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IMPRUDENT POWER: RECONSIDERING U.S. REGULATION OF FOREIGN TENDER OFFERS

Jill E. Fisch*

I. INTRODUCTION

As the business world becomes increasingly global, capital markets have become international in scope.¹ The number of cross-border transactions, in which Americans invest overseas² and foreigners purchase stock in domestic corporations,³ has grown rapidly. With this development comes conflict, however, as cross-border transactions implicate the regulations and interests of more than one sovereign.

Traditionally the United States has viewed its jurisdiction expansively and imposed its regulations on transactions that may be viewed as essentially foreign.⁴ This approach has proven costly. The United States

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¹ For current statistical illustrations of the internationalization of the world's capital markets, as well as a summary of the factors responsible for hastening this development, see Manning G. Warren III, *Global Harmonization of Securities Laws: The Achievements of the European Communities*, 31 HARV. INT'L L.J. 185, 185-93 (1990). See also Stephen H. Axilrod, *What Globalization Means for Emerging Market Issues*, 20 FUTURES: THE MAGAZINE OF COMMODITIES & OPTIONS 14 (May 1991) (discussing market, political, and technological factors contributing to the globalization of securities and capital markets); Arthur R. Pinto, *The Internationalization of the Hostile Takeover Market: Its Implications for Choice-of-law in Corporate and Securities Law*, 16 BROOK. J. INT'L L. 55, 62-64 (1990) (describing benefits to American firms and investors resulting from internationalization of capital markets).

² For example, in 1990, U.S. investors purchased an estimated \$130.9 billion in foreign equities. International Tender and Exchange Offers, Exchange Act Release No. 34-29,275, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,803, at 81,743 (June 5, 1991) [hereinafter "Tender Offer Release"].

³ Estimates indicate that cross-border equity investments by Americans, British, Japanese, and West Germans alone reached a record \$92.3 billion in 1989 and that total cross-border stock trading might approach \$5 trillion by the year 2000. See, e.g., Robert B. Reich, *More Purposeful Debt Could Kick-Start the U.S.*, JAPAN ECON. J., Dec. 1, 1990, at 9; *Worldwide Securities Organization Agrees to Take Action to Promote Globalization of Securities Markets*, PR Newswire, Apr. 10, 1990, available in LEXIS, Nexis Library, PRNEWS File.

⁴ See DIETER LANGE & GARY BORN, INT'L CHAMBER OF COMMERCE, *THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS* 4-32 (1987) (listing industries in which internationalization has led to conflicting regulation by different countries and describing efforts by United States and other countries to apply their laws extraterritorially in these areas); Warren Pengilly, *Extraterrito-*

has offended the sovereignty of other countries which have reacted by passing retaliatory legislation of their own.⁵ More importantly, the application of U.S. law to essentially foreign business transactions increases the cost and uncertainty associated with these transactions and may ultimately hurt the American investors who are the intended beneficiaries of that law.

The harms of the traditional approach have been particularly evident in the regulation of international or cross-border tender offers. Courts have used expansive notions of jurisdiction to apply the federal securities laws to transactions with minimal U.S. contacts.⁶ The scholarly commentary has focused exclusively on the jurisdictional issue of whether the courts are exceeding their power and encroaching on the interests of other sovereigns.⁷ This literature has ignored the fact that the practice threatens American participation in foreign markets and, in order to escape U.S. regulation, foreign bidders have denied U.S. investors access to their offers, barring them from participation in economically beneficial transactions. The courts' application of U.S. law to foreign tender offers has actually injured U.S. investors rather than protected them. Furthermore, the courts' approach does not adequately address the foreign policy concerns implicated by this expansive application of U.S. law. Although the Securities & Exchange Commission ("SEC") has partially acknowledged the problems that arise when courts apply U.S. law to foreign tender offers, its approach does not prevent the courts from continuing to regulate foreign transactions based on their own concepts of foreign policy.⁸

This Article will reconsider the issue of U.S. power to regulate foreign tender offers. The Article will demonstrate a fundamental weakness in both the existing judicial tests and scholarly commentary: the domestic regulation of foreign tender offers should not be addressed as an issue of subject matter jurisdiction but of choice-of-law.⁹ By focusing on the

rial Effects of United States Commercial and Antitrust Litigation: A View from "Down Under", 16 VAND. J. TRANSNAT'L L. 833 (1983) (describing various attempts by United States at extraterritorial application of its commercial law and resulting hostile reactions by the international community).

⁵ See *infra* notes 254-57.

⁶ See *infra* Part III.B (discussing "effects test" and "conduct test").

⁷ For a sample of the scholarly commentary addressing the extraterritorial application of federal securities laws, see Neal T. Bueth & Thomas J. Coyne, *Securities Law—Subject Matter Jurisdiction in Transnational Securities Fraud Cases: The Expanding Application of the Conduct Test*, 59 NOTRE DAME L. REV. 471, 472 n.9 (1984) (citing commentary); Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677, 682-83 n.23 (1990) (same). See also Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1314-16 (1985); Gregory K. Matson, Note, *Restricting the Jurisdiction of American Courts over Transnational Securities Fraud*, 79 GEO. L.J. 141, 148-49 (1990).

⁸ See *infra* Part III.A (discussing SEC proposals).

⁹ See *infra* Part IV.A.

courts' power to apply U.S. law, courts and commentators have been diverted from considering the propriety of regulation. An analysis in terms of choice-of-law presents the issue primarily in terms of policy, not power.

The Article will then describe the policy inquiries that the courts, in their focus on subject matter jurisdiction, have failed to consider and will demonstrate why courts are ill-suited to perform such a policy-oriented analysis. Moreover, the Article will demonstrate that the courts have failed to achieve the investor protection goals at the heart of the federal securities laws. Accordingly, the Article will propose a legislative approach to the regulation of foreign tender offers.

It is the position of this Article that Congress should resolve the issue of extraterritorial application of the federal securities laws by statute and, with respect to foreign tender offers, reject the broad judicially developed tests for the application of U.S. law.¹⁰ Instead, the U.S. regulations should apply only to offers for U.S. securities as defined herein.¹¹ Offers for other securities should only be subject to a minimal level of regulation designed to advance the core value underlying tender offer regulation—disclosure to investors—without provoking foreign bidders to deny U.S. investors access to their offers.

II. THE REGULATION OF TENDER OFFERS - AN OVERVIEW

A. Regulation of Domestic Tender Offers

In the United States, tender offers are regulated by the Williams Act,¹² which amended the Securities Exchange Act of 1934 ("Exchange Act") in 1968, and the SEC rules thereunder. The primary purpose of the Williams Act is to protect of investors in connection with the tender offer process.¹³ Congress passed the Williams Act in response to a concern that an increasing amount of stock was being acquired through se-

¹⁰ One may also argue that, even if the judicial interpretations of congressional intent to authorize a broad application of the federal securities laws were accurate, they do not take cognizance of any limitation on congressional power to so authorize. There may be limits on the power of Congress to intrude to this degree on the interests of foreign sovereigns. See Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 J.L. & CONTEMP. PROBS. 11 (Summer 1987) (constitutional due process clause limits the power of Congress to legislate extraterritorially); Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992) (same).

¹¹ This Article defines U.S. securities to include three classes of securities: (1) those issued by a U.S. corporation; (2) those listed on a national securities exchange; and (3) those registered with the SEC under § 12(g) of the Securities Exchange Act of 1934. See *infra* note 272 and accompanying text.

¹² Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified at 15 U.S.C. § 78m(d)-(e), n(d)-(f) (1992)).

¹³ See 113 CONG. REC. 24,664 (1967) (remarks of Sen. Williams) ("S. 510 is designed solely to require full and fair disclosure for the benefit of investors.").

cret¹⁴ block purchases¹⁵ and large rapid acquisitions. Most of the statutory provisions deal with the disclosure¹⁶ required in connection with a tender offer.¹⁷ Congress viewed the disclosure provisions as plugging a loophole in the then-existing regulatory system which required disclosure in connection with other forms of change in control such as proxy contests.¹⁸ To the statutory provisions, the SEC has added an extensive body of regulation¹⁹ under its rulemaking authority.²⁰

Regulation of tender offers under the Williams Act and the SEC

¹⁴ See H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2812 (1968) (discussing need for legislation to combat secrecy).

¹⁵ The SEC has noted that the mere accumulation of a large block of stock by an investor may have significant consequences for other investors. The existence of block holdings may affect the speed and ease with which a potential tender offeror can acquire a beachhead position in the target company; it may also impact upon the likely success of a prospective tender offer. See Legislative Proposals on Tender Offers, 542 Sec. Rec. & L. Rep. (BNA) Spec. Supp. 15 (Feb. 27, 1980).

¹⁶ Section 14(d) (15 U.S.C. § 78n(d) (1992)), the primary operative provision regulating tender offers, requires a bidder to make extensive disclosure (which disclosure has been prescribed by the SEC in Schedule 14D-1), prior to initiating a tender offer. The bulk of the Senate Report accompanying the proposed legislation emphasized that the amendments were disclosure-oriented:

The failure to provide *adequate disclosure* to investors in connection with a cash takeover bid or other acquisitions which may cause a shift in control is in sharp contrast to the regulatory requirements applicable where one company offers to exchange its shares for those of another, or where a contest for control takes the form of a proxy fight.

S. REP. NO. 550, 90th Cong., 1st Sess. 2 (1967) (emphasis added). The Supreme Court has stated that the primary purpose of the Williams Act is to provide for disclosure of tender offer information to shareholders. See *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 26, 27 (1977) (quoting as stated purpose of bill: "A bill to provide for full disclosure of corporate equity ownership of securities under the Securities Exchange Act of 1934.") (quoting 1 ALAN BROMBERG, *SECURITIES LAW: FRAUD* § 6.3 (121), at 116.2 (1975)); cf. *Data Probe Acquisition Corp. v. Datatab, Inc.*, 568 F. Supp. 1538, 1545 (S.D.N.Y.) (discussing dual purposes of the Williams Act: disclosure to shareholders and prevention of impediments to the shareholders' exercise of free choice), *rev'd*, 772 F.2d 1 (2d Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984).

¹⁷ The Williams Act also (1) specifies periods during which tendering stockholders may withdraw their shares during an offer (15 U.S.C. § 78n(d)(5)(1992)); (2) requires purchases in an offer that is over-subscribed to be made on a pro rata basis (15 U.S.C. § 78n(d)(6)); and (3) requires the offeror to pay the same price for all shares purchased during the offer (15 U.S.C. § 78n(d)(7)).

¹⁸ "The cash tender offer is similar to a proxy contest, and the committee could find no reason to continue the present gap in the Federal securities laws which leaves the cash tender offer exempt from disclosure provisions." S. REP. NO. 550, *supra* note 16, at 3. See *Edgar v. MITE Corp.*, 457 U.S. 624, 632 (1982) ("The Williams Act, passed in 1968, was the congressional response to the increased use of cash tender offers in corporate acquisitions, a device that had 'removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities laws.'").

¹⁹ See, e.g., 17 C.F.R. § 240.14e-1(a) (1991) (requiring the offer to remain open for at least 20 business days); 17 C.F.R. § 240.14d-10 (1991) (requiring equal treatment of all shareholders); 17 C.F.R. § 240.14d-7 (1991) (expanding the withdrawal rights provided by statute); 17 C.F.R. § 240.10b-13 (1991) (prohibiting purchases of stock "alongside" a tender offer).

²⁰ Tender offer jurisprudence in the United States also consists of an extensive body of case law that attempts to define when a tender offer has been commenced, so as to trigger application of the Williams Act. The Second Circuit has described the typical tender offer as:

[A] bid by an individual or group to buy shares of a company—usually at a price above the current market price. Those accepting the offer are said to tender their stock for purchase. The

rules thereunder has three distinct aspects: procedural regulation of the tender offer, disclosure requirements, and a general antifraud provision.²¹ The procedural regulations include: the best-price rule which requires a bidder to pay all shareholders the best price paid to any one of them;²² the all-holders rule which requires that all stockholders be treated equally;²³ the requirement that a tender offer remain open for a statutory period and be extended if the terms of the offer are changed;²⁴ and the provision of withdrawal rights during the pendency of an offer.²⁵

The disclosure requirements compel the bidder to disclose certain information about its identity, its future intentions, and the terms of the offer to the shareholders of the target company²⁶ and the SEC.²⁷ Although the focus of the disclosure requirements is on the bidder, the requirements are not unilateral; the target company is also required to make certain disclosures in connection with its response to the tender offer.²⁸ The theory behind the disclosure requirements is that full disclosure would alleviate much of the evil, obviating the need for more extensive substantive antitakeover legislation.²⁹

Finally, section 14(e) of the Exchange Act³⁰ contains a general tender offer antifraud provision, similar to section 10(b)³¹ and Rule 10b-5 thereunder.³² Section 14(e) prohibits the use of all fraudulent, deceptive, and manipulative acts and practices in connection with a tender offer.³³ This provision, which requires deception in the form of a misrepresenta-

person making the offer obligates himself to purchase all or a specified portion of the tendered shares if certain specified conditions are met.

Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1206 (2d Cir. 1978) (quoting House Report). *See also* *E.H.I. of Florida, Inc. v. Insurance Co. of North America*, 652 F.2d 310, 315 (3d Cir. 1981) (The classic definition of a tender offer is "a public invitation to a corporation's shareholders to purchase their stock for a specified consideration.").

This Article will focus on the classic tender offer and will not address the potential application of U.S. law to transactions that do not involve a public offer to shareholders.

²¹ *See* *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 22-24 (1977) (describing disclosure, procedural protections, and antifraud provision of Williams Act).

²² *See* 15 U.S.C. § 78n(d)(7) (1992); 17 C.F.R. § 240.14d-10 (1991).

²³ The bidder's tender offer must be open to "all security holders of the class of securities subject to the tender offer." 17 C.F.R. § 240.14d-10(a)(1) (1991).

²⁴ *See* 17 C.F.R. § 240.14e-1(b) (1991); Interpretive Release Relating to Tender Offer Rules, Exchange Act Release No. 34-24296, 3 Fed. Sec. L. Rep. (CCH) ¶ 24,284J, at 17,776 (Apr. 3, 1987).

²⁵ *See* 15 U.S.C. § 78n(d)(5) (1992); 17 C.F.R. § 240.14d-7 (1991).

²⁶ The target company is the issuer of the securities that are the subject of the tender offer.

²⁷ *See generally* SEC Schedule 14D-1, 17 C.F.R. § 240.14d-100 (1991).

²⁸ *See* 17 C.F.R. § 240.14d-9 (1991); SEC Schedule 14D-9, 17 C.F.R. § 240.14d-101 (1991).

²⁹ *See* S. REP. NO. 550, *supra* note 16, at 3-4 (explaining how disclosure requirements address problems faced by target shareholders).

³⁰ 15 U.S.C. § 78n(e) (1992).

³¹ 15 U.S.C. § 78j(b) (1992).

³² 17 C.F.R. § 240.10b-5 (1992).

³³ Section 14(e) also gives the SEC explicit authority to "by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." 15 U.S.C. § 78n(e) (1991).

tion or omission,³⁴ applies to false statements by both the bidder and the target, statements contained in the tender offer documents themselves, and other statements made during the course of the tender offer. Litigants have used section 14(e) to challenge takeover attempts as well as target company defenses, although courts have, in many instances, limited private rights of action under section 14(e).³⁵ Courts have been virtually uniform, however, in granting the target of a tender offer standing to sue the bidder under the Williams Act.³⁶

B. Regulation of International Tender Offers

Whether the regulations of the Williams Act apply to a tender offer depends in part on whether the target company is registered under the Exchange Act. Section 14(e) and Regulation 14E apply to any tender offer or request or any invitation for tenders.³⁷ Section 14(d)(1) and Regulation 14D, which contain most of the SEC's procedural requirements as well as its disclosure provisions, are essentially limited, by their terms, to offers for a class of equity securities registered under section 12 of the Exchange Act.³⁸ Section 14(d)(1) applies to any offer made "by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise."³⁹ In an

³⁴ See *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 12 (1985) (finding § 14(e) aimed at misrepresentation or nondisclosure rather than substantive fairness of a transaction).

³⁵ See, e.g., *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977) (finding no private right of action for defeated tender offeror); *Panther v. Marshall Field & Co.*, 646 F.2d 271 (7th Cir.) (finding no § 14(e) claim for lost tender offer opportunity), *cert. denied*, 454 U.S. 1092 (1981).

³⁶ Almost every court to consider the issue has permitted an issuer to sue under the Williams Act, at least for injunctive relief. See, e.g., *City Capital Assocs., Ltd. v. Interco, Inc.*, 860 F.2d 60 (3d Cir. 1988) (allowing issuer to challenge bidder's disclosure); *Florida Commercial Banks v. Culverhouse*, 772 F.2d 1513, 1519 n.2 (11th Cir. 1985) (every circuit has held that the issuer has standing to sue for injunctive relief); *GAF Corp. v. Milstein*, 453 F.2d 709, 719 (2d Cir. 1971) (upholding issuer standing under § 13(d)), *cert. denied*, 406 U.S. 910 (1972); *American Carriers, Inc. v. Baytree Investors, Inc.*, 685 F. Supp. 800, 807 (D. Kan. 1988). The Supreme Court has assumed, without directly confronting the issue, that a private right of action was available to the issuer in *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 62 (1975). Cf. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 42 n.28 (1977) (reserving the question). *But see* *Polaroid Corp. v. Disney*, 862 F.2d 987, 1001-02 (3d Cir. 1988) (denying issuer standing under all-holders rule, SEC Rule 14d-10, 17 C.F.R. § 240.14d-10).

³⁷ The SEC has indicated its belief that § 14(e) is fully applicable to tender offers made by foreigners for foreign securities. See Alfred F. Conard, *Tender Offer Fraud: The Secret Meaning of Subsection 14(e)*, 40 BUS. LAW. 87, 95 n.30 (1984) (citing SEC Release No. 33-6159, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,374, at 82,604 n.15 (Nov. 29, 1979)).

³⁸ Section 12 requires registration of any class of equity securities listed on a national stock exchange or held by a substantial number of investors. Pursuant to its statutory authority, the SEC has exempted foreign issuers from the registration requirements of § 12 if they have fewer than 300 resident holders or if they meet the exemptive requirements of SEC Rule 12g3-2. See 17 C.F.R. § 240.12g3-2 (1992).

³⁹ 15 U.S.C. § 78n(d)(1) (1992). At least one commentator has suggested that Congress intended the jurisdictional restrictions present elsewhere in the Exchange Act to apply to § 14(e). See Conard, *supra* note 37. The SEC has indicated that, in its opinion, § 14(e) applies broadly. See

international tender offer,⁴⁰ an issue arises as to who is entitled to regulate that offer. The answer may depend on a number of factors: where the bidder and the target company are incorporated; where the securities of the bidder are listed and traded; whether the securities of the bidder are owned, in part, by nonresident investors; and where the offer is made. Generally, the country with primary interest in regulating a tender offer is the target's home country or the country under whose laws the target is incorporated.⁴¹ Many countries, including the United States, also regulate offers and transactions in foreign securities that occur within their borders.⁴² Accordingly, if the target has foreign investors, a bidder who makes a tender offer to those foreign investors may be subjecting itself to the tender offer regulations not merely of the target's home country but of the countries in which the foreign investors reside.

This creates several problems. One is the risk of conflicting tender offer procedural requirements. Tender offer regulation frequently specifies the timing of the offer, the class of offerees to which the offer must be made, the ability of the bidder to modify the offer, and the availability of withdrawal rights. For example, it is not possible for an offer to comply simultaneously with the procedural regulations of the United Kingdom and the United States.⁴³ Absent modification of the regulations by the appropriate authorities, it would be impossible to make a tender offer that is legal in both countries.⁴⁴

Countries also have different requirements for the substance of tender offer disclosure. For example, accounting principles are not a subject of universal accord; the financial principles by which a foreign corpo-

Tender Offers, Exchange Act Release No. 16,384, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,373, at 82,581 (Nov. 29, 1979). Former Commissioner Karmel expressed disagreement with this statement, indicating that the SEC rules adopted pursuant to § 14(e) should "be subject to clearly defined jurisdictional limits." *Id.* at 82,581 n.8.

⁴⁰ For purposes of this Article, an international tender offer is defined as an offer made in more than one country or in which the bidder, the target company, and the target company's investors are of at least two different nationalities.

