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THE UNITED STATES SECURITIES CREDIT REGULATIONS: HOW THEY AFFECT FOREIGN BORROWERS AND FOREIGN LENDERS IN ACQUISITIONS OF U.S. COMPANIES

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1. Introduction

In the United States, credit is extensively regulated by a complex set of rules that affect both domestic and foreign borrowers and lenders in the acquisition of exchange-listed and certain other actively traded, publicly-held equity securities of U.S. companies. Section 7 of the Securities Exchange Act of 1934 (Securities Exchange Act) [1] authorizes the Federal Reserve Board (FRB) to set limits on the amount of credit that may be extended in connection with securities transactions. Accordingly, the FRB has established requirements specifying the amount of collateral security, or "margin", that must be provided when the purchase of such publicly-held securities is financed. The rules currently provide that broker-dealers, banks, and other lenders may not extend or arrange credit for the purpose of purchasing or carrying such securities in excess of 50% of the market value of the publicly held securities (plus, in the case of banks and non-broker-dealer lenders, other collateral) used to secure such credits.

Recent amendments to the regulations (the 1982 FRB amendments) [2] will have a significant effect on foreign lenders and foreign borrowers comtemplating the acquisition of U.S. companies. If legislation passed by the House of Representatives and now pending in the Senate is enacted, there will be even greater regulation of foreign borrowers and lenders. This article analyzes the application of the credit regulations, as modified by the 1982 FRB amendments, to these entities, discusses the pending legislation and identifies the consequences of non-compliance.

1.1. Purpose of margin requirements

The FRB margin provisions are intended to serve several functions. The primary purpose is to protect the economy of the United States by preventing

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the excessive use of credit resources for securities speculation. In initially adopting the credit restrictions in 1934, Congress believed such speculation caused unreasonable expansion, followed by unreasonable contraction, of the volume of credit available for trade, transportation, and commerce. Secondary purposes of the margin regulations are preventing instability in securities markets and protecting small investors from becoming "sheared lambs" through dangerous speculation [3].

1.2. Applicability to acquisition financing

Both the FRB, which makes and interprets the margin regulations, and the Securities and Exchange Commission (SEC), which enforces them (primarily against broker-dealers), take the position that acquisition financing is subject to the margin regulations even if the securities will no longer be publicly held after the acquisition [4]. For purposes of this article, the term "acquisition financing" means any debt financing that is used to purchase or carry a substantial amount of publicly-held equity securities whether the purchase involves a tender offer, cash merger, or other acquisition technique.

2. Regulations T, U, and G

The lending and credit arranging activities of broker-dealers are governed by Regulation T; banks, by Regulation U; and other lenders (G-lenders), principally insurance companies, by Regulation G [5].

The basis of the regulations is a concern with "purpose credit" secured by "margin securities". Purpose credit, or a "purpose loan", is credit or a loan extended or arranged in order to purchase or carry margin securities for any purpose including acquisition financing. Margin securities are, essentially, securities listed on a national securities exchange or FRB approved stocks actively traded in the over-the-counter market [6].

Under Regulation T, broker-dealers are prohibited from extending purpose credit unless such credit is secured by margin securities and then only in amounts permitted by the regulation [7]. A broker-dealer is therefore prohibited from making unsecured (or under-secured) purpose loans and from making purpose loans secured by non-margin stock.

Under Regulation U and Regulation G, banks and G-lenders are subject to credit restrictions only if purpose credit is extended and secured by margin stock [8]. Unlike brokers, therefore, banks and G-lenders can make both unsecured purpose loans and purpose loans secured by non-margin stock.

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3. Regulation X

Regulation X [9] restricts borrowers who are U.S. persons or controlled by U.S. persons from obtaining credit within or outside the United States, except in compliance with Regulations T, U, or G.

