. The *MITE* court recognized that the jurisdictional provision of the Illinois takeover act enabled Illinois to regulate tender offers that did not affect a single Illinois shareholder. 633 F.2d at 501; *see* note 126 *supra.*

[149] 633 F.2d at 501. The *MITE* court noted that the Fifth Circuit in *Kidwell* had concluded that a tender offer does not fall within the intracorporate affairs doctrine. *Id.* at 501 n.28; *see* 577 F.2d at 1280 n.53; text accompanying notes 212-218 *infra.*

[150] 633 F.2d at 501. The court stated that, assuming tender offers are analogous to intracorporate control shifts, a state must still show some interest in regulating the offer in question. *See id.* In *MITE*, Illinois did not advance a sufficient reason, such as an intent by the bidder to loot the target, for regulating MITE's tender offer. 633 F.2d at 501.

[151] *Id.* at 502.

[152] *Id.*

[153] *Id.* After holding the Illinois act unconstitutional, the *MITE* court observed that not all state tender offer legislation which goes beyond the Williams Act is unconstitutional. *Id.* at 502-03. The *MITE* court, expressly left open the possibility that a state could draft a valid takeover statute which would compliment, rather than contradict, the Williams Act. *Id.*

[154] [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,027 (D.S.C. 1980).

[155] S.C. CODE §§ 35-2-10 to -100 (Supp. 1979).

clause grounds.[156] The South Carolina takeover statute empowered South Carolina's Securities Commissioner to subject tender offers to pre-offer fairness hearings and to prohibit a tender offer if the offer appeared unfair.[157] In *Campbell*, Hi-Shear Industries, Inc. (Hi-Shear), a Delaware corporation, commenced a tender offer for Raybestos-Manhattan, Inc. (Raybestos), a Connecticut firm.[158] Reacting to Hi-Shear's tender offer, Raybestos filed suit in a South Carolina state court alleging that the offer violated South Carolina's recently adopted takeover statute.[159] Hi-Shear removed the state court action to the South Carolina Federal District Court and moved to enjoin enforcement of the South Carolina act on preemption and commerce clause grounds.[160] Presuming that South Carolina's Securities Commissioner would interpret and apply the new South Carolina takeover act constitutionally, the *Campbell* court initially denied Hi-Shear's request for preliminary injunctive relief.[161] Hi-Shear renewed its request for an injunction, however, when South Carolina's Securities Commissioner refused to exempt the Hi-Shear offer from the South Carolina act and scheduled a hearing to determine the fairness of the offer.[162]

In granting Hi-Shear's second request for an injunction, the *Campbell* court held that South Carolina's takeover statute as applied to Hi-Shear's tender offer violated the supremacy and commerce clauses of the United States Constitution.[163] With respect to the supremacy clause argument, the *Campbell* court reasoned that the South Carolina takeover statute obstructed the objectives of the Williams Act by authorizing a public official to evaluate the substantive fairness of tender offers.[164] The *Campbell* court rejected this patently paternalistic

---

[156] [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,034.

[157] S.C. CODE § 35-2-60(3), (4) (Supp. 1979).

[158] [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,028.

[159] *Id.* The South Carolina state court granted Raybestos' request for a temporary injunction against Hi-Shear. *Id.* The Federal District Court for the District of South Carolina, however, subsequently dissolved the state court injunction. *Id.* at 90,028-29.

[160] *Id.* at 90,028.

[161] *Id.* at 90,029. Under the abstention doctrine set forth in *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941), federal courts should refrain from deciding the constitutionality of unsettled or ambiguous state laws until state courts or officials have had an opportunity to interpret or apply the laws in question. *Id.* at 427-28; *see* Baggett v. Bullitt, 377 U.S. 360, 376-77 (1976) (*Pullman* abstention triggered when applicability of challenged state law to certain party or defined course of conduct is unsettled); Harmon v. Forssenius, 380 U.S. 528, 534 (1965) (federal courts should avoid tentative decisions on state law questions and premature constitutional adjudication).

[162] [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,029.

[163] *Id.* at 90,030.

