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Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act

Morgan Shipman*

I. INTRODUCTION

THE TAKEOVER MOVEMENT is now largely moribund because of tight money, a change of attitude by the Antitrust Division about the standards for gauging the legality of pure conglomerate acquisitions,¹ a decline in performance by some of the conglomerates,² changes in the tax law discouraging the offeror's use of its debt securities in acquisitions,³ the proposed restrictions upon the use of the pooling of interests method of accounting for combinations,⁴ and some uncertainty in the case law under the Securities Exchange Act of 1934 concerning the disclosures which must be made.⁵ To be added to that enumeration are the state laws governing takeover bids,⁶ the most direct and far-reaching recent legisla-

* I want to express my deep gratitude to Mr. David E. Jones, a December 1969 graduate of the College of Law, Ohio State University, for his excellent work in conducting a substantial portion of the research for this article.


⁶ I have not attempted a search, but the following are those enacted takeover statutes of general application to all business corporations which have come to my attention:
tion, state or federal, affecting takeovers. They were enacted after it became evident that the mild Williams Bill, passed in 1968 as an amendment to the Exchange Act, had not changed the ground rules much.

So far, these state statutes have appeared in two general forms. The insurance company takeover statutes erect formidable barriers on three regulatory bases: shareholder protection, effect on competition, and policyholder protection. These statutes are licensing measures for prospective controlling stockholders. The statute with which we are concerned, the Ohio Takeover Act, passed in July 1969, belongs in the second category, for it is a securities regulation and general corporations law dealing only with the offeror’s disclosures and the substantive fairness of its offer to the target’s stockholders.

The Ohio Takeover Act (the Act) sets standards which must be met in a takeover bid for equity securities of an Ohio corporation or a corporation which has its principal place of business plus substantial property in the state (an Ohio-based corporation). The Act’s requirements apply globally, including, say, a bid made in New York by and to persons residing there if the target corporation has the requisite Ohio connection. In numerous ways, the Ohio Act presses beyond the federal statutes, especially in its requirements that cash and securities tender offers be precleared by the Division of Securities (which may order a hearing) during a waiting period after public filing of the proposed offering materials and that both types of offers meet requirements of substantive fairness, as well as


The Virginia statute, supra, was amended in April 1970 to incorporate many of the central features of the Ohio legislation, supra. See 3 CCH Blue Sky L. Rep. §§ 49, 228-41.


See text accompanying notes 153-65 infra.

See text accompanying notes 38-40, 82-83, 86-91 infra.
searching disclosure standards of the type imposed by the Securities Act of 1933.\textsuperscript{12} The Act, which may become a prototype, is superadded to the federal statutes and the blue sky laws of the various states in which the offer is made.\textsuperscript{13}

My inquiry is a rather narrow one of federalism directed to the proper allocation of legislative jurisdiction to regulate takeover bids among the state of incorporation (and the state in which the corporation is based), the states in which the bid is made, and the federal government. Specifically, the inquiry is whether Ohio’s assertion of jurisdiction is proper in the American scheme of securities regulation and corporations law. My general answers are that a takeover bid by a prospective major or controlling stockholder is in essence an internal affairs transaction which a state having legislative jurisdiction over the corporation’s internal affairs may reasonably regulate; that the Act is not an unreasonable exercise of legislative jurisdiction; that, however, courts in other states may refuse to apply the Act to transactions outside Ohio; and, that although the Act has almost unique interstate impact, it is an interesting and useful experiment and consideration of exclusive federal regulation of takeovers is definitely premature at the present time. I believe, however, that in several respects the Act’s existing structure is inconsistent with its stated purpose of providing fair, full, and effective disclosure to securityholders. A number of amendments are suggested.

A word is in order about the scope of the article. First, the article assumes a familiarity by the reader with the structure and effects of the federal regulation of takeover bids and proxy fights (a related form of battle between management and insurgents), subjects covered in several outstanding works.\textsuperscript{14}

Secondly, I do not attempt to re-present the arguments on the social value of takeovers or any particular form of securities or corporation law regulation of takeovers. The literature on these broader issues is excellent.\textsuperscript{15} At the risk of emphasizing the ob-


\textsuperscript{13} On the use of portions of the Act by Virginia, see note 6 supra. Concerning the superaddition, see text accompanying notes 139-47 infra.


\textsuperscript{15} See 6 L. Loss, supra note 14, at 3664-66 (Supp. 1969). See generally Cohen,
vious, however, I will note a central fact: The broader effects of securityholder protection are dramatically pronounced in takeover legislation. Takeover legislation may be framed in terms of investor protection standards, which is true of the Act and the Williams Bill, and does increase the information available to securityholders. One almost inevitable effect of such legislation is, however, to increase management's tenure protections. Opponents of takeover legislation deplore the anti-Darwinism. They also point out that investors may lose when takeover bids are regulated, even by benign means such as disclosure. The takeover bid represents a means of disposition alternative to the market and usually at a higher price. To the takeover bidder, any regulation of his bid discourages, and the benefit to securityholders of even the mild regulation established by the Williams Bill may be outweighed by the value of takeover bids that may never be conceived or completed because of such regulation.

Lastly, my coverage is almost entirely limited to the Act, since it is the most comprehensive state statute regulating takeovers of all types of business corporations. The insurance company takeover statutes are not considered to any appreciable extent. Although these statutes demand considerably more of a takeover offeror than does the Act, they rely upon policyholder protection and effects upon competition in addition to securityholder protection as bases of legislative jurisdiction. The insurance company statutes thus have grounds for legitimacy beyond those possessed by statutes such as the Act, whose sole stated purpose is securityholder protection. General takeover legislation such as the Act presents the most difficult and interesting corporations law and securities regulation problems.

A Note On Takeover Bids and Corporate Purchases of Stock, 22 BUS. LAW. 149 (1966); Fleischer & Mundheim, supra note 14; Hamilton, supra note 14; Manne, Cash Tender Offers For Shares — A Reply To Chairman Cohen, 1967 DUKE L.J. 232; Voys, supra note 6.

18 See authorities cited note 15 supra.

17 The purpose clause, which is not included in the Code, states the following aim: "To protect shareholders of Ohio and Ohio-based corporations by requiring public announcement and fair, full, and effective disclosure to shareholders in regard to takeover bids." Amend. Sub. S.B. No. 138, File No. 90, at 1 (Reg. Sess. 1969-70).

Because the Act is new and highly controversial and because we are considering the legitimacy of the Act in our scheme of federalism, I have thought it wise to begin with an analysis of what the Act does and does not require, especially in comparison with the central requirements of the Williams Bill and the Securities Act.

II. COMPARISON OF THE ACT WITH THE FEDERAL REGULATION

The Act mixes custom-made solutions with language and concepts from the Williams Bill and the SEC's regulations, the Securities Act, and preexisting sections of the Ohio Securities Law (of which the Act is a part). Because of the mixed ancestry and the not-so-tranquil circumstances in which the Act was passed, interpretation of parts of the Act is uncertain. Arthur Vorys, Esq., a proponent of the Act, has described the heated battle between such powerful groups as the Ohio Manufacturers Association (pro) and the Investment Bankers Association of America (con).¹⁸ He notes a total of 13 legislative committee hearings and "innumerable amendments."¹⁹ Mr. Vorys summarizes the result: "As with so many statutes which survive a hot legislative struggle, this one has been molded by numerous sculptors and therefore occasionally loses its symmetry. Nevertheless, its basic form is perfectly understandable and reasonably aesthetic."²⁰

The Act's general approach — that of imposing demanding requirements upon takeover offerors while leaving management untouched — is of course explained by the fact that corporate management supplied the impetus for adoption. The takeover movement achieved its greatest momentum in late 1968 and early 1969, as takeover offerors realized that the enactment of the Williams Bill the previous summer had only barely changed the rules. Takeover attempts became bolder and larger targets were selected. Few executive suites were free of anxiety. As a result, however, takeover defenses improved in sophistication and effectiveness. For example, B. F. Goodrich, an Ohio-based corporation, showed a full measure of resourcefulness and tenacity in blocking the takeover attempted during the first half of 1969 by Northwest Industries.²¹

¹⁸ Vorys, supra note 6, at 66.
¹⁹ Id.
²⁰ Id. at 70.
²¹ For an account of the fight, see O'Hanlon, Goodrich's Four-Ply Defense, FORTUNE, July 1969, at 110.
The Act is a result of the sharpened awareness by corporate man-
agements of the dangers of takeovers to them and of an increased
sophistication about takeover defenses.

A. Takeover Bids and Offerors Covered by the Act

Under the Act, only the "offerors" in a "takeover bid" are
regulated. A takeover bid is defined as a "tender offer" for equity
securities of an Ohio or Ohio-based corporation if after acquisition
the offeror would be the direct or indirect record or beneficial
owner of more than 10 percent of the outstanding equity securities
of any class.\textsuperscript{22} This is similar to the Williams Bill coverage, except
that the Williams Bill's restriction to equity securities registered
under section 12 of the Exchange Act and equity securities of regis-
tered closed-end investment companies is missing.\textsuperscript{23} The Act thus
reaches companies too small or closely held to be covered under
the Williams Bill.\textsuperscript{24} The Act, however, is limited to Ohio and
Ohio-based companies.\textsuperscript{25} A takeover bid for securities of any other
company, even when made by an Ohio resident or corporation or
made in Ohio, is outside the Act, although preexisting provisions
of the Ohio Securities Law continue to apply to the portion of any
bid made in Ohio.\textsuperscript{26}

Under the federal structure there is a sharp distinction between
the regulatory treatment of cash and securities bids, governed by
the Williams Bill and the Securities Act, respectively.\textsuperscript{27} Probably
the most important feature of the Act is that it treats securities
bids and cash bids the same.\textsuperscript{28}

Neither the Act nor the Ohio Securities Law applies when the
insurgent moves by a proxy solicitation rather than a tender offer.

Although neither the Act nor the Williams Bill defines "tender
offer," the Act translates the "public offer" connotation of the
term into specifics by excluding cash bids to 50 or fewer persons
and securities bids not involving a public offering under the Securi-
ties Act, provided in each case the bid is for the offeror's sole ac-

\textsuperscript{23} The Williams Bill's restriction is found in Exchange Act § 14(d) (1), 15 U.S.C.
§ 78n(d) (1) (Supp. IV, 1969).
\textsuperscript{24} See, however, text accompanying note 29 infra.
\textsuperscript{26} Id. § 1707.041(G).
\textsuperscript{27} See text accompanying notes 46-48, 56, 63-67 infra.
\textsuperscript{28} The Division could require fewer disclosures in a cash bid. See text accompanying
notes 57-67 infra.
A dealer's bids for his own account in the ordinary course of business are excluded. Acquisitions through ordinary trading market transactions seemingly do not constitute a takeover bid, although as under the Williams Bill a rapid accumulation of relatively large amounts would probably constitute a bid.

Compliance with the Exchange Act or the Securities Act at the federal level furnishes no exemption, but several types of transactions subject to the approval of the federal agencies having jur-

30 Id. § 1707.041(A)(1)(a).
31 See generally A. BROMBERG, supra note 14, § 6.3 (327).

By going into the trading markets, the offeror is losing the exemption for cash offers to 50 or fewer persons [see text accompanying note 29 supra] in the same manner that one selling securities loses the private offering exemption under the Securities Act by selling through the organized markets. See Securities Act § 4(2), 15 U.S.C. § 77d(2) (1964); SEC Securities Act Release No. 33-4552 (Nov. 6, 1962), in 1 CCH Fed. Sec. L. Rep. § 2776, at 2684-85. In each case, offers are being made to the public. But the Act and the Williams Bill seem to exclude certain trading market transactions because each regulates only "tender offers." The background of the Williams Bill would indicate that "casual" trading market transactions accomplished through only ordinary solicitation by broker-dealers of orders to sell and accompanied by ordinary brokerage payments should not be considered as comprehended in the term "tender offer," for such transactions have limited impact on the markets and cannot lead to the acquisition of a significant percentage of the target's securities, except over a long period of time. The reader will note that I am espousing an application of the type of standards promulgated in Rule 154 under the Securities Act for the "brokers' exemption." SEC Securities Act Rule 154, 17 C.F.R. § 230.154 (1969), reprinted in 1 CCH Fed. Sec. L. Rep. § 2902, at 2707. Under the Wheat Report scheme, Rule 154 would be carried forward in revamped form as a part of proposed new Rules 162-64. See SEC Securities Act Release No. 4997 (Sept. 15, 1969), reprinted in CCH Special Report No. 272 (Extra Edition Sept. 6, 1969).

The Williams Bill exempts an acquisition which is a "tender offer" if "the acquisition... together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 percentum of that class." Exchange Act § 14(d) (8) (B), 15 U.S.C. § 78n(d) (8) (B) (Supp. IV, 1969). The Act contains no similar exemption. The presence of this exemption in the Williams Bill may argue for a construction of that statute not permitting trading market transactions to come within an implied exclusion. If this exemption in the Williams Bill is relied upon, "all other acquisitions" must be included. Similar problems of integration exist if one attempts to rely upon the "nonpublic" exclusion (implied in the Williams Bill and explicit in the Act) and the "casual" trading market exclusions that seem to be implicit in the Act and the Williams Bill. That is, acquisition of anything more than an insignificant percentage of the target's securities in a nonpublic transaction may remove the rationale for allowing a related acquisition of even a very small percentage of such securities in casual trading market transactions to qualify for an implied exclusion. Present Securities Act Rule 154 and proposed Rule 162(a)(4) resolve in opposite ways an analogous integration problem concerning private sales.

