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I. Introduction

The purpose of this paper is to discuss the policy and legal problems with regard to foreign acquisitions of United States banks. Some of these problems are the same as for acquisitions of other types of businesses; other problems are quite special to the acquisition of banks. The emphasis in the paper will be on the acquisition of banks owned by holding companies, which is how most large (and many smaller) United States banks are organized.

There are many common sense business reasons why foreign banks are interested in acquiring banks in the United States. For example, customers of foreign banks are expanding into the United States and it may be considered important by foreign banks to be able to provide service for their customers directly rather than through other banks which are competitors or potential competitors. Acquisition, even at a high premium, is often believed to be the cheapest and least risky way to enter a new market. Furthermore, stock prices in the United States appear to be low in comparison to book asset values, which may make acquisitions, including of banks, appear to be an attractive form of expansion for both domestic and foreign companies. For foreign acquirers there are also other attractions. The dollar appears to be cheaper than it has been with respect to most European currencies, and investment in the United States provides an important form of political diversification of investment risk because the United States' political and economic systems are stable and still relatively friendly to capitalism.

Moreover, foreign banks have a special, very important, economic incentive for acquiring United States banks instead of organizing new banks.

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Legal rules in the United States severely restrict the extent to which United States banks and most other United States corporations can compete for bank acquisitions in the United States. These legal restrictions on United States banks and other potential United States acquirers could make the expected return on investment to a foreign acquirer of a United States bank appear to be higher than from other types of investment in the United States and elsewhere with the same amount of risk. Competition among foreign acquirers and legally eligible United States non-bank acquirers (including ordinary stock market purchases for investment) should have a tendency to reduce the expected return, but the elimination by law of their most knowledgeable and effective United States competitors for acquisitions must be viewed by foreign acquirers as a very important favorable factor.[1]

There are many difficulties for foreigners in making acquisitions in the United States which further reduce competition for such acquisitions and may increase the expected rewards for successful acquirers. The greatest difficulties are the federal and state regulatory structures which require the prior approval of regulatory agencies for acquisitions of banks.

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[1]In an efficient securities market, there is some mystery about why acquirers are willing to pay premiums over market price for acquisitions since stock prices should reflect accurately the values of companies. For a description of the theory and the empirical evidence supporting the hypothesis that securities markets are efficient *see* LORIE & HAMILTON, THE STOCK MARKET: THEORIES AND EVIDENCE 70–98 (1973); Fame, *Efficient Capital Markets: A Review of the Theory and Empirical Work*, 25 J. FINANCE 383 (1970); Jensen, *Capital Markets: Theory and Evidence*, 3 BELL J. ECON. MTG. SCI. 357 (1972); Herzel and Colling, *The Chinese Wall and Conflict of Interest in Banks*, 34 BUS. LAW. 73, 94–99 (1978); Saari, *The Efficient Capital Market Hypothesis, Economic Theory and the Regulation of the Securities Industry*, 29 STAN. L. REV. 1031, 1034–57 (1977). The most satisfactory, although very general, explanation is that acquirers believe they have some insight into the targets' businesses which will permit them to operate (or dispose of) these businesses more profitably than present managements. For an extensive survey of the literature on this subject and the development of an interesting theory very favorable to tender offers *see* Easterbrook and Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. __ (April 1981). Clearly some acquirers make unusually high profits on acquisitions and others make mistakes and lose money. There is statistical evidence, however, that on the average in negotiated acquisitions in the United States the premiums paid by acquirers reflect all the additional value in the acquisitions above a normal competitive rate of return on investments with the same degree of risk. Mandelker, *Risk and Return: The Case of Merging Firms*, 1 J. FINANCIAL ECON. 303 (1974). This is consistent with the hypothesis that there is, for practical purposes, perfect competition among domestic acquirers, exactly what may be lacking in the market for United States banks when domestic competition is excluded. In unnegotiated tender offers competition is also often lacking unless there is management resistance sufficient to give the management bargaining power similar to a negotiated acquisition. *See* Herzel, Schmidt & Davis, *Why Corporate Directors Have a Right to Resist Tender Offers*, 61 CHI. B. REC. 152 (1979); *also published in* 3 CORP. L. REV. 107 (1980). In the case of foreign acquirers there is a possibility that the premiums they pay reflect in part the fact that they are willing to accept lower rates of return than domestic acquirers because after discounting for political risks the expected return to foreigners in their own countries is lower than it appears and lower than in the United States. However, to the extent that international securities markets are also efficient the attitudes of foreigners toward political risk should already be reflected in securities prices in the United States and elsewhere. *See* Black, *The Ins and Outs of Foreign Investment*, May/June, 1978, FINANCIAL ANALYSTS J. 2.

II. Policy Issues

A. *Economic Issues*

In general, the purely economic effects of foreign acquisitions should be beneficial to shareholders of United States companies and for the United States economy. If an acquisition is at a premium over the market price of the acquired company's stock (as it almost always is), stockholders benefit directly from the premium; and, unless the acquirer has made a mistake, the United States economy benefits because the allocation of economic resources in the United States is improved. An acquirer motivated by a desire for economic gain generally could not afford to pay more than the market price of the stock unless it expected to improve the use of the acquired company's resources. Although acquirers, like everyone else, are sometimes wrong, on the average they must be right or else acquisitions would cease.

Even from a purely economic standpoint, banks are a special case of foreign investment. If there were no legal restrictions on domestic banks and other domestic corporations against acquiring banks in the United States, then the economic effects of acquisition by foreigners would be the same as for other foreign acquisitions. However, the severe legal restrictions against acquisitions of banks by domestic banks and corporations make these conclusions less clear. Foreign acquisitions of banks at a premium are probably, on the average, beneficial to bank shareholders and the economy. But if domestic banks were permitted to compete for acquisitions, prices to shareholders and benefits for the United States economy might be much greater. It is impossible to justify on economic, political or any other grounds a set of legal rules which may be giving foreign banks sheltered bargain prices in making acquisitions of United States banks.

The effect of foreign bank acquisitions of United States banks on control of the United States money supply is probably non-existent or very minor. Most of the problem is created by the large dollar balances held in foreign banks abroad, not by foreign bank acquisitions. In general, we probably have much less control over our money supply than we pretend.[2]

B. *Political Issues*

Most of the negative aspects of foreign investment involve political rather than economic issues.[3] Foreign ownership of companies can reduce or

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[2]For a discussion of the economic effects of foreign investment *see* Black, *The Ins and Outs of Foreign Investment*, May/June, 1978, FINANCIAL ANALYSTS J. 2.

[3]Since 1977, an Arab group has been attempting to acquire control of Financial General Bankshares Inc. which owns two small banks in New York (New York City and Albany) and several banks in the Washington, D.C. metropolitan area (total assets, $2.5 million). Until the price was increased, management resisted the acquisition and there were some legal problems with the SEC. Management is no longer resisting but the acquisition is still subject to approval by the Federal Reserve Board and the New York and Maryland banking authorities. There is some political pressures against the takeover. (New York State Senator Ohrenstein said that

appear to reduce the United States' complete control over its economy and political system. Even if the actual amount of foreign control over total bank assets in the United States is relatively minor, the suspicion that there is pervasive foreign influence could be very undesirable. On the other hand, as the Iran crisis has illustrated, there may in some instances be real strategic advantages in having the power to hold foreign assets hostage.

There is also in the background the belief (which may have no proper empirical basis) that, despite supervision by bank regulatory agencies, foreign ownership is more likely than domestic ownership to result in looting or other misuse of bank and trust assets. This uneasiness has been reinforced by what may be a statistically rare example, the role which Michele Sindona played in the failure of the Franklin National Bank. This foreign financier was convicted of, among other things, misappropriating $15,000,000 in Franklin funds and directing improper foreign currency speculation that resulted in the bank losing $30,000,000 before its collapse in 1974.[4]

"as representatives of their governments" the Arab investors can "draw upon resources and even laws that take them out of the realm of competition with other banks.") New York Times, March 27, 1981 § D (Business), at 3, col. 4. The political and social sensitivity of a change in the control of an important (although not one of the largest) banks in a purely domestic United States context is illustrated by the attempt of Mr. Joe L. Allbritton to acquire control of Riggs National Bank in Washington, D.C. with a tender offer at a premium of approximately 40% over market price which would give him 35% of the outstanding shares, New York Times, February 10, 1981, § D (Business), at 3, col. 1, February 13, 1981, [§ D (Business), at 3 col. 1.] (All New York Times citations are to the Late City Edition.) The bank filed a lawsuit against Mr. Allbritton in the federal district court in Washington which issued a preliminary injunction delaying the offer, Wall Street Journal, March 18, 1981, at 10, col. 4. Later the bank announced that it had reached a settlement with Mr. Allbritton and that it would end its opposition to the tender offer in court and before the Bank Regulatory Agencies. Wall Street Journal, March 24, 1981 at 22, col. 2. (All Wall Street Journal citations are to the Eastern Edition.) Approval by the Comptroller of the Currency is necessary before the tender offer can become effective. A recent domestic Canadian example was the attempt by Campeau Corp. to acquire control of Royal Trustco Ltd. which was frustrated when "friends" of Royal Trustco acquired sufficient shares to defeat the offer, Wall Street Journal, February 2, 1981, at 19, col. 6, March 23, 1981, at 4, col. 1. Two other interesting recent examples of political and social concern about the sale of important companies in a politically sensitive industry (national newspapers) are the sales of Times Newspapers and the Observer in London. Neither of the buyers was a foreigner although concern had been expressed about the possibility that Times Newspapers might possibly be acquired by a foreigner. Financial Times, January 28, 1981, at 1, 7, col. 4, February 26, 1981, at 1, col. 3, February 27, 1981, at 8, col. 2. (All Financial Times citations are to the Daily Edition published in London and Frankfurt.); New York Times, March 2, 1981, § D (Business), at 1, col. 3; Wall Street Journal, February 27, 1981, at 26, col. 5; *see also* Johnson, *"Tiny" Rocks the Boat*, March 7, 1981, SPECTATOR 17.

