

Financial Advisor Engagement Letters: Post-Rural/Metro Thoughts and Observations

By Eric S. Klinger-Wilensky and Nathan P. Emeritz*

The liability of RBC in last year's In re Rural/Metro decision was derivative of several breaches of fiduciary duty by the Rural/Metro directors, including those directors' failing "to provide active and direct oversight of RBC." In discussing that failure, the Court of Chancery stated that a "part of providing active and direct oversight is acting reasonably to learn about actual and potential conflicts faced by directors, management and their advisors." In the year since Rural/Metro, there has been an ongoing discussion—in scholarly and trade journals, courtrooms and the marketplace—regarding how, if at all, the process of vetting potential financial advisor conflicts should evolve. In this article, we set out our belief that financial advisor engagement letters are an efficient (although admittedly not the only) tool to vet potential conflicts of a financial advisor. We then discuss four contractual provisions that, we believe, are helpful in providing the active and direct oversight that was found lacking in Rural/Metro.

In litigation arising from the acquisition of Rural/Metro Corporation by Warburg Pincus LLC, the Delaware Court of Chancery famously (or infamously, depending on one's point of view) held RBC Capital Markets, LLC liable for aiding and abetting breaches of fiduciary duty by the board of directors of Rural/Metro.¹ Much ink has been spilled discussing the factual and legal underpinnings of the Court of Chancery's opinions in that litigation. This article does not add to that interesting discussion. Instead of debating the merits of the outcome in *Rural/Metro*, this article begins from that outcome and contains our thoughts on the drafting and implementation of financial advisor engagement letters in a post-*Rural/Metro* world.

RBC's liability in *Rural/Metro* was derivative of a finding that the Rural/Metro directors had breached their fiduciary duties in approving the sale of the company to Warburg Pincus. The directors breached their fiduciary duties by,

* Eric S. Klinger-Wilensky is a partner, and Nathan P. Emeritz an associate, at Morris, Nichols, Arshat & Tunnell LLP in Wilmington, Delaware. We thank Chief Justice Leo E. Strine, Jr., Vice Chancellor J. Travis Laster, Professors William W. Bratton and Andrew Tuch, and Messrs. Rick Alexander, R. Alec Dawson, Jim Honaker, Andrew Johnston, Stephen M. Kotran, Bill Lafferty, and Stanton D. Wong for their comments and insights. The views expressed herein are those of the authors only, and do not necessarily reflect the views of the firm or its clients.

1. *In re Rural Metro Corp.*, 88 A.3d 54 (Del. Ch. 2014) [hereinafter *Rural I*]; *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205 (Del. Ch. 2014) [hereinafter *Rural II*]. An appeal in the *Rural/Metro* litigation is pending as of the last edit date of this article (November 17, 2015).

among other things, “fail[ing] to provide active and direct oversight of RBC.”² Addressing that failure, *Rural I* provided the following admonition:

Because of the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives, directors must act reasonably to identify and consider the implications of the investment banker’s compensation structure, relationships, and potential conflicts.³

The Court went on to state that a “part of providing active and direct oversight is acting reasonably to learn about actual and potential conflicts faced by directors, management, and their advisors.”⁴ In our experience, deal advisors have heeded this admonition, using financial advisor engagement letters as a key tool to vet potential conflicts of a financial advisor. That said, we understand that other practitioners have responded to *Rural/Metro* by vetting potential financial advisor conflicts through a side “disclosure memorandum” or a slide in a bankers’ book.

In this article, we explain our belief that financial advisor engagement letters are an efficient (although admittedly not the only) tool to vet potential conflicts of a financial advisor.⁵ We then discuss certain contractual provisions that are helpful in providing the active and direct oversight that was found lacking in *Rural/Metro*.⁶

2. *Rural II*, 102 A.3d at 218.

3. *Rural I*, 88 A.3d at 90.

4. *Id.*

5. Professors William W. Bratton and Michael L. Wachter have observed that cases such as *Rural/Metro*, as well as *In re Del Monte Foods Co. Shareholders Litigation*, 25 A.3d 813 (Del. Ch. 2011) and *In re El Paso Corp. Shareholder Litigation*, 41 A.3d 432 (Del. Ch. 2012), reflect a shift in judicial focus to whether “banker-client contracting inhibits realization of the best deal.” William W. Bratton & Michael L. Wachter, *Bankers and Chancellors*, 93 TEX. L. REV. 1, 46 (2014) [hereinafter *Bankers and Chancellors*]. The professors suggest that these cases should lead to reinvigorated negotiation between directors and financial advisors on the terms of the financial advisor engagement letter, and thus cause directors to “us[e] contract [i.e., the engagement letter] to facilitate oversight and position the board to take appropriate action” in the event a conflict arises. *Id.* at 61. We agree.

6. The starting point for many of the form provisions discussed in this article was a document entitled “Form of Engagement Letter, marked to show comments from Company’s counsel.” That document, reproduced as Exhibit A to this article, was prepared by David I. Albin, a partner at Finn Dixon & Herling LLP in Stamford, Connecticut, in connection with an ABA, Business Law Section Mergers & Acquisitions Committee Forum that Mr. Albin chaired titled Retaining and Managing Your Investment Banker in the Aftermath of *In Re Del Monte Foods Company Shareholder Litigation* and presented in April 2011 following the release of the *Del Monte* opinion. The potential changes to a form of financial advisor engagement letter shown in that document were meant to be used as a teaching tool and discussion aid in connection with the *Del Monte* opinion and were not meant by the author or the other panel members (Michael G. O’Bryan, a partner at Morrison Foerster LLP, San Francisco, California; Kevin Miller, a partner at Alston & Bird LLP, New York, New York; The Honorable Myron T. Steele, then Chief Justice of the Delaware Supreme Court and now a partner at Potter Anderson Corroon LLP, Wilmington, Delaware; and Patricia O. Vella, a partner at Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware) as recommendations of changes that counsel for the party engaging a financial advisor should request. Among other provisions appearing in that document that we do not, in this article, advocate including in financial advisor engagement letters are (i) a prohibition on engaging in discussions with any third person regarding a deal with the company for one year after the engagement is terminated, (ii) an indemnity running from the financial advisor to the company for actions taken by the financial advisor that cause the directors to violate their fiduciary duties to the company, and (iii) an express statement that the financial advisor will perform its services as a fiduciary to the company.

