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Problems in Defining "Tender Offer": The Decision in *Hanson Trust PLC v. SCM Corp.*

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I. INTRODUCTION

In 1968, Congress enacted the Williams Act¹ (the "Act") to regulate tender offers and large stock acquisitions. The purpose of the Act was to ensure investor protection by closing a gap in the regulation of corporate takeovers.² In passing the legislation, Congress left the term "tender offer" undefined.³ The Securities and Exchange Commission (the "SEC"), which enforces the Act, has also refused to define the term.⁴ This absence of a clear definition has

¹. Williams Act, 15 U.S.C. §§ 78m(d), (e), 78m(d)-(f) (1982).
². See infra notes 16-42 and accompanying text. Congress recognized that cash tender offers were being used with increasing frequency as a method of corporate takeover and that abuses were resulting from a lack of regulation in this area.
³. See infra notes 43-46 and accompanying text. Congress' failure to define "tender offer" was intentional. Congress recognized the need to retain flexibility in defining the term in order to further the purposes of the Williams Act. See generally Takeover Bids: Hearings on H.R. 14475, S. 510 Before the Subcomm. on Commerce and Financing of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. 18 (1968) (testimony of Manual Cohen, Chairman of the Securities and Exchange Commission).
⁴. See infra notes 43-46 and accompanying text. The SEC has considered definitions of "tender offer" and has proposed a specific definition of the term, but has never adopted one. In a 1976 release, the SEC stated that,

[a]lthough testimony and letters of comment were received at the Tender Offer Hearings on the definition of the term "tender offer," no consensus of opinion was reached on the meaning of the term . . . the Commission's position at this time is that a definition of the term "tender offer" is neither appropriate nor necessary. This position is premised on the dynamic nature of these transactions and the need of the Commission to remain flexible in determining what types of transactions, either present or yet to be devised, are or should be encompassed by the term.


However, the SEC later proposed a specific definition of "tender offer." The proposed definition was based on two tiers which would operate independently of each other. If the transaction or series of transactions met the test of either tier, it would be construed as a tender offer. The definition was stated as follows:

The term "tender offer" includes a "request or invitation for tenders" and
left the SEC and courts to determine what constitutes a tender offer on a case-by-case basis.

Although many conflicts over alleged tender offers have arisen, no workable definition has developed. Instead, a variety of amorphous tests and considerations have been used to identify tender offers. There is little problem in identifying conventional tender offers, but it is often difficult to determine whether certain open market or privately negotiated transactions constitute unconven-

Securities Exchange Act Release No. 16,385, [1979-80 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,374 (Nov. 29, 1979) (the definition, which is part of the release, is printed separately at ¶ 24,281A). This definition was never adopted, however, and has been criticized extensively in the literature. See, e.g., Mather, Symposium: Current Issues in Tender Offers: The Elusive Definition of a Tender Offer, 7 J. CORP. L. 503 (1982); Wurczinger, Toward a Definition of “Tender Offer,” 19 HARV. J. ON LEGIS. 191 (1982).

5. See infra notes 66-111 and accompanying text. The lack of a clear definition has led to a great deal of litigation. Secrecy and speed are often key factors in a successful hostile takeover attempt because management of a target company may adopt defensive measures to thwart the hostile takeover attempt if it becomes aware of the attempt in advance and has time to react. Since the Williams Act requires preacquisition disclosures and a waiting period for share purchases, corporate raiders seeking to acquire control of a target company in an unfriendly takeover frequently attempt to structure transactions so that they will not be characterized as a tender offer. See infra note 59 and accompanying text; see also Greene & Juniewicz, A Reappraisal of Current Regulation of Mergers and Acquisitions, 132 U. PA. L. REV. 647, 656 (1984). Consequently, target company management often attempts to characterize a hostile acquiror’s purchases as a de facto tender offer in order to delay or prevent the potential takeover. See generally S. LORNE, ACQUISITIONS AND MERGERS: NEGOTIATED AND CONTESTED TRANSACTIONS § 4.02 (1986); Jupiter, An Analysis of Efforts to Avoid Williams Act Requirements, 9 SEC. REG. L.J. 259, 267-68 (1981).

6. Some of the tests used are the SEC’s eight-factor test, the S-G Securities two-pronged test, the shareholder impact test and tests evolving from the private offering analogy. See infra notes 72-102 and accompanying text for a discussion of these tests.

7. See infra notes 47-51 and accompanying text.
tional tender offers.8

In *Hanson Trust PLC v. SCM Corp.*,9 a court considered for the first time whether large stock purchases constitute a tender offer when made immediately following the purchaser’s termination of a formal tender offer.10 The court held that the purchases at issue

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However, when circumstances that potentially lead to investor protection problems accompany large stock purchases, the purchases constitute a tender offer. See, e.g., Zuckerman v. Franz, 573 F. Supp. 351 (S.D. Fla. 1983) (well publicized cash merger proposal constituted a tender offer); SEC v. Texas Int’l Co., 498 F. Supp. 1231 (N.D. Ill. 1980) (in light of the purposes of the Williams Act, a public invitation to a well-defined class of creditors of a bankrupt company who anticipated trading their fraud claims, arising out of their ownership of shares therein, for shares in the reorganized corporation constituted a tender offer); Wellman v. Dickinson, 475 F. Supp. 783 (S.D.N.Y. 1979) (see infra notes 97-108 and accompanying text for a discussion of this case); Hoover Co. v. Fuqua Indus., Inc., [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107 (N.D. Ohio June 11, 1979) (see infra note 111 for a brief discussion of the case); S-G Sec., Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114 (D. Mass. 1978) (see infra notes 72-76 and accompanying text for a discussion of this case); Cattlemen’s Inv. Co. v. Fears, 343 F. Supp. 1248 (W.D. Okla. 1972) (see infra notes 66-71 and accompanying text for a discussion of this case).

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

10. The purchases were made within a few hours of an announcement by the acquiror that it was terminating its tender offer. Id. at 52.
were neither a tender offer\textsuperscript{11} nor a de facto continuation of the terminated tender offer.\textsuperscript{12} The court refused to recognize a post-tender offer "cooling off period" during which a tender offeror would be prohibited from purchasing stock in the target company.\textsuperscript{13}

This note will examine the purposes underlying the Williams Act. It will also discuss why "tender offer" has not been defined and will consider judicial efforts to identify tender offers. The note will critically analyze the \textit{Hanson} decision and point out problems that may arise from a broad interpretation of the holding. Finally, the note will discuss the inadequacy of current approaches to identifying tender offers and suggest a viable solution to this problem.

