Washington and Lee Law Review

Volume 43 | Issue 3 Article 5

Summer 6-1-1986

The Tender Offer: In Search Of A Definition

NOTES

THE TENDER OFFER: IN SEARCH OF A DEFINITION

Congress enacted the Williams Act[1] in 1968 to amend the Securities and Exchange Act of 1934 ('34 Act)[2] for the purpose of regulating substantial stock acquisitions, including tender offers.[3] Although neither Congress nor the Securities and Exchange Commission (SEC) has defined the term "tender offer"[4] by statute, the conventional usage of the term tender offer refers to a public invitation to all shareholders of a target corporation to tender their shares for sale at a price above the market price.[5] Over the years, some courts and the SEC have supported the expansion of the original understanding of the term tender offer to include certain open market and privately

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1. Pub. L. No. 90-439, 82 Stat. 454 (codified as amended in 15 U.S.C. §§ 78m(d)(e), n(d)-(f) (1982)). Two of the five provisions that the Williams Act added to the Securities and Exchange Act of 1934 ('34 Act) specifically regulate tender offers. *See* 15 U.S.C. §§ 78n(d)-(e) (1982).

2. 15 U.S.C. §§ 78a-kk (1982).

3. *See infra* notes 17-34 and accompanying text (legislative history of the Williams Act).

4. *See* SEC Securities and Exchange Act Release No. 34-12676 (Aug. 2, 1976), *reprinted in* [1976-77 Transfer Binder] FED. SEC. L. REP. (CCH) 80,659, at 86,695-96 (Proposed Rules and Schedules For Tender Offers). In 1976, the Securities and Exchange Commission (SEC) stated that it was unnecessary to define the term tender offer. *Id.* On later occasions, however, the SEC drafted two proposed definitions of the term tender offer. *See* A.L.I. Fed. Sec. Code § 292 (1979) (proposing definition of tender offer); SEC Securities Exchange Act Release No. 34-16385 (Nov. 29, 1979), *reprinted in* [1979-80 Transfer Binder] Fed. Sec. L. Rep. (CCH) 82,374 at 82-603 (proposed Rule 14(d)-1(b)(1) defining tender offer). Congress has not adopted either of the proposed definitions.

5. *See* S. REP. No. 550, 90th Cong., 1st Sess. 2 (1967) (discussing tender offers) [hereinafter cited as *Senate Report];* H. REP. No. 1711, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S.CODE CONG. & AD. NEWS 2811, 2811-13 (discussing tender offers) [hereinafter cited as *House Report].* The House and Senate reports on the Williams Act describe a pre-Williams Act tender offer as an offer to all of a company's shareholders to purchase company's shares at a price above the market price. *House Report, supra,* at 2811. The pre-Williams Act tender offeror usually was under no obligation to purchase shares unless the number of shares tendered reached a certain specified number. *House Report, supra,* at 2811. Furthermore, the pre-Williams Act tender offeror's identity and purposes often were unknown to the shareholders. *House Report, supra,* at 2812; *see* Smallwood v. Pearl Brewing Co., 489 F.2d 579, 597 n.22 (5th Cir.) (discussing pre-Williams Act shareholders' need for information when faced with tender offer), *cert. denied,* 419 U.S. 873 (1974). In addition, shareholders who tendered shares prior to the adoption of the Williams Act relinquished control over these shares until the tender offer expired, at which time the tender offeror would count the shares tendered and either purchase a specified amount or return the shares to the shareholders. *Smallwood,* 489 F.2d at 597 n.22. *See* Note, *The Developing Meaning of 'Tender Offer' Under the Securities and Exchange Act of 1934,* 86 HARV. L. REV. 1250, 1251-52 (1973) (explaining characteristics of conventional tender offers).

negotiated purchases.[6] Until recently, most courts examining private negotiations and open market activity employed a multifactor test suggested by the SEC to determine whether specific acquisitions constituted tender offers for the purposes of the Williams Act.[7] The multifactor test consists of several indicia that are characteristic of conventional tender offers.[8] The United

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6. *See, e.g.,* Esmark Inc. v. Strode [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) 98,238, at 91,581 (KY. CT. APP. 1981) (rapid acquisition of stock through open market and privately-negotiated stock purchases constituted tender offer); Wellman v. Dickinson, 475 F. Supp. 783, 823-25 (S.D.N.Y. 1979) (privately negotiated purchases constituted tender offer), *cert. denied,* 460 U.S. 1069 (1983); Hoover Co. v. Fuqua Indus., Inc. [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) 97,107, at 96,150 (N.D. Ohio 1979) (solicitation of shares from family members constituted tender offer); S-G Sec., Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114, 1126-27 (D. Mass. 1978) (open market held likely to constitute tender offer); Cattleman's Inv. Co. v. Fears, 343 F. Supp. 1248, 1251-52 (W.D. Okla. 1972) (private negotiations for securities purchases constituted tender offer).

7. *See, e.g.,* SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 950-52 (9th Cir. 1985) (issuer's repurchase of shares on open market did not constitute tender offer under multifactor test); Polinsky v. MCA, Inc., 680 F.2d 1286, 1291 (4th Cir. 1982) (open market and privately negotiated purchases did not constitute tender offer under multifactor test); University Bank and Trust v. Gladstone, 574 F. Supp. 1006, 1010-11 (D. Mass. 1983) (private solicitations did not constitute tender offer under multifactor test); Zuckerman v. Franz, 573 F. Supp. 351, 358 (S.D. Fla. 1983) (cash merger proposal did not constitute tender offer under multifactor test); Astronics Corp. v. Protective Closures Co., Inc., 561 F. Supp. 329, 334-36 (W.D.N.Y. 1983) (private sale held not likely to constitute tender offer under multifactor test); Ludlow Corp. v. Tyco Labs, Inc., 529 F. Supp. 62, 67 (D. Mass. 1981) (open market and privately negotiated purchases did not constitute tender offer under multifactor test); Wellman v. Dickinson, 475 F. Supp. 783, 823-26 (S.D.N.Y. 1979) (privately negotiated purchases constituted tender offer under multifactor test), *cert. denied,* 460 U.S. 1069 (1983); Hoover Co. v. Fuqua Indus., Inc. [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) 97,107, AT 96,150 (N.D. OHIO 1979) (private solicitations constituted tender offer under multifactor test). *See also infra* notes 51-55 and accompanying text (explaining multifactor test). *But see* Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 57 (2d Cir. 1985) (criticizing multifactor test as not consistently determinative of whether activity constitutes tender offer); Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 791 (S.D.N.Y. 1979) (finding multifactor test undersirable because of test's unpredictability).

8. *See* Wellman v. Dickinson, 475 F. Supp. 783, 824 (S.D.N.Y. 1979) In *Wellman v. Dickinson,* the SEC suggested, through an amicus curie brief, that courts should consider seven characteristics usually associated with tender offers in determining whether a particular transaction constitutes a tender offer. *Id.* at 823. The SEC identified the following seven factors as indicative of a tender offer: active and widespread solicitation of a corporation's shareholders for the purpose of acquiring shares in that corporation; solicitation made for a substantial percentage of the corporation's stock; offer to purchase a corporation's shares from the shareholders at a premium above the prevailing market price; firm rather than negotiable terms of the offer; offer contingent on the tender of a certain number of shares; offer open for a limited time period; and offer that subjects shareholders to selling pressures. *Id.* at 823-24. The *Wellman* court explained that a court should weigh the factors qualitatively and that the importance of particular factors in a specific transaction depends upon the fact pattern of the transaction at issue. *Id.* at 824; *see* Hoover Co. v. Fuqua Indus., Inc. [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) 97,107, AT 96,148. IN *Hoover Co. v. Fuqua Indus. Inc.,* the SEC identified as an eighth factor of the multifactor test—an offeror's public announcement

States Court of Appeals for the Second Circuit in *Hanson Trust PLC v. SCM Corp.*[9] recently questioned the utility of the multifactor test for purposes of determining whether certain open market and privately negotiated purchases constitute tender offers and, instead, proposed a shareholder identification test.[10] As *Hanson Trust* and other judicial decisions suggest, uncertainty exists among courts concerning not only the applicability of the Williams Act to open market and privately negotiated purchases[11] but also the proper test to utilize in determining whether certain activity constitutes a tender offer.[12]

Although the scope of the Williams Act remains unclear, the specific purposes of the Williams Act are: to provide a target company's shareholders (target shareholders) with material information about a tender offer,[13] to provide target shareholders with time to reach an informed decision about a tender offer,[14] and to assure the equal treatment[15] of all target shareholders throughout the tender offer process.[16] Prior to the enactment of the Williams

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of intent to acquire control of corporation followed by rapid acquisition of large blocks of corporation's stock. *Id.*

9. 774 F.2d 47 (2d Cir. 1985).