⁴¹ See Tender Offer Release, *supra* note 2, at 81,746. It is clear, however, that in this age of internationalization of securities markets, states other than the home country have an interest in regulating the tender offer. The target company's stock may, for example, be listed on stock exchanges in other countries. Still other countries may have citizens who own target company securities. The bidder may send offering documents through the mails to those citizens. Additionally, the offer may have indirect effects on the economy of a foreign state. The target company may produce goods or services that it sells abroad, or it may have subsidiaries operating and employing workers in other countries. All these countries may be affected by a tender offer or merger involving the target company.

⁴² For example, Canada, France, and Japan all apply their tender offer regulations to bids for foreign companies if the foreign company has sufficient domestic ownership. See Tender Offer Release, *supra* note 2, at 81,746.

⁴³ See *infra* notes 64-79 and accompanying text.

⁴⁴ See Concept Release on Multinational Tender and Exchange Offers, Exchange Act Release No. 34-28093, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,606, at 80,873 (June 6, 1990) [hereinafter "Concept Release"].

ration maintains its books and records do not comply with U.S. disclosure requirements.⁴⁵ Similarly, many foreign countries place a very different weight on financial privacy concerns.⁴⁶ United States disclosure rules, which do not reflect the same concerns, may violate the principles or even the laws of such sovereigns. These issues are multiplied in the case of exchange offers, in which the bidder must be in compliance not merely with the tender offer disclosure requirements but with the rules governing a public offering of securities.⁴⁷

Finally, the regulation of a tender offer by more than one sovereign increases both the costs and uncertainties associated with the offer. It may result in delay of the offer, as the bidder must discover and meet the conditions imposed by different regulations. It also increases the number of jurisdictions in which the bidder may be sued for noncompliance with tender offer rules, for misrepresentations, or for substantive objections to the offer. Importantly, since different states have different policy objectives inherent in their tender offer regulations, a bidder's exposure to litigation is likely to multiply substantially if its offer is regulated by more than one state.⁴⁸

These problems are particularly true under U.S. regulation of a

⁴⁵ See, e.g., Linda C. Quinn, Remarks at American Institute of Certified Public Accountants' Nineteenth Annual National Conference on Current SEC Developments, in *Fed. Sec. L. Rep. (CCH) No. 1482*, at 13 (Jan. 15, 1992) (substantial differences in international accounting systems have impeded progress by the SEC and other countries towards common disclosure requirements); see also Letter from Shoichiro Toyoda, President, Toyota Motor Corporation, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Sept. 25, 1991) (on file with author) (under current disclosure laws, Toyota would have to keep two types of accounting records to meet requirements of U.S. and Japan).

⁴⁶ See, e.g., Bernard F. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, 14 *NEW ENG. L. REV.* 18, 22 (1978) (right to financial privacy is more firmly established in civil law jurisdictions than in the United States); Joel R. Reidenberg, *The Privacy Obstacle Course: Hurdling Barriers to Transnational Financial Services*, 150 *FORDHAM L. REVIEW* 137 (1992) (differing regulatory schemes with respect to privacy impede uniform regulation of computer data); Marc G. Corrado, Comment, *The Supreme Court's Impact on Swiss Banking Secrecy: Societe Nationale Industrielle Aerospatiale v. United States District Court*, 37 *AM. U. L. REV.* 827, 828 (1988) (discussing different policies with respect to financial privacy in the United States and abroad).

⁴⁷ These rules would presumably require that the new security offering be registered under the provisions of the Securities Act. See *S. REP. NO. 550*, *supra* note 16, at 3:

Where one company seeks control of another by means of a stock-for-stock exchange, the offer must be registered under the Securities Act of 1933. The shareholder gets a prospectus setting forth all material facts about the offer. He knows who the purchaser is, and what plans have been made for the company.

Id.

⁴⁸ At one point, the SEC, recognizing the substantial costs imposed by the system of tender offer regulation under the Williams Act, requested comment on a provision that would allow firms to opt-out of some or all of the tender offer regulations. See *Acquisitions of Substantial Amounts of Securities and Related Activities Undertaken During and Following a Tender Offer for Those Securities*, Exchange Act Release No. 34-24976, [1987 Transfer Binder] *Fed. Sec. L. Rep. (CCH)* ¶ 81,160, at 88,871-72 (Oct. 1, 1987); *Concept Release on Takeovers and Contests for Corporate Control*, Exchange Act Release No. 34-23486, [1986-1987 Transfer Binder] *Fed. Sec. L. Rep. (CCH)* ¶ 84,018, at 88,207 (July 31, 1986). The recognition by the SEC that, in some cases, deregulation could prove

tender offer. Because the United States has an extensive system of securities regulation, coupled with a generous policy of providing private rights of action to enforce that system,⁴⁹ litigation plays a major role in most battles for corporate control.⁵⁰ Furthermore, U.S. litigation tends to be more intrusive, more time-consuming, and more costly than litigation in other countries.

As a result, foreign bidders are loathe to engage in conduct⁵¹ that will require them to submit to and comply with U.S. law.⁵² American investors have nonetheless chosen to go abroad and purchase securities that are not offered and sold in the United States. Investors have also developed methods of purchasing foreign securities indirectly when the securities are not marketed in the United States.⁵³ Consequently, securi-

economically beneficial to firms lends credibility to the less-intrusive regulatory structures of other countries.

⁴⁹ See, e.g., Sachs, *supra* note 7, at 677 n.3.

⁵⁰ This is perhaps an understatement. The use of litigation as a defensive tactic in hostile contests for corporate control is becoming increasingly widespread. See Michael Rosenzweig, *Target Litigation*, 85 MICH. L. REV. 110 (1986) (analyzing the use of litigation by target management as a defensive response to a tender offer). As the court observed in *Norlin Corp. v. Rooney, Pace, Inc.*, 744 F.2d 255 (2d Cir. 1984), "Elaborate strategies and ingenious tactics have been developed both to facilitate takeover attempts and to defend against them. Skirmishes are fought in company boardrooms, in shareholders' meetings, and, with increasing regularity, in the courts." *Id.* at 258. Litigation is a potent defensive tool because of the delay and uncertainty it adds to a lawsuit. See Marc P. Chernoff & Sandra F. Coppola, *Use of Litigation as a Takeover Defense*, in 1 SECURITIES LITIGATION 245, 247 (ALI-ABA 1988); Jerold S. Solovoy et al., *The Role of Litigation in Control Contests*, in HOSTILE BATTLES FOR CORPORATE CONTROL 1988: THE NEW MARKET ENVIRONMENT 787 (PLI 1988) (discussing the strategic effect of litigation in delaying and possibly defeating a tender offer).

See also Memorandum of General Electric Company PLC at 2, *Plessey Co. PLC v. General Elec. Co. PLC*, 628 F. Supp. 477 (D. Del. 1986) (No. 85-761) (characterizing Plessey's litigation as a "transparent effort to delay or disrupt" General Electric's tender offer), cited in Gavin G. McCabe, Note, *The Extraterritorial Application of U.S. Securities Law in the Absence of Fraud Charges: Plessey v. GEC*, 18 LAW & POL'Y INT'L BUS. 649, 660 n.48 (1986).

⁵¹ This phenomenon is not limited to tender offers; many foreign issuers, for example, have avoided U.S. capital markets in order to escape the registration requirements of the Securities Act of 1933 as well as concomitant litigation.

⁵² See Roberta S. Karmel, *SEC Regulation of Multijurisdictional Offerings*, 16 BROOK. J. INT'L L. 3, 6 (1990). The SEC has promulgated a rule providing a safe-harbor exemption from the registration requirements of the 1933 Act for certain private placements of foreign securities to qualified U.S. investors. See SEC Rule 144A, 17 C.F.R. § 230.144A (1991). Rule 144A was intended to attract foreign issuers to the United States by making it easier to enter the private placement market, and the SEC has indicated that, since its enactment in April, 1990, the Rule has resulted in approximately four billion dollars of securities relating to foreign issuers being sold in the United States. See Staff Report on Rule 144A, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,918, at 82,411 (Jan. 29, 1992).

Rule 144A applies solely to the registration requirements of the 1933 Act and not to the antifraud provisions. See Preliminary Note 1, Rule 144A, 17 C.F.R. § 230.144A (1991).

⁵³ These methods include the use of trustees in the foreign country who hold the stock for a U.S. investor as beneficial owner, and the creation of American Depositary Receipts. An American Depositary Receipt ("ADR") is a security issued by a bank against the bank's holding of securities in a foreign company. The ADR provides one of the principal means by which U.S. residents can invest

ties of a foreign target company that are not traded on a national exchange or marketed within the United States may be partially held by U.S. investors.

Tender offer bidders have attempted to deal with the target's U.S. shareholders in several ways. One option is simply to make the offer directly to U.S. shareholders and to comply with the Williams Act. Even if there are no inconsistencies between the Williams Act and the law of the home country, however, an offer in the United States is costly, imposes significant burdens of disclosure, and creates the risk of litigation. Accordingly, the bidder may prefer to avoid making the tender offer in the United States. When the number of shares owned by U.S. holders is sufficiently small, making tender of the shares unnecessary to the success of the offer, a foreign bidder can frequently avoid the cost and difficulty of compliance with the U.S. regulations by making an offer that is not open to U.S. residents.⁵⁴ The SEC has observed that this exclusion of U.S. investors is the foreign bidders' method of choice in situations in which U.S. shareholdings are not necessary for the success of the offering.⁵⁵

In order to exclude U.S. shareholders, it is common for the bidder to

in securities that are not traded in the United States directly. *See* Securities Act Release No. 6894, Exchange Act Release No. 29,226, [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,740, at 81,586-87 (May 23, 1991). ADRs are traded in the United States in the same manner as domestic securities and may be listed on a national exchange or traded in the over-the-counter market. *Id.* at 81,590. The ADR purchaser typically acquires the right to the dividends paid by the foreign company, but the depository retains discretion as to the method of distribution and as to the provision of voting rights. *Id.* at 81,598.

Although ADRs are treated as securities for purposes of regulation under the federal securities laws, the creation of an ADR facility need not involve the issuer. ADR facilities are generally described as either "unsponsored" or "sponsored." Unsponsored facilities are developed by the depository in response to a perception of investor interest. A depository may establish an ADR facility without the participation or cooperation of the issuer of the deposited securities. *Id.* at 81,588. Alternatively, the ADR facility may be "sponsored," that is, established jointly by an issuer and a depository. In the case of a sponsored facility, the issuer usually bears some of the costs relating to the depository and agrees to provide certain information and notices to ADR holders. *Id.* Sponsorship in and of itself does not affect the reporting and registration requirements of the federal securities laws. *Id.*

⁵⁴ One of the more highly publicized examples of this was Sir James Goldsmith's bid for B.A.T. Industries in the fall of 1989, which bid was expressly designed to exclude U.S. shareholders. *See, e.g.,* Letter from SEC Chairman David S. Ruder to Congressman Harold Rogers (Sept. 6, 1989) [hereinafter "Ruder Letter"], *discussed in* 21 Sec. Reg. & L. Rep. (BNA) 1399 (Sept. 15, 1989); Laurie P. Cohen, *Goldsmith is Shunning U.S. Media, Seeking to Keep B.A.T. Bid From Snags*, WALL ST. J., July 18, 1989, at B6; Kurt Eichenwald, *U.S. Concern On B.A.T. Bid by Goldsmith*, N.Y. TIMES, Aug. 11, 1989, at D1.

⁵⁵ Tender Offer Release, *supra* note 2, at 81,743 (foreign offers "routinely have excluded shareholders resident in the United States where their holdings were not necessary for the success of the offering"); Concept Release, *supra* note 44, at 80,871 (foreign bidders have, in a number of cases, attempted to avoid jurisdiction and exclude U.S. investors from an offer where the number of U.S. investors is small, because of the costs, in both time and dollars, of compliance with an additional regulatory system).

take a number of precautions. The bidder does not mail offering documents into the United States, announce the offer in the U.S. press, or accept tenders made from the United States. The bidder hopes, in this way, to avoid application of U.S. law, on the theory that the law only applies to offers made in the United States.⁵⁶

If the bidder succeeds in excluding U.S. investors from the offer, such investors are barred, by the terms of the offer, from tendering their shares to the bidder directly. If they want to tender their shares, they bear the increased costs of arranging to have them tendered from outside the United States or selling them into the international arbitrage market.⁵⁷ Either procedure causes U.S. investors to incur substantial transaction costs. Furthermore, if the tender offer is an exchange offer, U.S. investors' inability to participate directly will preclude them from continuing to participate in the resulting company.⁵⁸

In addition, U.S. investors must make this decision in the absence of the traditional Williams Act disclosure and often without even the benefit of the disclosure provided by foreign law.⁵⁹ The mailing of offering documents into the United States might trigger application of U.S. law; accordingly, bidders who wish to avoid the application of this law do not communicate at all with U.S. residents.⁶⁰ Frequently, U.S. investors do not even receive information on the procedures for tendering that may be available, such as tendering from outside the United States.⁶¹

In some cases, complete exclusion of U.S. holders from the offer is not possible. The number of target shares owned by U.S. residents may be sufficiently large that success of the offer requires a tender by those shareholders. Additionally, the laws of the home country may require that the offer be communicated to all shareholders or that the offer provide equal treatment for both resident and foreign holders.⁶² In either case, the bidder must deal with U.S. law. Several recent bidders have

⁵⁶ In *Plessey Co. PLC v. General Elec. Co. PLC*, 628 F. Supp. 477 (D. Del. 1986), the District Court of Delaware held that such steps, taken by General Electric, were sufficient to avoid application of the U.S. securities laws. See *infra* notes 135-39 and accompanying text.

⁵⁷ See *infra* note 59 and accompanying text.

⁵⁸ The SEC has observed that U.S. shareholders excluded from a foreign tender offer have the option of selling into the market at substantial cost or retaining their minority shareholder status with the possibility of reduced liquidity and possibly being frozen out in a subsequent merger. See Tender Offer Release, *supra* note 2, at 81,744.

⁵⁹ According to the SEC:

U.S. investors not only can be deprived of the opportunity to realize significant value on their investments in foreign securities by tendering into a favorable offer, they also must decide whether to retain their securities or sell into the secondary market without the disclosure and procedural safeguards afforded by the regulatory scheme applicable in the U.S. or in the relevant foreign jurisdiction.

Concept Release, *supra* note 44, at 80,872.

⁶⁰ Even sophisticated investors who are able to gain access to the offering documents must incur additional costs in doing so.

⁶¹ See Concept Release, *supra* note 44, at 80,871.

⁶² *Cf. Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 262 (2d Cir.) (British

negotiated with the SEC to produce transaction structures that comply with both U.S. law and the law of the home country. Although this negotiation makes it possible for the offer to proceed, it is a costly and uncertain mechanism to use on a case-by-case basis. In addition, it essentially requires the bidder to submit to U.S. regulation.

Submission to U.S. regulation subjects the offer, among other things, to the uncertainty of interference through litigation under the Williams Act. A suit under the Williams Act, which might be initiated by the target or investors, may demand that the bidder comply with the procedural and disclosure provisions of the Williams Act or seek injunctive relief under section 14(e). Even if the bidder deliberately excludes U.S. shareholders, a court may find that the offer has a sufficient effect on the United States to justify imposition of U.S. laws.⁶³

III. CURRENT APPROACHES TO THE APPLICABILITY OF U.S. LAW

A. *The SEC Proposals*

Both the SEC and the courts have addressed the application of the U.S. securities laws to international securities transactions. Because it is difficult, if not impossible, to comply simultaneously with U.S. law and the requirements of many foreign countries, bidders frequently request that the SEC exempt them from some of the conflicting elements of U.S. law before making an offer. The SEC has received an increasing number of such requests, which it has traditionally handled through individually structured transactions. Based on these experiences, the SEC has developed two proposals for a uniform approach to U.S. regulation of foreign tender offers.

1. *Negotiated Transaction Structures.*—Two well-known examples of the individually structured approach are the *Ford-Jaguar*⁶⁴ and *Procordia-Volvo-Pharmacia*⁶⁵ transactions. In both instances, negotiation between the bidder and the SEC resulted in a deal structured as two separate tender offers, one of which was made in the United States and the other abroad. The U.S. tender offer was made in general compliance with the Williams Act; the foreign offer complied with the applicable foreign law which was, in both cases, the law of the target company's home country. The SEC permitted this dual structure and granted exemptions from certain procedural requirements of the Williams Act to

nominee banks that received tender offer documents were required by law to forward tender offer documents to shareholders in the United States), *cert. dismissed*, 492 U.S. 939 (1989).

⁶³ See *id.* at 261-62.

⁶⁴ In the Matter of Ford-Jaguar, Exchange Act Release No. 34-27,425, 1989 SEC LEXIS 2161 (Nov. 7, 1989) [hereinafter "Ford Release"].

⁶⁵ In the Matter of Procordia Aktiebolag and Aktiebolaget Volvo, Exchange Act Release No. 34-27671, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,514 (Feb. 2, 1990) [hereinafter "Procordia Release"].

allow the offer to proceed and to minimize the conflict with foreign law.⁶⁶

In *Ford-Jaguar*, Ford U.K. sought to acquire Jaguar, a company organized under the laws of the United Kingdom. Approximately twenty-five percent of Jaguar's stock was owned by Americans indirectly through ADRs,⁶⁷ and a small amount was owned by U.S. residents directly.⁶⁸ Due to conflicts between the Williams Act and the U.K. City Code on Tender Offers,⁶⁹ it was impossible for Ford to design a tender offer that would meet the procedural requirements of both statutes. In particular, although U.S. tender offer regulations require the bidder to provide withdrawal rights throughout the offering period,⁷⁰ the rules in the United Kingdom do not permit withdrawal rights during the initial twenty-one days of the offer.⁷¹ The U.K. provisions also require the offer to be extended for an additional fourteen day period after it has gone "unconditional as to acceptances."⁷²

Ford sought to resolve this conflict by structuring its transaction as two separate offers. Ford would make one offer to U.S. shareholders in which it would follow the procedures required by the Williams Act. U.S. shareholders would tender into this offer. Simultaneously, Ford would make a non-U.S. offer, on the same terms, to non-U.S. Jaguar shareholders.⁷³ The non-U.S. offer would comply with the U.K. City Code. The SEC agreed to this bifurcated structure. It granted Ford no-action relief

⁶⁶ The SEC is authorized by statute to exempt from the provisions of § 14(d) transactions that are "not comprehended within the purposes of this subsection." 15 U.S.C. § 78n(d)(8) (1992). In addition, the SEC has the power to modify the requirements of particular statutory provisions and rules under specific provisions such as § 14(d)(5), which authorizes the SEC to modify statutory withdrawal rights. See 15 U.S.C. § 78n(d)(5) (1992).

⁶⁷ The stock was on deposit at the Bank of New York, Jaguar's ADR facility.

⁶⁸ See Ford Release, *supra* note 64, at *2. Elizabeth Jacobs, *The Ford-Jaguar Deal: A New Model for U.S.-U.K. Takeovers*, INSIGHTS, Feb. 1990, at 3.

⁶⁹ Tender offers in the United Kingdom are regulated by the Panel on Takeovers and Mergers. The legal requirements for tender offers are set out in the City Code on Takeovers and Mergers. Although this Code does not have legal force, noncompliance can lead to sanctions by a U.K. self-regulatory agency. See Jacobs, *supra* note 68; *Internationalization of the Securities Markets*, Report of the SEC to the Senate Committee on Banking, Housing, and Urban Affairs, and the House Committee on Energy and Commerce, III-255-56 (July 27, 1987).

⁷⁰ See *supra* note 25.

⁷¹ PANEL ON TAKEOVERS AND MERGERS (GREAT BRITAIN), CITY CODE ON TAKEOVERS AND MERGERS AND THE RULES GOVERNING SUBSTANTIAL ACQUISITIONS OF SHARES Rule 34 (3d ed. 1990) [hereinafter "CITY CODE"]. Only if the offer has not gone "unconditional as to acceptances" after 42 days are withdrawal rights granted. *Id.*

For a detailed description of the City Code, see Lucian A. Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1693, app. A (1985); Deborah A. DeMott, *Current Issues in Tender Offer Regulation: Lessons from the British*, 58 N.Y.U. L. REV. 945 (1983).

⁷² CITY CODE, *supra* note 71, Rule 31.4. For an explanation of the difference between the City Code withdrawal rules and those of the Williams Act, see Tender Offer Release, *supra* note 2, at 81,761-62.