\section{Tender Offer Regulation: The Williams Act}

\subsection{Events Leading to Tender Offer Regulation}

Prior to the 1960's, proxy solicitations and securities exchange offers were the favored vehicles for corporate acquisitions.\textsuperscript{14} Both of these methods were subject to various regulations under the securities laws.\textsuperscript{15} However, during the 1960's, cash tender offers became the preferred method of acquiring control of a company whose management opposed the takeover.\textsuperscript{16} Tender offers were "simpler and cheaper"\textsuperscript{17} than proxy contests\textsuperscript{18} and had the strategic advantage of surprise.\textsuperscript{19} Tender offers also were basically unregulated.\textsuperscript{20}

Without regulation and disclosure requirements, a corporate

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\begin{thebibliography}{99}
\bibitem{11} Id. at 57.
\bibitem{12} Id. at 59.
\bibitem{13} Id. at 60. The SEC previously suggested such a "cooling off period" under Proposed Rule 14e-5, but never adopted the rule. (For purposes of this article the term "target company" refers to the company whose stock is sought in a tender offer or non-tender offer purchase program.)
\bibitem{15} Id. Proxy solicitations were regulated under the Securities Exchange Act of 1934 (hereinafter referred to as the "1934 Act") and securities exchange offers were regulated under the Securities Act of 1933 (hereinafter referred to as the "1933 Act").
\bibitem{17} Id. (citing Fleischer \& Mundheim, \textit{Corporate Acquisition by Tender Offer}, 115 U. Pa. L. Rev. 317, 320-21 (1967); D. Austin \& J. Fishman, \textit{Corporations in Conflict—The Tender Offer} 8-9 (1970)).
\bibitem{18} Note, \textit{supra} note 16, at 1253.
\bibitem{20} Note, \textit{Expansion of the Williams Act: Tender Offer Regulation for Non-conven-
outsider could offer a premium price for a controlling share of a
target company's stock and force shareholders to act without ade-
quate time or information. Target company shareholders were	enable to make rational and informed investment decisions. They were presented with "take-it-or-leave-it" offers, often without
knowing the offeror's identity or intentions or the approximate
value of their shares. Because one of the underlying goals of fed-
eral securities regulation is to provide investors with an opportu-
nity to make informed investment decisions, the situation created by tender offers was undesirable. Therefore, in an attempt to
close this "gap" in the securities laws, and in recognition of the
increased popularity of the tender offer as a method of corporate
acquisition, Congress enacted the Williams Act.

B. The Scope of the Williams Act

The Williams Act regulates tender offers and non-tender offer
acquisitions resulting in beneficial ownership of more than five per-
cent of any class of equity securities in a company. Section 13(d)
of the Act requires a purchaser to make specific disclosures within
ten days of crossing the five percent threshold. This section cov-
ers purchases of all types. Sections 14(d) and 14(e) of the Act
deal specifically with tender offers. Section 14(d) contains disclo-
sure provisions and substantive requirements, while section 14(e) is
a general antifraud provision.

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21. See infra notes 22-27 and accompanying text.
22. Mather, supra note 4, at 503-04.
23. Jupiter, supra note 5, at 260; see also Note, Private Solicitations under the Wil-
liams Act, 66 CORNELL L. REV. 361, 363-64 (1981). Target shareholders also lacked an
opportunity to consider counterproposals by incumbent management or competing suit-
ors. Id.
24. Mather, supra note 4, at 504; see also Ernst & Ernst v. Hochfelder, 425 U.S. 185,
195 (1976).
25. 113 CONG. REC. 854 (1967); H.R. REP. NO. 1711, 90th Cong., 2d Sess. 4, re-
printed in 1968 U.S. CODE CONG. & AD. NEWS 2811 (hereinafter cited as H.R. REP.); S.
REP. NO. 550, 90th Cong., 1st Sess. 1 (1968), (hereinafter cited as S. REP.). See generally
Note, supra note 16, at 1254.
26. H.R. REP., supra note 25, at 2; S. REP., supra note 25, at 2; see also Note, supra
note 20, at 279 (citing Piper v. Chris-Craft Indus., 430 U.S. 1, 22 (1977)).
27. See C. KANTER, TENDER OFFERS—MAKING AND MEETING THEM 10 (1979)
(citing Piper v. Chris-Craft Indus., 430 U.S. 1, 22 (1977)).
28. See generally Mather, supra note 4, at 504 (discussion of the provisions of the
Williams Act).
30. Id.
31. Id. at § 78n(d), (e).
Section 14(d)(1) requires a tender offeror to make specific pre-acquisition disclosures in any bid to acquire five percent or more beneficial ownership of any class of equity securities of the target company.\textsuperscript{32} Sections 14(d)(5) to 14(d)(7) provide the key substantive rules.\textsuperscript{33} Section 14(d)(5) permits shareholders to withdraw tendered securities within certain time frames to allow those persons who have tendered to reconsider their decision.\textsuperscript{34} It also prevents securities from being tied up in a depository indefinitely.\textsuperscript{35} Section 14(d)(6) requires pro rata purchase by the tender offeror if more securities are tendered than were requested.\textsuperscript{36} This prevents the "first-come-first-served" pressure on shareholders that was characteristic of preregulation tender offers.\textsuperscript{37} Section 14(d)(7), which was designed to ensure equal treatment of all tendering shareholders,\textsuperscript{38} requires that any increase in price paid to tendering shareholders during a tender offer be paid to all persons who tendered, even if they did so at a lower price.\textsuperscript{39} Sections 14(d)(1) and 14(d)(5) to 14(d)(7) have been interpreted as requiring that shareholders be given an adequate period of time in which to make informed and rational decisions regarding whether or not to tender.\textsuperscript{40}

\textit{C. The Attempt to Define "Tender Offer"}

The primary purpose underlying the Williams Act was the protection of investors.\textsuperscript{41} Through the disclosure requirements, the substantive tender offer rules and the general antifraud provision for tender offers, Congress hoped that investors would be informed

\begin{footnotesize}
\textsuperscript{32} Id. at § 78n(d)(1).
\textsuperscript{33} Id. at § 78n(d)(5)-(7).
\textsuperscript{34} Id. at § 78n(d)(5).
\textsuperscript{35} Id. Without a withdrawal provision, tendered securities could be tied up in a depository by the offeror and the tendering shareholder would have no access to his shares.
\textsuperscript{37} Id. Under the pro rata provision, shareholders who tender first are given no preferential advantage over shareholders who tender later. The offeror must purchase all tendered shares on a pro rata basis if the number of shares tendered exceeds the amount of shares desired. Therefore, there is no pressure to tender early in the process.
\textsuperscript{38} Id. at § 78n(d)(7). Prior to the enactment of this provision, shareholders who tendered early could be deprived of an opportunity to be paid the higher price if the tender offeror raised its offer after the shareholder tendered.
\textsuperscript{39} Id.
\textsuperscript{40} See Note, supra note 16, at 1258-59.
\textsuperscript{41} See Note, supra note 20, at 280 (citing Piper v. Chris-Craft Indus., 430 U.S. 1, 22 (1977)); see also E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 75 (1973); Note, supra note 23, at 365 (protection should be afforded to all investors, not merely solicitees).
\end{footnotesize}
and unpressed during potential transfers of corporate control.\textsuperscript{42} However, in regulating tender offers, neither the Williams Act nor the SEC has defined "tender offer".\textsuperscript{43} This lack of definition does not result from either an oversight or a universal understanding of the definition, but rather from a recognition of the need to retain flexibility in defining the term.\textsuperscript{44} A specific definition would enable clever corporate raiders to structure transactions that fall barely outside the statutory definition. These raiders could then employ acquisition strategies containing potential investor protection problems without complying with the regulatory restrictions created to protect investors.\textsuperscript{45} Therefore, in order to retain the flexibility needed to promote the purposes behind the Williams Act, Congress left to the SEC and the courts the responsibility of defining "tender offer" on an ad hoc basis.\textsuperscript{46}

A "conventional" tender offer can be defined as a public offer or solicitation by a person or group of persons to purchase all or a fixed percentage of shares in a target company at a specified price.\textsuperscript{47} Conventional tender offers differ from ordinary open mar-

\textsuperscript{42} H.R. REP., \textit{supra} note 25, at 1; S. REP., \textit{supra} note 25, at 1; 113 CONG. REC. 855 (1967). Senator Williams, in introducing the bill which became the Williams Act, stated:

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 . . . . [This] is inconsistent with the disclosure pattern generally prevailing in the American securities markets.

