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Use of Special Committees in Conflict Transactions

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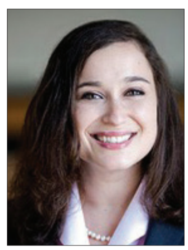

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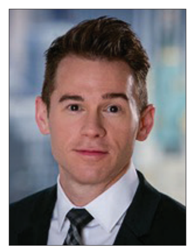

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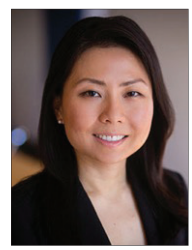

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Special committees often play a critical role in conflict transactions, such as transactions involving controlling stockholders, corporate insiders or affiliated entities, including "going private" transactions, or purchases or sales of assets or securities from or to a related party. Such "conflict transactions" raise complicated legal issues and, in today's environment, a high likelihood of litigation. A well-functioning and well-advised committee can offer important protections to directors and managers in after-the-fact litigation.

But special committees are not one-size-fits-all, and they can be deployed to the detriment of a company and its stockholders. Forming a special committee in the absence of a conflict transaction can needlessly hamper the operations of the company and its ability to transact, create rifts within the board and between the board and management, create a misimpression of conflict that invites rather than discourages litigation, and burden the company with an inefficient decision-making structure that may be difficult to unwind. It is important, therefore, for companies to carefully consider – when the specter of a real or potential conflict arises – whether a special committee is in fact the best approach, whether it is advisable at all, and whether recusal of conflicted directors or other safeguards is perhaps the better approach. Equally important is the proper formation and empowerment of the special committee and the execution of its work.

Where a special committee is properly deployed, the committee should exclude anyone with a direct or indirect interest in the transaction, and the committee should engage its own unconflicted legal and financial advisors. The committee should also be provided full negotiating power, including the power to reject the proposed transaction. It should be constituted early in the process, before any material transaction terms are agreed to, and have access to all relevant material information regarding the company and the proposed transaction.

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Committees can fail to function properly for a number of reasons, including lack of independence, improper motivations (including both overzealousness and languor), poor advice, lack of diligence or unwarranted limitations on their mandate. As a result, decision makers should consider the ground rules governing a special committee process before it is begun.

This article provides an overview of the key considerations involved in the decision whether, when and how to form a special committee. Because the vast majority of public corporations are incorporated in Delaware, and many other jurisdictions look to Delaware corporate law for guidance, we focus on Delaware law.

I. Overview of Legal Framework

Generally speaking, when a company engages in an arm's-length transaction, the decisions of its board of directors are examined under the well-known "business judgment rule," which works to protect individual directors from being second-guessed by a court. However, board decisions in respect of conflict transactions may not receive the deference normally accorded by the business judgment rule and instead may be assessed under a stricter judicial lens.

A. Conflict Transactions – Entire Fairness

The default standard of review for conflict transactions is "entire fairness," which is "Delaware's most onerous standard [of review]."[1] It imposes the burden of proof upon directors to show the fairness of both the price and process of the transaction they approved. Conflict transactions where a court will review a board's actions under the entire fairness standard occur:

- when a majority of the board either (a) has an interest in the decision or transaction that differs from the stockholders in general or (b) lacks independence from or is dominated by an interested party;

- when the transaction at issue is one where the directors or a controlling stockholder "stand[] on both sides" of a transaction; or

- when a controlling stockholder receives additional consideration to the detriment of the other stockholders.[2]

There is no bright-line test to determine whether an individual director is conflicted, or a majority of directors are conflicted, for purposes of determining whether the entire fairness standard will be applied. A conflict must generally be "material" if it is to be considered disabling,[3] although in some cases, self-dealing by a director standing on both sides of the transaction may suffice to disable that director, regardless of materiality.[4] Potential conflicts can take many shapes, including when a director receives certain payments from,[5] has certain family relationships with,[6] or has certain significant prior business relationships with, a party to the transaction,[7] and other instances where a director will benefit or suffer a detriment in a manner that is not aligned with the interests of the public stockholders. A key consideration is whether the director can be said to stand on both sides of the transaction in question, or whether he or she has obtained some material benefit not ratably shared with the public stockholders.