⁷³ See Ford Release, *supra* note 64, at *4.

from the all-holders provisions of Rule 14d-10⁷⁴ and from certain of the U.S. provisions governing withdrawal rights.⁷⁵

In *Procordia-Volvo-Pharmacia*, two Swedish companies, Procordia and Volvo, sought to acquire Pharmacia Aktiebolag, a Swedish company affiliated with Volvo.⁷⁶ Pharmacia was registered under Section 12 of the Exchange Act, as about eight percent of its equity was held by U.S. investors, either directly or indirectly through ADRs.⁷⁷ The bidders again sought to structure their bid so as to extend a separate offer to U.S. investors because provisions of Swedish law were inconsistent with the Williams Act.⁷⁸ The SEC agreed to the structure and granted the requested no-action relief.⁷⁹

Significantly, although the bidders in both cases claimed that their negotiation with the United States did not constitute a submission to U.S. jurisdiction or an agreement that U.S. law applied, neither sought a declaration from the SEC that the Williams Act was inapplicable.⁸⁰ Nor did the bidders attempt to evade U.S. jurisdiction by not making the offer in the United States. It appears that the number of U.S. investors was large enough to require the bidders to extend offers to U.S. holders.⁸¹ As a result, the bidders incurred the costs of making two separate offers, negotiating with the SEC, and subjecting themselves to the possibility of litigation under the antifraud provisions.

⁷⁴ This relief was necessary for Ford to structure its offer as two separate offers. *Id.* at *3. See also Tender Offer Release, *supra* note 2, at 81,762.

⁷⁵ See Ford Release, *supra* note 64, at *4; see also Concept Release, *supra* note 44, at 81,744.

⁷⁶ See *Procordia Release*, *supra* note 65.

⁷⁷ See *id.* at 80,584.

⁷⁸ Both Procordia and Volvo were subject to the tender offer regulations of the Recommendation Concerning Public Offers to Purchase Shares, a comprehensive set of procedural and disclosure requirements for tender offers modeled after the U.K. City Code. The Recommendation was promulgated by the Joint Committee of the Stockholm Chamber of Commerce and the Federation of Swedish Industries. Procordia and Volvo were subject to the Recommendation because of their listing on the Stockholm Stock Exchange. See *id.*

⁷⁹ See *id.* at 80,586.

⁸⁰ See *id.* at 80,585 (bidders request for relief); Ford Release, *supra* note 64, at *4. The bidders appeared to take the position that an offer which is made available to United States investors is presumably an offer made in the United States, for purposes of the Williams Act.

⁸¹ Approximately 25% of Jaguar's shares were beneficially owned by U.S. residents. See *supra* note 67. The Procordia offer was subject to the condition that Procordia acquire at least 90% of the shares of Pharmacia. The presence of a large number of U.S. shareholders in the target company may result in pressure both from the SEC and the target company to open the offer in the United States. This was likely the case in the recent tender offer by RMV Acquisition, Inc. for Vulcan Packaging, Inc. Although both the issuer and target were Canadian companies, U.S. investors represented half of Vulcan's shareholders and owned 28% of its stock. RMV Acquisition Inc. & Vulcan Packaging Inc., SEC No-Action Letter, [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,899, at 78,490 (Nov. 2, 1988). Although RMV's original offer was made only in Canada and did not comply with the Williams Act, RMV responded to pressure by SEC staff and Vulcan directors and extended a parallel offer to U.S. nationals. *Id.*; Michael D. Mann & Joseph G. Mari, *Development in International Securities Law Enforcement*, in CORP. L. & PRAC. COURSE HANDBOOK SERIES (PLI 1990), available in WESTLAW, SEC Library, at *39.

2. *The Exemption Proposals.*—The *Ford-Jaguar* and *Procordia-Volvo-Pharmacia* transactions indicated to potential bidders that the SEC was receptive to the negotiation process and would not insist on rigid compliance with U.S. law as a condition for permitting foreign-based tender offers to be made in the United States. Other corporations rapidly began to use these transactions as a model, and an increasing number of foreign bidders sought similar exemptive relief.⁸² Nevertheless, the burdens of compliance with U.S. law, even under the negotiated structure, were substantial.⁸³ Hence, the SEC's willingness to negotiate was not enough to cause bidders, who did not otherwise need to purchase the shares owned by U.S. investors, to open their offers to such investors.⁸⁴

The SEC observed that the exclusion of U.S. investors from a foreign offer was a matter of serious concern.⁸⁵ Exclusion meant that U.S. investors were not able to tender and to receive the tender offer premium. In addition, the efforts by foreign bidders to avoid triggering application of U.S. law reduced the information available to U.S. investors about the transaction.⁸⁶

In response to these concerns, the SEC developed two proposals. On June 6, 1990, the SEC issued a Concept Release on Multinational Tender and Exchange Offers.⁸⁷ The stated purpose of the Concept Release was to propose an approach under which foreign bidders would be encouraged to include U.S. investors in their tender offers, and to facilitate the making of such offers in cases where the number of U.S. investors was small.⁸⁸

⁸² See *Breeden Reassures Capitol Hill with SEC's Foreign Tender Offer Proposal*, SEC. WK., June 4, 1990, at 1, 1 (quoting Commissioner Mary Schapiro to the effect that the SEC proposal was influenced by an increasing number of corporate requests for no-action relief).

⁸³ See Concept Release, *supra* note 44, at 80,874.

⁸⁴ See Tom Doggett, *SEC's Breeden Seeks Comment on Exempting Foreign Takeovers from Tender Offer Regulations*, INVESTMENT DEALER'S DIGEST, MERGERS & ACQUISITIONS REP., May 7, 1990, at 1, 1 (citing remarks of Chairman Breeden before Institute on Acquisitions and Takeovers).

⁸⁵ The SEC also recognized a number of issues raised by multinational tender offers. First, the procedural requirements imposed by a foreign sovereign may be different or even directly in conflict with those of the Williams Act, making it difficult or impossible to design a single tender offer that will comply with both. Concept Release, *supra* note 44, at 80,874. Second, the disclosure requirements of U.S. law impose substantial burdens on a foreign bidder. In addition to the disclosure required in connection with the offer directly, U.S. rules require registration if the offer is an exchange offer, and the registration process requires, inter alia, reconciliation with U.S. accounting principles. *Id.* Finally, foreign bidders are particularly leery of involvement with the United States in the tender offer context because of the broad reach of domestic antifraud provisions, including both §§ 14(e) and 10(b). The willingness of U.S. courts to apply the antifraud provisions to overseas transactions, the broad nature of the provisions themselves and available remedies thereunder, and the expensive and burdensome nature of litigation in the United States all militate against U.S. involvement by the bidder.

⁸⁶ See *supra* notes 54-61 and accompanying text.

⁸⁷ Concept Release, *supra* note 44.

⁸⁸ *Id.* at 80,871.

The Release focused on several concepts. The first was disclosure. The Release questioned whether U.S. disclosure regulations should be imposed upon all foreign offers or whether, if the number of U.S. investors was limited, compliance with foreign disclosure requirements would provide sufficient protection.⁸⁹ The SEC recognized the need to balance two objectives in the protection of investors: (1) insuring that investors receive adequate information to make a decision; and (2) insuring that investors have the opportunity to decide.⁹⁰ Presumably the SEC realized that there is little value in requiring compliance with American disclosure rules if foreign bidders respond by closing their offers to U.S. citizens.⁹¹

In the case of international tender offers involving a substantial proportion of U.S. investors, the SEC proposed increased development of the multijurisdictional disclosure concept ("MJDS"),⁹² a concept which has recently been adopted for transactions involving U.S. and Canadian companies.⁹³ The SEC also sought comments on the feasibility of allowing tender offers in which the proportion of U.S. securityholders is small⁹⁴ to proceed entirely on the basis of the applicable home country's law.⁹⁵

The Release described the negotiation processes that had been employed in past tender offers (such as *Ford-Jaguar* and *Procordia-Volvo-Pharmacia*) to reconcile foreign and domestic procedural requirements.⁹⁶

⁸⁹ *Id.* at 80,875.

⁹⁰ *Id.*

⁹¹ The SEC was skeptical of the proposition that a bidder could avoid the application of the Williams Act by closing an offer to U.S. investors. *See id.* at 80,872 n.2 ("The tender offer provisions of the Williams Act are extraterritorial in scope Moreover, the application of the antifraud provisions . . . does not depend upon whether U.S. securityholders are included in an offer, or whether the tender offer is required to comply with Regulation 14D or 14E.").

⁹² *See id.* at 80,872.

⁹³ *See* Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers, Exchange Act Release Nos. 29,354, 29,355; International Series Rel. Nos. 291, 292, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶¶ 84,812-84,813 (June 21, 1991) [hereinafter "MJDS Releases"].

Under the MJDS system, disclosure is subject to a predetermined set of rules acceptable to the securities regulators in both countries. The MJDS system adopted for Canadian issuers permits offers for Canadian issuers to proceed under Canadian law so long as U.S. investors hold less than 40% of the securities that are the subject of the tender. The exemption from the provisions of the Williams Act only applies if the offer is open to all U.S. securityholders upon terms and conditions no less favorable than those offered elsewhere. *See id.* at 81,874. The system also provides exemption from the restrictions of Rules 10b-6 and 10b-13 for participants in a Canadian tender offer. *See id.* at 81,876; Tender Offer Release, *supra* note 2, at 81,759. The MJDS provisions explicitly provide that transactions under the system will still be subject to civil liability and the antifraud provisions of the U.S. securities laws, including § 14(e) of the Exchange Act. *See* MJDS Releases, *supra* note 93, at 81,880.

⁹⁴ The SEC sought public comment on what threshold of U.S. ownership should be applied. *See* Concept Release, *supra* note 44, at 80,875.

⁹⁵ *Id.*

⁹⁶ *See id.* at 80,873-74.

Typically these strategies involve the bidder structuring the offer as two distinct transactions: one in the foreign jurisdiction and one in the United States. Although the U.S. transaction is designed to comply with the U.S. procedural rules, the SEC has been willing to waive compliance with certain requirements under the Williams Act, such as the all-holders rule, so long as the offer, in the view of the SEC, provides the protections which are the focus of those requirements.⁹⁷

The Release explicitly declined to consider a broader safe-harbor provision that would protect foreign bidders from exposure to civil or criminal liability under the antifraud provisions of the Williams Act.⁹⁸ The SEC recognized that the continued risk of such liability might represent a deficiency in its approach and requested comment on whether the conceptual approach, as outlined in the Release, would encourage foreign bidders to forgo attempts to avoid jurisdiction or whether the possibility of antifraud liability would continue to provide a sufficient deterrent to foreign bidders.⁹⁹

The following year, the SEC elaborated on the Concept Release with a Tender Offer Release which contained proposed exemptive rules and registration procedures designed to facilitate the inclusion of U.S. investors in offers for a foreign target company's securities.¹⁰⁰ In the Tender Offer Release, issued on June 5, 1991, the SEC indicated that commentators had expressed overwhelming concern about the exclusion of U.S. investors from international tender offers and had "endorsed the view that U.S. investors would be better served by their inclusion in the offer, even where they have to rely on a foreign regulatory scheme."¹⁰¹

The Release acknowledged that exclusion of U.S. investors was frequently due to the costs of compliance with U.S. law. As the SEC explained: "When excluded from participation in a tender or exchange offer, U.S. holders are denied the opportunity to receive a significant premium for their shares or participate in what may be an attractive investment opportunity."¹⁰² The proposal was designed to encourage foreign bidders and issuers to extend their offers to U.S. investors.¹⁰³

The proposal would relax previous SEC positions regarding application of the disclosure and procedural requirements to foreign offers beyond the limits of the negotiated transactions. In cases involving a foreign tender offer¹⁰⁴ where U.S. securityholders own less than ten per-

⁹⁷ See *supra* section III.A.1.

⁹⁸ See Concept Release, *supra* note 44, at 80,876 (specific inquiry 8).

⁹⁹ *Id.*

¹⁰⁰ See Tender Offer Release, *supra* note 2, at 81,741-42.

¹⁰¹ *Id.* at 81,744.

¹⁰² *Id.* at 81,743.

¹⁰³ *Id.* at 81,746.

¹⁰⁴ A foreign offer was defined as an offer for a foreign issuer's securities irrespective of the nationality of the bidder. See *id.* at 81,747 (nationality of bidder would not determine application of rules).

cent of the class of securities subject to the offer, the SEC proposed to exempt the transaction from virtually all the procedural and disclosure requirements—including the filing and dissemination requirements, and the rules regarding proration, minimum offering period, and withdrawal rights¹⁰⁵—provided certain minimal requirements were met.¹⁰⁶

The Release also proposed exemption from Securities Act registration for certain exchange offers. In lieu of regulation under the Williams Act, the SEC would defer to the tender offer regulations of the foreign target's home jurisdiction.¹⁰⁷ In sum, the proposal sought to impose single jurisdictional regulation of multinational tender offers with the presumption that, if the target has less than ten percent U.S. securityholders, the appropriate jurisdiction to regulate the offer would be the home jurisdiction of the target company.¹⁰⁸

With respect to the antifraud provisions, the Release was explicit. The antifraud provisions of the Exchange Act would continue to apply to otherwise exempted transactions.¹⁰⁹ Although the SEC recognized the concern expressed by many commentators that application of the antifraud provisions alone was sufficient to inhibit bidders from opening their offers to U.S. holders,¹¹⁰ it was not moved by that concern.¹¹¹ The

¹⁰⁵ See Tender Offer Release, *supra* note 2, at 81,744 (summarizing exemption provisions).

¹⁰⁶ These requirements include the submission of an English language translation of the offering materials to the SEC in cases that would otherwise be subject to Regulation 14D or Rule 13e-4 (15 C.F.R. § 240.13e-4 (1992)), treatment of U.S. securityholders on terms at least as favorable as those offered other holders, and dissemination of the offer to U.S. holders on an equal basis as foreign holders.

¹⁰⁷ The SEC defined home jurisdiction "to mean the jurisdiction of incorporation, organization or chartering of the foreign target company." *Id.* at 81,746 (quoting Proposed Rule 802(a)(4) to be codified at 17 C.F.R. § 230.802(a)(4)). However, the SEC explained that one factor it would also consider in determining a target company's home jurisdiction is the location of the majority of securityholders. See *id.* at 81,746 n.42.

¹⁰⁸ Although the proposal provides that the nationality of the bidder would not determine the applicability of these rules, the SEC requested comment on the appropriateness of applying the exclusion to U.S. bidders. See *id.* at 81,747.

A significant aspect of the exemption provision in the Tender Offer Release was the SEC's suggestion that the percent of U.S. securityholders be calculated based on the securities held of record by U.S. holders. *Id.* at 81,747. Under the proposal, ADRs held by U.S. residents are treated as ordinary shares for purposes of the calculation. *Id.* at 81,747-48. In order to increase predictability of the application of U.S. law, the proposal would amend the reporting requirements for foreign issuers under the securities laws to require disclosure, on an annual basis, of the extent to which a foreign issuer's stock is held by U.S. holders. *Id.* at 81,748.

¹⁰⁹ *Id.* at 81,750.

¹¹⁰ See, e.g., Letter from American Bar Association Section of Business Law, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (September 20, 1990) [hereinafter "ABA Letter"] (on file with author) (stating that greatest obstacle to foreign bidders' use of SEC's conceptual approach will be application of antifraud provisions to foreign bids).

¹¹¹ The SEC stated that bidders who engage in fraud would likely be liable anyway, under the laws of the target's home country as well as the United States. Accordingly, the SEC concluded: "These provisions should not serve to inhibit an offeror from including U.S. securityholders in the tender offer." Tender Offer Release, *supra* note 2, at 81,750.

SEC reiterated its position that the federal antifraud provisions apply to foreign offers, even if the offer is not made in the United States, "given the foreseeable effect of the fraud in the United States."¹¹² The significance of this position is that the SEC will treat foreign offers as subject to U.S. law and subject to challenge in U.S. courts.¹¹³ The proposal therefore does not address the substantial risk that U.S. litigation will deter offers by foreign bidders.

B. *The Judicial Approach*

The SEC's position, which it has retained throughout its examination of the regulation of foreign tender offers, is that the U.S. securities laws presumptively apply wherever the offer is made so long as the offer is conducted in or has an effect in the United States.¹¹⁴ This position is supported by recent cases holding that the antifraud provisions of the federal securities laws are to be applied broadly to international transactions. The courts have concluded that they may apply U.S. law to foreign transactions that have an effect on the United States or U.S. investors and transactions in which there is domestic conduct.

1. *Judicial Tests for the Extraterritorial Application of the Securities Laws.*—The leading case on the application of U.S. law to a foreign tender offer is *Consolidated Gold Fields PLC v. Minorco, S.A.*¹¹⁵ *Gold Fields* involved a takeover attempt initiated in the United Kingdom by a Luxembourgian bidder, Minorco,¹¹⁶ who sought, through a tender offer, to gain control over a British target, Consolidated Gold Fields.¹¹⁷ Neither the stock of Minorco nor that of Gold Fields was traded on any U.S. stock exchange,¹¹⁸ although U.S. investors owned some Gold Fields

¹¹² *Id.* The Commission also indicated that § 13(d) would continue to apply to bidders who accumulated more than five percent of a class of equity securities registered with the SEC under § 12 of the Exchange Act. *Id.*

¹¹³ See *supra* note 35.

¹¹⁴ See Tender Offer Release, *supra* note 2, at 81,750; Brief of the SEC, Amicus Curiae, *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir. 1989) (noting that § 14(e) does not contain a jurisdictional means requirement); Jacobs, *supra* note 68; cf. Ruder Letter, *supra* note 54 ("While Section 14(e) of the Exchange Act, and rules promulgated thereunder, apply to all tender offers, whether or not the securities are registered under the Exchange Act, jurisdiction to enforce those provisions, as well as the antifraud provisions generally, would not be available where, as here, the shares are not registered and no other U.S. jurisdictional means appear to have been triggered.").

¹¹⁵ 871 F.2d 252 (2d Cir.), cert. dismissed, 492 U.S. 939 (1989).

¹¹⁶ Minorco was incorporated in Luxembourg and owned primarily by two South African companies. *Gold Fields*, 871 F.2d at 255. It had no employees or property in the United States and had never done business in the United States as of the time of the lawsuit. *Consolidated Gold Fields PLC v. Anglo American Corp.*, 698 F. Supp. 487, 494 (S.D.N.Y. 1988).

¹¹⁷ Gold Fields had a partially owned American subsidiary, Newmont Mining Corp., which also joined in the lawsuit. Gold Fields also had substantial holdings in the United States. *Gold Fields*, 871 F.2d at 255.

¹¹⁸ *Gold Fields*, 698 F. Supp. at 490.

stock directly and indirectly through ADRs.¹¹⁹

Minorco's tender offer was made in the United Kingdom and complied with all applicable U.K. laws.¹²⁰ Minorco sought to exclude U.S. stockholders from the tender offer; it did not mail the offering documents into the United States, and the offer stated that it was not being made in the United States, directly or indirectly.¹²¹ In addition, Minorco refused to discuss the offer with the American press, labeled its initial press release "Not for distribution in the USA" and refrained from any direct communication with U.S. shareholders or ADR holders.¹²²

Immediately after Minorco announced its tender offer, Gold Fields brought suit in the United States, claiming that the offer violated sections 10(b) and 14(e) because it failed to disclose that Minorco was controlled by South African interests.¹²³ Gold Fields sought a preliminary injunction preventing the offer from going forward.¹²⁴

The district court applied the Second Circuit tests for extraterritorial application of the federal securities laws¹²⁵ and dismissed the securities claims for lack of subject matter jurisdiction. Specifically, the district court found that jurisdiction could be predicated upon one of two theories. If Minorco had engaged in sufficient conduct in the United States which related to the alleged fraud, jurisdiction could be predicated on that conduct.¹²⁶ Alternatively, if Minorco's activities outside the United

¹¹⁹ Some 2.5% of Gold Fields' stock, representing approximately 5,300,000 shares, was held by U.S. investors. Of this stock, about 50,000 shares were held directly by U.S. residents, another 3.1 million shares were held through trustees in the United Kingdom, and the remaining 2.15 million shares were held through ADRs. *Gold Fields*, 871 F.2d at 255. The Gold Fields ADRs were traded in the U.S. over-the-counter market. *Gold Fields*, 698 F. Supp. at 490.

¹²⁰ William R. Covey, Comment, Consolidated Gold Fields PLC v. Minorco, S.A.: *The Extraterritorial Application of U.S. Securities Laws in International Equities Markets*, 14 *FORDHAM INT'L L.J.* 240, 256 n.84 (1990).

¹²¹ *Gold Fields*, 871 F.2d at 256.