The failure to protect investors in connection with a cash takeover bid is in sharp contrast to the regulatory requirements applicable where one company offers to exchange its shares for those of another, or the protections applicable to a proxy fight for corporate control.

\textit{Id.}; see also \textit{Note}, \textit{supra} note 16, at 1259.

\textsuperscript{43} Congress has not defined "tender offer" anywhere in the Securities Acts. In the House and Senate reports accompanying the Williams Act, the characteristics of a typical cash tender offer were described. H.R. REP., \textit{supra} note 25, at 2; S. REP., \textit{supra} note 25, at 2. However, a definition was never included in the legislation. \textit{See} supra note 3.

The SEC has never adopted a definition either. \textit{See} supra note 4 for a discussion of the SEC's failure to define the term.

\textsuperscript{44} \textit{See} supra notes 3-4 and accompanying text.

\textsuperscript{45} \textit{See} supra notes 28-40 and accompanying text.

\textsuperscript{46} E. ARANOW & H. EINHORN, \textit{supra} note 41, at 70; E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL \textit{1} (1977).

\textsuperscript{47} \textit{See} E. ARANOW & H. EINHORN, \textit{supra} note 41, at 70. According to the House Report:

[An] offer normally consists of a bid by an individual or group to buy shares of a company—usually at a price above the current market price. Those accepting the offer are said to tender their stock for purchase. The person making the offer obligates himself to purchase all or a specified portion of the tendered shares if certain specified conditions are met.
ket and privately negotiated purchases in a few important ways. First, in a conventional tender offer, if fewer shares are tendered by the solicitees than are requested, the offeror does not have to purchase the shares.\textsuperscript{48} Also, if more than the requested number of shares are tendered, the offeror does not have to purchase all of them.\textsuperscript{49} And finally, during the time period in which the tender offer is open, the tendering shareholder relinquishes control over his shares; they are placed in a depository and the shareholder has limited access to them.\textsuperscript{50} By contrast, in ordinary securities transactions, a shareholder has control over and access to his shares until the transaction is completed.\textsuperscript{51}

Some commentators have suggested that tender offer regulations were meant to apply only to those transactions which can be classified as conventional tender offers.\textsuperscript{52} They contend that since the legislative history of the Act suggests that tender offers and other forms of securities purchases undertaken to acquire control of a target company were recognized as distinctly different types of transactions, it was not Congress' intention to regulate these other types of purchases as tender offers.\textsuperscript{53} The legislative history provides some support for this contention because the terms "tender offer" and "open market or privately negotiated purchases" were used separately, as if referring to distinct types of transactions.\textsuperscript{54}

Those who argue that the tender offer rules were only meant to cover conventional tender offers also point out that section 13(d) would not have been necessary if all large open market and privately negotiated purchases were to be regulated as tender offers. If tender offer regulation was extended to all of these purchases, they could not be made by any means other than a conventional tender offer in compliance with the substantive provisions of sec-

\textsuperscript{48} See Note, supra note 16, at 1252.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} See, e.g., E. ARANOW & H. EINHORN, supra note 41, at 74-75.
\textsuperscript{53} See 113 CONG. REC. 854-57 (1967); H.R. REP., supra note 25; S. REP., supra note 25.
\textsuperscript{54} As support for the contention that the legislative history indicates that only conventional tender offers were meant to be regulated by sections 14(d) and 14(e) of the Williams Act, commentators often point out that the House and Senate reports on the Williams Act, and Senator Williams' introductory remarks on the bill that became the Act, all refer to the terms "tender offer" and "open market or privately negotiated purchases" separately, thus indicating that open market and privately negotiated purchases are not tender offers. 113 CONG. REC. 854-57 (1967); H.R. REP., supra note 25; S. REP., supra note 25.
tion 14(d) of the Act. It is argued that Congress could not have intended this result, since Congress had no intention of interfering with purely open market or privately negotiated transactions. The legislative history of the Act indicates that postacquisition disclosure under section 13(d) was considered sufficient to protect investors involved in substantial open market and privately negotiated purchases, while preacquisition disclosure was necessary only to protect shareholders confronted with tender offers.

However, in order to promote adequately the goals of the Williams Act, certain transactions that were not conventional tender offers had to be regulated as tender offers. The deliberate structuring of transactions by corporate raiders to evade the provisions of the Williams Act necessitated an expansion of the definition of tender offer beyond its conventional meaning. Corporate raiders developed strategies which were clearly not conventional tender offers but posed similar problems. These "unconventional" tender offers or "end runs" forced the SEC and the courts to adopt flexible approaches to defining "tender offer." Only one month after the Williams Act became effective, the SEC announced that "special bids" would be construed as tender offers subject to regulation under sections 14(d) and 14(e). And later, in a 1976 release, the SEC explicitly stated that the term "tender offer" must apply to a variety of situations. The SEC stated that, in addition to special bids, purchases resulting from widespread solicitation and transactions which pressure shareholders into hasty or ill-informed decisions should be regulated as tender offers. Additionally, the Supreme Court has stated that as a matter of policy, securities regulations should be construed broadly to further their remedial

55. E. Aranow & H. Einhorn, supra note 41, at 74-75.
56. See 113 Cong. Rec. 856 (1967).
57. Id.
58. Note, supra note 23, at 369; see also supra note 9 (a listing of cases where courts have found it necessary to expand tender offer coverage to cases involving unconventional tender offers).
60. Mather, supra note 4, at 505.
61. "End run" is a term commonly used in reference to attempts to structure a tender offer so as to avoid the regulations of the Williams Act.
62. A special bid is a device for handling open market securities purchases that are too large to be effectuated in the usual auction system on the floor of an exchange. See Wurczinger, supra note 4, at 196-97. Using the market tape, the bidder announces a price, usually at a premium, and the number of shares desired. Sales may then be immediately consummated on the exchange with shareholders willing to sell. Id.
purposes.65

D. Judicial Expansion of the "Tender Offer" Definition

Consistent with the spirit of the Williams Act and securities laws in general, courts have expanded the definition of "tender offer." In Cattlemen's Investment Co. v. Fears,66 a federal district court in Oklahoma held that a coordinated series of stock purchases from a large number of shareholders during a relatively short period of time constituted a tender offer.67 Because the transactions included "active and widespread" solicitation of target company shareholders68 and the shareholders were pressured to make hurried, uninformed investment decisions,69 the court concluded that the transactions contained potential dangers that the Williams Act intended to eliminate.70 Therefore, a court for the first time extended coverage of the Act beyond the scope of a conventional tender offer.71

Subsequently, in S-G Securities, Inc. v. Fuqua Investment Co.,72 a federal district court in Massachusetts held that several large block purchases of stock constituted an unconventional tender offer.73 The purchases had been preceded by two widely publicized press releases.74 The court, setting forth a two-pronged test for determining whether purchases constitute a tender offer, stated that when both of the following conditions are met, there is a tender offer: (1) a public announcement by the purchaser that it intends to acquire control of a target company through substantial stock purchases; and (2) a subsequent rapid acquisition of large blocks of stock by the purchaser.75 Concluding that these conditions were present, the court held that the transactions in issue were subject to

67. Id. at 1252.
68. Id. at 1251-52.
69. Id. at 1252. The court stated that "the contacts utilized by the defendant seem even more designed than a general newspaper advertisement, the more conventional type of 'tender offer,' to force a shareholder into making a hurried investment decision without access to information." Id.
70. Id.
71. Prior to the Cattlemen's case, no court had ever held that a transaction was a tender offer where the transaction was not within the scope of a conventional tender offer. See Note, supra note 16, at 1263.
73. Id. at 1127.
74. Id. at 1126.
75. Id. at 1126-27.
tender offer regulation under the Act.\textsuperscript{76}