[164] *Id.* at 90,031; *see* text accompanying note 157 *supra*. The South Carolina provision that empowered the state's Securities Commissioner to prohibit tender offers as substantively inequitable was essentially identical to the Illinois provision which the Seventh Circuit rejected in *MITE*. *Compare* S.C. CODE. § 35-2-60(4) (Supp. 1979) *with* ILL. ANN. STAT. ch. 121 1/2 137.57E (Smith-Hurd Supp. 1979).

method of shareholder protection as contrary to congressional intent under the Williams Act that investors be free to make their own investment decisions regarding a tender offer.[165] The *Campbell* court also found impermissible conflict in the differing time requirements of the respective federal and state substantive provisions that governed withdrawal rights,[166] and pro-rata purchase rights of tendering shareholders.[167] Moreover, the *Campbell* court stated that South Carolina's pre-offer hearing provision caused delays which disrupted the regulatory neutrality that Congress considered essential to investor protection.[168] The *Campbell* court concluded, therefore, that the Williams Act preempted South Carolina's takeover statute.[169]

Turning to the constitutionality of the South Carolina takeover act under the commerce clause, the *Campbell* court balanced South Carolina's asserted interests in regulating the tender offer against the resultant burden on interstate commerce.[170] South Carolina argued that its takeover statute furthered legitimate state concerns by safeguarding shareholders and by regulating internal corporate affairs.[171] The *Campbell* court discounted the weight of South Carolina's interest in shareholder protection by reasoning that only two percent of the

---

[165] [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,031 (citing *MITE* and *Kidwell*).

[166] *Id.* at 90,031. Regulations under the Williams Act provide a shareholder the right to withdraw tender shares within fifteen business days and after sixty days from the start of an offer. *See* note 5 *supra*. The South Carolina takeover statute, however, allowed withdrawal within twenty days and after thirty days from the commencement of an offer. S.C. CODE § 35-2-70(3) (Supp. 1979). The *Campbell* court concluded that the two statutes conflicted because the South Carolina statute permitted investors to withdraw tendered shares at times when the Williams Act did not provide for withdrawal. [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,031 (citing Dart Indus., Inc. v. Conrad, 462 F. Supp. 1, 12-13 (S.D. Ind. 1978)).

[167] [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,031. Under the Williams Act, an offeror must purchase pro-rata all of the shares that investors tender during the first ten days of the offer if the total number of shares tendered during the initial ten days exceeds the number sought. *See* note 6 *supra*. Unlike the Williams Act, the South Carolina takeover statute required pro-rata acceptance of all deposited shares regardless of when investors tendered the shares. S.C. CODE. § 35-2-70(4) (1979 Supp.). The *Campbell* court found that requiring tender offerors to comply with both of these requirements was impossible and contrary to the purpose of the Williams Act. [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,031.

[168] *Id.* at 90,031-32 (citing *Kidwell* and *MITE*). Although the South Carolina takeover act authorized the state securities Commissioner to convene a pre-offer fairness hearing on proposed tender offers, the state act did not permit target companies to demand pre-offer hearings. S.C. CODE § 35-2-60(3) (Supp. 1979). In contrast, the state takeover statutes invalidated in *MITE* and *Kidwell* provided target companies with the right to call, directly or indirectly, pre-offer fairness hearings. *See* 633 F.2d at 494-95 (ILL. REV. STAT ch. 121 1/2 § 137.57A (Smith-Hurd Supp. 1980) construed); 577 F.2d at 1278 (IDAHO CODE § 30-1503(4) (Supp. 1979) construed).

[169] [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,032.

[170] *Id.* at 90,032-34.

[171] *Id.* at 90,032.

Raybestos shareholders who the state act purportedly protected were South Carolina residents.[172] The *Campbell* court also reasoned that state takeover statutes like South Carolina's are of questionable benefit to shareholders and possibly only protect the incumbent management of target companies.[173]

In considering South Carolina's alleged interest in regulating the Hi-Shear tender offer as an intracorporate matter, the *Campbell* court initially observed that a state's interest in regulating the internal affairs of domestic corporations is traditionally recognized.[174] Nevertheless, because Raybestos was a foreign corporation with its principal place of business in Connecticut, the *Campbell* court rejected South Carolina's contention that Hi-Shear's tender offer for Raybestos was an intracorporate matter amenable to South Carolina regulation.[175] In contrast to South Carolina's minimal interest in regulating the Hi-Shear tender offer, the *Campbell* court found that the South Carolina statute imposed a major burden on interstate commerce.[176] Local action under the South Carolina takeover statute against Hi-Shear's offer would have delayed and potentially halted a thirty million dollar transaction in interstate commerce.[177] The court in *Campbell* concluded, therefore, that the South Carolina takeover act impermissibly obstructed interstate commerce in violation of the commerce clause of the United States Constitution.[178]

---

[172] *Id.* The *Campbell* court found suspect South Carolina's alleged interest in protecting resident shareholders since the jurisdictional criteria for invoking the state's takeover act did not relate to the residence of the target's shareholders. *Id.* at 90,033; *see* S.C. CODE § 35-2-20(5) (Supp. 1979). Similarly, the Illinois statute rejected in *MITE* and the Idaho statute rejected in *Kidwell* granted potential jurisdiction over tender offers without regard to the residence of the target's shareholders. 633 F.2d at 501; 577 F.2d at 1283.

