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THE SEC'S PROPOSAL TO REGULATE MARKET SWEEPS

In 1968 Congress enacted the Williams Act[1] to amend the Securities and Exchange Act of 1934[2] (the 1934 Act) to regulate the acquisition of publicly held corporations.[3] The Williams Act authorizes the Securities and Exchange Commission (SEC) to promulgate rules to protect shareholders during takeover attempts.[4] The Williams Act and the SEC rules promulgated pursuant to the Williams Act (Williams Act regulations), therefore, provide substantive and procedural safeguards to shareholders of a corporation whose stock is the subject of a tender offer.[5] A tender offer is a public offer to purchase at a specified price during a fixed period of time all or a portion of a class of a corporation's stock (target stock).[6] In enacting the

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1. Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982 & Supp. IV 1986)).

2. Securities and Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a-78kk (1982 & Supp. IV 1986)).

3. *See* S. REP. No. 550, 90th Cong., 1st Sess. 2 (1967). The Senate Report accompanying the Williams Act explained that people seeking to acquire control over publicly held corporations increasingly have used cash tender offers. *Id.* The Senate Report asserted that the increased use of cash tender offers posed a threat to shareholders of target companies and, thus, Congress should regulate tender offers to provide investors with protection from offeror's coercive practices during cash tender offers. *Id*; *see also* H.R. REP. No. 1711, 90th Cong., 2d. Sess. 2 (1968)(describing increasing use of cash tender offer in market for gaining corporate control and need for Congress' regulation of tender offers), *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2812-13; Note, *Defining "Tender Offer" under the Williams Act*, 53 BROOKLYN L. REV. 189, 189 (1987) (explaining that by passing Williams Act, Congress intended to regulate acquisition of controlling positions in publicly held corporations).

4. 15 U.S.C. § 78w (1982 & Supp. IV 1986); *see also* S. REP. No. 550, *supra* note 3, at 2 (noting that takeover attempts force shareholders to make investment decisions with inadequate information); H.R. REP. No. 1711, *supra* note 3, at 3 (stating that takeover attempts cause shareholders quickly to make decision to tender target stock without providing shareholders with information about takeover attempt).

5. *See* 15 U.S.C. § 78m(d)(1) (1982) (requiring any person acquiring beneficial ownership of 5% of class of stock to file disclosure statement within 10 days); *id.* § 78n(d)(1) (prohibiting person from making tender offer unless person makes requisite disclosures); *id.* § 78n(d)(5) (providing shareholders tendering in response to tender offer right to withdraw tendered shares in specified period); *id.* § 78n(d)(7) (guaranteeing that tender offeror pays all tendering shareholders same price for target stock); *id.* § 78n(d)(6) (requiring offeror to purchase stock on pro rata basis if shareholders tender more stock than offeror seeks); *infra* notes 21-29 and accompanying text (discussing Williams Act regulation protection of shareholders during tender offer).

6. *See* E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 69-70 (1973) (explaining that although Williams Act does not define term "tender offer," term "tender offer" generally refers to public offer or solicitation to purchase during fixed period all or portion of class of securities at specified price or terms for cash or securities); *see also* Wellman v. Dickinson, 475 F. Supp. 783, 823-24 (S.D.N.Y.), *aff'd on other grounds*, 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983). In *Wellman v. Dickinson* the United States District Court for the Southern District of New York used an eight factor test

Williams Act, Congress recognized that tender offers pressure shareholders of a corporation's stock immediately to decide whether to sell the corporation's stock on the open market, tender the target stock to the maker of the tender offer (the offeror), or risk owning stock in a corporation with new and unknown management.[7] In addition to making tender offers to gain control over a corporation, persons recently have used market sweeps to gain substantial control over a corporation.[8] A market sweep is a person's attempt to purchase on the open market during or shortly after the termination of a tender offer a significant amount of a corporation's stock.[9]

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to determine whether certain substantial purchases of securities constituted a tender offer. *Wellman*, 475 F. Supp. at 823-24. First, the *Wellman* court considered whether the offeror actively and widely solicited public shareholders to sell the shares of an issuer. *Id.* Second, the *Wellman* court determined whether the offeror solicited a substantial percentage of the issuer's stock. *Id.* Third, the *Wellman* court ascertained whether the offeror made an offer to shareholders to purchase the issuer's stock at a price above the market price, or at a premium. *Id.* Fourth, the *Wellman* court considered whether the offeror's offer to buy the issuer's stock was firm, rather than negotiable. *Id.* Fifth, the *Wellman* court determined whether the offeror's offer to purchase the stock was contingent upon shareholders tendering a minimum amount of the stock. *Id.* Sixth, the *Wellman* court considered whether the offeror limited the time within which the offeror would purchase stock. *Id.* at 823-24. Seventh, the *Wellman* court weighed whether the offeror pressured the offerees to sell the securities. *Id.* at 824. Eighth, the *Wellman* court considered whether the offeror made a public announcement of a plan to purchase the target stock before or contemporaneously with the offeror's rapid acquisition of large blocks of the target company's securities. *Id.* After considering each of the eight factors, the *Wellman* court stated, however, that a person's plan to acquire stock in a corporation does not require the presence of all eight elements to qualify as a tender offer under the Williams Act. *Id.* The *Wellman* court noted that the circumstances involved in a particular case may cause one or more of the eight factors to be more determinative than the other factors. *Id.*

7. *See* S. REP. No. 550, *supra* note 3, at 2 (noting that tender offer forced pre-Williams Act shareholders to make ill-informed investment decisions); H.R. REP. No. 1711, *supra* note 3, at 2 (stating that absence of regulation of tender offers denies shareholders information needed to make informed investment decision); *see also* Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 55 (2d. Cir. 1985) (noting that Congress enacted Williams Act because limited availability of tender offers forced average shareholders to make decision to sell on inadequate information).

8. *See* Acquisitions of Substantial Amounts of Securities and Related Activities Undertaken During and Following a Tender Offer for Those Securities, Exchange Act Release No. 34-24976, 52 Fed. Reg. 37472, 37474 (to be codified at 17 C.F.R. § 240.13e-2, 14d-11) (proposed Oct. 7, 1987) [hereinafter Exchange Act Release] (noting that people seeking control over publicly held corporations increasingly use market sweep); *see also* Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 52 (2d Cir. 1985) (describing use of market sweep to gain substantial control of target corporation); SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 947 (9th Cir. 1985) (recounting target corporation management's use of market sweep to defend against hostile takeover bid); UV Indus., Inc. v. Posner, 466 F. Supp. 1251, 1255 (D. Me. 1979) (describing shareholder's use of market sweep to gain substantial control over target corporation). At least one court has referred to the substantial acquisition of target securities outside of a tender offer as a street sweep. *See* Ivanhoe Partners v. Newmont Mining Corp., Nos. 341, 1987, 345, 1987, slip op. at n.3 (Del. 1987) (noting that to block hostile takeover bid, target management declared dividend to shareholders to enable third party to engage in street sweep).

9. *See* Exchange Act Release, *supra* note 8, at 37474 (defining term "market sweep");

Currently, the SEC does not regulate market sweeps, and courts have refused to regulate market sweeps without explicit legislative or administrative guidance.[10] In response to the courts' failure independently to regulate market sweeps, the SEC has issued for public comment Proposed Rules 13e-2 and 14d-11 (Proposed Rules) to provide shareholders with Williams Act protection during a market sweep.[11] In issuing the Proposed Rules, the SEC claims that market sweeps and tender offers place the same pressures to sell a corporation's stock on a corporation's shareholders and that shareholders, accordingly, deserve the same protection during both tender offers and market sweeps.[12]

In enacting the Williams Act Congress recognized that tender offers pressure shareholders to decide to sell target stock without giving shareholders the time or information needed to make a reasoned decision.[13] During the 1960's, people seeking to gain control over a corporation began increasingly to use the cash tender offer.[14] Because federal securities law did not regulate tender offers before 1968, offerors could pressure shareholders to tender the target stock by operating in complete secrecy, buying tendered stock on a first come, first served basis, and terminating the tender offer at any time.[15] Because federal securities law before 1968 did not require

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see also Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 54 (2d Cir. 1985) (describing market sweep as existing when offeror makes substantial purchases of target stock immediately after termination of tender offer); *cf.*, Ivanhoe Partners v. Newmont Mining Corp., Nos. 341, 1987, 345, 1987, slip op. at n.3 (Del. 1987) (defining term "street sweep" as rapid acquisition of securities on open market during and shortly after pendency of tender offer for subject securities).

10. *See* Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 60 (2d Cir. 1985) (holding that courts' regulation of market sweeps would be usurpation of legislative or regulatory function); *see also* SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 953 (9th Cir. 1985) (holding that current law does not support regulation of market sweep as tender offer).

11. *See* Exchange Act Release, *supra* note 8, at 37481-82 (publishing text of Proposed Rules 13e-2 and 14d-11); *infra* notes 94-119 and accompanying text (discussing Proposed Rules 13e-2 and 14d-11).

12. Exchange Act Release, *supra* note 8, at 37474-75; *infra* notes 121-28 and accompanying text (discussing SEC's argument that tender offer and market sweep impose similar pressures upon shareholders).

13. *See* S. Rep. No. 550, *supra* note 3, at 2 (noting lack of information available to pre-Williams Act shareholders during tender offer); H.R. Rep. No. 1711, *supra* note 3, at 2 (describing how pre-Williams Act tender offer forced shareholders to make investment decision without adequate information); 113 Cong. Rec. 24664 (1967) (statement of Sen. Williams) (stating that, absent regulation, shareholders faced with tender offer lack adequate information to decide whether to sell shares of target stock or to tender target stock to offeror).

14. *See* S. Rep. No. 550, *supra* note 3, at 2 (stating that use of cash tender offers as method to acquire control of corporations increased tenfold in 8 years); H.R. Rep. No. 1711, *supra* note 3, at 2 (noting increased use of tender offer in contests for corporate control); 113 Cong. Rec. 24664 (1967) (statement of Sen. Williams) (claiming that cash tender offer has become increasingly favored method of acquiring corporate control because tender offer is cheaper and faster than proxy solicitation).

15. *See* S. Rep. No. 550, *supra* note 3, at 2 (describing how offerors pressured shareholders to sell target stock by acting in complete secrecy); H.R. Rep. No. 1711, *supra* note 3,

offerors to disclose their identity, their plans, or their financing, offerors forced shareholders to make the investment decision without any knowledge of the offeror, the tender offer's probability of success, or the possible future of the corporation.[16] Because the offeror purchased the target stock from the first shareholders to tender the target stock, shareholders who immediately tendered stock were better able to sell the target stock to the offeror than were shareholders who took time carefully to consider the investment decision.[17] Furthermore, because the offeror could terminate the tender offer without notice, tender offers pressured shareholders immediately to tender the target stock, instead of evaluating the likelihood that another offeror would make a higher offer for the target stock.[18] After considering investors' vulnerability during unregulated tender offers, Congress decided that shareholders needed protection from the coercive nature of tender offers.[19] Congress, therefore, passed the Williams Act.[20]

To protect investors owning target stock, the Williams Act regulations require the offeror to comply with several regulations when making a tender offer.[21] First, the Williams Act regulations compel offerors to disclose to shareholders information about the offeror and the offeror's intentions for the future of the corporation (disclosure requirements).[22] Second, the Williams Act regulations require offerors to hold the tender offer open for a minimum period of time.[23] Third, the Williams Act regulations require that offerors guarantee that all shareholders tendering stock to the offeror will receive the same price for the target stock, regardless of the tender offer

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at 2 (noting that offerors free of restrictions of proxy regulation could pressure shareholders to sell target stock); *see also* 113 CONG. REC. 24664 (1967) (statement of Sen. Williams) (noting secrecy in which offerors were allowed to operate when offeror announced tender offer).

