

MARSHALL & STEVENS

FAIRNESS OPINION

Let the experts at Marshall & Stevens be your guide.

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Introduction

Fairness Opinions are typically rendered in the context of extraordinary transactions to help directors, trustees or managers satisfy their fiduciary duties. Such transactions include mergers, sales of control, dispositions of material assets, issuances or repurchases of equity securities, and financial restructurings. As the fiduciary issues involved in such transactions are legally complex and often involve the weighing of competing interests in an uncertain and factually fluid environment, advice from experienced legal counsel is imperative.

What is a Fairness Opinion?

A Fairness Opinion is, in essence, a form of valuation analysis. However, it goes beyond a typical valuation analysis as it looks not just at the value of what is being given up, but also at the value of what is being obtained in exchange. In the context of a merger, this will typically involve the valuation of the resultant entity. In the context of a share issuance, this will typically involve an assessment of the purposes to which such capital is to be put and the impact on the value of the company going forward. Consequently, among the assets to be valued may be control.

A Fairness Opinion constitutes the formal written opinion of a valuation professional given to the body (for example, the board or a special committee) making the fiduciary decision whether or not to proceed with a particular transaction and that there is a commercially reasonable relationship between what is being given up and what is being obtained in the transaction. This ends in the ultimate advice that the transaction (or the consideration to be received in the transaction) is, or is not, fair to a particular constituency from a financial point of view.

Accordingly, **a Fairness Opinion is a part of the process** pursuant to which fiduciaries ultimately reach their conclusion of whether or not to proceed with a particular transaction. It is the final deliverable in this process by the valuation professional.

A Fairness Opinion is an analysis of value. It is not, however, a substitute for the ultimate judgment of the fiduciary and accordingly a Fairness Opinion is NOT:

- an evaluation of the business rationale to proceed with the proposed transaction;
- a recommendation to proceed with the proposed transaction, or
- an opinion that the proposed transaction was the result of a legally fair process or is otherwise fair from a legal point of view.

Likewise, **a Fairness Opinion is not an insurance policy.** Rather, it is the product of the exercise of professional judgment rendered in an imperfect world. While a valuation professional strives to locate and rely upon objective or market standards of value, the end result is ultimately subjective. For these reasons, valuation professionals typically:

- Specifically identify the assumptions on which their opinion is based, the purposes for which the opinion may be used, and the person who may rely on it,
- Limit their financial exposure to liability for gross negligence or willful misconduct, and
- Charge fees that reflect a so called "risk" premium and that typically are fixed at a higher level if the opinion is going to be used in the context of a public company transaction than in the case of a private company transaction in which no regulatory filings are involved.

How does a Fairness Opinion relate to an entity's other valuation needs?

Valuation is an increasingly important part of modern accounting, securities disclosure and corporate governance. Fairness Opinions are only one aspect of this enhanced "fair value" oriented disclosure scheme. Valuation is often required in the context of an entity's financial reporting, including:

- Goodwill impairment
- Purchase price allocations
- Ghost and Zombie Asset reviews
- Property tax reassessments
- Stock option pricing
- Asset impairment and mark-to-market issues
- Valuation of Liabilities under "Fair Value" standards.

Valuation is also important where solvency is an issue, such as in the context of dividends, stock repurchases, or transactions involving the taking on of significant debt.

However, much of the work associated with a well-executed fairness opinion can provide a base for addressing future valuation needs of a company, such as the above referenced purchase price allocation work or, in a bankruptcy setting, setting up the company's postbankruptcy balanced sheet (Fresh Start Accounting).



Purpose of a Fairness Opinion

As previously mentioned, **a Fairness Opinion is the final product of the consultative and advisory exchange between the valuation professional, the management and the client.** In the case of a corporation, the board of directors or the applicable special board committee is typically the client.

The purpose of this process is to assist the fiduciary in executing his or her obligation to make sure that the transaction is in the best interests of the applicable beneficiaries. In the case of a corporation, the typical focus is on the obligations of a director to the corporation's shareholders. However, in the case of an insolvent corporation, the interests of other constituencies may need to be considered.