¹²² *Gold Fields*, 698 F. Supp. at 495. Minorco did, however, make use of the services of U.S. lawyers, investment bankers, and a public relations firm in connection with the offer. *Id.* at 494-95.

¹²³ *Gold Fields*, 871 F.2d at 261-63. Gold Fields also claimed that the offer violated U.S. antitrust laws. *Id.* at 256-61.

¹²⁴ *Gold Fields*, 698 F. Supp. at 490.

¹²⁵ The tests used by the court, the "conduct test" and the "effects test," had been developed in litigation under § 10(b) and Rule 10b-5. See *infra* notes 126-27. *Gold Fields* involved claims under both § 10(b) and § 14(e). Although it is not clear that the plaintiffs had standing under § 10(b), neither the district court nor the Second Circuit addressed that issue or considered whether the tests previously used under § 10(b) were equally applicable to § 14(e).

¹²⁶ *Gold Fields*, 698 F. Supp. at 496. The conduct test was developed by the Second Circuit in *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972) and *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975). It focuses on the fraudulent activities engaged in by the defendants and premises jurisdiction upon the connection between those activities and the United States. In *Leasco*, plaintiffs alleged securities fraud in connection with their purchase of stock in a British corporation, Pergamon Press, Ltd., on the London Stock Exchange. *Leasco*, 468 F.2d at 1330-31. Pergamon stock was not registered or listed in the United States. See *id.* at 1335. *Leasco* stands for the proposition that, where the defendant has engaged in a sufficient degree of domestic conduct and where that conduct is related to the fraudu-

States had substantial effects in the United States, jurisdiction was proper under the effects test.¹²⁷

After reviewing the facts, the court found that although Minorco had engaged in conduct in the United States, that conduct was at most incidental to the alleged fraud: “Although Minorco’s contacts here suffice for personal jurisdiction, there are no allegations that fraudulent statements were made in the course of those contacts.”¹²⁸ The court therefore found no subject matter jurisdiction under the conduct test.

The court then considered the effects test. It concluded that only a small number of Americans held stock in Gold Fields and that Minorco had taken reasonable steps to prevent the offering documents from being sent into the United States. Accordingly, it held that “the mere fact that an insignificant number of Americans hold stock in the defrauded London company is not enough to support subject matter jurisdiction.”¹²⁹

The Second Circuit reversed, stating that the U.S. securities laws apply to acts committed abroad if those acts have a substantial and foreseeable effect in the United States. The court found that the tender offer

lent dealings, § 10(b) will apply to a transaction, even if the transaction is conducted abroad. *Id.* at 1336.

In *Bersch*, the court clarified the conduct test by explaining that the quantity of conduct required to trigger application of U.S. law depends on the victim’s relationship with the United States. *Bersch*, 519 F.2d at 992. Where the victim is a U.S. investor, the relationship between the domestic conduct and the fraud may be less. Where the victim is a foreign citizen, the U.S. conduct must have “directly caused” the loss. *Id.* at 992-93. Some courts have distinguished, in applying the conduct test, between conduct which is part of the fraud and conduct which is merely preparatory. *See, e.g.*, *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 35 (D.C. Cir. 1987) (jurisdiction under the conduct test requires domestic conduct that “directly causes” the losses and is more than “merely preparatory”); *see also* *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1018-19 (2d Cir. 1975) (remanding case for a determination of the “wickedness” of the conduct performed in the United States). *Cf.* *SEC v. Kasser*, 548 F.2d 109, 114 (3d Cir.) (jurisdiction proper “where at least some activity designed to further a fraudulent scheme occurs within this country”), *cert. denied*, 431 U.S. 938 (1977).

¹²⁷ *Gold Fields*, 698 F. Supp. at 496-97. The effects test, which was developed by the Second Circuit in *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir.), *rev’d on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969), allows the federal courts to exercise jurisdiction over foreign offers whenever a predominantly foreign transaction has substantial effects in the United States. In *Schoenbaum*, the court explained that the provisions of the Exchange Act should be applied extraterritorially “in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities.” 405 F.2d at 206. Accordingly, the court found such domestic effects where the securities at issue were traded on a national exchange and the challenged transaction adversely affected American investors. *Id.* at 208-09.

In *Bersch*, the court explained that the quality of the effect in the United States was important:

[T]here is subject matter jurisdiction of fraudulent acts relating to securities which are committed abroad only when these result in injury to purchasers or sellers of those securities in whom the United States has an interest, *not where acts simply have an adverse effect on the American economy or American investors generally.*

519 F.2d at 989 (emphasis added).

¹²⁸ *Gold Fields*, 698 F. Supp. at 496.

¹²⁹ *Id.* at 497.

would have "substantial effects" in the United States, based on the fact that British law required the ADR depository banks to forward the tender offer to Gold Fields shareholders¹³⁰ in the United States and 2.5% of the Gold Fields beneficial shareholders were U.S. residents.¹³¹ In addition, the court found the quantity of stock owned by U.S. residents to be significant.¹³² It concluded therefore that jurisdiction was proper.¹³³

The Second Circuit distinguished the only other reported case to consider the extraterritoriality of the Williams Act.¹³⁴ In *Plessey Co. PLC v. General Electric Co. PLC*,¹³⁵ the District of Delaware refused to exercise subject matter jurisdiction in a suit by Plessey, a British target company, seeking to force General Electric, another British company, to comply with the Williams Act in its offer for Plessey,¹³⁶ of which approx-

¹³⁰ *Gold Fields*, 871 F.2d at 261-62. Notably in the B.A.T. Industries offer, the terms of the offer precluded those who received the offering documents from sending the documents into the United States, regardless of their obligations under British law. Sending the offering documents by U.S. mail would render the offer invalid. See Jacobs, *supra* note 68.

¹³¹ *Gold Fields*, 871 F.2d at 262.

¹³² *Id.* ("American residents representing 2.5% of Gold Fields' shareholders owned 5.3 million shares with a market value of about \$120 million."). The Second Circuit did not distinguish, as the lower court had, between investors who held Gold Fields stock directly and those who held it indirectly through ADRs or nominee accounts. See 698 F. Supp. at 496 n.2 ("Plaintiffs' counsel conceded at oral argument that the number of Gold Fields shares *owned directly by U.S. residents* is insignificant.") (emphasis added).

The Second Circuit's finding that the U.S. shareholdings were significant was based on its prior decision in *Bersch*, in which it had upheld jurisdiction for a transaction involving sales of 42,936 shares to 22 American residents. 871 F.2d at 262. The statement in *Gold Fields*, that *Bersch* had predicated jurisdiction under the effects test on ownership by 22 U.S. residents, is erroneous. The court in *Bersch*, assumed that the defendants had mailed misleading prospectuses into the United States and concluded that this mailing was sufficient conduct to subject defendants to jurisdiction on the basis that it constituted conduct with a direct and foreseeable effect in the United States. See *Bersch*, 519 F.2d at 991 (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965)).

¹³³ *Gold Fields*, 871 F.2d at 262.

¹³⁴ In a recent unreported decision issued from the bench, *CDC Life Sciences, Inc. v. Institut Merieux S.A.*, No. 88 Civ. 2761 (S.D.N.Y. Apr. 26, 1988) (hearing transcript of decision denying preliminary injunction), the Southern District of New York refused to issue a preliminary injunction preventing a French corporation from making a tender offer for the stock of a Canadian company. *Mann & Mari*, *supra* note 81, at *37. CDC, the target of the tender offer, had common stock which was listed on the Toronto and Montreal stock exchanges and quoted through NASDAQ. *Id.* Approximately 15% of the stock was held by U.S. investors. Merieux publicly announced its offer in Canada and stated that it was open for acceptance on the floors of the Canadian exchanges. It did not comply with the procedural or disclosure requirements of the Williams Act. *Id.* at *38.

Although Judge Sprizzo recognized the possibility that U.S. investors might tender their stock in Canada and that the offer would thereby have an effect in the United States, he stated, "I am not persuaded as a matter of law that the American securities laws can have extraterritorial effect in Canada with respect to this foreign offer merely because shares are traded here and because an American shareholder is not foreclosed from tendering his shares." *Id.* (quoting hearing transcript of *CDC Life Services, Inc.*).

¹³⁵ 628 F. Supp. 477 (D. Del. 1986).

¹³⁶ Plessey claimed that General Electric made a tender offer in the United States when it announced its imminent U.K. offer. The announcement was reported in the American press including

imately 1.6% was owned indirectly by U.S. investors.¹³⁷

General Electric had taken steps similar to those taken by Minorco to exclude U.S. shareholders: it did not mail the offer into the United States or announce it in the U.S. press; it specified that the offer was not open to U.S. holders; and the offering documents indicated that shares could not be tendered from the United States.¹³⁸ The court found that General Electric had “steadfastly avoided American channels in its pursuit of a foreign target” and that the U.S. interest in applying the Williams Act was minimal.¹³⁹ It therefore refused to enjoin the offer to require compliance with the disclosure provisions of the Act.

The *Gold Fields* court distinguished this decision on the ground that the *Plessey* litigation was not based on allegations of fraud. The court held that “the antifraud provisions of American securities laws have broader extraterritorial reach than American filing requirements.”¹⁴⁰

2. *The Restatement (Third) Approach.*—The analysis by the Second Circuit in *Gold Fields* relied on a substantial body of case law addressing the extraterritorial application of section 10(b) and Rule 10b-5 and developing the conduct and effects tests. It also relied on the principles articulated by the American Law Institute in the *Restatement (Third) of Foreign Relations Law of the United States*.¹⁴¹

In 1986, the ALI revised the *Restatement of Foreign Relations*.¹⁴² It added to the general jurisdictional tests, which are similar to the conduct

the *New York Times* and the *Wall Street Journal*. *Plessey*, 628 F. Supp. at 480, 483. The offer was also sent to Plessey's ADR holders by the depository, Citibank, pursuant to a contractual agreement between Citibank, which was a sponsored ADR depository, and Plessey. *See id.* at 483.

¹³⁷ *Id.* at 488. Plessey shares were held by Citibank as depository and traded in the United States in the form of ADRs, which were registered with the SEC and traded on the New York Stock Exchange. Approximately 1.2 million ADRs were outstanding in the United States at the time of the offer. *Id.* at 479-83.

¹³⁸ *Id.* at 480-86.

¹³⁹ *Id.* at 495.

¹⁴⁰ *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 262 (2d Cir.) (citing *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 986 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975)), *cert. dismissed*, 492 U.S. 939 (1989).

¹⁴¹ The ALI has attempted to address the issue of federal securities jurisdiction in its various *Restatements of Foreign Relations Law of the United States*. Indeed, the conduct and effects tests utilized by the Second Circuit are analogous to the two legal tests for prescriptive jurisdiction under the *Restatement (Second) of Foreign Relations Law of the United States*. Section 17 of the *Restatement (Second)* states that principles of international law allow a state to assert jurisdiction over conduct occurring within its territory. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965). Section 18 allows a state to prescribe conduct occurring outside its territory if the conduct causes a substantial and foreseeable effect within the territory. *Id.* § 18. A number of opinions have used the principles of the Restatement to support their application of U.S. law to primarily foreign transactions. *See, e.g.*, *Bersch*, 519 F.2d at 985-89; *AVC Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148, 153 n.8 (2d Cir. 1984) (citing cases).

¹⁴² For a description of the revisions to the *Restatement*, see Karl M. Meessen, *Conflicts of Jurisdiction Under the New Restatement*, 50 J.L. & CONTEMP. PROBS. 47 (Summer 1987).

and effects tests, the requirement that the exercise of jurisdiction must be reasonable.¹⁴³ The “reasonableness requirement”¹⁴⁴ provides that, even where the exercise of jurisdiction is otherwise permissible, the courts should decline to “exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.” Section 403 of the *Restatement (Third)* sets out the factors to be considered in determining whether the exercise of jurisdiction is reasonable. The effect of the additional requirement is to shift the emphasis from a determination of whether jurisdiction is permissible to whether it is proper.

The *Restatement* factors direct the court to conduct something like an interest analysis in determining jurisdiction in cases of international law. Courts are instructed to “consider various interests, examine contacts and links, give effect to justified expectations, search for the ‘center of gravity’ of a given situation, and develop priorities.”¹⁴⁵ One reason proffered for this change is the fact that other nations object to a broad application of American law by our courts. Although a comprehensive analysis of the new reasonableness requirement is beyond the scope of this Article,¹⁴⁶ the focus on reasonableness begs the question of whether an interest analysis is either practical or appropriate in the international context.¹⁴⁷

IV. AN ANALYSIS OF THE CURRENT APPROACH TO REGULATION

The application of the federal securities laws to foreign transactions has been the subject of extensive commentary.¹⁴⁸ An analysis suggests two possible questions: (1) whether the decisions are a permissible exercise of judicial power; and (2) even if the courts have the power to apply domestic law to these transactions, whether the decisions are prudent. Scholarly commentary has focused on the first question. Similarly, courts have generally ended their inquiry with the first question, failing

¹⁴³ The “reasonableness” test was designed to encourage restraint in the application of domestic law. *See id.* at 54-60.

¹⁴⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1986).

¹⁴⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. IV, ch. 1, introductory note (1987).

¹⁴⁶ For a comprehensive evaluation of the reasonableness requirement, see David Michaels, Note, *Subject Matter Jurisdiction Over Transnational Securities Fraud: A Suggested Roadmap to the New Standard of Reasonableness*, 71 CORNELL L. REV. 919 (1986); Barbara S. Thomas, *Extraterritoriality in an Era of Internationalization of the Securities Markets: The Need to Revisit Domestic Policies*, 35 RUTGERS L. REV. 453, 460-66 (1983).

¹⁴⁷ This issue will be considered in more detail below. *See infra* section IV.B.4; *see also* Note, *Extraterritorial Application of United States Law: the Case of Export Controls*, 132 U. PA. L. REV. 355, 379 (1984) (reasonableness test is “too amorphous and capable of being manipulated”).

¹⁴⁸ *See supra* note 7.

to consider whether they *should* apply domestic law to the challenged transactions, even if they possess the power to do so.

This Article will consider both questions. First, it will analyze the reasoning in extraterritoriality decisions and conclude that courts are not getting the law right. The issue in these cases is whether U.S. law should be applied to a foreign tender offer. This is a choice-of-law question. By framing the issue in terms of subject matter jurisdiction and applying a “minimum contacts” analysis, courts are ignoring important factors.

The Article will go on to explore the relevant factors in a choice-of-law analysis. It will conclude that even if the courts were to analyze the issues properly, the result would be bad policy. First, the courts have misapprehended the effects of expansive U.S. regulation on both U.S. investors and foreign sovereigns. Second, the choice-of-law analysis in this area requires the courts to weigh competing foreign and domestic interests in a way that strains judicial competence.

A. *The Power of the United States to Regulate Foreign Tender Offers*

1. *The Judicial Approach—Subject Matter Jurisdiction.*—The starting point in an analysis of the existing law is whether the courts’ determination of power is proper. At the outset, this determination must be measured by the presumption against applying domestic statutes extraterritorially. A fundamental principle of statutory interpretation requires courts to apply an ambiguous statute only to domestic conduct. As the Supreme Court has stated on numerous occasions, “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”¹⁴⁹ The assumption is that Congress, absent any express provision to the contrary, is concerned primarily with domestic conduct.¹⁵⁰

The Exchange Act does not expressly direct courts to apply its provisions extraterritorially. Most courts and commentators have described the statute as silent on extraterritoriality.¹⁵¹ There are also indications that, at the time the federal securities laws were drafted, Congress was

¹⁴⁹ *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1230 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

¹⁵⁰ The Supreme Court has repeatedly explained that, when it so chooses, Congress knows how to give extraterritorial effect to one of its statutes. *See, e.g.*, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989). Accordingly, congressional silence is generally interpreted as a decision against extraterritoriality. *See Arabian Am. Oil*, 111 S. Ct. at 1230.

¹⁵¹ *See, e.g.*, *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 29-30 (D.C. Cir. 1987) (Exchange Act is virtually silent on extraterritoriality, and legislative history is even more “barren”); Matson, Note, *supra* note 7, at 148 (“Given the Exchange Act’s silence on the question of extraterritoriality . . . courts face a difficult dilemma.”); Sachs, *supra* note 7, at 687 (Case law rests upon propositions that Congress did not indicate whether the federal securities laws apply to foreign transactions and that this silence was unintentional).

primarily concerned with domestic markets.¹⁵² Part of the impetus for the federal securities laws was congressional concern with repairing the damage to the economy caused by the United States stock market crash in 1929. The drafters hoped to institute a system to regulate and protect domestic securities markets.¹⁵³ In particular, Congress focused on the advantages of national regulation of the securities markets, as opposed to the state-by-state regulation effected by the blue sky laws.¹⁵⁴ Through the regulation of the securities markets, Congress intended to protect and stabilize the domestic economy.¹⁵⁵

Accordingly, one can argue that the presumption against extraterritoriality, coupled with an absence of clear evidence that Congress intended the federal securities laws to apply to primarily foreign transactions, does not permit courts to apply American law in these cases.¹⁵⁶ The courts have responded that Congress could not have been expected, when the Exchange Act was drafted, to foresee the development of an international and largely interdependent market for securities.¹⁵⁷ Thus, according to the Second Circuit and many commentators, it is necessary for courts not simply to determine if jurisdiction is expressly authorized, but to consider whether Congress would have authorized such jurisdiction had it foreseen and considered the internationalization of the markets.¹⁵⁸ The courts have acknowledged that their interpretation is based on a wholly hypothetical legislative intent. Is the process therefore illegitimate? As Judge Bork observed in

¹⁵² See, e.g., *Des Brisay v. Goldfield Corp.*, 549 F.2d 133, 135 (9th Cir. 1977) (Congress intended to "protect the integrity of domestic securities markets in a particular stock.").

¹⁵³ *But see SEC v. Kasser*, 548 F.2d 109, 114 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977) ("The securities acts expressly apply to 'foreign commerce,' thereby evincing a Congressional intent for a broad jurisdictional scope for the 1933 and 1934 Acts.").

¹⁵⁴ See 15 U.S.C. § 78b (1990).

¹⁵⁵ Professor Sachs argues that the prevailing reasoning which attributes to Congress a domestic focus in the enactment of the federal securities laws is inaccurate. See Sachs, *supra* note 7. Professor Sachs cites numerous places in the legislative history where Congress was both aware of and concerned about the increasing amount of trading by American investors in foreign securities. See *id.* at 684-708.

¹⁵⁶ Congressional intent with respect to the extraterritorial application of § 14(e) is equally unclear. See generally Conard, *supra* note 37. Professor Conard observes that the legislative history of § 14(e) supports two radically opposed hypotheses: (1) that Congress intended the section to have the same applicability as other provisions in the statute; and (2) that Congress intended the section to apply to virtually all tender offers everywhere.

¹⁵⁷ See, e.g., *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30 (D.C. Cir. 1987) ("Fifty years ago, Congress did not consider how far American courts should have jurisdiction to decide cases involving predominantly foreign securities transactions with some link to the United States."); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975) (The Congress that passed the federal securities laws "in the midst of the depression could hardly have been expected to foresee the development of offshore funds thirty years later.").

¹⁵⁸ Faced with a lack of evidence as to congressional intent but a concern that the general congressional purpose of protecting domestic investors and markets be effected, the courts, led by the Second Circuit, have decided to assert jurisdiction under § 10(b) based on their "best judgment as to what Congress would have wished if these problems had occurred to it." *Bersch*, 519 F.2d at 993.

Zoelsch, "It is somewhat odd to say, as *Bersch* and some other opinions do, that courts must determine their jurisdiction by divining what 'Congress would have wished' if it had addressed the problem."¹⁵⁹ Even if judges believe that Congress would have crafted the statute to apply to international securities transactions, they lack the power, through a display of judicial activism, to edit the statute from chambers.

But it is not clear that this is an accurate description of the decisions on extraterritoriality. The decisions and resulting commentary appear to skip a crucial step: consideration of whether application of U.S. law to the transactions at issue is really extraterritorial application of the law. This raises a more fundamental issue: what do we mean by extraterritoriality? Is it an extraterritorial (and perhaps objectionable) application of U.S. law to apply the federal securities laws to transactions such as those in *Bersch*¹⁶⁰ and *Leasco*¹⁶¹? Are the courts applying U.S. law to something other than a domestic securities transaction?

