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April 5, 2006

Nancy Morris
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-9303

Re: Amendments to the Tender Offer Best-Price Rule
Release No. 34-52968 (File No. S7-11-05)

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities of the American Bar Association's Section of Business Law (the "Committee") in response to the request of the Securities and Exchange Commission (the "Commission") for comments on Release No. 34-52968 dated December 16, 2005 (the "Release"). The Release sets forth proposals (the "Proposals") to amend the current tender offer best-price rule to, among other things, remove unintended incentives not to structure transactions as tender offers to which the best-price rule applies.

The comments and suggestions expressed in this letter represent the views of the Committee only and have not been approved by the House of Delegates or Board of Governors of the American Bar Association (the "ABA") and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law or any other ABA Section, nor does it necessarily reflect the views of all members of the Committee.

Introduction

Overall, the Committee strongly supports the Proposals. Although we do have some comments and suggestions, we believe the Proposals, if adopted, should help restore tender offers as a means of accomplishing public company acquisitions without sacrificing necessary investor protections. The decline in the use of tender offers has been harmful to investors because tender offers are often the most expedient means of transferring consideration from a willing buyer to a willing seller in connection with the acquisition of a public company.

Set forth below are our most significant comments and suggestions which focus on the exemption and the safe harbor contemplated by the Proposals and the need to have the proposed exemption and safe harbor also apply to issuer tender offers . In addition, to further assist the Commission in evaluating the Proposals, we have set forth in Annex A attached to this letter brief answers to specific questions posed by the Commission in the Release.

I. The Exemption and the Safe Harbor

The Proposals provide for a new exemption, Rule 14d-10(c), that includes a safe harbor for employment compensation, severance or other employee benefit arrangements with current or future employees or directors of the subject company if they are approved by the compensation committee of the board of directors (or a committee performing similar functions) comprised solely of independent directors of the bidder or subject company, depending on which entity is party to the arrangement.

A. Agreements Covered by the Exemption and Safe Harbor

The Committee does not believe that the exemption and the safe harbor should be limited to particular types of agreements (i.e., employment compensation, severance or other employee benefit arrangements) or agreements with certain persons (i.e., current or future employees or directors of the subject company). Instead, the Committee believes that the exemption and the safe harbor should be available for any contractual agreement or arrangement, including commercial agreements, between the subject company or the bidder or their affiliates on the one hand and any shareholder of the subject company (including employees and directors of the bidder and consultants of either party) on the other hand. Though less frequent, commercial arrangements such as licenses, leases and supply and distribution contracts can be as or more important to the ongoing success of a business (and thus its aggregate value to a bidder) as any employment compensation, severance or other employee benefit arrangements. Moreover, bidders are unlikely to forego such commercial agreements or arrangements in order to be able to use a tender offer acquisition structure. Rather, bidders for

whom these arrangements are important would likely continue favoring statutory mergers to which the best-price rule does not apply. Further, no compelling rationale has been provided to justify the exclusion of commercial or other types of agreements or arrangements from the exemption or the safe harbor. In fact, the rationale for the proposed exemption and safe harbor applies equally to commercial agreements – legitimate agreements not entered into for the purpose of compensating a shareholder for its shares tendered in a tender offer.

The Committee believes that, just as compensation committees are likely to seek the advice of competent consultants and advisors before approving employment compensation, severance or other employee benefit arrangements, or amendments thereto, for purposes of the safe harbor, a qualified approving committee seeking to rely on a broader safe harbor would frequently seek the advice of competent consultants and advisors. The advice and assistance of such consultants and advisors would help ensure that any commercial and other agreements and arrangements with shareholders of the subject company reflect arm's-length and commercially reasonable terms, and not consideration for shares tendered in the tender offer.

