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Private Solicitations Under the Williams Act

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PRIVATE SOLICITATIONS UNDER THE WILLIAMS ACT

The legislative history of the Williams Act[1] indicates that tender offers[2] do not include privately negotiated transactions.[3] Neither the Act nor its legislative history, however, defines the terms "tender offer"[4] and "privately negotiated transaction." Because acquiring companies often seek to bring their takeover attempts within the private transaction exception,[5] the need for standard definitions of both terms[6] is pressing.[7]

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[1] 15 U.S.C. §§ 78m(d)-z(e), 78n(d)-(f) (1976). For a summary of the relevant provisions of the Act, see notes 30-39 and accompanying text *infra*.

[2] The Williams Act regulates "tender offer[s], or request[s] or invitation[s] for tenders." 15 U.S.C. § 78n(d)-(e) (1976). This Note will use the abbreviated phrase, "tender offer."

A tender offer is an attempt to acquire controlling interest in a corporaton by paying cash for shares. Other means of acquiring control include proxy contests, regulated by the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a)-(c) (1976), and offers to excbange stock, regulated by the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1976).

[3] *See* Wellman v. Dickinson, 475 F. Supp. 783, 817-20 (S.D.N.Y. 1979); Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96, 150 (N.D. Ohio 1979); Financial Gen. Bankshares, Inc. v. Lance, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,403, at 93,429 (D.D.C. 1978); S-G Securities, Inc. v. Fuqua Inv. Coop., 466 F. Supp. 1114, 1125 (D. Mass. 1978); Heine v. The Signal Companies, Inc., [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,898, at 91,319-20 (S.D.N.Y. 1977); Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,592 (N.D. Ill. 1973); *Takeover Bids: Hearings on H.R. 14475 and S. 510 Before the Subcomm. on Commerce and Finance of the Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 14 (1968) (statement of SEC Chairman Manuel F. Cohen) [hereinafter cited as *H.R. Hearings*]; *Full Disclosure of Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Comm. on Banking and Currency*, 90th Cong., 1st Sess. 24, 36 (1967) (Statement of SEC Chairman Manuel F. Cohen) [hereinafter cited as *S. Hearings*]; *id.* at 123, 133 (statement of Prof. Stanley A. Kaplan); 113 CONG. REC. 856 (1967) (introductory remarks of Sen. Williams). *But see S. Hearings, supra*, at 74 (statement of Arthur Fleischer, Jr.) (Williams Act "appl[ies] in full to cash tender offers directed to small groups of persons.").

[4] Although the Williams Act's legislative history discusses the characteristics of tender offers, *see* notes 50-57 and accompanying text *infra*, Congress did not adopt a controlling definition.

[5] *See, e.g.*, Wellman v. Dickinson, 475 F. Supp. 783, 817-20 (S.D.N.Y. 1979) (not a privately negotiated transaction); Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107 at 96,150 (N.D. Ohio June 11, 1979) (not a privately negotiated transaction); *cf.* Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 789-90 (S.D.N.Y. 1979) (transaction solicited off exchange and then consummated on exchange floor not a tender offer).

[6] Open market purchases also fall outside the "tender offer" definition. *See, e.g.*, Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1206-07 (2d Cir. 1978); Chromalloy Am. Corp. v. Sun Chem. Corp., 483 F. Supp. 116, 117-118 (E.D. Mo. 1980) (granting defendant's motion for summary judgment in Williams Act suit where evidence indicated

Despite this need for uniform definitions on which offerors can rely,[8] however, courts have adopted divergent tests[9] for defining "tender offers." Some courts follow the "conventional" test for tender offers. This test characterizes as a tender offer a solicitation at a fixed premium price and contingent on specified conditions.[10] Other courts focus on pressure to make ill-considered decisions to tender[11] in distinguishing tender offers from exempted solicitations. Still others apply Securities Exchange Commis-

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open market purchases); Chromalloy Am. Corp. v. Sun Chem. Corp., 474 F. Supp. 1341, 1346-47 (E.D. Mo. 1979) (denying plaintiff's motion for preliminary injunction in Williams Act suit where evidence indicated open market purchases); Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 789-90 (S.D.N.Y. 1979) (acquisition of "large amount of stock in open market purchases" not tender offer); D-Z Inv. Co. v. Holloway, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,771, at 96,562 (S.D.N.Y. 1974) ("It seems clear ... that open market purchases cannot be a 'tender offer' "). However, this Note focuses only on private solicitations, and the problems that it addresses are remediable through either a comprehensive definition of "tender offer," or a narrow definition of "privately negotiated transaction." Although this Note analyzes the inadequacies of the definitions of both "tender offer" and "privately negotiated transaction," *see* notes 50-105 and accompanying text *infra*, it proposes a narrow definition of the private exemption exception alone. *See* notes 106-37 and accompanying text *infra*.

[7] Acquisition of an ongoing business is the least expensive way to enter a new market, [1979] SEC. REG. & L. REP. (BNA) No. 492, at A-14 (statement of Martin A. Siegel), and purchasers can obtain working control of a company by acquiring the holdings of a few institutional investors. *See* Block & Schwarzfeld, *Curbing the Unregulated Tender Offer*, 6 SEC. REG. L.J. 133, 137-38 (1978). Such takeover attempts are more likely to succeed if they can avoid the pre-disclosure requirements of the Williams Act, *see* notes 23-30 and accompanying text *infra*, through the privately negotiated transaction exemption; pre-solicitation disclosure enables the target company to implement defensive tactics. *See generally* E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENT IN TENDER OFFERS FOR CORPORATE CONTROL 199-202 (1979). Because of the increasing opportunities for corporate takeovers due to the concentration of securities in a few institutional investors, *see* Block & Schwarzfeld, *supra* at 137-38, courts must fashion carefully definitions for "tender offer" and "privately negotiated transaction." *Cf.* Long, *Pressure on Fiduciary Holders in Premium Cash Offers*, MERGERS & ACQUISITIONS, Winter 1979, at 5, 10 (presence of trustee-shareholders may increase target company's vulnerability to tender offers at premium prices because of trustees' fiduciary duties).

[8] *See* Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 791 (S.D.N.Y. 1979) (criticizing SEC's test for tender offers because "so vague a test would introduce a crippling uncertainty in an area in which practitioners should be entitled to be guided by reasonably clear rules of the road.").

[9] Some courts offer no reasons for why a particular solicitation is a tender offer or an exempt transaction. *See, e.g.*, Cattlemen's Inv. Co. v. Fears, 343 F. Supp. 1248, 1252 (W.D. Okla. 1972).

[10] *See* Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1206 (2d Cir. 1978); Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 789 (S.D.N.Y. 1979); notes 50-57 and accompanying text *infra*. The "conventional definition" may also include other factors such as widespread solicitation. *See* notes 54-57 and accompanying text *infra*.

[11] *See* Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,590 (N.D. Ill. 1973); notes 64-68 and accompanying text *infra*.

sion (SEC) guidelines[12] or analogize to the private offering exception[13] under the Securities Act of 1933 (1933 Act).[14]

These definitions of "tender offer" are unsatisfactory. Often focusing on rigid and artificial criteria,[15] they fail to reflect all the protective purposes[16] of the Williams Act and the economic justifications for the privately negotiated transaction exemption.[17] Furthermore, current definitions are often vague.[18]

In order to effectuate congressional intent fully, courts should not exempt a tender offer from the Williams Act unless it meets three threshold requirements. Solicitees must have access to relevant information,[19] adequate time to make a well-considered choice to tender,[20] and sufficient sophistication to make an informed decision.[21] If an offering satisfies these threshold criteria, courts should weigh both the interests of the economy and of the offeror in an exempt transaction against the interests of the solicitees in the Act's fairness provisions and of the unsolicited shareholders and investing public in advance disclosure.[22] Such a test would accurately reflect congressional intent, be flexible enough to accommodate unique fact patterns, and yet also permit prospective offerors to predict more accurately the legal consequences of their conduct.

