Defining Tender Offers: Resolving a Decade of Dilemma

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INTRODUCTION

In November 1979, the Securities and Exchange Commission (SEC or Commission) proposed a rule that defines the term "tender offer." In making the proposal, the SEC sought to make it clear that coverage of the provisions of the federal securities laws governing cash takeover bids extends beyond "conventional" tender offers. Traditionally, a tender offer has been described as an invitation to all shareholders of a specified publicly held corporation to sell a fixed amount of the company's stock at a price above that prevailing in the market place. Unregulated by the securities laws as originally drafted, abuses surged concomitantly with the popularity of tender offers as corporate takeover devices. In re-

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2 15 U.S.C. § 78m(d)-(e), n(d)-(f) (1976).
3 See, e.g., 1 M. LIPTON & E. STEINBERGER, TAKEOVERS & FREEZOUTS 106 (1978); Note, The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934, 86 HARV. L. REV. 1250, 1251 (1973) [hereinafter cited as Developing Meaning]. Most commonly, the conventional tender offer reached the shareholders of the target corporation by means of newspaper advertisements. See Sowards & Mofsky, Corporate Take-Over Bids: Gap In Federal Securities Regulation, 41 ST. JOHN'S L. REV. 499, 502 (1967). Large scale mailings, intermediaries, and other impersonal methods, however, also were utilized. See 2 A. BROMBERG, SECURITIES LAW: FRAUD § 6.1, at 107 (Supp. 1977). The offering price was approximately 20% above the market price. See Hayes & Taussig, Tactics of Cash Takeover Bids—For Bidders, Incumbent Managements, and Shareholders, 45 HARV. BUS. REV. 135, 141 (1967). Although the price was fixed, competing offers and shareholder resistance often served to increase the premium. See 2 A. BROMBERG, SECURITIES LAW : FRAUD § 6.1, at 109 (Supp. 1969). A stated time until which the offer would remain open was contained in every bid. See Note, Cash Tender Offers, 83 HARV. L. REV. 377, 378 (1969). Where the offeror did not receive the amount of shares he requested within the period designated in the offer, he could merely extend the duration of the offer. See, e.g., Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 943 (2d Cir. 1969).
4 Widespread use of the tender offer began occurring in the mid 1960's, an era characterized by rising corporate liquidity, easily attainable credit, and a growing amount of respect attributed to cash offers. See Hayes & Taussig, Tactics of Cash Takeover Bids — For Bidders, Incumbent Managements, and Shareholders, 45 HARV. BUS. REV. 135, 136 (1967). The factor most directly responsible for the swell in the number of cash tender offers was the presence of rigid pre-acquisition filing requirements affixed to the traditional takeover
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or merger when accomplished through a proxy contest, see notes 13-15 infra, or an exchange offer, and the absence of any in the case of the cash tender offer. The number of tender offers has ballooned in recent years. Between 1956 and 1960, only 83 takeover bids were initiated. See Hayes & Taussig, supra, at 137. Shortly thereafter, the tender offer began its development, as evidenced by the 155 bids attempted from 1964 through 1966. Id. In 1966 alone, there were more than 100 such attempts as contrasted with only eight made in 1960. See H.R. Rep. No. 1711, 90th Cong., 2d Sess. 2, reprinted in [1968] U.S. Code Cong. & Ad. News 2811, 2812 [hereinafter cited as H.R. Rep., U.S. News]. In keeping with this boom, the tender offer was employed as an interfirm takeover vehicle a total of 313 times in 1976 and 1977. See Austin, Study Reveals Trends in Tactics, Premiums, Success Rates in Offers, N.Y.L.J., June 12, 1978, at 25, col. 3. The success rate of effecting a takeover by tender offer has remained constant at approximately 80% between 1956 and 1977. Id. One commentator has argued that because the takeover wave is healthy to both the market and the economy, it is likely to continue into the future. See generally, Ehrbar, Corporate Takeovers Are Here to Stay, FORTUNE, May 8, 1978, at 91, 100.

The tender offer has also experienced substantial growth in the methods of its use. Throughout the early 1960's, tender offers were utilized chiefly in situations where the offeror and the target's management were on friendly terms. See Fleischer & Mundheim, Corporate Acquisition by Tender Offer, 115 U. Pa. L. Rev. 317, 318 (1967). Under these non-contested circumstances, the tender offer was found to be more advantageous than the customary asset acquisition primarily because it was cheaper. Id. The tender offer was also commonly employed by an issuer attempting to repurchase its own shares, see D. Austin & J. Fishman, Corporations in Conflict—The Tender Offer 7 (1970), and by a controlling shareholder desirous of enlarging his block. See, e.g., FMC Corp. Plans to Acquire Raygo, N.Y. Times, Sept. 21, 1972, at 67, col. 4.

The recent trend, however, has been to use tender offers for four other purposes: to obtain control of a corporation that is adverse to being taken over, to acquire a company whose board of directors, although unopposed, is not in favor of sponsoring the acquisition, to gain control of a corporation before a competing bid is perfected by a third party, and to save a company in danger where a timely merger could not be made. See M. Lipton & E. Steinberger, supra note 3, at 3.

6 When the tender offer is employed as a device to raid a corporation, the raider generally looks for seven features in finding a target company. See M. Lipton & E. Steinberger, supra note 3, at 9-10. These characteristics include "low price-earnings ratio and high book value in relation to market price;" "a business that it knows and understands;" "no concentrated blocks in inside hands;" "no antitrust or other regulatory problems;" "no state takeover statute impediments;" "insiders with a low tax basis for their shares who may be receptive to conversion of a cash tender offer to a complete or partial tax-free merger or an installment sale purchase of their shares prior to or after a cash tender offer;" and a management that probably will not fight too hard. Id.


Although tender offers were not subject to federal regulation prior to the Williams Act, the forms used were controlled to some degree by the rules of the New York Stock Exchange. See Sowards & Moskay, Corporate Take-Over Bids: Gap in Federal Securities Regulation, 41 St. John's L. Rev. 499, 503 (1967). The American Stock Exchange also made certain recommendations available to those dealing with companies whose securities were listed on its exchange. Id. at 503 n.14. Further evidencing a lack of control over tender offers was that none of the remaining eleven American exchanges nor the National Association of
compel complete disclosure by tender offerors to permit the shareholders of target corporations to make informed judgments. In providing for the regulation of tender offers, the legislation failed to specify the term's meaning. As a result, the courts and the SEC have attempted to evolve a definition on a case-by-case basis, but no single construction of the term has achieved universal application.7

This Note will examine the development of the meaning of the term "tender offer" from passage of the Williams Act to the present. To this end, the Note will start with a discussion of events leading to passage of the Williams Act and of the provisions of the Act.8 An analysis of judicial and administrative attempts at definitions will follow.9 Finally, the Note will explain the definition that the SEC has proposed to adopt as a rule and evaluate its merit in light of the Act's legislative and judicial history.10

DEVELOPMENT OF THE LAW GOVERNING TENDER OFFERS

The Need for Legislation

During the mid 1960's, tender offers, which traditionally had been employed by corporations wishing to repurchase their own securities,11 came into increasing use as corporate takeover devices.12 Unlike conventional means of effecting takeovers such as mergers, exchange offers, and proxy contests, tender offers were unregulated.13 As a result, tender offers were the fastest method of acquir-

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7 See notes 41-112 and accompanying text infra.
8 See notes 11-40 and accompanying text infra.
9 See notes 41-112 and accompanying text infra.
10 See notes 113-156 and accompanying text infra.
13 When confronted with a hostile management, the raider's choices are narrowed to a
They also tended to be less expensive than proxy contests, and the consequences to the tender offeror for failing to succeed in obtaining the desired control over the target company tended not to be as severe. Perhaps the most beneficial characteristics to the offeror were its elements of secrecy and surprise. Where the offeror's identity was concealed, the target company would be almost powerless to present convincing reasons to shareholders for not selling their securities at prices that were consider-

tender offer, an exchange offer, or a proxy contest, since the asset acquisition or merger requires the endorsement of the target's management. See Fleischer & Mundheim, Corporate Acquisition by Tender Offer, 115 U. Pa. L. Rev. 317, 320 (1967).


An exchange offer is made when a corporation makes an offer to shareholders of another corporation to exchange the shares of the offering corporation for the individuals' shares. Sowards & Mofsky, supra note 3, at 501. Such an offer mandates compliance with certain registration requirements of the Securities Act of 1933. 15 U.S.C. § 77b (1976). Additionally, the exchange offer was subject to various state "blue sky" laws, see Lipton & Steinberger, supra note 3, at 3, while prior to 1968, cash takeover bids generally eluded state regulation.

Former SEC Chairman Manuel Cohen explained the inadequacy of the lack of federal regulations governing cash takeovers by analogizing to exchange offers. See Cohen, A Note On Takeover Bids And Corporate Purchases Of Stock, 22 Bus. Law. 149, 150 (1966). He observed that "[t]he investment decision is similar—the choice whether to retain the original security or sell it is, in substance, little different from the decision made on an original purchase of a security, or an offer to exchange one security for another." Id. Accordingly, exchange offers are now regulated with tender offers under 14(e) of the 1934 Act. See notes 37-40 infra.