For additional requirements of prior disclosure imposed with respect to all acquisitions by a 5-percent holder or a person who becomes one, see subsection (B)(2) of the Act, CODE §§ 1707.041(B)(2) (Page Supp. 1969), and text accompanying notes 43-45 infra.
isdiction over banks, bank holding companies, savings and loan holding companies, and public utility holding companies and public utilities (as defined in the Public Utility Holding Company Act of 1935) are excluded. Aside from that limited exclusion, however, an offeror's or target's status as a public utility or any other type of business affected with a special public interest affords no exemption and imposes no special standards. The Act is not a measure licensing prospective controlling shareholders. For example, if the offeror or target is an insurance company, the Act applies as usual, although in that particular case the Superintendent of Insurance, rather than the Division of Securities, administers the Act.

An offer by a company for its own securities is outside the Act.

There is an exclusion, not found in the Williams Bill or the Securities Act, for a tender offer if the target's board has recommended acceptance to shareholders and the terms of the offer, including any special inducements to officers and directors, have been furnished to shareholders. Presumably it was thought that the board of the target, before recommending acceptance, would scrutinize the fairness of the offer and the adequacy of the disclosures, thus supplying an adequate substitute for the Act.

Lastly, the Act empowers the Division to exempt by "reasonable" regulations takeover bids having neither the purpose nor the effect of changing or influencing the control of the target. The Williams Bill contains a similar provision.

Because of the judicial tendency to employ a territorial canon of construction in interpreting legislation, it is surprising that the Act is inexplicit on extraterritorial coverage. Moreover, the Act is a part of the Ohio Securities Law rather than the General Corporations Law; and the Securities Law, unlike the General Corporations Law, is limited by its language and by interpretation to acts in Ohio. However, the seemingly unavoidable implication is that

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83 Id. § 1707.041(G).
84 See id. § 1707.041(A) (1).
85 Id. § 1707.041(A)(1)(d).
86 Id. § 1707.041(F)(2).
89 See CODE §§ 1707.01(E)(1), .05, .09-.11 (Page 1964); Ohio Division of Securities, Ruling No. 11, reprinted in 2 CCH BLUE SKY L. REP. § 38,711, at 34,525.
the Act applies globally — for example, to a New York resident making a bid there for equity securities of an Ohio corporation.\textsuperscript{40}

The Act’s definition of “offerors” regulated seems even broader than that in the Williams Bill. “Offeror means a person who makes, or in any way participates or aids in making, a take-over bid, and includes persons [i] acting jointly or in concert, or [ii] who intend to exercise jointly or in concert any voting rights attached to the securities for which such take-over bid is made.”\textsuperscript{41} Among those included are members of the dealer group. Thus, an Ohio-registered broker-dealer jeopardizes his license by participating in a nonqualifying takeover bid made outside Ohio.\textsuperscript{42}

B. \textit{How the Offeror Complies with the Act}

Chronologically, the first duty is imposed by a Draconian analogue of sections 13(d) and 16(a) of the Exchange Act.\textsuperscript{43} A person owning 5 percent or more of any class of the target’s equity securities may not launch a takeover bid if, within the year before the bid, he acquired (in any manner) any of the target’s equity securities and failed, before the transaction, publicly to announce his intention to gain control or to make “fair, full, and effective disclosure of such intention” to those from whom he purchased.\textsuperscript{44} The 1-year delay presumably applies whether or not the intent existed when, say, the first 100 shares were purchased on an exchange.\textsuperscript{46} Although private purchases and ordinary trading market transactions are spared the Act’s full regulatory treatment, this provision substantially decreases their utility.

The Act eliminates the surprise permitted by the Williams Bill, which allows the materials to be filed simultaneously with the commencement of the bid.\textsuperscript{46} In enacting the Williams Bill, Congress

\textsuperscript{40}The Act covers only companies with an Ohio nexus of the type which supports internal affairs regulation. That regulation is always extraterritorial. \textit{See} text accompanying notes 122-26 \textit{infra}. Furthermore, the Act does not contain a single limitation to acts “in this state,” a phrase liberally employed in the remainder of the Ohio Securities Law [\textsc{Code} §§ 1707.01 (E) (1), .05, .09-.11 (Page 1964)], and the Act reads as though it is intended to apply globally. Furthermore, the Act, if interpreted as one governing only the Ohio portion of a tender offer, is largely superfluous. \textit{See} text accompanying notes 88-91 \textit{infra}. The canon of territorial construction should easily be overcome. \textit{Cf.} Trautman, \textit{supra} note 38.

\textsuperscript{41} \textsc{Code} § 1707.041(A)(2) (Page Supp. 1969).

\textsuperscript{42} \textit{See} Vorys, \textit{supra} note 6, at 69, 71.

\textsuperscript{43} \textsc{Code} § 1707.041(B)(2) (Page Supp. 1969).

\textsuperscript{44} \textit{Id.} There was a grace period for those purchasing before the 30th day following the effective date.

\textsuperscript{46} \textit{See} text accompanying notes 191-93 \textit{infra}.

\textsuperscript{40} A. Bromberg, \textit{supra} note 14, § 6.3 (421).
decided against a waiting period after filing and before the bid is made.\footnote{See id.; Cohen, supra note 15, at 152-53.} The Bill does, however, allow tendering shareholders to withdraw during the first 7 days of the offer,\footnote{A. BROMBERG, supra note 14, §§ 6.3(521)-(525).} giving management a semblance of an opportunity to present its case.

Under the Act, 20 days prior to a takeover bid, the offeror must publicly announce the terms of the offer\footnote{CODE § 1707.041(B)(1) (Page Supp. 1969). No particular form of announcement is specified.} and file with the target and the Division copies of the materials to be used and the data and information required by the Act, all of which must meet the Act's disclosure standards.\footnote{Id.} It appears that no solicitation by the offeror is permitted until clearance of the offer and the disclosure materials.\footnote{“Takeover bid” seems to be defined broadly enough to include any type of solicitation of offers to sell. CODE § 1707.041(A)(1) (Page Supp. 1969). Subsection (B)(3) speaks of the filing of all material by which the offeror “proposes” to make full disclosure. The wording of subsection (C), relating to pro rata takeups, also seems to support this construction.} On its own motion, or upon management's request, the Division may during the first 10 days after the filing order a hearing.\footnote{Id. § 1707.041(B)(1).} The Division's conclusion on the necessity for a hearing appears to be beyond review. If no hearing is ordered, the offeror may proceed at the end of the 20-day period.\footnote{See note 80 infra.}

The Act requires, of cash bids and of securities bids, a combination of Williams Bill and Securities Act disclosures and in a few particulars goes beyond both. However, the disclosure burdens imposed upon a securities offeror in addition to those under the Securities Act (which in nearly all cases will also be applicable) are few; and the Securities Act's waiting period after the filing of the registration statement removes the surprise from a securities bid. The main impact of the waiting period, preclearance, and disclosure requirements of the Act is on cash bids. Of those bids, the Act is far more demanding than the federal legislation. The waiting period under the Act does, however, impose one significant burden on securities bids in addition to those present under the Securities Act. Under the Act, it appears that no solicitation is permitted until the end of the 20-day period (or until approval, if a hearing is ordered), whereas the Securities Act allows certain

\begin{itemize}
\item \footnote{See id.; Cohen, supra note 15, at 152-53.}
\item \footnote{A. BROMBERG, supra note 14, §§ 6.3(521)-(525).}
\item \footnote{CODE § 1707.041(B)(1) (Page Supp. 1969). No particular form of announcement is specified.}
\item \footnote{Id.}
\item \footnote{“Takeover bid” seems to be defined broadly enough to include any type of solicitation of offers to sell. CODE § 1707.041(A)(1) (Page Supp. 1969). Subsection (B)(3) speaks of the filing of all material by which the offeror “proposes” to make full disclosure. The wording of subsection (C), relating to pro rata takeups, also seems to support this construction.}
\item \footnote{Id. § 1707.041(B)(1).}
\item \footnote{See note 80 infra.}
\item \footnote{CODE § 1707.041(B)(1) (Page Supp. 1969).}
\end{itemize}
types of preliminary solicitation immediately after the filing of the registration statement. 56

The general disclosure standard demands that the offeror "make fair, full, and effective disclosure to offerees of all information material to a decision to accept or reject the offer." 57 Before clearance is granted, the Division must conclude that the offeror proposes to do this. 58 The Act does not specifically state the items of information to be communicated to securityholders, the form of prospectus to be used, or the means or timing of its delivery. The Act, however, enumerates data to be filed with the Division, and there is an implication that all this information must be communicated. 59 Furthermore, since the Act emphasizes "effective" disclosure, the delivery of a full prospectus of the type required by the Securities Act to each securityholder who deposits is undoubtedly the contemplated general rule. The more difficult question is whether this delivery is to be made simultaneously with the deposit or whether delivery must precede the deposit. The Act seems to contemplate that less formal and inclusive soliciting documents may precede the prospectus. 60 These are questions within the Division's reasonable discretion. 61 and it can be anticipated that the Division will insist upon effective communication of salient facts through techniques such as clear summaries. 62

The specified data to be filed with the Division consists, generally speaking, of the following: (1) The few items of information required by the SEC under the Williams Bill, with some changes. 63 For example, the Williams Bill's requirement concerning borrowed funds is omitted and the Act's requirements concerning plans or proposals for changes in the target's operations includes "policies of


58 The subsections which expressly impose the standard when a hearing is ordered [id.] would seem to make it incumbent upon the Division so to conclude before it decides under subsection (B)(1)(a) or (B)(1)(b) that no hearing is necessary. Id. §§ 1707.041 (B)(1)-(b).

59 See id. § 1707.041(B)(3)(b).

60 See id. § 1707.041 (B) (3) (a), which lists a portion of the papers to be filed with the Division. That subsection requires filing of "copies of all prospectuses, brochures, advertisements" by which the offeror proposes to disclose. Brochures or advertisements which at that time are already prepared would usually be used in the initial soliciting efforts (e.g., by publication in newspapers).

61 Id. §§ 1707.041(B)(1)(c), (B)(4), (F).

62 Vorys, supra note 6, at 72.

employment." (2) "Complete information on the organization and operations of [the] offeror." The Act proceeds to enumerate substantially all the information about the offeror required in a Securities Act registration, including description of the business, capital structure, conflict of interest transactions, financial statements for the current period and the 3 preceding years, and developments and changes during the past 5 years. This requirement, like all those imposed by the Act, applies equally to cash and securities bids. However, the Act does not explicitly require information about the organization and operations of the target. The Securities Act requires such information in a securities bid. (3) Such other data, documents, information, and exhibits "as may be required by regulations of the division ... or as may be necessary to make fair, full, and effective disclosure to offerees of all information material to a decision to accept or reject the offer." The inclusion of proposals or plans for changes in the target's policies of employment illustrates one of the acknowledged purposes of the Act: to give securityholders information about the impact of the takeover on third persons such as employees of the target. The SEC has traditionally limited required disclosures to areas of interest to an investor as an economic man, even under the Exchange Act, where the "public interest" standards would allow a broader scope. The Act's entry into the controversial arena of the public responsibility of corporations and their shareholders is extremely limited: Only a few disclosures along those lines are contemplated and they may be of direct economic relevance to securityholders who are employees or residents of an affected area. Those disclosures in fact also bear upon the managerial competence of the offeror and upon the target's future profits, which in turn may influence any securityholder's decision whether to hold or sell; and the Division's authority mani-

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64 Id. § 1707.041(B)(3)(g).
65 Id.
66 This may be required, however, especially in a securities bid. See text accompanying notes 67-68 infra. See also text accompanying note 179 infra.
67 See A. Bromberg, supra note 14, § 6.2(410).
69 Vorys, supra note 6, at 68.
71 See Vorys, supra note 6, at 68. In light of the background of the Act, all of the disclosures required by the Act concerning plans for changes in the operations of the target take on more significance than the similar disclosures required by the SEC's rules under the Williams Bill.
72 Disclosures about plans for plant closings, management changes, and layoffs of
frestly cannot be exercised on grounds such as impact on local employment, provided proper disclosure is made. The Act holds the Division to a strict timetable if a hearing is set. The hearing must be held within 40 days of filing and the adjudication must be made within 60 days of filing. If the Division finds that the offer and the proposed disclosures comply with all of the Ohio Securities Law, including the Act, a go-ahead is given. If the Division finds that the offer would comply if amended in certain respects, the Division must so order. It appears, however, that the Division is empowered simply to adjudicate that the offer is incurably deficient, in which event the offeror could start anew by presenting a revised bid and set of disclosures. An aggrieved offeror has a right of judicial review. It is not clear whether management may obtain such review of a ruling adverse to it.

