1980

Expansion of the Williams Act: Tender Offer Regulation for Non-Conventional Purchases

Henry R. Daar

Follow this and additional works at: http://lawecommons.luc.edu/luclj

Part of the Securities Law Commons

Recommended Citation
Expansion of the Williams Act: Tender Offer Regulation for Non-conventional Purchases

INTRODUCTION

In the last twelve years, the definition of a tender offer has proven to be elusive. Developing case law has significantly broadened the definition beyond the traditional scope of the term. Two recent decisions have followed that trend by further expanding the parameters of tender offers.

The District Court for Massachusetts broke new ground by extending the application of the Williams Act to include open market purchases of securities. In *S-G Securities, Inc. v. Fuqua Investment Company*, the court determined that a publicly announced intention to acquire stock to obtain control of a corporation, followed by a rapid acquisition of large blocks of shares through open market purchases, constituted a tender offer.

In *Wellman v. Dickinson*, the District Court for the Southern District of New York also interpreted the Williams Act liberally. The court held that arguably private purchases from a large number of "sophisticated" sellers resembled a traditional tender offer.

1. A tender offer is generally defined as “[a] public offer or solicitation by a company, an individual or a group of persons to purchase during a fixed period of time all or a portion of a class or classes of securities of a publicly held corporation at a specified price or upon specified terms for cash and/or securities.” E. Aranow & H. Einhorn, Tender Offers for Corporate Control 70 (1973). [hereinafter cited as Aranow & Einhorn].


5. Id. at 94,936.


7. Prior to Dickinson, "sophisticated" holders of stock, such as financial institutions, were deemed able to withstand being pressured into hasty investment decisions because of their knowledge of the market. Therefore, it was thought sophisticated investors did not need the protection of the Williams Act. See, e.g., D-Z Investment Co. v. Holloway, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,771 (S.D.N.Y. 1974); Block & Schwarzsfeld, Curbing the Unregulated Tender Offer, 6 Sec. Reg. L. J. 133 (1978).
and therefore came within the Williams Act.

While the *S-G Securities* and *Dickinson* decisions expanded the coverage of tender offer regulation, they also gave further judicial definition to what constitutes a tender offer. The SEC has affirmed this evolving case law in its recently proposed definition of a tender offer.8

This article will first summarize traditional regulation of tender offers under the Williams Act. Second, the two cases will be discussed and analyzed in light of their apparent departure from these historical views. Third, the effect of these decisions on future tender offers and their regulation will be discussed. Finally, the SEC's proposed definition of a tender offer will be reviewed.

**TENDER OFFER REGULATION—A BRIEF SUMMARY**

**Traditional Tender Offers**

Before the passage of the Williams Act in 1968, tender offers were basically unregulated.9 Traditionally, the offer was characterized as a publicly made invitation addressed to all shareholders of a corporation to tender their shares to the offeror10 at a premium price.11 A distinctive feature of the traditional tender offer was that offerors conditioned their obligation to purchase. A stated minimum number of shares had to be tendered. As the shares were tendered, they were placed in a depository,12 and the offeror was not required to take up the shares until the required number were deposited. If fewer than the stated number were tendered, the offeror did not have to purchase any shares.13 If the offer was over-

---

8. See note 99 infra and accompanying text.
9. Federal regulations required pre-transaction disclosure for both proxies and exchange offers. Also, tender offers were regulated to the extent that an offeror acquiring more than 5% of the outstanding stock of a company had to file a statement with the SEC within 10 days. However, when a cash tender offer was made, no information needed to be disclosed to shareholders. "Such an offer can be made on the most minimal disclosure; yet the investment decision—whether to retain the security or sell—is in substance little different from the decision made on an original purchase of a security, or an offer to exchange one security for another." House of Representatives Report on Interstate and Foreign Commerce, H.R. Rep. No. 1711, 90th Cong., 2d Sess. reprinted in [1968] U.S. Code Cong. & Ad. News 2811, 2813 [hereinafter cited as 1968 House Report]. It was this gap in the regulation of securities that Congress intended the Williams Act to fill.
10. Offerors in the tender offer context are those who offer to purchase shares. The selling parties are solicitees who tender their stock.
12. The depository is usually a bank.
13. Developing Meaning, supra note 11, at 1252.
subscribed, however, the offeror needed to purchase only the stated minimum number of shares. Inequities arose in the oversubscription situation because the offeror could choose which shares to buy.

Additional inequities involved in the traditional tender offer further disadvantaged target shareholders. The basic evil of the pre-Williams Act tender offer was that the offeror could “operate in almost complete secrecy . . . [T]he Law [did] not even require that he disclose his identity, the source of his funds, who his associates [were] or what he [intended] to do if he [gained] control of the corporation.” Compounding the problem, the shareholder was given only a short period of time to respond to the offer, which was generally priced 16% above the market value. In toto, the target corporation shareholder was pressured into making a hurried and uninformed decision.

In response to these inequities and the increased popularity of this method of corporate acquisition, Senator Harrison Williams of New Jersey introduced a bill to regulate the cash tender offer. This bill was passed in 1968 as the Williams Act Amendments to the Securities and Exchange Act of 1934.

