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WHAT IS A TENDER OFFER?

The Williams Act[1] amended the Securities Exchange Act of 1934 ('34 Act)[2] to regulate large scale stock acquisitions, including tender offers.[3] Increasingly frequent attempts to gain corporate control through common stock acquisition have focused the attention of the corporate bar on determining what is a "tender offer."[4] The Williams Act does not define a tender offer and, until recently, the Securities and Exchange Commission (SEC) had refused to promulgate a tender offer definition.[5] On November 29, 1979, however, the SEC issued Proposed Rule 14d-1 which, if adopted, would define the term "tender offer" under the Williams Act.[6] The SEC's forthcoming tender offer definition is especially significant because recent court decisions have failed to produce a uniform test for determining whether a specific stock acquisition plan is a tender offer under the Williams Act.[7]

The purpose of the Williams Act is to protect shareholders in connection with transfers of corporate control.[8] Section 13(d) of the '34 Act, a Williams Act addition, provides that a person who acquires in excess of five percent of a corporation's common stock must file certain relevant information with the SEC within ten days of the acquisition.[9] In particular, section 13(d) requires the purchaser to disclose in a Schedule 13D any

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[1] 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976 & Supp. II 1978) (adding §§ 13(d)-(e), 14(d)-(f) of the '34 Act).

[2] 15 U.S.C. 78a-78kk (1976 & Supp. II 1978).

[3] *See* note 8 *infra*.

[4] *See* E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 1-2 (1977).

[5] *See* SEC Securities Exchange Act Release No. 34-12676 (August 2, 1976), *reprinted in* [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,659, at 86,695-96. The SEC justified its refusal to establish a tender offer definition by asserting that the diverse nature of stock acquisition methods demands flexibility in applying § 14(d). *Id.*

[6] SEC Securities Exchange Act Release No. 34-16385 (Nov. 29, 1979), *reprinted in* [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,374, at 82,600 (hereinafter cited as Proposed Tender Offer Definition).

[7] Courts usually apply certain "shareholder pressure" factors in ruling whether a specific stock acquisition plan was a tender offer. *See* note 48 *infra*. Shareholder pressure factors, however, are too vague to constitute a uniform, predictable tender offer definition. *See generally* note 131 *infra*.

[8] *See* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 35 (1977); 113 CONG. REC. 854 (1967) (statement of Sen. Williams). The purpose of the Williams Act is to insure that shareholders confronted by a tender offer will have adequate information and time with which to make an intelligent investment decision. *See* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 35 (1977); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975). Congress also designed the Williams Act to inform investors of transfers of corporate control by means other than tender offer. *See* 15 U.S.C. § 78m(d) (1976 & Supp. II 1978) (§ 13(d) of '34 Act); 113 CONG. REC. 856 (1967) (statement of Sen. Williams).

[9] 15 U.S.C. § 78m(d)(1)(1976 & Supp. II 1978).

intention to liquidate the acquired company.[10] By enacting section 13(d), Congress thus recognized that disclosure of information pertaining to a change in corporate control is vital to enable a shareholder to protect his investment.[11]

Congress also enacted section 14(d) of the '34 Act to ensure disclosure of pertinent information regarding shifts in corporate control.[12] Section 14(d) provides that a person who solicits more than five percent of a corporation's stock by means of a tender offer must file immediately a Schedule 14D.[13] Section 14(d) disclosure parallels the information requirement under section 13(d).[14] A significant difference between sections 13(d) and 14(d), however, is that section 13(d) allows a stock acquisition to remain undisclosed for ten days while section 14(d) requires contemporaneous disclosure when a prospective purchaser acquires stock by means of a tender offer.[15] A second important distinction between sections 13(d) and 14(d) is that section 13(d) permits the buyer and sellers freedom to negotiate the terms of their transaction while section 14(d) automatically structures the terms of a tender offer.[16] Section 14(d) requires that the tender solicitor's offer comply with certain substantive provisions.[17] Whether a specific stock acquisition plan constitutes a tender offer is significant because the substantive provisions of section 14(d) increase the expected cost of purchasing a target company's shares.[18]

Courts must look to the Williams Act's purpose to determine whether a purchaser must disclose a stock acquisition program as a section 14(d) tender offer or as a section 13(d) transaction.[19] The structure of the Williams Act indicates that Congress enacted section 14(d) of the '34 Act to equalize the bargaining power between small shareholders and tender solicitors.[20] Congress realized that the volatile atmosphere of a publicized

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[10] *See id.* § 78m(d)(1)(C).

[11] *See* 113 CONG. REC. 855-56 (statement of Sen. Williams); note 114 *infra.*

[12] *See* 113 CONG. REC. 854-55 (1967). (statement of Sen. Williams).

[13] *See* 15 U.S.C. § 78n(d)(1) (1976).

[14] *See id. Compare* 17 C.F.R. § 240.14d-100 (1980) *with* id. § 240.13d-101.

[15] *Compare* 15 U.S.C. § 78m(d)(1)(1976 & Supp. II 1978) *with id.* § 78n(d)(1).

[16] *Compare id.* § 78m(d) *with id.* § 78n(d).

[17] *See id.* § 78n(d).

[18] *See* 15 U.S.C. § 78n(d)(5)-(7) (1976); Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers,* 57 TEX. L. REV. 1, 19-20 (1978); Smiley, *Tender Offers, Transaction Costs and the Theory of the Firm,* 58 REV. ECON. & STAT. 22, 31 (1976).

[19] The Supreme Court consistently scrutinizes legislative history to interpret federal securities statutes. *See, e.g.,* Transamerica Mortg. Advisers, Inc. v. Lewis, 100 S.Ct. 242, 245 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979). Both § 13(d) and § 14(d) regulate stock purchases resulting in holdings in excess of five percent of the outstanding shares of a certain class of securities. *See* 15 U.S.C. §§ 78m(d)(1), 78n(d)(1) (1976 & Supp. II 1978). Thus, the distinguishing factor between a § 13(d) and a § 14(d) transaction is the method of acquisition.

[20] If the larger shareholders of a target company needed the protection of § 14(d), presumably Congress would have imposed the disclosure and substantive provisions of § 14(d) on all purchasers of large blocks of shares. The only rational basis for excluding some trans-

tender solicitation engenders uninformed and hasty investment decisions that the disclosure and substantive provisions of the Williams Act can prevent.[21] The less onerous terms of section 13(d), however, reflect Congress' belief that larger shareholders do not need the protection that section 14(d) affords because these shareholders enjoy sufficient bargaining power to exact pertinent information from a potential buyer.[22] Thus, whether an acquisition of a substantial amount of stock constitutes a tender offer, rather than a section 13(d) transaction, depends on the number of shareholders solicited.[23] If a person solicits large numbers of a company's stockholders, the solicitor will contact small investors who are unable to demand the necessary information.[24] Conversely, if an offeror solicits a small number of a company's shareholders, the solicitees will be large shareholders who have the leverage to demand the information and time conducive to an informed investment decision.[25]

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actions from the ambit of § 14(d) is that the market participants in these transactions do not need the protection provided by § 14(d). *See also* note 22 *infra*.

[21] *See* Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,590 (N.D. Ill. 1973); Cattlemen's Invest. Co. v. Fears, 343 F. Supp. 1248, 1251 (W.D. Okl.), *vacated per stipulation*, Civil No. 72-152 (W.D. Okla. May 8, 1972); note 26 *infra*.

[22] *See* Note, *The Developing Meaning of 'Tender Offer' Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1276 n.137 (1973) [hereinafter cited as *Developing Meaning*]. One commentator has stated that pressure is absent from purchases involving a few, substantial shareholders since these persons have the leverage to make an informed, carefully considered decision on whether to sell their controlling interest. *Id.* Thus, a stock acquisition that involves only a small number of large shareholders is regulated by § 13(d) rather than by § 14(d). *See* note 23 *infra*.

[23] *See* Einhorn & Blackburn, *The Developing Concept of "Tender Offer": An Analysis of the Judicial and Administrative Interpretations of the Term*, 23 N.Y. SCH. L. REV. 379, 396 (1978) [hereinafter cited as *Judicial Interpretations of a Tender Offer*]. Einhorn and Blackburn state that the crucial factors in determining whether a stock acquisition program is a tender offer are the number of shareholders contacted and the percentage of the target's shareholders contacted. The authors explain that pressure applied on target shareholders to sell their stock would not be deemed a tender offer if the prospective purchaser only contacted one or two shareholders. *Id.* The authors further state that the percentage of target shareholders contacted is generally more significant than the number of shareholders solicited. *Id.* at 396-97 n.84. Einhorn and Blackburn support this contention by predicting that a purchaser who contacts 40 out of 600 target stockholders will not be making a tender offer, while a purchaser soliciting 40 of 50 shareholders probably has made a tender offer. *Id.* The number of shareholders solicited in a stock acquisition attempt is inversely proportional to the bargaining power that any one solicitee may exert to obtain adequate disclosure of pertinent information from the tender solicitor.