The Act is silent concerning the clearance procedure applicable

employees are relevant to an investor qua investor; and he might be influenced to hold, hoping that the offeror will gain control, effect the changes, and increase the target’s profitability.

74 Id. § 1707.041(B)(4).
75 Id.
76 Id.
77 See id.
78 The effect of section 1707.22 of the Code is unclear, but a revised bid would seem to escape the delay in resubmission contained in that section.
79 The Act, subsection (B)(4), states that an adjudication by the Division shall be pursuant to sections 119.01 to .13 of the Code. A preexisting section of the Ohio Securities Law [CODE § 1707.22 (Page 1964)] allows appeals by the aggrieved party whenever the Division takes negative action on the right of a person to buy or sell securities. Section 119.12 would allow the offeror, as a "party adversely affected," to appeal. Section 1707.22 would reach the same result because the offeror would clearly be an "aggrieved party."
80 As pointed out in note 79 supra, this is governed by sections 119.01 to .13 and 1707.22 of the Code. Under section 119.12, one of the prerequisites to judicial review is the status as a "party adversely affected." Id. § 119.12. "Party" is defined as "the person whose interests are the subject of an adjudication by an agency." Id. § 119.01(G). Section 1707.22 speaks of an appeal by the "aggrieved party" whenever the Division takes negative action on the right of a person to buy or sell securities. This indicates a negative answer. I have not undertaken a review of the case law. It may be relevant that the Ohio Securities Law states that it creates no civil liabilities other than those specified. Id. § 1707.40. See also id. § 1707.38; text accompanying note 108 infra.

A Division determination not to hold a hearing seems to present even greater obstacles. The explicit reference in subsection (B)(4) of the Act, which governs the conduct of the hearing, to sections 119.01 to .13 coupled with a lack of such reference in subsection (B)(1), which empowers the Division to determine whether a hearing will be held, may indicate a total commitment of this question to agency discretion.

An attempt by the offeror to appeal a Division determination to hold a hearing would probably be invalid on the ground of prematurity.
to amendments or supplements to the offeror's materials. This raises some crucial problems. Application of the 20- to 60-day procedure to all amendments and supplements is patently impractical in a contested takeover bid, where events move swiftly, where the offeror is under a practical compulsion to respond to the inevitable management counterattacks, and where the federal standards may compel correction of earlier misstatements and dissemination of information about important subsequent events. For example, the offeror, especially in a cash bid, almost necessarily must have discretion to raise the price from the one indicated in the first filing. The Division, however, has adequate discretion to adopt workable rules or procedures; and we can assume that the Division will use its discretion properly.\(^{81}\)

As noted, one ground for an adverse determination is a violation of any section of the Ohio Securities Law, of which the Act is a part. Preexisting Code section 1707.13 authorizes the Division to suspend the registration of or the right of dealers or the issuer to buy, sell, or deal in any security if "such security is being disposed of or purchased on grossly unfair terms, in such manner as to deceive or defraud or as to tend to deceive or defraud purchasers or sellers."\(^{82}\) This standard is usually applied only to Ohio transactions. It appears, however, that the Act incorporates the standard for application on a global basis to all takeover bids covered by the Act,\(^{83}\) and in any event it continues to apply to the portion of any bid made in Ohio. In practice, it may be difficult to distinguish "grossly unfair terms" from those which are merely unfair; and many attorneys who practice before the Division, which has the

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\(^{81}\) In addition to the rulemaking authority under subsection (F), the standard under which the Division is to allow an offer to proceed requires only that the offeror proposes to make fair, full, and effective disclosure. *Id.* §§ 1707.041(B)(1), (B)(4). This gives the offeror an opportunity to propose a fair way in which amendments and supplements are to be handled — say, by a proxy rules type of system requiring nonpublic prefiling with the Division 2 days before use, giving the Division the right to comment on the material before its use. Protection of the Division's enforcement rights could be accomplished by an agreement that its approval could be revoked upon stipulated contingencies.

On the presumption concerning proper use of discretion, see note 168 infra. For recommended changes in this area, see text accompanying notes 178-84 infra.

\(^{82}\) CODE § 1707.13 (Page 1964).

\(^{83}\) *Id.* § 1707.041(B)(4) (Page Supp. 1969), which requires a Division finding that the bid is consistent with the Ohio Securities Law. Subsection (F)(1) [see text accompanying note 98 infra] indicates that the section 1707.13 standards are intended to apply globally. Section 1707.19, which empowers the Division to prescribe antifraud rules applicable to dealers, may also be applicable; but global application of this provision seems unlikely since only the Ohio portion of a bid must be effected through locally registered dealers. See notes 89-91 infra & accompanying text.
reputation as one of the most demanding of the state blue sky authorities, feel that the Division in fact applies a fairness test. The Division's authority to veto a bid made on terms which are "grossly unfair" thus becomes quite important, especially in a securities bid. The Williams Bill and the Securities Act contain no requirements of substantive fairness, aside from the ratable acceptance, price increase, and withdrawal provisions in the Williams Bill.

Since, however, the Act does not empower the Division to determine that the exchange ratio is fair, the hearing and an affirmative determination will not qualify a securities bid for an exemption from registration under section 3(a)(10) of the Securities Act.84

No special fees are imposed upon an offeror. If the target requests a hearing, fees up to $1000 may be collected from it.85

Like the Williams Bill, the Act does not require an offer to be made for all shares or to be made ratably to all shareholders. A takeover bid must, however, be made to all holders who are Ohio residents and must be made to them "on the same terms as . . . made to holders . . . not residing in [Ohio]."86 The requirements were inserted to prevent retaliation against Ohio residents because of the adoption of the Act.87

Even before the Act was passed, the Ohio Securities Law reached any bid through the "grossly unfair terms" requirement, which we have already examined, and through section 1707.14(B),88 which demands (with some exceptions) that a person engaging in the business of buying or selling securities otherwise than through Ohio-licensed dealers must register with the Division as a dealer. A bid is apparently interpreted as constituting a "business." The Act specifically requires an offeror to comply with section 1707.14(B).89 The authors may have intended to enlarge the Ohio Securities Law to require all takeover bid transactions inside and outside Ohio to be consummated through

86 See id. § 1707.041(C).
87 Vorys, supra note 6, at 70-71. See also text accompanying notes 149-52 infra.
88 CODE § 1707.14 (B) (Page 1964). See also id. § 1707.19; note 83 supra.
89 Id. § 1707.041 (C) (Page Supp. 1969), incorporating id. § 1707.14 (B) (Page 1964).
Ohio-registered dealers, but because the duty is imposed by a cross-reference to section 1707.14(B), which is explicitly limited to transactions in Ohio, probably only the Ohio portion of the bid must so qualify.

The Act follows the Williams Bill in decreeing ratable acceptance of securities deposited during the first 10 days if more securities than the offeror has bid for and is willing to accept are deposited. The Williams Bill's protection that initial depositors will benefit from any increase in price is also included. The Williams Bill allows an offeree to withdraw during the first 7 days or after 60 days (if the tender has not been accepted). The Act has no similar provision.

C. Application of the Act to Persons Other Than Offerors

Neither the Act nor any preexisting provision of the Ohio Securities Law imposes duties on management or anyone other than an offeror. Under both the Law and the Act, management will be free to solicit shareholder opposition to the bid free of antifraud or disclosure requirements. The draftsmen undoubtedly relied upon the antifraud prohibitions under Rule 10b-5 and section 14(e) of the Exchange Act to prevent misstatements, half-truths, and other unfair practices by management or by other persons recommending acceptance or rejection. Those federal requirements will not, however, prevent management from attacking the offer during the waiting period, when the offeror seemingly can do or say nothing on the bid itself.

90 One proponent of the Act mentions the requirement but does not explicitly state that it is global. Vorys, supra note 6, at 70.
91 Section 1707.14, especially when coupled with section 1707.01(E)(1), seems clearly limited to Ohio transactions. Though territorial limitation thus seems indicated, such an interpretation causes the incorporation to be surplusage, as subsection (G) of the Act explicitly preserves preexisting requirements of the Ohio Securities Law.
93 Id.
94 See text accompanying note 48 supra.
95 It is unlikely that subsections F(1) and F(3) can be applied to anyone other than an offeror.
96 On the federal controls, see A. Bromberg, supra note 14.
97 The SEC would probably have authority under sections 10(b) and 14(e) of the Exchange Act to adopt such a rule. Cf. SEC Exchange Act Rule 10b-13, adopted in SEC Exchange Act Release No. 8712 (Oct. 8, 1969). The Rule, reprinted in 2 CCH Fed. Sec. L. Rep. ¶ 22,733, at 16,621-3, prohibits purchases during a tender offer other than pursuant to the offer. For examples of other management responses to a takeover bid, see text accompanying note 171 infra.
D. Enforcement and Administration of the Act

The Division’s regulations may play a major role in determining the impact of the Act. The Division is authorized to prescribe reasonable regulations defining terms used in the Act and “fraudulent, evasive, deceptive, or grossly unfair practices in connection with take-over bids.” The quoted language refers to standards contained elsewhere in the Ohio Securities Law and incorporated by the Act, as the Act contains no general antifraud prohibition. Reasonable Division regulations may also deal with “such other matters as are necessary to give effect to [the Act].”

To date, the Division has proposed no regulations. Although it has promulgated Forms 041 and 041(B)(4) for filing of information and request for a hearing, respectively, these forms largely paraphrase the Act and provide few additional specifics. For an offeror contemplating a bid, the present generality is troublesome. For example, we have examined the crucial question, which remains unanswered, of how amendments and supplements are to be handled. In addition, the Division’s standards for application of the “grossly unfair terms” requirement are largely unpublished. One hopes that more definite administrative guides will be issued. Although it is a truism that an agency administering a securities statute must retain considerable discretion in order to deal with the unusual features or disclosure questions in each transaction and to reach clever evasions (which seldom appear twice in the same guise), better policy and smoother, more evenhanded administration almost necessarily result from the fashioning and publication of guides identifying what the agency will routinely accept or reject and what the agency will judge on a case-by-case basis in light of stated policy principles. We can assume that the Division will properly exercise the discretion which the Act, uninterpreted by administrative guides, leaves in its hands for ad hoc exercise, but more definite standards would be extremely helpful.

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99 Id. § 1707.041(F)(3).
100 An exception is the requirement for financial statements relating to the current period. See id. §§ 1707.041(G)-(H).
101 See text accompanying note 81 supra.
102 For a classic article bearing on the choice between rulemaking and adjudication, see Shapiro, The Choice of Rulemaking or Adjudication in The Development of Administrative Policy, 78 HARV. L. REV. 921 (1965).
103 See note 168 infra.
The criminal penalties of the Ohio Securities Law and the Division's injunctive authority apply to any violation of the Act. The Act also grants offerees express rights of rescission and damages against offerors. This is done by stating that "an offeror is subject to the liabilities and penalties applicable to a seller, and an offeree is entitled to the remedies applicable to a purchaser, as set forth in sections 1707.041 to 1707.44." Under those sections, a purchaser has certain damage and rescission rights against a seller who has used materially false offering materials or has otherwise made a sale or contract for sale in violation of any section of the Law.

The Ohio Securities Law, however, has no long-arm section, and the general Ohio long-arm provision does not reach purchases and sales outside Ohio. Nor does the Act require the offeror to file a consent to service of process.

Enforcement of the Act other than by governmental actions or damage or rescission cases brought by selling shareholders is highly uncertain. There will be great difficulty in obtaining relief such as a denial of voting rights to tainted shares or a decree of divestiture on an implied private rights theory. The Ohio Securities Law proclaims that, although it does not limit common law actions for fraud or deceit, it creates no civil liabilities other than those specified. Indeed, management and shareholders (tendering or non-tendering) may be without standing even to obtain injunctive relief under the Ohio Securities Law against an offer being made in patent disregard of the Act.

The enforcement mechanisms are thus less sophisticated than those developed under the federal acts and those found in some of the other state takeover statutes. Even the right to damages and rescission may prove limited with respect to sales made by

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104 Code §§ 1707.25-26, .36, .44-.47, .99 (Page 1964). In a cash bid, there may be difficulty in applying some of these sections, as they were written primarily to cover sellers, not buyers, of securities.

105 Id. § 1707.041 (E) (Page Supp. 1969). The reference to sections 1707.041 to 1707.44 is a misprint. The reference should be to sections 1707.41 to 1707.44.

106 Id. §§ 2307.381-85.

107 In a securities bid, the offeror may have to file such a consent under a preexisting section of the Ohio Securities Law, but it would relate only to an action "growing out of a fraud committed ... in connection with the sale of ... securities in [Ohio]." Id. § 1707.11 (Page 1964).

108 Id. § 1707.40. See also id. § 1707.38.


110 See text accompanying notes 195-99 infra.
securityholders outside Ohio when enforcement is attempted in the courts of sister states. The staggering potential liabilities inherent in the right to damages and rescission are probably sufficient, however, to prevent deliberate violations of the Act.