B. Composition of Approving Committees

The Committee believes that the Proposals should not be limited to the compensation committee. Rather, the Proposals should be revised to provide that the requirements of the safe harbor are satisfied if the relevant agreement or arrangement is approved by a committee, whether standing or ad hoc, of the board of directors of the bidder (if the bidder is a party to the arrangement) or the subject company (whether or not the subject company is a party to the arrangement), all of whose members are deemed by the board of directors of such company to be independent under the applicable Commission approved rules of the self regulatory organization (each, an "SRO"), if any, on whose exchange or quotation system shares of the company's common stock or equivalent securities (e.g., American depositary shares of a foreign private issuer) are traded. This approach would provide the necessary flexibility for the application of the safe harbor in situations where the independent directors best able to evaluate the agreement or arrangement are not members of a standing committee or where a member of the standing committee best suited to evaluate an agreement or arrangement is conflicted with respect to a particular agreement or arrangement. It would also permit the boards of directors of foreign private issuers and controlled public companies that are not required to have standing committees of independent directors to appoint ad hoc committees of independent directors satisfying the independence rules of the applicable SRO so long as they had at least one independent director that satisfies those requirements. Even where the bidder is a private company or otherwise has no

independent directors, the safe harbor would be available so long as the agreement or arrangement was approved by a committee of independent directors of the subject company.

C. The Safe Harbor Must Be Clear

Most importantly, it is crucial that the safe harbor permit bidders, with reasonable certainty based on readily ascertainable facts, to conclude whether or not the safe harbor will effectively preclude claims that a particular agreement or arrangement violates the best-price rule. Absent certainty regarding potential liability, it is likely that the Proposals will be ineffective in eliminating unintended incentives to structure acquisitions as statutory mergers and bidders will continue to shy away from using tender offers to acquire public companies. The worst outcome would be for the Commission to adopt changes to the wording of the best-price rule that undermine the ability of bidders to rely on current "bright-line" test legal precedents, without providing bidders with a truly effective safe harbor.

The Committee believes a truly effective safe harbor can only be accomplished if challenges to the qualifications (i.e., independence) of directors serving on a committee that approves an agreement or arrangement for purposes of the safe harbor are minimized to provide transactional certainty. If independence is tied to the listing standards investors will be protected by the SROs whose Commission approved rules on independence were allegedly violated and their ability to make claims under state law that the board of the relevant company had violated their duties in selecting the members of the approving committee. Similarly, the Committee believes that the safe harbor should be crafted to minimize challenges regarding the propriety and bases of, and all conclusions imbedded in, a committee's approval of an agreement or arrangement for purposes of the safe harbor. State law sufficiently and more appropriately addresses director action in making such determinations.

II. Issuer Tender Offers

The Committee believes that similar issues may arise in the context of certain recapitalizations and going-private transactions and consequently believes that, as a matter of policy and consistency, Rule 13e-4 should be amended to include the proposed exemption and safe harbor.

Conclusion

As noted above, to further assist the Commission in evaluating the Proposals,

we have set forth in Annex A attached to this letter, brief answers to specific questions posed by the Commission in the Release.

The Committee appreciates the opportunity to comment on the Proposals and respectfully requests that the Commission consider our recommendations. We are prepared to meet and discuss these matters with the Commission and the Staff and to respond to any questions.

Very truly yours,

/s/Dixie L. Johnson
Dixie L. Johnson
Chair
Committee on Federal Regulation of Securities

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Annex A

Q1. **What effect would the removal of "during" from the best-price rule have on the bright-line case law precedent? Would the change in this language broaden the scope of potential future claims to include allegations that payments made at any time violate the best-price rule?**

A1. The Committee believes that that removal of "during" will undermine the application of the bright-line case law precedents and broaden the scope of potential future claims. While the loss of such precedents will be of less concern if replaced with an effective safe harbor, the Committee is concerned that the loss of such precedents would further reduce the viability of tender offers if the safe harbor does not permit courts to dismiss claims alleging violations of the best-price rule based on readily ascertainable facts.

Q2. **If the "for securities tendered" language is added to the best-price rule, would employees and directors who enter into arrangements with the bidder or subject company, and who do not tender their securities into a tender offer, avoid the strictures of the best-price rule? Is this the appropriate outcome of the proposed amendment? Would a similar outcome result under the current language of the best-price rule? If this outcome is a possibility, should we revise the proposed language of the best-price rule so that the best-price rule would apply to arrangements entered into by employees and directors with the bidder or subject company regardless of whether they tender their securities in the offer?**

A2. The Committee believes that if the "for securities tendered" language is added to the best-price rule, arrangements entered into between employees or directors and the bidder or subject company where the employees or directors do not tender their securities into a tender offer would not implicate the best-price rule and that this is the appropriate outcome. We reach this conclusion in large part on the basis that if the securities are not tendered in the offer, and the offer nonetheless achieves any stated minimum condition, it seems self evident that any actual or alleged consideration being paid for the shares is in relation to a transaction other than the tender offer and has no factual or causal relationship to the success or failure of the tender offer.

