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VIA E-MAIL (**rule-comments@sec.gov**)

Securities and Exchange Commission
450 Fifth Street NW
Washington, D.C. 20549-0609
Attention: Jonathan G. Katz, Secretary

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

Ladies and Gentlemen:

This letter is submitted on behalf of Dechert LLP in response to the Securities and Exchange Commission's request for comments on its December 16, 2005 release entitled "Amendments to the Tender Offer Best-Price Rule" (the "Proposing Release"). For ease of reference, except as otherwise noted we use the definitions set forth in the Proposing Release.

Introduction

At the outset, we applaud the Commission for its efforts to update the best-price rule embodied in Rule 14d-10 under the Exchange Act. As the Commission notes in the Proposing Release, in recent years both litigation with respect to the best-price rule and the split in judicial circuits in interpreting the rule have created significant uncertainty for transaction participants. As a result, transactions which might have been structured as tender offers because of the speed and efficiency afforded by that structure often are configured as statutory mergers in order to avoid the application of Rule 14d-10.

Because the best-price rule litigation usually centers on whether an arrangement constitutes bona fide compensation or disguised tender offer share consideration, the legal analysis is inherently fact-intensive. As a result, many best-price rule suits have survived early dismissal regardless of their actual merits. In addition, to the extent a court determines that such payments are (or may be) part of the tender offer share consideration, the additional payments must be made to all tendering shareholders under Rule 14d-10, resulting in potentially huge financial exposure to bidders. It is no surprise that acquisitions are now structured as tender offers only where there is virtually no question or possibility that arrangements related to a transaction -- including but by no means limited to employment compensation, severance or other employee benefit arrangements -- could be characterized as tender offer share consideration.

The Proposing Release, and in particular the exemption and safe harbor provisions of proposed Rule 14d-10(c), help restore clarity to the area and provide greater certainty to participants that their tender offers will not be second-guessed by plaintiffs or courts under the best-price rule. However, we believe the Proposing Release can be improved in several substantive and technical respects. Most importantly, we believe that limiting the exemption and safe harbor to employee or director compensation, severance and benefit matters ("employee compensation arrangements") does not go far enough, and we are concerned that enterprising and imaginative plaintiffs will simply redirect their energies to other areas outside of the narrow focus of the proposed rule.

Specific Comments

1. *Proposed Rule 14d-10(c) Exemption and Safe Harbor*

(a) Scope.

- We believe the exemption and safe harbor should not be limited to employee compensation arrangements. We do not believe it is logical to draw a distinction for these purposes between employee compensation arrangements and other arrangements, commercial or otherwise. The fact that most of the best-price rule litigation to date has involved employee compensation arrangements does not mean that the exemption and safe harbor are not necessary for other arrangements. The *Lerro* case, which the Commission cites, involved a distribution agreement which would not be exempt under the proposed rule. As noted earlier, we are concerned that an exemption drawn too narrowly will only incentivize plaintiffs to recharacterize non-exempt arrangements as disguised tender offer share consideration.

  As a policy matter, by creating the proposed safe harbor the Commission has essentially deputized a subset of directors of corporations to review and approve certain arrangements in a manner which exempts them from Rule 14d-10. We believe this is laudable and places the inquiry squarely on the shoulders of the shareholders' fiduciaries, where it belongs. A similar policy approach was used successfully by the Commission when it revised Rule 16b-3 in 1992. However, unlike Rule 16b-3(d), which applies to virtually all transactions between the company and its officers and directors, the Proposing Release's safe harbor covers only the limited transactions mentioned. We think it is anomalous from a policy perspective to provide that corporate fiduciaries can make a determination that employee compensation arrangements are not covered by the best-price rule, but cannot make this determination for other arrangements involving the company and its shareholders.

- We believe a more expansive exemption is particularly necessary if the Commission does not adopt the "bright line" analysis expounded by the Seventh Circuit in *Lerro.* Future courts are likely to look to the Commission's views on the current judicial split with respect to the best-price rule. To the extent an arrangement falls outside of the exemption, there will be even more uncertainty surrounding the best-price issue based on the Commission's rejection of the *Lerro* analysis.

- We do not believe the exemption should be limited to arrangements tied only to employees or directors. Other shareholders should be included whether or not the exemption is expanded beyond employee compensation arrangements. Independent directors can make the safe harbor determination for non-employee and non-director shareholders by exercising the same fiduciary judgment they make for arrangements with employees and directors.

(b) Compensation Committee.

- The proposed safe harbor provides that the approval is to be made by the company's compensation committee or a committee performing similar functions. We believe this is unduly narrow and that a company should have the flexibility to have the approval made by any standing or ad hoc committee or group consisting of independent directors. Again, the precedent of Rule 16b-3 is instructive. Providing this flexibility is important if the safe harbor is expanded to include arrangements other than employee compensation arrangements, as the compensation committee cannot be expected to have any greater competence or experience dealing with such transactions than any other committee or group of directors. In addition, there may be circumstances involving even employee compensation arrangements where a compensation committee member or members may have an actual or potential conflict of interest or other disabling connection as a result of the particular arrangement. In this circumstance the company might wish to provide that the approval is performed by other independent directors.