I
PURPOSES OF THE WILLIAMS ACT

A. *Protection of Solicited and Tendering Shareholders*

Prior to the enactment of the Williams Act, solicitees of tender offers typically lacked information about the offeror's identity,

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[12] *See* Wellman v. Dickinson, 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979); Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,148 (N.D. Ohio 1979); notes 73-75 and accompanying text *infra*. *But see* Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 791 (S.D.N.Y. 1979) (questioning both permissibility and desirability of SEC test).

[13] *See* Wellman v. Dickinson, 475 F. Supp. 783, 817-21 (S.D.N.Y. 1979); notes 94-95 and accompanying text *infra*.

[14] 15 U.S.C. §§ 77a-77aa (1976).

[15] *See* notes 59-63 and accompanying text *infra*.

[16] *See* notes 72, 77-81, 96-101, and accompanying text *infra*.

[17] *See* notes 71, 80, and accompanying text *infra*.

[18] *See* notes 76, 77, and accompanying text *infra*.

[19] *See* notes 109-13 and accompanying text *infra*.

[20] *See* notes 117-22 and accompanying text *infra*.

[21] *See* notes 114-16 *infra*.

[22] *See* notes 108, 124-27, and accompanying text *infra*.

its means of financing the transaction, and its plans for the target corporation.[23] Many offerees who did receive information had insufficient time to analyze it thoroughly before tendering.[24] Premium prices,[25] coupled with short periods in which to tender or with first-come-first-served purchase provisions, compelled hasty choices. Furthermore, solicitees lacked time to consider counter-arguments by incumbent management[26] and counter-proposals by competing tender offerors.[27] Thus, prior to the Act, offerees were usually unable to decide rationally whether to tender.[28]

The primary purpose of the Williams Act was to afford solicitees such a rational choice.[29] The statute thus requires disclosure of material information about the offeror.[30] The Act also permits solicitees to withdraw tendered shares,[31] thereby enabling them to evaluate information about the purchaser,[32] competing offers, and management's counter-arguments even after tendering.

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[23] *See H.R. Hearings, supra* note 3, at 11-12 (statement of SEC Chairman Manuel F. Cohen); S. *Hearings, supra* note 3, at 17, 34 (statement of SEC Chairman Manuel F. Cohen); 113 CONG. REC. 855 (1967) (introductory remarks of Sen. Williams).

[24] *H.R. Hearings, supra* note 3, at 11-12 (statement of SEC Chairman Manuel F. Cohen); *S. Hearings, supra* note 3, at 34 (statement of Chairman Manuel F. Cohen); 113 CONG. REC. 856 (1967) (introductory remarks of Sen. Williams).

[25] 113 CONG. REC. 855 (1967) (introductory remarks of Sen. Williams).

[26] *H.R. Hearings, supra* note 3, at 12 (statement of SEC Chairman Manuel F. Cohen); *S. Hearings, supra* note 3, at 35 (statement of SEC Chairman Manuel F. Cohen).

[27] *H.R. Hearings, supra* note 3, at 12 (statement of SEC Chairman Manuel F. Cohen); *S. Hearings, supra* note 3, at 34 (statement of SEC Chairman Manuel F. Cohen).

[28] *See* H.R. REP. No. 1711, 90th Cong., 2d Sess. 2-3, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2811, 2812 [hereinafter cited as HOUSE REPORT]; SEN. REP. No. 550, 90th Cong., 1st Sess. 2 (1967) [hereinafter cited as SENATE REPORT].

[29] *H.R. Hearings, supra* note 3, at 11 (statement of SEC Chairman Manuel F. Cohen); *S. Hearings, supra* note 3, at 33 (statement of SEC Chairman Manuel F. Cohen) (Williams Act "is designed . . . to provide those who receive a tender offer with information adequate to an informed decision whether of [*sic*] not to accept. . . .").

[30] The Act's pre-solicitation disclosure provisions apply only to tender offers that might result in beneficial ownership of more than five percent of the outstanding securities of the class solicited. 15 U.S.C. § 78n(d)(1) (1976). Before soliciting, such a purchaser must disclose his identity, the source and amount of funds used in making the purchase, his plans for the target corporation, the number of shares owned, and any arrangements, understandings, or contracts relating to the purchased securities. The SEC may require disclosure of additional information. The purchaser must send this information to the issuer, the SEC, and each exchange on which the security is traded. *Id.*

Subject to certain exceptions, *see id.* § 78m(d)(6)(A)-(D), persons acquiring more than five percent of the outstanding securities of the solicited class must disclose information similar to that required of a tender offeror. *Id.* § 78m(d)(1).

[31] Subject to certain exceptions, *see id.* § 78n(d)(8), each tender offeree may withdraw tendered securities during the first seven days following his tender or after the first 60 days of the offer. *Id.* § 78n(d)(5).

[32] *Cf.* 17 C.F.R. § 240.14e-1 (1980) (requiring all tender offers not made by the issuer to remain open for 20 days).

Congress also intended the Williams Act to insure fair treatment[33] of tendering solicitees.[34] For example, Congress designed the withdrawal provision to prevent an offeror from locking offerees into irrevocable tenders at low prices and then tendering those shares himself to a second tender offeror at a higher price.[35] Furthermore, a pro-rata take-up provision[36] insures that the offerer will not secure early tenders, thereby tying up shares for long periods, and later decide not to purchase any securities of particular tendering shareholders.[37] Finally, a most-favored offeree price provision[38] prevents discrimination against early tender if the price is later increased to attract sufficient shares.[39]

B. *Protection of Unsolicited Shareholders and the Investing Public*

Congress intended the Williams Act to benefit not only the solicitees of tender offers, but also the unsolicited shareholders of the target corporation and other public investors.[40] The Act requires offerors to make available to all investors information that "might substantially change the assumptions on which the market

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[33] *See* 15 U.S.C. § 78n(e) (1976) (prohibiting fraud, deception, and manipulation in tender offers).

[34] *H.R. Hearings, supra* note 3, at 11 (statement of SEC Chairman Manuel F. Cohen); *S. Hearings, supra* note 3, at 33 (statement of SEC Chairman Manuel F. Cohen); *id.* at 35 (statement of SEC Chairman Manuel F. Cohen) ("The second objective of this bill is to assure fair treatment of all shareholders who decide to accept a tender offer.").

[35] *S. Hearings, supra* note 3, at 39 (statement of SEC Chairman Manuel F. Cohen). Congress also designed the withdrawal provision to prevent offerors from delaying excessively before deciding whether to purchase tendered shares. HOUSE REPORT, *supra* note 28, at 10, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS at 2820; SENATE REPORT, *supra* note 28, at 10; *S. Hearings, supra* note 3, at 38-39 (statement of SEC Chairman Manuel F. Cohen).

[36] Subject to certain exceptions, *see* 15 U.S.C. § 78n(d)(8) (1976), if the offeree tenders during the first 10 days of the offer more securities than the offeror is willing to purchase, the offeror must purchase those securities *pro rata* according to the number that each offeree tenders. *Id.* § 78n(d)(6). The pro rata take-up provisions also applies to all securities tendered during the 10 days following any notice of an increase in the price that the offeror is willing to pay. *Id.*

[37] *S. Hearings, supra* note 3, at 36, 39 (statement of SEC Chairman Manuel F. Cohen).

[38] If the amount offered increases during the course of the tender offer, all offerees must receive the highest price paid. 15 U.S.C. § 78n(d)(7) (1976).

[39] HOUSE REPORT, *supra* note 28, at 11, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS at 2811, 2821; SENATE REPORT, *supra* note 28, at 10.

