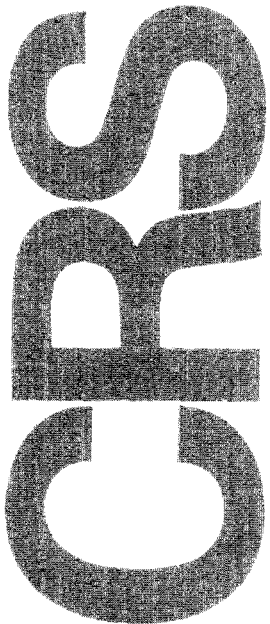


CORPORATE MERGERS THROUGH TENDER OFFERS:
MEASUREMENT AND PUBLIC POLICY CONSIDERATIONS

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ABSTRACT

This report provides a perspective on the role of tender offers in corporate mergers and acquisitions and on the nature of financing used to carry them out. Analyzing SEC data on corporate takeovers, it classifies by industry those firms for which tender offers were made in 1979 and 1980 and examines the sources of funds used in these acquisition bids. Comparing SEC data with information compiled by FTC and others, it assesses the importance of tender offers in overall merger and acquisition activity. The report focuses mainly on domestic mergers, but foreign takeovers of U.S. companies also are discussed.

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CORPORATE MERGERS THROUGH TENDER OFFERS:
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I. INTRODUCTION

Large corporate takeovers receive active media coverage, and 1981 is likely to be a record-breaking year, featuring the acquisition of Conoco, Inc. by the DuPont Co. for approximately \$8.8 billion. ^{1/} Other multi-billion dollar mergers also made headlines in 1981, due in part to tender offer publicity. Because of the size of these mergers, and because some of them involved foreign control of U.S. companies, merger activity has been a subject of increasing interest to the 97th Congress.

Merger-related considerations in the 97th Congress have, for the most part, been concerned with the credit used to finance takeovers and foreign acquisition of U.S. companies; other interests include the size of takeovers and the nature of the affected industries. This report focuses on the record of successful and partially successful corporate acquisitions through the use of tender offers for the years 1979 and 1980. The two-year record has been summarized and analyzed by industry and by source of financing; other data provide a preliminary view of the pace of merger activity in 1981.

The basic data used in this report were gathered from tender offer filings with the Securities and Exchange Commission (SEC). A tender offer refers to

^{1/} U.S. Library of Congress. Congressional Research Service. Selected Mergers and Acquisitions in the Natural Resources Industry, 1981: Case Histories and Financial Profiles. Report No. 81-205 E, by Jeffrey P. Brown. August 21, 1981.

any effort to purchase at least five percent of the outstanding shares of a publicly traded securities issue. When the goal of the entity acquiring shares is control of the targeted company, a 14-D disclosure statement must be filed with the SEC. The information required in these filings includes the industry classification of the company to be acquired and the source of funds used to finance the acquisition; information from these filings provided the basis for the data in tables 2, 3, 4 and 5 of this report.

For the industry classifications, the SEC filings provide information on a four-digit basis, using the standard industrial classification (SIC) code, for the companies being acquired. For the tables in this report, these data were aggregated to a two-digit SIC code basis. This aggregation loses some of the detail present in the SEC filings, but has the advantage of providing a more compact view of the industries involved in corporate takeover bids. Since every targeted company is listed under only one SIC code, this single classification is misleadingly simple for some companies, e.g. when an acquired firm owns subsidiaries which would fall under a different SIC code that is not shown in the SEC filings. This omission would be unimportant in the case of most small companies, but when the targeted company is a relatively large multi-product firm, using a single SIC code may distort the aggregated industry data included in this report.

The source of funds used in takeover bids is presented in Table 3. Aside from the reporting requirements, the credit used to finance corporate acquisitions is not regulated by the government with one exception. Government regulations apply only when the funds used for takeovers meet the following criteria: 1) the funds must be borrowed from a financial institution; 2) the loan must utilize as collateral certain securities defined by the SEC, i.e. the

loan is secured by particular debt or equity issues; and 3) the borrowed funds must be used to purchase shares of the target company (in regulatory parlance, the loan is "purpose credit").

In some instances, the SEC tabulations did not include data on source of financing and/or the total estimated cost of the acquisition. Where possible, estimates for these categories were obtained from the Austin Data Bank compiled by Professor Douglas V. Austin, Chairman of the Department of Finance, College of Business Administration, University of Toledo, Ohio. The summary calculations used in producing Tables 2, 3, 4, and 5 were performed by CRS staff.