The purpose of the Fairness Opinion itself then, as the end product of this valuation process, is to:

1. Document the results of the analytic process and the financial considerations that were taken into consideration;

2. Provide the fiduciary with written assurances that the value arrived at is fair from a financial point of view; and

3. Provide tangible evidence that can be used in litigation to demonstrate that the fiduciary has acted reasonably and on a fully informed basis.

When is a Fairness Opinion Needed?

Fairness Opinions are typically obtained in connection with most extraordinary transactions. However, they are particularly important where a company is controlled by a controlling shareholder, or where management, or one or more members of the governing body (such as the Board of Directors), have interests that conflict with (or which may appear to conflict with) those of the beneficiaries of their trust (in the corporate setting, the shareholders or, in the case of a controlled corporation, the minority shareholders). Examples of such extraordinary transactions include the following:

- Mergers, acquisitions and change of control transactions
- Tender offers and going private transactions
- Transactions with insiders or controlling shareholders
- Private placements and rights offerings (particularly in situations which may result in dilution to existing shareholders or the issuance of shares at below market prices)
- Corporate restructurings (including de-listing,
- de-REITing, reverse stock splits, stock buy-backs, installation of or liquidation of an Employee Stock Ownership Plan, debt for equity swaps)
- Negotiation or renegotiation of loan covenants.

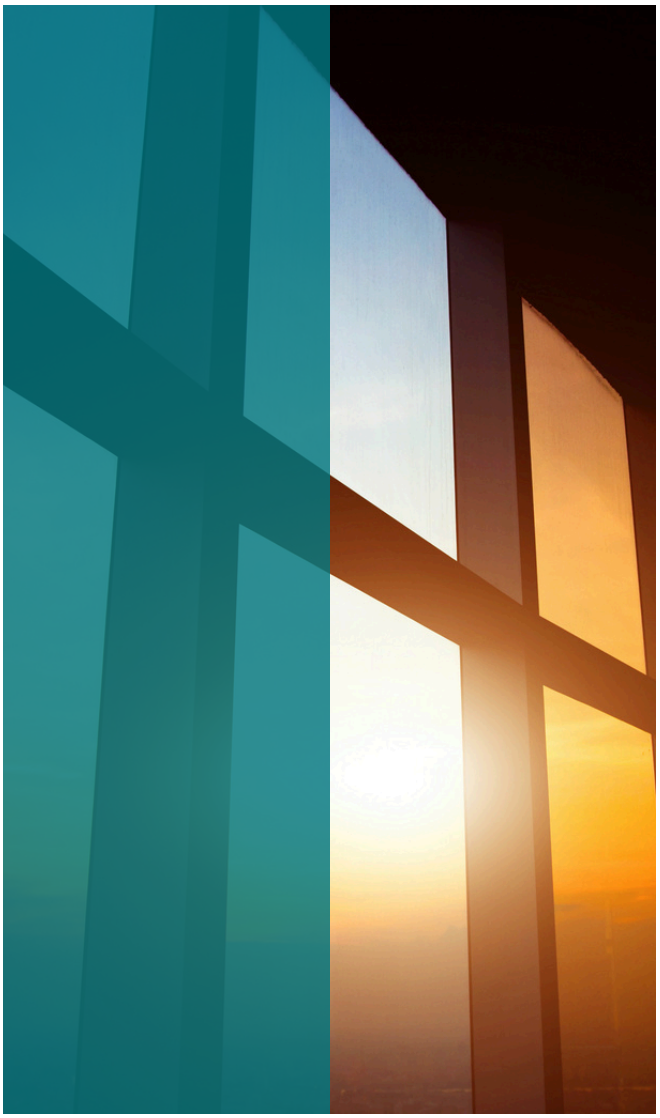
Is a Fairness Opinion a Good Idea?
A Fairness Opinion is a good idea because...

