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February 1, 2005

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

Re: Notice to Members 04-83 - Request for Comment on Whether to Propose New Rule That Would Address Conflicts of Interest When Members Provide Fairness Opinions in Corporate Control Transactions

Dear Ms. Sweeney:

We are pleased to submit this letter in response to the NASD's request for comment on whether the NASD should propose a new rule that would address procedures, disclosure requirements and conflicts of interest when members provide fairness opinions in corporate control transactions. We generally are supportive of many of the suggested disclosure requirements and procedures so long as any rules adopted by the NASD set forth general parameters which (a) permit sufficient flexibility for members to exercise their professional judgment and undertake a process that members deem appropriate based on their substantial experience in and familiarity with various corporate control transactions as well as the specific circumstances of any given transaction and (b) are consistent with current regulations of the Securities and Exchange Commission (the "SEC"). We would not be supportive, however, of the adoption of procedures which would circumscribe particular valuation approaches for fairness opinions or would require members to evaluate management or other compensation arrangements in connection with their fairness opinions.

Disclosure Requirements

Conflicts of Interest.

The NASD has requested comment on whether it should propose a new rule to regulate the identification and disclosure of conflicts by members that provide fairness opinions in corporate control transactions. In particular, the NASD is considering whether to propose a new rule that would require members to disclose in any fairness opinion appearing in a 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 the compensation that the member will receive upon the successful completion of the transaction. We would support a rule requiring disclosure of material relationships (that are otherwise of public knowledge) over a defined period between members that provide fairness opinions in connection with a corporate control transaction and the parties to such corporate control transaction. We believe it is important, however, that any rule adopted by the NASD not impair the confidentiality obligations a member may have to parties involved in such transaction or otherwise and that such disclosure requirements be consistent with SEC regulations currently in effect. While we support an appropriate level of disclosure with respect to certain material relationships, we also believe that such material relationships should not be characterized as conflicts of interest.

SEC regulations currently require disclosure in proxy or information statements relating to mergers, consolidations, acquisitions and similar matters of certain material relationships between the provider of a fairness opinion and parties to the proposed transaction to which the opinion relates. Specifically, Item 1015(b)(4) of Regulation M-A under the Securities Act of 1933, as amended, requires that the provider of an opinion, report or appraisal referred to in a proxy or information statement describe in such proxy or information statement "any material relationship that existed during the past two years or is mutually understood to be contemplated and any compensation received or to be received as a result of the relationship between (i) the outside party, its affiliates, and/or unaffiliated representatives; and (ii) the subject company or its affiliates."

In addition to disclosing material relationships in proxy or information statements in response to the SEC's regulations, similar disclosure generally appears in fairness opinions whether or not such opinion will be referred to in a proxy or information statement. In our experience, members that provide a fairness opinion in connection with a corporate control transaction generally include in their fairness opinions a description of the member's role in connection with the proposed transaction as well as a general summary of the nature of the compensation arrangements for such services. For example, if the member had been retained solely for the purpose of providing a fairness opinion, the opinion would state this limited role and that compensation is payable in connection with the delivery of such fairness opinion. Similarly, if the member had been retained to act as a financial advisor for the transaction and, in that capacity, had rendered a fairness opinion, the opinion generally would disclose that the member acted as a financial advisor and, to the extent applicable, whether an opinion fee was payable in connection with such services as well as whether a portion of the member's compensation was contingent upon consummation of the proposed transaction. In addition to describing the member's current role in, and summarizing generally the nature of compensation arrangements with respect to, a proposed transaction, members also typically include in their fairness opinions a general description of past and current material relationships between the member and the parties to the proposed transaction and whether or not compensation was received or expected to be received in connection with such relationships.

Given that disclosure of material relationships is required by the SEC with respect to fairness opinions included in proxy or information statements and is consistent with the current practice of members generally, we respectfully suggest that any rule enacted by the NASD in this regard be consistent with SEC requirements. We think it is important to note that a material relationship between a member which provides a fairness opinion and a party to the corporate control transaction with respect to which such fairness opinion relates does not necessarily constitute a conflict of interest. The determination of a conflict of interest is a legal conclusion based on particular facts and circumstances of a specific transaction and relationship. The existence of an economic or other material relationship between an advisor and a client should not necessarily be characterized as a conflict of interest or suggest that such advisor would act without objectivity and professionalism. In fact, the contingent nature of a member's fee arrangements may be viewed as aligning the member's interests with those of its client (see *In re The MONY Group Inc. Shareholder Litigation*, 852 A.2d 9 (Del. Ch. Feb. 17, 2004) in which the court noted that the financial advisor was ". . . itself incentivized to obtain the best available price due to a fee that was set at 1% of transaction value."). In addition, we believe a company, when selecting a financial advisor, should have the ability to retain a member firm with which such company has had a prior relationship based on that firm's prior performance as well as its familiarity with the company and the industry in which the company operates. Accordingly, we suggest that any new rule adopted by the NASD be cast more expansively in terms of "material relationships" consistent with the approach adopted by the SEC.

Reliance on Key Information.

