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January 31, 2005

<u>NASD Notice to Members 04-83</u>
<u>Fairness Opinions Issued By Members</u>

Dear Ms. Sweeney:

I write with respect to the Notice to Members 04-83 (the "Notice") of the National Association of Securities Dealers, Inc. (the "NASD") relating to fairness opinions issued by member firms of the NASD. As a practitioner in the area of M&A, I frequently counsel boards of directors in connection with their requests for, and receipt of, fairness opinions issued by member firms. It may be useful to the NASD, in its consideration of the proposals reflected in the Notice, to receive views that are oriented toward the expectations and requirements of recipients of fairness opinions.

<u>Disclosure of Relationships</u>

I support, and I believe most boards of directors would support, a requirement that a member firms must disclose to the board of directors, prior to or simultaneously with delivery of a fairness opinion, a fair and accurate summary of all material relationships between the member firm and the parties to a proposed transaction during the past two years, including a summary of compensation received or expected to

be received. I believe this requirement would be more easy to implement if the relevant disclosure was not required to be included in the fairness opinion; frequently, this disclosure includes very sensitive commercial information that should not routinely be made public by being included in the text of the fairness opinion itself.

I am strongly opposed to, and I believe most boards of directors would be opposed to, a requirement that member firms disclose "actual or potential conflicts of interests". As a legal matter, boards of directors themselves must make determinations as to whether or not it would be reasonable, in light of all the circumstances, to rely on a fairness opinion. These determinations are made upon the basis of all relevant facts. Boards of directors are not interested in, and do not want, member firms making their own determinations as to whether a particular fact or material relationship is or might be viewed as "a conflict of interest". That is a determination that the opinion recipient must make.

Verification of Information

The Notice requests comment on the need for a rule that would require disclosure by member firms of the extent to which they relied on key information supplied by companies and the firms' independent verification of data.

I am strongly opposed to, and I believe most boards of directors would be opposed to, a rule that directly or indirectly requires or suggests that member firms engage in independent verification of data. Boards of directors fully understand that member firms are in general not qualified to engage in verification of data. In relevant situations, boards of directors separately retain auditing specialists, forensic accountants, industry experts, legal counsel and even private investigators to review or validate

information. Boards of directors understand who has the expertise in this area. It is not even clear that a board of directors would be acting reasonable in relying upon a member firm's verification of data. Boards of directors should have no interest in, and would be reluctant to pay for, a service to be performed by member firms if there are third parties better suited to engage in that activity.

Evaluation of Compensation Arrangements

The Notice also suggests that member firms may be required to measure and consider how compensation from the underlying transaction benefits individual officers, directors or employees of parties to the proposed transaction.

I am opposed to, and I believe most boards of directors would be opposed to, an NASD rule that required member firms to engage in such analyses. Boards of directors understand that compensation matters in general are outside the expertise of member firms. If necessary, boards of directors retain compensation consultants to review and analyze these matters. As with the question of verification of data, discussed above, it is not clear that a board of directors would be acting reasonably in relying on any assessment of the appropriateness of compensation matters that had been undertaken by a member firm. Once again, board of directors of clients of member firms are not interested in receiving analyses on which they cannot rely.

Conclusion

I commend the NASD for its consideration of this topic. Fairness opinions have become an important part of the United States M&A environment, and the best interest of the United States capital markets and investors are well served by improving the professionalism of their preparation. I also believe, however, that the best interests of investors would also be served by a better understanding of the usefulness and

limitations of a fairness opinions. Regrettably, a number of commentators have come to regard fairness opinions as "cure-alls" for poorly-designed M&A transactions. Boards of directors, however, understand that a fairness opinion speaks to only one part of the transaction. There is a policy debate to be had about whether shareholders in United States public companies that are participating in M&A transactions should receive accountants' reports as to the verification of data (including projections), consultants' reports on achievable synergies or reports from compensation experts as to the reasonableness of payments to be made to management. Whatever may be the advantages of those required disclosures, it is clearly not in the best interests of investors in the United States capital markets to impose on member firms an obligation to perform analyses that are outside their expertise.

Sincerely,

Richard Hall

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