MANDATORY TENDER OFFERS AS A TOOL FOR THE DEMOCRATIZATION OF WEALTH: ARTICULATING THE SEC'S BROAD PRECEDENT IN *NAT'L LIFE INS. CO. V. CEMCO HOLDINGS, INC.*[*]

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Tender offer rules were never applied before in the Philippines, but that changed with a landmark Securities and Exchange Commission ("SEC") decision in February 2005. *National Life Insurance Co. v. Cemco Holdings* applied these rules mandatorily to a transaction that involved only two sellers, and one that did not even result in a direct purchase of the shares of stock in dispute. Rather, the transaction was indirect, and it was the controlling block of a holding corporation that was purchased.

The decision was both brief and simple, and curiously took the Securities Regulation Code's declaration of policy regarding the democratization of wealth as its main premise. Because of this, the ruling laid down a broad doctrine, and one that will characterize the application of the entire Securities Regulation Code ("Code") in the future.

This essay argues that *National Life Insurance* had impeccable logic and legal foundations, despite its seeming brevity and the complete lack of precedent or clear

[*] Nat'l Life Ins. Co. of the Phils., Inc. v. Cemco Holdings, Inc., Securities & Exchange Commission (hereinafter "SEC"), Feb. 14, 2005 (hereinafter "Nat'l Life Ins."). The decision was signed by Chair Fe Barin and Commissioners Fe Eloisa Gloria, Ma. Juanita Cueta, and Jesus Enrique Martinez. Commissioner Joselia Poblador dissented. This paper was awarded the Professor Gonzalo T. Santos, Jr. Prize for Best Paper in Securities Law in 2005.

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statutory rules to govern the case. Further, its handling of the Code's declaration of policy and legislative intent sets the proper tone for securities regulation.

This will be developed in three parts. First, the essay will discuss the *National Life Insurance* ruling itself and its surrounding facts. Second, it will examine the history of both Philippine and American tender offer rules, and closely scrutinize the legislative deliberations of the Code. Finally, it will examine American tender offer decisions, and conclude that these only highlight the very different regulatory intent in the Philippines.

I. THE NATIONAL LIFE INSURANCE DECISION

A. FACTS

The facts of *National Life Insurance* are straightforward. Philippines-based Cemco Holdings, Inc.("Cemco") was a minority shareholder in Union Cement Corp. ("UCC"), a publicly-listed Philippine cement manufacturer, and held 17% of its shares.[1] As of March 22, 2005, UCC, now named Holcim Philippines, Inc., had 6,452,094,578 outstanding shares and a market capitalization of PHP23,550,146,670.[2]

UCC's majority shareholder was a holding corporation, Union Cement Holding Corp. ("UCHC"), which held 61% of UCC's shares.[3] UCHC was in turn controlled by Bacnotan Consolidated Industries, Inc. ("BCI") and Atlas Cement Corp., which held a total of 51% of UCHC's shares. Cemco was itself a minority shareholder of UCHC, holding 9% of its shares.[4]

Table 1: Substantial ownership in UCC and UCHC[5]

Union Cement Corp. owners	%	**Union Cement Holdings Corp. owners**	%
Union Cement Holdings Corp.	60.51%	Atlas Cement Corp.	29.69%
Cemco Holdings, Inc.	17.03%	Bacnotan Consolidated Industries, Inc.	21.31%
Sumitomo Osaka Cement, Ltd.	9.23%	Cemco Holdings, Inc.	9.00%

In late 2004, Cemco bought out the holdings of both BCI and Atlas,[6] which increased its control of UCHC with a 60% stake. This also made Cemco the majority shareholder of UCC, with a rough 53% stake, since it directly owned 17% of UCC and indirectly owned another 36% through UCHC. Prior to the transaction, Cemco had obtained a letter from the SEC, advising that the transaction would not fall under

[1] Nat'l Life Ins., at 3.

[2] Philippine Stock Exchange, Inc., *Stock Information: Holcim Philippines, Inc. ("HLCM")*, available at <http://www.pse.org.ph> March 27, 2005.

[3] *Ibid.*

[4] Nat'l Life Ins., at 3.

[5] *Ibid.*

[6] *Id.* at 1.

mandatory tender offer rules.[7] In 2003, the Philippine Stock Exchange ("PSE") had also issued a memo to its brokers stating that a tender offer would not be required.[8]

The relevant section of the Code[9] read:

> SEC. 19. *Tender Offers.* 19.1. (a) Any person or group of persons acting in concert who intends to acquire at least fifteen per cent (15%) of any class of any equity security of a listed corporation or of any class of any equity security of a corporation with assets of at least Fifty Million Pesos (P50,000,000.00) and having two hundred (200) or more stockholders with at least one hundred (100) shares each or who intends to acquire at least thirty per cent (30%) of such equity over a period of twelve (12) months shall make a tender offer to stockholders....

The SEC, however, increased the threshold for creeping tender offers from 30% above to 35%.

National Life Insurance Co., however, protested because it held 45,000,000 UCC shares and asked the SEC to impose mandatory tender offer rules.[10] On February 14, 2005, the SEC rendered a decision withdrawing the original letter and ordering Cemco to make a tender offer to all UCC shareholders. This was no simple change; the company estimated the additional cost at six billion pesos.[11] Holcim Chief Operation Officer Paul O'Callaghan decried the decision as a deterrent to foreign investment, and reacted: "The fact that if you are an investor if you make an effort to ask the question and get a ruling and you act upon that ruling then certainly that should give you the certainty to go ahead with the transaction."[12]

O'Callaghan described that Holcim had budgeted half a billion poses for capital expenditure in 2005, and planned to build a new power plant in Mindanao to support two cement plants in Davao and Misamis Oriental. Holcim was also eyeing further acquisitions of small cement corporations, but only after it posts growth in the next four years.[13]

On March 8, 2005, Cemco filed a case before the Court of Appeals and sought the dismissal of the SEC ruling.[14] The Court of Appeals subsequently halted the enforcement of the ruling.[15] UCC's stock price changed violently throughout these

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[7] *Id.* at 1. The letter was signed by Director Justina Callangan and dated July 27, 2004.

[8] Karen Capino, *Firm to challenge SEC's tender offer rule in court*, MANILA TIMES, Feb. 24, 2005, ¶ 8, available at <http://www.manilatimes.net/national/2005/feb/24/yehey/business/20050224bus6.html>.

[9] Rep. Act No. 8799 (2000).

[10] Nat'l Life Ins. Co., at 3.

[11] K. Capino, *op. cit. supra* note 8 at ¶ 10.

[12] *Id.* at ¶ 12.

[13] *Id* at ¶¶ 16, 18, 20.

[14] Karen Capino, *Cemco files appeal to overturn SEC order*, MANILA TIMES, Mar. 14, 2005, ¶¶ 1-2, available at <http://www.manilatimes.net/national/2005/mar/14/yehey/business/20050314bus8.html>.

[15] LexisNexis, *STOCK ALERT – Philippines' Holcim down on court order stopping tender offer*, Mar. 14, 2005, available at <http://www.newratings.com/analyst_news/article_732304.html>.

transactions, first rising sharply from less than two pesos per share to almost five pesos in expectation of a mandatory tender offer, then declining sharply after the appeal.[16]

B. REASONING

National Life Insurance is a surprising securities decision for two reasons. First, a mandatory tender offer had never before been applied in the Philippines, and certainly not in so large a transaction. Second and more importantly, at first glance, its legal methodology seems lamentably sparse

The actual reasoning was extremely simple, and one might be surprised that so large a transaction hinged on such a brief argument. Its premise was that section 19 of the Code was meant to apply to any kind of transaction, and the relevant characteristic was not the mode but its size. If section 19's thresholds were met, a tender offer would have to be made.[17] Without examining the mode of acquisition, taking this premise, Cemco had obtained UCC shares that exceeded section 19's threshold, even though what it actually purchased was a controlling stake in the holding company UCHC.

The decision's actual reasoning may be divided into two parts. First, *National Life Insurance* established the premise that the tender offer rules were meant to apply to any kind of transaction, so long as it meets section 19's thresholds. It quoted legislative history to show that "the provision was intended to address the interest of minority stockholders: control, dilution and stock value":[18]

> SEN. S. OSMENA. Eto ang mangyayari diyan, eh. Somebody controls 67% of the company. Of course, he will pay a premium for the first 67%. Control yan, eh. Eh, kawawa yung mga maiiwan, ang 33% because the value of the stock market could go down, could go down after that, because there will (p. 41) be no more market. Wala nang gusting bumenta. ... [W]e have had a case in Cebu wherein Ayala A who already owned 40% of Ayala B made an offer for another 40% of Ayala B without offering the 20%. Kawawa naman yung nakahawak ngayon ng 20%. Ang baba ng share sa market. But we did not have a law protecting them at that time....
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> REP. TEODORO. As long as it reaches 30, ayan na. Any type of acquisition just as long as it will result in 30... (p. 50) reaches 30, ayan na.[19]

Simply, without a tender offer, a small stockholder would have no opportunity to sell at an above-market price that a large stockholder could, because of a premium his block commands, especially if it is a controlling block. Thus, the Code's rule aimed to

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[16] LexisNexis, *STOCK ALERT – Holcim Philippines continues to rise ahead of Cemco's tender offer*, Feb. 23, 2005, available at <http://www.newratings.com/analyst_news/article_706639.html>.

