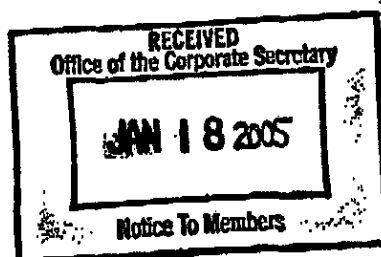


**STANDARD
& POOR'S**

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January 10, 2005

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

Dear Ms. Sweeney:

Standard & Poor's Corporate Value Consulting (S&P CVC) is pleased to submit the following comments in response to the recent NASD invitation to comment (NASD NTM 04-83, November 2004) on whether NASD should propose a new rule that would address procedures, disclosure requirements and conflicts of interest when NASD members provide fairness opinions in corporate control transactions.

Standard & Poor's founding principle was "the investor's right to know." This principle continues to guide how we serve our clients, and more broadly, the global financial markets. In the area of fairness opinions, this principle supports what we believe are three essential elements of a credible fairness opinion: full disclosure, independence, and rigor.

We understand that NASD is considering whether to propose a new rule that would require members to: (i) disclose in any fairness opinion appearing in any proxy statement any significant conflicts of interest, including, if applicable, that the member has served as an advisor on the transaction in question, and the nature of compensation that the member will receive upon the successful completion of the transaction; and (ii) require specific procedures that members must follow to identify and disclose potential conflicts of interest in rendering fairness opinions.

Although S&P CVC is not a NASD member, we support NASD's efforts to propose such rules and offer the following thoughts:

First, NASD suggests that the proposed rule could require a member to provide, in any fairness opinion that will be included in a proxy statement, a clear and complete description of any significant conflict of interest by the NASD member. This disclosure would include, if applicable, that the member has served as an advisor on the transaction in question and the nature of compensation that the member will receive upon the successful completion of the transaction (including any variance or contingency in the fee charged for the fairness opinion).

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At the heart of any fairness opinion must be a commitment to clear and complete disclosure of significant conflicts of interest. Conflicts can impair the ability of fiduciaries and shareholders to place reasonable reliance on the opinions expressed. Because it can be impractical to enumerate all circumstances that may constitute a significant conflict of interest (whether actual or perceived) the commitment must be to the spirit of such disclosure. Contingent fee arrangements and the incentive of potential future work are commonly cited as factors that are indicative of a significant conflict of interest.

Where a financial advisor provides, or has the potential to provide, services beyond the scope of the fairness opinion, one factor that may mitigate the conflict of interest is the willingness, on the part of the advisor, to provide all services on an "a la carte" basis. For example, in the process of being engaged by the client, the advisor should be able to demonstrate a willingness to separately provide, and establish fee schedules for, the lead advisory role and the provision of the fairness opinion. A service model that incorporates providing a fairness opinion independently of other advisory services, supports a rigorous and unfettered scope of analysis to support the opinion.

A further safeguard against conflicts of interest is a fairness opinion fee that is supported by estimated professional effort and out-of-pocket costs. The nature of the deal consideration, the industries in which the parties operate, the complexity of the transaction structure and the overall economic environment are a few of the factors typically considered when estimating scope and level of required effort. Once estimated, a fixed fee is communicated to the client in advance of providing the actual opinion. If the scope of the analysis increases, incremental fees may be incurred on the basis of additional professional effort.

In the past, financial advisors have been criticized for arbitrarily allocating a portion of total client service fees to the fairness opinion. Transparency and disclosure of the fairness opinion fee will tend to increase the accountability of the financial advisor to establish, and estimate fees on the basis of the actual work required to provide a credible opinion for the subject transaction. A full disclosure of the fairness opinion fee, and in some instances, an actual indication of the financial advisor's effort, could be meaningful disclosures for fiduciaries and shareholders.

Second, NASD suggests that the proposed rule could require a member to disclose the extent to which the financial advisor relied on key information supplied by a company or its management, or whether it independently verified certain information. A financial advisor can never replace honest and competent management. However, an advisor can demonstrate a degree of independence and rigor that makes disclosure truly meaningful to fiduciaries and shareholders. Many fairness opinions list documents reviewed and other steps taken in connection with the preparation of the opinion, but fairness opinions would be more informative if they included a clear and complete disclosure of information provided by management upon which the opinion is based. In format, the disclosure could

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resemble the "List of Documents Relied Upon" that typically accompanies an expert's report in commercial litigation. A more meaningful disclosure could include additional information that clearly identifies the key assumptions upon which the opinion is based and the qualifications of the individuals that performed/reviewed the analysis. Key assumptions are fact and circumstance specific, but more robust disclosure would enable fiduciaries to independently assess assumptions such as sales growth, profit margins, and access to capital.

