

December 21, 2004

Ms. Barbara Z. Sweeney
Office of the Corporate Secretary
NASD
1735 K Street, NW
Washington, DC 20006-1500

Re: Notice to Members 04-83 (November 2004) Fairness Opinions

Dear Ms. Sweeney:

We appreciate the opportunity to respond to the NASD's Notice to Members, which seeks comment on whether to propose a new rule that would address procedures, disclosure requirements, and conflicts of interest when members provide fairness opinions in corporate control transactions.

We applaud the NASD for taking the initiative to consider addressing some of the concerns about the independence and quality of fairness opinions. The NASD's proposal and subsequent adoption of a rule governing the manner in which fairness opinions are issued is vital if fairness opinions are to provide management and shareholders with meaningful information on the fairness of a contemplated transaction.

As we stated in an article¹ cited by the NASD in its Notice to Members,² a number of factors tend to undermine the usefulness of fairness opinions. These include the conflicts of interest of many opinion givers due to the success fees they stand to receive upon the successful consummation of the transaction and the absence of uniform standards governing the due diligence and analytical procedures employed in the preparation of fairness opinions.

In response to these flaws, we have proposed two procedures that would make fairness opinions significantly more useful to management and shareholders alike in evaluating the fairness of a particular transaction: requiring fairness opinions, particularly those that are to be attached to a proxy statement, to be issued by independent investment banks that do not receive a fee that is contingent upon the closing of the transaction in question, and adopting "best

¹ Elson, Rosenbloom and Chapman, *Fairness Opinions – Can They Be Made Useful?*, Securities Regulation and Law Report, Vol. 35, No. 46, November 24, 2003; Corporate Counsel Weekly, Vol. 18, No. 45, November 11, 2003.

² NASD Notice to Members 04-83 (November 2004), endnote 7.

practices” standards that would seek to address both the quality of the fairness opinion and the conflicts of interest that too often arise.

As to independent fairness opinions, we believe that investment banks are disincentivized from using their best judgment in determining the fairness of the transaction by the recognition that if they find the transaction unfair, they jeopardize their ability to collect the principal portion of their compensation in the deal – the success fee. Having at least one independent fairness opinion would ameliorate this problem.

There is also a critical need for adopting “best practices” standards that set forth due diligence and valuation procedures that govern how an opinion provider comes to its opinion. The quality of fairness opinions, and the wide range of techniques used in determining whether a transaction is fair, vary greatly. Establishing qualitative due diligence and valuation procedures will assist in addressing some of these problems. While the determination of the fairness of the consideration in any given transaction will always be as much “art” as “science”, the adoption of “best practices” standards can help bring about more defensible opinions.

We would be pleased to respond to any inquiries regarding the views set forth in this letter or the articles that we have published on this subject. Please feel free to contact Charles Elson at 302-831-6157, Arthur Rosenbloom at 212-584-2400, or Drew Chapman at 212-480-4800.

Respectfully submitted,

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