16. *See* S. REP. No. 550, *supra* note 3, at 2 (stating that shareholders faced with tender offer lacked knowledge of available options); H.R. REP. No. 1711, *supra* note 3, at 2 (noting that shareholders in tender offer situations lacked knowledge to make reasoned response to tender offer).

17. *See* S. REP. No. 550, *supra* note 3, at 2 (explaining that without knowledge of offeror's plans, shareholders immediately must tender stock or risk that offeror will not buy their stock); H.R. REP. No. 1711, *supra* note 3, at 2 (noting that shareholders who delay tendering in hopes of better offer risk offeror's purchase of only first tendered stock).

18. *See* S. REP. No. 550, *supra* note 3, at 2 (explaining that unregulated tender offers force shareholders immediately to make uninformed decision to tender target stock or to risk offeror's termination of tender offer before purchasing their stock); H.R. REP. No. 1711, *supra* note 3, at 2 (noting that pre-Williams Act tender offer forced shareholders to forego potentially higher offers for target stock because offeror could purchase only first tendered stock and not stock tendered late in tender offer period).

19. *See supra* note 18 and accompanying text (explaining that shareholders are vulnerable during tender offer).

20. Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982 & Supp. IV 1986)).

21. *See infra* notes 22-29 and accompanying text (explaining provisions of Williams Act and how provisions protect shareholders from coercive tender offers).

22. 15 U.S.C. § 78m(d)(1)(A)-(E) (1982); *id.* § 78(n)(d)(1); 17 C.F.R. § 240.13e-4(d) (1987); *id.* § 240.14d-2.

23. 17 C.F.R. § 240.13e-4(f)(1) (1987).

price when a shareholder actually tendered stock (same price requirements).[24] Fourth, the Williams Act regulations dictate that offerors allow a shareholder tendering the target stock to withdraw the shares if a better offer develops and, thus, enable shareholders fully to consider available options (withdrawal rights).[25] Finally, the Williams Act regulations require offerors to purchase, pro rata, tendered stock and thus eliminate the risk that the offeror will not purchase stock tendered late in the tender offer period (pro rata purchasing requirement).[26] The pro rata purchasing requirement allows shareholders adequately to evaluate a tender offer before tendering target stock by permitting shareholders to tender target stock late in a tender offer period.[27] The Williams Act regulations insure, therefore, that shareholders have the necessary information and an adequate amount of time sufficiently to evaluate a tender offer.[28] The Williams Act regulations insure, further, that shareholders have an equal opportunity to participate in a tender offer.[29] In addition to fashioning the Williams Act to protect shareholders, Congress also fashioned the Williams Act to favor neither the offeror nor the target management.[30] By favoring neither the offeror nor target management, the Williams Act regulations provide the offeror and target management with an equal opportunity to solicit shareholder support for their respective bids for control of the corporation.[31]

Although the Williams Act protects shareholders from an offeror's coercion to sell target stock, shareholders confronted with a tender offer still endure market pressures that Congress did not intend the Williams Act to alleviate.[32] When an offeror announces a tender offer, the price of the

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24. 15 U.S.C. § 78n(d)(7) (1982); 17 C.F.R. § 240.13e-4(f)(4) (1987).

25. 15 U.S.C. § 78n(d)(5) (1982); 17 C.F.R. § 240.13e-4(f)(2) (1987).

26. 15 U.S.C. § 78n(d)(6) (1982); 17 C.F.R. § 240.13e-4(f)(3) (1987).

27. 15 U.S.C. § 78n(d)(6) (1982); 17 C.F.R. § 240.13e-4(f)(3) (1987).

28. *See supra* notes § 22-27 (describing procedural and substantive requirements of Williams Act that provide shareholders with information and sufficient time to consider information during tender offer).

29. *See supra* notes 22-28 (discussing Williams Act regulations that provide target shareholders with disclosure and substantive rights during tender offer thus providing shareholders equal opportunity to participate in tender offer).

30. *See* H.R. Rep. No. 1711, *supra* note 3, at 4 (asserting neutrality of Williams Act); 113 Cong. Rec. 24664 (1967) (statement of Sen. Williams) (explaining that drafters of Williams Act avoided favoring either target management or offeror). Senator Williams, the co-sponsor of the Williams Act, explained that the Act's increased regulation of tender offers was not an effort to discourage tender offers. 113 Cong. Rec. 24665 (1967) (statement of Sen. Williams). Congress recognized that tender offers provided a check on entrenched but inefficient management. H.R. Rep. No. 1711, *supra* note 3, at 4.

31. *See* 113 Cong. Rec. 24664 (1967) (statement of Sen. Williams) (stating that regulation of tender offers will provide offeror and management opportunity to present case for control of target corporation).

32. *See* Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 58 (2d Cir. 1985) (implying that Congress did not intend Williams Act to alleviate pressures on shareholders caused by forces of market place); SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 952 (9th Cir. 1985) (stating that only pressure on shareholders to sell was pressure of marketplace, which was not type of pressure that Congress intended for Williams Act regulations to prohibit); *infra* notes 35-41 and accompanying text (discussing risks associated with tender offers).

target corporation's stock increases to reflect the existence of the tender offer.[33] Target corporation shareholders must decide whether immediately to tender to the offeror all of the shareholder's target stock, to wait and see if the target management or a competing bidder makes a higher offer, to retain the stock, or to sell the stock on the market at the increased market price.[34] In deciding how to dispose of the target stock, therefore, shareholders must evaluate the risks associated with tender offers.[35] First, shareholders risk that the tender offer may fail.[36] If the tender offer fails, the market price of the target stock will decrease.[37] Target shareholders who fail to sell the target stock on the open market not only fail to profit from the tender offer, but also now hold stock of reduced value.[38] Second, shareholders risk that the target corporation's shareholders will tender more stock than the offeror seeks to purchase.[39] If shareholders tender an excessive amount of stock, the offeror must purchase the stock from all tendering shareholders on a pro rata basis.[40] If an offeror makes a pro rata purchase, however, the unpurchased shares may decrease in value.[41] Most nonprofessional shareholders lack the expertise needed properly to evaluate these risks associated with a tender offer.[42] Many shareholders, therefore, prefer to avoid the risks of the tender offer and sell the stock on the open market for the inflated market price.[43]

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33. *See* E. ARANOW & H. EINHORN, *supra* note 6, at 74 (explaining how market professionals' purchases of target stock immediately following announcement of tender offer increase market price of target stock); Bromberg, *Tender Offers: Safeguards and Restraints-An Interesting Analysis*, 21 CASE W. RES. L. REV. 609, 615 (1970) (noting that market price of target stock rises after announcement of tender offer); Comment, *Should Tender Offer Arbitrage be Regulated?* 1978 DUKE L.J. 1000, 1005 (noting that activity of professional investors following announcement of tender offer causes market price of target stock to increase).

34. *See* S. REP. No. 550, *supra* note 3, at 2 (noting alternatives available to shareholders during tender offer); H.R. REP. No. 1711, *supra* note 3, at 2-3 (evaluating options available to shareholders confronted by tender offer).

35. *See infra* notes 36-41 and accompanying text (outlining risks associated with tender offers).

36. *See* E. ARANOW & H. EINHORN, *supra* note 6, at 177 (noting that possibility of failure of tender offer causes difference between market price and tender offer price); Comment, *supra* note 33, at 1007 (explaining that market professionals purchasing target stock assume risk that legal impediments or external economic influences may defeat tender offer).

37. *See* Comment, *supra* note 33, at 1011 n.56 (noting that market price for target shares normally falls substantially following tender offer).

38. *See id.* (stating that value of target stock decreases after failed tender offer).

39. *See* E. ARANOW & H. EINHORN, *supra* note 6, at 177 (explaining that shareholder tendering shares in response to tender offer risks nonacceptance of target shares in pro rata purchase).

40. 15 U.S.C. § 78n(d)(6) (1982).

41. *See* Comment, *supra* note 33, at 1011 (stating that unpurchased shares of target stock may decrease in value after tender offer if new corporate management implements plans to freeze-out minority shareholders).

42. *See id.* (stating that evaluation of merits of tender offer, offer's chance of success, and value of target stock as continuing investment requires degree of financial acumen beyond abilities of average unsophisticated investor).

43. *See* E. ARANOW & H. EINHORN, *supra* note 6, at 174 (noting that some shareholders

In avoiding the risks associated with tender offers, however, shareholders often immediately sell stock on the open market to market professionals, known as arbitrageurs, who are willing to assume the risks of the tender offer in anticipation of selling the target stock at a profit.[44] The arbitrageurs' open market purchase of stock concentrates among relatively few shareholders the ownership of the target stock.[45] The concentration among arbitrageurs of the ownership of the stock may, consequently, insure the success of the tender offer.[46] The concentration among arbitrageurs of the ownership of the target stock, however, may enable a person quickly to buy on the open market, without making a tender offer subject to the Williams Act regulations, enough of the target stock either effectively to control the corporation or to wield sufficient power to block any competing bids for control of the target corporation.[47]

A tender offer's concentration of target stock among arbitrageurs recently has encouraged some investors to use market sweeps, instead of tender offers, to gain control over a corporation.[48] A market sweep occurs when a person purchases a substantial block of the target stock on the open market or through privately negotiated sales during or shortly after the termination of a tender offer for the target stock.[49] Although the SEC

are unwilling to assume risks inherent in tendering stock and, thus, dispose of target shares at favorable price in open market); Bromberg, *supra* note 33, at 615-16 (stating that shareholders prefer to sell target stock on open market for guaranteed profit instead of facing uncertainties of tender offer).

44. *See* E. Aranow & H. Einhorn, *supra* note 6, at 174 (discussing role of arbitrageurs in enabling shareholders who are unwilling to assume risks inherent in tendering to dispose of target shares at favorable price in open market); Bromberg, *supra* note 33, at 615-16 (stating that role of arbitrageurs is to buy target stock on open market after announcement of tender offer); *see also* Comment, *supra* note 33, at 1011 (noting that option to sell to market professionals allows shareholders to avoid risk of proration in event of excessive tender).

45. *See* Exchange Act Release, *supra* note 8, at 37474 (describing concentration of target stock among arbitrageurs following tender offer).

46. *Id.*

47. *Id.*

48. *See supra* note 8 (noting recent cases in which person seeking corporate control used market sweep).

