ADVISING THE CORPORATION AND ITS DIRECTORS IN CONNECTION WITH ACQUISITION PROPOSALS

by

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I.

DUTIES OF A CORPORATE FIDUCIARY

To avoid potential conflicts of interest, acquisition proposals are frequently evaualted by a special committee of the board of directors. Members of a special committee, like regular members of the board, have an unyielding fiduciary duty to the corporation and its shareholders.[1] The fiduciary duty encompasses both a duty of loyalty and a duty of care in taking actions and making decisions that affect the business and affairs of the corporation.[2] The former embodies not only a duty to protect the interests of the corporation but also to refrain from conduct which would injure the enterprise or deprive them of profit or advantage.[3] In short, directors must avoid any conflict between duty and self-interest. The duty of care requires a director, when making a decision, to act in an informed and deliberate manner.[4]

The reluctance of courts to substitute their judgment for the business judgment of directors is expressed in the business judgment rule which provides that a court will not review the substance of a business decision made by an independent body of directors if they exercised due care and acted in good faith.[5] On the other hand, where the directors violated their duties of loyalty or care, the rule does not apply and the directors may be held personally liable for losses suffered by the shareholders unless they show that the challenged action was intrinsically fair.[6]

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1 *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939).

2 *Smith v. Van Gorkum*, 488 A.2d 858, 872, 873 (Del.1985).

3 *Loft*, 5 A.2d at 510; *see also Sinclair Oil v.Levien*, 280 A.2d 717, 720 (Del. 1971).

4 *Van Gorkum,* 488 A.2d at 873; *see also Aronson v. Lewis,* 473 A.2d 805, 812 (Del. 1984); *Pogostin v. Rice*, 480 A.2d 619 (Del. 1984).

5 *Aronson*, 473 A.2d at 812.

6 *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).

The employment of a truly disinterested special committee satisfies the loyalty concern of a self-interested board. Nonetheless, a court in analyzing a challenge to a transaction approved by a special committee must be satisfied the committee acted in good faith and with due care.[7] In the absence of special circumstances, the availability of the business judgment rule in the context of a special committee will ordinarily turn on the "due care" requirement--did the directors have sufficient knowledge of a proposed transaction, did they independently examine the information gathered and presented to them by their advisors, and did they take sufficient time to properly consider the transaction.[8] When a special committee reviews a transaction with a controlling shareholder, if the evidence shows it aggressively sought to protect the interests of the minority, courts will generally view its actions as an "acceptable surrogate for the energetic, informed and aggressive negotiation that one would reasonably expect from an arm's-length adversary."[9]

II.

DUTIES WHEN A COMPANY IS BEING SOLD

A. *The Revlon Effect.*

When a board decides that it is in the best interest of the corporation to sell the business, or when the sale of the company is inevitable, the board, or a special committee acting on behalf of the board, has a duty to maximize value for the stockholders.[10] The duties arising when a company is sold were defined in the Revlon decision where the Delaware Supreme Court

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7 *In re J.P. Stevens,* 542 A.2d at 780.

8 *Aronson*, 473 A.2d at 812.

9 *See, e.g., In re Trans World Airlines, Inc. Shareholders Litigation*, C.A. No. 9844, slip op. at 16-19 (Del. Ch. Oct. 21, 1988) (in parent-subsidiary merger context, court criticized board for not aggressively seeking to protect minority interests); *Freedman v. Restaurant Associates Indus*., CA. No. 9212, slip op. at 21 (Del. Ch. Oct. 16, 1987) ("no structural reason to doubt the effectiveness of the independent committee [where it was] appropriately constituted, well-advised and active.").