[24] Depending upon the size of the target company, the solicitation of large numbers of the target's shareholders will necessarily include solicitees who individually hold minute percentages of the target company's stock. The definition of a tender offer in a given factual situation, therefore, depends on a determination of how many shareholders can be solicited while still maintaining an equitable parity of bargaining power between the solicitees, as individuals, and the tender solicitor. *See* note 141 *infra*.

[25] The solicitation cost per share is minimized when one contacts the largest shareholders of a target company. Presumably, a tender solicitor will choose stock acquisition methods that maximize the expected profit of the purchase. Thus, the solicitor will first solicit

Although the number of shareholders solicited is the determinative element of a tender offer, courts also look to other factors to determine whether transactions fall within the scope of section 14(d). Many courts accept the premise that investors need disclosure of pertinent information to prevent the tender solicitor from pressuring them into hasty, ill-considered decisions to sell their stock.[26] Courts measure the level of impermissible shareholder pressure attending tender solicitation by analyzing factors besides the number of shareholders solicited. Courts examine

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the largest shareholders of the target company. A person who makes a tender offer by soliciting only limited numbers of a target's shareholders is described as making an "unconventional tender offer." *See generally* M. LIPTON & E. STEINBERGER, TAKEOVERS & FREEZEOUTS 113-16 (1978) [hereinafter cited as LIPTON & STEINBERGER]. The legislative history of the Williams Act described a conventional tender offer as a bid to buy shares of a company, usually at a price above the current market price. H.R. REP. No. 1711, 90th Cong., 2nd Sess. 8-9, *reprinted in,* [1968] U.S. CODE CONG. & AD. NEWS 2811, 2811. The tender offeror obligates himself to purchase a specific portion of the tendered shares if certain specified conditions are met. *Id.* Since the Williams Act does not define a tender offer, whether § 14(d) regulates unconventional tender offers is unclear. Several commentators contend that Congress failed to define a "tender offer" because its conventional meaning was well-known to the business and financial community. LIPTON & STEINBERGER, *supra* at 107. The SEC and the courts, however, have identified unconventional tender offers and have interpreted § 14(d) as embracing them as well as traditional ones. *See* Cattlemen's Invest. Co. v. Fears, 343 F. Supp. 1248, 1253 (W.D. Okl. 1972); Proposed Tender Offer Definition, *supra* note 6, at 82,602. *But see* Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1207 (2d Cir. 1978) (court decided not to extend "tender offer" beyond its conventional meaning under instant facts).

[26] *See, e.g.,* Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,590 (N.D. Ill. 1973); Cattlemen's Invest. Co. v. Fears, 343 F. Supp. 1248, 1251-52 (W.D. Okla. 1972) The *Cattlemen's* court was the first to expand the scope of the Williams Act to unconventional tender offers. There, the defendant solicited a large number of the target's shareholders. *See* 343 F. Supp. at 1251-52. *Cattlemen's* ruled that the defendant's actions constituted a tender offer. The court reasoned that Congress intended the Williams Act to prevent the type of uninformed, hurried investment decisions that the defendant's widespread solicitations could have fostered. *Id. See generally* Note, Cattlemen's Investment Co. v. Fears: *Informal Solicitation of Stock Held to Constitute a Tender Offer,* 1972 DUKE L. J. 1051. In Nachman Corp. v. Halfred, Inc., the defendant sought control of Nachman by soliciting 40 of the corporation's 600 shareholders. The defendant eventually bought stock from 14 of the solicitees. [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,592. The *Nachman* court expressly adopted the thesis of *Developing Meaning, supra* note 22, at 1270, which suggested that courts should apply § 14(d) to all offers having the same pressurized impact on shareholders as a conventional tender offer. [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,592. The *Nachman* court, however, rejected plaintiff's contention that the defendant's solicitations constituted an unconventional tender offer governed under § 14(d). *Id.* The district court stated that the solicitees, who included Nachman directors and large shareholders, presumably were powerful enough not to be pressured into making uninformed, ill-considered decisions to sell. *Id.* Specifically, the court reasoned that the defendant had not pressured the shareholders with offers of limited duration, and instead had returned to several of the solicitees with higher offers. *Id.* The *Nachman* court also decided that open market purchases of Nachman stock did not constitute a tender offer because a public announcement did not precede the purchases. *Id. See generally* 1974 *Securities Law Developments: The Tender Offer — A Developing Concept,* 32 WASH. & LEE L. REV. 772-76 (1975).

whether the tender solicitor offers unsophisticated investors a substantial premium over the current market price.[27] Additional shareholder pressure factors have included time limits on the offer, fixed rather than negotiable offer terms, and minimum purchase contingencies.[28]

Courts apply these shareholder pressure factors to both open market and privately negotiated stock purchases to determine whether a purchaser must comply with section 13(d) or section 14(d).[29] In the context of a privately negotiated transaction, courts ascertain whether the tender solicitor privately contacted a widespread number of the target shareholders in a manner that pressured them to sell their shares.[30] Open market purchases may constitute a tender offer when the purchaser publicizes the proposed acquisition plan in a manner that pressures all of the target shareholders into an investment decision.[31] Recent judicial decisions, however, have not established the precise combination of shareholder pressure factors that invokes the jurisdiction of section 14(d).

In *S-G Securities, Inc. v. Fuqua Investment Co.*,[32] the Federal District Court for the District of Massachusetts ruled that open market and privately negotiated purchases accompanied by publicity constitute a tender offer.[33] In *S-G Securities,* the defendant sought control of S-G through private negotiations with the board of directors of the target company.[34] Rebuffed by S-G's board, Fuqua publicly announced its intention to acquire control of S-G.[35] Fuqua subsequently bought twenty-eight percent of the outstanding S-G shares through purchases on the American Stock Exchange and through privately negotiated purchases.[36] S-G sought a preliminary injunction to prevent Fuqua from acquiring additional shares and to prohibit Fuqua from voting the purchased shares.[37] The district court granted S-G's motion for a preliminary injunction,

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[27] *See, e.g.,* Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,592 (N.D. Ill. 1973). Courts typically regard as "sophisticated" investors corporate insiders and market professionals, such as financial institutions. *See, e.g.,* D-Z Inv. Co. v. Holloway, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,771, at 96,563 (S.D. N.Y. 1974).

[28] *See, e.g.,* Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,145 (N.D. Ohio 1979). A purchaser imposes a minimum purchase contingency when he conditions his offer to purchase target shares on the resulting tender of a specified minimum number of shares.

[29] *See, e.g.,* Stromfeld v. Atlantic & Pac. Tea Co., 484 F. Supp. 1264, 1273 (S.D. N.Y. 1980) (privately negotiated); Chromalloy Amer. Corp. v. Sun Chem. Corp., 474 F. Supp. 1341 (E.D. Mo.), *aff'd on other grounds,* 611 F.2d 240 (8th Cir. 1979) (open market).

[30] *See, e.g.,* Wellman v. Dickinson, 475 F. Supp. 783, 824 (S.D. N.Y. 1979).

[31] *See* S-G Secur., Inc. v. Fuqua Invest. Co., 466 F. Supp. 1114, 1126 (D. Mass. 1978); Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,590 (N.D. Ill. 1973).

[32] 466 F. Supp. 1114 (D. Mass. 1978).

[33] *Id.* at 1126-27.

[34] *Id.* at 1119-21.

[35] *Id.* at 1119.

[36] *See id.*

[37] *Id.* at 1118.

holding that the plaintiff had satisfied its burden of establishing the likelihood that the defendant had made an illegal tender offer by not complying with the disclosure and substantive provisions of section 14(d).[38] The *S-G Securities* court stated that the allegations concerning the defendant's open market and privately negotiated purchases, if true, constituted a tender offer because a public announcement of Fuqua's intention to acquire S-G stock preceded the defendant's purchases.[39] While acknowledging that open market and privately negotiated stock acquisitions do not fall automatically within the ambit of section 14(d), the district court explained that Fuqua's public announcements may have subjected solicitees to the pressures that Congress designed the Williams Act to prevent.[40]

In *Hoover Co. v. Fuqua Industries, Inc.*,[41] the Federal District Court for the Northern District of Ohio also ruled that publicized stock solicitations could constitute a tender offer.[42] The Fuqua solicitation letter solicited 100 Hoover family members holding forty-one percent of the plaintiff's stock and offered them a large cash premium over the current market price.[43] Fuqua subsequently raised the offering price twice to a

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[38] *Id.* at 1126-27.