10 One study disclosed that conducting a proxy contest was more than three times as expensive as making a tender offer. See Wall St. J., Feb. 11, 1966, at 1, col. 6. That estimate, however, excluded from the cost of the tender offer, the huge expense of purchasing the target's shares, construing that outlay to be an investment rather than an expenditure. Id. Viewed in that manner, even if the takeover bid proved unsuccessful, the raider was left in a position to make earnings from market sales of its acquired shares or to be bought out by a management, unpleased with its holdings. See Fleischer & Mundheim, Corporate Acquisition by Tender Offer, 115 U. Pa. L. Rev. 317, 321 (1967).

16 See Sowards & Mofsky, supra note 3, at 500-01; Comment, Tender Offers, Creeping Acquisitions and the Williams Act, 2 Cum.-Sam. L. Rev. 402, 403 (1971). Absolute secrecy was a valuable asset to the raider because it limited the factors influencing a shareholder's decision to the premium price. See Cohen, A Note on Takeover Bids and Corporate Purchases of Stock, 22 Bus. Law. 149, 151 (1966). Similarly, the element of surprise renders the raider more effective. Without warning, an unfriendly management cannot utilize numerous defensive tactics which might otherwise be employed to defeat the bid. See Hayes & Taussig, supra note 3, at 139.
ably higher than market prices. Moreover, shareholders were pressured to make hurried judgments because of the time limitations of the offers. Ultimately, the cash tender offer became the most successful and popular means of acquiring control over corporations.

Lacking adequate information about the persons or entities making tender offers, shareholders solicited in cash takeover bids became subject to several risks over which they had no control. If a shareholder rejected an offer, for example, his interest in the target company could become subject to the management of a successful unknown raider. Another risk was that a shareholder who tendered his stock might be able to sell only a portion of it, since most tender offers seek only a limited number of shares. In this event, the remaining shares would be subject to the control of the

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17 Management's ability to combat a known offer can be as awesome, in many ways, as the capacity of the raider acting against a naive management. Management has at its disposal the corporate financial resources to resist a tender offer. See Fleischer & Mundheim, Corporate Acquisition by Tender Offer, 115 U. Pa. L. Rev. 317, 321 (1967). With access to the corporate treasury, management is equipped to commence litigation by claiming antitrust, margin regulation, conflict of interests, or Williams Act violations. See M. Lipton & E. Steinberger, supra note 3, at 70, 71. It might, however, choose to urge its shareholders not to tender. Id. at 71. If this route is selected, management will be aided by shareholder lists and by knowing which shareholders own large blocks. The target could also raise its dividends, split its stock, liquidate at a price greater than the price of the bid, or attempt to purchase its own shares at a premium above the raider's offering price. Id. Additionally, the target may have "allies" such as banks and insurance companies who will refrain from financing the takeover attempt. See Fleischer & Mundheim, Corporate Acquisition by Tender Offer, 115 U. Pa. L. Rev. 317, 322 (1967). Another technique that can be used by a hostile management is to seek out a "White Knight," a friendly corporation willing to make a competing offer. See M. Lipton & E. Steinberger, supra note 3, at 71. For an exhaustive analysis of the options available to management, see Lynch & Steinberg, The Legitimacy of Defensive Tactics in Tender Offers, 64 Cornell L. Rev. 901 (1979); Note, Defensive Tactics Employed by Incumbent Managements in Contesting Tender Offers, 21 Stan. L. Rev. 1104 (1969).

18 Although it has been contended that price is the only factor evaluated by shareholders when considering whether to sell, it has been argued that this statement must be considered in light of the bidder's intentions before an informed decision can be made. See Cohen, A Note on Takeover Bids and Corporate Purchases of Stock, 22 Bus. Law. 149, 151 (1966). For example, assume a bidder is confident that liquidating the target will realize him an amount per share three times the value of the stock's current market price. While an offering price of 20% above market might ordinarily seem quite attractive, it is questionable whether the raider would be able to get away so cheaply if the shareholders knew of any liquidation plans or changes in operating procedures or investment decisions. Id.

19 See note 4 supra.


21 Fleisher & Mundheim, supra note 4, at 336 & n.76.
raider. Without knowledge about the acquirer, the shareholder assumed the risk of his investment turning sour under new management. These risks attached at the moment the tender offer began, because shareholders who accepted offers were required, as they are today, to relinquish their shares to a designated depository. Finally, shareholders with small amounts of stock often tendered their shares as early as possible because of the prospect of being closed out of an offer, whereas those owning enough shares to have a crucial effect on the outcome of the offer could withhold their acceptances until a higher price were offered.

Notwithstanding the risks inherent in unregulated tender offers, judicial attempts to bring such offers within the ambit of the existing securities laws proved fruitless. Since knowledge of one’s own intentions usually does not amount to inside information, the mere withholding of such information by an offeror was not fraudulent and thus not violative of rule 10b-5. Although rule 10b-5 might have governed a takeover bid by an offeror having a duty to disclose inside information, the great majority of tender offers re-

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23 The function of the depository, which invariably is a bank, is to receive the tendered shares and pay for them on behalf of the offeror. Prior to passage of the withdrawal provisions of the Williams Act, § 14(d)(5), 15 U.S.C. § 78n(d)(5)(1976), the shareholder was without power to retake them. See Developing Meaning, supra note 3, at 1252 n. 14. This deprived the investor of control over his securities, a power which he retained in privately negotiated transactions or dealings in the open market until the sales were consummated. See Developing Meaning, supra note 3, at 1252. While it is arguable that this was a risk known to investors, it nevertheless placed shareholders on far less than equal footing with the offeror, whose obligation to purchase any shares was almost always conditioned upon the tendering of a minimum number of shares. Such an amount was invariably fixed by the offeror at a point which would guarantee him control of the target company. Setting a high minimum may also result in discouraging arbitrage. See generally, Rubin, Arbitrage, 32 Bus. Law. 1315 (1977).
24 See Fleischer & Mundheim, supra note 4, at 346, 350.
25 In some instances, the terms of the tender offer were preliminarily negotiated with major shareholders, thereby creating further discrimination against the small investor. See, e.g., Mills v. Sarjem Corp., 133 F. Supp. 753, 757 (D.N.J. 1955).
26 SEC rule 10b-5, 17 C.F.R. 240.10b-5(c) (1979). Rule 10b-5 renders illegal any fraudulent conduct “in connection with the purchase or sale of any security.” Id. Because the rule is triggered only when there is a duty to disclose, Chiarella v. U.S., 48 U.S.L.W. 4250 (March 18, 1980), and since such a duty arises predominantly when there exists a fiduciary relationship between the parties to the transaction, the weakness in the argument that all tender offers are covered by the provision is clear. See Connelly v. Balkwill, 174 F.Supp. 48, 59 (N.D. Ohio 1959), aff’d per curiam, 275 F.2d 685 (6th Cir. 1960).
27 It was suggested that a raider could attain “insider” status if, while engaged in a program of market purchases prior to the making of a tender offer, it learned publicly undisclosed material information about the target through discussions with incumbent man-
mained unregulated, and the need for legislation became clear.

The Williams Act

Recognizing the need to extend the coverage of the securities laws to tender offers, Congress considered amendments to the Securities Exchange Act of 1934 (1934 Act) in 1968.28 In defending the legislation of which he was sponsor, Senator Harrison Williams claimed that the bill was intended both to correct the existing imbalance between the regulatory burdens placed on the target companies and those placed on offerors and to afford investors much-needed protections.29 Senator Williams' bill ultimately became law,

agreement. See Fleischer & Mundheim, supra note 4, at 332. The authors noted, however, that such a classification was strained at best. Id. at 331.


28 When Senator Williams initially introduced a bill to regulate cash tender offers, S. 2731, 89th Cong., 1st Sess. (1965), the SEC made recommendations which would promote a more neutral policy, believing that Senator Williams' measure would give management unwarranted advantages. Memorandum of the Securities and Exchange Commission to the Committee on Banking and Currency, U.S. Senate, on S. 2731, 112 Cong. Rec. 19,003-06 (1966).

29 See 113 Cong. Rec. 854 (1967). Since it was feared that Senator Williams' previous measure, S. 2731, see note 28 supra, was too harsh on takeover attempts, the Senator was quick to observe, upon introduction of S. 510, 90th Cong., 1st Sess. (1967), that the revision guarded all of the legitimate interests of the target, its management, and its shareholders “without unduly impeding cash takeover bids.” Id. One restraint that the revised bill placed on management was a grant of rulemaking power to the SEC regarding the statements that management could make to shareholders on how to act on the offer. Id. at 855-56.

Despite this attempt at a balancing approach, the Supreme Court has declared that the offerors were not “intended beneficiaries” of the legislation. See Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 28 (1977).

In elucidating that the essential purpose of the proposed legislation is to demand full and fair disclosure for the benefit of shareholders, the bill's co-sponsor, Senator Thomas Kuchel, depicted the very situation he hoped enactment of S. 510 would prevent:

Today, there are those individuals in our financial community who seek to reduce our proudest businesses into nothing but corporate shells. They seize control of the corporation with unknown sources, sell or trade away the best assets, and later split up the remains among themselves. The tragedy of such collusion is that the corporation can be financially raped without management or shareholders having any knowledge of the acquisitions.