1. Well recognized step in the process for maximizing shareholder value.
The early involvement of a valuation professional can help the client by providing (i) independent industry and general economic data and (ii) an experienced and independent financial advisor, who can make suggestions as to alternative structures to enhance achievable values and control transaction costs.

2. Serves as an early warning system.
Identifies valuation issues that may impact the transaction and the reported financial results of the entity after the transaction has been completed, for example, purchase price allocation issues under FASB 805 and Fair Value Considerations under FASB 820.

3. Provides a structure for decision making.
The discipline of a written analysis designed to assure fiduciaries that they have in fact asked the hard questions, gotten the necessary data, and executed on their fiduciary duties helps provide a strong foundation of support.

4. Provides tangible evidence.
Finally, given the likelihood in this day and age that the fiduciary's judgment will be second guessed, the Fair-ness Opinion and the report backing up that opinion provide tangible evidence that can be presented to a court to demonstrate that the fiduciary did in fact satisfy applicable fiduciary standards.





What are the liability traps addressed through a Fairness Opinion process?

Special Note for Controlled and Closely Held Corporations

Typically, Fairness Opinions are considered as being for the benefit of the "fiduciary" decision maker, which in a corporate setting is usually the Board of Directors or a committee of the Board of Directors. However, such opinions can also provide benefits to controlling shareholders, particularly in the context of a closely held company.

Controlling shareholders can also owe fiduciary duties to minority shareholders. In the context of a closely held company, some courts have held these duties to be akin to the duties owed by partners in a partnership: a level of duty which is typically greater than that owed in a corporate context by an officer or director. Indeed, in California, there is court authority for the proposition that this duty cannot be waived by minority shareholders.

Over-dependence on a Potentially Conflicted Management Team.

Courts frequently find management to be conflicted when extraordinary transactions are at issue. Management may be conflicted, by way of example, due to:

- The potential for bonus compensation,
- The potential to cash-out stock options on favorable terms,
- Future employment and related compensation considerations,
- Desires to grow even though such growth may not be in the best interests of shareholders or result in the taking on of excessive debt — the temptation on the part of management to "swing for the fences."

Such a finding of conflict of interest can undermine the data provided and advice given by management and the reasonableness of reliance by the Board of Directors on such data and advice. Fiduciaries typically have no separate staff to assist them in the information gathering and analysis or the time to individually do the fact finding and analysis required without outside assistance. Often, where outside advice is obtained, it is from someone who will only profit if the transaction advocated by management is consummated.

The most objective advice will be from a professional who has no stake in the outcome of the transaction. An independent Fairness Opinion and the procedures backstopping that opinion are designed to address this issue.

Being Too Close to the Transaction. Fiduciaries, due to their long involvement with the company and management, may be too close to the situation:

- To see the alternative opportunities that may be available and
- To ask hard questions of management and advisors who will benefit from the transaction.

The Fairness Opinion process is designed to consider these alternatives and to ask these questions.

Failing to Establish a Record

Unfortunately, it is not enough to do well. One must be able to prove to a court, sitting with the benefit of 20/20 hindsight, that one did well.

The Fairness Opinion process results in a tangible record, ultimately memorialized in the opinion itself and the supporting report, that the fiduciary has in fact satisfied his or her legal obligations.

Cost/Benefit Analysis

The time, cost and expense of a Fairness Opinion analysis can be significant. In order to get maximum value from the Fairness Opinion process, the valuation professional needs to have the time and access to do the appropriate due diligence and analysis. Time is often at a premium in the context of an extraordinary corporate transaction, and, naturally, no management team likes to be second guessed. Accordingly, there is a tendency to look to the investment banker to also opine as to fairness.

However, the cost of an independent, as opposed to banker generated opinion, must be weighed against the benefits of:

- Potentially achieving price or other enhancements to the deal;
- Having a counter-balance to information and advice provided by management and advisors who may have a stake in the completion of the transaction; and
- Providing a tangible record that can be used to demonstrate that legal obligations have been satisfied in the face of legal challenge.