THE USE OF A FINANCIAL ADVISOR ENGAGEMENT LETTER TO ADDRESS POTENTIAL CONFLICTS

In our post-*Rural/Metro* experience, financial advisors and their counsel recognize that because, as discussed above, RBC's liability derived from a breach of the directors' duty of care, conflicts-related disclosures that demonstrate care in the retention of a financial advisor will mitigate the possibility that the financial advisor will be liable for aiding and abetting a breach of the directors' duty of care.

Several commentators on an initial draft of this article, however, questioned whether an *engagement letter* is the proper tool for providing the "direct oversight" that was found lacking in *Rural/Metro*. Those commentators observed, and we readily admit, that using engagement letters as a tool for providing oversight contractually adds time and expense to the financial advisor engagement process and that, historically, the board of directors does not even read the financial advisor engagement letter, let alone understand it to be a tool for addressing conflicts. Rather than addressing these issues contractually, the commentators suggest that "direct oversight" can be accomplished via a page in a board book or via a "disclosure memorandum." In our view, although addressing conflicts-related issues through a board book or a disclosure memorandum represents a positive evolution from pre-*Rural/Metro* practice and is, in many instances, sufficient,⁷ negotiating for inclusion in the engagement letter of the provisions discussed in this article could be worth the extra time and expense for several reasons.

First, the process of providing contractual representations encourages the representation giver to exercise thorough diligence in a timely fashion, so as to avoid complications arising from belated discovery and disclosure of significant conflicts.⁸ Take the following example. Bank A has been providing financial advice throughout a strategic review process. The process began when Party A lobbed a bid over the transom. Bank A indicated it had a few minor prior engagements for Party A at the outset of the engagement, and the board decided those small minor engagements did not result in a disabling conflict. A few alternative bidders are contacted,

7. See Transcript of Telephonic Ruling on Defendants' Motions to Dismiss at 36, *In re PLX Tech. Inc. S'holders Litig.*, C.A. No. 9880-VCL (Del. Ch. Sept. 3, 2015) [hereinafter *PLX II Transcript*] ("The directors' toolbox for vetting these things and continuing their oversight includes basic contracting techniques, such as representations, covenants and disclosure schedules. But it also involves just keeping your eyes open, asking questions, and getting straight and complete answers as the process unfolds.").

8. JAMES C. FREUND, *ANATOMY OF A MERGER: STRATEGIES AND TECHNIQUES FOR NEGOTIATING CORPORATE ACQUISITIONS* § 7.1.1 (1975) [hereinafter *ANATOMY OF A MERGER*] ("[R]epresentations constitute a systematic smoke-out of the data about the [bank] which the [board] feels is important."); see also *GRT, Inc. v. Marathon GTF Tech., Ltd.*, C.A. No. 5571-CS, 2011 WL 2682898, at *13 n.69 (Del. Ch. July 11, 2011) (citing *Anatomy of a Merger, supra*, at 160 ("But in acquiring a public company [where the representations and warranties expressly terminate at closing], your investigative prowess must be exhibited prior to the closing.")); *ABA MODEL AGREEMENT AND PLAN OF MERGER* § 2 (Jan. 20, 2010) ("In a public company acquisition [where the representations and warranties expressly terminate at closing], the target's representations and warranties . . . are a device for obtaining disclosures about the target before the signing of a definitive agreement and thus play a significant role in the buyer's diligence process."); cf. *Weinberger v. Bankston*, C.A. No. 6336-VCB, 1987 WL 20182, at *2 (Del. Ch. Nov. 19, 1987) (citing *Gould v. Am.-Hawaiian Steamship Co.*, 387 F. Supp. 163, 168 (D. Del. 1974) and noting that in a proxy solicitation "[o]nly a realistic possibility of liability for damages will encourage due diligence by those who solicit proxies and will protect the interests of informed corporate suffrage").

but a broad-based auction is not conducted. At the end of the process, Party A emerges the winner. As the board and its advisors are negotiating the short strokes of the acquisition agreement, the board's counsel receives a call from counsel to Bank A. It goes something like this: "Well, we were updating our conflicts check for purposes of disclosure in our fairness opinion and noted a few more conflicts."

Honest to goodness, this scenario has come up on more than a handful of occasions. Indeed, in a recent ruling declining to dismiss an aiding and abetting claim against Deutsche Bank, the plaintiff alleged a fact pattern substantially similar to this hypothetical.⁹ The increased focus on diligence up front will hopefully mitigate (if not eliminate in its entirety) our unfortunate repeat experience of a financial advisor surfacing conflicts only upon a "more focused conflicts search" performed in drafting its fairness opinion letter.¹⁰

It may well be that, in fact, financial advisors are performing their conflicts-related diligence at an earlier stage in the process, and with more alacrity, than in prior years, and that the results of such diligence are being reflected in board books or disclosure memoranda. But we believe that if such diligence forms the basis for a contractual representation, as opposed to a unilateral disclosure document, the person performing the diligence will have more incentive to do so at a time when it is most useful. Admittedly, it would be an unusual case where a counterparty to a financial advisor engagement letter sues the financial advisor for breach of a conflicts representation.¹¹ If a transaction fails, it is hard to envision damages; if a transaction succeeds, it is similarly difficult to envision the successor counterparty to the engagement letter (i.e., the acquirer who likely would have benefitted from the conflict) going after the financial advisor for breach of contract.¹² But even if a contractual action against a financial advisor

9. *PLX II* Transcript, *supra* note 7, at 19 ("It was only now, during the final days before the presentation of its fairness opinion, that Deutsche decided to disclose to the committee various relationships it had with [the buyer]."); see also *In re Zale S'holders Litig.*, C.A. No. 9388-VCP, 2015, WL 5853693, at *17 (Del. Ch. Oct. 1, 2015) [hereinafter *Zale I*] (finding that "the Director Defendants did not learn of Merrill Lynch's conflict until after the merger was announced" despite the board's earlier inquiry), amended on reargument by 2015 WL 6551418 (Del. Ch. Oct. 29, 2015) [hereinafter *Zale II*].