In 1969–70, the SEC, among others, became concerned with the use of funds borrowed from foreign lenders for the purpose of taking over control of registered U.S. companies. Such use was the principal issue in *Metro-Goldwyn-Mayer, Inc. v. Transamerica Corp.* [10], which involved a foreign financed takeover attempt of MGM. In denying an injunction against the takeover, the court held that neither Regulation T nor Regulation G was applicable to foreign lending institutions. This decision heightened the concern with such borrowing and led to the addition of section 7(f) to the Securities Exchange Act in 1970 [11] and the adoption of Regulation X by the FRB. Section 7(f) and Regulation X deal with foreign-based acquisition financing by regulating the borrower rather than the lender. Section 7(f) forbids the use of credit, no matter where obtained, by a citizen or resident of the United States or one involved with such a person, for the purpose of (a) purchasing any United States securities or (b) purchasing any securities within the United States, if the transaction by which such credit was obtained would have been prohibited had it occurred within the United States.

Under Regulation X, if credit to purchase or carry securities is obtained abroad by a U.S. person from a foreign lender not subject to Regulations G, T, or U, then the borrower is required to conform with the credit limitations in Regulation G as though the lender were subject to that Regulation [12]. The indirect effect of Regulation X on a foreign lender is that any purpose loan extended in connection with acquisition financing to a U.S. person or a foreign person controlled by a U.S. person or acting on behalf of or in conjunction with such a person *and* secured by margin stock is subject to the Regulation G margin restrictions in effect at that time [13].

3.1. Indirectly secured credit

Even though a direct pledge of margin securities is not made to a lender, a purpose credit cannot be indirectly secured by margin securities in excess of the applicable credit limitations. The FRB defines the term "indirectly secured" to include any arrangement under which stock is more readily available as security to a lender than to other creditors [14], and any arrangement under which the borrower's right or ability to sell, pledge, or otherwise dispose of such stock is in any way restricted (so-called negative pledge covenants) [15]. Therefore, even though not directly pledged to a lender, stock can be indirectly securing a loan if by custody arrangements or loan covenants the lender could have preferential access to the stock.

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An excepton to the indirectly secured classification occurs when a lender in good faith has not relied upon the stock as collateral in making the loan. The Board has interpreted this good faith exception to be available when (i) a loan has fixed maturity dates rather than being payable on demand or in the event of market fluctuations, and (ii) the lender has examined financial statements of the borrower that can reasonably be interpreted to support the loan [16].

3.2. Persons covered

Regulation X regulates purpose credit extended to U.S. persons, including (i) foreign subsidiaries of U.S. parents and (ii) U.S. subsidiaries of foreign parents, even if made by a foreign lender.

Foreign subsidiaries of U.S. parents are covered since the phrase "a foreign person controlled by a U.S. person" is defined to include any corporation in which a U.S. person owns more than 50% of voting control or share value [17]. Moreover, when a U.S. subsidiary of a foreign borrower is organized for the purpose of effecting the acquisition (which is a common method used in such transactions), then the participation by the U.S. subsidiary in the acquisition would cause the foreign borrower of a purpose loan secured by margin securities to be deemed "acting on behalf of or in conjunction with a U.S. person" [18] and would cause the loan to be subject to the credit regulations.

Although not wholly free from doubt, it does not appear that foreign lenders making purpose loans to foreign borrowers are directly subject to Regulation G [19]. In the only case to consider the issue, it was held that Regulation G does not apply directly to foreign lenders [20]. Moreover, the argument for coverage is perhaps also undercut by the congressional perception that coverage of such transactions requires a further amendment to the Securities Exchange Act [21].

In a letter dated July 3, 1980 [22], the FRB staff expressed its opinion with respect to the applicability of Regulations G, U, and X to a tender offer for the stock of a U.S. corporation by a Canadian corporation that had several U.S. subsidiaries. The tender offer was to be financed by a Canadian bank that had branches and agencies in the United States and was to be collateralized by the target margin stock. All the activities relating to arranging and extending the credit, however, were to be done in Canada. The opinion stated that the margin regulations would not apply. It concluded that Regulation X would not apply unless the acquired corporation were to be merged into one of the U.S. subsidiaries of the Canadian corporation. Regulation U was considered inapplicable because all the activities connected with the credit would occur outside the United States (the sole exception being that the U.S. branch of the Canadian bank would act as a depository for the shares tendered). Regulation G was deemed inapplicable unless Regulation X applied to the borrower.

