

TRANSACTION OPINIONS



Boards of directors and management teams are under more scrutiny than ever. With activists' and plaintiffs' attorneys taking a more prominent role in the corporate world, challenges to transactions are becoming the norm. Boards, special committees, Limited Partner Advisory Committees (LPACs) and management teams often turn to transaction opinions to evidence their seriousness in satisfying their fiduciary duties. Opportune Partners is uniquely positioned to provide true independent advice with specific energy expertise and a dedicated transaction opinions practice. We help guide the process to watch for pitfalls that have led courts to challenge transactions.

Areas of Expertise:

- Fairness Opinions
- Solvency Opinions
- Reasonably Equivalent Value Opinions
- Commercially Reasonable Debt Opinions
- Related-Party Contract Opinions
- Second Opinions
- Board Advisory

FAIRNESS OPINIONS

Typically sought by companies (or private equity firms) on behalf of their boards of directors (or LPACs) to address the financial fairness of a transaction.

- Corporate best practice
- Good corporate governance
- Addresses conflicts of interest in related-party transactions
- Mitigates lack of a robust sale process or other market-clearing mechanism to determine price
- Defends against possible shareholder lawsuits or other legal challenge
- Supports fiduciary duties

Fiduciary Duties

A Board's fiduciary responsibilities have been well-defined by the courts—the Business Judgment Rule:

- Disinterestedness
- Good faith
- Due care (informed decision)
- Evidenced by fairness opinion

For transactions involving controlling shareholders, the courts have held to a higher standard – Entire Fairness:

- Fair price (addressed through fairness opinion)
- Fair dealing (based on process)

Corporate Context

- Material M&A transactions
- Transactions among related parties
- Minority transactions (i.e., buyouts, squeeze-outs, etc.)

Private Equity Context

- Cross-fund investments (e.g., Fund II invests in Fund I portfolio company)
- Cross-fund sale
- Down-round investment

MLPs

- Dropdowns
- Simplification transactions

SOLVENCY OPINIONS

- A solvency opinion is a collection of determinations on the valuation, capitalization and cash flow-generating ability of an entity immediately following a transfer, distribution, dividend or leveraged transaction
- Language is carefully drafted to conform to federal bankruptcy law and Delaware (or other state) statutes

Typically sought in the context of a transfer of cash or assets out of a company via distribution or sale. If such a transfer results in a company's insolvency, the transaction could be deemed a "Fraudulent Transfer".

- Boards and management may be held personally liable
- Courts could mandate an unwind of the transaction

Boards must represent that a distribution or dividend is made from a company's surplus. For certain transactions, boards (LPACs) seek a solvency opinion to execute the following:

- Corporate spin-offs and split-offs
- Leveraged dividend recapitalizations or other recapitalization transactions
- Leveraged buyouts
- Special dividends, accelerated stock buybacks and buybacks via self-tender
- Debt refinancings
- Asset sales by financially distressed companies (sometimes required by buyers to protect against unwind)

REASONABLY EQUIVALENT VALUE (REV) OPINIONS

Close cousins of solvency opinions, REV opinions also protect against claims of Fraudulent Transfer. Sometimes, a solvency opinion isn't feasible in the context of an asset sale by a distressed company, even if the sale is in the best interest of stakeholders. However, if "Reasonably Equivalent Value" is received for the assets, the transaction is protected against claims of Fraudulent Transfer. Unlike a Solvency Opinion, which focuses on what is left in a company after a distribution, REV opinions focus on the value of the assets being sold.

COMMERCIALLY REASONABLE DEBT OPINIONS

Typically requested by tax attorneys or tax departments in connection with cross-border related party debt financing transaction.

RELATED-PARTY CONTRACT OPINIONS

Fairness of the terms of operating or management agreements.

SECOND OPINIONS

To guard against claims of conflicts in transactions with large contingent M&A fees, boards may seek a second opinion to one given by the primary M&A advisor.

BOARD ADVISORY

Even if an opinion is not needed, boards and special committees often seek their own independent advisor.

Most opinion processes begin with the formation of a special committee, conflicts committee or LPAC.

- Must be empowered and willing to negotiate or even say "no"
- Members must be independent of actual or perceived conflicts
- The committee should hire their own legal and financial advisors

Hiring of Financial Advisors

- Courts have been critical of conflicts due to past or desired relationships involving large fees (i.e., capital markets underwriters, M&A advisors, lenders, auditors, etc.)
- Engagement fees must not be contingent on transaction closing
- Advisor/opinion provider must be qualified:
 - Nationally recognized valuation expert
 - Industry expertise (re: *Tousa 2012*)

We are best-positioned to defend against litigation:

- Dedicated transaction opinions practice
- Leader in energy valuations
- Deep industry experience
- Independence and integrity
- Senior-level commitment
- Focus on process
- Expert testimony experience
- Two-step review process

KEY CONTACT

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