10. *PLX II* Transcript, *supra* note 7, at 40 ("If the committee had gotten in there at the outset and secured representations or disclosure covenants from Deutsche, it might have been different. Instead, the committee only learned the details of Deutsche's relationship with [the buyer] when Deutsche chose to disclose them one day before presenting its fairness analysis.").

11. See Andrew F. Tuch, *Disclaiming Loyalty: M&A Advisors and Their Engagement Letters: In Response to William W. Bratton & Michael L. Wachter, Bankers & Chancellors*, 93 TEX. L. REV. 211, 227 (2015) [hereinafter *Disclaiming Loyalty*] ("It seems that directors virtually never sue their M&A advisors."); see also *PLX II* Transcript, *supra* note 7, at 40–41 (suggesting that "firing Deutsche Bank, seeking legal remedies and starting all over" would be at the extreme end of the spectrum of potential responses to an allegedly related conflicts disclosure).

12. In *In re Freeport-McMoran Copper & Gold Inc. Derivative Litigation*, the directors of Freeport-McMoran Copper & Gold Inc. settled a derivative action arising over Freeport's acquisition of McMoran Exploration Co. and Plains Exploration & Production Co. in a way that would have allowed the plaintiffs to pursue derivatively contractual claims of Freeport against the Freeport board's financial advisor, Credit Suisse. The settlement contemplated the settling defendants making "themselves reasonably available as fact witnesses in any action Plaintiffs may pursue on behalf of Freeport against Credit Suisse arising from Credit Suisse's bad faith, gross negligence, willful misconduct or fraud, as those terms are used in the Engagement Letter between Freeport and Credit Suisse dated September 20, 2012, in connection with its engagement to act as lead financial advisor to the Special Committee of

for breach of a conflicts representation is unlikely, even an unlikely threat of damages could serve to elicit the timely conflicts-related diligence discussed above. Moreover, as discussed below, a contractually created remedy of allowing a target board to terminate the engagement with its initial financial advisor and hire a new financial advisor without having to pay a tail fee if a contractual conflicts representation proved incorrect could, in some instances, provide a more feasible remedy than suing the original financial advisor for damages.¹³

In addition, although directors historically may not have read the financial advisor engagement letter, neither have they historically been provided a disclosure memorandum or a bankers' book containing a slide on conflicts. In any case, even if conflicts-related provisions are included in an engagement letter, we do not believe that means a board must read an engagement letter front-to-back. As with most agreements, it will be the advisors working through the details of the engagement letter and addressing any issues that are surfaced either in negotiating the initial representation or through disclosure covenants. The goal is for the advisors to use that contractual exercise to raise issues that need to be brought to the board's attention, and for the board to understand the advisors are using the engagement letter as a tool in doing so.

Finally, even if potential conflicts are vetted at the outset of the engagement, absent a contractual covenant to disclose additional conflicts that may surface, a financial advisor is under no obligation to disclose future potential conflicts.¹⁴ In

the Freeport Board with respect to Freeport's decision to acquire MMR and Plains." Stipulation and Agreement of Settlement, Compromise and Release, *In re Freeport-McMoRan Copper & Gold Inc. Derivative Litig.* C.A. No. 8145-VCN, at para. 12 (Del. Ch. Jan. 15, 2015). Credit Suisse subsequently settled with plaintiffs for a payment of \$10 million to Freeport and an agreement to provide Freeport \$6.25 million worth of investment-banking advice during a two-year period. Addendum to Stipulation and Agreement of Settlement, Compromise and Release, *In re Freeport-McMoRan Copper & Gold Inc. Derivative Litig.* C.A. No. 8145-VCN, at para. 9 (Del. Ch. Mar. 16, 2015).

A settlement contemplating a plaintiff stockholder bringing an action sounding in contract against a board's financial advisor presumably would be more difficult in a class action claim (which most deal claims are) than a derivative claim. In addition, as reported by the *Wall Street Journal*, Credit Suisse believed it had a consent right over such a settlement. Liz Hoffman, *Freeport-McMoRan Settlement Leaves Credit Suisse in Cross Hairs*, WALL ST. J. (Jan. 15, 2015, 5:12 PM EST), <http://www.wsj.com/articles/freeport-mcmoran-settles-litigation-over-acquisitions-1421335791> ("Credit Suisse, which advised Freeport's independent directors and wasn't a defendant in the lawsuit, privately argued that Freeport couldn't settle the case without a guarantee the plaintiffs wouldn't later target the bank."). The breadth of financial advisor contractual consent rights over settlements of claims where the financial advisor might seek indemnification from the company is an evolving area (e.g., no consent rights, absolute consent rights, or consent rights not to be unreasonably withheld). Because of those consent rights, and because of the derivative nature of the claims in *Freeport*, settlements along the lines of those negotiated in *Freeport* may be rare.

13. One commentator to this article observed that "the provisions [we suggest] dealing with consequences for breach are remarkably lenient." In part that is due to, in our view, the practical reality discussed above that it is unlikely a financial advisor would be subject to a damages action arising out of a breach of a conflicts representation. More important, it reflects our belief that the primary function of representations in an engagement letter is to focus diligence, rather than serve as an allocation of risk.

14. *But see In re Dole Food Co., Inc. S'holder Litig.*, C.A. No. 8703-VCL, 2015 WL 5052214, at *49 n.38 (Del. Ch. Aug. 27, 2015) (questioning the extent to which a financial advisor engagement letter may be used to contract out of agency law principles, including fiduciary obligations of a purported agent); *Disclaiming Loyalty*, *supra* note 11, at 217 n.40 (same); *Bankers and Chancellors*, *supra* note 5, at 42 (same). Whether a provision—typical, in our experience, in financial advisor engagement

the hypothetical above, assume that among the few alternative bidders contacted were Party B and Party C. Bank A might have a substantial co-investment with Party B and no relationship with Party C. Absent a contractual covenant that defines when a financial advisor must provide updated conflicts disclosure, the financial advisor has no contractual obligation to respond to a request from the board to disclose potential conflicts between Bank A and Parties B and C. As much as we would like to accept the “trust me to do the right thing” argument, it simply is not an alternative to a contractual covenant that sets out up front the “what” and “when” regarding future conflicts-related disclosure.¹⁵

For all of these reasons, we believe that a financial advisor engagement letter is an appropriate tool to vet potential conflicts of a financial advisor.¹⁶ With that, we turn to the actual provisions. Although the remainder of this article discusses potential contractual provisions, we believe that some of the issues discussed below are relevant whether it is a contract, a disclosure memorandum, or a slide in a board book that is being negotiated.¹⁷

SPECIFIC FINANCIAL ADVISOR ENGAGEMENT LETTER PROVISIONS

DISCLOSURE OF ACTUAL AND POTENTIAL CONFLICTS: THE RELATIONSHIPS REPRESENTATION AND THE RELATIONSHIPS COVENANT

The following subsections highlight two provisions that we have seen in financial advisor engagement letters post-*Rural/Metro*. The first is a Relationships Representation, and it is used to discover potential conflicts at the beginning of an engagement. The second is a Relationships Covenant, and it creates an ongoing disclosure obligation of the financial advisor to disclose potential conflicts during the course of an engagement. Before turning to those provisions, we make two observations.

