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Elevating the Fairness Opinion above a Merger Ritual

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Abstract

Many American publicly traded companies have chosen a path to growth through merger and acquisition. As part of this strategy, investment bankers and lawyers are commonly hired to assist in the search for merger partners and help navigate the merger process. Still the merger process can be fraught with opportunities for mistakes and potential shareholder litigation. Costly shareholder lawsuits have followed many high profile mergers when these mergers have failed to deliver adequate shareholder value. Divestitures shortly after a merger are also a common byproduct of poorly matched merger partners. Billions of dollars of shareholder value have been lost due to ill-advised mergers. Since the mid-1980's boards of directors have relied upon third party fairness opinions in their quest to purportedly increase the chance of merger success and limit board litigation exposure. These opinions bring a so-called "second set of eyes" to bear on the proposed merger transaction. Despite good intentions, fairness opinions are not without their detractors. Commentators have questioned the value of the fairness opinion and the independence of preparers. Recently the National Association of Securities Dealers (NASD) has proposed rules to improve the fairness opinion process. The aim of this paper is to examine the fairness opinion process in areas such as independence and true value provided. The authors' conclusions include a finding that fairness opinions have become more ritualistic and less substantive. Relying upon this analysis, seven areas of suggested improvement to the fairness opinion process are proffered.

Key words: Mergers and Acquisitions, Corporate Governance, Fairness Opinion.
JEL classification: G34.

A Merger Ritual

The scene is a common one. A group of distinguished looking men and women, dressed in business attire, are clustered around a long oak table in a conference room in a downtown office building. It is a special meeting of the Board of Directors of a publicly traded company. Connected by phone are two members of the Board who could not make the special meeting on short notice. No one is sitting at the head of the table as it is occupied by a projector and a laptop computer operated by a young investment banker. If the banker looks like she hasn't slept in awhile, it is because she hasn't. She has been working long hours for several weeks helping put together a corporate merger. It is her hope that this meeting will result in the Board's approval of the merger.

Also standing before the group are two senior investment bankers, one holding a laser pointer. The other banker is holstering his Blackberry, having received last minute instructions from New York. They are introduced by the Chairman of the Board and begin a detailed PowerPoint presentation outlining the structure and benefits of a proposed business combination of this Board's company with another company. Board members follow the presentation and turn pages in a glossy book emblazoned with an investment bank logo that was handed out to them by the bankers. Somewhere across town or across the country, the same scenario is being played out in another boardroom for the other company in the proposed business combination. The presentation is detailed

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and requires the Board to digest a complicated exchange of stock formula. It ends with a recommendation by the bankers that the Board vote to approve the combination. The floor is now thrown open for questions and there are many from the board members, "Where will the merged company be headquartered?"; (Not here.) "How many members on our existing board will be on the board of the new merged company?"; (Not many.) "Will there be layoffs?"; (Yes, mostly here.) "How long will it take to close the merger ?"; (3-6 months) "What are we paying in fees to these investment bankers?"; (Very little, unless the merger closes. If it closes, a lot.) "What are the legal responsibilities of the Board in this situation?". (The answer to this one is deferred and answered later by the attorneys.) The questions are fielded by the investment bankers and senior members of the company's management. At the end of the discussion an outside attorney specializing in mergers an acquisitions stands and specifically explains to the board what their responsibilities are as board members.

Some of the Board members are visibly unsettled. They fidget in their chairs until one of them asks the obvious question, "Are we selling our company for the right price or are we going to be second-guessed and sued for accepting too low of an offer for our company?" The chairmen steeples his fingers and tells the Board that he has decided, for a number of reasons, including the Board's protection, to get a fairness opinion on the proposed transaction. He then signals a member of management to open the boardroom door and bring in a second group of investment bankers. These bankers may or may not work for the same firm as the first set of investment bankers. They too have brought a PowerPoint presentation but with a less drowsy junior investment banker to operate the laptop as the senior bankers commence to lead the Board through another presentation. The first few slides explain that the information the bankers have analyzed has been obtained from the company and some public sources and that they have not taken steps to validate the company provided information. The rest of the presentation is focused on explaining several methods the fairness opinion bankers have used to value the Board's company. Usually, one method involves calculating the value of the company by comparing it to the prices of comparable companies or companies in comparable transactions. Alternative valuation methods are likely demonstrated too. The various valuation methods are then melded together to yield a range of prices the company could be valued at. If the price the shareholders of the Board's company are receiving is within this range (And it usually is), the banker then concludes with a statement that in his bank's opinion the price is "fair". There is another round of questions for this set of bankers followed by the chairman's request for a vote to approve the merger. The vote is taken and the merger is approved.

