The Tender Offer Pinch: A Constitutional Analysis of the New York Security Takeover Disclosure Act

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The several states have a manifest interest in protecting their residents and regulating the businesses incorporated under their respective laws. However, if this regulation impinges too severely on interstate commerce, important constitutional issues are raised. To protect these manifest interests, some states have enacted so-called anti-takeover statutes.

Recently, New York enacted such legislation, expressly intending to avoid any constitutional infirmities. This article will attempt to evaluate the constitutional validity of New York’s expansive disclosure requirements concerning tender offers. Part I


2 See infra notes 58-59 and accompanying text.

3 See infra note 27.

4 Ch. 915, §§ 1-6, [1985] N.Y. Laws 2414-31 (McKinney).

5 See Memorandum of the State Executive Department, reprinted in [1985] N.Y. Laws 3193 (McKinney).

6 See ch. 915, § 4-1603(a)-12, [1985] N.Y. Laws 2424-26 (McKinney). It should be noted that § 2 of amended chapter 915 encourages any person to seek advance approval from the board of directors of a New York domestic corporation for the purchase of voting stock which would entitle the acquirer to cast 20% or more of the votes entitled to be cast in the election of directors of that corporation. Should the purchaser not seek this advance approval, he may still acquire the securities, however, he could not thereafter engage in any business combination with that resident domestic corporation for a period of five years from the date he first acquired such 20% of the voting stock. See ch. 915, § 2-912, [1985] N.Y. Laws 2414-22 (McKinney). Moreover, there are additional restrictions placed upon the purchaser after the five year holding period has expired. Id. Arguably
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will offer an historical analysis of related federal regulation of tender offers. Part II will discuss judicial evaluation of other state anti-takeover statutes. Part III will analyze New York's anti-takeover statute in light of relevant case law.

I. GOVERNMENT REGULATION OF TENDER OFFERS

A. Federal - The Williams Act

Subsequent to the economic boom of the 1960's, cash tender offers as a means of obtaining control of a business entity became widespread. Intensive campaigns conducted for the tender of stock at a fixed price were mounted, effectively removing a substantial number of corporate control contests from governmental regulation under existing federal securities law. Due to this lack such restrictions present serious constitutional issues. However, analysis of that section is beyond the scope of this article.


See infra notes 34-73 and accompanying text.

See infra notes 73-125 and accompanying text.

See Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 54-57 (2d Cir. 1985). The typical tender offer is a publicly made invitation, often announced in a newspaper advertisement, soliciting all shareholders of a particular publicly owned corporation to tender their shares, which are traded on a national securities exchange, for sale at a fixed price. Id. at 54. To induce the sale, the price is generally substantially higher than the current market price. Id. See Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1261 n.2 (5th Cir. 1978), rev'd on other grounds sub nom. Leroy v. Great W. United Corp., 443 U.S. 173 (1979). The offer is made for a limited time and the offeror may seek to purchase all the outstanding shares or a fixed minimum number of shares of the target company. Id. See generally H.R. REP. No. 1711, 90th Cong., 2d Sess. 2-4, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2811 (tender offer consists of a bid to buy shares of a company, usually at a price above current market price) [hereinafter HOUSE REPORT]; S. REP. No. 550, 90th Cong., 1st Sess. 2-4 (1967) [hereinafter SENATE REPORT].

Congress has consistently refused to define the term "tender offer." Rather, Congress has delegated that responsibility to the courts and to the Securities Exchange Commission (SEC) in order to maintain flexibility. See Smallwood v. Pearl Brewing Co., 489 F.2d 579, 598 (5th Cir.), cert. denied, 419 U.S. 873 (1974); Takeover Bids: Hearings on H.R. 14475, S. 510 Before the Subcomm. on Commerce and Financing of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. 18 (1968) (statement of Manuel Cohen, Chairman, SEC). For a detailed analysis of cash tender offers as devices for securing corporate control, see E. Aranow & H. Einhorn, TENDER OFFERS FOR CORPORATE CONTROL 2-10 (1973); Hayes & Taussig, Tactics of Cash Takeover Bids, 45 HARV. BUS. REV. 155 (1967).


See House Report, supra note 10, at 2-4, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2812-13. Prior to the 1960's, attempts to take over companies were usually implemented through proxy solicitations, or exchange offers of securities, both of which were
of regulation, the average stockholder was under a severe handicap in deciding whether to tender his shares. Limitations on the duration of the offer, restrictions on the number of shares generally sought and inadequate information disclosures by the offeror all contributed to defeat intelligent decisionmaking. Congress remedied this gap in the federal regulation of securities through enactment of the Williams Act.

The Williams Act requires tender offerors to file a statement regulated under existing federal law; cash tender offers, on the other hand, were not regulated. See Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 22 (1977). As noted by the Senate Committee on Banking and Currency: "By using a cash tender offer the person seeking control can operate in almost complete secrecy... the law does not even require that he disclose his identity, the source of his funds, or what he intends to do if he gains control of the corporation." House Report, supra note 10, at 2, reprinted in 1968 U.S. Code Cong. & Admin. News 2812.


The typical tender offer provides for the opportunity to tender stock to remain open for a short period, usually about two weeks. See Note, The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934, 86 Harv. L. Rev. 1250, 1251-54 (1973). Certain tender offers have been referred to as "Saturday Night Specials". A cash bid would come out on a Saturday night and remain open for seven days, during which period shareholders would stampede to sell their stock. See A. Fleischer Jr., Tender Offers: Defenses, Responses, and Planning 65-66 (1981).

Offerors usually seek to purchase a pre-determined percentage of outstanding stock. Id. The offer is generally conditioned upon the tender of at least this percentage and if the number of shares tendered is less, the offeror is not required to purchase any shares. Id. Similarly, if more than the requested number of shares are tendered, the offeror is not required to buy the excess. Id.


Absent knowledge of exactly who the tender offeror is, and what his plans are regarding the takeover, the shareholder cannot reach an informed decision. Id.

The Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (embodied in §§ 13(d), 13(e), 14(d), 14(e) and 14(f) of the Securities Exchange Act of 1934; codified at 15 U.S.C. §§ 78m(d), 78n(e), 78n(d), 78n(e), 78n(f) (1981) [hereinafter The Williams Act]. See Edgar v. MITE Corp., 457 U.S. 624, 632 (1982) (plurality opinion); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 22 (1977). The primary purpose of the Williams Act is to insure that shareholders will have adequate information to decide whether to tender their stock to a tender offeror. See Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975).

The Williams Act, supra note 18, at § 78m(d)(1). This section of the statute provides that:

Any person who, after acquiring... the beneficial ownership of any equity security of a class which is registered pursuant to section 78l of this title... is... the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security... send to each exchange where the security is traded, and file with the Commission, a statement[.]
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with the Securities Exchange Commission (SEC) disclosing information with the intention of promoting informed decisionmaking by the offeree. The purpose of these disclosures is to protect the investor shareholder. However, Congress determined that this protection was to be afforded without favoring either incumbent management or the takeover bidder. This policy of "evenhandedness" was illustrated by the protection bestowed upon the

Id. This document is commonly referred to as a Schedule 13D statement; see Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 52 (2d Cir. 1985). For an example of a Schedule 13D, see A. Fleischer, Jr., supra note 14, at 698-714.

Furthermore, The Williams Act, supra note 18, at § 78n(d)(1) provides in part that it is unlawful for any person to make a tender offer unless he has filed this statement containing the information specified in the statute and "such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors." Id. This statement is commonly referred to as a Schedule 14D and may also be required to be filed by the issuer itself if it seeks to make a tender offer for its own outstanding shares, depending on the local state statute. See A. Fleischer, Jr., supra note 14, at 106, 108, 110.

See Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975). The statement that must be filed with the SEC is to include information concerning the source and amount of funds or other consideration to be used in purchasing the tendered shares, the extent of the offeror's holdings in the target firm, and the offeror's plans regarding the target company's business or corporate structure. The Williams Act, supra note 18, at § 78m(d)(1)(A). The statute requires any group or person acquiring the beneficial ownership of more than 5% of the equity securities of certain issuers to file reports providing in part: "[T]he background and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected." Id.

Moreover, if the purpose of the purchases is to acquire control of the target the offeror must include in his statement any plans or proposals he may have to liquidate the target or to merge it with any other entity or any plans to make other major changes in the business or corporate structure of the target. The Williams Act, supra note 18, at § 78m(d)(1)(C). See generally 113 Cong. Rec. 24,664 (1967) (statement of Sen. Williams listing all disclosure requirements for tender offers).


See MITE, 457 U.S. at 653 (plurality opinion). The disclosure provisions originally proposed in Congress were pro-management. See Piper, 430 U.S. at 30. Congress subsequently decided that takeover bids could serve a useful purpose. For example, they dissuade incumbent management from maintaining inefficient business practices. See House Report, supra note 10, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2813. They also give shareholders an opportunity to sell their shares for a premium over market price. See 115 Cong. Rec. 24,666 (1967) (remarks of Sen. Javits). As the legislation evolved, Congress embraced a policy of neutrality between the tender offeror and incumbent management. See Rondeau, 422 U.S. at 58 (1975). Senator Williams, the sponsor of the Williams Act, stated that "[Congress has] taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bid." 115 Cong. Rec. 24,664 (1967).
investor through the enactment of specific timing, filing and enforcement requirements governing tender offers.

B. State Anti-Takeover Statutes

As the use of cash tender offers increased, a majority of states, believing the federal regulatory scheme inadequate to protect their interests, enacted their own legislation. These statutes were written to afford further protection to shareholders residing

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88 The Williams Act, supra note 18, at § 78n(d)(5). Securities tendered pursuant to a tender offer could be withdrawn by the offeree at any time until 7 days after the offer was first published. Id. This 7 day withdrawal period has been extended to 15 business days by the SEC. See 17 C.F.R. § 240.14d-7(a)(1) (1986). Furthermore, the deposit may withdraw his shares after 60 days from the date of the original tender offer, unless otherwise prohibited by the SEC. Id. The Williams Act also provides that when the number of shares tendered exceeds the number of shares sought in the offer, those shares tendered during the first 10 days of the offer must be purchased on a pro rata basis. See 15 U.S.C. § 78n(d)(6) (1981); 17 C.F.R. § 240.14d-8 (1986). See also The Williams Act, supra note 18, at § 78n(d)(7) (where any increase in consideration offered to holders of qualified stock is made by offeror before expiration of offer, shareholders who tendered earlier at a lower price must also receive the increase in the premium).

89 See The Williams Act, supra note 18, at § 78n(d)(1). Upon commencement of a tender offer, the offeror must file a statement reciting the information required to be divulged under § 78n(d)(1). See supra notes 19-20 and accompanying text. The date on which papers are actually received by the Commission is the date of filing thereof. See 17 C.F.R. §§ 240.0-3 (1986). The filing must be done as soon as practicable on the day of the commencement of the tender offer. See 17 C.F.R. § 240.14d-5(a) (1986). There is no requirement of advance notice to the target company. Id.

90 See The Williams Act, supra note 18, at § 78n(e). This broad anti-fraud provision makes it unlawful for any party engaged in a tender offer to make any untrue statement in connection with the offer. Id. In addition, it is unlawful to state any misleading facts in, or to omit a material fact from, the tender offer statement. Id. The statute also requires that the SEC shall, by rules and regulations, define and prescribe means reasonably calculated to prevent "such acts and practices as are fraudulent, deceptive, or manipulative." Id.

91 See Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1282-83 (5th Cir. 1978), rev'd on other grounds sub nom. Leroy v. Great W. United Corp., 443 U.S. 173 (1979). The Kidwell court held that a state's interest in helping incumbent management would be valid where it influenced "local lifestyle[s] through such means as charitable contributions or civil involvement and the depth of its commitment to issues such as pollution control or job safety." Id. In Edgar v. MITE Corp., 457 U.S. 624, 644 (1982), state representatives asserted two legitimate local purposes in support of their anti-takeover statute: to further protect resident stockholders; and to regulate the internal affairs of companies incorporated within the state. Id. The latter was rejected, id. at 645, but the former was found to constitute a legitimate local interest. Id. at 644. See infra notes 72-73 and accompanying text.

92 See Sargent, On the Validity of State Takeover Regulation: State Responses to MITE and Kidwell, 42 Ohio St. L.J. 689, 690 n.7 (1981). Thirty-seven states have enacted takeover legislation; many have been held unconstitutional and subsequently repealed or amended to reflect the infirmities found by various courts. Id.
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in the respective states. The New York Security Takeover Disclosure Act (New York Disclosure Act) was drafted with the additional interest in regulating the internal affairs of companies incorporated under New York law. The New York legislature sought to avoid the adverse effects on the state and its citizens from certain takeovers that are solely motivated by substantial and immediate financial returns for the tender offeror. Moreover, the legislature noted that such takeover contests encourage defensive tactics on the part of the target company that are aimed at making the target less attractive and also have the effect of im-


See Memorandum of the State Executive Department, reprinted in [1985] N.Y. Laws 3184, 3189-90 (McKinney). State corporate law defines an investor's substantive rights as a shareholder in certain transactions in the corporation's securities. See Sargent, supra note 27, at 724. A tender offer should be viewed as functionally equivalent to other methods of altering corporate control which have traditionally been subject to state regulation under its corporate law. Id. State takeover legislation can thus be considered merely a way of regulating an attempt to secure a fundamental change in the corporate ownership and organization through a series of transactions between an offeror and the stockholders of the corporation. Id.

See Memorandum of the State Executive Department, reprinted in [1985] N.Y. Laws 3184, 3189 (McKinney). The New York legislature was concerned over a recent increase in highly leveraged takeovers by offerors which resulted in liquidation of the target either because of a substantial profit motive on the part of the offeror, or due to compelling pressures on the offeror to liquidate by those who financed the takeover. Id. The legislature noted that these types of takeover contests rearrange ownership interests by substituting lenders for shareholders. Id. In this way, those who financed the takeover as underwriters would effectively have control of the corporation until the offeror paid off the financing. Id. Therefore, as the traditional risk inherent in security investments shifted from equity owners to creditors, the concurrent ownership interest would shift to the creditors, who are far more concerned with immediate returns than with long-term growth. Id.

Incumbent management, concerned with the investor's interests, the continued independence of their corporation, and their own continued employment, have been extremely creative in developing new ways to fend off unwanted takeover offers. See Matheson & Norberg, Hostile Share Acquisitions and Corporate Governance: A Framework for Evaluating Antitakeover Activities, 47 U. Prrr. L. Rev. 407, 409 (1986). These defensive and prophylactic measures endorsed by target management in the face of a current or future threat to corporate control have been the subject of much litigation, but a discussion of those cases is beyond the scope of this note.