First, we have sometimes experienced strong pushback against requests for conflicts representations and covenants. That pushback typically proceeds along the lines of: “Our bank is so big, how can you expect us to track this?” In this regard, the following observation from Chief Justice Strine bears noting:

letters—disclaiming that the financial advisor is a fiduciary of the corporation is enforceable is outside the scope of this article. For purposes of this article, we assume that a financial advisor engagement letter is negotiated on the premise that the financial advisor is not a fiduciary of the corporation.

15. See, e.g., *PLX II* Transcript, *supra* note 7, at 40 (“If the committee had gotten in there at the outset and secured representations or disclosure covenants from Deutsche, it might have been different.”).

16. As discussed in *Bankers and Chancellors*, to the extent one may contract out of agency-based fiduciary obligations, a more extensive conflicts disclosure also is necessary for the financial advisor effectively to contract out of agency-based fiduciary duties. See *Bankers and Chancellors*, *supra* note 5, at 36–39; see also *Rural I*, 88 A.3d at 101 (“If RBC thought it was obtaining a waiver in the engagement letter without first disclosing the conflict and its import, then it was committing ‘what, in the old days, might have been called constructive fraud.’” (quoting *Hollinger Int’l, Inc. v. Black*, 844 A.2d 1022, 1068 (Del. Ch. 2004), *aff’d*, 872 A.2d 559 (Del. 2005))).

17. We have conformed the sample provisions in this article to an engagement between a “Bank” and a “Board” but they could also operate between a committee of directors and its independent financial advisor. In addition, although this article refers generally to engagement letters between a target company and a financial advisor, if an acquiror engages a financial advisor (e.g., in the context of a stock-for-stock transaction, where a financial advisor might assist in negotiating, and opine on, the exchange ratio), the issues addressed in this article may similarly be relevant.

I also am not purporting to say that setting up conflict identification and limitation processes for investment banks will be without complexity. But, there is likely much that investment banks can learn from the more evolved experience of law firms, and by focusing on this important issue, investment banks will do a better job of surfacing conflict issues and of addressing them with their clients forthrightly. This will improve the industry's reputation for integrity and minimize the litigation risk to their clients that banker conflicts sometimes generate.¹⁸

Second, we do not mean to suggest that, if a conflict or potential conflict is discovered during the process of negotiating the engagement letter and concomitant disclosures, the financial advisor may not be engaged by the board. To the contrary, the provisions discussed below are designed to assist the board in learning of potential conflicts and deciding whether to engage the financial advisor in spite of (or in many cases because of the benefits arising from) the potential conflict. Indeed, as observed in *Bankers and Chancellors*, “[c]onflicted representation can make cost-benefit sense.”¹⁹ Nonetheless, at a recent hearing on a motion to dismiss litigation arising from the acquisition of PLX Technology, Inc. by Avago Technologies Ltd., Vice Chancellor Laster commented that certain financial advisor conflicts might be “non-contractable.”²⁰ And in his oral ruling on that motion, the Vice Chancellor observed that there may be some conflicts that are “so pervasively impairing that the directors could not reasonably consent.”²¹ At both oral

18. Leo E. Strine, Jr., *Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-Making and Reduce the Litigation Target Zone*, 70 *Bus. Law.* 679 (2015) [hereinafter *Documenting the Deal*].

19. *Bankers and Chancellors*, *supra* note 5, at 26.

20. Transcript of Oral Argument on Defendants' Motions to Dismiss at 58, *In re PLX Tech. Inc. S'holders Litig.*, C.A. No. 9880-VCL (Del. Ch. Apr. 15, 2015); *see also id.* at 69 (“But I would think that people would view it as a non-contractable conflict if Deutsche were working for Avago on the same deal.”); *see also Zale I*, 2015 WL 5853693, at *20 (citing *Bankers and Chancellors* in dicta for the statement that “some of a board's financial advisor's conflicts arguably cannot be consented to”).

21. *PLX II* Transcript, *supra* note 7, at 36. With respect to potential Deutsche Bank conflicts in this transaction, the Schedule 14D-9 disclosed:

During 2011, the DB Group was paid approximately \$24.0 million by Parent or its affiliates for services including (i) acting as a lead underwriter for the 2011 secondary securities offering of Parent's ordinary shares, (ii) acting as book runner in a series of block trades of Parent's ordinary shares, and (iii) general corporate banking and securities advice. During 2012, the DB Group was paid approximately \$1.2 million by Parent or its affiliates for services including (i) acting as book runner in a series of block trades of Parent's ordinary shares and (ii) general corporate banking and securities advice. During 2013, the DB Group was paid approximately \$1.3 million by Parent or its affiliates for services including (i) acting as financial advisor to Parent in connection with Parent's 2014 acquisition of LSI Corporation and (ii) general corporate banking and securities advice. During 2014 for the year to date, the DB Group has been paid approximately \$29.7 million by Parent or its affiliates for services including (i) acting as financial advisor to Parent in connection with Parent's 2014 acquisition of LSI Corporation, (ii) acting as joint arranger on a \$4.6 billion term loan and a \$500 million revolving credit facility in connection with financing Parent's 2014 acquisition of LSI Corporation, as well as acting as sole book runner on a \$1 billion investment in Parent by Silver Lake Partners in the form of a 2% convertible notes offering in connection with financing Parent's 2014 acquisition of LSI Corporation, and (iii) general corporate banking and securities advice. In addition, the DB Group currently holds a position in Parent's or its affiliates' revolving credit facility and a fronting position in Parent's or its affiliates' term loan facility.

argument and in his transcript ruling, the Vice Chancellor pointed to the example of a “sell-side advisor simultaneously . . . represent[ing] the buyer in the price negotiations over the same deal.”²² The scope of both “non-contractable” conflicts and conflicts that are “so pervasively impairing that the directors could not reasonably consent”²³ awaits further developments by the courts.