49. *See* Exchange Act Release, *supra* note 8, at 37474 (defining term "market sweep"); *see also* Ivanhoe Partners v. Newmont Mining Corp., Nos. 341, 1987, 345, 1987, slip op. at n.3 (Del. 1987) (defining term "street sweep" as rapid acquisition of securities on open market during and shortly after pendency of tender offer for subject securities). In the Exchange Act Release the SEC explains that three different classes of persons seeking to gain control of a corporation may initiate a market sweep. *See* Exchange Act Release, *supra* note 8, at 37475. First, the SEC notes that an offeror may initiate a market sweep if the offeror thinks that the tender offer may fail. *Id.* The SEC explains that an offeror sweeps the market after prematurely terminating the tender offer or allowing the tender offer to expire without purchasing the tendered stock. *Id.* The SEC states that under the tender offer regulations, the offeror must terminate the tender offer before initiating a market sweep because the Williams Act regulations prohibit an offeror from purchasing target stock outside of the terms of the tender offer. *Id.*; 17 C.F.R. § 240.10b-13 (1987). Second, the SEC asserts that a target corporation may initiate a market sweep to defend against a hostile takeover bid. Exchange

claims that courts should afford investors subject to market sweeps the protections of the Williams Act regulations, courts have refused to regulate a market sweep as a tender offer.[50] For example, in *Hanson Trust PLC v. SCM Corp.*[51] Hanson Trust PLC (Hanson), announced a cash tender offer of sixty dollars per share of stock for any and all of the outstanding shares of stock of SCM Corp.(SCM).[52] In response, SCM recommended that all current SCM stockholders decline the Hanson tender offer.[53] SCM announced, further, that SCM and Merrill Lynch (Merrill) had entered a merger agreement.[54] The SCM-Merrill merger agreement provided that a newly formed corporation would effect a leveraged buyout[55] of all SCM stock at a cash purchase price of seventy dollars per share of stock.[56] In

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Act Release, *supra* note 8, at 37475. The SEC explains that target management seeking to block a hostile takeover bid may announce a plan to purchase a large amount of target stock on the open market. *Id.* The SEC notes that because shareholders realize that the target's defensive measures could defeat the tender offer, the target corporation's market sweep discourages shareholders from tendering stock in response to the tender offer. *Id.* Third, the SEC contends that a third party challenging the initial tender offer for corporate stock may make a market sweep. *Id.* The SEC claims that if two bidders make tender offers for a corporation's stock, one of the bidders may terminate the tender offer, sweep the market, and gain control of the corporation. *Id.* The SEC asserts that the fear that the other bidder may terminate the tender offer and sweep the market may force one bidder preemptively to sweep the market, and, consequently, to circumvent the entire tender offer process. *Id.*

50. *See* Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 57 (2d Cir. 1985) (holding that market sweep is not unconventional tender offer subject to tender offer regulations); SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 953 (9th Cir. 1985) (holding that market sweep was not tender offer for Williams Act purposes and, therefore, purchases were not subject to tender offer regulations); *infra* notes 52-93 and accompanying text (discussing Hanson Trust's market sweep and Second Circuit's rationale for finding that open market purchases did not merit Williams Act regulation).

51. 774 F.2d 47 (2d Cir. 1985).

52. Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 51 (2d Cir. 1985). In *Hanson Trust* Hanson announced on August 21, 1985, the corporation's intention to buy for sixty dollars cash per share of stock all available shares of SCM stock. *Id.* On August 26, 1985, Hanson filed with the SEC the documents that section 14(d)(1) of the Williams Act requires upon the making of a tender offer. *Id*; *see infra* note 112 and accompanying text (explaining requirements of § 14(d) of Williams Act). Hanson's tender offer stated that the corporation would accept tendered shares from September 10, 1985, until September 23, 1985, unless Hanson extended the offer beyond that date. *Hanson Trust*, 774 F.2d at 51. Hanson's tender offer stated, further, that Hanson might purchase additional shares of SCM in the open market, through privately negotiated purchases, through another tender offer, or otherwise. *Id.*

53. *Hanson Trust*, 774 F.2d at 51.

54. *Id.*

55. *Id.* A leveraged buyout is a transaction in which the purchaser invests little actual cash in relation to the purchase price and an outside lender provides most of the purchase price. H. Benjamin and M. Goldberg, Leveraged Acquisitions and Buyouts 11 (1987). In some leveraged acquisitions the seller actually finances part of the sale by deferring part of the purchase price. *Id.* The financers of a leveraged transaction do not look to the purchaser for cash repayment of the loans. *Id.* Instead, the financers of a leveraged transaction look to the assets and the cash flow of the acquired business as the source of repayment of the loans. *Id.*

56. *Hanson Trust*, 774 F.2d at 51. In *Hanson Trust* Merrill agreed to sponsor a leveraged

response to the leveraged buyout agreement, Hanson increased its cash tender offer to seventy-two dollars per share of SCM stock.[57] Hanson reserved, however, the right to terminate the new tender offer if SCM created a lock-up device[58] to block Hanson's tender offer.[59]

Several days after Hanson announced its new tender offer, SCM and Merrill entered a new two-step leveraged buyout agreement to deter Hanson's attempt to acquire SCM.[60] Under the first step of the revised leveraged buyout agreement, Merrill would purchase for seventy-four dollars per share of stock approximately eighty-two percent of SCM's outstanding stock.[61] Under the second step of the revised leveraged buyout agreement, SCM and Merrill would merge after Merrill's initial purchases of SCM stock.[62] The revised leveraged buyout agreement provided, further, that the new corporation resulting from the merger of SCM and Merrill would exchange the remaining SCM stock for debentures in the new corporation.[63] The revised leveraged buyout agreement provided, moreover, that if an investor or group other than Merrill acquired more than one-third of SCM's outstanding shares, SCM would allow Merrill to buy SCM's two most profitable businesses.[64] Hanson, therefore, recognized that even if Hanson raised its cash tender offer to seventy-four dollars per share of SCM stock to counter

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buyout of all of SCM's securities to help SCM defeat Hanson's tender offer. *Id.* Under the leveraged buyout agreement, the corporation resulting from the merger of SCM and Merrill would make a $70 per share cash tender offer for 85% of SCM's securities. *Id.* If the resulting corporation acquired more than two-thirds of the SCM shares, the agreement stated, further, that the resulting corporation would acquire the remaining SCM shares in exchange for debentures in the corporation resulting from the SCM and Merrill merger. *Id.*

57. *Id.*

58. *Id.* A lock-up device is a contractual arrangement between an acquiring company and a target company. K. BIALKIN, A. FLEISCHER & E. GREENE, NINTH ANNUAL INSTITUTE ON ACQUISITIONS AND TAKEOVERS 53 (1987). The lock-up contract provides the acquiring company an advantageous position over other prospective acquirors. *Id.* Originally, corporations used lock-up devices to induce attractive, potential acquiring corporations, known as white knights, to agree to outbid a hostile bidder. *Id.* Lock-up devices are generally either stock lock-up devices or asset lock-up devices. *Id.* A stock lock-up device gives the acquiring corporation an option to purchase newly-issued shares of the target corporation's stock. *Id.* An asset lock-up device, like the kind in *Hanson Trust*, grants the acquiror an option to purchase an asset of the target corporation at a specified price if the acquiror is unsuccessful in acquiring the entire target corporation. *Id.*; *see Hanson Trust*, 774 F.2d at 52 (describing revised SCM-Merrill merger agreement lock-up device that allowed Merrill to purchase two profitable businesses from SCM for bargain price), *see also infra* note 64 and accompanying text (describing lock-up device in *Hanson Trust*).

59. *Hanson Trust*, 774 F.2d at 51. In *Hanson Trust* Hanson would recognize the existence of a lock-up option if SCM granted to anyone an option to purchase SCM assets at a bargain price. *Id.*

60. *Id.* at 52.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* In *Hanson Trust* Merrill and SCM agreed that the purchase price for the two businesses would be $430 million. *Id.* Hanson, however, believed that the sale price was far below the market value of the businesses. *Id.*

the revised leveraged buyout, SCM would sell the two profitable businesses to Merrill.[65] Hanson recognized, further, that SCM's sale of the two businesses to Merrill would result in Hanson's gaining control of SCM as a substantially depleted and damaged corporation holding no substantial assets.[66] Accordingly, Hanson terminated the cash tender offer and returned all of the tendered shares of SCM stock to the tendering stockholders.[67] On the same day that Hanson withdrew its cash tender offer, Hanson purchased in two hours through privately negotiated transactions and open market purchases twenty-five percent of SCM's outstanding stock.[68]

In response to Hanson's purchases of SCM stock, SCM successfully sought in the United States District Court for the Southern District of New York a temporary restraining order prohibiting for twenty-four hours Hanson's acquisition of more SCM stock.[69] The district court subsequently extended the temporary restraining order until the district court could determine whether to grant SCM a preliminary injunction.[70] After conducting an evidentiary hearing, the district court issued a preliminary injunction prohibiting Hanson from purchasing any more SCM stock or exercising any voting rights of the approximately 3.1 million shares of SCM stock that Hanson already had acquired.[71] In issuing the preliminary injunction, the district court reasoned that Hanson's purchases of SCM stock after withdrawing its tender offer constituted a tender offer that violated section 14(d) of the Williams Act.[72] Subsequently, Hanson successfully appealed the district court's issuance of the preliminary injunction to the United States Court of Appeals for the Second Circuit.[73]

In reviewing the district court's issuance of the preliminary injunction, the Second Circuit examined whether Hanson's purchases of SCM stock

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65. *Id.*

66. *Id.* In *Hanson Trust* if SCM sold its two most profitable businesses to Merrill at a price below the value of the businesses, SCM would lose valuable assets and receive no comparable amount of money to replace the lost assets. *Id.*

67. *Id.*

68. *Id.* In *Hanson Trust* Hanson, a British corporation, needed to comply with British corporate law that required Hanson to obtain certain clearances before acquiring fifty percent of SCM's shares unless Hanson made a formal tender offer. *Id.* Hanson recognized, however, that British law allowed Hanson to avoid the requisite clearances by acquiring less than fifty percent of SCM's outstanding stock. *Id.* Hanson could acquire up to one-third of the SCM stock before Merrill could exercise the option to purchase the businesses. *Id.* Because the revised SCM-Merrill leveraged buyout agreement required that Merrill acquire at least two-thirds of the outstanding SCM stock, Hanson's ownership of nearly one-third of SCM's outstanding stock would allow Hanson effectively to block the merger. *Id.* To acquire nearly one-third of the outstanding SCM stock, Hanson, acting through its financial advisor, Robert Pirie of Rothschild's, Inc., within hours of terminating its tender offer, purchased 3.1 million shares of SCM stock through 5 privately negotiated cash purchases and 1 purchase on the open market. *Id.* at 52-53.

69. *Id.* at 53.

70. *Id.*

71. *Id.* at 50.

72. *Id.* at 54.

73. *Id.* at 50.

constituted a tender offer under the Williams Act.[74] The Second Circuit recognized that the Williams Act does not define the term "tender offer."[75] In determining what constitutes a tender offer, however, the *Hanson Trust* court focused on the statutory purposes of the Williams Act.[76] The *Hanson Trust* court noted that Congress enacted the Williams Act to protect shareholders from the pressures of tender offers.[77] The Second Circuit acknowledged, further, that in deciding whether a particular party in a transaction needs the protection of the Williams Act, courts must consider the totality of the circumstances surrounding the transaction.[78] The *Hanson Trust* court explained that if a purchaser's failure to adhere to the requirements of the Williams Act would create a substantial risk that target shareholders would lack information regarding the transaction, courts should require the purchaser to adhere to the Williams Act requirements.[79] In considering all of the circumstances surrounding Hanson's purchases, the Seventh Circuit concluded that Hanson's purchases did not constitute a tender offer and, thus, did not trigger the Williams Act regulations.[80]

In finding that Hanson's purchases did not constitute a tender offer and, thus, did not trigger the Williams Act regulations, the Second Circuit focused on seven factors.[81] First, the *Hanson Trust* court noted that Hanson's solicitations for stock were not widespread.[82] Second, the *Hanson Trust* court recognized that Hanson purchased the SCM stock from highly sophisticated professionals who had all of the information necessary to

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74. *Id.* at 54.

75. *Id.* at 56.

76. *Id.*

77. *Id.* at 55. The *Hanson Trust* court explained that before the Williams Act, a bidder could act in complete secrecy without revealing his identity, his plans for the corporation, or his source of funds. *Id.* The *Hanson Trust* court noted that a pre-Williams Act shareholder often recognized that a tender offer was available only for a short time and for a limited number of shares. *Id.* The Second Circuit explained that the short duration of a tender offer created market pressures forcing shareholders to race to be the first to tender stock and to profit from the premium. *Id.* The *Hanson Trust* court explained, accordingly, that a shareholder had no opportunity to search for the best price for his stock and, consequently, sold stock without any knowledge of the purchaser. *Id.* The *Hanson Trust* court explained, further, that the Williams Act insures that shareholders confronted by a cash tender offer for stock have adequate time and opportunity to respond. *Id.*; *see also supra* note 15-18 and accompanying text (discussing pressures of tender offers on shareholders before Williams Act).