For example, the Delaware Court of Chancery has applied entire fairness review to a board's decision to approve a merger that provided disparate consideration to members of management and the company's preferred stockholders as compared to the common stockholders, where a majority of the directors were affiliated with either management or the preferred stockholders.[8] On the other hand, directors' mere ownership of different classes of stock, or of common stock rather than preferred stock, will not necessarily trigger entire fairness review, absent a showing that the directors' holdings of different classes of stock were sufficiently material to make it improbable that the directors could fulfill their obligation to act in the collective best interest of holders of common stock.[9]

Entire fairness review can be triggered even though a majority of directors are disinterested if the conflicted directors control or dominate the board, or if one or more of the conflicted directors failed to disclose his or her interest.[10] In addition, entire fairness review frequently applies to transactions involving conflicted controlling stockholders, including "squeeze-out" mergers and other transactions in which the controller stands on both sides.

When analyzing a transaction to determine whether it satisfies the entire fairness standard, a Delaware court will consider both process ("fair dealing") and price ("fair price"), although the inquiry is not a bifurcated one; rather, all aspects of the process and price are considered holistically in evaluating the fairness of the transaction.[11] As the Delaware Court of Chancery has explained:

> The concept of entire fairness has two components: fair dealing and fair price. These prongs are not independent, and the Court does not focus on each of them individually. Rather, the Court determines entire fairness based on all aspects of the entire transaction. Fair dealing involves questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. Fair price involves questions of the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock.[12]

A "fair price" has been described as follows: "A fair price does not mean the highest price financeable or the highest price that fiduciary could afford to pay. At least in the non-self-dealing context, it means a price that is one that a reasonable seller, under all of the circumstances, would regard as within a range of fair value; one that such a seller could reasonably accept."[13]

B. Shifting the Standard of Review

1. Use of Special Committees Can Shift the Burden of Proof or Help Defendants Meet their Burden

The use of a well-functioning and properly formed and empowered special committee can shift the burden of proof regarding entire fairness from the defendant to the plaintiff, thus requiring the plaintiff to prove that a transaction was not entirely fair, rather than requiring the defendant to prove that it was entirely fair. The quantum of proof needed under entire fairness is a "preponderance of the evidence," which has led the Delaware Supreme Court to note that the effect of a burden shift is "modest," as it will only prove dispositive in the rare instance where the evidence is entirely in equipoise.[14] Nevertheless, the Supreme Court has also stressed that it views the use of special committees as part of the "best practices that are used to establish a fair dealing process," and thus, in spite of the only "modest" benefit from a burden standpoint, special committees remain important in conflict transactions.[15]

2. Use of Special Committees Can Lower the Standard of Review

Under certain circumstances and by following certain procedural requirements, the standard of review generally applicable to conflict transactions may be lowered to business judgment review. Specifically, the fully informed approval of *both* a well-functioning and independent special committee of directors *and* the majority-of-the-minority stockholders can lower the standard of review from entire fairness to business judgment in certain transactions.[16]

Since the Delaware Supreme Court's 2014 decision in *Kahn v. M&F Worldwide Corp.*, a controlling stockholder has been able to obtain business judgment review treatment of a conflict transaction if it and the board follow specific requirements. As described below, although *M&F Worldwide* addressed a squeeze-out merger, the Court of Chancery has held that the standard applies to other conflict transactions.[17] To qualify for business judgment review, the following conditions must be satisfied: "(i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority-of-the-minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority."[18] Moreover, the conditions of approval by a Special Committee and by a majority-of-the-minority stockholders must apply to the proposed transaction from the outset.[19] The Court in *M&F Worldwide* also noted that the proper use of *either* special committee or majority-of-the-minority approval alone "would continue to receive burden-shifting within the entire fairness standard of review framework."[20]

The Delaware Supreme Court recently clarified application of the *M&F Worldwide* requirements, rejecting a "bright-line" requirement that the controller commit to the protective conditions in the very first written expression of interest, and agreeing that *M&F Worldwide*'s requirement that the controller's proposal be conditioned

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on approval by a Special Committee and by a majority-of-the-minority stockholders is satisfied if these conditions are included "before any substantive economic negotiations begin."[21] The Supreme Court also clarified that a plaintiff must plead that the Special Committee failed to meet its duty of care by sufficiently alleging "that the Special Committee acted with gross negligence, not by questioning the sufficiency of the price."[22]

Finally, standard-shifting under *M&F Worldwide* can occur not only in squeeze-out transactions or other transactions in which the controller stands on both sides of the transaction, but also in third-party sales in which the controller allegedly receives disparate consideration.[23] The same requirements, including that the standards be applied from the outset, apply in such circumstances.[24] The Court of Chancery also has held that the *M&F Worldwide* standard could be used to shift the standard of review in conflict transactions not involving a sale of the company, finding "no principled basis on which to conclude that the dual protections in the [*M&F Worldwide*] framework should apply to squeeze-out mergers but not to other forms of controller transactions."[25]