10 *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

held that when a company is for sale or its breakup is inevitable, the duty of the board changes from the preservation of the company as a corporate entity to the maximization of value for the benefit of the shareholders.[11] In its most-quoted remark, the court pointed out that in a sale situation, the directors' role changes from "defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company. *Id*. Even though the directors' duty in a sale situation has been formulated as the effectively equivalent phrases -- "maximization of the company's value," "getting the best price for shareholders" and getting the "best possible transaction" for the shareholders -- what Revlon requires, at a minimum, is a director's "scrupulous adherence to ordinary principles of fairness" in the conduct of a sale of the corporation.[12] This is so whether the "sale" takes the form of an active auction, negotiated purchase, a management buy-out or a restructuring.[13]

When conducting an "auction" for the sale of corporate control, this concept of fairness must be viewed from the standpoint of advancing general, rather than individual, shareholder interests.[14] The special committee members empowered with evaluating sale proposals may not allow any impermissible influence, inconsistent with the best interests of the shareholders, to alter the strict fulfillment of these duties.[15] Clearly this requires the independent committee members to intensely scrutinize any buy-out proposals, to actively participate in the negotiation of such proposals and to arrive at any ultimate decision through a good faith, informed process.[16]

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11 *Revlon*, 506 A.2d at 182.

12 *See, e.g., Revlon*, 506 A.2d 182 ("maximization of the company's value" and "best price for shareholders"); *In re J.P. Stevens*, 542 A.2d at 781 ("best possible transaction for the shareholders"); MacMillan, slip op. at 4 (*Revlon* "requires the most scrupulous adherence to ordinary standards of fairness in the interest of promoting the highest values reasonably attainable for the stockholder's benefit.").

13 *MacMillan*, slip op. at 56; *see also Rand v. WesternAirlines, Inc.,* C.A. No. 8632, slip op. at 3 (Del. Ch. Sept. 11, 1989) (*Revlon* duties also apply to sale of company in arm's-length transaction with independent third-party bidder).

14 *MacMillan,* slip op. at 4.

15 *Revlon*, 506 A.2d at 181-82.

16 *MacMillan*, slip op. at 57.

B. Enhanced Scrutiny of Director Action In a Sale Situation.

A recent ruling of the Delaware Supreme Court has indicated that in the setting of a sale of corporate control, a board decision will be subject to a heightened judicial scrutiny. *Id.,* at 61-62 The court noted that where issues of corporate control are at stake, there exists the specter that a board may be acting primarily in its own interests rather than those of the corporation and its shareholders. *Id*. at 61.

If a plaintiff, challenging a sale transaction, shows that the directors of the target company treated one or of the respective bidders on unequal terms, those directors must satisfy a two-part threshold requirement in order to receive business judgment rule review. The directors must demonstrate that when such disparate treatment occurred that they "properly perceived that shareholders' interests were enhanced . . . [and that their action was reasonable] in relation to the advantage sought to be achieved, or conversely to the threat which a particular bid allegedly poses to shareholder interests." *Id*. at 64. If the foregoing conditions are satisfied and in the absence of self-interest, the actions of an independent board of directors in designing and conducting a corporate auction will be entitled to the protections of the business judgment rule.[17]

C. Structure of an Auction.

While *Revlon* said the role of directors in a corporate sale is that of auctioneers, it does not mean that directors must conduct an auction in the literal sense of the word. Directors are not required to conduct an auction according to any standard formula.[18] Instead, directors must act in consonance with their overriding purpose of enhancing general shareholder interests. The process which a board may choose, whether it be a formal bidding auction or a negotiated sale, must provide them with sufficient information to make a good-faith and informed judgment regarding what is the highest value transaction for shareholders. *Interco*, 551 A.2d at 802-03

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17 *Id.,* slip. op at 60.

18 *Id.*, slip op. at 59. For a more elaborate discussion, *see City Capital Associates Limited Partnership v. Interco, Inc.,* 551 A.2d 787, 802-03 (Del. Ch. 1988); *see also Yanow v. Scientific Leasing, Inc.*, Fed. Sec. L. Rep. (CCH), ¶93,660 (Del. Ch. Feb.8, 1988).

The specific methods corporate directors may use to elicit bids from potential acquirors is a matter within the business judgment of the board that necessarily must vary with each case.[19] In certain transactions, such as in an MBO, a probing of the market for alternatives may be what is required under the circumstances in order for a board to satisfy its obligations that it be well-informed about the value of alternative transactions. But even in such a setting, fraught with conflict-of-interest problems, the fiduciary obligations of the directors can be met in ways other than a traditional auction, if the procedure supplies the board with information from which it can reasonably conclude that it has arranged the best available transaction for shareholders.[20]

Consequently, diverse sale procedures have been approved as long as the courts were satisfied that the directors fulfilled their fiduciary obligations of loyalty and care. Courts have been willing to approve sales conducted outside the context of a true "auction" where the market has been adequately tested for more valuable alternatives.[21] Such "market checks" have taken the forms of having the independent committee's financial advisors solicit competing bids, making a public announcement that the board would entertain alternative bids and an extended period for the tender offer of the approved bidder so that alternative bids could surface.[22]

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19 *Scientific Leasing*, Fed. Sec. L. Rep. (CCH), ¶ 93,660.