78. *Hanson Trust*, 774 F.2d at 57.

79. *Id.*

80. *Id.*

81. *Id.* at 57-58; *see infra* notes 81-88 and accompanying text (explaining seven factors upon which *Hanson Trust* court focused in determining that Hanson's market sweep did not constitute a tender offer).

82. *Hanson Trust*, 774 F.2d at 57. The *Hanson Trust* court explained that 22,800 shares of SCM stock were available on the market at the time of the market sweep. *Id.* In the market sweep, Hanson privately negotiated purchases of SCM stock from 5 shareholders and made 1 purchase on the open market. *Id.* at 52-53. The Second Circuit noted that Congress directed the Williams Act against public solicitations affecting a much larger percentage of a target corporation's shareholders. *Id.* at 57.

make an informed decision to sell the stock.[83] The *Hanson Trust* court acknowledged, third, that Hanson did not pressure the sellers of the SCM stock to sell their shares.[84] Fourth, the Second Circuit noted that no widespread publicity or public solicitation regarding the Hanson purchases preceded the purchases.[85] Fifth, the *Hanson Trust* court determined that the sellers of the SCM stock received no premium above the market price for their shares.[86] The *Hanson Trust* court stated, sixth, that Hanson did not condition its purchases upon obtaining a definite amount of the outstanding shares of SCM stock, but instead, that the negotiation of each sale obligated Hanson to buy the amount agreed upon regardless of the amount Hanson sought to acquire.[87] Finally, the Second Circuit noted that unlike most

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83. *Id.* In *Hanson Trust* the Second Circuit determined that when Hanson bought the SCM stock, the shareholders who sold the SCM stock to Hanson had access to the disclosure statement that Hanson had filed with the SEC upon making the original tender offer. *Id.* The Second Circuit noted, further, that the shareholders had access to the amended disclosure statement that Hanson filed when Hanson raised the tender offer price to $72 per share of stock. *Id.* at 58. The Second Circuit reasoned, further, that the shareholders had access to the press releases explaining the basic terms of the SCM-Merrill revised leveraged buyout agreement. *Id.* The Second Circuit noted, finally, that Hanson purchased the SCM stock from highly sophisticated investors. *Id.* The *Hanson Trust* court concluded, accordingly, that the shareholders who sold the SCM stock to Hanson had sufficient knowledge of the purchaser of the stock, Hanson, and the financial condition of SCM so that the shareholders could, and did, make an informed investment decision to sell the SCM stock to Hanson. *Id.* at 57.

84. *Id.* In *Hanson Trust* the Second Circuit reasoned that shareholders who sold the SCM stock to Hanson faced market pressure rather than any pressure from Hanson to sell. *Id.* The *Hanson Trust* court determined that Congress intended the Williams Act to protect shareholders from coercive pressure from the offeror, not from the normal pressures of the investment market. *Id.*

85. *Id.* In *Hanson Trust* the Second Circuit recognized that pursuant to New York Stock Exchange (NYSE) rules, Hanson reported its purchases of SCM stock on the NYSE ticker and the Dow Jones Broad Tape. *Id.* at 52. The *Hanson Trust* court admitted, further, that arbitrageurs might have been able to conclude from the NYSE ticker and Dow Jones Broad Tape reports that Hanson was buying SCM stock. *Id.* at 58. The Second Circuit reasoned, however, that Hanson's compliance with the NYSE rules should not constitute active or widespread solicitation. *Id.*

86. *Id.* In *Hanson Trust* the Second Circuit noted that the market price for SCM stock on the day of Hanson's purchases ranged from $72.50 to $73.50 per share of stock. *Id.* The *Hanson Trust* court noted, further, that Hanson paid $73.50 per share of stock for all of the purchases. *Id.* Hanson's purchase price was, therefore, at most $1.00, or 1.4%, higher than the market price. *Id.* The *Hanson Trust* court held that because the SEC's proposed definition of the term "premium" is the greater of $2.00 per share of stock or 5% over the market price per share of stock, Hanson's purchase price did not represent a premium. *Id.*

87. *Id.* In *Hanson Trust* the Second Circuit noted that Hanson negotiated each purchase independently of the other purchases. *Id.* at 52-3. The Second Circuit noted that Hanson did not make its purchases of SCM stock contingent on its acquisition of a certain percentage of the outstanding SCM stock. *Id.* The *Hanson Trust* court contrasted Hanson's purchases to purchases under a tender offer when the purchaser purchases the target stock only after shareholders have tendered a specified amount of the stock. *Id.* The *Hanson Trust* court determined that Hanson had an obligation to purchase each of the blocks of SCM stock, regardless of the total amount Hanson acquired. *Id.* The *Hanson Trust* court noted, further, that SCM's evidence did not indicate that Hanson had a firm limit on the amount of SCM shares that Hanson eventually would purchase. *Id.*

tender offerors, Hanson imposed no time limit for the purchases.[88] In considering all of the circumstances surrounding Hanson's market sweep of SCM shares, the Second Circuit concluded that a substantial risk that ill-informed shareholders would make ill-considered sales of SCM stock most likely did not exist.[89] The Second Circuit held, accordingly, that Hanson's privately negotiated purchase of SCM stock was not a tender offer.[90] The *Hanson Trust* court rejected the SEC's argument that federal securities law should prohibit Hanson from purchasing SCM stock for ten days after Hanson terminated the tender offer (cooling off period).[91] The Second Circuit determined that existing federal securities law did not support a ten day cooling off period.[92] The *Hanson Trust* court, therefore, concluded that Congress or the SEC has the authority to create a cooling off period to regulate market sweeps, but that the court would not usurp the legislative or regulatory function by judicially creating a cooling off period.[93]

In response to courts' refusal independently to regulate market sweeps, the SEC has published for public comment Proposed Rules 13e-2 and 14d-11 to regulate market sweeps.[94] The Proposed Rules regulate the trading, on the open market or through private negotiation, of stock that recently was or currently is the subject of a tender offer.[95] The Proposed Rules apply to the actual purchases of a target corporation's stock, offers to purchase a target corporation's stock, the making of arrangements or understandings to purchase a target corporation's stock, and the soliciting of offers to sell a target corporation's stock.[96] The Proposed Rules regulate, further, during a restricted period the trading of a target corporation's

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88. *Id.* In *Hanson Trust* the Second Circuit determined that although all of Hanson's purchases were immediate, Hanson imposed no general time limit on the purchasing plan. *Id.* The *Hanson Trust* court postulated that if Hanson and one of the sellers had been unable to agree on a sale price, the parties could have resumed the negotiations at a later time. *Id.* The *Hanson Trust* court did recognize, however, that the arbitrageurs assumed that once Hanson acquired nearly one-third of the outstanding SCM stock, Hanson would make no more purchases. *Id.*; *see supra* note 68 (discussing Hanson's strategy to block SCM-Merrill merger).

89. *Hanson Trust*, 774 F.2d at 58.

90. *Id.* at 58-59. Commentators disagree with the Second Circuit's holding that Hanson's privately negotiated transactions and the open market purchase did not constitute a tender offer. *See* Tyson, *The Williams Act after* Hanson Trust v. SCM Corporation: *Post Tender Offer Purchases by the Tender Offeror*, 61 TUL. L. REV. 1, 25 (1986) (criticizing *Hanson Trust* decision); Note, *supra* note 3, at 208-09 (discussing *Hanson Trust* court's failure to note detrimental effect Hanson's purchasing plan had on innocent shareholders).

91. *Hanson Trust*, 774 F.2d at 60.

92. *Id.*

93. *Id.*

94. *See* Exchange Act Release, *supra* note 8, at 37474, 37481-82 (publishing text of Proposed Rules).

95. *See id.* at 37472-73 (explaining that Proposed Rules govern acquisitions of target stock during and shortly after conventional tender offer for target stock).

96. *Id.* at 37476, 37481. In the Exchange Act Release the SEC explains that the Proposed Rules apply to all activities that enable a person to acquire stock, regardless of whether the buyer completes the acquisitions immediately or after the Proposed Rules would cease to apply. *Id.* at 37477.

stock.[97] Under Proposed Rules 13e-2 and 14d-11(a), the restricted period for the trading of a target corporation's stock begins when a person commences a tender offer for a corporation's stock and continues until ten business days after the scheduled expiration date of the tender offer.[98] When a person commences a tender offer by public announcement, however, Proposed Rule 14d-11(b) provides that the restricted period begins when an offeror publicly announces the tender offer and continues until either the offeror begins the tender offer by means other than public announcement[99] or thirty business days after the offeror publicly withdraws the tender offer, whichever event occurs first.[100]

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97. *Id.* In the Exchange Act Release the SEC asserts that because a tender offer creates market dynamics that continue after the tender offer expires, the Proposed Rules also will continue to apply after the scheduled expiration date of the tender offer. *Id.*

98. *Id.* Proposed Rules 13e-2 and 14d-11(a) apply if an issuer commences a tender offer under Rule 13e-4(a)(4) or if a bidder commences a tender offer under Rule 14d-2. *Id.* Rule 13e-4(a)(4) states that an issuer commences a tender offer when the issuer first publishes, sends, or gives the offer to the shareholders of the target corporation. 17 C.F.R. § 240.13e-4(a)(4) (1987). Rule 14d-2 states that a bidder commences a tender offer as of 12:01 a.m. on the date that the bidder performs one of the specified means of notifying shareholders of the tender offer. *Id.* § 240.14d-2(a).

Proposed Rules 13e-2 and 14d-11(a) provide that the restricted period for trading the target stock lasts for ten business days after the scheduled expiration date of the tender offer. Exchange Act Release, *supra* note 8, at 37477, 37481. If the offeror amends the tender offer schedule to extend the time for shareholders to tender stock, the restricted period would extend until ten business days after the amended scheduled expiration date. *Id.* The SEC reasons that, because the scheduled expiration date of the tender offer determines the restricted time period, a person terminating a tender offer before the scheduled expiration date could not reduce the applicable restricted period. *Id.* at 37477.

99. Exchange Act Release, *supra* note 8, at 37482. In the Exchange Act Release the SEC explains that Proposed Rule 14d-11(b) applies only until the bidder commences the tender offer by some means other than public announcement because the commencement of a tender offer by other means will trigger Proposed Rule 14d-11(a). *Id.* at 37478.