113 Cong. Rec. 854, 857-58 (1967). Referring to bidders as “takeover pirates,” id. at 858, Senator Kuchel suggested that the threats posed by these “pirates” were more dangerous than the underhandedness that culminated in the crash of 1927. Id. at 857-58.

In the same spirit, SEC Chairman Cohen stressed the importance of providing adequate
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and tender offers now are regulated by sections 14(d) and 14(e) of the 1934 Act.30

In its present form, section 14(d) requires a tender offeror to disclose certain information to the SEC at the start of the offer if its successful consummation would result in ownership of more than five percent of any class of the target company's equity securities.31 Any person to whom this provision applies must file a state-

communication with shareholders and the need to insure them sufficient time to arrive at a sound investment decision. Only in this manner, the SEC chief explained, could undue pressure on offerees during a takeover bid be avoided. See Hearings on S. 510 Before Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 15 (1967) [hereinafter cited as Senate Hearings].

30 The five new sections added by the Williams Act to the 1934 Act are § 13(d), 15 U.S.C. § 78m(d) (1976) (requiring any “person” attaining “beneficial ownership” of 5% of a class of registered equity securities to file within 10 days specified information with the issuer, the SEC, and every exchange where the security is traded); § 13(e), 15 U.S.C. § 78m(e) (1976) (affording SEC power to regulate corporate stock repurchases); § 14(d) 15 U.S.C. § 78n(d) (1976) (governing preacquisition disclosure where tender offer would result in bidder's owning more than 5% of a class of securities, withdrawal rights of offeree, proration in offers for less than all of the target's shares, and increased prices to be paid to shareholders tendering early); § 14(e), 15 U.S.C. § 78n(e) (1976) (prohibiting fraud in the making of any tender offer); and § 14(f), 15 U.S.C. § 78n(f) (1976) (requiring disclosure where a change of majority of the Board of Directors would occur subsequent to takeover).


It shall be unlawful for any person . . . to make a tender offer for, or a request or invitation for tenders of, any class of any equity security . . . if, after consumma-
tion thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 78m (d) of this title . . . .

As originally enacted, § 14(d)(1) required 10% beneficial ownership before disclosure was mandated; this was lowered to 5% in 1970. Act of Dec. 22, 1970, Pub. L. No. 91-567,§ 3, 84 Stat. 1497.

Specifically exempted by § 14(d)(8), 15 U.S.C. § 78n(d)(8) (1976), from preacquisition disclosure, are acquisitions that would not amount to more than 2% of a class when combined with all other acquisitions of that class made within the past year. Also excluded are offers made by the issuer of the security solicited, and those which the Commission deems do not fall within the class of activities designed to be regulated by Congress. Id. Presumably, these exclusions were incorporated into the legislation because they are not among the type of transactions that will result in a substantial transformation of the target or that will pressure a shareholder into making an uninformed decision to sell. See H. R. Rep. supra note 4, at 8-9, reprinted in U.S. News at 2813; 113 Cong. Rec. 856 (1967) (remarks of Senator Williams).

The question whether “beneficial ownership” exists is governed by rule 13d-3, 17 C.F.R. § 240.13d-3 (1979).

By virtue of § 13(d)(3), persons acting as a group to acquire, retain or sell securities are deemed a “person” for Williams Act filing purposes. For a detailed discussion of this issue, see M. LIPTON & E. STEINBERGER, supra note 3, at 96-105.
ment with the SEC revealing, *inter alia*, his identity and background; the source of funds to be used for purchases; the number of shares he holds in the target company; any arrangements he has made involving the target company's stock; and any major changes he contemplates in the company's corporate structure if control of the target is desired.\(^2\) The offeror also is required to file copies of all materials used to solicit shares in the target company and to furnish the target company with a copy of all filed information.\(^3\)

Apparently fearful that the disclosure requirements might not resolve all potential inequities in cash takeover bids, Congress enacted several additional provisions that regulate the manner in which tender offers may be carried out. For example, investors who accept an offer are permitted to withdraw their shares during the first 15 days and after the first 60 days of the offer.\(^4\) Additionally, where an offeror seeks fewer than all the outstanding shares in the target company, the shares tendered must be purchased on a pro rata basis.\(^5\) Finally, where an offeror raises the purchase price

\(^2\) The 1934 Act, § 14(d), 15 U.S.C. § 78n(d) (1976). The information required of the purchaser is set forth in § 13(d)(1), 15 U.S.C. § 78 m(d)(1) (1976). The mere preparation of such a massive document, it was observed, "may delay or even compromise the secrecy of the tender offer itself." Schmults & Kelly, *Disclosure in Connection With Cash Take-Over Bids: The New Regulations*, 24 Bus. LAW. 19, 25 (1968). Additionally, § 14(d)(1) prescribes that the SEC may require the disclosure of whatever additional information it deems necessary to effectuate the underlying policy considerations of the Act. Accordingly, the SEC has promulgated a more exhaustive list of disclosure requirements in Schedule 14D, which was devised pursuant to its adoption of rule 14d-1 of Regulation 14D, rule 14d-1(a)-(g), 17 C.F.R. § 240.14d-1 (1979).


\(^4\) 15 U.S.C. § 78n(d)(5) (1976); Rule 14d-7(a)(1), 44 Fed. Reg. 70,234 (1979). Section 14(d)(5) is designed to present investors with a "short period within which to reconsider", H.R.Rep., *supra* note 4, at 10, *reprinted* in U.S.News at 2820, and to "prevent tendered securities from being tied up indefinitely ... ." *Id.* A shareholder who has tendered his shares may wish to reconsider upon a showing by management that the offering price is really inadequate. See *Note, Cash Tender Offers*, 83 Harv. L. Rev. 377, 385 (1969). During consideration of the bill, the SEC opted for withdrawal to be permitted up until the time that the securities were purchased, thereby allowing offerees to participate in counteroffers. *Senate Hearings, supra* note 29, at 210-212. The New York Stock Exchange opposed such a one-sided approach, favoring a 7-day provision, which was adopted in the legislation. *Id.* at 92 (statement of New York Stock Exchange). Recent action by the Commission extended the withdrawal period from 7 to 15 days, rule 14d-7(a)(1), and established additional withdrawal rights applicable to a situation with competing tender offers. *Id.* (a)(2).

\(^5\) The 1934 Act, § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1975). Only shares tendered during the first 10 days of the offer or within 10 days of an increase in the offering price must be purchased pro rata. *Id.* In response to some confusion among the authorities on whether § 14(d)(6) is violated when the offeror provides pro rata periods in excess of those made mandatory by the statute, see *Senate Hearings, supra* note 29, at 77 (testimony of Donald Calvin); *id.* at 186-88 & 190 (testimony of Manuel Cohen, Chairman, SEC), the Commission
while the offer is pending, all tendering shareholders must be given the benefit of the price increase. Adding to these provisions, the SEC recently promulgated a rule requiring tender offers to remain open for at least 20 days in an effort to discourage a raider from attempting a quick takeover, sometimes referred to as a "Saturday night special" or "blitzkrieg."

In addition to its disclosure requirements and substantive provisions, the Williams Act contains its own antifraud section. Modeled after rule 10b-5 of the 1934 Act, section 14(e) makes it unlawful for anyone "to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer . . ." Like rule 10b-5, the provision has been interpreted to prohibit false statements and omissions of material facts in connection with any tender offer.

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footnote:

38 Saturday night specials are unfriendly tender offers which involve no discussions with the respective target prior to the announcement of the takeover bid. Because they generally remain open for minimum periods, they are calculated to place incumbent management in a highly pressured situation. See M. Lipton & E. Steinberger, supra note 3, at 39. Other tender offer approaches include the strong bear hug, where the offeror informs the target of its intentions and negotiates for its support while simultaneously announcing publicly its plans to make a tender offer; the bear hug, where the raider merely tells the target about a proposed takeover bid including the fixed terms of the offer; the cash option merger, where the raider offers stockholders their choice of taxable cash consideration or an exchange of stock, which is tax free; the installment sale, which offers the same tax advantage, where shareholders can accept an installment note rather than cash; and the casual pass, where, in a friendly takeover attempt, the raider notifies the target that it is contemplating a tender offer but that it is willing to negotiate. Id. at 40-56.


40 Section 14(e), 15 U.S.C. § 78n(e) (1976), applies even to tender offers exempted from the preacquisition disclosure requirements of § 14(d)(1). See Henry Heide, Inc., [1972-1973}
WHAT CONSTITUTES A TENDER OFFER?

Development of the law

While the Williams Act generally has proven effective in the regulation of tender offers, it is not always clear whether a particular transaction comes within its coverage. Although the Williams Act clearly was intended to regulate conventional tender offers, the extent, if any, to which it was intended to reach transactions resembling conventional offers in substance but differing in form, remains unclear. It has been suggested that since the legislative history contains references only to conventional offers, Congress may have intended that the relevant provisions of the Act be similarly limited in scope. Indeed, this proposition appears to be sup-
ported by the addition of section 13(d), whose disclosure requirements apply to any type of acquisition program resulting in more than five percent ownership. One might argue, therefore, that if Congress had intended for the Williams Act to reach beyond conventional offers, it would have so provided in explicit terms. Moreover, Senator Williams explained that in the cases of privately negotiated transactions and open market purchases, prior disclosure would be premature and "upsetting [to] the free and open auction market, where buyer and seller normally do not disclose the extent of their interest . . . ."

