Intel Corporation
2200 Mission College Blvd.
P. O. Box 58119
Santa Clara, CA 95054
(408) 765-8080

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Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-9303
C/o rule-comments@sec.gov
Attn: Nancy M. Morris, Secretary

Re: Proposed Amendments To The Tender Offer Best-Price Rule
File No. S7-11-05
Release Nos. 34-52968; IC-27193

Dear Mr. Katz:

Intel Corporation is pleased to submit this comment letter setting forth comments on Release Nos. 34-52968 and IC-27193 (the "Release") of the Securities and Exchange Commission (the "Commission"). This Release concerns proposals to clarify that the tender offer best-price rule applies only with respect to the consideration offered and paid for securities tendered, and does not apply to consideration offered and paid pursuant to other business arrangements. Specifically, the Release would: (i) exempt certain compensation, severance and other employee benefit arrangements from the application of the rule; and (ii) establish a safe harbor for such arrangements if approved by a compensation committee (or a committee performing similar functions) of the acquiring or target company (whichever is the party to the arrangements) comprised solely of independent directors.

Executive Summary

Intel strongly supports the Commission's efforts to eliminate some of the uncertainty surrounding the application of the best-price rule that has led acquirers to prefer statutory mergers over tender offers when structuring business combinations. We believe the adoption of revised rules is likely to alleviate some of the litigation risk associated with tender offers by resolving the uncertainty generated by the split in court interpretations of the rule.

We believe, however, that the differences in regulatory requirements between tender offers and other transaction structures, and the risk of litigation in effecting tender offers, could be further reduced without compromising the objectives of the Williams Act and the best-price rule. Towards that end, we suggest the that the proposed rule revisions be modified in the following three ways:

1. expand the scope of the proposed exemption to expressly include commercial arrangements with directors, employees and third parties;

2. revise the proposed safe harbor so that it is available for arrangements that are approved by a committee of independent directors of the acquirer, regardless of whether such arrangement is with the acquirer or the target; and

3. extend the application of the exemption and safe harbor to issuer tender offers.

Discussion and Analysis

1. Expand the Scope of the Exemption to Include Commercial Arrangements

We believe that the exemption to the best-price rule should be expanded to include commercial arrangements with employees, directors and third parties, in addition to employment compensation, severance or other compensatory benefit arrangements with employees or directors.

The revisions proposed in the Release will clarify that the best-price rule was not intended to apply to all payments made to persons who happen to be security holders of a subject company, but rather only applies to payments made as compensation for the securities tendered in the tender offer. The Release acknowledges that employment-related and commercial arrangements that are not based on the number of securities that the security holder owns or tenders should not be considered when calculating the price paid for securities tendered in the tender offer. The Release, however, then goes on to create a clear exemption for employment-related arrangements, but no correspondingly clear exemption for commercial arrangements. The Release notes that the absence of any particular type of arrangement, including commercial arrangements, from the language of the exemption is not intended to raise any inference that such an arrangement constitutes consideration paid for securities tendered in a tender offer. We believe, however, that the absence of an express exemption for commercial arrangements will perpetuate an undesirable level of unnecessary uncertainty in connection with tender offers, leading in many cases to continued structuring of statutory merger transactions in lieu of tender offers and undermining the objectives of the proposed rule revisions .

It is not at all uncommon that certain of the stockholders of a public company may also have business arrangements with the company, such as technology licenses, manufacturing or supply agreements, sales contracts and the like. When the company is the target of an acquisition, the acquirer will naturally want, in many cases, to ensure that these commercial arrangements will remain in place following the acquisition, perhaps on the exact same terms or perhaps with modifications. It is also possible that the acquirer will want to terminate certain of such commercial arrangements following the acquisition, for example, if the other party to the arrangement is a competitor of the acquirer or the acquirer already has an alternate and preferred source of supply. In any of these circumstances, it may be desirable for the acquirer to negotiate in advance with the other party to the commercial arrangement to confirm that an acceptable agreement can be reached and the acquisition transaction is viable, prior to proceeding with either a tender offer or a proxy solicitation for stockholder approval to do a statutory merger. The consideration negotiated in connection with these types of arms' length agreements is

normally entirely separated from the compensation to be paid for the securities held by the other party to the arrangement.

To eliminate uncertainty, the rule revisions should include an express exemption stating that consideration paid pursuant to commercial arrangements that are not based on the number of securities that the security holder owns or tenders should not be considered when calculating the price paid for securities for purposes of the best-price rule. The Commission has also sought input on whether specific examples of employment compensation arrangements that are within the proposed exemption should be included in the rule or in an accompanying instruction. We do not believe that examples of types of employment-related or commercial arrangements, or factors to be considered in evaluating such arrangements, should be included in the text of the exemption or in an accompanying instruction. Any such list, even if expressly non-exclusive, would inevitably cause acquirers and targets to seek to use transaction structures other than a tender offer when arrangements not appearing on the list or not clearly fitting within the specified factors were involved, due to the uncertain application of the exemption and the opportunity for litigants to challenge any arrangements not specifically listed.