[40] The Supreme Court has stated that "[t]he sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer." Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 35 (1977) (denying an unsuccessful tender offeror standing to sue the target company for alleged Williams Act violations). *Accord,* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58-60 (1975) (Williams Act's "principle object" is "to insure that public

price [of the target company's stock] is based"[41] and that might cause the stock's value to decline. Disclosure also renders the market less susceptible to needless disruption because of leaks of information and rumors.[42]

Congress also enacted the Williams Act to protect the economic efficiency of tender offers. Congress recognized that tender offers frequently benefit both the target company and the economy by weeding out inefficient management.[43] Congress therefore designed the Act to protect the investing public without placing "undue obstacles in the way of honest and fairly conducted transactions."[44]

C. *The Privately Negotiated Transaction Exemption*

Although Senator Williams recognized that privately negotiated transactions could create the same problems for solicitees and the investing public as could tender offers,[45] he be-

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shareholders . . . confronted by a cash tender offer for their stock will not be required to respond without adequate information. . . ."). *See also* Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1276 (5th Cir. 1978) (underlying purpose of Williams Act is protection of investors through full disclosure by both offeror and incumbent management), *rev'd on other grounds sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979).

Although the *Piper* Court's statement might refer only to *solicited* investors in the target company, such an interpretation seems inaccurate. At least one court has read *Piper* as "making a broad distinction between public investors who were the intended beneficiaries of the Williams Act, and tender offeror contestants whom the Williams Act was designed to regulate. . . . *All* shareholders of the target are within the class the Act was designed to protect." Wellman v. Dickinson, 475 F. Supp. 783, 817 (S.D.N.Y. 1979). Furthermore, if the Court did interpret the Williams Act to protect only solicitees, its interpretation would be inconsistent with its construction of the antifraud provisions in the 1933 Act, 15 U.S.C. § 77q(a) (1976), which are similar to those in the Williams Act, 15 U.S.C. § 78n(e) (1976). *See* United States v. Naftalin, 99 S. Ct. 2077, 2082 (1979) ("[N]either this Court nor Congress has ever suggested that investor protection was the *sole* purpose of the Securities Act [of 1933].").

[41] SENATE REPORT, *supra* note 28, at 3. Senator Kuchel argued that both solicited shareholders and the public are entitled to know the offeror's identity, financial commitments, and plans for the target company. 113 CONG. REC. 24665 (1967).

[42] *S. Hearings, supra* note 3, at 86 (statement of New York Stock Exchange President G. Keith Funston) (one of the Act's three most important objectives).

[43] HOUSE REPORT. *supra* note 28, at 4, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS at 2813; SENATE REPORT, *supra* note 28, at 3.

[44] 113 CONG. REC. 856 (1967) (introductory remarks of Sen. Williams). *See also H.R. Hearings, supra* note 3, at 10 (statement of SEC Chairman Manuel F. Cohen) (Act not intended to encourage or discourage "planned acquisitions of large blocks of securities of publicly-held companies, where control of the company may be at stake"); *S. Hearings, supra* note 3, at 32 (statement of SEC Chairman Manuel F. Cohen).

[45] "The essential problem in transfers of control resulting from cash tender offers or open market or privately negotiated purchases is that persons seeking control in these ways are able to operate in almost complete secrecy concerning their intentions, their commit-

lieved that such transactions should be exempt from the Act because of the danger of "premature disclosure."[46] Pre-solicitation disclosure may adversely affect business transactions in several ways. For example, disclosure of the terms of one purchase might injure both buyer and seller in future negotiations with others by revealing how far each is willing to go to strike a bargain. Disclosure of a purchaser's plans for corporate acquisitions might also alert its competitors to its expansion plans, or create publicity that might upset delicate negotiations.[47] Furthermore, disclosure of the buyer's plans for the target company might encourage the shareholder to take a tougher bargaining stance than he otherwise would.[48]

Good reasons also exist for exempting a limited solicitation of a few large and sophisticated shareholders from the Act's fairness provisions.[49] Because substantial, sophisticated investors will likely have significant bargaining power with the purchaser, they are unlikely to require the protection of the Williams Act's best price, take-up, and withdrawal provisions.

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ments and even their identities." 113 CONG. REC. 855 (1967) (introductory remarks of Sen. Williams).

[46] *Id.* at 856.

[47] *Cf. id.* (pre-solicitation disclosure "upset[s] the free and open auction market where buyer and seller normally do not disclose the extent of their interest. . . .").

[48] The reasons for exempting privately negotiated transactions from the Williams Act's disclosure requirements ostensibly apply also to tender offers. For example, the tender offeror's future business negotiations suffer as much from pre-solicitation disclosure as do those of a private offeror. However, the business disadvantages of disclosure for offerors justify exempting only privately negotiated transactions (and also open market transactions), *see* 113 CONG. REC. 856 (1967) (introductory remarks of Sen. Williams), because in these transactions offerees, other shareholders, and the general investing public do not need the Act's protections. *See* notes 109-22 and accompanying text *infra*.

The interests of the general investing public and of the unsolicited shareholders in advance disclosure, *see* notes 39-43 and accompanying text *supra*, also explain why the private solicitation exemption does not apply automatically if the solicitees do not need the Act's protections. Even if the solicitees have adequate information and can obtain equitable terms, the solicitation should be exempt only if the public's and the unsolicited shareholders' interests are satisfied or outweighed. *See* notes 108, 126, 127, and accompanying text *infra*. Thus, many of the rationales supporting the privately negotiated transaction exemption, *see* notes 46-47 and accompanying text *supra*, represent interests of the offeror and the economy that may outweigh the interests of public investors aud unsolicited shareholders. *See* notes 108, 126, 127, and accompanying text *infra*.

[49] *See generally* notes 33-39 and accompanying text *supra*.

II

CURRENT DEFINITIONS OF "TENDER OFFER" AND "PRIVATELY NEGOTIATED TRANSACTION"

A. *The Conventional Definition of "Tender Offer"*

Several courts look to the legislative history of the Williams Act to define the "conventional" tender offer.[50] According to the committee reports, typical tender offerors bid to buy shares at a premium price.[51] The offeror usually agrees to purchase shares only if specified conditions are met,[52] such as the tender of enough shares to gain working control of the target corporation.[53] The hearings and debates on the Act discuss other attributes of tender offers,[54] including widespread solicitation[55] of

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[50] *See, e.g.,* Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1206-07 (2d Cir. 1978) (no tender offer where most solicitations not made on the floors of stock exchanges, but where almost all purchases consummated on exchanges and where off-market purchases "largely [from] ... sophisticated institutional shareholders"); Smallwood v. Pearl Brewing Co., 489 F.2d 579, 596-99, 597 n.22 (5th Cir.) (take-over need not be hostile to be a conventional tender offer), *cert. denied,* 419 U.S. 873 (1974); Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 790 (S.D.N.Y. 1979) (no tender offer where purchaser's broker scouted 30 to 50 "large institutional" shareholders and "about a dozen large individual investors" out of 50,000 Brascan shareholders to provide sufficient stock for purchase on open market); 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) (no tender offer where offeror solicited two dozen "sophisticated persons" by phone and purchased stock from four financial institutions); Dyer v. Eastern Trust & Banking Co., 336 F. Supp. 890, 908 n.24 (N.D. Me. 1971) (no tender offer where surviving corporation in corporate reorganization that did not change central management solicited original corporation's shares); Water & Wall Assocs. v. American Consumer Indus., Inc., [1973 Transfer Binder] FED. SEC L. REP. (CCH) ¶ 93,943, at 93,759 (D.N.J. 1973) (open market purchases not a tender offer); *cf.* Wellman v. Dickinson, 475 F. Supp. 783, 821-23 (S.D.N.Y. 1979) (finding tender offer under conventional definition, but noting that "[w]hat is probably more important than ... this transaction['s] traditional characteristics ... is that [it] ... was designed to ... transfer controlling interest ... in a swift, masked maneuver.").