Whatever Congress' intent may have been in passing the Williams Act, both the SEC and the courts began expanding the scope of the term tender offer soon after the Act took effect. An expansive reading of the Act first occurred in an SEC release, wherein the Commission asserted that special bids were to be construed as tender offers for purposes of the Act. Special bids differ from conventional tender offers in that they are not conditioned upon the tender of any fixed number of shares, and shareholders therefore can sell and not merely relinquish control. Special bids are similar to cash takeovers, however, in three significant respects.

that use of the word "normally" may well indicate that Congress did not intend such a restrictive construction.

45 15 U.S.C. § 78m(d)(1)(1976). Section 13(d) requires persons acquiring more than five percent of certain classes of securities to file in a Schedule 13D detailed information with the SEC within 10 days of the acquisition. Failure to file a timely Schedule 13D can lead to injunctive relief barring the purchaser from exercising his voting rights. Where the schedule is filed late but the acquisition of the securities does not conflict with any of the policies that prompted passage of the Williams Act, however, injunctive relief has been denied. See Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58-61 (1975); General Aircraft Corp. v. Lampert, 556 F.2d 90, 94-95 (1st Cir. 1977).

46 113 Cong. Rec. 856 (1967) (remarks of Senator Williams). Interestingly, Senator Williams distinguished privately negotiated transactions, open market purchases, and tender offers after acknowledging the contentions of some authorities that all three should be subject to preacquisition disclosure regulations. Id. Indeed, Congress found the distinctions drawn by Senator Williams valid. Compare §13(d)(1) of the 1934 Act, 15 U.S.C. § 78m (d) (1) (1976) with § 14(d)(1) of the 1934 Act, 15 U.S.C. § 78n(d)(1) (1976). The differences are critical since, if a court finds that the acquirer's activities comprised a tender offer, then the offeror has already irreparably violated §14(d), whereas a violation of § 13(d) may only result in a mandatory subsequent filing.

47 See generally Einhorn & Blackburn, The Developing Concept of "Tender Offer": An Analysis Of The Judicial And Administrative Interpretations Of The Term, 23 N.Y.L. Sch. L. Rev. 379 (1978); Developing Meaning, supra note 3.


First, special bids are announced on the market tape and therefore are addressed to all shareholders of a particular class. Special bids also feature offering prices that are considerably higher than those prevailing in the market. Finally, special bids place ceilings on the numbers of shares sought to be purchased. As a result of these similarities, a shareholder considering whether to sell securities pursuant to a special bid is confronted by the same pressures that inhibit well-reasoned judgment in a conventional tender offer. It would appear, therefore, that the SEC’s extension of the Williams Act to special bids constituted a sound attempt at curbing the effects of a type of open market purchase program calculated to bring about a takeover.

Early cases enlarging the definition of “tender offer,” although challenging some traditional conceptions of the nature of privately negotiated transactions, manifested preventative goals similar to those of the SEC. In the first case addressing the issue, *Cattlemen’s Investment Co. v. Fears*, a federal district court considered whether the defendant’s active and widespread solicitation of the plaintiff company’s stockholders through personal visits, telephone conversations, and the mails constituted a tender offer. While observing that the solicitation methods distinguished the campaign from conventional takeover bids, which usually are extended to all shareholders through newspaper advertisements, the court nevertheless held that the transaction was a tender offer. In emphasizing the manner of solicitation, the court suggested that the means employed by the defendant were even more calculated to pressure a shareholder into making an ill-considered investment decision than would be a newspaper advertisement. The court took the view

50 NYSE rule 391(c), 2 NYSE Guide (CCH) § 2391. See also Am. Stock Ex. rule 560(d)-(e), 2 Am. Stock Ex. Guide (CCH) § 9524.


52 Id.

53 The SEC’s maneuver may have come in response to a takeover attempt by special bid only shortly after the Williams Act was implemented. See Wall St. J., Aug. 23, 1968, at 7, col. 1. Such a reaction may well have been a warning that the boundaries of the Williams Act would expand to effect its underlying purpose.


56 343 F. Supp. at 1252.
that the Williams Act should be construed liberally to effectuate its remedial purpose,\textsuperscript{57} which would be frustrated unless the defendant were required to comply with the disclosure provisions of section 14(d).\textsuperscript{58} It would appear that the \textit{Cattlemen} court, which construed the term “tender offer” to include a transaction containing virtually no elements of public solicitation, gave the Williams Act its broadest interpretation to date. Courts in subsequent cases, while recognizing that the distinctions between tender offers and privately negotiated transactions are not always clear,\textsuperscript{59} have applied the Act only to transactions conforming more closely to conventional tender offers.\textsuperscript{60}

One approach that apparently has tended to restrict expansion of the definition of tender offer has been to examine the impact that a solicitation program has had on the solicited shareholders. Unlike the \textit{Cattlemen} test, which focused on the extent of a solicitation program, an impact test seeks to weigh the pressures to which solicitees are subjected.\textsuperscript{61} In the first case that applied the test, the court reasoned that the Williams Act should govern a transaction only if the pressure it exerts upon shareholders to sell is as formidable as would be the pressure accompanying a conventional tender offer.\textsuperscript{62} Accordingly, if the impact test were applied,
it would involve an inquiry into the sophistication of the solicited shareholders, and courts would be able to tailor decisions according to the shareholders' needs for information. It is submitted, however, that the burden of extensively examining the circumstances present in each case generally would make the impact test difficult to apply in practice. Problems would arise both in planning a cash takeover and in later assessing whether the takeover was a tender offer, since the test could be applied only on a case-by-case basis. Indeed, the shareholder impact test has been criticized as "much too broad," and it appears, therefore, that the test cannot achieve universal acceptance.

Another approach to defining tender offer, which resembles a hybrid of the extent and impact tests, arose from an acquisition program involving both open market and privately negotiated purchases. The offeror started the program by making several public announcements of his intention to acquire control of the target company and followed the announcements with rapid accu-
mulations of stock. Finding that the preacquisition public announcements subjected shareholders to the very pressures and dangers that the Williams Act was designed to relieve, the court held that a tender offer had occurred. In reaching its conclusion, the court apparently employed neither an extent test nor an impact test. Instead, it examined both the extent of the alleged tender offer and its probable impact on shareholders, utilizing what might be termed a "widespread public announcement" test. While leaving undisturbed the notion that a pure open market purchase program does not constitute a tender offer, the court indicated that widespread public announcements preceding open market purchases would expose such acquisitions to the strictures of the Williams Act.

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67 Id.
68 Id. at 1125. The court framed the issue of the case as "whether defendants' method of acquisition of [the plaintiff's] common stock creates the same pressures and dangers, as in Cattlemen's Investment Co. v. Fears, . . . that the Williams Act was designed to prevent." Id. at 1125 (emphasis in original). The court found it significant that the defendant's purchases followed its issuance of three press releases which had specified the terms of a proposed tender offer and alternative buying methods. Id. at 1126. The result of such publicity, the S-G court reasoned, was to instill in the minds of the target's shareholders the very fears which lead to hasty decisions. Id. According to the court, therefore, a tender offer is made where a pervasive announcement by the purchaser of his intention to acquire control of the target precedes an actual rapid accumulation by means of market or privately negotiated purchases. Id. at 1126-27. The S-G court added that the conditional language employed by the defendant in its proposals did not lessen the need for investor protection, especially where the announcements were both precise and genuine. Id. Hence, the court ultimately found that the open market and private transactions probably did amount to a tender offer. Id. at 1127. See also Applied Digital Data Systems Inc. v. Milgo Electronic Corp., 435 F. Supp. 1145, 1155 (S.D.N.Y. 1977); Anaconda Co. v. Crane Co., 411 F. Supp. 1208 (S.D.N.Y. 1975); ICM Realty v. Cabot, Cabot & Forbes Land Trust [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,585, at 96,046 (S.D.N.Y. 1974).
70 466 F. Supp. 1114, 1126-27.
71 Id. It is plausible that courts will apply a rule of integration and find that a concerted program of open market purchases immediately preceding a formal tender offer should be deemed to be part of that tender offer. See Griffin & Tucker, The Williams Act, Public Law 90-439—Growing Pains? Some Interpretations with Respect to the Williams Act, 16 How. L.J. 654, 700-01 (1971). Thus far, however, courts have rejected this construction. See Copperweld Corp. v. Imetal, 403 F. Supp. 579 (W.D. Pa. 1975); Texagulf, Inc. v. Canada Dev. Corp., 366 F. Supp. 374 (S.D. Tex. 1973). Since investors who sell in the open market prior to the announcement of a tender offer are not confronted with the pressures accompanying a takeover bid, this judicial rejection appears to be in line with both the more widely accepted notion that pure open market purchases are not tender offers and with the spirit of the Act itself.
The State of the Law in the Second Circuit

The failure of the judiciary to evolve a common definition of tender offer is highlighted by three recent cases decided within the second circuit. In the first case, *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, the Court of Appeals for the Second Circuit became the only federal appellate court to pass on the question. The *Kennecott* plaintiff challenged the legality of the means by which Curtiss-Wright Corp. acquired its stock, claiming the tactics amounted to an undisclosed tender offer. Between November 1977 and March 1978, the defendant engaged in a buying campaign that culminated in the purchase of approximately ten percent of the stock in Kennecott Copper. Most of the shares were obtained through widely publicized open market dealings. Some of the other purchases took place on the exchange floor following off-the-floor solicitations of fifty shareholders, and the remainder were purchased from approximately twelve institutional holders in privately negotiated transactions. In an opinion written by Judge Van Graafeiland, the second circuit held that Curtiss-Wright had not made a tender offer.

