
Revisions to Standard 510 – Fairness Opinions

August 2018

Comments Must Be Received By: November 2, 2018

This Exposure Draft concerning revisions to the fairness opinion standard (the Standard) is issued by The Canadian Institute of Chartered Business Valuators for comment. The Standard may be modified in light of the comments received.

Individuals and organizations are invited to send written comments on revisions to the Standard proposed by this Exposure Draft. Comments are requested from those who agree with the Exposure Draft as well as from those who do not.

Comments are most helpful if they refer to a specific paragraph or group of paragraphs, and when expressing disagreement with the Exposure Draft, they clearly explain the issue, and include a suggested alternative supported by specific reasoning.

To be considered, comments must be received by November 2, 2018, addressed to:

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It is preferable that comments be sent by email, to: Catalina.Miranda@cicbv.ca

Introduction

Fairness Opinions are routinely used by boards of directors to satisfy their fiduciary duties to act with due care and in an informed manner with respect to the fairness, from a financial point of view, of a proposed transaction. A fairness opinion, or information about it, is often provided to security holders as a part of the disclosure document relating to a conflict of interest transaction such as an insider bid, issuer bid, business combination or related party transaction. Fairness Opinions are not required by securities legislation, regulation or policy.

The CICBV is proposing revisions to Practice Standard No. 510 Fairness Opinions (the Standard) in order to update and clarify the standard for current best practice and recent regulatory developments, with respect to fairness opinions in the following key areas:

- Independence
- The basis for the fairness opinion
- Disclosures in a public fairness opinion

The revisions also reflect additional clarity in certain other areas of the Standard.

The revisions are set out in the blacklined copy of the proposed revised Standard attached.

Regulatory Developments

In July 2017, the Canadian Securities Administrators (CSA) issued Multilateral CSA Staff Notice 61-302 (the Staff Notice) regarding Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*, which outlines, among other things, the CSA's enhanced disclosure expectations by reporting issuers and their boards in respect of fairness opinions.

Specifically, the Staff Notice outlines that where a fairness opinion is obtained for a material conflict of interest transaction, the disclosure document should provide security holders with a meaningful understanding of the fairness opinion, by disclosing: a) the compensation arrangement with the opinion provider, b) any relationship to the opinion provider that may be relevant to a perception of lack of independence, and c) a clear summary of the methodology, information and analysis underlying the opinion sufficient to understand the basis for the opinion.

In light of these regulatory developments and the enhanced regulatory scrutiny of fairness opinions, corresponding revisions to the disclosure Standard are proposed, to allow Fairness Opinion issuers to align report disclosure with the disclosure obligations of a reporting issuer. The revisions to the Standard better reflect the intent of the Staff Notice and best practice, and provide enhanced clarity.

Specific Revisions to Standard 510

The key areas of proposed revisions to the Standard are:

- **Independence:** clearly stating whether or not the opinion provider (the Fairness Opinion issuer) acted independently and objectively in preparing the fairness opinion; disclosing the basis for the Fairness Opinion issuer's fee, including whether the fee is contingent; disclosing any relationships or arrangements that may be relevant to an assessment of independence, including specifically disclosing whether the Fairness Opinion issuer is also acting as a financial advisor. The revisions clarify that accepting contingent fees or acting as a financial advisor affects the independence or a reasonable perception of independence of the Fairness Opinion issuer such that it cannot be considered to be independent.
- **Basis for the fairness opinion:** providing a clear summary of the methodology, information and analysis underlying the fairness opinion sufficient to allow a reader to understand how the Fairness Opinion issuer arrived at its opinion on fairness. Such summary is not required to be so detailed as to allow a reader to recreate the analysis.
- **Public fairness opinion:** providing certain additional disclosures in a fairness opinion that is to be disclosed to public security holders or other readers who may not be familiar with the proposed transaction, including a description of the underlying business and its financial results, the approaches used in assessing financial fairness, the relevant financial metrics for the transaction and any other considerations relevant to the fairness assessment.