100. *Id.* at 37482. Under Proposed Rule 14d-11(b) a bidder seeking to withdraw a tender offer may make a public announcement pursuant to Rule 14d-2(b)(1). *Id.* Rule 14d-2(b)(1) provides that if a bidder acts within five business days of the public announcement of the tender offer, the bidder subsequently may announce the bidder's decision not to pursue the tender offer. 17 C.F.R. § 240.14d-2(b)(1) (1987). The SEC notes that Proposed Rule 14d-11(a) restricts the activities of a person who announces a tender offer and subsequently commences a tender offer by other means. Exchange Act Release, *supra* note 8, at 37478. The SEC explains, further, that under Proposed Rule 14d-11(b) an offeror who publicly announces the withdrawal of a tender offer within the five business day period prescribed by Rule 14d-2(b) would be restricted from buying target stock until thirty business days after the withdrawal announcement. *Id.* The SEC notes that the Proposed Rules would affect a person prematurely terminating a tender offer for a period equal to the twenty business day minimum offering period applicable to tender offers plus the ten day cooling off period imposed by Proposed Rule 14d-11(a). *Id.*

The SEC exempts from Proposed Rules 13e-2 and 14d-11(a) a tender offer that a person commences solely by public announcement under Rule 14d-2(b), because issuers and third parties may not be able to identify some public announcements as tender offers. Exchange Act Release, *supra* note 8, at 37476. The SEC explains, further, that if a bidder publicly announces a tender offer under Rule 14d-2(b) by a press release, newspaper advertisement, or

Both of the Proposed Rules regulate issuers[101] and affiliates[102] seeking to acquire substantial blocks of a target corporation's stock.[103] Proposed Rule 13e-2(a) regulates issuers who seek to acquire an aggregate of ten percent or more of the target stock.[104] Proposed Rule 13e-2(b), however, regulates affiliates seeking to acquire an amount of the target stock that would increase by an aggregate of ten percent or more any person's beneficial ownership of the stock.[105] If an issuer or affiliate is subject to Proposed Rule 13e-2, the issuer or affiliate must comply with the requirements of Rule 13e-4.[106] Rule 13e-4 requires that an issuer or affiliate making a tender offer comply with the Williams Act disclosure, withdrawal, pro rata purchasing, and same price requirements.[107] Rule 13e-4 requires, further, that issuers or affiliates making tender offers keep the tender offer open for a minimum number of days and not purchase shares outside of the terms of the tender offer.[108]

In contrast to Proposed Rule 13e-2, Proposed Rule 14d-11(a) regulates all persons, not just issuers, who seek to acquire an amount of a target corporation's stock that would increase by an aggregate of ten percent or more any person's beneficial ownership of target stock.[109] Proposed Rule

public statement, issuers and third parties all may not receive notice of the tender offer. *Id.* The SEC asserts, accordingly, that to apply Proposed Rules 13e-2 and 14d-11(a) to issuers and third parties would be difficult to administer and add confusion to the market. *Id.*

101. 17 C.F.R. § 240.13e-4(a)(1) (1987). Rule 13e-4 defines the term "issuer" as a corporation that registers a class of equity securities pursuant to section 12 of the 1934 Act. *Id.*

102. *Id.* § 240.13e-3(a). Rule 13e-3(a) of the Code of Federal Regulations defines the term "affiliate" of an issuer as a person who controls the issuer, whom the issuer controls, or who is under common control with the issuer. *Id.*

103. Exchange Act Release, *supra* note 8, at 37481-2.

104. *Id.* at 37481. Proposed Rule 13e-2(a) applies, further, to an issuer seeking to acquire stock that the issuer can exchange for, or convert into, stock that will give the issuer any right or privilege to an aggregate of ten percent or more of the target stock. *Id.* The SEC notes that a bidder's announcement of a tender offer causes an increase in the volume of trading of the target corporation's stock during the tender offer. *Id.* at 37474. The SEC notes that the Proposed Rules apply to solicitations of offers to sell, whether the buyer of the stock or another person would be the person conducting the solicitation. *Id.* at 37477. The SEC recognizes, consequently, that brokers and dealers who solicit offers to sell the target stock often will solicit offers to sell an amount of target stock that would represent an aggregate of ten percent or more of the target stock. *Id.* The SEC asserts that because the Proposed Rules focus on an increase in ownership instead of total ownership, the Proposed Rules will not interfere with normal brokerage activity. *Id.* at 37477.

105. *Id.* at 37481.

106. *Id.*

107. 17 C.F.R. § 240.13e-4 (1987). Rule 13e-4 regulates issuer tender offers. *Id.* Rule 13e-4(b) prohibits issuers or affiliates from engaging in specified deceptive or fraudulent practices during a tender offer. *Id.* Rule 13e-4(d) specifies the information that issuers and affiliates making a tender offer must disclose to target shareholders. *Id.* Rule 13e-4(f) subjects issuers and affiliates making a tender offer to various substantive requirements, such as allowing shareholders' withdrawal and same price rights, purchasing target stock on a pro rata basis, and keeping the tender offer open for a minimum period of time. *Id.*

108. *Id.*

109. Exchange Act Release, *supra* note 8, at 37482.

14d-11(b), however, regulates bidders seeking to increase by ten percent or more any person's beneficial ownership of the target stock.[110] A person subject to Proposed Rule 14d-11 must comply with the requirements of section 14(d) of the Securities and Exchange Act of 1934 and the corresponding rules.[111] Section 14(d) of the 1934 Act requires an investor to make a formal tender offer upon the investor's acquisition of five percent of the target stock.[112]

Although the Proposed Rules generally limit acquisitions of stock subject to a tender offer, Proposed Rules 13e-2(c) and 14d-11(c) provide exceptions to Proposed Rules 13e-2 and 14d-11.[113] First, Proposed Rule 13e-2(c)(1) exempts from Proposed Rule 13e-2 an issuer's purchasing program that target corporation shareholders previously have approved.[114] Second, and similarly to the first exemption, Proposed Rules 13e-2(c)(2) and 14d-11(c)(2) exempt from the Proposed Rules any person who purchases target stock of a corporation to execute a merger or consolidation if the shareholders of the corporation have approved the merger or consolidation.[115] Third, Proposed Rules 13e-2(c)(3) and 14d-11(c)(3) exempt from the calculation of the aggregate increase in a person's stock holding under the Proposed Rules the purchases of a block of stock that represents more than five percent of the target stock if the seller reported beneficial ownership of the target stock for at least one year before the sale of the target stock.[116] Fourth,

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110. *Id.* at 37481-2. Under section 13d-3(a) a beneficial owner of a security is a person who can exercise the investment or disposal of the stock. 17 C.F.R. § 240.13d-3 (1987).

111. Exchange Act Release, *supra* note 8, at 37482.

112. 15 U.S.C. § 78n (1982); 17 C.F.R. § 240.14d-3 (1987). Section 14(d) of the 1934 Act regulates tender offers by owners of more than 5% of a class of securities. 15 U.S.C. § 78n(d) (1982). Under section 14(d) any person making a tender offer that would increase his beneficial ownership of the target stock by five percent of the outstanding stock must comply with the disclosure requirements of section 13(d) of the 1934 Act. *Id.* Section 14(d) gives, furthermore, withdrawal rights, pro rata purchasing rights, and best price rights to target shareholders who tender target stock to the offeror. *Id.*

113. Exchange Act Release, *supra* note 8, at 34781-2; *see infra* notes 114-19 and accompanying text (delineating exceptions to Proposed Rules).

114. Exchange Act Release, *supra* note 8, at 37481. To qualify as a previously approved transaction under Proposed Rule 13e-2(c)(1), the requisite number of shareholders as specified in state law and in the corporation's by-laws must approve the transaction. *Id.* The SEC reasons that by requiring the shareholders' approval, an issuer informs the shareholders of the purchaser, the purchaser's plans for the corporation, the purchaser's offering price, and the number of shares that the purchaser will purchase. *Id.* The SEC asserts, therefore, that if the requisite number of shareholders approve the purchase, the shareholders possess the necessary information to make a reasoned decision about the purchase. *Id.* The SEC reasons that the process of procuring shareholder approval of the purchase adequately will protect shareholders from coercive pressure to sell the target stock. *Id.*

115. *Id.* at 37481-2.

116. *Id.* In the Exchange Act Release the SEC explains that to qualify for the exemption under Proposed Rules 13e-2(c)(3) and 14d-11(c)(3), the seller of the target stock must have reported his beneficial ownership of the stock pursuant to sections 13(d) or 13(g) of the 1934 Act. *Id.* The SEC reasons that if the seller of the block of stock reported beneficial ownership of the stock at least one year before the sale, the owner did not assemble the block of stock

Proposed Rules 13e-2(c)(4) and 14d-11(c)(4) exempt from the Proposed Rules purchases pursuant to a written agreement before the earlier of either the public announcement of information specified in Rule 14d-2(c)[117] or the occurrence of any of the events specified in Rule 14d-2(a).[118] Finally, Proposed Rule 14d-11(c)(1) exempts from Proposed Rule 14d-11 purchases or potential purchases of target stock from the issuer.[119]

In response to the SEC's request for comments on the Proposed Rules, commentators supporting market sweep regulation (supporters) claim that the SEC should regulate market sweeps for several reasons.[120] Supporters assert initially that the absence of market sweep regulation frustrates the shareholder protection policies of the Williams Act regulatory scheme.[121]

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as a reaction to or in anticipation of a tender offer. *Id.* at 37478. The SEC asserts that if the owner did not acquire the stock as a result of the market dynamics caused by a tender offer, the acquisition of the stock posed no threat to the target stock shareholders. *Id.* The SEC reasons, accordingly, that a shareholder's sale of a block of stock that the shareholder did not assemble in reaction to a tender offer poses no shareholder protection problems and should be exempt from the scope of the Proposed Rules. *Id.*

117. 17 C.F.R. § 240.14d-2(c) (1987). Rule 14d-2(c) specifies the information that a person making a tender offer by public announcement under Rule 14d-2(b) must disclose. *Id.* Rule 14d-2(b)(1) provides that the offeror must identify himself to the target shareholders, disclose the identity of the target company, disclose the amount of the target stock that the offeror is willing to purchase, and disclose the price or range of prices that the offeror is willing to pay for the target stock. *Id.*

118. Exchange Act Release, *supra* note 8, at 37481-2. Rule 14d-2(a) enumerates the events that signify the commencement of a tender offer. 17 C.F.R. § 240.14d-2(a) (1987). Rule 14d-2(a) states that when the bidder first publishes the long form publication or a summary advertisement of the tender offer pursuant to Rules 14d-4(a)(1), 14d-4(a)(2), or 14d-4(a)(3), the bidder has commenced the tender offer. *Id.* § 240.14d-2(a). Under Rule 14d-2(a)(4) when the bidder first publishes or otherwise provides to the shareholders definitive copies of the tender offer, the bidder officially has commenced the tender offer. *Id.* Finally, Rule 14d-2(a)(5) states that when a bidder in any way makes the tender offer known to the target shareholders, the bidder has commenced the tender offer. *Id.*

119. Exchange Act Release, *supra* note 8, at 37481. In the Exchange Act Release the SEC asserts that issuer sales and rapid accumulations of blocks of the target stock do not pose the same problems to shareholders as do market sweeps. *Id.* at 37478.

120. *See id.* at 37475 (presenting reasons for SEC regulation of market sweeps); Tyson, *supra* note 90, at 27 (analyzing *Hanson Trust* market sweep's negative affect on shareholders and need for market sweep regulation); Note, *Promoting Shareholder Equality in Stock Accumulation Programs for Corporate Control*, 36 AM. U.L. REV. 93, 114-15 (1986) (noting unfairness of nonregulation of market sweeps); Note, *supra* note 3, at 208 (describing inequitable treatment of unsophisticated shareholders resulting from unregulated market sweep); Letter from Securities Industry Association to Katz, Commissioner of SEC at 2-3 (Dec. 9, 1987) (commenting on Proposed Rules) (available in SEC File No. S7-33-87) [hereinafter Letter from SIA] (noting that public policy favors regulation of market sweep); Letter from Sullivan and Cromwell to Katz, Commissioner of SEC at 1-2 (Dec. 11, 1987) (commenting on Proposed Rules) (available in SEC File No. S7-33-87) [hereinafter Letter from Sullivan and Cromwell] (supporting SEC's proposed regulation of market sweeps).

121. *See infra* notes 122-38 and accompanying text (discussing supporters' arguments that market sweeps hinder Williams Act policies); *supra* notes 22-29 and accompanying text (discussing Williams Act regulation of tender offers); *supra* notes 13-20 and accompanying text (discussing reasons that Congress enacted Williams Act).