A phone call is now made to the office of the company's merger partner. The results of their board meeting are the same. Cigars are lit up and a bottle of champagne is uncorked. Management scurry about and a conference call is immediately scheduled between the companies to finalize a press release. Separately, attorneys from the two merging firms schedule a call to iron out any legal details before the announcement is made. The next few days will be hectic. Considerable time will be dedicated to informing stakeholders as to the details and benefits of the combination. There will be meetings with analysts, shareholders, politicians, community leaders, and employee groups.

The Best Laid Plans

Taking into consideration the time and effort expended to complete a merger, why do 53% of mergers result in divestitures of the acquired company within a few years? (Bruner, 2004). Other authors indicate that the failure rate of such mergers may approach 60-70%, (Bruner, 2004) indicating not all companies acquired in failed mergers are eventually divested. This paper examines the value of a key component in the merger process, the fairness opinion, and proposes substantial changes in the way such opinions are arrived at and rendered.

Origin of Fairness Opinions

By definition, a fairness opinion is a letter, written usually by an investment bank, stating that the price paid in an acquisition is fair (IFLR, 2003). Other less common providers of fairness opinions are CPA firms, commercial banks, appraisers, and consultants (Bowers and Latham, 2004). However, Standard and Poor's Consulting reported that in deals during 2004 with values greater than $500 million, in cases where the financial adviser was identified, only 7% of the companies identified a fairness opinion provider other than their main adviser (Davis and Berman, 2005). Fairness opinions are usually prepared after a merger has been structured but before it has been approved by shareholders and regulators (Caddell, 1997). Importantly, fairness opinions are normally prepared by an independent third party and addressed to the board of directors, not the shareholders (Cookson, 2004). These boards have, at a minimum, to satisfy a fiduciary "duty of care" when accepting a purchase price for the sale of their company (commonly through a merger transaction) (Mihanovic, 2006). The fairness opinion is designed to help board members discharge this duty. The opinion may also be structured to assure boards that they have satisfied their "Revlon duties" if any are present (DeMott, 2004). Revlon duties are duties of a board of directors as defined by the court in the landmark case, *Revlon Inc. vs. MacAndrews & Forbes Holdings* (Revlon, 1986). These duties largely deal with making certain a board obtains the best price that is reasonably available for its shareholders when deciding to sell its company. Failure of a board to meet its duty of care or Revlon duties (if applicable) are commonly the foundation merger related shareholder lawsuits are built upon. As such, a prime purpose of fairness opinions is to diffuse these potential shareholder lawsuits by giving boards another line of defense. That is, the price they have accepted for their company has been declared fair by an independent third party.

Fairness opinions are almost never required by law. However they became a common component of the merger process following the 1985 *Smith v. Van Gorkom* case (Van Gorkom, 1985). In the Van Gorkom case, shareholders successfully sued their board of directors after the board voted to allow the company to go private in a leveraged buyout. (Shareholders voted to approve the transaction as well.) Shareholder plaintiffs in the case successfully argued that the price they received for their stock was insufficient. The judge found that the board had acted too quickly in approving the transaction and relied on their collective knowledge rather than the advice of an investment banker. The judge's order also underscored the fact that it is the board's duty to determine the intrinsic value of a firm being sold and cannot rely on shareholder approval to discharge this duty (Black and Kraakman, 2002). The order in the case also implied that the board's liability may have been avoided if they had obtained a fairness opinion (Sweeney and Sechler, 1999).