20 *Interco*, 551 A.2d at 803; *see also Braunschweiger v.American Home Shield Corp*., Fed. Sec. L. Rep. (CCH), ¶ 94,779 (Del.Ch. 1989).

21 *Scientific Leasing*, Fed. Sec. L. Rep. (CCH), ¶ 93,660 (while no auction was conducted, the target was known to be an acquisition candidate and offers were entertained during pendency of approved bid); *see also In re KDI Corp. Shareholders Litigation*, C.A. No. 10278 (Del. Ch. Nov. 1988) (knowledge that its advisers had been soliciting bids for three months, along with fairness opinion, were enough to demonstrate the special committee was adequately informed about the fairness of the transaction); *In re Fort Howard Corp*. Shareholders Litigation, C.A. No. 9991 (Del. Ch. Aug. 8, 1988) (court refused to enjoin an MBO without an auction or other contacts with potential buyers prior to acceptance of management offer because there was a sufficient "market check through (1) a public announcement of the company's interest in considering other bids, (2) an extended tender offer period, and (3) merger agreement provisions that did not deter a higher offer); *In re Formica Corporation Shareholders Litigation*, Fed. Sec. L.Rep. (CCH), ¶ 94,362 (Del. Ch. March 22, 1989) (court approved post-agreement market check in which investment bank actually explored market by contacting potential bidders). *In re Amstead Industries, Inc*., C.A. No. 8224 (Del. Ch. Aug. 24, 1988) (court "deeply troubled" as to why independent committee did not check the investment bank's fairness opinion by shopping company or at least by negotiating for a period in which it could publicly encourage any interested party to come forward).

22 See note 32, *supra*.

In addition to placing great weight on such market checks in determining whether a special committee satisfied its fiduciary obligations, courts have also relied heavily on arm's-length dealings and the role a special committee may play in that regard.[23] Courts have viewed a well-advised, active special committee acting in good faith to negotiate with a controlling shareholder, interested directors, or interested third party as an effective means of protecting the interests of shareholders.[24] Correspondingly, courts have been skeptical about the fairness to shareholders of sales transactions which lacked the appointment of a special committee of independent directors or where the special committee took a passive, uninformed role in the transaction.[25] In fulfilling its duty to be well-informed, a special committee should employ legal and financial advisors to assist it in evaluating and negotiating all proposed sale transactions. It is very important that the lawyers and financial advisors for the special committee be chosen by the special committee and that they be truly independent advisors answerable only to the special committee. Otherwise, a court may doubt whether an authentic negotiating structure has been established and the legal complications of a challenged transaction will be unnecessarily intensified.[26]

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23 See, e.g., Jedwab, 509 A.2d at 599 (an independent board appointed to negotiate on behalf of the minority is an index of fairness); see also Freedman, C.A. No.9212 (Del. Ch. Oct.16, 1987); In re J.P. Stevens, 542 A.2d at 780; Formica, Fed. Sec. L. Rep. ¶ 94,362.

24 *Freedman*, Fed. Sec. L. Rep. (CCH), ¶ 93,502.

25 *See, e.g., Sealy Mattress Co*., 532 A.2d at 1337 (court critical of fact no independent committee appointed); In re TWA, slip op. at 16-19 (court criticized special committee for not aggressively seeking to protect minority shareholder interests in freeze-out with controlling shareholders); *MacMillan*, slip op. at 45-46 (court criticized committee of independent directors for allowing themselves to be controlled by management, including having management's investment bank "auction" the company; "when presumably well-intentioned outside directors remove themselves from the design and execution of an auction, then what occurred here, given the human temptations left unchecked, was virtually inevitable").

26 *MacMillan*, slip op. at 48-49.