Meaningful disclosure should not only list the key assumptions, but should indicate the sensitivity of the opinion to changes in these assumptions. As a final step, the financial advisor might want to demonstrate the level of independent validation of these assumptions by comparison to proprietary models, industry data and, in some cases, interviews with customers, investors, vendors, and third-party industry consultants. A combined disclosure of the information provided by management, key assumptions used by the advisor, and the sensitivity of the opinion to the key assumptions will provide fiduciaries and shareholders with additional information that could be useful in their decision to approve or reject a proposed transaction. As NASD considers greater disclosure requirements for fairness opinions, it may wish to consider the comparatively robust disclosure requirements for fairness opinions in certain going-private transactions (i.e., those transactions considered under SEC Rule 13e-3).

Third, NASD suggests that the proposed rule could set forth specific procedures that NASD members must follow to guard against conflicts of interest in rendering fairness opinions, and that such procedures could address, in addition to the substantive factors used by members in reaching a fairness opinion, the following procedures: (i) the process by which fairness opinions are approved by a NASD member, including whether the firm uses a fairness committee, and, if so, the selection of personnel for the fairness committee, the level of experience of such persons, procedures designed to provide balanced review, and whether steps have been taken to require review by persons whose compensation is not directly related to the underlying transaction of the fairness opinion; (ii) the process to determine whether the valuation analyses used are appropriate for the type of transaction and the type of companies that propose to participate in the transaction; and (iii) the process to evaluate the degree to which the amount and nature of the compensation from the transaction underlying the fairness opinion benefits any individual officers, directors or employees, or class of such persons, relative to the benefits to shareholders of the company, is a factor in reaching a fairness determination.

As a non member organization, S&P does not look to present specific procedures to the NASD. However, by way of example, S&P CVC has adopted specific procedures that we believe support our three-pronged approach to fairness opinions, emphasizing independence, disclosure and rigor. Below we provide a brief description of those procedures for consideration by NASD in establishing procedures for its members.

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The foundation of our approach to fairness opinions is an emphasis on a committee process. The composition of the committee is specific to each transaction but typically includes fairness opinion experts; industry experts; technical review by other managing directors (whose compensation is not directly tied to the fairness opinion fee or client relationship); economists/econometricians; and, as required, specific technical expertise that pertains to the structure of the deal or nature of the consideration (e.g., derivatives or tax experts). The use of a knowledgeable and independent committee accomplishes several goals. First, it is one of the most effective procedural safeguards against conflicts of interest. The fairness opinion does not solely reflect the opinion of one managing director who might have a long-standing relationship with the company or its management. It is a consensus opinion that reflects the totality of expertise the committee brings to bear. Second, a committee approach encourages consideration of reasonable and appropriate assumptions and valuation methodologies. Valuation, for any purpose (including fairness opinions), requires a degree of subjectivity. Informed subjective opinions, by experts in their respective fields, will produce the most credible results. Third, the use of a committee process in formulating fairness opinions promotes consistency in the level of analytical rigor for all fairness opinions. This consistency is a risk-management tool for both S&P CVC and our clients. Further, the consistency promoted by the committee approach enables all S&P CVC fairness opinion professionals to clearly communicate with clients regarding our process and the scope of effort. The committee process culminates in a meeting with the fiduciary/client, typically a board of directors or special committee of independent directors. During this meeting, highlights of the analysis and process are communicated to the fiduciary so that the fiduciary has an opportunity to ask questions and have us expand on areas of concern or interest to the fiduciary. Such a meeting facilitates a candid and independent interchange on the proposed transaction and the way in which it was analyzed.

Our final comment, in response to NASD's invitation, concerns its inquiry into compensation or consideration paid to specific classes of shareholders. S&P CVC primarily advocates greater disclosure. Specifically, the fairness opinion might disclose (i) the amount of compensation or consideration paid to each class of shareholders (including management) and (ii) the intended source of funding for payment of such compensation or consideration. Typically at issue is the payment of the control premium. A control premium is typically defined as the excess of the proposed purchase price over the market capitalization of the target. However, in some instances, change of control payments to management may be disguised elements of a control premium. In many instances, it may be appropriate for the fairness opinion to specifically identify and opine upon the fairness of the total control premium (including both implicit and explicit elements of premium). An opinion specific to the control premium, combined with disclosures as to the distribution of this premium, could be of significant value to fiduciaries and shareholders. The use of fairness opinions has increased and is no longer the exclusive domain of traditional corporate boards of directors. Courts, insurance regulators, independent ERISA and other fiduciaries, state attorneys general and even some legislative bodies now seek out such opinions. The utility of these opinions is inextricably linked to the rigor,

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independence, and transparency with which they are conducted and communicated. The goal of regulatory initiatives should be to enhance the fiduciaries' and investors' ability to understand and rely upon the advice and counsel of qualified financial advisors.

Thank you for the opportunity to comment on this issue. Should you have any questions, we would welcome the opportunity to further discuss with you our views and experiences. I can be reached at 212.512.3034 or via email gerry_creagh@sandp.com.

Regards,



Gerard M. Creagh
Executive Managing Director

cc: M. Athanason
P. Wisler