---

14. An offer became oversubscribed when the shareholders of the target company offered more shares to the offeror than it desired to take up. Because there was no mechanism to determine whose shares would be purchased in this situation, the offeror usually bought on a first-come, first-served basis. Further, it was this practice which caused target shareholders to make hurried investment decisions for fear of having their shares rejected if they waited too long. 15 U.S.C. § 78n (d)(6) remedies this situation. See note 19 infra and accompanying text.

15. 1968 House Report, supra note 9, at 2812.

16. See Developing Meaning, supra note 11, at 1251 n. 9.

17. The increased use of cash tender offers to acquire control of corporations was evidenced by the following statistics: in 1966, there were over 100 such offers involving companies with securities listed on national securities exchanges, in 1960, there had been eight. 1968 House Report, supra note 9, at 2812.

18. S. Rep. 510, 90th Cong., 1st Sess., 113 Cong. Rec. 854 (1967) (remarks of Sen. Williams on S.510). While Senator Williams' first introduction of tender offer regulation was not met with an enthusiastic response (no hearings were held on the original bill), many of his proposals formed the basis for his second bill which was proposed in 1967. See Hearings on S.510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 15, 175, 244 (1967); 1968 House Report, supra note 9, at 12. It is generally recognized that Williams' first bill failed because it leaned too much in favor of incumbent management.

19. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1970). Sections 78n(d)(5)-(7)(1976) contain the thrust of the Act. The main purpose of these sections is to assure equal treatment for all shareholders of the target corporation.

Section 78n(d)(5) allows shareholders to withdraw shares tendered within seven days of the time of the offer for tenders is first published, and anytime after the expiration of 60
The Williams Act

The primary purpose of the Williams Act was "investor protection". Congress sought to alleviate the pressure placed on target shareholders in tender offer situations without discouraging takeover bids. To accomplish this end, the Act required full disclosure by the offeror in connection with tender offers.

Section 78n(d)(6) provides for pro rata acceptance of securities tendered within the first 10 days of the offer (where more securities have been deposited than the tender offeror is bound to take up).

Section 78n(d)(7) requires that any increase in tender price shall be paid to all persons whose securities are taken up.

Although this article deals primarily with what constitutes a tender offer under § 78n(d), the Williams Act is also comprised of sections 78m(d)-(e) and 78n(e)-(f).

Section 78m(d) requires that any person who, after acquiring directly or indirectly the beneficial ownership of more than 5% of a class of equity stock registered pursuant to the Securities Exchange Act (with minor exceptions), must, within 10 days after such acquisition, send to the issuer of the security and the SEC a statement describing, (1) the background and identity of the purchaser or purchasers on whose behalf the purchases have been or are to be effectuated; (2) the source and amount of funds or other consideration used or to be used in making the purchases; (3) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans the purchaser may have for liquidation of the issuer, to sell its assets or merge it with any other persons, or to make any other major change in its corporate structure; (4) the number of shares of such security beneficially owned and the number of securities which such person has a right to acquire, directly or indirectly; and (5) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer.

Section 78m(e) provides that it shall be unlawful for an issuer which has a class of stock registered pursuant to the Securities Exchange Act (with minor exceptions) to purchase any of its own shares if such purchase is in contravention of such rules and regulations as the Commission may adopt.

Section 78n(e) is the Williams Act's broad anti-fraud provision which makes it unlawful for any person to make any untrue statement of a material fact or to omit to state any necessary fact or to engage in any fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer.

Section 78n(f) contains provisions for dissemination of information to shareholders in the event that any offerors are to become directors of the target company upon completion of the tender offer.


20. See Piper v. Chris-Craft Indus. Inc., 430 U.S. 1, 26 (1977). 15 U.S.C. § 78n(d) enhances protection by making it unlawful for any person to make a tender offer in which he will become the owner of greater than 5% of a class of equity stock without first filing with the SEC a statement containing the information specified in § 78m(d).


22. Full disclosure was considered necessary because:

The competence and integrity of a company’s management and of the persons who seek management positions, are of vital importance to stockholders. Secrecy in this area is inconsistent with the expectations of the people who invest in the securities of publicly held corporations and impairs public confidence in securities...
The Williams Act, however, does not define "tender offer". In past years, the SEC has also refused to define a tender offer.\textsuperscript{28}

In the Commission's view, the term 'tender offer' is to be interpreted flexibly in accordance with the intended purposes of Sections 14(d) and 14(e) of the Williams Act. Therefore, the determination of whether a transaction or series of transactions constitutes a tender offer depends upon consideration of the particular facts and circumstances in light of such purposes.\textsuperscript{24}

As a result, the courts, the SEC, and practitioners had the task of determining whether particular securities transactions were tender offers\textsuperscript{25} and thus subject to the extensive regulatory requirements of the Williams Act.\textsuperscript{26}

In interpreting the coverage of the Williams Act, a number of commentators have argued that Congress intended to regulate only those transactions conforming to the traditional understanding of a tender offer.\textsuperscript{27} However, several judicial decisions and SEC staff interpretations have rejected that contention.\textsuperscript{28} These have held that

---

as a medium of investment. S. Rep. No. 550, 90th Cong. 1st Sess. 1,2 (1967). Yet, Congress recognized that the competing interest of investor, management and offeror had to be considered:

extreme care [must be exercised] to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. The bill is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case. Id. at 3.

See note 18 supra.