[39] *Id.* at 1125-26, (citing Cattlemen's Inv. Co. v. Fears, 343 F. Supp. 1248 (W.D. Okla. 1972)). On July 17, 1978, S-G published a statement that the company was negotiating with several unnamed parties interested in purchasing S-G shares. 466 F. Supp. at 1119. The next day, Fuqua announced that it was proposing a tender offer for approximately 35% of S-G's outstanding shares. *Id.* The facts in *S-G Securities* thus suggest the question of whether the target corporation's press release may create the publicity that will necessitate the purchaser's compliance with § 14(d). This question has far reaching implications because a target corporation opposed to the solicitor's purchase plan could immediately publicize it, hoping to capitalize on the delay necessarily caused by the filing requirements of § 14(d). Whether publicity disseminated by a target company can unilaterally force a solicitor to comply with the disclosure and substantive provisions of § 14(d) also is significant because the target directors' fiduciary duties may compel disclosure of a proposed tender offer to the target's shareholders. *Cf.* Condec Corp. v. Lunkenheimer Co., 43 Del. Ch. 353, 363, 230 A.2d 769, 776 (1967) (target directors owe fiduciary duty to shareholders during takover attempt.) *See generally* Fleischer, Mundheim & Murphy, *An Initial Inquiry into the Responsibility to Disclose Market Information*, 121 U. PA. L. REV. 798 (1973). The *S-G Securities* court, however, stated that regardless of which party's announcement was first in time, Fuqua's announcement necessitated compliance with the protective provisions of § 14(d). 466 F. Supp. at 1126 n.11. Thus, whether a target can invoke § 14(d) by unilaterally publicizing the solicitor's plans remains unclear. *But see generally* note 64 *infra*.

[40] 466 F. Supp. at 1125.

[41] [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,145 (N.D. Ohio 1979).

[42] *Id.* at 96,151.

[43] *See id.* at 96,146, 96,150; [Permanent] OVER THE COUNTER STOCK REP. (S&P) 4174 (May 9, 1980). The *Hoover* court construed Fuqua's letters requesting the tender of the Hoover family's stock as effectively soliciting all those family members who owned Hoover stock. [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,147 & n.2. Thus, despite Fuqua's contention that only 23 Hoover family shareholders received letters, the court held that Fuqua solicited 100 Hoover family shareholders because each shareholder could take advantage of Fuqua's offer. *Id.* at 96,146 n.1, 96,147 & n.2. The *Hoover* opinion, however, does not indicate whether any of the family's shares were owned beneficially sub-

level approximately eighty percent above the market price existing before Fuqua's first offer.[44] While the offer was outstanding, Fuqua frequently issued press releases in connection with the proposed purchases.[45] The Hoover Company sought an injunction against Fuqua's solicitations, claiming that the defendant was proceeding with an undisclosed tender offer.[46] The *Hoover* court permanently enjoined Fuqua from soliciting Hoover stock unless the defendant first complied with section 14(d)'s disclosure provision.[47]

The *Hoover* court concluded that Fuqua's offer was a section 14(d) tender offer based on eight factors suggested by the SEC.[48] The court reasoned that Fuqua's public announcements constituted an active and widespread solicitation which could have pressured the unsophisticated Hoover family members into rapid, uninformed investment decisions.[49] Without defining the term "unsophisticated investor," the court concluded that the Hoover family members who had not worked for the company were indistinguishable from unsophisticated public shareholders.[50] The district court further reasoned that Fuqua's letter was typical of a tender offer because the defendant established the offering price unilater-

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ject to the complete discretion of an institutional trustee. *See id.* Assuming that the Hoover shares owned by Hoover family members were subject to the complete investment discretion of a trustee, the court should have ruled that Fuqua solicited one person, the trustee. *See* note 159 *infra*.

[44] *See* [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,146. The *Hoover* court noted that Fuqua's public announcements expressed the possibility of a later tender offer to shareholders who were not members of the Hoover family. *Id.* at 96,150.

[45] *See id.* at 96,146.

[46] *Id.* at 96,145.

[47] *Id.* at 96,151.

[48] The SEC suggested the following factors as considerations in determining whether acquisitions are subject to § 14(d):

1. Whether there is an 'active and widespread solicitation of public shareholders' for shares of an issuer;
2. Whether the solicitation is made for a substantial percentage of the issuer's stock;
3. Whether the offer to purchase is made at a premium over the prevailing market price;
4. Whether the terms of the offer are firm rather than negotiable;
5. Whether the offer is contingent on the tender of a fixed minimum number of shares, and perhaps, subject to the ceiling of a fixed maximum number to be purchased;
6. Whether the offer is open for only a limited period of time;
7. Whether the offerees are subjected to pressure to sell their stock; and
8. Whether public announcements of a purchasing program concerning the target company precede or accompany a rapid accumulation of large amounts of target company securities.

Id. at 96,148.

[49] *Id.* at 96,149-50. The court rejected Fuqua's contention that its announcements were justifiable responses to earlier Hoover press releases by explaining that Fuqua had only introduced one of the Hoover announcements into evidence. *Id.* at 96,150 n.9.

[50] *Id.* at 96,149.

ally, rather than through mutual negotiations.[51] Additionally, the court emphasized that Fuqua had offered the family a substantial premium for their stock.[52]

The Federal District Court for the Eastern District of Missouri recently considered whether certain open market and privately negotiated stock purchases constituted a tender offer. In *Chromalloy American Corp. v. Sun Chemical Corp.*,[53] Sun purchased over six percent of Chromalloy's stock on the open market at prevailing market prices.[54] During Sun's open market purchases, the defendant acquired a large block of the plaintiff's stock through a privately negotiated block trade.[55] Chromalloy subsequently sought a preliminary injunction prohibiting Sun from purchasing additional amounts of the plaintiff's shares.[56] The plaintiff alleged that Sun had made an illegal tender offer by not complying with section 14(d)'s disclosure and substantive requirements.[57] The district court, however, ruled that the defendant's acquisitions did not constitute a tender offer, reasoning that Sun did not pressure Chromalloy shareholders to sell their stock.[58] The *Chromalloy* court explained that Sun's purchases involved neither a premium, a time limit, nor a minimum purchase contingency.[59]

Sun, prior to its privately negotiated acquisition of Chromalloy stock, had filed a Schedule 13D with the SEC.[60] In the Schedule 13D, Sun had disclosed its intention to purchase additional Chromalloy shares.[61] Further, Sun had filed a registration statement pursuant to a public offering of Sun's debentures.[62] Sun's registration statement disclosed that the company intended to use a portion of the offering's proceeds to purchase Chromalloy stock.[63] The facts in *Chromalloy* thus raise the issue of whether a public document, such as a Schedule 13D, constitutes sufficient

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[51] [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,150. While the *Hoover* court characterized Fuqua's offer as "firm" rather than negotiable, the court's analysis ignored the fact that Fuqua had raised its offer twice during the solicitation. *See id. But cf.* Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,592 (N.D. Ill. 1973) (court considered defendant's raising his bidding price to indicate that solicitees were powerful enough to resist any pressure to sell their stock).

[52] [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,150. Besides ruling that Fuqua offered a substantial premium, the *Hoover* court found additional factors of the SEC's definition satisfied. The district court held that the defendant imposed a time limit on his offer and that the Fuqua offer was expressly contingent on the tender of a minimum number of shares. *Id.*

[53] 474 F. Supp. 1341 (E.D. Mo. 1979).

[54] *Id.* at 1344-45.

[55] *Id.* at 1345.

[56] *Id.* at 1346.

[57] *Id.* at 1346-47.

[58] *Id.* at 1347.

[59] *Id.* at 1346.

[60] *Id.* at 1344.

[61] *Id.*

[62] *Id.*

[63] *Id.*

publicity to qualify Sun's subsequent purchases as a tender offer. The *Chromalloy* court, however, did not consider this issue.[64]

In *Brascan Ltd. v. Edper Equities Ltd.*,[65] the Federal District Court for the Southern District of New York recently decided that private solicitations to approximately fifty shareholders culminating in open market purchases did not constitute a tender offer.[66] In *Brascan,* the defendant acquired twenty-five percent of Brascan's outstanding shares through purchases on the American Stock Exchange.[67] A brokerage firm, Gordon Securities (Gordon), was instrumental in Edper's successful attempt to gain control of Brascan.[68] An Edper vice-president informed Gordon that Edper might be willing to buy a large block of Brascan stock at a premium.[69] Subsequently, Gordon contacted twelve large individual investors and between thirty and fifty large institutional shareholders, thereby bringing to the stock exchange a large percentage of the Brascan stock that Edper eventually purchased.[70] Gordon had not guaranteed the solicited shareholders that Edper would buy their share.[71] Instead, Gordon explained to the solicitees that Edper might pay a premium if a sufficiently large block of Brascan stock became available.[72]

On April 9, 1979, twenty-one days before Edper's purchases began, Edper publicly announced that it was considering making a tender offer for forty-five percent of Brascan's outstanding shares.[73] Immediately after Edper's announcement, Brascan publicly proposed a tender offer for the outstanding stock of F.W. Woolworth Co., a corporation owning twice the assets of Brascan.[74] Responding to Brascan's proposed tender offer, Edper issued a second announcement, stating it would not proceed with the Brascan acquisition because of Brascan's Woolworth proposal.[75] Never-

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[64]. The Federal District Court for the Eastern District of Missouri in Chromalloy American Corp. v. Sun Chemical Corp. (*Chromalloy II*) recently granted Sun summary judgment on Chromalloy's § 14(d) claim. [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,253, at 96,772 (E.D. Mo. 1980). The *Chromalloy II* court ruled that any publicity of Sun's desire to purchase Chromalloy stock that may have facilitated Sun's open market purchases was irrelevant to whether the defendant's activities constituted a tender offer. *Id.* at 96,772 n.1. The court explained that Chromalloy had caused the publicity in large part by bringing the suit against the offeror. *Id.*

[65] 477 F. Supp. 773 (S.D. N.Y. 1979).