Some of the defensive gambits employed by incumbent management have been given colorful terminology that reflect the effect of the defensive maneuver. See Responsibility of Corporate Officers & Directors Under Federal Securities Laws, Fed. Sec. L. Rep. (CCH) No. 1178, at 69-71 (May 21, 1986). For example, the "poison pill" defense is designed to make a takeover unpalatable, by making it prohibitively expensive "through issuance of a special class of stock - the poison pill - which the offeror will have to 'swallow' if successful." Id. Other terms given to efforts to combat takeover offers include: "sale of the crown jewels,"
pairing the long-term potential of New York domestic corporations by restricting the ability of the affected business to grow.33

II. CONSTITUTIONAL ISSUES RAISED BY STATE REGULATION OF TAKEOVERS - Edgar v. MITE Corp.

Many state statutes regulating cash tender offers were successfully challenged by takeover bidders as violative of the Supremacy44 and/or Commerce Clauses55 of the United States Constitution.56 The Supreme Court in Edgar v. MITE Corp.57 held the Illinois Business Take-Over Act (Illinois Act)58 unconstitutional.59 While a plurality of the Court concluded that the Illinois Act was

where a corporation sells off its most coveted asset which had made the target attractive in the first instance; "golden parachutes," which are lucrative severance packages for senior management of a target company, payable if control changes hands through a hostile takeover; the "pac-man" defense, whereby the target company makes a counter bid for the stock of the original tender offeror; "greenmail," where the target pays a premium to the bidder for its stock in the target and also demands that the bidder not repeat a tender offer; "shark repellents," which involve amending a target company’s by-laws to include a fair price provision, thereby discouraging unsolicited offers; and finally, the use of a “White Knight,” where the target seeks out a friendly party to purchase its shares during a hostile tender offer. Id. For an application of many of these defensive tactics, see Hanson Trust PLC v. SCM Corp., 774 F.2d 47 (2d Cir. 1985).

33 See Memorandum of the State Executive Department, reprinted in [1985] N.Y. Laws 3189 (McKinney). While the legislature saw the benefits of certain tender offers as a check on inefficient management, it was more concerned with tender offerors who, once gaining control, divert funds from research, development, and capital expenditures to paying off the acquisition debt. Id. at 3190.

34 U.S. Const. art. VI, cl. 2. Article VI provides in part that: “This Constitution and the Laws of the United States which shall be made in Pursuance thereof ... under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby . . . .” Id.

35 U.S. Const. art. I, § 8, cl. 3. For a discussion of the Commerce Clause, see infra notes 56-59.


38 ILL. REV. STAT. ch. 121½, § 137.52-9 (1979) (repealed 1983).

39 MITE, 457 U.S. at 646.
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preempted by the Williams Act,40 and constituted an invalid direct regulation of interstate commerce,41 a majority held the Illinois Act invalid as posing an excessive indirect burden on interstate commerce.42

A. Preemption

The plurality in MITE found that Congress did not expressly preempt state regulation of corporate takeovers.43 Earlier Supreme Court decisions had upheld state legislation aimed at regulating intrastate investment ventures.44 The validity of these “blue-sky” laws,45 coupled with congressional failure to amend the Se-

40 MITE, 457 U.S. at 657-40 (plurality opinion). There is no single, straightforward formula that can summarize the analysis necessary to determine whether a state statute is void under the Supremacy Clause. See Hines v. Davidowitz, 312 U.S. 52 (1941). However, the Supreme Court has established some guidelines and summarized them in Jones v. Rath Packing Co., 450 U.S. 519, 525-26 (1977).

The first inquiry made is whether Congress has expressly declared its intent to preclude the states from a specific area of regulation. Id. at 525. If such a finding of congressional intent is made, a court will hold the state statute preempted on that ground alone. Id. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947), holding that the Federal Warehouse Act expressly preempted all concurrent state regulation. Id.

A court may also find that, while no express exclusion of state regulation is evident, a preemptive intent may be inferred based on the pervasive nature of the federal legislative scheme. See Jones, 430 U.S. at 525. If the federal legislation is incompatible with similar state legislation, see Burbank v. Lockheed Air Terminal, 411 U.S. 624, 635 (1973), or if the state statutes “touch a field in which the federal interest is so dominant,” see Rice, 331 U.S. at 230, then the federal system has presumably excluded enforcement of the state law on the same subject. See id.

Preemptive intent must be found if compliance with both the federal and state legislation is a “physical impossibility”, even in the absence of any express or implied congressional intent to exclude state regulation. See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

Even in the absence of congressional intent to exclude state regulation, or in the absence of any direct conflict of legislation, a finding of preemption will be made if “under the circumstances of [the] particular case, [the state’s] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Hines, 312 U.S. at 67. This inquiry requires the court to consider the relationship between federal and state laws as they are interpreted and applied, not merely as written. See Ray v. Atlantic Richfield Co., 455 U.S. 151 (1978); accord De Canas v. Bica, 424 U.S. 351 (1976).

41 MITE, 457 U.S. at 643-46 (plurality opinion). See infra notes 60-65 and accompanying text.

42 Id. at 651 (plurality opinion).


44 See id. States have an interest in regulating “speculative schemes which have no more basis than so many feet of blue sky.” Id. Blue-sky laws are state statutes providing for the regulation and supervision of securities offerings and sales, to protect citizens from investing in fraudulent companies. See 69 Am. Jur. 2d, Securities Regulation - State §§ 1-4 (1975).
curities Exchange Act of 1934, prompted the MITE plurality to find that the Williams Act did not expressly nor impliedly pre-empt state regulation of tender offers.

However, the plurality identified three provisions of the Illinois Act that served as obstacles to full implementation of the congressional purpose of the Williams Act. Compliance with the Illinois Act resulted in advance notice of the tender offer to the target company. This advance notification enabled incumbent management to employ delay tactics through a hearing pro-

They are limited to purely intrastate transactions. *Id.* Such statutes have generally been held not to violate federal or state constitutions because any burden on interstate commerce is only incidental. See Merrick v. N.W. Halsey & Co., 242 U.S. 568 (1917); Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559 (1917); Hall v. Geiger-Jones Co., 242 U.S. 539 (1917).


* MITE, 457 U.S. at 631 (plurality opinion).

* Id. at 694. Determining whether a state statute stands as an obstacle to full implementation of the congressional purpose of federal legislation requires a two-step process. The court must first construe both the state and federal statutes, and then reach a determination as to whether there in fact exists a conflict. See Perez v. Campbell, 402 U.S. 637, 644 (1971). Furthermore, it is imperative that the court distinguish between those situations where there is a mere possibility of a conflict arising, and those "where conflicts will necessarily arise." See Goldstein v. California, 412 U.S. 546, 554 (1973) (emphasis in original). For this reason it must be evident that both the federal and the state legislation cannot, of necessity, stand together.

* See ILL. REV. STAT. ch. 121½, §§ 137.54E, - .54B (1979) (repealed 1983). This provision of the Illinois Act required a tender offeror to notify the Illinois Secretary of State and the target company of his intent to make a tender offer, and the material terms thereof, twenty business days before the offer was to become effective. *Id.* During that time the offeror was not to communicate its offer to the stockholders, but the target company was free to disseminate any information concerning the impending offer to its shareholders. *Id.*

The Williams Act has no precommencement notification provision and Congress, on several different occasions, has refused to impose such a requirement. See MITE, 457 U.S. at 655-56 (plurality opinion). Precommencement notification was viewed as a powerful weapon with which incumbent management could combat tender offers, perhaps to the detriment of the investor; Congress determined that this should be avoided. *Id.*

* Brief for SEC as Amicus Curiae at 10 n.8, Edgar v. MITE Corp., 457 U.S. 624 (1982). According to the SEC, delay or advance notice to the target company could provide incum-
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vision. Moreover, the Illinois Act provided for the Secretary of State to rule on the substantive fairness of the offer. Since these provisions did not serve to protect the investor, but would merely entrench incumbent management often to the detriment of investors, the Illinois Act provided for the Secretary of State to rule on the substantive fairness of the offer. 