The Relationships Representation

Although often contained together in one paragraph, for purposes of ease, this article breaks up a sample Relationship Representation into three sections—the Engagement Representation, the Holdings Representation, and the Prior Pitch Representation, and discusses each in turn.²⁴

The Engagement Representation

The Engagement Representation addresses the financial advisor’s prior engagements with potential bidders. As repeatedly recognized by Delaware courts, this representation may suggest a conflict of interest for a financial advisor, which may want to steer a bid toward a repeat client.²⁵ (Although similar conflicts also may arise based on the financial advisor’s prior relationship with management of the target,²⁶ this information can typically be provided by the company.²⁷)

22. *PLX II* Transcript, *supra* note 7, at 37.

23. *PLX II* Transcript, *supra* note 7, at 36.

24. In lieu of the provisions discussed below, one financial advisor questionnaire we saw after *Rural I* asked for the following disclosure:

Please describe any other direct or indirect relationship between Bank, its affiliates, any Bank Personnel or any person with whom any Bank Personnel has a family relationship, on the one hand, and any Applicable Entities or their respective management, on the other hand (including any commercial, industrial, banking, consulting, legal, accounting, charitable, or familial relationships, among others) that may influence the performance of Bank’s obligations under the Engagement Letter.

Although the breadth of this disclosure may be appropriate in certain circumstances (perhaps in connection with a single bidder strategy), we have not seen this extensive solicitation disclosure often accepted by financial advisor counsel as something to be incorporated into an engagement letter.

25. *E.g.*, *In re* Ness Techs., Inc. S’holders Litig., C.A. No. 6569-VCN, 2011 WL 3444573 (Del. Ch. Aug. 3, 2011); *In re* Del Monte Foods Co. S’holders Litig., 25 A.3d 813 (Del. Ch. 2011). Of course, financial advisors are in the business of growing their slice of the pie as well as retaining it, and could have incentives to steer a bid toward a new client the advisor has been wooing. To date we have not seen a representation addressing a desire to obtain business from a potential counterparty to the transaction.

26. *E.g.*, *Mills Acquisition Co. v. Macmillan*, 559 A.2d 1261 (Del. 1989); *In re* Netsmart Techs., Inc. S’holders Litig., 924 A.2d 171, 199 (Del. Ch. 2007); *In re* Tele-Comm’n, Inc. S’holders Litig., C.A. No. 16470-CC, 2005 WL 3642727, at *10 (Del. Ch. Dec. 21, 2005); *Robert M. Bass Grp., Inc. v. Evans*, 552 A.2d 1227, 1233–34 (Del. Ch. 1988).

27. Although the following admonition from Chief Justice Strine is not addressed to the scope of representations in a financial advisor engagement letter, it nonetheless bears noting in the context of those contractual provisions:

[I]t is important that the independent directors—in a situation when they have not made sure that the company’s regular financial advisor owes its retention and tenure to the independent board majority and not management, and when they must therefore hire another financial advisor—seek out the best and not go with a singular recommendation of management.

Documenting the Deal, *supra* note 18, at 16 n.16.

To flesh out whether this form of conflict exists, counsel may seek the Engagement Representation along the lines of the following two sentences²⁸:

Except as set forth on Schedule A, the Bank has not, within the past three years, had investment banking, capital markets or lending engagements with respect to the parties identified thereon (the “*Relevant Parties*”), or to the Bank’s knowledge, a portfolio company of a Relevant Party. Schedule A also sets forth the total fees derived from such engagements by the Bank.

There are four key variables to be negotiated in these two sentences: (i) the list of parties who are the Relevant Parties, (ii) the types of engagements captured by the representation, (iii) the length of the look back, and (iv) the breadth of disclosure regarding the engagements.

The breadth of the list of potential bidders captured by the disclosure is context-specific. Obviously, if a sales process is a response to an unsolicited bid, that single bidder, at a minimum, should be included on the list. On the other end of the spectrum, if a board expects to run a broad pre-signing auction process without any clear top-tier potential partners, it may make little sense to include these two sentences of the Relationships Representation at all. Somewhere in the middle is a limited pre-signing auction. Are there top-tier and second-tier potential bidders? How many potential bidders should be included on the list? These are questions we believe are still being explored by negotiators of financial advisor engagement letters (or, if a board deck or disclosure memorandum is used, the preparers of those documents) post-*Rural/Metro*.²⁹

Also being explored post-*Rural/Metro* is the type of engagement to be captured by the disclosure. “Investment banking, capital markets or lending engagements” is a baseline trigger that financial advisors may be comfortable providing. A blanket “all engagements” trigger may be more difficult to obtain, although it is hard to imagine a material engagement that would not be captured by “investment banking, capital markets or lending engagements.”

The length of the look back is of course subject to negotiation. Since *Rural/Metro*, we have seen financial advisor engagement letters that included look-back periods from one to three years.³⁰ FINRA Rule 5150, which requires disclosure in fairness

28. The provisions discussed in the remainder of this article are amalgams of (i) provisions contained in the form markup included in Exhibit A, (ii) provisions we have seen negotiated, or attempted to be negotiated for, in the past, and (iii) our own editing of such provisions in writing this article. They are both generic and aspirational. They also reflect the best efforts of two lawyers who have negotiated with financial advisors, but have not served in-house to a financial institution and so are not intimately familiar with the unique challenges a large financial institution may face in tracking conflicts. As with any negotiation, forms will be conformed to fit a given fact pattern; and, as with any new development in transactional advice, further experience will inform future negotiations. For ease of reference, the provisions discussed in the remainder of this article are collected in Exhibit B.