[4]The *New York Times*, March 28, 1980, § D (Business), at 10, col. 5. Sindona's conviction was recently affirmed by the Court of Appeals, United States v. Sindona, 1980 FED. SEC. L. REP. (CCH) ¶ 97,732 (2d Cir. 1980). There is no lack of counterexamples of domestic defrauders. In October 1973, United States National Bank in San Diego was declared insolvent because of loan losses caused by its chief executive officer and principal shareholder, C. Arnholt Smith, and as a consequence, the Federal Deposit Insurance Corporation ultimately paid out over $200 million to protect depositers. Wall Street Journal, March 4, 1981, at 26, col. 1. More recently Wells Fargo Bank in California was the victim of a large employee fraud although neither principal officers nor shareholders were involved. New York Times, February 23, 1981, at 1, col. 3, March 20, 1981, at 1, col. 1; Wall Street Journal, March 4, 1981, at 1,

Whatever one may think of the empirical basis for the justifications, the political implications of foreign bank acquisitions are clearly very serious. There is a political limit on how much foreign bank ownership the United States can permit, and ownership by acquisition rather than by new investment poses the problem in its most controversial form. Lest we should, unintentionally, appear to be painting a picture of a jingoish, restrictive United States, we would like to make it clear that United States policy in this regard is far less restrictive than the policies of European countries. Can one imagine one of the largest commercial banks in the United Kingdom, Switzerland, France or West Germany being controlled by United States nationals?[5]

III. Legal Issues

A. *Regulatory Approvals*

In discussing the principal legal steps which must be taken to acquire a United States bank, this article will assume that a foreign bank holding company (Parent) has organized a wholly-owned subsidiary (Buyer) under the laws of the state of Delaware (a state where many large United States corporations are organized), to purchase for cash from a publicly held corporation (usually also organized in Delaware) (Seller) all of the stock (Shares) it owns of its subsidiary bank (Bank).[6]

1. Federal Reserve Board Approval Required

The Bank Holding Company Act of 1956 (Act)[7] prohibits any "company" (which includes corporations and partnerships but excludes individuals) from becoming a bank holding company without the prior approval of

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col. 6, at 26, col. 1. Furthermore, if the public in the United States were to generally look upon foreign bankers as potential defrauders, foreign bankers would have to quickly overcome this perception or else risk losing the value of their investments through loss of deposits, fiduciary accounts and other bank business. The limited empirical studies on the subject do not support the view that United States banks suffer from foreign ownership. Report by the Comptroller General of the United States, pp. iii-v, chapters 3, 4 (GGD-80-66, August 26, 1980).

[5]As an example of foreign restrictions on foreign acquisitions by United States Banks, it was reported recently that under pressure from large Spanish banks, the Bank of Spain refused permission to Citibank to buy certain Spanish finance companies, Financial Times, March 10, 1981, at 19, col. 2.

[6]There may also be situations where it is advantageous for the bank holding company itself to be acquired, either by a merger of Buyer into Seller or a merger of Seller into Buyer. For example, this may allow the Buyer to benefit from prior United States tax losses of the Seller or the Parent may desire to acquire non-bank assets of the Seller. Except under special circumstances, it is unlikely that the Buyer will make a tender offer for the publicly held shares of Seller. *See* pp. 387–88 *infra*.

United States banks are either organized under the banking laws of one of the 50 states (a state bank) or under federal law (a national bank). The applicable law may impose requirements of significance to the Buyer. For example, directors of a national bank must be United States citizens, provided that, in the case of a national bank which is a subsidiary or affiliate of a foreign bank, the Comptroller of the Currency may in his discretion waive this requirement in the case of a minority of the directors. 12 U.S.C. § 72.

[7]12 U.S.C. §§ 1841–49.

the Board of Governors of the Federal Reserve System (Board).[8] A company is a "bank holding company" if it "controls" a United States bank.[9] Control is deemed to exist when a company owns or controls, directly or indirectly, 25 percent or more of any class of voting stock and may be deemed to exist in other situations.[10] (Usually the ownership of less than 5 percent of such stock will not be deemed "control.") Accordingly, both the Buyer and the Parent would have to obtain approval of the Board before the Buyer acquired 25 percent (or, depending upon the circumstances, more than 5 percent) of any class of voting stock of the Bank.

In general, the Act prohibits a United States controlled bank holding company from owning non-banking assets.[11] Consequently, a United States conglomerate could not acquire a United States bank. Non-bank related activities are deemed to include the activities of a securities broker, investment banker or underwriter.

However, a foreign bank holding company which is principally engaged in the banking business outside the United States (i.e., more than one-half of its business—disregarding its United States banking—is banking and more than one-half of its banking business is outside the United States), or is otherwise specifically authorized by the Board, is permitted to acquire a United States bank even though it may also, among other things, (i) engage in direct activities of any kind outside the United States, (ii) engage in direct activities in the United States that are incidental to its activities outside the United States and (iii) own stock of any company that is not engaged in any activities in the United States except as are incidental to the international or foreign business of such company.[12] This allows foreign banks and bank holding companies, many of which traditionally engage in

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[8] 12 U.S.C. § 1842(a). The Change in Bank Control Act of 1978, which excludes acquisitions by companies because they are already regulated by the Act, requires individuals seeking to acquire control of a bank to give the appropriate federal bank regulatory agency 60 days' notice of the proposed acquisition. 12 U.S.C. § 1817(j). The agency may disapprove of such acquisition if it would substantially lessen competition, result in a banking monopoly in any part of the United States, jeopardize the financial stability of the bank or otherwise be contrary to the interests of the bank to be acquired. It is likely that an attempt by a foreign individual to acquire a United States bank would be allowed only in unusual circumstances, *e.g.*, if the only alternative were to close the bank.

The direct activities of foreign banks, acting in the United States through branches and agencies, were not subject to federal banking laws, until the enactment of the International Banking Act of 1978. *See generally* Symposium, *Regulation of Foreign Banks in the United States*, 1980 U. OF ILL. L.F. number 1. This statute attempted to subject those activities to substantially the same treatment as if they were activities of United States banks. However, this statute did not necessarily eliminate the advantages that a foreign acquirer has over its United States competitor in acquiring a United States bank, as is explained in this article. *See* pp. 372–73 *infra*.

[9] 12 U.S.C. § 1841(a)(1).

[10] U.S.C. § 1841(a)(2); 12 C.F.R. § 225.2.

[11] 12 U.S.C. § 1843. However, a bank holding company may engage in bank-related activities directly or through subsidiaries and may own shares of any company which do not constitute more than 5% of the outstanding voting shares of such company. 12 U.S.C. § 1843(c); 12 C.F.R. § 225.4.

[12] 12 U.S.C. § 1843(c)(9); 12 C.F.R. § 225.4(g); 211.23(f)(1).

investment banking and other securities businesses and own non-bank related assets, to buy a United States bank without divesting their other businesses and assets. This standard also reflects the Board's policy that only foreign organizations with considerable banking experience should be permitted to acquire United States banks.

The Act prohibits a company from owning a bank in more than one state.[13] When this restriction is combined with the restrictions of the antitrust laws, it is unlikely that a large United States bank holding company or bank could acquire control of any other United States bank. On the other hand, a foreign bank (or other foreign company) which did not control a United States bank or have a United States branch or agency,[14] would not be subject to the geographical restrictions of the Act and would not be likely to have any antitrust problem.[15]

In 1979, the Board approved the following bank acquisitions by foreign bank holding companies: the acquisition of Union Bank, Los Angeles, California (Union Bank), by Standard Chartered Bank Limited (Standard);[16] the acquisition of Marine Midland Banks, Inc., Buffalo, New York

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[13] 12 U.S.C. § 1842(d). An out-of-state acquisition is permitted only if the laws of that state expressly allow it, and there are no state laws which permit such acquisitions. A few states (*e.g.*, Delaware, Maine and South Dakota) have recently enacted laws which permit out-of-state bank holding companies to form local banks, provided those banks do not compete for local retail business. The principal attractions of these laws are lower tax rates and higher permitted interest rates on consumer credit.