23. But see note 99 infra and accompanying text.

24. Proposed Tender Offer Rules and Schedule, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) \$ 81,935 at 81,213 (Feb. 5, 1979). See also E. Aranow, H. Einhorn & G. Berlstein, Developments in Tender Offers for Corporate Control (1977) [hereinafter cited as Developments in Tender Offers], where the authors suggest a rationale for not defining a tender offer:

Congress and the SEC believed that, for the purposes of the federal regulatory scheme, a tender offer might well encompass transactions yet unborn which were not considered tender offers in general custom and usage. Thus, the question of just what was encompassed by the term "tender offer" was intentionally left open, in an effort to preserve the flexibility of both the SEC and the courts in making determinations on a case-by-case basis. Id. at 1.

25. In Dickinson there were extensive discussions by Sun's attorneys as to the state of tender offer law. The attorneys indicated that the law regarding tender offers was still murky and that the concept of a tender offer was still in flux. Thus, the lawyers attempted to structure a "privately negotiated" transaction which they knew was outside the scope of the tender offer provisions. Wellman v. Dickinson, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) \$ 96,198 at 95,826 (S.D.N.Y. 1979). See notes 75-77 infra and accompanying text.

26. See notes 19-20 supra.

27. See Aranow & Einhorn, supra note 1, at 74-75.

28. See, e.g., Loews Corp. v. Accident & Cas. Ins. Co., No. 74 C 1396 (N.D. Ill. July 11,
transactions which induce the same shareholder impact as a conventional tender offer are within the Act regardless of the form of the transaction. This position has resulted in an expansion of the coverage of the Williams Act.

**Expansion of Tender Offers After the Williams Act**

Shortly after passage of the Williams Act, the SEC extended the Act's coverage by declaring that “special bids” were tender offers within the Act. The special bid is a stock market device for hand-

---

29. The “shareholder impact” test was first discussed in Developing Meaning, supra note 11, where the author reasoned that “[u]nder this approach, methods of acquisition representing deviations from the conventional tender offer, but exerting the same deleterious pressures on shareholders, could not be resorted to for purposes of circumventing the regulatory scheme.” Id. at 1275-76.

30. The Court of Appeals for the Second Circuit, although refusing to expand the meaning of a tender offer beyond its conventional definition, has suggested that in the appropriate case, it would expand the meaning of that term. Kennecott Copper Corp. v. Curtiss-Wright Corp., [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,565, at 94,361 (2d Cir. 1978).

In Kennecott, Curtiss-Wright quietly purchased 9.9% of the outstanding Kennecott shares in transactions both on and off the national securities exchanges. Kennecott claimed that those purchases made between November 23, 1977, and March 10, 1978, constituted a tender offer within the meaning of the Williams Act. The district court judge found that:

1. Curtiss-Wright had purchased substantially all of Kennecott's stock on national exchanges;
2. although one of Curtiss-Wright's brokers had solicited fifty (50) Kennecott shareholders off the floor of the exchange, the sales were consummated on the floor. Further, the potential sellers of Kennecott stock were merely asked whether they wanted to sell their shares. They were offered no premium over the market price, nor given a deadline by which to make a decision; and
3. twelve institutional holders of Kennecott stock were solicited; however, these holders were sophisticated and therefore, unlikely to be forced into hurried, ill-considered decisions. Id.

The Court of Appeals affirmed:

Several courts and commentators have taken the position . . . that other unique methods of stock acquisition which exert pressure on shareholders to make uninform- ed, ill-considered decisions to sell, as is possible in the case of tender offers, should be treated as tender offers for the purposes of the statute. . . . The Second Circuit has not yet moved this far. . . .

Although broad and remedial interpretations of the Act may create no problems insofar as the antifraud provisions of subsection (e) of section 78(n) are concerned, this may not be true with regard to sections (d)(5)-(d)(7). . . . It seems unlikely that Congress intended “tender offer” to be so broadly interpreted as to make these provisions unworkable.

Id. at 94,361.

ling the purchase of blocks of securities too large to be readily accommodated in the regular auction market. A prospective purchaser announces a special bid on the market tape, specifying the number of shares desired and a bid price that is substantially higher than the market price. As shareholders respond to the bid, the sell orders are executed immediately at the bid price, until the entire block has been acquired or the bid has been withdrawn.

The special bid, although similar in some respects to the conventional tender offer, does not condition purchases on the tendering of a pre-determined minimum number of shares. Further, instead of relinquishing control of their shares for a period before sale, shareholder's sell their shares immediately.

Although the SEC has not explained its reasons for characterizing special bids as tender offers, its decision is logical. The SEC chose to view the special bid’s impact, not just its form. A special bid may involve the same lack of disclosure and accompanying pressure tactics that prompted the passage of the Williams Act. Therefore, special bids constitute the type of activity that should fall within the Act’s purview.

The Williams Act was further expanded in Cattleman’s Investment Co. v. Fears. In Cattleman’s, the offeror solicited shares through a scheme that included personal meetings, telephone calls, and letters. Although the court did not specify the number of Cattleman shareholders approached, the solicitation was characterized as “active and widespread”.

The court found that the offeror’s conduct deprived the shareholders of information pertinent to investment decisions. Because the Williams Act was intended to alleviate this type of conduct, the court held that this purchasing scheme came within the Act. By doing so, the court expanded the concept of a tender offer to include solicitations of stock that place the same pressures on shareholders as conventional tender offers.

