

M&A Monitor

Piper Jaffray Middle Market Mergers & Acquisitions

M&A Monitor: Analyzing M&A Activity—April 5, 2006

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Feature Article**Fairness Opinions—New Developments**by Michael Coddington, mcoddington@faegre.com, Faegre & Benson LLP

In today's business environment, it is common for a board of directors to obtain a fairness opinion in corporate control transactions to help satisfy the board's fiduciary duties to act with due care and in an informed matter.

There have been a number of recent developments that companies should be aware of when receiving fairness opinions, including:

- a recent Delaware Court of Chancery decision that questioned a number of fairness opinion practices;
- shareholder activism, which was exemplified in one transaction in which a shareholder sent a public letter to the board of a selling corporation providing its own analyses and questioning the analyses used in the fairness opinion; and
- proposed NASD disclosure and procedural requirements for fairness opinions.

While none of these recent developments mandates particular action by boards seeking fairness opinions, these developments stress the importance of asking questions throughout the process.

Delaware Decision

In December 2005, the Delaware Court of Chancery questioned a number of fairness opinion practices in denying the defendants' motion for summary judgment in *In re Tele-Communications, Inc. Shareholder Litigation*. The case involves AT&T's acquisition of the TCI Group of Tele-Communications, Inc. At the time of the acquisition, there were two series of tracking stocks tracking TCI Group's performance. The series A shares were entitled to one vote per share and the series B shares had ten votes per share; otherwise the rights of the two series were the same. In the acquisition, TCI's high-vote shares received a 10% premium over the low-vote shares and the holders of the low-vote shares filed suit alleging breaches of fiduciary duties by TCI's directors.

Due to the interests of TCI's board members, the transaction was subject to the entire fairness standard of review, which requires fair dealing and a fair price. Although TCI formed a special committee to approve the transaction, the Court identified several shortcomings in the special committee's composition, compensation and mandate, as well as deficient proxy statement disclosure regarding the special committee, which caused the defendants to bear the burden of proving entire fairness.

The Court found that questions regarding the quality and independence of the financial advisor's advice were raised because the financial advisor was already advising TCI. The Court also held that the financial advisor's contingent compensation of \$40 million raised serious issues of whether the financial advisor could provide independent advice to the special committee. Furthermore, the Court stated that the special committee did not have complete information on which to make an informed decision. For example, the special committee did not review the historical trading premiums for the high-vote shares over the low-vote shares. In addition, the financial advisor's board book presented four precedent transactions in which high-vote shares received premiums over low-vote shares; however, during the presentation of the board book, the financial advisor noted that premiums for high-vote shares were not the norm. The Court questioned the special committee's lack of inquiry about high-vote precedents. Another concern of the Court was the scope of the fairness opinion. The fairness opinion stated that consideration to be received by the holders of each series of stock was fair to such holders. The Court expressed its opinion that the determination of entire fairness requires the examination of the fairness of the consideration paid for the low-vote shares in relation to the consideration paid for the high-vote shares. The failure to receive a relative fairness opinion diminished the value of the fairness opinion in proving entire fairness. As a result of these shortcomings and concerns, the Court determined that genuine issues of material fact existed regarding whether the price and transaction process were fair and therefore denied the motion for summary judgment.

As a denial of a summary judgment motion, the decision is not a ruling on the merits of the case; however, it raises questions regarding scrutiny that courts might give to established fairness opinion practices in the future.

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Feature Article, Cont.

Fairness Opinions—New Developments

by Michael Coddington, mcoddington@faegre.com, Faegre & Benson LLP

Shareholder Public Scrutiny

In February 2006, a hedge fund shareholder of Tommy Hilfiger Corp. sent two letters to the independent directors of Hilfiger questioning the analyses used by Hilfiger's financial advisor in rendering a fairness opinion to Hilfiger's board in connection with the proposed sale of Hilfiger. The letters to Hilfiger's board were publicly filed on the SEC's EDGAR system and contained detailed valuation analyses that the shareholder prepared based on publicly available data. Based on those analyses, the shareholder suggested that the proposed cash offer price per share was insufficient. After Hilfiger filed a preliminary proxy statement setting forth a summary of the analyses prepared by Hilfiger's financial advisor, the shareholder sent a second letter to Hilfiger's independent directors in which it identified alleged flaws in each of the financial advisor's analyses. In the letter, the shareholder claimed that the fairness opinion contained several highly questionable assumptions that gave the appearance that commonly accepted valuation techniques were disregarded. The board met with its financial advisor, reviewed the shareholders' claims and reaffirmed that the proposed sale was in the best interests of Hilfiger and its shareholders. At the shareholder's request, Hilfiger's lead director and financial and legal advisors met with the shareholder and discussed the shareholder's concerns.

