Private Solicitations Under the Williams Act

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PRIVATE SOLICITATIONS UNDER
THE WILLIAMS ACT

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

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

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."


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.

Although open market purchases also fall outside the "tender offer" definition. See, e.g., Kennecott Copper Corp. v. Curriss-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, however, courts have adopted divergent tests 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. Other courts focus on pressure to make ill-considered decisions to tender in distinguishing tender offers from exempted solicitations. Still others apply Securities Exchange Commis-
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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\(^{13}\) *See* Wellman v. Dickinson, 475 F. Supp. 783, 817-21 (S.D.N.Y. 1979); notes 94-95 and accompanying text *infra*.


\(^{15}\) *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.\textsuperscript{23} Many offerees who did receive information had insufficient time to analyze it thoroughly before tendering.\textsuperscript{24} Premium prices,\textsuperscript{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\textsuperscript{26} and counter-proposals by competing tender offerors.\textsuperscript{27} Thus, prior to the Act, offerees were usually unable to decide rationally whether to tender.\textsuperscript{28}

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

\textsuperscript{23} See \textit{H.R. Hearings, supra} note 3, at 11-12 (statement of SEC Chairman Manuel F. Cohen); \textit{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).

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

\textsuperscript{25} 113 CONG. REC. 855 (1967) (introductory remarks of Sen. Williams).

\textsuperscript{26} \textit{H.R. Hearings, supra} note 3, at 12 (statement of SEC Chairman Manuel F. Cohen); \textit{S. Hearings, supra} note 3, at 35 (statement of SEC Chairman Manuel F. Cohen).

\textsuperscript{27} \textit{H.R. Hearings, supra} note 3, at 12 (statement of SEC Chairman Manuel F. Cohen); \textit{S. Hearings, supra} note 3, at 34 (statement of SEC Chairman Manuel F. Cohen).


\textsuperscript{29} \textit{H.R. Hearings, supra} note 3, at 11 (statement of SEC Chairman Manuel F. Cohen); \textit{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 ... ").

\textsuperscript{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. \textit{Id.}

Subject to certain exceptions, see \textit{id.} § 78m(d)(5)(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. \textit{Id.} § 78m(d)(1).

\textsuperscript{31} Subject to certain exceptions, see \textit{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. \textit{Id.} § 78n(d)(5).

\textsuperscript{32} \textit{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 of tendering solicitees. 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. Furthermore, a pro-rata take-up provision 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. Finally, a most-favored offeree price provision prevents discrimination against early tender if the price is later increased to attract sufficient shares.

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. The Act requires offerors to make available to all investors information that “might substantially change the assumptions on which the market
price [of the target company’s stock] is based” 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.

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. Congress therefore designed the Act to protect the investing public without placing “undue obstacles in the way of honest and fairly conducted transactions.”

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, he be-
lieved that such transactions should be exempt from the Act because of the danger of "premature disclosure." 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. 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.

Good reasons also exist for exempting a limited solicitation of a few large and sophisticated shareholders from the Act's fairness provisions. 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.
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...
shareholders by newspaper advertisements or press releases and holding of tendered shares in a depository or in the purchaser's hands prior to acceptance.

The "conventional" description of a tender offer is unsatisfactory because it fails to promote the purposes of the Williams Act. 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 provisions "any offer for ... tenders ... not comprehended within the purposes of [those provisions]." 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


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).


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. 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. An adequate definition of tender offer cannot consist merely of a potentially underinclusive checklist of objective factors.

B. Extending the Conventional Definition: The Impact Test

At least two courts have accepted a definition of tender offer that focuses on the impact of a transaction upon solicited shareholders. 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" and likely to have "the same impact as the conventional tender offer." Under this test, open market purchases and transactions negotiated privately with a limited number of major shareholders are exempt from the Williams Act. 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."
Although the impact test goes beyond the conventional definition and properly considers pressure on solicitees, it, too, is inadequate. The test is both over inclusive and underinclusive. On the one hand, because it fails to account for the economic reasons underlying the privately negotiated transaction exemption, 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. 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 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.


71 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.

