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SEC Approves Amendments to Best Price Rules

At today's open meeting, the SEC unanimously approved final rules to modify the "all-holders, best-price" requirements of Exchange Act Rules 14d-10 and 13e-4 to exempt certain compensation, severance and other employee benefit arrangements from those requirements. These amendments are intended to resolve the uncertainty that has resulted from a split among the U.S. Circuit Courts as to whether these arrangements violate the best price requirements. The possibility of litigation in tender offer transactions where payments are made to employees, directors and certain shareholders outside of the tender offer has led to a significant decrease in U.S. tender offer activity in recent years.

The amendments to the best-price rule were originally proposed in December 2005, and are now being adopted by the SEC with significant changes from the original proposal to reflect comments received. Generally, the changes broaden the exemption and related safe harbor rules and clarify their application. The most significant of the changes to the proposed rules that will be included in the final rules are as follows:

- *The proposed exemption from application of the best price rule to compensation, severance and other employee benefit arrangements has been expanded.*
    - The exemption will be available for issuer, as well as third party, tender offers.
    - The exemption will be available for "compensation" arrangements with any security holder, not just employees and directors.
    - Under the final rule, the exemption will be available for arrangements if the amounts payable thereunder (i) are paid or granted as compensation for services rendered or to be rendered and (ii) are not calculated based on the number of securities tendered (i.e., calculation of amounts payable based on the number of securities owned is acceptable). Under the original proposal, the exemption was available only for arrangements in which the amounts payable thereunder (i) related <u>solely</u> to services rendered or to be rendered and (ii) were not based on the number of securities <u>owned</u> or tendered.

Note that the SEC chose not to expand the exemption to cover non-employment related commercial arrangements as many commentors had urged. The Staff viewed this change as too open-ended and insufficiently protective of investors.

- *The safe harbor for arrangements approved by the independent compensation committee of the entity that is party to the arrangement has been expanded.*
  - The safe harbor will be available for issuer, as well as third party, tender offers.
  - The target company's independent compensation committee may approve any arrangements for coverage by the safe harbor, regardless of whether the target is a party to the arrangement or not.
  - The safe harbor will be expanded to accommodate (i) certain situations where the entity that needs to approve an arrangement does not have an independent compensation committee and (ii) the different board structures and independent director standards of foreign private issuers under their home country rules.

These new rules will be effective 30 days after their publication in the Federal Register.

Please note that the above summary is based on oral discussions from today's open meeting, and the exact wording of the final rules will not be known until they are published. We will update you on the content of the final rules when they are available. For a copy of the proposed rules, see http://sec.gov/rules/proposed/34-52968.pdf.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addresses in this memorandum may be addressed to any of the following:

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