[17] Nat'l Life Ins. Co., at 3.

[18] *Id.* at 6.

[19] *Id.* at 4, *quoting* Bicameral Conference Committee Minutes (hereinafter "Bicam. Minutes"), Jul 17, 2000., at 40-42, 49-50.

distribute such a premium and equalize selling opportunities whenever a large purchase was made.

This, the SEC argued, is embodied in the Code's policy declaration:

> SEC. 2. *Declaration of State Policy.* The State shall establish a socially conscious, free market that regulates itself, encourage the widest participation of ownership in enterprises, enhance the democratization of wealth, promote the development of the capital market, protect investors, ensure full and fair disclosure about securities, minimize if not totally eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market.

This was further reiterated in the Code's Implementing Rules ("IRR"):

> SRC Rule 2 – Interpretation of Rules
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> Any doubt in the interpretation of these Rules shall be resolved by the Commission in a manner which will establish a socially conscious, free market that regulates itself, encourage the widest participation of ownership in enterprises, enhance the democratization of wealth, promote the development of the capital market, protect investors, ensure full and fair disclosure about securities, and/or minimize, if not totally eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market.

Second, the SEC asserted that Cemco's indirect acquisition of UCC shares was tainted with fraud and intended to circumvent the SRC's tender offer rules.[20] It applied the definition of "beneficial owner" in SRC Rule 3A, which included a person "deemed to have an indirect beneficial ownership in any security which is... held by a corporation of which he is a controlling shareholder."[21] The indirect acquisition was thus a "device, scheme or artifice to defraud any person" listed as a prohibited practice under section 26 of the Code and the Code's IRR Rule 19, item 12A.

Further, it showed that UCC, UCHC, BCI, and Atlas had interlocking directors and shareholders,[22] and further implied that the indirect acquisition was a means for the large shareholders to monopolize the premium paid by Cemco. UCHC, it noted, had no other assets other than its UCC shares, except for shares in a non-operating corporation, Southern Visayas Development Corp.

Other than this, it cited a Supreme Court precedent that held that if a statute's purpose is clear, it must be construed accordingly.[23]

The SEC's case is perhaps not particularly convincing at first glance, in the absence of any clear legal provision or precedent, or even a provision in its

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[20] Nat'l Life Ins., at 7.
[21] *Id.* at 8.
[22] *Id.* at 9.
[23] *Id.* at 7-8, citing Pilipinas Kao, Inc. v. Court of Appeals, 423 Phil. 837 (2001).

implementing rules, to govern Cemco's indirect acquisition. The appeal, essentially, to the Code's preamble and legislative history is at heart a plea to statutory construction. The allegation of fraud is perhaps too bold a statement, supported mainly by the circumstance that there were interlocking shareholders and UCHC had no other assets. Nevertheless, Holcim's O'Callaghan precisely protested that they had sought to obtain prior advisories from both the SEC and the PSE, and, "there is no question being hidden behind the scene because everything was very open dealing with the authority. It was quite straight forward."[24]

Perhaps the most surprising thing about the decision, however, is that it was correct. It was brief only because it truly was straightforward, and its legal bases were sparse because there truly were no other governing sources. Perhaps the only way it could have appeared more convincing might have been with the flourish of a George Malcolm or Jose Laurel, but this is a matter of rhetoric and not of logic.[25]

The succeeding sections will endeavor to describe the context and legislative intent of the SRC's tender offer rules to illustrate this conclusion.

C. PRACTICAL PROBLEMS

The SEC's reversal, it must be noted, created many practical problems. First, for example, one asks who could avail of the tender offer, considering many small stockholders at the time of the actual purchase by Cemco had already sold their holdings in the confusion. Although they could be tracked down one by one through a search of records, one asks if they were still entitled to the share of the premium Cemco paid over the market price, considering they no longer had any shares to tender. On the other hand, one also asks if current holders would be entitled to the offer.

Second, tender offers involve a ceiling percentage. If Cemco's acquisition of 51% of UCHC translated to about 31% of UCC, then Cemco should not be forced to acquire more than this target or ceiling. Tender offer rules implement this by allowing the purchaser to refuse excess shares and purchase from shareholders pro rata, based on the number of shares each tendered. Cemco, however, would nevertheless be forced to pay far more than it intended because it cannot return excess UCC shares to UCHC, which it now controls. Neither can it partially rescind the purchase of UCHC shares from BCI and Atlas, and this is even doctrinally difficult to defend considering the mandatory tender offer finding dealt with the UCC and not UCHC shares. It must be emphasized that tender offer rules theoretically facilitate corporate takeovers, and should not result in making takeovers more expensive or inconvenient.

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[24] K. Capino, *Firm to challenge*, *op. cit. supra* note 8 at ¶ 9.

[25] Justice Vicente V. Mendoza teaches that law is comprised of logic and of rhetoric, and cautions students against being seduced by rhetoric only to miss the actual logic of a case.

II. THE HISTORY OF TENDER OFFER RULES

A. PHILIPPINE TENDER OFFER RULES

National Life Insurance recounted no history of tender offer laws, and quoted only one portion of legislative deliberations. This is for the simple reason that there is no legal history to speak of, and tender offer rules were never applied prior to *National Life Insurance*. In fact, even under the Code, the SEC suspended the application of the tender offer rules for several years,[26] lifting this only recently in time for *National Life Insurance*. One, however, readily concludes that the Code unequivocally intended to democratize wealth in general, and to apply tender offer rules to all modes of stock purchase in particular.

A tender offer is not defined in the Code itself, but the IRR define it as "a publicly announced intention by a person acting alone or in concert with other persons... to acquire equity securities of a public company as defined in SRC Rule 3."[27] It basically involves an offer for a large but fixed number of shares by a single purchaser or group, and is accepted by shareholders by surrendering control of their shares to a depositary. The sale is then finalized at the end of the stated period and excess shares are returned to the owners. Tender offer rules existed even before the present Code, in the Revised Securities Act. Both enactments contained the basic conventional framework of tender offers:

1) A ceiling amount of shares;

2) Disclosure requirements on the purchaser's part;

3) A fixed period for the offer, but one of sufficient length;

4) Allows shareholders that they may withdraw their shares from the depositary during the pendency of the offer, or after a certain time if the shares have not yet been actually purchased;

5) Allows the offeree to refuse shares in excess of its set ceiling, purchasing from shareholders pro rata depending on the number of shares each tendered, and returning the rest;

6) Requires the offeree to retroactively offer apply any improved terms to all holders who tendered shares if such terms were offered to any shareholder during the pendency of the tender offer.

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[26] SEC Memo. Circ. 2003-12, Re: Suspension of Thresholds on Tender Offer Under Section 19 of the Securities Regulation Code, Sep. 9, 2003. This cited the original 2001 circular that made the initial suspension from September 12, 2001 to September 11, 2002. This was renewed for another year in 2002, and the 2003 circular again renewed it that year.

[27] Implementing Rules and Regulations of the Securities Regulation Code (hereinafter "SRC IRR"), Rule 19(1)(I).

This basic framework protects both the shareholders and the offeree. The shareholders are protected by disclosure requirements and by the assurance that they have sufficient time to make an informed decision. The offeree is allowed not to purchase more shares than intended. Finally, the final characteristic which retroactively applies improved terms emphasizes that shareholders will not be punished for tendering early. This prevents the inconvenience of having other shareholders hold out for better terms, since the last shareholders to sell before the target amount is reached could bargain for a higher price.[28]

The Revised Securities Act provided:

> Sec. 33. Tender offers. (a) (1) It shall be unlawful for any person, directly or indirectly, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to this Act if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than ten (10%) per centum of such class, or such reasonable percentage as fixed by the Commission, unless, at the time copies of the offer or request or invitation are first published or sent or given to security holders, such person has filed with the Commission and furnished the issuer a statement containing such of the information required in Section 32 of this Act as the Commission may prescribe. All requests or invitations for tender, or advertisements making a tender offer or requesting or inviting tenders of such a security, shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission and sent to the issuer not later than the time copies of such materials are first published or sent or given to security holders.[29]

The Code now provides:

> SEC. 19. *Tender Offers.* 19.1. (a) Any person or group of persons acting in concert who intends to acquire at least fifteen per cent (15%) of any class of any equity security of a listed corporation or of any class of any equity security of a corporation with assets of at least Fifty Million Pesos (P50,000,000.00) and having two hundred (200) or more stockholders with at least one hundred (100) shares each or who intends to acquire at least thirty per cent (30%) of such equity over a period of twelve (12) months shall make a tender offer to stockholders by filing with the Commission a declaration to that effect; and furnish the issuer, a statement containing such of the information required in Section 17 of this Code as the Commission may prescribe. Such person or group of persons shall publish all requests or invitations for tender, or materials making a tender offer or requesting or inviting letters of such a security. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may prescribe, and shall

[28] *See, generally,* Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1520, 1252-59 (1973).

[29] Batas Blg. 178, sec. 33 (1982).

be filed with the Commission and sent to the issuer not later than the time copies of such materials are first published or sent or given to security holders.