Q3. **If officers or directors recommend that security holders tender into the transaction but, in order to avoid implicating the best-price rule, the same officers or directors opted to withhold tendering their own securities, what would be the outcome? Could this result in an alleged breach of fiduciary duty? What effect or impact is this type of behavior likely to have on tender offers? Would it discourage officers or directors from recommending that security holders tender into the offer?**

A3. The Committee believes that officers and directors would be free to

recommend that shareholders tender shares into a tender offer but not themselves tender to avoid implicating the best-price rule and that such behavior would not be in breach of their fiduciary duties or necessarily adversely impact tender offers, provided there were adequate disclosure of their intentions. However, this is not a realistic scenario and it would be unfortunate if the best-price rule had this effect.

Q4. **The proposed rule does not specifically define or refer to examples of employment compensation, severance or other employee benefit arrangements that would be captured in the exemption. Should we define these arrangements? If so, would a definition similar to Instruction 7(ii) to Item 402(a)(3) of Regulation S-K be helpful? Alternatively, or perhaps in addition to providing a definition, would it be more helpful if we gave examples? If so, what examples of employment compensation, severance and employee benefit arrangements should be included? Are we risking making the exemption too broad by providing a list of examples (e.g., would parties simply call the arrangement something in the list, even where it is some other arrangement entirely, in the hopes of triggering application of the exemption)?**

A4. The Committee believes that the proposed rule should not attempt to define or provide an exclusive or nonexclusive list of examples of employment compensation, severance or other employee benefit arrangements. To do so would only invite litigation and further uncertainty regarding compliance with the rule.

Q5. **Should we include a list of non-exclusive factors in our proposed amendments to Rule 14d-10(c) to assist bidders and subject companies in making a determination as to whether an employment compensation, severance or employee benefit arrangement falls within the exemption? Such factors could include: timing of the execution of the arrangements; timing of payments to be made pursuant to the arrangements; the reasonable and customary nature of the arrangements; endorsement or recommendation of the tender offer; and whether the arrangement is conditioned on tendering into the tender offer. Should we include additional factors or modify or exclude some of these proposed factors? Is there a certain factor or combination of factors that should always be present to conclude that an arrangement falls within the exemption? Should a certain factor or combination of factors be deemed dispositive as to whether an arrangement falls within the exemption? Would the inclusion of the non-exclusive factors be helpful in determining what arrangements fall within the exemption? Would some or all of these factors currently be considered by boards of directors and courts when deciding whether an arrangement falls within the exemption? If the non-exclusive factors were not included in the proposed rule, would it be**

helpful if a discussion of certain non-exclusive factors were included in the adopting release?

A5. The Committee believes that the proposed rule should not include a list of exclusive or non-exclusive factors to consider in determining whether such arrangements satisfy the requirements of the exemption. We believe that any such list (even if articulated as non-exclusive) would only invite litigation and further uncertainty regarding compliance with the rule.

Q6. **What would be the impact on the proposed rule if an exemption for commercial arrangements also was included in the best-price rule? Should we expand the proposed amendment to Rule 14d-10(c) to cover any commercial arrangement (e.g., distribution rights arrangements) where the party received an economic benefit beyond the price paid for the securities? Some commenters have raised this issue in their analysis of the judicial precedent to date. Are the proposed amendments to Rule 14d-10(a)(2) broad enough to provide commercial arrangements protection from the potential application of the best-price rule?**

A6. See Comment I.A. in our letter.

Q7. **The proposed exemption would require that the arrangement relate to past or future services and matters incidental thereto. We solicit comment on the appropriateness of this requirement. Specifically, should we give guidance as to what evidence would be necessary to prove that the agreement or arrangement relates to past or future services? Is it clear what the clause "matters incidental thereto" would capture? Should we give guidance as to what this was intended to cover?**

A7. See Comment I.A. in our letter. Given the Committee's views that the exemption and safe harbor should not be limited to particular types of agreements or arrangements with certain persons, the Committee believes that this requirement is not necessary and should be deleted. Approval by a designated committee of independent directors with fiduciary obligations provides adequate protection against the inappropriate diversion of transaction consideration.