Obtaining an appropriate Fairness Opinion, potentially limits the likelihood that such legal challenges will be brought in the first place, thus actually limiting future costs and expenses.

What is the role of the valuation professional in this process?

The role of the valuation professional is largely defined by the requirements of the fiduciary. The services asked for can vary significantly from assignment to assignment, and not all Fairness Opinions are created equally. This is one of the reasons why the fees quoted can vary significantly from firm to firm, a matter that is discussed in greater detail later.

Ideally, the valuation professional is retained early in the transaction and can assist in the structuring of the transaction, so as to maximize value, and to anticipate issues that may adversely impact value or result in inferior results from an accounting point of view.

Not all Fairness Opinions are created equal.

Fiduciaries should consider:

- Timing of the advice (the earlier the involvement of the valuation professional the better);
- The scope of the due diligence and the parameters of the analysis commissioned;
- The scope and extent of the opinion itself (for example, does it address only to the end result or to the process as well); and
- The reputation and history of the valuation professional: who will be there if expert testimony is ultimately required.

The valuation professional can serve as a sounding board for the fiduciary and the fiduciary's legal and tax advisors, as a source of independent data and information, and as an intermediary who can ask questions, solicit information and challenge assumptions on an independent basis. In short, the valuation professional can bring a fresh set of eyes to the project and facilitate communications between the various parties.

How does getting a Fairness Opinion impact Fiduciary Liability?

A properly executed Fairness Opinion assignment can materially reduce the exposure of a fiduciary involved in an extraordinary transaction. It does this by, in the first instance, assisting the fiduciary in gathering appropriate data, analyzing that data, and considering potentially available alternatives and transaction structures. The best defense is always a good economic result. However, in these days of litigation and second guessing, a Fairness Opinion and the associated report also provides tangible evidence that can be introduced into court to tangibly demonstrate that the fiduciary has in fact satisfied his or her duty of care. Indeed, fiduciaries have been found to have violated their fiduciary duties even where the company is sold at substantial premiums to share prices, where due diligence standards were not satisfied.

What is the applicable Fiduciary Standard?

The fiduciary standards imposed upon corporate directors, trustees, partners and managers of limited liability companies vary from state to state. While the standards are relatively easy to articulate, the application of these standards can be very complex in practice. Accordingly, an experienced lawyer should be consulted as to the laws applicable to a particular fiduciary's situation. This being said, certain generalizations may be made and certain rules of thumb identified. For example, every state in the United States honors in some form or another the so-called "Business Judgment Rule." This rule recognizes that judges are not necessarily in the best position to make business decisions, and creates a presumption that in making a business decision, the directors have acted (1) on an informed basis; (2) in good faith, (3) in a manner they honestly and reasonably believe to be in the best interests of the company and (4) without fraud or selfdealing



The Duties of a Corporate Director

Basically, a corporate director has two principal duties: the duty of care and the duty of loyalty. In addition, courts have articulated from time to time, either as component parts of these two principal duties or as stand-alone obligations, the duties of candor and good faith.

The Business Judgment Rule creates a presumption that these duties have been satisfied. Accordingly, the obligation is on the person attacking a particular transaction to demonstrate that these duties have not been satisfied. However, in those cases where the transaction involves conflicting interest, and where those participating in the decision making were not independent, courts have applied a standard of stricter scrutiny, sometimes referred to as the "entire fairness" standard. This shifts the burden of proof to the fiduciary to demonstrate that the transaction was entirely fair.

Duty of Care: What is it?

This duty has been described in various ways in a variety of cases. Basically, in order to satisfy his or her duty of care a director must have:

- Acted on an informed basis,
- Acted after due deliberation and discussion with fellow directors, management and appropriate advisors,
- Exercised the level of care that a reasonably prudent person would use in the exercise of his or her own affairs.

Duty of Care: How is it demonstrated?

