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## SEC ADOPTS AMENDMENTS TO TENDER OFFER BEST PRICE RULE

*By Joe Parkey*

On November 1, 2006, the SEC adopted amendments to the tender offer best price rule intended to clarify that the provisions of the rule apply only to consideration offered and paid for securities in a tender offer. The best-price rule, as set forth in Exchange Act Rules 13e-4(f)(8)(ii) and 14d-10(a)(2), requires that all security holders be paid the highest consideration paid to any other security holder in the tender offer.

Bidders for public companies have often avoided utilizing tender offers as a result of several unfavorable court decisions interpreting the best price rule. The courts in these decisions have generally held that where compensation arrangements are made with executives of the target company in connection with the tender offer, the rule is violated where those executives are also stockholders of the target company, effectively viewing the new compensation arrangements as a portion of the purchase price paid for their securities in the tender offer. Because acquisition transactions often involve new compensation arrangements to be provided to executives of the target company, acquiring companies have often structured acquisition transactions as statutory mergers, to which the rule does not apply, rather than tender offers.

The SEC has enacted amendments to the rule intended to eliminate this disincentive to the use of tender offers. The amended rule provides that that consideration offered and paid according to compensation arrangements entered into with security holders of the target company are not prohibited by the best price rule where the amounts payable under the arrangement are: (1) being paid for services performed or to be performed (and matters incidental thereto); and (2) not calculated based on the number of securities tendered in the tender offer by the security holder. The adopting release states that the exemption applies to equity-based awards as well as cash compensation, and that the exemption applies to all security holders, not just current management.

The amendments also include a non-exclusive safe harbor, which provides that employee benefit arrangements that are approved by the independent members of a compensation or similar committee of the target company, regardless of whether the target company is a party to the arrangement, are not prohibited by the best price rule. Alternatively, if the acquiring company is a party to the arrangement, the arrangement may be approved by the independent members of the compensation or similar committee of the acquiring company.

The amendments become effective December 8, 2006.

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*Please remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues you may contact the head of our Corporate and Securities practice group:*

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