- We believe the definition of "independence" should not be limited to listing agreement standards. Because the Commission is essentially relying on state law fiduciary duty standards via the deputization model, the company's board should have the flexibility to determine independence consistent with prevailing state law standards as well. This may be an important factor depending on the nature of the transaction and the configuration of the company's board.

(c) Other Technical Comments.

- We believe a determination of qualification for the safe harbor made by the target company's independent committee should satisfy the rule even if the arrangement is made between the bidder and the target employee or director. Under the Proposing Release, there may be confusion as to whether the target's or the bidder's committee is the appropriate vehicle because it may not be clear who the "party to the arrangement" actually is. Inasmuch as the best-price rule exists for the protection of the target's, not the bidder's, shareholders, we think the target's independent committee should be sufficient in all events (subject to our comment later regarding bidders' due diligence issues).

  As contemplated by the Proposing Release, the approval by the independent committee of the bidder could also be sufficient to satisfy the safe harbor for such arrangements with the bidder. Alternatively, the Commission should consider whether arrangements between the bidder and target employees or directors even need independent director approval to satisfy the safe harbor. A bidder will have an immediate and obvious self-interest in making the safe harbor determination, as it bears the ultimate economic cost of best-price rule violations. In addition, the fiduciary duty issues surrounding a bidder's determination have nothing to do with the considerations underlying Rule 14d-10 and the fiduciary duty issues surrounding a target's determination. Nor is it clear why a bidder's committee needs to be "independent" in this context.

- We believe the safe harbor language in proposed Rule 14d-10(c) can be more precisely written so that it is clear that the independent committee determination alone operates to effect the exemption. The language of proposed Rule 14d-10(c)(3) is potentially ambiguous. It states that an arrangement "shall be deemed an employment compensation, severance or other employee benefit arrangement if it is approved...". Without more, this could suggest that the safe harbor is not self-operating, thereby giving plaintiffs the right to argue that such arrangements, even if approved, are not the type of arrangements covered by the rule.

  Moreover, requiring the independent committee to make a finding that an arrangement "relates solely to past services performed or future services to be performed or refrained from performing..." and "is not based on the number of securities the employee or director owns or tenders" is not the kind of inquiry or judgment customarily made by directors of a corporation. This standard implies that a director can make a subjective analysis of the intent of a particular arrangement. It is unclear what information a director could rely on to make this kind of determination: An officer's certificate? A recitation in the background section of the agreement? If the safe harbor is adopted in its present form, it might have the effect of merely substituting one defendant for another in the litigation that ensues over whether this subjective standard has been satisfied (and, as long as there is a private right of action under Rule 14d-10, directors might conclude that eliminating the risk of a best-price rule claim via a merger will be the best way to proceed).

  A comparison with Rule 16b-3 is also helpful in this context. The exemption afforded by that rule requires only that the transaction with the issuer be approved by the requisite directors of the corporation; no finding as to the character or type of arrangement is necessary. The same approach should be used for the best-price rule safe harbor. If the arrangement is approved by the independent directors of the target or the bidder, as the case may be, it should be *per se* exempt from the rule. Just as in the case of a statutory merger, shareholders will have the benefit of disclosure of such arrangements and may pursue state law breach of fiduciary duty claims if they believe the arrangements are inappropriate.

- If the Proposing Release is adopted, we would expect that many bidders, as part of their due diligence, will request representations from targets in the transaction agreements with respect to compliance with the safe harbor. However, in public transactions it is typical for representations not to survive the closing, and therefore there could be exposure for bidders in case of a breach. In addition, bidders may have difficulty conducting the inherently intrusive due diligence with respect to the targets' internal governance procedures. In order to give bidders additional comfort that the safe harbor is available, we suggest that the Commission consider including in the safe harbor a provision that bidders may rely on representations from the target in order to effect the exemption, or that a determination by the bidder's independent committee to the same effect as the target's shall provide for the exemption notwithstanding any defect in the target's committee determination.

2. *Other Provisions of the Proposing Release*

(a) "Pursuant to the tender offer" and "during the tender offer."

- We strongly disagree with the Commission's proposal to replace the captioned phrases with "for securities tendered in the tender offer." We do not object if the phrase "for securities tendered in the tender offer" is used in addition to the foregoing phrases.

  We believe the "bright line" standard articulated in *Lerro* is legally correct, and it provides the most predictability and engenders the most confidence for transaction participants in planning tender offers. However, even if the Commission does not accept the "bright line" standard, the elimination of the "pursuant to" and "during" phrases will disrupt precedent for transaction participants who wish to use that standard where the safe harbor is not available.

  The deletion of the phrases will also potentially give more grist for plaintiffs using the "integral part" test or other interpretation where the safe harbor is not available. Plaintiffs will no longer be constrained by any temporal limitations in their characterization of transactions as disguised share payments. The new phrase "for securities tendered in the tender offer" does nothing to relieve this problem, as the analysis in all the cases to date has hinged on the securities tendered in the relevant tender offer.