[173] [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,032 (citing *MITE*).

[174] *Id.* at 90,033.

[175] The *Campbell* court suggested in dicta that South Carolina had a legitimate state interest in preventing locally managed corporations from being taken over by foreign corporations. [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,033. The *Campbell* court observed, however, that this interest was nonexistent in the instant case because both the offeror and the target were foreign corporations with out-of-state managements. *Id.* In contrast to the *Campbell* court, the *Kidwell* circuit court expressly stated that protection of incumbent management against takeovers by out-of-state bidders was an impermissible state interest. 577 F.2d at 1282; *see* note 118 *supra*.

[176] [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,033.

[177] *Id.* In addition to interfering with a thirty million dollar transaction in interstate commerce, the concurrent jurisdiction of Connecticut's takeover statute over the Raybestos tender offer increased the South Carolina statute's potential to disrupt interstate commerce. *Id.*; *see* note 178 *infra*.

[178] [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,033. The Hi-Shear tender offer at issue in *Campbell* also prompted litigation over the constitutionality of Connecticut's takeover statute. In Hi-Shear Indus. Inc. v. Neiditz, [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,805, at 90,035 (D. Conn. 1980), Hi-Shear brought suit seeking to enjoin enforcement of Connecticut's takeover statute on preemption and commerce clause grounds. *Id.*; *see* CONN. GEN. STAT. ANN. §§ 36-456 to -469 (West Supp. 1980). In evaluating Hi-Shear's request for a preliminary injunction, the *Neiditz* court found potential conflict

Relying on the commerce clause and preemption rationales set forth in *Campbell*, *Kidwell*, and *MITE*, the New Jersey District Court in *Kennecott Corp. v. Smith*[179] recently rejected New Jersey's takeover act.[180] In holding that the Williams Act preempted the New Jersey statute,[181] the *Kennecott* court first recognized that the purpose of the Williams Act was to protect investors by insuring that investors promptly receive adequate information with which to evaluate a tender offer.[182] The *Kennecott* court also reasoned that Congress provided for regulatory neutrality between bidders and targets under the Williams Act to preserve for investors the opportunity to receive tender offers.[183] The *Kennecott* court then found that New Jersey's statute, through delay, obstructed the investor protection purpose of the Williams Act by depriving shareholders of essential investment information and decision-making autonomy.[184] The court further held that the delay which the

---

between the Williams Act and Connecticut's advance disclosure and pre-offer hearing provisions. [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,805, at 90,036-37. The *Neiditz* court further noted that the Connecticut statute might place unacceptable burdens on interstate commerce. *Id.* at 90,037 n.3; *see* CONN. GEN. STAT. ANN. § 36-457(h)(9) (West Supp. 1980) (Securities Commissioner allowed to exempt tender offers from state act). The *Neiditz* court, therefore, denied Hi-Shear's initial request for preliminary injunctive relief by applying the doctrine of judicial abstention. [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,805, at 90,037-38; *see* note 161 *supra*. After Connecticut's Securities Commissioner refused to exempt the Hi-Shear tender offer from the requirements of the Connecticut takeover act, however, the *Neiditz* court barred enforcement of the state act on preemption and commerce clause grounds. [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,805, at 90,038 (Order of December 16, 1980).

[179] [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,858, at 90,298 (D.N.J. 1981).

[180] *Id.* at 90,306, 90,312; *see* N.J. STAT. ANN. §§ 49:5-1 to -19 (West Supp. 1980). The district court's opinion in *Kennecott* involved the same tender offer at issue in *Smith*. *See* text accompanying notes 33-51 *supra*. In *Smith*, the Third Circuit Court of Appeals held in the limited context of a motion for a preliminary injunction that SEC rule 14d-2(b) preempted certain provisions of New Jersey's takeover statute which delayed commencement of Kennecott's tender offer for Curtiss-Wright. [1980-81 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,383; *see* text accompanying notes 41-46 *supra*. On remand from the *Smith* decision, the District Court of New Jersey issued a preliminary injunction against enforcement of New Jersey's takeover statute. [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,858, at 90,310. Subsequently, the *Kennecott* court held New Jersey's takeover statute invalid and granted Kennecott's original request for a declaratory judgment and a preliminary injunction. *Id.* at 90,299.