29. By way of one example, in the *PLX* litigation, Vice Chancellor Laster appeared critical of the PLX special committee for not asking its financial advisor about potential conflicts vis-à-vis the ultimate acquiror. At the time of the banker’s engagement, that entity “was perhaps the most likely bidder for the company” as it “had shown its eagerness by submitting an unsolicited expression of interest” only eight months earlier. *PLX II* Transcript, *supra* note 7, at 11–12.

30. *Cf. In re Ness Techs., Inc.*, C.A. No. 6569-VCN, 2011 WL 3444573, at *3 (Del. Ch. Aug. 3, 2011) (granting expedited discovery where the financial advisor had provided advisory services

opinions of “any material relationships that existed during the past two years or that are 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 any party to the transaction that is the subject of the fairness opinion,” may provide guidance in this regard.³¹ Again, practice is still evolving.

If there are prior engagements to disclose, the actual text of that disclosure is subject to negotiation. Recognizing that the goal of the Engagement Representation and concomitant disclosure is to understand potential conflicts that could affect a financial advisor’s advice, an itemized, representation-by-representation disclosure may not be warranted (and, if the financial advisor is subject to confidentiality obligations, may not be possible). In other words, the specifics of each transaction may or may not be material to a board’s “identif[ication] and consider[ation] . . . of . . . potential conflicts” of the financial advisor³² if the financial advisor is already disclosing that it performs substantive investment banking, capital markets, and lending work for a Relevant Party and the aggregate amount it has received for such work.

The Holdings Representation

The next two sentences of the Relationships Representation address potential conflicts of both the financial advisor and its lead individual bankers working on the transaction arising from their holdings of securities of a potential transaction partner. Before discussing the issues associated with the drafting of those sentences, it is important to identify the situations that those issues arise from.

The language in question addresses the form of conflict that arose in *In re El Paso Corp. Shareholder Litigation*.³³ *El Paso* involved the acquisition of El Paso Corporation by Kinder Morgan, Inc.³⁴ The El Paso board engaged Goldman Sachs as its financial advisor.³⁵ Goldman owned 19 percent of Kinder Morgan (an investment worth \$4 billion) and the lead Goldman banker on the assignment owned approximately \$340,000 worth of Kinder Morgan stock.³⁶ The Goldman-level conflict was disclosed and efforts were taken to mitigate that conflict.³⁷ (Goldman put up an internal wall between its representatives working for El Paso and those responsible for its Kinder Morgan investment, and El Paso engaged Morgan Stanley as a conflict-cleansing financial advisor.³⁸)

within the preceding two years, but the proxy statement did not disclose the amount of fees paid for those services); Transcript of Oral Argument at 101, *In re Art Tech. Grp., Inc. S’holders Litig.*, C.A. No. 5955-VCL (Del. Ch. Dec. 20, 2010) (granting a motion to preliminarily enjoin the stockholder vote on a sale of the company until ten calendar days after the parties disclosed the aggregate compensation that the buyer had paid to the seller’s financial advisor in the prior four years).

31. FINRA R. 5150(a)(3) (2008).

32. *Rural I*, 88 A.3d at 90.

33. 41 A.3d 432 (Del. Ch. 2012).

34. *Id.* at 433.

35. *Id.* at 434.

36. *Id.*

37. *Id.* at 440.

38. *Id.*

Then-Chancellor Strine found on a preliminary record, however, that those efforts did not sufficiently address the conflict because the record suggested Goldman might not have honored the internal wall³⁹ and, as discussed below,⁴⁰ the engagement letter for Morgan Stanley might have created poor incentives for that bank. The individual-banker conflict was not disclosed.⁴¹

In the *El Paso* decision, the Chancellor observed: “Given that Goldman’s largest conflict was surfaced fully and addressed, albeit in incomplete and inadequate ways, whether the plaintiffs could ultimately prove Goldman liable for any shortfall is, at best, doubtful, despite [the lead banker’s] troubling individual failure of disclosure.”⁴² In light of the comfort the Chancellor took in the disclosure of the Goldman entity-level interest in Kinder Morgan, and the concern expressed about the failure to disclose the lead banker’s interest in Kinder Morgan, companies could seek variations of the following Holdings Representation in financial advisor engagement letters:

The Bank has previously disclosed to the Board, and hereby represents, that the Bank and its affiliates (including portfolio companies in which the Bank has investments) do not beneficially own any interests in the Company, a Relevant Party, or to the Bank’s knowledge, a portfolio company of a Relevant Party. In addition, the Bank has had discussions with the Vice President and Managing Directors that the Bank intends to work on this engagement (comprising _____ (the “Team Members”)) and has confirmed that, other than as set forth on Schedule B, no Team Member has any direct holding, as of the date hereof, in the Company, a Relevant Party, or, to the relevant Team Member’s knowledge, a portfolio company of a Relevant Party.⁴³

In our experience, the entity-level Holdings Representation may be separated from the individual-level Holdings Representation. That is because the entity-level Holdings Representation often is coupled with a general disclosure regarding the financial advisor holding and trading in securities for the benefit of customers of its brokerage and asset management services. In addition, both the entity- and individual-level Holdings Representations often exclude disclosure related to passive, non-controlling interests which may not create the same economic conflicts that might alter the financial advisor’s decisions.

With respect to the individual-level Holdings Representation, in late 2014, Bloomberg reported that Goldman Sachs had issued an internal memorandum prohibiting individual bankers from buying individual stocks and bonds.⁴⁴ Should other financial advisors follow suit, the individual-level section of the Holdings Representation may become a very easy representation to give or it

39. *Id.* at 441.

40. *See infra* note 64.

41. *El Paso*, 41 A.3d at 442.

42. *Id.* at 448.

43. Some forms of this representation capture holdings by a Team Member’s spouse and children.

44. Michael J Moore, *Goldman Sachs Said to Prohibit Bankers from Buying Stocks*, BLOOMBERG BUS. (Sept. 26, 2014, 11:00 PM CDT), <http://www.bloomberg.com/news/articles/2014-09-26/goldman-sachs-said-to-prohibit-bankers-from-buying-stocks> (“Employees at the New York-based firm were notified yesterday of the change, which takes effect immediately, said the person, who requested anonymity because the matter isn’t public.”).

may evolve into a representation that an engaged financial advisor has instituted that policy (either alone or in combination with a broader individual-level section of the Holdings Representation).