It is helpful to recognize that a decision by the court to apply the federal securities laws to a transaction with foreign elements implicitly involves two issues. First, the court must find that the transaction has sufficient minimum contacts with the United States to justify the exercise of adjudicative jurisdiction by a U.S. court.¹⁶² Second, having assumed control of the case, the court must decide to apply U.S. law. This second decision involves the application of choice-of-law rules. An analytical difficulty arises because federal courts are courts of limited jurisdiction. In these cases, jurisdiction is based on the existence of a federal question, the application of the federal securities laws. Therefore, if the court is to retain jurisdiction, it must do so on the basis that it is applying federal law to the transaction.¹⁶³ Thus a finding of subject matter jurisdiction is premised on two different thresholds: minimum contacts sufficient to render exercise of jurisdiction proper; and a sufficient basis for application of U.S. law.

The courts in cases like *Leasco* and *Bersch* deal with the first threshold explicitly.¹⁶⁴ They fail to acknowledge, however, that their exercise

¹⁵⁹ *Zoelsch*, 824 F.2d at 32.

¹⁶⁰ In *Bersch*, stock was sold by a Canadian corporation in an international public offering to citizens of many countries, including some Americans. The stock was not listed, registered or directly marketed in the United States. 519 F.2d at 978-80, 983-85.

¹⁶¹ *Leasco* involved the purchase, by U.S. citizens, of stock in a British corporation. The purchase was made through British brokers on the London Stock Exchange. The stock was not registered in the United States and not traded on U.S. exchanges. 468 F.2d at 1330, 1332.

¹⁶² The court must also conclude that each party has sufficient ties with the United States to permit the imposition of personal jurisdiction.

¹⁶³ See *Brilmayer*, *supra* note 10, at 13. When the federal court's jurisdiction is premised upon the application of the federal securities laws, a finding by the court that those laws do not apply will destroy the federal question basis for subject matter jurisdiction and, in the absence of a pending federal question, the federal court must dismiss the case.

¹⁶⁴ See *Bersch*, 519 F.2d at 985 (activities in U.S. sufficient to authorize jurisdiction); *Leasco*, 468 F.2d at 1334-35 (conduct within U.S. sufficient from standpoint of jurisdiction).

of jurisdiction involves a choice-of-law question. Unlike many areas involving conflicts of law or the potential application of the laws of more than one sovereign, courts in federal securities cases do not consciously employ a choice-of-law analysis.

In reality, these cases are not about whether the transactions have sufficient minimum contacts with the United States to *permit* the application of U.S. law. Although the courts claim to be applying U.S. law to foreign transactions, which is presumably what we mean by extraterritoriality, the unarticulated choice-of-law analysis locates the U.S. elements and interests in the transaction, thereby recharacterizing the transaction as international rather than foreign.¹⁶⁵ Once this transformation has occurred, the application of U.S. law is no more extraterritorial than the application of Minnesota law to a Wisconsin automobile accident.¹⁶⁶ Moreover, an examination of the courts' reasoning demonstrates that these cases do not involve the application of U.S. law to foreign securities fraud, but rather a judicial determination that the fraud to which U.S. law is being applied is located in the United States.¹⁶⁷

Accordingly, the cases do not implicate the courts' *power* under principles of subject matter jurisdiction at all. Application of U.S. law to a transaction that may be characterized as domestic is not an extraterritorial application of the law, and does not encroach upon the congressional prerogative to determine the scope of such application. The courts clearly have the power to apply U.S. law and if their analysis complies with the limitations on a forum court's authority to apply forum law, they should do so.

2. *Recasting the Judicial Approach as Choice-of-Law.*—An examination of the Second Circuit "extraterritoriality" cases demonstrates that the court's analysis is nearly identical to the traditional territorial approach to choice-of-law. The territorial approach viewed application of a sovereign's law as constrained by the territorial limits of the sovereign. A court could therefore apply a state's law to transactions occurring

¹⁶⁵ The Second Circuit performed this analysis explicitly in *Alfadda v. Fenn*, 935 F.2d 475 (2d Cir.), *cert. denied*, 112 S. Ct. 638 (1991), a recent case involving the extraterritorial application of the Racketeer Influenced and Corrupt Organizations Act, 15 U.S.C. § 1962(a)-(d) (1988) ("RICO"). Although the court claimed that its analysis of legislative history justified the extraterritorial application of RICO, it concluded that subject matter jurisdiction was proper on the basis that the allegedly fraudulent securities sales were "predicate acts which occurred primarily in the United States, and hence, serve as a basis of subject matter jurisdiction for the RICO claims." *Alfadda*, 935 F.2d at 480. Thus, the court was essentially locating the transactions, for purposes of RICO, in the United States.

¹⁶⁶ See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

¹⁶⁷ Indeed, the *Leasco* court came close to acknowledging this rationale for its analysis when it analogized to the choice-of-law rules under the *Restatement of the Conflict of Laws* and concluded that the rules for determining the location of a tort have become more sophisticated. See *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1337 (2d Cir. 1972).

within that state.¹⁶⁸ This choice-of-law rule was known as *lex loci delicti*. Under this approach, which was adopted by the *First Restatement of Conflict of Laws*, the law governing a tort claim was the law of the state in which the tort occurred.¹⁶⁹

Of course, in order to apply this principle, the court had to determine the location of the tort. This location was not determined by the nationality of the tortfeasor or the victim, but by a set of legal tests which varied from state to state.¹⁷⁰ For example, most courts applying the *lex loci delicti* approach determined that the tort “occurred” at the location where its *effects* were felt, that is, where the plaintiff suffered injury.¹⁷¹ Other courts, particularly in actions based on intentional misrepresentations, concluded that the place of the tort was the place of the wrongful *conduct*, that is, at the place where the misrepresentation was made.¹⁷²

Modern choice-of-law rules have moved beyond the “location of the tort” analysis. Nonetheless, we can see within this early approach the seeds of the Second Circuit’s jurisdictional tests under the federal securities laws. For example, the courts’ conduct test can be viewed as determining the location of the tortious conduct. Someone who engages in fraudulent conduct in the United States has committed a fraud within the United States. If the fraud occurs within the United States, application of domestic law to the transaction is not extraterritorial application of the securities laws.

Similarly, the effects test is merely an extension of the legal rule that a tort is located at the place where the injury occurs. The “effects” of the securities fraud in the United States upon which courts have predicated U.S. jurisdiction are injuries to U.S. investors and U.S. markets. Thus a misrepresentation which, although made abroad, injures investors and

¹⁶⁸ See, e.g., *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356-57 (1909) (sovereign power to regulate limited to that sovereign’s territorial limits).

¹⁶⁹ State law torts such as tortious or fraudulent misrepresentation are most closely analogous to federal securities fraud. Accordingly, this Article analyzes the courts’ choice-of-law analysis by comparison to choice-of-law principles applicable to torts.

¹⁷⁰ The *First Restatement* leaves open the issue of whether the location of the wrong in a tort case is the place where the wrongful conduct occurs or the place of the injury. See, e.g., Joseph W. Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 9 n.22 (1989).

¹⁷¹ See, e.g., *Alabama Great Southern R.R. Co. v. Carroll*, 11 So. 803 (Ala. 1892) (the law of the state of the injury, not the state of the negligent conduct, governs a tort action); *Eby v. York Division, Borg-Warner*, 455 N.E.2d 623 (Ind. Ct. App. 1983) (under Indiana law, torts of fraud and misrepresentation occurred where the loss occurred). This was the majority position under the *First Restatement*. See Willis L.M. Reese, *Conflicts of Laws and the Restatement Second*, 28 J.L. & CONTEMP. PROBS. 679, 699 (1963) (“Until recently, the courts with rare unanimity applied the law of the place of the injury to determine rights and liabilities in tort.”).

¹⁷² See, e.g., *Johnston Assocs., Inc. v. Rohm and Haas Co.*, 560 F. Supp. 916, 918 (D. Del. 1983) (“In the case of intentional torts, the courts have preferred to apply the law of the defendant’s place of conduct rather than the place of injury.”) (citing *Marra v. Bushee*, 477 F.2d 1282, 1283 (2d Cir. 1971)).

markets within the United States, is also located within the United States.

This puts the courts' analysis in the above-described cases in a new light. The courts are not applying the securities laws extraterritorially, but simply using traditional choice-of-law rules to conclude that a defendant who makes misrepresentations or omissions in the context of an international transaction can be deemed to have committed a fraud within the United States, thereby subjecting him to the coverage of the federal securities laws. Whether the courts have chosen the correct choice-of-law rules and applied those rules properly is a matter that may be debated, but the courts are not engaging in judicial lawmaking or broadening the scope of the securities laws beyond that authorized by Congress.

Moreover, once the courts' actions are properly described as characterizing the fraud as domestic and applying choice-of-law principles, they become virtually immune from attack as beyond the courts' authority.¹⁷³ Even in the domestic context, there are few constraints upon a forum state's decision to apply its own law to a transaction.¹⁷⁴ The U.S. Constitution serves as an outer limit on this decision; the application of local law to a transaction in which the state has no interest may violate the due process or equal protection rights of the parties.¹⁷⁵

In the international context, however, even this minimal constraint is abandoned. Courts have not used the Constitution to limit the application of U.S. law to predominantly foreign transactions.¹⁷⁶ Instead of viewing the issue in terms of whether the United States has sufficient contacts with the transaction to render the application of domestic law jurisdiction constitutional, the courts have focused on ascertaining con-

¹⁷³ As Professor Kramer has observed, choice-of-law is not subject to some "overarching theory of justice [which] defines objectively 'correct' answers to conflict cases. [Rather,] true conflicts are difficult precisely because there is no general theory against which to measure the justice of the conflicting laws of different states." Larry Kramer, *Rethinking Choice-of-law*, 90 COLUM. L. REV. 277, 280 (1990).

¹⁷⁴ See Robert A. Leflar, *The Nature of Conflicts Law*, 81 COLUM. L. REV. 1080, 1084 (1981) ("[A] forum court may employ any reasonable basis for choice that pleases it, and several bases are available. Courts need not distinguish clearly between them, may combine them in some eclectic fashion, or misapply them, if the adequate contact exists."); see also ROGER C. CRAMTON ET AL., *CONFLICT OF LAWS* 58-135 (4th ed. 1987) (citing absence of limits on a court's ability to manipulate the location of the tort under traditional choice-of-law rules to justify the application of a preferred law); *Developments in the Law-International Environmental Law*, 104 HARV. L. REV. 1484, 1626 (1991) (same).

¹⁷⁵ "[I]f a state has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981). See Robert A. Leflar, *Constitutional Limits on Free Choice-of-law*, 28 J.L. & CONTEMP. PROBS. 706, 706-14 (1963).

¹⁷⁶ Professor Brilmayer has asserted that the constitutional limitations on application of local law that have been used in the domestic context are similarly applicable in the international area. See Brilmayer, *supra* note 10, at 31.

gressional intent and, once the predicate intent to apply the statute has been established, applied domestic law on the basis of the minimum contacts necessary for jurisdiction.¹⁷⁷ In the absence of any constitutional or other legal constraint on the choice-of-law decision in the international context, the application of the federal securities laws under the conduct and effects tests appears to be a legitimate exercise of the courts' power.

B. *The Propriety of Applying U.S. Law to Foreign Tender Offers*

Recasting the analysis in terms of choice-of-law makes it difficult to attack decisions such as that in *Gold Fields* as beyond the court's power. But are decisions applying U.S. law to foreign tender offers correct? To be more precise, if the question is one of choice-of-law, have the courts properly analyzed the choice-of-law issue? By terming the issue jurisdictional, the courts have tended to analyze the *sufficiency* of contacts, and to find it equitable to apply U.S. law to predominantly foreign transactions¹⁷⁸ based on a minimal level of such contacts.¹⁷⁹ This approach has ignored several important choice-of-law factors.

By contrast, choice-of-law analysis recognizes that a number of countries may have sufficient contacts with the transaction to permit the exercise of subject matter jurisdiction. Even if this threshold is met, however, the forum court must still choose a single law to provide each rule of decision. The choice-of-law decision requires the court to do more than count a minimum quantity of contacts; it must further investigate the quality of the contacts. This forces the court to consider the legitimate interests and expectations of both the parties to the dispute and the sovereigns whose law might be applied. In domestic choice-of-law cases, it is commonplace for a state to possess the power to act as the forum for the dispute—if the state possesses the minimal contacts necessary for jurisdiction¹⁸⁰—yet be obliged to apply some other state's sub-

¹⁷⁷ Accordingly, the courts never address the question of whether there are constitutional (or other) limits, even under a statute which unambiguously applies extraterritorially to the application of U.S. law to foreign transactions. For a critical examination of this issue, see Brilmayer & Norchi, *supra* note 10.

¹⁷⁸ As the foregoing analysis indicates, there is no greater theoretical limitation on courts' power to apply domestic law to transactions that are exclusively foreign in nature. In the absence of explicit statutory direction, however, it is unlikely that the courts would choose to go so far, even in the name of investor protection.

¹⁷⁹ The *Leasco* court adopted this approach explicitly, giving short shrift to defendants' argument that choice-of-law principles required application of English law: "[A]s we have already demonstrated . . . the nation where the conduct has occurred has jurisdiction to displace foreign law and to direct its courts to apply its own." *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1339 (2d Cir. 1972).

¹⁸⁰ Generally, a state need only have sufficient contacts with the parties to render its exercise of jurisdiction consistent with the constitutional limits on personal jurisdiction. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). There are a few areas in which states have traditionally been limited with respect to subject matter jurisdiction—most commonly cases involving the adjudication of title to land located outside the state and divorce proceedings by nondomiciliaries or non-

stantive law—if those contacts do not arise to the higher level necessary under choice-of-law rules.¹⁸¹

Moreover, even in the domestic context, choice-of-law analysis grants courts considerable latitude to decide whether it is in the best interest of public policy to apply forum law. In both domestic and international cases, the court must interpret the policy behind application of the competing laws. In the international context, the decision also involves issues of comity; the court must consider the political impact of applying U.S. law on international relations, U.S. foreign policy, and the development of multinational business.

Whether the application of U.S. law is correct therefore depends upon a number of factors.¹⁸² It is clear that courts are ignoring these factors. A conflicts-type analysis reveals that courts have not even applied the correct test. Although territorial notions were the original basis for determining which law to apply to a transaction, modern choice-of-law theory has moved away from that approach. At least in the context of choosing between the laws of different U.S. states, courts have moved from territorialism to more modern methods.¹⁸³

residents. *See, e.g.,* *Massie v. Watts*, 10 U.S. (6 Cranch) 148, 158 (1810) (no jurisdiction of Kentucky over “naked question of title” to land outside the state); *Winston v. Winston*, 161 So.2d 588 (Ala. 1964) (divorce decree void for want of subject matter jurisdiction where both parties were nonresidents of forum state); *Stewart v. Stewart*, 698 S.W.2d 516 (Ark. Ct. App. 1985) (subject matter jurisdiction of Kansas court over divorce requires domiciliary status); *Holt v. Guerguin*, 163 S.W. 10, 12 (Tex. 1914) (state cannot adjudicate title to land located in another state).

¹⁸¹ This is something of an oversimplification. One of the most common criticisms of Currie’s interest analysis is that it permits a state to manipulate the interests involved to permit application of its own law to virtually any dispute. *See supra* note 174 and accompanying text.

¹⁸² At the forefront of commentators’ objections to broad principles of extraterritoriality is the recognition that the judicial resources of the United States are limited. *See, e.g.,* Stephen Boatwright, Note, *Reversing the Expansive Trend of Extraterritorial Subject Matter Jurisdiction over Bad Conduct Under Rule 10b-5 of the Securities Exchange Act of 1934*, 23 TEX. INT’L L.J. 487, 500 (1988). A decision to apply federal law represents a choice to expend those limited resources on a class of problems that a foreign country may be better equipped to handle. The *Bersch* court questioned “whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to [transnational transactions] rather than leave the problem to foreign countries.” *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975). Although this Article will not discuss the interest of the United States in conserving its scarce judicial resources, it is clear that federal docket congestion is an increasing problem and that the limitations of the federal judicial system and the effect of overcrowding on the availability of justice militate against an expansive view of the subject matter jurisdiction of the federal courts. In addition, to the extent that the securities laws are interpreted to permit private rights of action by foreigners, the American judicial system (and American taxpayers) are subsidizing the resolution of essentially foreign disputes.

¹⁸³ *See* *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1337 (2d Cir. 1972) (“In the somewhat different yet closely related context of choice-of-law, the mechanical test that, in determining the locus delicti, ‘The place of the wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place,’ . . . has given way, in the case of fraud and

1. *The Validity of Territorialism.*—The primary replacement for territorialism is interest analysis. Interest analysis was developed by Brainerd Currie in the late 1950s and early 1960s and requires the court to determine which state has the primary interest in applying its law to the transaction.¹⁸⁴ Professor Currie's work was influential in the development of the *Restatement (Second) of Conflict of Laws*.¹⁸⁵ The *Second Restatement* rejects the somewhat rigid choice-of-law rules of the *First Restatement* in favor of flexible standards, namely "applying the law of the state with the most significant relationship to the parties and the transaction or occurrence."¹⁸⁶ This approach, termed the "most significant relationship" test,¹⁸⁷ requires courts to consider a number of factors to determine which sovereign has the most significant relationship to a transaction.¹⁸⁸

Replacement of the *lex loci delicti* approach was motivated in part by a perception that the territorial approach of the *First Restatement* was too inflexible.¹⁸⁹ The application of interest analysis or the *Second Restatement* approach allows the court to consider a variety of factors in determining which state is more appropriately concerned with regulating

misrepresentation, to a more extensive and sophisticated analysis.") (citing RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 148 (1971)).

As of 1989, however, some fourteen states have retained the territorial approach of the *First Restatement* and expressly rejected interest analysis or its equivalent. See Michael E. Solime, *An Economic and Empirical Analysis of Choice-of-law*, 24 GA. L. REV. 49, 54 n.33 (1989).

¹⁸⁴ See Leflar, *supra* note 174, at 1080-87.

¹⁸⁵ See, e.g., BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963); Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966).

¹⁸⁶ Singer, *supra* note 170, at 7.

¹⁸⁷ *Id.* at 21.

¹⁸⁸ The *Restatement* includes specific factors to be considered in a misrepresentation case as well as general factors to be considered in any choice-of-law analysis. The specific factors include:

(a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations, (b) the place where the plaintiff received the representations, (c) the place where the defendant made the representations, (d) the domicile, residence, nationality, place of incorporation and place of business of the parties, (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148 (1971). The general factors include:

(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Id. § 6.

¹⁸⁹ See, e.g., *In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988) (per curiam) (describing Ohio's decision "to abandon strict adherence to the traditional rule of *lex loci delicti* in favor of a more flexible rule based on which state has 'a more significant relationship to the lawsuit.'") (citing *Morgan v. Biro Mfg. Co.*, 474 N.E.2d 286, 289 (Ohio 1984), *cert. denied*, 488 U.S. 1006 (1989); *In re Air Crash Disaster Near Chicago*, 644 F.2d 594, 613 n.21 (7th Cir.) (describing *Second Restatement* approach as designed to "supplant" *lex loci delicti* rule which was "wooden and mechanical"), *cert. denied*, 454 U.S. 878 (1981).

the subject transaction. The development of the *Second Restatement* together with reexamination of conflicts standards by both scholars and courts has led to a general acceptance of the principles of interest analysis.¹⁹⁰

Although interest analysis in one form or another commands the greatest degree of accord among courts, some recent scholars have criticized this approach, claiming that it suffers from many of the flaws of the traditional territorial approach.¹⁹¹ Such scholars argue that conflict-of-laws analysis should reflect a greater recognition of the rights created by legislation; it is these rights that should determine which state's law is applied.¹⁹² Whether the inquiry is framed in terms of interests or rights, however, it is clear that a simple adherence to territorial principles is inappropriate; modern choice-of-law theory requires a more thorough examination of the issues than that developed by the Second Circuit.

2. *Interest Analysis: U.S. Interests in Regulation.*—Contemporary choice-of-law principles suggest that the decision to apply U.S. law to foreign tender offers should be examined under the principles of interest analysis, rather than under the outdated territorialist approach. Under this approach, the courts must evaluate the interests of the United States in applying the Williams Act to foreign tender offers.¹⁹³ Against this

¹⁹⁰ See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 306-07 (1981) (upholding Minnesota Supreme Court's use of interest analysis); *Judge v. American Motors Corp.*, 908 F.2d 1565, 1567-68 (11th Cir. 1990) (applying interest analysis as replacement for rule of *lex loci delicti*); *Barnes Group, Inc. v. C & C Prod., Inc.*, 716 F.2d 1023, 1032-33 (4th Cir. 1983) (finding Ohio had abandoned *lex loci delicti* in favor of "the contemporary approach based upon interest analysis").