[181] The *Kennecott* court recognized that Congress in enacting the Williams Act had not expressly barred the states from regulating tender offers. *Id.*, at 90,305. The court in *Kennecott* further observed that a congressional intent to preempt state takeover statutes was not implicit in the Williams Act. *Id.* The *Kennecott* court concluded, therefore, that the only issue before the court was whether New Jersey's takeover statute obstructed the accomplishment of the purposes of the Williams Act. *Id.*; *see* notes 131 & 132 *supra*.

[182] [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,858, at 90,305-06 (citing *Smith*, *Kidwell*, and *MITE*).

[183] *Id.* at 90,306 (citing Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975)).

[184] *Id.* at 90,306. Stating that Congress had already determined that delay-causing advance disclosure requirements injured investors, the *Kennecott* court held that pre-offer delay violates the Williams Act's investor protection purpose. *Id.* (citing *Smith* and *MITE*).

New Jersey takeover act engendered discouraged tender offers to the detriment of shareholders by enhancing the ability of targets to defeat offers.[185] The *Kennecott* court concluded, therefore, that the Williams Act preempted New Jersey's takeover statute.[186]

Addressing the constitutionality of the state takeover statute under the commerce clause, the *Kennecott* court initially observed that the state statute unquestionably burdened interstate commerce.[187] The *Kennecott* court explained that a local statute which has only an incidental adverse effect on interstate commerce can be valid under the commerce clause.[188] The *Kennecott* court found, however, that New Jersey's takeover statute was neither local in purpose nor incidental in its effect on interstate commerce.[189] Therefore, the *Kennecott* court rejected the New Jersey statute without balancing the state's alleged local interests against the resultant burden on interstate commerce.[190] Moreover, the *Kennecott* court held that even if the New Jersey statute was a local measure with only incidental adverse effects on interstate commerce, the statute's interference with interstate commerce clearly outweighed any local benefits which the statute furthered.[191]

---

[185] [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,858, at 90,306.

[186] *Id.* at 90,310. The specific New Jersey provisions that the *Kennecott* court rejected as causing unacceptable delay and usurping shareholder decision-making power provided for a pre-commencement waiting period, a pre-offer fairness hearing, burdensome disclosure requirements, and additional discretionary administrative restraints. *See* N.J. STAT. ANN. § 49:5-3(a) (Supp. 1980) (waiting period); N.J. STAT. ANN. § 49:5-4(a) (Supp. 1980) (hearing provision); N.J. STAT. ANN. §§ 49:5-12(a), -17 (Supp. 1980). The *Kennecott* court also found that SEC rule 14d-2(b) preempted various New Jersey provisions. [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,858, at 90,309-10; *see* text accompanying notes 26-30 *supra.*

[187] [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,858, at 90,310-311. In *Kennecott*, New Jersey conceded that Kennecott's tender offer was a transaction in interstate commerce and that the state's takeover statute restrained interstate commerce. *Id.* at 90,310. Enforcement of New Jersey's takeover statute would have delayed and possibly prohibited a $160 million dollar nationwide securities transaction. *Id.* at 90,310.

[188] [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,858, at 90,311; *see* note 17 *supra.*

[189] [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,858, at 90,311. In finding that the New Jersey takeover statute was not merely a local regulation with incidental effects on interstate commerce, the *Kennecott* court reasoned that the statute undertook to safeguard investors nationwide. *Id.* Moreover, the *Kennecott* court observed that a major characteristic of proper "local" regulatory purposes was the control of regional problems and circumstances that are too diverse and numerous for adequate federal regulation. *Id.* (citing Southern Pac. Co. v. Arizona, 325 U.S. 761, 767 (1945)). State tender offer statutes lack this characteristic, however, since the federal government already regulates tender offers under the Williams Act. *Id.*

[190] *Id.* In rejecting New Jersey's takeover statute under the commerce clause, the *Kennecott* court's refusal to balance local benefits against interstate burdens goes beyond earlier cases in the *Kidwell* line. The earlier cases in the *Kidwell* line all found that states had a valid local interest in regulating tender offers. *See* MITE Corp. v. Dixon, 633 F.2d at 500-01; Great W. United Corp. v. Kidwell, 577 F.2d at 1282-86.