The SEC’s position in LSL Corporation further extended
tender offer regulation. LSL requested an SEC opinion as to whether a certain method of purchases constituted a tender offer. LSL desired to increase its holdings in another corporation from 30% to approximately 50%. LSL proposed to purchase these shares through both open market and privately negotiated transactions. LSL also planned to send out, prior to commencement of any purchases, a press release announcing the intended acquisitions, and to have copies of the release mailed to the target's shareholders.³⁸

The SEC declined to express any view on whether the described program of purchases could be made without satisfying the disclosure requirements of the Act. This was a change in the SEC's position. In a similar case, the SEC had previously issued a no-action letter.³⁹ Although the SEC staff did not set forth their reasons for now denying the no-action letter, their decision may have rested on the perception that the press releases were equivalent to public solicitations. The disclosures proposed by LSL, moreover, did not insure the protection of investors mandated by the Williams Act.

In their treatment of special bids, Cattleman's, and LSL indicate that the coverage of the Williams Act is not limited to the conventional tender offer situation. The common thread running through each of these cases is the pressure placed on target shareholders. If a scheme forces an investor to make a hurried, uninformed decision, the transaction may violate the Williams Act.

S-G Securities

Although the courts and the SEC had classified certain “non-conventional” solicitations as tender offers⁴⁰ prior to S-G Securities Inc. v. Fuqua Investment Company,⁴¹ neither had included open market purchases⁴² within the scope of the Williams Act.⁴³

³⁸. Id. at 83,910.
⁴⁰. See note 28 supra and accompanying text.
⁴². The term ‘tender offer’ was deliberately left vague by Congress and the SEC. It is now well settled, however, that the term embraces not only conventional tender offers formally announced by communications to shareholders, but also more subtle activities designed to lead to an offer of shares. On the other hand, it is by now equally well settled that market purchases of stock, however aggressive, do not constitute a tender offer. Kennecott Copper Corp. v. Curtiss-Wright Corp., 449 F. Supp. 951, 961 (S.D.N.Y. 1978).
The underlying rationale was that “[i]n ordinary market transactions, no pressure is applied by the prospective purchaser on the selling shareholder; the latter reaches his decision to sell independently.” When there is no pressure on the selling shareholder, there is no need for the protections of the Williams Act.

The cases exempting open market purchases from tender offer regulation, however, involved purchases made prior to any public announcement of a conventional tender offer or independent buying program, proposed or actual. The S-G Securities case did involve widespread publicity that placed pressure on target shareholders. For this reason, the District Court for Massachusetts decided that this was an appropriate case to extend the boundaries of tender offer regulation.

Factual Background

In the latter part of 1977, J.B. Fuqua, president and sole shareholder of Fuqua Investment Company, approached representatives of S-G Securities, Inc., and proposed a combination between S-G and a Fuqua-controlled corporation. Merger discussions proved fruitless. Fuqua then made a tender offer proposal to S-G and subsequently drafted a press release. The press release disclosed that FIC sought between 475,000 and 600,000 shares of S-G common at a price of $3 per share. S-G rejected FIC’s tender offer proposal.

FIC then countered with a proposal to buy a substantial amount of authorized but unissued shares of S-G. This proposal was immediately followed by a second press release in which FIC stated the terms of this second offer. The next day, S-G reported its rejection of FIC’s second offer.

Within the next two weeks FIC purchased, through private transactions and open market purchases, a total of 400,000 shares of S-G common stock. FIC then issued a third press release in

\( \text{FIC} \) at 94,930.

\( \text{Id. at} \) 94,930

\( \text{Id.} \) The effect of the announcement in the market place was immediate as the average trading volume of 475 shares per day jumped to greater than 6,800 shares per day. \( \text{Id.} \)
which it “announced its purchases of S-G common stock to date, its intention to gain operating control of S-G, and the possibility that it might require additional S-G shares in the future.”

Three days after this announcement, FIC made a final large block market purchase.

In response to these purchases, S-G filed suit alleging violations of the Williams Act, specifically: 1) that FIC failed to disclose information prior to commencing a tender offer as specified by Rule 14(d)-100 of the Rules and Regulations of the SEC; and 2) that the manner in which FIC conducted its tender offer failed to comply with the remedial provisions of sections 14(d)(5)-(7) of the Act.

The court noted that although FIC’s actions did not constitute a traditional tender offer, the purchases posed the same dangers that section 14(d) was designed to alleviate. The district court judge thus concluded that a publicly announced intention by a purchaser to acquire a substantial block of stock for purposes of control and subsequent rapid purchases of large blocks of stock through open market purchases constitutes a tender offer.

