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Business Law Section
Committee on Securities Regulation

February 24, 2006

Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-9303

E-mail address: rule-comments@sec.gov

Attention: Nancy M. Morris, Secretary

Re: File No. S7-11-05
Best Price Rule Amendments
Release Nos. 34-52968; 1C-27193

Ladies and Gentlemen:

The Committee on Securities Regulation (the "Committee") of the Business Law Section of the New York State Bar Association appreciates the invitation in Release No. 34-52968 (the "Release") to comment on the proposed amendments to the best-price rule.

The Committee is composed of members of the New York Bar, a principal part of whose practice is in securities regulation. The Committee includes lawyers in private practice and in corporation law departments. A draft of this letter was reviewed by certain members of the Committee, and the views expressed in this letter are generally consistent with those of the majority of members who reviewed and commented on the letter in draft form. The views set forth in this letter, however, are those of the Committee and do not necessarily reflect the views of the organizations with which its members are associated, the New York State Bar Association, or its Business Law Section.

GENERAL

We commend the Commission for responding to the issues raised in several court cases when special compensation arrangements with executives of target companies in a tender offer were added to the price paid for the securities held by those executives and tendered in the tender offer with the result that the stated tender offer price for other investors was not the "best-price" under Securities Exchange Act Rule 14d-10. We support adoption of the rule proposals. However, we urge the Commission to consider the comments set forth below and revise the

proposals accordingly in order to provide greater certainty for parties considering tender offers and thereby increase the utility of the proposal.

COMMENTS

A. The Express Exemption and Safe Harbor Provisions Should Apply to Compensation for Commercial Arrangements.

The Commission's proposal would clarify that the tender offer best-price rule applies only to the consideration offered and paid for securities tendered in a tender offer, by an issuer or a third party and, in the case of third party tender offers, provides an express exemption and a safe harbor for consideration paid under employment compensation, severance or other employee benefit arrangements with employees or directors of the subject company. However, the Commission stated that its exemption and safe harbor rule proposal would not apply to compensation in connection with commercial agreements, but asked for comments on expanding proposals to cover any commercial arrangement where the party received an economic benefit beyond the price paid for the securities. We urge the Commission to expand the benefit of the express exemption and safe harbor rule proposals to include compensation paid to any third parties (not limited to employees and directors) under any commercial arrangements (not limited to employee or director compensation arrangements) with the subject of the tender offer.

Because the proposal clarifies that the best-price rule does not apply to arrangements in addition to employee benefit arrangements and arrangements with employees and directors, we see no reason to limit the express exemption and safe harbor to employees or directors or to employee benefit arrangements. Limiting the express exemption and safe harbor as the Commission has proposed would be counterproductive and might, as a practical matter, render the proposals ineffective to achieve the Commission's purposes.

B. The Rule should provide a De Minimis Carve Out for Shareholders holding less than some Specified Minimal Amount of Shares.

The Commission inquired whether it would be appropriate to carve out of the application of Rule 14d-10 to employment compensation, severance or other employee benefit arrangements with an employee or director who, together with affiliates, beneficially owns less than a nominal threshold amount. We urge the Commission to follow this approach. Any threshold should be applicable to third parties in addition to employees and directors, consistent with the comment in item A above. In addition, it appears that the 1% threshold could be increased consistent with the public interest to 3% of the stock.

C. The Exemption and Safe Harbor should Cover Arrangements entered into during the Tender Period.

The Commission should expressly state that the exemption and safe harbor are applicable to agreements and arrangements whenever entered into, to make clear that the exemption and safe harbor would apply to arrangements entered into during the tender offer period.

D. Approval by the Board of Directors including a Majority of Independent Directors should be Sufficient to establish the Safe Harbor.

We support the proposal for a safe harbor in the case of approval by a Compensation Committee or other committee of the board of directors, consisting of independent directors. The approval required for the safe harbor should be expanded to include approval by the board of directors including a majority in number of independent directors, in addition to the Compensation Committee or similar board committee.

E. The Exemption and Safe Harbor should apply to Issuer Tender Offers as well as third Party Tender Offers.

The issuer tender offer rules should be amended to provide similar exemption and safe harbor protection (modified as recommended above) in the case of issuer tender offers. Without the protections being proposed for third party tender offers, these means of accomplishing the same economic results would be foreclosed by the lack of uncertainty.

F. Independent Contractors should be included with Employees if the Commission does not adopt the Comments in Item A, above.

Independent contractors should be included with employees if, notwithstanding our comments in Item A, above, the Commission does not apply the exemption and safe harbor to all commercial arrangements and with any persons.

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We hope the Commission finds these comments helpful. We would be happy to discuss these comments further with the Staff.

Respectfully submitted,

COMMITTEE ON SECURITIES REGULATION

By _____
MICHAEL J. HOLLIDAY
CHAIR OF THE COMMITTEE

Securities and Exchange Commission

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Drafting Committee

Morris N. Simkin

cc: The Honorable Christopher Cox, Chairman
The Honorable Paul S. Atkins, Commissioner
The Honorable Roel C. Campos, Commissioner
The Honorable Cynthia A. Glassman, Commissioner
The Honorable Annette L. Nazareth, Commissioner