10. *See id.* at 57 (2d Cir. 1985) (arguing that arbitrariness and unpredictability of multifactor test contribute to inadequacy of multifactor test); *infra* notes 118-19 and accompanying text (discussing *Hanson Trust* shareholder identification test).

11. *Compare* SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 950-53 (9th Cir. 1985) (open market purchases may constitute tender offer under multifactor test) *with* Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1207 (2d Cir. 1978) (open market purchases not subject to Williams Act tender offer provisions). *See* Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 57 (2d Cir. 1985) (private negotiations for purchases may constitute tender offer if shareholders need information provided by Williams Act); Hoover Co. v. Fuqua Indus., Inc. [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) 97,107, AT 96,150 (N.D. OHIO 1979) (private negotiations for stock purchases constituted tender offer if multifactor test met).

12. *See* Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 57 (2d Cir. 1985) (shareholder identification test utilized to determine whether privately negotiated transactions constituted tender offer); SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 950-53 (9th Cir. 1985) (multifactor test utilized to determined whether open market purchases constitute tender offer); Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1207 (2d Cir. 1978) (legislative history of Williams Act examined to determine whether open market purchases constitute tender offer); Hoover Co. v. Fuqua Indus., Inc. [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) 97,107 at 96,147-49 (N.D. Ohio 1979) (multifactor test utilized to determine whether privately negotiated solicitations constitute tender offer); S-G Sec. Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114, 1126-27 (D. Mass. 1978) (publicity preceding purchases of stock examined to determine whether offer likely to constitute tender offer).

13. 15 U.S.C. § 78n(d)(1) (1982); *see infra* notes 25-27 and accompanying text (explaining disclosure requirements of section 14(d)(1) of the '34 Act).

14. 15 U.S.C. § 78n(d)(5) (1982); *see infra* notes 29-31 and accompanying text (explaining withdrawal rights of shareholders under section 14(d)(5) of the '34 Act and pro-rata acceptance provisions under section 14(d)(6) of the '34 Act).

15. 15 U.S.C. § 78n(d)(7) (1982); *see infra* note 32 and accompanying text (explaining equal treatment provisions of section 14(d)(7) of the '34 Act).

16. *See House Report, supra* note 5, at 2812-14. While the original '34 Act regulated proxy battles and stock-for-stock exchanges, the '34 Act did not regulate cash tender offers as

Act, target shareholders faced with tender offers often had no access to information about the tender offeror or the consequences of accepting the tender offer.[17] Lacking proper information about the tender offer or tender offeror, target shareholders often were unable to assess adequately the reasonableness of an offering price or to determine whether accepting or rejecting the offer was in the target shareholders' best interest.[18] In addition, pre-Williams Act tender offers often discriminated against target shareholders who tendered shares either early or late in the tender offer process.[19] A target shareholder who tendered shares early in the pre-Williams Act tender offer process undertook the risk that the original tender offeror or a new tender offeror would present the target shareholders who had not yet tendered shares with a more favorable offer than the original offer.[20] Alternatively, a target shareholder who tendered shares late in the pre-Williams tender offer process undertook the risk that the tender offeror would reject the offered shares because the tender offer quota already had been fulfilled.[21] Target shareholders involved in pre-Williams Act tender offers, therefore, often fell victim to tender offer discrimination regardless of the course of action that the target

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a means of gaining corporate control. *Id.* The framers of the Williams Act recognized that shareholders in cash tender offer situations need the information and protections that are accorded to other shareholders involved in other types of battles for corporate control to determine what activity would best serve the shareholders' interest. *Id.* Therefore, Congress enacted the Williams Act to bridge the perceived gap in existing securities laws. *Id.*

17. *See House Report, supra* note 5, at 2812 (discussing lack of information available to shareholders involved in pre-Williams Act tender offers).

18. *See Takeover Bids: Hearings on H.R. 14475 Before the Subcom. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 90th Cong., 2d Sess. 12 (1968) (Statement of Hon. Manuel F. Cohen, Chairman, Securities and Exchange Commission) (discussing need for tender offer regulation) [hereinafter cited as *House Hearings*]. The disparity between the market price and the tender offer price for a specific company's stock often is misleading. *Id.* While the market price reflects the value of a stock in a business operating as a going concern, the value of a stock may increase dramatically through a change in ownership or through the sale of certain corporate assets. *Id.* A tender offeror, therefore, often is willing to pay a shareholder a price above the market price because the tender offeror expects, through the sale of corporate assets or through other means, to realize a value even greater than the tender offer price. *Id.* Although a high tender offer price might appear to be a bargain to the uninformed target shareholder, the tender offer price often is lower than the actual value of the share under the tender offeror's plans for the company. *Id.* Accordingly, without knowledge of the tender offeror's plans, a target shareholder prior to the Williams Act was unable to make an informed decision whether to accept or reject a proposed offer. *Id.*

19. *See infra* notes 20-26 and accompanying text (explaining hazards of tendering shares early or late in response to a pre-Williams Act tender offer).

20. *See House Hearings, supra* note 18, at 11-12. Prior to the enactment of the Williams Act, a shareholder who tendered shares in response to a tender offer provided the tender offeror with an option to purchase the shares at a specified price. *Id.* The shareholder who tendered shares in response to a pre-Williams Act tender offer thereby relinquished the right to apply those shares to any subsequent and more lucrative offers which were made for the class of securities that the shareholder had tendered. *See id.* (warning that an early tender of shares may prevent participation in a later offer).

21. *House Report, supra* note 5, at 2812.

shareholders chose.[22] In response to the unequal treatment accorded target shareholders and the target shareholders' need for time and information concerning a tender offer, Congress adopted the Williams Act in 1968.[23]

The Williams Act, in part, added sections 14(d) and 14(e) to the '34 Act to regulate the tender offer process.[24] Section 14(d)(1) of the '34 Act requires that any person making a tender offer that would result in that person's ownership of more than five percent of a class of any registered equity security must disclose the information specified in section 13(d)(1) of the '34 Act.[25] The information specified in section 13(d)(1) includes the background and identity of the tender offeror, the source and amount of funds involved in the purchase, the offeror's present holdings in the target corporation, and any anticipated change the offeror plans to make in the corporate structure.[26] The purpose of section 14(d)(1) is to provide unsophisticated target shareholders with the information necessary to make informed decisions concerning whether to accept or reject a tender offer.[27]

In addition to requiring that a tender offeror disclose material information about a tender offer, section 14(d), and in particular sections 14(d)(5)-(7) of the '34 Act, lessens the pressures on target shareholders to tender shares hastily and, also, prevents a tender offeror from discriminating amongst target shareholders.[28] Section 14(d)(5) of the '34 Act provides that target shareholders who tender shares in response to a tender offer may withdraw those shares during the first seven days of the tender offer and at any time after the tender offer has been in effect for sixty days.[29] Section 14(d)(5) thereby negates the possibility that target shareholders who tender

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22. *See supra* notes 20 and 21 and accompanying text (discussing dangers of tender offers to pre-Williams Act target shareholders under alternative courses of action).

23. *See House Report, supra* note 5, at 2812-14 (explaining purpose of Williams Act); *House Hearings, supra* note 18, at 11-12 (same).

24. Pub. L. No. 90-439, 82 Stat. 454 (codified as amended at 15 U.S.C. §§ 78m(d)-(e), n(d)-(f) (1982)).

25. 15 U.S.C. § 78n(d)(1) (1982). Section 14(d)(1) of the '34 Act requires that the tender offeror disclose the information specified in section 13(d)(1) of the '34 Act to the SEC and the issuer of the security concurrently with the announcement of a tender offer.

26. 15 U.S.C. § 78m(d)(1) (1982). Section 13(d)(1) of the '34 Act specifies the information that must be disclosed to the issuer, the exchanges where the securities are traded and the SEC within ten days after a person acquires, by any means, 5% of a class of a corporation's registered equity securities. *Id. See* 15 U.S.C. § 78m(d)(1) (1982). (Section 14(d)(1) requires disclosure of section 13(d)(1) information in event of tender offer). *But see* Wall St. J., Jan. 10, 1986 at 36, col. 2. The SEC recently petitioned Congress to amend section 13(d) to require purchases of 5% of a company's securities to disclose 13(d) information within two business days of the acquisition. *Id.*

27. *See House Report, supra* note 5, at 2813 (discussing Williams Act purpose of providing full and fair disclosure for benefit of shareholder solicitees); *House Hearings, supra* note 20, at 13 (same).

28. 15 U.S.C. § 78n(d)(5)-(7) (1982); *see infra* notes 29-33 and accompanying text (discussing purpose of sections 14(d)(5)-(7) of '34 Act).