A tender offer is a bid for securities made directly to the shareholders of the target company. The offer can be made with the support of the target company's management (a friendly offer), but it can also be made in the face of opposition from the target company's management (an unfriendly or hostile offer). In most cases, the shareholders of the target company are offered a premium substantially above the current market price of the shares they own; primarily for this reason, most tender offers have been successful.

II. PROFILE OF TENDER OFFER TAKEOVERS

A. OVERVIEW

Tender offers are primarily a phenomenon of the last twenty years; in absolute numbers there have been relatively few tender offers in any one year, and, as indicated in Table 1, the growth pattern has been highly erratic.

Table 1. TOTAL NUMBER OF INTER-FIRM TENDER OFFERS a/

<u>Year</u>	<u>Number</u>	<u>Percent Change</u>	<u>Year</u>	<u>Number</u>	<u>Percent Change</u>
1961	8	14	1971	6	- 60
1962	10	20	1972	29	383
1963	21	110	1973	80	176
1964	12	- 43	1974	68	- 15
1965	35	192	1975	71	4
1966	45	29	1976	132	86
1967	86	91	1977	181	37
1968	62	- 28	1978	166	- 8
1969	49	- 21	1979	118	- 29
1970	15	- 69	1980	85	- 28

a/ Austin, Douglas V. Tender Offer Update: 1978-1979. Mergers and Acquisitions, v. 15, n. 2, Summer 1980. p. 14 for 1961-1978; data for 1979 and 1980 were compiled from the unpublished Austin Data Bank. The data are for all tender offers for which there was a schedule 14-D filing with the SEC; thus there is some duplication in that the data include original and subsequent offers (follow-ups or mop-ups); also included are offers which were withdrawn, unsuccessful, or not completed for other reasons; and foreign offers. Percent calculations were made by CRS.

The cost data for tender offers are particularly susceptible to distortion over time since acquisitions of one or a few very large firms can make a difference in the record for any one year. Interpretation of the data on acquisitions summarized in this paper should be done with caution since the total and average figures mask an enormous amount of variation. Aggregating the individual cost data into the industry and financing tables which follow can be deceptive; for 1979 and 1980, the estimated cost of acquisition bids for individual companies ranged from \$100,000 to \$750,000,000.

A study of the 122 domestic acquisitions for 1979 and 1980 for which cost

estimates are available indicates a pattern of bunching at the low end of the cost spectrum. There were 38 bids (31 percent of the total) in which the acquisition cost was \$10 million or less, and an additional 38 cases in which the cost ranged from just over \$10 million to \$50 million. By contrast, 26 bids (21 percent of the total) exceeded \$100 million, and only 5 of the 122 total bids were greater than \$500 million. Tender offers in amounts much higher than the limits in these two years have occurred in 1981 and in years prior to 1979; however, a casual study of these periods suggests that a similar distribution pattern prevailed in those years, with most of the tender offers concentrated on relatively small companies.

The data in tables 2, 3, 4, and 5 were compiled by CRS from case-by-case detailed worksheets provided by the Security and Exchange Commission's Directorate of Economic and Policy Research. The information was obtained by the SEC from schedule 14-D filings; these filings are required by law whenever a takeover bid is made. The data recorded by the SEC include all takeover bids which were either completely or partially successful. An example of a partially successful bid would be an instance when the bidding company did not receive tenders for as many of the target company's shares as it had sought. Foreign bids for U.S. companies are excluded from the data in tables 2, 3, and 4. CRS has not made any independent effort to verify the accuracy of this information.

B. INDUSTRY PROFILE OF ACQUIRED FIRMS

Tables 2 and 3 organize and summarize the data for 1979 and 1980 by industry, number of acquisitions, total estimated cost, and the average cost per takeover. The firms were grouped by industry according to the standard industrial classification (SIC) code following an organizational pattern frequently used by analysts in the U.S. Department of Commerce. 2/

2/ U.S. Department of Commerce, Bureau of Industrial Economics. 1981 U.S. Industrial Outlook for 200 Industries with Projections for 1985. Washington, U.S. Govt. Print. Off., January 1981. p. xxiv, xxv.