The Prior Pitch Representation

The third element of the Relationship Representation that we examine addresses the phenomenon described by Vice Chancellor Laster in *Del Monte*: “To facilitate transactional activity, investment bankers routinely pitch deals to parties they hope might be interested. Coverage officers for investment banks regularly visit past, present, and potential clients to suggest mergers, acquisitions, and other strategic alternatives.”⁴⁵ These kinds of pitches are not, of themselves, a bad thing. But, in our view, it is helpful for a board engaging a financial advisor for a sell-side engagement to know whether that advisor has recently pitched a sale of the company.⁴⁶ We refer to a representation addressing prior pitches as a Prior Pitch Representation.

We understand that many banks do not track prior pitches in a manner that would permit providing a broad Prior Pitch Representation. By way of example, a commentator to an earlier version of this article noted that a large investment bank could meet with a private equity client several times a year with pitch books identifying hundreds of potential investment candidates without logging every single one of those companies into a globally accessible conflicts system. The goal in negotiating for a Prior Pitch Representation, however, is not to capture fleeting references to a potential target company in a large pitch book. To the contrary, the goal is to capture prior substantive discussions that might affect the financial advisor’s representation of the target.

For example, in *Zale*, the board of directors of Zale selected Merrill Lynch as its financial advisor in connection with a strategic review process that ultimately led to the sale of Zale to Signet Jewelers.⁴⁷ At the time it selected Merrill Lynch, the board was not aware that a team of investment bankers from Merrill Lynch, including a banker who would eventually work on the Merrill Lynch team representing Zale, had previously pitched an acquisition of Zale to Signet management.⁴⁸ That prior pitch presented a valuation of Zale between \$17 and \$21 per share (with \$21 per share ultimately being the price Signet would agree to acquire Zale for).⁴⁹ In his initial written opinion in the litigation, Vice Chancellor Parsons found it “reasonably conceivable” that the Zale board’s failure to learn of Merrill Lynch’s conflict prior to signing the merger agreement could constitute a breach of the board’s duty of care.⁵⁰ In so finding, the court observed that the Zale board “simply [discussed] the possibility that Merrill Lynch would be con-

45. *In re Del Monte Foods Co. S’holders Litig.*, 25 A.3d 813, 819 (Del. Ch. 2011).

46. To the contrary, in *Del Monte*, “[t]he Board did not learn of [Barclay’s] efforts to stir up the initial LBO bid until discovery in th[e] litigation.” *Id.* at 820.

47. *Id.* at *1.

48. *Zale I*, 2015 WL 5853693, at *3.

49. *Id.*

50. *Id.* at *19.

flicted and apparently re[lied] without question on Merrill Lynch's representation that it had 'limited prior relationships [with Signet] and no conflicts.'"⁵¹ The court further wrote as follows:

In the context of detecting a preexisting conflict when engaging a financial advisor, [the board's] oversight duty could include negotiating for representations and warranties in the engagement letter as well as asking probing questions to determine what sorts of past interactions the advisor has had with known potential buyers, such as Signet here. In this case, it might have included a question as to whether the potential financial advisor had made any presentations regarding Zale to prospective buyers within, e.g., the last six months.⁵²

In an opinion on a motion for reargument, the court subsequently found the complaint in *Zale* failed adequately to allege a breach of the duty of care.⁵³ In doing so, the court stated, "The conduct of Merrill Lynch in this case [was] troubling," and expressly declined to modify the first sentence in the block quote above.⁵⁴ A representation designed to flesh out prior pitches of the *Zale* variety (and one we have obtained in the past) is as follows:

The Bank has not within the past year engaged in any discussions with any third party concerning the possibility of effecting, causing, or participating in a Transaction with the Company.

We recognize the concern that the above representation should not capture "fleeting references" to a target company in a pitch book and we think the use of the term "discussions" addresses the concern. That said, we suspect that, if Prior Pitch Representations become more common, financial advisors might seek additional language to demonstrate that the representation is designed only to pick up substantive discussions regarding the target company (such as discussions providing a value on the target company stock or discussions regarding the financial advisor providing buy-side financing).

51. *Zale*, 2015 WL 5853963, at *19 (alterations in original).

52. *Id.*

53. The motion for reargument was predicated on the opinion of the Delaware Supreme Court in *Corwin v. KKR Financial Holdings LLC*, No. 629, 2014, 2015 WL 5772262 (Del. Oct. 2, 2015), issued one day after *Zale I* was released. In *KKR*, the Delaware Supreme Court held that the business judgment rule, rather than the *Revlon* standard of review, applies to a change-in-control transaction not otherwise subject to entire fairness review that is "approved by an informed, voluntary vote of disinterested stockholders." *Id.* at *5. The transaction at issue in *Zale* was so approved. *Zale II*, 2015 WL 6551418, at *2. Accordingly, the court in *Zale II* analyzed plaintiff's claims to determine whether plaintiff had rebutted the presumptions of the business judgment rule (as opposed to analyzing those claims in the context of the *Revlon* standard of review, as the court had done in *Zale I*). *Id.* at *5. The court determined that plaintiff had not done so. *Id.* But see *In re TIBCO Software Inc. S'holders Litig.*, C.A. No. 10319-CB, 2015 WL 6155894 (Del. Ch. Oct. 20, 2015) (finding, in a decision issued after *KKR*, that plaintiffs had adequately pleaded a breach of the duty of care in the context of a change-in-control transaction not otherwise subject to entire fairness review that had been approved by a fully informed disinterested stockholder vote by alleging that a board failed adequately to inform itself about the circumstances of an error in share capitalization information provided to a buyer).

54. *Zale II*, 2015 WL 6551418, at *5.

Other than drafting for a particular context, the key variable open for negotiation in the Prior Pitch Representation is the length of the look back. Because the Prior Pitch Representation relates to discussions, as opposed to a definitive engagement, counsel might be comfortable limiting this look back to as little as one year. Of course, context-specific facts may call for a longer look back and, as with many provisions of a financial advisor engagement letter post-*Rural/Metro*, practice is still developing.