29. 15 U.S.C. § 78n(d)(5) (1982).

shares will lose complete control over those shares.[30] Section 14(d)(6) of the '34 Act requires a tender offeror to take up tendered securities pro rata according to the number of securities deposited by each target shareholder during the first ten days of an offer and, thus, diminishes the pressure on the target shareholders to promptly tender their shares.[31] Section 14(d)(7) of the '34 Act requires that all target shareholders receive an equal price for tendered shares, regardless of the order in which the shareholders deposited their shares.[32] Therefore, sections 14(d)(5)-(7) of the '34 Act reduce the pressures and prejudices to target shareholders that pre-Williams Act tender offers traditionally involved.[33] Finally, section 14(e) of the '34 Act serves as a broad antifraud provision in connection with tender offers.[34]

While the Williams Act amendments to section 14 of the '34 Act appear straightforward, confusion exists concerning which types of acquisitions trigger the protection of the Williams Act tender offer provisions.[35] Although the legislative history of the Williams Act suggests that Congress meant to regulate only conventional tender offers,[36] some courts and the SEC favor

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30. *See House Report, supra* note 5, at 2820. Section 14(d)(5) of the '34 Act provides a shareholder with an opportunity to reconsider a tender offer and, also, prevents an unreasonably lengthy immobilization of shares while the tender offeror considers whether to purchase the shares. *Id.*

31. 15 U.S.C. § 78n(d)(6) (1982) (section 14(d)(6) requires pro-rata acceptance of shares tendered in response to tender offer only when number of shares desposited during first 10 days of tender offer is greater than tender offeror is bound or willing to accept); *see supra* notes 17-22 and accompanying text (explaining pre-Williams Act pressures on shareholders to respond immediately to tender offers).

32. 15 U.S.C. § 78n(d)(7) (1982). *See House Report, supra* note 5, at 2821. The purpose of section 14(d)(7) of the '34 Act is to provide fair and equal treatment to all target shareholders who tender shares in response to a tender offer by ensuring that all shareholder solicitees receive an equal price for their shares. *Id.; see supra* note 20 and accompanying text (tender offerors in pre-Williams Act tender offers could raise tender offer price discriminately in favor of nontendering target shareholders).

33. *See supra* notes 28-32 and accompanying text (explaining sections 14(d)(5)-(7) of the Williams Act).

34. 15 U.S.C. § 78n(e) (1982). *See House Report, supra* note 5, at 2821 (anti-fraud provision makes unlawful any fraudulent or manipulative acts or practices in regard to tender offers).

35. *Compare* Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1207 (2d Cir. 1978) (open market purchases cannot constitute tender offer) *with* S-G Sec. Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114, 1126-27 (D. Mass. 1978) (open market purchase found likely to constitute tender offer); *see supra* note 12 and accompanying text (explaining that courts use various tests in determining whether certain activities constitute tender offers).

36. *See House Hearings, supra* note 18, at 11-12 (describing tender offer as invitation to stockholders to tender shares in exchange for premium price); *House Report, supra* note 5, at 2811-13 (same); *Senate Report, supra* note 5, at 2 (same); *supra* note 5 (explaining conventional usage of tern tender offer); *see also* Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1207 (2d Cir. 1978) (suggesting that Congress meant to regulate only conventional tender offers through the Williams Act). *See generally* 1 M. LIPTON & STEINBERGER, TAKEOVERS & FREEZEOUTS § 2.02 at 2-23 - 2-24 (1986) (suggesting that legislative history and language of Williams Act indicate that Congress intended Williams Act to apply only to conventional tender offers). *But see* ARANOW, EINHORN & BERNSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR

expansion of the scope of the term tender offer to encompass certain open market and privately negotiated purchases of securities.[37] The SEC and courts that favor expansion of the scope of the term tender offer, however, are not in uniform agreement concerning the proper test to employ in determining whether particular transactions constitute tender offers.[38] As a result, the scope of the term tender offer remains an elusive concept.[39]

OPEN MARKET PURCHASES

The legislative history of the Williams Act suggests that Congress did not intend to regulate any open market purchases of securities as tender offers.[40] Indeed, during the course of congressional hearings on the Williams Act, speakers specifically distinguished tender offers from open market purchases and commented upon the need for pre-acquisition disclosure only in the case of tender offers.[41] Congress recognized that, in contrast to open market purchases of securities under which the acquisition of control nor-

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CORPORATE CONTROL 1 (1977) (suggesting that Congress intentionally did not define tender offer so that term tender offer could expand to concepts beyond conventional tender offers); J. FLOM, M. LIPTON & E. STEINBERGER, 1 TAKEOVERS AND TAKEOUTS—TENDER OFFERS AND GOING PRIVATE 27 (1976) (legislative history of Williams Act implies that Act is applicable to nonconventional tender offers).

37. *See, e.g.*, Midcontinent Bancshares, Inc. v. O'Brien [1982 Transfer Binder] FED. SEC. L. REP. (CCH) 98,734, at 93,709 (E.D. Mo. 1981) (personal solicitations constituted tender offer); SEC. v. Texas Int'l Co., 498 F. Supp. 1231, 1240 (N.D. Ill. 1980) (private offer to purchase reorganization claims constituted tender offer); Wellman v. Dickinson, 475 F. Supp. 783, 826 (S.D.N.Y. 1979) (privately negotiated purchases constituted tender offer under SEC multifactor test); S-G Sec. Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114, 1127 (D. Mass. 1978) (open market purchases held likely to constitute tender offer); Cattleman's Inv. Co. v. Fears, 343 F. Supp. 1248, 1252 (W.D. Okla. 1972) (personal solicitations constituted tender offer). In *Cattleman's Inv. Co. v. Fears*, the United States District Court for the Western District of Oklahoma justified the extension of the scope of the term tender offer to nonconventional tender offers based on the reasoning that nonconventional tender offers potentially present the same dangers to shareholders as conventional tender offers present. *See* Cattleman's Inv. Co., 343 F. Supp. at 1251-52; *infra* notes 88-94 and accompanying text (discussing *Cattleman's*).

38. *See supra* note 12 and accompanying text (identifying various tests courts use in determining whether certain activities constitute tender offers).

39. *See supra* notes 36-38 and accompanying text (explaining confusion concerning definition and scope of tender offers).

40. *See House Hearings, supra* note 18, at 14 (describing open market purchases as non-tender offer acquisitions); *see also infra* notes 41-49 and accompanying text (supporting theory that Congress did not intend Williams Act to regulate open market purchases). *But see* S-G Sec. Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114, 1126-27 (D. Mass. 1978) (open market purchases held likely to constitute tender offer).

41. *See* 113 CONG. REC. 856 (1967). During congressional hearings on the Williams Act, Senator Williams stated that post-acquisition disclosure for open market and privately negotiated purchases is preferable to pre-acquisition disclosure so that the disclosure does not interfere with market forces or the bargaining positions of the negotiators. *Id.; House Hearings, supra* note 18, at 14 (describing open market purchases as non-tender offer acquisitions requiring only post-acquisition disclosure); *Senate Report, supra* note 5, at 16, 17, 24-25, 36 (distinguishing open market purchases from tender offers).

mally proceeds slowly, tender offers usually involve the rapid acquisition of control and, accordingly, necessitate pre-acquisition disclosure so that target shareholders can reach informed conclusions whether or not to participate in a tender offer.[42] Consequently, for the purpose of governing open market and other similar purchases, the framers of the Williams Act added section 13(d)(1) to the '34 Act which provides that any person acquiring, by any means, more than five percent of any class of registered equity securities must disclose certain information to the SEC within ten days of the acquisition.[43] Accordingly, section 13(d)(1) requires corporate equity securities acquirors to disclose the same information after an acquisition that section 14(d)(1) requires tender offerors to disclose prior to or concurrently with a tender offer.[44] The different time periods for disclosure under section 14(d)(1) and 13(d)(1), therefore, effectively demonstrate that Congress recognized the need for early disclosure in tender offer situations.[45]

In addition to the legislative history of the Williams Act, which discredits extending the scope of the term tender offer to open market purchases of securities, the inapplicability of sections 14(d)(5)-(7) of the '34 Act to open market purchases of securities further disfavors regulating open market purchases of securities as tender offers under the Williams Act.[46] For example, sections 14(d)(5)-(7) of the '34 Act assume the existence of certain procedures designed to facilitate the tender offer process, including a depository in which shares are held until the tender offeror accepts or rejects the shares.[47] The tender offer depository concept promotes compliance with the

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42. *See* Note, *supra* note 5, at 1257 (analyzing section 13(d)(1) of the '34 Act in conjunction with section 14(d)(1) of the '34 Act).

43. 15 U.S.C. § 78m(d)(1) (1982). *See House Report, supra* note 5, at 2818. The *House Report* on the Williams Act states that the purpose of section 13(d) is to provide information to certain groups about an acquiror who has acquired a substantial interest in a company or who has substantially increased his interest in a company. *Id.* Section 13(d)(1) also provides that if the purpose of a purchase is to acquire control, the SEC may require information about the acquiror's future plans for the company. *Id.*

44. *See* 15 U.S.C. § 78m(d)(1) (1982) (outlining information that section 13(d)(1) of the '34 Act requires purchasers of substantial amounts of corporate securities to provide); 15 U.S.C. § 78n(d)(1) (1982) (requiring tender offers to disclose information outlined in section 13(d)(1) of the '34 Act).