[51] HOUSE REPORT, *supra* note 28, at 2, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS at 2811; SENATE REPORT, *supra* note 28, at 2.

[52] HOUSE REPORT, *supra* note 28, at 2, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS at 2811; SENATE REPORT, *supra* note 28, at 2.

[53] 113 CONG. REC. 855 (1967) (introductory remarks of Sen. Williams). A purchaser may often obtain working control of a company by acquiring less than ten percent of the target company's stock. H.R. REP. No. 1966, 91st Cong., 2d Sess. 3, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5025, 5027-28; 111 CONG. REC. 28258 (1965) (remarks of Sen. Williams).

[54] *See H.R. Hearings, supra* note 3, at 11-14 (statement of SEC Chairman Manuel F. Cohen); *S. Hearings, supra* note 3, at 87-88 (statement of New York Stock Exchange President G. Keith Funston); 113 CONG. REC. 855-56 (1967) (introductory remarks of Sen. Williams).

[55] *See H.R. Hearings, supra* note 3, at 17, 33 (statement of SEC Chairman Manuel F. Cohen); *S. Hearings, supra* note 3, at 17 (statement of SEC Chairman Manuel F. Cohen); 113 CONG. REC. 854 (1967) (introductory remarks of Sen. Williams).

shareholders by newspaper advertisements or press releases[56] and holding of tendered shares in a depository or in the purchaser's hands prior to acceptance.[57]

The "conventional" description of a tender offer is unsatisfactory[58] because it fails to promote the purposes of the Williams Act.[59] Congress intended the definition of tender offer to reflect the purposes underlying the Williams Act; this intention is implicit in the Act's authorization of the SEC to exempt from the disclosure and fairness provisons "any offer for . . . tenders . . . not comprehended within the purposes of [those provisions]."[60] The conventional definition does not account for the Williams Act's purposes, however. Rather, it focuses only upon objective criteria when characterizing a transaction. Thus, slight deviation from these criteria might exempt transactions contravening the Act's

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[56] Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 789 (S.D.N.Y. 1979); 113 CONG. REC. 855 (1967) (introductory remarks of Sen. Williams).

[57] Smallwood v. Pearl Brewing Co., 489 F.2d 579, 597 n.22 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974); Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 789 (S.D.N.Y. 1979); *H.R. Hearings*, *supra* note 3, at 11 (statement of SEC Chairman Manuel F. Cohen); *S. Hearings*, *supra* note 3, at 33 (statement of SEC Chairman Manuel F. Cohen).

Courts disagree on which of the typical attributes of tender offers discussed in the legislative history are necessary for a tender offer. Some courts focus exclusively on the committee reports and find that a bid, premium price, and offer contingent on specified conditions are sufficient to violate the Act where a privately negotiated transaction is not involved. *See* Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1206-07 (2d Cir. 1978); Wellman v. Dickinson, 475 F. Supp. 783, 822 (S.D.N.Y. 1979) (conventional definition of tender offer not requiring publicity, widespread solicitation, or deposit of shares). Other courts, however, also examine whether the offer involved widespread public solicitation and deposit of shares. *See* Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 789 (S.D.N.Y. 1979); Financial Gen. Bankshares, Inc. v. Lance, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,403, at 93,429 (D.D.C. 1978).

[58] *See, e.g.*, Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,147 (N.D. Ohio 1979); S-G Sec., Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114, 1125 (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); Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1271 (1973). *But see* Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1206-07 (2d Cir. 1978); Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 789-92 (S.D.N.Y. 1979).

[59] *See* notes 23-49 and accompanying text *supra*.

[60] 15 U.S.C. § 78n(d)(8)(c) (1976). Another indication that Congress intended definitions of tender offer to effectuate the broad, remedial purposes of the Act is the Act's wide scope; the Act regulates not only tender offers, but also requests or invitations for tenders. *Id.* §§ 78n(d)(1), (5)-(7), (e). Construing "tender offer" broadly to implement the Williams Act's purposes also comports with prior expansive construction of the securities laws. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 432-33 (1965); GAF Corp. v. Milstein, 453 F.2d 709, 719-20 (2d Cir. 1971); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 945-46 (2d Cir. 1969). *But see* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 24-37 (1977) (tender offeror without standing to sue under Williams Act).

purposes.[61] For example, solicitations to a small group without widespread publicity may pose as much danger to uninformed and unsolicited public investors as a "typical" tender offer, and pressure to make ill-considered tenders may exist despite the absence of a premium price.[62] An adequate definition of tender offer cannot consist merely of a potentially underinclusive checklist of objective factors.[63]

B. *Extending the Conventional Definition: The Impact Test*

At least two courts have accepted a defintion of tender offer that focuses on the impact of a transaction upon solicited shareholders.[64] The "impact test" extends the definition of tender offer "beyond its conventional meaning to offers likely to pressure shareholders into making uninformed, ill-considered decisions to sell"[65] and likely to have "the same impact as the conventional tender offer."[66] Under this test, open market purchases and transactions negotiated privately with a limited number of major shareholders are exempt from the Williams Act.[67] One commentator has suggested that courts evaluate impact by looking "only [to] objective elements involved in a transaction such as time limits, premium prices, or specification of number of shares to be bought."[68]

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[61] Note, *supra* note 58, at 1271.

[62] *See* Wellman v. Dickinson, 475 F. Supp. 783, 820-21 (S.D.N.Y. 1979) (most solicitees asked to respond within one hour or less and "told that acceptances were coming in very fast, inferring [*sic*] that the solicitee had better act quickly or be left out."); Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,150 (N.D. Ohio 1979) (pressure by multiple press releases and letters); Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,591 (N.D. Ill. 1973) (pressure by threats of loss of solicitee's directorship).

[63] *Cf.* Wellman v. Dickinson, 475 F. Supp. 783, 822 (S.D.N.Y. 1973) (finding tender offer under "conventional" definition, but noting that "[w]hat is probably more important than . . . this transaction['s] [traditional] characteristics . . . is that [it] . . . is infected with the basic evil which Congress sought to cure by enacting [the Williams Act]").

[64] Smallwood v. Pearl Brewing Co., 489 F.2d 579, 596-99 (5th Cir. 1974); Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,590 (N.D. Ill. 1974) (dicta). *See generally* Note, *supra* note 58, at 1275-81 (proposing impact test).

[65] Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,590 (N.D. Ill. 1974).

[66] *Id.*

[67] Note, *supra* note 58, at 1276. "In negotiated purchases from a few, substantial shareholders, pressure is . . . absent since these shareholders have the leverage to obtain the disclosure, time, and fair treatment necessary to make an informed, carefully considered decision on whether to sell their controlling interest." *Id.* at 1276 n.137.

[68] *Id.* at 1278.

Although the impact test goes beyond the conventional definition and properly considers pressure on solicitees,[69] it, too, is inadequate. The test is both over inclusive[70] and underinclusive. On the one hand, because it fails to account for the economic reasons underlying the privately negotiated transaction exemption,[71] the test may impose the burdens of the Williams Act on transactions better left unregulated. On the other hand, the test does not promote the Act's purpose of protecting unsolicited shareholders and the general investing public through advance disclosure.[72] The test may thus exempt from the Act's disclosure requirements solicitations that do not pressure solicitees into ill-considered choices, but that do decrease the value of unsolicited shareholders' shares and of the future holdings of prospective public investors.

