Securities Industry Association
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Via Electronic Mail

February 21, 2006

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

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

Dear Ms. Morris:

The Capital Markets Committee of the Securities Industry Association ("SIA")[1] welcomes the opportunity to respond to the request of the Securities and Exchange Commission (the "Commission") for comments on its release entitled "Amendments to the Tender Offer Best-Price Rule" (the "Release") dated December 16, 2005. SIA members provide a variety of financial advisory and other services in connection with mergers and acquisitions and consequently are intensely interested in proposals intended to reestablish the tender offer as a viable means of effecting public company acquisitions. SIA believes this can be accomplished without undermining existing investor protections and commends the Commission for undertaking this effort.

Introduction

As the Commission noted in the Release, the split in the courts regarding the proper

[1] The Securities Industry Association brings together the shared interests of approximately 600 securities firms to accomplish common goals. SIA's primary mission is to build and maintain public trust and confidence in the securities markets. SIA members (including investment banks, broker dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals, and its personnel manage the accounts of nearly 93 million investors directly and indirectly through corporate, thrift, and pension plans. In 2004, the industry generated $236.7 billion in domestic revenue and an estimated $340 billion in global revenues. (More information about SIA is available at: www.sia.com.)

interpretation of the current best-price rule has made parties that are considering the acquisition of a public company (the "subject company") reluctant to utilize a tender offer to effect the acquisition if the bidder or the subject company intends to contemporaneously enter into or amend contractual agreements or arrangements with employees, directors or other shareholders of the subject company. This is unfortunate, as tender offers are often the quickest and most efficient means of effecting the acquisition of a public company and getting the consideration paid for purchased shares into the hands of the subject company's shareholders.

SIA strongly supports the Commission's objectives: (i) to clarify that the tender offer best-price rule applies only with respect to the consideration offered and paid for securities tendered in issuer or third-party tender offers and not to consideration offered and paid according to employment compensation, severance or other employee benefit arrangements ("Employment Arrangements") entered into with employees or directors of the subject company; (ii) to alleviate the uncertainty arising from varying judicial interpretations of the best-price rule; and (iii) to remove any unwarranted incentive to structure transactions as statutory mergers to which the best-price rule does not apply. However, SIA remains concerned that, absent certain modifications, the proposed best-price rule will not necessarily achieve the Commission's objectives and, in light thereof, has the following comments and suggestions.

Comments and Suggestions

1. ***Elimination of Uncertainty with respect to the Safe Harbor***. To be effective in achieving the Commission's objectives of providing judicial certainty and reestablishing tender offers as a viable means of effecting public company acquisitions, it is important that, in appropriate circumstances, the safe harbor permit courts to grant motions to dismiss claims alleging violations of the best-price rule and grant summary judgment in favor of defendants based on readily ascertainable facts. SIA is concerned that, as currently drafted, the proposed amendments to the best-price rule may permit plaintiffs' claims alleging a violation of the best-price rule to survive a motion to dismiss or a motion for summary judgment by merely challenging the independence of one or more members of the committee approving an Employment Arrangement or such committee's determination that such arrangement satisfies the requirements of (c)(2)(i) and (c)(2)(ii) of the proposed new rules. A result in which one set of disputed material facts (e.g., director independence) is substituted for another (i.e., the integral part test) will not achieve the Commission's objectives. By eliminating unnecessary conditions to the satisfaction of the proposed safe harbor or at least modifying such requirements, SIA believes the Commission can provide the necessary predictability regarding judicial outcomes that bidders require in order to structure proposed acquisitions to include a tender offer.

   a. *Approving Committee*. The proposed rule provides that for purposes of the safe harbor an arrangement shall be deemed an Employment Arrangement if it is approved by a compensation or other committee performing similar functions consisting solely of independent directors. SIA believes that the proposed safe

harbor should be amended to provide that the approval of an Employment Arrangement by a committee of the board of directors of the bidder (if the bidder is the counterparty to such arrangement) or of the subject company (whether or not the subject company is the counterparty to the arrangement) be sufficient in and of itself to satisfy the requirements of the safe harbor so long as such committee (an "Independent Committee") is comprised of directors serving on committees subject to Commission approved independence requirements of a self-regulatory organization ("SRO") such as the New York Stock Exchange, Inc. or the National Association of Securities Dealers, Inc.

SIA believes that allowing the approving committee to be an Independent Committee provides necessary and appropriate flexibility to meet specific facts and circumstances (such as when one or more members of the compensation committee are conflicted) without sacrificing investor protection. The applicable rules of SROs provide adequate protection regarding the independence of such committee members and the protection of the safe harbor should not be lost as a result of [mere] allegations challenging the independence of committee members already serving on a committee subject to the independence requirements of an SRO. The ability to use an Independent Committee could also facilitate the extension of the safe harbor to commercial agreements as suggested below.

SIA also believes that an Independent Committee of the subject company should be able to approve arrangements for purposes of the safe harbor whether or not the subject company is a party to the arrangement. Investors are appropriately protected as the directors of the subject company have a duty to ensure that such arrangements 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.