[66] *Id.* at 789.

[67] *See id.* at 781-84; [Permanent] AMER. STOCK EXCH. REP. (S&P) 7359 (Jan. 1, 1980).

[68] *See* 477 F. Supp. at 780-84. Gordon extensively assisted Edper's acquisition, advising Edper on the financial aspects of the proposed acquisition and suggesting the appropriate timing for the purchases. *Id.* at 780.

[69] *Id.* at 782.

[70] *Id.* at 790.

[71] *Id.*

[72] *Id.* Although Edper did not remunerate Gordon for the assistance rendered, the brokerage house subsequently earned lucrative commissions by soliciting the shares that Edper bought on the American Stock Exchange. *Id.* at 782.

[73] *Id.* at 778.

[74] *Id.; see* [Permanent] N.Y.S.E. STOCK REP. (S&P) 2500 (Dec. 10, 1979).

[75] 477 F. Supp. at 779. Relying on various sources of information in the financial com-

theless, on April 30, 1979, Edper purchased approximately half of the Brascan shares that the defendant would ultimately purchase.[76] On the same day, several Canadian stock exchanges requested that Edper publicize the amount of its purchase of Brascan stock.[77] Edper complied with the request and publicly announced that it was not planning to acquire additional Brascan shares.[78] The next day Edper revised its strategy and completed its purchases of Brascan stock on the American Stock Exchange.[79]

Brascan sued Edper under section 14(e) of the Williams Act,[80] alleging that Edper's April 30, 1979, statement was misleading in light of the subsequent purchases.[81] The *Brascan* court, however, rejected the contention that section 14(e) regulated Edper's purchases of Brascan stock.[82] Citing the Second Circuit's decision in *Kennecott Copper Corp. v. Curtiss-Wright Corp.*,[83] the *Brascan* court asserted that accumulating large amounts of stock on the open market is not necessarily a tender offer.[84] Since Edper had not engaged in widespread solicitation of Brascan shareholders, Edper's acquisitions constituted permissible open market purchases.[85] The court refused to attribute Gordon's solicitations to Edper, explaining that Gordon had not solicited Brascan shareholders at Edper's behest.[86] Instead, the court determined that Gordon acted in the normal capacity of a seller's broker who properly earned commissions by matching his customer's shares with Brascan's demand.[87]

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munity, Edper concluded that the consummation of Brascan's proposed Woolworth acquisition would drastically impair the value of the Brascan shares. *Id.* at 779.

[76] *See id.* at 781-84.

[77] *Id.* at 783.

[78] *Id.*

[79] *Id.* Edper purchased more Brascan shares because management felt additional shares were necessary to prevent Brascan's proposed acquisition of Woolworth. *See id.* at 781, 784.

[80] 15 U.S.C. § 78n(e) (1976). Section 14(e) of the '34 Act prohibits any fraudulent, deceptive or manipulative act in connection with a tender offer. *Id.* Nothing in the Williams Act suggests that a tender offer under § 14(e) is different than a § 14(d) tender offer.

[81] 477 F. Supp. at 789.

[82] *Id.* at 789.

[83] 584 F.2d 1195 (2d Cir. 1978).

[84] 477 F. Supp. at 789; *accord,* D-Z Inv. Co. v. Holloway, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,771, at 96,562-63 (S.D. N.Y. 1974); Water & Wall Assoc., Inc. v. American Consumer Indus., Inc., [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,943, at 93,759 (D. N.J. 1973).

[85] 477 F. Supp. at 790.

[86] *Id.* at 790. The *Brascan* court rejected the claim that Gordon was Edper's agent. Instead, the court reasoned that Edper and Brascan simply had common interests—the acquisition of Brascan stock on which commissions would be paid. *Id.*

[87] *Id.* at 790 (citing Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195 (2d Cir. 1978)). Under the American Law Institute's Proposed Federal Securities Code (Code), Gordon's solicitations constituted a "tender offer." ALI FEDERAL SECURITIES CODE § 299.68 (Proposed Official Draft) (1978) [hereinafter cited as CODE]. Broker solicitation of more than 35 persons is a tender offer under the Code, unless the broker is engaging in risk arbitrage or marketmaking. *See id.* § 299.68 & Note 2. *See generally* Rosenman, *Role of the Dealer-Manager in Tender and Exchange Offers,* 6 INST. SEC. REG. 83, 83 (1975). Since

The district court stated that even if Gordon's solicitations were attributable to Edper, the defendant had not made a tender offer.[88] The court stated that Gordon had merely scouted approximately fifty, highly professional Brascan shareholders in the manner of a conventional, privately negotiated stock purchase.[89] The *Brascan* court specifically rejected the premise that courts should necessarily apply section 14(e) to privately negotiated purchases of large blocks of stock.[90]

The Second Circuit's opinion in *Kennecott Copper Corp. v. Curtiss-Wright Corp.* supports the *Brascan* court's interpretation of the scope of section 14(e). Pursuant to a secret plan to gain control, the *Kennecott* defendants had acquired nearly ten percent of the target's stock in open market and privately negotiated purchases.[91] Without offering a premium or imposing a deadline by which to respond, the defendant's brokers di-

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Gordon was not buying the Brascan shares, the brokerage house did not engage in either risk arbitrage or marketmaking. *See* 477 F. Supp. at 782; CODE, *supra* § 299.68 Note 2. *See generally* Henry, *Activities of Arbitrageurs in Tender Offers*, 119 U. PA. L. REV. 466, 467-71 (1971).

[88] 477 F. Supp. at 790. The *Brascan* court questioned whether the SEC's eight factors constituted either a permissible or desirable interpretation of § 14(d) of the '34 Act. *Id.* at 791; *see* note 48 *supra*. The court expressed concern that the SEC's factors expanded the intended scope of a "tender offer" under the Williams Act. 477 F. Supp. at 791. The district court also stated that the SEC's vague criteria were undesirable substitutes for a predictable tender offer definition, reasoning that the resulting uncertainty would effectively discourage large scale acquisitions, unless they could be accomplished profitably by a conventional tender offer. *See id.* The *Brascan* court concluded that Congress did not intend to eliminate all transfers of corporate control except those accomplished through a "tender offer." *Id.* at 790. Furthermore, the *Brascan* court determined that even if the SEC factors accurately established the scope of a "tender offer," Edper's purchases did not sufficiently satisfy those criteria. *Id.* at 791. Characterizing the solicited Brascan shareholders as "experienced professionals," the district court refused to hold that Gordon's solicitations had pressured them to sell their stock. *Id.* at 792. The *Brascan* court found that Gordon's soliciting approximately 50 of Brascan's 50,000 shareholders did not qualify as a widespread solicitation. *Id.* at 791. Edper bought the Brascan shares at only a slight premium over the prevailing price and the defendant did not make a non-negotiable offer. *See id.* at 791-92. Although Gordon advised its customers that Edper probably would not purchase Brascan shares unless a sufficient number were available, the court nevertheless held that Edper's offer was contingent on a fixed minimum number of shares "only to a slight degree." *Id.* at 792. Further, the *Brascan* court ruled that public announcements of a purchasing program did not precede or accompany a rapid accumulation of stock. *Id.* The district court, however, did not discuss whether the April 30 press release and Edper's subsequent purchases could have pressured Brascan shareholders into selling. *See id.* at 792. The trading volume of Brascan shares on May 1 was approximately 30 times larger than the normal volume of Brascan shares. *See* [Permanent] AMER. STOCK EXCH. STOCK REP. (S&P) 7359 (Jan. 1, 1980). Thus, the court's conclusion that Brascan shareholders were not pressured into selling is questionable. *See* text accompanying notes 96-99 *infra*.

[89] 477 F. Supp. at 790.