In tables 2 and 3, the relatively small number of firms is rather widely spread out even when aggregated on a two-digit SIC code basis. With only two years of data under consideration, it would not be possible to identify trends, or undertake any other type of time-series analysis. However, in observing these years in terms of patterns, two factors stand out:

- * There are some industries which offered no examples of successful takeovers in either year. Noticeable by their absence are any successful bids for mining companies, other than those engaged in oil and gas extraction; this may be due in part to the fact that many such companies are not independent publicly owned firms, i.e. they are privately held, and thus would not be the subject of tender offers; many other mining firms are subsidiaries of large integrated manufacturing companies. In the manufacturing sector, there were no takeovers of firms in the following industries: tobacco manufactures, furniture and fixtures, paper and allied products, or motor vehicles and equipment.
- * The finance, insurance and real estate classification was the most active category in both 1979 and 1980 when measured either by the number of takeovers or the total cost of takeovers by industry classification. Combining the data for both years, the financial services sector accounted for over 25 percent of both the number of all takeovers, and the cost of all takeovers. The cost estimates for acquired firms mirrored the pattern demonstrated for all the industries, ranging from \$300,000 to well over \$700 million.

Further observation of tables 1 and 2 indicates that in 1979 and 1980 corporate takeovers were not concentrated in any particular industry, with the exception of financial services as noted above. The data also indicate that the majority of acquired companies were small. For the two years covered in tables 2 and 3, the role of successful tender offers, whether measured by the number of firms involved or by the dollar cost, appears relatively unimportant in the context of the overall U.S. economy.

C. FINANCING CORPORATE ACQUISITIONS

Table 4 summarizes the information on sources of financing provided by the SEC for each successful domestic takeover in 1979 and 1980 by the origin of the funds used to complete the takeover. The legislation and regulations

governing the reporting of these data are at times ambiguous and allow some flexibility in the way the information is provided. It is assumed that the corporations reporting these data comply with the appropriate laws and regulations to the best of their ability, but nonetheless there are shortfalls in the data which limit an analyst's ability to make unequivocal comments on the source of funds. One example, easily noticed in Table 4, is that for more than 10 percent of the acquisitions data are lacking in the SEC records for cost estimates, source of funds, or both.

Table 4. SOURCE OF FUNDS USED IN SUCCESSFUL TAKEOVER BIDS

	1979		1980	
	Number of Takeovers	Total Estimated Cost (millions of \$)	Number of Takeovers	Total Estimated Cost (millions of \$)
Total Bank Participation	44	4,009.32 <u>c/</u>	26	758.02 <u>a/</u>
Unsecured bank loans	14	2,187.03 <u>b/</u>	7	145.36
Unsecured bank loans plus internal financing	23	1,447.99 <u>a/</u>	12	506.80
Secured bank loans (not purpose credit)	2	9.20	5	48.26 <u>a/</u>
Secured bank loans (purpose credit)	5	365.10	2	57.60
Internal financing only	33	1,239.42 <u>c/</u>	27	3,259.12 <u>b/</u>
100 percent in exchange of shares	3	692.80	5	352.23 <u>b/</u>
External, non-bank financing	1	35.00	0	0.00
Source of funds not available	3	<u>c/</u>	4	312.00 <u>b/</u>
Total	81	5,283.74 <u>e/</u>	57	4,329.14 <u>d/</u>

a/ Excludes one takeover with no cost estimate.

b/ Excludes two takeovers with no cost estimate.

c/ Excludes three takeovers with no cost estimate.

d/ Excludes five takeovers with no cost estimate.

e/ Excludes nine takeovers with no cost estimate.

Source: Compiled by CRS from information provided by the SEC.

In analyzing these data in terms of their credit market impact, attention should be paid to the extremes of the spectrum: where there is no direct impact on the credit markets, and where the acquisitions involved the use of secured loans subject to the regulations of the Board of Governors of the Federal Reserve System. Acquisitions which were achieved completely through an exchange of shares of the companies involved accounted for 5.8 percent of the number of takeovers, and 10.9 percent of the estimated cost of takeovers for these two years. These types of transactions are frequently motivated by a desire to avoid any capital gains tax liability, but since they involve no cash transfer they have no direct credit market effects. While the filing information is sometimes ambiguous, it appears that in about the same number of cases (5.1 percent of the total), but with a relatively smaller share (4.4 percent) of the total estimated costs, bank credit directly controlled by the Federal Reserve Board was involved, as noted in Table 4 under secured bank loans (purpose credit). Thus, the vast majority of tender offers involved cash bids rather than the exchange of shares, and were financed with unregulated credit or internal funds.