Boards may expect that some shareholders will express disapproval of the price to be paid in a transaction. Historically, this disapproval has taken the shape of litigation claiming a breach of fiduciary duty or exercise of dissenters' appraisal rights. Now, boards and their financial advisors should also be prepared for the possibility that shareholders may publicly criticize the fairness opinion and the particular analyses used by the financial advisor.

NASD

In response to concerns regarding investment banker conflicts of interest in rendering fairness opinions, the National Association of Securities Dealers (NASD) proposed new Rule 2290 in June 2005 which would require new disclosure and procedural requirements for NASD members that issue fairness opinions. The proposed rules are not yet final. The proposed disclosure rules are intended to complement the SEC's proxy rules and would require disclosure in fairness opinions of matters such as the NASD member's role in the transaction, relationships with the transaction parties and contingent fees.

The NASD proposal also includes procedural rules requiring NASD members to adopt written supervisory procedures to mitigate potential conflicts of interest in rendering fairness opinions, including procedures regarding the use of fairness committees, the determination of appropriate valuation analyses and the relevance of consideration paid to company insiders in a transaction.

Notably, the NASD's proposed rules do not prohibit NASD members who are also engaged as a company's financial advisor from rendering a fairness opinion, regardless of whether the NASD member receives a fee that is contingent on the success of the transaction.

What To Do?

Given these recent developments, what should board members do when receiving a fairness opinion? Ask questions.

Ask questions so that you understand the investment banker's past, present and future relationships with your company, company management and other parties to the transaction. In addition, inquire about the analyses used in rendering the fairness opinion and discuss with their legal and financial advisors the scope of the fairness opinion. In the end, it is the duty of the board of directors to decide whether the transaction is fair.

Feature Transaction

Piper Jaffray Advises York Label Holdings, Inc.

by Andrew Schwartz, andrew.h.schwartz@pjc.com, 312 920-3273

On March 17, 2006, York Label Holdings, Inc. ("York Label" or the "Company"), a portfolio company of Huron Capital Partners, was acquired by Wind Point Partners. Terms of the deal were not disclosed.

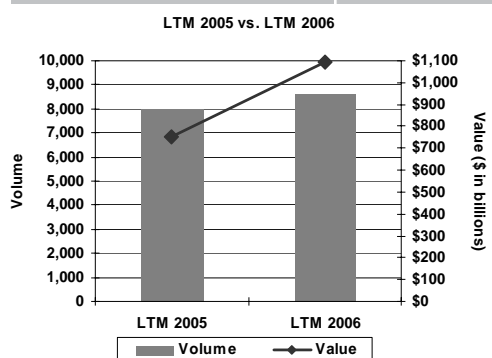
York Label, located in York, PA, is a premier provider of high-end pressure-sensitive labels to an attractive national customer base in a variety of end markets, including consumer products, health and beauty aids, pharmaceutical/medical, food and beverage, CD/DVD, financial services and direct mail. York Label's products are characterized by high degrees of customization, complexity, and innovation, including high-impact graphics, vivid colors, and unique constructions and functionality. York Label maintains unmatched product development capabilities, relying on the Company's technical expertise to develop products which precisely match customers' specifications. The Company's products are manufactured in one of the largest pressure-sensitive label manufacturing facilities in North America.

Piper Jaffray served as exclusive financial advisor to York Label Holdings, Inc. and Huron Capital Partners.

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Domestic Transactions

(\$ in billions)	Value*	Volume
LTM: 2005	\$750.7	8,000
LTM: 2006	\$1,096.5	8,601



*Total value based on deals with reported values

Source: Thomson Financial Securities Data Corporation

LTM median deal value for 2006 is \$32.0 million compared to \$26.0 million for 2005.

LTM Transaction Multiples

By Size (\$ in millions)	EBIT	EBITDA
Less than \$25	7.4x	4.1x
\$25 to \$100	10.0x	8.1x
\$100 to \$250	12.7x	7.1x
\$250 to \$1,000	13.2x	8.1x
Over \$1,000	14.7x	9.7x

Current data as of March 31, 2006

Source: Thomson Financial Securities Data Corporation

Based on multiples between 0x and 25x; excluding media and telecom.

Public Company Premiums

1 week prior to announcement	22.9%
4 weeks prior to announcement	24.8%

Current data as of March 31, 2006

Source: Thomson Financial Securities Data Corporation

Deal Financing

	Current	1 Year Ago
Leveraged Bank Loan	7.50%	5.47%
High Yield Bond Rate	8.06%	7.57%
Senior Debt/EBITDA*	4.4x	3.4x
Total Debt/EBITDA*	5.2x	4.6x

Current data as of March 31, 2006

Source: Portfolio Management Data, The Wall Street Journal and LCD Comps

*Represents leverage statistics for middle market LBOs (less than \$50 million of EBITDA)

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Buyout Fund Market

(\$ in billions)	2005	2004	2003
Funds Raised	\$173.5	\$42.2	\$24.0
Deals Completed	\$198.0	\$136.5	\$94.8

Data as of March 31, 2006

Source: Buyouts

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