Opposing Views

Despite the benefits accruing from a "second set of eyes" reviewing a transaction prior to approval and the litigation shield provided to boards of directors described above, fairness opinions are not without their detractors. Questions have arisen as to the level of independence, objectivity, and rigor present in the analysis and the providers of the fairness opinions. Criticism includes claims that fairness opinions are little more than "rubber stamps" (Sweeney and Sechler, 1999) and critics claim that the selection of valuation methodologies by the firm rendering the opinion "serve the purpose of reaching a preordained conclusion" (Henry, 2003). Another critic believes that "No professional investor pays any attention to a fairness opinion. Their only real use is by lawyers as evidence that a board of directors has performed some kind of ritual that courts recognize as satisfying fiduciary duties" (Hahn, 2003). Finally, there are claims that "some Wall Street firms have a cavalier attitude toward fairness opinions and parrot whatever the client proposes to them" and fairness opinions are an oxymoron and that "you can get just about any outcome you want in a fairness opinion" (Sweeney and Sechler, 1999). "I'd like to see an investment bank that had a $5 million contingency fee riding on a deal come back with an opinion that the deal was unfair" (Mergers and Acquisitions, 2004).

Lack of Independence?

The most common complaint about the rendition of fairness opinions centers on the independence of the firm giving the opinion. In many cases, investment banks earn fees by advising companies regarding the structure, financing the planned merger **and** also rendering the fairness opinion. The investment banker commonly earns most of its fees in the form of success fees. That is, the bank will receive most of its compensation (for the merger advising and financing fees) once the merger transaction is consummated (Gould and Ahmedani, 2005). The fees are significant. As an example, Bank of America agreed to pay its advisor, Goldman Sachs Group a $3 million retainer, $5 million for a fairness opinion, and $17 million upon completion of the $40 billion merger (DeMott, 2004). The problem lies in ascertaining whether or not the investing public can rely on the fairness opinion given by a banker who knows he has a good chance of earning an even greater fee (success fee), but only if the fairness opinion is given and the merger closes. He will probably earn no success fee if no fairness opinion is given and no merger is completed.

Sweeney and Sechler, in the Journal of Accountancy write:

> *"However, because of the typical fee structure, competitors and shareholder activists see an inherent conflict of interest when a company's merger adviser also writes the fairness opinion. Fairness opinion fees vary, but they are usually not conditional. In contrast, merger advisory fees – which typically are much bigger than fairness opinion fees – almost always are contingent on the consummation of a deal. If the same investment bank acting in both capacities wrote a truly thorough, independent fairness opinion, the result might scotch the deal or force a renegotiation of the price, eliminating, reducing or postponing a very large cash reward for the investment bank. Sometimes the same investment bank also is underwriting the financing for the deal and stands to lose out on even more" (Sweeney and Sechler, 1999).*

Proponents of allowing the same bank to provide merger advice, financing assistance, and a fairness opinion claim it can be done properly. Specific bankers providing merger and financing advice to a client are kept isolated by so called "Chinese Walls" from specific bankers working on the fairness opinion. Prior to presentation to a company's board, the fairness opinion bankers will make a formal presentation to and ask for approval of the fairness opinion from an internal fairness committee of fellow investment bankers. Fairness committee members are normally some of the most senior members of the investment bank and are said to only reach their conclusion after significant analysis and research. Finally, proponents of one-stop shopping for merger advice and fairness opinions claim that the process works because the costs (damage to bank reputation and the costs to resolve ensuing shareholder litigation) to a bank who gives a bad fairness opinion far outweigh any possible benefits the bank may earn in success fees once the merger closes.

Dubious Protection

As stated above, many boards seek out fairness opinions as a litigation shield should a completed merger be followed by unsatisfactory financial results and shareholder litigation. In that case, when structuring their defense, board members will likely point to the work their management and investment banker teams did during the merger negotiation and due diligence process prior to the merger closure. They will also likely cite the fairness opinion they obtained from an independent group of bankers or consultants.