45. *See* Note, *supra* note 5, at 1257. Congress enacted Section 14(d)(1) of the '34 Act specifically to require tender offerors to disclose material information contemporaneously with a tender offer. *Id.* In the absence of section 14(d)(1), tender offers are subject to the same disclosure requirements of section 13(d)(1) of the '34 Act that are applicable to all other types of corporate security purchasers. *Id.* Thus, Congress recognized a necessity for earlier disclosure in tender offer situations than in other types of acquisitions. *Id.*

46. 15 U.S.C. §§ 78n(d)(5)-(7) (1982); *see supra* notes 28-33 and accompanying text (explaining functions of sections 14(d)(5)-(7) of the '34 Act); *supra* notes 28-33 and accompanying text (demonstrating incompatibility between sections 14(d)(5)-(7) of the '34 Act and open market purchases).

47. 15 U.S.C. §§ 78n(d)(5)-(7) (1982). Section 14(d)(5) of the '34 Act allows a shareholder who deposits shares in response to a tender offer to withdraw those shares during the first seven days of an offer or any time after the tender offer has been in effect for 60 days if the tender

uniform price, shareholder withdrawal and pro rata acceptance provisions of the Williams Act. In contrast, open market transactions do not involve depositories and, therefore, are incompatible with the group depository aspects of tender offers.[48] The incompatibility of the tender offer provisions of the Williams Act with open market purchases, as well as the legislative history of the Williams Act, demonstrate that Congress did not contemplate the application of the scope of the term tender offer to open market purchases.[49]

Despite the arguments against including open market purchases within the scope of the term tender offer, courts continue to entertain claims that open market purchases are within the scope of the term tender offer.[50] In addressing claims arising out of open market purchases under the Williams Act, some courts apply a multifactor test to determine whether a particular open market purchase constitutes a tender offer.[51] Under the multifactor test the reviewing court determines whether an acquisition constitutes a tender offer by comparing the characteristics of the transaction with seven factors normally associated with a conventional tender offer.[52] The seven factors

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offeror already has not acted on the offer. 15 U.S.C. § 78n(d)(5) (1982). Section 14(d)(6) of the '34 Act requires the tender offeror to accept the shares pro rata if more shares than the tender offeror sought are deposited within 10 days of the commencement of the tender offer. 15 U.S.C. § 78n(d)(6) (1982). Section 14(d)(7) of the '34 Act requires the tender offeror to pay an equal price for all shares accepted pursuant to the tender offer. 15 U.S.C. § 78n(d)(7). Sections 14(d)(5)-(7) of the '34 Act, therefore, necessitate a deposit period of several days between the time that the shareholders deposit the securities in accordance with the tender offer and the time when the securities are either accepted or rejected by the tender offeror. *See* 15 U.S.C. § 78n(d)(5)-(7) (1982).

48. *See* Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1207 (2d Cir. 1978). The withdrawal provision, the pro rata acceptance provision, and the equal price provision of the Williams Act are inapplicable to open market purchases for three reasons. *Id.* First, open market sellers cannot withdraw shares from sale after the shares have been relinquished. *Id.* Secondly, open market purchasers are unable to accept shares on a pro rata basis. *Id.* Finally, open market purchasers cannot realize more than the market price per share of stock on the open market. *Id.*

49. *See supra* notes 40-48 and accompanying text (supporting proposition that Congress did not intend Williams Act to apply to open market purchasers).

50. *See, e.g.*, Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 57-60 (2d Cir. 1985) (addressing whether five privately negotiated purchases and one open market purchase constituted tender offer); SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 950-53 (9th Cir. 1985) (addressing whether open market purchases constituted tender offer); Polinsky v. MCA Inc., 680 F.2d 1286, 1291 (9th Cir. 1982) (same); Ludlow Corp. v. Tyco Labs, Inc., 529 F. Supp. 62, 66-68 (D. Mass. 1981) (same); LTV Corp. v. Grumman Corp., 526 F. Supp. 106, 109-10 (E.D.N.Y. 1981) (same); S-G Sec., Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114, 1123-27 (D. Mass. 1978) (same).

51. *See* SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 950-53 (9th Cir. 1985) (open market purchases did not constitute tender offer under multifactor test); Polinsky v. MCA, Inc., 680 F.2d 1286, 1291 (9th Cir. 1982) (same); Ludlow Corp. v. Tyco Labs, Inc., 529 F. Supp. 62, 67 (D. Mass. 1981) (same); *infra* text accompanying notes 52-55 (discussing multifactor test).

52. *See* SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 950-52 (9th Cir. 1985). The *Carter Hawley Hale Stores* court examined open market repurchases of securities against

which are characteristic of a conventional tender offer are as follows: active and widespread solicitation of a corporation's shareholders; offer at a premium price; firm rather than negotiable terms of the offer; offer contingent on the tender of a certain number of shares; offer that is open for a limited period of time; offer that subjects shareholders to pressure to sell stock; and offer preceded by a public announcement of the offeror's intent to gain control.[53] Courts that employ the multifactor test need not find any specific number of characteristics in an acquisition to conclude that the acquisition constitutes a tender offer.[54] Rather, a court's inquiry under the multifactor test must be flexible enough to assess qualitatively the specific factors involved in the transaction at hand.[55]

In *SEC v. Carter Hawley Hale Stores, Inc.*,[56] for example, the United States Court of Appeals for the Ninth Circuit applied the multifactor test in considering whether Carter Hawley Hale Stores, Inc.'s (CHH) repurchase of over fifty percent of the outstanding shares of CHH constituted a tender offer.[57] In *Carter Hawley Hale Stores,* the Limited, Inc. (Limited) made a cash tender offer for twenty million shares, or fifty-five percent, of the outstanding shares of CHH.[58] After CHH publicly announced that Limited's offer was not in the best interest of CHH or its shareholders, CHH instituted an open market repurchase program for fifteen million shares of CHH common stock.[59] Under the repurchase program, CHH acquired over fifty percent of the outstanding common stock of CHH before Limited was able to legally purchase any of the shares tendered pursuant to the tender offer.[60] Limited revised and eventually withdrew the original tender offer.[61] Subsequent to Limited's withdrawal of its tender offer, the SEC instituted proceedings for injunctive relief against CHH in the United States District Court for the Central District of California alleging that the CHH repurchase

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each of eight factors of the multifactor test and found that the purchases did not possess any of the factors which characterize conventional tender offers. *Id.*

53. *Id.* at 950.

54. *Id.*

55. *See* Wellman v. Dickinson, 475 F. Supp. 783, 824 (S.D.N.Y. 1979) (determinative value of particular multifactor test factor depends on facts of transaction).

56. 760 F.2d 945 (1985).

57. *Id.* at 947-53; *see infra* notes 66-70 and accompanying text (addressing issue whether Carter Hawley Hale Stores, Inc. (CCH) repurchases program constituted tender offer).

58. Carter Hawley Hale Stores, 760 F.2d at 946.

59. *See id.* In *Carter Hawley Hale Stores,* CHH announced intention to repurchase as many as 15,000,000 shares of CHH stock at an aggregate price of $500,000 or less. *Id.* The CHH repurchase program was part of an elaborate scheme to defeat Limited's offer to purchase shares of CHH stock. *Id.* In connection with the scheme, CHH sold a substantial percentage of CHH preferred shares to General Cinema Corporation (General Cinema) and granted General Cinema an option to purchase a lucrative CHH subsidiary. *Id.* CHH anticipated that General Cinema would represent one-third of the voting shares of CHH if the repurchase program succeeded. *Id.*

60. *Id.* at 947.

