January 10, 2005

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

Re: Addressing Conflicts of Interest When Members Provide Fairness Opinions; Comments

Dear Ms. Sweeney:

We offer the following comment:

David vs. Goliath. This firm is one of the few offering financial opinions, including fairness opinions, without at the same time conducting any sales (brokerage), trading, research, asset management, principal equity investing and commercial lending activities. To offer un-conflicted representation of independent directors with significantly fewer potential challenges to our independence, we simply do not operate with conflicting business relationships with our client, its counterparties or competitors. Our entire business model, since inception, has been based in large part on the importance of truly independent financial advice, so this firm fully supports rule-making activity in this and every area where lack of independence can leave public stakeholders worse off.

Speaking Upon (Previously?) Deaf Ears. As we do not have the advantage of high brand awareness or significant market volume (in comparison to full-service firms with large retail brokerage and asset management arms) we base the strength of our competitive appeal on competence and independence. Our experience over the last decade and a half, however, is that many corporate officers do not consider our structural independence to be of the critical importance that we do, frequently regarding it, at best, with indifference, or apparently of no consequence at all. Specifically related to fairness opinions: our experience in the marketplace includes a significant number of incidents in which corporate management's engagement of a firm to render a fairness opinion hinges **primarily** on a pre-existing relationship developed in the course of financial business activities that are, could be, or appear to be, in conflict with the independence of a fairness opinion. For example, we do not find it unusual for financial advisory work, including fairness opinions, to be awarded to the investment banking arm of "Institution A, B or C" because "they put money into our credit facilities," "they follow our stock," "they've helped us with all of our acquisitions," "they manage our pension plan," "they underwrote, placed, and/or invested in, our securities," etc.

"Tying Arrangements." Sometimes these quid pro quo arrangements by which a financial institution captures the mandate to provide fairness opinions is codified as part of the engagement letter for unrelated services, such as a commercial lending or a private placement agreement. More often, the quid quo pro is tacit, but understood, particularly in the linkage of provision of credit facilities, securities research coverage and trading/market-making. Whether de jure or de facto, however, we can borrow a concept from anti-trust: such dealings are tantamount to "tying arrangements," where the purchase and delivery of one service assumes the purchase and delivery of another service. The respective managements of public corporations and full-service investment banks know what they are getting into and why; they balance the benefits and risks and make the ultimate election to sign up, or otherwise participate informally in these relationships.

"Which Master Is Served?" Are the shareholders, however, really better served when a primary commercial lender gets a prior in-depth look and opines on the fairness of an equity transaction, sale of a division or the like? Is the bank protecting shareholders first or its debt position? Does company management believe, notwithstanding the "Chinese Wall," that giving the fairness opinion work to a firm that trades a large volume of its shares will tend to promote acceptance and therefore, favorable commentary about the transaction from that firm's securities analyst when comment can be made? Or, more cunningly, can awarding fairness opinion work to the firm of an (at times, adversely) "free spirit" analyst, keep critical comments out of the market place for the period that analyst may be foreclosed from commenting publicly?" When all this business is linked together formally or informally, the possibilities for maneuver are limited only by the human imagination.

Implications for rule-making:

- **Working Our Side of the Street.** The observation we make here is that the sources of challenge against the "independence" in fairness opinions arise as much from the corporate clients as from the regulated investment firms. However, the NASD can only regulate its members. One thing we can do to clean up our side of the street is to decouple provision of financial opinions from the provision of other financial services. We can simply forbid firms with a given threshold of "securities business" for a particular corporate client from qualification to render financial opinions for that client, much the way auditors are now barred from much ancillary consulting work for their audit clients. We can forbid Member firm engagement letters from "tying" financial advisory work (that includes fairness opinion work) to commercial lending arrangements and other unrelated activities.

- **Setting the Tone – Cast a Wider Definitional Net for Disclosure of Potential Conflict of Interest Relationships.** We can discourage de facto "tying arrangements" by casting a wider definitional net when describing potential "securities business" that may impair independence in the provision of a financial opinion. The easiest potential conflict occurs when the firm to be compensated to complete a transaction is the same firm charged with opining as to its fairness. This is also the baldest example. It's easy to see because the firm with impaired independence is the one touted as principal financial advisor in the newspapers. In contrast, we are arguing that there is a de jure and de facto web of business relationships among public corporations and many of the full-service investment firms serving them that can impair the independence of fairness opinions even if the firm rendering the opinion is NOT a principal financial advisor on (being rewarded for completing) a transaction. We believe that there is a potential for conflict of interest if the opinion is rendered by a major lender, market-maker, asset manager or firms with a variety of other recurring securities-related business with the corporate client. Accordingly, we believe that it will better serve the purposes of this rule-making activity if firms rendering fairness opinions are required to disclose ANY securities-related, lending or financial advisory work conducted for the engaging corporate client perhaps up to two years prior. By volume, whether measured by number of transactions or aggregate dollars, we believe that there are a lot more opinion rendering firms wearing two hats where one of the hats is NOT the principal transaction advisor hat – yet with similar independence impairing potential.

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