The NASD also specifically has requested comment on whether it should propose a new rule that would require a member to disclose the extent to which a member relied on key information supplied by a company or its management, or whether it independently verified certain information. In our experience, in rendering a fairness opinion, a financial advisor will undertake a customary due diligence review of a company and its financial condition in order to familiarize itself with the company's business and financial prospects, the rationale for the proposed transaction, and other relevant matters. However, given that a financial advisor is neither an auditor nor an expert with respect to a company's business, in rendering its opinion, a financial advisor will necessarily rely on management and other representatives of, and advisors to, the company, including independent auditors and legal counsel, for their knowledge and expertise. In addition, although it is important for a customary due diligence review to be undertaken in connection with a fairness opinion, much of the information provided to a financial advisor will not be readily susceptible to independent verification. Accordingly, while we believe it is neither feasible nor appropriate to require a member firm to independently verify the information it is given in connection with a fairness opinion, we would be supportive of a rule that would require, if the case, explicit disclosure in a fairness opinion to the effect that, in rendering such opinion, the member firm has not assumed responsibility for independent verification of the information it utilized. We believe this approach is consistent with current case law which suggests that an assumption as to the accuracy or completeness of information utilized by a member is an appropriate basis for a fairness opinion so long as such assumption is clearly disclosed (see *In Re Enron Corp. Sec., Derivative & "ERISA" Litig.*, Nos. MDL 1446, H-01-3624, H-04-0122, H-04-0123 (S.D. Tex. Aug. 6, 2004) in which the court noted that the proxy statement ". . . reflected that Goldman Sachs and the Board agreed that Goldman Sachs could assume that the information that it was given to review was accurate").

Internal Procedures

Fairness Opinion Committees.

The NASD also has requested comment on a new rule that would set forth specific procedures that members would be required to follow to guard against conflicts of interest in rendering fairness opinions. Specifically, the NASD has suggested procedures that could address the process by which fairness opinions are approved by a member firm, including review by a fairness opinion committee, the selection of personnel for such committee, the level of and experience of such persons, and whether steps have been taken to require review by persons whose compensation is not directly related to the transaction underlying the fairness opinion. We are supportive of general guidelines designed to provide a fair and balanced review by member firms of their fairness opinions, including the use of established committees which would review the process and analytical approach undertaken in connection with rendering a fairness opinion and, to the extent practicable, a requirement that such committee members include senior officers who are not part of the deal team (and, thus, whose compensation may be viewed as not being directly related to the transaction underlying a fairness opinion) and legal counsel of the member firm.

Valuation Approaches.

The NASD also has suggested procedures to determine whether the valuation analyses used in a fairness opinion are appropriate for the type of transaction and the type of companies that propose to participate in the transaction. We respectfully submit that the determination as to what valuation analyses and approach are appropriate in connection with a fairness opinion should be made by the financial institution rendering such opinion (including, if the

NASD's proposed procedure requiring review by a fairness opinion committee is adopted, such committee) based on that institution's (and committee's) substantial experience in and familiarity with various valuation approaches and methodologies. Each company and transaction is unique and has its own dynamics to which the fairness opinion process must be specifically tailored depending on, among other things, the availability of financial projections, a company's historical performance relative to such financial projections, the comparability of companies or precedent transactions to which a company or transaction may be evaluated and industry specific considerations. If procedures are adopted which would restrict the ability of members rendering fairness opinions to apply their judgment and experience to these dynamics, the integrity of the fairness opinion process could be jeopardized. Adoption of procedures that would require specific valuation approaches also could lead to the opposite result intended by the NASD's proposed rules. A mandated valuation process could require a valuation approach that would not be appropriate under the circumstances and could result in a different (and not necessarily better or appropriate) conclusion than a member would otherwise reach if allowed to rely on its experience and judgment.

Compensation Arrangements.

An additional procedure suggested in the NASD's request for comment would require that a process be undertaken by a member firm rendering a fairness opinion to evaluate the degree to which the amounts and nature of the compensation from the transaction benefits any individual officer, director or employees, or class of such persons, relative to the benefits to shareholders of the company. We respectfully submit that the evaluation of compensation arrangements is not within a member's role as a financial advisor or provider of a fairness opinion and that such institutions do not have the level of experience with compensation arrangements to properly advise or comment on such arrangements. We believe it is appropriate for a company, when considering such arrangements, to involve the Compensation Committee of its Board of Directors and to seek the advice of legal counsel, management consultants and other compensation specialists who have the requisite expertise to advise the company on such matters. For this reason, we would not be in support of a rule that would require compensation arrangements to be evaluated by members rendering fairness opinions. We would, however, be in support of a rule that would require a member to explicitly disclose in its fairness opinion, if the case, that such arrangements were not considered for purposes of its fairness opinion.

We appreciate this opportunity to respond to the NASD's request for comment and would be happy to discuss any of our comments with the NASD's staff. Please call Morton A. Pierce at (212) 259-6640 or Denise A. Cerasani at (212) 259-6608 if we can be of further assistance.

Very truly yours,

Dewey Ballantine LLP

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