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Moreover, the delay could afford the target the opportunity to implement a defensive maneuver. See supra note 32. The target company could effectively reduce the value of the security to the tender offeror, thereby forcing him to reduce his offer to the stockholder or resulting in the offeror’s decision to retract the offer entirely, all to the investor’s detriment. See MITE, 457 U.S. at 639-40 n.14 (plurality opinion); Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1277 (5th Cir. 1978), rev’d on other grounds sub nom. Leroy v. Great W. United Corp., 443 U.S. 173 (1979); National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1150-51 (8th Cir. 1982). See Langevoort, State Tender-Offer Legislation: Interests, Effects and Political Competency, 62 Cornell L. Rev. 213, 238 (1977).

Although delay tactics are generally viewed as contrary to an investor’s best interests, some commentators believe delay can be beneficial to the investor. For example, it has been suggested that the time pressures of responding to a tender offer distract the investor and impede informed decisionmaking. See E. Aranow, H. Einhorn & G. Berlstein, Developments in Tender Offers for Corporate Control 218-19 (1977). Another commentator has suggested that delay tactics benefit the investor by increasing the price of his security both through the tender offer and on the open market. See Note, Securities Law and the Constitution: State Tender Offer Statutes Reconsidered, 88 Yale L.J. 510, 523-25 (1979).

81 See Ill. Rev. Stat. ch. 121¼, §§ 137.57A & B (1979) (repealed 1983). These provisions allowed the Illinois Secretary of State to call a hearing, with respect to any tender offer subject to the statute, for a determination of compliance therewith. Id. Pursuant to the Illinois Act, the offer could not proceed until the hearing was completed, and there was no deadline for the completion of the hearing. See id. §§ 137.57A, B, C, D. Although the Secretary was to render a decision on the validity of the offer within 15 days of the hearing, that period could have been extended indefinitely. See MITE, 457 U.S. at 637 (plurality opinion). The MITE plurality stated that these provisions frustrated the congressional purpose of the Williams Act. Id. at 637-39 (plurality opinion).

Furthermore, any party who was located in Illinois holding at least 10% of any class of equity securities which were the subject of a takeover offer could request a hearing. See Ill. Rev. Stat. ch. 121¼, § 137.57A (1979) (repealed 1983). Upon such a request, the Secretary was required to call a hearing. Id. The MITE plurality noted that often incumbent management will control, directly or indirectly, 10% of a target company’s shares. See MITE, 457 U.S. at 637 (plurality opinion). These provisions may afford incumbent management an undue advantage by creating an opportunity to delay an offer. Id. See supra note 50 and accompanying text.

82 See supra note 51. See also MITE, 457 U.S. at 639-40 (plurality opinion) (Illinois Act, requiring Secretary to deny registration to tender offer if he found the bid inequitable, preempted because legislative history of Williams Act indicated that Congress intended investors to be free to make their own decisions; commonly referred to as the “market approach”).

83 MITE, 457 U.S. at 639-40 (plurality opinion). But see supra note 50 (under certain conditions delay may benefit investor).
of the investor, the Illinois Act did not maintain the congressional policy of evenhandedness and was preempted by the Williams Act.

B. Commerce Clause

The Constitution directly empowers Congress to regulate interstate commerce. This grant, however, does not entirely preclude states from regulating in this field. Direct regulation of interstate commerce by the states is prohibited, but a state's incidental regulation of interstate commerce will be permitted if it furthers some legitimate state interest and is not outweighed by the burden imposed on such commerce.

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[85] MITI, 457 U.S. at 639-40 (plurality opinion).
[86] Id. at 637-39 (plurality opinion).
[87] U.S. CONST. art. 1, § 8, cl. 3. The Commerce Clause provides that "Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several States."] Id. The Commerce Clause emerged from the Constitutional Convention as a response to the bitter trade wars that existed between the states under the Articles of Confederation. See Stern, That Commerce Which Concerns More States Than One, 47 HARV. L. REV. 1335, 1337-41 (1934). These trade wars resulted from states enacting tariff measures on the importation of goods from other states. Id. As more states adopted reciprocal levies, development of interstate business was hampered and antagonism among the states increased. Id. The Convention, recognizing the need for centralized commercial regulation, granted Congress broad power to regulate trade or business. Id. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW 321 (1978); C. SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 25-27 (2d ed. 1954).

Limits exist upon state power to regulate commerce over which Congress has primary responsibility. See Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370-71 (1976) (quoting Freeman v. Hewitt, 329 U.S. 249, 252 (1946)). Some limits are expressly found in the Constitution, such as the prohibition on state imposition of an export duty, U.S. CONST. art. 1, § 9, cl. 5, and limits on the state right to engage in foreign trade. U.S. CONST. art. 1, § 10, cl. 2. However, in most areas concerning interstate commerce, the Constitution does not expressly address whether the states may exercise similar power as Congress in the area. See L. TRIBE, supra, at 321. This grey area, known as the "dormant" Commerce Clause, has been the subject of Supreme Court interpretation. See id.


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1. **Direct Regulation**

A state statute which directly regulates transactions that occur across state lines is strictly prohibited regardless of the legislative purpose. In *Edgar v. MITE Corp.*, a four-member plurality determined that the Illinois Act was a direct regulation of interstate commerce. The plurality observed that provisions within the statute allowed Illinois to directly suspend a tender offer even when a target company's shareholders were all out-of-state residents, thus giving the statute a "sweeping extraterritorial effect." Distinguishing a state's blue-sky laws, the plurality noted that the Illinois Act directly regulated tender offers occurring entirely outside the State of Illinois.

which prohibited the importation of waste into the state which had been collected outside its borders. Id. In striking down the statute as violative of the Commerce Clause, the Court recognized that certain incidental burdens on interstate commerce may be unavoidable in the area of state regulatory measures directed at the safety and health of its citizenry. Id.; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citing *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 445 (1960)). In *Pike*, a cantaloupe grower challenged the order of an Arizona state official which prohibited the grower from shipping its cantaloupes outside the state unless packed in a manner so as to identify their Arizona origin. Id. at 144. This would have required the grower to construct a packing plant in Arizona at a cost of $200,000. Id. at 140. In finding the Arizona order unconstitutional, the Court noted the state's interest was tenuous in relation to the burden such order imposed on interstate commerce. Id. at 145.


"Id. at 642.

"Id. at 642-43. The Illinois Act provided that any tender offer for the stock of a target company had to be registered with the Illinois Secretary of State. *ILL. REV. STAT.* ch. 121 1/2, § 137.54A (1979) (repealed 1983). The Illinois Act defined a target company as a corporation of which 10% of the outstanding shares were held by Illinois residents or that met two of three other conditions: (a) had its principal executive office in Illinois; (b) was organized under the laws of Illinois; (c) had at least 10% of its stated capital and paid-in surplus represented in Illinois. Id. § 137.52-10. Illinois therefore could apply its statute "to regulate a tender offer which would not affect a single Illinois shareholder." *MITE*, 457 U.S. at 642.

"See supra note 45 and accompanying text.

"*MITE*, 457 U.S. at 641 (plurality opinion). The plurality found that the Illinois Act "directly regulate[d] transactions which [took] place across state lines . . . wholly outside the State of Illinois." Id. Moreover, the plurality asserted that blue-sky laws only regulate
2. Indirect Regulation

The majority in MITE held that under the test enunciated in Pike v. Bruce Church, Inc., the Illinois Act was an unconstitutional indirect burden on interstate commerce. In Pike, the Court essentially required balancing the statute's benefits to state residents against the burdens it imposed on interstate commerce. If the statute imposed an excessive burden on interstate commerce in relation to the local putative benefits, the statute will be deemed unconstitutional.