Except where the "entire fairness" test is applied, the burden of proof is on the person attacking the director's decision to prove that the duty of care has not been satisfied. Red flags indicating a lack of due care include:

- Quick decision making (failure to take the time required for careful consideration and deliberation);
- Over-reliance on or over deference to management, a controlling shareholder or dominant board member;
- Failure to independently select, engage and consult with and to question independent advisors (including both independent legal and financial advisors);
- Failure to meet independently (i.e. separate from management or others promoting a particular transaction);
- Failure to appropriately document the decision- making process; and
- Failure to go through a Fairness Opinion analysis and to obtain a written Fairness Opinion;

Duty of Loyalty: What is it?

As in the case of the duty of care, the duty of loyalty has been described in various ways in a variety of cases. Basically, in order to satisfy his or her duty of loyalty a director must:

- Have acted in a manner which he or she reasonably believed to be in the best interests of the corporation,
- Have not received any special benefit from the transaction,
- Have no other conflict of interest that would cause him or her to be biased or to otherwise act independently.

Duty of Loyalty: How is it demonstrated?

Again, the burden of proof is on the person attacking the transaction to prove that the duty of loyalty has not been satisfied. Red flags indicating a failure to satisfy the duty of loyalty, include:

- An economic interest in the outcome of the particular transaction under consideration (other than as a shareholder or due to ongoing service as a director or the receipt of usual and customary director's fees);
- Non-transaction related interests, such as family or other business relationships, which are indicative that the director is either "beholden" to the proponents of the transaction or otherwise lacks independence.

Entire Fairness Test

If the person attacking the transaction demonstrates that the transaction involved conflicts of interests and those involved in the decision making process lack independence, then some courts (for example, the Delaware Court) will apply the so called "Entire Fairness" test. This takes away the presumptions of the Business Judgment Rule, and shifts the burden to the fiduciary to prove that the process followed was fair (so called "fair dealing") and the price achieved was fair ("fair price").

Typically, Fairness Opinions do not address the fair dealing element of the Entire Fairness Test and focuses only on the fair price element. However, Marshall & Stevens does offer, in an appropriate case, an opinion which addresses the commercial (i.e. non-legal) elements of fair dealing. This is not, however, a part of a standard Fairness Opinion, but a matter of separate engagement and contract.

The Fair Dealing Element of the Entire Fairness Test looks at the various procedural elements of the transaction, including:

- Whether the timing of the transaction benefited the proponents of the transaction to the detriment of the company or its minority shareholders – who initiated negotiations and why;
- Whether the structure of the transaction favored insiders to the detriment of the company or its minority shareholders;
- Whether the negotiation of the transaction was conducted, controlled or overseen by competent and independent individuals free of conflict of interest;
- Whether a competitive bidding process was implemented so as to maximize shareholder value;
- Whether the directors were fully informed and provided with all relevant information; and
- Where shareholder approval is required, whether the shareholders were fully informed and provided all relevant information

The Fair Price Element of the Entire Fairness Test takes into consideration all of the economic and financial aspects of the transaction including:

- Market value of the company's shares,
- Earnings (discounted cash flow analysis),
- Underlying asset values,
- Future prospects,
- Potential synergies related to the transaction, and
- Any other elements that affect the intrinsic value of the company or its shares.



Unless a different standard is specified in the engagement letter, an appropriately executed Fairness Opinion should address all of the elements of value considered in the Entire Fairness Test, whether or not this standard is applicable to a particular transaction.

Other Duties

Some court decisions make reference to the duties of candor and good faith. In those situations where the directors are required or seek shareholder approval of a transaction or other matter, directors have a duty to make sure that the shareholders receive all of the information they need to make an informed decision. This duty is referred to as the duty of candor. The duty of good faith is mentioned in a variety of judicial decisions, but is very difficult to define. Some decisions seem to treat good faith as a subcategory of the duty of loyalty. The general notion is that fiduciaries must act in a manner that is reasonable under the circumstances and that is designed to promote the interests of the beneficiary of their trust, as opposed to the interests of the fiduciary.

Fairness Opinion Process

The Fairness Opinion process will vary from engagement to engagement. Best practice is to involve the valuation professional from a very early stage in the process. He or she can be involved in relating to the consideration of potential alternatives and the structuring of the transaction to add support and promote the independence of the board and the board process.