Initially, the court declared that the transactions effected through open trading in a public market were outside the statute. Addressing the transactions that took place off the floor, the court rejected the shareholder impact test employed by the lower court, observing that “[t]he Second Circuit has not yet moved this far.” In so ruling, Judge Van Graafeiland reasoned that, while liberal construction of the Act might not preclude effective application of

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72 584 F.2d 1195 (2d Cir. 1978).
73 Id. at 1206-07.
74 Id. at 1197-98.
75 Id. at 1206.
76 Id.
77 Id. at 1207.
78 Id. Judge Van Graafeiland relied on D-Z Inv. Co. v. Holloway [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,771 (S.D.N.Y. 1974), discussed at note 65 supra, as authority for his contention that the second circuit has not yet gone so far as to construe a method not conventionally perceived to be a tender offer as a tender offer. Id. at 1206-07. The district court, citing *Developing Meaning*, supra note 3, had noted that the shareholder impact test was the broadest definition of tender offer of which it had been aware. 449 F. Supp. 961, 961 (S.D.N.Y. 1978). Applying that test to the activities of Curtiss-Wright's brokers, the district court reasoned that since the potential sellers were only asked if they wanted to sell their holdings, were not offered a premium price, were not given a deadline by which to make a decision and, were all sophisticated investors, they were not likely to have been pressured into irrational decisions to sell. Id. at 962.
the Act's antifraud provision, "[i]t would also require courts to apply the withdrawal, pro-rata, and increased price provisions of [the Act] to ordinary stock purchases, a difficult if not impossible task."

The tender offer issue next arose in the second circuit in Brascan Ltd. v. Edper Equities Ltd., in which the Southern District of New York followed the approach taken in Kennecott. Brascan grew out of the solicitation of a large block of shares from between thirty and fifty institutional investors by the defendant's broker. Since the solicitations had not been made by the defendant Edper Equities (Edper) directly, the plaintiff contended that the broker had acted as Edper's agent, because of his assistance in Edper's efforts to acquire control of the plaintiff. The court rejected this argument, finding that the broker's solicitation of selling shareholders was not made on Edper's behalf. In so holding, the court found that the solicitations were conducted according to "conventional methods of privately negotiated block trades" and that, therefore, the transaction would not constitute a tender offer even if the broker were considered Edper's agent. The Brascan court observed that conventional tender offers were distinguished from other large scale acquisition programs in the legislative history of the Williams Act. Moreover, the court asserted that an excessively liberal application of the Williams Act would make it impos-

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79 584 F.2d at 1207; see notes 34-36 supra. Despite the apparent reluctance of the second circuit in Kennecott to move far away from the conventional meaning of tender offer, that decision did not hammer the death knell into a broader construction that might be given to the term at some future date. Judge Van Graafeiland made this clear when he noted that "[i]f this court is to opt for an interpretation of 'tender offer' that differs from its conventional meaning, this is not the case in which to do it." 584 F.2d at 1207.


81 Id. at 95,631-32.

82 Id. The Brascan court rejected the plaintiff's agency argument because, in its view, the evidence did not support a finding that the broker was acting pursuant to the instructions of or on behalf of Edper. Id. Further reasoning that if the broker's solicitations culminated in sales, he would have earned handsome brokerage commissions, Judge Leval concluded that the broker was acting in his own interest, albeit, that interest was shared by Edper. Id.

83 Id. at 95,631. The court noted that "privately negotiated block trading is done on a daily basis in the U.S. securities markets without anyone's ever suspecting that what is being practiced might be a tender offer." Id.

84 Id. Judge Leval thought that the acquisition of large bulks of stock on the open market through cautious bidding is not a tender offer irrespective of the amount of stock that is accumulated. Id.

85 Id. at 95,632 (citing 113 Cong. Rec. at 854-56 (remarks of Sen. Williams); Senate Hearings, supra note 29, at 16, 17, 24-25, 36 (testimony of SEC Chairman Cohen)).
sible for anyone to engage in a takeover scheme "except in the manner of a conventional tender offer."  

The Brascan court also addressed contentions made in a brief filed by the SEC as amicus curiae.  

Apparently departing from its prior position, which avoided adopting a definition of a term it considered to be dynamic in nature, the SEC proposed that the court consider eight factors in determining whether a tender offer had been made. Examination of these factors suggests that the SEC was advocating a definition consistent with the more liberal case law. Initially, the Commission urged, the court should look for "active and widespread solicitation of public shareholders," which had figured prominently in the disposition of the Cattlemen case. The next four factors correspond to conventional notions of what constitutes a tender offer: whether the solicitation sought a substantial percentage of the target's shares, whether a premium price was offered, whether the terms of the offer were non-negotiable, and whether the offer was conditioned upon the tender of a stated minimum number of shares. Another two factors contended by the SEC to be relevant reflect the shareholder impact test: whether the offer was to remain open for a limited period of

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67 Id. at 95,632-33.  
68 Adhering to a stance it had taken in a 1976 release, the SEC 3 years later, articulated the following approach:

In recognition of the dynamic nature of tender offers and the need for the Williams Act to be interpreted flexibly in a manner consistent with its purposes, the Commission affirms its position that a definition of the term "tender offer" is neither appropriate nor necessary at this time. . . . [T]his position should in no way be construed to mean that the term applies only to a so-called "conventional" tender offer. . . .  

Therefore, the determination of whether a transaction or series of transactions constitutes a tender offer depends upon consideration of the particular facts and circumstances in light of such purposes.


91 See Developing Meaning, supra note 3, at 1251.


93 Id. at 95,633.
time, and whether the solicitees were pressured into making hasty decisions. Finally, the SEC argued that the court should be wary of any public announcements of the offeror’s intentions prior to rapid acquisition of securities, a factor that had been given significant weight in an earlier case applying a variation of the impact test.

Although the Brascan court requested the SEC to prepare the brief, it criticized the Commission for failing to indicate the number of factors that had to be satisfied for an acquisition to be treated as a tender offer and it questioned the validity of the broad interpretation of the Williams Act. Accordingly, the court did not base its decision on the arguments contained in the SEC’s brief.

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The Brascan court criticized the SEC interpretation as being both an impermissible and undesirable reading of the Williams Act. Id. at 95,632. Nevertheless, the court did analyze Edper’s activities in accordance with the Commission’s standards, appearing to be mindful, however, of the Kennecott precedent at all times. Id. at 95,632-33. Judge Leval first noted that directing solicitations to 50 of 50,000 shareholders did not satisfy the first factor calling for active and widespread solicitation. Id. at 95,632. Edper’s solicitations were made to only one tenth of 1% of Brascan’s shareholders. The Brascan court found the second factor, solicitation of a substantial percentage of the target’s stock, clearly met because a large percentage of Brascan’s stock was, in fact, solicited. Id. at 95,633. Finding that the third and fifth factors, a premium price and the contingency of a minimum number of shares being tendered, were met “only to a slight degree,” id., and that the remaining elements were absent, Judge Leval determined that, even under the SEC guidelines, Edper’s activities did not constitute a tender offer. To have found otherwise, the judge remarked, would have been to usurp legislative power and rewrite the provisions of the Williams Act. Id. Upon a careful reading, it may be seen that the Brascan court felt compelled, perhaps by the Kennecott decision, not to adhere to the SEC factors, thereby disregarding Congress’ intent underlying the Williams legislation.

At least one commentary has attacked the eight SEC factors as being too vague for practical application. See Block & Schwarzfeld, How to End ‘Confusion’ Under the Williams Act, N.Y.L.J., Aug. 1, 1979, at 3, col. 3. Furthermore, they submit that the factors leave decision making to the subjective whims of presiding judges, id., which results in inconsistencies and risky planning. See Block & Schwarzfeld, Curbing the Unregulated Tender Offer, 6 Sec. Reg. L.J. 133, 153 (1978). Accordingly, the authors originally urged rulemaking by the Commission in this area. Id. Having subsequently found the Commission’s position to be inadequate, the commentators presently suggest that new legislation might be more appropriate. Block & Schwarzfeld, How to End ‘Confusion’ Under the Williams Act, N.Y.L.J., Aug. 1, 1979, at 3, col. 4.