The Court in MITE balanced the burdens of the Illinois Act in intrastate transactions, and that such laws "are unconstitutional indirect burdens on interstate commerce..." In Pike, the Court essentially required balancing the statute's benefits to state residents against the burdens it imposed on interstate commerce. If the statute imposed an excessive burden on interstate commerce in relation to the local putative benefits, the statute will be deemed unconstitutional.

The rule as stated in Pike is:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. The extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Since 1970, the rule enunciated in Pike has been the standard by which courts have measured state regulatory schemes that affect interstate commerce. See Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978). Raymond Motor involved a Wisconsin statute which prohibited trucks over a certain length from using its highways. Id. at 432. In its analysis of the statute, the Court weighed the purported safety interest of the state against the burden imposed upon interstate commerce. Id. at 442. The Court found no actual evidence of increased safety, and therefore struck down the statute as unconstitutional.

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its ability to prevent tender offers from proceeding outside the state, against the two local interests which the statute purported to further: 1) protection of Illinois resident stockholders; and 2) the regulation of the internal affairs of businesses incorporated within Illinois. While the Court recognized the protection of resident shareholders as a legitimate interest, the Court found the statute to be flawed since it governed out-of-state transactions over which Illinois had no interest. As to the internal affairs doctrine, the majority found it to be a conflict of laws principle which had no bearing on tender offers.

III. CONSTITUTIONAL ANALYSIS OF THE NEW YORK DISCLOSURE ACT

A. Preemption Analysis

The New York Disclosure Act was drafted in light of the MITE decision. It contains none of the provisions of the Illinois Act which were found constitutionally infirm by the MITE plurality. There is no precommencement notification provision, no hearing provision, and no section authorizing the state representative charged with the enforcement of the statute to rule on the substantive fairness of the tender offer. However, the New York

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71 Id. at 644.
72 Id. at 643-46.
73 Id. at 645.
74 See Memorandum of the State Executive Department, reprinted in [1985] N.Y. Laws 3195 (McKinney).
76 There is no hearing provision in the New York Disclosure Act, but the Attorney General, the official charged with the enforcement of the statute, may conduct an investigation concerning the takeover bid if he deems it necessary. See ch. 915, § 4-1604(a), [1985] N.Y. Laws 2427 (McKinney). The purpose of such an investigation is limited to a determination of compliance with the requirements of the Act. Id. Similarly, there is no provision in the New York Disclosure Act providing for the Attorney General to rule on the substantive fairness of the offer as there was in the Illinois Act. See ILL. REV. STAT. ch. 121½, § 137.57E
Disclosure Act does require substantial disclosure of information concerning the tender offer and the takeover bidder which is beyond the scope of the disclosure mandated by the Williams Act.\textsuperscript{76} It is submitted that the New York Disclosure Act would not be preempted by the Williams Act because of these required additional disclosures.

It is further submitted that the MITE Court, as evidenced by the plurality decision, did not purport to require the states to enact legislation evenhandedly without exception, and thereby establish new rights for tender offerors.\textsuperscript{77} Rather, not tipping the scales in (1979) (repealed 1983).

The New York Attorney General is given subpoena power to conduct these compliance hearings. See ch. 915, § 4-1604(a), [1985] N.Y. Laws 2427 (McKinney). This provision, as written, is arguably overbroad and vague since it does not restrict the documents which may be subjected to investigation. Id. Judicial construction of the statute should correct any such infirmities. For example, in Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906 (8th Cir. 1984), the Court of Appeals for the Eighth Circuit held that a provision in the Minnesota Corporate Take-Over Act that required the offeror to disclose "such additional information as the commissioner [may] by rule prescribe" was unconstitutional. Id. at 914. The court concluded that the section was vague and could require the disclosure of confusing or irrelevant information and might require judgmental data that the Commissioner had no right to demand. Id. While the provision in the New York Disclosure Act is narrower than the infirm section of the Minnesota statute, it is susceptible to an overbroad reading and should be tailored by judicial construction to include only information clearly relevant to the tender offer.


A statement as to the potential impact, if any, of the offeror's plans or proposals on the residents of New York state, including any material change in the location of the target company's offices or business activities within this state ... any significant reduction in the workforce ... any other material change in the ... conditions of employment of persons employed by the target company in this state; any material change in the relationships of the target company with suppliers or customers within this state, or any other material changes in the target company's business, corporate structure, management, personnel or activities which would have a substantial impact on residents of this state ... .

Ch. 915, § 4-1603(a)(9), [1985] N.Y. Laws 2425 (McKinney). In addition, particulars as to adjustments to any pension or profit sharing plans must be disclosed, as well as a vast array of labor relations records, including all violations of federal labor laws adjudicated or settled within five years of the commencement of the tender offer. Id. § 4-1603(a)(10). If the offeror is a natural person, he or she must reveal financial statements for the current and preceding three years that include a description of his business activities during that time period and a description of any pending legal or administrative proceedings to which the offeror is a party. Id. There are numerous additional disclosures required by the statute. See id.

\textsuperscript{77} See Edgar v. MITE Corp., 457 U.S. 624, 655 (1982) (Stevens, J., concurring); Id. at 646-47 (Powell, J., concurring). As Justice Powell noted, headquarters of the large multinational corporations tend to be situated in the major cities of just a few states. Id. at 646.
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favor of either incumbent management or the takeover bidder was essential only insofar as it furthered investor protection.7\(^a\) Language in the concurring opinion suggests that it is appropriate to legislate in favor of incumbent management if it furthers the goal of investor protection.7\(^b\)

Often, a takeover of smaller corporations located elsewhere will result in moving the corporate headquarters to these large metropolitan centers. Id. The loss of the company may have a significant adverse effect on the state or locality that lost the company. Id. Besides the potential loss of management personnel, many of whom have been civic minded and responsible for community leadership, contributions to all facets of a community may diminish. Id. This could result in concomitant losses of leadership and financial support to cultural, charitable and educational life within the community. Id.

It is often the case that tender offerors possess both capital and experienced takeover personnel far superior to those of the target company. This disparity may seriously disadvantage a regional company in combatting a tender offer. Id. at 646. If there is no express or implied preemption of state takeover legislation by the Williams Act, see id. at 631, then it is submitted that there must be room to enact a regulatory scheme that may encompass additional protections for incumbent management.

Similarly, it is proposed that an investor stockholder often will have overlapping interests with the target company and incumbent management. These interests include maintaining all the cultural, charitable and employment advantages that businesses provide to any locality in which it is situated. Concurrently, if the stockholder also resides in that same locality, or is an employee of a target company, legislation that may discourage tender offers but maintains the status quo may further protect the shareholder. Thus, allowing state regulation designed to further protect the investor can also work to protect incumbent management.

Many cases stand for the proposition that evenhandedness is not imperative. See, e.g., Agency Rent-A-Car, Inc. v. Connolly, 686 F.2d 1029, 1036 (1st Cir. 1982) (MITE cannot stand for general proposition that there is broad preemption principle under which state regulation of takeover bids would have to be invalidated); AMCA Int'l Corp. v. Krouse, 482 F. Supp. 929, 936-37 (S.D. Ohio 1979) (Williams Act did not intend to create affirmative regulatory neutrality between tender offeror and incumbent management). Cf. Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 29-30 (1977). In Piper, the Court noted that "Congress was indeed committed to a policy of neutrality in contests for control, but its policy of evenhandedness does not go . . . to the purpose of the legislation." Id. at 29. The shareholders of the target company are the intended beneficiaries of the Williams Act. Id. It is the protection of their interests to which a court must look and not to whether the legislation protects both contestants equally. Id.