III. VALIDITY OF THE EXTRATERRITORIAL COVERAGE

A. Corporations Incorporated in Ohio

Aside from the Act, the Ohio Securities Law follows the near-universal pattern of territoriality established in American blue sky legislation. The blue sky laws cover only offers, purchases, or sales which to some substantial extent are made in or from the state, thus evidencing a purpose of prevention of fraud and unfair practices in securities transactions within, or made from within, its borders. The residence and domicile of the participants and place of organization of the issuer of the securities are usually immaterial. The Act has quite a different stated purpose: 

"[T]o protect [all] shareholders [wherever located] of Ohio and Ohio-based corporations by requiring public announcement and fair, full, and effective disclosures to shareholders in regard to take-over bids." We have seen the interpretive problems created by placing the Act in the Securities Law rather than in the General Corporation Law, which (like the Act) is of global application to Ohio corporations. Our concern, however, is with the constitutionality of the extraterritorial reach that survives the interpretive problems — a reach demanding that the preclearance, waiting period, disclosure, substantive fairness, pro rata take-up, and price increase provisions apply globally.

The federal statutes expressly disclaim any effect on state regulation of securities, except to the extent it conflicts with the federal requirements. The Act does not "conflict" with the federal statutes. For this purpose, "conflict" has been interpreted narrowly as comprehending only state regulation making impossible a compliance with federal standards. That is difficult to find

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111 See generally text accompanying notes 112-65 infra.
112 See Loss & Cowett, supra note 38, at 211-12, 401-05.
113 Special treatment is sometimes afforded securities of domestic corporations. See, e.g., Code § 1707.06 (Page 1964).
115 See text accompanying notes 38-40, 89-91 supra.
when nearly all of the federal regulation prohibits transactions unless its standards are met rather than requires transactions to be undertaken, and the SEC has studiously avoided the creation of regulatory conflicts.\textsuperscript{118} When the original blue sky cases, decided in 1917, upheld the blue sky laws against commerce clause and 14th amendment objections, the Court was dealing with territorial statutes, and a basis for the holding that the statutes did not unduly burden commerce was their limited geographical reach.\textsuperscript{119}

The preemption disclaimers in the federal statutes indicate, however, at least that the only national uniformity Congress deems necessary is that obtained by establishing the minimum standards specified in those statutes. It would seem, therefore, that a commerce clause objection based upon an alleged "undue burden" on commerce would probably be no more potent than challenges to Ohio's legislative jurisdiction based on the due process and full faith and credit clauses.\textsuperscript{120} Under these last two clauses, the geographical coverage of the Act, even in today's judicial climate, does raise questions of legislative jurisdiction.\textsuperscript{121}

An implicit premise of the Act is that a takeover bid is essentially an internal affairs matter — one involving "the relationships \textit{inter se} of the corporation, its directors, officers, and stockholders" — which Ohio may reasonably regulate on a global ba-

\textsuperscript{118} See, e.g., SEC releases cited note 117 \textit{supra}. Note, however, that reorganization orders entered under the Public Utility Holding Company Act and the Investment Company Act will often necessarily conflict with state law and will take precedence over it. See 1 L. Loss, \textit{supra} note 14, at 157 & n.95.


The precise effect of the preemption disclaimers is unclear, although they manifestly stop short of the McCarran-Ferguson Act [15 U.S.C. §§ 1011-15 (1964)], which greatly expanded state power to regulate and tax the "business of insurance." See Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946). In SEC v. National Securities, Inc., \textit{supra}, the Court held that state statutes which focus on the protection of stockholders of insurance companies are outside the McCarran-Ferguson Act's protection of the states' rights to regulate the "business of insurance." The Court also indicated, however, that the state stockholder-protection statutory provision (which required the Director of Insurance to find, as a precondition to the approval of a merger, that the merger would not be inequitable to the stockholders of any domestic insurer) could coexist with federal securities regulation because of the preemption disclaimers in the latter. \textit{See also} note 138 infra.

\textsuperscript{121} Cf. FTC v. Travelers Health Ass'n, 362 U.S. 295, 302, 305-06 (1960).
If a takeover bid can fairly be so classified, Ohio is right insofar as Ohio corporations are concerned. Acting on a felt need for uniform resolution of internal affairs questions such as shareholders liability, validity of stock issues, ability to merge and effect other organic changes, election of directors, voting trusts and voting agreements, dividends, relative rights of shareholders, and duties of officers, directors, and controlling shareholders to the corporation and to shareholders, American courts almost invariably decide these questions (in the absence of a local statute to the contrary) by applying the incorporating state's law, regardless of where the operative acts occurred. To some uncertain extent, there is a constitutional compulsion under the full faith and credit and due process clauses that the incorporating state's law be applied. The near-unanimity has survived the recent eclecticism in

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122 The quoted language is from Reese & Kaufman, The Law Governing Corporate Affairs: Choice of Law and the Scope of Full Faith and Credit, 58 COLUM. L. REV. 1118, 1124 (1958).


The Williams Bill and the proxy rules, which require no use of the means of instrumentalities of interstate or foreign commerce as a jurisdictional nexus, literally apply to any cash tender offer or proxy solicitation (wherever conducted) with reference to securities of a corporation incorporated in the United States if the securities are registered under Exchange Act section 12. Indeed, the Williams Bill's antifraud provision [Exchange Act § 14(e), 15 U.S.C. § 78n(e) (Supp. IV, 1969)] appears to dispense with the section 12 nexus. See A. BROMBERG, supra note 14, §§ 5.5(230)-(250). SEC Exchange Act Rule 10b-5 and the Securities Act are inapplicable if no means or instrumentalities of commerce are used in any part of the transaction. Section 30(b) of the Exchange Act makes that statute inapplicable to "any person insofar as he transacts a business in securities without the jurisdiction of the United States" unless the SEC promulgates regulations (which it has not done) to prevent evasions. 15 U.S.C. § 78dd(b) (1964). The leading current case on extraterritorial application of the federal securities requirements is Schoenbaum v. Firstbrook, 400 F.2d 200 (2d Cir.), rev'd on rehearing on other grounds, 405 F.2d 215 (1968) (en banc), cert. denied, 395 U.S. 906 (1969), which gave an expansive interpretation to SEC Exchange Act Rule 10b-5 as applied to a foreign corporation. For an excellent discussion of this question, see Note, United States Taxation and Regulation of Offshore Mutual Funds, 83 HARV. L. REV. 404, 426-52 (1969).

124 The most relevant Supreme Court authority is limited to two areas. First, a policyholder's rights against a fraternal benefit association are governed by the law of the state of incorporation. Order of Commercial Travelers of America v. Wolfe, 331 U.S. 586 (1947). In Clay v. Sun Ins. Office, Ltd., 377 U.S. 179, 183 (1964), Wolfe was referred to as "a highly specialized decision dealing with unique facts."

conflict of laws principles.\textsuperscript{128} The exceptions to the pattern of the application of the law of the state of incorporation have concerned pseudo-foreign corporations and the relatively infrequent situation where a local statute specifically regulates some facets of the internal affairs of foreign corporations having local contacts.\textsuperscript{128}

Nearly all internal affairs regulation designed for securityholder protection imposes obligations on the corporation in its dealings with the securityholders, or on officers, directors, or controlling persons in their dealings with shareholders or the corporation. Because the Act imposes obligations upon the insurgent tender offeror in dealing with shareholders, the question is raised whether this type of regulation falls within the ambit of internal affairs regulation. In analogous areas, there is already considerable extraterritorial state regulation reaching insurgents’ transactions with shareholders. On a mechanical level, the form of proxies solicited by insurgents must meet those few minimal requirements found in the statutes of the state of incorporation.\textsuperscript{127} A more important type of requirement along these lines has resulted from the 1964 amendments to the Exchange Act, in which Congress exempted over-the-counter insurance companies from the Exchange Act’s reporting, proxy, and insider trading requirements on the condition that the state of incorporation provide comparable regulation.\textsuperscript{128} Almost all state legislatures responded. The result includes, in addition to state versions of section 16 of the Exchange Act, state versions of section 14 governing all proxy solicitations by insurgents.\textsuperscript{129} To this enumeration should be added the limitations upon voting trusts and voting agreements.\textsuperscript{130}

Nevertheless, good arguments can be mustered for the proposition that sales in other states by minority shareholders to an outsider are not internal affairs transactions which may be regulated by the state of incorporation. The formal structure of the target

\textsuperscript{128} Concerning the various schools, see D. CAVERS, THE CHOICE OF LAW PROCESS (1965).

\textsuperscript{129} See text accompanying notes 153-65 infra.


\textsuperscript{128} 5 L. LOSS, supra note 14, at 2741-60 (Supp. 1969).

remains unaffected by a takeover. Action at the corporate level contractually binding all shareholders is missing, unlike the result in, say, a vote approving a merger, consolidation, or liquidation. Free transferability of shares is an economic, if not legal, precondition of a publicly held company.131 Moreover, the takeover bid itself necessarily involves diversity rather than uniformity in various shareholders' elections to tender or not.

On closer examination, however, it is easier to make the case that a takeover bid is so similar to classical internal affairs transactions that the state of incorporation has legislative jurisdiction to prescribe reasonable uniform regulation. Bids are by definition made by an incipient controlling person who under traditional common law doctrines will acquire, upon successful completion of the bid, a fiduciary-relationship to the corporation and all of its securityholders.132 The offeror may have acquired inside information about the target in prior unsuccessful merger negotiations with management, and there may be tacit understandings or arrangements with management. Furthermore, the offeror is acquiring his controlling block from a group of securityholders acting in concert through the unifying mechanism of a tender offer. Though corporate action is missing, there is mass common action by persons whose only mutual link is the target, and their actions will profoundly affect the target and nontendering shareholders. If control is a corporate asset, corporate property is being transferred.133

Furthermore, for the tendering securityholder in a securities bid, the effects are similar to those resulting from a merger, a classic internal affairs transaction. Most important, a successful tender offer, which by definition marks a shift or probable shift in control, is usually the first step toward a change in the composition of directors or in their policies. The securityholder who sells some securities and keeps some — and often he must keep some because the offer is only for a controlling block — may be selling those of his securities taken up, but he is also electing future directors and determining future board policy to govern the remainder of his securities. In this respect, a takeover bid is a de facto proxy-solicitation as well. This point can also be made with respect to the amalgamations and other ma-

132 E.g., Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947).
The role of state legislation

Major organic changes often following a bid: Securities not taken up are as a practical matter locked into the offeror's future plans if the bid is successful.

This analysis can also be extended to the bid for all outstanding securities. Even there, the individual securityholder retains the right to tender in part or at least to tender not at all. The offeror may not desire these options to be open, but at least the latter is totally beyond its control (aside from a stipulation that unless at least, say, 80 percent of all outstanding securities are tendered, the offer may be called off). A concept underlying the Williams Bill is that among the possibilities open to the securityholder is retention of his securities, which would in essence be new securities. One of the ways in which the securities will differ is that the voting power will effectively be diminished. By deciding not to tender, a securityholder is selecting the offeror as the steward of his interest in the corporation.

None of these arguments is itself wholly satisfying, but the cumulative effect indicates, I believe, that a takeover bid is similar enough to a proxy solicitation so that the state of incorporation can regulate the practices of insurgents in the former to substantially the same extent as in the latter. And it does not harm Ohio's case to show that Congress, in passing the Williams Bill, found takeover bids functionally similar to proxy fights.\(^\text{134}\) A concept of de facto proxy solicitation also supports the Act's requirement that cash bids as well as securities bids employ a disclosure document rather comprehensively describing the offeror's organization, operations, and financial condition. In either type of bid, success will substantially lessen the actual potential voting power of securities not tendered or accepted; there will often be at least some amalgamation of the offeror's and the target's business and financial operations; and a merger in the not-so-distant future is always a substantial possibility. Thus, even in a cash bid, comprehensive information about the offeror's organization, operations, and financial condition is useful.

The Act, however, has effects other than securityholder protection. The Act's securityholder protections solidify management tenure and, by doing so, also increase the probability that Ohio plants and offices will not be moved to other states, a step that a successful offeror would usually be more likely to take than an incumbent management with strong local ties. This latter effect

raises a possible question, under the commerce clause, about the validity of Ohio's legislative jurisdiction. These effects, furthermore, were not unrecognized by the management proponents of the Act or the General Assembly. But the Act, as written, should be adjudged a legitimate securityholder protection statute. The Act limits itself to regulatory techniques that in similar contexts are widely used for securityholder protection. Disclosure is the foundation of securities regulation. A waiting period is found in the Securities Act; and though rarely used, the Securities Act provides for a hearing procedure roughly similar to the Act's. A power to veto a securities transaction because of "grossly unfair terms" stops short of the substantive standards sometimes employed. One need not conclude that these techniques are optimal or even clearly beneficial to investors in the long run in order to note that their ubiquity establishes them as recognized means of securityholder protection, which in turn is recognized as a legitimate aim of corporations and securities laws. Furthermore, corporations and securities laws always have substantial impacts on persons such as promoters, insurgents, and management: The laws protect securityholders against overreaching or unfairness by these groups and in doing so limit their power. Regulation of a contest between insurgents and management necessarily affects the balance of power, and indeed a legislative body attempting to provide securityholder protection through a technique such as disclosure must determine the balance that is most beneficial to securityholders. As written, the Act is not a de facto prohibition oftakeovers, but rather is a not unreasonable attempt to balance. The management proponents of the Act may have been primarily interested in strengthening their tenure rights. The General Assembly may have been sympathetic to that interest and undoubtedly was concerned about keeping Ohio plants and offices in Ohio. But since the Act, as written, effects these objectives only to a limited extent, incidental to the use of procedures which have widely been thought to afford major protections to security-


136 E.g., Texas Securities Act of 1957, §§ 7C(2), 10, TEX. REV. CIV. STAT. arts. 581-7(C)(2), -10 (1964) ("fair, just, and equitable"). Even if the Division does administer the test as if it prohibits "unfair terms" [see text accompanying notes 82-83 supra], a standard of "grossly unfair terms" rather than "unfair terms" should make a considerable difference in judicial review.