Although the Kennecott and Brascan decisions suggest that the courts within the second circuit will limit application of the Williams Act to conventional tender offers, a more recent decision has broadly interpreted the Act. In Wellman v. Dickinson,9 Judge Carter of the Southern District of New York discussed the Act in depth and concluded that liberal application of it would effectuate its purposes best.10 The events culminating in the lawsuits in Wellman consisted of face-to-face transactions with a small number of individual shareholders and of telephone solicitation of approximately thirty institutional holders, which enabled the raider to acquire a controlling position in the target company.11 The court initially considered whether the transactions were privately negotiated or public, reasoning that the former could not constitute a tender offer, but that the latter might.12 Noting that similar

10 Id. at 822.
11 The Wellman litigation arose from the rapid acquisition of 34% of Becton, Dickinson & Co. (BD) stock, a percentage guaranteed to afford control, by a wholly owned subsidiary formed to buy the shares. Id. at 790. In planning the acquisition program, Sun's advisors decided that private transactions would be the most favorable strategy in light of a hostile BD management. Id. at 806; see Frome, District Court Focuses on Definition of Tender Offer, N.Y.L.J., Oct. 18, 1979, at 2, col. 3. Two separate scripts were prepared for telephone solicitations to individuals and institutions. 475 F. Supp. at 806-07 n.19. Two days before the phone solicitations were to take place, Fairleigh Dickinson, Jr., his daughter, and a close friend, all of whom disapproved the current BD management, were approached with an offer. They were told that Sun was the offeror, that they could choose between two offering prices, and that everything was to be kept confidential. Id. at 808. The telephone callers were supplied with a list of instructions covering the following points: (1) confidentiality was imperative; (2) the purchaser would remain uncommitted unless a minimum of 20% BD stock was obtained; (3) the minimum was to be revealed to the institutions; (4) the purchaser's identity was not to be disclosed until the 20% was acquired—the institutions could, however, have been notified that the purchaser was among Fortune magazine's listing of the nation's top 50 companies; (5) the only stock to be solicited was that which the institutions had unfettered discretion to dispose of; (6) the purchase price was negotiable; (7) the callers were instructed not to require a response quicker than was customary in block trading; and (8) that the callers were not acting as brokers. Pretrial Brief #1 for Defendants at 33-35. The solicitations of approximately 30 institutions were made from New York to cities throughout the nation, with the exception that calls to Massachusetts institutions were made from offices in Boston. 475 F. Supp. at 809-10. In slight variance with the instructions given to the callers, most solicitees were told that the $45 non-recourse price was final and that response within one hour was required. Id. at 810. One and one-half hours after the solicitation began, the 20% minimum had been attained and Sun's representatives anticipated that the total might exceed the desired 34%. Id. Fearful that verbal promises might be broken, the following day Sun dispatched couriers across the country to acquire physical possession of the stock. Id. at 810-11.
considerations were involved in determining the availability of a private placement exemption under the Securities Act of 1933,\(^\text{103}\) the court held that since the solicitees lacked access to information as would be required for a private placement exemption,\(^\text{104}\) the transactions had been public.\(^\text{105}\) Turning to whether the transactions constituted a tender offer, the court examined the legislative history of the Williams Act and found that the transactions resembled a conventional tender offer in all relevant respects,\(^\text{106}\) from the acquisition program involving a takeover bid and the premium offering price to the conditional offer to buy. While conceding that the transactions differed from a conventional tender offer in that they were accomplished without publicity or use of a depository, the court found the differences insignificant.\(^\text{107}\) Interestingly, the

\(^{103}\) 475 F. Supp. at 818-20; see the Securities Act of 1933, § 4, 15 U.S.C. § 77d(2) (1976). The private placement analogy drawn by Judge Carter had previously been made. See Block & Schwarzfeld, Curbing the Unregulated Tender Offer, 6 SEC. REG. L.J. 133, 139 (1978). The private placement exemption under the Securities Act of 1933 was premised on Congress' belief that there are certain transactions in which "no practical need" for registration exists and that, in such cases, the benefits to the public would be "too remote." H.R. REP. No. 89, 73d Cong., 2d Sess. 5 (1933). It has been suggested that the types of transactions to which Congress referred were those involving only a few potential investors. Moreover, where the offerees of unregistered stock are able to fend for themselves by virtue of their own knowledge, sophistication, or access to relevant data, there is no real benefit in requiring registration. See Block & Schwarzfeld, Curbing The Unregulated Tender Offer, 6 SEC. REG. L.J. 133, 139 (1978). See generally Newlin, Control Stock: Disposition Without Registration Under the Securities Act of 1933, 24 BUS. LAW 773 (1969). The self-protection approach has, however, been abandoned in some recent judicial decisions. See note 104 infra.

\(^{104}\) 475 F. Supp. at 820; see SEC v. Ralston Purina Co., 346 U.S. 119 (1953). In Ralston, the Supreme Court defined the contours of the 1933 Act private offering exemption to include those offers made to persons who could protect their interests. Id. at 124-25. Subsequently, it has been held that the sophistication of an offeree alone does not render a transaction private since a high degree of business knowledge is no substitute for access to information. Indeed, without disclosure, even the most intelligent investor would have no basis on which to exercise his abilities. See Doran v. Petroleum Management Corp., 545 F.2d 893, 903 (5th Cir. 1977); Hill York Corp. v. American Int'l Franchises, Inc., 448 F.2d 680, 690 (5th Cir. 1971). Accordingly, Judge Carter gave little weight to the fact that 30 of the 39 holders solicited by Sun were institutional investors. 475 F. Supp. at 820.

\(^{105}\) Looking to the facts before him, Judge Carter observed that the solicitors were not authorized to negotiate with the offerees, but rather were instructed to get quick commitments over the telephone based on a mere price quote. Consequently, the court reasoned, the absence of providing shareholders with adequate information precluded a private transaction status. Id. at 821-23.

\(^{106}\) From its analysis of the Act's legislative history, the Wellman court found that the essential elements of a conventional tender offer are a bid, a tender by the offerees, a bidder's conditional obligation, universal publicity, and the offeror's intent to effect a shift in corporate control. Id. at 821-22.

\(^{107}\) Id. at 822. Finding that a bid, premium price, conditional obligation, and intent to shift control were all present, the Wellman court reasoned that the facts before it may well
SEC filed a brief in the Wellman action similar to the one it had filed in Brascan. In contrast to the Brascan court, which rejected the Commission's factors, the Wellman court approved of the SEC's position and indicated that the contested action would constitute a tender offer under this test even if it were not deemed a conventional tender offer.

As a result of the inconsistent interpretations given the Wil-

have constituted a conventional tender offer notwithstanding the absence of widespread publicity, solicitation of the general body of investors, and use of a depository. Id. at 823.

108 Id. at 822; see notes 87-98 and accompanying text supra.

109 See 475 F. Supp. at 823-26. In its brief in the Wellman action, the SEC excluded the element of publicity as a factor to consider in defining tender offers, see text accompanying notes 95-96 supra, and, hence, confined its test to the seven remaining factors. Id. The court noted that this was done probably because that feature was unquestionably and purposefully missing from Sun's acquisition program. Id.

110 Id. at 825. Observing that 40% of the target company's shares were held by institutional investors and that this group of shareholders was solicited in a nationwide campaign, Judge Carter was persuaded that there was "active and widespread solicitation." Id. at 824. The Wellman court found that Congress' rendering the statute effective upon the possibility of a 5% acquisition was sufficient to establish a quantitative test for the "substantial percentage" requirements. Thus, the acquisition of 34% of the stock satisfied the second factor. Id. Importantly, the substantial percentage requirement is not rendered obsolete by Congress' language. While 5% represents the minimum acquisition which will call the statute into play, a substantially higher percentage may be sought by methods other than a conventional tender offer which embrace only some of the other SEC factors. Where widespread solicitation is absent, presuming a raw number test is applied to interpret that factor, the substantial percentage factor may well be of great significance.

After declaring the premium price element to be present, id., the Wellman court observed that the fourth characteristic, firm terms of the offer and lack of opportunity to negotiate, was met. Id. The fourth element apparently goes hand in hand with the pressure factor. Both criteria were met by the facts in Wellman Judge Carter asserted, as the inability of the solicitees to negotiate terms was made necessary by the speed element crucial to the program's success. Offerees were pressured from the terms, from messages by the callers that the goal was rapidly being reached, and from the 1 hour time limit, which satisfied the sixth factor, the offer being open for a limited time. Id. at 824-25. In concluding that the defendants' activities satisfied the SEC test, Judge Carter clearly indicated that the absence of one element "should be no deterrent to classifying this transaction as a tender offer since the principal objective of the Williams Act was to prevent secret corporate takeovers." Id. at 825. Interestingly, the court utilized a two-tiered approach in its analysis. Distinguishing as a preliminary step between private and public transactions, however, was made seemingly unnecessary because the SEC criteria were employed. Standing alone, the factors apparently discern the differences between true privately negotiated transactions and open market purchases on the one hand, and transactions infected with the same evils as an unregulated tender offer on the other.

Subsequent to Judge Carter's decision in the bifurcated action, the raider, Sun Company, settled with both the SEC and with the target, Becton-Dickinson, by agreeing to divest itself of all the Becton stock it acquired through the contested acquisitions, although still denying any liability. See SEC v. Sun Co. [1980] FED. SEC. L. REP. (CCH) ¶ 97,209, at 96,599 (S.D.N.Y. 1979). For a detailed analysis of the parties' settlement, see SEC. REG. & L. REP. (BNA) No. 534, A-6 (January 2, 1980).
Williams Act by the Kennecott, Brascan, and Wellman courts, at least two related conflicts may be discerned. First, Kennecott and Wellman leave unclear the actions that will constitute a private transaction. Second, whether the coverage of the Williams Act extends beyond conventional tender offers is an open question, because the Brascan and Wellman decisions suggest opposite answers. It is submitted that the opinions within the second circuit reflect the problems left unresolved by the Williams Act’s draftsmen and highlight the need to prescribe the term “tender offer.”