The big difference is that the Code provision is mandatory. Otherwise, the subsequent subsections of both laws are generally the same. For example, the specific provision in the Revised Securities Act regarding a group of purchasers has been simplified and incorporated into the main subsection of the Securities Regulation Code.[30]

One notable change is observed in the Code's Implementing Rules. The former Rule 19.1 contained a subsection 4 on "voluntary tender offer":

4. Voluntary tender offers

   a. A person may make a voluntary tender offer.

   b. A voluntary tender offer shall be made in accordance with this Rule.

   c. A person will be presumed to be making a voluntary tender offer where some or all of the following factors are present:

      i. Active and widespread solicitation of public shareholders for the shares of a public company;

      ii. Solicitation made for a substantial percentage of the issuer's stock;

      iii. Offer to purchase is made at a premium over the prevailing market price, at firm rather than negotiable terms;

      iv. An offer is contingent on the tender of a fixed number of shares; and/or

      v. Offer is only open for a limited period of time.

The above factors are significant because they partially conform to a key enumeration in American jurisprudence. They were recently omitted in the current Implementing Rules, which were signed on December 30, 2003. It is proposed that the omission implies the SEC's recognition that the Philippine Securities Regulation Code diverges from American jurisprudence, and this will be discussed in greater detail in a subsequent section. The definition that remains in the Implementing Rules, however, contains some vestige of American jurisprudence.

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[30] Sec. 33(c). "When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of Section 32 and subsection (a) of this Section." The next subsection was omitted, though it is largely a rule of mathematics. Sec. 33(d). "In determining, for purposes of Section 32 and subsection (a) of this Section, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer."

B. THE LEGISLATIVE INTENT OF THE SECURITIES REGULATION CODE

Perhaps the biggest change in the Code lies in its preamble:

> SEC. 2. *Declaration of State Policy.* The State shall establish a socially conscious, free market that regulates itself, encourage the widest participation of ownership in enterprises, enhance the democratization of wealth, promote the development of the capital market, protect investors, ensure full and fair disclosure about securities, minimize if not totally eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market.

As previously discussed, the SEC Rules adopted this policy such that the Code must be interpreted to give effect to these policy goals. Further, this provision was the linchpin of *National Life Insurance*.

The legislative intent of the Code is easier to gauge because the sponsor was principally Senator Raul Roco and he answered all the questions in the Senate with respect to the Code. The Senate interpellations revealed little about the tender offer provision itself,[31] but Senator Roco emphasized the significance of the Code's declaration of policy.

The Code was a response to the BW Resources Corp. scandal, where the company's share price rose from PHP2 to 107 in several months.[32] It was being passed after the 1997 crisis when the market was seen as anemic, but with an eye to the future when volume would pick up.[33] The overarching vision, however, was described:

> The intention... is to have information made available to everybody, the retiring teachers, the small farmers, so that they will be induced to participate not only in forming capital, in generating savings, but also in the trading in the stock market. One does not have to be bigtime to trade in the stock market. But right now, because of information kept by the big boys, the little people do not want to go when the elephants are moving around.[34]

In his sponsorship speech, Senator Roco equated development with "broader choices for our people,"[35] which included economic opportunities in addition to political and social ones. This is the democratization of wealth referred to in the Code's declaration of policy. Further, Senator Roco later stated that, "[t]his Declaration of State Policy... elucidates most of the sections and should always be read into account as we discuss the other sections."[36] This readily explains the SEC's rule of interpretation.

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[31] This author reviewed 241 pages of Senate Transcripts of Session Proceedings from 1998, dated Sep. 29, Sep. 30, Oct. 1, Oct. 19, Oct. 20, Oct. 21, Nov. 9, Nov. 11, Nov. 12, Nov. 16, Nov. 17, Nov. 18, Nov. 19, and Nov. 24. The only specific reference to the tender offer rules were in Senator Roco's report on Jul. 17, 2000.

[32] Senate Transcript of Session Proceedings (hereinafter "Senate TSP"), July 17, 2000, at 128.

[33] Senate TSP, October 19, 1998, at 37.

[34] *Id.* at 38.

[35] Senate TSP, October 1, 1998, at 20.

[36] Senate TSP, July 17, 2000, at 129.

The intermediate goal was to build public confidence in the securities market, particularly through its legal framework.[37] Specifically, the Code aimed to address four broad problems:

1) the asymmetric information problem, the incompatibility or the lack of equality and access to information;

2) the uneven playing field between the insiders of the market and those who have more money and the small market investors, or those who want to participate in the development of wealth in the country;

3) the static view of the securities market, and

4) the structural weaknesses of the regulatory body.[38]

Accordingly, there was an emphasis placed on full disclosure as a tool for regulating securities and, further, significant attention was given to punishment of insider trading during the interpellations.

Senator Roco's final report, however, devoted a specific portion to the tender offer rules, and emphasized that the Code would make these mandatory. Further, it was emphasized that this particular section did not stop at disclosure:

> Under tender offer, there is a departure. There will be mandatory tender offers when there is an acquisition of 15% on a single moment, so that if there is a proxy contest and somebody wants to buy 15% to ensure a seat he must try to buy 15% of everybody. Or when it is the intention of any group or any individual to acquire 30% over one-year period trying to accumulate, that must also be applicable to all.
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> This was a clear policy decision, Mr. President. Under the present law, there is no compulsory tender offer. But if we want to enhance the stock market, the minority must feel that he will not be left in the *kankungan* simply because he is small. The minority must have the chance of selling at a high price when somebody wants to gain control of a listed company. And so tender-offer rule is a new direction. This was debated for a long time and the committee seeks the approval of this new direction.[39]

Disclosure, however, would also be required for significantly large transactions that might be preludes to a change in control, the scenarios to which tender offer rules were largely seen to apply to.[40]

Unlike the Senate interpellations, a lengthy portion of the Bicameral Committee meeting discussed the tender offer rules. The thresholds, for example, were adjusted because the House of Representatives felt the originals had been too low.

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[37] Senate TSP, October 1, 1998, at 20.
[38] *Id.* at 21.
[39] Senate TSP, Jul. 17, 2000, at 130-31.
[40] See Bicameral Minutes, Jul. 17, 2000, at 44 (Rep. Teodoro).

During this meeting, Rep. Salceda focused on the basic tender offer principle, "an offer to one should be an offer to all. ... [Y]ou should be offered the same opportunity to sell."[41] He also asserted that tender offer rules must protect very small, passive shareholders.[42]

Senator Osmeña was actually quoted out of context in *National Life Insurance:*

> SEN. OSMENA. [W]e have had a case in Cebu wherein Ayala A who already owned 40% of Ayala B made an offer for another 40% of Ayala B without offering the 20%. Kawawa naman yung nakahawak ngayon ng 20%. Ang baba ng share sa market. But we did not have a law protecting them at that time.

In this discussion, the senator was actually proposing to require a purchaser to make an offer for all a corporation's shares once he acquired a certain threshold percentage of shares, so that the minority's shares would not be valueless because they were no longer relevant to corporate control. This was not adopted instead of the conventional pro rata rule, however. Nevertheless, Senator Osmeña's discussion most clearly illustrated the direction taken by the legislators.

The discussions echo the statement in Senator Roco's speech that the tender offer rules were deliberately crafted to take a new direction. It was pointed out that the ownership of large corporations' shares is concentrated in the hands of a few in the Philippines, and more specific measures were taken rather than leaving situations addressed by the tender offer rules to, for example, penalties for insiders.[43]

Finally, the tender offer discussion evidenced a clear intent to give the SEC broad discretion and great flexibility in acting as a regulatory body, and to "trust the SEC."[44] This echoes the fourth goal stated in Senator Roco's sponsorship speech.

Taken together, the relevant portions of the Code's legislative deliberations directly support *National Life Insurance*. The declaration of policy was in fact intended to permeate the entire Code. Further, the tender offer rules were crafted to move in a deliberate direction, to allow small, passive shareholders to receive a share of premiums paid during corporate takeover attempts, and to preserve their value even when they are part of a clear minority. These are, finally, very specific measures to boost small investor confidence in the capital market.

C. THE LEGISLATIVE INTENT BEHIND AMERICAN TENDER OFFER REGULATIONS

The Philippine legislative intent clearly addresses the need to mobilize the savings of small investors and ordinary citizens given the country's fledgling capital

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[41] *Id.* at 55.
[42] *Id.*
[43] *Id.* at 45.
[44] *Id.* at 69. *See* Senate TSP, Oct. 19, 1998, at 76.

market and a lack of public confidence after the BW scandal. Much doctrine, however, is taken from the American experience,[45] and it is important to contrast the Philippine legislative intent with the goals of regulation in that more sophisticated First World country.