Internal financing, either alone or in combination with bank loans, appears to be the most frequently used source of funds. However, this category is the most ambiguous of all those noted in Table 4. This is because it is conventional corporate practice to treat all sources of funds as fungible, i.e. firms regard all credit as interchangeable and ordinarily do not identify available credit by source. Corporate financial officers are frequent participants in credit markets, both domestic and foreign, both longterm and short-term, and as both borrowers and lenders. Particularly in times when high interest rates represent high corporate borrowing costs or potentially high corporate income for funds not immediately needed, careful attention is paid to every opportunity to minimize the cost of borrowing or maximize corporate income from credit market participation. Borrowing or lending on a very short

term basis--often overnight--is a common business practice. ^{3/} In this milieu, it is often impossible for a company to be specific about its source of funds for any purpose, including corporate acquisitions. In fact, it is not unlikely that a company could state in good faith that it was using internal financing for a tender offer when the ultimate source of funds involved credit market borrowing. Undoubtedly, there could also be cases where a corporation, totally free of external debt, used retained earnings or other internal finances to complete an acquisition. Under current conditions, from an analytic perspective the classification of internal financing is frequently terra incognita.

While bank financing is clearly a popular credit vehicle to finance acquisitions, the financing need not be domestic. Borrowers try to obtain credit at the lowest rates available; in the relatively restrained credit market conditions of 1980, 26 takeover bids involved some bank participation, but in four of those cases the banks were not domiciled in the United States. None of these foreign tender offers was exceptionally large, but their presence is concrete evidence that American firms can and do use foreign credit to finance domestic takeovers.

The role of bank financing changed dramatically from 1979 to 1980; the total number of takeovers dropped 30 percent from 1979 to 1980, and all forms of bank financing (including combined bank and internal financing) dropped from 76 percent of total acquisition costs in 1979 to only 18 percent in 1980. Since bank financing usually plays a very significant role in corporate acquisitions, the record high interest rates established in 1980 undoubtedly dampened some credit demand for takeover funding. However, it is reasonable to assume that credit supply conditions probably had a more telling effect. As part of a general anti-inflationary program, on March 14, 1980, the Federal Reserve Board announced a series of voluntary credit restraints, but in such a way as to

^{3/} Wittebort, Suzanne. The Frantic New Pace of Cash Management. Institutional Investor, v. 15, June 1981.

virtually assure compliance by the banking community. In describing this new program of restraint, the Federal Reserve Board stated, in part,

No numerical guidelines for particular types of credit are planned but banks are encouraged particularly to take the following actions: ...Discourage financing of corporate takeovers or mergers and the retirement of corporate stock, except in those limited instances in which there is a clear justification in terms of production or economic efficiency commensurate with the size of the loan. 4/

Developments so far in 1981 indicate that there has been a strong resurgence in merger activity, with bank financing once more playing a major role in funding corporate acquisitions. The data for 1979 and 1980 show that corporations tend to avoid regulated credit (secured bank loans using purpose credit) when possible and use unregulated credit sources. However, the 1980 experience also suggests that under certain circumstances it may be possible to restrain the general use of bank credit to finance corporate takeovers when that goal is consistent with general national economic policy objectives.

D. FOREIGN BIDS FOR U.S. COMPANIES

Despite extensive media coverage and concern expressed by the Congress and the business community, the actual number of foreign offers for U.S. companies was relatively small in 1979, 1980, and the first half of 1981. The record was compiled using data from the SEC's 14-D filings; it is summarized by country of foreign bidder in Table 5. These data include all foreign bids for U.S. firms, whether successful or unsuccessful, and in this way differ slightly in comparability with the data in Tables 2, 3, and 4. Two Canadian offers were classified as unsuccessful.

An analysis of the case-by-case details provided by the SEC, as well as the summary presented in Table 4, indicates the following characteristics of foreign

4/ Special Credit Restraint Program. Federal Reserve Bulletin. April 1980. p. 315.

bids for U.S. companies during this period: 1) Canadian offers tend to dominate those of other foreign entities; 2) almost every foreign tender offer was successful; 3) the bidding companies relied heavily on bank financing--23 offers used some type of bank credit to finance their takeover bids, while 14 indicated they were relying on corporate funds. With one exception, all of the bank credit was established through unsecured loans.

