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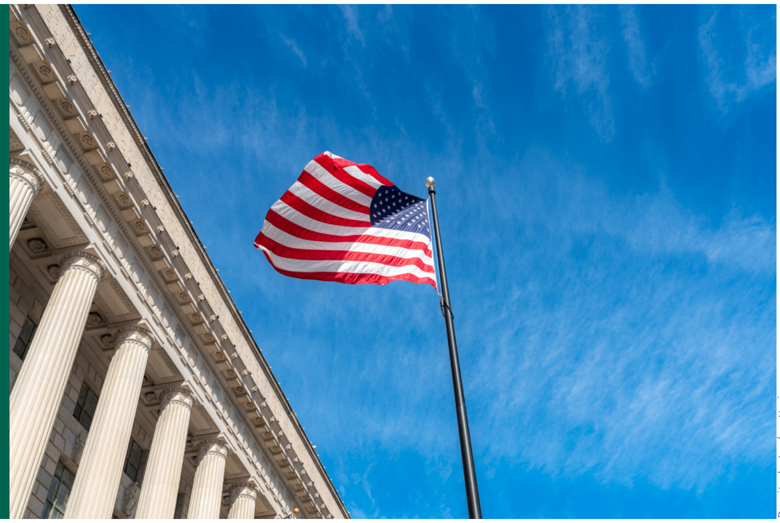

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CONFLICT TRANSACTIONS AND THE EVOLUTION OF THE FAIRNESS OPINION LANDSCAPE

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When navigating a conflict transaction, fiduciaries are expected to demonstrate independence, informed judgment, and proper procedure. A fairness opinion, when properly executed, can deter or defend against litigation and serves as evidence of proper governance process. Long a fixture in public company transactions, fairness opinions are becoming more important in private company transactions as well.

Fiduciaries and Fairness Opinions

Fiduciary obligations in a transaction context typically encompass two broad duties: the duty of care and the duty of loyalty. The duty of care requires directors to make informed and deliberate decisions in the best interests of a company and its shareholders. This typically involves consulting external advisors and thoroughly understanding the financial terms of a deal.

The duty of loyalty mandates that directors prioritize the interests of the company and its shareholders above any personal or conflicting interests. This is particularly important in related-party transactions where there is potential for conflicts of interest between the fiduciaries and the shareholders. A fairness opinion, delivered by a qualified and independent financial advisor, directly supports these duties.

A fairness opinion is an objective financial assessment provided by an independent advisor to assess whether the terms of a proposed transaction are fair from a financial point of view. By engaging an expert to conduct a thorough, arms'-length analysis of value and deal terms, fiduciaries can demonstrate that they took reasonable steps to understand the financial implications of the transaction at the time of decision-making. Fairness opinions are obtained by a wide range of fiduciaries, including corporate boards, special committees, trustees, and private equity sponsors.

A fairness opinion serves a dual purpose. It provides substantive support for the financial fairness of a transaction, and it contributes to the procedural integrity of the decision-making process. When litigation arises from a conflict transaction—a transaction when a conflict of interest might exist—it is often the process, not the price, that comes under the most scrutiny.

It is important in such cases to demonstrate that the board was informed and took proper procedural actions, such as engaging an independent advisor or obtaining a fairness opinion. This bolsters the defense that fiduciaries met their duties without gross negligence.

The Rise of Fairness Opinions

The modern use of fairness opinions in public company transactions can be traced to the Delaware Supreme Court's landmark decision 40 years ago in *Smith v. Van Gorkom*. In *Van Gorkom*, the board of Trans Union Corporation approved a buyout after a brief and poorly documented process.[1] The court concluded that the directors acted with gross negligence by failing to inform themselves of the company's intrinsic value and by approving the sale without independent advice. The court explicitly noted the absence of an independent valuation study or a fairness opinion.

Although *Van Gorkom* did not mandate fairness opinions, and the court noted that fairness opinions were not required by law, boards began implementing fairness opinions as part of their transaction processes. Fairness opinions reflect an informed, independent opinion of value, based on professional analysis and market data. By relying on these opinions, boards can provide evidence that they sought objective validation of a transaction's terms. Many transactions involving a change in control or conflict of interest now include a fairness opinion. In particular, special committees formed by boards to evaluate transactions now often rely on fairness opinions to demonstrate substantive and procedural fairness.