The original American legislative intent is discussed in a *Harvard Law Review* Note that has been cited in most federal tender offer decisions to date.[46] It defined a tender offer in the American understanding as:

> A tender offer has been conventionally understood to be a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price. Cash or other securities may be offered to the shareholders as consideration; in either case, the consideration specified usually represents a premium over the current market price of the securities sought. This opportunity to tender shares at a premium remains open for only a limited period of time, often about two weeks. (internal citations omitted)[47]

American tender offer regulation focuses on the Williams Act,[48] which expanded the relevant provisions of the Securities Exchange Act of 1934. The Act was enacted at a time when proxy fights and exchange tender offers were regulated as takeover tools, and Congress felt offerees of cash tender offers required similar protections, especially when these would result in changes in control of the corporation.[49] Such cash tender offers had emerged as a more convenient tool for corporate takeovers.[50] The primary goals were to ensure that bidders disclosed sufficient information to allow shareholders to make intelligent decisions, and to give shareholders enough time to decide and prevent bidders from pressuring them into hasty decisions with extremely short windows to accept offers.[51]

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[45] Some Senate and Bicameral Committee discussions readily reveal this. One placed tender offer rules in the context of hostile takeovers. Bicameral Minutes, July 17, 2000, at 44. In one Senate discussion used terms such as greenmail, poison pill, and golden parachute, which refer to defensive measures against hostile takeovers. Senate TSP, Oct. 19, 1998, at 77. These remain relevant today because, for example, some result in what can be interpreted as hidden premiums to select shareholders, which must then be offered to all sellers.

[46] *Developing Meaning of "Tender Offer", supra* note 28. *See* Frank Easterbrook & Daniel Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); Lucian Bebchuk, Comment, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028 (1982); Henry Nearing III, Note, *Kahn v. Virginia Retirement System: The Impact of Rule 10B-5's Corporate Disclosure Requirements on the Williams Act's Tender Offer and Best Price Rules*, 40 VILL. L. REV. 263 (1995); Ronald Gilson, *Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense*, 35 STAN. L. REV. 51 (1982); Mark Khmelnitskiy, Note, *Structuring Transactions Outside All Holders/Best Price Rule*, 9 FORDHAM J. CORP. & FIN. L. 501 (2004); Miriam Albert, *Because We Said So: The SEC's Overreaching Efforts to Regulate Mini-Tender Offers*, 45 ARIZ. L. REV. 897 (2003); Rusty Fleming, *A Case of "When" Rather Than "What:" Tender Offers Under the Williams Act and the All Holders and Best Price Rules*, 27 S. ILL. U. L.J. 263 (2003).

[47] *Id.* at 1251-52.

[48] Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454, *amending* 15 U.S.C. secs. 78(m)-(n) (1964) (codified at 15 U.S.C. secs. 78m(d)-(e), n(d)-(f) (Supp. V, 1965-69), as amended, 15 U.S.C. secs. 78m(d)-(e), n(d)- (f) (1970)).

[49] *E.g.*, Piper v. Chris-Craft Industries, 430 U.S. 1, 22 (1977); Hoover Co. v. Fuqua Industries, Inc., CCH Fed. Secur. L. Rep. ¶ 97107, 1979 WL 1244, at *3, *4 (N.D. Ohio) (hereinafter "Hoover v. Fuqua").

[50] SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 948 (9th Cir. 1985) (hereinafter "SEC v. Carter Hawley"), citing Piper, 430 U.S. 1, 22.

[51] *Id.* at 948.

These characteristics are now part of a standard tender offer framework, and is reflected in the Philippine Code. It must be emphasized, however, that the focus was on shareholders targeted as sellers, unlike in the Philippines where the focus is on shareholders who are normally unable to sell to the large purchasee. Consequently, the focus of the American protections was on disclosure and the fixing of a reasonable time period for the offer. The goal was to allow each shareholder to make an informed decision to sell, without undue pressure. The American context was the rapid and uncontrolled accumulation of shares where shareholders were tempted with a premium over the market price but were told the offer could be revoked at any time or once the quota was met, or simply given a very brief deadline in which to respond.

The American law did not define a tender offer much like the Philippine Code does not, and this was intentional "in an effort to preserve the flexibility of both the Commission and the courts in making determinations on a case-by-case basis,"[52] and to allow regulators to address future methods whose characteristics were not envisioned by legislators. Further, the Williams Act was "not intended to be restricted to conventional tender offers but rather was meant to encompass all methods of takeover by a large-scale stock purchase program."[53]

The first expansion of the term came when the SEC applied tender offer rules to "special bids," defined as:

> [A] stock market procedure designed to permit the purchase of blocks of securities too large to be readily handled in the regular auction market. A purchaser announces a special bid on the market tape, specifying the number of shares desired and a fixed bid price which is usually "substantially higher" than the concurrent market price. As sell orders are received on the floor, they are executed at once at the bid price, until the entire block has been acquired or the bid has been withdrawn.[54]

This was similar to a conventional tender offer in that a purchaser obtains shares from different shareholders at a premium. There was also pressure on shareholders because the premium would be unavailable once the quota of purchases was met. However, there was no depositary involved and, further, the pressure was arguably different because the transactions took place openly on the exchange.

The first judicial expansion of the term took place in 1972, in the landmark case *Cattlemen's Investment Co. v. Fears*,[55] where a coordinated series of privately negotiated purchases led to a rapid accumulation of Cattlemen's Investing Co. stock, and was considered a tender offer. The court held that although the transactions did not constitute a tender offer in the conventional sense, the dangers addressed by the

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[52] Wellman v. Dickinson, 475 F.Supp. 783, at 825 (S.D.N.Y. 1979) (hereinafter "Wellman v. Dickinson"), citing E.R. ARANOW, H.A. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 1 (1977). See Hoover v. Fuqua, at *3.

[53] Wellman v. Dickinson, at 825, *quoting* Martin Lipton, *Open Market Purchases*, 32 BUS. L. 1321 (1977).

[54] *Developing Meaning of "Tender Offer"*, *supra* note 28, at 1261.

[55] 343 F. Supp. 1248 (W.D. Okla. 1972).

Williams Act were clearly present. First, the purchases were made through mail, telephone, or personal visits, and the direct contact was clearly designed to apply pressure to shareholders. Second, the shareholders had no material decision on which to base a decision.

The American trend has thus been to apply tender offer rules to situations outside the conventional tender offer framework that nevertheless evidenced the problems sought to be remedied by the original legislative intent. Again, however, the American intent was very different.

III. THE BROADENED TENDER OFFER IN AMERICAN JURISPRUDENCE

A. THE BROADER DEFINITION AND THE EIGHT WELLMAN FACTORS

Again, the American law intentionally left the definition of tender offer open, but the United States Senate's working definition was:

> The offer normally consists of a bid by an individual or group to buy shares of a company usually at a price above the 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.[56]

This original definition referred to what is called a conventional tender offer, and is characterized by a conditional bid, a premium price, and a tender by sellers to a depositary.[57]

Given the intentional lack of a statutory definition, the United States SEC proposed an eight-part test in the 1970s that checked for indicia of a tender offer, and this was adopted by the early cases *Hoover Co. v. Fuqua Industries, Inc.*[58] and *Wellman v. Dickinson*.[59] The test was most recently quoted in the 2004 decision *Gorman v. Coogan*,[60] and checks whether:

> 1) Active and widespread solicitation of public shareholders for the shares of an issuer;
>
> 2) Solicitation made for a substantial percentage of the issuer's stock;
>
> 3) Offer to purchase made at a premium over the prevailing market price;
>
> 4) Terms of the offer are firm rather than negotiable;

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[56] Hoover v. Fuqua, at *3, *quoting* 1968 U.S. CODE CONG. & AD. NEWS 2811, 2811. Wellman v. Dickinson, at 821, *quoting* S. Rep. No. 550, 90th Cong., 1st Sess. 2 (1967). The United States House of Representatives at the time used an identical definition. H. Rep. No. 1711, 90th Cong., 2d Sess. 2 (1968).

[57] Wellman v. Dickinson, at 821.

[58] CCH Fed. Secur. L. Rep. ¶ 97107, 1979 WL 1244 (N.D. Ohio).

[59] Wellman v. Dickinson, at 823-24.

[60] 2004 WL 60271 (D.Me.).

5) Offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased;

6) Offer open only for a limited period of time;

7) Offeree subjected to pressure to sell his stock; and

8) Public announcements of a purchasing program concerning the target company precede or accompany rapid accumulation of a large amount of target company's securities.[61]

These are now referred to as the "Wellman factors," and are directly relevant to Philippine practice because the test was formerly partially, but almost verbatim, adopted by the Philippine SEC:

> c. A person will be presumed to be making a voluntary tender offer where some or all of the following factors are present:
>
> i. Active and widespread solicitation of public shareholders for the shares of a public company;
>
> ii. Solicitation made for a substantial percentage of the issuer's stock;
>
> iii. Offer to purchase is made at a premium over the prevailing market price, at firm rather than negotiable terms;
>
> iv. An offer is contingent on the tender of a fixed number of shares; and/or
>
> v. Offer is only open for a limited period of time.[62]

Further, the current definition of tender offer in the Philippine Implementing Rules still refers to a public announcement, or the eighth factor.

It is argued that the difference is explained by the divergence in legislative intent. Again, the regulatory focus in the Philippines was not for the benefit of offerees, but precisely for those to whom the offer was not extended, making concerns regarding pressure on shareholders irrelevant. Eventually, the SEC perhaps realized that the sole focus of the Philippine legislative intent was the size of the transaction, which made the rest of the factors irrelevant as well. The initial adoption and subsequent omission is telling, however, and American developments can be used to contrast the Philippine intent.

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[61] *Id.* at *18, quoting SEC v. Carter Hawley, at 950; Wellman v. Dickinson, at 823-24. See Pin v. Texaco, 793 F.2d 1448, 1454-55 (5th Cir. 1986); 69 AM. JUR. 2d Securities Regulation – Federal, sec. 714 (May 2004). *Wellman* cites *Hoover* as the source of this enumeration. Hoover v. Fuqua, at *4.