[14] If the foreign entity controlled a United States bank, it would be a United States bank holding company and therefore subject to the geographical restrictions of the Act. In addition, the International Banking Act of 1978 prohibits a foreign bank which has a United States branch or agency from acquiring control of a bank in another state. 12 U.S.C. § 3103(a). However, if the foreign entity wished to acquire a bank in another state, it could dispose of its bank, branch or agency. For example, Hong Kong and Shanghai Banking Corporation disposed of its controlling interest in the Hong Kong Bank of California before applying for approval to acquire Marine Midland Bank. *See* note 17 *infra*.

[15] The General Accounting Office believes that foreign acquisitions of United States banks should be prohibited (except for the acquisition of small or troubled banks) until this competitive unfairness has been eliminated or alleviated. *See* note 77 *infra*. On the other hand, the federal bank regulatory agencies believe that no such prohibition should be imposed. *See* notes 79 and 80 *infra*.

In January, 1981, the Carter Administration issued a report which concluded that the present restrictions of the Act on interstate banking are "increasingly ineffective, inequitable, inefficient and anachronistic," and urged a gradual easing of these restraints. *Introduction and Recommendations in White House Staff Report on the McFadden Act which Restricts Interstate Branching by Banks*. Daily Report for Executives, Bureau of National Affairs, January 2, 1981, pp. B–1, B–7. Among other things, it pointed out that the "public interest is not well served by a system which effectively limits to foreign institutions the opportunity to acquire or merge with many domestic banks." (p. B–4). However, the prospect of any liberalizing legislation in the near future is very uncertain. For example, in commenting on this report, Rep. Fernand J. St. Germain, the new Chairman of the House Banking, Finance and Urban Affairs Committee, stated that "interstate branching, to understate the case, is a highly emotional, highly charged issue" and that there were "serious questions about the possibility of mustering a consensus for substantive change." American Banker, January 5, 1981, at 1, col. 1. This highly emotional issue is caused by the self-interest which one would expect from any group which has a monopolistic advantage based on law and is skillfully combined with populist economics.

[16] Order dated March 16, 1979, 65 Fed. Res. Bull. 350 (1979).

(Marine), by Hong Kong and Shanghai Banking Corporation (Hong Kong);[17] the acquisition of National Bank of North America, Jamaica, New York (NBNA), by National Westminster Bank Limited (NatWest);[18] and the acquisition of LaSalle National Bank, Chicago, Illinois (LaSalle), by Algemene Bank, Nederland, N.V. (Algemene).[19] During the period March 31, 1980 to July 1, 1980, there was a legislative moratorium on the acquisition of large United States banks by foreign persons[20] which has not been extended.[21]

2. CRITERIA FOR BOARD APPROVAL

There are three criteria for Board approval: (a) antitrust considerations, (b) financial and managerial resources, and (c) convenience and needs of the community.[22]

(a) Antitrust

The Act provides that the Board not approve any acquisition which would substantially lessen competition unless it finds that the anti-competitive effects are outweighed by the probable effect of the acquisition in meeting the conveniences and needs of the community. In addition, before an application is approved, it must be referred to the United States Department of Justice for its opinion on any anti-competitive implications of the acquisition.

The initial question is whether the Board may employ standards for judging the possible anti-competitive effect of an acquisition that are more strict than the standards generally contained in the antitrust laws to determine the lawfulness of an acquisition, or, in other words, whether the Board may deny approval for an acquisition absent a finding of an antitrust violation. This issue has been the subject of some dispute. The board has taken the position that adverse anti-competitive effects, even if they would not be otherwise condemned under the antitrust laws, are nevertheless relevant to the determination by the Board to grant or withdraw approval for an acquisition.

However, in *Washington Mutual Savings Bank v. FDIC*,[23] the Court of Appeals for the Ninth Circuit held that, under the Bank Merger Act, an agency (in that case, the Federal Deposit Insurance Corporation) does not have authority to apply a standard more stringent than the antitrust laws, and to deny, solely on competitive grounds, an acquisition that would not violate the antitrust laws. The decision in *Washington Mutual* was recently

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[17]Order dated March 16, 1979, 65 Fed. Res. Bull. 354 (1979).
[18]Order dated March 16, 1979, 65 Fed. Res. Bull. 357 (1979).
[19]Order dated July 13, 1979, 65 Fed. Res. Bull. 658 (1979).
[20]*See* pp. 388–391 *infra*.
[21]*Id.*
[22]12 U.S.C. § 1842(c).
[23]482 F.2d 459 (9th Cir. 1973).

followed by the Court of Appeals for the Eighth Circuit in *County National Bancorporation and TGB Co. v. Board of Governors of the Federal Reserve System*[24] and by the Court of Appeals for the Fifth Circuit in *Mercantile Texas Corp. v. Board of Governors of the Federal Reserve System*.[25] For the present, therefore, the standards imposed by the courts for determining the lawfulness of a bank acquisition under the antitrust laws are apparently binding upon the Board.

Normally, foreign acquirers should have little difficulty satisfying the antitrust criterion, particularly if the foreign acquirer does not have, prior to the acquisition, significant banking activities in the United States. Possible antitrust problems are related to two factors: (1) the extent to which the foreign acquirer performs banking functions in the United States prior to the acquisition; and (2) the extent to which the foreign acquirer may be viewed as one of a few potential entrants into a concentrated market in the United States. Thus, it has been noted that

> [A]n acquisition by the foreign institution of a domestic bank is most likely to raise significant competitive problems where the foreign bank already serves markets in which the offices of the bank to be acquired are located, or is one of a few significant potential entrants into concentrated markets in which the bank to be acquired holds a substantial position. This is equally true of acquisitions by domestic banks. Moreover, as may be true of domestic acquisitions, a foreign bank acquisition may have procompetitive effects.[26]

The application of these criteria to foreign acquirers is unlikely to present serious problems except in unusual circumstances. If the foreign acquirer and the bank to be acquired both have operations in the same geographical area in the United States, the activities of each entity would have to be significant before an antitrust question would arise.[27] In the event that the

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[24]1980-81 Trade Cases ¶ 63, 726 (8th Cir. 1980), *petition for rehearing granted*, October 28, 1980.

[25]638 F.2d 1255 (5th Cir. 1981).

[26]Testimony of Donald L. Flexner, [former] Deputy Assistant Attorney General, Antitrust Division, Department of Justice, before the Committee on Banking, Housing and Urban Affairs, United States Senate, Concerning Acquisitions of American Banks by Foreign Banking Institutions, July 16, 1979, p. 23. *See generally* Weiss, *Competitive Standards Applied to Foreign and Domestic Acquisitions of U.S. Banks*, Winter 1980, THE ANTITRUST BULLETIN, 701; and Weiss, *National Policies on Foreign Acquisitions of Banks*, 164 THE BANKERS MAGAZINE 25 (1981). It is quite possible that the new Reagan administration will be far less restrictive on antitrust grounds with regard to both domestic and foreign acquisitions. *See* New York Times, February 13, 1981, § D (Business), at 2, col. 1, March 20, 1981, § D (Business), at 1, col. 1.

[27]In a market that is not highly concentrated, that is, where the market shares of the four largest firms amount to less than approximately 75%, the Merger Guidelines of the Department of Justice, TRADE REG. REP. (CCH) ¶ 4510, at 6884, state that the Department "will ordinarily challenge" a merger where the shares of the firms involved exceed the following:

Either of the Firms	The Other Firm
5%	5% or more
10%	4% or more
15%	3% or more
20%	2% or more
25% or more	1% or more

foreign acquirer did not, prior to the acquisition, conduct banking activities in the same area in the United States, questions would arise only if the acquirer was one of a few potential entrants into the particular United States market, if that market was concentrated, and if the bank sought to be acquired was a substantial factor in that market.[28]

In the case of each of the acquisitions approved in 1979, the Board concluded that the increased market share of the combined institution was not significant. Union Bank was the sixth largest banking organization in the state of California and the fourth largest banking organization in the Los Angeles metropolitan market, controlling less than 8 percent of the deposits in commercial banks in that market; Marine was the seventh largest banking organization in the state of New York and the ninth largest banking organization in the New York City market, controlling less than 3 percent of the deposits in commercial banks in that market; NBNA was the thirteenth largest commercial bank in the state of New York and the eleventh

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In a highly concentrated market, that is, where the market shares of the four largest firms amount to approximately 75% or more, the Guidelines state that the Department "will ordinarily challenge" a merger where the shares of the firms involved exceed the following:

Either of the Firms	The Other Firm
4%	4% or more
10%	2% or more
15% or more	1% or more

[28]The Department of Justice Guidelines state that the Department "will ordinarily challenge" a merger between "one of the most likely entrants into the market" and

(i) any firm with approximately 25% or more of the market;

(ii) one of the two largest firms in a market in which the shares of the two largest firms amount to approximately 50% or more;

(iii) one of the four largest firms in a market in which the shares of the eight largest firms amount to approximately 75% or more, provided the merging firm's share of the market amounts to approximately 10% or more; or

(iv) one of the eight largest firms in a market in which the shares of these firms amount to approximately 75% or more, provided either (A) the merging firm's share of the market is not substantial and there are no more than one or two likely entrants into the market, or (B) the merging firm is a rapidly growing firm." TRADE REG. REP. (CCH) ¶ 4510, at 6888.