However, other courts have generally been reluctant to hold that open market or privately negotiated purchases constitute tender offers. \textit{Kennecott Copper Corp. v. Curtiss-Wright Corp.}\textsuperscript{77} is one of the leading cases rejecting a claim of unconventional tender offer. In \textit{Kennecott}, the Second Circuit affirmed a lower court holding that aggressive and substantial open market purchases did not create an unconventional tender offer.\textsuperscript{78} The district court stated that regardless of how aggressive a purchase program is, purchases of stock in the open market do not constitute a tender offer.\textsuperscript{79} Since the solicitees were not given a deadline for responding to the offer, there was no premium price offered, and the institutional shareholders solicited were sophisticated investors able to fend for themselves, the district court concluded that no tender offer was involved.\textsuperscript{80} In affirming, the Second Circuit stated that the case was not an appropriate setting for expanding the definition of tender offer beyond its conventional meaning.\textsuperscript{81}

In \textit{Brascan, Ltd. v. Edper Equities, Ltd.},\textsuperscript{82} another claim of unconventional tender offer was rejected when a federal district court in New York refused to recognize certain open market and privately negotiated purchases as a tender offer.\textsuperscript{83} The case typifies a general refusal to recognize substantial open market and privately negotiated purchases as an unconventional tender offer in the absence of certain factors.\textsuperscript{84} The case’s real importance, however, lies in the eight-factor test for identifying a tender offer which was introduced by the SEC in an amicus brief.\textsuperscript{85} The district court applied the test, but refused to adopt it as a definitive method for determining whether a purchaser’s actions constitute a tender offer.\textsuperscript{86}

\textsuperscript{76} Id. at 1127.
\textsuperscript{77} 449 F. Supp. 951 (S.D.N.Y.), aff’d in part, rev’d in part, 584 F.2d 1195 (2d Cir. 1978).
\textsuperscript{78} 584 F.2d at 1207.
\textsuperscript{79} 449 F. Supp. at 961.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 789.
\textsuperscript{82} 584 F.2d at 1207.
\textsuperscript{83} Id.
\textsuperscript{84} Many of the factors which may lead a court to hold that a transaction constitutes a tender offer can be found in the eight-factor test. \textit{See infra} notes 88-96 and accompanying text.
\textsuperscript{85} 477 F. Supp. at 791-92.
\textsuperscript{86} Id.
E. The SEC's Eight-Factor Test

Since the Brascan case, the eight-factor test has been almost universally adopted as the primary method for determining whether a transaction or series of transactions constitutes a tender offer.87 The eight-factor test attempts to identify the circumstances which set tender offers apart from ordinary market or negotiated securities transactions.88 The test examines whether there was active and widespread solicitation of target company shareholders,9 and whether the offer was contingent on the tender of a fixed minimum or maximum number of shares.91 The test also examines whether the offer was made at a premium over the prevailing market price92 and whether the terms of the offer were firm rather than negotiable.93 Additionally, the test looks at whether the offer was only open for a limited period of time94 and whether solicitees were subject to pressure to sell their stock.95 Finally, if appropriate, the test considers whether public announcements of a purchase program preceded or accompanied a rapid accumulation of large amounts of the target company's securities.96

In Wellman v. Dickinson,97 the leading case using the eight-factor test, the district court for the Southern District of New York applied seven factors from the test to conclude that privately negotiated stock purchases resulting in ownership of one-third of the outstanding shares in the target company constituted a tender offer.98 The purchases were made in a series of private transactions

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89. Id. at 823 (the first factor in the test).
90. Id. (the second factor in the test).
91. Id. (the fifth factor in the test).
92. Id. (the third factor in the test).
93. Id. (the fourth factor in the test).
94. Id. at 823-24 (the sixth factor in the test).
95. Id. at 824 (the seventh factor in the test).
96. Id. (the eighth factor in the test).
98. Id. at 824-25. Only seven factors were used because the court determined that the eighth factor was not relevant to this case. Id.
with thirty to forty institutional and large individual shareholders. The court began its analysis by concluding that purely open market or privately negotiated transactions are not tender offers. Since the transactions in the case were clearly not open market purchases, the court considered whether they were purely privately negotiated transactions. The court looked to cases applying the private offering exemption under section 4(1) of the Securities Act of 1933 to determine whether the transactions were purely private. The court recognized that the private offering exemption was not meant to apply to tender offers, but concluded that similar criteria should be used when examining whether any securities transaction is exempt from regulation. The court then applied the reasoning of the Supreme Court in SEC v. Ralston Purina Co., the leading private offering exemption case, to the case before it. In Ralston Purina, the Supreme Court held that the applicability of the private offering exemption depends on whether affected parties need regulatory protection.

Applying this logic, the transactions would seem to be private because of the sophistication of the solicited investors. However, the district court reasoned that sophisticated investors cannot apply their investment skills if they are not given sufficient information to evaluate an offer. Therefore, since the court found that the solicitees were pressured to make a hurried response without adequate information, it concluded that the transactions were not truly private.

The Wellman court then applied seven relevant factors from the SEC's eight-factor test to determine whether the transactions constituted a tender offer. Finding that all seven factors were present, the court concluded that the purchases were a tender offer in violation of the Williams Act.

Even after widespread acceptance of the SEC's eight-factor test, courts have continued to reject the vast majority of claims of unconventional tender offer. They have consistently held that, re-

99. Id. at 824.
100. Id. at 818-19.
101. Id. at 818-21.
102. Id. at 819-20.
104. Id. at 125.
106. Id.
107. Id. at 824-25.
108. Id. at 824-26.
Regardless of how aggressive or successful a purchase program is, purely open market and privately negotiated purchases are not tender offers. However, when open market or privately negotiated purchases violate the purposes of the Williams Act and create the potential dangers that tender offer regulations were designed to alleviate, they are held to be tender offers.

Typical of cases in which courts use the eight-factor test to reject claims of unconventional tender offers. In Ludlow, the court concluded that an aggressive open market purchase program coupled with privately negotiated block purchases of stock did not qualify as a tender offer under the eight-factor test. Id. at 67-68. The court also looked to the two-pronged test applied in S-G Securities, see supra note 75 and accompanying text, and to the “shareholder impact test” in concluding that the purchase program was not a tender offer. The “shareholder impact test” was suggested by a commentator, see Note, supra note 16, at 1275-81, and focuses on the pressure on target company shareholders in an alleged tender offer situation.

In Ludlow, the purchase program was augmented by the use of Autex, an electronic system which provides subscribing investors with securities information. Ludlow, 529 F. Supp. at 64. The court, however, refused to characterize the use of Autex and the publicity generated by a previously filed Schedule 13D statement (which is required after crossing the five percent beneficial ownership threshold) as an “aggressive publicity campaign.” Id. at 68-69. The court also concluded that the purchases did not contain the high pressure characteristics of a tender offer. Id. at 68.

Other cases which have used the eight-factor test to reject a claim of unconventional tender offer include SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945 (9th Cir. 1985); Polinsky v. MCA, Inc., 680 F.2d 1286 (9th Cir. 1982); Energy Ventures, Inc. v. Appalachian Co., 587 F. Supp. 734 (D. Del. 1984); Astronics Corp. v. Protective Closures Co., 561 F. Supp. 329 (W.D.N.Y. 1983); Kaufman and Broad, Inc. v. Belzberg, 522 F. Supp. 35 (S.D.N.Y. 1981).