The SEC Proposals

Acknowledging the inconsistencies in the law, and in an effort to curtail deliberate evasions of the Williams Act, the SEC has recently defined the term “tender offer” in a proposed amendment to the rules governing tender offers. The proposal provides two distinct tests; satisfying either would characterize a particular transaction or series of transactions as a tender offer. Under the first tier, an acquisition program is deemed a tender offer if it involves one or more solicitations of securities within a single class during a 45-day period, is directed to more than ten persons, and seeks the acquisition of more than five percent of the class. Each condition must be satisfied to classify a transaction as a tender offer.

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117 44 Fed. Reg. 70,349-50 (1979). Therefore, an offer made on January 1, would be viewed together with an offer made on February 1, but not with one extended to shareholders on March 1, although the latter two would be aggregated for separate consideration.
fer under the first tier. Since the explicit requirements of this tier make it rather inflexible, the proposed second tier is stated in terms sufficiently broad to embrace other schemes that the Commission believes ought to be subject to the Williams Act. This more flexible test is satisfied if three conditions are met: the scheme must take place through “widespread solicitation” of the target company’s shareholders, the shares must be sought at a premium exceeding the greater of five percent of or two dollars above the stock’s current market price, and the offer must be carried out in a manner that denies offerees a meaningful opportunity to negotiate its terms.

The SEC recognizes that under its proposed rule, “certain open market purchasing programs . . . would be tender offers.” Because the Commission does not intend the rule to be unlimited in scope, however, it has provided an exemption for transactions by brokers and their customers and dealers. In order for a transaction to come within this exemption, four conditions must be satisfied: an individual seeking the exemption must not solicit “any order to sell;” a broker or dealer may engage only in activities customarily performed by members of his profession; a broker or dealer must not receive more than a normal commission for his services; and an offer must seek shares at the current market price. It would appear that this exemption, applicable to transactions that would otherwise satisfy the first tier, is tailored to

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118 Id.
120 44 Fed. Reg. at 70,351.
121 Id.
122 Id.
123 Id.
124 Id. at 70,350.
125 Id. The Commission has pointed out that activity by a broker or dealer which merely amounts to talks with specialists or persons on the exchange floor would not amount to a solicitation sufficient to remove the transaction from the exception. Id. Where, however, talks are conducted off the floor or prior arrangements are made merely to conclude the sale on the floor, the Commission would view such activity as a solicitation. Id. Additionally, where a block is assembled off the floor or where the offeror publicizes his intent to engage in a large acquisition program, the Commission also has taken the position that solicitations have either been made or arranged. Id. at 70,351.
126 Id.
127 Id.
128 Id.
129 Because the second tier of the test contemplates only offers made for a premium above the market price, the exception is applicable only under the first test.
distinguish true open market purchases from those merely disguised as such by being consummated on the floor of an exchange.\footnote{130}

It is submitted that the definition embodied in the proposed rule reflects both the spirit of the Williams Act and the cases properly construing it. To be sure, Congress drew distinctions between privately negotiated and open market transactions and tender offers in debating the merit of the Act and in enacting pre- and post-acquisition filing requirements,\footnote{131} but it did not indicate a desire to limit the tender offer provisions to conventional tender offers. While it might be argued that Congress intended to exempt private transactions of any form from preacquisition regulation, it is submitted that any such exemption must be limited to private transactions as they were understood at the time the Act was debated. The provisions of the Act affecting tender offers would carry little force if they could be sidestepped by labeling solicitations resembling cash takeover bids as private transactions or open market purchases. The proposed rule appears to scrutinize the distinctions between pure private transactions and imposters.\footnote{132}

The strict numerical test of the first tier of the proposal appears to be a sound approach toward identifying those transactions deserving of Williams Act protection. It seems reasonable, for example, to aggregate all offers made within any consecutive 45-day period in order to determine whether other elements of the test have been satisfied.\footnote{133} Although the Commission offers no rationale for its selection of a 45-day period, a program of that duration should give the target’s management sufficient time in which to recognize and deal with any takeover attempt. Furthermore, if a program of numerous offers lasts for more than 45-days, yet fails to satisfy the requirements of the first tier within any 45-day period, a court would not be precluded from considering whether the

\footnotesize{\begin{itemize}
\item \footnote{130} 44 Fed. Reg. at 70,350.
\item \footnote{131} See note 46 supra.
\item \footnote{133} See 44 Fed. Reg. 70,349, 70,350 n.10 (1979).
\end{itemize}}
program is nevertheless a tender offer under the second tier.\textsuperscript{134}

The first tier also offers a logical resolution of whether a test conditioned on the number of offerees solicited is preferable to one conditioned on the percentage of shares solicited.\textsuperscript{135} Under the approach taken by the American Law Institute in the proposed Federal Securities Code, a transaction would be treated as a tender offer if more than thirty-five persons were solicited and successful completion of the transaction would result in the purchaser's owning five percent or more of the target company's stock.\textsuperscript{136} Thus, a solicitation of fifty persons, owning in the aggregate only three percent of the target's stock by a person already owning three percent would be treated as a tender offer, while the solicitation of twenty-five persons could not be, even if the twenty-five persons held ten percent of the company's stock.\textsuperscript{137} The SEC's approach should avoid such an anomaly. Under the first tier, a solicitation must be directed to more than ten persons and must itself seek more than five percent of the target's stock. It would appear that in conditioning satisfaction of the first tier test on the number of solicitees and the percentage of shares sought, the SEC has kept in mind the considerations underlying passage of the Williams Act—protection of shareholders with little bargaining power.\textsuperscript{138} Thus, for example, a solicitation of thirty persons collectively owning ten percent of

\textsuperscript{134} See note 115 and accompanying text supra.

\textsuperscript{135} The authors of one work contend that the percentage of stockholders solicited is generally more significant than the number approached. Einhorn & Blackburn, The Developing Concept of "Tender Offer": An Analysis of the Judicial and Administrative Interpretations of the Term, 23 N.Y.L. Sch. L. Rev. 379, 396 n.84 (1978).

\textsuperscript{136} ALI FED. SEC. CODE § 299.9(a) (Tent. Draft Nos. 1-3, 1974). Other commentators, by drawing an analogy to the numbers utilized in the private placement exemption under the 1933 Act, have suggested that if 35 shareholders are solicited within a 1-year period, a rebuttable presumption in favor of the making of a tender offer should arise. See E. Aranow, H. Einhorn & G. Berlstein, Developments in Tender Offers For Corporate Control 5-6 (1977). By not establishing criteria necessary to determine what could rebut the presumption, however, its application may be problematical.


\textsuperscript{138} See note 29 supra.
the target's stock would be a tender offer and would require disclosure prior to acquisition. In contrast, a solicitation of five persons collectively owning forty percent of the target's stock would not constitute a tender offer, which is justified, since the solicitees' interests would be substantial enough that they probably would have sufficient leverage to insist that the offeror negotiate.

One problem that may arise under the first tier relates to the Commission's failure to define "person" in the requirement that the offer must be directed to at least ten persons. Since the proposed rule currently lacks such a definition, it is unclear whether accounts handled by financial institutions and whether parties having special relationships with one another are to be counted as one solicitee. It is hoped that the Commission, if it should ultimately adopt the proposals, will expressly provide for members of a tightly knit family to be viewed as a single person under the test. Under such circumstances, the solicitees have the capability of uniting to negotiate a pact or defeat the bid.

Unlike the first tier of the proposed rule, the second tier contains no specific time period, percentage test, or minimum number of offerees. Instead, the second tier contemplates widespread solicitation, a premium price, and non-negotiable terms, affording the courts greater leeway than under the first tier. The SEC's concern over solicitation in a widespread manner may be traced to the Cat- tlemen and Wellman decisions. In these cases, it was recognized that solicitations conducted in a manner different from the conventional newspaper advertisement may be more calculated to force a hurried investment decision. In proposing the second

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139 Recognizing potential ambiguities, the Commission requested specific comments on the proper definition of the term "person." 44 Fed. Reg. at 70,350 n.11. One approach is that the term carry with it the same definition as was given it in § 3(a)(9) of the Exchange Act, 15 U.S.C. § 78(c)(9) (1976), wherein "person" means a "natural person, company, government, or political subdivision, agency, or instrumentality of a government." Id. Another possibility is that the term operate so as to count individually all accounts of investment advisors, clients of brokers or dealers, and trusts administered by various banks. See Preliminary Note 5 to Rule 146, 17 C.F.R. § 230.146 (1979). Under this method, the solicitation of one financial institution could conceivably satisfy the test.

140 The SEC recognizes that circumstances exist wherein a number of persons should only be counted once, but is uncertain whether it should expressly provide for such relationships. 44 Fed. Reg. at 70,350 n.11.

141 It is further hoped that if the Commission specifically enumerates instances wherein several persons should be treated as one, it will clearly establish that any such list is not exhaustive, in order to allow flexible interpretation of the Williams Act.