Indeed, we strongly urge that the qualification in the exemption that the payments relate to past or future services is unduly limited and all too likely to become the subject of allegations that payments were not sufficiently related to the performance of services to qualify for the exemption. For example, severance payments could easily be alleged not to be related to the performance of services, nor to be in consideration for a loss of opportunity to perform services, on the bases of amount and/or nature of the severance payment (for example, gross-up payments). We urge that the language in the proposed rule qualifying the nature or basis for employment

related services be deleted because it introduces factual determinations into an exemption that will function as intended only to the extent it depends solely on readily ascertainable facts.

Q8. **The proposed exemption would require that the payments made pursuant to an arrangement not be based on the number of securities the employee or director owns or tenders. We solicit comment on the appropriateness of this requirement. For example, would it be helpful if we included the word "specifically" in front of the requirement "based on the number of securities the employee or director owns or tenders?" Should we give guidance as to what standard would be applied to avoid having payments be based on the number of securities owned or tendered?**

A8. The Committee believes that this requirement is confusing and may easily be misinterpreted to apply to common forms of compensation and severance arrangements that provide for grants of options and restricted stock that often vest upon a change in control. As a consequence, the Committee suggests that this requirement be deleted. If the Commission nevertheless decides to retain this requirement, the Committee suggests that it be revised to delete “owns or” and to include “specifically calculated”. In addition, the Committee believes that it would be useful if the proposed amendments to the best-price rule included language that clarified that this requirement was not intended to and should not be interpreted as being applicable to the accelerated vesting of stock options and restricted stock.

Q9. **The proposed exemption would cover arrangements or agreements entered into with employees and directors of the subject company. Should the exemption be restricted to only such employees and directors? Is it possible that these types of arrangements or agreements would be entered into with employees and directors of the bidder?**

A9. See Comment I.A. in our letter.

Q10. **Would the proposed exemption help alleviate the litigation risk currently posed by the best-price rule? Would it make it less likely that cases involving a violation of the best-price rule survive a summary judgment motion, and, if so, is this preferable?**

A10. See Comment I.C. in our letter. The Committee believes that if its suggestions are accepted, the proposed safe harbor is likely to be more successful than the exemption in alleviating the litigation risk by increasing the likelihood that bidders will be able to obtain the dismissal of claims or summary judgment based on readily ascertainable facts. However, in any event, we believe that the Proposals as drafted would alleviate litigation risk and make it less likely that cases involving a violation of the best-price rule survive a summary judgment motion.

Q11. **Should we amend the issuer tender offer rules contained in Rule 13e-4 to provide a similar exemption? Are similar issues present in issuer tender offers, particularly where a going-private transaction is involved? Would the failure to include a similar exemption with respect to the issuer tender offer rules contained in Rule 13e-4 create a negative implication that employment compensation, severance and other employee benefit arrangements would or should be covered by the issuer best-price rule?**

A11. See Comment II in our letter.

Q12. **We have proposed that either the bidder's or the subject company's (depending which entity is a party) compensation committee or similar committee would be allowed to approve the arrangement. Will the respective state law fiduciary duties protect security holders' interests in these arrangements? For example, is it clear that the compensation committee members of the entity approving an arrangement will owe fiduciary duties to the security holders of that entity? If the compensation committee of the bidder does not owe fiduciary duties to subject company shareholders, are there alternative remedies available to protect their interests? What if the arrangement that is entered into between the subject company and the employee or director provides for payment over an extended period of time? Would that implicate a fiduciary duty of the bidder to its security holders for future obligations? Are there other state law protections apart from those arising from fiduciary duties? Can the safe harbor be modified to work better with state law protections?**

A12. The Committee believes that directors of the subject company have a fiduciary duty to ensure that such arrangements or agreements do not effect an unwarranted diversion of transaction consideration to employees and directors of the subject company at the expense of the subject company’s shareholders and consequently a requirement that approval of agreements or arrangements by a committee of independent directors of the subject company provides substantial protection to subject company shareholders regardless of whether the subject company is a party to the arrangement or agreement. While directors of the bidder may not owe fiduciary duties to subject company shareholders, they do owe fiduciary duties to their own shareholders that would guide their actions and their approval of an agreement or arrangement for purposes of the safe harbor would be the only practical solution in many cases.