111. See supra note 8. As the Willman v. Dickinson case indicates, courts have used the eight-factor test to define actions outside the scope of a conventional tender offer as tender offers subject to Williams Act regulation. See supra notes 97-108 and accompanying text for a discussion of the Willman v. Dickinson case.

Another case which used the eight-factor test to hold that stock solicitations constituted an unconventional tender offer was Hoover Co. v. Fuqua Indus., Inc., [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107 (N.D. Ohio 1979). In Hoover, members of the Hoover family, who owned 41 percent of the outstanding shares in Hoover Company, were solicited to sell their stock at a considerable premium over the prevailing market price. Id. at ¶ 96,146. The offer was subject to the purchaser receiving a minimum number of shares, but gave the purchaser the option of taking fewer shares than offered. Id. In deciding the case, the court looked to the eight-factor test and determined that because six of the eight factors were present, the solicitation was a tender offer. Id. at ¶¶ 96,148-50. The Hoover court found the second factor inconsequential because the Williams Act presumes five percent beneficial ownership of a class of equity securities as a substantial percentage of ownership. Id. at ¶ 96,148; see supra note 90 and accompanying text. The court also found that the eighth factor was inapplicable because the solicitations in the case were private. Id.; see supra note 96 and accompanying text; see also Zuckerman v. Franz, 573 F. Supp. 351 (S.D. Fla. 1983) (eight-factor test used to conclude that cash merger proposal constituted a tender offer).
III. HANSON TRUST PLC v. SCM CORP.

In Hanson Trust PLC v. SCM Corp.,112 the Second Circuit was presented with the issue of whether large block stock purchases made immediately following termination of the purchaser's tender offer constituted an unconventional tender offer or a de facto continuation of the previously terminated tender offer.113 The case arose from the appeal by Hanson Trust PLC ("Hanson") of an order issued by the district court barring Hanson or any agent of Hanson from acquiring additional shares in SCM Corporation ("SCM") or voting those shares already acquired.114 In its motion for a preliminary injunction before the lower court, SCM claimed that Hanson's post-tender offer purchases constituted a tender offer or a de facto continuation of Hanson's prior tender offer in violation of sections 14(d)(1) and 14(d)(6) of the Williams Act.115 The district court judge granted SCM's motion because she believed that SCM demonstrated a likelihood of success on the merits.116 However, the Second Circuit reversed, holding that Hanson's purchases were essentially privately negotiated and not, therefore, subject to Williams Act tender offer regulation.117

A. The Factual Background

The facts are typical of many hostile takeover contests for control of a large public corporation. On August 21, 1985, Hanson initiated its effort to acquire control of SCM by announcing a tender offer at $60 per share for any or all outstanding SCM shares.118 Five days later Hanson filed the required disclosure documents. In its filing, Hanson stated that it might later purchase additional shares in the open market, through privately negotiated transactions, by tender offer or by other means.119

On August 30, SCM's board of directors recommended to its shareholders that they reject Hanson's offer and announced an agreement with Merrill Lynch Capital Markets ("Merrill").

112. 774 F.2d 47 (2d Cir. 1985).
113. Id.
115. Id. at ¶ 91,963.
116. Id. at ¶ 91,964.
117. Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 60-61 (2d Cir. 1985). The Second Circuit held that the district court judge erred in granting the injunction, but stated that the reversal did not preclude SCM shareholders from seeking a remedy at law. Id. at 61.
118. Id. at 51.
119. Id.
Under the agreement a new entity, formed by SCM and Merrill, would acquire all outstanding shares in a leveraged buyout. On September 3, the SCM-Merrill agreement was executed and a cash tender offer at $70 per share for approximately 85 percent of SCM's outstanding shares was initiated.

On September 3, Hanson raised its tender offer from $60 per share to $72 per share, while reserving the right to terminate its offer if SCM granted a lock-up option to anyone. SCM responded on September 10 by entering into a new agreement with Merrill. The agreement provided that Merrill would acquire approximately 82 percent of SCM's shares at $74 per share and issue debentures for the remaining shares. More significantly, SCM granted a lock-up option to Merrill to buy SCM's two most profitable businesses. The lock-up option would be triggered if anyone other than Merrill acquired more than one-third of SCM's outstanding shares.

Hanson concluded at this point that raising its own tender offer would be foolish, since it might receive a substantially depleted company if it triggered the lock-up option. Therefore, at 12:38 P.M. on September 11, Hanson announced on the Dow Jones Broad Tape that it was terminating its tender offer. A few minutes later, Hanson issued a press release stating that all tendered shares would be returned.

Hanson, however, had not given up its efforts to acquire control of SCM. Later that afternoon, Hanson decided that if it could acquire slightly less than one-third of the outstanding shares in SCM,

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120. *Id.*
121. *Id.* If more than two-thirds of the outstanding shares in SCM were acquired by SCM-Merrill, the remaining shares were to be exchanged for debentures in the corporation formed by the merger. *Id.*
122. A lock-up option is a device whereby one entity grants another the opportunity to exercise rights under the option, usually the purchase of corporate assets at a bargain price, if more than a specified percentage of the grantor's outstanding shares are purchased by a third party. Phillips & Grisham, *Tender Offers in the Legislative Arena,* in *Dynamics of Corporate Control II* 367 (1985). The device is most commonly used as a defensive measure by the target company to ensure that a friendly merger partner, known as a "white knight," is successful over a potential hostile acquiror, known as a "shark," in a hostile takeover contest. *Id.*
123. *Hanson,* 774 F.2d at 51.
124. *Id.* at 51-52.
125. *Id.* at 52.
126. *Id.* If the lock-up option was triggered, Merrill would receive an option to buy SCM's pigments and consumer foods businesses. These were SCM's most profitable assets. *Id.*
127. *Id.*
128. *Id.*
it would be able to block the SCM-Merrill merger without trigger-
ing the lock-up option. Hanson hoped that this would induce Mer-
rill to drop out of the bidding and force SCM to work out an
agreement giving Hanson control of SCM. 129

Accordingly, on that same afternoon Hanson acquired approximately 25 percent of SCM's outstanding shares in five privately negotiated purchases and one open market transaction. 130 Hanson's initial purchase was from an institutional shareholder who had contacted Hanson's broker on the morning of September 11, prior to the termination of Hanson's tender offer. 131 Once the decision was made to purchase shares following the termination of the tender offer, Hanson's broker contacted the institutional shareholder and arranged to purchase its shares. 132 This transaction, absent the identity of the parties, was reported on the Dow Jones Broad Tape at 3:29 P.M. 133

Hanson's broker then contacted a well-known risk arbitrageur 134 who had disclosed a few weeks earlier in a Schedule 13D statement that he owned approximately 12.7 percent of SCM's outstanding shares, and a purchase of his shares was arranged on the same terms as the previous purchase from the institutional shareholder. 135 Simultaneously, Hanson acquired shares on the open market for the same price. 136 Finally, after these transactions were reported on the broad tape, professional investors surmised that

129. Id.
130. Id.
131. Id. On the morning of September 11, the institutional investor told Hanson that he wished to sell the shares held by the institution to Hanson. Id.
132. Id.
133. Id. New York Stock Exchange rules mandate such a report. Id.
134. A risk arbitrageur is one who

tak[es] advantage of the disparity in value that exists between two different but related securities that are trading simultaneously in the same or different mar-
kets, or the disparity between market price and the cash price being offered.
The possibility for such an investment arises not only in corporate takeovers, but also in liquidations and other company reorganizations.