Standard No. 510

FAIRNESS OPINIONS

Disclosure Standards and Recommendations

1. Chartered Business Valuators may be retained to provide a conclusion as to the fairness of a proposed transaction to security holders (or to a group of security holders), from a financial point of view. In these circumstances, written communications arising from such engagements are termed “Fairness Opinions”.
2. A Fairness Opinion is defined as **“any written communication containing a conclusion as to the fairness of a proposed transaction to security holders (or a group of security holders), from a financial point of view.”** A Fairness Opinion does not include work product that is in the process of being completed that is provided to a client or knowledgeable third party in circumstances where each of the following conditions are met: (i) the work product is clearly marked as being in draft form and subject to change; (ii) the work product is issued for the purpose of obtaining comment, instruction, confirmation or other information required to complete the Fairness Opinion; and (iii) the Fairness Opinion issuer knows, or reasonably ought to know, that the intended reader(s) does not intend to rely on the work product or distribute the work product to a third party who may in turn rely on such work product.
3. Fairness Opinions are routinely used by boards of directors to satisfy their fiduciary duties to act with due care and in an informed manner with respect to the fairness, from a financial point of view, of a proposed transaction. A Fairness Opinion, or information about it, is often provided to shareholders as a part of the proxy materials.
4. A Fairness Opinion should outline specifically the subject matter of the conclusion, how it relates to the proposed transaction and all material assumptions and limitations. The particular facts of a proposed transaction will affect the degree to which the Fairness Opinion issuer will consider the transaction to be fair, from a financial point of view. In conducting the fairness review, the Fairness Opinion issuer should consider the factors and circumstances particular to the proposed transaction. The Fairness Opinion should describe the various factors considered important by the Fairness Opinion issuer in performing its fairness analysis.
5. The disclosure requirements of this Standard should not be viewed as an all-inclusive list of required disclosure but rather as a guideline for the Fairness Opinion issuer in exercising professional judgment to determine acceptable disclosure. There will be situations where certain items listed are not applicable or where other items that are not listed should be disclosed. The Fairness Opinion issuer should consider the level of disclosure described herein when considering the appropriate level of disclosure in a Fairness Opinion

- concerning matters or factors not specifically addressed herein but that are significant in reaching a fairness conclusion.
6. Reference to the Fairness Opinion issuer includes his/her firm, partnership or corporation.
 7. At a minimum, a Fairness Opinion shall contain the following information, which is set out herein in bold characters. “Recommendations” are not mandatory, but encouraged. “Explanatory comments” provide additional guidance in applying the specific provisions of the Standard.
 8. **Fairness Opinion Disclosure**
 - 8.1 **The Fairness Opinion shall provide sufficient information to allow a reader to have a meaningful understanding as to the basis for the conclusion expressed by the Fairness Opinion issuer;** (*Explanatory comment:* the amount of information included and the manner of disclosure is a matter of professional judgment, based on the scope of review and the purpose for which the Fairness Opinion is intended).
 - 8.2 **The Fairness Opinion shall contain the disclosures as noted below:**
 - A. **To whom the Fairness Opinion is being provided;** (*Explanatory comment:* if not readily apparent from the addressee, the name of the party who engaged the Fairness Opinion issuer should be disclosed);
 - B. **A description of the proposed transaction and the consideration being offered to the security holders (or to a group of security holders);**
 - C. **The purpose of the Fairness Opinion;**
 - D. **The effective date of the Fairness Opinion;**
 - E. **The identity and credentials of the Fairness Opinion issuer;**
 - F. **A description of the basis of the Fairness Opinion issuer’s compensation arrangements, including whether it is contingent on delivery of the final Fairness Opinion or is contingent upon the successful completion of the transaction, as compensation that is contingent on such matters is relevant to the determination of the Fairness Opinion issuer’s independence.** (*Explanatory comment:* the required disclosure does not necessarily include the quantum of the compensation);
 - G. **A description of any past, present or anticipated relationship or arrangement between the Fairness Opinion issuer and any interested party to the proposed transaction, that may be relevant to a perception of lack of independence of the Fairness Opinion issuer, such as also acting as a financial advisor to any party to the proposed transaction or any other matter in which compensation was received or is intended to be received as a result of the relationship between the Fairness Opinion issuer and any party to the proposed transaction;**
 - H. **A clear statement that either (i) the Fairness Opinion was prepared by the Fairness Opinion issuer acting independently and objectively or (ii) the Fairness Opinion was prepared by the Fairness Opinion issuer not acting independently and objectively.** (*Explanatory comment:* in making a determination as to whether or not the Fairness Opinion issuer was acting independently and objectively, the Fairness Opinion issuer should consider the basis of their compensation, any past, present or anticipated relationship or arrangement between the Fairness Opinion issuer and any interested party to the proposed transaction that may be

relevant to a perception of the lack of independence of the Fairness Opinion issuer and any other matter that would reasonably create a perception of lack of independence. For example, in accordance with section 401.3 of the CICBV Code of Ethics, accepting a contingent compensation arrangement means that the Fairness Opinion issuer is not providing independent professional services. Furthermore, acting as a financial advisor would reasonably create a perception of lack of independence.)