[90] *Id.; accord,* Financial Gen. Bankshares v. Lance, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,403, at 93,429 (D. D.C. 1978). In *Lance,* the defendant soliciting 10 sophisticated shareholders for substantial amounts of stock did not make a "tender offer." *See id.*

[91] 584 F.2d at 1198, 1206. Subsequent to the defendant's stock purchase, the defendant sought control of the target company through a proxy solicitation. *Id.* at 1198.

rectly solicited sixty-two of the target's shareholders.[92] The *Kennecott* court rejected the target's contention that the purchaser's activities constituted a tender offer and stated that the Second Circuit had not adopted an interpretation of a tender offer that differs from its conventional meaning.[93]

While the stock purchases in *Brascan* are closely analogous to the privately negotiated *Kennecott* transactions,[94] the *Brascan* facts differ significantly in one respect from the *Kennecott* facts. In *Kennecott,* the defendant did not publicize its intention to acquire control of the target company.[95] In *Brascan,* however, the defendant widely publicized its interest in acquiring Brascan shares.[96] One result of the publicity surrounding Edper's acquisition plan is that several unsolicited shareholders contacted Gordon to obtain Edper's terms of purchase.[97] Consequently, the court could have concluded that the effect of Gordon's solicitations and Edper's press releases pressured Brascan shareholders to sell their stock.[98] Although the *Brascan* court indicated its acceptance of the shareholder pressure test, the court refused to invoke the jurisdiction of section 14(e) despite the publicity accompanying Edper's purchases.[99] The *Brascan* decision thus is significant for illustrating the flexibility of the shareholder pressure test.[100]

Another Southern District of New York decision, *Wellman v. Dickinson,*[101] also highlights the unpredictable nature of judicial opinions defining a tender offer. In *Wellman,* Sun Company (Sun) attempted to gain control of Becton-Dickinson (BD) through the purchase of one-third of BD's outstanding shares.[102] Without publicly announcing its intentions,

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[92] *Id.* at 1206.

[93] *Id.* The district court in *Kennecott* concluded that the defendant had purchased the target's stock "largely from sophisticated institutional shareholders who were unlikely to be forced into uninformed, ill-considered decisions." *Id.*; 499 F. Supp. 951, 961 (S.D. N.Y. 1978). The Second Circuit, however, did not reject the § 14(d) claim on the basis that defendant's purchases had not exerted pressure on the target's shareholders. *See* 584 F.2d at 1207. Rather than foreclosing the possibility that § 14(d) could regulate an unconventional tender offer, the *Kennecott* court simply refused to interpret the instant facts as a "tender offer." *Id.*

[94] Both *Brascan* and *Kennecott* involved a broker soliciting approximately fifty shareholders on behalf of a purchaser. *See* 584 F.2d at 1206; 477 F. Supp. at 790.

[95] *See* 584 F.2d at 1206.

[96] 477 F. Supp. at 778; *see* text accompanying notes 73-78 *supra.*

[97] *See* 477 F. Supp. at 782.

[98] *Cf.* S-G Securities, Inc. v. Fuqua Investment Co., 466 F. Supp. 1114, 1126 (D. Mass 1978) (publicizing a stock purchase plan and a subsequent rapid stock acquisition constitutes a "tender offer"). In determining whether the publicity of Edper's stock purchase program indicated that a tender offer occurred, the *Brascan* court inexplicably ignored the impact that the April 30 announcement may have had on Edper's ability to make its massive May 1 purchases. *See* 477 F. Supp. at 792; note 88 *supra.*

[99] *See* 477 F. Supp. at 792.

[100] *See* note 122 *infra.*

[101] 475 F. Supp. 784 (S.D. N.Y. 1979).

[102] *Id.* at 824.

Sun secretly solicited nine individuals and thirty financial institutions.[103] The defendant offered a thirty-seven percent premium over the current market price for the BD shares.[104] Sun conditioned its offer upon the availability of twenty percent of the target's stock and further required that the solicitees respond by a certain time.[105] Sun was aware that courts often distinguish a privately negotiated stock acquisition from a tender offer on the basis of the specific number of investors solicited.[106] Consequently, the defendant purposely restricted the number of solicitees and urged each solicitee to consider the offer as confidential information.[107]

The *Wellman* court held that the purchase of thirty-four percent of BD's stock constituted a tender offer.[108] The district court relied on the shareholder pressure test to conclude that section 14(d) governed Sun's purchases.[109] The court stressed that Sun had offered a premium, specified a contingency, and had pressured investors by using tactics such as a time limit.[110] Explaining that Sun solicited a large number of institutional shareholders, the court concluded that Sun engaged in "widespread solicitation" of BD shareholders.[111] The *Wellman* court found the lack of publicity of Sun's transactions inconsequential by reasoning that a principal objective of the Williams Act is to prevent secret corporate takeovers[112] and to regulate all methods of large scale stock acquisition.[113]

Based on the legislative history and the statutory provisions of the Williams Act, the *Wellman* court incorrectly interpreted the amount of BD stock sought as a relevant factor in defining a tender offer. Senator Williams introduced his bill by expressly distinguishing between tender offers regulated under section 14(d) and open market and privately negotiated purchases of substantial amounts of stock governed under section 13(d).[114] The SEC supported Senator Williams' distinction and its chair-

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[103] *Id.*

[104] *See* Margolick, *The Tilt over Tender Offers*, Nat'l L.J., Feb. 19, 1979, at 13, col. 2.

[105] 475 F. Supp. at 824-25.

[106] *See id.* at 806.

[107] *Id.* at 826.

[108] *Id.* at 823-25. The court evaluated Sun's purchases with eight factors suggested by the SEC. *See id.* at 824-25; note 48 *supra.*

[109] *See* 475 F. Supp. at 824-25.

[110] *See id.* at 824.

[111] 475 F. Supp. at 824.

[112] *Id.* at 825 (without citing authority).

[113] *Id.* at 825 (citing Lipton, *Open Market Purchases*, 32 Bus. Law. 1321 (1977)).

[114] *See* 113 Cong. Rec. 856 (1967) (statement of Sen. Williams); Lipton & Steinberger, *supra* note 25, at 108. Explaining that § 13(d) applies to large open market and privately negotiated purchases that are not necessarily a tender offer, Senator Williams stated:

> Substantial open market or privately negotiated purchases of shares may precede or accompany a tender offer or may otherwise relate to shifts in control. While some people might say that this information should be filed before the securities are acquired, disclosure after the transaction avoids upsetting the free and open auction market where buyer and seller do not disclose the extent of their interest and avoids prematurely disclosing the terms of privately negotiated transactions.

113 Cong. Rec. 856 (1967).

man testified that the acquisition of substantial amounts of stock does not necessarily constitute a tender offer.[115] The Act's legislative history thus indicates that the size of the block of shares acquired does not control whether section 14(d) will regulate a specific stock acquisition. The statutory provisions of the Williams Act also establish that the size of an acquisition is irrelevant to whether the acquisition constitutes a tender offer. The '34 Act clearly implies that the size of an acquisition is not a determinative element of a tender offer since the anti-fraud provision of section 14(e) is applicable to all tender offers regardless of the amount of stock sought.[116] Rather, as the *Brascan* court implied, the central characteristic of a tender offer is the widespread solicitation of the target's shareholders.[117]

Although no court has established the number of solicitees necessary to qualify a stock acquisition plan as "widely solicited," two Second Circuit decisions construing the Williams Act strongly suggest that the thirty-nine solicitees in *Wellman* should not have invoked the application of section 14(d). In *Kennecott Copper Corp. v. Curtiss-Wright Corp.*,[118] the Second Circuit refused to hold the solicitation of sixty-two shareholders a tender offer.[119] The Second Circuit's decision in *GAF Corp. v. Milstein*[120] also suggests that the *Wellman* court should not have ruled Sun's solicitations a tender offer. The *Milstein* court clearly distinguished between a privately negotiated stock acquisition and a section 14(d) tender offer when the panel ruled that a tender offer entailed "extensive communication to the shareholders."[121] Sun's clandestine offer to 39 of BD's approximately 12,000 shareholders hardly can be considered as an extensive solicitation.[122]

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[115] *See Hearing on S. 510 before Subcom. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 24-25 (1967) (statement of SEC Chairman Manuel F. Cohen).

[116] *See* 15 U.S.C. § 78n(e) (1976).

[117] *See* 477 F. Supp. at 789; *accord, Judicial Interpretations of a Tender Offer, supra* note 23, at 396. *See generally* notes 22 & 23 *supra*.

[118] 584 F.2d 1195 (2d Cir. 1978).

[119] *Id.* at 1206-07.

[120] 453 F.2d 709 (2d Cir. 1971).