I. BOESKY, supra note 19, at 14.

The goal of a risk arbitrageur in a hostile takeover situation is to purchase shares from individual shareholders in the target company at prices lower, perhaps only slightly lower, than the outstanding tender offer. See generally id. at 13-23. The arbitrageur hopes to tender the shares pursuant to the tender offer and receive a profit on the price differential or to hold the shares while the bidding escalates. Id. If arbitrageurs purchase enough shares, even a small price differential between buying and selling price can generate a large return. Id.; see also id. at 111.

135. Hanson, 774 F.2d at 52-53. Hanson's broker rejected the arbitrageur's initial price offer. Id. at 53.
136. Id. at 53.
Hanson was the buyer and contacted Hanson's broker.\textsuperscript{137} As a result, three more privately negotiated purchases were arranged.\textsuperscript{138}

All of the purchases were consummated within two hours in the afternoon of September 11. All of the privately negotiated transactions were arranged on the same terms, at a price approximately one dollar per share over the market price immediately preceding the transactions, with sellers who were sophisticated institutional investors or arbitrageurs.\textsuperscript{139}

\textbf{B. The Holding}

The Second Circuit began its analysis by stating that because public and private securities transactions differ, courts have held that privately negotiated and open market transactions do not qualify as tender offers.\textsuperscript{140} The court noted that solicitees in private transactions do not tend to be as uninformed and subject to pressure as those in a public tender offer.\textsuperscript{141}

The court refused to adopt the SEC's eight-factor test for determining whether Hanson's purchases constituted a tender offer. Although the court acknowledged that many of the factors in the test are relevant to a determination of what constitutes a tender offer, the court reasoned that factors not considered by the test may be more important than those actually considered.\textsuperscript{142} Therefore, the Second Circuit concluded that the test should not be used as a "litmus test" for identifying tender offers.\textsuperscript{143}

Instead, the court looked to the Supreme Court's reasoning in the leading private offering exemption case\textsuperscript{144} to determine whether Hanson's purchases should be exempt from tender offer regulation.\textsuperscript{145} Based on \textit{SEC v. Ralston Purina Co.},\textsuperscript{146} the court concluded that the dispositive question is whether there is a risk that solicitees will lack the information needed to make a carefully considered investment decision if the Williams Act preacquisition filing requirements are not met.\textsuperscript{147} Applying this test, the court

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{137} Id.
\item \textsuperscript{138} \textit{Id.} The last deal was completed by 4:35 p.m. on September 11th. \textit{Id.}
\item \textsuperscript{139} All deals were arranged on a cash basis at $73.50 per share. SCM had been trading at approximately $72.50 per share prior to the transactions. \textit{Id.} at 52-53.
\item \textsuperscript{140} \textit{Id.} at 56.
\item \textsuperscript{141} \textit{Id.}
\item \textsuperscript{142} \textit{Id.} at 57.
\item \textsuperscript{143} \textit{Id.}
\item \textsuperscript{144} \textit{SEC v. Ralston Purina Co.}, 346 U.S. 119 (1953).
\item \textsuperscript{145} \textit{Hanson}, 774 F.2d at 57.
\item \textsuperscript{146} \textit{SEC v. Ralston Purina Co.}, 346 U.S. 119 (1953).
\item \textsuperscript{147} \textit{Hanson}, 774 F.2d at 57.
\end{enumerate}
\end{footnotesize}
concluded that Hanson's purchases did not constitute a tender offer. The court reasoned that the percentage of shareholders solicited was small and that the five sellers in the privately negotiated transactions were highly sophisticated investors with access to a variety of market information. The court also stated that the sellers were not pressured and that there was no widespread publicity or public solicitation other than the wire reports mandated by stock exchange rules. Additionally, the court found that the price negotiated was not really a premium and that the purchases were not contingent on Hanson's acquisition of a fixed minimum or maximum number of shares. Finally, the court stated that there was no time limit on the transactions.

The Second Circuit also rejected the contention that the purchases functioned as a de facto continuation of Hanson's prior tender offer. The court reasoned that Hanson's termination of its outstanding tender offer was legitimate and based on a logical response to the SCM-Merrill lock-up. The court found no evidence that Hanson decided to make the purchases prior to terminating its tender offer. The Second Circuit dismissed the contention, made by SCM and the SEC, that a "cooling off period" should be recognized whereby a tender offeror could not purchase shares for ten days after termination of its tender offer. The court found it significant that there was no current rule of that type, despite an earlier SEC proposal to adopt one.

In reversing the injunction, the Second Circuit stated that the facts completely contradicted the district court judge's assessment that Hanson's purchases amounted to "a deliberate attempt to do an 'end run' around the requirements of the Williams Act." The Second Circuit pointed out that in preacquisition tender offer filings, Hanson had expressly reserved the right to make later

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148. Id. The court listed seven reasons for its conclusion. Id. at 57-58.
149. Id. at 57.
150. Id. at 57-58.
151. Id. at 58.
152. Id.
153. Id.
154. Id.
155. Id.
156. Id. at 58-59.
157. Id. at 59.
158. Id.
159. Id. at 60. The SEC filed an amicus brief in the case. Id.
160. Id. The court also mentioned that the SEC had adopted a similar rule preventing issuers' purchases within 10 days of a terminated tender offer. Id.
161. Id. at 59.
IV. Analysis

A. The Court’s Use of the Private Offering Test Was Inappropriate

In the Hanson decision, the Second Circuit used an inappropriate test to evaluate whether Hanson’s purchases were subject to Williams Act regulation. The court relied on a test derived from the leading private offering exemption case to determine whether the transactions were exempt from regulation. However, the analogy between the private offering exemption and the exemption of private transactions from tender offer regulation is weak. Under the Securities Act of 1933 (the “1933 Act”), Congress explicitly exempted “private offerings” from regulation. But Congress did not explicitly exempt “private transactions” from the reach of the tender offer rules in the Williams Act. The exemption of private transactions from the reach of the tender offer rules stems only from the legislative history of the Williams Act. Therefore, the private transaction exemption under the Williams Act should be read more narrowly than the statutorily enacted private offering exemption in the 1933 Act.

Additionally, the two exemptions reflect different legislative purposes. The 1933 Act private offering exemption was passed by Congress for two reasons. First, in securities offerings, no public interest is presumed to be served by regulation when a small number of investors are involved. Also, when persons offered unregistered securities are sophisticated investors able to gain access to relevant information, they presumably do not need the pro-

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162. Id. The court stated that since no rule expressly prevented Hanson’s acquisitions, it would not prevent Hanson from using “hardball” tactics in its effort to acquire SCM. Id. at 60. Hanson eventually acquired SCM in a $75 per share tender offer after the Second Circuit later voided the lock-up in additional litigation. See Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264 (2d Cir. 1986).
163. Hanson, 774 F.2d at 57.
165. See, e.g., S. Rep., supra note 25; H.R. Rep., supra note 25; 113 Cong. Rec. 85457 (1967). Congress never included an exemption clause in the Williams Act because that would have defeated the purpose of not defining “tender offer.” This lack of a definition enables the SEC and the courts to flexibly interpret transactions to determine whether they violate the purposes behind the legislation and should thus be construed as tender offers. See supra notes 3-4 and accompanying text.
166. Block & Schwarzfeld, Curbing the Unregulated Tender Offer, 6 SEC. REG. L.J. 133, 139 (1978) (citing H.R. Rep. No. 93, 73d Cong., 2d Sess. 5 (1933)).
tection of the registration requirements. However, in regulating tender offers, Congress was concerned with matters which went beyond the considerations underlying the 1933 Act private offering exemption. Congress was concerned not only with pressure on direct solicitees and their ability to make rational investment decisions during a tender offer, but also with pressure on unsolicited target company shareholders, the nondiscriminatory treatment of target company shareholders, and the public's interest in the disclosure of imminent changes in corporate control. The legislative history of the Williams Act indicates that private transactions were exempted from the preacquisition disclosure requirements of tender offer regulation because Congress did not believe it was necessary to require the premature disclosure of information that the transacting parties preferred to keep secret. In order to ensure that the purposes underlying tender offer regulation are upheld, it is necessary to view the private transaction exemption from the tender offer rules narrowly, in keeping with the legislative history.