- I. **A description of the subject assets or securities (including non-cash consideration) to be exchanged and proposed transaction terms, sufficient to allow the Fairness Opinion reader to understand the key components of the financial fairness analysis;**
- J. **A statement that the Fairness Opinion has been prepared in conformity with the Practice Standards of The Canadian Institute of Chartered Business Valuators;** (*Recommendation:* a Fairness Opinion prepared in conformity with the requirements of relevant securities legislation, regulation or policies should also meet the disclosure requirements of such legislation, regulation or policies);
- K. **The Fairness Opinion shall contain a description of the scope of the review conducted, including a summary of the type of information reviewed and relied upon;**
- L. **A description of any valuation work and/or other financial analyses performed or relied upon in support of the Fairness Opinion's conclusions;**
- M. **A discussion of any bona fide offer or prior valuation or other material expert report considered by the Fairness Opinion issuer in coming to the Fairness Opinion's conclusions;**
- N. **A statement of the key assumptions made and significant representations relied upon; and**
- O. **A clear summary of the methodology, information and analysis underlying the Fairness Opinion sufficient to enable a reader to understand the basis for the Fairness Opinion conclusion.** (*Explanatory comment:* the summary should be presented in a manner that does not obscure the basis for the conclusion, although it does not need to provide information sufficient to enable a reader to perform their own analysis or form their own conclusion).
- P. **In circumstances where the Fairness Opinion will be disclosed to readers who may not be familiar with the proposed transaction, such as minority security holders in a material conflict of interest transaction, or where a board of directors, or a special committee thereof, will make disclosures to convey to security holders a meaningful understanding of the Fairness Opinion and how it was considered by them, the Fairness Opinion should also include:**
 - (a) **a description of the underlying businesses (including historical and projected financial results);**
 - (b) **a discussion of the approaches used in the assessment of financial fairness;**
 - (c) **relevant financial metrics for the transaction, and not merely a narrative description thereof, such as cash flow, cost of capital, implied internal rates of return, trading multiples of comparable public companies or recent stock trading prices for the subject shares; and**

(d) a discussion of any other considerations in assessing financial fairness.

8.3 **A Fairness Opinion shall disclose any restrictions that affect the fairness conclusion, as noted below:**

A. **Where the Fairness Opinion issuer was limited in the scope of review or where information provided to the Fairness Opinion issuer was incomplete, disclosure should be made of the limitation and of the incomplete information, reasons given and the potential impact of such limitation on the Fairness Opinion conclusions; and**

B. **Any qualifications or limitations to which the Fairness Opinion is subject.**

(Explanatory comment: to the extent the scope of review has been significantly restricted, or information provided is substantially incomplete, or any qualifications or limitations are material, the Fairness Opinion issuer should determine whether an opinion can reasonably be provided in the circumstances).

8.4 **It is recommended that Fairness Opinions also disclose any restrictions that affect the Fairness Opinion conclusion, as noted below:**

A. **A statement restricting the use of the Fairness Opinion to the persons for whom it was prepared and only for the stated purpose; and**

B. **A statement disclaiming responsibility for losses resulting from unauthorized or improper use of the Fairness Opinion.**

8.5 **The Fairness Opinion shall contain a conclusion as to fairness of the proposed transaction to the security holders (or to a group of security holders), from a financial point of view.**

(Recommendation: the conclusion should include a reference to the scope of review, key assumptions relied upon, and any restrictions and/or qualifications in the Fairness Opinion).