Because the number of foreign bids for U.S. companies was relatively small, no effort was made by CRS to summarize them by industry of acquired company or by source of financing.

Table 5. SOURCE AND COST OF FOREIGN TAKEOVER BIDS FOR U.S. COMPANIES

Bidding Country	1979			1980			1981(six months)		
	Number Of Offers	Cost to Bidder		Number Of Offers	Cost to Bidder		Number Of Offers	Cost to Bidder	
		Millions Of Dollars	Percent Of Total		Millions Of Dollars	Percent Of Total		Millions Of Dollars	Percent Of Total
Canada	3	530	a/ 58.1	5	1,796	52.2	3	6,129	68.8
England	4	102.4	11.2	5	1,523.5	44.3	1	270	3.0
France	1	30	3.3	2	30.5	0.9	1	2,500	28.1
Germany	2	125.8	13.8						
Ireland	1	12	1.3	1	8.5	0.2			
Japan	1	72	7.9						
Netherlands				2	82.5	2.4			
Sweden	1	10	1.1						
Switzerland	2	29.8	a/ 3.3						
Details unavailable	5								
TOTAL	20	912.0	100.0	15	3,441.0	100.0	5	8,899	100.0

a/ Cost estimate for one bid unavailable and not included.

Source: U.S. Library of Congress. Congressional Research Service. A Congressional Handbook on U.S. Materials Import Dependency/Vulnerability. Report to the Subcommittee on Economic Stabilization of the Committee on Banking, Finance, and Urban Affairs, House of Representatives. Committee print, 97th Cong., 1st sess. Washington, U.S. Govt. Print. Off., September 1981. p. 204.

III. IMPORTANCE OF TENDER OFFERS IN TOTAL MERGER ACTIVITY

A. DATA SOURCES

Corporate mergers and acquisitions can be accomplished through other means than tender offers. For example, a firm may divest itself of a part of its business through a private sale to another corporate entity, new ventures may be started by existing corporations, or the directors and shareholders of two companies may agree to merge for what is perceived to be their mutual benefit. Thus, the entire universe of mergers and acquisitions is much larger than those acquisitions achieved through tender offers. The total number of actual mergers for any particular year depends, in part, on the criteria used to define mergers.

The Bureau of Economics of the Federal Trade Commission published an annual report on mergers and acquisitions until 1981. In its final report 5/, the FTC noted that acquisitions must have met the following criteria to be included in its listing:

1. The FTC must have jurisdiction over the industry to which the acquired company belongs.

This excludes commercial banks, transportation entities, such as railroads and airlines, and communication concerns, such as radio and television stations.

2. The acquiring concern must acquire at least 10 percent of the acquired company's stock or assets.

A 10 to 50 percent purchase is a partial acquisition. A 50.1 percent and over purchase is a whole or full acquisition.

3. The acquired company must be American.
4. The acquired company must be an independent company, a subsidiary or division of another company, or a division of a subsidiary.

5/ U.S. Federal Trade Commission. Statistical Report on Mergers and Acquisitions 1979. U.S. Govt. Print. Off., Washington, D.C., July 1981. p. 11.

These criteria differ considerably from those that require the filing of a 14-D schedule with the SEC. It is not the purpose of this report to analyze or evaluate these different reporting systems, but only to point out that the inclusions and exclusions in the two systems differ significantly.

The FTC recorded a total of 1,214 completed mergers and acquisitions for 1979; another source, using the SEC 14-D filings, showed a total of 118 tender offers in 1979. 6/ The FTC data are reported with a considerable lag, while the SEC data are available in detailed form at SEC offices within days of a tender offer announcement.

The FTC data collection system is somewhat eclectic, relying on FTC pre-merger notification information, the financial press, and various financial reporting services. Similar information is reported, using similar sources, by private sector organizations; a frequently reported source of such information is W. T. Grimm & Co. in Chicago. 7/

Grimm & Co. believes "its merger data bank is considered to be the oldest and most extensive of its kind" and has noted that "for the first three quarters of 1981, completed or pending acquisitions having a purchase price of \$100 million or more totaled 94, the same aggregate recorded for all of 1980. There were 66 such sizable deals during the first nine months of 1980." 8/ This same source has identified eight mergers valued at over \$1 billion, for a total value of \$24.3 billion during 1981's first three quarters.

6/ Austin, Douglas V. Austin Data Bank (unpublished); see page 5 of this report.