It should be noted that, while these guidelines may be a guide to the Department's enforcement intentions, they do not, unlike the guidelines set forth in the prior footnote, have a sound basis in the cases decided by the courts. The number of cases that have been decided to date under a potential competition theory is relatively small, and therefore the interpretation and application of the potential competition theories is uncertain. Recently, in Mercantile Texas Corp. v. Board of Governors of the Federal Reserve System, 638 F.2d 1255 (5th Cir. 1981), the court of appeals described a potential competition theory as a "controversial doctrine whose validity remains a current subject of debate" (638 F.2d 1255, at 1263) and discussed the extensive findings that the Board would have to make to apply such a theory to a merger of two Texas bank holding companies. *Id.* at 1267–1272. Moreover, the Supreme Court has rebuffed various specific attempts by the Department of Justice to apply a potential competition theory in the context of domestic bank mergers on the grounds that, *inter alia*, regulatory barriers to ready entry into new markets "often significantly reduce, if they do not eliminate, the likelihood that the acquiring bank is either a preceived potential de novo entrant or a source of future competitive benefits through de novo or foothold entry." United States v. Marine Bancorporation, 418 U.S. 602, 630 (1974). *See also* United States v. Citizens & Southern National Bank, 422 U.S. 86 (1976); United States v. Connecticut National Bank, 418 U.S. 656 (1974). *See generally* Austin, *The Evolution of Commercial Bank Merger Antitrust Law*, 36 BUS. LAW. 297 (1981).

largest banking organization in the metropolitan New York City market, controlling less than 2 percent of the deposits in commercial banks in that market; and LaSalle was the sixth largest banking organization in the state of Illinois and also the sixth largest banking organization in the Chicago market, controlling less than 2 percent of the deposits in commercial banks in that market. In each case, the acquiring foreign bank was not a major factor in the relevant market.

(b) Financial and Managerial Resources

The Board may deny an application to form a bank holding company on grounds of financial or managerial unsoundness even in the absence of anti-competitive impact.[29]

The Board has stated that it expects a foreign bank holding company to be a source of financial and managerial strength to its United States subsidiary bank.[30]

Satisfying these criteria should not present a problem to any of the major foreign bank holding companies. Frequently, the Board expects that there be an infusion of capital into the United States Bank at the time of the acquisition, e.g., the $25 million additional capital which Standard invested

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[29] Board of Governors of the Federal Reserve System v. First Lincolnwood Corp. 439 U.S. 234 (1978). However, in a recent decision of the Ninth Circuit which may be inconsistent with the *First Lincolnwood* case, it was held that the moral character of the controlling stockholders of the proposed holding company is not a proper ground for denial unless it would cause the bank or the holding company to be unsound or mismanaged. Security Bancorp, et al. v. Board of Governors of the Federal Reserve System 1979-80 FED. BANKING L. REP. (CCH) ¶ 98,467 (9th Cir. 1980) (Board is not authorized to deny bank holding company application on ground that the major stockholder was allegedly involved in giving bribes to foreign governments at a time when such payments would not have violated any United States law and refused to give the Board information concerning this allegation, because lack of good moral character is relevant only if it would cause the bank or the holding company to be unsound or mismanaged.)

[30] [T]he Board believes that in general foreign banks seeking to establish banks or other banking operations in the United States should meet the same general standards of strength, experience and reputation as required for domestic organizers of banks and bank holding companies. The Board also believes that foreign banks should meet on a continuing basis these standards of safety and soundness if they are to be a source of strength to their United States banking operations.

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> Whenever a foreign bank applies to become a bank holding company, the Board will seek to assure itself of the foreign bank's ability to be a source of financial and managerial strength and support to the United States subsidiary bank. In reaching this judgment, the Board will analyze the financial condition of the foreign organization, evaluate the record and integrity of management, assess the role and standing of the bank in its home country, and request the view of the bank regulatory authorities in the home country. In connection with its financial analysis, the Board will require sufficient information to permit an assessment of the financial strength and operating performance of the foreign organization. Information will consist of reports prepared in accordance with local practices together with an explanation and reconciliation of major differences between local accounting standards and United States generally accepted accounting procedures including full information on earnings, capital, charge-offs and reserves.

Board of Governors of the Federal Reserve System, Statement of Policy on Supervision and Regulation of Foreign Bank Holding Company, February 23, 1979.

in Union Bank[31] the $200 million additional capital which Hong Kong invested in Marine,[32] the $25 million additional capital which NatWest invested in NBNA,[33] and the $15 million additional capital which Algemene Bank invested in the LaSalle National Bank.[34] Indeed, such a proposed infusion can be a strong inducement to the Board to approve the acquisition.

(c) Convenience and Needs of Community

It may also be necessary to show that the acquisition would result in new or improved services being offered to the Bank's customers. For example, the acquisition would permit the Bank to offer international banking services in addition to its present activities.[35]

3. Approval Procedure

To apply for Board approval, the Buyer and the Parent must each prepare an application, which gives financial and corporate information about the Buyer and the Parent, including information to enable the Board to determine whether the acquisition would lessen competition or serve the needs of the community and whether the foreign acquirer would be a source of strength. Unless the Board otherwise determines, all information is available to the public upon request.[36] The Board may afford confidential treatment for information if the applicant is able to establish that disclosure would likely result in substantial competitive harm or would be an unwarranted invasion of personal privacy.[37]

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[31]Note 16 *supra*.
[32]Note 17 *supra*.
[33]Note 18 *supra*.
[34]Note 19 *supra*.
[35]For example, see orders cited *supra* n.16 at 352, n.17 at 355, n.18 at 359, and n.19 at 659.
[36]Although the Freedom of Information Act generally requires that government agencies make filings available to the public, there are various exceptions for which confidential treatment may be requested including matters in reports to agencies which regulate financial institutions. 5 U.S.C. § 552(b)(8).
[37]If the acquisition is approved, thereafter the Buyer would be required to file an annual report which sets forth extensive financial and corporate information about the Buyer and the Bank. In addition, the Parent would be required to file an annual report which sets forth extensive financial and corporate information about the Parent and each of its material subsidiaries (*i.e.*, contributing 5% of gross operating income or net income, or representing 5% of the Parent's consolidated capital accounts). The financial statements of foreign banking organizations are to be prepared in accordance with local accounting principles and practices in the home country. *See* proposed Annual Report Form F.R. Y-7. In addition, a quarterly report is required with respect to transactions between the Bank and the Buyer, the Parent or any subsidiary of the Buyer or the Parent. *See* Form F.R. Y-8 and Form F.R. Y-8f has become effective. Confidential treatment may be requested for certain information as indicated above. Various foreign regulators, including British, Swiss, Japanese and German, are attempting to persuade the Board to reduce these disclosure requirements insofar as they relate to foreign banks. They contend that these requirements violate their countries' sovereignty, often requiring disclosures which are not made to the public in the home country, and may even violate local law, and they raise the possibility of retaliation against United States banks. American Banker, November 10, 1980, at 3, col. 3.

After the application is complete (which is likely to be a prolonged process, especially if the Bank is large and the acquirer is foreign), the Board notifies the appropriate bank supervisory authority (i.e., the Comptroller of the Currency in the case of a national bank and the appropriate state agency in the case of a state bank) of the application and allows the bank supervisory authority thirty days in which to submit its recommendation. If the Board does not act on an application within ninety-one days after it has a complete record on that application, the application is deemed approved.[38] If approved, the Justice Department has thirty days for its review. However, if necessary to prevent the probable failure of the Bank, the Board may act immediately.[39]

4. STATE LAW

If the Bank is organized under state law rather than federal law, the acquisition may also have to be approved by the state bank regulatory agency. For example, if the Bank is organized under Illinois law, the sale must be approved by the Illinois Commissioner of Banks,[40] and if the Bank is organized under New York law, the sale must be approved by the New York Superintendent of Banks.[41]

The need for state approval can be a difficult problem. For example, in the case of the acquisition of Marine (which owned a large bank which provided banking services to upper New York state as well as to the New York metropolitan area) by Hong Kong, the New York Superintendent of Banks would not approve the acquisition. The Superintendent's reasons included the belief that (i) permitting the acquisition would be inconsistent with the policy of the New York Banking Department which prohibited large New York City banks from acquiring major upstate New York banks, (ii) the acquisition by a foreign bank would reduce Marine's commitment to the banking needs of upstate New York, and (iii) the inability, because of differences in regulatory and accounting requirements between Hong Kong and the United States, to evaluate the financial condition of Hong Kong or to supervise adequately potential conflicts of interest.[42] This regulatory hurdle was overcome by the time-consuming step of first converting Marine into a national bank. The approval of the New York Superintendent was not required for either that conversion or the later acquisition by Hong Kong.

[38] 12 U.S.C. § 1842(b).

[39] *Id.*

[40] Illinois Banking Act § 15(9), ILL. REV. STAT. ch. 16½ § 15.

[41] New York Banking Act § 143-b.

[42] Schedule 14 D-1 filed, in accordance with SEC regulations, February 1, 1980 by HSBC Holdings B.V., pp. 19-20.