[191] [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,858, at 90,311. The *Kennecott* court reasoned that although New Jersey might have had a legitimate interest in protecting

Taken together, *Kidwell*, *MITE*, *Campbell*, and *Kennecott* provide tender offerors with a strong basis for challenging state takeover statutes under the commerce clause.[192] An even-handed state statute that furthers a legitimate local public interest with only incidental effects on interstate commerce is valid unless the resultant burden on interstate commerce exceeds the putative local benefits.[193] State takeover statutes, however, are clearly not local statutes with only incidental effects on interstate commerce. Rather, state takeover statutes govern securities transactions with nationwide impact.[194] Since the jurisdictional provisions of most takeover statutes[195] permits states to regulate tender offer transactions executed outside the regulating state, state tender of-

---

resident investors, the state had no interest in prohibiting Kennecott's solicitation of shares outside of the state. *Id.* (citing *MITE* and *Kidwell*). Since the New Jersey statute forbid the solicitation of Curtiss-Wright shares worldwide, the statute's extraterritorial effect was excessive in relation to the state's purported interest in shareholder protection. *Id.* Moreover, the *Kennecott* court reasoned that the takeover statute through delay harmed rather than safeguarded investors. *Id.* (citing *MITE* and *Kidwell*).

[192] *See* text accompanying notes 202-217 *infra*. *See also* Crane Co. v. Lam [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,986, at 90,535-38 (E.D. Pa. 1981) (enjoining enforcement of Pennsylvania Takeover Act). Commerce clause and preemption challenges to state tender offer statutes based on the rationales set forth in *Kidwell* were not totally successful in 1980. *See, e.g.*, Wylain, Inc. v. TRE Corp., 412 A.2d 338 (Del. Ch. 1980) (commerce clause and preemption challenges to Delaware takeover statute rejected); Strode v. Esmark [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,538, at 97,801 (Cir. Ct. Ky. 1980) (Kentucky takeover statute upheld against supremacy and commerce clause challenges). In *Telvest v. Bradshaw*, 618 F.2d 1029 (4th Cir. 1980), the Fourth Circuit Court of Appeals reversed a district court's grant of preliminary injunctive relief that had barred enforcement of the Virginia takeover statute against open market purchases. *Id.* at 1036. The district court had enjoined enforcement of Virginia's statute on commerce clause and preemption grounds. Telvest v. Bradshaw [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,154, at 96,366 (E.D. Va. 1980). In reversing the district court, the Fourth Circuit held merely that the district court failed to adhere to the appropriate standards for issuance of a preliminary injunction. 618 F.2d at 1033-34, 1036. Thus, due to Telvest's procedural posture, the decision neither supports nor contradicts the commerce clause and preemption challenges set forth in the *Kidwell* line of cases. *See generally* McCauliff, *Federalism and the Constitutionality of State Takeover Statutes*, 67 VA. L. REV. 295 (1981).

[193] *See* note 17 *supra*.

[194] [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,858, at 90,311; *see* text accompanying notes 188 & 189 *supra*.

[195] Almost all state takeover statutes regulate tender offers for domestic corporations or corporations with their principal place of business located in the regulating state. Tiger, *supra* note 12, at 460; *State Tender Offer Statutes Reconsidered*, *supra* note 131, at 525-56; *see, e.g.*, DEL. CODE ANN. tit. 8, § 203(c)(2) (Supp. 1980) (tender offers for companies incorporated in Delaware regulated); N.Y. BUS. CORP. LAW § 1601(a) (McKinney Supp. 1980) (offers for companies incorporated in, or with principal place of business and substantial assets in New York regulated); VA. CODE § 13.1-529(e) (Supp. 1980) (tender offers for corporations chartered and doing business in Virginia regulated). Other statutes also grant jurisdiction over tender offers to companies having a certain number of shareholders, employees, or assets in the regulating state. *See, e.g.*, ILL. ANN. STAT. ch. 121 1/2 § 137.52-10 (Smith-Hurd Supp. 1980) (tender offer to corporation having over 10% of its shareholders in Illinois regulated).

fer statutes have a substantial and intentional impact on interstate commerce.[196]

Even if state takeover statutes are local measures with only incidental effects on interstate commerce, the detrimental impact of the statutes on interstate commerce outweighs any associated local benefits. The effect of state takeover statutes on interstate commerce is unquestionably burdensome. State takeover statutes discourage, delay, and often prohibit large-scale securities transactions.[197] State tender offer laws also disrupt the efficient functioning of national securities markets.[198] Moreover, the differing jurisdictional requirements under various state takeover statutes could subject a tender offer to multiple inconsistent burdens.[199]

Commentators have suggested that two legitimate local interests justify the burdensome impact of state takeover statutes on interstate commerce.[200] The first asserted state interest, investor protection, is legitimate to the extent that the state takeover statute in question pro-

---

[196] *See* Tiger, *supra* note 12, at 481; *State Tender Offers Statutes Reconsidered*, *supra* note 131, at 527. The extra-territorial reach of state takeover statutes differentiates state takeover statutes from state blue sky laws. The Supreme Court has upheld various state blue sky laws against commerce clause challenges because the laws in question only applied to "intrastate" transactions. *See, e.g.*, Hall v. Geiger-Jones Co., 242 U.S. 539, 552 (1917).