Regulation U applies only to a bank as defined in section 3(a) (6) of the

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Securities Exchange Act. That definition, by its terms, excludes foreign banks [23]. If a foreign bank maintains a branch or agency in the United States that is supervised by state or federal banking authorities, it would literally fall within the definition and, therefore, within Regulation U. The July 3, 1980, staff opinion [24], however, indicates that so long as the foreign bank's head office (or other non-U.S. branch of the foreign bank) extends the credit and conducts all activities connected with arranging the extension of the credit outside the United States, Regulation U would not be applicable. If the credit is extended in the United States or to a U.S. person, such as a U.S. subsidiary of a foreign borrower, it would appear, although there is no staff or Board interpretation directly on point, that Regulation U would be applicable to a foreign bank that maintains a U.S. branch or agency [25].

4. The 1982 FRB amendments

These amendments, which became effective on February 15 and March 31, 1982 [26], made four significant changes. None of the changes was specifically directed toward foreign borrowers or lenders, but all have impact on foreign persons.

4.1. Broker-dealers

Formerly, broker-dealers could arrange debt financing with other lenders only on terms and conditions that would be permissible under Regulation T if the broker were directly extending the loan even though the terms of the loan otherwise complied with either Regulation U or Regulation G. A purpose loan is "arranged" by a broker-dealer when it is initiated or negotiated by the broker-dealer or when the broker-dealer acts as intermediary between the borrower and the lender. This rule allowed a broker-dealer to arrange a credit only if the proceeds were not used to purchase publicly-held securities or if the credit fully complied with the Regulation T restrictions on broker-dealers.

Under the 1982 FRB amendments, a broker-dealer is able to arrange financing without imposing such restrictions even if the proceeds are used to purchase margin securities, so long as the arranged loan otherwise complies with the credit regulations [27]. This amendment is particularly important for the United States investment banking community which was formerly impeded in its ability to participate in arranging acquisition financing [28]. It has significance for foreign persons as well, since the principal reason a foreign transaction prior to the 1982 FRB amendments was likely to be subject to, or prohibited by, the margin restrictions was due to the involvement of a broker-dealer in the credit. Now, broker-dealers are expected to be actively involved in promoting foreign participation in acquisition financing.

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4.2. Banks

Formerly, Regulation G applied only to purpose loans secured by margin securities, whereas Regulation U applied to purpose loans secured by *any* stock. Regulation U was amended, among other things, to substitute the term "margin stock" where the term "stock" previously appeared throughout the Regulation, thus limiting the application of Regulation U to margin stock collateral only [29]. As a consequence, the principal difference that previously existed between banks and G-lenders has been removed. Moreover, the stock of subsidiaries and other non-margin stock of a borrower may now be pledged or restricted by negative pledge covenants in bank loan agreements for purpose credit without limitation under Regulation U.

4.3. G-lenders

Regulation G was amended to permit G-lenders to extend credit secured by assets other than margin securities concurrently with the extension of regulated purpose credit [30]. Previously, G-lenders were prohibited from extending regulated loans and non-purpose loans to the same borrower if the non-purpose loan was over $5,000 and both loans were secured (or deemed secured) by the same margin securities.

Equally significant, G-lenders are now treated comparably with banks in terms of being able to ascribe loan value to collateral other than margin securities [31]. As a general proposition both before and after these amendments, regulated loans by either banks or G-lenders cannot exceed the loan value of the collateral. For margin stock, loan value equals 50% of market value. Prior to the amendment, however, banks could value *both* margin stock collateral and non-margin stock collateral, whereas G-lenders could value only the margin securities. Consequently, the same loan to the same borrower, collateralized by both margin stock and non-margin stock, may have been lawful for the bank but unlawful for the G-lender. For example, a $1,000 loan from a bank secured by margin stock having a market value of $1,000 (and, therefore, a loan value of $500) and other assets valued in good faith at $500 was permissible under Regulation U and impermissible under Regulation G because the G-lender could ascribe no value to the other assets. Now such a loan would be permissible for both types of lenders.