However, where the fairness analysis is being completed by a professional with no economic interest in the transaction being reviewed, it is not unusual for that professional to be brought in only when the transaction is essentially fully negotiated, as something akin to the getting of a second opinion on the transaction.

In any event, the valuation professional should be retained sufficiently in advance of board consideration of a proposed transaction. This will allow for reasonable due diligence and analysis on the part of the professional and a reasonable opportunity for the board to receive, review and consider the report of the valuation professional. In

addition, the board will be able to ask questions of the valuation professional and to receive, review and consider any supplemental or follow up materials.

There is relatively limited professional or legal guidance for what due diligence must be done prior to the issuance of a Fairness Opinion, and the extent of such work will be, at least in part, a function of the level of due diligence and involvement sought by the fiduciary. However, it is recommended that, at a minimum, the following due diligence be completed:

1.Visit and/or inspect the material assets involved in the transaction (in the case of a merger or stock issuance), the facilities of the applicable entities involved) and review any material contracts relating to the assets or businesses involved;

2.Review applicable transaction documents and the terms of any securities to be issued;

3. Meet with and interview management and various company advisors (including auditors, legal counsel and any financial advisors);

4.Review and analyze historical financial statements, projections and operating performance data;

5.In the case of a publicly traded company, review applicable SEC filings and analyze its stock trading history;

6.Analyze the trading price and market caps of comparable/guideline publicly traded companies; and

7.Analyze comparable/guideline transactions.

Standards of Financial Fairness

As mentioned earlier, not all Fairness Opinions are created equal. Also, the legal duties applicable to the fiduciary may vary from state to state and depending upon a variety of factors specific to the particular transaction. Accordingly, the valuation professional needs to work with the client and legal counsel to determine what approach is best suited to meet the particular needs of the client. Fairness Opinions are definitely not a case of one size fits all.

Among the standards used or considered by financial advisors in determining whether a transaction, the purchase price, and/or the consideration received is fair from a financial point of view may be the following:

- the legal standards applied to appraisal or dissenters rights under applicable state law (is the value greater than that which a shareholder would be awarded in such a proceeding);
- the value of the company, as a stand-alone entity (without consideration of minority interests or liquidity issues);
- the highest value that shareholders would receive if the company were to be sold in a property conducted auction to the highest bidder;
- the value of any synergies resulting from the transaction and the benefit of the transaction to the counterparty; and
- the extent of any premium to market.

Range of Fairness

Ultimately, financial fairness is a judgment call, influenced by a variety of factors. It is tied to value, but reasonable people can often disagree as to what is or is not the value of a particular asset or business. This is why, the valuation professional, in reaching an opinion, typically takes into account a variety of valuation methodologies and considerations, such as:

- Trading prices of comparable assets or the shares of comparable public companies;
- Results achieved in comparable transactions; Income and discounted cash flow;
- Replacement value; and
- Net asset value.

The use of these multiple methodologies will result in a variety of potential values and, ultimately, an overall range of value. Typically, if the applicable standard of value or values fall(s) within this range, the transaction, sale price or consideration received (as applicable) is determined to be “fair from a financial point of view.”

While some individuals may disagree, in our view, a typical Fairness Opinion does not address whether or not the process that was followed in connection with the negotiation of the transaction or the establishment of who

gets what in a particular transaction was fair. Indeed, given that in many cases, the valuation professional is not involved in this negotiation or structuring process, it would seem to us odd to assume, in the absence of a specific undertaking, that the process itself was fair (i.e., designed to achieve the best available price)

Fair Dealing Opinions

Occasionally, Fiduciaries may desire advice as to whether the transaction is fair from a "Fair Dealing" point of view. There is very little professional guidance as to what is involved in such opinions.

At Marshall & Stevens, we have developed a methodology for the rendering of such advice, as follows:

First, we obtain from company counsel (or if independent counsel has been engaged by the Board or Special Committee, from such independent counsel) advice as to the applicable legal component of Fair Dealing.