Are then the investment bankers who rendered the fairness opinion prior to the closure of the merger likely to be held liable for the merged company's unsatisfactory financial results? It depends, but history would tell us probably not. Investment banks (and others) normally only agree to issue the fairness opinion after an engagement letter has been signed by the bank and the board requesting the opinion. In the engagement letter the purpose of the fairness letter is specifically laid out. The opinion is commonly written to the board, not the shareholders. It will likely have language indemnifying the bank against third party claims (i.e. shareholders and bondholders) and

outlining that the bank is not acting as the company's agent or fiduciary. In these cases shareholders will likely have to prove that the bank operated with gross negligence or willful misconduct in order to collect damages from the bank (Mihanovic, 2006). The engagement letter will also list the sources of the data the bank relied upon. The sources will likely be publicly available data and non-public information provided by the board's company. The banks will also likely indicate that they did not verify the accuracy of the data provided. Taking this all into consideration, some legal experts and academics believe the fairness opinion may have little value to shareholders (Sweeney and Sechler, 1999).

An example of the caveats surrounding the issuance of a fairness opinion can be found in the two excerpts from the fairness opinion issued by Credit Suisse First Boston LLC in the ATT&T/SBC Communications included in Appendix 1 (AT&T, 2005).

A Legitimizing Element of the Merger Ritual

Considering the issues raised related to fairness opinions, such as the potential lack of preparer independence and the contractual near lack of accountability of the preparer, can the almost unanimous insistence by American boards of directors for fairness opinions (in publicly traded company mergers) be explained? A number of authors say yes. The fairness opinion has become a manifestation of the cultural value of fairness evident in the United States say Fligstein, Zukin & DiMaggio. In turn, the legal-business-investor interrelationships (and resulting desire for fairness opinions) are shaped by political and cultural structures (Fligstein, 1996, Zukin & DiMaggio, 1990). The desire to survive may be a source of fairness opinion popularity. Scott found that the striving for survival by business institutions eclipses the moral purpose that the fairness opinion was devised to serve (Scott, 1998). According to DiMaggio and Powell, institutional forces may augment competitive forces. This is evident when companies adopt practices (such as fairness opinions) for symbolic reasons as well as for instrumental reasons (DiMaggio and Powell, 1983).

Institutional theory offers another framework for understanding the merger ritual in that all organizational participants share a common set of commitments and a unity of purpose. Institutional theory predicts ceremonial conformance with institutional rituals, such as the use of fairness opinions. Normative pressures influence organizations to adopt legitimizing elements (Zucker, 1987). Examples of legitimizing elements include standard operating procedures, certifications, accounting principles, and in the case of mergers, the fairness opinion. The investment banks, the merging companies, and the shareholders are all influenced by normative pressures, one being that the transaction should be fair for all of the stakeholders of a merger.

Adopting rituals that contain legitimizing elements increases the probability of organizational survival (Zucker, 1987). However, such rituals may have the effect of directing attention away from the actual preferred outcome as well as the outcome's relevance. The fairness opinion can be seen as a legitimizing element of the merger ritual; although its effectiveness is questionable. The fairness opinion functions as a socially constructed instrument, institutionalized by the involved parties in order for each to gain legitimacy, resources, stability, and a better chance for survival. Thus, the fairness opinion may be a socially constructed legitimizing element of the merger ritual in that it creates a certain perception that all participants (i.e., company and investment banks) are, in good faith, trying to make a viable, mutually profitable merger. Such impression management aids in attracting investors and maintaining their confidence in the merging companies and the investment banks.

Finally, research has found that on occasion, various ceremonies and rituals reach a level of legitimization where failure to adopt them is seen as "irrational and negligent." Such generally accepted ceremonies and rituals even become legal mandates (Meyer & Rowan, 1977; DiMaggio & Powell, 1983). At this point, organizations will adopt such rituals even though they prove ineffective. In such a case, legitimacy is enhanced, but such rituals can possibly hinder organizations' viability (Meyer & Rowan, DiMaggio & Powell, 1983).

Regulatory Response

The prominence of the fairness opinion in merger transactions has not gone unnoticed by regulators. In November 2004, the National Association of Securities Dealers (NASD) published a request for comments as to whether it should propose new rules on conflicts of interest in the fairness opinion process (NASD (a), 2006). The NASD then received comments and filed with the Securities and Exchange Commission (SEC) draft rules on June 22, 2005 and requested additional comments (NASD (b), 2006). Following the publication of the draft rules, three amendments were filed to the originally proposed rules and further comments were requested (NASD (c), 2006).