II. Key Components of an Effective Special Committee Process

With respect to process, the Delaware Supreme Court has long encouraged boards to utilize a "special committee" of independent directors when a conflict transaction is proposed. As discussed at greater length below, the purpose of a special committee is to attempt to reproduce the dynamics of arm's-length bargaining. To be effective, a special committee generally should: (1) be properly constituted (*i.e.*, consist of independent and disinterested directors selected by the independent and disinterested members of the board); (2) have an appropriately broad mandate from the full board; and (3) have its own legal and financial advisors.[26] Factors considered in determining whether a special committee functioned adequately are further described below.

A. Disinterestedness and Independence of Committee Members

Special committees are only effective to impact the standard of review and/or the burden of proof if their members are disinterested and independent. In determining director independence and disinterestedness, a board should consider requiring its directors to disclose their compensatory, financial and business relationships, as well as any significant social or personal ties that could be expected to impair their ability to discharge their duties. The Delaware Supreme Court has stressed that all of these factors must be considered "in their totality and not in isolation from each other."[27] Paying close attention to which directors are selected to serve on a special committee is important, and care should be taken to vet the independence of those selected.[28] The use of a special committee will not shift the burden of proving unfairness to the plaintiffs if the directors on the committee are viewed as "beholden" to a controlling stockholder.[29] Even if a director does not have a direct personal interest in the matter being reviewed, the director will not be considered qualified if he or she lacks independence from the controlling stockholder or some other person or entity that is interested in the transaction.

Certain compensatory relationships can lead to independence concerns. For example, the Court of Chancery has questioned the independence of a member of a special committee because he was a paid consultant of an affiliate of the controlling stockholder.[30] Familial relationships may also be disqualifying. For example, the Court of Chancery held that a director who was the brother-in-law of the CEO and involved in various businesses with the CEO could not impartially consider a demand that was adverse to the CEO's interests.[31] Special committee members are entitled to fees for their service on the special committee. Such fees may be payable in any reasonable form or amount, including as a lump sum or as separate meeting fees payable per meeting or in a combination, depending on the needs of the committee. But caution must be exercised as unusual compensation arrangements or excessive fees may give rise to issues regarding the independence of special committee members.

And the confluence of business and social relationships may together compromise a director's independence. For instance, the Delaware Supreme Court ruled that allegations that a director had "a close friendship of over half a century with the interested party" and that "the director's primary employment . . . was as an executive of a company over which the interested party had substantial influence" adequately raised a doubt that the director was not independent.[32] In another example, the Court of Chancery found that one director lacked independence from an interested party because of her employment in a leadership position at a charity where the interested party's wife served on the board of directors and to which the interested party had made significant financial contributions.[33] In that same case, the Court also found that another director lacked independence from the same interested party because that director had been invited by the interested party to join an ownership group of a professional basketball team.[34] Although some of these cases involved the demand futility framework rather than the assessment of a special committee's independence, they reflect a trend in the Delaware courts that may suggest closer scrutiny of business, social, or financial relationships between board members.

Not all relationships between special committee members and management or controlling stockholders will give rise to independence concerns, however, and Delaware courts have offered broad guidance on this topic. For example, the Delaware Supreme Court has rejected the concept of "structural bias," *i.e.*, the view that the professional and social relationships that naturally develop among members of a board impede independent decision-making.[35] The Court of Chancery has also refused to accept a "transitive theory" of conflict, rejecting the argument that a director lacks independence from an alleged controller because the director is allegedly beholden to someone else who, in turn, is allegedly beholden to the controller.[36] In *M&F Worldwide*, the Delaware Supreme Court reinforced that "[a] plaintiff seeking to show that a director was not independent must satisfy a materiality standard" and that neither "the existence of some financial ties between the interested party and the director" nor "allegations that directors are friendly with, travel in the same social circles as, or have past business relationships with the proponent of a transaction" are sufficient to rebut the presumption of independence.[37] Notably, the Supreme Court approved then-Chancellor Strine's finding that the directors' satisfaction of the independence standards of the New York Stock Exchange was informative, although not dispositive, of their independence under Delaware law.[38] The Supreme Court has noted that the Nasdaq standards raised similar issues to those relevant under Delaware law, while reiterating that Delaware and stock exchange standards were still not equivalent.[39]

The purpose for which the special committee is created may also be relevant in determining whether its directors are independent. The Delaware Supreme Court has said, "[i]ndependence is a fact-specific determination made in the context of a particular case. The court must make that determination by answering the inquiries: independent from whom and independent for what purpose?"[40] For example, special litigation committees are analyzed differently from transactional special committees because, as a defendant in a lawsuit, the board itself is interested in the outcome of the litigation and whether it should be pursued.