In addition to judicial expectations, fairness opinions are closely tied to U.S. Securities and Exchange Commission ("SEC") disclosure obligations and Financial Industry Regulatory Authority ("FINRA") rules, which reinforce the need for independent analysis in transactions involving a potential conflict of interest. Under the SEC's proxy disclosure rules, public companies must disclose whether they received a fairness opinion in connection with certain transactions and, if so, provide a summary of the opinion and the methodologies used.[2]

Fairness opinions are particularly prevalent in going-private transactions, where management, controlling shareholders, or private equity sponsors take a public company private.[3] These deals often involve inherent conflicts of interest, including information asymmetries between insiders and public shareholders. In such cases, boards and special committees almost universally obtain a fairness opinion to support their decision and inform shareholder disclosures.

Fairness opinions are also increasingly common in special-purpose acquisition company ("SPAC") reverse mergers. Although not required by the SEC, even though it was recently proposed and considered,[4] fairness opinions have become a best practice in SPAC reverse mergers. Because SPAC transactions involve the conversion of blank-check capital into long-term investments and SPAC sponsors often retain asymmetrical economic upside, fairness opinions are used to support disclosures and mitigate litigation risk by validating the price of a target company.

In recent years, private equity general partners ("GPs") have increasingly turned to fairness opinions in the context of GP-led secondary transactions, such as continuation funds. Continuation fund transactions involve moving assets from an existing fund into a new vehicle, with some limited partners ("LPs") rolling their interests into the new vehicle and others cashing out. In these situations, fairness opinions serve multiple functions. They validate transaction pricing for LPs who are rolling or redeeming their equity, and they support fund governance committees and LP advisory committees and enhance their credibility with regulators and coinvestors.

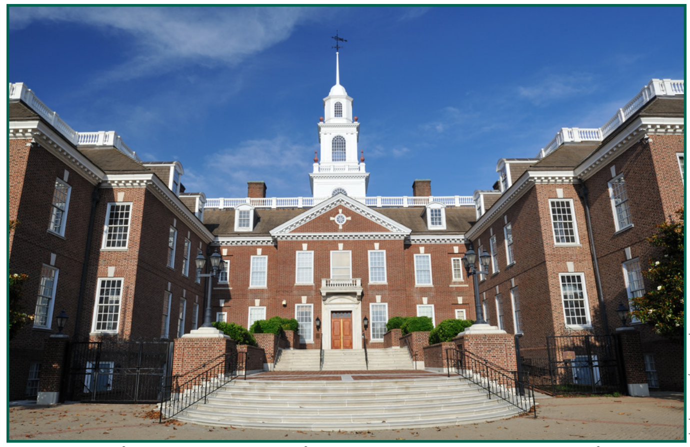
The SEC has increased its scrutiny of these types of transactions. In August 2023, it adopted rules under the Investment Advisers Act that require independent fairness or valuation opinions for GP-led secondaries.[5] However, this regulation was struck down by the Fifth Circuit Court of Appeals in 2024.[6] Nevertheless, many sponsors still obtain fairness opinions as a best practice.

Fairness and Control

While public company transactions attract the most headlines and shareholder litigation, closely held businesses often face the same types of conflicts and risks, with fewer formal governance protections. A sale of a business or a recapitalization can lead to allegations of self-dealing or breach of fiduciary duty, particularly when the differing liquidity and timing needs common in family or otherwise closely held companies are present. In many closely held companies, a controlling shareholder might not serve on the board, hold a management position, or be involved in day-to-day operations. Yet, under Delaware law, control brings with it fiduciary responsibility, particularly in the context of transactions that affect minority shareholders.

A "controlling shareholder" is defined by majority ownership and by actual control or domination of corporate decision-making. Even a shareholder with less than 50 percent ownership may be deemed controlling if the shareholder exerts outsized influence over the board, management, or strategic direction.

Courts have examined a shareholder's ability to control the timing, structure, and approval of transactions as evidence of control. This can cause problems when a shareholder is unaware that their interest would be considered controlling by the courts.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A new law in Delaware provides a safe harbor for conflict transactions involving controlling shareholders.

Fairness Standards and Safe Harbors

Although Delaware corporate law applies only to companies domiciled in the state, because of the large number of businesses incorporated there, other states look to precedent cases in the Delaware court system when reviewing and deciding similar matters.