¹⁹¹ See Solime, *supra* note 183, at 51-58 (discussing judicial and academic criticisms of interest analysis). Scholars claim that both interest analysis and territorialism are difficult to apply, produce unpredictable results, and raise constitutional problems. See, e.g., Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); John B. Corr, *Interest Analysis and Choice-of-law: The Dubious Dominance of Domicile*, 1983 UTAH L. REV. 651; Maurice Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946 (1981).

¹⁹² See, e.g., Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 297-98 (1987); Lea Brilmayer, *Rights, Fairness, and Choice-of-law*, 98 YALE L.J. 1277 (1989); Perry Dane, *Vested Rights, "Vestedness," and Choice-of-law*, 96 YALE L.J. 1191 (1987).

¹⁹³ The reader will observe that this brings the analysis back to the issue of congressional intent. Although the correct analysis focuses on the legislative policies behind the federal securities laws rather than on whether Congress in 1934 intended to regulate a foreign tender offer, an evaluation of the U.S. interest in regulation includes an inquiry into congressional intent. The following discussion demonstrates that courts may be better able to analyze legislative purpose and policy under a choice-of-law approach; the discussion does not purport to be an exhaustive list of the relevant factors to be considered in such an analysis. Moreover, it is not clear that this analysis is properly conducted by the courts. See *infra* section IV.B.4. Accordingly, this section will highlight a number of the factors relevant to a judicial choice-of-law analysis but will conclude that the legitimacy and adequacy of such a judicial inquiry is constrained by the limited judicial role in policy-making, in general, and foreign policy, in particular. The Article will therefore propose that the choice-of-law issue in foreign tender offers be addressed by Congress directly, based on the policies discussed in this section.

interest, the courts must weigh the interests of other sovereigns in regulating the transactions.

What are the U.S. interests implicated by application of the federal securities laws?¹⁹⁴ The legislative history indicates that the primary purpose of the federal securities laws was investor protection.¹⁹⁵ This protection was to be achieved through a disclosure-oriented system of regulation.¹⁹⁶ In particular, at the time of the 1929 stock market crash and the subsequent Great Depression, many U.S. investors had sustained losses through the purchase of worthless and fraudulent securities *that were marketed into the United States from abroad*.¹⁹⁷

Accordingly, the courts must consider whether the application of U.S. law to foreign tender offers protects the interests of U.S. securityholders. The recent SEC releases demonstrate the tension between the

¹⁹⁴ This analysis might include an examination of U.S. interests in regulation of foreign tender offers in general as well as the determination whether, on a case-by-case basis, regulation of a particular offer is warranted. It is the intention of this Article, through examination of these interests, to posit a general approach. The existing policy of examining transactions on a post hoc individual basis defeats both the objectives of predictability and cost minimization and the incentive for foreign bidders to open transactions to U.S. investors in predominantly foreign transactions without fear of subjecting themselves to U.S. regulation.

¹⁹⁵ Congress was also concerned about protection of the U.S. securities markets. This concern included a recognition that the securities markets reflect investment value and thereby affect the flow of capital, as well as a concern about the impact that instabilities and crises in the securities markets have upon the economy as a whole. See 15 U.S.C. § 78b (Supp. 1990) (describing necessity for regulation as including impact of fluctuations in securities prices on commerce and recognizing that fluctuations and speculation in the securities markets have the effect of precipitating, intensifying, and prolonging national emergencies).

¹⁹⁶ The Supreme Court has identified disclosure as the fundamental purpose behind the Exchange Act. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477-78 (1977) (describing “fundamental purpose” of Securities Exchange Act as “implementing a ‘philosophy of full disclosure’”). See Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 390 (1990); see also *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (central purpose of Exchange Act is “to protect investors *through the requirement of full disclosure by issuers of securities*”) (emphasis added); Senate Report on Securities Exchange Act Amendments, S. REP. NO. 1036, 83d Cong., 2d Sess. (1954) (essential purpose of the basic federal securities laws was “full disclosure and the protection of the investing public”). In describing the application of the proposed tender offer regulations of the Williams Act, then-SEC Chairman Manfred Cohen analyzed the regulations to the preexisting registration provisions for initial public offerings. Chairman Cohen explained that the cash tender offer presented the shareholder with a decision as to whether to disinvest, and that it was appropriate to require the analogous disclosure to that associated with a decision to invest. See Manfred Cohen, Address on Proposed Legislation To Regulate Tender Offers Before American Society of Corporate Secretaries, Inc. (June 28, 1966), in VICTOR BRUDNEY & MARVIN A. CHIRELSTEIN, CASES AND MATERIALS ON CORPORATE FINANCE 850 (3d ed. 1987).

¹⁹⁷ See S. REP. NO. 47, 73d Cong., 1st Sess. (1933), reprinted in 2 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, item 17, at 2 (comp. by J.S. Ellenberger & Ellen P. Mahar 1973); Sachs, *supra* note 7, at 691-99 (describing substantial losses by U.S. investors holding foreign securities and congressional recognition of those losses during debate on federal securities laws). Professor Sachs has concluded from this historical background that Congress drafted the acts to protect those who trade in domestic markets, regardless of whether the securities stem from a domestic or foreign issuer. See Sachs, *supra* note 7, at 694-708.

courts' view of investor protection and the reality of the international securities markets.¹⁹⁸ An increasing number of investors are choosing to participate in those markets and to forsake the certain protection of U.S. law in favor of the opportunity to diversify more broadly and participate in economic development abroad.¹⁹⁹ These investors search out foreign markets with different levels of regulation for the different investment opportunities that those markets offer.

Although it may appear that the application of the tender offer regulations of the Williams Act clearly offer enhanced protection to shareholders, as discussed above, if the application of U.S. law causes foreign bidders to close their offers to U.S. investors, the ultimate effect may be both a decrease in the information available to U.S. investors and a loss of the ability to participate in the tender offer directly.²⁰⁰ The bidder risks the application of U.S. law if it so much as announces the offer in the United States and explains to investors how to tender.²⁰¹

The current SEC proposals do not alleviate this problem. The proposals do not address the primary concern of foreign bidders with U.S. involvement: the risk that making the offer in the United States will subject them to litigation under the federal securities laws, particularly litigation under the antifraud provisions.²⁰² Thus the SEC proposals are

¹⁹⁸ As the Commission observed:

[The] Concept Release posed the fundamental question of whether U.S. investors' interests would be better served by insisting upon compliance with U.S. regulations for all offers extended into this country, resulting in the continued exclusion of U.S. securityholders from tender and exchange offers, or facilitating the participation of U.S. investors on equal terms with foreign securityholders

Tender Offer Release, *supra* note 2, at 81,744. In response to this question, *supra*, commentators overwhelmingly endorsed the view that protection of investors would be furthered by a system which facilitated their inclusion in the offers.

¹⁹⁹ Courts have recognized this choice. See, e.g., *MCG, Inc. v. Great W. Energy Corp.*, 896 F.2d 170, 175 (5th Cir. 1990) ("Having gone to such lengths to structure a transaction not burdened by the securities laws, plaintiffs cannot expect to wrap themselves in their protective mantle when the deal sours.").

²⁰⁰ See *supra* notes 54-61 and accompanying text.

²⁰¹ This frustrates the purpose of the Williams Act—to provide investor protection through information. See *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985) (primary purpose of Williams Act is disclosure). Senator Williams, sponsor of the bill in the Senate, articulated the rationale for legislation as follows:

Today, the public shareholder in deciding whether to accept or reject a tender offer possesses limited information. No matter what he does, he acts without adequate knowledge to enable him to decide rationally what is the best course of action. This is precisely the dilemma which our securities laws are designed to prevent.

Id. at 8-9 (quoting 113 CONG. REC. 24,664 (1967) (remarks of Sen. Williams)).

²⁰² See, e.g., Letter from Pepper, Hamilton & Scheetz, Attorneys at Law, to Securities and Exchange Commission (Nov. 21, 1991) (on file with author) (In response to Tender Offer Release, *supra* note 2, Pepper, Hamilton stated that U.K. lawyers and bankers view risk of U.S. litigation as the "most significant deterrent" against including U.S. shareholders in a tender offer.); Letter from Securities Industry Association to Jonathan G. Katz, Securities and Exchange Commission (Sept. 11, 1992) [hereinafter "Securities Industry Association Letter"] (on file with author) (In response to Tender Offer Release, *supra* note 2, the Association stated that it "believe[s] the imposition of U.S.

unlikely to persuade foreign bidders not to lock U.S. investors out of their offers.²⁰³

One might argue that Congress, in applying the Williams Act to these transactions, has made a policy decision in favor of broad regulation at the expense of some tender offer opportunities for those who invest abroad. One problem with this argument is that there is scant evidence in the statute of such a decision. A second problem is that the legislative history of the Williams Act indicates a focus not on the abstract notion of investor protection, but on protection of investor choice.²⁰⁴ Indeed, both the Senate Report accompanying S. 510 and statements by supporters of the legislation indicate a desire to preserve the opportunity for investors to participate in tender offers.²⁰⁵ Finally, the SEC itself has proposed for comment the advisability of permitting corporations and their shareholders to waive the protections of the Williams Act, recognizing that some investors may not need the protections or desire the costs associated with the regulations.²⁰⁶

The courts may also be concerned with whether refusing to apply the Williams Act will defeat the legitimate expectations of investors.²⁰⁷ Is it reasonable for U.S. residents who purchase securities in predominantly foreign transactions to expect that U.S. law will apply? If the

civil liability is generally recognized to be the single greatest obstacle to foreign bidders who might otherwise wish to include U.S. shareholders in their offers of foreign securities.”); see also Morton A. Pierce, *SEC Looks At Multinationals: Encouraging International Offers to U.S. Security Holders*, N.Y. L.J., Sept. 10, 1990, at 5, 7 (Because of perception of United States as a litigious society, foreign bidders may be reluctant to rely on exclusion from U.S. tender offer rules if antifraud provisions still apply to their bid).

²⁰³ See ABA Letter, *supra* note 110 (suggesting that application of antifraud provisions to foreign offers will remain an obstacle to use of the SEC’s approach by foreign bidders and advocating a safe-harbor approach with respect to application of the U.S. antifraud provisions); Letter from R.A.G. Miller, Heading of Listing Secretariat, London Stock Exchange, to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Sept. 6, 1991) (on file with author) (In response to Tender Offer Release, *supra* note 2, Miller stated that “if the aims of the release are to be realised, the threat of litigation arising as a result of extending offers to United States holders will have to be reduced.”).

²⁰⁴ See, e.g., *Data Probe Acquisition Corp. v. Datatab, Inc.*, 568 F. Supp. 1538, 1545-47 (S.D.N.Y.) (discussing development of Williams Act into a vehicle for protecting investor choice), *rev’d*, 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984).

²⁰⁵ See, e.g., S. REP. NO. 550, *supra* note 16, at 3 (protections designed to allow reasoned investment decisions by shareholders); 113 CONG. REC. 854 (daily ed. Jan. 18, 1967) (statement of Sen. Williams) (bill would protect shareholders “without impeding cash takeover bids”); 113 CONG. REC. 24,666 (daily ed. Aug. 30, 1967) (statement of Sen. Javitz) (bill would allow shareholders to benefit from “the opportunities which result from the competitive bidding for a block of stock of a given company”).

²⁰⁶ See Concept Release on Takeovers and Contests for Corporate Control, Exchange Act Release No. 23,486, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,108, at 88,207 (July 31, 1986) (“self-governance” exemption).

²⁰⁷ See, e.g., *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 694-96 (1984); *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 851 (1975); *Ruefenacht v. O’Halloran*, 737 F.2d 320, 333-34 (3d Cir.), *aff’d sub nom.*, *Gould v. Ruefenacht*, 471 U.S. 701 (1984) (recognizing importance of legitimate expectations of investors in determining scope of federal securities laws coverage).

securities are listed on a U.S. exchange or registered with the SEC, the answer is probably yes. In addition to protecting investors, the United States has an interest in regulating the U.S. securities markets. However, it is not clear that this interest extends to transactions that occur outside of those markets. One may conclude that investors who choose to bypass the domestic exchanges by purchasing stock that is not offered or traded directly in the United States have waived the protection of the U.S. system.

The interest of the United States may also depend on the type of claim for which jurisdiction is sought. The *Gold Fields* court, for example, concluded that the U.S. has a stronger interest in applying its antifraud provisions than its disclosure requirements.²⁰⁸ The *Restatement of Foreign Relations* takes the same position.²⁰⁹ The problem is that fraud in the context of sections 10(b) and 14(e) is not the equivalent of common law fraud, but is based on a complex jurisprudence of disclosure obligations and duties to disclose that are closely linked with the statutory disclosure requirements.²¹⁰ For example, liability for securities fraud is frequently predicated on an omission which is fraudulent because of the defendant's statutory disclosure obligations or because of duties imposed by state or common law.²¹¹ The antifraud provisions serve to effectuate and enforce these duties.²¹²

²⁰⁸ See *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 262-63 (2d Cir. 1989) (antifraud provisions have broader extraterritorial reach than filing requirements).

²⁰⁹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 416, cmt. a (1987) ("The reasonableness of the exercise of jurisdiction depends not only on the territorial links of a given activity with the United States, but also on the character of the activity to be regulated Thus, an interest in punishing fraudulent or manipulative conduct is entitled to greater weight than are routine administrative requirements.").

²¹⁰ Courts have found violations of Rule 10b-5 and § 14(e) based on reckless misrepresentations and, more significantly, on failures to disclose material information under circumstances in which the defendant had a duty to disclose. How is this standard to be applied to a foreign transaction, particularly where the U.S. imposes no affirmative duty of disclosure? For example, in *SEC v. OSEC Petroleum, S.A.*, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,915 (D.D.C. 1974), the SEC took enforcement action against a West German company and its Luxembourgian subsidiary for violations of § 10(b) and § 13(d) based on the failure of the defendants to file a timely Schedule 13D disclosing their purchase of more than 5% of the stock of a Canadian corporation through a Canadian broker on the Toronto Stock Exchange.

Jurisdiction was premised upon the fact that the stock of the target company was also listed on the Pacific Coast Stock Exchange and registered under § 12 of the Exchange Act. The SEC charged that the defendants had failed to disclose their control intentions with respect to the target. Although these allegations stated a cause of action for U.S. securities fraud, the defendants' actions could hardly have been termed fraud in the absence of a statutory disclosure obligation.

²¹¹ An omission is fraudulent only if the defendant has a duty to speak. See, e.g., *Chiarella v. United States*, 445 U.S. 222, 228 (1980); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 152 (1972). Courts have found a basis for such a duty in the common law, state law, and statutory disclosure provisions. See, e.g., *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) (en banc); *In re Healthco Int'l, Inc. Securities Litig.*, 777 F. Supp. 109, 114 & n.5 (D. Mass. 1991).

²¹² See *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 8-9 (1985) ("It is clear that Congress relied primarily on disclosure to implement the purpose of the Williams Act."); see also *Affiliated*

The application of the antifraud provisions to foreign defendants thus raises the secondary question of whether the disclosure obligations of a foreign defendant can be evaluated under the domestic standards. At a minimum, the claim that the courts are not applying the more intrusive disclosure requirements of U.S. law if they simply apply the statutory antifraud provisions is overstated.²¹³ It is difficult and arguably inappropriate to evaluate these provisions separately.²¹⁴ Nor is it clear that the policy reasons behind applying domestic law broadly to remedy a fraud in the purchase or sale of securities apply equally to litigation intended to block or delay a foreign tender offer. Both the degree of interference with foreign transactions and the costs imposed by application of U.S. law are substantially greater in a tender offer.

Finally, it seems appropriate, in making a choice-of-law determination, to ask whether the strength of the U.S. interest depends on who is challenging the transaction. An enforcement action by the SEC would appear to evidence a stronger U.S. interest than a private civil suit,²¹⁵ and the interests of the U.S. appear stronger in a private suit brought by U.S. citizens than in one prosecuted by foreigners.²¹⁶ At least one commentator has expressed skepticism at the vitality of the U.S. interests implicated by *Gold Fields* based on the fact that while the SEC examined the proposed transaction, it did not institute its own challenge.²¹⁷

3. *Examining Conduct and Effects Tests Under Interest Analysis.*—

At a minimum, interest analysis indicates that the territorial approach currently employed is too simplistic because of its failure to recognize the

Ute Citizens, 406 U.S. at 151 (federal securities acts have as “fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry”) (second emphasis added).

²¹³ See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 986 (2d Cir.) (“It is elementary that the antifraud provisions of the federal securities laws apply to many transactions which are neither within the registration requirements nor on organized American markets.”), *cert. denied*, 423 U.S. 1018 (1975).

²¹⁴ Congress has not distinguished between these regulations for purposes of extraterritoriality. Moreover, the transaction-oriented and continuous disclosure requirements of the federal securities laws are not designed as ends in themselves, but are aimed at preventing fraud and stabilizing the markets by specifying the information relevant to an investment decision. Conversely, the antifraud provisions operate as the enforcement arm of the acts’ disclosure requirements. See *supra* note 212; Securities Industry Association Letter, *supra* note 202 (explaining difficulty of applying U.S. antifraud provisions without also applying U.S. disclosure culture).

²¹⁵ See *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 33 n.3 (D.C. Cir. 1987) (suggesting that a broad extraterritorial approach may be more easily justified in an SEC enforcement action because the SEC, unlike a private litigant, would consider the foreign policy concerns of the State Department).

²¹⁶ See, e.g., Russell J. Weintraub, *A Proposed Choice-of-Law Standard for International Products Liability Disputes*, 16 BROOK. J. INT’L L. 225, 225-26 (1990) (observing the propensity of foreign plaintiffs to seek access to American courts, both because of more favorable substantive laws and because of procedural benefits of the U.S. litigation system).

²¹⁷ See Harold G. Maier, Book Review, 83 AM. J. INT’L L. 676 (1989).

full impact on U.S. investors of applying U.S. law. The strength of U.S. interests may vary considerably depending on the nature of the transaction, but U.S. interests clearly do not justify the automatic application of U.S. law. In addition, there are problems even with the factors considered by the courts. For example, in applying the effects test, the courts have not explained which effects should be considered. Although many foreign transactions and events—a fraud that causes the Tokyo stock exchange to collapse,²¹⁸ a war in the Persian Gulf,²¹⁹ the merger of two large Japanese automakers—have substantial effects in the United States,²²⁰ presumably the jurisdictional test requires something more to justify a U.S. interest, unless the U.S. is to claim jurisdiction over all foreign transactions large enough to have an impact here.²²¹

Alternatively, the effect of a foreign transaction on the United States securities markets might be measured by whether the transaction involves securities that are traded in the United States.²²² It is reasonable to conclude that, because the securities acts focus on regulation of the domestic securities markets, it is those markets which Congress deemed significant. This raises additional issues of line-drawing. For example, the courts might, before exercising jurisdiction, question whether the foreign issuer has purposely participated in the U.S. securities markets. It might be reasonable to treat issuers who have sold stock into the United States or registered their stock on U.S. exchanges differently from those issuers who have refrained from deliberate use of U.S. capital markets.

²¹⁸ See, e.g., Diana B. Henriques, *Global Investing—A Special Report*; *In World Markets, Loose Regulation*, N.Y. TIMES, July 23, 1991, at D1 (Japanese stock market scandal blamed for dip in New York stock prices).

²¹⁹ See, e.g., Bill Barnhart & Stephen Franklin, *Fear Factor Back in Markets, Prices Off After Iraq Fires Back*, CHI. TRIB., Jan. 18, 1991, Business sect., at 1 (war historically brings fear and uncertainty to financial markets); Robert T. McCartney & Stan Hinden, *Early War Reports Buoy Global Markets; Stock Prices Expected to Rise in U.S.*, WASH. POST, Jan. 17, 1991, at E1 (effect of Persian Gulf War on U.S. stock prices); Sylvia Nasar, *The Economy Lives, But Will It Ever Dance Again?*, N.Y. TIMES, July 28, 1991, § 3, at 8 (“Saddam Hussein’s invasion of Kuwait caused the biggest one-month plunge in American consumer confidence that has appeared in the survey’s history.”).

²²⁰ See Richard C. Breeden, *Reconciling National and International Concerns in the Regulation of Global Capital Markets*, Address at London School of Economics (Nov. 8, 1991), (on file with author) (“‘BCCI’ is as much a household word in the U.S. as it is in Britain, and financial scandals or failures such as Drexel, BCCI, Salomon, Nomura and others have the direct potential for disrupting markets all over the world.”). The increasing integration of the global securities markets means that even transactions primarily affecting a foreign market generate an indirect effect in the domestic markets and vice versa. See K.P. Fischer & A.P. Palasvirta, *High Road to a Global Marketplace: the International Transmission of Stock Market Fluctuations*, 25 FIN. REV. 371 (1990).