B. The Committee's Role and Process

The function of a special committee is to protect stockholder interests by delegating a decision to a group of independent, disinterested directors in cases where the interests of certain directors (such as directors participating in a management buyout or representing a controlling stockholder) differ significantly from those of the public stockholders. The influence (and number) of interested directors on a board may be relevant in determining the desirability of forming a special committee. For example, a board consisting of a majority of independent directors may not be significantly affected by management directors promoting a leveraged buyout. It may be sufficient for interested directors to recuse themselves from any deliberations and votes in connection with a proposed transaction. As the Court of Chancery has explained, "[t]he formation of a special committee can serve as 'powerful evidence of fair dealing,' but it is not necessary every time a board makes a decision."[41]

If directors who have a personal interest that conflicts with those of the public stockholders constitute a minority of the board, the disinterested majority can act for the board, with the interested members abstaining from the vote on the proposal. But if a majority of the board is not disinterested, under Delaware law, absent appropriate procedural protections, the merger will be reviewed under the "entire fairness" standard, with the burden of proof in any stockholder litigation placed on the board.[42]

Even where a majority of directors is independent, delegation of negotiation or review func-

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tions to a special committee may be appropriate or expedient in certain contexts as the mere recusal of conflicted directors may not be sufficient to obtain the protections under the *M&F Worldwide* framework. However, there is no automatic need to create a special committee of directors, or to layer on separate newly retained advisors (legal or financial) in every instance where there may potentially be conflicts. In fact, employing a special committee where the facts do not call for it, may be inadvisable and jeopardize a transaction that could be in the best interests of a company's stockholders. There is also the potential that creation of a special committee can itself be the basis for additional scrutiny by stockholders and courts of a potential transaction as it creates an inference of a conflict where none was otherwise apparent.

As explained above, the presence of a well-functioning special committee can shift the burden of proof to the plaintiff in an entire fairness case. To achieve this burden shift, the special committee must follow proper procedures. For example, in the context of a transaction with a majority stockholder, "the special committee must have real bargaining power that it can exercise with the majority shareholder on an arm['s-] length basis."[43] The special committee should receive independent financial and legal advice, negotiate diligently and without the influence of the controlling stockholder, and should possess all relevant material information, including material facts relating to the value of the assets to the stockholder itself, including alternative uses.[44] The controlling stockholder need not, however, disclose information relating to its reservation price, how it would finance a purchase or invest the proceeds from a sale, or other information that "would undermine the potential for arm's-length negotiations to take place."[45] The Delaware Supreme Court has suggested that even where a special committee obtains independent legal and financial advice and negotiates diligently, the requisite degree of independence may still be lacking if the committee and controlling stockholder fail to establish that the committee has the power to negotiate independently.[46]

The authority granted to a special committee should generally be reflected in formal resolutions setting forth the committee's purpose and authority, which should reflect the ability of the special committee to act on behalf of the company in a clear and sufficiently broad mandate. A special committee should be sufficiently empowered to act independently of conflicted directors, controlling stockholders and management. Such resolutions should also require management to cooperate with the special committee and, as discussed in more detail below, permit the special committee to retain its own independent legal, financial and other advisors. The special committee should be empowered to determine the timing, manner and content of its meetings and be able to deliberate in a confidential manner from management, the conflicted directors on the board and the controlling stockholder, if any. Special committees and their advisors should be proactive in seeking all relevant information (potentially including valuation information and information held by management or the transaction proponent) and in negotiating diligently on behalf of stockholders.[47]

While clear resolutions setting forth in writing the broad powers of a committee represent best practices, it is even more important that the committee both have those powers and that the committee members understand as much. The special committee should have a clear conception of its role, which should include the power to say "no" to the potential transaction.[48] In the 2011 *Southern Peru* case,[49] the Delaware Court of Chancery criticized the role of the special committee in reviewing a merger proposal from a controlling stockholder. The Court stated that the special committee's "approach to negotiations was stilted and influenced by its uncertainty about whether it was actually empowered to negotiate" and that the special committee "from inception . . . fell victim to a controlled mindset and allowed [its controlling stockholder] to dictate the terms and structure of the [m]erger."[50] The Delaware Supreme Court affirmed the Court of Chancery's rulings and adopted its reasoning.[51] A special committee that does not recognize, even in the context of a takeover bid by a controlling stockholder, that it may refuse to accept the offer might bear the burden of proving the entire fairness of the transaction in court.[52] The ability to say no must include the ability to do so without fear of retaliation. For example, in one case the Supreme Court was persuaded that the special committee's negotiations were influenced by the controlling stockholder's threat to acquire the company in a hostile takeover at a much lower price if the special committee did not endorse the controlling stockholder's offer.[53]