The MITE plurality stated that Congress intended to embrace a policy of neutrality between the tender offeror and incumbent management and neither side "should be extended additional advantages vis-a-vis the investor . . ." See MITE, 457 U.S. at 633 (plurality opinion). See Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250, 261 (7th Cir.), prob. juris. noted, 107 S. Ct. 258 (1986); Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 565-66 (6th Cir. 1982); National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1126-33 (8th Cir. 1982).

7\(^a\) See supra note 77. As Justice Powell opined, "the Williams Act's neutrality policy does not necessarily imply a congressional intent to prohibit state legislation designed to assure - at least in some circumstances - greater protection to interests that include but often are broader than those of incumbent management." MITE, 457 U.S. at 646-47 (Powell, J., concurring).

7\(^b\) Id.
By burdening the tender offeror with additional disclosure obligations\(^8\) that may be difficult for him to comply with, the New York Disclosure Act may seem to favor incumbent management and yet further investor protection. The New York Disclosure Act may favor incumbent management in that failure to comply with the disclosure requirements can result in the suspension of a tender offer.\(^1\) It would protect the investor by giving him additional information on how the takeover will affect the community, particularly in terms of employment opportunities.\(^2\) Since state regulation of tender offers was neither expressly nor impliedly preempted by the Williams Act, there must exist some permissible boundaries within which Congress thought states may legislate. It is submitted that state legislation designed merely to provide additional information to the investor falls within this non-preempted zone.\(^3\) It necessarily follows that an investor with additional information, which he may or may not consider, is at least as well protected as an investor who is not furnished with that information.\(^4\)

\(^{8}\) See ch. 915, § 4-1609(a) 1-12, [1985] N.Y. Laws 2427 (McKinney); supra note 76 and accompanying text.

\(^{1}\) Ch. 915, § 4-1604(b), [1985] N.Y. Laws 2427 (McKinney). The N.Y. Attorney General is empowered to seek a temporary or permanent injunction against the tender offeror for failure to comply with the disclosure requirements. Id.

\(^{2}\) See supra note 77.

\(^{3}\) Cf. Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906, 909-12 (8th Cir. 1984) (Minnesota disclosure statute, with similar disclosure provisions as the New York Disclosure Act, not preempted by Williams Act).

\(^{4}\) Id. See also Edudata v. Scientific Computers, Inc., 599 F. Supp. 1084 (D. Minn. 1984) (disclosure of additional information conforms to congressional purpose of Williams Act to protect investor). But see Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1280 (5th Cir. 1978), rev'd on other grounds sub nom. Leroy v. Great W. United Corp., 443 U.S. 173 (1979). In Kidwell, the Fifth Circuit Court of Appeals determined that "[d]isclosure of a mass of irrelevant data can confuse the investor and obscure relevant disclosures." Id. The court noted that that would be inconsistent with the Williams Act's goal of investor protection. Id. Furthermore, the Kidwell court concluded that Congress had delegated to the SEC the task of specifying what information was material to an investor considering a tender offer. Id. at 1281. That judgment is a legislative one and a state effort to second-guess that judgment could not stand. Id. See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 175 (1963) (White, J., dissenting). Cf. T.S.C. Indus., Inc. v. Northway, Inc., 426 U.S. 438, 448 (1976) (excessive disclosure requirements pursuant to state proxy solicitation regulation "may accomplish more harm than good" by confusing shareholders). That result would conflict with the objectives of the Williams Act to permit an unfettered decision by an investor. See National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1131-32 (8th Cir. 1982).

It is the authors' contention that the statutes litigated in those earlier cases are distinguishable from the New York Disclosure Act. All of the statutes adjudicated as invalid had
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Moreover, when an investor is also an employee of the target, that investor may have a greater interest in the tender offeror's plans regarding future employment policies. Viewed in this light, disclosures pursuant to the New York Disclosure Act are in no way inconsistent with the purpose of the disclosure requirements under federal law, and serve to protect the unique interests of New York shareholders. Therefore, it is suggested that the extensive disclosure requirements of the New York Disclosure Act do not so conflict with the purpose of the Williams Act to warrant a finding of preemption.

provisions that the MITE plurality found to be preempted by the Williams Act so that, when coupled with additional disclosure requirements, the statute created such an overall burdensome package for the tender offeror that the overwhelming effect was to hurt the investor. See supra note 36 and accompanying text. The mere requirement of providing additional information, standing alone, is not so onerous a burden that it would necessarily discourage a tender offeror, nor aid incumbent management to any significant degree. Moreover, the courts that addressed the additional information provisions have used speculative terms when making statements concerning the effects of those provisions. Additional information "may" or "can" work to the investor's disadvantage. However, this is not necessarily so. See Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906, 914 (8th Cir. 1984).

See Edgar v. MITE Corp., 457 U.S. 624, 646 (1982) (Powell, J., concurring). As an illustration, Justice Powell pointed out that an employee investor may be asked to move if a takeover results in moving corporate headquarters to another locality. Id. It is often the case that an employee of a target company will also be an investor based on a profit-sharing plan. Cf. 19 Business Organizations, YOUNG, PENSION AND PROFIT SHARING PLANS § 502[3][b], at 5-17, -18 (discussing tax deductibility of corporate distribution of stock to employees pursuant to a profit-sharing plan).

See Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906, 914 (8th Cir. 1984).

Id.

See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973). The Supreme Court has stated that, if possible, the proper approach when considering preemption is to reconcile the operation of the federal and state statutory schemes. Id. A mere possibility of a state-federal conflict is not sufficient to justify preemption. See Agency Rent-A-Car v. Connolly, 868 F.2d 1029, 1038 (1st Cir. 1982). As the Court of Appeals for the First Circuit wrote: "[T]he Supreme Court cases of the last decade demonstrate a new solicitude toward state interests and an elevation of the threshold of conflict required before a state statute is preempted." Id. Furthermore, the First Circuit Court of Appeals noted:

[T]here is support on the Court for acceptance of what amounts virtually to a strong presumption against preemption, based on two factors: diffusion of power to the states is said to further democracy, and a finding of no preemption is regarded as preferable because Congress can overrule it by appropriate legislation, while a finding of preemption cannot be changed by the states.

Id.
B. Commerce Clause Analysis

1. Direct Regulation

In response to the Court's decision in *Edgar v. MITE Corp.*, New York amended provisions of the New York Disclosure Act to require compliance only where both the offerees and the target company are residents of the state.\(^8\) Furthermore, the New York Disclosure Act, as amended, now implies that any suspension of a tender offer would only apply to New York resident shareholders.\(^9\) Implicit in this framework is that the statute could not directly prevent a cash tender offer from proceeding elsewhere if the target company had no New York resident shareholders.\(^1\) It

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\(^{1}\) See ch. 915, § 4-1601(a), [1985] N.Y. Laws 2423 (McKinney). The statute defines an "offeree" as: "the beneficial owner, residing in this state, of securities which an offeror acquires or offers to acquire in connection with a takeover bid." *Id.* § 4-1601(c) (emphasis added).

The New York Disclosure Act defines a "target company" as "a corporation, organized under the laws of this state and having its principal executive offices or significant business operations located within this state." *Id.* § 4-1601(d).

Under the New York Disclosure Act, the definition of a tender offer is narrowly tailored to incorporate the two aforementioned definitions. A "takeover bid" is defined as:

the acquisition of or offer to acquire by an offeror from an offeree, pursuant to a tender offer or request or invitation for tenders, any equity security of a target company, if after acquisition thereof the offeror would, directly or indirectly, be a beneficial owner of more than five percent of any class of the issued and outstanding equity securities of such target company.