The current version of the draft NASD rules is attached as Appendix 2. The proposed rules focus on a number of areas already addressed in this paper. These include:

a) A proposal that firms issuing fairness opinions disclose if they have acted as a financial adviser in the transaction.

b) A proposal that firms issuing fairness opinions disclose if they will receive compensation upon successful completion of the transaction.

c) A proposal that firms issuing fairness opinions disclose if they had a material relationship during the last two years with companies involved in the transaction.

d) A proposal that firms issuing fairness opinions disclose types of information that formed a substantial basis for the opinion and if the information has been independently verified.

e) A proposal that firms issuing fairness opinions disclose whether the opinion was approved or issued by a fairness committee.

The proposed rules also included draft procedures that firms approving fairness opinions must follow.

Conclusion

If the recommendations of the NASD become effective, shareholders should view it as a step in the right direction. However, the steps proposed do not go far enough. The following seven procedures should be put into place in order to help make the fairness opinion a document which truly and independently assesses the fairness of a proposed transaction.

a) Firms would be precluded from issuing fairness opinions to the boards of merging companies which they are financial advisers for or have had material relationships during the last two years or intend to have material relationships with the company for two years following consummation of the merger.

b) Compensation for fairness opinions must not be contingent upon successful completion of the merger transaction.

c) The SEC will initiate a rulemaking whereby participants will suggest acceptable methodologies for valuation of companies and assets. The rulemaking will also propose rules which provide guidance for assumptions (i.e. discount rates, cash flow growth rates) used by preparers of fairness opinions. The eventual rules promulgated will comprise the fairness opinion preparer "toolbox".

d) Transparency of fairness opinion calculations must be increased. Merging firms must file with the SEC, the calculations used in the fairness opinion preparation (except for commercially sensitive information) as part of their required filings.

e) The level of verification of data relied upon by fairness opinion preparers must be increased beyond reliance upon management in merging companies. Standards of verification must be established and compliance with these standards disclosed as part of the fairness opinion.

f) All potential preparers of fairness opinions must be qualified and made part of a national registry. Both merging parties will no longer secure separate fairness opinions. Rather, one fairness opinion shall be prepared jointly for boards of directors in both merging firms. The

method of choosing the fairness opinion firm will follow the model used by the American Arbitration Association (American Arbitration Association, 2006). When a fairness opinion is requested, five names of qualified fairness opinion providers (who have no conflicts under recommendation (a) above) will be provided by the registry to both merging companies. Both companies may strike two names from the list. The remaining firm will complete the fairness opinion.

Preparers of fairness opinions may still be held liable for damages to shareholders from failed mergers, but only to the extent the firm operated with gross negligence or willful misconduct during the preparation of the fairness opinion.

g) Companies may choose to merge even after they have tried and failed to obtain a fairness opinion. In that case, the failed attempt to obtain a fairness opinion must be publicly disclosed through an SEC filing. This reporting requirement would be analogous to the current reporting requirement of companies who have disagreement with their auditors (Securities and Exchange Commission, 2006).

Disclosure of failed attempts to obtain fairness opinions in situations where merger negotiations failed to result in merger agreements being signed would obviously not need to be disclosed. Failed attempts to obtain fairness opinions in situations where the failed attempt is followed by additional merger negotiations and a significant restructuring of the proposed merger and subsequent successful securing of a fairness opinion would not need to be disclosed. Firms in the fairness opinion registry may not be approached or contracted by potential merging companies in order to analyze merger structure scenarios. This provision is designed to discourage "opinion shopping".

Additional Study

The world of fairness opinions is only partially visible to outsiders. We can observe, in most cases, the final product of the fairness process. However, there is very little transparency to view the various methodologies used in the opinion's preparation. Study is also obscured because the fairness opinion's primary purpose is to help diffuse litigation. Understandably, boards of directors and investment banks are highly reluctant to reveal or discuss components of their strategies employed to minimize litigation. For these reasons, research on the topic of fairness opinions has been very limited.

Future study of all components of fairness opinions is therefore warranted. Acceptance of the recommendations of this paper will facilitate research in two ways.

1. The level of transparency will be increased and the research of methodologies will be facilitated.
2. More mergers will likely be completed without fairness opinions. Ex-post analysis of mergers with and without fairness opinions will become more practical and meaningful.