C. Selection of the Committee's Advisors

The special committee itself, rather than management or a controlling stockholder, should choose its own financial and legal advisors. For example, the Delaware Supreme Court was critical of the conduct of an auction to sell the company in which a financial advisor selected by the company's CEO, rather than by the special committee, played a dominant role.[54] In other cases, the Delaware Court of Chancery has looked unfavorably on the decision to use a company's legal and financial advisors rather than retaining independent advisors, and has also criticized a special committee's use of advisors who were handpicked by the majority stockholder seeking a merger.

Whether the special committee should retain advisors with a previous relationship with the corporation is a context-specific decision. While having a special committee advised by firms that have close ties to the company may raise independence concerns, it is not in all cases better for the special committee to choose advisors who are unfamiliar with the company or to avoid hiring advisors who have done prior work for the company. In one case, Justice Jacobs (sitting as a Vice Chancellor) criticized a process in which the company's historical advisors were "co-opted" by the majority stockholder, leaving the special committee with independent advisors who did not know the company well and who lacked the information available to the majority stockholder's advisors.[55]

As a practical matter, some companies may have had at least some prior dealings with close to all of the financial or legal advisors who would have the relevant experience and expertise to advise a special committee on a transaction that is particularly complicated or of a certain size. If the special committee chooses to engage an advisor with such prior dealings, it should carefully document any potential conflict, the reasons the special committee considered it important to engage the advisor, and the measures the special committee took to mitigate any such conflict. Such measures may include negotiating carefully worded confidentiality provisions and structuring the advisor's fee to prevent any misaligned incentives. The committee may also choose to hire a second advisor for a particular role, although it should take care to ensure that the second advisor's presence will successfully mitigate the conflict that has been identified—for example, by ensuring that the new advisor is not merely a "secondary actor."[56] As a practical matter, fees paid to advisors ought to take into consideration the nature of the engagement and the particular needs of the special committee. Generally, it is common to see financial advisors paid an initial engagement fee followed by milestone payments payable upon the delivery of certain advice to the committee or the completion of a transaction. Committees may also pay additional discretionary fees based on an advisor's performance. Interviewing several advisors, and ensuring a record of such through board and committee minutes, may also help to show that a special committee was aware of its options and made an informed decision in hiring its advisors, without delegating the decision to management.

D. Some Additional Considerations

1. Keep Focused on What Is Best for the Company

In quite a few of the legal cases involving special committees, the committees have been painted as too compliant or passive in representing the public stockholders. There is an equal and opposite risk: the tendency of special committees to get "dug in" and to kill transactions potentially beneficial to stockholders. Thus, serving on a special committee requires a careful balancing of toughness and pragmatism in order to ensure that the committee is not so legally risk-averse that a beneficial and good transaction opportunity is lost. Committees should carefully consider the various alternatives and forthrightly address the risks and benefits of each.

A basic question is how far the committee should go, and terms of the process it uses, in satisfying itself that it has taken a sufficient look at the alternatives. Processes such as full-blown open auctions that may be right for some companies may be potentially disastrous for others, and whether the special committee has the legal authority to "shop" the company will depend on the board resolutions that establish it. An experienced financial advisor can often provide extremely useful advice about a company's potential strategic alternatives, what the potential universe of interested buyers looks like and any incremental value that could be expected from one approach or the other. Experienced legal advice on the committee's fiduciary duties and processes, and on deal protections, should an agreement be entered into, will also be critical.

So that committee members are not unduly

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concerned about personal financial exposure, it is entirely appropriate to review, with the help of counsel, indemnification and D&O insurance arrangements in the context of a conflict transaction.