Moreover, the exemption of private transactions from tender offer coverage frees them from the antifraud provisions of section 14(e) of the Williams Act. Under the 1933 Act, the private offering exemption does not free the offeror from the antifraud provisions of that act. Therefore, the private transaction exemption must be viewed more narrowly to promote the remedial purposes of the securities antifraud provisions.

B. The Problems That May Result from the Decision

A broad interpretation of the Hanson decision may be problematic. Hanson is a setback for those favoring greater investor protection in the marketplace. Shortly after the decision, SEC Chairman John Shad stated that Hanson implies that a party can

167. Block & Schwarzfeld, supra note 166, at 139.
169. 113 CONG. REC. 856 (1967); see also Note, supra note 23, at 375.
170. If a transaction is not subject to Williams Act tender offer regulation, it is not subject to Section 14(e) of the Act—the Act's antifraud provision. See 15 U.S.C. § 78n(e) (1982).
171. 15 U.S.C. § 77q (1982), the antifraud provision for the 1933 Act, explicitly states: “The exemption provided in section 77c of this title [which describes securities that are exempt from registration under the 1933 Act] shall not apply to the provisions of this section.”
172. As the Supreme Court stated in Tcherepnin v. Knight, 389 U.S. 332 (1967), securities regulation must be construed broadly to effectuate its remedial purposes. Id. at 336. Following this logic, any regulatory exemption that frees one from the Act's remedial measures designed to protect investors should be read narrowly—especially if it is not an explicitly authorized exemption.
begin a tender offer, call attendant market forces into play, and then terminate the offer and take advantage of such forces to quickly purchase large amounts of stock in the target company.173

The SEC Chairman was referring to the market forces which accompany most takeover battles involving tender offers. Generally, a tender offer is made at a substantial premium over the current market price.174 Then, almost immediately after the offer, arbitrageurs begin aggressively purchasing shares in the open market in hopes of being able to sell their shares at the tender offer price or an even higher price if there is a fight for control of the target company and the bidding escalates.175 Arbitrageurs are often willing to pay prices for shares which are only slightly under the tender offer price.176 They realize that only a small difference between the buying price and the selling price can result in a large return on investment because of the relatively short time frame involved in most takeovers.177 Consequently, arbitrageur purchases drive up the market price of target company shares during the tender offer,178 and the market price usually levels off at a price only slightly below the tender offer price.179

Arbitrageur purchases may also lead to a situation where large blocks of target company shares become concentrated in the hands of a few arbitrageurs.180 This occurs because many target company shareholders are willing to sell their shares to arbitrageurs to cash in on a large profit without incurring the risk that the tender offer will fall through and the price will drop.181 Additionally, in many

175. See S. Lorne, supra note 5, at 4-66.
176. This is why the market price of shares in the target company rises almost to the level of the tender offer price during a tender offer. See infra notes 177-79 and accompanying text.
177. See I. Boesky, supra note 19, at 111.
178. S. Lorne, supra note 5, at 4-66.
179. Id.; see also J. McCuown, supra note 174, at 94.
180. Merger arbitrage is a highly complicated specialty requiring large amounts of cash (which is usually borrowed) to finance large purchases. Consequently, relatively few investors practice merger arbitrage. However, these arbitrageurs acquire the shares of many smaller investors during potential takeovers. These purchases thus lead to much higher levels of shares concentration in target companies. See generally I. Boesky, supra note 19 (an excellent analysis of merger arbitrage, the methods used by arbitrageurs, and the considerations taken into account by arbitrageurs).
181. See J. McCuown, supra note 174, at 90, 94; see also I. Boesky, supra note 134, at xiv (foreword).
large public corporations, a small number of institutional investors own a large percentage of the outstanding shares.\textsuperscript{182} Potential control of the target company is, therefore, often concentrated in a few hands.\textsuperscript{183} A corporate raider may only need to purchase the shares of some institutional investors or arbitrageurs to obtain control of the target company.

If a corporate raider is permitted to terminate its tender offer and immediately go into the marketplace to buy shares, the raider can put market forces into play and then quickly acquire control of the target company without complying with the tender offer rules.\textsuperscript{184} The raider has a stronger bargaining position after initiating and terminating a tender offer because of high levels of share concentration and the ability to avoid the substantive tender offer rules. This situation may result in pressure on all target company shareholders. Institutional investors and arbitrageurs may fear that if they do not sell at the raider's price, the raider may acquire effective control of the target company through purchases from other large shareholders or walk away from the deal entirely. Through the exploitation of this fear, the raider can pressure these shareholders to sell on the raider's terms. Because the tender offer has been terminated, the raider will not be required to purchase shares on a pro rata basis or to comply with the best price and equal treatment provisions of the Williams Act.\textsuperscript{185} Target company shareholders will not be given an opportunity to reconsider hastily made investment decisions and will not be protected by the minimum time period for tender offers, which was designed to give target company shareholders an opportunity to make unhurried, careful investment decisions.\textsuperscript{186} This situation, possible after the Hanson decision, is entirely contrary to the purposes behind tender offer regulation, and it implies that a tender offeror may accomplish indirectly what it could not accomplish through compliance

\textsuperscript{182} See generally Staff of Senate Comm. on Gov't Affairs, 2d Sess., 1 Structure of Corporate Concentration: Institutional Shareholders and Interlocking Directorates Among Major U.S. Corporations 96-97 (Comm. Print 1980) (this report contained a study of large corporations and the number of people controlling various percentages of the corporations' shares). See also Block & Schwarzfeld, supra note 166, at 137-38.

\textsuperscript{183} Block & Schwarzfeld, supra note 166, at 145.

\textsuperscript{184} See supra notes 32-40 and accompanying text.

\textsuperscript{185} See supra notes 32-40 and accompanying text (discussion of the best price, pro rata and equal treatment provisions of the tender offer rules).

\textsuperscript{186} Rule 14e-1 requires that a tender offer be held open for 20 business days. 17 C.F.R. § 240.14e-1 (1985).
C. The Subtle Pressure on Sellers in Hanson

The Hanson case provides a good example of how solicitees and other shareholders may be subject to the type of subtle pressure that the Williams Act was designed to alleviate. In reaching its conclusion that the sellers did not need the protection of tender offer regulation, the Hanson court did not properly evaluate the position of the sellers in the transactions. The Second Circuit began its analysis with the statement that solicitees in private transactions are “less likely to be pressured, confused or ill-informed” than solicitees in public tender offers. Presumably, the court reasoned that solicitees in private transactions are generally professional investors with the knowledge, sophistication and negotiating leverage necessary to protect adequately their interests. However, even sophisticated investors may be subject to pressure.