*Id.* § 4-1601(a).

\(^{2}\) See ch. 915, §4-1604(b), [1985] N.Y. Laws 2427 (McKinney). The statute provides that if the Attorney General feels an offeror is going to, or has violated the New York Disclosure Act's provisions, he can obtain an injunction temporarily or permanently barring that person from making or taking part in or continuing a takeover bid or from taking up or paying for shares tendered by offerees pursuant to a takeover bid, and the court may grant the relief applied for or so much thereof as it may deem proper. *Id.* (emphasis added).

"Offerees" only include New York resident shareholders, so the injunction would only affect the shares of New York residents. See *supra* note 89.

\(^{3}\) See *supra* notes 89-90. It is suggested that by way of the *MITE* plurality, the litmus test of whether a state's takeover statute imposes a direct burden on interstate commerce is in the statute's ability to suspend the tender offer as to out-of-state shareholders. *See Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality opinion). Such a focus by the *MITE* plurality leads the writers to believe that since the New York Disclosure Act provides that any suspension of a tender offer would only apply to New York resident shareholders, the statute avoids any direct regulation of interstate commerce. *But see Dynamics Corp. of Am. v. CTS Corp.*, 794 F.2d 250, 264 (7th Cir.), *prob. juris. noted*, 107 S. Ct. 258 (1986). In *Dynamics*, Judge Posner seemed to view any act of state regulation that impacts on the "interstate market in securities and corporate control" as one which should be precluded on the
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is submitted, therefore, that on these facts the New York Disclosure Act successfully avoids a direct regulation of interstate commerce.

2. Indirect Regulation

While not interfering directly with interstate commerce, it is suggested that the New York Disclosure Act is invalid as it indirectly imposes significant burdens on interstate transactions which far outweigh any local benefits that the statute may provide. While New York does have a legitimate interest in protecting New York resident shareholders, it is submitted that this interest does not outweigh the burdens which the statute imposes on interstate commerce. The extensive disclosure requirements mandated by the statute may have the general effect of discouraging tender offers. When tender offers are made more difficult, the market for corporate control can be crippled, and the allocation of cor-

basis that such an act is a direct and substantial regulation of interstate commerce. Id. It is the authors' contention that a statute's effect on the market for corporate control should be but one factor to weigh in an analysis of its indirect effect on interstate commerce.


Integral to an understanding of the market for corporate control is that in an efficient capital market, with information equally available to all, a stock's price quickly and accurately reflects its true value. See Fischel, supra note 93, at 1, 5. One component of a stock's price is the firm's incumbent management. See id. at 1, 5. The better the quality of incumbent management, the higher the stock's price. See id. at 2, 5. Conversely, a lower price will be reflected in a company's stock where poor management is in control. See id. at 5. The market for corporate control is the "efficient mechanism whereby control shifts from less capable managers to others who can manage corporate assets more profitably." Id. Cash tender offers are particularly well suited to accomplishing this shift. See id. at 7. For excel-
porate resources to their highest valued uses may be discouraged. Such effects impede the free market economy, and leave incumbent management with no incentive to perform well.

Furthermore, it is submitted that any possible short-term protection afforded to local investors is outweighed by the future harm forseeably caused by the statute. Long-term investment in New York companies would be discouraged by the increased cost and uncertainties of investing. Additionally, the statute's effect of promoting burdensome litigation, as well as increasing the investment of both time and money by the tender offeror, would discourage future bidders from attempting takeovers.


Cf. Telvest v. Bradshaw, 697 F.2d 576, 580 (4th Cir. 1983). In Telvest, expert testimony was offered to show Virginia's Take-Over Disclosure Act had a deleterious effect on the free market. Id. A special committee established by the SEC to examine the tender offer process also noted the detrimental effect of regulation of tender offers to the economy and investors. See Special Report, supra note 93, at 76. State statutes also discourage arbitrageurs, who play a key role in the implementation of takeovers by providing a market for stockholders to insure against the possibility that a tender offer may be unsuccessful. See SEC Rel. No. 34-16384, 1979-1980 Fed. Sec. L. Rep. (CCH) 82,373, at 82,583-84 (Nov. 29, 1979).

Cf. Telvest v. Bradshaw, 697 F.2d 576, 580 (4th Cir. 1983). Expert testimony was offered to show that Virginia's Take-Over Disclosure Act had a deleterious effect on the free market. Id. A special committee established by the SEC to examine the tender offer process also noted the detrimental effect of regulation of tender offers to the economy and investors. See Special Report, supra note 93, at 76. State statutes also discourage arbitrageurs, who play a key role in the implementation of takeovers by providing a market for stockholders to insure against the possibility that a tender offer may be unsuccessful. See SEC Rel. No. 34-16384, 1979-1980 Fed. Sec. L. Rep. (CCH) 82,373, at 82,583-84 (Nov. 29, 1979).

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A more significant burden imposed by the New York Disclosure Act is that the state can indirectly block the consummation of a tender offer.\(^\text{100}\) If an offeror has set out to obtain a pre-established percentage of a target company's outstanding shares, and the Attorney General of New York successfully moves for an injunction prohibiting the offeror from acquiring shares from New York residents, the offeror's attempt to acquire this pre-determined amount could be frustrated.\(^\text{101}\) In such an instance, shareholders who are residents of states other than New York would be prevented from selling their shares at a premium, and concurrently, offerors could be deterred from accepting tenders of stock from other nonresidents.\(^\text{102}\) Similarly, where an offer could proceed without any tender of shares by New York resident stockholders, these in-state residents would be deprived of the opportunity to sell their shares at a premium, an option available to nonresidents.\(^\text{103}\) One possible result of the statutory scheme would be price of the target stock. \textit{Id.}

\(^{100}\) See infra notes 101-104 and accompanying text.

\(^{101}\) See L.P. Acquisition Co. v. Tyson, 772 F.2d 201, 206-07 (6th Cir. 1985). The statute prevented shareholders domiciled in other states from tendering their shares where the stock of in-state residents was crucial to a successful completion of the tender offer. \textit{Id.} at 207. For example, assume tender offeror X sought 51% of all outstanding shares of target company Y. Y held 20% of its outstanding stock, New York residents held 40% of the stock and the remaining 40% was held by shareholders residing in other states. X could fail to obtain the 51% interest in Y due to the suspension of the tender offer in New York. \textit{Id. But see} Cardiff Acquisitions, Inc. v. Hatch, 597 F. Supp. 1493, 1497-98 (D. Minn.), aff'd in part, rev'd in part, 751 F.2d 906 (8th Cir. 1984) (acknowledging aforementioned burden statute imposes, but finding it outweighed by legitimate local interests statute protected).\(^{103}\) Cardiff can be distinguished on the basis that Minnesota's Corporate Take-Over Act mandated compliance only when 20% or more of the target company's shareholders were residents of the state, \textit{see id.} The New York Disclosure Act, however, contains no similar provision and an offeror would be required to comply with the statute's registration provisions even if just 50 shareholders of the target company resided in New York. Ch. 915, §4-1601(a)(3), [1985] N.Y. Laws 2423 (McKinney). It is submitted that this potential burden on interstate commerce is more than incidental.


\(^{103}\) See Edgar v. MITE Corp., 457 U.S. 624, 643 (1982); Telvest v. Bradshaw, 697 F.2d
that New York could effectively frustrate the transfer of millions of dollars across state boundaries.  

