



International Valuation Standards Council  
41 Moorgate  
London  
EC2R 6PP

31 May 2012

Dear Sirs

**Re: Exposure Draft (ED) on Procedural Guidelines on fairness opinions**

We are responding to your invitation to comment on the above exposure draft on behalf of PricewaterhouseCoopers.

Following consultation with several members of the PricewaterhouseCoopers network of firms, this response summarises our collective views. "PricewaterhouseCoopers" refers to the network of member firms of PricewaterhouseCoopers International Limited, each of which is a separate and independent legal entity.

PricewaterhouseCoopers appreciates the International Valuation Professional Board's (IVPB) efforts in the process and welcomes the opportunity to provide comments on the ED. We have in this letter outlined our general comments and then, as requested in the ED, responded to the specific questions for comment in Appendix A. The definition of a fairness opinion can vary across different territories and many countries already have existing regulations or guidelines covering such opinions. Although we understand that any guidance or statutory requirements in existence at a national level would override any guidance provided by the IVPB, we believe this should be explicit in the ED and in any final technical or guidance paper.

Given the different types of fairness opinions required under statute, local regulations or for legal purposes across territories, we believe that providing generic international guidance covering fairness opinions is extremely difficult. There needs to be further consideration and more detail where appropriate within any guidance which we have outlined in this letter and in our comments in Appendix A.

Our key comments are set out below:

- The ED should clearly state whether it is applicable to valuation professionals or a wider range of professional service providers. For instance, in many jurisdictions investment banks often provide fairness opinions as part of a corporate finance role advisor role. The IVPB should consider engaging with other regulatory bodies (for example, the UK Listing Authority) on this topic in order to set a standard that will be widely recognised by preparers and users of fairness opinions.
- Further guidance is required on what constitutes independence or a conflict of interest, the related threats and the appropriate safeguards. The ED suggests that being involved in discussions that contemplate the "merits of the contemplated transaction" could give rise to a threat to perceived independence. Conflicts of interest could potentially be avoided, for example, by requiring that fairness opinions are provided by independent advisors who do not have any self-interest from the

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potential completion of the transaction. However, in our view, this area needs to be considered further depending on the independence requirements in different jurisdictions and the reason for which a fairness opinion is required.

- The ED does not define the term 'fair'. An example of a definition sometimes provided for 'fair' in the context of fairness opinions is that a given transaction price is generally fair from a financial point of view when it lies within a range of values determined using appropriate valuation approaches and with reference to transaction prices. We believe at least a general definition of the term 'fair' should be included in the ED. Consideration must also be given to other quantitative and qualitative factors beyond the valuation analysis in order to arrive at the fairness conclusion.
- The ED does not explain the type of comfort a fairness opinion is intended to provide. For instance, should the provider of a fairness opinion also be expected to assess the appropriateness of the assumptions that underpin a transaction price? If so, further guidance is required on the standard and scope of work to be required to be performed on assumptions. The Canadian Institute of Chartered Business Valuators Standard 520 has an example of this – "Sufficient evidence shall be gathered by such means as inspection, inquiry, computation and analysis to ensure that the Fairness Opinion and the conclusion(s) contained therein are properly supported. When determining the extent of evidence necessary to support the Fairness Opinion, the Fairness Opinion issuer shall exercise professional judgment, considering both the nature of the Fairness Opinion and its expected use."

We would be happy to participate fully in any round-table discussions that the Board may decide to hold to discuss the comments received on the Exposure Draft.

If you have any questions on the content of this letter, please do not hesitate to contact Andreas Mackenstedt, PwC Global Valuations Leader (+49 69 9585 5704), Romil Radia, UK Valuations Partner (+44 20 7804 7899) or John Glynn, US Valuations Partner (+1 646 471 8420).

Yours faithfully,

A handwritten signature in blue ink that reads "PricewaterhouseCoopers LLP". The signature is written in a cursive, flowing style.