5. RESTRICTIONS ON BUYER

If the Buyer obtains all necessary approvals and acquires the Bank, the Buyer must comply thereafter with the same restrictions that apply to all United States bank holding companies. For example, the Buyer and the Bank must comply with the branch banking laws of the state where the bank is located, cannot have a branch or another bank in any other state[43] and cannot engage in non-banking business (which includes many of the businesses of an investment banker and the ownership of stock in non-banking businesses) in the United States.[44] The Parent is subject to these same restrictions, except that, as mentioned previously, the Parent can continue to conduct foreign non-bank activities.[45]

B. *Form of Acquisition*

1. USUAL FORM: PURCHASE OF SHARES FROM PARENT

Usually an acquisition negotiated with the board of directors of the Seller (a "friendly" acquisition) is the only suitable alternative for the foreign acquirer of a bank.[46] Such an acquisition would normally be in the form of a purchase of assets (i.e., the Shares of the Bank, and possibly other assets, owned by the Seller) by the Buyer or a merger between the Buyer and Seller.[47]

The sale of the Shares must be approved by the board of directors of the Seller, which generally means that it must be approved by a majority of the directors. Furthermore, if the Shares represent all or substantially all of the assets of the Seller, which will usually be the case in the sale of a bank by a bank holding company, the sale must also be approved by the Seller's shareholders.[48]

An important problem in a friendly acquisition (whether the acquirer is a United States company or foreign) is that the announcement of the pending acquisition may attract other potential acquirers to make higher, or otherwise more attractive, competing offers.[49] In this situation the board of

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[43] 12 U.S.C. § 1842(d).

[44] 12 U.S.C. §§ 378(a)(1), 1843(a).

[45] Note 11 at 372–73 *supra*.

[46] Because of the need for regulatory approval and the politically controversial nature of foreign acquisitions of United States banks, it is very unlikely that an unfriendly acquisition of a United States bank could occur. For example, *see* Wall Street Journal, March 14, 1979, at 10, col. 3, quoting the then Chairman of the Board of Governors of the Federal Reserve System as stating that it would be highly unlikely that an unfriendly takeover of a United States bank by a foreign entity would obtain the requisite United States bank regulatory approval.

[47] With regard to the use of tender offers, *see* pp. 387-88 *infra*.

[48] *See* pp. 381-83 *infra*.

[49] *See* Freund & Easton, *The Three-Piece Suitor: An Alternative Approach to Negotiated Corporate Acquisitions*, 34 BUS. LAW. 1679, 1694 (1979); Fleischer & Sternberg, *Corporate Acquisitions*, 12 REV. SEC. REG. 937 (1979). This problem is not limited to the United States. In the United Kingdom, for example, Racal Electronics recently entered into a friendly acquisition with the board of directors of Decca. After this acquisition was announced, British General Electric made a superior competing offer, forcing Racal to increase its offer in order to prevail.

directors of the Seller would have great difficulty in refusing, or in urging shareholders of the Seller to refuse, a more attractive offer because of legal rules regulating the fiduciary conduct of the Seller's directors.[50] Moreover, in the case of a bank, the competing offer may be much more attractive from the standpoint of the bank regulatory agencies, for example, because the offeror has a much better banking record and would make a larger capital contribution to the bank.

It is very doubtful whether this problem could be solved by a definitive acquisition agreement between the Buyer and the Seller's management even if one could be signed quickly. Because of federal securities law and stock exchange publicity requirements, it would be very difficult to sign a definitive acquisition agreement before the publicly held Seller must make a public announcement of the pending negotiations forced by sudden increases in the price and volume of the Seller's shares. Often it is possible to sign quickly a preliminary acquisition agreement (agreement in principle) describing the essential points in the transaction such as price and the general nature of the representations and warranties that will be required in the final agreement. Such an agreement in principle provides little protection against competing offers because it must be conditional upon obtaining all requisite regulatory approval (discussed on pp. 371–380, *supra*, and it would usually also be conditional on obtaining director and stockholder approval, the execution of a mutually satisfactory definitive agreement, and possibly other matters.

Stockholder's approval is obtained by distributing to the Seller's stockholders a proxy statement which complies with SEC requirements for disclosure of financial and other information about the Seller.[51] A proxy statement is necessary because state corporation statutes require approval by the Seller's shareholders of a sale of all or substantially all of its assets or a merger.[52] The proxy statement must be filed with the SEC in a preliminary version and cannot be distributed until 10 days have elapsed without comment, or notice that there will be comment, from the SEC staff. In an acquisition the staff should be expected to comment, which usually takes in the neighborhood of twenty-five days. If for any reason the acquisition is controversial the time required for comments may be much longer. Some additional time is usually required to satisfy these comments, and the meeting cannot be held until at least twenty days after the final version of the

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See Wall Street Journal, February 19, 1980, at 16, col. 2; Financial Times, February 15, 1980, at 1, col. 7.

[50]Directors of United States corporations do not have an obligation to accept an offer simply because it is made at a premium over market price. However, once a board of directors has accepted an offer, it is much more difficult to find convincing reasons for refusing another offer at a higher price. *See* Herzel, Schmidt & Davis, *Why Corporate Directors Have a Right to Resist Tender Offers*, *op cit.*, *supra* note 1; Lipton, *Takeover Bids in the Target's Boardroom*, 35 Bus. Law. 101 (1979).

[51]SEC requirements are applicable if the Seller has at least 500 shareholders. Securities Exchange Act of 1934 §§ 12(9), 14(a).

[52]*See, e.g.*, Del. Gen. Corp. L. §§ 251(c), 271(a).

proxy statement has been mailed to the Seller's shareholders. An optimistic estimate for the time necessary to accomplish all of these requirements is ninety days from the day the parties make a public announcement of the proposed acquisition, and a best estimate is in the neighborhood of 120 days if there are no unexpected problems.[53] Moreover, as mentioned previously, it is likely that regulatory approval of a bank acquisition will take considerably longer, although shareholder approval could be obtained first with effectiveness conditional on regulatory approval.[54] If a better offer from the point of view of either the Bank or the Seller's stockholders is made during the period it may be difficult or impossible to obtain regulatory approval even if a definitive agreement has been signed and approved by the Seller's shareholder.

During the waiting time before shareholder and regulatory approval, competing offers can be made. If a competing offer is made, the board of directors of the Seller would have a legal obligation under state corporation law and SEC proxy rules to explain the nature of the competing offer in the proxy statement. Even if a competing offer is made after the proxy statement has been mailed, the board of directors of the Seller would probably have an obligation to inform the shareholders of the existence of a superior offer before they voted.[55] In practical effect, if the competing offer is clearly superior the Buyer would have no alternative but to improve its own offer or to withdraw its original offer and allow the Seller to go ahead with the competing offer. Moreover, as we have said, a superior offer, even after shareholder approval has been obtained, might as a practical matter make it difficult or impossible to obtain regulatory approval.

A preliminary (and definitive) acquisition agreement provides much more protection for the Buyer if the Seller has one or more large shareholders (in the case of large publicly held bank holding companies, not common but possible) and they also agree to be bound by the agreement, subject to obtaining regulatory approval. Preliminary arrangements with shareholders must be handled very cautiously to avoid having these arrangements subsequently characterized by a court as a "tender offer" which would be illegal because it would have been made without compliance with the tender offer rules.[56] An illegal tender offer can be difficult and expensive to untangle. If these shareholders own significantly less than 50 percent of the outstanding stock of the Seller, even a preliminary agreement would not

[53]*See* Freund & Easton, *supra*, note 49, at 1690 (3 to 4 months delay from time deal is announced to closing).

[54]The Offer to Purchase for Cash dated July 21, 1980, in connection with the proposed acquisition of control of Crocker National Corporation by Midland Bank Limited, estimates (at p. 15) that the approval process will take 9 to 18 months.

[55]The board of directors of a corporation and any controlling shareholders have a fiduciary duty to the corporation's shareholders which requires them to take all reasonable steps to protect the shareholders' interests. *See, e.g.*, Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977).

[56]*See* Wellman v. Dickinson, 475 Supp. 783 (S.D.N.Y. 1979).

provide complete protection against a competing offer. The exact amount of large shareholder ownership required for safety depends in part on the law of the state in which the Seller is organized. Delaware requires majority shareholder approval for a negotiated acquisition unless there is a contrary provision in the company's charter.[57] Some other states require a two-thirds vote of the outstanding shares for approval.[58] Special charter provisions requiring a higher percentage vote have become common in recent years as a protection against "unfriendly" tender offers[59] but they do not usually apply to transactions negotiated by the board of directors, and are usually not found in charters of large bank holding companies because the legal restrictions against acquisitions by other United States bank holding companies and non-banking corporations and the requirements for prior regulatory approval make unfriendly tender offers very unlikely.