2. Don't Check Collegiality at the Door

Conflict transactions are stressful. People who have previously worked harmoniously together, pulling together for a common cause even as they vigorously expressed their individual opinions, may suddenly find themselves advocating for highly distinct and perhaps irreconcilable positions. While zealous advocacy is important, it is equally important that all involved work hard to avoid having the situation degenerate into hostility. There are various risks and distractions that can be caused when a board and management lose mutual trust and descend into dysfunction. Avoiding this pitfall may involve people going that extra mile to be respectful of the others involved and the duties they must discharge, even as they remain firm in their views when necessary. While this is a difficult balance to maintain, the dangers of letting a board or committee go off the rails are just as real as the dangers of excessive subservience. When the special committee process is over, people may well have to go on living with each other (particularly if there is no transaction) and the good of the company and its stockholders may well depend on their ability to do so.

3. Documenting the Process

The record of the deliberation and investigation of the special committee and its advisors should reflect careful and informed consideration of the material issues raised by the transaction. Counsel can help frame the agenda, review in advance the nature and contents of reports from financial advisors, and review or assist in the preparation of appropriate minutes.

Occasionally, the special committee itself will undertake one or more formal, written reports to the entire board of directors regarding the transaction. The report may contain the committee's recommendation, a description of the process it undertook in reviewing the transaction, and a summary of the reasons for its conclusions.

Reports and analyses – whether from the committee or its financial advisors – should be carefully and thoughtfully prepared. Many conflict transactions are subject to enhanced public disclosure of the approval process for the transaction, including the public filing of such reports as exhibits with the SEC. Moreover, many documents (including drafts and notes) prepared by or for a special committee will be discoverable in litigation, and this should be borne in mind in connection with all written materials.

III. Special Committee Interaction with Conflicted Persons

Some basic guidelines to the proper course of interaction between the special committee and conflicted persons such as company management, conflicted directors or a controlling stockholder include:

- *Cooperation*. The special committee should have the cooperation of the conflicted persons, and it (and its advisors) should receive any analysis or assistance that they request from such conflicted persons, including any documents, reports, or analyses (other than tactical and strategic information, such as the conflicted person's reserve price for a transaction).

- *Meetings of the Special Committee*. Meetings of the special committee should be attended only by the members of the special committee and its advisors; conflicted persons should not attend such meetings unless invited to do so by the special committee.

- *Confidentiality*. The special committee's meetings and analysis should be confidential, meaning conflicted persons should not request copies of records relating to the special committee's meetings or analysis or ask for reports as to the special committee's deliberations. A key benefit of establishing a special committee is limiting access by conflicted persons to sensitive materials.

- *Management Interaction with Special Committee Advisors*. While conflicted persons should engage with the special committee's advisors if and as requested, such persons should avoid attempting to dictate the methods or results of any process or analysis employed by such advisors.

IV. Conclusion

These guidelines distill certain best practices in connection with the establishment and operation of a special committee of disinterested and independent directors. The special committee process, while highly beneficial if properly executed, is complex and can be expected to be subject to rigorous review in litigation. It is therefore imperative that all special committee interactions be undertaken thoughtfully, and with a view to how they may be perceived in hindsight.

An effective special committee should act with due care, have thorough advice from independent advisors, understand and fulfill its role as representative of public stockholders, and ultimately have the power to "just say no." If these elements are in place, a conflict transaction will be much more likely to withstand judicial review. Regardless of whether a special committee is used, however, careful planning and implementation of the transaction will be necessary to assure success.

Endnotes

1 *Encite LLC v. Soni*, C.A. No. 2476-VCG, 2011 WL 5920896, at *20 (Del. Ch. Nov. 28, 2011) (internal quotation marks omitted).

2 *See In re Martha Stewart Living Omnimedia, Inc. Stockholder Litig.*, Cons. C.A. No. 11202-VCS, 2017 WL 3568089, at *11 (Del. Ch. Aug. 18, 2017) (noting that a controller not standing on both sides of the transaction "can nonetheless 'compete' with the minority by leveraging its controller status to cause the acquiror to divert consideration to the controller that would otherwise be paid into the deal").

3 *See, e.g., Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334 (Del. 1987).

4 *See Harbor Fin. Partners v. Huizenga,* 751 A.2d 879, 887 & n.20 (Del. Ch. 1999); *see also Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993), *decision modified on reargument*, 636 A.2d 956 (Del. 1994) (noting that absent evidence of self-dealing, i.e., where a director or directors stand on both sides of a transaction, evidence of any personal or special benefit accruing to a director in an otherwise arm's-length transaction does not establish a lack of disinterestedness sufficient to rebut the business judgment rule unless the director's self-interest is also found to be "material.").

5 *See, e.g., O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 913 (Del. Ch. 1999).

6 *See, e.g., Harbor Fin. Partners,* 751 A.2d 879.