Epilogue

Adoption of this paper's recommendations will have the effect of transforming fairness opinions to truer independent representations of analyses of a proposed merger's fairness. Adoption may also have the effect of reducing the number of fairness opinions requested as boards may not want to risk having to disclose the unsuccessful attempt to obtain a fairness opinion. Given fairness opinions are not a legal requirement of completing a merger, boards opting to forgo a fairness opinion, who (with their shareholders) are ultimately responsible for the approval of mergers, would then be faced with exercising other means to manage the risk of unsuccessful mergers (and shareholder litigation) such as the performance of more rigorous pre-merger due diligence. This process should also reduce the number of unsuccessful mergers and the hasty divestitures following these unsuccessful mergers.

Critics of the proposed approach may also object to the requirement that a single fairness opinion be obtained for both merging companies (recommendation (f) above). In the American system of doing business, it is not a board's responsibility to be concerned with the outcomes to another company's shareholders. That is true. However, the recommendations do not call for the equal treatment of all affected shareholders, only the fair treatment. It is a virtual certainty that one group of merging shareholders will receive benefits greater than the other group of merging shareholders. The proposal suggests adoption of a system which encourages fair (not equal) treatment of all involved, while minimizing the costs of shareholder litigation and failed mergers. That is a positive movement from the status quo.

Finally, this approach shifts preparation of a fairness opinion, which is inherently subjective, to a registry of firms. Claims that this creates unneeded costs and bureaucracy while resulting in the same firms likely preparing the fairness opinions are unfounded. Under the proposed system, the addition of the requirements of independence, verifiability, transparency, and the "toolbox" will result in a fairness opinion which is vastly superior to the product today.

References

1. American Arbitration Association. http://www.adr.org/sp.asp?id=22009. Downloaded June 28, 2006.
2. AT&T, Fairness Opinion. http://www.sec.gov/Archives/edgar/data/732717/000095012305006561/y04651a3sv4za.htm#254, Downloaded June 28, 2006.
3. Black B., R. Kraakman. Delaware's Takeover Law: The Uncertain Search for Hidden Value // Northwestern University Law Review, 2002. – Nº 96. (2) – pp. 521-566.
4. Bowers, H., W. Latham. Information Asymmetry, Litigation Risk, Uncertainty and the Demand for Fairness Opinions: Evidence from U.S. // Mergers and Acquisitions, 1980-2002. http://ssrn.com/abstract=626321: 1-33. Downloaded June 28, 2006.
5. Bruner, R. Applied Mergers and Acquisitions**.** Hoboken, New Jersey: Wiley, 2004. – pp. 148.
6. Caddell, R. SEC to banks: You're Liable to Shareholders for Fairness Opinions // Corporate Financing Week, 1997. – Nº 23 (39) – pp. 1-2.
7. Cookson, I. M&A Issues Raise the Governance Bar // Financial Executive, 2004. – Nº 20 (7) – pp. 44-47.
8. Davis A., D. Berman. Checkup Prompts Search for Second Opinion // The Wall Street Journal, January 24, 2005. – pp. C1.
9. DeMott, D. Bank Conflicts Raise Threat of Lawsuits over M&A // International Financial Law Review, August 2004. – 1 pp.
10. DiMaggio, P.H., W.W. Powell. The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields // American Sociological Review*,* 1983. – Nº 48 – pp. 147-160.
11. Fligstein, N. Markets and Politics: A Political-cultural Approach to Market Institutions // American Sociological Review, 1996. – Nº 61 (4) – pp. 656-673.
12. Gould, J., Z. Ahmedani. NASD Expands Fairness Opinion Disclosure // International Financial Law Review, August 2005. – pp. 26-28.
13. Hahn, A.L. Fairness Opinions: Not Fair, but Lucrative Buffet's $12.50 per Share Bid for Clayton Homes Now Seems Awfully Low // The Investment Dealer's Digest, July 2003. – 1 pp.
14. Henry, D. A Fair Deal-But for whom? Fairness Opinions in Acquisitions Are Rife with Conflicts-and Coming under Fire // Business Week, 2003. – Nº 3859 – 108 pp.
15. IFLR. Lawyers Dismiss Spitzer Call to Investigate Fairness Opinions // International Financial Law Review. April 2003 – 1 pp.
16. M&A. NASD Launches Inquiry into Fairness Opinion Conflicts // Mergers and Acquisitions, 2004. – Nº 39 (8) – pp. 4-6.