[121] *Id.* at 720 n.22. The Second Circuit explained that a § 13(d) transaction "ordinarily does not entail regular communication with the shareholders." *Id.* The court further observed that "persons subject to § 13(d) may confer or communicate with shareholders in the course of a takeover attempt." *Id.*

[122] A comparison between *Wellman* and *Brascan* highlights the extremely flexible nature of the shareholder pressure test. The courts in *Brascan* and *Wellman* defined a privately negotiated transaction exempt from § 14(d) differently by selectively emphasizing specific facts. The *Brascan* court, applying the shareholder pressure test, justified the privately negotiated nature of Edper's controverted activities by comparing the 50 shareholders Gordon solicited to Brascan's 50,000 shareholders. 477 F. Supp. at 791. On the other hand, *Wellman* focused on the large percentage of the outstanding BD shares solicited in order to reject the contention that Sun's transaction was privately negotiated. 475 F. Supp. at 824. The *Wellman* decision did not compare the 39 BD shareholders solicited with the company's almost 12,000 shareholders, a comparison inconsistent with the holding that Sun's

The *Wellman* court erroneously asserted that a principal objective of the Williams Act is the prevention of secret corporate takeovers.[123] Section 14(d) prohibits undisclosed corporate takeovers only if the purchaser acquires control through a tender offer.[124] Section 13(d) clearly allows transfers of corporate control by means other than a tender offer.[125] Thus, unless Congress eliminates section 13(d) from the statutory scheme of the '34 Act, the Williams Act cannot be interpreted correctly as preventing all secret transfers of corporate control.[126]

Recent cases thus establish the nebulous shareholder pressure test as the generally accepted method of determining whether a stock acquisition plan is a tender offer under the Williams Act. Courts are likely to rule that open market or privately negotiated stock purchases constitute a tender offer if, prior to the acquisition, the purchaser publicizes his intent to obtain control.[127] A purchaser acquiring stock after publicly announcing a stock acquisition plan makes a tender offer because the purchaser effectively invites all shareholders to tender their shares.[128] In the context of privately negotiated solicitation to less than all of the target's shareholders, the specific number of solicitees necessary to qualify a subsequent purchase as a tender offer remains unclear. Between forty to sixty offerees seems to mark the solicitation threshold of a section 14(d) transaction.[129] Nevertheless, a court's perception of the amount of shareholder

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purchases were not privately negotiated.

[123] *See* Stromfeld v. Atlantic & Pac. Tea Co., 484 F. Supp. 1264, 1273 (S.D. N.Y. 1980) (allegation of a purchaser secretly soliciting seven shareholders does not state a cause of action under § 14(d)). In *Stromfeld,* the defendant bought 30% of the target company's common stock from seven shareholders. Plaintiff, a target company shareholder, sued alleging that an illegal tender offer occurred. The district court, however, dismissed plaintiff's § 14(d) claim for failing to state a cause of action. Applying the SEC's eight tender offer factors, the *Stromfeld* court reasoned that plaintiff's complaint did not allege that the defendant conducted a widespread solicitation of stock. The court further explained that the defendant did not publicize its attempts to acquire control of the target, nor did the defendant aver that the plaintiff subjected the solicitees to high pressure tactics. The court stated that the allegations of prolonged secret meetings instead indicated that the offer was not subject to a time limit and, further, that the terms of the offer were indeed negotiated. *See id.* at 1273. The district court concluded that only three of the eight tender offer factors were present—a substantial percentage of target stock was sought, accompanied by a premium offering price and a minimum purchase contingency. *Id.* Therefore, the complaint failed to allege enough to support a § 14(d) claim. *See id.*

[124] *See* 15 U.S.C. § 78n(d)(1) (1976).

[125] *See* 15 U.S.C. § 78m(d)(1) (1976 & Supp. II 1978).

[126] *See* Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,147. The *Hoover* court stated that the definition of a tender offer cannot be allowed to swallow up all the situations where § 13(d) would otherwise apply. *Id.*

[127] *See* Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,150 (N.D. Ohio 1979); S-G Securities, Inc. v. Fuqua Invest. Co., 466 F. Supp. 1114, 1126-27 (D. Mass. 1978).

[128] *See* Griffin & Tucker, *The Williams Act, Public Law 90-439—Growing Pains? Some Interpretations with Respect to the Williams Act,* 16 How. L.J. 654, 700-01 (1971).

[129] *See* Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1206-07 (2d Cir. 1978) (62 solicitees); Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 791 (S.D.

pressure accompanying a stock acquisition ultimately determines whether the stock purchase plan constitutes a tender offer.[130]

The shareholder pressure factors, however, have raised considerations not pertinent to whether a transaction constitutes a tender offer since not all of the shareholder pressure factors measure whether solicited investors have a meaningful opportunity to negotiate with the solicitor.[131] Determining whether the solicitee has a meaningful opportunity to negotiate, however, is actually the goal in defining a tender offer.[132] Whether the solicitee enjoys a meaningful opportunity to negotiate and whether a parity of bargaining power exists between the solicitee and the solicitor are essentially the same inquiry.[133] Courts, however, do not make the parties' relative bargaining power the preeminent consideration in determining the scope of section 14(d).[134] Rather, they often mechanically follow a checklist of shareholder pressure factors.[135] These courts ignore the fact that some shareholder pressure factors are also common to bona fide privately negotiated stock purchases.[136] As a result of this commonality,

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N.Y. 1979) (approximately 50 solicitees); Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,592 (N.D. Ill. 1973) (40 solicitees). *But see* Wellman v. Dickinson, 475 F. Supp. 784, 824 (S.D. N.Y. 1979) (39 solicitees constituted a tender offer).

[130] *See, e.g.*, Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,590 (N.D. Ill. 1973). *But see* Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1207 (2d Cir. 1978) (Second Circuit has not adopted the shareholder pressure test).

[131] *See* note 48 *supra*. The second, third, fifth and sixth shareholder pressure factors of those suggested by the SEC in Hoover Co. v. Fuqua Indus., Inc. are irrelevant to whether solicited investors have a meaningful opportunity to negotiate with the solicitor because none of these factors address the size of the stock holdings of *each* solicitee. A solicitee's ability to meaningfully negotiate with the solicitor depends on the amount of stock held by that shareholder. A reliable indicator of the size of the stock holdings of each solicitee is the number of shareholders solicited. *See* note 25 *supra*. Thus, the first and eighth factors of those suggested by the SEC indirectly address the proper issue since these two factors are concerned with the number of shareholders solicited. Inquiry pursuant to the fourth factor suggested by the SEC could prove useful in determining that the solicited shareholder has had a meaningful opportunity to negotiate with the solicitor if the solicitor has raised his offering price in response to a rejection of his previous offer by the solicitee. *See also* text accompanying notes 139-140 *supra*. The SEC's seventh factor is unhelpful to the pertinent inquiry concerning the definition of a tender offer since that "factor" merely restates the issue of whether a shareholder is subjected to illegal pressure to sell his stock. *See* note 48 *supra*.

[132] *See* notes 22 & 24 *supra*.

[133] *See* note 132 *supra*.

[134] *See, e.g.*, Wellman v. Dickinson, 475 F. Supp. 783, 823 (S.D. N.Y. 1979) (court utilized SEC's eight shareholder pressure factors).

[135] *See, e.g.*, Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,148-50 (N.D. Ohio 1979).

[136] In the context of any commercial transaction, a purchaser will apply as much pressure as necessary to obtain the desired commodity from a solicitee. Specifically, a person seeking to acquire corporate stock often will offer a premium, impose a time limit, and specify a minimum purchase contingency. These shareholder pressure factors are not proper considerations in defining a tender offer since they do not address whether a solicitor

courts improperly use certain shareholder pressure factors to distinguish tender offers from transactions exempt from section 14(d). Neither a large premium, a time limit, nor a minimum purchase contingency should transform a privately negotiated acquisition into a tender offer.[137]

Thus, the true test of a tender offer is whether the solicitee has sufficient bargaining power to enter into meaningful negotiations with the solicitor.[138] The strength of a bargaining position depends on the importance the solicitor attaches to acquiring the specific solicitee's shares. If a solicitor raises the offer price or extends a "firm" time deadline, these facts indicate that the solicitee is effectively negotiating with the solicitor.[139] Yet, the absence of this type of negotiating does not necessarily mean that the solicitee does not have the opportunity to negotiate with the offeror. The solicitee may choose not to exercise his bargaining power in order to take quick advantage of what he believes is a generous offer.[140] Thus, to evaluate correctly an alleged tender offer in the absence of facts indicating that actual negotiations occurred, courts must determine how important a single solicitee's shares are to the success of the desired acquisition.[141] If a solicitor contacts all 50,000 of a hypothetical corpora-

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posesses sufficient bargaining power to force the offeror to negotiate. Merely because a solicitor attempts to pressure prospective sellers does not mean that the solicitors do not have the bargaining power to withstand pressure tactics. Shareholder pressure tactics may be legitimately used in a privately negotiated stock acquisition if, for example, the solicitor contacts only two shareholders. *See* note 23 *supra.*