**Appropriateness of the Decision: Do Publicity and Substantial Open Market Purchases Constitute a Tender Offer?**

The threshold question is whether Congress intended open market purchases to fall within the ambit of the tender offer regulations. Senator Williams made explicit his intention that open market purchases not be subject to the Act. He concluded that the early disclosure provisions would have a disruptive effect on the market, and further, he believed that no pressure was involved in

---

48. *Id.* at 94,931.
49. *Id.* This large block purchase was for 115,600 shares of S-G common stock. *Id.*
50. S-G sought a preliminary injunction to restrain FIC from (1) acquiring additional shares of S-G common stock, (2) voting or otherwise exercising rights of ownership of those shares already owned, and (3) attempting to influence or control S-G and its management. Upon S-G’s *ex parte* motion, an order was issued temporarily restraining FIC from any further acquisition of S-G common stock. *Id.* at 94,931-932.
51. 17 C.F.R. § 240.14d-100 (1979), regulates the disclosure requirements of tender offers. It requires the offerors to disclose the number of shares owned by the person or group involved, the source of the funds used or to be used to acquire the shares, and whether the purpose of the acquisition is to gain control of the company, sell its assets, merge it with another company, or make any major changes in its business or corporate structure.
52. *See note 19 supra* and accompanying text.
54. *Id.*
the open market purchase.\textsuperscript{55}

Senator Williams' position presumes that open market purchases are made without any impermissible outside influences on prospective shareholders. Securities transactions, however, are not conducted in a vacuum. Certain information and rumor are naturally present in the marketplace. This outside data affects the shareholder's decision on whether to sell or hold his shares. Senator Williams believed that this type of information should not be regulated by the Williams Act.\textsuperscript{56} Although this information may cause some pressure to be put on the shareholder, it is not the same degree of pressure that is involved in a tender offer.

However, when the open market purchaser uses aggressive buying tactics, the degree of pressure that the Williams Act attempted to alleviate is present. The decision in \textit{S-G Securities} rests on the theory that widespread publicity placed this degree of pressure on the target shareholders. The court found that Fuqua's press releases were very similar to a public announcement of a tender offer invitation. The court concluded that the publicity, which outlined in detail the purchasing plans and specified FIC's desire to acquire control of the target, forced shareholders into making uninformed, ill-considered decisions.\textsuperscript{57} That the shareholders sold their stock in the open market did not mitigate this pressure.

Under the court's analysis, whether conduct falls within the Act depends on shareholder impact. The court reasoned that the form of a transaction, i.e. an open market purchase, should not be allowed to overcome the substance of the transaction.\textsuperscript{58} The \textit{S-G Securities} decision extends the definition of tender offer to encompass the type of situation that Congress intended to eliminate; pressure on target shareholders caused by lack of adequate disclosure.

At first blush, with all the publicity in this case, it seems inconsistent that Fuqua should be charged with failure to disclose. Fuqua's disclosures, however, were limited to price terms and a pro-

\textsuperscript{55} See 113 Cong. Rec. 845, 856 (1967).
\textsuperscript{56} Id.
\textsuperscript{58} If tender offers were defined strictly in accordance with the conventional conception, the requirements of section 78n(d) could too easily be avoided through slight deviations from the conventional model, thus frustrating the Congressional intent. A more flexible approach is necessary. See Harvard Note, supra note 11, at 1271.
fessed desire to gain control of S-G. The essential disclosures, such as the background of the purchaser, any plans of the purchaser to change the structure of the corporation, or the source and amount of funds used to effectuate the purchases, were not disclosed. Therefore, if the outside influences involved in S-G Securities pressured shareholders in contravention of the Act, the court was correct in holding this transaction to be a tender offer.

The widespread publicity arising from the FIC press releases pressured shareholders in three ways to make hurried and ill-considered investment decisions. First, the public announcement of a proposed buying program to acquire control placed the target shareholder in the same dilemma that he faced in the traditional tender offer. If he retained his shares, he took the risk that the offeror, after gaining control, would alter the management of the company to its detriment. On the other hand, if he sold his shares, he might be giving up an investment that would ultimately prove profitable.

Second, the shareholders of S-G, who had full knowledge of FIC's intention to control the company, were pressured to sell their securities before FIC acquired the amount of stock it desired. If the shareholder did not act quickly, the purchasing program might end before the shareholder could sell.

Third, the publicity of the proposed takeover program immediately caused trading to increase in S-G common stock. The increased trading caused the market price to rise. Shareholders could benefit from the inflated premium on their stock if they acted immediately, yet they lacked the information to make an informed and carefully considered investment decision. Because the pressures associated with a traditional tender offer were present in S-G Securities, this was an appropriate case for expanding the concept of tender offers to include open market purchases.

S-G Securities leaves unanswered which open market purchases will remain unregulated and which will be subject to the provisions

60. In a two week period prior to the publicity, S-G common stock had traded within a range of $1 7/8 - 2 per share on an average trading volume of approximately 475 shares per day. Two days after the first announcement, S-G's trading volume averaged 35,700 shares per day within a range of 2 1/4 - 2 3/4. Id.
61. This inflated premium was similar to the premium a solicitee would receive in a traditional tender offer.
Expansion of Tender Offer Regulation 289

of the Williams Act.62 Clearly, when a purchasing scheme places no pressure on shareholders, no tender offer occurs.63 A problem may arise, however, when a person makes a substantial number of open market purchases and rumors begin to spread with regard to this activity.64 It is difficult to predict what a court would do in this situation.65 The decision whether those purchases are tender offers depends on the totality of the purchaser’s conduct and an evaluation of the pressure that conduct places on the shareholders.66

62. See also Developing Meaning, supra note 11, at 1271.

63. Chromalloy American Corp. v. Sun Chemical Corp., [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,126 (E.D. Mo. 1979). In Chromalloy, Sun Corp. purchased stock on the open market and made one block purchase off the exchange. The block purchase involved no solicitation of shares, no premium above the market price, no time limit and no minimum purchase contingency. In the face of an allegation that a tender offer in violation of section 14(d) had occurred, the court stated that “[R]egardless of the ultimate meaning ascribed to ‘tender offer’ under the Williams Act, . . . this Court is certain that the situation here could not fall within that definition. The evidence adduced . . . showed no pressure whatsoever placed on the shareholders.” Id. at 96,223.