17. Meyer, J.W., B. Rowan. Institutionalized Organizations: Formal Structure as Myth and Ceremony // American Journal of Sociology, 1977. – Nº 83 (2) – pp. 340-363.
18. Mihanovic, M. Legal Perils for M&A Advisers: The Morgan Stanley Setback and Fairness Opinion Controversies Prompt Advice Givers to Redefine Client Relationships and the Services They Will Provide // Financial Times Ltd. January 2006.
19. (NASD (a)) National Association of Securities Dealers. http://www.nasd.com/web/groups/rules_regs/documents/notice_to_members/nasdw_012248.pdf. Downloaded June 28, 2006.
20. (NASD (b)) National Association of Securities Dealers. http://www.nasd.com/web/groups/rules_regs/documents/rule_filing/nasdw_016111.pdf Downloaded June 28, 2006.
21. (NASD (c)) National Association of Securities Dealers**.** http://www.nasd.com/RulesRegulation/RuleFilings/2005RuleFilings/NASDW_014559 Downloaded June 28, 2006.
22. Revlon Inc. vs. MacAndrews & Forbes Holdings, Supreme Court of Delaware, 1986, 506A. 2d 173.
23. Scott, W.R. Organizations: Rational, Natural and Open Systems. 4th Ed. Upper Saddle River, NJ. Prentice Hall. 1998.
24. Securities and Exchange Commission. Regulation S-K, Item 304. http://www.sec.gov/about/forms/regs-k.pdf Downloaded June 28, 2006.
25. Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).
26. Sweeney, P., C. Sechler. Who Says It Is a Fair Deal? // Journal of Accountancy, 1999. – Nº 188 (2) – pp. 44-50.
27. Zucker, L.G. Institutional Theories of Organization // Annual Review of Sociology, 1987. – Nº 13 – pp. 443-464.
28. Zukin, S., P. DiMaggio. Introduction, Structures of Capital: The Social Organization of the Economy. Cambridge, MA: Cambridge University Press. 1990.

APPENDIX 1

"In arriving at our opinion, we have reviewed the Merger Agreement and certain publicly available business and financial information relating to the Company and the Acquiror. We have also reviewed certain other information relating to the Company and the Acquiror, including financial forecasts for 2005 prepared and provided to us by the Company, financial forecasts for 2005 through 2007 prepared and provided to us by the Acquiror and certain publicly available research analyst estimates concerning the Company and the Acquiror, and have met with the managements of the Company and the Acquiror to discuss the business and prospects of the Company and the Acquiror, respectively. We have also considered certain financial and stock market data of the Company and the Acquiror, and we have compared that data with similar data for other publicly held companies in businesses we deemed similar to those of the Company and the Acquiror and we have considered, to the extent publicly available, the financial terms of certain other business combinations and other transactions which have recently been effected or announced. We also considered such other information, financial studies, analyses and investigations and financial, economic and market criteria which we deemed relevant.