It is conceivable that the Buyer could buy sufficient stock in the Seller directly from the Seller itself to give the Buyer a preferred position in the negotiation of an acquisition. Since the Seller is a bank holding company, this would have to be less than twenty-five percent (and possibly less than five percent) of the Seller's outstanding shares, because otherwise regulatory approval would be required for the sale.[60] Moreover, such a maneuver might be vulnerable to legal attack unless the Seller unambiguously required the additional capital for some pressing business purpose. Under some circumstances, the sale of shares for the purpose of providing protection against competing offers might be a breach of fiduciary obligation by the Seller's board of directors[61] and could be attacked in a shareholder suit by a shareholder of the Seller, by the SEC for failure to disclose the true purpose of the sale of shares, or possibly by a company which desires to

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[57]Del. Gen. Corp. L. §§ 251(c), 271(a).

[58]*E.g.*, ILL. REV. STAT. ch. 32, §§ 157.64, 157.72.

[59]*See* ARANOW, EINHORN & BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 193-96 (1977); Buford, *Amending the Corporate Charter*, 32 BUS. LAW. 1353 (1977); Yoran, *Advance Defense Tactics Against Takeover Bids*, 21 AM. J. COMP. L. 531 (1973); Mullaney, *Guarding Against Takeovers—Defense Charter Provisions*, 25 BUS. LAW. 1441 (1970).

[60]*See* text at note 10 *supra*.

[61]Recent cases, however, indicate that in some situations directors may sell shares or assets to a third party during a battle for control of the company as long as they do not themselves have an interest in retaining control through such a sale: sale of shares to company making competing offer, Treadway Companies, Inc. v. Care Corp., 638 F.2d 357 (2d Cir. 1980); sales of assets, but sole or primary motivation of directors was not to retain control, Johnson v. Trueblood, 629 F.2d 287 (3d Cir., 1980); sale of assets calculated to protect the corporation and its shareholders from injury, *GM Sub Corp. v. Ligget Group Inc.*, 415 A.2d 473 (Del. Sup. Ct. 1980) *See also* Smith v. Pritzker, No. 6342 (Del. Ch. Jan. 30, 1981), preliminary injunction denied where shares were issued to acquiring corporation at market price although acquisition price was higher, but shares not voted at shareholder meeting called to approve acquisition. In the case of sales of shares to protect an acquisition, it is not easy to determine the best rule for society. Allowing the sale encourages acquisitions at a premium which should be good for stockholders who receive the premium and for society because of the improved allocation of resources. Prohibiting the sale could often result in higher prices for stockholders because competition for acquisitions is fostered and could on the average result in an even better allocation of resources.

make a competing offer.[62] Under both state and federal law, the Buyer and the Parent could be considered participants in the violation and would very likely be joined as defendants in any such lawsuit.

2. PAYMENT: CASH OR SECURITIES

As a practical matter, foreign acquisitions usually involve cash rather than an exchange of securities. Because of lack of information and higher transaction costs, United States stockholders generally prefer cash to foreign securities, unless the foreign securities are listed on a United States stock exchange. There are also important legal problems associated with the issuance of securities in the United States. If an exchange of securities is used, the foreign issuer must file a registration statement for the securities under the Securities Act of 1933 (1933 Act);[63] and if the securities will be listed on a United States stock exchange (or, in some circumstances, if they will be widely held by United States residents), the foreign issuer must also register the securities under the Securities Exchange Act of 1934 (1934 Act).[64]

Registration statements under the 1933 Act and the 1934 Act must comply with detailed disclosure requirements of the Securities and Exchange Commission (SEC) and must include audited financial statements for at least the three preceding years.[65] Foreign registrants under the 1933 Act and the 1934 Act must comply with the periodic reporting requirements of the 1934 Act. Until recently, these requirements were not onerous because they were keyed to reports which the foreign issuer was required to make with its home government, any stock exchange or its security holders.[66] But now, foreign issuers must file annual reports that are more similar to those

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[62] *See, e.g.*, SEC v. Parkland Hosiery Co. 558 F.2d 1083 (2d Cir., 1977); Applied Digital Data Systems v. Milgo Elec. Corp., 425 F. Supp. 1145, 1158 (S.D.N.Y. 1977); Condec Corp. v. Lunkenheimer Co., 230 A.2d 769, 775–76 (Del. Ch. 1967).

[63] *See* Section 5 of the 1933 Act, 15 U.S.C. § 77e. *See also Neutralizing the Regulatory Burden: The Use of Equity Securities by Foreign Corporate Acquirers*, 89 YALE L.J. 1413, 1419–22 (1980), for a general discussion of the securities laws problems that a foreign acquirer using securities would encounter. The registration under the 1933 Act and the trading in United States markets of American depository receipts (ADR) have no bearing on the registration problems which are being discussed. ADR's are issued and registered under the 1933 Act by United States banks to make it easier to trade foreign securities in the United States market, although banks are not treated as issuers of these foreign securities with regard to liability under the 1933 Act. There is no requirement that the foreign issuer of the securities file a registration statement under either the 1933 or 1934 Acts and in most instances the foreign issuer has not filed a registration statement. *See* Form S-12 which is used by banks to register ADR's, FED. SEC. L. REP. (CCH) ¶ 8301, p. 7292; Moxley, *The ADR: Instrument of International Finance and a Tool of Arbitrage*, 8 VILL. L. REV. 19, 20 (1962).

[64] 15 U.S.C. § 78a *et seq*. *See* § 12 of the 1934 Act, 15 U.S.C. § 78l, and the regulations promulgated thereunder, particularly Rule 12g3-2, 17 C.F.R. § 240.12g3-2.

[65] *See* Items 25–27 of Schedule A of the 1933 Act, 15 U.S.C. § 77aa(25)–(27) and Forms S-1 and S-7 promulgated under the 1933 Act. *See also* §§ 12(b)(1)(J) - 12(b)(1)(L) of the 1934 Act, 15 U.S.C. §§ 78l (b)(1)(J) - 78l(b)(1)(L), and Form 10 promulgated thereunder.

[66] Some North American and other foreign issuers are for SEC purposes treated like United States issuers because they are closely connected with the United States. *See, e.g.*, SEC Rule 12g3-2, 17 C.F.R. § 240.12g3-2.

filed by United States registrants. Interim reporting requirements are still keyed to reports filed by the foreign issuer with its home government, but reports which go to its shareholders and material press releases must be translated into English.[67] Listing securities on United States stock exchanges would also subject a foreign issuer to stock exchange disclosure requirements such as sending annual financial reports to shareholders, publishing quarterly financial statements, and promptly releasing important information about the issuer to the public in the United States through financial wire services and newspapers.

Although many foreign issuers (and United States subsidiaries) have registered securities under the 1933 and 1934 Acts and successfully complied with the requirements for audited financial statements, a foreign issuer which has not previously filed a registration statement can expect some delay while resolving with the SEC staff any differences between foreign and United States accounting rules.[68] The extensive disclosures required by registration statements and reporting requirements under the 1933 and 1934 Acts and stock exchange rules could present foreign banks unused to making such extensive public disclosures about themselves with a serious basic policy problem.[69] A foreign issuer which files a registration statement under the 1933 or 1934 Acts could also become subject to the foreign bribery and accounting provisions of the Foreign Corrupt Practices Act, which could be an important additional burden for some issuers although this burden may be lessening.[70]

Theoretically, the use of cash rather than securities for an acquisition could place foreign acquirers at a disadvantage. The use of cash alone for an acquisition would make it impossible to make the acquisition a tax-free reorganization or an installment sale under United States tax law.[71] A tax-free reorganization would permit the shareholders of the Seller to postpone (or possibly to avoid completely) the tax on any gain received through the exchange of stock because under the rules governing tax-free reorganizations there is no gain realized until the stock received in the exchange is sold.[72] An installment sale would make postponement of the tax possible until payments are received.

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[67] *See* SEC Rule 12b-12(d), 17 C.F.R. § 240.12b-12(d). *See generally* Stephens, *Foreign Issuer Disclosures*, 9 REV. SEC. REG. 893 (1976), describing the disclosure requirements for foreign companies before the recent rule changes.

[68] Foreign and American accounting standards are significantly different. Financial Times, February 20, 1980, at 13, col 1.

[69] However, even if the acquisition is for cash, foreign acquirers of banks have special problems because the rules of the Board of Governors of the Federal Reserve System require the Parent to file extensive material about itself. *See* note 37 *supra*.

[70] The Foreign Corrupt Practices Act comprises §§ 13(b) and 30A of the 1934 Act, 15 U.S.C. §§ 78m(b) and 78dd-1.

[71] *See* Freund & Easton, note 49 *supra*.

[72] Voting stock of a foreign corporation can usually be used to accomplish a tax-free reorganization. One exception is a "statutory merger" directly with the foreign corporation itself pursuant to Section 378(a)(1)(A) of the Internal Revenue Code, which because of the definition of

These impediments to the use of shares by a foreign acquirer, however, will not usually be an important handicap, unless the Seller is controlled by some large individual shareholders who may be particularly interested in a tax-free sale or in postponement of the tax under the installment rules. Making an acquisition tax-free is no longer as significant as it once was. Recent amendments to the United States tax law have lowered the maximum tax on capital gains to 28 percent, substantially less than the rate of almost 50 percent in effect before these amendments. More reductions are promised by President Reagan. Many large institutional stockholders are tax exempt or prefer to be free to sell and, therefore, do not value highly the tax postponement available in a tax-free reorganization. Arbitrageurs usually acquire large amounts of stock in the company which is being acquired after the proposed acquisition is announced (and frequently to the chagrin of the SEC staff a short time before any announcement despite very strict legal restrictions against the use of "insider" information for trading in publicly held securities) and they are interested only in realizing cash from the transaction as quickly as possible. For these reasons many large recent United States acquisitions not involving foreigners have been for cash, although this is subject to change when there are Federal Reserve Board restrictions (or less formal pressures) against United States bank lending to finance acquisitions or when stock prices appear to be so high that they appear to be an attractive alternative to cash for both buyers and sellers.