C. *The SEC Eight-Factor Test*

The SEC has suggested an eight-factor definition[73] of tender

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[69] *See* notes 23-32 and accompanying text *supra*. Although the impact test properly evaluates pressure on solicitees, it fails to focus on two fundamental concerns of the Williams Act: disclosure of information and the need for statutorily-imposed fairness in a transaction. *See* notes 33-39 and accompanying text *supra*.

[70] 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) (impact test "seems ... much too broad.") (dicta).

The court in Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195 (2d Cir. 1978), also criticized the application of the impact test to open market transactions. The court stated:

> Although broad and remedial interpretations of the Act may create no problems insofar as the antifraud provisions ... are concerned, this may not be true with regard to [the withdrawal, pro rata take-up, and most favored offeree price provisions]. ... It seems unlikely that Congress intended "tender offer" to be so broadly interpreted as to make these provisions unworkable.

Id. at 1207.

[71] *See* notes 43-44 and accompanying text *supra*.

[72] *See* notes 39-43 and accompanying text *supra*.

[73] In March 1980, the SEC submitted to the Senate proposed amendments to the Williams Act that would replace "tender offer" with the concept of "statutory offer." *See* SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, 96TH CONG., 2d SESS., SECURITIES AND EXCHANGE COMMISSION REPORT ON TENDER OFFER LAWS 89-90 (Comm. Print 1980). The proposed amendments to the Act's disclosure provisions define "statutory offer" as

> [a]n offer or offers to acquire securities ... described in section 13(d)(1) ... made, directly or indirectly, by a person, other than the issuer thereof, if that person is or upon consummation of such offer or offers could become the beneficial owner of more than 10 percent of the class except that the term shall not include:
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> ....
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> ... any offer to acquire the beneficial ownership of securities in a privately negotiated transaction; *provided, however,* that no person shall acquire the bene-

offers which at least two courts have applied.[74] The SEC's criteria for tender offers are: (1) active and widespread solicitation of public shareholders; (2) solicitation of a substantial percentage of issuer's stock; (3) premium price; (4) non-negotiable terms; (5) offer contingent on the tender of a minimum number of shares and, perhaps, on a maximum number to be purchased; (6) limited time in which to tender; (7) pressure from the offeror to tender stock; and (8) public announcements of the offeror's intention to purchase the target company's shares preceding or accompanying rapid accumulation of large amounts of target company securities.[75]

The SEC's test is unsatisfactory principally because of its vagueness. The test does not indicate which factors are essential to a tender offer, or what weight courts should accord each criterion.[76] The inability of purchasers to predict whether a stock ac-

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ficial ownership of securities in reliance upon this provision from more than 10 persons, directly or indirectly, in any period of 12 consecutive months. *Id.* These propsals do not define "privately negotiated transaction." No bill incorporating the SEC's recommendations has been introduced in Congress.

Supp. 773, 790-92 (S.D.N.Y. 1979) (criticizing SEC test because "some question whether it [impermissibly] expands the scope" of Williams Act and because "so vague a test would introduce a crippling uncertainty," yet applying test and finding no tender offer).

[74] *See* Wellman v. Dickinson, 475 F. Supp. 783, 823-25 (S.D.N.Y. 1979) (alternative holding) (SEC test "set[s] a tender offer apart from open market purchases, privately negotiated transactions or other kinds of public solicitations."); Hoover Co. v. Fuqua Indus. Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97, 107, at 96, 148-51 (N.D. Ohio 1979) (SEC test "conveniently separates the factors which enter into the determination whether an offer is a tender offer."). *But see* Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 790-92 (S.D.N.Y. 1979) (criticizing SEC test because "some question whether it [impermissibly] expands the scope" of Williams Act and because "so vague a test would introduce a crippling uncertainty," yet applying test and finding no tender offer).

[75] *See* Wellman v. Dickinson, 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979); Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,148, 96,148 n.3 (N.D. Ohio 1979).

[76] Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 791 (S.D.N.Y. 1979).

Despite the test's vagueness, courts agree that the importance of each factor varies with the particular facts of the case at hand. Wellman v. Dickinson, 475 F. Supp. 783, 824 (S.D.N.Y. 1979); Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,148 (N.D. Ohio 1979). Furthermore, courts agree that solicitation of a substantial percentage of the target company's stock cannot alone distinguish a tender offer from a privately negotiated transaction or other exempt purchase. *See* Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 792 (S.D.N.Y. 1979); Wellman v. Dickinson, 475 F. Supp. at 824; Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,148. However, courts disagree on the importance of publicity in the SEC test. *Compare* Wellman v. Dickinson, 475 F. Supp. at 825 ("Lack of publicity . . . should be no deterrent to classifying this transaction as an offer. . . .") *with* Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,148 (publicity "would seem to be highly relevant if there were public announcements of a purchasing program to be effected through open trading in a public market.").

quisition is subject to the Williams Act could have a chilling effect on economically beneficial takeovers that Congress intended to leave unregulated.[77]

The SEC's definition of tender offer also fails to incorporate the purposes behind the Williams Act. Like the impact test, the SEC's definition examines pressure on solicitees, yet ignores Congress's intent to prevent discrimination among solicitees,[78] to protect unsolicited shareholders and the public,[79] and to exempt open market and privately negotiated transactions.[80] Furthermore, the definition does not expressly require courts to investigate the availability of information to solicitees, a central goal of the Act.[81]

D. *Analogy to the Private Offering Exemption Under the 1933 Act*

In *Wellman v. Dickinson,*[82] the court determined whether a solicitation met the privately negotiated transaction exemption by analogizing[83] to the private offering exemption under the 1933

Despite the minimal importance that the *Wellman* Court accorded to publicity, publicity can be an important reason for designating a transaction a tender offer. Publicity is a telling sign of a tender offer when open-market purchases are involved. In S-G Securities, Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114, 1126-27 (D. Mass. 1978), the court held that "a publicly announced intention ... to acquire a substantial block of ... stock ... for purposes of acquiring control" followed by "rapid acquisition ... of large blocks of stock through open market and privately negotiated purchases" is a tender offer.

Although the holding in *S-G Securities* may be limited to transactions involving pressure in open market purchases, *see* 466 F. Supp. at 1126 (concern about pressure from publicity on "public shareholders"), publicity may also be significant in finding private, off-market purchases to be tender offers. First, publicity undercuts the offeror's argument that pre-solicitation disclosure in private purchases may disrupt delicate negotiations, *see* note 47, and second, publicity may place additional pressure on solicitees already contacted privately, *see* Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,146 n.1, 96,147 n.5, 96,150 (N.D. Ohio 1979) (mail solicitation restricted by its terms to Hoover family members "active and widespread" because of the "myriad public announcements" accompanying the solicitation); preventing pressure to make ill-considered tenders is a central purpose of the Williams Act. *See* notes 28-32 and accompanying text *supra*.

[77] [S]o vague a test would introduce a crippling uncertainty in an area in which practitioners should be entitled to be guided by reasonably clear rules of the road. The consequences of having purchased on the open market where a court would later determine on the basis of so unpredictable a test that the provision of [the Act] should have been respected could well be catastrophic beyond reason.

Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 791 (S.D.N.Y. 1979).

[78] *See* notes 33-39 and accompanying text *supra*.

[79] *See* notes 39-43 and accompanying text *supra*.

[80] *See* notes 6, 46-49, and accompanying text *supra*.

[81] *See* notes 19-32 and accompanying text *supra*.

[82] 475 F. Supp. 783 (S.D.N.Y. 1979).

[83] *Id.* at 818-21. *See* Block & Schwarzfeld, *supra* note 7, at 139 (courts and SEC consistently, although implicitly, analogizing Williams Act exemption to private offering exemption under 1933 Act).