DATE

Standard No. 510

FAIRNESS OPINIONS

Disclosure Standards and Recommendations

1. Chartered Business Valuators may be retained to provide a conclusion as to the fairness of a proposed transaction to security holders (or to a group of security holders), from a financial point of view. In these circumstances, written communications arising from such engagements are termed “Fairness Opinions”.
2. A Fairness Opinion is defined as **“any written communication containing a conclusion as to the fairness of a proposed transaction to security holders (or a group of security holders), from a financial point of view.”** A Fairness Opinion does not include work product that is in the process of being completed that is provided to a client or knowledgeable third party in circumstances where each of the following conditions are met: (i) the work product is clearly marked as being in draft form and subject to change; (ii) the work product is issued for the purpose of obtaining comment, instruction, confirmation or other information required to complete the Fairness Opinion; and (iii) the Fairness Opinion issuer knows, or reasonably ought to know, that the intended reader(s) does not intend to rely on the work product or distribute the work product to a third party who may in turn rely on such work product.
3. Fairness Opinions are routinely used by boards of directors to satisfy their fiduciary duties to act with due care and in an informed manner with respect to the fairness, from a financial point of view, of a proposed transaction. A Fairness Opinion, or information about it, is often provided to shareholders as a part of the proxy materials.
4. A Fairness Opinion should outline specifically the subject matter of the conclusion, how it relates to the proposed transaction and all material assumptions and limitations. The particular facts of a proposed transaction ~~may will~~ affect the degree to which the Fairness Opinion issuer will consider the transaction to be fair, from a financial point of view. ~~Although in conducting the consideration being offered in a proposed transaction may be within a range of values determined to be fair, fairness review, the Fairness Opinion issuer should consider the factors and~~ circumstances particular to the proposed transaction ~~may lead the Fairness Opinion issuer to be of the view that other preferable alternatives exist other than what has been proposed. In essence, The Fairness Opinion should describe the range of values as determined may only comprise one of the factors that various factors considered important by~~ the Fairness Opinion issuer ~~considered in the particular circumstances in performing its fairness analysis.~~
5. The disclosure requirements of this Standard should not be viewed as an all-inclusive list of required disclosure but rather as a guideline for the Fairness Opinion issuer in exercising

professional judgment to determine acceptable disclosure. There will be situations where certain items listed are not applicable or where other items that are not listed should be disclosed. The Fairness Opinion issuer should consider the level of disclosure described herein when considering the appropriate level of disclosure in a Fairness Opinion concerning matters or factors not specifically addressed herein but that are significant in reaching a fairness conclusion.

6. Reference to the Fairness Opinion issuer includes his/her firm, partnership or corporation.
7. At a minimum, a Fairness Opinion shall contain the following information, which is set out herein in bold characters. "Recommendations" are not mandatory, but encouraged. "Explanatory comments" provide additional guidance in applying the specific provisions of the Standard.

8. Fairness Opinion Disclosure

- 8.1 **The Fairness Opinion shall provide sufficient information to allow ~~the~~ reader to ~~understand how~~ have a meaningful understanding as to the basis for the conclusion expressed by the Fairness Opinion issuer ~~arrived at the conclusion expressed~~; (Explanatory comment: the amount of information included and the manner of disclosure is a matter of professional judgment, based on the scope of review and the purpose for which the Fairness Opinion is intended).**

8.2 The Fairness Opinion shall contain the disclosures as noted below:

- A. **To whom the Fairness Opinion is being provided;** (*Explanatory comment: if not readily apparent from the addressee, the name of the party who engaged the ~~Valuator~~ Fairness Opinion issuer should be disclosed*);
- B. **A description of the proposed transaction and the consideration being offered to the security holders (or to a group of security holders);**
- C. **The purpose of the Fairness Opinion;**
- D. **The effective date of the Fairness Opinion;**
- ~~E.~~ **The identity and credentials of the Fairness Opinion issuer;**
- ~~E.F.~~ **A description of the basis of the Fairness Opinion issuer's compensation arrangements, including whether it is contingent on delivery of the final Fairness Opinion or is contingent upon the successful completion of the transaction, as compensation that is contingent on such matters is relevant to the determination of the Fairness Opinion issuer's independence. (*Explanatory comment: the required disclosure does not necessarily include the quantum of the compensation*);**
- ~~G.~~ **A description of any past, present or anticipated relationship or arrangement between the Fairness Opinion issuer and any interested party which to the proposed transaction, that may be relevant to the Fairness Opinion issuer's independence for purposes of providing the Fairness Opinion a perception of lack of independence of the Fairness Opinion issuer, such as also acting as a financial advisor to any party to the proposed transaction or any other matter in which compensation was received or is intended to be received as a result of the relationship between the Fairness Opinion issuer and any party to the proposed transaction;**
- ~~H.~~ **~~A.F.~~ The effective date of the Fairness Opinion;**