"statutory merger" in the regulations must be effected "pursuant to the corporation laws of the United States or a state or territory or the District of Columbia." See regulation § 1.368-2(b)(1). In any event, a merger directly between a foreign corporation and the acquired corporation, even if allowed by the laws under which each corporation is organized, would rarely be desirable because it would completely expose the foreign corporation to state and federal regulation. A tax-free reorganization can be accomplished by a foreign corporation pursuant to Sections 368(a)(2)(D) and 368(a)(2)(E) of the Internal Revenue Code through a merger between a United States subsidiary of the foreign corporation and the corporation being acquired using voting stock of the foreign parent. This can be achieved despite the requirement of Section 368(a)(2)(D) that this "transaction would have qualified under paragraph 1(A) if the merger had been into the controlling corporation . . ." *See* regulation § 1.368-2(b)(2); REV. RUL. 74-297, 1974-1 C.B. 84. Another form of tax-free reorganization which can be used in accordance with Section 368(a)(1)(C) by a foreign corporation is the acquisition of all or substantially all of the assets of the acquired corporation by the foreign corporation or a subsidiary, using solely voting stock of the foreign parent, and the assumption of the liabilities of the acquired corporation by the corporation making the acquisition. Stock for stock exchanges (in substance a negotiated tender offer) using solely voting stock of the foreign corporation are also possible under Section 368(a)(1)(B) of the Internal Revenue Code. This is generally an undesirable form for the acquisition of a publicly held corporation because it leaves an outstanding minority. Section 368(a)(1)(B) can also be used to accomplish a stock-for-stock exchange in the form of a merger of a subsidiary of a foreign corporation into the acquired corporation (a reverse (B) reorganization), which eliminates the problem of a minority interest. See Rev. Rul. 67-448, 1967-2 C.B. 144. In certain situations, a ruling must be obtained under Section 367(a) of the Internal Revenue Code for a tax-free reorganization in which a foreign corporation or its stock is involved to assure that the reorganization "is not in pursuance of a plan having as one of its principal purposes the avoidance of Federal income taxes." In addition, there may be situations where some tax is generated even though the transaction qualifies as a tax-free reorganization. *See also* 89 YALE L.J. 1413, 1417-19 note 63 *supra*.

3. TENDER OFFER FOR STOCK OF SELLER

In addition to acquiring the Seller's assets or acquiring the Seller by merger, it would be theoretically possible to accomplish an unfriendly acquisition by acquiring the Seller's outstanding stock by a cash tender offer (conceivably even a registered exchange offer using stock or other securities of the foreign acquirer) made directly to the Seller's stockholders. As previously pointed out, it is, as a practical matter, very unlikely that an unfriendly foreign acquisition of a United States bank could obtain the requisite regulatory approval for a successful outsome.[73] Moreover, if it appeared likely that approval would be obtained, the enactment of new legislation in time to defeat the tender offer (particularly for a very large bank) would be a serious possibility.

However, tender offers are sometimes used in connection with friendly acquisitions of publicly held companies because they are faster than mergers or asset purchases and, therefore, provide somewhat more protection against the possibility of competing offers. But this consideration is not applicable to the acquisition of the stock of a bank holding company because substantial delays are inevitable before obtaining the required regulatory approvals.[74] Nevertheless, there have been at least two instances of friendly tender offers having been made by a foreign bank for a United States bank. The acquisition of Marine by Hong Kong mentioned previously, was accomplished in part by a tender offer. Hong Kong acquired approximately 25 percent of the stock of Marine by a tender offer at $25 per share and 26 percent directly from Marine at a price of $35.42 per share. Hong Kong agreed not to purchase any additional shares of Marine for five years and then only if a majority of the other stockholders agreed.

The proposed acquisition by Midland Bank Limited (Midland) of shares of Crocker National Corporation (Crocker), which owns the twelfth largest bank in the United States, is also in part by a friendly tender offer with a structure similar to the Marine offer. Midland has made a tender offer for less than 50 percent of the outstanding shares of Crocker for a formula price of not more than $50 per share and has agreed to buy additional newly issued shares from Crocker at a price of $90 per share, so that when the transaction is completed Midland will own approximately 57 percent of the outstanding shares of Crocker. The Midland tender offer states that it is conditional upon regulatory approval and the approval of a definitive agreement by the boards of directors and shareholders of both Midland and Crocker, that it is being made at this time because rules of the Securities and Exchange Commission require that a tender offer be made within five business days of the announcement, that the shareholders of Crocker are urged not to tender any shares until after regulatory approval is obtained,

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[73]Note 46 *supra*.

[74]*See* 378–380 and note 54 *supra*.

and that shares tendered may be withdrawn at any time prior to purchase.[75]

In the case of both of these tender offers, there will continue to be a substantial percentage of shares of the acquired bank holding company owned by the public, which is usually very undesirable for the acquirer for both economic and legal reasons. This arrangement enables the remaining stockholders to benefit from the majority stockholder's ideas and capital, creates possible conflicts of interest situations for the majority stockholder and corresponding constraints for the acquired bank, and keeps the acquired holding company subject to continued registration under the Securities Exchange Act of 1934. On the other hand, this structure affords some obvious benefits to the acquired bank and its shareholders. The shareholders who wish to sell are afforded an opportunity (but not forced) to sell at a price which represents a premium over the then market, and the bank obtains substantial additional equity at an even higher premium for strengthening and expanding its business. This large capital contribution at a high premium to the bank may be viewed by the bank regulatory authorities favorably as financial and political justifications for approving the acquisition. Nevertheless, a conventional purchase of all the stock of the bank, together with a capital infusion into the bank, should have satisfied these bank regulatory objectives. The most reasonable guess is that the acquisition structure used in these two cases was designed primarily to satisfy the requirements of the acquired banks' managements to remain as independent forces in the banks. Whether the Crocker shareholders would have chosen this form instead of a higher price (between $50 and $90) for all the outstanding Crocker shares is impossible to say. Normally it would not be the preferred structure for the acquisition from the standpoint of the acquirer.

Is it desirable from an economic point of view that unfriendly foreign tender offers for United States banks are unlikely to succeed? There is almost no disagreement that tender offers serve a very useful economic purpose for target stockholders and for society, although it is also clear that in many instances resistance by the target's management also accomplishes a useful economic purpose for the target's shareholders and for society by obtaining a much higher price for the shareholders and a better allocation of resources for society.[76] However, the economic case for unfriendly foreign tender offers for banks is different and weaker than the case for tender offers in general. The present structure of United States bank law effectively eliminates as competitors either in negotiated transactions or by tender offer large domestic banks and other corporations which are the best

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[75]Obviously, tendering for stock of a bank holding company (or stock of a publicly held bank) within 5 business days of the announcement is not ideal because of the long delay involved in obtaining regulatory approval. *See* Offer to Purchase note 54 *supra*. The SEC rule (17 C.F.R. § 240.14d-2(b)) which forced this awkward early tender offer is poorly thought out and can work out very badly in negotiated domestic transactions involving tender offers.

[76]*See* the discussion and citations, note 1 *supra*.

informed part of the market. By approving unfriendly foreign tender offers, the United States would be taking another step in encouraging an allocation of banking resources which is less than optimum (although probably better than the present one) at the expense of its own banking system and for the benefit of foreign banks.

C. *Moratorium*

The acquisitions of Banks by foreign bank holding companies which were approved by the Board in 1979, led to widespread (although possibly poorly informed) concern that unless the laws regulating such acquisitions were changed, a large percentage of United States banking would some day be controlled by foreign persons to the detriment of the United States economy. In response to this concern and to allow time to consider such changes, on March 31, 1980, the United States enacted a moratorium on acquisitions of United States banks by foreign persons, which expired July 1, 1980, and was not extended.[77]

Although the moratorium was not extended, there was considerable support for an extension. For example, the United States General Accounting Office (an independent nonpolitical governmental agency which assists the United States Congress) recommended that the moratorium be extended

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[77]TITLE IX — FOREIGN CONTROL OF
UNITED STATES FINANCIAL INSTITUTIONS
Definitions

SEC. 901. For purposes of this title—

(1) the term "domestic financial institution" means any bank, mutual savings bank, or savings and loan association organized under the laws of any State or of the United States;

(2) the term "foreign person" means any foreign organization or any individual resident in a foreign country or any organization or individual owned or controlled by such an organization or individual; and

(3) the term "takeover" means any acquisition of the stock or assets of any domestic financial institution if, after such acquisition, the amount of stock or assets held is 5 per centum or more of the institution's stock or assets.