64. In this situation, the market price will invariably rise due to speculation in the stock.

65. A plausible answer to this difficult question may be found in the S-G Securities decision itself. There, the court held that it was the pre-tender offer publicity which ran afoul of section 14(d). Presumably, any publicity occurring after the purchasing scheme begins is a natural result of the marketplace and not attributable to the purchaser. In this situation, section 14(d) would not be violated and the filing of a Schedule 13D should suffice. See note 19 supra.

However, if the post-purchase publicity is initiated by the purchaser and he is still soliciting shares of the target corporation, the S-G Securities rationale should again be applicable. The purchases made both prior to and after the publicity could be deemed a tender offer because of the total “scheme” of purchases.

66. One guide for determining whether certain purchases constitute a tender offer was suggested in Hoover Co. v. Fuqua Ind., Inc., [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,107 (N.D. Ohio 1979). The factors that the district court there considered were:

1. Whether there is an ‘active and widespread solicitation of public shareholders’ for shares of an issuer;
2. Whether the solicitation is made for a substantial percentage of the issuer’s stock;
3. Whether the offer to purchase is made at a premium over the prevailing market price;
4. Whether the terms of the offer are firm rather than negotiable;
5. Whether the offer is contingent on the tender of a fixed minimum number of shares, and perhaps, subject to the ceiling of a fixed maximum number to be purchased;
6. Whether the offer is open for only a limited period of time;
7. Whether the offerees are subjected to pressure to sell their stock; and
8. Whether public announcements of a purchasing program concerning the target company precede or accompany a rapid accumulation of large amounts of the target company securities. Id. at 96,148.
THE Dickinson Decision

The factual background

In Wellman v. Dickinson, the litigation stemmed from the acquisition by Sun Company, Inc. of roughly 34\% of the stock of Becton, Dickinson & Company. Fairleigh Dickinson, the ousted Chairman of BD, wanted to reacquire control of the company. He planned to find a corporation interested in acquiring a controlling percentage of BD stock, and enlisted the aid of the investment banking firms of Salomon Brothers and F. Eberstadt & Company. Between April and December, 1977, Salomon and Eberstadt arranged meetings with a number of large corporations. However, these efforts failed; the corporations were not interested in a takeover attempt in the face of hostile management.

Simultaneous to Dickinson's attempts to find someone to take over BD, Sun was looking to diversify by investing in institutions outside the energy field. Sun sought the acquisition of no less than 20\% and not more than a 50\% interest in three or four companies by investing some $300-400 million in each organization. "Thus, the stage was now set for the main event", and, at a meeting on December 27, 1977, Sun decided to solicit individual and institutional shareholders of BD in order to acquire control of that company.

Strategy for the solicitation was narrowed to (1) open market purchases, (2) a conventional tender offer, or (3) private purchases. In the face of a hostile target, a conventional tender offer was not considered attractive. A procedure was needed that would enable the acquisition to be effectuated quickly and would put Sun in...
physical possession of the shares in the shortest possible time.

On January 9, 1978, Dickinson’s lawyers met with Salomon and Eberstadt. The lawyers indicated that the law regarding tender offers was still murky and that the concept of a tender offer had not been precisely defined. Therefore, in order to avoid any tender offer litigation, the attorneys proposed to structure a privately negotiated transaction. To maintain the private character of the transaction, the attorneys advised limiting the number of solicitations.

On January 16, 1978, at 4:00 P.M., some thirty-nine institutions and four individuals were contacted and asked to sell their holdings in BD. Each solicitee was told that a non-disclosed purchaser, sometimes identified as in the top fifty of Fortune Magazine’s 500, was looking to acquire a 20% holding in BD stock; that no transaction would be final unless 20% of the shares were acquired; that the price was either $45 as a top final price or $40 with protection, in the event shares were later bought at a higher figure; and that the desired 20% goal was within reach, or that the order was filling up fast and a hurried response was essential. Each solicitee was asked to respond within one hour or less, although some were given until the next day.

By 5:35 P.M., the total shares of BD committed for sale reached 20%. On January 17 and 18, couriers were dispatched with checks to pay for the stock and collect the certificates. After the dust had settled on “Sun’s brilliantly designed, lightning strike”, Sun had control of 35% of BD’s outstanding shares.