Supporters argue that during both tender offers and market sweeps, shareholders immediately must assess the likelihood of the outstanding tender offer's or market sweep's success and the possibility that a competing bidder or the target corporation management will offer a higher price.[122] Supporters note that a shareholder selling to an offeror, however, rationally may assess the tender offer's risk of failure because the offeror must comply with the Williams Act regulations.[123] Supporters claim, further, that because a person making a market sweep does not have to comply with the disclosure requirements, shareholders involved in a market sweep must make investment decisions without any information about the purchaser, the purchaser's financing, or the purchaser's future plans for the target corporation.[124] Supporters argue that because a person making a market sweep does not have to comply with the minimum offering period, pro rata purchasing, withdrawal, or same price requirements, market sweeps force shareholders hurriedly to make investment decisions.[125] Supporters claim, additionally, that nonregulation of market sweeps favors arbitrageurs over nonprofes-

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122. *See* Exchange Act Release, *supra* note 8, at 37476 (noting decisions that shareholders must make during tender offer or market sweep).

123. *See* Tyson, *supra* note 90, at 25 (explaining that Williams Act includes procedural and substantive requirements to protect both ill-informed and hurried shareholders); *supra* note 23 and accompanying text (noting that Williams Act regulation requires offeror to hold tender offer open for minimum period of time).

124. *See* Tyson, *supra* note 90, at 28 (noting that market sweep forces shareholders to make hurried, ill-informed investment decisions); *see also* Exchange Act Release, *supra* note 8, at 37475 (stating that shareholders selling target stock during market sweep sell without adequate information or option to choose better offer).

125. *See* Note, *supra* note 120, at 111 (noting that persons making market sweeps purchase stock on first come, first served basis, thus forcing target corporation shareholders to forego Williams Act protections); Exchange Act Release, *supra* note 8, at 37475 (stating that market sweep forces shareholders to forego Williams Act regulation protections). Supporters argue that market sweeps pressure all solicitees to sell target stock. *See* Tyson, *supra* note 90, at 27 (noting pressure that market sweep places on shareholders). Supporters contend, first, that because the person sweeping the market may discontinue the buying program at any time, market sweeps pressure shareholders who sell the target stock on the open market to the arbitrageurs. *Id.* at 28. Supporters claim that if the person sweeping the market discontinues the sweep, the arbitrageurs no longer will have a ready market for the target stock and will discontinue purchasing target stock from the risk averse shareholders. *See id.* at 27 (noting that arbitrageurs solicit sales of target stock as reaction to buyers purchasing large number of shares of target stock at a premium price). Supporters assert, second, that market sweeps pressure arbitrageurs to sell blocks of the target stock to a person sweeping the market because arbitrageurs must act quickly, before the purchaser discontinues the purchasing program. *Id.* at 31. Supporters claim that although arbitrageurs are sophisticated market professionals, the Williams Act regulations protect arbitrageurs as well as nonprofessional shareholders. *Id.* at 27 n.139. Supporters claim, third, that market sweeps pressure shareholders because once a purchaser commences a market sweep, arbitrageurs solicit stock from shareholders as the arbitrageurs seek to assemble large blocks of the target stock. *Id.* at 27 (noting that in *Hanson Trust* arbitrageurs solicited target shareholders to sell target stock so that arbtitrageurs could sell stock to Hanson). Supporters note, therefore, that shareholders receive pressure to sell target stock to arbitrageurs during a market sweep. *See id.* (recapping arbitrageur pressure on shareholders during *Hanson Trust* market sweep).

sional shareholders because arbitrageurs are the only shareholders with access to information necessary to make an intelligent investment decision.[126] Supporters insist, further, that, although unaware of a sale of control, minority shareholders are entitled to make an informed investment decision and, thus, share in the opportunity to profit from the purchaser's offered premium.[127] Supporters contend that because market sweeps create the same pressures on and unfair treatment of shareholders that Congress adopted the Williams Act to prevent, market sweeps should be subject to the Williams Act requirements.[128]

In addition to claiming that shareholders deserve Williams Act protections during market sweeps, supporters of market sweep regulation argue that market sweeps discourage the use of tender offers because market sweeps place an offeror at a distinct disadvantage to the target corporation or a competing offeror.[129] Supporters note that during a tender offer the Williams Act regulations prohibit an offeror's purchasing of target stock outside of the terms of the tender offer.[130] Supporters claim that, accordingly, an offeror is unable to counter a target corporation's or a competing bidder's market sweep because the offeror is unable to purchase the target stock except pursuant to the tender offer.[131] Supporters note that if a person

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126. *See* Note, *supra* note 120, at 114 (stating that secrecy surrounding market sweeps prevents minority shareholders from gaining information about possible market sweep, thus, enabling arbitrageurs to obtain control premium); Letter from SIA, *supra* note 120, at 2 (suggesting that market sweeps place some shareholders at disadvantage to arbitrageurs because nonprofessional shareholders lack adequate information).

127. *See* Note, *supra* note 120, at 115 (noting that arbitrageurs are only shareholders who receive control premium for target shares in market sweep and that other shareholders should have opportunity to share in profit of change of corporate control).

128. *See* Exchange Act Release, *supra* note 8, at 37475 (stating that because tender offers and market sweeps are similar and pose similar shareholder protection problems, Williams Act requirements should apply to market sweeps as well as to tender offers); Letter from Sullivan and Cromwell, *supra* note 120, at 1 (stating that to promote Williams Act's goals of protecting investors, SEC should require large scale accumulations of target stock to occur through formal tender offer process, instead of through market sweep); *supra* notes 122-25 and accompanying text (discussing supporters' contention that because tender offers and market sweeps are similar, SEC should regulate both tender offers and market sweeps).

129. *See* Letter from SIA, *supra* note 120, at 2 (stating that as practical matter, offeror generally is unable to respond to market sweep because Rule 10b-13 prevents offeror from purchasing target stock outside of tender offer during pendency of tender offer); *infra* notes 130-33 and accompanying text (discussing supporters' contentions that market sweeps discourage tender offers by disadvantaging offerors).

130. *See* Letter from SIA, *supra* note 120, at 2 (stating that Rule 10b-13 prevents offeror from responding to competitor's market sweep); Note, *supra* note 120, at 110-11 (asserting that person making market sweep has distinct advantage over offeror because offeror cannot purchase target stock except pursuant to tender offer); *see also* 17 C.F.R. § 240.10b-13 (1987) (prohibiting offeror from making other purchases during tender offer).

131. *See* Letter from SIA, *supra* note 120, at 2 (noting that because of tender offer regulations, offeror cannot compete with investor who sweeps market); Note, *supra* note 120, at 110-11 (explaining that unregulated market sweep disadvantages offeror in corporate control battle because offeror must comply with Williams Act regulations and person making market sweep need not).

seeking control over a corporation initiates a market sweep instead of a tender offer, the person may purchase stock in any manner to compete with target management or competing offerors.[132] Supporters argue, consequently, that nonregulation of market sweeps discourages the use of tender offers and encourages investors to act outside of the tender offer process.[133] Supporters believe that by bypassing the tender offer process, investors can use market sweeps to change control of corporations but shareholders receive no substantive protection provided in the Williams Act regulations.[134]

In addition to claiming that market sweeps frustrate the Williams Act regulations and discourage the use of tender offers, supporters claim, further, that market sweeps discourage competitive bidding and, accordingly, deny shareholders the higher stock sale prices that accompany competitive bidding.[135] Supporters claim, also, that if a party involved in a bidding competition sweeps the market and gains a controlling block of the target stock, the party prematurely terminates the competition for the target stock.[136] Supporters argue that by giving one party a controlling block of target stock, the premature termination of competition for the target stock discourages a competing party from making an offer at a higher price.[137] Furthermore, supporters assert that the possibility that one of the parties in a battle for corporate control may sweep the market pressures offerors to terminate a tender offer and pre-emptively sweep the market.[138]

Although many commentators support the regulation of market sweeps, many commentators oppose the SEC's Proposed Rules (opponents).[139] Op-

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132. *See* Letter from SIA, *supra* note 120, at 2 (stating that competing bidder's market sweep forces offeror to retaliate with market sweep).

133. *See id.* at 2-3. Supporters claim that because the SEC regulates tender offers but not market sweeps, the lack of market sweep regulation encourages investors seeking control over a corporation to use a market sweep instead of a tender offer to gain control of a corporation. *Id.*

134. *Id.*

135. *Cf.* 113 CONG. REC. 24665 (1967) (statement of Sen. Javits) (noting that shareholders often profit from competing tender offers).

136. *See* Letter from Sullivan and Cromwell, *supra* note 120, at 2 (noting that market sweeps preclude competitive bidding process).

137. *See id.* (suggesting that market sweep may foreclose potential offers for target stock at prices higher than person making market sweep's price).

138. *See* Exchange Act Release, *supra* note 8, at 37475 (noting that fear that competing bidder or target corporation may commence market sweep may prompt bidder to commence market sweep to prevent competing bidders or target corporation from sweeping the market or successfully completing a tender offer).

139. *See infra* notes 140-67 and accompanying text (discussing negative comments submitted to SEC regarding Proposed Rules); *see also* Letter from Chairman of the Council of Economic Advisers to Katz, Commissioner of SEC at 4 (Dec. 7, 1987) (commenting on Proposed Rules) (available in SEC File No. S7-33-87) [hereinafter Letter from Council of Economic Advisers] (suggesting that SEC withdraw Proposed Rules); Letter from Department of Justice to Katz, Commissioner of SEC at 1 (Dec. 7, 1987) (commenting on Proposed Rules) (available in SEC File No. S7-33-87) [hereinafter Letter from Department of Justice] (advocating that SEC not regulate market sweeps); Letter from Executive Office of the President to Katz, Commissioner of SEC at 1 (Dec. 20, 1987) (commenting on Proposed Rules) (available in SEC

ponents argue, initially, that market sweep regulation is inconsistent with the policies of the Williams Act.[140] Opponents contend that Congress enacted the Williams Act to insure that shareholders confronted with a tender offer have adequate information to respond to the tender offer.[141] Opponents assert that in a market sweep, however, the person sweeping the market generally buys target stock from arbitrageurs.[142] Opponents argue that because the arbitrageurs are market professionals, arbitrageurs generally have access to any information needed to make investment decisions and, therefore, do not need the protection of the Williams Act regulations.[143] Opponents contend, further, that Congress enacted the Williams Act to protect shareholders from an offeror's coercion to sell the target stock.[144] Opponents assert, accordingly, that the SEC should expand the Williams Act protections to market sweeps only if sellers in market sweeps are genuinely subject to coercive pressure to sell and cannot make well-informed investment decisions.[145] Opponents claim, moreover, that because only a few shareholders own sufficiently large blocks of stock to interest a person initiating a market sweep, sellers have sufficient leverage to negotiate the

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File No. S7-33-87) [hereinafter Letter from Executive Office of the President] (stating that SEC should not regulate market sweep).

140. *See* Letter from Executive Office of the President, *supra* note 139, at 3 (asserting that market sweep regulation does not further Williams Act objectives); Letter from Department of Justice, *supra* note 139, at 5 (discussing that Congress enacted Williams Act to protect shareholders and Proposed Rules will not protect shareholders during market sweep); Letter from Council of Economic Advisers, *supra* note 139, at 1 (stating that SEC market sweep regulation is inconsistent with Williams Act goals).