Moratorium

SEC. 902. The Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Board of Directors of the Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board may not approve any application relating to the takeover of any domestic financial institution by a foreign person until July 1, 1980, unless—

(1) such takeover is necessary to prevent the bankruptcy or insolvency of the domestic financial institution involved;

(2) the application was initially submitted for filing on or before March 5, 1980;

(3) the domestic financial institution has deposits of less than $100,000,000;

(4) the application relates to a takeover of shares or assets pursuant to a foreign person's intrafirm reorganization of its interests in a domestic financial institution, including specifically any application to establish a bank holding company pursuant to such reorganization;

(5) the application relates to a takeover of the assets or shares of a domestic financial institution if such assets or shares are owned or controlled by a foreign person; or

(6) the application relates to the takeover of a domestic financial institution which is a subsidiary of a bank holding company under an order to divest by December 31, 1980.

Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 97-221 § 901, 902, 94 Stat. 193 (1980).

primarily because foreign banks had an unfair advantage over United States banks in making acquisitions of United States banks.[78]

The primary United States agencies which regulate banking opposed the extensions of the moratorium, primarily because of the contribution which foreign banks can make to strengthen troubled United States banks and the general United States policy of free movement of trade and investment.[79]

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[78]Report by the Comptroller General of the United States, *Despite Positive Effects, Further Foreign Acquisitions of U.S. Banks Should Be Limited Until Policy Conflicts Are Fully Addressed*, August 26, 1980 concludes, in part:

> Although it is generally agreed that the current level of U.S. banking assets under foreign control is not too high, there is also a general concurrence that the situation bears watching . . . These beliefs are based on the assumption that domestic-controlled banks may be, at some future time, more sensitive to local business and government credit needs than foreign-controlled banks. . . . As of December 1979, foreign investors held $202.5 billion in U.S. banking assets. This accounted for 13.7 percent of the total U.S. banking assets. . . Although a few well-publicized bank problems have been attributed to foreign investors who gained control of U.S. banks, foreign investors have generally improved weak U.S. banks and maintained the condition of financially strong U.S. banks they acquired. . . There are several possible justifications for restricting foreign acquisitions of U.S. banks or limiting all foreign banking in the U.S. However, GAO found only one—a basic unfairness—to be compelling. . . . U.S. law allows some foreign banks the opportunity to buy large domestic banks which U.S. banks are prevented from buying. Because this unfairness results from a conflict among various policies, it will take time to resolve. However, until the policy conflict is resolved, the unfairness should not be allowed to persist. Therefore, GAO believes that a moratorium on future foreign acquisitions of U.S. banks with total assets of $100 milllion or more is justified. This moratorium should continue until the basic policy issues which have caused the unfair situation have been fully addressed. The moratorium should exclude foreign acquisitions necessary to prevent the bankruptcy or insolvency of domestic banks. *Digest ii-xii*.

United States antitrust laws would usually prevent a large United States bank from acquiring another bank in its same market area. Furthermore, the Act prohibits a United States bank from acquiring control of a bank in another state unless the laws of that state permit the acquisition. Act § 3(d). These two prohibitions have the effect of reducing the ways in which United States banks can provide funds to a troubled bank. For example, when Citibank invested money in Central National Bank of Chicago, Citicorp had to be satisfied with non-voting stock and a 15 year non-transferable warrant to acquire voting stock, which warrant could be exercised only if the law banning an out-of-state acquisition was changed. Also, the injection of funds into the First Pennsylvania Corporation, the parent of the First Pennsylvania Bank, was made by the Federal Deposit Insurance Corporation and a syndicate of 30 banks in the form of loans and warrants, in a manner which assured that no one bank could be deemed to be in control of the First Pennsylvania Bank.

[79]For example, the Board of Governors of the Federal Reserve System responded to the recommendation of the GAO Report as follows:

> As we understand it, the concern is that the anti-trust laws and the inter-State banking restrictions working in tandem effectively exclude domestic organizations from certain acquisitions and thus give a significant advantage to foreign purchasers. This situation is most likely to occur in connection with acquisitions of large banks since most qualified in-State purchasers would normally be excluded for competitive reasons and out-of-state purchasers would be excluded because of inter-State restrictions. In these circumstances, an acquisition by a foreign organization is occasionally the only feasible alternative.
>
> Exclusion of in-State acquisitions in which severe anti-competitive effects are not clearly outweighed by other public interest considerations remains appropriate public policy. From a public policy point of view, it can be argued that entry of foreign parties has positive competitive effects. A foreign acquirer is in most instances a new entrant into the U.S. and its acquisition of an existing competitor brings a new competitive force into that market without changing the number of competitors. An acquisition by a domestic bank, by definition, results in a diminution of the number of competitors in the United States.

Similar views were expressed by the Comptroller of the Currency and the Federal Deposit Insurance Corporation.[80]

Although the United States bank regulatory agencies believe that, in general, the acquisition of United States banks by foreigners should not be restricted, and that the present system of legal restrictions with regard to potential domestic acquirers is justifiable, it would be unrealistic to assume that they will not be affected by political pressure favoring restriction on foreigners. For example, even the 1979 Board approvals of the acquisitions of Union Bank, Marine and NBNA included the following statement: "In arriving at this conclusion the Board also considered the proportion of banking resources controlled by foreign-owned institutions in the markets relevant to this proposal."[81]

D. *Margin Requirements*

United States law regulates the amount of credit which may be extended to purchase "margin stock" (i.e., stock registered on a United States securities exchange and certain other stock actively traded in the United States) if the credit is to be directly or indirectly secured by any stock.[82] Therefore, if the stock of the Bank were publicly owned, or if the Buyer were merging with the Seller or tendering for the publicly held stock of the Seller, these margin regulations would have to be complied with if the Buyer were borrowing in the United States to finance part of the purchase price.[83] How-

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. . . .

As the GAO report brings out clearly, there is no evidence that foreign ownership of United States banks has been or is likely to be contrary to the interests of the U.S. Indeed, an important finding of the report is that foreign investment has had a positive influence on U.S. banks, notably in cases where foreign organizations have provided much needed financial support to weakened, but not necessarily failing, U.S. institutions. That financial support has significantly improved the financial strength and competitive vitality of the U.S. banking organizations making them better able to serve the banking needs of their communities.

The Board does not believe that these acknowledged benefits should be foregone for an indefinite period while fundamental domestic banking issues are debated. Moreover, a moratorium on foreign investment would breach this country's tradition of free and open markets. Also, it might have adverse effects on other countries' policies toward free movements of trade and investment. For these reasons, the Board opposes a reintroduction of a moratorium on foreign acquisitions of United States banks.

Id. Appendix XII.

[80] *Id.*, Appendix XIII and Appendix XIV.

[81] *Supra* note 16 at 351; *supra* note 17 at 355, and *supra* note 18 at 358.

[82] 12 C.F.R. §§ 207, 220, 221 and 224. Direct security is a pledge of shares. Indirect security is any restriction on sale or pledge of shares, unless the lender in good faith is not looking to such shares for payment.

[83] Program by the ABA Committee on Developments in Business Financing, *The Impact of the Federal Reserve Margin Regulations on Acquisition Financing*, 35 Bus. Law. 517 (1980); Herzel and Rosenberg, *Loans to Finance Tender Offers: The Bank's Legal Problems*, 96 Banking L.J. 676, 684 (1979).

ever, if the loan were made by a foreign institution to the Parent, the margin regulations might not be applicable.[84]

IV. Conclusions

In general, foreign acquisitions, like domestic acquisitions, have beneficial economic effects for domestic stockholders and on the allocation of domestic resources, although from a political point of view foreign control of domestic corporations can be the cause of fears and tensions which are undesirable although probably in many respects empirically unfounded. In the case of banks, the economic effects of foreign acquisitions are more difficult to assess because the restrictions on competition from the best informed part of the market, domestic banks and other domestic corporations, make the outcome economically less desirable from the standpoints of both shareholders and society. Foreign acquisitions of banks are also peculiarly sensitive politically although even here the concern may be in good part unfounded. Unfriendly tender offers for banks are an unsuitable form of acquisition because of the long delays imposed by present legal regulations and are unlikely to succeed. Even if an unfriendly tender offer could obtain regulatory approval, the target bank would have plenty of time to arrange a friendly acquisition by another foreign bank. Furthermore, unfriendly tender offers would almost certainly lead to legislation prohibiting or severely restricting foreign acquisitions of banks. The ideal short-run solution from all points of view would probably be the elimination of all or most of the restrictions on domestic banks in making acquisitions with no additional restrictive legislation on foreign acquisitions.[85] However, foreign acquisitions of United States banks is such a sensitive subject that some restrictive legislation is likely (although probably undesirable on economic grounds) even if restrictions on acquisitions by domestic banks are reduced or eliminated.

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[84]Herzel and Rosenberg, *Foreign Bank Loans to Finance Tender Offers for U.S. Companies*, 62 CHI. B. REC. 80 (1980). Also, legislation has been introduced recently in both houses of Congress which would subject foreign investors to the margin requirements when they borrow abroad to buy shares of United States companies. New York Times, January 28, 1981, § D (Business), at 3, col. 2.

[85]*See* note 15 *supra*.