- ~~clear~~ ~~G.~~ ~~A statement that either (i) the Fairness Opinion was prepared by the Fairness Opinion issuer acting independently and objectively or facts that might result in the possible actual or perceived lack of independence and objectivity; (Recommendation: consideration (ii) the Fairness Opinion was prepared by the Fairness Opinion issuer not acting independently and objectively. (Explanatory comment: in making a determination as to whether or not the Fairness Opinion issuer was acting independently and objectively, the Fairness Opinion issuer should be given to any consider the basis of their compensation, any past, present or anticipated relationship or arrangement between the Fairness Opinion issuer and any interested party which to the proposed transaction that may be relevant to a perception of the Fairness Opinion issuer's lack of independence and objectivity for purposes of providing of the Fairness Opinion) (Explanatory comment: in circumstances where a firm is responsible for preparing the Fairness Opinion, this statement is in respect of the issuer and any other matter that would reasonably create a perception of lack of independence and objectivity of the person(s) who prepared the Fairness Opinion and any assistants); For example, in accordance with section 401.3 of the CICBV Code of Ethics, accepting a contingent compensation arrangement means that the Fairness Opinion issuer is not providing independent professional services. Furthermore, acting as a financial advisor would reasonably create a perception of lack of independence.)~~
- ~~I.~~ ~~A H.~~ ~~A description of the relevant business, subject assets or securities (including non-cash consideration) to be exchanged and proposed transaction terms, sufficient to allow the Fairness Opinion reader to understand the rationale of the Fairness Opinion and the approach and various factors influencing key components of the financial fairness that were considered analysis;~~
- ~~I.~~ ~~A statement that the Fairness Opinion issuer's compensation is not contingent on an action or event resulting from the use of the Fairness Opinion or disclose the nature of the actual or perceived contingent consideration;~~
- J. A statement that the Fairness Opinion has been prepared in conformity with the Practice Standards of The Canadian Institute of Chartered Business Valuators; (Recommendation: a Fairness Opinion prepared in conformity with the requirements of relevant securities legislation, regulation or policies should also meet the disclosure requirements of such legislation, regulation or policies.);
- K. The Fairness Opinion shall contain a description of the scope of the review conducted, including a summary of the type of information reviewed and relied upon;
- L. A description of any valuation work and/or other financial analyses performed or relied upon in support of the Fairness Opinion's conclusions;
- M. A discussion of any bona fide offer or prior valuation or other material expert report considered by the Fairness Opinion issuer in coming to the Fairness Opinion's conclusions;
- N. A statement of the key assumptions made and significant representations relied upon; and
- ~~O.~~ ~~A discussion of the factors considered to be important by the Fairness Opinion issuer in performing the Fairness Opinion analysis.~~ ~~O.~~ ~~A clear summary of the methodology, information and analysis underlying the Fairness Opinion~~

sufficient to enable a reader to understand the basis for the Fairness Opinion conclusion. (Explanatory comment: the summary should be presented in a manner that does not obscure the basis for the conclusion, although it does not need to provide information sufficient to enable a reader to perform their own analysis or form their own conclusion).

P. In circumstances where the Fairness Opinion will be disclosed to readers who may not be familiar with the proposed transaction, such as minority security holders in a material conflict of interest transaction, or where a board of directors, or a special committee thereof, will make disclosures to convey to security holders a meaningful understanding of the Fairness Opinion and how it was considered by them, the Fairness Opinion should also include:

(a) a description of the underlying businesses (including historical and projected financial results);

(b) a discussion of the approaches used in the assessment of financial fairness;

(c) relevant financial metrics for the transaction, and not merely a narrative description thereof, such as cash flow, cost of capital, implied internal rates of return, trading multiples of comparable public companies or recent stock trading prices for the subject shares; and

(d) a discussion of any other considerations in assessing financial fairness.

8.3 A Fairness Opinion shall disclose any restrictions that affect the fairness conclusion, as noted below:

A. Where the Fairness Opinion issuer was limited in the scope of review or where information provided to the Fairness Opinion issuer was substantially incomplete, disclosure should be made of the limitation and of the incomplete information, reasons given and the potential impact of such limitation on the Fairness Opinion conclusions; and

B. Any qualifications or limitations to which the Fairness Opinion is subject.

(Explanatory comment: to the extent the scope of review has been significantly restricted, or information provided is substantially incomplete, or any qualifications or limitations are material, the Fairness Opinion issuer should determine whether an opinion can reasonably be provided in the circumstances).

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A. A statement restricting the use of the Fairness Opinion to the persons for whom it was prepared and only for the stated purpose; and

B. A statement disclaiming responsibility for losses resulting from unauthorized or improper use of the Fairness Opinion.

8.5 The Fairness Opinion shall contain a conclusion as to fairness of the proposed transaction to the security holders (or to a group of security holders), from a financial point of view. (Recommendation: the conclusion should include a reference to the scope of review, key

assumptions relied upon, and any restrictions and/or qualifications in the Fairness Opinion).

~~February 26, 2010~~DATE