4.4. Indirectly secured credit

Finally, the definition of indirectly secured was amended to quantify the amount of a borrower's assets that may comprise margin securities without triggering Regulation U and G restrictions on loans deemed indirectly secured by margin securities [32]. A negative pledge covenant will not result in

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indirectly securing a loan if, following application of the proceeds of the credit, not more than 25% of the value of the borrower's assets consists of margin stock.

The amendment also clarified the use of cross-default provisions in loan agreements. Cross-default provisions create a default under one loan agreement if an event of default has occurred under a different loan agreement. Previously it was unclear when a cross-default provision would result in a loan deemed to be indirectly secured by margin stock. The amendment expressly states that a cross-default provision will not cause a loan agreement to be deemed indirectly secured by margin securities even though another lender has made a loan to the same borrower secured by margin stock, so long as the lenders are unaffiliated [33].

The effect of all these amendments is to rationalize, in large part, the rules and to achieve parity in regulations among broker-dealers, banks, and G-lenders. To the extent foreign lenders remain indirectly subject to U.S. margin regulations through Regulation X, they are beneficiaries of these policies. Sensitivity to credit requirements continues to be required, however, and it will be of even greater significance in the event of the passage of pending legislation on uniform margin requirements.

5. Pending legislation – uniform margin requirements

Principally in reaction to several well-publicized tender offers for U.S. corporations in 1980 and 1981 [34], several bills were proposed in the Senate and the House of Representatives to regulate and restrict the ability of foreign borrowers to obtain margin credit. On October 13, 1981, H.R. 4145 was approved by the House of Representatives and is presently pending before the Senate Committee on Banking, Housing, and Urban Affairs [35]. The legislation as passed by the House of Representatives was intended to put non-United States persons on an equal credit footing with United States persons in transactions involving the acquisition of securities of United States companies and to specify a private right of action for violation of the margin requirements in certain circumstances.

Under the proposed legislation, section 7(f) of the Securities Exchange Act would be amended so that it is unlawful for "any person" (not just any U.S. person or a person controlled by or acting in conjunction with a U.S. person) to obtain purpose credit, even from a foreign lender, in excess of the credit restrictions applicable were the loan made completely in the United States. The foreign lender is not directly restricted by the proposed amendment, although to the extent it facilitates a violation by a borrower, the foreign lender would, of course, be subject to an allegation that it is an aider and abettor.

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5.1. Effect of non-compliance

Compliance with the securities credit regulations is significant to all lenders, including foreign lenders, since non-compliance could result in rendering a loan contract unenforceable. Section 29(b) of the Securities Exchange Act provides that each contract made in violation of the Act is voidable at the option of an innocent party to the loan [36]. Sophisticated corporate borrowers would have difficulty in establishing innocence in this context, but even the possibility of a loan being rescinded by the corporate borrower (or by a trustee in bankruptcy in the event of the insolvency of the borrowers) is disquieting.

Foreign lenders, *per se*, are not directly regulated by the margin regulations; but clearly they become indirectly implicated by virtue of Regulation X. A foreign lender that extends credit to a Regulation X borrower in excess of that permissible may well be deemed an aider and abettor of the Regulation X violator and may, therefore, be subject to an action by an innocent party under section 29(b). Indeed, in *United States v. Weisscredit Banca Commerciale e D'Investmenti* [37], the court, in denying a motion by a foreign bank to dismiss a criminal indictment, held that a foreign bank acting as an alleged broker-dealer may be found to be an aider and abettor in a margin violation by a U.S. broker-dealer, even though the foreign bank was not transacting business in securities in the United States and even though it had no "fair warning" from the U.S. government that the margin regulations extended to foreign banks. Exposure to such liability is not often fully appreciated by foreign lenders [38].

5.2. Private right of action

Generally, recent case law has not favored a private right of action under section 7 of the Securities Exchange Act. The legislative history of H.R. 4145 indicates that the House Committee recognized that previous holdings granting a private right of action under section 7 were being increasingly called into question and that the only rights of action clearly available involve violations of the tender offer provisions of the Securities Exchange Act [39].