Sun’s acquisitions gave rise to seven separate actions that were consolidated for trial. The complaints alleged not only violations of the tender offer provisions, but also a myriad of other securities

75. Id.
76. It is clear that privately negotiated transactions were not meant to be covered by section 14(d) of the Williams Act. See 1968 House Report, supra note 9; GAF Corp. v. Milstein, 454 F.2d 709, 720 n. 22 (2d Cir. 1971) cert. denied, 406 U.S. 910 (1972).
77. One Sun attorney believed 60 solicitees was safe; another argued for an upper limit of 40, but within those limits the lawyers felt there would be no problem. Wellman v. Dickinson, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,918 at 95,826 (S.D.N.Y. 1979).
78. Id. at 95,938.
79. Id. at 95,830.
80. Id. at 95,812.
81. The plaintiffs in the Dickinson case included: the SEC; BD; its officers; and several of its shareholders, both individually and derivatively. The defendants included; Sun; L.H.I.W., Inc., the corporation Sun formed to receive the BD shares; Salomon Brothers; F. Eberstadt & Co., Inc; and Fairleigh S. Dickinson. Id. at 95,812-813.
violations. A major issue was whether the solicitations and purchases constituted a tender offer and, therefore, violated the pre-disclosure requirements of Section 14(d).

The Dickinson Opinion

The Dickinson court first addressed the distinction between a privately negotiated transaction, which is outside the scope of section 14 of the Williams Act, and a public transaction, which may not be. The court noted that an arms-length negotiation between two people epitomizes a private transaction. However, as the number of actors increases, the identifiable characteristics of private activity become blurred.

To determine if the transaction was public or private, the Dickinson court looked to the case of SEC v. Ralston Purina Co. Although the court recognized that the Ralston Purina case was concerned with the private offering exception under the Securities Exchange Act of 1933 and not tender offer regulation, the court reasoned that the provisions were analogous. The court adopted the Ralston Purina test to distinguish a private from a public transaction in the tender offer context.

The Ralston Purina test involved several factors: (1) whether the particular class of persons affected needs the protection of the

82. Other securities law violations included aiding and abetting the violation of sections 10(b), 13(d) and 14(e) of the Securities Exchange Act of 1934, as amended, (15 U.S.C. §§ 78j(b), 78m(d), and 78n(e)); Rule 10b-5 (17 C.F.R. § 240.13d-1 and 13d-2), sections 17(d) and 17(e) of the Investment Company Act of 1940, as amended, (15 U.S.C. §§ 80a-17(d), 80a-17(e)) and Rule 17d-1 (17 C.F.R. § 270.17d-1).
83. This article focuses only on the section 14(d) violations and leaves the other violations for another time and place.
86. The private offering exemption refers to section 4(1) of the Securities Act of 1933, 15 U.S.C. § 77d(2) (1970). That statute allows stock to be exempted from the registration requirements of the 1933 Act if it does not involve any public offering. Essentially, there are two reasons for this exemption: (1) where there is a sufficiently small number of potential investors involved, there is no public interest served by regulation; and (2) where the persons offered unregistered stock are able, by reason of sophistication, knowledge or access to information, to protect themselves from the abuses which the 1933 Act was designed to prevent, there is no need for the additional protection afforded by registration.

The application of the private offering exemption rationale to the tender offer context had been advocated by commentators. See, e.g., Developments In Tender Offers, supra note 24; Block & Schwarzfeld, Curbing the Unregulated Tender Offer, 6 Sec. Reso. L. J. 133, 139 (1978).
Act; (2) the number of solicitees; and (3) the party carrying the burden of proof.88 Using this test, the Dickinson court determined that: (1) the BD shareholders were in need of protection, especially in light of the secretive nature and quickness of the transactions; (2) the number of actors was sufficient to make the solicitation public; and (3) Sun failed to carry the burden of showing that the transaction was privately negotiated.89 The court concluded from this that the transaction was public.

The Dickinson court next considered whether this public solicitation was in fact a tender offer.90 The court found the solicitations possessed substantially all the elements of the traditional tender offer.91 Moreover, Sun’s scheme of acquisition was “... infected with the basic evil which Congress sought to cure by enacting the law.”92 The solicitations were designed to force hurried investment decisions without the proper information. The court concluded that it would undermine the remedial purposes of the Williams Act to hold that Sun’s secret operation was not covered by Section 14(d).93

Analysis of the Dickinson Decision

The Dickinson holding significantly expanded the accepted definition of a tender offer. As in the S-G Securities case, the focus was on the substance of the transaction rather than its form. In Dickinson, Sun did not attempt to disclose any information. Furthermore, the solicitees were allowed only one hour to make a decision. The court was correct in its decision that these secretive ac-

88. S.E.C. v. Ralston Purina Co., 346 U.S. 119 (1953). An offering to investors who were shown to be able to fend for themselves is a transaction “not involving any public offering.” Id. at 125. The Ralston Purina court also decided that the statute applied to a public offering whether there were few or many solicitees, and that the burden of proof lay with the party claiming the benefit of the private offering exemption. Id. at 126.
90. Sun argued that because the entities solicited were mostly financial investment institutions who were “sophisticated investors”, the public/private dichotomy was not important. As sophisticated sellers, the institutions did not need the protections of the Williams Act. The court turned away that contention by stating: “sophistication serves no purpose unless it can be applied to the particulars of an investment or sale decision. Therefore, sophistication and expertise cannot be relied on here to exempt this transaction from the reach of Section 14(d).” Id. at 95,481.
91. See notes 10 through 14 supra and accompanying text.
93. Id.
tions produced the same pressure on shareholders as a tender offer. The court's decision to apply the private offering exemption analysis to tender offer situations helps to carve a distinction between a private transaction and a tender offer. Certain commentators have argued that the cut-off point between a privately negotiated transaction and a tender offer should be a specific number of solicitees. However, using a quantitative test may confound the statutory purpose of the Williams Act. For example, assume that the requisite number of shareholders is set at thirty-five. If a purchaser solicited 100 shareholders holding 3% of the outstanding shares of a corporation, there would be a tender offer. However, if the purchaser solicited only twenty shareholders holding 40% of the outstanding shares, there may not be a tender offer.