Finally, because some subject companies and bidders will not have committees subject to Commission-approved SRO independence requirements (e.g., foreign private issuers or, in the case of bidders, private entities formed by financial sponsors), SIA also believes that the proposed safe harbor should permit such companies to satisfy the requirements of the safe harbor by other means (e.g., approval by a majority of the relevant company's board of directors or a duly authorized committee thereof).

b. *Safe Harbor Determinations Should Not Be Subject to Challenge Under the Best Price Rule.* As more fully discussed below, SIA believes that the requirements set forth in paragraphs (c)(2)(i) and (c)(2)(ii) are unnecessary and should be deleted for purposes of the safe harbor and exemption provided by the proposed rule. Allowing plaintiffs to raise the satisfaction of such requirements as material factual disputes would only result in the substitution of one set of disputed material facts for another and consequently not achieve the Commission's objectives of providing

judicial certainty and the elimination of unwarranted incentives to structure public company acquisitions as statutory mergers. State law provides potential plaintiffs with an adequate means of challenging the propriety of determinations by directors. If the Commission nevertheless determines to retain paragraphs (c)(2)(i) and (c)(2)(ii), SIA believes that the Commission should clarify that the determination by an Independent Committee that an Employment Arrangement meets the requirements of (c)(2)(i) and (c)(2)(ii) for purposes of the safe harbor is not subject to challenge under the best-price rule, but only through claims for breach of fiduciary duty under state law.

i. Paragraph (c)(2)(i) requires that the amount payable pursuant to such arrangements "relates solely to past services performed or future services to be performed or refrained from performing by the employee or director (and matters incidental thereto)." Should the Commission determine to retain paragraph (c)(2)(i), SIA suggests that it be modified by deleting the word "solely" and replacing it with "in whole or in part." Employment Arrangements are often complex and contain terms and conditions not "solely" relating to past services performed or future services to be performed or refrained from performing. In addition, SIA further suggests that the phrase, " current services being performed" be added after the words "past services performed" so that all temporal possibilities are included in (c)(2)(i).

ii. Paragraph (c)(2)(ii) requires that the amount payable pursuant to such arrangement "is not based on the number of securities the employee or director owns or tenders." Because Employment Arrangements often provide for grants of shares of subject company stock and options to acquire shares of subject company stock and the accelerated vesting of such shares and options upon certain triggering events, SIA believes that many such arrangements will technically run afoul of (c)(2)(ii) and consequently not qualify for the exemption or safe harbor contemplated by the proposed new best-price rule. Should the Commission determine to retain paragraph (c)(2)(ii), SIA suggests that it be modified by inserting "specifically calculated" before the word "based," and by deleting the words "owns or" and provide additional, explicit clarification that the granting of stock and options and the acceleration of their vesting pursuant to the terms of any Employment Arrangement will not be deemed consideration for securities tendered in a tender offer.

2. ***Commercial Agreements.*** SIA believes that commercial agreements, though less frequent, can be as important an aspect of a merger or acquisition as the retention of key employees or directors or the execution of definitive severance arrangements and that companies are not likely to forgo entering into or amending commercial arrangements in favor of retaining an acquisition structure that includes a tender offer. As a consequence, SIA

believes that the proposed new rules should permit commercial agreements to be covered by the safe harbor and exemption. SIA believes that an Independent Committee can and would seek the information and advice it needs to ascertain whether a contemporaneous commercial agreement with an employee, director or other shareholder reflected arms-length commercially reasonable terms. By allowing commercial agreements to be covered by the safe harbor and exemption, SIA believes that the proposed new rules will more fully achieve the Commission's objective of eliminating unwarranted incentives to structure transactions as statutory mergers.

3. ***Issuer Tender Offers.*** SIA believes that Rule 13e-4 should be amended to be consistent with the proposed amendments to Rule 14d-10. Although likely to be less frequent, SIA believes similar issues relating to Employment Arrangements and commercial agreements can arise in connection with a recapitalization and other transactions potentially subject to Rule 13e-4 and there does not appear to be a compelling reason to distinguish between the two rules.

4. ***de minimus Exception***. SIA believes that a *de minimus* exception to the proposed new best-price rule is desirable and consistent with the Commission's objective of removing unwarranted incentives to structure transactions as statutory mergers. The magnitude of the potential financial risk to a bidder of a judicial determination that all or a substantial portion of the consideration under an Employment Arrangement or commercial agreement is attributable to shares tendered in a tender offer is inversely proportional to the number of shares owned and tendered by an employee, director or other shareholder of the subject company. SIA believes that the potential magnitude of the financial risk will often be sufficient to cause a bidder to structure an acquisition as a statutory merger in order to avoid any concerns regarding the application of the best-price rule. SIA would recommend that the proposed new best-price rule be amended to include an exemption with respect to Employment Arrangements, as well as commercial agreements with holders of less than 1% of the outstanding shares of the class of subject company shares that are the subject of the tender offer. SIA believes it is extremely unlikely that bidders would have a reason to pay differential consideration to holders of such a small percentage of the subject company's shares.

Conclusion

We thank the Commission for the opportunity to present our views. If you have any questions or would like to discuss these issues further, please contact the undersigned or Eileen Ryan, Vice President and Associate General Counsel of SIA, at 212-618-0508 or eryan@sia.com.

Very truly yours,

/s/ John Faulkner
John Faulkner
Chairman
Capital Markets Committee

cc: The Hon. Christopher Cox, Chairman
The Hon. Cynthia Glassman, Commissioner
The Hon. Paul Atkins, Commissioner
The Hon. Roel Campos, Commissioner
The Hon. Annette Nazareth, Commissioner
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