A new subsection (g) to be added to section 7 of the Securities Exchange Act is proposed by the pending legislation. It would provide that the issuer of securities purchased in violation of the margin requirements and any other person who is injured or threatened with injury by reason of a violation thereof may bring a private action if the acquisition involves (a) 5% or more of any class of equity securities or (b) a tender offer for any class of equity securities that results in such person being directly or indirectly the beneficial owner of more than 5% of any class of equity securities. An action under this section would have to be brought within one year after discovery of the facts constituting the violation or three years after the occurrence of the last substantial element of the violation [40].

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The remedy provided by the new legislation would require, therefore, that greater attention be directed toward compliance with the margin credit regulations, since it would clearly create a private right of action. In the context of a contested tender offer, it would substantially increase the ability of the target company or a competing tender offeror to allege violations of the margin regulations by foreign borrowers and foreign lenders, and it would significantly expand their exposure to litigation in the United States. The Committee report, moreover, indicated that the right recognized in subsection (g) is not intended to impair any other implied right a party may have under the Securities Exchange Act.

6. Conclusion

The FRB is conducting a review of the margin regulations, and it is difficult to predict whether changes resulting from such review will lessen the attention that presently must be paid. Certainly if the proposed legislation discussed above is enacted, the credit rules will be of greater concern to foreign borrowers and lenders. It is unlikely, however, regardless of any revisions, that the restrictions will ever be completely eliminated in the context of acquisition financing [41].

It will continue to be imperative that a full analysis be made of the effects of the credit restrictions and whether the anticipated financing structure used in the acquisition is appropriate. Inadvertant mistakes in this area – where hostile challenges are likely and microscopic scrutiny is inevitable – can cause severe and perhaps irremediable consequences. Only a strict compliance program and carefully drafted loan documentation will be able to withstand allegations necessitating a full factual inquiry into the circumstances under which the financing of the acquisition occurred.

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Notes

[1] 15 U.S.C. §78g (1976). The Securities Exchange Act includes a variety of provisions governing the trading of publicly-held securities and regulating broker-dealers.

[2] 47 Fed. Reg. 2981 (1982).

[3] House Committee on Energy and Commerce, Uniform Margin Requirements, H.R. Rep. No. 258, 97th Cong., 1st Sess. 2 (1981).

[4] *See* 12 CFR §221.110; letters to the district court from the SEC and the FRB attached as Appendices G and H to the decision set forth in Pargas, Inc. v. Empire Gas Corp., 423 F. Supp. 199, 251–56 (D. Md.), *aff'd per curiam*, 546 F. 2d 25 (4th Cir. 1976). The FRB's expressed policy, as stated in its opinion dated November 29, 1979, *reprinted in* 35 Business Lawyer 570–71 (1980), is that the date the financing commitment is made (not the funding of the loan) determines the publicly-held status of the securities to be acquired. This policy may be changed, however, in light of the FRB's current reconsideration of the margin regulations.

[5] Regulation T – 12 CFR §220; Regulation U – 12 CFR §221; and Regulation G – 12 CFR § 207.

[6] The term "purpose credit" is defined at 12 CFR §221.3 (b), 12 CFR §207.1 (c), and 12 CFR §224.5 (j); and the term "margin securities" (or margin stock) is defined at 12 CFR §220.2 (f), 12 CFR §221.3 (v), 12 CFR §207.2 (d), and 12 CFR §224.5 (h). Margin securities also include debt securities convertible into or carrying a right to purchase a margin security, a warrant or right to subscribe to or purchase a margin security, and a security issued by an investment company unless at least 95% of its assets are invested in exempted securities. To "carry" a security is to refinance an existing purpose credit. 12 CFR §221.3 (b) (2).

[7] 12 CFR §220.3 (c); 12 CFR §220.8 (a).