The Dickinson decision rejected the quantitative test. By relying on Ralston Purina, the court placed the question of the number of solicitees into the background. The court reasoned that the number of solicitees should not be the talisman that determines whether a transaction is public. Rather, it is only one factor in deciding whether the overall purchase scheme is public and thus regulated by the Williams Act.

The Dickinson decision also effectively prevents the "blitzkrieg" type of corporate takeover. Prospective purchasers are now forewarned that clandestine schemes to acquire control of a corporation by purchasing stock will succeed only if (1) the purchases are truly private, or (2) the disclosure rules of section 14(d) are followed. The Dickinson court, moreover, has given

94. In Developments In Tender Offers, supra note 24, the authors suggest that the number of solicitees to be contacted in one year should be thirty-five.

Thus, if a prospective purchaser made solicitations to no more than thirty-five shareholders within twelve months, he would be presumed not to have made a tender offer for those shares. If he solicited more than thirty-five shareholders within a year, he would be presumed to have made a public offer to buy those securities, and unless he rebutted that presumption, would be subject to the requirements of Section 14(d) so long as the solicitations came within the other provisions of the statute. Id. at 6.


96. Although the Williams Act did not specifically provide a minimum period during which a tender offer had to remain open, the withdrawal provision of section 78n(d)(5) was construed as setting a minimum. Out of that interpretation grew the so-called "blitzkrieg" offers limited to seven days. In the eyes of many, they had the effect of stampeding shareholders into a hurried decision, a practice the Williams Act had sought to end. Sommer, Tender Offer Rules Seek to Codify Permissible Conduct, 1 NAT'L L. S. 24 (Mar. 9, 1974).

97. It is interesting to note that the name of the corporation which was formed to accept the BD shares, L.H.I.W., Corp., is an acronym standing for "Let's Hope It Works".
other courts a standard to determine if a transaction is or is not private.  

A RECENT ATTEMPT TO “DEFINE” TENDER OFFER

The SEC has recently published proposed rule changes that for the first time offer a “definition” of tender offers. The “first tier” of the definition subjects stock purchases to tender offer regulation if they involve an attempt to purchase more than 5% of the shares outstanding from ten or more holders within a forty-five day period. The “second tier” of the proposed regulation requires tender offer regulation for purchases made in a “widespread”, broadly publicized offer that involves a premium above the market price of 5% or $2 per share, whichever is greater, and in which there is no “meaningful” opportunity for holders to negotiate price and terms.

The proposed tender offer definition encompasses the schemes in both S-G Securities and Dickinson. In Dickinson, the purchaser attempted to buy more than 5% of the outstanding stock from ten or more shareholders within a forty-five day period; this scheme falls within the first tier. In S-G Securities, there was a widespread, broadly publicized offer involving a premium above the market price; this is an example of the second tier.

The proposed rules, however, do no more than codify the S-G Securities and Dickinson opinions. The rules offer little more guidance than the holdings of the cases themselves. Nevertheless, this does not make the rules undesirable. The courts have struggled to define a tender offer on a case by case basis. The codification of this judicial development promotes consistency particularly when one recognizes that the true touchstone of any effective sys-

98. The proposed ALI Federal Securities Code would circumvent the private/public issue by suggesting a definition of the term tender offer based on the number of solicitees—thirty-five—regardless of the manner in which the offer was made. See ALI Fed. Sec. Code § 299.9(a) (Tent. Drafts. Nos. 1-3 Revised 1974). See also, note 94, supra.

99. 44 Fed. Reg. 70349 (Dec. 6, 1979). These rules were left open to public comment until February 1, 1980.

100. “Define” may not be the proper word, for what the SEC is doing is setting forth situations in which the tender offer regulations will have effect. In essence, the SEC is defining by example. However, this method of “definition” still leaves the SEC the flexibility to label new schemes as tender offers.

101. Note the lack of qualifying language with regard to “sophisticated” or “non-sophisticated” holders. The SEC may be putting to rest the notion that the solicitee’s sophistication may be taken into consideration in defining “tender offer”.

102. The Proposed Rules are desirable because of their binding legal force, comparable to the precedential weight of the two district court opinions discussed in this article.
system of jurisprudence is the promulgation of laws upon which men can reasonably plan their affairs."

CONCLUSION

The holdings of S-G Securities and Dickinson, along with the SEC's recently proposed rules, give potential purchasers and the courts a clearer framework within which to analyze tender offers. This should aid in the determination of what purchasing schemes constitute tender offers.

The two decisions are in no way an attempt by the judiciary to "legislate" a definition for the phrase "tender offer". What the courts have done is to interpret the Williams Act in accordance with its legislative purpose of providing maximum protection for investors. The S-G Securities and Dickinson cases merely come to the further assistance and protection of the investor in situations where insufficient disclosure and aggressive purchasing schemes place an impermissible degree of pressure on the financial investor, both institutional and private.

HENRY R. DAAR

103. ARANOW & EINHORN, supra note 1, at 75.