[62] This was formerly Rule 19.4(c), which was omitted in the present Implementing Rules.

In any case, the eighth factor regarding publicity, however, was deemed not decisive even in *Wellman* itself, where the well-organized transaction was sought to be kept secret from the general public.[63]

The American SEC did not require the presence of all the factors before applying the tender offer rules, thus applying it as a totality of the circumstances test.[64] *Wellman* stated:

> [T]he list of characteristics stressed by the Commission are the qualities that set a tender offer apart from open market purchases, privately negotiated transactions or other kinds of public solicitations. ... The absence of one particular factor, however, is not necessarily fatal... because depending upon the circumstances involved in the particular case, one or more of the above features may be more compelling and determinative than the others.[65]

1. Second and third Wellman factors: Solicitation for a substantial percentage of the stock at a premium

The second Wellman factor is one of the most important in American law especially if present with a price premium, and despite the revocation of the Implementing Rule on voluntary tender offers, these are still readily implied in Philippine regulation.

Following legislative deliberations and *National Life Insurance*, this second factor alone is decisive, again given the overriding Philippine policy goal of protecting the investments of small shareholders during large stock transactions. In the American cases, it is the key prerequisite since if the transaction does not meet the explicit statutory thresholds similar to the above, it is difficult to justify applying the tender offer rules.[66] *Hoover* articulated that "there would be no tender offer where a substantial portion of the issuer's shares was not involved."[67] *Clearfield Bank & Trust Co. v. Omega Financial Corp.*[68] found that there was a tender offer where 20% of the target's stock was involved, and especially considering a merger agreement provided that an exercise of dissenter's rights by shareholders holding at least 9% would derail the merger.[69]

The third factor is the practical incentive to seek application of the Code's section 19. It is similarly important in American law, being "one of the typical indicia of

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[63] Wellman v. Dickinson, at 822, 825.

[64] E.g. Gerber v. Computer Associates Int'l, Inc., 812 F.Supp. 361, 366 (E.D.N.Y. 1993).

[65] *Id.* at 824, cited in SEC v. Carter Hawley, at 950.

[66] Wellman v. Dickinson, at 821.

[67] Hoover v. Fuqua, at *4 (N.D. Ohio). "Thus, item 2 is a necessary element, but hardly sufficient, to a finding that Fuqua's offer is a tender offer under the Williams Act."

[68] 65 F.Supp.2d 325 (W.D.Penn. 1999).

[69] *Id.* at 339. Other cases that upheld the second factor include Iavarone v. Raymond Keyes Associates, 733 F.Supp. 727, 733 (S.D.N.Y.1990) (hereinafter "Iavarone v. Keyes").

a conventional tender offer."[70] In *Zuckerman v. Frantz*,[71] for example, the price offered was twice the market price during the affected period.[72] *In Re General Motors Class E Stock Buyout* involved an offer price at twice the last market price before the offer,[73] though it found *Wellman* inconclusive because other factors were absent. Many other decisions that found the existence of a tender offer similarly found that a premium had been offered.[74]

From a practical perspective, finally, it is difficult to imagine a suit such as *National Life Insurance* arising if not for the incentive of a premium, unless the stocks concerned are illiquid. Note, however, that the premium must be found by reference to the prevailing market price.[75] This is important if rival bidders or larger arbitrageurs, or even the target company in a defensive action, make purchases before a tender offer expires. *Hanson Trust PLC v. SCM Corp.*[76] was one example where there was a large purchase but no premium, nor any intent to take control. Instead, the buyer was speculated to be trying to block a leveraged buyout by a third company, or inducing the target company to negotiate to buy its holdings.[77]

However, one notes that these two key factors are not so straightforward. The relation of a group of sellers or of buyers, or the relation of separate transactions may not be readily evident. A transaction with a shareholder during a conventional tender offer may amount to a hidden, additional premium not extended to others. To cite a further example, a significant number of tender offers in Japan in the past decade involved not premiums but discounts.[78] More recently, in February 2005, the Philippine company Globe Telecoms made a tender offer close to the prevailing market price to repurchase its own shares,[79] and this was intended to increase share value and investor confidence amidst growth approaching a plateau.

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[70] Wellman v. Dickinson, at 824, *citing* Kennecott Copper Corp. v. Curtis-Wright Corp., 584 F.2d 1195, 1206 (2nd Cir. 1978). "[T]ender offers are typically made at a substantial premium over the market price." Hoover v. Fuqua, at *6.

[71] 573 F.Supp. 351 (S.D. Fla. 1983).

[72] *Id.* at 358.

[73] In Re General Motors Class E Stock Buyout Securities Litigation, 694 F.Supp. 1119, 1130 (D.Del. 1988) (hereinafter "In Re General Motors").

[74] Clearfield Bank & Trust Co. v. Omega Financial Corp., 65 F.Supp.2d 325, 339 (W.D.Penn. 1999) (hereinafter "Clearfied v. Omega"); Iavarone v. Keyes, at 733.

[75] SEC v. Carter Hawley, at 951.

[76] Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 58 (2nd Cir. 1985) (hereinafter "Hanson Trust v. SCM").

[77] *Id.* at 60.

[78] KATSUMASA SUZUKI, *Future Prospects of Takeovers in Japan Analyzed from the View of Share-Ownership Structures and Laws in Comparison with the United States and the European Union*, 42 COLUM. J. TRANSNAT'L L. 777, 781 (2004), *citing* TAKASHI KOZUKA, *Saikin no M&A doko, nihon ni okeru kokai kaitsuke ("Recent M&A Activities, Tender Offer Bid in Japan: Analysis of the Past Cases and Future Developments")*, M&A REV., April 5, 2000, at 6, 13.

[79] SEC Form 17-C filed by Renato Marzan, Globe Telecom Corporate Secretary, Re: Notice of Extension of the Tender Offer Period, February 21, 2005. The offer expired on March 3, 2005.

2. First Wellman factor: Active and widespread solicitation

The first factor seeks solicitation of transactions by the bidder to a number of relatively unrelated shareholders[80] in related transactions forming integral parts of a single large transaction. It must be emphasized that this focuses on the nature of the sellers and solicitation need not be done publicly or openly, and publicity is distinct as the seventh factor. Active and widespread solicitation is an earmark of a conventional tender offer in American law.[81]

Wellman itself spoke of "a well structured, brilliantly conceived, and well executed project."[82] There, the first offer was made on a Saturday, followed by another that Sunday and a third on Monday morning. By Monday afternoon, the price and other terms of the offer had been communicated to various institutional holders of the BD stock sought around the country. The aim was to "secretly and quickly"[83] secure control of one-third of the company.

Hoover found that a solicitation to about one hundred family members is tantamount to a public offering. These Hoover scions were of diverse professions and living in different areas of the country.[84] *Clearfield Bank & Trust* found there was active and widespread solicitation where thirty shareholders were present at a meeting and the offer clearly extended even to those not present, for whom extra copies of documents were provided.[85] *Iavarone v. Raymond Keyes Associates* applied tender offer regulations where an offer was extended to all twenty-five of a company's shareholders, but one lacked information available to the others.[86]

In contrast, *Hollywood Casino Corp. v. Simmons*[87] found no tender offer where one party merely informed several friends that he had formed a group that had been purchasing shares to take over the target company. There was no allegation that actual offers had been made, nor that the defendants were trading on advance knowledge of an offer.[88] *In Re General Motors Class E Stock Buyout*[89] featured a shareholder who initiated the transaction, and where the final sale involved only three other shareholders.[90]

Publicity is a strong indicia of solicitation. *Zuckerman* found that "Tyco's cash merger proposal was well publicized and constituted a widespread solicitation."[91] *SEC v.*

[80] *See* Hill York Corp. v. American International Franchises, Inc., 448 F.2d 680, 688 (5th Cir. 1971).
[81] Hanson Trust v. SCM; Pin v. Texaco, 793 F.2d 1448, 1454 (5th Cir. 1986).
[82] Wellman v. Dickinson, at 820.
[83] *Id.* at 821.
[84] Hoover v. Fuqua, at *2, *5.
[85] Clearfied v. Omega, at 338-39.
[86] Iavarone v. Keyes, at 733-34.
[87] 2002 WL 1610598 (N.D. Tex.).
[88] *Id.* at *4.
[89] *Supra* note 73.
[90] *Id.* at 1130.
[91] Zuckerman v. Frantz, 573 F.Supp. 351, 358 (S.D. Fla. 1983) (hereinafter "Zuckerman v. Frantz").

Carter Hawley Hale Stores, Inc.,[92] however, ruled that there was no active solicitation where a company's repurchase program was announced solely through SEC or stock exchange-mandated public announcements, and there was no direct solicitation from shareholders.[93] "It would be perverse to hold that required disclosure under one rule is a prohibited solicitation under another rule."[94] *Carter Hawley Hale* is distinguished because the purchases here were made on the open market.

The broad base of solicitees, taken with other factors such as a uniform price and a condition that the buyer obtain a certain target percentage of shares, thus conforms to a tender offer. It must be argued, however, that while the presence of the first Wellman factor may support a finding that the transaction is actually a voluntary tender offer, its absence should not be given much weight.

