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SPECIAL COMMITTEE ON MERGERS, ACQUISITIONS
AND CORPORATE CONTROL CONTESTS

December 12, 2002

Via email: rule-comments@sec.gov
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Attention: Jonathan G. Katz, Secretary

File No. S7-43-02; Release No. 33-8145, 34-46788
Proposed Rule: Conditions for Use of Non-GAAP Financial Measures

Ladies and Gentlemen:

This letter is submitted on behalf of the Special Committee on Mergers, Acquisitions and Corporate Control Contests of the Association of the Bar of the City of New York (the "Committee") in response to Release No. 33-8145, 34-46788, dated November 4, 2002 (the "Release"). Among other things, the Release proposes rules of the Securities and Exchange Commission (the "Commission") that would require public companies that disclose or release certain financial information that is derived on the basis of methodologies other than in accordance with generally accepted accounting principles ("GAAP") to include, in that disclosure or release, a presentation of the most comparable GAAP financial measure and a reconciliation of the disclosed non-GAAP financial measure to the most comparable GAAP financial measure.

The Committee is comprised of partners and associates at law firms, counsel to corporations and investors and focuses on, among other things, issues related to mergers and acquisitions of public companies. While we are aware that other committees of the above Association and the American Bar Association are commenting more broadly on the Release, the comments of the Committee herein solely address the aspects of the Release related to business combination transactions .

In short, we believe that the proposed new Regulation G and proposed amendments to Item 10 of Regulation S-K and Regulation S-B should not apply to disclosures relating to business combination transactions that are subject to Rule 165, Rule 14a-12 or Rule 14d-2(b)

(collectively, the "Communication Rules"), or to disclosures that are required under Item 1015 of Regulation M-A.

As proposed for adoption by the Commission in the Release, new Regulation G would apply whenever a reporting company publicly discloses or releases material information that includes a non-GAAP financial measure.[1] As part of the public disclosure or release containing a non-GAAP financial measure, Regulation G would require the public company to provide a presentation of the most comparable financial measure calculated and presented in accordance with GAAP and a reconciliation of the non-GAAP financial measure to the comparable GAAP financial measure. Regulation G also provides that the presentation of a non-GAAP financial measure, together with the accompanying information, may not misstate a material fact or omit to state a material fact necessary to make the presentation of the non-GAAP financial measure not misleading, in light of the circumstances under which it is presented.

The Commission also has proposed amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B to address specifically the use of non-GAAP financial measures in filings with the Commission. The proposed amendments to Item 10 of Regulation S-K and Regulation S-B would apply to the same categories of non-GAAP financial measures as covered by Regulation G, but with more detailed requirements. The proposed amendments would require public companies using non-GAAP financial measures in filings with the Commission also to include a presentation of the most comparable GAAP financial measure, with equal or greater prominence, along with a clearly understandable quantitative reconciliation between the non-GAAP financial measure and the GAAP financial measure. In addition, public companies would be required to provide statements disclosing management's purpose for using the non-GAAP financial measures and describing the reasons why such measures are useful to investors.

Both proposed Regulation G and the proposed amendments to Item 10 of Regulations S-K and S-B would apply to disclosures of non-GAAP financial measures that represent projections or forecasts of results of business combination transactions ("post-transaction measures") and that are filed with the Commission pursuant to the communications rules applicable to business combination transactions, as well as non-GAAP financial measures of each registrant that are used to calculate post-transaction measures. In the Release, the Commission raises the question, among others, of whether there should be exceptions from certain of the requirements

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[1] As provided in the Release, a "non-GAAP financial measure" is a numerical measure of a reporting company's historical or future financial performance, financial position or cash flows that: (a) excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the comparable measure calculated and presented in accordance with GAAP in the statement of income, balance sheet or statement of cash flows (or equivalent statements) of the reporting company; or (b) includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the comparable measure so calculated and presented.

of these proposed rules for post-transaction measures or other measures filed as information under the business combination rules.