61. *Id.*

program constituted an illegal tender offer.[62] The district court denied the SEC's motion for a preliminary injunction on the ground that the SEC had failed to establish the likelihood that the CHH repurchase program constituted a tender offer under the multifactor test.[63]

The Ninth Circuit affirmed the district court ruling after a careful analysis of the CHH repurchase program under the multifactor test.[64] The *Carter Hawley Hale Stores* court found that the CHH repurchase program did not involve an active and widespread solicitation of shareholders and, thus, did not involve solicitation for a substantial percentage of CHH shares.[65] The Ninth Circuit also found that the CHH repurchase offer was not conditioned upon the acquisition of a certain number of shares, did not involve a premium price or fixed terms, and was not open for only a limited period of time.[66] In considering whether the shareholder pressure factor was present, the Ninth Circuit found that, although the shareholders experienced pressure, market forces, not CHH, were the cause of pressure on the shareholders.[67] The Ninth Circuit conceded, however, that the CHH repurchase program involved a public announcement of intent to acquire stock followed by a large acquisition of stock and, therefore, met one factor of the multifactor test.[68] The *Carter Hawley Hale Stores* court affirmed the district court decision finding that the CHH repurchase program did not

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62. *See* SEC v. Carter Hawley Hale Stores, Inc., 587 F. Supp. 1248, 1251 (C.D. Cal. 1984) (SEC sought to enjoin further stock repurchases and to obtain preliminary injunctive relief requiring CHH to transfer the repurchased stock to trustees for voting purposes). The SEC alleged that the CHH repurchase program amounted to a tender offer in violation of section 13(e)(1) of the '34 Act which governs issuer repurchases of securities. *Id.*

63. *Id.* at 1252-56. The United States District Court for the Central District of California in *Carter Hawley Hale Stores* found that the repurchase program did not constitute a tender offer under the multifactor test. *Id.* In denying the motion for a preliminary injunction, the district court refused to consider the tender offer identification test proposed in *S-G Securities Inc. v. Fuqua Investment Co.*. *Id. See* S-G Sec. v. Fuqua Inv. Co., 466 F. Supp. 1114 (D. Mass. 1978) (explaining S-G test); *supra* notes 52-55 and accompanying text (explaining S-G test).

64. *See* SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 950-52 (9th Cir. 1985); *infra* notes 65-69 and accompanying text (court's analysis of whether CHH open market repurchase program constituted tender offer).

65. *See Carter Hawley Hale Stores,* 760 F.2d at 950 (CHH did not directly solicit any shareholders and did not indirectly solicit shareholders through publicity concerning repurchase program).

66. *See id.* at 951. The *Carter Hawley Hale Stores* court found that since CHH engaged in many transactions at various prices, the terms of the repurchase offer were not firm in the sense that negotiation could not take place. *Id.* The court also determined that a "premium" price normally is measured in relation to market price and that CHH's repurchases at the market price, therefore, were not made at a premium. *Id.* In addition, the court found the repurchases were not contingent on the tender of a fixed number of shares and that CHH did not set a limited time period for the offer. *Id.*

67. *See id.* at 952. The Ninth Circuit in *Carter Hawley Hale Stores,* found that the pressure on shareholders to tender shares to CHH resulted from market forces rather than the CHH repurchase program. *Id.*

68. *Id.*

constitute a tender offer according to the tender offer characteristics specified in the multifactor test.[69] In accordance with the Ninth Circuit's decision in *Carter Hawley Hale Stores,* most courts that have applied the multifactor test have concluded that open market purchases generally do not possess the characteristics indicative of a conventional tender offer.[70]

As an alternative to the multifactor test, for determining whether open market purchases constitute tender offers,[71] the United States District Court for the District of Massachusetts in *S-G Securities v. Fuqua Investment Co.*[72] adopted a test that examines solely whether a public announcement of intent to gain control of a corporation has been followed by rapid substantial open market and privately negotiated purchases.[73] In *S-G Securities,* Fuqua Investment Company, Inc. (Fuqua) entered into negotiations with the board of directors of S-G Securities, Inc. (S-G) in an attempt to gain control of S-G through either a merger or a tender offer.[74] After S-G's board of directors rejected Fuqua's proposals, Fuqua publicly announced its intent to acquire control of S-G.[75] Fuqua then purchased twenty-eight percent of the outstanding shares of S-G through privately negotiated and open market purchases.[76] Fuqua, however, did not comply with section 14(d) of the '34 Act.[77] S-G petitioned the district court for a preliminary injunction to enjoin Fuqua from voting the shares that Fuqua had purchased and from purchasing additional shares of S-G on the grounds that Fuqua's purchases constituted an illegal tender offer under section 14(d) of the '34 Act.[78] Since Fuqua had

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69. *Id.* The *Carter Hawley Hale Stores* court found that none of the traditional seven tender offer characteristics were present in the CHH repurchase program. *Id.* The presence of the eighth factor, a public announcement made prior to the repurchase program, did not justify, in the court's opinion, characterizing the program as a tender offer. *Id.*

70. *See id.* at 950-53 (open market purchases did not constitute tender offer under multifactor test); Polinsky v. MCA, Inc., 680 F.2d 1286, 1291 (9th Cir. 1982) (same); Ludlow Corp. v. Tyco Labs, Inc., 529 F. Supp. 62, 67 (D. Mass. 1981) (same); Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 791-92 (S.D.N.Y. 1979) (criticizing multifactor test but finding that open market purchases would not constitute tender offer even if multifactor test applied).

71. *See supra* notes 52-55 and accompanying text (explaining multifactor test).

72. 466 F. Supp. 1114 (D. Mass. 1978).

73. *Id.* at 1126-27. *See infra* text accompanying note 81 (S-G *Securities* court reasoned that public announcement of intent to acquire control followed by rapid stock acquisitions pressures target shareholders into selling stock); *see also* Esmark Inc. v. Strode [1981-1982 Transfer Binder] FED. SEC. L. REP. 98,238, at 91,581 (KY. CT. APP. 1981) (applying S-G test). *See generally* Note, *Expansion of the Williams Act: Tender Offer Regulation for Nonconventional Purchases,* 11 Loy. U. Chi. L.J. 277, 277-96 (examining *S-G Securities* case).

74. *S-G Sec.,* 466 F. Supp. at 1119.

75. *See id.* at 1119 (Fuqua published press releases which reported Fuqua's intent to acquire substantial amount of S-G stock).

76. *See id.* at 119-21. In *S-G Securities,* Fuqua purchased 28%, or approximately 400,000 shares, of S-G stock in six large block purchases. *Id.* Fuqua bought approximately 285,000 shares of S-G stock on the open market and approximately 115,000 shares of stock through privately negotiated purchases. *Id.*

77. *Id.* at 1124; *see supra* notes 25-32 and accompanying text (explaining requirements of sections 14(d)(1), (5)-(7) of '34 Act).

78. *See S-G Sec.,* 466 F. Supp. at 1110.

made a public announcement of intent to gain control of S-G and subsequently made substantial purchases of S-G stock on the open market and through private negotiations, the district court held that S-G demonstrated a likelihood of prevailing on the claim that Fuqua's open market purchases constituted a tender offer within the meaning of the Williams Act.[79] The district court reasoned that a public announcement of intent to acquire control of a company, followed by rapid acquisitions of the stock of that company, exert pressures upon target shareholders of the type that Congress intended the Williams Act to prevent.[80] Under the *S-G Securities* test, therefore, large open market purchases are susceptible to characterization as tender offers if preceded by a purchaser's announcement of intent to acquire control of the target corporation.[81]

Although courts continue to entertain claims that open market purchases constitute tender offers, the history of these allegations in the courts suggests that most courts are not receptive to the extension of the scope of the term tender offer to include open market purchases.[82] To the extent that the *S-G Securities* case contradicts the general tendency among courts, the case remains something of an anomaly to judicial decisions on the subject of the applicability of the Williams Act to open market purchases.[83] The refusal of the judiciary to apply the tender offer provisions of the Williams Act to open market purchases is justified in light of the legislative history and the statutory framework of the Williams Act.[84]

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79. *Id.* at 1126-27. The *S-G Securities* court examined the legislative history of the Williams Act and prior judicial interpretations of section 14(d) of the '34 Act. *Id.* at 1124-26.

80. *See id.* at 1126. Despite the finding of the *S-G Securities* court that S-G demonstrated a likelihood of prevailing on the claim that Fuqua's actions constituted an illegal tender offer under section 14(d) of the '34 Act, the district court declined to grant S-G's motion for a preliminary injunction on the ground that S-G had failed to demonstrate irreparable injury to S-G shareholders. *Id.* at 1127-29. The *S-G Securities* court, instead, enjoined Fuqua from purchasing additional S-G shares through means other than a tender offer and also enjoined Fuqua from voting the shares that Fuqua had acquired without first offering recission to the uninformed shareholders from whom Fuqua had purchased the S-G shares. *Id.* at 1129.

81. *See id.* at 1126-27.

82. *See* SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 953 (9th Cir. 1985) (open market purchases do not constitute tender offer); Kennecott Copper Corp. v. Curtiss-Wright Corp., 582 F.2d 1195, 1207 (2d Cir. 1978) (legislative history of Williams Act suggests that tender offer rules are not applicable to open market purchases); Wellman v. Dickinson, 475 F. Supp. 783, 820 (S.D.N.Y. 1979) (same); 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) (SAME); *supra* notes 50-51, 71-73 (discussing judicial treatment of claims that open market purchases constitute tender offers).

83. *See supra* note 51 and accompanying text (judicial decisions refuse to extend scope of term tender offer to open market purchases).

84. *See supra* notes 46-49 and accompanying text (inapplicability of sections 14(d)(5)-(7) of the '34 Act to open market purchases); *supra* notes 40-45 and accompanying text (discussing legislative history of Williams Act); *supra* note 51 and accompanying text (discussing judicial reluctance to hold that open market purchases constitute tender offer). *But see S-G Sec. v. Fuqua Inv. Co.*, 466 F. Supp. 1114, 1127 (D. Mass. 1978) (finding that open market purchases likely to constitute tender offer).