7/ Merger Pace Showed Another Sharp Rise In the Third Quarter. The Wall Journal, October 21, 1981. p. 56.

8/ W. T. Grimm & Co. Press release dated October 21, 1981 (emphasis in original).

IV. PUBLIC POLICY CONSIDERATIONS

A. OVERVIEW

Interest and concern over merger trends appear to be waxing rather than waning in the 97th Congress. The House Committee on Energy and Commerce noted recently that:

Margin requirement legislation addresses only a small part of the Committee's concerns. The Committee believes that additional legislative measures in the near future may be necessary to safeguard the interests of U.S. companies and the U.S. economy. 11/

To date, Congressional concern has focused on two principal areas: credit used to finance takeovers, and foreign takeovers of U.S. companies.

B. CREDIT RESTRAINT

The general concern expressed in the 97th Congress has involved a perceived relationship between high rates of interest and the allocation of bank credit to finance large corporate mergers. The following is an example of this concern.

In the Committee's view the centralization of economic power now underway should be halted and the Federal Reserve Board should make it clear to the Nation's money center banks that using huge chunks of the Nation's available credit for corporate takeovers and other speculative purposes is not a productive use of available credit. The Federal Reserve has many implied powers and no banker can ignore a clear signal from the Nation's central bank. It must use all its power and influence to make sure the effects of monetary policy fall as evenly as possible on all sectors of the economy.

There are those who would say that even moral suasion of this type is an unwarranted attempt by the government to affect the allocation of credit. In fact, whether it likes it or not, the government already profoundly affects the allocation of credit by its policies. The current rage of high interest rates is an inequitable distribution of credit to the large corporations and oil companies

11/ U.S. Congress. House. Committee on Energy and Commerce. Uniform Margin Requirements; report to accompany H.R. 4145. September 30, 1981. Washington, U.S. Govt. Print. Off. (97th Cong., 1st sess., House Report No. 97-258). p. 6.

who can afford to pay 20 percent and more for their money, and away from the small businessman and homeowner who cannot. ^{12/}

This sentiment is reflected in several Congressional resolutions recently introduced (S. Res. 211, H. Res. 227, H. Res. 228, H. Res. 238; also see H.R. 4409).

Some aspects of the effect of the market mechanism on the allocation of credit have recently been studied by the Federal Reserve Board, dealing with the relatively deprived sectors. ^{13/} At this point, it appears that the Federal Reserve is not sympathetic to proposals for allocating credit. One recent report by the Federal Reserve Bank of New York noted that for a period in the third quarter of 1981, bank loan commitments to finance takeovers of more than \$40 billion led to actual lending by American banks of a maximum of \$10 billion. For about the same time period, business loans by commercial banks were about \$350 billion, while all commercial bank loans and investments were \$1,300 billion. Thus, "by themselves, these credit lines will not have a substantial impact on United States bank credit growth." ^{14/}

While this report apparently dismisses the need to restrict credit for merger-related activity on empirical grounds, it also noted that it is not possible to determine the net effect of such credit extensions on the banking system, financial markets or consumer spending. In one extreme example, it is possible that there would be no net effect; that is, that the credit would be

^{12/} U.S. Congress. House. Committee on Banking, Finance and Urban Affairs. Monetary Policy for 1981. Sixth Report by the Committee on Banking, Finance and Urban Affairs together with Additional, Minority, Supplemental, and Dissenting Views. 97th Cong., 1st sess. Washington, U.S. Govt. Print. Off., July 31, 1981. p. 8, 9.

^{13/} U.S. Board of Governors of the Federal Reserve System. The Impact of High Rates on the Housing, Automobile, Agriculture, and Small Business Sectors. Staff study. September 1, 1981.

^{14/} The Financial Markets, Current Developments. Federal Reserve Bank of New York Quarterly Review, v. 6, no. 3, Autumn 1981. p. 29.

immediately recycled to the lending banks by the recipients of the credit. Under other assumptions, it is possible that credit for other purposes would be restrained and/or there would be some upward pressure on interest rates.

Because banks are not the only source of credit for corporations, it is likely that blocking the availability of domestic bank credit to finance mergers would only channel the demands of acquisition-minded corporations into other credit markets.

