

CAHILL GORDON & REINDEL LLP
EIGHTY PINE STREET
NEW YORK, NEW YORK 10005-1702
TELEPHONE: (212) 701-3000
FACSIMILE: (212) 269-5420

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**Recent Securities Law Developments on:
SEC Adoption of Amendments to the Tender Offer Best-Price Rule**

On November 1, 2006, the Securities and Exchange Commission (“SEC”) adopted amendments to the tender offer best price rules.¹ Pursuant to Rule 13e-4 and Rule 14d-10 of the Securities Exchange Act of 1934, the third party and issuer best-price rules require that consideration paid to any tendering shareholder is the highest consideration paid to any other security holder in the offer to ensure that all shareholders are paid the same amount. As adopted, the amendments:

- clarify that the provisions apply only with respect to the consideration offered and paid *for securities* in a tender offer;
- establish an exemption for consideration offered and paid pursuant to compensation, severance or employee benefit arrangements entered into with security holders of the subject company subject to certain requirements; and
- provide a non-exclusive safe harbor provision whereby arrangements that are approved by certain independent directors of either the subject company’s or the bidder’s board of directors, as applicable, will not be prohibited by the rules.

In its release, the SEC noted that the amendments to the best price rules were necessary to alleviate the uncertainty that the various interpretations of the best-price rule by courts have produced, while ensuring that the intent of the best-price rule — “equal treatment of security holders” — is satisfied. The final rules will become effective 30 days after their publication in the Federal Register.

¹ See Securities Exchange Act of 1934 Release No. 34-54684, entitled “Amendments to the Tender Offer Best-Price Rules,” available at <http://www.sec.gov/rules/final/2006/34-54684.pdf> (Nov. 1, 2006); see also Securities Exchange Act of 1934 Release No. 34-52968, Proposed Rules, available at <http://www.sec.gov/rules/proposed/34-52968.pdf> (Dec. 16, 2005).

A. Clarification

The existing rules will be revised to clarify that they only apply with respect to the consideration offered and paid for securities tendered in an issuer or third-party tender offer, as applicable, and that there is no time restriction on their application. Specifically, the phrase “for securities tendered in the tender offer” will replace the clauses “pursuant to the tender offer” and “during such tender offer,” to avoid such prior ambiguity.

B. Exemption

A specific exemption will be added to the issuer and third-party best-price rules with respect to consideration offered and paid pursuant to employment compensation, severance or other employee benefit arrangements that are entered into with any security holder of the subject company. Subject to certain substantive requirements, the new rules make clear that amounts paid for which there is a legitimate compensatory purpose should not be considered when calculating the price paid for tendered securities. In order to fall within this exemption, the amount payable under the compensatory arrangement:

- must be “paid or granted as compensation for past services performed, future services to be performed, or future services to be refrained from performing, by the security holder (and matters incidental thereto)”; and
- may “not [be] calculated based on the number of securities tendered or to be tendered in the tender offer by the security holder.”

C. Safe Harbor

The new rules also establish a non-exclusive safe harbor provision to the issuer and third-party best-price rules that provides an exemption for employment compensation, severance or other employee benefit arrangements approved by a compensation committee or other committee performing similar functions. Such committee may be of the target company’s board of directors, whether or not the target is a party to the arrangement, or of the bidder company’s board of directors, if the bidder is a party to the arrangement. In either case, all members of the committee approving the employment arrangement must be independent as defined by applicable listing standards. If a company does not have a compensation committee (or equivalent) or if none of its members are sufficiently independent, the rules permit the appointment of a special committee of independent directors to approve the arrangements. Similar to the new exemption, the safe harbor will apply to any security holder of the subject company.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Jonathan I. Mark at (212) 701-3100 or jmark@cahill.com; John Schuster at (212) 701-3323 or jschuster@cahill.com; or Boji Wong at (212) 701-3011 or bwong@cahill.com.