PRIVATELY NEGOTIATED TRANSACTIONS

Courts generally agree that privately negotiated transactions, which typically involve a buyer and a seller negotiating stock purchase terms directly with one another, are susceptible to categorization as tender offers for the purposes of the Williams Act.[85] Unlike open market purchases, private negotiations for the sale of securities may involve many of the characteristics associated with conventional tender offers and, therefore, may cause the pressured, ill-informed target shareholder decisions that Congress sought to prevent through adoption of the Williams Act.[86] The United States District Court for the Western District of Oklahoma in *Cattleman's Investment Co. v. Fears*[87] first extended the term tender offer to private negotiations for the purchase of securities.[88] In *Cattleman's Investment Co.*, the defendant, George Fears, solicited many of the National Pioneer Insurance Company's (Pioneer) shareholders for the purpose of purchasing shares of Pioneer's stock.[89] Fears, however, did not comply with any of the Williams Act tender offer provisions.[90] The *Cattleman's* court held that Fears' solicitation activity

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85. *See* Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 57 (2d Cir. 1985) (individual purchases may constitute tender offer if shareholders need Williams Act information); Mid-Continent Bancshares, Inc. v. O'Brien [1982 Transfer Binder] FED. SEC. L. REP. (CCH) 98,734, at 93,709 (E.D. Mo. 1981) (widespread private solicitations at premium for substantial block of stock constituted tender offer); Wellman v. Dickinson, 475 F. Supp. 783, 826 (S.D.N.Y. 1979) (purchase of substantial amount of stock from 39 individuals and institutions constituted tender offer); Hoover Co. v. Fuqua Indus., Inc. [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) 97,107, at 96,145 (N.D. Ohio 1979) (solicitation of over 100 family members for more than 40% of a company's stock constituted a tender offer); Cattleman's Inv. Co. v. Fears, 343 F. Supp. 1248, 1252 (W.D. Okla. 1972) (widespread solicitation of shareholders constituted tender offer).

86. *See* Wellman v. Dickinson, 475 F. Supp. 783, 824-25 (S.D.N.Y. 1979), *cert. denied*, 460 U.S. 1069 (1983). The district court in *Wellman v. Dickinson*, employing the multifactor test, found that seven of the eight characteristics traditionally associated with a tender offer were present in the privately negotiated purchases at issue. *Id.* The *Wellman* court also distinguished privately negotiated purchases from open market purchases by recognizing that the application of the Williams Act to privately negotiated purchases, unlike the application of the Williams Act to open market purchases, does not render sections 14(d)(5)-(7) unworkable. *See id.* at 822. The *Wellman* court explained that *Wellman* involved only privately negotiated purchases while *Kennecott Copper Corp. v. Curtiss-Wright Corp.* involved, in addition to privately negotiated purchases, open market purchases which could not adapt to procedural aspects of the Williams Act tender offers provisions. *Id.*, Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1207 (2d Cir. 1978) *supra* notes 46-49 and accompanying text (explaining incompatibility between open market transactions and sections 14(d)(5)-(7) of '34 Act).

87. 343 F. Supp. 1248 (W.D. Okla. 1972).

88. *See* Cattleman's Inv. Co. v. Fears, 343 F. Supp. 1248, 1252 (W.D. Okla. 1972) (active and widespread solicitation of shareholders constituted tender offer).

89. *See id.* at 1251-52. In *Cattleman's Investment Co. v. Fears*, the defendant solicited several of the Cattleman's Investment Co. (Cattleman's) shareholders for the purchase of their stock. *Id.* The defendant's purchases in *Cattleman's Investment Co.* resulted in ownership of more than 5% of the outstanding shares of Cattleman's Investment Co. *Id.*

90. *Id.* at 1252.

constituted a tender offer because Fears' widespread solicitation of target shareholders caused the target shareholders to make hurried investment decisions without access to material information concerning the proposed offering.[91] The court reasoned that Fears' solicitation of Pioneer's shareholders exposed the target shareholders to the dangers that Congress designed the Williams Act to prevent.[92] In applying the Williams Act tender offer provisions to a transaction beyond the scope of a conventional tender offer,[93] the *Cattleman's* court provided a foundation for the establishment of the multifactor test which further extended the scope of the Williams Act tender offer provisions to encompass privately negotiated purchases.[94]

Although the *Cattleman's* case provided the foundation for the application of the multifactor test to private negotiations for the sale of securities, one of the earliest specific judicial articulations of the multifactor test appeared in *Wellman v. Dickinson.*[95] In *Wellman,* Sun Company (Sun) sought to gain control of Becton, Dickinson & Company (BD) through privately negotiated purchases of BD's shares.[96] Sun solicited thirty-nine individual and institutional BD shareholders located throughout the country for the purpose of purchasing BD stock.[97] Sun offered the BD shareholders a premium for shares of BD but did not permit negotiation concerning the offering price or the terms of the offer.[98] Sun also imposed time constraints and pressures on the BD shareholders to tender their shares and conditioned the offer on the tender of a certain number of shares.[99] Despite the condi-

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91. *See id.* at 1251. In the *Cattleman's* case, the district court found that the clear purpose of the Williams Act is to provide material information and time to shareholders faced with control-related tender offers, as well as to ensure that the tender offeror treats all target shareholders fairly. *Id.* The defendant's actions conflicted with the purposes of the Williams Act because the defendant's active solicitation of the Cattleman's Investment Co. shareholders pressured the shareholders to make uninformed, hurried investment decisions of the sort that Congress designed the Williams Act to prevent. *Id.* at 1252. In failing to comply with the Williams Act tender offer provisions, the defendant, Fears, also deprived the Cattleman's shareholders of the equal protection provisions of section 14(d) of the '34 Act. *Id.*

92. *Id.; see supra* notes 25-33 and accompanying text (purpose of Williams Act tender offer provisions).

93. *See* Cattleman's Inv. Co., 343 F. Supp. at 1252 (private negotiations constituted tender offer).

94. *See id.* (private soliciations constituted tender offer); Wellman v. Dickinson, 475 F. Supp. 783, 825 (S.D.N.Y. 1979), *cert. denied,* 460 U.S. 1069 (1983). The *Wellman* court found that private negotiations for the purchase of stock constitute a tender offer. *Id.* The *Wellman* court not only accepted the *Cattleman's* court's proposition that private negotiations may constitute tender offers but also articulated a multifactor test for use in determining whether privately negotiated transactions actually constitute a tender offer. *Id.*

95. *Wellman,* 475 F. Supp. at 825 (S.D.N.Y. 1979); *see supra* text accompanying note 53 (identifying multifactor test factors).

96. *See Wellman,* 475 F. Supp. at 824. (The defendant, solicited over 34% of the outstanding BD stock from over 39 individuals and institutions).

97. *See id.* (Sun solicited of more than 34% of the outstanding BD stock from shareholders located in areas from New York to California and from Massachusetts to North Carolina).

98. *Id.* (defendant structured purchases so there would be no individual negotiation).

99. *See id.* at 822, 824-25 (defendant conditioned offer on the acquisition of 20% of the outstanding shares of BD).

tional terms of Sun's offer, Sun did not comply with the tender offer provisions of the Williams Act.[100]

In considering the claim that Sun's purchases constituted a tender offer, the *Wellman* court recognized that Sun's offer possessed all of the characteristics of a conventional tender offer as described in the legislative history of the Williams Act.[101] The *Wellman* court next considered the seven characteristics of a tender offer that the SEC provided for the court in an amicus curiae brief.[102] The factors that the SEC suggested were characteristic of a tender offer provide the basis for the multifactor test: active and widespread solicitation of shareholders; solicitation for a substantial percentage of stock; offer at a premium price; offer contingent upon the tender of a specific number of shares; offer based on fixed terms; offer open for a limited period of time; and pressure on shareholders to tender stock.[103] The *Wellman* court compared the multifactor description of a tender offer with Sun's offer and determined that Sun's offer possessed all seven factors specified in the SEC multifactor description of a tender offer.[104] The *Wellman* court, therefore, concluded that Sun's offer constituted a tender offer in violation of section 14(d) of the '34 Act.[105]

Although the *Wellman* decision demonstrates an application of the multifactor test to a privately negotiated transaction which amounted to a tender offer,[106] other courts have applied some factors of the multifactor test to privately negotiated securities transactions and have found that no tender offer existed.[107] For example, the United States District Court for the District

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100. *Id.* at 826.

101. *See id.* at 822-23. The *Wellman* court found that Sun's purchases involved several of the traditional characteristics of a conventional tender offer including a bid, a premium price, and a obligation to purchase all or a specific number of shares if certain conditions were met. *Id.*

102. *See id.* at 823-25 (identifying several factors that SEC suggests are characteristic of tender offer).