Q13. **Could the proposed safe harbor be relied on in both negotiated or "friendly" tender offers and unsolicited or "hostile" tender offers? Should changes be made to the language of the proposed safe harbor to make it clear that the safe harbor can or cannot be relied on in hostile transactions? Would the hostile nature of a takeover preclude the ability to negotiate arrangements that would involve additional consideration**

that would violate the best-price rule?

A13. The Committee believes that the safe harbor and exemption should be available for all tender offers subject to the best-price rule in order, among other things, to avoid any confusing negative implications that might otherwise arise. See also our response to Q.12. above.

Q14. **For those companies, such as small business issuers, that may not have established a compensation committee or a committee performing similar functions, would full board approval provide an equally useful standard in establishing that the arrangement falls within the safe harbor? If so, would it matter whether or not the full board was comprised of at least a majority of independent directors, utilizing the independence standard provided in the instruction to the proposed safe harbor?**

A14. See Comment I.B. in our letter.

Q15. **The proposed safe harbor benefits are available only if the arrangements are approved by the compensation committee or a committee performing similar functions. Should the language of the safe harbor require, as a basis for reliance on the safe harbor, approval of specific arrangements? Are there circumstances under which approval for entire plans or arrangements would be sufficient? Do bidders in a tender offer enter into employment compensation, severance or other employee benefit arrangements with officers or directors of the subject company without first obtaining compensation committee approval? Do compensation committees generally set broad parameters that the officers of the company use when negotiating and entering into compensation arrangements?**

A15. The Committee believes that approval of specific arrangements should not be required so long as the plan or program pursuant to which the specific arrangements are authorized has been approved.

Q16. **Should we address specifically the timing of the approval of the compensation committee (or the committee performing similar functions) of arrangements for purposes of the safe harbor? Should benefits granted or to be granted to an employee or director in connection with a tender offer pursuant to existing employment compensation, severance or other employee benefit arrangements that were approved by the compensation committee or the full board of directors when adopted be eligible for the safe harbor protections? If the proposal is adopted, should the safe harbor have retroactive applicability? If so, should the safe harbor be available for arrangements approved not sooner than, for example, the date the changes to the listing standards of the New York Stock Exchange requiring that the compensation committee be comprised solely of**

independent directors were adopted, or is some other date appropriate?

A16. The Committee believes that the safe harbor should have retroactive applicability and that, solely for purposes of such retroactive application, the approval of an agreement or arrangement with a shareholder of the subject company by the board of directors or a committee of the board of the subject company should satisfy the requirements of the safe harbor so long as a majority of the independent directors of the board or authorized committee of the board voted to approve such agreement or arrangement.

Q17. **If a member of the compensation committee or a committee performing similar functions is a party to the employment compensation, severance or other employee benefit arrangement, should the safe harbor still be available? Should the safe harbor address recusal or leave it to the committee members to determine how to handle this or similar situations that may arise?**

A17. See Comment I.B. in our letter. The Committee believes that the safe harbor should still be available and that the ability to have such arrangement approved by a committee of independent directors rather than the subject company's compensation committee provides appropriate flexibility and, in some cases, obviates the need for recusal.

Q18. **Is the independence test that is tied to the listing standards sufficient? Should we define "independent" by some other standard? Should the subject company directors also be independent from the bidder? Should we consider using the Non-Employee Director standard used in Rule 16b--3(d)?**

A18. The Committee believes that the independence test tied to the listing standards is sufficient and that independence need not be defined by any other standard.

Q19. **How would the independence test affect bidders that are foreign private issuers? Should we consider an alternative standard for foreign private issuers? Will the fiduciary duties of the members of the compensation committee of a foreign private issuer adequately serve to ensure that the agreement or arrangement falls within the exemption?**

A19. See Comment I.B. in our letter.

