SOCIETY OF CORPORATE SECRETARIES & GOVERNANCE PROFESSIONALS
521 Fifth Avenue
New York, NY 10175
(212) 681-2000 – Fax (212) 681-2005

Comment Letter to the SEC

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

February 21, 2006

Jonathan G. Katz, Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-9303

[VIA EMAIL (rule-comments@sec.gov)]

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

Dear Mr. Katz:

The Society of Corporate Secretaries & Governance Professionals (the "Society") is a professional association founded in 1946, serving more than 3,000 issuers. Job responsibilities of our members include working with corporate boards of directors and senior management regarding corporate governance; assuring issuer compliance with securities regulations and listing requirements; and coordinating activities with shareholders such as proxy voting for the annual meeting of shareholders and negotiation of shareholder proposals. The majority of Society members are attorneys. This letter is submitted in response to the Commission's request for comment in connection with the Proposal for Amendments to the Tender Offer Best-Price Rule.

We highly commend the Commission for proposing to clarify the scope of the tender offer best-price rule. We agree that the proposed modification of the language in Rules 13e-4(f)(8)(ii) and 14d-10(a)(2) would clarify that both of these rules apply only with respect to the consideration paid for securities tendered in a tender offer. Nevertheless, we believe that additional clarifications and coverage are warranted that would equally satisfy the underlying reasons for the proposals, not the least of which is to avoid providing incentives to structure transactions as statutory mergers versus tender offers.

Below are our comments as to certain issues raised by the Commission in the rules proposal; for your reference, we have included the text of the request.

## I. Proposed Amendments to Rule 14d-10(c): Requirements of the Exemption

### A. Determination of Arrangements Eligible for the Exemption and Safe Harbor

*Comments Requested: 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? [...] Alternatively, or perhaps in addition to providing a definition, would it be more helpful if we gave examples? [...] 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?*

We believe that what constitutes employment, compensation, severance and other employee benefit arrangements referenced in the exemption need not be defined. Although there can be countless variations on the theme for any particular arrangement, these terms are both long-standing and commonly understood. Any definition would run the risk over time of being construed too narrowly. Including examples or a list of non-exclusive factors would involve the same risk over time. The approach we suggest is consistent with principles-based rulemaking which we believe to be appropriate here.

### B. Commercial Arrangements

*Comments Requested: 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? 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?*

We believe that the underlying reasons identified for the proposed amendment of the best price rule apply equally to commercial arrangements and that an express exemption should be included as part of subsection (c). We do not view the proposed amendments to Rule 14d-10(c)(2) as being sufficiently broad enough to avoid litigation on this issue in light of the addition of the exemption proposed to be added in subsection (c)(2). There is also no reason in our view not to add a safe harbor in this area for a determination by an appropriately independent committee of the bidder's or subject company's board of directors, as applicable.

### C. Past and Future Services

*Comments Requested: The proposed exemption would require that the arrangement relate to past or future services and matters incidental thereto. 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?*

We do not believe that any further guidance by the Commission would be necessary. For evidentiary purposes, we believe that the concept of performance of services, whether past or future, is both long-standing and relatively well-understood. As such, we propose that use of the word "solely" in the rule be deleted as unnecessary. We believe that the approach we suggest on this issue is also consistent with principles-based rulemaking.

D. Employees and Directors of the Bidder

*Comments Requested: 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?*

We suggest that the Commission extend the proposed exemption and safe harbor to arrangements or agreements entered into with the employees and directors of the bidder. In the context of tender offers, compensation, severance and other employee benefit arrangements could potentially be entered into with employees of the bidder. As with the target company's personnel, these agreements and arrangements are not intended as compensation for securities tendered but rather as compensation for past services or as incentives for the continued services of the employee or director. The fact that such agreements and arrangements are not captured by the proposed exemption and safe harbor may create a negative inference that they would run afoul of the best-price rule.

E. Litigation Risk

*Comments Requested: Would the proposed exemption help alleviate the litigation risk currently posed by the best-price rule?*

In our opinion, the proposed exemption would significantly alleviate the litigation risk posed by the current rule.

F. Issuer Tender Offers

*Comments Requested: 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?*

We suggest that the Commission also amend the issuer tender offer rules contained in Rule 13e-4 to include an exemption and related compensation committee safe harbor for the negotiation, execution or amendment of an employment compensation, severance or other employee benefit arrangement or payments made or to be made or benefits granted or to be granted pursuant to such an arrangement.