137 See also text accompanying notes 167-70 infra.
holders, the Act should be considered a valid securityholder-protection statute.\textsuperscript{138}

The Act, however, will not displace the territorial application of other states' blue sky laws to a bid which it governs.\textsuperscript{139} The Act does not, of course, express such an aim. A bid may have many effects, but it is after all cast in the form of an offer to buy or to buy and sell securities. Territorial regulation, especially of businesses such as securities and insurance which are affected with a special public interest, is historically well established and is not constitutionally prohibited because of impact outside the state's borders; one of the original blue sky cases concerned application of a local statute to a foreign corporation wishing to sell its securities in the state.\textsuperscript{140} Even a merger, a classical internal affairs transaction, may have no constitutional immunity to the territorial blue sky regulation of the various states in addition to the regulation by the incorporating state, although the blue sky laws usually provide an exemption.\textsuperscript{141} Ohio's global regulation of takeover

\textsuperscript{138} Vorys states that disclosure of plans to close down offices and plants (and typically these would be Ohio offices and plants) is an objective of the Act, and he notes that disclosure of such plans may discourage tenders. See Vorys, \textit{supra} note 6, at 68. See also text accompanying notes 69-73 \textit{supra}.

The Supreme Court "has viewed with particular suspicion state statutes requiring business operations to be performed in the home State which could be more efficiently performed elsewhere." Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970). If administered fairly, however, (see text accompanying notes 168-70 \textit{infra}) the Act should have only an incidental impact on the mobility of Ohio offices and plants.

A state stockholder-protection statute requiring a finding by a state official of fairness to stockholders before a merger of a domestic corporation is approved introduces immobilities, but such statutes seem permissible. See the discussion of SEC v. National Securities, Inc., 393 U.S. 453 (1969), in note 120 \textit{supra}.

None of the common exemptions or exclusions would be applicable. For example, section 401(j)(6) of the Uniform Securities Act excludes from coverage a "judicially" approved reorganization and amalgamations approved by corporate action through a class vote of shareholders. Furthermore, the hearing procedure in the Act does not purport to bind shareholders or even to make provision for notice to them or participation by them.

For a cash offeror, only antifraud sections and broker-dealer registration provisions must be met. The latter provisions will, in some states, require the offeror either to register as a broker-dealer or to purchase through a firm locally registered as such. In addition to these requirements, a securities offeror must register the securities offered in exchange unless some exemption (e.g., for securities listed on a major exchange) is available.


\textsuperscript{140} The SEC has proposed a revision of SEC Securities Act Rule 133, 17 C.F.R. \S 230.133 (1959), \textit{reprinted in} 1 CCH Fed. Sec. L. REP. \S 3011, at 3051-53, recognizing that for all purposes a merger of X into Z in which X's shareholders receive Z securities
bids is, moreover, a controversial newcomer to internal affairs regulation. Furthermore, a takeover bid lacks corporate action or a change in the corporation's organic structure; and the need for uniformity is not so intense as in classical internal affairs questions such as the validity of a stock issue or of a merger, especially since the Act does not require that the offer be made to all shareholders. All of this means, I believe, that other states certainly can and undoubtedly will decide that their regulation of transactions within their borders will not abate because the Act is applicable.

There will be no conflict between the Act and other states' blue sky laws in the sense that compliance with the former will not force the offeror to violate the latter. Both can be complied with. When residents of sister states bring rescission or damage actions in their courts based upon violations of the Act and the local blue sky laws (or local common law fraud doctrines), there would be no inconsistency in a choice of law allowing the seller to assert both causes of action, though obtaining only a single recovery. The bases of legislative jurisdiction are different: Ohio is applying its statute for the benefit of all shareholders on an internal affairs base and the forum is regulating locally on a territorial base. Similar overlaps occur whenever an internal affairs transaction involves purchases and sales of securities and the various states choose to regulate the securities transactions on a local basis. The special problem arises here because the general corporation laws directing internal affairs seldom attempt to assure adequate disclosure or fairness in securities transactions; by entering that domain, the Act is to some extent duplicating the blue sky laws. That, however, does not mean that the latter cannot coexist with the former. Moreover, the Uniform Securities Act contemplates that a securities transaction may be governed by the blue sky laws of two states, each having a substantial contact with the transac-

Section 401(j) (6) of the Uniform Securities Act exempts a merger, and section 402(b) (11) exempts certain offerings to existing shareholders.
There is no square Supreme Court authority on the interrelationship of the blue sky cases, note 119 supra, and the internal affairs principle. The most relevant recent litigation is the Western Air Lines case, notes 156-58 infra & accompanying text.

For an illuminating discussion of the factors to be weighed, see Reese & Kaufman, supra note 122.

As indicated in note 139 supra, the hearing procedure is not designed or intended to bind shareholders.
tion, and courts are accustomed to this approach where rights under federal and state laws are asserted. In addition, the general objective of the Act and blue sky statutes — investor protection — is the same.

There is, however, a possible conflict in the policies of the few states with takeover acts and those without them. Regulation of securities transactions protects investors from profitable as well as unprofitable deals. Determining the optimum level of securities regulation is a relatively delicate, albeit unscientific, business. One of the bases on which lines are drawn is that investors may be harmed by overregulation, since regulation decreases the number of buy and sell opportunities presented to them. A state without a takeover statute applicable to domestic corporations may have made an implicit judgment that investors will derive the greatest benefit from takeover bids absent a level of regulation superadded to the federal statutes and the various blue sky laws. Such a state may also wish to encourage takeovers. Thus, when a resident of a sister state asserts rights under the Act with respect to sales made to the offeror in that state, it is possible that the local court will perceive a conflict between the Act and local law and will apply only the latter. The factors which preclude displacement of the local law — the numerous and strong local contacts, the newness of the Act as internal affairs legislation, and the relatively unintense need for uniform resolution of the question of the validity of the offer — make this a possible result, especially so long as state takeover acts remain few in number and takeover legislation remains controversial. This choice of law would probably be constitutionally permissible under current Supreme Court de-

144 See Uniform Securities Act §§ 414(a)-(d); Loss & Cowett, supra note 38, at 402.

145 Cf. Reese & Kaufman, supra note 122, at 1138 (discussion, in a related context, of the importance to be attached to a determination that all interested states have the same basic policy).

146 See Gaillard v. Field, 381 F.2d 25 (10th Cir. 1967), cert. denied, 389 U.S. 1044 (1968). Oklahoma residents sold fractional interests in oil and gas leases located in Oklahoma, Texas, Nebraska, and Colorado to California residents. Oklahoma exempts such interests from its blue sky law. California does not. The interests were not qualified under the California blue sky law. The California residents sued for rescission in the federal district court in Oklahoma. The trial court seemingly assumed that the California law covered the transaction but refused to apply it, holding that state regulation of such oil and gas transactions was contrary to Oklahoma's public policy. The court of appeals affirmed, holding that in this case the interests of California and Oklahoma were antagonistic, that application of the California law "would violate a deep-rooted tradition of the common weal in Oklahoma," and that Oklahoma had sufficient important contacts to justify its conflicts rule that would bar application of California law. 381 F.2d at 28-29.
cisions, which allow a court to apply the law of the forum if it has substantial contacts with the transaction and governmental interest in applying its law. Application of both statutes also would be permissible, as Ohio would have substantial contacts and governmental interest in regulating the transaction.

The most likely result, and the desirable one, is the application of both statutes. Although the local blue sky statutes will apply because a bid involves purchases or purchases and sales, a bid’s similarities to mergers or proxy solicitations are not difficult to appreciate. Aside from Ohio-based companies, Ohio is not attempting to impinge upon other states’ policies with respect to corporations incorporated there. And as a practical matter it is only through use of the internal affairs base, as opposed to a territorial base, that the states can set uniform minimum standards of protection for securityholders of corporations.

My conclusions thus are that Ohio has legislative jurisdiction to pass the Act as global legislation, but that because of the overlap in governmental interests the Act will not displace the blue sky laws of other states and that it is possible that the Act will not be applied by their courts in addition to those laws. The first conclusion, that Ohio has legislative jurisdiction, assumes that Ohio’s regulation is not unreasonable, arbitrary, or capricious in the constitutional sense. The Act, it seems to me, easily passes that test. Later in this article, I make numerous recommendations for amendments to the Act to narrow what I consider some substantial gaps between its stated purposes and its effects. Even if my perceptions are correct, however, the gaps fall far short of raising serious constitutional questions.

Ironically, what appears to be the only major constitutional question in the Act’s extraterritorial coverage of bids for Ohio corporations results from its lapse into territorial parochialism in requiring that a bid be made to all Ohio residents and made to them on most-favored-purchaser terms, while omitting residents of other states from these protections. If the Act were a territorial one applying to the Ohio portion of bids for any corporation, these provisions would probably be valid. But by applying the

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149 See text accompanying notes 86-87 supra.

Act globally to Ohio and Ohio-based corporations through an internal affairs concept, this discrimination is probably unconstitutional, at least insofar as individual residents of other states are concerned.\footnote{See Blake v. McClung, 176 U.S. 59 (1900); Blake v. McClung, 172 U.S. 239 (1898). A Tennessee statute provided that in proceedings governing the local assets of an insolvent foreign corporation, Tennessee residents would have a priority in distribution. As to individuals resident in other states, this was held to violate the interstate privileges and immunities clause, which provides that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2. The evil in the statute was that it excluded "citizens of other States from transacting business with the corporation upon terms of equality with citizens of Tennessee." 172 U.S. at 252.}

This infirmity — which should not affect the remainder of the Act in light of the severability clause and the Act's clear implicit reliance upon internal affairs regulation as the base for extraterritorial jurisdiction — could be cured either by deleting the requirements or by dictating that bids be made ratably and on the same terms to all holders. The Division may have authority under the Act to impose the latter alternative.\footnote{The Division seemingly is authorized to veto a bid proposed on grossly unfair terms. See text accompanying notes 82-83 supra. Moreover, the Division's regulations may cover such "matters as are necessary to give effect to [the Act]." See text accompanying notes 98-99 supra. We have noted one problem — that of amendments and supplements to the offeror's materials — where the Division will have to use its adaptive powers in order to make the Act work. See note 81 supra & accompanying text. Concerning the relationship to the constitutional issue of this probably existing Division discretion to prevent unconstitutional treatment, see note 168 infra & accompanying text. For a suggested amendment to cure the defect, see text accompanying note 194 infra.}

B. Foreign Corporations Based in Ohio

The Act appears to be the only state takeover statute covering foreign corporations. Some of the foreign corporations accorded
the Act’s protection will be pseudo-foreign — substantially all relevant contacts, aside from the state of incorporation, will be with Ohio. Ohio’s legislative jurisdiction over the internal affairs of such corporations probably equals its right to legislate concerning domestic corporations.163

To classify a foreign corporation as Ohio-based, however, requires nothing more than showing that it has its principal place of business and “substantial assets” in the state. Principal place of business may or may not mean home office,164 and substantial property may or may not mean only a substantial absolute dollar value.165 The percentage of all outstanding shares held by Ohio residents is immaterial.

California’s assertion of jurisdiction in the Western Air Lines litigation was less aggressive. Though Western Air Lines was not the classic pseudo-foreign corporation, its principal place of business and more than 75 percent of its tangible property were in


164 On the conflicting decisions under section 1332(c) of the Judicial Code [28 U.S.C. § 1332(c) (1964)] concerning the location of the “principal place of business” when the home office and actual place of operations do not coincide, see Comment, The Corporate Principal Place of Business: A Resolution and Revision, 34 GEO. WASH. L. REV. 780 (1966).

165 That is the literal reading, but in light of the purpose of the section — to identify those foreign corporations which might be treated in the same way as corporations incorporated under Ohio law — the other construction, “a substantial portion,” is possible.


This protracted litigation apparently was settled as a result of the enactment of the California Corporate Securities Law of 1968, wherein securities listed on the New York Stock Exchange were exempted. CAL. CORP. CODE § 25100(o) (West Supp. 1970). Western’s common stock is, and was throughout the litigation, listed on the New York Stock Exchange. The stock presently has no cumulative voting rights. See MOODY’S TRANSPORTATION MANUAL 1364 (Sept. 1969).