D. Factors for Special Committee To Consider in Getting Best Transaction.

Although *Revlon* said the proper objective of corporate fiduciaries is to obtain the highest "price" reasonably available for stockholders in a sale of a company, later decisions made clear that other factors should be considered in arriving at the best transaction. For instance, in assessing a bid, a special committee should consider, among other factors, the adequacy and terms of the offer, its fairness and feasibility, the proposed or actual financing for the offer, the consequences of that financing, questions of illegality, the risk of nonconsummation, the basic stockholder interests at stake and the bidders' identity and history.[27]

E. The "Level Playing Field".

While much has been said that during an auction a board must conduct negotiations with competing bidders on a "level playing field", that metaphor is somewhat misleading. In evaluating sale proposals, directors are not precluded from treating bidders differently by entering into agreements such as lock-ups, no-shops, fee-reimbursement provisions, topping fees and break-up fees, as long as they act in good faith and with appropriate care.[28] While it is true that these type of agreements may have the effect of tilting the playing field in favor of the holder of such rights, that fact alone, does not establish that they necessarily are against the best interests of shareholders. It is the shareholders to whom the board owes a duty of fairness, not to persons seeking to acquire the company. Therefore, a board may "tilt" the playing field if, but only if, it is in the shareholders' interests to do so. *In re J.P. Stevens,* 542 A.2d at 781-82.

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27 *Id*., slip op. at 48, n.29; *see also In re J.P.Stevens*, 542 A.2d at 781, n.6; *Citron v. Fairchild Instrument and Camera Corp*., Fed. Sec. L. Rep. (CCH), 93,915 (Del. Ch. May 19, 1988) (court upheld board's decision to choose all-cash offer over nominally higher part-paper offer as proper exercise of business judgment discretion).

28 *MacMillan*, slip op. at 59 (the requirement of fairness to shareholders' interests "does not preclude differing treatment where necessary to advance those interests . . . [as long as] the board's primary objective, and essential purpose must remain the enhancement of the bidding process for the benefit of the stockholders"). Nevertheless, the courts will not tolerate tilted playing fields where such action is not motivated by enhancing shareholders' interests. S*ee In re Holly Farms Corp. Shareholders Litigation*, C.A. No. 10,350 (Del. Ch. Dec. 30, 1988) (applying *MacMillan* I to enjoin the implementation of an asset lock-up agreement, a break-up fee and an expense reimbursement provision in connection with a merger agreement).

In the setting of a sale of the company, defensive steps such as lock-up options or break-up fees are valid when designed to promote higher bidding and invalid when designed to favor one bidder and stop the bidding prematurely to the detriment of shareholder interests.[29] Courts realize that to achieve the best price available for stockholders, a special committee may have to invoke a panoply of devices, and the giving and/or receiving of bidder over another. However, when that diverse treatment of bidders occurs, a special committee must ensure that it can demonstrate a rational basis for the action such that the interests of shareholders are manifestly the committee's paramount objective. *MacMillan*, slip op. at 60

While such lock-up options and break-up fees or topping fees may be viewed with skepticism, courts realize that they are often necessary to induce bidders to enter into a bidding contest or to induce them to make higher bids. One factor a court will look to is whether an independent member of the board attempted to negotiate alternate bids before granting such a significant concession. *Id*. at 58. Courts will also more closely scrutinize lock-ups granted before there has been an effective market test of the proposed transaction.[30] Obviously, the care and attention of the special committee are crucial if these provisions are to withstand a legal challenge.

Although a no-shop provision may be valid when it acts to attract a bidder and results from arm's-length negotiations, a recent court decision has stated that no-shop provisions are looked upon with even greater scrutiny than lock-ups or other fee arrangements because of the possibility that a board may thereby fail to adequately inform themselves of transactions that are more favorable to the shareholder interests.[31] A special committee may be able to protect itself by negotiating a fiduciary-out provision into an approved merger agreement which reserves the right to terminate the merger agreement if a more favorable offer is received at a later date.[32]

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29 *MacMillan*, slip op. at 57; see also *Revlon*, 506 A.2d at 183; Freedman, C.A. No. 9212 (Del. Ch. Oct. 16, 1987).

30 *See Holly Farms*, C.A. No. 10350 (Del. Ch. Dec. 30,1988).

MacMillan, slip op. at 59.