PricewaterhouseCoopers LLP

## **Appendix A**

- 1. The Board recognises that, in many jurisdictions, laws or regulations exist that govern when a fairness opinion is required, who may provide the opinion and matters that the opinion has to address. As indicated in the preamble to the proposed Guidelines, they are intended for use where there are either no equivalent statutory requirements or to supplement statutory requirements where these are silent on matters addressed in the Guidelines. While some jurisdictions may have more prescriptive or additional requirements to those proposed in the Guidelines, the Board is interested in knowing if any of the proposals conflict or contradict national regulatory requirements.**

***Do these Guidelines contradict any particular regulatory requirements in the jurisdiction within which you operate? If so please provide a brief description of the conflicting provision and a reference to the relevant law or regulation.***

The Guidelines are significantly less detailed than existing regulatory or professional guidelines in various territories (e.g. Germany<sup>1</sup> and Canada<sup>2</sup>). As such there are clearly differences. In our view, additional detail is required to make the ED more comparable to existing regulations. If the Guidelines are too high-level they will not be useful to the preparers of fairness opinions.

- 2. The Board considered whether a distinction should be made between a fairness opinion, contained in a comprehensive and detailed report delivered to the commissioning party (sometimes known as the “Board Book” or “Board Presentation”), and any abbreviated document that is publicly disclosed. It agreed that while it is common practice to prepare a summary of the conclusions reached by the opinion provider for publication or circulation to all stakeholders, a clear line does not exist between the different formats used for reporting, and they are part of the same service.**

***Do you agree with this conclusion? If not, what distinctions do you believe should be made in the Guidelines between the content of an opinion intended for the commissioning party and one intended for public disclosure?***

We disagree with this conclusion. In our view a Board Presentation should include more detail on the assumptions and analysis made. Depending on the nature of the transaction, the Board Presentation should be tailored to provide any meaningful information that the Board would find useful in making a decision – this would vary depending on the nature of the transaction.

A document for circulation to all stakeholders does not necessarily require a high level of detailed analysis. We would recommend that the ED provides guidance on the minimum areas that should be covered in such a document. We would expect such minimum areas to cover:

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<sup>1</sup> Institut der Wirtschaftsprüfer (IDW) Standard 8 (“Principles for the Preparation of Fairness Opinions”)

<sup>2</sup> The Canadian Institute of Chartered Business Valuators Standards 510 (“Fairness Opinions – Disclosure Standards and Recommendations”), 520 (“Fairness Opinions – Scope of Work Standards and Recommendations”) and 530 (“Fairness Opinions – File Documentation Standards and Recommendations”)

- the relevant details of the transaction;
- the opinion / valuation date;
- the transaction date (if different to the valuation date);
- the valuation methodology applied by the appraiser
- the data and information underlying the fairness opinion; and
- a conclusion on the fairness of the transaction.

As an example, the CICBV Standard 510 provides guidance of other disclosure items.

**3. Paragraphs 3 & 4 of the Exposure Draft describe what a fairness opinion is and also what it is not.**

***a) Is this description consistent with fairness opinions delivered in those jurisdictions within which you operate?***

The concept of "fairness from a financial point of view" is unclear and may be less/more extensive than the terms in fairness opinion guidelines in some territories. For example, in Australia, defined concepts such as "fair and reasonable" and "in the best interests" are applied in comparable reports. In Germany, the term "financial fairness" is not defined by law or within the standard IDW S 8 ("Principles for the Preparation of Fairness Opinions"). The local regulations on fairness opinions require that the appraiser determines, on the basis of the procedures and analyses defined in the standard, a benchmark against which the transaction price is compared.

***b) Do you consider it helpful for users and in the wider public interest for the IVSC Guidelines to attempt to define the nature of a fairness opinion?***

Whilst we believe that providing a definition is helpful for the users of fairness opinions, the Guidelines should include more detail on what a fairness opinion is, who the Guidelines are applicable to, how conflicts of interest can be mitigated and the level of work required to provide varying levels of comfort.

**4. The Board has tentatively decided that the Guidelines should be confined to the process of establishing independence and objectivity, matters that should be addressed in determining the scope of work, the conditions applicable to the assignment and the matters to be included in a typical fairness opinion. It considered that extending the guidance into matters that might indicate whether a proposed transaction was fair or not, e.g. the nature, extent and timing of a proposed transaction, would be impractical in an international context and could be interpreted as constraining a fairness opinion provider's judgement in certain cases.**

***Do you agree with the Board's decision to exclude guidance on criteria to be considered in determining whether a proposed transaction can be determined Fair or not? If you disagree, please indicate the types of additional guidance that you believe could usefully be included.***

Given that such reports are very clearly defined by regulators in specific territories and there will potentially be nuances between the reports in different territories, we agree that common international guidance on the evaluation process inherently cannot be provided.