While it is true that the application of the best-price rule may be less of a practical concern in issuer tender offers than in third-party tender offers, there may be situations in which an issuer contemplates changes to compensation arrangements at the time of an issuer tender offer. As currently drafted, the proposed rules may create an unintended negative implication that employment compensation, severance and other employee benefit arrangements negotiated or entered into during an issuer tender offer are subject to the best-price rule. This would unnecessarily create a chilling effect on issuers contemplating such a tender offer. We see no logical distinction between the two types of tender offers for this purpose.

## II. Proposed Amendments to Rule 14d-10(c): The Compensation Committee Safe Harbor

### A. Hostile Transactions

*Comments Requested: 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?*

The language of the proposed safe harbor should make it clear that the safe harbor does apply to "hostile" tender offers. We do not believe there is any reason to differentiate conceptually between hostile and friendly tender offers relative to the underlying reasons of the proposed rule change.

### B. Approval of Specific Arrangements

*Comments Requested: Should the language of the safe harbor require, as a basis for reliance on the safe harbor, approval of specific arrangements?*

We believe that the language of the safe harbor should not *require* the approval of specific arrangements. A compensation committee should be able to determine certain categories of arrangements that either would or would not qualify for the safe harbor.

### C. Independence of the Committee

*Comments Requested: 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?*

The safe harbor should remain available in the event a member of the compensation committee or committee performing similar functions is a party to the employee compensation, severance or other employee benefit arrangement. This issue should be allowed to be addressed either by recusal of the member or by the Board of Directors being allowed to designate a separate independent committee or by the designation in the rule of a subcommittee of the compensation committee excluding the particular member.

*Comments Requested: 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)?*

We believe that the independence test using the listing standards approach should be sufficient for safe harbor purposes. We do not believe that the subject company directors need also be independent from the bidder in circumstances where the subject company enters into the arrangement.

D. Reliance on Compensation Consultant

*Comments Requested: 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?*

We believe that it would be inconsistent with the notion of having an independent compensation committee act for safe harbor purposes to allow such committee to rely exclusively on, and hence delegate its authority to, a compensation consultant. The committee could, of course, seek the advice of experts, such as a compensation consultant or legal counsel.

E. Basis for Determinations Made by Committee

*Comments Requested: 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?*

Whether disclosure by the bidder or the subject company as to how the safe harbor was satisfied is appropriate depends on the materiality of the arrangements that the committee reviewed. We believe that a general requirement to disclose any and all deliberations of these arrangements would be overly broad, and is not necessary to support the purpose of the proposals (to clarify that Rules 13e-4(f)(8)(ii) and 14d-10(a)(2) apply only with respect to the consideration paid for securities tendered in a tender offer and, consequently, to avoid providing incentives to structure transactions as statutory mergers versus tender offers).

*Comments Requested: 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?*

The new rules should not require that a compensation committee examine a particular list of non-exclusive factors when making the determination whether an agreement

falls within the exemption for purposes of the safe harbor. We believe that it should be the prerogative of the compensation committee to determine how to conduct its deliberations and to identify factors relevant to its determinations, and that compensation committees are fully competent to make this determination. Therefore, we do not believe that a requirement that these factors be examined in each case would be appropriate.

## III. General Request for Comment

*De Minimis* Exclusion

*Comments Requested: 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)?*

We believe that it would be appropriate to include a *de minimis* exclusion to the best-price rule. We agree that such a *de minimis* threshold should be based on the number of securities beneficially owned by the employees or directors with whom the compensation, severance or other employee benefit arrangement is being made. Such a *de minimis* exclusion should be based on the beneficial ownership of employees and directors *excluding* their affiliates. We would suggest using the definition of beneficial ownership found in Section 13 of the Exchange Act and the regulations thereunder. That definition, which covers the power to dispose of securities, is the more appropriate one to use in the context of tender offers.

In line with our comments under I. D. and I. F. above, we suggest that such an exclusion apply to both issuer and third party tender offers; in addition, the exclusion should capture both employees and directors of the target company and the bidder company.

Should the Commission add an express exemption for commercial arrangements, we also believe that such a *de minimus* exemption should be made available as to the commercial party to the arrangement.

* * * * *

Thank you for the opportunity to comment on this proposal. Should you have any questions, please do not hesitate to contact me at 202-662-4678.

Sincerely,

Securities Law Committee
of the Society of Corporate Secretaries & Governance Professionals

By: Marilyn Mooney

cc: Pauline Candaux, Society Securities Law Committee Chairperson
William Mostyn, Society Chairman-Elect
David W. Smith, Society President
Susan Ellen Wolf, Society Chairman