32 *See, e.g., Jewel Cos. v. Pay Less Drug Stores Northwest, Inc*., 741 F.2d 1555 (9th Cir. 1984); *ConAgra, Inc. v. Cargill, Inc*., 382 N.W.2d 576 (Neb. Sup. Ct. 1986) (company that negotiated fiduciary-out clause in merger agreement allowed to recommend a subsequent

III.

LIST OF PROCESSES AND CONCERNS OF WHICH
THE COMMITTEE SHOULD BEAR IN MIND

In order to satisfy its fiduciary obligations, the special committee must thoroughly evaluate the sale proposals during the course of their deliberation. This evaluation process can be separated into four distinct categories. First, the committee members must obtain sufficient information concerning a transaction so that an informed decision is possible. Second, committee members must critically examine the information available to them. Third, committee members should take sufficient time in evaluating the proposed transactions. Fourth, committee members should establish procedures for negotiating with the different buyer groups and for receiving and evaluating competing offers. To ensure that the special committee satisfies each of these broad categories, the following is a more focused list of factors for the committee members to consider:

A. Establish Presence of Any Conflicts Of Interest (At Outset).

Even though special committee members may be truly "disinterested" it is crucial that, at the outset, the committee members conduct a review as to whether any other persons aiding or counseling the special committee may have conflicts of interest which may make an accepted sale proposal susceptible to legal challenge. In this light, it is important that the lawyers and the financial advisors for the special committee be chosen by the special committee and not by management. If an interested party is able to influence the special committee's advisors, or if that perception exists, this could create an impression that the committee advisors are beholden to the interested party. Moreover, in order to create the best possible litigation record as to the financial advisor's objectivity, the advisors' fee arrangements should be structured so as not to provide undue incentives to achieve any particular result.

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bidder's higher offer to shareholders); cp. *In re Holly Farms Corp.*. Shareholders Litigation, C.A. No. 10350, slip op. at 21 (Del. Ch. June 14, 1989) (court suggests that ifboard had negotiated a "fiduciary-out" clause in merger agreement, the board could have terminated a merger agreement that has stifled an active bidding process).

B. Engage Legal and Financial Advisors.

If a special committee is to function properly given the buyout transaction, it must be supported by the advice of experts on whom it can rely for guidance. In addition to satisfying itself that advisors are free of any conflicts of interest, the committee must also satisfy itself that the advisors have the requisite expertise.

1. Legal Advisor. The legal advisor should be responsible for setting forth an agenda for the committee's deliberations, guiding the committee through the legal issues which will arise in the course of evaluating proposals, and accurately documenting the committee's proceedings. If the special committee ultimately recommends submitting a proposal to the shareholders for a vote, the legal advisor should be instrumental in reviewing and negotiating various provisions in acquisition-related agreements as well as assisting in drafting disclosure documents that will be filed with appropriate regulatory authorities and distributed to shareholders.

2. Financial Advisor. The financial advisor's primary task will be assisting the special committee in satisfying its responsibility of evaluating whether the buyout proposals are fair to the corporation's public shareholders. The financial advisor must be able to establish a range of values for the corporation, analyze any proposals, and, if necessary, compare the various proposals. The special committee needs its financial advisor to conduct a sufficiently broad analysis to provide a complete picture of any proposal. The financial advisor should be in constant communication with the special committee and should convey to the special committee its conclusions long before any report is finalized. This is so because if there is a substantial likelihood of an adverse position being taken on a particular proposal, the special committee would be well-advised, at that juncture, to undertake negotiations to raise the price to be paid in the buyout to a more acceptable level. In order to demonstrate that it has acted on a well-informed basis, the special committee should establish a record that the financial advisor conducted an independent, thorough and exclusive analysis of the corporation and of any buyout proposal prior to rendering any fairness opinion. Furthermore, the record should also demonstrate that all relevant information was made available to the financial advisor.

C. Actions To Be Taken at an Early Stage.

Before the committee begins to evaluate any proposal, they should receive advice as to their legal obligations under applicable federal and state law, including the applicable state law interpretation of the business judgment rule. The committee's legal advisors should also examine the corporation's charter and by-laws regarding the function and power of the special committee. Having received this general advice, the special committee may want its legal advisor to suggest procedural guidelines designed to assist members in fulfilling their obligations. For instance, a timetable could be established for the review of any proposals. At any meetings held to consider buyout proposals, the committee members should receive a status report from their legal and financial advisors. Moreover, given the importance of building a complete record of the special committee's deliberations, written materials should accompany these progress reports, to the extent possible. The legal advisors may want to function as the secretary of the meetings and prepare minutes that reflect the analysis accorded to each topic brought up at the meetings. To ensure accuracy, committee members should review the draft minutes.