142 See notes 56 & 110 and accompanying text supra.
tier, the SEC apparently has adopted the positions of the Cattlemen and Wellman courts by expressly urging that interpretations of the term “widespread” be consistent with these opinions.\textsuperscript{143} Although the second tier is potentially broad in scope, it will allow courts to examine the particular circumstances of any offering that was directed to enough shareholders to raise a question about its private nature, even though it would not be considered a tender offer under the first tier.\textsuperscript{144} Thus, the second tier seems to offer courts considerable flexibility in applying the Williams Act, an end to which the proposed rule is directed.\textsuperscript{145}

One difficulty that may arise under the second tier concerns the premium price factor. Since that factor is satisfied only if securities are solicited for a price higher than the greater of five percent of or two dollars more than the stock's market price,\textsuperscript{146} some puzzling situations may surface. To demonstrate, the condition is satisfied for stock having a five dollar per share market value at an offering price of seven and one-eighth, which amounts to a pre-

\textsuperscript{143} 44 Fed. Reg. at 70,351. According to the SEC, widespread solicitation may be brought about in a variety of ways, ranging from the traditional newspaper announcements or press releases to more recently recognized methods of telephone solicitations, use of the mails, or personal visits to shareholders. 44 Fed. Reg. at 70,351 n.16. The SEC further supports the interpretation given to the notion of widespread solicitation by the court in Hoover Co. v. Fuqua Indus. Inc. [1980] Fed. Sec. L. Rep. (CCH) ¶ 97,107, at 96,145 (N.D. Ohio 1979). In Hoover, the court was confronted with an offer made to more than 100 holders of Hoover Co. stock, each of whom were descended from the company's founders. Id. at 96,146. Applying the SEC factors, see notes 87-96 and accompanying text supra, the court observed that since there was great diversification among the family members, their solicitation was no different from a solicitation of all the target's shareholders. Hence, the first SEC factor, widespread solicitation, was found to have been met. [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 96,148-49. See also Block & Schwarzheld \textit{How to End Confusion Under the Williams Act}, N.Y.L.J., Aug. 1, 1979, at 3, cols. 5-6 n.40. Emphasizing the widespread solicitation and the pressure upon shareholders that accompanied it, the Hoover court found that a tender offer had been made. [1980] Fed. Sec. L. Rep. (CCH) at 96,150.

Commentators have suggested that one flaw in the proposals might stem from uncertainty over the meaning of the term “widespread solicitation.” See Hein, Lesser & Reich, \textit{New Tender Rules: Detailed and Broad Ranging}, N.Y.L.J., Dec. 17, 1979, at 41, col. 1. The authors, however, appear to be confusing the definition of “widespread solicitation,” a term that has been consistently expanded by the courts, with the term's acceptance by the judiciary as a factor to consider in defining tender offer, which has not been universal. \textit{Compare Wellman}, 475 F. Supp. 783 with Brascan Ltd. [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,882.

\textsuperscript{144} Cf. A. ARANOW, E. EINHORN, & G. BERLSTEIN, supra note 40 at 9-10 (opting for examination into facts of each case).

\textsuperscript{145} 44 Fed. Reg. at 70,349.

\textsuperscript{146} Id. at 70,351.
mium of forty percent. An offer for any lower price would not satisfy the test because the two-dollar minimum premium would be applicable in any instance in which the stock's market price is less than $40 per share. In contrast, the condition is satisfied for stock having a market value of $100 per share at an offering price of $106, which amounts to a premium of only six percent. There seems to be little doubt that an investor is more likely to react hastily to the former offer than the latter. Given the importance that the courts, commentators, and Congress have attached to the premium price element, it is suggested that the SEC reconsider this aspect of the second tier. Unless corporations with low priced stock become generally unattractive to corporate raiders, the SEC is advised to redefine the premium price element so as to make it solely dependent upon a percentage excess of the offering price over the market price.

The final factor of the second tier, the lack of a meaningful opportunity for offerees to negotiate, is perhaps the most critical for distinguishing a privately negotiated transaction from a tender offer. Parties who truly intend their dealings to be private must be afforded opportunities to negotiate. Moreover, as the degree of negotiating leverage decreases, the need for the protections guaranteed by the Williams Act increases, particularly in a transaction in which time is a crucial factor.

Despite a few aspects that may be problematical, the Commission's proposals appear workable and "capable of providing guidance and certainty to practitioners and their clients," without being "unduly burdensome to the prospective bidders." Furthermore, the SEC's definition seems consonant with Congress' pur-

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147 The current market price refers to the higher of the last sale price or the highest independent bid. Id. at 70,350 n.14.
148 At $41 per share, 5% would be $2.05 and any bid, therefore, would have to exceed $43.05 to be considered a tender offer under the second test.
149 See note 107 supra.
150 See, e.g., Developing Meaning, supra note 3, at 1251.
151 See note 42 supra.
152 One commentator observed that "[i]n negotiated purchases from a few, substantial shareholders, pressure is . . . absent since these shareholders have the leverage to obtain the disclosure, time, and fair treatment necessary to make an informed, carefully considered decision on whether to sell their controlling interest." Developing Meaning, supra note 3, at 1276 n.137.
154 Id.
pose in passing the Williams Act,\textsuperscript{155} without overstepping the boundaries drawn by the case law. While the reach of the SEC's proposed definition goes beyond the strict "conventional tender offer only" view elucidated by the Kennecott and Brascan courts, it successfully ties together the valid arguments forwarded by advocates of the "extent" and "impact" tests. In so doing, the proposal reflects the reasoning advanced by the Cattlemen and Wellman benches and their progeny. It is hoped, therefore, that adoption of the amendments will resolve the inconsistency which has developed in the case law.\textsuperscript{156}

**CONCLUSION**

It cannot be doubted that regulation of tender offers is essential to prevent a recurrence of the dangers and abuses that were

\textsuperscript{155} It has been asserted that the SEC's proposals may be broader in scope than the meaning Congress intended tender offer to have and may therefore be both unauthorized and unconstitutional. Hein, Lesser & Reich, *New Tender Rules: Detailed & Broad Ranging*, N.Y.L.J., Dec. 17, 1979, at 41, col. 1; accord, Fogelson, Friedman & Wenig, *SEC's Proposed Amendments to Williams Act*, N.Y.L.J., March 14, 1980, at 4, col. 6. One commentator has further argued that the position taken by the Commission in its proposals is even broader than that which the SEC opted for when it urged several courts to consider the "eight factors." Frome, *Expanded Definition of Tender Offer*, N.Y.L.J., Feb. 29, 1980, at 2, col. 3. In support of this allegation, it was observed that the second tier of the SEC's definition could be satisfied if only three of the eight factors are present. *Id.* at col. 4. Moreover, it was asserted:

> It is hard to imagine... an offer which is made at current market price and on negotiable terms, which is for an unlimited number of shares and is open for an unlimited period of time, and which is absent any attendant pressure on shareholders or any public announcements of purchasing programs that can still be said to compel any investor, even a relatively unsophisticated investor, to make a hurried, uninformed investment decision. And yet, under Proposed Rule 14d-1(b)'s first tier test such an offer could easily qualify as a tender offer.

*Id.*

\textsuperscript{156} The SEC ultimately desires even stricter regulation of corporate takeovers than could be accomplished through the adoption of its proposed tender offer definition. *See Crock, SEC Seeks Takeover Rule Changes to End Controversy, Could Increase Firms' Costs*, Wall St. J., Feb. 20, 1980, at 2, col. 3. At the requests of three interested Senate committees, the SEC has prepared several legislative proposals which, if acted upon by Congress, could "end some of the controversy swirling around many takeover attempts." *Id.* Included within these proposals lurks yet another definition of tender offer which is broader in scope than any of the previously suggested approaches. The Commission's proposal would deem any transaction wherein the offeror acquires more than 10% of the target's stock to be a tender offer, with the exception that privately negotiated purchases from 10 or fewer solicitees would not be included in the computations. *Id.* The Commission's proposed amendments to the Williams Act are reprinted in full at 542 Sec. Reg. & L. Rep. (BNA) (Special Supp.) 2-29, Feb. 27, 1980. *See also Fogelson, Friedman & Wenig, SEC's Proposed Amendments to Williams Act*, N.Y.L.J., March 14, 1980, at 1, col. 2.
manifested throughout the era of unregulated tender offers. While Congress’ immediate response to this dilemma, the Williams Act, was a commendable effort at promoting investor protection, it had its shortcomings. Although Congress’ failure to define tender offer may have been deliberate, courts construing the Act have been battling with the omission since the Act took effect and have been reaching inconsistent results. Despite the SEC’s prior refusal to define tender offer in its implementing rule, the Commission has recently proposed an amendment to determine whether stock acquisitions have been effected by tender offers. Its position generally reflects the liberal position adopted by some courts. Despite some potential problems concerning the definition’s applicability, the criteria embodied in the proposal should remove any uncertainties that presently exist. Moreover, the rule would bring within the purview of the Williams Act individuals who presently go unprotected because of restrictive interpretations of the Act. Above all, it is urged that the SEC’s factors be applied flexibly so as to realize the balance Congress attempted to strike between the offeror, management, and the investor.

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