

# HFBE Capital, L.P.

815 Walker, Suite 1140  
Houston, Texas 77002

January 31, 2004

Barbara Z. Sweeney  
Office of the Corporate Secretary  
NASD  
1935 K Street NW  
Washington, DC 20006-1500

Re: Request for Comment 04-83 - Fairness Opinions Issued by Members

Dear Ms. Sweeney:

HFBE Capital, L.P. ("HFBE") appreciates the opportunity to address the NASD's request for comments as to whether to propose a rule concerning conflicts of interest when members provide fairness opinions. We provide fairness opinions as part of our investment banking services. Alex Howard founded our firm over a decade ago and practiced in valuation and fairness opinions for more than three decades. Mike Hansen practiced as a corporate securities and M&A lawyer with Fulbright & Jaworski L.L.P. in Houston, Texas. In banking, Mike's experience is with Credit Suisse First Boston and HFBE. We have personally studied the issues and circumstances addressed in 04-83 from all angles.

The issue of disclosing conflicts of interest in fairness opinions is an appropriate and timely matter for the NASD to consider. The basic issue is whether a firm receiving a significant fee contingent on the consummation of a transaction can provide the impartial and independent assessment as to the fairness of same transaction. It has become common industry practice for members who advise companies in M&A and other corporate control transactions also to be asked to render fairness opinions to the Board of Directors or a Special Committee. In almost every instance, such a firm might be very well situated to do so. It may be an efficient use of intellectual capital developed during the transaction. However, it might also be bad "optics".

One might fairly inquire as to the intended beneficiaries of a fairness opinion. Fairness opinions became more common after the Delaware Supreme Court suggested that obtaining a fairness opinion would support a board's "duty of care".<sup>1</sup> Fairness opinions clearly support and protect the judgment of a board of directors; however, the clearly intended third-party beneficiaries are the stakeholders in the entity to whom the board owes its duties. In this inquiry, we

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<sup>1</sup> Opinions Labeling Deals Fair Can Be Far From Independent. Ann Davis and Monica Langley. WSJ December 29, 2004.

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should collectively keep our eye on the stakeholders. With this backdrop, HFBE asks (i) is disclosure enough and (ii) can process be effectively mandated?

There seems to be a working presumption that more disclosure is good. It may be good if disclosure provides a richer set of information to a decision maker and the decision maker is in fact able to react or make a choice. Another benefit may be that clearer disclosure could have a chilling effect on behavior in a moral hazard situation which appears, or is in fact, improper. The moral hazard most commonly cited in our estimation is the review or approval of an opinion by a party or parties who derive compensation directly or indirectly therefrom.

We do not believe that regulating disclosure can provide enhanced protection for stakeholders. Is there a real ability, based on better disclosure, to engage in "Self-help"? If not, increased disclosure may not matter in some situations. One more pessimistic view is that enhanced disclosure in response to NASD guidelines might create presumptive safe harbors where none should in fact exist. We should avoid this outcome if at all possible. In certain instances, we see disclosure as ineffective. Such an outcome might be the case if the newly mandated level of disclosure becomes perceived as "boilerplate" and, due in part to its ubiquitous nature, is ignored more than today. The bottom line is that, in our view, certain conflicts just can't be waived. If they can't be waived, no level of disclosure will cure the underlying conflict.

As another important consideration, we must assess whether mandating internal processes of review and approval will have the desired effect. There are assertions that the process of approving a fairness opinion might be a rubber stamp. We have never experienced this.

In both large firms and small, we feel that the processes proposed in 04-83 are already generally in place. Many times they are very rigorously applied. Our concern is that it will be difficult to mandate process requirements that will allow competent member firms to act as service providers in the fairness opinion arena. The member universe is not a one-size-fits-all world.

If there is an effort to uniformly mandate process, the greatest beneficiary group will not be boards or stakeholders. It will be the plaintiff bar.

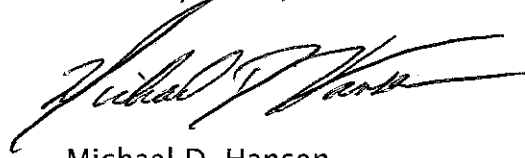
In our experience the practice of professional bankers, lawyers and accountants today already exhibits (i) comprehensive disclosure and (ii) seriously applied internal review and approval processes. Further legislation of these activities is unlikely to solve the fundamental problem of perception. If we have a fundamental conflict, we require a more fundamental solution. If disclosure and process are inadequate tools, perhaps requiring a second look makes sense. Some firms are already doing this as a matter of internal procedure.

Thank you for the opportunity to comment. If you have any questions, please call either of us at (713) 225-9580.

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Sincerely yours,

A handwritten signature in black ink, appearing to read "Michael D. Hansen". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Michael D. Hansen  
Managing Director

A handwritten signature in black ink, appearing to read "Alex W. Howard". The signature is cursive and somewhat compact, with a distinct loop at the end.

Alex W. Howard  
Senior Managing Director