At the outset, the special committee should meet with its financial advisors to instruct them of their role involving the target corporation and in evaluating buyout proposals. Promptly after the special committee is appointed, it should request all studies, reports, analyses, etc. prepared by or on behalf of the regular board of the target, relating to value of the target or any of its assets or businesses, possible extraordinary transactions involving the target, and any related-party transactions involving the target. In addition any forward-looking business plans and projections for the target should also be obtained and given to the committee's financial advisor.

D. Structuring the Sale Process.

The special committee should meet with its ad bidders for the corporation. The committee should determine whether the circumstances present a need to establish a formal bidding process with specific procedures for qualifying bidders, and accepting bids or a less formal structure. Whatever the process chosen, be it a formal auction or a negotiated sale with

one bidder, the special committee must ensure that its decision on this issue is a well-reasoned one. The special committee should consider other strategies and alternatives to the buyout proposals being considered. The special committee must make sure that if it adopts a process where the corporation will not be actively "shopped" in the marketplace that it has engaged in sufficient "market checks" that will allow it to make a reasoned, good faith decision that the sale transaction which it may approve is the best transaction for the shareholders. Such market checks may include having the accepted bidder extend its tender offer period beyond the minimum required time or making a public announcement that the special committee will consider bids by third parties.

E. Specific Provisions in Any Accepted Transaction.

In evaluating a bid, the special committee should consider, in conjunction with its advisors, the risks and benefits of specific provisions in such proposals. *First*, the committee should be cognizant of confidentiality needs and any risks in divulging sensitive information to bidders. The proper use of confidentiality and standstill agreements at the outset of the submission of any bid should be considered. *Second*, if the special committee is considering a no-shop clause, lock-up option, break-up or topping fees, or expense reimbursements, it should evaluate the need and effect of such action. The committee must satisfy itself that those provisions are necessary to induce the bid and secure consummation of a transaction that it has concluded to be in the best interests of the shareholders. Any documentation demonstrating the arm's-length character of negotiation on these provisions will be helpful.

Third, in the specific situation of the grant of ano-shop clause, the special committee should seriously consider negotiating to retain the flexibility to respond to, and seek confirmation of, unsolicited competitive bids. Thus, the use of a "fiduciary-out" clause can be helpful in this context. As a final, general comment, the special committee should critically evaluate any proposed bid which contains anticompetitive devices designed to discourage
additional bidding.

F. Valuation of Target Company.

To properly evaluate a buyout proposal, a special committee should ask its financial advisors to prepare a valuation of the corporation. Since various methodologies may be used to arrive at a value for a company, it may be necessary for the financial advisor to come up with a range of values. The committee should request not only the final numbers or ranges derived from the valuation but also should receive an explanation of the methodologies used, the key assumptions used in applying e each methodology, and sensitivity analyses based on variances in those key assumptions. A valuation by the financial advisor of the target corporation, apart from the "auction" process established to sell the company, will be useful in providing a further benchmark against which to test proposed bids. Such a valuation study will also be necessary to bolster the special committee's final accepted choice among the proposed bids.

G. Evaluating Fairness OF Price.

The special committee must eventually determine the fairness of the proposal the shareholders, including the fairness of price. The element of fair price requires a detailed financial analysis and embraces considerations that extend beyond a rigid comparison of the proposal with a series of computer-generated models. Obviously, a special committee will require the aid of its financial advisor in determining whether a proposal provides a fair price. However, since a fair price will turn on a variety of "non-financial" considerations, the committee's legal counsel must also assist the committee. Among other the things, the committee must consider:

1. The present and future prospects of the target;
2. The existence of other alternatives;
3. The ability of the bidder to consummate the transaction;
4. Financing for the offer and the consequences of that financing;
5. Regulatory and legal obstacles to the transaction;
6. The impact of the bid and the potential acquisition on other constituencies provided that it bears some relationship to general shareholder interests;