The California Securities Law of 1968 expands California’s jurisdiction beyond that claimed in Western Air Lines. A substantial change in the terms of outstanding securities or a merger into another corporation are subject, generally speaking, to California’s standards if 25 percent of the outstanding shares (excluding street-name shares) are held by persons with California addresses. CAL. CORP. CODE §§ 25103, 25110, 25120 (West Supp. 1970). But as noted above, the new statute exempts from nearly all of its requirements securities listed on the New York Stock Exchange.
California; approximately 50 percent of its rental payments were made for the use of land situated there; 60 percent of its wages were paid to California employees; its principal bank accounts were there; approximately 34 percent of its passenger traffic was entirely in California and about 54 percent either originated or terminated in the state; and probably more than 50 percent of its stock was held by California residents. Furthermore, Western Air Lines had no contact with Delaware other than its charter. In addition, California was asserting territorial regulation: It was purporting to regulate the offers and sales effected in California through the solicitation of proxies for approval of the removal of cumulative voting rights, which California considered to be the exchange of stock. This difference can easily be overemphasized, however, as a final California veto would have prevented the removal.

The Act's coverage also outreaches the SEC regulations under the Exchange Act determining the reporting, proxy, and insider trading obligations of foreign over-the-counter issuers, though the SEC's regulations do focus in part upon the location of a corporation's headquarters. A foreign corporation is treated as a United States company if (1) its business is administered principally in the United States or its board has as 50 percent or more of its members persons who are United States residents, and (2) more than 50 percent of its voting securities are held of record by 300 or more residents of the United States. The New York regulation of the internal affairs of foreign corporations also depends upon greater local contacts. Only if the corporation derives more than one-half its business income within New York are the provisions applicable.

Location in Ohio of a foreign corporation's principal place of business is, however, a highly significant nexus. Furthermore, we have noted that the Supreme Court now usually avoids the use of

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167 These statistics are taken from Reese & Kaufman, supra note 122, at 1119-20.
168 The cumulative voting rights have been removed. See note 156 supra.
169 See SEC Exchange Act Rule 12g3-2, 17 C.F.R. § 240.12g3-2 (1969), reprinted in 2 CCH FED. SEC. L REP. § 26,829, at 20, 102-3. The statement in the text is only a substantially accurate generalization.
160 N.Y. BUS. CORP. LAW §§ 1317-20 (McKinney 1963). Even where the 50 percent test is met, a corporation having a class of stock listed on a national securities exchange is exempted.
161 For a discussion of the importance of a corporation's headquarters, one of the possible meanings of "principal place of business," see Latty, supra note 153, at 166-72; von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 HARV. L. REV. 1121, 1174 (1966).
the Constitution to lay down fixed rules of legislative jurisdiction and choice of law where several jurisdictions have substantial contacts with the transaction. Application of the Act to Ohio-based corporations does not create the most serious type of conflict — a situation in which the offeror cannot comply with the Act and the corporations statute of the state of incorporation. The offeror may obtain certainty by satisfying the Act's requirements. The conflict may be real, however, as superaddition of the Act denies the state of incorporation a choice. Furthermore, it can be anticipated that the states of incorporation probably will not apply the Act and that courts in other states will probably be less inclined to apply the Act in addition to the local blue sky law where the target is Ohio-based than where the target has an Ohio charter. Admittedly, lack of uniformity in conflict principles will not create the most fundamental and damaging type of tensions in the target, for as the Act now reads damage and rescission actions by shareholders appear to be the primary enforcement tool: The Act seemingly does not create a remedy of, say, denial of voting rights to tainted shares which if enforced in Ohio and not enforced in the state of incorporation could create two competing managements claiming legitimacy through conflicting judicial decrees. If, however, the enforcement techniques recommended in part V of this article were adopted, that would change, for Ohio would, for example, be asserting a right to exclude tainted shares from the election process.

Balancing the benefits of uniformity derived from limiting internal affairs regulation to the state of incorporation against the palpable interests of a foreign jurisdiction where the corporation is based is far from a mechanical task. For example, there is a difficult threshold question on securityholder protection measures regulating internal matters such as mergers or tender offers. Should such jurisdiction over a corporation based in the state be dependent upon ownership of a large percentage, say, 25 percent or 50 percent of the securities by local residents? Or is a nexus such as principal place of business or receipt of 50 percent or more of business income enough to indicate that the corporation is primarily administered or located in the foreign jurisdiction rather

162 See cases cited note 147 supra & accompanying text.
163 These are the percentages employed by California and the SEC, respectively, in the situations discussed in note 156 & text accompanying notes 156-59 supra. Notice that the SEC uses a two-fold requirement — a type of principal-place-of-business test plus a shareholders test — while California uses only the latter.
than the state of incorporation, with the result that the former’s
claims to regulate the various relationships in the corporation’s
family group should be considered substantially equal to that of
the chartering state, whose residents may hold only a minute
fraction of the corporation’s securities?104 Directly relevant Su-
preme Court authority is lacking, but extrapolations from recent
cases should make anyone cautious in predicting constitutional
invalidation of the Act’s coverage of any class of Ohio-based cor-
porations. Coverage of Ohio-based corporations which are pseudo-
foreign is clearly valid and proper. Furthermore, I find no policy
or constitutional ground of sufficient weight to deny a state leg-
islative authority over the internal affairs of a foreign corporation
which has local contacts equaling those Western Air Lines had
with California or which derives 50 percent or more of its busi-
ness income from within the state, especially so long as the regu-
lation does not prevent compliance with the incorporating state’s
laws. Coverage of Ohio-based companies having lesser Ohio con-
tacts is, on my scales, a questionable policy, but the constitu-
tional question is another matter.105

104 Professors Reese and Kaufman answer in the negative as to legislation protect-
ing equity securityholders. See Reese & Kaufman, supra note 122, at 1133.

105 Ohio receives no help from the established proposition [see note 124 supra]
that a state statute may validly impose liability on a shareholder of a foreign corpo-
ration for an act of the corporation in the state. International Harvester Co. v. Depart-
ment of Taxation, 322 U.S. 435 (1944), is likewise distinguishable. There, the Wis-
consin tax on dividends paid by foreign and domestic corporations was upheld, even
though the Court assumed that the method chosen constituted the imposition of a
tax upon all shareholders, resident and nonresident, and distributed the tax burden
among classes of stockholders differently than if the tax had been one imposed upon
the corporation. The critical distinction is that the tax was imposed only upon divid-
ends paid out of income derived from property located and business transacted in the
state.

Any serious study of this question should begin with Reese & Kaufman, supra note
122. The authors value most highly the predictability and ease of application obtained
by deference to the law of the state of incorporation and conclude that state statutes
dictating the application of local law to the internal affairs of foreign corporations
“lead in practice to complexities and uncertainties. If they were more common than
they are at present, they would, if rigorously applied, make difficult the efficient
operation of an interstate business by a corporation.” Id. at 1144. The authors would
establish a demanding set of criteria to be met before a state having substantial con-
tacts with a foreign corporation could regulate its internal affairs, especially where only
the interests of stockholders are involved and the policies underlying the laws of the
interested states differ. They conclude that even California’s assertion of jurisdiction
in Western Air Lines was improper. They note, however, that the extent to which the
full faith and credit clause requires application of the law of the state of incorporation
“is almost entirely unexplored and anything said on the subject must be in the nature
of an opinion.” Id. Since the publication of the article in 1958, the Supreme Court
decisions, [note 147 supra] (none of which has related to the internal affairs of corpo-
rations) have continued the trend of refusing to apply constitutional compulsions to limit
IV. IS AN EXCLUSIVE FEDERAL TAKEOVER STATUTE DESIRABLE?

Though the federal securities statutes at present specifically eschew preemption, state legislation such as the Act immediately raises the issue of whether federal regulation of takeovers should be exclusive. The takeover acts have an almost unique interstate impact. Ohio is legislating for the nation in setting global, minimum standards to be satisfied in a takeover bid for Ohio and Ohio-based companies. In contrast, the remainder of the Ohio Securities Law limits itself to transactions in Ohio. The regulation of takeovers, moreover, involves the broadest possible political and economic considerations, of which securityholder protection is only one. Some of the questions which must be pondered are potential effects on competition; increases or decreases in the efficiency of the target; local versus centralized control of our industries; limits on the debt-equity ratio of an offeror; and the impact on the management, employees, customers, suppliers, and creditors of the target. An integrated legislative policy taking all these considerations into account clearly could be fashioned only by Congress. Furthermore, as recently as 1968 Congress acted on the takeover issue, deciding to stop with the mild requirements of the Williams Bill. Lastly, a state takeover act adds a third level of coverage to preexisting federal and state blue sky legislation and in the process creates uncertainties in conflict of laws. Through the commerce clause, Congress is able to provide certainty and uniformity in economic regulation, and as a political body comprised of representatives of all regions, it is best situated to balance those needs against the interests served by local, overlapping regulation. The Supreme Court has of course followed this philosophy by backing a plenary congressional power under the commerce clause, while at the same time expanding the states' authority to impose economic regulation not forbidden by or inconsistent with federal statutes. If unhealthy tangles develop among the states, Congress has both the power and the responsibility to act.

In discussing this issue, it is important, however, to determine

the authority of a state to regulate and to apply its own law when it has substantial contacts and governmental interests.

In determining which state may escheat debts owed by corporations, the Court has promulgated rigid, easily administered rules. See Texas v. New Jersey, 379 U.S. 674 (1965).

what the questions are. A first vital point is that the Act is a limited piece of legislation that, as written, should not make takeover bids impossible. Admittedly, Mr. Vorys has said of the Act:

The real impact of the law, in my opinion, will be felt not so much in its application as in its hovering omnipresence. I suspect, so far as Ohio and Ohio-based corporations are concerned, the corporate takeover as a form of corporate warfare is a thing of the past. Acquisitions will hereafter be negotiated. If management is unresponsive to the desire of shareholders it will be removed by proxy contest carried on in the open rather than by the secretly organized surprise attack which has, up to now, characterized the takeover bid.\(^\text{[167]}\)

The Act will discourage prospective takeover offerors, but at this time I would say only that the Act could mean the extinction of takeovers for Ohio and Ohio-based corporations. Much will depend upon the Division's administration, which we can assume will be fair.\(^\text{[168]}\) The attitude of the two courts of appeals which have rendered decisions on the Williams Bill (both of which have upheld the offeror) — that substantial compliance rather than perfection is to be the test in judging compliance with tender offer standards phrased in general terms\(^\text{[169]}\) — is of course reassuring evidence that regulation need not mean strangulation. Turning to the text of the Act, we have noted that, for a securities bid, the superaddition of the Act to the Securities Act should not present the offeror with any major additional timing or disclosure problems; and the test of grossly unfair terms (or unfair terms) in the Ohio Securities Law is far from an impossible one to meet. An offeror placing reasonable efforts into compliance should be able to clear his offer without much difficulty and without much delay beyond the waiting period imposed by the Securities Act. The

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\(^{167}\) Vorys, \textit{supra} note 6, at 73.

\(^{168}\) See Hall v. Geiger-Jones Co., 242 U.S. 539, 554 (1917), where the Court stated:

> "The discretion of the commissioner is qualified by his duty, and besides, as we have seen, the statute gives judicial review of his action. Pending such review, we must accord to the commissioner a proper sense of duty and the presumption that the functions entrusted to him will be executed in the public interest, not wantonly or arbitrarily to deny a license to or take one away from a reputable dealer . . . ."

Similarly, the Court in Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 46 (1966), observed: "We cannot presume that the authority [the New York State Liquor Authority] will not exercise that discretion to alleviate any friction that might result should the ABC Law chafe against the Robinson-Patman Act or any other federal statute."

waiting period will have a more pronounced effect on cash bids. With the surprise removed, management will no longer be in an ambush situation and will have the time to counterattack by means such as attempts to persuade securityholders and actions under the securities and antitrust statutes. Furthermore, the announcement of the intention to make a bid upon clearance by the Division will raise the market price, perhaps even to the figure the offeror states in its announcement. Whether this will make it improbable that the offeror will receive tenders at that price when the bid opens is unknown, although securityholders presumably should appreciate that if the bid is unsuccessful the market price may drop to its prior level.\footnote{170} But with respect both to cash and securities bids, the regulatory methods adopted by the Act — waiting period, disclosure, and standards of substantive fairness — are accepted means of securityholder protection which in other contexts have not stilled sales of securities, takeovers by proxy fights, or capture of control by a tender offer. The Act is a logical extension of the Williams Bill, the Securities Act, and the SEC's proxy rules. What the offeror considers a series of impediments are common techniques employed by the SEC and the states.