C. FOREIGN TAKEOVERS

In general, United States policy regarding foreign investment has been permissive and nondiscriminatory, granting "national treatment" to overseas ownership of domestic firms. The exception to this policy restrains foreign ownership in industries primarily where vital national interests are at stake. According to a recent U.S. Department of State summary,

Federal law restricts foreign participation in U.S. enterprises associated with atomic energy, hydroelectric power, communications, air transport, coastal and inland water shipping, fishing, and development of federally owned lands and mineral resources. Under Defense Department regulations, foreigners generally are excluded from participation in, or access to, work by firms on classified defense contracts.

In addition, many individual American states impose further restrictions on foreign participation in banking, insurance, and land ownership. However, these must be consistent with U.S. treaty obligations. Finally, foreigners investing in the U.S. must comply with all of the various Federal, State, and local regulations, such as antitrust laws and Securities and Exchange Commission regulations which apply to both foreign and domestic investors. 15/

In addition, the executive branch has established an inter-agency group, the Committee on Foreign Investment in the United States (CFIUS), charged with guarding against foreign investments which are not in the national interest. The ability of CFIUS to perform this function appeared questionable

15/ U.S. Department of State. Bureau of Public Affairs. Foreign Investment in the U.S. Gist. December 1980.

when, in July 1981, it asked the French government to delay the acquisition of an American firm (Texasgulf) by a state-owned French firm (Société Nationale Elf Aquitaine) and was promptly rebuffed. 16/ The general effectiveness of CFIUS had been criticized earlier by the Congress. 17/

Following the general policy of nondiscriminatory treatment of foreign investment, legislation in the 97th Congress has generally followed the path of assuring equal treatment of domestic and foreign investors. Such legislation includes bills which would apply uniform margin rules to secured borrowing in overseas credit markets to foreign investors bidding for U.S. companies (H.R. 4145 18/, S. 1436 19/), and bills to limit foreign investment in U.S. industries in cases where foreign governments do not extend reciprocal treatment to U.S. investors (H.R. 4186, H.R. 4225, S. 898 [§ 238]).

As long as mergers continue to involve large companies, they will probably continue to be a concern of the Congress. Currently, a new issue appears to be developing: concern over foreign government control over U.S. companies. According to one recent media report:

16/ Selected Mergers and Acquisitions in the Natural Resources Industry, 1981: Case Histories and Financial Profiles. p. 23.

17/ U.S. Congress. House. Committee on Government Operations. The Adequacy of the Federal Response to Foreign Investment in the United States; Report Together with Additional Views. August 1, 1980. Washington, U.S. Govt. Print. Off. (96th Cong., 2d sess., House Report no. 96-1216.)

18/ U.S. Congress. House. Committee on Energy and Commerce. Uniform Margin Requirements; report to accompany H.R. 4145. September 30, 1981. Washington, U.S. Govt. Print. Off. (97th Cong., 1st sess. House Report No. 97-258). Also see U.S. Library of Congress. Congressional Research Service. The Role of Secured Bank Credit in Corporate Acquisitions. Report No. 81-186 E, by Kevin F. Winch. August 13, 1981.

19/ U.S. Congress. Senate. Committee on Banking, Housing, and Urban Affairs. Subcommittee on Securities. Extension of Margin Requirements to Foreign Investors. Hearing, 97th Cong., 1st sess., on S. 1429 [and] S. 1436. July 8, 1981. Washington, U.S. Govt. Print. Off. 1981.

Official Government policy is still to encourage foreign investment, but Congress and some departments, especially the Defense Department, are starting to worry about the implications of the ownership of some high-technology American enterprises by foreign government-controlled companies. 20/

The Administration has indicated that it intends to adhere to the long-standing national policy of equal treatment for resident and non-resident investors, the "national treatment" policy for all investors. Nevertheless, while maintaining this nondiscriminatory policy, a spokesman for the Administration recently indicated that it intends to take a "fresh look" at problem areas, especially with respect to foreign investment. This plan was described in recent congressional testimony by a representative of the U.S. Department of the Treasury:

A special Working Group on International Investment has been established to consider whether U.S. investment policies are fully appropriate in light of our domestic economic objectives. One of the issues that the Working Group is looking at rather closely is direct investments in the United States by foreign governments and government-owned entities. We are carefully considering the problems that might arise from such investments, the adequacy of the current mechanisms in responding to those problems, and possible modifications to existing mechanisms, including whether or not the mandate of the Committee on Foreign Investment in the United States (CFIUS) is sufficient. The Working Group will also consider a large number of other issues, including the adequacy of current U.S. statistics on international investments.