103. *Id.* at 823-24.

104. *See id.* at 824-25 (analyzing private purchases under multifactor test). *Compare supra* notes 98-100 and accompanying text (factual breakdown of privately negotiated purchases in *Wellman) with* text accompanying note 103 *supra* (multifactor test factors). The purchases in *Wellman* possessed all of the SEC enunciated multifactor test characteristics. *See Wellman,* 475 F. Supp. at 824-25.

105. *See Wellman,* 475 F. Supp. at 826 (purchases of stock involved important characteristics of tender offers).

106. *See id.* (privately negotiated purchases constituted tender offer).

107. *See, e.g.,* Astronics Corp. v. Protective Closures Co., Inc., 561 F. Supp. 329, 335 (W.D.N.Y. 1983) (private sales not likely to constitute tender offer under multifactor test); University Bank and Trust Co. v. Gladstone [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) 99,594, at 97,343 (D. Mass. 1983) (solicitation of 22% of a corporation's stock from 49 shareholders did not constitute tender offer); Gilbert v. Bagley, 492 F. Supp. 714, 731 (M.D.N.C. 1980) (offer to purchase securities at a fixed price did not constitute tender offer); Stromfield v. Great Atl. & Pac. Tea Co., 484 F. Supp. 1264, 1272 (S.D.N.Y. 1980) (offer to seven shareholders to purchase stock at a premium did not constitute tender offer); Panter v. Marshall Field & Co. [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) 97,299, AT 97,059 (N.D. ILL. 1980) (offer to purchase shares of stock subject to condition precedent did not constitute tender offer).

of Massachusetts, when confronted with a transaction possessing only three of the factors of the multifactor test, concluded that the factors characteristic of tender offers which were absent outweighed the factors characteristic of tender offers that were present in the transaction.[108] As a comparison of the cases applying the multifactor test to privately negotiated transactions suggests, whether a court concludes that a privately negotiated transaction constitutes a tender offer under the multifactor test will depend upon the specific facts involved in a unique privately negotiated transaction.[109]

Despite the judiciary's widespread acceptance of the multifactor test, the United States Court of Appeals for the Second Circuit, in *Hanson Trust PLC v. SCM Corp.*,[110] recently criticized the multifactor test and, instead, proposed and employed a shareholder identification test for ascertaining whether a privately negotiated securities purchase constitutes a tender offer.[111] In *Hanson Trust,* Hanson Trust, PLC and certain of its affiliates (Hanson Trust) made five privately negotiated purchases and one open market purchase of SCM Corporation's (SCM) stock and, thereby, acquired twenty-five percent of SCM's outstanding stock within a two hour period.[112] SCM then applied to the United States District Court for the Southern District of New York for a temporary restraining order prohibiting Hanson Trust from

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108. *See* University Bank and Trust Co. v. Gladstone [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) 99,594, AT 97,343 (D. MASS. 1984). IN *University Bank and Trust Co. v. Gladstone,* a University Bank and Trust Company (Bank) shareholder, who owned approximately 19% of Bank's outstanding shares, privately solicited options to purchase an additional 22% of Bank's outstanding shares. *Id.* at 97,343. Bank brought suit, alleging that the shareholder had engaged in a tender offer that violated sections 14(d) and 14(e) of the '34 Act. *Id.* at 97,342. The district court held that the shareholder's solicitations did not constitute a tender offer based on the following reasons—the shareholder had not made a public announcement of intent to acquire a substantial amount of Bank stock prior to the solicitations, the terms of the offer were negotiable, the offer was not contingent upon the tender of a certain number of shares, and the tender offer did not involve pressure tactics directed toward the shareholders. *Id.* at 94,343. The district court found that the absence of certain tender offer characteristics outweighed the few tender offer characteristics that were present in the offer. *Id.* Specifically, the court recognized that the offer involved an active and widespread solicitation of shareholders for the purchase of a large block of securities at a premium price. *Id.*

109. *See supra* notes 102-108 and accompanying text (demonstrating fact-specificity of multifactor test when applied to privately negotiated transactions).

110. 774 F.2d 47 (2d Cir. 1985).

111. *See id.* at 57. The shareholder identification test enunciated in *Hanson Trust* focuses on the target shareholders' need for the information that section 14(d)(1) of the Williams Act provides in a tender offer context. *Id.* If an offer presents the likelihood that, unless a section 14(d)(1) disclosure is made, target shareholders will lack the information needed to consider the offer, the offer constitutes a tender offer under the shareholder identification test. *Id.*

112. *See id.* at 52-53. In *Hanson Trust,* Hanson Trust made open market and privately negotiated purchases subsequent to a former tender offer by Hanson Trust for SCM shares. *Id.* at 51-53. Hanson Trust withdrew the tender offer in response to actions taken by SCM which prevented Hanson Trust from successfully completing the tender offer. *Id.* SCM shareholders who desired to sell their SCM stock initiated four of the five subsequent Hanson Trust privately negotiated purchases. *Id.* at 52-53. The purchases involved no direct Hanson Trust solicitation. *Id.*

making additional purchases of SCM's stock.[113] The district court granted the temporary restraining order, accepting SCM's contention that Hanson Trust's purchases constituted a tender offer in contravention of the Williams Act.[114]

On appeal, the United States Court of Appeals for the Second Circuit noted that the district court did not rely on a particular established test to define the term tender offer and reversed the district court decision on the grounds that Hanson Trust did not purchase SCM's stock in connection with a tender offer.[115] In choosing a proper test to apply in determining whether certain activity constitutes a tender offer, the *Hanson Trust* court stated that complete reliance on the multifactor test to determine whether a transaction must comply with the tender offer provisions of the Williams Act is unwise because the factors of the test may not be determinative of whether a particular transaction constitutes a tender offer.[116] The *Hanson Trust* court argued that some transactions involving only a few of the multifactor test's factors constitute tender offers while some transactions involving many of the test's factors are not tender offers.[117] As an alternative to the multifactor test, the *Hanson Trust* court adopted a shareholder identification test.[118] Under the shareholder identification test, an offer to purchase shares of a target corporation constitutes a tender offer only when the pre-acquisition disclosure of section 14(d)(1) of the Williams Act is necessary for the target shareholders to make an informed investment decision.[119] The *Hanson Trust* court, applying the shareholder identification test, recognized that five of the six shareholders that Hanson Trust had solicited were sophisticated

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113. *See* Hanson Trust PLC v. SCM Corp., 617 F. Supp. 832, 834 (S.D.N.Y.), *rev'd* 774 F.2d 47 (2d Cir. 1995). SCM argued that the district court should enjoin further Hanson Trust purchases because Hanson Trust's purchases amounted to an illegal de facto continuation of Hanson Trust's earlier tender offer. *Id.*

114. *See id.* The district court in *Hanson Trust,* however, did not specify the standard that the court used to determine that the purchases constituted a tender offer. *Id.*

115. *See* Hanson Trust v. SCM Corp., 774 F.2d 47, 57 (2d Cir. 1985) (purchases not made pursuant to tender offer as defined in shareholder identification test).

116. *Id.* at 57. The Second Circuit in *Hanson Trust* suggested that the characteristics of a tender offer, specified in the multifactor test, are not determinative of whether a particular transaction constitutes a tender offer. *Id.* The court argued that some tender offers possess a few of the tender offer characteristics identified in the multifactor test while some non-tender offer activities possess many of the tender offer characteristics. *Id.* Thus, the Second Circuit opined that the multifactor test is unreliable. *Id. But see id.* at 57-58 (finding that even under multifactor test Hanson Trust's purchases did not constitute tender offer).

117. *Id.* at 57.

118. *Id.* .The *Hanson Trust* court modeled the shareholder identification test on the principals applied in *SEC v. Ralston Purina Co.* and *Kennecott Copper Corp. v. Curtiss-Wright Corp. Id. See* SEC v. Ralston Purina Co., 346 U.S. 119, 127 (1953) (applicability of a particular section of Securities Exchange Act of 1933 ('33 Act) depends upon whether protection of '33 Act is needed); Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1206 (2d Cir. 1978) (determination of applicability of Williams Act depends on statutory purpose); *infra* text accompanying note 120 (description of shareholder identification test).