I would, therefore, sharply distinguish the Act from defensive strategems which are not intended to aid shareholders in their decisionmaking process. Two horribles are the private placement in hands friendly to management of a small class of preferred stock with a veto power over mergers and a management-requested loan agreement clause empowering a major lender to accelerate upon a change in management or control unacceptable to it. It is one thing to enact legislation necessarily having some discouraging effects upon a potential offeror because securityholders will have more and better information and be guaranteed that some standards of substantive fairness will be met and because the waiting period will allow management more time to assert claims under the antitrust, securities, and other statutes. It is quite another matter when management attempts a harmful alteration of the corporate structure.\footnote{171}

\footnote{170} For a superb piece on "warehousing" and the role of the arbitrageur in takeover bids, see O'Boyle, \textit{Changing Tactics In Tender Offers}, 25 \textit{Bus. LAW.} 863 (1970).
\footnote{171} For a criticism of these and other tactics, see Cary, \textit{supra} note 166. Senator Williams' proposed amendment to the Williams Bill would strengthen the SEC's hands in this respect. See remarks on S. 3431, 91st Cong., 2d Sess. (1970), in 116 \textit{Cong. REC.} 1533-34 (daily ed. Feb. 10, 1970). From the Senator's description of the amendment, it clearly could be used to prohibit the issuance of the special small class of stock and the use of the management-inspired acceleration clause. Indeed sections 10(b) and
The possible divergencies in resolution of conflict of laws questions do not appear to be significant independent grounds for preemption. A lack in uniformity by courts in sister states in enforcing damage and rescission claims brought by selling security-holders is, as has been noted, not nearly so harmful as a diversity of results on, say, the validity of a stock issue. Furthermore, the Act does not displace the blue sky laws of the various states.

It is also noteworthy that legislation such as the Act does not merely duplicate the federal statutes. Redundant state regulation has always appealed to me as a prime candidate for elimination through preemption. For example, states which in fact do not pass on the substance of a Securities Act offering should be required by Congress to do no more than collect a registration fee upon sales in the state. In a related context, Professor Loss has demonstrated that the over-the-counter insurance companies and the state insurance administrators who fought so hard for the insurance company exemption from the 1964 amendments to the Exchange Act won little and created an unnecessary administrative morass with respect to insurance companies that otherwise would have been subject to the SEC's reporting, proxy, and insider trading rules. Since the state administrators are obligated to parallel the SEC's regulation of other large companies, there is little justification for the diseconomies and the interpretive problems inherent in the 50 different schemes of administration. There is one plus: The state regulation covers many companies too closely held to be within the SEC's rules.

Although the Act is neither a mere duplication of federal securities regulation nor repugnant to it, these conclusions alone do not tell us that the federal regulation should not be exclusive. If there were an integrated national policy on takeovers — one that had been struck after a legislative weighing of all political and economic ramifications — it would be highly desirable that such a carefully conceived balance not be altered by state takeover legislation. But we have nothing approaching that type of national pol-

14(e) of the Exchange Act can be used for this purpose. See note 97 supra. SEC Exchange Act Rule 10b-5 and state law may reach such stratagems. See Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969); Condec Corp. v. Lunkenheimer Co., 43 Del. Ch. 353, 230 A.2d 769 (Ch. 1967).

172 Admittedly, preemption on this ground would encounter a major difficulty because all or almost all state statutes grant the authority to review substantive fairness and even the mildest administrator sometimes does that.


174 See id.
icy. What we do have is uncertainty about the reach of relevant existing statutes and strong currents for and against legislative change. For example, the Williams Bill was intentionally shaped as a delegation to the SEC and the courts almost as extensive as the nearly total entrustment in the regulation of proxy solicitations. This is an addition to the ever-evolving body of law under Rule 10b-5 and the near-plenary SEC rulemaking authority under section 10(b) of the Exchange Act. Thus, under existing law the federal securities regulation of takeovers is developing, incomplete, and uncertain in its requirements. Senator Williams has introduced significant (though not fundamental) amendments to the Williams Bill; and a substantial portion of corporate managers would undoubtedly favor a federal version of the Act, although the securities industry opposition would exceed its intense fight against the Act.

During such periods of development and uncertainty about the proper strength of federal regulation, it seems particularly appropriate to allow the states to perform their laboratory function with statutes such as the Act that are logical extensions of the existing federal standards. I believe Ohio's experiment to be interesting and valuable. Even though the Williams Bill, in light of its delegations to the SEC and the courts, is not yet a completed product and although its provisions on pro rata take-up, withdrawal rights, and uniformity in price increases were desirable and major advances over prior law, the paramount truth is that (despite the dire predictions by the Bill's opponents of possible crippling effects on offerors) the Williams Bill appears to have had almost no impact on the relative strength of management versus the offeror or

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175 On the ferment concerning the present and the desirable scope of the antitrust statutes, see Comment, Conglomerates and Section 7: Is Size Enough?, 70 COLO. L. REV. 337 (1970).

176 On the attitude of corporate managers, see What Business Thinks, FORTUNE, Mar. 1970, at 131, 132. The respondents were asked: "Are you in favor of prohibiting surprise tender offers?" Thirty-nine percent favored, 52 percent opposed, and 9 percent were not sure. "The strongest support for a ban on surprise tenders was shown by industrialists and retailers with under $1 billion in sales; 49 percent favor abolishing the practice." Id. at 132.

On Senator Williams' amendment, see notes 171 supra, 193 infra.

177 Admittedly, the type of experimentation referred to by Mr. Justice Brandeis in his dissenting opinion in New State Ice Co. v. Liebmann, 285 U.S. 262 (1932), was "without risk to the rest of the country." Id. at 311. The Act has substantial interstate impact, as internal affairs regulation of corporations with multistate contacts always does. Nevertheless, although states regulate internal affairs through an extraterritorial statute, the impact of state takeover statutes is limited to corporations incorporated or based in the state.
the former's ability effectively to present its case to shareholders. Hindsight shows that by choosing to allow the offeror to retain the advantage of complete surprise, Congress left management in about the same position it formerly occupied. Given the present uncertainty on values and the lack of experience with statutes such as the Act — which takes the next logical step beyond the Williams Bill, a waiting period and a required comprehensive portrait of the offeror and its intentions — a period of observation is in order.

Should experience show that the Act does in fact prohibit takeovers and not merely regulate them, congressional nullification of statutes such as the Act, at least as to companies of sufficient federal concern to be covered under section 12 of the Exchange Act, would be warranted — except in the highly unlikely event that prevention of amalgamation by takeover becomes a congressional aim in the interim. Experience plus a maturation of thought on takeovers may indicate that the Williams Bill should include some of the Act's features; in that event, the redundancy principle would certainly justify partial preemption. Or it may be concluded that the Williams Bill approach is so clearly correct that state enactments such as the Act should not operate where the Williams Bill is fully applicable. A final possibility must be considered: Despite the almost unique interstate impact of state legislation such as the Act, Congress may never arrive at a sufficiently firm conclusion on the proper regulation of takeovers persuading it to preempt. That is, of course, the situation in American securities regulation today. Congress has set the minimum standards but has always sanctioned state power to set standards which do not prevent compliance with the federal requirements. This may be the ultimate outcome on takeover legislation, although the case for a single national standard for companies registered under section 12 is significantly more compelling than the case for, say, a similar standard on the offering of new securities. But in any event, the one clearly unwarranted present action would be a simple congressional ban of state takeover legislation reaching no farther than the Act.

V. SUGGESTED AMENDMENTS TO THE ACT

If, as I believe, it is premature to consider action at the federal level concerning preemption of the Act, it nevertheless is timely to consider perfecting amendments to the Act. Opponents
of the Act would naturally consider repeal the proper amendment, and one believing that takeovers should be stilled could devise amendments to accomplish that. I have limited myself to the major ones which I believe are needed in perfecting the Act to accomplish its stated purposes.

A. Extending the Coverage to Management and Others; Discarding the Hearing Procedure

The Act's expressed goal is to produce fair, full, and effective disclosure to shareholders in regard to takeover bids. Yet the Act fails to set standards for management and others attempting to influence shareholders' decisions concerning acceptance of the bid. The void is admittedly not so large as it first appears. The draftsmen undoubtedly were relying upon the federal requirements under Rule 10b-5 and sections 14(d) and 14(e) of the Exchange Act. Nevertheless, at least management's responses should be regulated under the Act. Many of the companies covered by the Act fall outside the scope of most of the Williams Bill. Also, the Division's authority to police the fight should reach both major participants. The minimal disclosure requirements of the SEC's rules under section 14(d)\textsuperscript{178} should apply to management, and a general antifraud standard like section 14(e) should govern both management and the offeror. In addition, the Division should be empowered to require management to come forth with material information possessed by the target relevant to the securityholders' choice of tendering or retaining the securities. This would include disclosures about the actual value of assets, current earnings trends, and amalgamation offers that have recently been rejected by management.\textsuperscript{179} Ohio's jurisdiction over management is even dearer than its jurisdiction over the offeror. Furthermore, if Ohio has global jurisdiction over an offeror's activities, it probably may impose the requirements of sections 14(d) and 14(e) on any per-


\textsuperscript{179} Professor Bromberg deals with the questions of how much information management should disclose and how far the federal antifraud standards allow it to go in using projections, plans, and appraisals. A. BROMBERG, supra note 14, §§ 6.3(130), (633). The possible conflicts with the federal antifraud requirements lead me to recommend a grant of rulemaking authority to the Division rather than a statutory specification. If management chooses to fight a tender offer, the federal antifraud standards, which proscribe half-truths as well as misstatements, will require a considerable amount of disclosure by management.
son recommending acceptance or rejection of the offer, even if he is not an offeror or acting on behalf of management.

The hearing process is also troublesome. As earlier indicated, it appears that the offeror must stand totally mute and motionless until approval of its materials by the Division (which might not issue until 60 days), while management operates under no Act-imposed restraints. From the offeror’s standpoint, the only advantages of the present structure are that private rights of enforcement appear to be limited to after-the-fact damage and rescission actions by securityholders and that the Division has sufficient lead time so that its approval, once given, will usually mean that it will not thereafter move to enjoin. From the standpoint of the securityholders, allowing materials to be disseminated by only one side during a period of 20 to 60 days is not calculated to produce “fair, full, and effective disclosure.”

The present procedure could be extended to the materials of management and anyone else making a recommendation concerning acceptance. That, however, strikes me as unworkable. Management may not have its full reply prepared until close to the end of the 20th day after the offeror has filed. Is it to wait a minimum of 20 days after it files before it circulates? Or suppose the Division orders a hearing on management’s materials and not on those of the offeror: should the offeror be free to proceed while management’s hands are tied or should the offeror be forced to delay its offer? Neither alternative would be satisfactory.

Furthermore, there is the question of handling the amendments and supplements of all parties. As the Act now reads, the offeror and the Division must fashion arrangements for the offeror’s subsequent materials so that the 20- to 60-day delays will be avoided, as the procedure specified in the Act for the original papers is patently unworkable for the later materials. This demonstrates the problems in applying the present procedure to something so fast-moving as a contested takeover bid, and an extension of the existing procedure to management and others would compound existing problems at a geometric rate.

\[180\] See text accompanying notes 52, 95-97 supra.

A waiting period of, say, 30 days after public filing with the Division and management before the tender offer is actually made need not be tied to a preclearing or a hearing procedure or even to a delay in dissemination of the offering documents. Management is adequately protected against undue surprise if the date on which the offer formally opens is delayed 30 days after the first public filing and in the interim the offeror cannot accept conditional or unconditional tenders or enter into any arrangement binding shareholders to tender when the offer formally opens. Furthermore, in a contested takeover bid, it is not necessary to rely upon an adjudication or finding by an administrative agency that the statutory standards have been met. A clear alternative is to follow the proxy rules and the Williams Bill by relying upon governmental and private enforcement (by management and shareholders) in court actions.

Moreover, I do not believe that an administrative hearing is indispensable. Mr. Vorys has said:

The provision for a hearing was roundly criticized by the opponents of the bill who argued that the delays occasioned by such hearing would destroy any takeover bid to which the target company has not consented.

The proponents asserted that the provision for a hearing is the only effective means of testing the sufficiency of disclosure prior to the takeover bid. Once the takeover bid has been made, there is no effective way to undo it.\textsuperscript{182}

This analysis rings true when a Williams Bill scheme governs, for filing with the SEC and the target is made the morning the offer is launched. Where, however, the offeror may only distribute materials during a 30-day waiting period, there is ample time to resort to appropriate judicial relief, and management's powers of correction and persuasion by circulation of its materials can also be effectively used.