²²¹ In *Bersch*, the court heard testimony from expert witness Morris Mendelson who cited a list of domestic effects caused by the fraud in the foreign issue and the subsequent collapse of the issuer. According to the expert’s analysis, the fraud affected countless securities listed on American exchanges, was detrimental to the interests of hundreds of American investors, and undermined confidence in the securities markets. 519 F.2d 974, 987-88 (2d Cir. 1975).

²²² See, e.g., *MCG, Inc. v. Great W. Energy Corp.*, 896 F.2d 170, 174 (5th Cir. 1990) (finding “effects” test inapplicable where issuer was not listed on any American exchange and had no American investors).

While imposing the requirements of the securities laws on a company that takes advantage of the U.S. capital markets may be reasonable, corporations that have not chosen to avail themselves of the benefits of our markets should not be subjected to their burdens.²²³

The *Bersch* court explicitly rejected registration or listing in the United States as a necessary condition to the application of U.S. law and held that the antifraud provisions are applicable to transactions in securities that are neither registered nor traded on organized U.S. markets.²²⁴ Indeed, the counter to the purposeful availment argument is that if the justification for regulation is the “effect” of the transaction on the United States, regulation is justified whether or not the effect is purposeful. The court in *Gold Fields* took this position in premising jurisdiction on an effect that, while arguably not intentional, was “direct and foreseeable.”²²⁵

The *Gold Fields* decision also illustrates the problem with using the percentage of U.S. holdings as a proxy for measuring the interest of the United States. The court concluded that the presence of 2.5% of Gold Fields’ shareholders in the United States was substantial for purposes of jurisdiction. In part, this conclusion was based on the court’s prior finding of jurisdiction in *Bersch*:

If in *Bersch* we could say that Congress intended American antifraud laws to apply to a transaction involving 41,936 shares owned by 22 American residents, then surely we must come to the same conclusion here, where American residents representing 2.5% of Gold Fields’ shareholders owned 5.3 million shares with a market value of about \$120 million.²²⁶

Thus the court’s analysis reduced consideration of the effects on the United States to a simplistic numbers game.²²⁷

²²³ This is similar to the test employed in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), as to when the exercise of personal jurisdiction over an out-of-state litigant violates due process. The Court in *World-Wide Volkswagen* rejected foreseeability as the limiting principle, observing that automobiles (like securities) can readily be foreseen to travel to distant states. *Id.* at 296. Rather, the Court stated that fairness required that the defendant “ ‘purposefully avail [] itself of the privilege of conducting activities within the forum State.’ ” *Id.* at 297 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The purposeful availment of a foreign issuer in employing U.S. markets to raise capital is analogous to the deliberate use by a foreign manufacturer of out-of-state markets for its goods. It was use of this character that the Court in *World-Wide Volkswagen* found a sufficient predicate for the exercise of personal jurisdiction. *See id.* at 297.

²²⁴ *See also* *Travis v. Anthes Imperial, Ltd.*, 473 F.2d 515, 526 (8th Cir. 1973) (jurisdiction not lost because “securities were foreign securities neither registered nor traded on an organized United States market”).

²²⁵ *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 262 (2d Cir.), *cert. dismissed*, 492 U.S. 939 (1989).

²²⁶ *Id.*

²²⁷ Does the United States have a greater interest in protecting U.S. investors when they constitute 20% of a corporation’s shareholders than when they constitute 5%? Although the SEC borrows from this numbers game approach in formulating its tender offer exemption proposal, *see supra* note 108 and accompanying text, it offers no better explanation of how the percentage of U.S. holders relates to the legitimacy of applying U.S. law.

Analysis of the size of U.S. holdings or the number of U.S. securityholders represents a very narrow view of U.S. interests. In fact, the numbers involved in some of the cases are quite small. How can the U.S. have a valid interest in applying its law instead of U.K. law, for example, if only 2.5% of the securityholders are resident in the U.S.²²⁸ and ninety percent plus are resident in the U.K.²²⁹ The use of mere numbers also ignores the method by which the U.S. investors acquired their holdings. Corporations that market directly into the United States may justifiably be burdened by the imposition of U.S. law; they have received the benefit of the U.S. capital markets. But a bank may set itself up as an ADR depository and issue ADRs, effecting secondary trading in foreign securities, to U.S. investors without any request from or cooperation by the issuer. Similarly, American purchasers may manufacture investment structures that allow them to purchase securities in purely foreign offerings.²³⁰ Should this unilateral action by a purchaser subject the issuer to the application of the U.S. securities laws?

Nor is it clear that it is appropriate to apply U.S. law to all transactions involving securities listed or traded in the U.S. markets. The *Schoenbaum* court suggested that a transaction involving stock listed on a national securities exchange was a condition sufficient for the application of U.S. law.²³¹ The recognition of domestic listing as a determinative or even conclusive factor in the choice-of-law analysis ignores the increasing interconnection of the global securities markets.²³² For exam-

²²⁸ On the other hand, the \$120 million affected by the transaction is a lot of money.

²²⁹ See, e.g., *Plessey Co. PLC v. General Elec. Co. PLC*, 628 F. Supp. 477, 501 (D. Del. 1986) ("the Court must consider the fact that the interest of 98.4% of United Kingdom holders of Plessey's equity capital might hang in the balance [if the offer is delayed by a preliminary injunction requiring General Electric to comply with the Williams Act]").

²³⁰ See, e.g., *MCG, Inc. v. Great W. Energy Corp.*, 896 F.2d 170, 175 (5th Cir. 1990) (refusing to apply federal securities laws to transaction in which plaintiffs used "extensive machinations" to participate in a foreign offering from which, as Americans, they should have been disqualified); see also *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 990-91 (2d Cir.) (stating that the record is "murky" as to how American plaintiffs came to subscribe in a foreign offering), *cert. denied*, 423 U.S. 1018 (1975).

²³¹ See *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968) ("We hold that the district court has subject matter jurisdiction over violations of the Securities Exchange Act although the transactions which are alleged to violate the Act take place outside the United States, at least when the transactions involve stock registered and listed on a national securities exchange, and are detrimental to the interests of American investors."). In *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 547 F. Supp. 309 (N.D. Ill. 1982), *aff'd*, 730 F.2d 1103 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984), the court went further. Although recognizing that no prior court had premised jurisdiction under the effects test "solely on the basis that the securities involved were traded on American exchanges," the court concluded that such trading had a sufficient impact on the American futures market to sustain jurisdiction. *Id.* at 313.

²³² Many securities are traded in the United States through the NASDAQ system although they are listed exclusively on foreign exchanges. Although a foreign tender offer would affect U.S. securityholders regardless of whether the securities are actually listed on a domestic exchange, the application of the securities laws to all transactions involving securities *traded* in the United States has far

ple, an increasing number of companies have their stock traded on the exchanges of more than one country.²³³ Should a plaintiff who is defrauded in connection with a transaction on the London Stock Exchange in the stock of a foreign issuer be able to sue under U.S. law²³⁴ merely because that stock is also traded on the New York Stock Exchange?²³⁵

The applications of the conduct test are equally troubling. Although the Second Circuit has stated that the conduct test requires substantial fraudulent activity in the United States at least when foreigners seek to recover here for their losses, other circuits have relaxed this test. According to some courts, even a single meeting²³⁶ in the United States between foreigners, in a transaction which is otherwise conducted abroad and involves no offer or sale in the U.S. markets, may subject the transaction to domestic law under the conduct test.²³⁷ The rationale for

reaching implications. See *CDC Life Sciences, Inc. v. Institut Merieux S.A.*, No. 88 Civ. 2761 (S.D.N.Y. Apr. 26, 1988).

²³³ It was estimated that in 1985 shares of more than 500 major corporations were being traded on at least one stock exchange outside their home country. See Rochelle G. Kauffman, Note, *Secrecy and Blocking Laws: A Growing Problem as the Internationalization of Securities Markets Continues*, 18 VAND. J. TRANSNAT'L L. 809, 813 (1985) (citing Daniel L. Thomas, *Securities Regulators Grapple with Extraterritoriality*, LEGAL TIMES, Jan. 17, 1983, at 20); see also Daniel L. Goelzer & Anne Sullivan, *Obtaining Evidence for the International Enforcement of The United States Securities Laws*, 16 BROOK. J. INT'L L. 145 (1990) ("Each of six major stock exchanges or trading systems—Amsterdam, the International Stock Exchange in London, the NASDAQ system in the United States, the Paris bourse, and the Singapore and Zurich exchanges—lists more than 200 foreign securities."). For an example of a stock that is cross-listed on stock exchanges in London, New York, and Tokyo, see the discussion of British Telecommunications PLC in Scott McMurray, et al., *As Global 24-Hour Trading Nears, Regulators Warn of Market Abuses*, WALL ST. J., Feb. 11, 1985, § 2 at 25.

²³⁴ One might further ask whether the answer to this question depends (or should depend) on the citizenship of the plaintiff. If the securities laws are designed to protect the U.S. markets and investors in those markets, it is unclear why the protection should not extend to foreign investors.

²³⁵ A growing number of foreign securities are traded in the United States. According to the SEC, approximately 425 foreign issuers have stock traded on a U.S. exchange or NASDAQ and approximately 1100 issuers furnish information to the SEC pursuant to Rule 12g3-2(b). See Tender Offer Release, *supra* note 2, at 81,743.

There are cases in which a corporation's stock is traded on a domestic exchange through the issuance of unlisted trading privileges. Such privileges, which may be granted by the exchange for the convenience of its customers, may result in the stock being traded on the exchange in the absence of any application or request for listing by the issuer. The B.A.T. ADRs, for example, were traded on the American Stock Exchange as a result of the Exchange's initiative to list them. See Pinto, *supra* note 1, at 75 n.64; *supra* note 53.

²³⁶ See *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 425 (9th Cir. 1983) (basing jurisdiction on domestic conduct consisting of a single meeting in a Los Angeles hotel).

In both *Psimenos* and *Tamari*, the act of transmitting a customer's orders to the United States for execution was held to constitute sufficient domestic conduct to support jurisdiction under the Commodities Exchange Act. See *Tamari v. Bache & Co. S.A.L.*, 730 F.2d 1103, 1108 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984); *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1047 (2d Cir. 1983).

²³⁷ Courts have concluded that a series of telephone calls and mailings between a foreign defendant and the United States constitutes sufficient conduct within the United States to justify application of U.S. law. See, e.g., *Continental Grain (Australia) Pty., Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 420 (8th Cir. 1979); *Travis v. Anthes Imperial, Ltd.*, 473 F.2d 515, 524-27 (8th Cir. 1973).

this approach—reluctance to condone activity conducted here to further a fraud abroad—is unconvincing.²³⁸ If there is no effect on this country or its residents, the U.S. interest in employing its enforcement powers is minimal. If the end result is indeed a fraudulent transaction committed abroad, there is an alternative and more appropriate sovereign available to sanction the conduct—the country in which the fraud was primarily conducted.²³⁹ Alternatively, if the transaction is conducted in a country that does not view the deal as fraudulent, there is little force to the argument that the U.S. is being used as a haven for fraud.²⁴⁰

4. *Interests of Other Sovereigns.*—In addition to considering the interests of the United States in applying its law to foreign tender offers, the courts must, under an interest analysis approach, consider the interests of other sovereigns in regulating the transaction.²⁴¹ The interests of other sovereigns include the interests of the target company shareholders. As indicated above, in a situation in which the majority of such shareholders are not U.S. citizens, an application of U.S. law which interferes with the effectuation of a tender offer would appear to infringe on those interests.

The burden of requiring courts to analyze foreign interests should not be overlooked. It is difficult for the courts to analyze and weigh the interests of the United States in applying its laws to an international securities transaction.²⁴² It is even more difficult for the courts to determine the interests of the foreign sovereign and to balance those interests against the interests of the United States as required.²⁴³

²³⁸ See *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir.) (justifying jurisdiction based on court's reluctance "to conclude that Congress intended to allow the United States to become a 'Barbary Coast,' as it were, harboring international securities 'pirates.'"), *cert. denied*, 431 U.S. 938 (1977).

²³⁹ See *Schoenbaum v. Firstbrook*, 405 F.2d 200, 209 n.5 (2d Cir. 1968) (suggesting that this might justify abstention on forum non conveniens grounds).

²⁴⁰ The Second Circuit has recently stated that, by virtue of its rulemaking authority under § 14(e), the SEC may regulate and even prohibit nonfraudulent conduct. *United States v. Chestman*, 947 F.2d 551, 562-63 (2d Cir. 1991) (en banc). See also James J. Junewicz, *The Appropriate Limits of Section 14(e) of the Securities Exchange Act of 1934*, 62 TEX. L. REV. 1171, 1196-1201 (1984) (discussing breadth and variety of judicial concepts of fraud).

²⁴¹ These sovereigns include the home country of the bidder, the home country of the target corporation, and the country in which the majority of the target corporation's shareholders reside.

²⁴² It is not clear that the procedure for balancing competing interests can be borrowed whole scale from the domestic choice-of-law cases. See Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 289-91 (1982). Moreover the result of such balancing is apt to be "an understandable bias in favor of the forum's policy, grounded in unsophisticated analysis, overt chauvinism, or erroneous perceptions of a constitutional duty to advance legislative policies described in broad language but designed primarily for use in a domestic context." *Id.* at 317.

²⁴³ See, e.g., *Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1283 (7th Cir. 1990) (Easterbrook, J., concurring) (describing balancing test as "an approach that calls on the district judge to throw a heap of factors on a table and then slice and dice to taste"); *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) ("Aside from the fact that the

One factor courts must consider is whether the application of U.S. law is unfair to the bidder or the target company.²⁴⁴ Under the conduct and effects tests, courts have not predictably and consistently applied U.S. law. This imposes costs in terms of uncertainty—a foreign bidder cannot ascertain in advance what conduct or effects will subject it to U.S. jurisdiction—and fairness.²⁴⁵

In the context of regulation of tender offers, predictability is particularly important. A tender offer is distinctive in that timing is often the key to its success. In order for a takeover and subsequent merger to be successful, the bidder must deal with risks of changing interest rates, rising stock prices, and economic uncertainty. The possibility of tender offer litigation, particularly in a foreign country, adds a considerable degree of uncertainty to the offer.²⁴⁶ Moreover, any delay in a tender offer, including the delay caused by litigation which ultimately is unsuccessful, increases the cost of financing the offer.²⁴⁷ Because most offers are made with short-term financing and refinanced after the merger, litigation alone may be sufficient to prevent the offer's success.²⁴⁸

Although the factors considered by the courts under the conduct

judiciary has little expertise . . . to evaluate the economic and social policies of a foreign country, . . . [i]t is simply impossible to judicially 'balance' these totally contradictory and mutually negating actions."'). Chief Justice Traynor described the impossibility of this type of judicial balancing as follows: "Can you weigh a bushel of horsefeathers against next Tuesday?" See Brainerd Currie, *The Disinterested Third State*, 28 J.L. & CONTEMP. PROBS. 754 (1963).

²⁴⁴ In the domestic context, application of a particular state law might violate the due process rights of a litigant. It is unclear whether the federal Due Process Clause would protect a foreign bidder from the unjust application of U.S. law. See Brilmayer & Norchi, *supra* note 10 (arguing for due process limitations on extraterritorial application of U.S. law); see also *supra* note 175 and accompanying text (due process may limit choice-of-law).

²⁴⁵ See, e.g., Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1323 (1985) (suggesting a fairness analysis must consider whether the defendant's conduct "has amounted to a voluntary submission to United States jurisdiction").

²⁴⁶ See *Plessey Co. PLC v. General Elec. Co. PLC*, 628 F. Supp. 477, 497 (D. Del. 1986) (General Electric would have much to lose in its fight for control of Plessey in becoming "entangled in American law and regulations." On the other hand, "[i]t is at least possible that Plessey's efforts in this litigation are motivated by a desire more to delay than to inform, more to gain an advantage than to preserve neutrality.").

²⁴⁷ This remains as a significant deficiency under the SEC's proposed approach. See *supra* section III.A.2. Even if the bidder is relieved from the procedural and disclosure requirements of the Williams Act, if the offer remains subject to the antifraud provision, it may be delayed or frustrated by litigation under § 14(e).

²⁴⁸ This principle applies to any litigation challenging the offer. See, e.g., *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 854 (2d Cir.) ("Drawing Excalibur from a scabbard where it would doubtless have remained sheathed in the face of a friendly offer, the target company typically hopes to obtain a temporary injunction which may frustrate the acquisition. . . ."), *cert. denied*, 419 U.S. 883 (1974); *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506, 510-11 n.9 (3d Cir. 1969) (grant of preliminary injunction may cause bidder to abandon its takeover plans instead of continuing costly litigation), *cert. denied*, 393 U.S. 1009 (1970). In addition, litigation may result in bad publicity for the bidder or draw the attention of third parties to the offer, such as regulatory agencies whose examination increases the delay.

and effects tests may not be unfair in the context of an ordinary purchase or sale of securities, they raise concerns in the tender offer context. For example, the courts have placed a great deal of emphasis on the degree of U.S. ownership, direct or indirect, of the target company.²⁴⁹ When the target company is sued for securities fraud, the degree to which it is owned by U.S. citizens may reflect the fact that it has benefitted from using the American markets to raise capital. This is particularly true when the allegations of fraud are made in connection with the sale of stock by the target company.

The purposeful availment by a foreign target company of the U.S. markets is less significant in litigation against a foreign bidder under the Williams Act. The bidder has no control over and derives no benefit from any American ownership in the target company. Instead, the target company gains through its use of U.S. markets, as did Gold Fields, a weapon against a foreign bidder. The availability of U.S. law as a defensive tool to block a foreign bidder runs directly counter to the congressional intent to "avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid."²⁵⁰

The courts' analysis also fails to consider the interest another sovereign may have in maintaining a different level of regulation. The judicial approach in the antifraud cases assumes, for example, that both the United States and any foreign sovereign involved have a common interest in providing a cause of action for allegations of fraud. This ignores the fact that many other countries have not chosen to duplicate the U.S. policy choice of favoring extensive regulation of its capital markets over a system of caveat emptor. The U.S. capital markets are among the most heavily regulated in the world. This is due not only to a congressional perception that regulation is justified both in terms of investor protection and stability of the economy, but also to a belief that increased disclosure and vigorous enforcement of antifraud laws result in more efficient markets, thereby reducing the cost of capital.

Although this system of regulation is a rational application of U.S.

²⁴⁹ This is consistent with the courts' view of the Williams Act as concerned primarily with investor protection. The dominant interest of the United States, in terms of interest analysis, would be the interest in protecting its residents who are target company shareholders. *See, e.g., Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975) (Williams Act aimed at protecting public shareholders confronted with a cash tender offer); *Indiana Nat'l Corp. v. Rich*, 712 F.2d 1180, 1183 (7th Cir. 1983) (purpose of Williams Act was protection of shareholders through more information).

²⁵⁰ *Rondeau*, 422 U.S. at 58-59 (citing S. REP. NO. 550, 90th Cong., 1st Sess. 3 (1967); H.R. REP. NO. 1711, 90th Cong., 2d Sess. 4 (1968), *reprinted in* 1968 U.S.C.C.A.N. 520). Indeed, predicating application of U.S. law upon the quantity of the issuer's stock owned by U.S. investors creates the opportunity for foreign target companies to adopt a "defensive measure" against a hostile tender offer by marketing stock to such investors. *Cf. Florida Commercial Banks v. Culverhouse*, 772 F.2d 1513 (11th Cir. 1985) (balancing likelihood that shareholders will benefit by obtaining necessary information against the likelihood of harm to shareholders by management seeking to thwart takeover attempt and likelihood that shareholders will be harmed by other aspects of remedy sought in determining standing of target company under the Williams Act).

perceptions and policy, it is not the only system possible. The notion that extensive regulation reduces the cost of capital relies on the assumption that the capital markets are efficient²⁵¹ and that the transaction costs associated with the U.S. regulatory system do not outweigh the benefits provided by the regulations. A foreign nation need not agree. Even among countries that accept the premise of extensive regulation of securities transactions, a variety of approaches to regulation are possible.²⁵²

Thus the courts' conclusion that it is improper to allow the United States to be used by foreign issuers as a haven for fraud disregards the fact that determining the appropriate level of regulation of the securities markets is a value choice by the issuer's home country.²⁵³ Consideration of the foreign state's interest in maintaining its own level of regulation, even if different from the United States,²⁵⁴ is an important aspect of interest analysis; in the international context it is part of what has been termed comity.²⁵⁵

Comity is a fundamental element of international choice-of-law. In

²⁵¹ See Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984). On the question of whether the stock markets function efficiently, see Lynn A. Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 MICH. L. REV. 613 (1988).