[8] 12 CFR §221.1 (a); 12 CFR §207.1 (c). The 1982 FRB amendments, *see infra* text accompanying notes 26–33, place banks and G-lenders in parity in this regard by amending Regulation U to trigger its applicability only when purpose loans are secured by margin stock. Regulation U previously applied if such loans were secured by *any* stock.

[9] 12 CFR §224.

[10] 303 F. Supp. 1354 (S.D.N.Y. 1969).

[11] 15 U.S.C. §78g (f) (1976).

[12] 12 CFR § 224.2 (b) (iv). A foreign lender means any person, other than a United States person, who in the ordinary course of its business extends, maintains, or arranges purpose credit outside the United States. *Id.*

[13] The impact of this result has been ameliorated by the 1982 FRB amendments, which now permit G-lenders to ascribe loan value to collateral other than margin securities. *See infra* text accompanying note 31. Prior to the adoption of the 1982 FRB amendments, a similar but more restrictive result would have occurred had the loan been arranged by a broker-dealer. If a broker-dealer subject to Regulation T arranged a purpose loan from a foreign lender to a U.S. borrower, the credit transaction would have been required to comply with the more severe credit restrictions of Regulaton T applicable to direct broker-dealer loans. Under the present rules, however, only the restrictions of Regulation G are applicable in such circumstances, even to broker-dealer-arranged credits.

[14] 12 CFR §221.113 (e).

[15] The 1982 FRB amendments revised both Regulations U and G to limit restrictions on negative pledge covenants to margin stock, rather than any stock, and quantified the amount of a borrower's assets that may consist of margin securities. 12 CFR §221.3 (c); and 12 CFR §207.2 (i).

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[16] 12 CFR §221.117 (b). *See also* Alaska Interstate Company v. McMillian, 402 F. Supp. 532 (D. Del. 1975). The FRB has also suggested factors that would support a conclusion that a loan is indirectly secured by stock. *Cf.* 12 CFR §221.113 (g). *See infra* notes 32–33 and accompanying text for a discussion of the clarification of indirect security made by the 1982 FRB amendments.

[17] Securities Exchange Act §7 (f) (2) (C), 15 U.S.C. §78g (f) (2) (C) (1976).

[18] 12 CFR §224.5 (a). This term includes a direct beneficial interest by the borrower in the securities of an acquiring subsidiary or in the income or gains or losses of the acquiring subsidiary.

[19] The argument for coverage by Regulation G finds support in a line of cases rebutting the usual presumption against extraterritoriality when actions outside the United States have substantial impact on the U.S. securities markets. *See, e.g.,* Schoenbaum v. Firstbrook, 405 F. 2d 200, 206-08 (2d Cir. 1968).

[20] Metro-Goldwyn-Mayer, Inc. v. Transamerica Corporation, 303 F. Supp. 1354 (S.D.N.Y. 1969). It should be noted that this case was decided prior to the addition of section 7 (f) to the Securities Exchange Act.

[21] *See infra* text accompanying notes 34–35.

[22] Federal Reserve Board, Securities Credit Transactions Handbook, ¶5-984.

[23] Section 3 (a) (6) of the Securities Exchange Act, 15 U.S.C. §78c (a) (6) (1976), provides:

The term "bank" means (A) a banking institution organized under the laws of the United States, (B) a member bank of the Federal Reserve System, (C) *any other banking institution, whether incorporated or not, doing business under the laws of any State or of the United States*, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under section 11 (k) of the Federal Reserve Act, as amended, and which is supervised and examined by State or Federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of this title, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph. (Emphasis added.)

[24] *Supra* note 22.

[25] If the foreign bank does *not* maintain a U.S. branch or agency and the credit involves a U.S. person, the credit must comply with the provisions of Regulation G by reason of Regulation X. The bank in such circumstances would not fall within the definition of bank in section 3 (a) (6) of the Act. However, because of the 1982 FRB amendments discussed *infra*, this technical distinction is presently not substantive.

[26] 47 Fed. Reg. 2981 (1982). At this writing, additional amendments to Regulation T are under consideration, 47 Fed. Reg. 13,376 (1982). However, the authors do not believe such amendments will affect acquisition financing.