119. *See Hanson Trust,* 774 F.2d at 57 (description of shareholders identification test); *supra* note 111 and accompanying text (explaining shareholder identification test).

institutional investors who had access to material information and, therefore, were not members of the class that Congress sought to protect through the enactment of the Williams Act.[120] Thus,the Second Circuit held that Hanson Trust's privately negotiated purchases of SCM stock did not constitute a tender offer since the shareholders in *Hanson Trust* did not need the information required under section 14(d)(1) of the '34 Act to make an informed investment decision concerning the sale of SCM stock.[121]

After *Hanson Trust,* courts in the Second Circuit most likely will base their determination of whether a particular privately negotiated purchase constitutes a tender offer on the target shareholders' sophistication and the target shareholders' access to information that section 14(d) of the '34 Act requires for disclosure.[122] The *Hanson Trust* decision suggests that the sole purpose of the Williams Act is to provide target shareholders with material information that will aid the shareholders in reaching an informed investment decision in the context of a tender offer.[123] While the tender offer provisions of the Williams Act seek to provide shareholders with material information,[124] the provisions also seek to ensure evenhanded treatment of shareholders and to provide shareholders with the time necessary to make an informed investment decision.[125] In light of the various purposes of the Williams Act, the Second Circuit's shareholder identification test is flawed because the test acknowledges only the Williams Act's purpose of providing information to the uniformed target shareholder and does not consider the Williams Act's purposes of providing time and equal treatment to target shareholders in tender offer situations.[126] Although target shareholders' need for information

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120. *See Hanson Trust,* 774 F.2d at 57. The *Hanson Trust* court found that five of the six sellers were highly sophisticated professionals and were aware of the information necessary to make an informed decision to sell. *Id.* Furthermore, the court found that the sellers had access to such information as Hanson Trust's section 14(d)(1) disclosure made in connection with a prior tender offer, Hanson Trust's amendment to the original offer, and press releases concerning SCM's responses to the formal Hanson Trust tender offer. *Id.* at 57-58.

121. *Id.*

122. *See supra* notes 118-21 and accompanying text (discussing Second Circuit's adoption of shareholder identification test).

123. *See Hanson Trust,* 774 F.2d at 57 (stating that purpose of section 14(d) of '34 Act is to provide disclosure of information to uninformed investors).

124. *See* 15 U.S.C. 78n(d)(1) (1982) (requiring disclosure of certain information to target shareholders in tender offer situations); *House Report, supra* note 5, at 2813-14 (one purpose of Williams Act is to provide information to target shareholders); *supra* notes 25-27 and accompanying text (purpose of section 14(d)(1) of '34 Act).

125. *See* 15 U.S.C. § 78n(d)(5)-(7) (1982) (providing time and equal treatment to shareholder solicitees in tender offer situations); *House Report, supra* note 5, at 2820-21 (Williams Act designed to protect tender offer shareholders from pressure and prejudice); *supra* notes 28-33 and accompanying text (explaining sections 14(d)(5)-(7) of '34 Act).

126. *See Hanson Trust v. SCM—Death of the Williams Act?,* N.Y.L.J. Dec. 9, 1985 at 44, col. 2 (explaining that *Hanson Trust* decision does not recognize purposes of the Williams Act other than the purpose of providing disclosure of information) [hereinafter cited as *Death of the Williams Act].*

about a tender offer is important,[127] the disclosure of material information alone is not sufficient to ensure informed, unhurried decision-making when tender offerors pressure target shareholders to tender shares hastily at the risk of discrimination.[128] Courts, therefore, should not depend solely upon the shareholder identification test to determine whether a specific privately negotiated transaction constitutes a tender offer.[129]

A solution to the conflict concerning the proper test to use in determining which offers to purchase securities constitute tender offers lies with a modified multifactor test.[130] Although *Hanson Trust* rejects the quantitative aspects of the multifactor test,[131] the multifactor test's flexibility enables courts to effectively inquire into whether a specific activity resembles a tender offer for the purpose of the Williams Act.[132] The multifactor test, however, fails to give due consideration to the needs of the target shareholders to obtain information about a tender offer.[133] A modification of the multifactor test to include the shareholders identification test would enable courts to determine more reliably which activities constitute tender offers for the purposes of the Williams Act.[134] Under a modified multifactor test, a reviewing court first should apply the multifactor test to determine whether a certain activity involves the characteristics of a conventional tender offer. Secondly, the court should investigate whether an activity that does not constitute a tender offer under the multifactor test nonetheless should comply with the Williams Act tender offer provisions because of the shareholders'

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127. *See House Hearings, supra* note 18, at 11-13 (discussing importance of disclosing material information in tender offer situations); *supra* notes 17-18 and accompanying text (shareholders' need for disclosure of material information).

128. *See Death of the Williams Act?, supra* note 126. Although the SCM shareholders in *Hanson Trust* were not in need of material information, Hanson Trust's offer did not accord equal treatment to all SCM shareholders. *Id.* Market professionals with access to specialized stock information sources determined that Hanson Trust was willing to purchase large amounts of SCM stock. *Id.* Other SCM shareholders without access to specialized information operated at a severe disadvantage since those shareholders did not know that Hanson Trust was a willing purchaser of SCM stock. *Id.* If Hanson Trust had complied with the Williams Act tender offer provisions, all SCM shareholders would have had access to the same information and, thereby, would have been treated equally. *Id.*

129. *See supra* notes 126-28 and accompanying text (explaining flaw in shareholder identification test).

130. *See infra* notes 134-35 and accompanying text (explaining needed modification of multifactor test).

131. *See Hanson Trust,* 774 F.2d at 57 (arguing that quantity of factors present in transactions is not determinative of whether transaction constitutes tender offer).

132. *See* SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 953 (9th Cir. 1985) (multifactor test reflects multiple congressional concerns about tender offers); *supra* notes 104-08 and accompanying text (demonstrating fact-specificity and flexibility of multifactor test).

133. *See* SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d at 945, 950-52 (9th Cir. 1985) (listing factors examined through application of eight-factor version of multifactor test). The tender offer shareholders' need for information is not one of the factors examined under the multifactor test. *See id.*

134. *See infra* notes 135-36 and accompanying text (explaining proposed modified multifactor test).

need for information, time, and equal treatment under the Williams Act.[135] A two tier test which examines both the form of an offer and the tendering shareholders' need for information about the offer, would recognize all the goals of the Williams Act while providing a flexible, effective standard for use in the identification of tender offers.[136]

The scope of the definition of the term tender offer under the Williams Act remains elusive.[137] Although courts do not apply actively the Williams Act tender offer provisions to open market purchases,[138] most courts recognize the applicability of the Williams Act tender offer provisions to those privately negotiated transactions which present many of the dangers that the Williams Act seeks to eliminate.[139] Although no particular test for identifying Williams Act tender offers has commanded uniform acceptance, the multifactor test and the shareholder identification test each further an important, yet limited, aspect of the Williams Act.[140] A two tier test which addresses whether an offer to purchase securities possesses characteristics traditionally associated with conventional tender offers and, also, whether the target shareholders solicited in the offer need the protection of the Williams Act tender offer provisions would provide a valuable method for determining which activities should comply with the tender offer provisions of the Williams Act.[141] Realization of the ultimate goal of the Williams Act, to protect target shareholders in the context of tender offer contests for

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135. *See* Wellman v. Dickinson, 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979) (explaining multifactor test), *cert. denied,* 460 U.S. 1069 (1983); *House Report, supra* note 5, at 2812-14 (one purpose of section 14(d)(1) of '34 Act is to provide uninformed shareholders with information about tender offer).

136. *See* SEC v. Ralston Purina Co., 346 U.s. 119, 124-25 (1953) (examining statutory purpose of securities legislation to determine applicability of securities legislation to specific types of transactions); Wellman v. Dickinson, 475 F. Supp. 783, 823-26 (S.D.N.Y. 1979) (considering whether activity presents same dangers as conventional tender offers to determine if Congress meant to regulate that activity through the Williams Act), *cert. denied,* 460 U.S. 1069 (1983); *Death of the Williams Act?, supra* note 126, at 44, col. 2-3 (possibility exists that activity will not constitute tender offer under multifactor test yet will warrant application of the Williams Act).

137. *See supra* note 12 and accompanying text (listing various tests courts use to identify tender offers).

138. *See supra* notes 41-49, 70 and accompanying text (discussing judicial reluctance to find that open market purchases constitute tender offers).

139. *See supra* note 85 and accompanying text (demonstrating judicial recognition that private negotiations for purchase of stock may constitute tender offer).

140. *See Hanson Trust,* 744 F.2d at 57 (2d Cir. 1985) (shareholder identification test recognizes statutory purpose of Williams Act to provide disclosure of material information to uninformed shareholders); Wellman v. Dickinson, 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979) (multifactor test recognizes intent of Congress to regulate conventional tender offers); *see also House Hearings, supra* note 8, at 11-14 (statutory purpose of Williams Act not only to provide disclosure of information but also to provide time for target shareholders to make informed decisions whether to tender shares and to provide equal treatment to target shareholders in tender offer situations).

141. *See supra* notes 134-35 and accompanying text (discussing dual components of modified multifactor tender offer test).

control,[142] is possible only through the employment of a flexible, complete standard which will identify those solicitations and purchases that Congress meant to govern under the Williams Act.

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142. *See House Reports, supra* note 5, at 2812-14 (purpose of Williams Act is to protect target shareholders faced with tender offers).