7. The background of the bidder and other business venture experience;

8. The basic stockholder interests at stake;

9. The consequences of the timing of the transaction.

Since reaching a determination with respect to the economic value of a proposal requires the special committee to rely a great deal on the advice of experts, it should again ensure that the financial analysis of its advisors has been thorough and question them on the methodologies employed. The committee should give considerable weight to whether the financial advisor issued a fairness opinion in connection with the proposal and whether the proposal compares favorably to the financial terms of transactions of a similar type. Although a fairness opinion is not necessarily required as a matter of law, a special committee is well-advised to instruct its financial expert to prepare a written opinion confirming its conclusions.

H. Ensuring Fairness of Procedure.

In arriving at a determination of fairness for any particular proposal, the special committee must assure that not only is a fair price present but also that there has been fair dealing throughout the bidding process. The special committee, in the event of a legal challenge to an acceptable proposal, must be able to demonstrate that each of the following elements of fair dealing has been satisfied.

1. Active Negotiation by Committee. Courts place great weight on a special committee's active negotiation on buyout proposals in evaluating the fair dealing issue. Therefore, the presence of bargaining by the special committee on behalf of minority shareholders, for instance, will bolster arguments that these minority interests have been treated fairly. While it is important for the committee itself to be involved in the negotiations to get the most favorable transaction for shareholders, the committee can also have its legal and financial advisors negotiate provisions and terms in acquisition agreements. The greater the arm's-length atmosphere created in the negotiations, the more likely the procedures adopted will withstand judicial scrutiny.

2. *Creating a Proper Record.* Unless the special committee creates a full and detailed record of its actions in evaluating buyout proposals, it will be unable to prove that it has, in a good faith and well-informed manner, carried out its mission. Therefore, with the assistance of legal counsel, the committee should make sure that the appropriate documentation created to establish that the committee has actively reviewed, scrutinized, and evaluated the buyout proposals. The committee members should also review such documentation with its legal counsel and seek explanations, if necessary.

*3. Proper Disclosure. T*he duty to deal fairly includes the duty of candor. The manner in which any transaction is disclosed to shareholders is scrutinized for indicia of fairness or unfairness. Therefore, the special committee should seek the assistance of legal counsel to ensure that all legally required disclosures are made and that such disclosures are not only fully detailed but also are not materially false or misleading. In disclosing the circumstances surrounding approval of a transaction, attention should be devoted to a true disclosure of the arm's-length character of the negotiations, the completeness and independence of the work of the special committee, the completeness and candor of all disclosures made to directors and experts, and the thoroughness of all diligence investigations.

4. Proper Time Spent Making Decisions. The time allotted to making decisions critical to the interests of the shareholders is a crucial focus of the fair dealing inquiry. A court will be sensitive to what it perceives to be an inadequate amount of time spent on a particularly important decision. Therefore, the special committee members must not rush their deliberations and evaluations throughout the process and risk making an ill-advised, hasty decision. The time allotted to arriving at valuation decisions is typically an important area of judicial scrutiny. Thus, sufficient time should be allotted to the independent advisors in arriving at valuations, to the special committee in reviewing and analyzing preliminary valuation reports, and to the committee and its advisors in deliberating on final valuations prepared for particular transactions.

I. Recommendations to the Board.

After the special committee receives final reports from its legal and financial advisors, the committee members will have to make a recommendation to the regular board as to the fairness of the buyout proposals to the corporation's public shareholders. When the committee delivers this recommendation to the board, the committee members should summarize their deliberations. In addition, their legal and financial advisors should be available to answer any detailed questions about the recommendation or about the analysis performed in arriving at the particular recommendation. Such action will aid in demonstrating the due care taken by the special committee.

J. Post-Acquisition Agreement Role.

Assuming a proposal is approved by the special committee and the board, an acquisition agreement will be executed and disclosure material will be prepared, filed with the appropriate regulatory authorities and distributed to shareholders. Upon execution of the acquisition agreement, the role of the special committee should change from that of an investigating and deliberating body to that of an overseer. Although a proposal has already been recommended, important decisions will remain, and therefore, the special committee should continue to be an instrumental part of the acquisition process. The committee and its advisors should remain actively involved to protect the interests of the corporation's public shareholders.