Act.[84] The 1933 Act prohibits the public offer or sale of unregistered securities,[85] but exempts "transactions by an issuer not involving any public offering."[86] Like the Williams Act, which does not define "tender offer," the 1933 Act fails to define "public offering."[87]

The Supreme Court has held that availability of the private offering exemption turns on "whether the particular class of persons affected needs the protection of the Act."[88] Sophistication of offerees does not by itself make an offering private.[89] Each offeree must either receive the information that a registration statement would provide,[90] or have access to such information because of a close relationship with the offeror.[91] Factors relevant in determining whether the exemption applies include the

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[84] 15 U.S.C. §§ 77a-77aa (1976).

[85] *Id.* § 77(e). A registration statement consists of two parts: (1) a prospectus distributed to each offeree, *id.* § 77e(b), containing specified information, *id.* § 77j(a)(1)(2); and (2) information and exhibits available for public inspection in the SEC's files. *Id.* § 77f(a). The latter information allows potential purchasers to verify the information in the prospectus. Note, SEC v. Continental Tobacco Co. *and SEC Proposed Rule 146 as Attempt to Define a Private Offering: The Insecure Exemption from Registration Under the Securities Act of 1933,* 41 GEO. WASH. L. REV. 582, 592 n.80 (1973).

[86] 15 U.S.C. § 77d(2) (1976).

[87] *See* SEC v. Ralston Purina Co., 346 U.S. 119, 122 (1953) ("The Securities Act nowhere defines the scope of [the] private offering exemption.").

[88] *Id.* at 125. *Accord,* Wellman v. Dickinson, 475 F. Supp. 783, 818 (S.D.N.Y. 1979) (analyzing availability of privately negotiated transaction exemption under Williams Act). The offeror bears the burden of persuasion to show that the transaction is an exempt private offering. Doran v. Petroleum Mgmt. Corp., 545 F.2d 893, 901 (5th Cir. 1977); Wellman v. Dickinson, 475 F. Supp. at 819 (analyzing availability of privately negotiated transaction exemption under Williams Act).

[89] Doran v. Petroleum Mgmt. Corp., 545 F.2d 893, 902 (5th Cir. 1977); Hill York Corp. v. American Int'l Franchises, Inc., 448 F.2d 680, 691 (5th Cir. 1971); Wellman v. Dickinson, 475 F. Supp. 783, 819 (S.D.N.Y. 1979) (analyzing availability of privately negotiated transaction exemption under Williams Act). Sophistication of offerees may also be unnecessary for a solicitation to qualify under the private offering exemption. Doran v. Petroleum Mgmt. Corp., 545 F.2d at 901 n.10.

[90] SEC v. Ralston Purina Co., 346 U.S. 119, 124-25 (1953); Doran v. Petroleum Mgmt. Corp., 545 F.2d 893, 904 (5th Cir. 1977); SEC v. Tax Serv., Inc., 357 F.2d 143, 144 (4th Cir. 1966); Gilligan, Will & Co. v. SEC, 267 F.2d 461, 466 (2d Cir.), *cert denied,* 361 U.S. 896 (1959); Wellman v. Dickinson, 475 F. Supp. 783, 819 (S.D.N.Y. 1979) (analyzing availability of privately negotiated transaction exemption under Williams Act).

[91] Doran v. Petroleum Mgmt. Corp., 545 F.2d 893, 903 (5th Cir. 1977); Wellman v. Dickinson, 475 F. Supp. 783, 819 (S.D.N.Y. 1979) (analyzing availability of privately negotiated transaction exemption under Williams Act). This relationship may be "based on factors such as employment, family, or economic bargaining power" that enable the offeree "effectively to obtain" the information that a registration statement would provide. Doran v. Petroleum Mgmt. Corp., 545 F.2d at 903. The relationship may also rest upon a promise from the offeror "to open appropriate files and records to the offeree as well as to answer inquiries regarding material information." *Id.* at 904. If the offeror claims access to information as a basis for the private offering exemption, "it must be shown that the offeree could realistically have been expected to take advantage of his access to ascertain the relevant information." *Id.* at 904-05.

number of offerees,[92] number of units[93] offered, manner of offering,[94] and lack of common characteristics among the offerees.[95]

Analogizing to the private offering exemption under the 1933 Act is an undesirable means of defining the privately negotiated transaction exemption because the rationales underlying each exemption differ.[96] The *Wellman* court recognized that the private offering case law "concerns matters not relevant to considerations which would inform the boundaries separating a tender offer from a privately negotiated transaction."[97] Conversely, defining the private solicitation exemption requires examining factors irrelevant to the private offering exemption. Among these factors are congressional intent not to require premature disclosure of information that the transacting parties prefer to keep secret,[98] Congress's concern about pressure on solicitees[99] and about nondiscriminatory treatment of tendering

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[92] Evidence of the number of offerees is important in any invocation of the private offering exemption "both in order to ascertain the magnitude of the offering and in order to determine the characteristics and knowledge of the persons thus identified." Doran v. Petroleum Mgmt. Corp., 545 F.2d 893, 900 (5th Cir. 1977). *See* Wellman v. Dickinson, 475 F. Supp. 783, 819 (S.D.N.Y. 1979) (analyzing availability of privately negotiated transaction exemption under Williams Act). However, quantity alone does not distinguish a private from a public offering. *See* SEC v. Ralston Purina Co., 346 U.S. 119, 121, 125 (1953) (500 offerees not necessarily too many); Doran v. Petroleum Mgmt. Corp., 545 F.2d at 901; Knapp v. Kinsey, 249 F.2d 797, 799, 893, 901 (6th Cir.) (issue of fact whether offering to 300 people is private or public), *cert. denied,* 356 U.S. 936 (1958). Nonetheless, "the more offerees, the more likely that the offering is public." Doran v. Petroleum Mgmt. Corp, 545 F.2d at 901 (quoting Hill York Corp. v. American Int'l Franchises, Inc., 448 F.2d 680, 688 (5th Cir. 1971)). *See also* H.R. REP. No. 1542, 83d Cong., 2d Sess. 19, *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 2973, 2992 (exempted are "offering[s] to a limited number of persons who presumably may be expected to possess some familiarity with the business involved.... [N]o limit to the amount which ... may be offered, provided it is ... 'privately offered, which ... [SEC] construes [as] ... no more than ... 25 offerees."); H.R. REP. No. 152, 73d Cong., 1st Sess. 25 (1933), *reprinted in* 2 J. ELLENBERGER & E. MAHAR, LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934 (1973) ("sales of stock to stockholders ... subject to the Act unless the stockholders are so small in number that the sale to them does not constitute a public offering.").

[93] Doran v. Petroleum Mgmt. Corp., 545 F.2d 893, 900 (5th Cir. 1977); Hill York Corp. v. American Int'l Franchises, Inc., 448 F.2d 680, 689 (5th Cir. 1971).

[94] Doran v. Petroleum Mgmt. Corp., 545 F.2d 893, 900 (5th Cir. 1977); Wellman v. Dickinson, 475 F. Supp. 783, 819 (S.D.N.Y. 1979) (analyzing availability of privately negotiated transaction exemption under Williams Act).

[95] Wellman v. Dickinson, 475 F. Supp. 783, 819 (S.D.N.Y. 1979) (analyzing availability of privately negotiated transaction exemption under Williams Act).

[96] *See* Block & Schwarzfeld, *supra* note 7, at 155 (private offering analogy inappropriate because "very different public interests" underlay Williams Act and 1933 Act).

[97] 475 F. Supp. at 819.