2. Revise the Proposed Safe Harbor So That It Is Available for Arrangements Approved by a Committee of Independent Directors of the Acquirer

The proposed rules include a safe harbor for employment-related arrangements that are approved by a committee of independent directors of the target or the acquirer, whichever is the party to the particular arrangement. We believe that the proposed safe harbor should be revised to encompass both commercial and employment-related arrangements that are approved by a committee of independent directors of the *acquirer,* whether the particular arrangement is entered into by the acquirer or the target.

We believe that the acquirer has the greatest incentive to review these arrangements critically and to determine whether they fall within the scope of the exemption. Both the target's directors and the acquirer's directors owe fiduciary duties to their respective stockholders. If, however, the consideration paid under an arrangement is later judged to fall outside the scope of the exemption and is then considered to be a payment for securities tendered pursuant to the tender offer in violation of the best-price rule, it is ultimately the acquirer, not the target, that will be required to remedy such violation. Therefore, the acquirer has a significant interest in ensuring compliance with the tender offer rules, including the requirements of the exemption.

The Commission has indicated that the remedy for a violation of the best price rule – payable by the acquirer – would be that the additional per share consideration paid to a security holder pursuant to such an arrangement for tendered securities would be payable for <u>all</u> the shares tendered by <u>all</u> of the other security holders as well. We believe that this risk of being required to pay a dramatically higher price for the target company, coupled with the risk of litigation based on claims that the acquirer's directors breached their fiduciary duty to the acquirer's security holders by incurring the higher price, would serve as a strong incentive for the acquirer's independent board committee to closely review and scrutinize these types of proposed arrangements, and determine whether the terms of the exemptions apply.

In addition, in light of the practicalities of how acquisition transactions are negotiated and consummated and the significant risks for the acquirer if the exemption is not met, we also believe that certain technical ambiguities respecting how and when arrangements must be approved merit clarification in the final rule or in an accompanying instruction. We are of the opinion that the safe harbor should be clarified in three ways:

- the committee of independent directors need not separately approve each individual commercial or employment-related arrangement, and may invoke the safe harbor simply by establishing general parameters for such arrangements, leaving the specifics to finalization as a part of the broader transaction;

- the safe harbor is satisfied if the independent committee ratifies arrangements previously negotiated by executives or other members of the board; and

- any subsequent finding of a violation of fiduciary duties by the board that is unrelated to the approval of employment-related or commercial agreements will not in any way compromise or revoke the application of the safe harbor.

We further believe that the amended rule requires an accompanying instruction to clarify that these arrangements may be conditioned upon the consummation of the tender offer. The employment-related and commercial arrangements that these amendments are intended to address are, almost without exception, structured to be effective only upon the closing of the transaction. We believe that without this clarifying instruction, the uncertainty in the rule's application will continue, and the intended benefits of the amendments will be compromised.

The above clarifications would both increase the flexibility of the proposed safe harbor and avoid the unnecessary litigation that has cast a shadow over tender offers for far too long. Moreover, the added flexibility of allowing executives to work out specific details of these arrangements pursuant to broadly pre-approved parameters, or subject to review and approval by a committee of independent directors after the fact, would make the safe harbor easier to apply in the midst of the already hectic process of executing a tender offer within a compressed time frame. Small errors in process—like the timing of agreements and related approvals—should not result in loss of the safe harbor. A violation of fiduciary duty unrelated to the specific employment-related or commercial agreement also should not preclude reliance on the safe harbor.

3. Extend the Application of the Exemption and Safe Harbor To Issuer Tender Offers

We believe that the protections of the proposed exemption and safe harbor should be extended to issuer tender offers under Rule 13e-4. The Commission asks whether the same issues of severance and retention arise during issuer tender offers, and we believe they do. In fact, an issuer tender offer can often have the same ultimate result as a third-party tender offer: a change in control. Because bidders do not always act alone when negotiating the terms of a business combination (*e.g.*, a leveraged buyout involving company affiliates and financed by third parties), some transaction structures simultaneously implicate Rules 13e-3, 13e-4, and 14d-10. Going private transactions could involve significant employee compensation restructuring to

address, e.g., stock-based compensation mechanisms that no longer provide sufficient incentives once the company is no longer public. These examples illustrate that retention and severance issues, as well as negotiations of commercial arrangements, are as likely to arise in certain types of issuer tender offers as in third party tender offers, and the examples also illustrate the importance of applying the best-price rule consistently to both issuer and third party tender offers.

Conclusion

We thank you for consideration of our views and we would be pleased to further discuss our comments at your convenience. I can be contacted at (408) 765-1215, or you may contact Patrice Scatena, Assistant Director of Corporate Affairs, at (408) 765-9771.

Very truly yours,

/s/ Cary Klafter

Cary Klafter
Vice President, Legal and Government Affairs
Director, Corporate Affairs
Corporate Secretary
Intel Corporation