Virtually all the Cabinet-level agencies are represented on the Working Group. This broad composition will ensure that the full spectrum of national interests is brought to bear in consideration of individual investment policy issues. In addition, the Group will seek the counsel of U.S. business and independent agencies, in particular the Overseas Private Investment Corporation, the Federal Reserve Board, the Federal Trade Commission, and the Securities and Exchange Commission. 21/

20/ Clyde H. Farnsworth. Washington Watch: Foreign Ties of Companies. The New York Times, October 26, 1981. p. D2. Also see Trudeau's Nationalism Spurs a Stern Response. Business Week, October 12, 1981. p. 44-45.

21/ Statement of the Honorable Marc E. Leland, Assistant Secretary of the Treasury for International Affairs before the Subcommittee on Commerce, Consumer and Monetary Affairs, Committee on Government Operations, House of Representatives. U.S. Department of the Treasury, Treasury News. September 23, 1981. p. 3-4.

V. CONCLUSIONS

The material studied for this report indicates that the following summary statements are valid for successful tender offers in 1979 and 1980:

- * The absolute number of mergers using tender offers was not large: 81 bids for firms were fully or partially successful in 1979; a total of 1,214 mergers and acquisitions were reported by the FTC. Fifty-seven tender offers were successful in 1980.
- * There was a sizeable number of important tender offers in the financial services industry, but among other industries they were widely dispersed.
- * The majority of acquired companies were relatively small, although there were several cases in which the acquisition cost exceeded \$500,000.
- * Almost all of the tender offers were cash bids, rather than offers to exchange shares of stock.
- * Few tender offers used regulated credit. Either directly or indirectly, bank financing was a common feature of most tender offers.
- * In some cases, the available data were incomplete or not usable for other reasons; this factor would support the position of those who argue in favor of more frequent and systematic monitoring of merger activity in the U.S. economy.
- * Foreign takeovers of U.S. companies were relatively few in number; however, there is growing concern over foreign government control of U.S. corporations.

APPENDIX: LIMITATIONS OF SEC DATA

The following comments are based on a study of the detailed listings provided by the SEC. They are not intended to be critical of the disclosure requirements, which have been periodically reviewed and revised and are generally regarded as adequate at least for their intended purpose. Nor is any criticism intended of the role of the Securities and Exchange Commission with respect to the 14-D disclosure reports. The SEC staff has been helpful, cooperative, and generous with the use of its time in assisting with the preparation of this report. It appears that the majority of the shortcomings of these data are the result of inconsistencies between conventional business practice and the disclosure requirements. For example, a company may be relatively vague about the source of credit used to finance a proposed acquisition because its accounting and other record keeping procedures are not organized toward that end; as a result, approximate or vague responses are sometimes the best good faith reply a company can make to the information required by the SEC.

1. General Problems. In six cases, the SEC records were not available, and as a result no source of financing information was provided. It may be that these records were unavailable because they were being used by SEC staff for review, analysis, or for other purposes. In many cases, an acquiring company establishes a subsidiary for the sole purpose of making a tender offer for another firm; when the information provided by the SEC lists only the subsidiary as the bidding firm, the identity of the acquiring firm may be obscured.

2. Source of Funds Problems. The central problem associated with the source-of-funds data is the difficulty of identifying explicitly the origin of the financing used to execute the tender offers. Ambiguity regarding the source of

funds may occur because the acquiring company, while assured of adequate funds to complete the tender offer, may not have determined an actual source of financing at the time of filing. In some cases, the information provided for the source of financing is so ambiguous that it is not useful for analysis.

When a firm either exchanges shares or uses equity or debt financing in the capital markets to fund a tender offer, it is reported as internal financing and that characterization has been followed in this report. Internal funds may be specified as the source of financing, but presented in such a manner as to be totally ambiguous from an analytical perspective. Reflecting the general corporate treatment of all credit as fungible, firms may claim to be using internal financing while concurrently noting that the internal funds to be used had been previously borrowed.

In only five percent of the total number of tender offers is there even a suggestion that Federal Reserve margin regulations might apply to the bank credit used to finance a takeover bid. The offers are summarized in Table 4 on the line identified as "secured bank loans (purpose credit)". However, in no case did the acquiring company offer a positive reply to the question (item 10(d) of the 14-D filing) whether the margin requirements of the Securities Exchange Act of 1934 applied to its offer.