²⁵² Japanese regulation of tender offers, for example, requires any purchase of more than one-third of the total equity securities of an issuer to be made by means of a tender offer, even if the purchase is made through a friendly, privately negotiated transaction. See Tomohisa Shinagawa & Constance H. Jameson, *The 1990 SEL Amendments: Impact on M&A in Japan*, 12 E. ASIAN EXECUTIVE REP., Dec. 15, 1990, at 9. This approach is markedly different from U.S. policy. Conceivably a failure to make a public tender offer in connection with such a purchase would be fraud under Japanese law but not under U.S. law. Cf. *Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47 (2d Cir. 1985) (rapid private purchases for 25% of SCM stock did not constitute a tender offer or violate Williams Act).

²⁵³ This concern increases when the antifraud provisions are applied to the regulation of takeovers. Regulatory schemes and attitudes towards takeovers vary significantly among countries. The lack of a uniform approach to takeovers was highlighted by recent attempts to reach accord on a takeover directive for the European Economic Community. See (Institution) Proposal for a Thirteenth Council Directive on Company Law Concerning Take-overs, and Other General Bids, 1990 O.J. (C 240) 33; Nathalie Basaldua, *Towards the Harmonization of EC-Member States' Regulations on Takeover Bids: The Proposal for a Thirteenth Council Directive on Company Law*, 9 NW. J. INT'L L. & BUS. 487 (1989); see also Daniel M. Keim, Note, *The European Community's Proposed Directive on Takeover Bids and Its Impact on Shareholders' Rights*, 16 BROOK. J. INT'L L. 561 (1990) (comparing takeover regulation in the United Kingdom and West Germany).

²⁵⁴ Cf. *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 949 (D.C. Cir. 1984) ("We are in no position to adjudicate the relative importance of antitrust regulation or nonregulation to the United States and the United Kingdom."); Note, *Developments in the Law-International Environmental Law*, 104 HARV. L. REV. 1484, 1612, 1623 (1991) (discussing tradeoff between economic development and environmental regulation and explaining how this leads to divergent environmental policies).

²⁵⁵ Additionally, a foreign state's regulation of tender offers may not duplicate the "neutral" approach of the Williams Act towards the struggle between bidder and target for control. For example, Great Britain limits the defensive tactics that a target may use under its City Code on Takeovers and Mergers. The U.K. courts will not generally delay a takeover attempt on the basis of allegations of improper conduct by the bidder. Accordingly, the courts of Great Britain are less accessible to a

criticizing the application of domestic laws to international transactions, many commentators raise the specter of comity without clearly setting forth exactly what they mean by the term. The Supreme Court has defined international comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."²⁵⁶ Thus comity is a voluntary basis for declining to exercise jurisdiction; it is not a legal rule compelling abstention.²⁵⁷

Like interest analysis, principles of comity require courts to assess the competing interests of a foreign nation and the United States in the application of their laws.²⁵⁸ The principles of comity, however, contemplate more than a mechanical balancing of the interests of two sovereigns; they require courts voluntarily to defer to objectives of the foreign state and to concerns of international law.²⁵⁹ Comity requires the courts to consider political factors, such as the extent to which application of domestic law is offensive to other sovereigns, the extent to which other countries may retaliate against the application of U.S. law, and the political effects this conflict may engender.²⁶⁰

Objection by other sovereigns to the broad application of U.S. law is not merely a theoretical possibility. As the United States has become more aggressive in applying its laws to international transactions, other

target as a means of fighting the takeover. See Tony Shea, *Regulation of Takeovers in the United Kingdom*, 16 BROOK. J. INT'L L. 89 (1990).

²⁵⁶ *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

²⁵⁷ The concept of comity was first articulated by Joseph Story who explained that it was only through the voluntary recognition by a sovereign of foreign law that the laws of a state could be extended beyond that state's own territory. Story's theory of comity was developed in his *Commentaries on the Conflict of Laws*, published in 1834. See Ernest G. Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15 (1934).

Story emphasized that the doctrine was not one of legal obligation:

[T]he administration of international law must rest [on] rules which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.

JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* § 35 (4th ed. 1852).

²⁵⁸ See *supra* notes 241-52 and accompanying text.

²⁵⁹ Compare *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) (comity involves balancing of interests of U.S. versus those of foreign states) with *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) (comity is more appropriately considered an abstention analysis).

²⁶⁰ See, e.g., Kenneth M. Dam, *Economic and Political Aspects of Extraterritoriality*, 19 INT'L L. 887, 895 (1985); Lange & Born, *supra* note 4, at 42-43. Trade controls, for example, are frequently imposed in order to achieve political, rather than economic, objectives. See, e.g., ANDREAS F. LOWENFELD, *TRADE CONTROLS FOR POLITICAL ENDS* § 1 (2d ed. 1983); see also Brief for Society for Human Resources Management as Amicus Curiae at 18-21, *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227 (1991) (Nos. 89-1838, 89-1845), *microformed on* U.S. Supreme Court Records and Briefs (Microform, Inc.).

countries have objected.²⁶¹ Furthermore, countries have retaliated against aggressive application of U.S. law. This retaliation has taken the form of statutes designed to reverse the effect of a given U.S. statute,²⁶² legislation designed to protect transactions in the home country or discriminate against U.S. business or business transactions,²⁶³ and rules aimed at preventing the intrusion of the U.S. litigation process.²⁶⁴ Similar legislation is a possible response to U.S. attempts to regulate foreign tender offers. For example, foreign sovereigns might pass laws forbidding U.S. investment in their businesses or eliminating requirements like that in *Gold Fields* which require foreign nominees like ADR depositories to forward information to beneficial owners. Thus the broad application of U.S. law might result in restrictions on U.S. investment abroad or a decline in the availability of information regarding such investments. Neither serves the interests of U.S. investors.²⁶⁵

²⁶¹ See, e.g., Pengilly, *supra* note 4, at 835-36 (describing "furor" in international community over expansive exercises of United States jurisdiction); cf. *EC Complains of Uncertainty Associated With Exon-Florio*, 24 Sec. Reg. & L. Rep. 236 (BNA) (Feb. 21, 1992) (describing joint declaration by the European Community and its member states objecting to the broad application of the Exon-Florio provision to interfere with foreign acquisitions of U.S. companies). In many areas, the expansive application of U.S. law is viewed as protectionist. See, e.g., Peter Passell, *Tuna and Trade: Whose Rules?*, N.Y. TIMES, Feb. 19, 1992, at D2 (application of environmental standards to international transactions offends political notions of free trade).

²⁶² The most notorious of these is the British clawback statute, the Protection of Trading Interests Act § 6 (1990), reprinted in 959 Antitrust & Trade Reg. Rep. (BNA) F-2 (April 10, 1980). The clawback statute allows a defendant who has paid a multiple damage award in a foreign judgment to recover the multiple portion of that judgment from the plaintiff. See Joseph E. Neuhaus, Note, *Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 COLUM. L. REV. 1097 (1981). Similar legislation has been introduced in Australia and Canada. *Id.* at 1098.

²⁶³ For example, in 1980, Great Britain passed the Protection of Trading Interests Act which authorizes the Minister of Foreign Trade to direct citizens to disobey the law of other nations when that law is applied extraterritorially. Commentators claim that this legislation was passed in direct response to aggressive extraterritorial application of U.S. statutes by American courts. See, e.g., Matson, Note, *supra* note 7, at 166-67; Michaels, Note, *supra* note 146, at 929.

²⁶⁴ Legislation enacted by other jurisdictions to interfere with the application of U.S. law include blocking statutes and secrecy statutes. Blocking statutes prohibit documents from being disclosed or removed from the enacting state in connection with foreign litigation. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442, reporter's note 4 (1987). Such statutes have been enacted in nearly twenty nations, including France, the United Kingdom, Canada, and West Germany. See Lange & Born, *supra* note 4, at 8-9. The texts of many such statutes are reprinted in A. V. LOWE, EXTRATERRITORIAL JURISDICTION—AN ANNOTATED COLLECTION OF LEGAL MATERIALS (1983).

Secrecy statutes forbid disclosure of information, usually by banks and other financial institutions, without customer consent. Violation of the statute may carry criminal penalties. See, e.g., SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981). Many countries consider secrecy statutes an important method of furthering a policy of financial privacy. See, e.g., United States v. Rubin, 836 F.2d 1096, 1102 (8th Cir. 1988).

²⁶⁵ In addition, the practice of using the laws and courts of the United States to interfere with foreign takeovers may be imitated by foreign litigants. Such litigants might seek a broad application of the laws of their home country in an attempt to interfere with a U.S. transaction. For example, in

Many commentators have criticized the doctrine of comity by recognizing that courts are ill-suited to apply it.²⁶⁶ The evidence suggests that the likelihood of a court choosing to defer to the foreign interests is small.²⁶⁷ When there is a choice between applying U.S. law or declining jurisdiction over a foreign transaction, courts are seldom inclined to abstain from hearing the case, particularly when they recognize that such abstention is not mandatory, but discretionary.

In addition, reconciling the foreign sovereign's objectives and effecting compromises in terms of the application of each state's law is typically a matter for the executive and legislative branches, not the courts.²⁶⁸ Although the foregoing analysis attempts to provide more realistic factors for the courts to consider in deciding whether to regulate foreign tender offers, the difficulty of the task suggests that there is a real risk that the courts will thwart the policy objectives of the other branches²⁶⁹ through their aggressive application of U.S. law.²⁷⁰ This Article therefore proposes a legislative approach to regulation of foreign tender offers.

V. AN ALTERNATIVE APPROACH TO REGULATION OF FOREIGN TENDER OFFERS

The concern of investor protection can be addressed without locking investors out of foreign tender offers and without intrusive regulation that may offend foreign sovereignty. The shortcomings of current SEC

the R. J. Reynolds takeover, bondholders in Switzerland sought to have the takeover enjoined based on Swiss law of fiduciary duty. See Deirdre Fanning, *Bonds that Bind*, FORBES, May 1, 1989, at 48. This "copycat" use of extraterritoriality could directly interfere with essentially domestic transactions.

²⁶⁶ See, e.g., MILTON HANDLER ET AL., *CASES AND MATERIALS ON TRADE REGULATIONS* 1135 (2d ed. 1983); Robert H. Bork, Introduction, 18 *STAN. J. INT'L L.* 241, 244 (1982); Steven A. Kadish, *Comity and the International Application of the Sherman Act: Encouraging the Courts to Enter the Political Arena*, 4 *NW. J. INT'L L. & BUS.* 130, 165 (1982).

²⁶⁷ See, e.g., Note, *The SEC's Waiver By Conduct Proposal: A Critical Appraisal*, 71 *VA. L. REV.* 1411, 1431-32 (1985) (discussing tendency of U.S. courts to undervalue foreign interests). The U.S. judicial reaction to foreign bank secrecy statutes provided a clear demonstration of the courts' inability to recognize the different objectives of a foreign regulatory scheme. See *id.*

²⁶⁸ The shortcomings of the courts in resolving these conflicts are illustrated by the litigation brought in foreign countries attempting to enjoin U.S. litigation on the grounds that the U.S. exercise of jurisdiction is unconscionable. See Note, *Antitrust Injunctions and International Comity*, 71 *VA. L. REV.* 1039, 1061-64 (1985) (discussing *British Airways Bd. v. Laker Airways*, [1984] 3 *All E.R.* 39). The British courts have unanimously declared their authority to issue such injunctions. *Id.*

²⁶⁹ Traditionally, the political branches of government have played the primary role in foreign affairs policy. See James W. Perkins, Note, *In re Japanese Electronic Products Antitrust Litigation: Sovereign Compulsion, Act of State and the Extraterritorial Reach of the United States Antitrust Laws*, 36 *AM. U. L. REV.* 721, 729 (1987) (suggesting extraterritoriality may implicate political question doctrine).

²⁷⁰ For example, the United States routinely uses trade sanctions to further its foreign policies. See *Lange & Born*, *supra* note 4, at 17-20.

proposals and the inherent difficulty of requiring courts to analyze extra-territoriality on a case-by-case basis and to consider the relevant policy factors, including comity, in their analysis, leads this Article to propose a legislative solution. This Article recommends that Congress amend the Exchange Act to address the application of the Williams Act to foreign tender offers.²⁷¹

The Article proposes that Congress delineate the scope of the Williams Act (and corresponding liability under section 10(b)) in connection with a foreign tender offer as follows: U.S. law would apply to tender offers made for the securities of corporations incorporated in the United States and for securities listed on a national securities exchange or registered with the SEC under Rule 12(g).²⁷² For all other tender offers which are made in the United States or which affect U.S. investors, the Williams Act provisions, including the antifraud provisions,²⁷³ would not apply so long as the bidder meets the following conditions: (1) the bidder must provide U.S. investors with an English translation of any tender offer disclosure documents required by the target company's home country; and (2) the tender offer must be open to U.S. investors on substan-

²⁷¹ Another alternative that would take cognizance of foreign and domestic policy concerns would be to address the regulation of international tender offers through a diplomatic approach, such as the negotiation of multilateral or bilateral mutual assistance treaties or memoranda of understanding with other countries. Following the example of successful negotiations in such areas as international discovery in insider trading cases (*see, e.g.*, Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019; U.S.-Switz. Memorandum of Understanding on Insider Trading, 14 Sec. Reg. & L. Rep. (BNA) 1737 (1982), *reprinted in* 22 I.L.M. 1 (1983)), the executive branch could negotiate the degree of U.S. involvement that would justify application of U.S. law and the degree to which that U.S. law would be applied. The SEC has traditionally been skeptical of approaching the problems of global conflict through international negotiation, citing the time-consuming nature and difficulty of such negotiations and the diversity of interests among the different nations involved. *See* SEC Request for Comments Concerning a Concept to Improve the Commission's Ability to Investigate and Prosecute Persons Who Purchase or Sell Securities in the U.S. Markets from Other Countries, Exchange Act Release No. 21,186, at 20-21 (July 30, 1984), *reprinted in* 16 Sec. Reg. & L. Rep. (BNA) 1305 (Aug. 3, 1984). For examples of successful bilateral negotiations in the antitrust area, *see* Memorandum of Understanding as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, Mar. 9, 1984, U.S.-Can., *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 50,464; Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, U.S.-Austl., *reprinted in* Trade Reg. Rep. [1969-1983 Current Comment Transfer Binder] (CCH) ¶ 50,440.

²⁷² An alternative would be to apply U.S. law to national market system securities, as that term is defined in SEC Rules 11Aa2-1 and 11Aa3-1—securities listed on a national exchange or for which quotation information is reported on the NASDAQ system. Because of the wider dissemination of information about national market system securities within the United States, investors in such securities are more likely to expect protection of the U.S. securities laws. Moreover, the actions taken by an issuer to have its securities listed and thereby to encourage U.S. trading interest in those securities may reasonably be characterized as a purposeful availing of the benefits of the U.S. securities markets. *See infra* note 276. Incidentally, the ADRs in *Ford-Jaguar* were national market system securities but were not registered under § 12. *See* Ford Release, *supra* note 64, at *1.

²⁷³ Congress might place some limits on the proposed safe harbor from the antifraud provisions. For example, it might exclude insider trading from the safe harbor, in light of the increasingly uniform international prohibition on insider trading. *See* ABA Letter, *supra* note 110, at 8.

tially equal terms as foreign investors.²⁷⁴

This proposal is designed to address the policy issues of extraterritorial application of the Williams Act directly. By adopting this proposal, Congress would be taking the position that the protection of U.S. markets must be balanced with a policy of noninterference with foreign markets. This balance can be achieved by limiting the extensive regulation of the Williams Act to situations in which the foreign issuer has chosen to utilize the American capital markets directly.²⁷⁵ With the benefit of this use comes the burden of complying with U.S. law.²⁷⁶

If the target's securities are not part of the U.S. markets, the effect of the tender offer on those markets is indirect. Regulation of such an offer has a greater effect on the markets of the home country, and the United States should defer to the regulations of that country.²⁷⁷ In such cases, the primary objective behind U.S. involvement in the tender offer is protection of its own citizens.²⁷⁸ A recognition that complete protection cannot be accomplished without substantial intrusion on the foreign sovereign, coupled with an understanding that the decision to invest overseas involves a conscious trade-off between the protection of U.S. law and the opportunity to participate in a broader global market, leads to the conclusion that the most appropriate form of U.S. regulation would be to require bidders to provide investors with all available information about their investments, including disclosure documents in English. This re-

²⁷⁴ This requirement will not preclude the bidder from making a cash offer to U.S. investors and an exchange offer abroad in order to avoid the registration requirements of federal law, so long as the U.S. investors receive substantially equal consideration for their stock.

²⁷⁵ This approach is responsive to the strong congressional purpose of protecting the U.S. markets and speculation in those markets through the federal securities laws. *See, e.g.*, H.R. REP. NO. 1383, 73d Cong., 2d Sess. (1934) (describing effect of fluctuations in the stock exchanges on the nation's economic system).

²⁷⁶ The nature of this approach is partly contractual. As a consequence of accepting the benefits of the U.S. capital markets, the foreign corporation agrees to submit to the burdens of U.S. regulation of those markets. The implication that this approach accords with legitimate expectations of the parties has played an important role in the analysis of personal jurisdiction, in which the courts have concluded that it is not unfair to require one who has purposely availed himself of the benefits of state law to litigate in that state. *See, e.g.*, *World-Wide Volkswagen v. Woodsen*, 444 U.S. 286, 297 (1980); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). As the Supreme Court has stated, if a defendant avails himself of the privilege of conducting business within a state, "it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

²⁷⁷ This deference is akin to the corporate law principle embodied in the internal affairs doctrine, under which the law applied to a corporation's internal affairs is generally the local law of the state of incorporation. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 90 (1987) ("a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation"); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 302(2) (1971).

²⁷⁸ *See, e.g.*, *United States v. Chestman*, 947 F.2d 551, 559 (2d Cir. 1991) (en banc) (quoting *Lewis v. McGraw*, 619 F.2d 192, 195 (2d Cir.) (per curiam), *cert. denied*, 449 U.S. 951 (1980)) ("The 'very purpose of the [Williams] Act' . . . was 'informed decisionmaking by shareholders.'").

quirement is consistent with the general securities law policy of favoring full disclosure over intrusive substantive regulation, a policy espousing the view that disclosure alone is effective in combatting much of the risk of fraud in the securities markets.

VI. CONCLUSION

The cursory analysis conducted by the courts under their current "subject matter jurisdiction" approach to the extraterritorial application of the federal securities laws focuses exclusively on judicial power and does not address the significant policy implications of applying U.S. law to foreign transactions. These policy implications include the effects of applying U.S. law to a primarily foreign transaction on foreign interests and on U.S. investors, effects that may actually prove detrimental to the interests of the United States.

The difficulty of developing a workable approach stems from the fact that the decision to apply foreign or domestic law to an international transaction cannot be made through a court-administered balancing test, regardless of which factors the court is directed to balance. Judicial incompetence in the field of measuring and setting U.S. policy, together with the courts' inability fairly to analyze and weigh the interests of the United States and a foreign sovereign compel a legislative solution.

The solution proposed in this Article is designed to address the legitimate concern of investor exclusion, the objectives of the federal securities laws, and the general political goal of noninterference with foreign business transactions. By deferring to foreign law in transactions that are primarily foreign in nature, the proposal reduces infringement on the interests of foreign nations. At the same time, the proposal balances the interests of U.S. investors of full participation in beneficial financial opportunities with the core interests of investor information and protection under the Williams Act. The solution—equal participation together with a minimum amount of mandated disclosure in English—is more responsive to the needs of Americans who choose to invest abroad while not impeding the rights of their fellow foreign investors.

Although the proposal addresses a single area in the field of extraterritoriality, the principles upon which it is based can be used generally to decide when U.S. law should be applied to foreign transactions.²⁷⁹ Accordingly, this proposal may be viewed as a model for a legislative determination of the appropriate limits of U.S. law.

²⁷⁹ See Maier, *supra* note 242, at 319 (the establishment of "clear value choices" and the consistent application of those choices "would contribute to the growth of transnational expectations about legitimate limits on the exercise of power.").