Closely related to the extraterritorial burden imposed by the New York Disclosure Act is the combined effect of all state disclosure statutes on cash tender offers. As more states adopt similar legislation, an offeror could eventually be required to file up to fifty different registration statements, each with its own disclosure requirements. The extent to which states could require disclosure of information specific to the particular state would be unduly burdensome. One can only imagine a New York resident leaving the state, while the offeror is enjoined, to establish residence in a state with less burdensome disclosure requirements in order to tender his shares at the premium offered. Moreover, there may be conflicting measures and/or requirements between two or more state takeover statutes that would effectively block an offer. If this were allowed, federal policy would be displaced


106 Since many states limit the application of their tender offer statutes to include only target companies incorporated within that state, an offeror could be required to file a number of registration statements, since companies often incorporate in more than one state. See Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1264 (5th Cir. 1978), rev'd on other grounds sub nom. Leroy v. Great W. United Corp., 443 U.S. 173 (1979). Moreover, some states do not even require that a target company be incorporated within the state before their statutes become operative. Rather, they require some lesser contact with the state. See, e.g., MINN. STAT. ANN. § 80B.01(9) (West Supp. 1985); S.C. CODE ANN. § 35-2-20(5) (Law. Co-op. Supp. 1985) (lesser contact includes principal place of business and substantial assets within the state or some minimum number of shareholders or percentage of shareholders who are residents of the state). Id.

107 See supra note 76.

108 See L.P. Acquisition Co. v. Tyson, 772 F.2d 201, 207 (6th Cir. 1985) (noting possibility of offeree changing residency in order to tender shares).

109 See Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1284-85 (5th Cir. 1978), rev'd on other grounds sub nom. Leroy v. Great W. United Corp., 443 U.S. 173 (1979). Several commentators have suggested that there may be contradictory requirements between dif-
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and become irrelevant.110

An additional interest which the New York Disclosure Act seeks to secure is promotion of the "long-term growth of New York resident domestic corporations."111 New York sought to assure this goal through provisions within the statute that would require the offeror to disclose numerous details on how consummation of the tender offer would affect New York residents.112 While not only being highly speculative,113 such disclosure requirements imply an unarticulated state interest in preventing corporations from moving assets and employment out of New York.114 When a state attempts to achieve this end by requiring the disclosure of information which discourages cash tender offers, the measure smacks of economic protectionism. Despite the expressed intent of a statute, courts will not hesitate in striking down, on Commerce Clause grounds, state statutes that promote economic balkanization.115

different state takeover statutes. See E. ARANOW, H. EINHORN & G. BERLESTEIN, supra note 50, at 228. The Kidwell court, however, was not entirely convinced that there were conflicting legal requirements between the statutes in question. See Kidwell, 577 F.2d at 1284. It should be noted that the Aranow, Einhorn & Berlestein work was written before the decision in Edgar v. MITE Corp., 457 U.S. 624 (1982), and does not reflect any repeals or amendments to state takeover laws that have since occurred.

110 Edgar v. MITE Corp., 457 U.S. 624, 642 (1982) (plurality opinion). In noting the potential of conflicting disclosure requirements, the MITE plurality stated "interstate commerce in securities transactions generated by tender offers would be thoroughly stifled." Id. See also Icahn v. Blunt, 612 F. Supp. 1400, 1415 (W.D. Mo. 1985). The Icahn court stated "[t]he interstate sale of securities on national and regional securities exchanges would be at the mercy of any state's parochial interests." Id.


112 Ch. 915, § 4-1603, [1985] N.Y. Laws 2424-27 (McKinney). For additional disclosure requirements, see supra note 77.


114 Cf. Dynamics, 794 F.2d at 264 (Commerce Clause does not allow states to prevent corporations from moving assets and employees to other states); Icahn, 612 F. Supp. at 1417-18 (protecting state's economic interest conflicts with neutrality policy of Williams Act).

One particularly burdensome provision of the New York Disclosure Act would require an offeror to disclose the "source and amount of funds," as well as "copies of all loan or credit agreements and letters of commitment" used by the offeror to obtain financing for the acquisition of the target company.\(^\text{116}\) This provision, while closely paralleling section 13(d)(1)(b) of the Securities Exchange Act of 1934,\(^\text{117}\) would also require the offeror to publicly disclose all loans obtained from banks. Under the Williams Act the offeror has the right to refuse to publicly disclose this information.\(^\text{118}\)

The effect of this provision of the New York Disclosure Act is significant. Lenders may hesitate to make credit available to an offeror for fear that suspension of the bid may reflect adversely on the character of the bank.\(^\text{119}\) Such a result is likely, especially where civil and criminal prosecution of the borrower is possible.\(^\text{120}\)

The New York Disclosure Act also purports to further New York's "interest in regulating the relationship among or between corporations organized in New York."\(^\text{121}\) It is submitted that this interest, essentially nothing more than the "internal affairs" doctrine,\(^\text{122}\) is insufficient to sustain the statute. While the statute only

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\(^{116}\) 403-06 (1948); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 (1928).

\(^{117}\) Ch. 915, § 4-1603(4), [1985] N.Y. Laws 2424 (McKinney).

\(^{118}\) See The Williams Act, supra note 18, at 15 U.S.C. § 78m(d)(1)(B). This section requires the disclosure of the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank as defined in section 3(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public.

\(^{119}\) See Langevoort, supra note 50, at 239.

\(^{120}\) See ch. 915, § 4-1605, [1985] N.Y. Laws 2427 (McKinney). A willful violation of a provision in the article is a class E felony, while a willful violation of a rule, order or regulation is a class A misdemeanor. Id. Civil fines for violations are $1,000 per violation for natural persons and $10,000 per violation for corporations. Id.

\(^{121}\) Memorandum of State Executive Department, reprinted in [1985] N.Y. Laws 3189 (McKinney).

\(^{122}\) See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 302 comment b (1971). The "in-
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applies to resident target companies, the very nature of a tender offer is to seek transfers of securities by shareholders to an offeror; they do not, as the Supreme Court has held, "implicate the internal affairs of the target company." It is suggested that any attempt to use the internal affairs doctrine to evade a Commerce Clause infirmity, especially where the burden on interstate transactions in corporate control and securities is substantial, would relegate the Commerce Clause to a mere paper tiger in the context of state regulation of tender offers.

Although the New York legislature attempted to draft around the Edgar v. MITE Corp. decision by limiting the application of the statute to only New York offerees and New York target companies, it is suggested that the statute fails to close significant gaps that pose troublesome questions. While the New York Disclosure Act avoids any direct burdens on interstate commerce, the indirect regulatory effects imposed present a severe onus not outweighed by the interests the statute purports to further.

CONCLUSION

The New York Disclosure Act has been drafted to avoid any preemption difficulties. The disclosure required by the statute serves the interest of investor protection, especially when the shareholder is also an employee of the target company. Because of this, the New York Disclosure Act and the Williams Act can

ternal affairs" doctrine protects against a corporation facing the conflicting obligations of more than one state by providing that only the state with the greatest interest in the subject matter and the litigants may regulate a corporation's internal affairs. \textit{Id.} 


\textsuperscript{134} United States v. Women's Sportswear Ass'n, 336 U.S. 460, 464 (1949). As Justice Jackson noted: "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." \textit{Id.} 

\textsuperscript{136} \textit{See supra} note 77.
peacefully coexist. However, the adverse effects of the New York Disclosure Act on interstate commerce cannot be denied. Several distinct and excessive burdens exist that threaten the market for corporate control. Under these circumstances, the prudent path suggests caution in state regulation. Federal legislation has implemented sufficient regulation to protect the investor. If a state desires further protection of employment opportunities and civic responsibility within its borders, this legislation should be much more narrowly drawn to effect only those purposes.

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