[197] [1980] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,836-37; 633 F.2d at 495-98; 577 F.2d at 1283; Fischel, *supra* note 12, at 27-28; Langevoort, *supra* note 131, at 238; Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM. L. REV. 1, 19-21 (1976) [hereinafter cited as Wilner & Landy]. Even ardent supporters of the constitutionality of state takeover statutes admit that state tender offer regulations substantially burden interstate commerce. *See, e.g.*, *State Tender Offer Statutes Reconsidered*, *supra* note 131, at 525-26.

[198] State tender offer statutes threaten the efficiency of the market for corporate control by enhancing the ability of inefficient target companies to resist tender offers by more competent bidders. *See* Fischel, *supra* note 12, at 27-28. Additionally, state takeover statutes impair the indispensible services of arbitrageurs. Langevoort, *supra* note 131, at 239. Arbitrageurs purchase shares at a price between the current market price and the tender offer price, thereby enabling investors to dispose of their shares without the risk of nonacceptance inherent in a tender offer. ARANOW & EINHORN, *supra* note 12, at 173-74. Arbitrageurs, therefore, provide an essential element of liquidity to securities markets. *Id.* A state tender offer act that limits the probability of an offer's success, however, will discourage arbitrage. *See* Langevoort, *supra* note 131, at 239.

[199] Great W. United Corp. v. Kidwell, 577 F.2d at 1284-85; *see* Tiger, *supra* note 12, at 482; *A Response to* Great Western, *supra* note 12, at 926. If several states impose inconsistent time requirements and substantive regulations on a single tender offer, the resulting burden could violate the commerce clause. *See* Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (inconsistent state regulations concerning truck trailer length unacceptably burden interstate commerce); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (inconsistent state regulations concerning truck mud-guards impermissibly burden interstate commerce); Boehm, *State Interests and Interstate Commerce: A Look At The Theoretical Underpinnings of Takeover Legislation*, 36 WASH. & LEE L. REV. 733, 754 [hereinafter cited as Boehm]. *See also* note 111 *supra* (inconsistent state requirements may cause preemption under 14d-2(b)).

[200] *See* text accompanying notes 201 & 202 *infra*.

tects resident shareholders and governs intrastate transactions.[201] A state's local interest in protecting resident shareholders, however, does not justify state regulation of non-residents involved in securities transactions outside of the regulating state.[202] The propriety of the second asserted local interest, the regulation of intracorporate affairs, depends upon whether the characterization of a tender offer as an internal corporate matter is valid.[203] A traditional feature of state corporate law, in contrast to state securities law, is its extraterritorial reach.[204] Classifying a tender offer as an intracorporate matter, therefore, could potentially justify the global impact of most state takeover statutes.[205] Although the *MITE* and *Campbell* courts did not expressly reject or accept the attempted classification of a tender offer as an intracorporate affair,[206] the analogy is without foundation. State corporate law traditionally governs the relationship between a corporation's separate management and ownership elements. Unlike transactions between a corporation and its shareholders, however, tender offers involve transactions between the target company's shareholders and an outside party.[207] Therefore, tender offers are distinguishable from certain internal mechanisms for achieving control changes such as proxy solicitations to which the intracorporate matters doctrine applies.[208] Since neither the intracorporate matters rationale nor local interests in shareholder protection justify the burdensome impact of state takeover statutes on interstate commerce, the *Kidwell* line of cases correctly invalidated state takeover statutes on commerce clause grounds.[209]

---

[201] MITE Corp. v. Dixon, 633 F.2d at 500; Great W. United Corp. v. Kidwell, 577 F.2d at 1283; *see State Tender Offer Statutes Reconsidered*, *supra* note 13, at 529; note 205 *supra*.

[202] MITE Corp. v. Dixon, 633 F.2d at 500; Great W. United Corp. v. Kidwell, 577 F.2d at 1285; *State Tender Offer Statutes Reconsidered*, *supra* note 131, at 529; Wilner & Landy, *supra* note 199, at 16-17.

[203] *See, e.g.*, Boehm, *supra* note 199, at 742-43; Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CASE W. RES. L. REV. 722, 741-45 (1970) [hereinafter cited as Shipman]; *A Response To* Great Western, *supra* note 131, at 931-34.