[27] 12 CFR §220.7 (a) (1982).

[28] This was particularly so in the context of leveraged buyouts, which were further inhibited by the FRB opinion of November 29, 1979, *supra* note 4. The result of that opinion was a major restructuring of certain of these transactions and the abandonment of others.

[29] 12 CFR §221.1 (a), (b), (c); 12 CFR §221.3 (a), (m), (p), (q), (r) (2), (s), (t) (4); 12 CFR §221.4 (a), (c) (1982).

[30] 12 CFR §207.1 (h) (1982).

[31] *Compare* 12 CFR §207.1 (i) (1982) *with* 12 CFR §221.3 (s) (1981).

[32] 12 CFR §207.2 (i) (1982); 12 CFR §221.3 (c) (1982).

[33] 12 CFR §221.3 (c) (2) (1982); 12 CFR §207.2 (i) (2) (1982).

[34] The tender offers that principally caused Congressional concern were offers for Zale Corp., Hobart Corporation, and Bache & Co. by Canadian firms. The Canadian acquisitions were particularly sensitive because of the Canadian government's policy under the Canadian Foreign

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Investment Review Act and The National Energy Program that restricted non-Canadian ownership in Canada. *See* H.R. Rep. No. 258, *supra* note 3, at 3–6.

[35] 127 Cong. Rec. H7210 (daily ed. Oct. 13, 1981), S11423 (daily ed. Oct. 14, 1981).

[36] Securities Exchange Act §29 (b), 15 U.S.C. 78cc (b) (1976), states:

Every contract made in violation of any provision of this title or of any rule or regulation thereunder, and every contract...the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title or any rule or regulation thereunder, shall be void....

[37] 325 F. Supp. 1384 (S.D.N.Y. 1971).

[38] Foreign appreciation of the reality of the application of the U.S. credit regulations and the concomitant exposure to lawsuits has been succinctly explained by one of the author's Swiss colleagues as follows:

A typical example of the difference in viewpoints is the non-U.S. opinion concerning the margin requirements. For European bankers, statutory rules which tell them how much credit they are allowed to advance against the pledge of securities constitute a severe infringement on their commercial liberties. They are convinced that they are in the best position to judge what is a reasonable percentage, and they do it at their own risk. Furthermore, the notion that someone can sue his banker because the banker gave him too much credit is considered to be absurd.

Widmer, *The U.S. Securities Laws – Banking Law of the World? (A Reply to Messrs. Loomis and Grant)*, 1 J. Comp. Corp. L. & Sec. Reg. 39, 40 (1978). Peter Widmer is a member of the Zurich bar and of Baker & McKenzie.

[39] Securities Exchange Act §14 (d), (e), 15 U.S.C. 78n (d), (e) (1976). *See* H.R. Rep. No. 258, *supra* note 3, at 9–10. In Pargas, Inc. v. Empire Gas Corp., 423 F. Supp. 199 (D. Md.) *aff'd per curiam*, 546 F. 2d 25 (4th Cir. 1976); however, the district court held that the target company could assert a private action against a broker-dealer for its violation of Regulation T in arranging the acquisition financing in that case. Although not required for its decision, the court also suggested that the target company would have standing to sue the acquiring company for its violation of section 7(f) of the Securities Exchange Act and Regulation X. *But see*, Merrill Lynch Pierce Fenner & Smith, Inc. v. Del Valle, 528 F. Supp. 147 (S.D. Fla. 1981), and the cases cited therein.

[40] H.R. Rep. No. 258, *supra* note 3, at 13.

[41] Even if the FRB were to change its position and hold that acquisition financing is not subject to the margin regulations when the acquired shares will no longer be publicly held, such change would not affect the first tender offer stage of the acquisition, which normally leaves a significant number of public shares to be acquired in a subsequent transaction. The popularity and prevalence of proration pools and multi-step acquisition techniques are discussed in L. Lederman and P. Vlahakis, *Pricing and Proration in Tender Offers*, 14 Rev. Sec. Reg. 813 (1981).

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