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

[an 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:

... 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{76} The inability of purchasers to predict whether a stock ac-

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private solicitation is subject to the Williams Act could have a chilling effect on economically beneficial takeovers that Congress intended to leave unregulated.\textsuperscript{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,\textsuperscript{78} to protect unsolicited shareholders and the public,\textsuperscript{79} and to exempt open market and privately negotiated transactions.\textsuperscript{80} Furthermore, the definition does not expressly require courts to investigate the availability of information to solicitees, a central goal of the Act.\textsuperscript{81}

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

In Wellman v. Dickinson,\textsuperscript{82} the court determined whether a solicitation met the privately negotiated transaction exemption by analogizing\textsuperscript{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 undercut the offeror’s argument that presolicitation 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.

\textsuperscript{77} 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. 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.


\textsuperscript{78} See notes 33-39 and accompanying text supra.

\textsuperscript{79} See notes 39-43 and accompanying text supra.

\textsuperscript{80} See notes 6, 46-49, and accompanying text supra.

\textsuperscript{81} See notes 19-32 and accompanying text supra.

\textsuperscript{82} 475 F. Supp. 783 (S.D.N.Y. 1979).

\textsuperscript{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).
The 1933 Act prohibits the public offer or sale of unregistered securities, but exempts "transactions by an issuer not involving any public offering." Like the Williams Act, which does not define "tender offer," the 1933 Act fails to define "public offering."

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." Sophistication of offerees does not by itself make an offering private. Each offeree must either receive the information that a registration statement would provide, or have access to such information because of a close relationship with the offeror. Factors relevant in determining whether the exemption applies include the

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).
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).
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, number of units offered, manner of offering, and lack of common characteristics among the offerees.

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. 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." 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, Congress's concern about pressure on solicitees and about nondiscriminatory treatment of tendering...

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.").

See Block & Schwarzfeld, supra note 7, at 155 (private offering analogy inappropriate because "very different public interests" underlay Williams Act and 1933 Act).
shareholders, and the public interest in disclosure of imminent changes in corporate control.

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. The exemption does not, however, free the offeror from the antifraud prohibitions under the 1933 Act. 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. Second, Congress explicitly authorized the private offering exemption in the 1933 Act. 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, or may unfairly trap those earnestly seeking to comply with the law. Flexibility is necessary so that courts may treat alike factually dissimilar transactions with identical impact on investors. These

100 See notes 33-38 and accompanying text supra.
101 See notes 39-43 and accompanying text supra.
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).
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\textsuperscript{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.\textsuperscript{109} The privately negotiated transaction exemption should therefore apply only if solicitees do not need pre-solicitation disclosure.\textsuperscript{110} Thus, an essential element of a private

\textsuperscript{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 comprehensively 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, such 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. 54-12676, 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 such 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 the price and terms." Id.

\textsuperscript{109} See notes 23-30 and accompanying text supra.

\textsuperscript{110} Cf. SEC v. Ralston Purina Co., 346 U.S. 119, 125 (1953) (availability of private offering exemption under 1933 Act based on "whether 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\textsuperscript{111} to the information and can compel its disclosure.\textsuperscript{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.\textsuperscript{113}

2. Sophistication of Solicitees

Information is worthless if the solicitee cannot evaluate it.\textsuperscript{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,\textsuperscript{115} but should carefully examine the sophistication of individual, non-professional investors.\textsuperscript{116}

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{114} See note 24 and accompanying text supra.


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.\textsuperscript{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,\textsuperscript{118} or with widespread publicity through press releases, letters, or telephone calls.\textsuperscript{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.\textsuperscript{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.\textsuperscript{121} Courts may also presume that transactions consummated according to the offeree's terms are not subject to excessive pressure.\textsuperscript{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\textsuperscript{123} to material

\textsuperscript{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.


\textsuperscript{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.").

\textsuperscript{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).


\textsuperscript{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. Courts should classify such solicitations only after weighing the solicitees' needs for the Act's fairness provisions and the public investors' needs for advance disclosure against the offeror's and economy's interests in exempting the transaction from the Act's burdens.

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. 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. Offerors in privately negotiated transactions must disclose information similar to that required of tender offerors within ten days after the acquisition. Third, publicity surrounding an offer also minimizes an offeror's interest in keeping a transaction secret in order to prevent disruption or delicate negotiations;

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 50 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 disclosure136 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.

Gary E. Humes

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 accompanying text supra.