7 *See, e.g., Kahn v. Tremont Corp.*, 694 A.2d 422 (Del. 1997).

8 *In re Trados Inc. S'holder Litig.*, 73 A.3d 17 (Del. Ch. 2013).

9 *See Solomon v. Armstrong*, 747 A.2d 1098, 1118 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000); *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 617 (Del. Ch. 1999); *see also LC Capital Master Fund, Ltd. v. James*, 990 A.2d 435, 451 (Del. Ch. 2010).

10 *Cinerama, Inc. v. Technicolor, Inc. (Technicolor II)*, 663 A.2d 1134, 1153 (Del. Ch. 1994) (internal citations omitted), *aff'd, Cinerama, Inc. v. Technicolor, Inc. (Technicolor III)*, 663 A.2d 1156 (Del. 1995).

11 *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983); *accord Kahn v. Lynch Commc'n Sys., Inc.,* 638 A.2d 1110, 1115 (Del. 1994) (quoting *Weinberger*, 457 A.2d at 711).

12 *In re John Q. Hammons Hotels Inc. S'holder Litig.*, C.A. No. 758-CC, 2009 WL 3165613, at *13 (Del. Ch. Oct. 2, 2009) (internal quotation marks and citations omitted).

13 *Technicolor II*, 663 A.2d at 1143.

14 *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1243 (Del. 2012).

15 *Id.* at 1244.

16 Recent case law has also held that the fully informed and uncoerced approval of a third-party (i.e., non-controller) change-of-control transaction by disinterested stockholders can lower the standard of review from enhanced scrutiny to business judgment.

17 *See In re Martha Stewart Living Omnimedia, Inc. Stockholder Litig.*, Cons. C.A. No. 11202-VCS, 2017 WL 3568089, at *16-18 (Del. Ch. Aug. 18, 2017); *IRA Trust FBO Bobbie Ahmed v. Crane*, C.A. No. 12742-CB, 2017 WL 6335912, at *11 (Del. Ch. Dec. 11, 2017, revised Jan. 26, 2018); *see also In re EZCORP Inc. Consulting Agreement Derivative Litig.,* C.A. No. 9962-VCL, 2016 WL 301245, at *11 (Del. Ch. Jan. 25, 2016).

18 *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 645 (Del. 2014).

19 *Id.* at 644.

Special Committees ➔

Special Committees

continued

20 *Id.* at 646.

21 *Compare Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 762 (Del. 2018) (holding that controllers must self-disable before the start of substantive economic negotiations) *with Olenik v. Lodzinski*, No. 392, 2018, --- A.3d ---, 2019 WL 1497167 (Del. Apr. 5, 2019, *revised* Apr. 11, 2019) (holding that the protections under *M&F Worldwide* did not apply where the facts indicated that the parties engaged in substantive economic negotiations for several months before establishing a special committee).

22 *Flood*, 195 A.3d at 768.

23 *In re Martha Stewart Living Omnimedia, Inc. Stockholder Litig.,* Cons. C.A. No. 11202-VCS, 2017 WL 3568089, at *16-18 (Del. Ch. Aug. 18, 2017).

24 *Id.*

25 *IRA Trust FBO Bobbie Ahmed v. Crane*, C.A. No. 12742-CB, 2017 WL 6335912, at *11 (Del. Ch. Dec. 11, 2017, revised Jan. 26, 2018); *see also In re Martha Stewart Living Omnimedia, Inc. Stockholder Litig.,* 2017 WL 3568089, at *16-18; *In re EZCORP Inc. Consulting Agreement Derivative Litig.,* C.A. No. 9962-VCL, 2016 WL 301245, at *11-15 (Del. Ch. Jan. 25, 2016).

26 *See Kahn v. Tremont Corp.*, 694 A.2d 422 (Del. 1997); *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110 (Del. 1994); *Rosenblatt v. Getty Oil Co.,* 493 A.2d 929 (Del. 1985).

27 *Del. Cty. Emps.' Ret. Fund v. Sanchez*, 124 A.3d 1017, 1019 (Del. 2015).

28 *See Orman v. Cullman*, C.A. No. 18039, 2004 WL 2348395, at *5 (Del. Ch. Oct. 20, 2004).

29 *Cf. Kahn v. Tremont Corp.*, 694 A.2d 422, 429-30 (Del. 1997) (reversing trial court's decision to place burden of proving unfairness on plaintiffs in part on the Delaware Supreme Court's finding that three members of the special committee had previous affiliations with the buyer and received financial compensation or influential positions from the buyer).