(b) Conditionality.

- The Commission has pointed out in the Proposing Release that in its view payments conditioned upon completion of a tender offer do not necessarily mean such payments are tender offer share consideration. We agree. Proposed Rule 14d-10(a)(2) should be changed to clarify this point by adding language to the effect that payments contingent upon the commencement or completion of a tender offer shall not, by reason of such contingency, cause such payments to be considered consideration paid to security holders for securities tendered in the tender offer.

(c) "Solely to past services" and "not based on the number of securities."

- Clause (i) of proposed Rule 14d-10(c)(2) states that the best-price provision shall not apply if the employee compensation arrangement does not relate "solely to past services or future services to be performed or refrained from performing, by the employee or director (and matters incidental thereto)." We do not believe this clause is necessary given that in all events the exemption relates to employee compensation arrangements, and we believe the word "solely" will unnecessarily invite a facts-and-circumstances analysis and possible litigation.

- Clause (ii) of proposed Rule 14d-10(c)(2) states that the best-price provision shall not apply if the employee compensation arrangement is "based on the number of securities the employee or director owns or tenders." We similarly do not believe this clause is necessary given that in all events the exemption relates to employee compensation arrangements. In addition, this clause will substantially undercut the breadth of the exemption. Substitute stock option and other benefit plans, securities rollovers in private equity transactions and other bona fide non-tender offer consideration tied to or based on the target's securities will fall outside the exemption. In fact, such transactions will be subject to heightened vulnerability if the "pursuant to" and "during" the tender offer phrases are deleted since these transactions are usually accomplished as part of back-end mergers following successful tender offers.

(d) Rule 13e-4.

- We believe the proposed Rule 14d-10 safe harbor should be implemented in Rule 13e-4 under the Exchange Act so that issuer tender offers are covered. Historically, the provisions of the two rules have largely mirrored one another and we do not see any reason to deviate from this pattern here. The absence of an analogous provision in the best-price equivalent language in Rule 13e-4(f)(8)(ii) may cause unnecessary misinterpretation or confusion. In addition, the fact that the litigation to date over the best-price rule involves third party tender offers does not mean issuer tender offers should not be able to obtain the benefits of the safe harbor.

3. *Other Concepts Promoting Transaction Convergence*

(a) Broader Exemption for Consensual Transactions.

- Although we are encouraged by the Commission's steps to clarify the boundaries of the best-price rule, we believe the Commission should revisit the original purpose of the Rule and developments in the marketplace involving institutional shareholder oversight and transparency that raise a substantial question as to the utility of the rule. We do not believe the best-price rule is necessary for consensual (i.e., target board approved) transactions. The target board has control over the form of the tender offer transaction and is bound by its fiduciary duties to structure the transaction in a manner beneficial to the target's shareholders. The Proposing Release's safe harbor implicitly acknowledges this stricture. The best-price rule is completely and easily circumvented by use of a statutory merger in lieu of a tender offer, and we are unaware of market confusion during the pendency of mergers or material abuses in the merger context that are not adequately monitored by the target's shareholders and the private bar. There is nothing inherently unique about tender offers that requires this kind of federal intervention in the economics of private ordering.

(b) "File and Go" Merger Proxy Authority.

- The Commission's Regulation M-A, issued in 1999, substantially eliminated regulatory inefficiencies by making the exchange offer structure a more attractive alternative to the statutory merger. Exchange offers can proceed more quickly as a result of the elimination of mandatory Commission pre-clearance of the required disclosure documents (although consummation of the offer is still dependent on

Commission registration statement effectiveness). However, mergers -- cash or stock -- still require Commission pre-clearance of proxy statements before the transaction can be launched and proxies solicited. This creates delays of at least a month in many transactions that cannot be structured as tender offers because of tax, financing, best-price rule or other considerations. The Commission declined to apply its pre-clearance waiver in Regulation M-A to mergers, citing the absence of a federally mandated proxy solicitation period analogous to the 20 business day tender offer period.

The Commission should reconsider Rule 14a-6 of the Exchange Act and its staff's merger proxy statement preclearance procedures. There should be no distinction between the review procedures for tender offers and non-tender offers such as mergers. As the rules now stand, transaction participants can commence and complete tender offers and distribute letters of transmittal on a regularized time schedule, and handle Commission staff comments depending on their severity via various forms of disclosure supplements or amendments. This is not the case with proxy statements and proxy cards, but it should be, at least where the parties agree to a minimum solicitation period of 20 business days.

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We appreciate the opportunity to comment to the Commission on the Proposed Rule, and would be happy to discuss any questions the Commission may have with respect to this letter. Any questions about this letter may be directed to William G. Lawlor (215-994-2823), Gil C. Tily (215-994-2224) or Marc Lindsay (215-994-2849).

Very truly yours,

Dechert LLP

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