

SEC APPROVES FINRA RULES FOR THE
REGULATION OF FAIRNESS OPINIONS- REVISED

October 24, 2007

To Our Clients and Friends:

On October 11, 2007, the SEC approved proposed rules of the Financial Industry Regulatory Authority, Inc. (FINRA) (f/k/a the NASD) relating to the regulation of fairness opinions by its members. We are attaching our earlier memo summarizing the proposed rules.

The rules have been approved by the SEC; however, comments may be submitted on or before the 21st day following the publication of the new rules in the Federal Register, and the SEC has the authority to reassess the rules based on any such comments.

Within 60 days following SEC approval of the rules, FINRA will issue a Notice to Members announcing their effective date, and the rules will become effective 30 days after publication of that Notice to Members.

Please feel free to contact us with any questions.

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NASD PROPOSES REVISED RULES FOR THE REGULATION OF FAIRNESS OPINIONS

June 8, 2007

To Our Clients and Friends:

On June 7, 2007, the NASD proposed procedural and substantive rules regulating the delivery of fairness opinions by its members. The new proposal, which addresses comments received by the Securities and Exchange Commission in response to the NASD's initial rule proposed several years ago, is less burdensome to bankers than the original proposal and is not likely to result in significant changes to current practice.

The procedural rules, which apply to any fairness opinion rendered by an NASD member, would require the member to maintain written procedures for approving a fairness opinion, including (1) the circumstances under which a fairness committee would be used to approve or issue a fairness opinion, and (2) the process for determining whether the valuation analyses used in the fairness opinion are appropriate. Where a fairness committee is used, the written procedures must include (a) the process for selecting the members of the committee, (b) the necessary qualifications of the members, and (c) the process for promoting a balanced review, which must include review and approval by persons not on the deal team for the relevant transaction. Most investment banks already have written procedures covering these matters, but it would be prudent to review existing procedures to ensure they comply with the proposed rules.

The proposal also requires NASD members to include certain disclosures in any fairness opinion that the member knows or has reason to know will be provided to the company's shareholders (for instance, if the transaction will require a vote of the company's shareholders). The NASD makes clear that it does not believe that any of the disclosures would require the member to breach any confidentiality obligations. These disclosures include:

1. Whether the member acted as a financial advisor to a party to the transaction and whether it will receive (x) compensation contingent upon the completion of the transaction for acting in such role or rendering the fairness opinion, or (y) any other significant contingent compensation. These disclosures are generally consistent with current practice.
2. Any material relationships that existed during the past two years, or that are mutually contemplated, between the member and any party to the transaction in

which compensation was received or is intended to be received by the member. This disclosure is also customarily included in fairness opinions.

3. Whether any information that formed a “substantial basis” for the fairness opinion has been independently verified by the member, and if so, a description of the information or categories of information verified. Where no information has been independently verified by the investment banker, the blanket statement to that effect which appears in most fairness opinions will continue to suffice.
4. Whether the fairness opinion was approved or issued by a fairness committee.
5. Whether the fairness opinion expresses an opinion about the compensation to the company’s officers, directors or employees, relative to the compensation to the company’s public shareholders. This requirement represents a significant softening of a more burdensome procedural requirement in the original proposal and reflects the NASD’s view that its members should not opine on matters outside their expertise (such as the fairness of “golden parachute” or similar payments).

Fairness opinion forms will generally need to be modified to include the disclosures in paragraphs 4 and 5 above.

The NASD will announce the effective date of the rules in a Notice to Members no more than 60 days following approval by the SEC, and the rules will become effective 30 days thereafter.

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