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February 7, 2006

*Via e-mail*

Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

**Re: Proposed Amendments to the Tender Offer Best Price Rule  
(File No. S-7-11-05)**

Ladies and Gentlemen:

We appreciate the opportunity to respond to the request of the Securities and Exchange Commission (the "Commission") for comments regarding the Commission's proposal to amend the tender offer best-price rule (the "Proposed Amendments"). The Proposed Amendments to Rule 14d-10 and Rule 13e-4 under the Exchange Act provide that certain compensatory and severance arrangements entered into with directors, officers and employees in connection with a tender offer will not be captured under the best-price rule. In the proposing release the Commission states that the purpose of the Proposed Amendments is to resolve the uncertainty generated by conflicting court decisions regarding the treatment of compensation and severance arrangements under the best-price rule and to remove any unwarranted incentive to structure transactions as statutory mergers instead of tender offers.

We support the Commission's efforts to clarify the best-price rule. Based on our experience and on feedback from our clients, we believe that the uncertainty as to the treatment of compensation and severance arrangements under the best price has led buyers to disfavor tender offers in certain cases as a method of structuring a negotiated acquisition of a public company. We believe that buyers will be much more likely to view tender offers as a viable alternative to statutory mergers if the Proposed Amendments are adopted.

We also think that the Proposed Amendments can be improved in several respects. In particular, we think:

- the exemption for compensation and severance arrangements that meet certain criteria and the safe harbor for arrangements that are approved by an independent compensation committee that apply to third-party tender offers should also apply to issuer tender offers under Rule 13e-4, and

[09901-0001/SB060170.139]

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- the proposed compensation committee safe harbor should only require the approval of the compensation committee of the target company, even if the target company is not a party to the compensation or severance arrangement, except in the case of hostile tender offers.

**1. The exemption and compensation committee safe harbor should apply to issuer tender offers under Rule 13e-4.**

The Proposed Amendments include an exemption set forth in proposed Rule 14d-10(c)(2) for compensation arrangements that meet certain criteria and a safe harbor set forth in proposed Rule 14d-10(c)(3) for arrangements that are approved by a compensation committee of independent directors. The proposed exemption and safe harbor apply only to third party tender offers. In its proposing release, the Commission states that it did not propose to extend the exemption and safe harbor to issuer tender offers because the Commission believes that issuers generally do not have the same need to negotiate, execute or amend compensatory arrangements when they structure and commence tender offers.

We believe that issuers do have this need, however, when they engage in issuer tender offers that are part of a going private transaction. Going private transactions are sometimes structured as a two-step process, with the first step being an issuer tender offer in which certain insiders do not tender their shares and with the second step being a merger or reverse stock split in which non-tendering stockholders who are not members of the buyout group are cashed out. As with third-party tender offers, such transactions will often involve implementing new compensation or severance arrangements with officers and key employees. Participants in these types of transactions have the same concerns with respect to the uncertainty surrounding the best-price rule as do participants in a third-party tender offer.

We do not believe that extending the exemption and safe harbor to issuer tender offers would have an adverse impact on investor protection, since we believe investors will be adequately protected by the extensive disclosure rules required by Rule 13e-3 and by the state law fiduciary duty requirements applicable to going private transactions.

**2. The compensation committee safe harbor should only require approval of the target company's compensation committee, except in the case of a hostile tender offer.**

We support the Commission's proposal to provide increased certainty that compensation and severance arrangements will not violate the best-price rule by creating the compensation committee safe harbor set forth in Rule 14d-10(c)(3). That rule as currently proposed provides that the compensation committee of the entity that is a party to the arrangement must approve the arrangement. It also provides that the compensation or similar committee approving the arrangement must be composed solely of independent directors, as defined by the listing standards of the various national securities exchanges.

We think as a practical matter it will be difficult for many private company buyers and private equity funds to take advantage of this safe harbor, in cases where the bidder and not the target company is a party to the arrangement, because many of these potential bidders do not have a sufficient number of directors who would be considered independent under the listing standards of the national securities exchanges. Moreover, we do not think that approval of compensation arrangements by a committee of the bidder's directors, even if it is composed of independent directors, will further the objectives of the best-price rule. The best-price rule was adopted to prevent discriminatory tender offers. As the proposing release recognizes, the bidder's board does not owe fiduciary duties to the target's shareholders. We believe the body that has the most incentive to scrutinize compensation and severance arrangements and to determine whether they are legitimate is the independent compensation committee of the target company.

A drawback to this approach is that hostile tender offers would be adversely affected, since it is not realistic to suppose that a target company's compensation committee would approve an arrangement involving a hostile bidder. As a result, we would propose that in situations where the target company has not affirmatively recommended that its stockholders tender in the tender offer, a bidder may take advantage of the safe harbor if the arrangement is approved by the bidder's independent compensation committee, in the case of listed issuers, or by the bidder's board of directors or similar governing body, in the case of non-listed issuers.

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We hope that the Commission will find these comments helpful, and we would be pleased to discuss our views with members of the staff of the Commission at their convenience. We ask the questions be directed to Evelyn Cruz Sroufe at (206) 359-8502, Andrew Bor at (206) 359-8577 or S. Paul Sassalos at (206) 359-8890.

Very truly yours,



Perkins Coie LLP