In contrast, this factor is completely irrelevant in the Philippines. This is readily seen in *National Life Insurance*, where there was only one purchaser and only two sellers who were closely related as evidenced by interlocking directors. Again, American regulation would presume that sellers in relatively private transactions do not face undue pressure. Philippine regulation, however, precisely focuses on shareholders not given the opportunity to sell, so such pressure is irrelevant.

The American distinction between public and private transactions

For purposes of comparison, it must be emphasized that *Wellman* made the public or private nature of the transaction discussed a threshold issue, stating that disclosure requirements prior to a tender offer rules were never envisioned to apply to a "privately negotiated transaction" as opposed to an offer to relatively diverse and unrelated buyers.[95] The idea was to avoid disclosing the terms negotiated by the parties prior to the transfer, but inform other shareholders of the change afterwards.[96] The rationale was that in a relatively private negotiation between two individuals or closely-associated groups, the prospective did not require the protections extended to sellers in the high-pressure "Saturday Night specials" that inspired the Williams Act in the first place. "An offering to those who are shown to be able to fend for themselves is a transaction 'not involving any public offering,'"[97] but as the number of potential sellers increases, their access to information may become unequal, and it arguably matters less

[92] 760 F.2d 945 (9th Cir. 1985).

[93] *Id.* at 950.

[94] SEC v. Carter Hawley, at 1253.

[95] This was also established in a number of other early cases. S-G Securities, Inc. v. Fuqua Investments Co., 466 F.Supp. 1114 (D.Mass. 1979); Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195 (2nd Cir. 1978); Financial General Bankshares v. Lance, Fed.Sec.L.Rep. (CCH) ¶ 96,403 (D.D.C. 1978); D-Z Investment Co. v. Holloway Fed.Sec.L.Rep. (CCH) ¶ 94,771 (S.D.N.Y. 1974); Nachman Corp. v. Halfred, Inc., Fed.Sec.L.Rep. (CCH) ¶ 94,455; Water & Wall Associates Inc. v. American Consumers Indus., Inc., Fed.Sec.L.Rep. (CCH) ¶ 93,943 (D.N.J. 1973).

[96] Wellman v. Dickinson, at 817. Senator Williams himself 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 concerning their intentions, their commitments and even their identities."

[97] SEC v. Ralston Purina Co., 346 U.S. 119, 125 (1953).

even if professional finance managers are involved because some may not have information to analyze.[98]

Wellman was in fact seen as a concrete means to broaden initial jurisprudence on tender offers, given the difficulty of distinguishing a public tender offer from a private transaction.[99] The underlying philosophy was "to substitute a philosophy of full disclosure for the philosophy of Caveat emptor and thus to achieve a high standard of business ethics in the securities industry."[100]

Hoover explicitly asked whether the case involved a relatively private offering to a small group of "sophisticated investors,"[101] and stated that there would be no tender offer if the Hoover scions fit this description.[102] However, it found that not all family members, some of whom were as young as seven years old, had their shares in bank trusts. They were of diverse backgrounds, and most had never worked for the Hoover Company. Thus, it held that the offer was not "a private, negotiable offer directed to sophisticated investors"[103] and was hardly different from an offer to the public at large.

Moreover, the offers were eventually accompanied by public announcements.

To show a concrete example, *In Re General Motors* declined to consider whether the transaction involved a substantial portion of the company's stock because it held that there was no active and widespread solicitation in the first place.[104]

3. Fourth Wellman factor: Firm rather than negotiated terms

The fourth factor relates to the first in that it envisions a firm offer of a uniform price to several prospective sellers, with no bargaining allowed. *Hoover* articulated this as an offer where "acceptance... results in a binding contract to sell."[105] Note that it is distinct from the seventh factor involving heavy pressure on the seller, although a prohibition on negotiation coupled with a limited time period for the offer results in such pressure.

This was readily seen in *Wellman* where the price offered was so high that no solicitee negotiated, and this was intentional in order to complete the series of transactions secretly and quickly, before the target company could respond. In its words: "This project was structured so that there would be no individualized negotiations. The

[98] Doran v. Petroleum Management Corp., 545 F.2d 893, 900-02 (5th Cir. 1977).
[99] Hanson Trust v. SCM, at 56.
[100] SEC v. Capital Gains Bureau, Inc., 375 U.S. 180, 186 (1963).
[101] Hoover v. Fuqua, at *5.
[102] *Ibid., citing* Brascan Ltd. v. Edper Equities Ltd., 477 F.Supp. 773 (S.D.N.Y.1979); Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1206 (2nd Cir. 1978).
[103] Hoover v. Fuqua, at *6.
[104] In Re General Motors, at 1130.
[105] Hoover v. Fuqua, at *6.

hope and expectation were that the price would be so attractive that negotiation would be unnecessary."[106]

Wellman, however, was slightly different in that a uniform but two-tiered price was actually offered: USD45, or USD40 with protection from the buyer if shares were later purchased at a higher price.[107] *Hoover* also involved different prices, but this was because the offeror uniformly raised the offer twice. The Court stated, "Just as with a conventional tender offer, Fuqua is publicly feeling its way to the offering terms that will entice the shareholders to tender their stock."[108]

The presence of a firm, uniform offer to various solicitees is straightforward, as seen in *Zuckerman*[109] and *Iavarone*.[110] *Clearford Bank & Trust* featured an agent who was not authorized to modify the terms of the offer, particularly the price.[111] *Carter Hawley Hale Stores*, however, found no tender offer partly because purchases were made on numerous dates at market prices, and therefore not at any fixed price.[112] *In Re General Motors* involved negotiations between the parties' attorneys, though it found *Wellman* inconclusive and decided against a tender offer because the shareholder was apparently well-protected if the transaction was handled by his lawyer.[113] Finally, in contrast, *Hall v. Shaw*[114] did not use the *Wellman* test, and applied tender offer rules to 57 sales at different prices because this "very strongly suggests that there was no reliable information as to the value of the stock."[115]

The history of the Williams Act itself, however, implies that a fixed offer is not decisive as well. Prior to the Act, one way of pressuring shareholders was to make offers on "a first come, first served basis,"[116] then increasing the offer to entice the least hesitant groups, and then repeating this until the target percentage was reached. Obviously, the first to tender was worse-off and shareholders were encouraged to play a waiting game that made some transactions awkward. This was thus one of the first concerns explicitly addressed by initial American regulation, these provisions were incorporated into the Philippine Code:

> Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for whether or not

[106] Wellman v. Dickinson, at 824.
[107] *Id.* at 810.
[108] Hoover v. Fuqua, at 6.
[109] Zuckerman v. Frantz, at 358.
[110] Iavarone v. Keyes, at 733.
[111] Clearfied v. Omega, at 339.
[112] SEC v. Carter Hawley, at 951.
[113] In Re General Motors, at 1130.
[114] Hall v. Shaw, 1999 WL 492581 (Tenn.Ct.App.).
[115] *Id.* at 7.
[116] Wellman v. Dickinson, *citing* Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Comm. on Banking and Currency, 90th Cong., 1st Sess., at 207 (1967).

such securities have been taken up by such person before the variation of the tender offer or request or invitation.[117]

Later American cases applied tender offer rules to "street sweeps" or a series of offers directed at a large number of small shareholders, even if the offer was not uniform or the particular price was not particularly important in the context.

Again, however, because the public or private nature of the transaction is irrelevant to Philippine jurisdiction, the presence or absence of negotiation is also completely irrelevant. This is also readily seen in *National Life Insurance*.

4. Fifth Wellman factor: Offer contingent on the tender of a fixed or a ceiling number of shares

The fifth factor, from the conventional definition, is "another characteristic of a typical tender offer."[118] In *Wellman*, the offers made to various shareholders were explicitly conditioned on the bidder obtaining 20% of the shares.[119] This was, incidentally, part of the pressure as offerees were told, "that the desired 20% Goal was within reach or that the order was filling up fast and a hurried response was essential."[120] Similarly, in *Hoover*, there was a quota of three million shares accompanied by time periods of several days, announced publicly.[121]

The ceiling need not be fixed. *Zuckerman*, for example, found a tender offer where the bid was contingent on approval by a majority of shareholders.[122] In *Clearfield Bank & Trust*, the offer was contingent on obtaining enough dissenting shareholder votes to "kill" a pending deal and on the target instead of merging with the purchaser.[123] In *In Re General Motors*, the offer was simply for all the shares held by one particular shareholder.[124] In *Iavarone*, the offer was for practically all the corporation's shares.[125] *Carter Hawley Hale Stores*, however, found no tender offer partly because although a target of fifteen million shares had been announced, purchases were actually made at market prices and not contingent on receiving a threshold number of offers to sell.[126]

On the other side of policy goals, while tender offer regulations allow a bidder to decline to purchase should his stated quota be unmet, they also generally allow the bidder to decline to purchase shares beyond the stated quota, in order to prevent such block purchases from becoming unduly expensive in that an offeror would be forced by

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[117] SEC. REG. CODE, sec. 19.1(e).
[118] Wellman v. Dickinson, at 824, *citing* Kennecott Copper Corp. v. Curtis-Wright Corp., 584 F.2d 1195, 1206 (2nd Cir. 1978); Smallwood v. Pearl Brewing Co., 489 F.2d 579, 597 n.22 (5th Cir.).
[119] Wellman, v. Dickinson, at 810.
[120] *Ibid.*
[121] Hoover v. Fuqua, at 6.
[122] Zuckerman v. Frantz, at 358.
[123] Clearfied v. Omega, at 339.
[124] In Re General Motors, at 1130.
[125] Iavarone v. Keyes, at 733.
[126] SEC v. Carter Hawley, at 951.