In the landmark case *Kahn v. Lynch Communication Systems, Inc.*, the Delaware Supreme Court held that when a controlling shareholder stands on both sides of a transaction, the "entire fairness standard" applies.[7] This standard was established in *Weinberger v. UOP, Inc.* and shifts the burden to the defendant to provide evidence of fair dealing and a fair price.[8]

In the two decades after *Kahn*, Delaware courts emphasized that transactions involving controlling shareholders must survive the rigorous test of "entire fairness." Although fairness opinions remained commonplace, they rarely sufficed as evidence that parties had met this burdensome standard. *Kahn v. M&F Worldwide Corp.* changed this. In the 2014 decision, the Delaware Supreme Court outlined a procedural road map through which conflict controlling interest transactions could earn the protection of the "business judgment rule."[9]

The court provided a six-part test for a controlling interest transaction to receive business judgment review, commonly referred to as the "MFW doctrine." These requirements are that (1) the controlling interest conditioned the transaction on approval by both a special committee and a majority of the minority stockholders, (2) the special committee was independent, (3) the special committee was empowered to freely select its own advisors and to reject the transaction, (4) the special committee met its duty of care in negotiating a fair price, (5) the vote of the minority was informed, and (6) there was no coercion of the minority. If any of those elements are not met, the transaction reverts to the entire fairness standard. A fairness opinion helps demonstrate that standards 4 and 5 were met.

The enactment of Delaware Senate Bill 21 ("SB 21") in 2025 provides a statutory safe harbor for conflict transactions involving controlling shareholders.[10] If followed precisely, these transactions are reviewed under the deferential business judgment rule, rather than the more onerous entire fairness standard. The law targets transactions where the controlling stockholder is either on both sides of the deal or receives a material benefit not shared pro rata with other stockholders.

The law specifically allows for transactions other than going-private transactions to qualify for the safe harbor. This includes scenarios such as sponsor-to-sponsor sales, recapitalizations, and continuation funds in which the GP retains an ongoing interest.

To qualify for the safe harbor, the company must follow one of three paths.

- The transaction is approved by an independent special committee of the board who is informed about the material facts of the transaction and has the power to negotiate and reject the transaction.
- The transaction is conditioned upon the approval of a majority of the disinterested

shareholders who approve the transaction through an uncoerced affirmative majority vote, having knowledge of the materials facts regarding the transaction.

- The transaction is fair to the corporation.

Whichever path is followed, the law places particular emphasis on the integrity of the process and the sufficiency of disclosure and knowledge of material facts. Although not explicitly required by SB 21, a fairness opinion from a qualified, independent financial advisor significantly bolsters both the special committee and disinterested stockholder pathways to the safe harbor.

For the board or special committee, a fairness opinion provides a substantive basis to assess financial fairness, document a diligent process, and support reliance on outside expert advice. A fairness opinion also helps demonstrate that disclosure materials made it so shareholders were properly informed and knowledgeable of material facts. Courts have emphasized that a stockholder vote is not informed unless the material financial facts, including valuation inputs and deal economics, are clearly disclosed.[11] A properly drafted fairness opinion directly supports that standard. In addition, a fairness opinion helps demonstrate that the process was conducted in good faith and without a preordained outcome. These are key considerations when defending against allegations of coercion or improper influence by a controlling shareholder.

Failure to qualify under one of the SB 21 safe harbor provisions exposes the transaction to review under the entire fairness standard. This places the burden on fiduciaries to prove fair dealing and a fair price. This standard is difficult to meet and often leads to protracted litigation, particularly where documentation is sparce or advisors lack true independence. In such cases, the absence of a fairness opinion is often viewed as an indicator of procedural weakness, while incorporating a fairness opinion into the process enhances legal defensibility and strengthens transparency.

Conclusion

In an environment where legal risk for fiduciaries in transactions is high and legal standards are evolving, fairness opinions are increasingly important. The trajectory of corporate law makes clear that boards, trustees, and controlling shareholders are expected to operate with transparency, independence, and proper financial knowledge. A proper fairness opinion helps mitigate litigation risk and enhances credibility, protects shareholder interests, and reinforces governance integrity at a crucial moment.

As transactions grow more complex and conflicts more nuanced, fiduciaries need qualified advisors who bring not only robust valuation expertise but also true independence and a deep understanding of the legal and strategic implications in play.

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11 Shell Petroleum, Inc. v. Smith, 606 F.3d 962 (8th Cir. 2010).