[98] *See id.* at 820; notes 47-48 and accompanying text *supra.*

[99] *See* Wellman v. Dickinson, 475 F. Supp. at 819-21; notes 23-32 and accompanying text *supra.*

shareholders,[100] and the public interest in disclosure of imminent changes in corporate control.[101]

The analogizing approach is also flawed because courts should construe the Williams Act exemption more narrowly than the 1933 Act exemption. First, the privately negotiated transaction exception exempts solicitations not only from the Williams Act's disclosure requirements, but also from its antifraud provisions.[102] The exemption does not, however, free the offeror from the antifraud prohibitions under the 1933 Act.[103] Narrow construction of the Williams Act exemption is thus necessary to prevent emasculation of the Act's antifraud provisions and to effectuate broadly their remedial purposes.[104] Second, Congress explicitly authorized the private offering exemption in the 1933 Act.[105] Because the privately negotiated transaction exemption derives from legislative history, courts should interpret it more narrowly.

III

PROPOSAL FOR DEFINING "PRIVATELY NEGOTIATED TRANSACTION"

An adequate definition of the privately negotiated transaction exemption must provide both certainty and flexibility and promote the purposes underlying the Williams Act. A vague definition may discourage economically beneficial private transactions that should not be subject to the Williams Act's burdens,[106] or may unfairly trap those earnestly seeking to comply with the law. Flexibility[107] is necessary so that courts may treat alike factually dissimilar transactions with identical impact on investors. These

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[100] *See* notes 33-38 and accompanying text *supra.*

[101] *See* notes 39-43 and accompanying text *supra.*

[102] 15 U.S.C. §§ 78n(d)(1), (e) (1976).

[103] *Id.* §§ 77d(2), 77e, 77q.

[104] Congress's intent that courts construe the Williams Act's antifraud provisions broadly is implicit in the provisions' wide scope. Although the Act's disclosure requirements generally apply only to tender offers that might result in ownership of at least five percent of the target company's outstanding securities, 15 U.S.C. §§ 78n(d)(1), (d)(8)(A)-(C) (1976), the antifraud prohibitions apply to all tender offers. *Id.* § 78n(e).

[105] *See* 15 U.S.C. § 77d(2) (1976).

[106] *See* note 81 and accompanying text *supra.*

[107] The Supreme Court exhibits such flexibility in interpreting the private offering exemption under the 1933 Act. *See generally* notes 84-95 and accompanying text *supra.* The Court rejects a rigid numerical definition of the exemption: the "[1933 Act] would seem to apply to a 'public offering' whether to few or many . . . but there is no warrant for superimposing a quantity limit on private offerings. . . ." SEC v. Ralston Purina Co., 346 U.S. 119, 125 (1953) (quoting SEC v. Sunbeam Gold Mines Co., 95 F.2d 699, 701 (9th Cir. 1938)). Rather, "it is essential to examine the circumstances under which the distinction is sought to be established. . . ." *Id.* at 124.

requirements are satisfied by a judicial[108] test for privately negotiated transactions consisting of threshold elements that each exempt solicitation must display and a balancing of the offeror's, shareholders', and public's interest in regulating transactions meeting the threshold criteria.

A. *Threshold Requirements*

1. *Availability of Information*

A fundamental goal of the Williams Act is full disclosure to solicitees of material information about imminent corporate control changes.[109] The privately negotiated transaction exemption should therefore apply only if solicitees do not need pre-solicitation disclosure.[110] Thus, an essential element of a private

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[108] An administrative "safe-harbor" rule should accompany this judicial definition of a privately negotiated transaction. *Cf.* Note, *Cash Tender Offers: A Proposed Definition,* 31 U. FLA. L. REV. 694, 715-18 (1979) (proposing administrative definition of tender offers because courts "ill-suited for the task of comprebensively defining the term"). Although the proposed judicial definition affords greater certainty to prospective offerors than some current tests, *see, e.g.,* notes 76, 77 *supra,* absolute certainty is possible only through a rigid administrative rule. However, because rigid definitions cannot account for all possible fact patterns, *see* notes 61-63 and accompanying text *supra,* the safe-harbor rule should be nonexclusive. Offerors should be exempt from the Williams Act if they comply with either the explicit requirements of the rule, or with the more flexible judicial interpretations of the exemption. *See* 17 C.F.R. § 230.146 (1976) (SEC nonexclusive safe-harbor interpretation of private offering exemption under 1933 Act). The rule should consist of objective criteria, sucb as number of solicitees and premium price, that would provide prospective offerors with clear guidelines.

Although the SEC long refused to define tender offer because the "dynamic nature" of tender offers required administrative and judicial flexibility, Securities Exchange Act Rel. No. 34-12676, 41 Fed. Reg. 33004, 33005 (1976), the SEC recently proposed a "safe harbor" definition of tender offer. *See* Securities Exchange Act Rel. No. 34-16385, 44 Fed. Reg. 70,349, 70,358 (1979). The definition makes a solicitation falling into either of two categories a tender offer. A tender offer under the first category consists of "one or more offers to purchase or solicitations of offers to sell securities of a single class;" the offers must extend to more than ten persons during any 45 day period and seek more than five percent of the class of securities. *Id.; cf.* 15 U.S.C. § 78n(d)(1) (1976) (pre-solicitation disclosure required if tender offer would result in *ownership* of more than five percent of class of securities solicited). Offers made by a broker or dealer, on a national exchange or over-the-counter, and at the current market price are not tender offers provided: (a) the offeror, broker or dealer neither solicits offers to sell, nor arranges sucb solicitations; and (b) the broker or dealer receives no more than the customary commission or mark-up. *Id.* A solicitation falls in the second, vaguer category of tender offer if "one or more offers to purchase or solicitations of offers to sell securities of a single class" are "disseminated in a widespread manner," offer a premium of at least the greater of two dollars or five percent of the current market price, and "do not provide for a meaningful opportunity to negotiate tbe price and terms." *Id.*

[109] *See* notes 23-30 and accompanying text *supra.*

[110] *Cf.* SEC v. Ralston Purina Co., 346 U.S. 119, 125 (1953) (availability of private offering exemption under 1933 Act based on "whetber the [offeree] . . . needs the protection of the Act.").

solicitation is the availability to offerees of the same information that the Act requires from tender offerors.

Information is "available" either if the offeror actually discloses it to the offeree, or if the offeree has access[111] to the information and can compel its disclosure.[112] Such access may rest on economic bargaining power, or an insider position with the offeror. Where economic bargaining power is the basis of access, courts should limit the exemption to solicitations of such a small number of substantial shareholders that each is important to the offeror's success and thus able to compel disclosure.[113]

2. *Sophistication of Solicitees*

Information is worthless if the solicitee cannot evaluate it.[114] Each solicitee in a privately negotiated transaction must therefore be sophisticated enough to evaluate the information to which he has access or which the offeror actually discloses. Courts should presume that professional and institutional investors have such sophistication,[115] but should carefully examine the sophistication of individual, non-professional investors.[116]

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[111] Either access to information or actual disclosure suffices for the private offering exemption under the 1933 Act. Doran v. Petroleum Mgmt. Corp., 545 F.2d 893, 903-08 (5th Cir. 1977). *See* notes 90-91 and accompanying text *supra.*

[112] *Cf.* Doran v. Petroleum Mgmt. Corp., 545 F.2d 893, 904-05, 905 n.12 (5th Cir. 1977) (access standard under private offering exemption from 1933 Act satisfied only if offeree able to compel disclosure).

[113] *Cf. id.* at 905 n.12 (access standard for private offering exemption under 1933 Act requiring ability to compel disclosure, which may rest on economic bargaining power).

[114] *See* note 24 and accompanying text *supra.*

[115] *See* Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP (CCH) ¶ 97,107, at 96,149 (N.D. Ohio 1979) (presuming financial institutions, bank trusts and other institutional investors to be sophisticated) (dicta); Financial Gen. Bankshares, Inc. v. Lance, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,403, at 93,422, 93,429 (D.D.C. 1978) (bank one of several "sophisticated investors").