[137] *See* note 136 *supra.*

[138] *See* note 24 *supra.*

[139] *See* Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,590 (N.D. Ill. 1973); note 26 *supra.*

[140] The solicitee may forecast a declining market price and, thus, want to sell as quickly as possible to take immediate advantage of a generous offer. The Williams Act does not prohibit controlling shareholders from freely choosing to sell their stock at a large premium. In fact, the larger the premium offered a shareholder, the more equitable the transaction appears. The fact that a control premium is paid to only a limited number of shareholders is irrelevant to whether the transaction constitutes a tender offer. *See* Toms, *Compensating Shareholders Frozen Out in Two-Step Mergers,* 78 COLUM. L. REV. 548, 551 n.7 (1978) [hereinafter cited as Toms]. The Williams Act does not require that a purchaser afford all shareholders equal opportunity to receive a premium for their shares. *See* note 160 *infra.* Rather, applying the tender offer regulations of § 14 to a given transaction solely depends on whether the solicited shareholders are powerful enough to obtain information that they deem important. If a large shareholder who has the leverage to extract pertinent information from the solicitor nevertheless decides to sell his shares with no more information that the selling price, § 14(d) does not govern this transaction. The broad scope of the SEC's proposed tender offer definition in combination with the Proposed Rule 14(e)-4(b), however, would tend to restrict a shareholder's right to receive a control premium for selling a large block of stock. Letter from Bate C. Toms, III to SEC (February 14, 1980) (SEC file No. S7-812) [hereinafter cited as Bate C. Toms, III]; *see* note 160 *infra.*

[141] Courts evaluating the importance of a solicitee's shares to the success of a tender offer must perform this analysis from the point of view of the individual shareholder. Hypothetically, a solicitor may need every share held by a corporation's 100,000 shareholders, yet unless each solicitee realizes that his shares are vital to the success of the acquisition, the solicited shareholder probably will not attempt to negotiate better terms. Thus, a court should look to the holdings of the solicitees as individuals when ruling whether a tender

tion's shareholders, the bargaining power that any one shareholder can exercise is minimal. Conversely, if a person solicits 50 shareholders, each of the solicitees wields considerable bargaining power. Thus, whether an acquisition constitutes a tender offer depends on the number of shareholders solicited.[142]

Despite a misguided approach to defining a tender offer, courts generally reach a result consistent with the Williams Act. The purpose of the Williams Act is to enhance small shareholders' ability to negotiate with tender solicitors.[143] Large shareholders, however, have little need for the protections of section 14(d).[144] Thus, courts generally achieve a result consonant with the purpose of the Williams Act.[145] A person soliciting forty to sixty large shareholders of a publicly-held corporation realistically cannot afford to ignore solicitees' attempts to negotiate more favorable terms. The SEC's proposed tender offer definition, however, would establish a definition that clearly is inconsistent with both case law and the purpose of the Williams Act. The SEC has proposed a two-tiered test for defining a tender offer.[146] Any acquisition plan that satisfies either tier of the test would constitute a tender offer.[147]

The first tier of the Commission's proposal defines a tender offer as an invitation to tender shares that is directed to more than ten persons, seeks to acquire more than five percent of the outstanding shares of a specific class of securities, and occurs during any forty-five day period.[148] The proposed definition's second tier defines a tender offer as a tender

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offer has occurred. If the average solicitee's holdings are large enough so that the solicitee should realize his shares are significant to the success of the acquisition attempt, the transaction is exempt from § 14(d) of the '34 Act. Evaluation of an alleged tender offer is properly performed by scrutinizing the number of shareholders solicited because a solicitor contacting a small number of shareholders presumably has selected the target corporation's largest, most powerful shareholders. *See* note 25 *supra.*

[142] *See* notes 20, 22 & 23 *supra.*

[143] *See* notes 20 & 22 *supra.*

[144] *See* note 22 *supra.*

[145] *See, e.g.,* Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773 (S.D. N.Y. 1979) (soliciting approximately 50 shareholders did not constitute a tender offer). *But see* Wellman v. Dickinson, 475 F. Supp. 783 (S.D. N.Y. 1979) (solicitation to 39 stockholders constituted a tender offer).

[146] *See* Proposed Tender Offer Definition, *supra* note 6, at 82,603.

[147] *Id.*

[148] *Id.* The first tier of the SEC's proposed tender offer regulations exempts offers by brokers performing the customary functions of the profession and receiving no more than the normal commissions. *Id.* at 82,604. The SEC limits this exemption, however, by prohibiting broker solicitation of orders to sell the target's securities. *Id.* The SEC's interpretation of the "customary functions" of a broker limits a broker's activities to merely placing the order with the stock's specialist on the floor of the stock exchange. The Commission interprets the proposed tender offer definition as not exempting brokers who leave the floor of the stock exchange to assemble a block of stock which later crosses the exchange. *See id.* Under this interpretation, Gordon's solicitations in Brascan Ltd. v. Edper Equities Ltd. would be a tender offer, probably attributable to Edper, as principal. *See* 477 F. Supp. at 789-90; text accompanying note 70 *supra; cf.* CODE, *supra* note 87, § 299.68(1)(a) (Proposed Federal Securities Code would regulate Gordon's purchases as a tender offer).

invitation that is disseminated in a widespread manner, provides for a premium of either two dollars or five percent over the current market price, and does not provide a meaningful opportunity to negotiate the price and terms.[149]

Under the SEC's proposed tender offer definition, section 14(d) would regulate any open market or privately negotiated stock acquisition plan that the tender solicitor publicly announces. The first tier of the definition would regulate all publicly announced open market purchases because the publicity effectively solicits all of the corporation's shareholders, who typically number in excess of ten persons.[150] The second tier would regulate all widely publicized, privately negotiated stock acquisitions because most large purchases usually include premiums in excess of five percent.[151] Thus, either the first or second tier would invoke the disclosure and substantive provisions of section 14(d) if a potential purchaser creates an unsettled investment environment by publicizing acquisition plans.

The SEC also designed its proposal to bestow the benefits of section 14(d) on the solicitees of non-publicized, privately negotiated stock acquisition plans. The ten person solicitation limit in the first tier narrowly defines a privately negotiated transaction exempt from section 14(d).[152] In addition, courts would likely interpret the second tier's "widespread dissemination" criterion as governing tactics such as widespread telephonic solicitation, personal visits, and use of the mails.[153]

The SEC should not adopt its proposed definition of a tender offer. The Commission states that one purpose of the proposed definition is to provide guidance to members of the financial community and their counsel.[154] Yet, the elements of the second tier are similar to the Commission's

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[149] Proposed Tender Offer Definition, *supra* note 6, at 82,604-05.

[150] *See id.* at 82,603-04. The Commission would interpret tier one to prohibit direct or indirect public announcements of an intended open market stock acquisition plan, unless the purchaser conforms to the provisions of § 14(d). *See id.*

[151] *See, e.g.*, Hoover Co. v. Fuqua Indus. Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,146 (N.D. Ohio 1979).

[152] *Cf.* Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1206 (2d Cir. 1978) (transaction involving 62 solicitees did not constitute a tender offer). Under the SEC's proposed rules, two methods of stock acquisition would remain exempt from § 14(d). Privately negotiated solicitations to less than 11 shareholders would not be regulated as a tender offer. In addition, the proposed tender offer definition would not govern non-publicized open market transactions. *See* Proposed Tender Offer Definition, *supra* note 6, at 82,603-05.

[153] *See* Proposed Tender Offer Definition, *supra* note 6, at 82,605. The SEC construes "widespread solicitation" as potentially including telephonic contacts and personal visits. *Id.* (citing Cattlemen's Inv. Co. v. Fears, 343 F. Supp. 1248 (W.D. Okl. 1972)); *see* note 26 *supra*.

[154] Proposed Tender Offer Definition, *supra* note 6, at 82,603. In addition to providing guidance to prospective tender offerors, the SEC states that another purpose of the proposed definition is to obtain jurisdiction over stock transactions that, in substance, are tender offers. *Id.* The SEC explains that the public is entitled to the benefits arising from the broadened scope of the Williams Act. *See id.*

tender offer factors which courts have extensively utilized in the past and which provide no more guidance than existing judicial decisions.[155] While the second tier properly includes consideration of whether the tender solicitor gives the solicitees a meaningful opportunity to negotiate the terms of sale, the Commission's first tier eviscerates this appropriate standard by placing an unwarranted ten person limit on the number of allowed solicitees.