141. *See* Letter from Council of Economic Advisers, *supra* note 139, at 2 (noting that purpose of Williams Act is to protect shareholders by providing adequate information regarding tender offer); Letter from Department of Justice, *supra* note 139, at 5 (stating that underlying purpose of Williams Act is to protect shareholders from coercion of tender offers); *supra* notes 13-29 and accompanying text (discussing reasons why Congress passed Williams Act and procedural and substantive protection that Williams Act regulations provide to shareholders).

142. *See* Letter from Council of Economic Advisers, *supra* note 139, at 2 (noting that typical sellers in market sweep are arbitrageurs); Letter from Department of Justice, *supra* note 139, at 5 (stating that in most market sweeps sellers of target stock are arbitrageurs or large institutional holders who are sophisticated sellers); *see also* Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 52-3 (2d Cir. 1985) (describing sellers of target stock in market sweep).

143. *See* Letter from Council of Economic Advisers, *supra* note 139, at 2 (stating that arbitrageurs have greater access to market information than other investors); *see also* Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 57 (2d Cir. 1985) (noting that sellers in market sweep were highly sophisticated market professionals well aware of essential facts needed to exercise professional skills in appraising offer).

144. *See* Letter from Council of Economic Advisers, *supra* note 139, at 1 (stating that Congress intended Williams Act to insure that shareholders are not required to respond to tender offer without adequate information); Letter from Department of Justice, *supra* note 139, at 5 (noting that underlying purpose of Williams Act is to protect small shareholders from pressures and related effects associated with tender offers); *see also supra* note 15-30 and accompanying text (discussing goals of Williams Act).

145. *See* Letter from Council of Economic Advisers, *supra* note 139, at 2 (stating that Williams Act procedures are means of protecting shareholders and SEC should extend Williams Act regulations only if shareholders genuinely need protection).

price of the stock and, if necessary, to gain more information about the person making the market sweep.[146] Opponents contend, consequently, that most sellers in a market sweep are not subject to the coercion that frequently exists during a tender offer.[147] Opponents contend, additionally, that Congress enacted the Williams Act to protect shareholders while favoring neither target management nor offerors.[148] Opponents claim, however, that by making it more difficult for arbitrageurs quickly to dispose of large blocks of target stock, market sweep regulation will discourage arbitrageurs from buying target stock.[149] Opponents argue that a decrease in arbitrage activity will prevent the customary concentration of target stock among arbitrageurs, thus making it more expensive, and accordingly more difficult, for an

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146. *See* Letter from Council of Economic Advisers, *supra* note 139, at 2 (noting that because Congress passed Williams Act to protect innocent shareholders from coercion to sell target stock, SEC should regulate market sweeps only to protect innocent shareholders); *see also* Letter from Executive Office of the President, *supra* note 139, at 3 (stating that because market sweeps do not harm innocent shareholders, SEC should not regulate market sweeps). Opponents note that shareholders confronted with a tender offer are subject to pressure to sell because of the numerous potential sellers. Letter from Council of Economic Advisers, *supra* note 139, at 2. Opponents assert that because an offeror can buy target stock in a tender offer from many potential sellers, the sellers are not in a position to bargain over price. *Id.* Opponents argue that during a market sweep, however, only a few shareholders hold blocks of stock that are large enough to interest a person sweeping the market. *Id.*; Letter from Executive Office of the President, *supra* note 139, at 3. Opponents argue that because a purchaser can buy target stock from a limited number of shareholders, the shareholders have the leverage necessary to negotiate over price and request more information. Letter from Council of Economic Advisers, *supra* note 139, at 2; Letter from Executive Office of the President, *supra* note 139, at 3. In fact, opponents claim that if more than one person is attempting to sweep the market, the people sweeping the market quickly must acquire a controlling amount of target stock before a competitor gains control over the target corporation. Letter from Council of Economic Advisers, *supra* note 139, at 3; Letter from Executive Office of the President, *supra* note 139, at 3. Opponents contend, therefore, that buyers, rather than sellers, in a market sweep are subject to intense time pressure. Letter from Council of Economic Advisers, *supra* note 139, at 2; Letter from Executive Office of the President, *supra* note 139, at 3.

147. *See* Letter from Council of Economic Advisers, *supra* note 139, at 2 (noting that market sweep sellers are not subject to same time pressures as sellers in tender offer); *see also* Hanson Trust, PLC v. SCM Corp., 774 F.2d 47, 58 (2d Cir. 1985) (stating that sellers in market sweep are not subject to pressure that Congress designed Williams Act to alleviate).

148. *See* Letter from Executive Office of the President, *supra* note 139, at 3 (explaining that Proposed Rules violate Williams Act principle of not favoring either target management or offeror in market for corporate control); *see* 113 CONG. REC. 24664 (1967) (statement of Sen. Williams) (explaining that drafters of Williams Act avoided favoring either target management or offeror); H.R. REP. No. 1711, *supra* note 3, at 4 (asserting neutrality of Williams Act); *supra* notes 30-31 and accompanying text (discussing congressional intent for Williams Act regulation not to favor target corporation or bidder).

149. *See* Letter from Council of Economic Advisers, *supra* note 139, at 2 (asserting that market sweep regulation will limit arbitrageurs' ability to sell stock and will, consequently, decrease arbitrage activity); Letter from Department of Justice, *supra* note 139, at 3 (arguing that increased substantive and procedural constraints of market sweep regulation will discourage arbitrageurs' purchases of target stock).

offeror successfully to complete a tender offer.[150] Opponents conclude that market sweep regulation will discourage the making of tender offers and, thus, will favor target management over an offeror in a battle for corporate control.[151] Opponents argue, furthermore, that the thirty day restricted period for an offeror in Proposed Rule 14d-11(b)(2), contrasted to the ten day restricted period for an issuer or an affiliate in Proposed Rules 13e-2(a) and 13e-2(b), allows target management to purchase large amounts of target stock on the open market twenty days before an offeror is eligible to purchase target stock.[152] Opponents assert, accordingly, that the extended restricted period for offerors favors target management over an offeror in a battle for corporate control.[153]

In addition to claiming that market sweep regulation fails to promote the objectives of the Williams Act regulations, opponents state that the SEC has no evidence that market sweeps hurt innocent shareholders.[154] Opponents assert, in fact, that although a market sweep appears to treat nonprofessional shareholders and arbitrageurs differently, all shareholders benefit from nondefensive market sweeps.[155] Opponents note that SEC statistics demonstrate that shareholders holding target stock until the person making the

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150. *See* Letter from Council of Economic Advisers, *supra* note 139, at 4 (claiming that market sweep regulation will increase costs and risks associated with holding of large blocks of target stock, will impede concentration of target stock, and, thus, increase cost of tender offers); Letter from Executive Office of President, *supra* note 139, at 5 (asserting that regulation of market sweeps will decrease arbitrage activity and increase cost of tender offers).

151. *See* Letter from Council of Economic Advisers, *supra* note 139, at 4 (noting that regulation of market sweeps increases cost of tender offer, which favors incumbent target management by decreasing incentive to make tender offer); Letter from Department of Justice, *supra* note 139, at 7-8 (stating that Proposed Rules favor target management); Letter from Executive Office of the President, *supra* note 139, at 4 (asserting that Proposed Rules favor target management over bidders).

152. *See* Letter from Department of Justice, *supra* note 139, at 8 (claiming that longer restricted period for offeror favors target management in battles for corporate control); Letter from Executive Office of the President, *supra* note 139, at 4 (noting that Proposed Rules favor target management in corporate control battle); *see also* Exchange Act Release, *supra* note 8, at 37481-82 (setting out text of Proposed Rules).

153. *See* Letter from Council of Economic Advisers, *supra* note 139, at 3 (arguing that Proposed Rules give target management initiating market sweep advantage over offeror initiating market sweep); Letter from Executive Office of the President, *supra* note 139, at 4 (stating that Proposed Rules' shortened restricted period for target management gives target managment advantage over competing offerors in battle for corporate control).

154. *See* Letter from Department of Justice, *supra* note 139, at 6 (noting that SEC has produced no evidence that market sweeps generally injure shareholders); Letter from Executive Office of the President, *supra* note 139, at 2 (stating that although market sweeps treat shareholders disparately, SEC has no evidence that market sweeps harm shareholders to extent that shareholders need protection); *infra* notes 155-59 and accompanying text (discussing SEC's lack of evidence that market sweeps harm shareholders).

155. *See* Letter from Council of Economic Advisers, *supra* note 139, at 3 (stating that shareholders tendering target stock before a market sweep but selling target stock after failed tender offer received premium comparable to tender offer premium); *see also* Exchange Act Release, *supra* note 8, at 37479-80 (presenting statistics demonstrating that shareholders selling target stock after a market sweep receive premium for stock).

market sweep gains control over the corporation receive prices for the target stock that equal or exceed the price that arbitrageurs pay to shareholders before the market sweep.[156] Opponents assert, further, that because arbitrageurs pay shareholders a premium for target stock and shareholders are able to avoid the risks associated with tender offers, market sweeps do not harm shareholders selling stock to arbitrageurs.[157] Opponents recognize, and the SEC concedes, that the only market sweep of the last few years that harmed target shareholders was part of a target management's defensive tactics adopted to defeat a hostile bid.[158] Opponents argue, therefore, that in the rare case that a market sweep harms target shareholders, target management activities are subject to state fiduciary law and the SEC does not need to protect shareholders from a target corporation's market sweep.[159]

In addition to claiming that market sweep regulation fails to promote the objectives of the Williams Act and fails to protect innocent shareholders,

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156. *See* Letter from Council of Economic Advisers, *supra* note 139, at 3 (stating that shareholders disposing of target stock after market sweep gained premiums comparing favorably with premium usually gained in tender offer); Letter from Department of Justice, *supra* note 139, at 6 (noting that statistics indicate that market sweeps initiated by hostile bidders generally have not harmed nonprofessional shareholders); Letter from Executive Office of the President, *supra* note 139, at 2 (explaining that SEC Chief Economist's study of four sweeps initiated by acquirors demonstrates that target shareholders holding stock until after market sweep, on average, did as well as or better than arbitrageurs selling to person making market sweep). In the Exchange Act Release the SEC stated that the Office of the Chief Economist (OCE) and the Directorate of Economic and Policy Analysis (DEPA) determined that during the past few years there have been only a few cases of market sweeps that might have violated the Proposed Rules. Exchange Act Release, *supra* note 8, at 37479. The OCE and the DEPA compared the price of the target stock 20 days prior to the first announcement of the tender offer, the price that the person making the market sweep paid to the shareholders selling stock during the sweep, and the price that the person who successfully swept the market paid to the remaining shareholders (the back-end price). *Id.* Of the five market sweeps initiated by a hostile bidder the OCE and DEPA found that the back-end price was between 11% and 55% over the pre-tender offer price. *Id.* The OCE and DEPA stated, further, that the premiums compared favorably with average tender offer premiums at that time. *Id.*

157. *See* Letter from Executive Office of the President, *supra* note 139, at 3 (noting that shareholders selling to arbitrageurs do not need further protection because selling shareholders get quick premium and elimination of risks associated with tender offers).