Q20. **Should we consider allowing the compensation committee or the committee performing similar functions to rely exclusively on the opinion of a compensation consultant in making its determination that an agreement or arrangement falls within the exemption for purposes of the proposed best-price rule amendments?**

A20. The Committee believes that in fulfilling their fiduciary duties as directors, directors are generally required to seek out such information as is reasonably necessary and available under the facts and circumstances to make an informed decision. As a consequence, exclusive reliance on the advice of a compensation consultant may not always be appropriate.

Q21. **If a bidder or subject company intended to rely on the proposed safe harbor, is it clear, based on existing rules and regulations, whether such reliance would be required to be disclosed in the tender offer documents? If not, should a specific requirement be adopted to ensure that adequate disclosure would be made to the security holders? Should reliance on the safe harbor be conditioned on corresponding disclosure by the bidder or subject company, as appropriate, about how the safe harbor was satisfied, including what factors were used in determining that the arrangement was deemed an employment compensation, severance or other employee benefit arrangement?**

A21. The Committee believes that it is unnecessary for such reliance to be disclosed and that no additional information regarding the satisfaction of the safe harbor should be required to be disclosed except and to the extent it may be material to the investment decision being made.

Q22. **If we were to include a list of non-exclusive factors in our proposed amendments to Rule 14d-10(c) to assist bidders and subject companies in making a determination as to whether an employee compensation, severance or employee benefit arrangement falls within the exemption, should we require that the compensation committee, or a committee performing similar functions, examine the non-exclusive factors in connection with its determination as to what arrangements fall within the exemption for purposes of the safe harbor?**

A22. The Committee does not believe that such non-exclusive list is necessary or that committees of independent directors approving agreements or arrangements should be required to examine any specific factors in connection with their determinations. The appropriate factors to be considered will vary depending on the specific facts and circumstances presented by each particular situation.

Q23. **To what extent would the proposed safe harbor provide bidders and subject companies with an adequate means to avoid implicating the best-price rule when it comes to employment compensation, severance and other employee benefit arrangements? Is there a risk that the proposed safe harbor would merely shift scrutiny by the courts to the determination as to whether the compensation committee has properly exercised its duties? Is that an appropriate outcome? Should approval that a court**

determines violates a fiduciary duty result in loss of the safe harbor? Will the fiduciary duties of the members of the compensation committee or a committee performing similar functions adequately serve to ensure that the agreement or arrangement falls within the exemption? Are there impediments to seeking judicial review of a determination that the agreement or arrangement falls within the exemption? Will the bidder's incentive to consummate a transaction impede the compensation committee members' exercise of their fiduciary duties? Will the fact that the members of the subject company's compensation committee may not be part of the ongoing business operation after the consummation of the transaction impede the exercise of their fiduciary duties?

A23. See Comment I.C. in our letter.

Q24. **Would the proposed amendments accomplish the goal of clarifying the scope of Rule 14d-10? If not, what other or additional language would accomplish this goal more effectively?**

A24. The Committee believes that the proposed amendments as modified in accordance with the comments and suggestions set forth in our letter and this Annex A would successfully clarify the scope of Rule 14d-10.

Q25. **Should we amend the issuer best-price rules as well as the third-party best-price rules? Are there issues that differ in issuer tender offers such that we should not consider making uniform changes to both sets of best-price rules? Would the failure to make uniform changes to both sets of best-price rules create any implication that employment compensation, severance and other employee benefit arrangements, as well as other commercial arrangements, would or should be covered by the issuer best-price rule? How should we address any such implication?**

A25. The Committee believes that uniform and consistent rules are appropriate.

Q26. **Would it be appropriate to also include a de minimis exclusion to the best-price rule? For example, would it be appropriate to carve out of the application of Rule 14d-10 the negotiation or execution of any employment compensation, severance or other employee benefit arrangement with an employee or director of the subject company who, together with any affiliates, beneficially owns less than a nominal threshold amount (e.g., 1% of the class of securities that is the subject of the tender offer)?**

A26. The Committee believes that a de minimis exclusion to the best-price rule with respect to agreements and arrangements, including commercial agreements, would be useful and appropriate, particularly if the Commission

determines not to extend the safe harbor beyond employment compensation, severance or other employee benefit arrangement. The Committee believes that the appropriate threshold should be between 1% and 3% of the class of securities that is the subject of the tender offer.