law to possibly purchase 100% of shares when he only desires 51%. If the target is exceeded, the purchases are made *pro rata* depending on the number of shares each shareholder tendered:

> Where the securities offered exceed that which a person or group of persons is bound or willing to take up and pay for, the securities that are subject of the tender offer shall be taken up as nearly as may be *pro rata,* disregarding fractions, according to the number of securities deposited by each depositor.[127]

One infers, however, that the presence of the fifth Wellman factor may indicate a tender offer, but its absence is again not decisive so long as the legal threshold is reached. The same is indubitable in Philippine regulation, and it is possible to have a tender offer without a real quota, as most recently exemplified by Globe Telecoms' repurchase offer that expired in March 2005. However, one wonders how the practical problems are solved, judging from *National Life Insurance.* The practical problems would appear to be more problematic in the Philippines where a transaction involving only one shareholder may result in an order for a mandatory tender offer, even after the original transaction is consummated. Possibly, the purchasee might be allowed to simulate a tender of the shares already purchased to himself, for the purpose of computing purchases *pro rata* from other shareholders. He would be unable to return the pro rata excess of shares purchased in the original transaction, however, as in *National Life Insurance*, and would end up spending more than intended. This poses another problem, especially when the purchasee cannot afford to spend for the additional shares.

5. Sixth and Seventh Wellman factors: Limited period of time and pressure to sell

The sixth and seventh factors readily follow from the original American intent to force bidders to give prospective sellers sufficient time and information to make a decision. In fact, *Hoover* stated that "as the facts presented approach the conventional tender offer, the Court believes it is appropriate to defer to the Congress' feeling that investors are pressured under the circumstances, and to find that there is a tender offer."[128]

Wellman featured an organized solicitation where shareholders received calls and told that responses were coming quickly, implying that the 20% quota would be met soon. The buyer was unidentified but shareholders were told it was "in the top 50 of Fortune's 500."[129] Some were given until the following day to decide to sell, most as little as half an hour to an hour.

In *Hoover*, offerees were given several days for each offer, and the offer price was increased twice and several press releases were made.[130] In *Zuckerman*, a deadline

[127] SEC. REG. CODE, sec. 19.1(d).
[128] Hoover v. Fuqua, at *7.
[129] Wellman v. Dickinson, at 820.
[130] Hoover v. Fuqua, at *2.

was set in connection with voting on a merger proposal,[131] and other cases involved similar deadlines relating to corporate agreements.[132] By contrast, although *Clearfield Bank & Trust* also held a tender offer existed, it noted there was no pressure in the situation because the effective deadline gave shareholders more than a month, and there was no evidence of any pressure outside normal market forces.[133] *In Re General Motors* found that there was no limited time period nor undue pressure to sell. Taken with the fact that the transaction was negotiated by the parties' lawyers, it found that the shareholder did not need the protection of tender offer rules.[134]

Carter Hawley Hale Stores is interesting in that the target company announced a repurchase program with a target of fifteen million shares that would remain open until a tender offer that was part of an attempted takeover expired. The company reacquired more than half of its outstanding shares this way in only seven trading days. The Ninth Circuit, however, ruled that this was not a time limit imposed by the company, but rather by "ordinary market forces."[135] Further, although the repurchases were announced publicly, these were all done on the open market so there could not have been any pressure on shareholders other than ordinary market pressure.[136]

Again these factors heavily emphasized in the American experience are irrelevant in Philippine regulation. As a practical matter, legislators felt that holdings in the Philippines are more concentrated, making rapid accumulation through direct solicitation from small shareholders unlikely. On the other hand, it is more difficult to apply the kind of pressure envisioned by these factors to large and institutional shareholders.

6. Eighth Wellman factor: Publicity

As already stated, the eighth factor is explicitly deemed not decisive, although the Williams Act initially aimed to regulate secret, private changes of corporate control. *Zuckerman* presented one example of the accumulation envisioned.[137] *Carter Hawley Hale* found no rapid accumulation accompanied by a public announcement because the over 50% of outstanding stock was purchased over seven trading days.[138]

The issue with respect to Philippine regulation is why the SEC definition retains publicity as a characteristic. In fact, it contradicts the idea that Philippine regulation does not consider the public and private transaction distinction in American jurisprudence. The Philippine concept of tender offer must be construed more broadly

[131] Zuckerman v. Frantz, at 358.
[132] Iavarone v. Keyes, at 733.
[133] Clearfied v. Omega, at 339-40.
[134] In Re General Motors, at 1130.
[135] SEC v. Carter Hawley, at 951.
[136] *Id.* at 952, *citing* Panter v. Marshall Field & Co., 646 F.2d 271, 286 (7th Cir.); Brascan Ltd. v. Edper Equities Ltd., 477 F.Supp. 773, 789-92 (S.D.N.Y.1979); Kennecott Copper Corp. v. Curtis-Wright Corp., 584 F.2d 1195, 1207 (2nd Cir. 1978).
[137] Zuckerman v. Frantz, at 358.
[138] SEC v. Carter Hawlcy, at 1255.

to cover more secretive transactions, although one notes that the definition focuses on public corporations and that other disclosure requirements in the Code must be considered.

B. ALTERNATIVE TEST: HANSON TRUST

Wellman and the other 1979 tender offer cases were mere district court opinions, although they were upheld in circuit opinions several years later. The American Second Circuit, however, refused to elevate the *Wellman* framework into a "mandatory litmus test," arguing: "[A] solicitation may constitute a tender offer even though some of the eight factors are absent or, when many factors are present, the solicitation may nevertheless not amount to a tender offer because the missing factors outweigh those present."[139]

Some later opinions echoed this. *Clearfield Bank & Trust*, for example, expressed difficulty in applying *Wellman*, which resulted in "loosely guided discretion."[140] *Clearfield* expressed that this was only realistic, even drawing a parallel to obscenity in that tender offers "cannot be defined but is immediately identified when seen."[141]

Hanson Trust PLC v. SCM Corp.[142] assumed a broader test, continuing a rationale upheld in earlier decisions.[143] *Hanson* reasoned that because tender offer regulations were enacted to protect solicitees:

> [T]he question of whether a solicitation constitutes a "tender offer" ... turns on whether, viewing the transaction in the light of the totality of circumstances, there appears to be a likelihood that unless the pre-acquisition filing strictures of that statute are followed there will be a substantial risk that solicitees will lack information needed to make a carefully considered appraisal of the proposal put before them.[144]

A later case proposed one application, that nonapplication of tender offer disclosure rules "must be premised on all shareholders being sufficiently 'inside' the corporation to make disclosure requirements superfluous."[145]

Hanson itself dealt with an accumulation of 25% of SCM Corp.'s stock, purchased from five shareholders in private and from a sixth on the open market. Hanson Trust had initially extended a tender offer, but terminated this and ordered tendered stocks returned because SCM had activated a "poison pill" where its most profitable businesses would be sold to another company. *Hanson* ruled that these

[139] Hanson Trust v. SCM, at 57.

[140] Clearfield v. Omega, at 340.

[141] *Ibid.*, *citing* Jacobellis v. Ohio, 378 U.S. 184 (1964) (Stewart, J., *concurring*).

[142] Hanson Trust v. SCM, at 56.

[143] SEC v. Ralston Purina Co., 346 U.S. 119 (1953); Kennecott Copper Corp. v. Curtis-Wright Corp., 584 F.2d 1195, 1206 (2nd Cir. 1978).

[144] Hanson Trust v. SCM, *supra* at 57.

[145] Iavarone v. Keyes, at 733, *quoted in* Hall v. Shaw, 1999 WL 492581, at *6 (Tenn.Ct.App.).

purchases made after the original tender offer was terminated were not designed to seek control of SCM, but perhaps to block a leveraged buyout by another company or to induce SCM to negotiate with Hanson Trust to purchase the large block.[146]

Applying the above rationale, the court held that these later transactions could not be defined as a tender offer because:

> 1) the transactions involved only six out of 22,600 SCM shareholders;
>
> 2) at least five were "highly sophisticated professionals"[147] who were aware of general market conditions and the implications of the accumulation on SCM, and even had a detailed disclosure due to the tender offer of another group;
>
> 3) the sellers were not pressured except by market forces given the existence of another tender offer, and one sale was even initiated by the shareholder;
>
> 4) there was no widespread advance publicity or public solicitation;
>
> 5) the price was at best 1.4% higher than the market price, and there was a tender offer by another group at a slightly higher price;
>
> 6) none of the transactions were contingent on the buyer obtaining a certain percentage of SCM shares, and the projected ceiling was just a speculation of arbitrageurs;
>
> 7) there was no time limit set by the buyer for transactions.[148]

Hanson's discussion may be criticized for being parallel to the *Wellman* factors it rejected, though its emphasis was that these should simply not be made mandatory indicators without rejecting them outright. *Clearfield Bank & Trust* found *Hanson* "more tautology than test" and noted it found the *Wellman* factors "relevant" in any case.[149] Nevertheless, *Clearfield* supplemented the *Wellman* analysis with a weighing of how material misrepresentations made during transactions were, and found there was a need to apply tender offer rules. This was also seen in *In Re General Motors*, which found *Wellman* inconclusive, but decided against a tender offer because the court felt the shareholder was amply protected since there was no evidence of a limited time period or undue pressure to sell, and the transaction was negotiated by the parties' lawyers. The result may be deemed an emphasis on the first, fifth, and sixth *Wellman* factors as applied in American law.[150]

A more recent case, *Hall v. Shaw*,[151] is a more straightforward example of the *Hanson* rationale. It ruled:

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[146] *Id.* at 60.
[147] *Id.* at 57.
[148] *Id.* at 57-58.
[149] Clearfied v. Omega, at 338; Iavarone v. Keyes, at 733.
[150] In Re General Motors, at 1130-31.
[151] Hall v. Shaw, 1999 WL 492581 (Tenn.Ct.App.).