If the suggested approach were adopted, the concept of a definitive Division clearance or adjudication would be dropped, although a requirement of nonpublic prefiling with the Division, say, 2 days before use could allow the Division to examine the materials and a person would be unlikely to proceed in the face of strong objection. The offeror and management could circulate their views immediately after the prefiling requirement has been met, but the offeror could not accept tenders until 30 days after the public

\textsuperscript{182}Vorys, \textit{supra} note 6, at 72-73 (1970).
THE ROLE OF STATE LEGISLATION

This change would be accompanied by a grant of standing to management, shareholders, and the offeror to obtain injunctive relief against persons violating or about to violate the Act. The Division presently has such standing.\(^{184}\)

The suggested procedure would improve the disclosure process by allowing management to circulate its materials during the waiting period and by subjecting management's counterattacks to regulation. The administrative and enforcement scheme would of course closely resemble that which exists under the Exchange Act in a proxy contest or in a cash takeover bid governed by the Williams Bill, except that there would be a most meaningful waiting period. Like the Exchange Act, the Act would rely heavily upon the judiciary, and the accumulated experience of the federal courts would be a useful reference in fashioning injunctive remedies. The fact that both the federal statutes and the Act will apply to a bid and that the questions under the former will be decided primarily by the judiciary supplies even further precedent for these proposals. Indeed, the federal issues and the questions under the Act could often be joined in a single federal court action.\(^{185}\) Another similarity of these proposals to the federal framework is that the administrative agency would play a major role. The Act wisely gives the Division rule-making authority necessary to make the Act responsive to new developments and to resolve interstitial questions. Furthermore, a 2-day nonpublic prefiling period would enable the Division to give its views to management and the offeror in a way calculated to induce compliance with Division interpretations that do not unreason-

\(^{183}\) Provided that the initial filing substantially complies with the Act, no amendment (other than one increasing the number of shares for which the offer is made) should extend the 30-day period. The offeror must be free, for example, to reset its price or exchange ratio.

The Virginia Take-Over-Bid Disclosure Act, VA. CODE ANN. §§ 13.1-528 to -541 (Supp. 1968), requires advance filing with the target and the administrator 10 days before the bid is made. Id. § 13.1-531(a). Shareholders may withdraw tenders at any time within 21 days from the date of the first invitation to deposit shares. Any written solicitation or recommendation to shareholders to accept or reject must be filed with the administrator concurrently with publication and all parties are subject to an antifraud standard similar to section 14(e). See id. §§ 13.1-532 to -33. It is unclear whether the offeror may make a recommendation during the 10-day period. See Comment, Take-Over-Bids in Virginia, 26 WASH. & LEE L. REV. 323, 329-30 (1969).

The immediately preceding paragraph reflects the situation under the Virginia statute before the April 1970 amendments, which copy or closely follow many of the Act's central provisions, including the hearing procedure. See 3 CCH BLUE SKY L. REP. §§ 49, 228-41.

\(^{184}\) CODE § 1707.26 (Page 1964).

\(^{185}\) 2 L. LOSS, supra note 14, at 973-1020; 5 id. 2949-80 (Supp. 1969).
ably construe or apply the Act and the Division's regulations. Lastly, the Division's role in court would be quite important. Another point is pertinent: It is only because I believe that it is administratively unworkable to require that materials of all parties be subjected to the present process that I recommend the adjustments in the Division's role.

Two further amendments suggest themselves. First, to facilitate the offeror's communication with shareholders, the offeror should have a right similar to that under Rule 14a-7 in a proxy contest to force management to mail the offeror's materials at the latter's expense. This addition would make it more feasible to require an offeror to make every reasonable effort to communicate the offer to all securityholders.

Secondly, the Act should impose a sanction for damages upon management and others if they materially violate the Act. The sanction would supplement the injunctive remedy already discussed. As the Act now reads, much is demanded of the offeror and it can be called to account for failures in damage and rescission actions, but management and others attempting to influence shareholders' decisions are untouched by the Act, including civil liabilities under it. If management and third parties are subjected to antifraud and disclosure standards, their material violations of the requirements should create a right for resulting damages. Considerations of effectiveness of sanctions and fairness vis-à-vis the offeror dictate this conclusion. This problem is a conceptual thicket, however. For example, is it management and the target or only the former who should be liable? Should liability run only to securityholders, only to the offeror, or to both? What tests of causation are proper and administrable when a securityholder fails to tender or the offeror's bid fails after a counterattack accompanied by false materials issued by management? The answer may be not to attempt the independent creation of a standard for damages but rather to adopt a mirror damages clause for non-offeror violators of the Act: They will be liable for damages under the Act only if and to the extent they are liable under federal law. Double recovery would


187 See text accompanying note 194 infra.

be prohibited. The mirror provision would serve a useful purpose. Since an offeror may not assert an Exchange Act claim in the state courts, the incorporation in the Act would sometimes facilitate disposition of all issues in one proceeding.  

B. Removal of Exemption for Management-Approved Bids

The total exemption for bids approved by the target’s management should be deleted. The need for disclosure is substantially the same whether or not management has been persuaded to recommend acceptance, and indeed management should be obligated to spell out the reasons for its agreement. If, however, management has acquiesced, the normal waiting period should be decreased, for the original documents will be rather complete and the need that exists in contested bids to allow time for management to present its case separately is absent.

C. Revision of the Declaration of Intent Procedure

The declaration of intent procedure is aimed at the 5-percent holder, or a person who becomes one, acquiring shares through transactions not constituting a tender offer. By conclusively presuming that any such person intends to acquire control, the Act may be on questionable grounds. Furthermore, in trading market transactions, it is unclear how the disclosure to the seller of intent to control is to be communicated. A more straightforward provision would accomplish substantially the same objective: All record or beneficial owners of 5 percent or more of any class should file, with the Division and with management, the type of public reports of securities transactions required by Exchange Act section 13(d), but the filing would be made within, say, 3 days rather than 2 years.

189 See 2 L. Loss, supra note 14, at 973-1020; 5 id. 2949-80 (Supp. 1969).

Although the Virginia Act regulates the communications of all parties, express rights of recovery by shareholders are granted only against the offeror and persons who materially aid the offeror or control it. VA. CODE ANN. §§ 13.1-532 to -539 (Supp. 1968). The April 1970 amendments, note 183 supra, did not change these features of the statute.


The procedure is discussed in text accompanying notes 43-45 supra.

192 Cf. Heiner v. Donnan, 285 U.S. 312 (1932). This decision declared the conclusive 2-year presumption in contemplation of death cases to be unconstitutional. The decision is not one now enjoying high standing, however. See E. Griswold, Federal Taxation 985 (1966).

than 10 days as allowed by section 13(d). A material violation of the reporting obligation could bar the offeror from making a tender offer within the following year. The reporting duty should extend only to public companies — those with, say, more than one hundred securityholders.

D. Uniform Offer to All Securityholders

The provisions favoring Ohio residents should either be deleted or replaced with a requirement that a bid for a portion or all of a class of securities be made ratably to all holders on uniform terms. The latter is much more appealing and would represent a definite advance over the Williams Bill and other state takeover legislation. An exception for jurisdictions where the offeror, after reasonable diligence, is unable to comply with the local blue sky or similar laws would be a necessity.

If a mandatory management-mailing provision similar to Rule 14a-7 were adopted, the requirement of an offering to all shareholders should include an obligation to make reasonable use of the mailing channels in disseminating the offering materials. A substantial waiting period before tenders can be made would tie in nicely with a requirement for an offering to all securityholders through the mails, as the waiting period can be used to contact nearly all shareholders by this method.104

E. Enforcement of the Act

We have noted some of the possible problems with the Act’s enforcement machinery. The comprehensive Connecticut insurance company statute provides two effective enforcement techniques which should be adopted. First, shares purchased in violation of that statute have no voting rights and are not considered outstanding for voting or quorum purposes.195 Secondly, a leaf from the Delaware practice is borrowed: Shares acquired in violation of the statute are subject to sequestration by a domestic court for

104 On the requirement of an offer to all holders and related possible changes in the Williams Bill, see A. Bromberg, supra note 14, at § 6.3 (130). See also N.Y. STOCK EXCH. CO. MANUAL A-179 (1965).

An earlier version of the Act required the offeror to make the offer to all holders of the same class and forbade discrimination among holders of the same class of equity security “by reason of domicile or otherwise.” Sub. S.B. No. 138, § (C) (108th Gen. Assembly, Reg. Sess. 1969-70).

The Division may have authority to require the bid to be made to all holders on uniform terms. See note 152 supra & accompanying text.

purposes of enforcing the statute, whether or not the certificates are in the court's custody or control.

The long-arm statutes of a few states providing for out-of-state service of process in actions against nonresident directors suggest another possibility. Since Ohio is legislating on an internal affairs principle, a long-arm statute giving Ohio courts jurisdiction over violations of the Act, wherever and by whomever committed, may be constitutionally permissible. Such a statute, if valid, would render academic much of the choice of law discussion in part III of this article, for Ohio's courts will probably feel compelled to apply the Act globally and prospective plaintiffs seeking damages or rescission against the offeror would not be slow to appreciate that. This is, of course, simply another illustration of the importance of long-arm statutes as a consequence of the flexibility in conflict of laws principles and the pronounced disinclination of the Supreme Court to impose uniformity through the full faith and credit or due process clauses, coupled with rather rigid rules under the full faith and credit clause requiring states to recognize and enforce judgments of sister states.

VI. TAKEOVER ACTS AS AN IMPETUS FOR STATE REPORTING, PROXY, AND INSIDER TRADING REGULATION

An interesting possible side effect of the state takeover legislation may be to focus attention upon the use of legislative power over internal affairs to impose state versions of the reporting, proxy, and insider trading provisions of the Exchange Act upon domestic corporations which are public companies (say, one hundred or more securityholders) but which have fewer than the 500 holders of a

198 See id. § 6(b).
199 See N.D. CENT. CODE § 10-19-11 (1960); S.C. CODE ANN. § 10.432-1 (1962); id. § 12.13-7 (1962) (Supp. 1970). This does not represent the fruits of a search of the state statutes. My impression is that such provisions are uncommon.

The leading current article on long-arm statutes is von Mehren & Trautman, supra note 161. For provisions especially relevant to our question (which must be considered an open one), see id. at 1159-61, 1173-75.

Concerning the freedom of the states to adopt differing conflict principles, see text accompanying notes 146-47 supra. On the application of the full faith and credit clause to judgments, see H. GOODRICH & E. SCOLIS, CONFLICT OF LAWS ch. 15 (1964).
single class required for coverage under those provisions of the Exchange Act. The special state provisions concerning insurance companies enacted as a result of the 1964 amendments to the Exchange Act did that to some extent, but the especially stringent regulation to which insurance companies have always been subject may have obscured the point that the same standards could theoretically be set for any domestic corporation. The takeover acts illustrate that, given proper motivation, the states will use their internal affairs powers to supplement the Exchange Act.

The current void in our laws concerning the smaller public companies is difficult to defend. Such companies, which have often made a Regulation A,\textsuperscript{201} or an intrastate\textsuperscript{202} offering, are no longer closely held; and even if there is no trading market, there are likely to be numerous securityholders having no close affiliation with management.\textsuperscript{203}

Although it would be most efficient and would produce the greatest uniformity if Congress were to lower the inclusion criteria in the Exchange Act to one hundred holders, there may be good reasons not to increase the workload of the SEC. The states of incorporation could fill the void. Historically, of course, while the states have been active in territorial blue sky legislation, the corporations statutes have been almost silent on matters such as public reporting, proxy solicitation, and insider trading regulation. States have generally vied with each other to produce management-oriented internal affairs regulation. We have noted that the takeover acts, though cast as shareholder protection measures, also


\textsuperscript{203}This assumes of course that the existing regulation under the Exchange Act represents sound policy. For a useful volume on the intersection of economic and legal policies in securities regulation, see ECONOMIC POLICY AND THE REGULATION OF CORPORATE SECURITIES (H. Manne ed. 1969).

The SEC Special Study's sample of about 1,250 small companies going public for the first time between 1952-62 shows the need for continuous information. As of Dec. 31, 1962, 8 percent of the companies could not be located and 29 percent were inactive, liquidated, dissolved, or in receivership or reorganization. SEC, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H.R. DOC. No. 95, 88th Cong., 1st Sess., pt. 1 at 550-52 (1963).

serve as management protection devices. The same is true of proxy regulation, however, in a proxy contest. One of the gaps in the Act is that a proxy contest accompanied by a few privately negotiated purchases or by purchases in the open market is outside its scope; and the management of a company not covered by the SEC's proxy rules (say a company with 450 holders of its common stock which has not voluntarily registered under Exchange Act section 12(g)) will probably find itself outside all federal protections, for Rule 10b-5 is usually inapplicable to a proxy contest for the election of directors. Management can also benefit from the reports required under Exchange Act section 16(a). There may, therefore, be some incentive for the states to reassess their traditional policy. Furthermore, congressional action on public companies below the 500-holders category could take the form of encouraging coverage by the states.

A movement by the states toward comprehensive reporting, proxy, and insider trading requirements is probably not a real possibility, but the precedent is there.

VII. CONCLUSION

My central conclusion is that the Act is an interesting and useful experiment in state securities and corporations law legislation. Since it has been adopted in one of the leading industrial states, it may produce valuable experience about the effect of an amalgamation of the Securities Act and Williams Bill approaches upon offerors, management, and securityholders in takeover bids. Though state statutes such as the Act have almost unique interstate impact, consideration of federal preemption at this time is premature. Anything approaching a consensus concerning the proper regulation of takeovers is lacking and the Act purports to be only a logical extension of the Williams Bill, the Securities Act, and the proxy rules. A trial period is indicated. The experience gained with the state statutes such as the Act coupled with a maturation of thought should, in a few years, produce a better congressional decision on a major expansion of the Williams Bill and on preemption.


205 A congressional mandate that a company not subject to specified regulation under the law of its state of incorporation must reincorporate under a federal corporations statute and give up its state charter would produce the necessary state action.