In connection with our review, we have not assumed any responsibility for independent verification of any of the foregoing information and have relied on its being complete and accurate in all material respects. With respect to the financial forecasts of the Company for 2005 prepared by the management of the Company, we have discussed such forecasts with the management of the Company and we have been advised by them, and we have assumed, that such forecasts represent the best currently available estimates and judgments of the management of the Company as to the future financial performance of the Company. With respect to the publicly available research analyst estimates concerning the Company for 2006 through 2009 that we reviewed and discussed with the Company, the management of the Company has advised us, and we have assumed, that such estimates represent reasonable estimates and judgments as to the future financial performance of the Company. With respect to the publicly available research analyst estimates concerning the Acquiror for 2005 through 2007 reviewed by us, we have, with your consent and based upon our comparison of such estimates to financial forecasts for such years prepared by and discussed with the management of the Acquiror, assumed that such analyst estimates represent reasonable estimates and judgments as to the future financial performance of the Acquiror. With respect to the estimates as to the cost savings and other potential synergies anticipated to result from the Merger reviewed and discussed by the managements of the Company and the Acquiror, we have been advised and have assumed that such estimates (including the aggregate amount, timing and achievability thereof) represent reasonable estimates and judgments. We have assumed, with your consent, that the Merger will be treated as a tax-free reorganization for federal income tax purposes. We also have assumed, with your consent, that, in the course of obtaining any regulatory or third party consents, approvals or agreements in connection with the Merger, no delay, limitation, restriction or condition will be imposed that would have an adverse effect on the Company, the Acquiror or the contemplated benefits of the Merger and that the Merger will be consummated in accordance with the terms of the Merger Agreement without waiver, modification or amendment of any material term, condition or agreement thereof. In addition, we have not been requested to make, and have not made, an independent evaluation or appraisal of the assets or liabilities (contingent or otherwise) of the Company or the Acquiror, nor have we been furnished with any such evaluations or appraisals. Our opinion addresses only the fairness, from a financial point of view, to the holders of Company Common Stock of the Exchange Ratio and does not address any other aspect or implication of the Merger or any other agreement, arrangement or understanding entered into in connection with the Merger or otherwise. Our opinion is necessarily based upon information made available to us as of the date hereof and financial, economic, market and other conditions as they exist and can be evaluated on the date hereof. We are not expressing any opinion as to what the value of shares of Acquiror Common Stock actually will be when issued to the holders of Company Common Stock pursuant to the Merger or the prices at which shares of Acquiror Common Stock will trade at any time. Our opinion does not address the relative merits of the Merger as

compared to alternative transactions or strategies that might be available to the Company, nor does it address the underlying business decision of the Company to proceed with the Merger".

"It is understood that this letter is for the information of the Board of Directors of the Company in connection with its consideration of the Merger and does not constitute a recommendation to any stockholder as to how such stockholder should vote or act on any matter relating to the proposed Merger.

Based upon and subject to the foregoing, it is our opinion that, as of the date hereof, the Exchange Ratio is fair, from a financial point of view, to the holders of Company Common Stock".

APPENDIX 2

(a) Disclosures:

Any member issuing a fairness opinion that may be provided, or described, or otherwise referenced to public shareholders must disclose, to the extent not otherwise required, in such fairness opinion:

(1) whether such member has acted as a financial advisor to any transaction that is the subject of the fairness opinion, and, if applicable, that it will receive compensation for:

(A) rendering the fairness opinion that is contingent upon the successful completion of the transaction;

(B) serving as an advisor that is contingent upon the successful completion of the transaction;

(2) whether such member will receive any other payment or compensation contingent upon the successful completion of the transaction;

(3) whether there is any material relationship that existed during the past two years or is mutually understood to be contemplated in which any compensation was received or is intended to be received as a result of the relationship between the member and the companies that are involved in the transaction that is the subject of the fairness opinion;

(4) the categories of information that formed a substantial basis for the fairness opinion that was supplied to the member by the company requesting the opinion concerning the companies involved in the transaction and whether any such information in each such category has been independently verified by the member; and

(5) whether the fairness opinion was approved or issued by a fairness committee.

(b) Procedures:

Any member issuing a fairness opinion must have procedures that address the process by which a fairness opinion is approved by a firm, including:

(1) the types of transactions and the circumstances in which the member will use a fairness committee to approve or issue a fairness opinion, and in such transactions where it uses a fairness committee:

(A) the process for selecting personnel to be on the fairness committee;

(B) the necessary qualifications of persons serving on the fairness committee; and

(C) the process to promote a balanced review by the fairness committee, including review and approval by persons who do not serve on or advise the ''deal team'' to the transaction;

(2) the process to determine whether the valuation analyses used in the fairness opinion are appropriate, and the procedures should state the extent to which the appropriateness of the use of such valuation analyses is determined by the type of company or transaction that is the subject of the fairness opinion; and

(3) the process to evaluate whether the amount and nature of the compensation from the transaction underlying the fairness opinion benefiting any individual officers, directors or employees, or class of such persons, relative to the benefits to shareholders of the company, is a factor in reaching a fairness determination.