[204] *See* Boehm, *supra* note 199, at 742-43.

[205] Shipman, *supra* note 203, at 741-45; *A Response To* Great Western, *supra* note 131, at 932.

[206] MITE Corp. v. Dixon, 633 F.2d at 501; Hi-Shear Indus. Inc. v. Campbell. [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,033. The *Kidwell* court expressly rejected the rationale that a tender offer is an intracorporate matter. 577 F.2d at 1280 n.53.

[207] *Id.* Wilner & Landy, *supra* note 197, at 16-17; Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 U. S. CALIF. L. REV. 1133, 1154 (1974) [hereinafter cited as *Commerce Clause Limitations*].

[208] Proxy contexts involve the transfer of voting rights rather than transfers of ownership. Therefore, state regulation of proxy contests under the intracorporate matters doctrine effects only a corporation and its existing shareholders. In contrast to proxy contests, a tender offer involves existing shareholders of the target and an outside bidder. Thus, the intracorporate matters doctrine is not applicable to tender offers. *Commerce Clause Limitations*, *supra* note 207, at 1154-55.

[209] Although not expressly relied on by the *Kidwell* line of decisions, state takeover statutes may constitute discriminatory economic protectionism. The practical effect and

The recent line of cases adopting *Kidwell* also supports the proposition that the Williams Act preempts any state takeover statute which unduly delays tender offers, strays from the regulatory neutrality of the Williams Act, or otherwise impairs investor decision-making autonomy.[210] Several commentators, however, have criticized the preemption rationales set forth in the *Kidwell* line of cases.[211] These commentators argue that Congress' purpose in enacting the Williams Act was investor protection, rather than the maintenance of regulatory neutrality.[212] These commentators further reason that a state's advance disclosure, pre-offer hearing, and administrative review provisions are entirely consistent with Congress' goal of investor protection.[213]

Although legislative history does not indicate that perpetuation of regulatory neutrality was the ultimate purpose of the Williams Act,[214] the Act's history does show that Congress considered regulatory neutrality essential to investor protection.[215] By disrupting through delay

---

unstated intent of most state takeover statutes is to insulate the incumbent management of targets from attack and thereby retain business in the state. *Commerce Clause Limitations*, *supra* note 207, at 1159; *see* Wilner & Landy, *supra* note 197, at 18-19. This purpose is subject to challenge under the theory that the protection of state industry against takeovers is analogous to invalid discrimination against out-of-state businesses in favor of local concerns. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970) (requirements that foreign company's business operations be performed in regulating state invalidated as violation of commerce clause); *Commerce Clause Limitations*, *supra* note 207, at 159. *Cf.* Great W. United Corp. v. Kidwell, 577 F.2d at 1282 (protection of incumbent management by takeover statutes would be impermissible).

[210] Kennecott Corp. v. Smith, [1980-81 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,835-37; MITE Corp. v. Dixon, 633 F.2d at 490-98; 577 F.2d at 1279-81. *See also* Crane Co. v. Lam [Current Matters Binder] FED. SEC. L. REP. (CCH) ¶ 97,896, at 90,532-35 (enjoining enforcement of Pa. takeover act).

[211] *See, e.g.*, Boehm, *supra* note 208, at 749-751; *A Response To* Great Western, *supra* note 12, at 906-17; *State Tender Offer Statutes Reconsidered*, *supra* note 131, at 517-24. Commentators criticizing preemption challenges to state takeover statutes have observed that recent Supreme Court decisions considering preemption have been highly solicitous of state interests. *See A Response To* Great Western, *supra* note 11, at 906; *see, e.g.*, Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (Maryland statute prohibiting oil companies from owning gasoline stations not preempted by Robinson-Patman Act); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) (Ohio trade secret law not preempted by federal patent law); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973) (reconciliation of state and federal regulations if possible held to be proper approach in preemption cases).

[212] *See* Boehm, *supra* note 199, at 749-50; *A Response To* Great Western, *supra* note 12, at 913-15. The Supreme Court has held recently that the sole purpose of the Williams Act is investor protection. *See* Piper v. Chris Indus., Inc., 430 U.S. 1, 35 (1977).

[213] *See A Response To* Great Western, *supra* note 12, at 901-02; *State Tender Offer Statutes Reconsidered*, *supra* note 13, at 523-24.

[214] During the Senate Committee hearings on the Williams Act, SEC Chairman Cohen emphasized that investor protection was the only purpose of the bill. *See* Piper v. Chris Craft Indus., Inc. 430 U.S. 1, 27-28 (1977).