The Committee believes that Regulation G and the proposed amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B should not apply to disclosures relating to business combination transactions that are subject to the Communication Rules. Disclosure of non-GAAP financial measures in the context of business combination communications (such as estimated cost savings, synergies and accretion or dilution in earnings per share), unlike the use of non-GAAP financial measures in earnings releases, does not have the same risk of misleading investors by "obscur[ing] GAAP results." (text at note 9) The non-GAAP financial measures commonly used in presenting business combination transactions are not intended to substitute for any comparable GAAP results, but rather to provide information to assist investors and analysts in understanding the expected effect on the combined companies if the proposed transaction is consummated. Indeed, the Release expressly provides that the pro forma financial information relating to a business combination transaction presented in a registration statement, proxy statement or tender offer statement pursuant to Article 11 of Regulation S-X "would not be subject to the [new] rules." (note 12).

Application of the proposed rules to disclosure relating to business combination transactions would significantly undermine the comprehensive revisions to the rules relating to security holder communications in business combination transactions which became effective on January 24, 2000. Rel. No. 34-42055 (the "Takeovers Communications Release"). Recognizing the "special nature of business combination transactions", as well as the need of parties to release "information on proposed transactions including pro forma financial information for the combined entity, estimated cost savings and synergies," the Commission found that "free communications relating to business combination transactions are in the public interest and consistent with the protection of investors." (text at notes 17, 22, 48) The Takeovers Communications Release addressed the goal of providing the maximum amount of flexibility to disclose material information to security holders and the markets, without changing the requirement that security holders receive the mandated disclosure document before being asked to make a voting or investment decision. Recognizing the risk that some persons may attempt to mislead the market in connection with business combination transactions, the Commission nevertheless concluded that investors would receive a benefit from an increased flow of information and would eventually receive a registration, tender offer or proxy statement, containing specific mandated information, before an investment, tender or voting decision would be required. (text at note 259)

Furthermore, in connection with its comprehensive revision of the rules relating to takeover communications, the Commission instituted several investor safeguards to balance the increased flexibility for issuers in communicating material information to the market. The safeguards include requirements that all written communications be filed on or before the date of first use; that all written communications include a prominent legend advising investors to read the registration, proxy or tender offer statement, as applicable; and confirmation that oral and written communications remain subject to Section 10(b) liability, Section 12(a)(2) liability and/or Rule 14a-9 liability, as applicable.

In view of these special investor safeguards for communications relating to business combinations, and the recognition of the importance to the markets of free communications relating to business combination transactions, the Commission should extend the special treatment it provided for such communications under Rule 165 to exclude "communications relating to business combinations" from the new rules relating to non-GAAP financial measures (see Preliminary Note to Rule 165).

In addition, we request that the Commission confirm that Regulation G and the other proposals in the Release would not apply to the required disclosures under Item 1015 of Regulation M-A concerning reports and analyses prepared by financial advisors. In these reports, investment banks frequently include analyses based upon non-GAAP financial information pertaining not only to the parties to the particular business combination transaction, but also to other companies and other transactions that the advisors deem relevant. These analyses, which include discounted cash flow analyses, public company analyses, precedent transaction analyses, and other analyses, are frequently prepared based on publicly available financial information, which the bankers then analyze to estimate non-GAAP financial measures for the relevant companies and transactions. In such instances, neither the parties to the transaction nor the investment banks preparing the reports would be able to prepare the required additional disclosures required under the proposed rules, nor would such additional disclosure be meaningful to security holders or the markets. Accordingly, we believe that proposed Regulation G and Item 10 of Regulation S-K should not apply to required disclosures under Item 1015 of Regulation M-A.

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Members of the Committee would be pleased to answer any questions you might have regarding our comments, and to meet with the staff of the Commission if that would assist the Commission's efforts.

Respectfully Submitted,

/s/ Erica H. Steinberger
Erica H. Steinberger, Chair
Committee on Mergers, Acquisitions and
Corporate Control Contests

cc: Alan Beller, Director
Division of Corporation Finance
Securities and Exchange Commission