We note that there are several territories which do not have existing guidance on regulatory requirements in relation to fairness opinions. It would therefore be beneficial for fairness opinion providers and users to have some guidance on the evaluation process. However, the Guidelines should clearly state that where a territory provides specific guidance, that guidance will supersede the IVSC's Guidelines. It might also be helpful to highlight which territories already have regulations / guidance on fairness opinions in place.

- 5. The Board considers it vital that the provider of a fairness opinion is sufficiently independent to provide, and be seen to provide, an Opinion that is objective and unbiased. These criteria apply to all valuation related services and the Code of Ethical Principles for Professional Valuers (the "Code") published by IVSC in 2011 includes discussion and guidance on how professional valuers can identify threats to their independence, and actions that may be taken to avoid or mitigate such threats. Paragraphs 10-18 of these Guidelines supplement the Code by providing some specific examples of threats to a fairness opinion provider's independence.**

*Do you consider that the Guidelines, when read in conjunction with the Code, adequately cover the threats to independence and objectivity that are likely to arise when considering whether an individual or firm should accept an appointment to provide a fairness opinion? If not please indicate either the additional threats that you believe should be identified or any threats that are identified in the draft that you believe should be modified or excluded.*

We believe that the ED should include additional guidance on threats to independence and the related safeguards that can be put in place. We note that the second bullet point under paragraph 15 of the ED, suggests that being involved in discussions that contemplate the "merits of the contemplated transaction" could give rise to a threat to perceived independence. In our view, delivery of a fairness opinion and advice on the merits of a transaction can co-exist as long as the fees for fairness opinions are not contingent on the success of the transaction. Where a fairness opinion provider has an interest in the transaction being completing (for example where the fees are contingent on the completion of the proposed transaction), sufficient safeguards need to be in place to mitigate any self-interest threat.

We would recommend that the IVPB engages with local regulators (particularly where guidance on fairness opinions already exists) and perhaps look to jointly provide guidance that would be applicable to all providers of fairness opinions e.g. investment banks.

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- 6. IVS 101 Scope of Work lists matters that should be addressed in agreeing the scope and terms of any valuation assignment. These are applicable to valuation advice contained within a fairness opinion. Paragraphs 19-21 of the draft Guidelines set out some specific matters additional to those in the IVS that should be considered when agreeing the scope and terms for providing a fairness opinion.**

***Do you consider that the Guidelines, when read in conjunction with IVS 101, adequately identify the principal matters that should be considered in agreeing the scope of work and terms for the provision of a fairness opinion? Please identify any additional matters that you consider should be included.***

In our view, the scope of work should include an initial assessment of the key valuation drivers (as these would vary depending on the nature of the company and its industry).

In addition, we believe that the Guidelines should recommend that the engagement letter is signed by both the commissioning party and the fairness opinion provider.

- 7. Where a fairness opinion includes a valuation, the principles of IVS 103 Reporting are applicable. Paragraphs 28–32 of these Guidelines discuss the principles that should be considered in determining the content of a fairness opinion and then list matters that it is recommended should be included in a typical Opinion.**

***Do you consider that this list of recommended contents is a) helpful and b) sufficiently comprehensive? Are there any matters that you believe should be excluded, or additional matters included?***

The list is very general and will not be sufficiently comprehensive in most specific circumstances. We have provided suggested areas that an Opinion should cover in our response to question 2. However, we note that in territories where there is no guidance on fairness opinions the list might serve a useful purpose.

- 8. Paragraph 31 r) includes some recommended restrictions and limitations for inclusion in a fairness opinion.**

***Do you consider that these restrictions and limitations are a) reasonable and b) applicable in the jurisdiction in which you operate? Are there any additional restrictions and limitations that you believe could usefully be added to those recommended?***

Appropriate restrictions and limitations will depend on the regulations and guidance in specific territories for the preparation of a fairness opinion. However, as noted above, where there is guidance on fairness opinions in a specific territory, the recommended restrictions and limitations might serve a useful purpose.

- 9. The Guidelines are intended to be helpful to those who commission fairness opinions, those who provide them and those who rely on them.**

***Are there any additional matters that you believe should be addressed in the guidance in order to best meet this objective?***

The guidance is brief and provides a high-level overview. We feel that to be useful to providers and users of fairness opinions it needs to be more detailed. Our responses to question 3 b) highlights the other areas that we believe the Guidelines should cover.