[215] Senator Williams, the author of the Williams Act, stated that the drafting committee designed the bill to benefit shareholders by providing tender offerors and target companies equal opportunity to present fairly their cases. *See* S. REP. NO. 550, 90th Cong., 1st

the delicate balance between tender offerors and targets, state takeover statutes obstruct the accomplishment of Congress' chosen scheme of investor protection.[216] Moreover, delay-causing advance disclosure and pre-offer hearing provisions frustrate the investor protection purpose of the Williams Act by denying shareholders the right to tender their shares at a premium.[217] Since state takeover statutes stand as an obstacle of the accomplishment of the purpose of the Williams Act, the Williams Act preempts the state laws.[218]

Taken together, the SEC's promulgation of rule 14d-2(b) and the *Kidwell* line of cases cast serious doubts on the future of state tender offer regulations. Many state takeover statutes that contain advance disclosure and mandatory waiting period provisions conflict impermissibly with SEC rule 14d-2(b).[219] Although states can amend their

---

Sess. 3 (1969). In connection with the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18(a) (1976 & Supp. III 1979), the House Report stated that the Williams Act was designed to maintain a neutral policy towards cash tender offers. H.R. REP. NO. 94-1373, 94th Cong., 2d Sess. 12, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2644. The reason for this regulatory neutrality was congressional recognition that tender offers often benefit investors and that a statute which discouraged offers would deprive investors of the opportunity to tender their shares at a premium. *Id.*; H.R. REP. NO. 1711, 90th Cong., 2d Sess. 3, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2811, 2813. Prior to the enactment of the Williams Act, Congress rejected proposed tender offer legislation that contained advance notice requirements. *See* MITE Corp. v. Dixon, 633 F.2d at 496 n.22; Great W. United Corp. v. Kidwell, 577 F.2d at 1277. Although this rejection does not indicate that Congress intended to bar the states from adopting advance disclosure requirements, the rejection does illustrate Congress' intent to preserve the efficiency of tender offers. Kennecott Corp. v. Smith, 216 [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,837; MITE Corp. v. Dixon, 633 F.2d at 497; Great W. United Corp. v. Kidwell, 577 F.2d at 1279-80; *see* Langevoort, *supra* note 131, at 252; Wilner & Landy, *supra* note 197, at 29. By passing burdensome takeover statutes, states diminish the incentives for potential bidders to produce privately market information on possible targets. *See* Fischel, *supra* note 12, at 13. This decrease in market information undermines the efficiency of securities markets. *See id.* at 4; *see also* note 198 *supra*

[216] *See* note 217 *infra.*

[217] Kennecott Corp. v. Smith, [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,837; MITE Corp. v. Dixon, 633 F.2d at 497-98; Great W. United Corp. v. Kidwell, 577 F.2d at 1279-80. Where the quantity of information that an offeror must disclose under state law greatly exceeds the amount of information that a bidder must reveal pursuant to federal law, the state mandated disclosures may injure investors by causing greater shareholder confusion. 577 F.2d at 1280-81.

[218] In addition to preemption and commerce clause challenges, state takeover statutes may be difficult to justify under the first amendment. U.S. Const. amend. I. The *Smith* court noted that the recently expanded scope of the first amendment commercial speech doctrine limits the ability of states to control under corporate laws commercial speech. [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,731, at 98,837 n.10. Under Central Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n, 100 S. Ct. 2343 (1980), a state restriction on corporate speech can be no more extensive than the state interest the restriction advances. *Id.* at 2351. Assuming, therefore, that the solicitation of shareholders to tender their shares is commercial speech, state takeover statutes must advance a sufficiently counterbalancing state interest.

[219] *See* text accompanying notes 26-30 *infra.*

takeover statutes to eliminate this preemptive conflict,[220] state takeover statutes will still be vulnerable to constitutional challenges under the *Kidwell* line of cases.[221] Moreover, the SEC's apparent ability and inclination to promulgate rules such as 14d-2(b) that preempt state takeover statutes may result in the Williams Act becoming the limit of tender offer regulation.[222]

KENNETH B. TILLOU*

[220] *See* text accompanying notes 104-114 *infra*.

[221] *See* text accompanying notes 192-218 *infra*.

[222] In response to a request by Senators Williams, Proxmire, and Sarbanes that the SEC review the adequacy of federal takeover laws, the SEC has recently proposed legislation that would expressly preempt state takeover statutes. *See* [1980] 42 SEC. REG. & L. REP. (BNA) 28-29 (special supplement).

* Text accompanying notes 66-103 *supra*, contributed by Lizanne Thomas.