For example, even if Hanson did not exert direct pressure on the sellers, the circumstances accompanying the negotiations may have created subtle pressures. The sellers knew that Hanson would not want to acquire more than one-third of the outstanding shares in SCM because this would trigger the SCM-Merrill lock-up option. They also knew that if Hanson could purchase over 20 percent of the outstanding shares in SCM, it could block the SCM-Merrill merger and perhaps cause the SCM-Merrill tender offer to be withdrawn. Finally, they were aware that once Hanson acquired the amount of shares it desired, it would stop buying. Therefore, they may have felt pressure to be among the first to sell to Hanson. Congress specifically attempted to eliminate such pressure by enacting the Williams Act. The minimum time requirements for tender offers and the best price, withdrawal and proration provisions were all designed to eliminate this type of

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187. If Hanson had complied with the tender offer rules, it would not have been able to selectively purchase shares prior to the expiration of its tender offer. See supra note 36 and accompanying text.
188. See infra notes 192-95 and accompanying text.
189. Hanson, 774 F.2d at 56.
190. Block & Schwarzfeld, supra note 166, at 146-48.
191. See supra note 125 and accompanying text.
192. The SCM-Merrill merger plan called for Merrill to acquire approximately 82% of the outstanding shares in SCM as the initial step in the plan. See supra note 124 and accompanying text.
193. See supra note 129 and accompanying text.
pressure. The *Hanson* court evaluated the transactions as if prior events in the takeover battle had had no impact on the negotiations, and failed to consider the manner in which existing circumstances may have pressured the sellers.

**D. The Court’s Failure to Consider Effects on the Small Investor**

In applying the private offering test, the *Hanson* court also ignored the effect of the transactions on target company shareholders who were not involved in the privately negotiated transactions. By allowing Hanson to terminate its tender offer and selectively purchase shares, the court ignored the fair and equal treatment provisions of sections 14(d)(5) to 14(d)(7) of the Williams Act. If a raider can terminate a tender offer and make large privately negotiated or open market purchases immediately following termination, small investors are subject to additional pressure to sell their shares at the beginning of the bidding contest to avoid the risk of being left out in the cold. Small target company shareholders would never know when a raider might terminate its tender offer and instead choose to make large non-tender offer purchases from institutional investors and arbitrageurs. Therefore, small investors would not be able to make unhurried decisions. They would be pressured to sell early in the bidding process, and would not be entitled to the benefit of the pro rata and best price provisions of tender offer regulation. The initiation and termination of a tender offer by a raider could be used to deny fair and equal treatment to target company shareholders because it could effectively exclude certain shareholders from an opportunity to sell their shares at the best price offered. In such a situation, the protections afforded to investors by the Williams Act would be undermined.

**E. Applying an Appropriate Test to These Cases**

The *Hanson* court’s test was an inappropriate method for determining whether Hanson’s purchases were subject to regulation as a tender offer. The test was inappropriate, not only because the analogy between the private offering exemption and the exemption of private transactions from the Williams Act tender offer rules is weak, but also because the test failed to consider whether the cir-

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194. See supra notes 41-42 and accompanying text.
195. Small investors would be forced to sell their shares to arbitrageurs early in the bidding process or risk being stuck with shares in a company now controlled by others. See Greene & Junewicz, supra note 5, at 657.
196. See supra notes 36-39 and accompanying text.
circumstances resembled those present in an unconventional tender offer. The court failed to examine the subtle pressures exerted on both direct participants in the transactions and on target company shareholders not involved in the transactions.

The SEC’s eight-factor test should arguably have been applied in Hanson. The eight-factor test, if applied properly, can provide the necessary flexibility in determining whether a transaction or series of transactions should be regulated as a tender offer. The eight-factor test also has the advantage of prior acceptance and recognition. Since its introduction, the test has been almost universally applied to determine whether a particular purchase program constitutes a tender offer. Therefore, legal and financial counselors advising their clients in takeover situations may look to the test to help them determine whether an action is likely to be construed by a court as a tender offer. This recognition provides some certainty in the area.

Nevertheless, critics of the test claim that it does not provide enough certainty. They point out that there is no way of knowing how many of the eight factors must be present for a court to construe an action as a tender offer. Critics also state that factors not considered by the test may be more important in certain situations than those considered. And finally, some critics note that courts differ in their approaches to individual factors in the test. For example, in considering the first factor, there appears to be little consensus among different courts as to how many target company shareholders must be solicited to support a finding that there has been active and widespread solicitation of shareholders. However, despite its shortcomings, the eight-factor test still appears to be the best judicial method presently available for identifying unconventional tender offers. Although the test does not add the degree of certainty in the marketplace that many critics desire, the test provides an appropriate method for adjudicating disputes and may provide more certainty as it is applied more frequently. The only method of achieving absolute certainty in the area would

197. See supra notes 87-96 and accompanying text.
198. See supra note 87 and accompanying text.
199. See, e.g., Greene & Junewicz, supra note 5, at 664-65, 674; Note, supra note 23, at 372-73.
201. See supra note 142 and accompanying text.
202. See Mather, supra note 4, at 509-14 (discussion of various courts' applications of the test).
203. Id. at 509-10.
be for Congress or the SEC to provide a definition of "tender offer." However, as Congress and the SEC have realized, this would only enhance the ability of clever corporate raiders to evade the Williams Act regulatory requirements by structuring transactions to fall barely outside the statutory definition.\footnote{204}{See supra notes 3, 4, 43-46 and accompanying text.}

Also, problems in analyzing individual factors within the eight-factor test are no different than those present in any test which attempts to examine different factual circumstances. Courts are constantly asked to interpret factual situations, and there are bound to be some differences in interpretation because of the unique nature of every case. The solution to the problem of non-uniformity in judicial application is not to abandon the test, but rather to maintain the test's focus on results-oriented decisions so that the effect of these differences is minimized.

In fact, the primary advantage of the eight-factor test is its flexibility. As with any balancing test, the court is presented with a framework for analyzing the factual situation, but is free to interpret the facts within the framework so that a just result can be fashioned. Because there is no definitive number or combination of factors which must be present in order for the court to conclude that a transaction or series of transactions constitutes a tender offer, and because the test focuses on subjective as well as objective factors, the test enables the court to determine in each case whether investors were adequately protected without application of the Williams Act tender offer rules. Courts are, therefore, able to strive for results-oriented decisions consistent with the purposes underlying tender offer regulation. Such decisions can best ensure adequate investor protection, the primary goal of the Williams Act.\footnote{205}{See supra note 41 and accompanying text.}

Finally, corporate raiders who are unsure of whether their actions constitute a tender offer need only comply with the tender offer rules. This may deter some takeovers because of the added costs and the reduced likelihood of success,\footnote{206}{See supra note 5 and accompanying text.} but Congress considered this a small price to pay for adequate investor protection.\footnote{207}{See H.R. Rep., supra note 25, at 3; S. Rep., supra note 25, at 3.}

\section{Conclusion}

The Hanson decision illustrates the range of problems present in current judicial attempts to identify tender offers. In Hanson, the
Second Circuit used an inappropriate test for determining whether stock purchases were subject to regulation as a tender offer. The court also conspicuously failed to consider whether the transactions pressured investors and should have, therefore, been subject to regulation to further the purposes of the Williams Act legislation. Finally, the decision points out the need for consistent judicial application of a flexible, yet recognizable, test for identifying tender offers. An appropriate test would advance the purposes of tender offer regulation while affording corporate advisors some judicial guidance on which to base their plans.

Courts at present should consistently apply the SEC's eight-factor test, which can be flexibly used to fashion results-oriented decisions consistent with Williams Act goals. It is an already-recognized test which, if applied more consistently and frequently, can perhaps add some certainty to the area. Of course, a method which requires courts to analyze completed transactions and, in many cases, to undo them, is not the perfect solution in a difficult area. However, in the absence of further regulation, which appears at this point unwise, it is the best solution available.

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208. See supra notes 163-72 and accompanying text.
209. See supra notes 173-97 and accompanying text.