[116] Courts should not assume that holders of substantial amounts of the target company's securities are sophisticated. *See* Wellman v. Dickinson, 475 F. Supp. 783, 823 (S.D.N.Y. 1979) (solicitees who acquired substantial amount of target company shares after target took over business in which solicitees were principals not sophisticated investors). *Cf.* Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,149 (N.D. Ohio 1979) (in solicitation to Hoover family members collectively owning 41% of target stock, member of controlling family not necessarily sophisticated) (dicta). *But see* Financial Gen. Bankshares v. Lance, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,403, at 93,420, 93,429 (D.D.C. 1978) (finding substantial shareholders of target company stock, controlling shareholder of an investment banking firm, and attorney holding 20,000 shares of target "sophisticated investors"); Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,592 (N.D. Ill. 1973) (substantial shareholders "may be presumed to be powerful enough not to be pressured into making uninformed, ill-considered decisions to sell").

3. *Absence of Pressure on Solicitees*

The third essential element of a privately negotiated transaction should be the absence of excessive pressure on solicitees to make ill-considered decisions to tender.[117] Sophistication and information hardly benefit an offeree unless he has the opportunity to analyze the information thoroughly. Pressure may arise from short time periods in which to tender coupled with a premium price,[118] or with widespread publicity through press releases, letters, or telephone calls.[119]

Although they should analyze the facts of each transaction, courts may reasonably assume that large institutional investors and corporate insiders will be less susceptible to pressure than small, outside investors.[120] Because of their greater resources and expertise, institutional investors will generally require less time to deal intelligently with available information than even a small, sophisticated investor.[121] Courts may also presume that transactions consummated according to the offeree's terms are not subject to excessive pressure.[122]

B. *Balancing Interests in Regulating a Transaction*

A solicitation to a few shareholders that meets the three threshold criteria and in which solicitees have access[123] to material

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[117] *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) ("Congress's basic purpose in enacting the Williams Act was to take the pressure off investors who were forced to make rapid, uninformed decisions in tender offer situations."); notes 23-32 and accompanying text *supra.*

[118] A premium price alone—without threats that the offer will terminate if the offeree does not tender promptly—should not establish excessive pressure. *Cf.* Financial Gen. Bankshares, Inc. v. Lance, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,403, at 93,429 (D.D.C. 1978) (premium price alone insufficient for tender offer).

[119] *See* Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,146-47 (N.D. Ohio 1979).

[120] *See* Nachman Corp. v. Halfred, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,592 (N.D. Ill. 1973) ("directors [of target company and] . . . substantial shareholders . . . may be presumed to be powerful enough not to be pressured . . . into making uninformed, ill-considered decisions to sell.").

[121] A period of 10 days within which to tender should suffice for any solicitee. *See* 15 U.S.C. § 78n(d)(6) (1976) (10 day right to withdraw tendered shares).

[122] *See* Nachman Corp. v. Halfred, Inc. [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,455, at 95,592 (N.D. Ill. 1973). Courts finding excessive pressure should presume that the transaction is a tender offer. *Cf.* Hoover Co. v. Fuqua Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107, at 96,150 (N.D. Ohio 1979) ("If an offer [is] otherwise far removed from a conventional tender offer, a court might still find a tender offer if the shareholders were pressured.").

[123] *See* notes 111-13 and accompanying text *supra.*

information should be exempt from the Williams Act without further analysis. However, an offer to a large group that meets the threshold requirements and in which information is available only through actual disclosure by the offeror should not always merit the privately negotiated transaction exemption.[124] Courts should classify such solicitations only after weighing the solicitees' needs for the Act's fairness provisions[125] and the public investors' needs for advance disclosure[126] against the offeror's and economy's interests in exempting the transaction from the Act's burdens.[127]

Several considerations should guide a court when balancing these interests. First, if all solicitees receive identical terms, advance disclosure of the terms offered to one party will likely not hinder the offeror's negotiations with other offerees.[128] Second, if the offeror structures a transaction as a "lightning takeover," intending to acquire a controlling interest in a few days, he has little interest in keeping the acquisition secret from his competitors.[129] Offerors in privately negotiated transactions must disclose information similar to that required of tender offerors within ten days after the acquisition.[130] Third, publicity surrounding an offer also minimizes an offeror's interest in keeping a transaction secret in order to prevent disruption or delicate negotiations;[131] public-

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[124] Three reasons support distinguishing a solicitation to a half-dozen or so substantial investors with access to information from a solicitation to a larger number of investors in which information is available only through actual disclosure. First, although neither group needs the protection of the Williams Act's disclosure provisions, the need for the Act's fairness provisions is probably greater in the second solicitation. The second group's lack of access to information and inability to obtain its disclosure suggests a corresponding inability to obtain equitable terms. Solicitees in the larger group will likely be less able to bargain for equitable terms because each is less important to the success of the solicitation. Second, statements made during the congressional hearings on the Williams Act imply that the offerees in a privately negotiated transaction would be a few substantial shareholders. *See S. Hearings, supra* note 3, at 36 (statement of SEC Chairman Manuel F. Cohen) (Williams Act inapplicable to "privately negotiated purchases from substantial shareholders"); *id.* at 133 (statement of Prof. Stanley A. Kaplan) (Williams Act inapplicable "where the new interest buys working control or majority control from the present holder of such control"). Third, corporations closely held by few shareholders tend to be small; thus, the economic impact of unregulated changes in corporate control is less than in acquisitions involving large corporations owned by many shareholders.

[125] *See* notes 33-39 and accompanying text *supra.*

[126] *See* notes 40-43 and accompanying text *supra.*

[127] *See* notes 43-47 and accompanying text *supra.*

[128] *See* note 46 and accompanying text *supra.*

[129] *See* note 47 and accompanying text *supra.*

[130] *See* note 30 *supra.*

[131] *See* note 47 and accompanying text *supra.*

ity itself disrupts such negotiations.[132] Fourth, the privately negotiated transaction exemption should be unavailable if the transacting parties have no mutual desire to keep an acquisition secret,[133] but the offeror alone wants secrecy in order to mask a takeover attempt.[134] Fifth, because solicitees unable to compel disclosure of material information are probably also unable to compel equitable terms,[135] courts should scrutinize closely the substantive and procedural fairness accorded each offeree. Sixth, the public interest in advance disclosure[136] of an offeror's plans for the target company may be low if the target corporation is small or closely held. Few public investors may be interested in disclosure,[137] and the cost of complying with the Williams Act may far outweigh the benefits.

CONCLUSION

Current definitions of "tender offer" and "privately negotiated transaction" are inadequate. Courts should recognize that the interests of offerees demand that "privately negotiated transactions" have three essential characteristics: availability of material information through access or disclosure, sophistication of solicitees, and absence of excessive pressure to tender. If a solicitation meets these requirements and if information is available only through actual disclosure, courts should weigh the competing interests in regulating the solicitation. This definition of the privately negotiated transaction exemption would enable courts to both promote the purposes underlying the Williams Act and provide prospective offerors with reasonably certain guidelines.

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[132] *See* note 76 *supra.*

[133] *See* Wellman v. Dickinson, 475 F. Supp. at 820 ("[T]hese were undoubtedly not 'privately negotiated transactions' in which there was a mutual desire to avoid premature disclosure.").

[134] *See id.* at 823 ("acquisition . . . infected with . . . basic evil which Congress sought to cure [through Williams Act:] . . . intent . . . to effectuate a transfer . . . in a swift, masked maneuver").

[135] *See* note 124 *supra.*

[136] *See* notes 39-44 and accompanying text *supra.*

[137] If a target corporation is small, and its securities are not widely and publicly traded, a court should focus on the size of unsolicited holdings because the interest of non-shareholding public investors will be minimal. The reasons for characterizing a transaction as a tender offer become more compelling as the number of unsolicited and uninformed shareholders increases. *See* notes 39-43 and accompaning text *supra.*