The first tier's narrow limit of ten solicitees in a stock acquisition attempt is inconsistent with the legislative intent of the Williams Act.[156] The extremely low limit of ten solicitees is indicative of an impermissible desire to regulate most corporate takeovers under section 14(d) rather than under section 13(d). Expanding the scope of a tender offer to regulate transactions involving more than ten solicitees would contravene congressional intent by effectively eliminating section 13(d) from the securities law.[157]

The Commission should adopt a definition of a tender offer that places a reasonable limit on the number of solicitees in an acquisition attempt. A tender offer definition that provides a "safe harbor" exempting solicitations of up to thirty-five persons is appropriate.[158] Further, if a person solicits more than thirty-five shareholders, section 14(d) should regulate the transaction only if a plaintiff can prove that the solicitees did not have a meaningful opportunity to negotiate the price and terms of sale with the tender solicitor.[159] Considering that the Second Circuit has sanctioned a transaction in which a solicitor contacted sixty-two shareholders, the thirty-five person safe harbor would be a reasonable provi-

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[155] *See* note 48 *supra*.

[156] An administrative agency promulgating rules pursuant to a federal statute must adopt regulations consistent with the congressional intent underlying the statute. *See* Santa Fe Indus., Inc., v. Green, 430 U.S. 462, 472-73 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1975).

[157] *See* Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,145 (N.D. Ohio 1979).

[158] The American Law Institute's Proposed Federal Securities Code establishes a 35 person solicitation threshhold to a tender offer. *See* CODE, *supra* note 87, § 299.68. In the Comment to a tentative draft of § 299.68, the ALI stated that the Williams Act was hardly needed or intended to govern solicitations involving a few controlling shareholders. ALI FEDERAL SECURITIES CODE § 299.9 Comment (1) (Tentative Draft) (1972). The Comment further indicates that the ALI derived the figure 35 from Code's definition of a "limited offering." *Id.* The Code's "limited offering" registration exemption is similar to Rule 146's private offering exemption from registering under the Securities Act of 1933. *See* CODE, *supra* note 87, § 277 (b)(1)(B). Rule 146 provides a "safe harbor" from '33 Act registration requirements if the issuer sells its securities to no more than 35 persons. *See* 17 C.F.R. § 230.146(g)(1) (1979).

[159] *See* text accompanying note 132 *supra*. The SEC requested comment on the appropriate meaning of the term "person" as used in the Commission's proposed tender offer definition. Proposed Tender Offer Definition, *supra* note 6, at 82,603. Immediate family members holding target shares should be counted as one person. Similarly, a financial institution that has sole discretionary power of sale over target shares should be counted as one person, regardless of the number of owners of the solicited shares.

sion that would provide much-needed certainty to stock acquisitions.[160] Since the purpose of section 14(d) is to equalize the bargaining power between shareholders and tender solicitors, the upper solicitation limit is properly based on analyzing whether the solicitees have an opportunity to meaningfully negotiate with the tender offeror.

Courts correctly interpret the Williams Act as prohibiting tender solicitors from exerting undue pressure on corporate shareholders to sell their stock.[161] Courts analyzing stock acquisitions in terms of the shareholder

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[160] The SEC simultaneously published Proposed Rule 14e-4(b) with the Commission's proposed tender offer definition. Proposed Tender Offer Definition, *supra* note 6, at 82,610-11. Proposed Rule 14e-4(b) provides with certain exceptions that a tender offer be made to all the securities holders of the particular class of securities sought. *Id.* at 82,610. In proposing the adoption of this rule promulgated pursuant to § 14(e) of the '34 Act, the Commission explained that the congressional purpose underlying the Williams Act was to require fair and equal treatment of all holders of the class of securities subject to a tender offer. *Id.* The Commission's justification of Proposed Rule 14e-4(b), however, is flawed. The SEC is incorrect in stating that the legislative history of the pro rata and equal price substantive provisions of §§ 14(d)(6) & (7) mandate that a tender offer is made to all shareholders of the particular security sought. The Act's pro rata and equal price provisions appear to contemplate giving equal opportunity to all shareholders to sell their shares simply because a conventional tender offer actually solicits all shareholders to tender their shares. The Williams Act, however, is designed only to protect those shareholders who are actually pressured to sell their shares. Shareholders who are not solicited have no need for the disclosure and substantive provisions of § 14(d) since they are not being pressured to sell their shares. The Williams Act therefore is not designed to mandate that all shareholders of the target company, whether solicited or not, be given an opportunity to receive part of a control premium offered only to a small group of shareholders. *See* Toms, *supra* note 140, at 551 n.7. If Congress had intended the type of equal treatment that Proposed Rule 14e-4(b) mandates, the substantive provisions of § 14(d) would have explicitly so provided. Letter from Sullivan & Cromwell to SEC (February 15, 1980) (SEC File No. S7-812); Letter from Committee on Securities Regulation of the Association of the Bar of the City of N.Y. to SEC (January 31, 1980) (SEC File No. S7-812).

[161] The SEC published several other proposed rules along with its proposed tender offer definition and the proposed rule requiring that a tender offer be made to all shareholders. *See* Proposed Tender Offer Definition, *supra* note 6, at 82,606-15. Proposed Rule 14e-3(a) forbids trading in a target company's stock on the basis of material, non-public information unless, prior to the purchase, the purchaser publicly announced the information received and its source. *Id.* at 82,607. Proposed Rule 14(e)-4(a) provides that all shareholders selling pursuant to a tender offer must receive the highest consideration paid to any shareholder. *Id.* at 82,610. Proposed Rule 14(e)-4(a) thus would eliminate the possibility implicit in § 14(d)(7) that a tender solicitor could lower the price offered to subsequent tender solicitees. *See* 15 U.S.C. § 78n(d)(7) (1976). Proposed Rule 14e-5 would prohibit a solicitor from acquiring a target's shares for ten days after the tender offer has terminated. *Id.* at 82,612. The Commission justifies Proposed Rule 14e-5 by asserting that this provision may be necessary to ensure that a bidder does not take advantage of unsettled market conditions following the termination of its tender offer. *Id.* at 82,612. A commentator has properly criticized the validity of Proposed Rule 14e-5. *See* Bate C. Toms, III, *supra* note 140. A former tender solicitor cannot unfairly take advantage of an unstable market because the offeror possesses no informational or other advantage over other market participants. *Id.* Unless a former tender solicitor becomes an insider after the tender offer, the former offeror simply will be another outside participant. A former tender solicitor does not abuse the market by purchasing target shares for less than the price paid during the tender offer. *Id.* The tender offer price is not a benchmark of fairness to be maintained over time. *Id.* Rather, stock

pressure factors, however, have diffused the proper focus of section 14(d) analysis.[162] The appropriate emphasis in defining a tender offer is whether solicited shareholders have a meaningful opportunity to negotiate the sale terms with the solicitor. A definition of a tender offer ideally would increase the level of predictability of when a transaction must comply with section 14(d). Nevertheless, the SEC's most recent attempt to provide that certainty forsakes the purpose of the Williams Act and thereby violates an important judicial constraint on the Commission's rulemaking authority.[163]

JAMES S. MCNIDER III

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values fluctuate because the stock market's pricing mechanism continually factors new economic information into the share price. *See id.*

[162] *See* text accompanying note 131.

[163] In July, 1979, Senators Williams, Proxmire and Sarbanes requested that the SEC review the adequacy of the current federal takeover laws. [1980] 542 Sec. Reg. & L. Rep. (BNA) 3-4 (Special Supplement) [hereinafter cited as Proposed Legislation]. The Commission responded to the Senators' request by proposing new legislation to amend the Williams Act. *Id.* at 2-3. The Commission asserted that new legislation is needed to prevent continuing attempts to circumvent the provisions and spirit of the Williams Act. [1980] 542 SEC. REG. & L. REP. (BNA) A-1. The SEC's draft bill would trigger certain disclosure and substantive provisions if a person makes a "statutory offer," which is defined, subject to certain exceptions, as an offer to acquire more than 10% of a company's outstanding shares. Proposed Legislation, *supra* at 25-26. In particular, proposed § 14(d)(1)(B)(v) would exempt from the purview of a statutory offer any privately negotiated stock purchase from no more than 10 stockholders in any twelve-month period. *Id.* at 26. Substantive provisions proposed by the Commission include requirements that a statutory offer be made to all shareholders and that every tendering shareholder must be paid the best price offered to any other solicitee. *Id.* at 26-27. Proposed § 13(d)(3) would alter the current § 13(d) ownership reporting provision by requiring that a beneficial owner of more than 5% of a security publicly announce within one business day the amount of securities owned and the purpose of the acquisition. *Id.* at 24. The SEC's draft bill would preempt state tender offer laws and would grant private rights of action for damages and equitable relief under the amended Williams Act to the target company's shareholders, the target company, the successful tender solicitor and to any defeated competing solicitor. *Id.* at 28-29. The Commission's proposal thus would legislatively overrule Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977) (defeated tender offeror lacks standing to sue for damages under Williams Act). Proposed Legislation, *supra* at 28.