Next, we review the transaction, interview the participants, review the process and procedures leading up to the transaction, review current market conditions and analogous transactions completed in recent periods, and form a view as to whether the procedures followed were reasonably designed, from a commercial or market point of view, to maximize the value realized the applicable beneficiary group (typically, the shareholders or minority shareholders).

This analysis is overseen by a mixed discipline team of professionals comprised of at least one individual with at least ten years of experience in investment banking and one individual with at least ten years as a corporate attorney specializing in merger and acquisition transactions.

Frequently Asked Questions (FAQs)

Q. Is there a problem with using the investment banker who negotiated the transaction to advise as to fairness?
A. This is a customary process. Some courts have criticized this practice, however, based on the view that the firm rendering the opinion has an economic interest in seeing that the transaction is consummated. The safest route is to get a Fairness Opinion from an independent valuation professional.

Q. What is the Board's role in selecting and engaging the valuation professional?
A. Ultimately, the retention of a valuation professional to independently review the fairness of the transaction is a part of the due diligence of the Board or the Board Committee delegated responsibility for the review and negotiation of the transaction. Accordingly, the Board should treat the matter the same as the engagement of any other key independent advisor.

Q. When should the valuation professional be retained?
A. Best practice is to engage the valuation professional early on in the process. A qualified valuation professional can also give valuable advice regarding the structuring of the transaction and the impact of structure on accounting issues

Q. How should the fee be structured?
A. It is not unusual for there to be a contingent component to a Fairness Opinion. This is in part due to the fact that the risk profile of the engagement is different if ultimately no opinion is rendered. However, any contingent compensation element will likely be criticized by anyone attacking the transaction and, in an appropriate case, an hourly rate engagement should probably be considered.

Q. What should the interaction be between the Board and the valuation professional?

A. The valuation professional is a part of the director's due diligence process and deal team. Accordingly, the valuation professional should have open access to the Board, and there should be at least one (and preferably more) opportunities for the directors to meet with the valuation professional separate and apart from management in order to receive the advice and input of the valuation professional and to ask questions. The directors should expect to receive at least one draft written and a final presentation of the information and analysis underlying the advice given by the valuation professional. The draft report should be provided sufficiently in advance of any decision making by the Board to allow a reasonable period of time to consider the report, to ask questions and to consider the responses to those questions.

Q. How much should a Fairness Opinion cost?

A. Fairness Opinions are the most complex valuation opinion rendered by a professional valuation firm. The due diligence and analysis involved can be significant and vary materially from engagement to engagement. Accordingly, there is no general rule of thumb as to the cost of such opinions. The following will naturally impact the cost of the engagement:

- The complexity and size of the company(ies) being valued (for example, the number of business units involved) and the transaction being considered;
- Nature of business plan;
- Time parameters and constraints;
- Number of constituencies that need to be considered;
- The state of the company's books and records;
- Scope, extent and quality of existing projections; and
- Intended use of advice (for example, use in connection with regulatory filings).