> There is no evidence that the 57 people who were solicited by Shaw were sophisticated or that they were insiders or that they had access to any information regarding the financial affairs or condition of the company. The fact that the price varied so markedly with respect to the 57 persons who sold to Shaw very strongly suggests that there was no reliable information as to the value of the stock.[152]

Iavarone v. Raymond Keyes Associates used the *Wellman* factors, but applied the *Hanson* rationale afterwards to justify applying tender offer rules to a small company with only twenty-five shareholders. Peculiarly, the plaintiff in the case was the only shareholder in the transactions found to lack information available to others, "but it should not prevent him from benefiting from a statutory scheme whose object is to minimize uninformed decision-making by corporate shareholders."[153]

Applying the *Hanson* rationale in the Philippines, however, may not be done because of the very different legislative focus. *Hanson's* discussion, in fact, was explicit in its primary concern regarding disclosure to investors, and it found that there had been sufficient disclosure in the case before it. Because the primary consideration in the Philippines is the distribution of a control premium to benefit small shareholders, *Hanson's* rationale might be reformulated to reflect this. The result is an emphasis that matches *National Life Insurance* and the legislative deliberations, and would apply tender offer rules to any purchase excluding only open market transactions and the narrow exceptions specified in the rules.

C. SECOND ALTERNATIVE TEST: S-G SECURITIES

S-G Securities, Inc. v. Fuqua Investment Co.[154] provided an alternate framework that focused roughly on two particular *Wellman* factors. It held that there is a tender offer when:

> 1) a publicly announced intention by the purchaser to acquire a substantial block of the stock of the target company for purposes of acquiring control thereof, and
> 2) a subsequent rapid acquisition by the purchaser of large blocks of stock through open market and privately negotiated purchases....[155]

"The *S-G Securities* formulation was designed to detect atypical tender offers that pose the same potential dangers"[156] that tender offer rules were designed to alleviate.

In *S-G Securities*, three widely-publicized press releases contained details of Fuqua Investment Co.'s plan to purchase at least 20% of S-G's stock and acquire control. This came after S-G's Board of Directors rejected Fuqua's initial offers, and the

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152 *Id.* at *7.
153 Iavarone v. Keyes, at 734.
154 466 F.Supp. 1114 (D.Mass. 1979).
155 *Id.* at 1126-27.
156 Gorman v. Coogan, 2004 WL 60271, at *19 (D.Me.), *citing* S-G Securities, 466 F.Supp. at 1124.

market price of S-G stock rose after these announcements. *S-G Securities* reasoned that this kind of publicity followed by rapid acquisitions pressured shareholders to sell and was precisely the kind of situation tender offer disclosure requirements and other regulations were designed to address.[157]

The *S-G Securities* framework may be criticized as readily absorbed in the very flexible *Wellman* framework. Further, its emphases may be criticized as overly narrow. *Wellman* already explained why publicity may be an indicator but hardly an essential one, since, for example, secret negotiations may be tender offers in American law. Further, although the control premium is implied in transactions that would result in a change of control, not all sales of large blocks would result in this.

This was recently seen in *Gorman v. Coogan*. In the context of alleged self-dealing by a director, "the well-pleaded facts fail to disclose that Coogan preceded his open-market and privately negotiated purchases with a publicly announced intention to acquire a substantial block of stock in the target company."[158] Applying *Wellman*, the court found that there was active and widespread solicitation, a set offer price, pressure to sell on offerees, and rapid accumulation of stock sufficient to establish a majority position. However, the court declined to apply tender offer rules because other *Wellman* factors it deemed more crucial, namely a price premium and pressure caused by a deadline, were absent.[159]

The test has either been rejected outright, or discussed secondary to *Wellman*. *Carter Hawley Hale*, for example, refused to apply it because it was "vague and difficult to apply," and offers little guidance to buyers because it "is largely subjective and made in hindsight based on an *ex post facto* evaluation of the response in the marketplace."[160]

This last test is not very relevant to the Philippines, much like most of the *Wellman* factors. For example, Philippine regulation can require a mandatory tender offer even if there is only one seller, and the idea of rapid accumulation is inapplicable in such a case. Reformulating the test to reflect the divergent Philippine legislative intent would result in the modified *Hanson* formulation discussed above.

CONCLUSION

National Life Insurance is the first case of its kind, making it a *Marbury v. Madison*[161] of Philippine securities regulation. Quite like Chief Justice John Marshall in *Marbury*, the SEC had barely any legal basis on which to build such a landmark decision. When one considers the limitations, however, one concludes that *National Life Insurance*

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157 S-G Securities, 466 F.Supp. at 1126.

158 Gorman v. Coogan, *supra* at *19.

159 *Ibid.*, citing SEC v. Carter Hawley, at 952.

160 SEC v. Carter Hawley, at 953. This comment is also cited in 69 AM. JUR. 2d Securities Regulation – Federal, sec. 715 (May 2004).

161 "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

acquitted itself admirably, and resulted in a broad holding that will dictate the application of the Securities Regulation Code in the years to come, and has given effect to the very soul of this new law.

The Code's self-professed goal is the democratization of wealth, and Senator Raul Roco took pains to specify that every provision in the Code must be applied with this goal in mind. He also specified that the tender offer provisions in particular were intended to take a new direction. These rules go beyond the disclosures generally envisioned in the Code, and mandate a more specific distribution of premiums normally available only to large shareholders, particularly those with controlling blocks. One concludes that the Philippine tender offer rules were meant to be applied with great flexibility to any kind of transaction that meets the specified thresholds, the litmus test being whether another shareholder was not given the opportunity to sell extended to the prospective sellers in a large transaction. This was readily seen in the indirect acquisition in *National Life Insurance*.

Beyond the legal sources cited in *National Life Insurance*, a more comprehensive examination of the Senate interpellations and the Bicameral Committee meetings reveal even stronger legislative history to support the SEC decision. Beyond this, one turns to American jurisprudence and discovers that the Philippine legislative intent is clearly very different despite the similarities in the two jurisdictions' laws. This is evidenced not only by the clear declaration of policy in the Code, but by the removal of an old Implementing Rule that partly mirrored the main American jurisprudential test. Nevertheless, the American methodology is readily applicable to Philippine regulation, and this methodology envisions a very flexible approach that will apply the tender offer rules whenever the legislative intent calls for it. This is roughly a parallel of the *Hanson* framework adapted to the Philippine legislative intent.

Having considered the dearth of precedent or clear statutory rules available to the SEC, perhaps *National Life Insurance* is more properly criticized for being unable to articulate its holding such that the practical problems created by ordering Cemco to make a belated tender offer are addressed. First, it should have been made clear to whom the new tender offer was directed. This becomes all the more relevant since the appeal has suspended the enforcement of the SEC order. Relief to the original shareholders will likely be too late after the Court of Appeals case is resolved.

Second, *National Life Insurance* essentially characterized the indirect acquisition as a fraudulent transaction, but a more precise articulation could have been made. For example, did the SEC merely set aside UCHC's corporate personality in that instance in order to prevent fraud, given the facts, especially UCHC's lack of other assets? This would be very relevant in case of an acquisition of a corporation with real assets that incidentally owns a controlling block in another corporation. If it could be shown that the acquisition of that corporation was not to obtain indirect control of another, would the tender offer rules nevertheless be applied as well? *National Life Insurance* also failed to address how the ceiling and pro rata purchase would be applied in the belated tender offer, considering Cemco already cannot refund excess shares to itself and does not have the funds to make more purchases.

The single factor that determines whether Philippine tender offer rules must be applied to a transaction does present many other potential practical difficulties, and even the *Wellman* factors that are not directly relevant may offer insight. For example, what happens in a sale of the controlling block of a corporation that is losing money such that the administrative costs in making a tender offer even exceed the value of the shares? The sale might be to a white knight, or merely to dispose of the shares and relieve the parent corporation of a financial burden. Although *National Life Insurance* established a respectable mindset for the future, clearer guidelines still need to be articulated either through administrative rules or future adjudication.

Nevertheless, the landmark nature of *National Life Insurance* should not be downplayed, and it is especially hoped that it is upheld by the Court of Appeals and the Supreme Court. It would be a fitting tribute to the legislative initiative in the Securities Regulation Code if what is at heart a commercial law is upheld as a great step in achieving the Constitutionally envisioned social justice, and the more holistic democracy Senator Roco described.

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