30 *In re Emerging Commc'ns, Inc. S'holders Litig.*, C.A. No. 16415, 2004 WL 1305745 (Del. Ch. May 3, 2004, *revised* June 4, 2004).

31 *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879 (Del. Ch. 1999); *see also Mizel v. Connelly*, C.A. No. 16638, 1999 WL 550369, at *4 (Del. Ch. July 22, 1999, *corrected* Aug. 2, 1999) (stating that close familial ties should "go a long (if not the whole) way toward creating a reasonable doubt" as to independence).

32 *Sanchez*, 124 A.3d at 1019. In another case, the Delaware Supreme Court held that a director lacked independence from an interested party because the director and her husband co-owned a private plane with the interested party. *See Sandys v. Pincus*, 152 A.3d 124, 135 (Del. 2016). In so holding, the Court noted that co-owning an airplane was uncommon and inferred that the families of the director and the interested party were extremely close to each other and thus were intimate friends. *Id.* at 126.

33 *Cumming v. Eden*, C.A. No. 13007-VCS, 2018 WL 992877, at *14-16 (Del. Ch. Feb. 20, 2018).

34 *Id.* at *16.

35 *Aronson v. Lewis*, 473 A.2d 805, 815 n.8 (Del. 1984). *See also In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 818 (Del. Ch. 2005) (dismissing plaintiffs' claims that the acquiror "overpaid" for the target because claims were derivative and therefore could not survive if a majority of the acquiror's board was independent, and concluding that the overwhelming majority of directors were in fact independent, despite directors' various business relationships with the acquiror and (in some cases) leadership positions held by directors of charitable institutions that were alleged to be major recipients of the acquiror's corporate giving), *aff'd*, 906 A.2d 766 (Del. 2006).

36 *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 997 (Del. Ch. 2014).

37 *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 639, 649 (Del. 2014).

38 *Id.* at 648 n.26.

39 *Sandys v. Pincus*, 152 A.3d 124, 133 (Del. 2016).

40 *Beam ex. rel Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1049-50 (Del. 2004).

41 *In re Plains Expl. & Prod. Co. Stockholder Litig.*, C.A. No. 8090-VCN, 2013 WL 1909124, at *5 (Del. Ch. May 9, 2013) (quoting *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1145 (Del. Ch. 2006)).

42 *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1115 (Del. 1994).

43 *Rabkin v. Olin Corp.*, C.A. No. 7547, 1990 WL 47648, at *6 (Del. Ch. Apr. 17, 1990), *aff'd*, 586 A.2d 1202 (Del. 1990); *accord Kahn v. Dairy Mart Convenience Stores, Inc.*, C.A. No. 12489, 1996 WL 159628, at *6 (Del. Ch. Mar. 29, 1996).

44 *In re Dole Food Co., Inc. Stockholder Litig.*, C.A. Nos. 8703-VCL, 9079-VCL, 2015 WL 5052214, at *29-30 (Del. Ch. Aug. 27, 2015) (quoting *Kahn v. Tremont Corp.*, C.A. No. 12339, 1996 WL 145452, at *15 (Del. Ch. Mar. 21, 1996), *rev'd*, 694 A.2d 422 (Del. 1997)).

45 *ACP Master, Ltd. v. Sprint Corp.*, C.A. Nos. 8508-VCL, 9042 VCL, 2017 WL 3421142, at *22 (Del. Ch. July 21, 2017, corrected Aug. 8, 2017); *see also In re Dole Food Co.*, 2015 WL 5052214, at *29.

46 *Kahn v. Lynch Commc'n Sys. Inc.*, 638 A.2d at 1115.

47 *See, e.g., In re Rural Metro Corp. Stockholders Litig.,* 88 A.3d 54, 90 (Del. Ch. 2014).

48 *See Gesoff v. IIC Indus. Inc.*, 902 A.2d 1130, 1150 (Del. Ch. 2006).

49 *In re S. Peru Copper Corp. S'holder Derivative Litig.,* 30 A.3d 60 (Del. Ch. 2011), *revised and superseded*, 52 A.3d 761 (Del. Ch. 2011).

50 *Id.* at 97-98.

51 *See Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).

52 *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994).

53 *Id.*

54 *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279-80 (Del. 1989).

55 *In re Emerging Commc'ns, Inc. S'holders Litig.*, C.A. No. 16415, 2004 WL 1305745, at *32 (Del. Ch. May 3, 2004, *revised* June 4, 2004).

56 *See, e.g., RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 864 (Del. 2015).

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