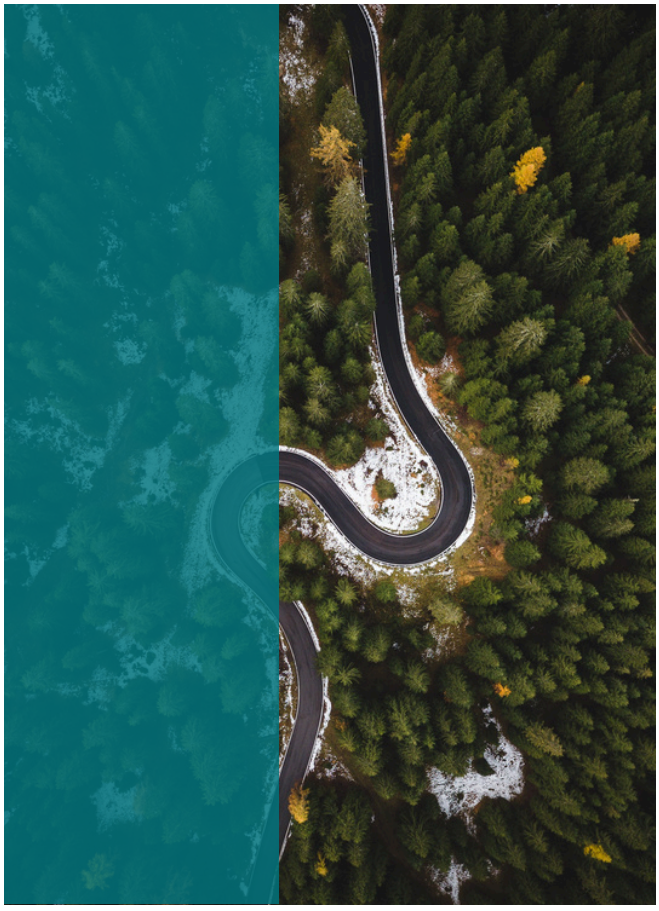
Q. Is it acceptable for the directors to rely on an oral opinion?

A. It is not unusual, due to time constraints, for the directors to rely on an initial oral opinion, provided it is clear that a written opinion will be given prior to the time the matter is submitted to shareholders for approval or will be a condition to closing.

Q. What should Directors look for in retaining a valuation professional?

A. Among other things, the Directors should consider:

- The reputation and history of the firm (will the firm be around down the line, if called upon to defend its opinion in court);
- The credentials and experience of the individuals who will actually be responsible for the engagement;
- Whether they feel comfortable with and believe that they can reasonably rely upon the advice they are given by the firm;
- Whether the firm has the resources to perform the work required within the time frame of the transaction;
- Whether the firm has any conflict of interest; and
- Whether the fee is reasonably related to the scope, extent, complexity and timing of the engagement.



"Fair from a Financial Point of View?"

First, this is not a legal determination, nor a determination that the transaction is legally "fair."

Second, it is not an accounting determination. While GAAP guidance as to what constitutes "fair value" may be instructive, accounting principles are not controlling. The purchase price may be found to be "fair" but this is not particularly helpful in determining how any assets acquired are to be booked to the acquirer's balance sheet.

Consequently, it is perhaps not surprising that there is no clear definition of what is meant by "fair" in the context of a Fairness Opinion and typically, a Fairness Opinion does not include any self-contained definition of the term.

Furthermore, the standard may vary depending on what is being valued. For example, does the opinion address the fairness, from a financial point of view, of:

- The transaction,
- The purchase price (presumably measured in dollars), or
- The consideration to be received (which may include a variety of rights, interests and/or securities) by the seller.

The analysis may also vary depending on the constituency from what point of view value is being considered, (i.e. the company, shareholders generally, minority shareholders only, or one or more other constituencies such as preferred stockholders or debt holders). These are largely state law issues on which advice of counsel should be considered.

Summary

Fairness Opinions and the due diligence process that underlies such opinions can help improve results and control risk in an extraordinary transaction.

While not required in order for a fiduciary to satisfy his or her fiduciary duties in the context of a particular transaction, they have become customary. The failure to obtain such an opinion will definitely be pointed out and commented upon by anyone opposing the transaction.

However, a fiduciary needs to understand the parameters of the engagement and, working with counsel, requires making sure that the engagement meets the needs of the situation. Among other things, reputation, independence and compensation structure should be considered.

The cost of the engagement will vary, depending upon a variety of factors, including, by way of example,

- the complexity or uniqueness of the transaction,
- the amount of due diligence required,
- the availability or lack of availability of applicable comparables,
- the size and complexity of the companies or business units involved,
- the timeline for the completion of the analysis,
- Whether the opinion covers basic financial fairness or, in addition, opines as to the commercial reasonableness of the procedures followed in connection with the negotiation and structuring of the transaction, and
- the risk involved (is it a public or private company, is there dissension on the board, within management or among shareholders).



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EXPERTISE IN ACTION

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