158. *See* Exchange Act Release, *supra* note 8, at 37479 (stating that empirical evidence does not clearly indicate whether defensive tactics accompanying market sweep or market sweep itself harmed shareholders); Letter from Council of Economic Advisers, *supra* note 139, at 3 (noting that only case in which large open market purchase during a control contest harmed target shareholders was case in which target management adopted defensive tactics); *see also* SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 947 (9th Cir. 1985). In *SEC v. Carter Hawley Hale Stores, Inc.* target management, Carter Hawley Hale Stores (CHH), adopted a series of defensive tactics, including a large repurchase program, to defeat a hostile bid. *Id.* at 947. The shareholders who did not sell the target stock to CHH, the back-end shareholders, received a premium for the target stock that was less than 1% above the pre-tender offer price. *Id.*

159. *See* Letter from Council of Economic Advisers, *supra* note 139, at 3 (asserting that because state law provides shareholders remedies for target management's breach of fiduciary duties, shareholders challenging target management's harmful defensive market sweeps do not need regulation of all market sweeps).

opponents argue that the increased regulation of market activity will hurt shareholders.[160] Opponents explain that market sweeps occur because arbitrageurs obtain large blocks of target stock from shareholders choosing to sell the target stock at a guaranteed profit rather than risk the tender offer.[161] Opponents claim that a person seeking control over a corporation may choose a market sweep because a market sweep is less expensive and administratively easier than a tender offer.[162] Opponents argue, however that the arbitrageurs' concentration of target stock ownership also provides an efficient means of consummating successful tender offers.[163] Opponents predict that if the SEC restricts arbitrageurs' ability to obtain or sell the target stock by regulating market sweeps, arbitrageurs are likely to participate less in the market and will pay the risk-averse shareholders less for the target stock.[164] Opponents anticipate, consequently, that market sweep regulation will limit the shareholders' opportunity to sell the target stock to arbitrageurs for a premium except when the shareholders sell the target stock to the offeror.[165] Opponents claim, further, that because target stock no longer would be in the hands of a few arbitrageurs, a decrease in arbitrage activity could deter tender offers.[166] Opponents argue that if tender offer activity decreases significantly, shareholders will lose the opportunity to profit from tender offers.[167]

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160. *See* Letter from Executive Office of the President, *supra* note 139, at 5 (explaining how restriction of arbitrage activity will decrease tender offer activity which will hurt shareholders); Letter from Department of Justice, *supra* note 139, at 6 (asserting that by restricting arbitrage activity SEC will impair ability of small shareholders to sell stock to arbitrageurs and insure profit); *infra* notes 161-67 and accompanying text (explaining how increased regulation of market sweeps could discourage tender offers, which would harm shareholders).

161. *See* Letter from Council of Economic Advisers, *supra* note 139, at 2 (noting that arbitrageurs obtain large blocks of target stock from risk-averse shareholders). Arbitrageurs serve an important role in the market because arbitrageurs reallocate to themselves risk of shareholders unwilling to bear it. *Id.* By assuming the risks of a tender offer, arbitrageurs provide the market with liquidity. *Id.*

162. *See* Zwirb, *SEC Takeover Regulation Would Be Unwarranted*, LEGAL TIMES, Jan. 20, 1986, at 20, col. 1 (stating that complexity and expense of Williams Act regulations encourage persons seeking corporate control to avoid tender offer process and use strategies such as market sweeps).

163. Letter from Council of Economic Advisers, *supra* note 139, at 4; *see* Letter from Executive Office of the President, *supra* note 139, at 5 (noting that arbitrageurs purchasing target stock from risk averse shareholders and selling target stock to offeror contributes to liquidity and efficient functioning of capital markets).

164. *See* Letter from Council of Economic Advisers, *supra* note 139, at 2 (predicting possible decrease in arbitrage activity as result of Proposed Rules).

165. *Id.* at 3; *see* Letter from Department of Justice, *supra* note 139, at 3-4 (stating that although Proposed Rules do not regulate shareholders' sales of target stock on open market, regulation of market sweeps will impair shareholders' ability to sell target stock on open market).

166. *See* Letter from Executive Office of the President, *supra* note 139, at 5 (predicting that market sweep regulation will inhibit arbitrage activity and, accordingly, may discourage offerors from making tender offers).

167. *Id.*

Although commentators present several arguments supporting and opposing the regulation of market sweeps, the SEC should choose not to regulate market sweeps.[168] Unlike an unregulated tender offer, a market sweep does not coerce ill-informed shareholders hurriedly to decide whether to sell target stock.[169] Generally, shareholders selling target stock in a market sweep are arbitrageurs.[170] As professional investors, arbitrageurs have access to any information needed to make an investment decision.[171] Furthermore, because so few shareholders own blocks of stock large enough to interest a person making a market sweep, arbitrageurs who own large blocks of stock have the leverage to gain any necessary information before selling target stock in the market sweep.[172] The shareholders who decide to sell the target stock to the arbitrageurs before the market sweep are reacting to the inherent risks associated with tender offers and not to any coercive pressure that the person making a market sweep is applying.[173] Furthermore, Congress did not intend the Williams Act to protect shareholders from normal market pressures, only from coercion by offerors.[174]

The SEC should not regulate market sweeps not only because shareholders selling target stock to a person sweeping the market do not need extra protection, but also because all shareholders faced with a market sweep appear to make comparable profits in market sweeps.[175] Shareholders selling target stock to arbitrageurs before the market sweep profit from the inflated market price and avoid the risks associated with the tender offer.[176] Shareholders who sell target stock on the market after the completion of the market sweep typically sell the target stock for a price comparable to

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168. *See infra* notes 169-85 and accompanying text (discussing reasons that SEC should not regulate market sweeps).

169. *See supra* notes 141-47 and accompanying text (discussing difference in nature of pressure that tender offers and market sweeps impose upon shareholders).

170. *See supra* notes 142-49 and accompanying text (discussing mechanics of market sweep and noting that person engaging in market sweep buys target stock from arbitrageurs).

171. *See supra* note 143 and accompanying text (noting arbitrageurs' superior access to investment information).

172. *See supra* note 146 and accompanying text (discussing how arbitrageurs selling target stock in market sweep have leverage over person sweeping market and, thus, can obtain necessary information to make rational investment decision).

173. *See supra* notes 33-41 and accompanying text (discussing how risks associated with tender offers pressure shareholders to sell target stock to arbitrageurs).

174. *See supra* notes 19-20 and accompanying text (discussing purpose of Williams Act being to protect shareholders from offeror's coercive conduct).

175. *See* Exchange Act Release, *supra* note 8, at 37479 (noting that, on average, shareholders selling target stock after market sweep gain premium comparable to market sweep premium); *supra* note 154-59 and accompanying text (asserting that market sweeps do not treat shareholders disparately).

176. *See supra* notes 33-43 and accompanying text (describing increase in target stock's market price following announcement of tender offer and noting that some shareholders prefer to sell to arbitrageurs and avoid risks associated with tender offer); *supra* note 155 and accompanying text (noting that all shareholders profit in nondefensive market sweeps).

the price that arbitrageurs receive in the market sweep.[177] Although arbitrageurs may make more money in a market sweep than the nonprofessional shareholders who sell target stock to arbitrageurs, arbitrageurs assume the risks of the tender offer in exchange for the potential to make a larger profit.[178] The structure of the investment market provides investors willing to bear a greater risk with a greater opportunity for profit than shareholders unwilling to bear the increased risk.[179] Accordingly, the investment protection objectives of the Williams Act regulations do not exist in market sweeps because shareholders have the information, the opportunity, and the time to make a rational investment decision.[180]

Finally, the SEC should not regulate market sweeps because, although market sweeps theoretically encourage investors seeking control over a corporation to work outside of the tender offer process, market sweeps of the type that the SEC proposes to regulate generally are rare.[181] Market sweeps targeted for regulation by the SEC are unusual because few investors have the capital to make a market sweep without having assurances that the market sweep will result in future control of the corporation.[182] The SEC acknowledges that only five market sweeps of the last several years would have violated the Proposed Rules.[183] Four of the five market sweeps potentially regulated by the Proposed Rules did not harm shareholders.[184] Thus, the SEC should not regulate market sweeps because market sweeps do not occur often enough and do not have enough of a negative impact upon shareholders to merit regulation.[185]

The SEC should not extend the Williams Act protections and regulate market sweeps because market sweeps are not a widespread phenomenon and because market sweeps do not appear to pose serious threats to

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177. *See* Exchange Act Release, *supra* note 8, at 37480 (discussing statistics demonstrating that shareholders who sell target stock after market sweep generally receive fair price for target stock after market sweeps).

178. *See supra* note 44 and accompanying text (noting that arbitrageurs assume tender offer risks on assumption that arbitrageurs can sell target stock at increased price later).

179. *See* Zwirb, *supra* note 162, at 20, col. 3 (explaining that returns in financial and capital markets are proportional to risk); Note, *supra* 120, at 115 n.138 (stating that in securities market, investors bearing greater risk generally have greater potential return).

180. *See supra* notes 142-53 and accompanying text (discussing reasons that, unlike tender offer, market sweep does not harm innocent shareholders).

181. *See infra* notes 182-84 and accompanying text (discussing rare occurrence of market sweeps).

182. Letter from Bogen to Katz, Commissioner of SEC at 2 (Dec. 18, 1987) (commenting on Proposed Rules) (available in SEC File No. S7-33-87)(noting that investors usually do not make market sweeps because most investors cannot afford to purchase target stock without assurances that purchaser can obtain control over target corporation).

183. Exchange Act Release, *supra* note 8, at 37479.

184. *Id.*; *supra* note 156 and accompanying text (explaining how shareholders profit from nondefensive market sweeps).

185. *See supra* notes 181-84 and accompanying text (noting infrequency of market sweeps and market sweep's negligible affect on shareholders).

uninformed shareholders.[186] SEC regulation of market sweeps will increase the cost of making tender offers and give unwanted protection to arbitrageurs, arguably the investors who need the least protection.[187] Because SEC regulation of market sweeps would not prohibit risk-averse shareholders from selling target stock in the open market, risk-averse shareholders will continue to seek a risk free return for their stock.[188] SEC regulation of market sweeps simply will make it more difficult for risk-averse shareholders to obtain the risk free profit that risk-averse shareholders often seek.[189] Furthermore, SEC regulation of market sweeps would prevent a person seeking corporate control from taking advantage of normal market dynamics.[190] By extending the Williams Act protections to market sweeps, the SEC would not prevent a person seeking corporate control from coercing shareholders. The normal dynamics of the securities market will coerce the shareholders to some extent and the Williams Act regulations cannot insulate shareholders from all of the risks of the securities market.[191] Yet, Congress enacted the Williams Act specifically to protect shareholders during a tender offer from an offeror's coercion to sell target stock.[192] Therefore, the SEC would not promote the primary objective of the Williams Act by extending the Williams Act protections to market sweep.

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186. *See supra* note 183 and accompanying text (noting that only five market sweeps of last several years would fall under Proposed Rules); *supra* notes 155-57 and accompanying text (stating that SEC statistics demonstrate that all target shareholders profit from market sweep).

187. *See supra* note 150 and accompanying text (noting that market sweep regulation will increase cost of making tender offer by decreasing arbitrage activity); *supra* notes 142-43 and accompanying text (stating that sellers in market sweeps generally are arbitrageurs who are sophisticated investors, and not innocent shareholders in need of Williams Act protection).

188. Letter from Chiappinelli to Katz, Commissioner of SEC at 1 (Dec. 5, 1987) (commenting on Proposed Rules) (available in SEC File No. S7-33-87) (stating that Proposed Rules will not protect shareholders from unwarranted pressure to reach a hasty decision whether to tender target stock because Proposed Rules, like Williams Act regulations, do not prohibit shareholders from selling in open market).

189. *See supra* notes 164-65 and accompanying text (explaining opponents prediction that regulation of market sweep will decrease open market demand for target stock during tender offer).

190. *Cf.*, *supra* notes 44-47 and accompanying text (discussing how announcement of tender offer concentrates target stock among relatively few shareholders).

191. *See supra* notes 32-43 and accompanying text (describing risks that, despite Williams Act regulations, shareholders face during tender offer).

192. *See supra* notes 13-20 and accompanying text (discussing tender offer practices that Congress saw as coercive to shareholders).