The Relationships Covenant

The Relationships Representation generally speaks only as of the date of the engagement letter (whether explicitly or not). But transaction processes are dynamic and conflicts may be introduced after the engagement letter has been signed. Accordingly, companies may seek a Relationships Covenant to help provide “active” oversight of financial advisor conflicts.⁵⁵

Relationships Covenants we have seen accepted require the financial advisor to update the Relationships Representation as to additional parties upon certain negotiated triggers. A formulation of the Relationships Covenant we have seen is as follows:

If the Board elects to engage in formal discussions with one or more parties other than the Relevant Parties about a Transaction, the Bank will, upon the request of the Board, disclose to the Board the information described above concerning such party or parties, and such party or parties will be, and will be deemed, a Relevant Party for purposes of this Agreement.⁵⁶

The Relationships Covenant above requires two conditions be satisfied before the obligations contained therein are triggered: (i) the board elects to “engage in formal discussions” with a party other than a Relevant Party about a Transaction and (ii) the board requests conflicts disclosure from the Bank about such party. From the board’s perspective, we would prefer a Relationships Covenant without the first condition. In other words, if a board requests additional conflicts information, we would prefer a Relationships Covenant under which it can receive such information without an analysis as to whether “formal discussions” have begun. Financial advisors, however, may not be willing to accept a broad disclosure obligation without a tie to an objective second condition, negotiated upfront, to provide some guidelines on when a financial advisor must engage in a subsequent conflict check. The language we have often seen for this second condition is the board “electing to engage in formal discussions” with other parties. Admittedly,

55. See *PLX II Transcript*, *supra* note 7, at 35–36 (“This type of continuous and diligent oversight is necessary because issues can arise during the sale process that were not foreseen or could not be fully vetted at the outset. It may be that at the outset you don’t know that a particular bidder will emerge as the most likely candidate.”).

56. A commentator on this article has asked whether this covenant is qualified by confidentiality obligations. We have not been faced with such a request (yet), but do have concern that such a qualification could end up swallowing the entire covenant. We hope that most issues arising from confidentiality obligations could be addressed in drafting the actual disclosure to be made.

“formal discussions” is not a completely clear standard. Could it simply involve negotiating a confidentiality agreement with a bidder that has survived the first round of an auction? Does it require active negotiations over definitive transaction documents? This is yet another area that is still being refined post-*Rural/Metro*.

Note that the above Relationships Covenant does not affirmatively require a financial advisor to bring-down information it previously disclosed, either pursuant to the original Relationships Representation or following a trigger of the Relationships Covenant. To address this, we have sometimes seen a form of the following covenant negotiated as part of the Relationships Covenant:

If, during the term of this letter agreement, the Bank becomes aware that any of the statements set forth in the Relationships Representation (or provided pursuant to the Relationships Covenant) is, or at the time of the execution of this letter agreement or disclosure of such information was, materially inaccurate, the Bank will promptly notify the Board and inform the Board of the manner in which such statement is or was materially inaccurate.

Target-side counsel may experience pushback from counsel to the financial advisor regarding this covenant. It is admittedly broad and imposes on the financial advisor a continuing obligation to update prior disclosures. We believe, however, it is a reasonable ask. The bring-down does not impose a continuing obligation to search for conflicts; to the contrary, it simply imposes a continuing obligation to inform the board if the financial advisor becomes aware that a statement previously made was inaccurate. Moreover, the use of a materiality (or some other form of) qualifier (as in the language above) can help bridge the gap between the board’s ask and the financial advisor’s position. Time will tell if this kind of obligation becomes more commonplace in financial advisor engagement letters. To the extent it does not, the Restricted Services Covenant, discussed in the next part, may serve to fill to some extent the hole that may exist by failing to obtain the above covenant.⁵⁷

RESTRICTED SERVICES COVENANT

Conflicts arising because another potential transaction partner enters the fray may be unavoidable. What may be avoidable (or at least mitigated), however, are

57. As discussed below (and implied by its name), the Restricted Services Covenant restricts certain, enumerated future engagements by the financial advisor for Relevant Parties that might raise conflicts that otherwise would need to be disclosed in the Relationships Representation. It does not, however, restrict investments by the financial advisor or individual bankers working the assignment. One possible common ground if the financial advisor is reluctant to include the broad bring-down requirement discussed above is to accept the narrower Relationships Covenant coupled with a strong Restricted Services Covenant and the following bring-down requirement, limited only to the Holdings Representation:

In addition, the Bank will immediately inform the Board upon the occurrence of the Bank’s or any of its affiliates’ (including portfolio companies in which the Bank has investments), or a Team Member’s having any direct holding in a Relevant Party (or, to the knowledge of the Bank or Team Member, as applicable, a portfolio company of a Relevant Party) at any time before the termination of the engagement contemplated by this Letter Agreement.

financial advisor-initiated conflicts with respect to known potential transaction partners. Although, in our experience, Restricted Services Covenants initially focused on providing buy-side financing,⁵⁸ over the years we have seen these covenants broadened to address a wider set of activities that may raise conflicts. A sample is as follows:

Notwithstanding anything herein to the contrary, during the term of this engagement, the Bank shall not provide M&A advisory services, new debt or equity capital markets or new bank financing to any Relevant Party without the prior written consent of the Board.⁵⁹

Although companies may like to have the services listed in the Restricted Services Covenant match the engagements listed in the Relationships Representation, in our experience financial advisors are more willing to include a broader set of services in a disclosure obligation than they are in a negative covenant. Accordingly, companies may negotiate to include in the Restricted Services Covenant a set of activities such as “M&A advisory services, new debt or equity capital markets or new bank financing” (on the theory that a financial advisor will not agree not to provide financing based on existing facilities).⁶⁰

Some commentators to a draft of this article wondered whether the inclusion of a Restricted Services Covenant would result in financial advisors being restricted in a materially greater fashion than lawyers representing the same client as the finan-

58. The focus on Restricted Services Covenants sharpened after then-Vice Chancellor Strine’s opinion in *In re Toys “R” Us, Inc. Shareholder Litigation*, 877 A.2d 975 (Del. Ch. 2005). In *Toys “R” Us*, Vice Chancellor Strine observed that First Boston, financial advisor to the target board, created an “unnecessary issue” by asking to provide buy-side financing while the strategic review process was ongoing. *Id.* at 1005. The Vice Chancellor was careful to note, however, that he was not “making a bright-line statement” as to the propriety of a sell-side advisor providing buy-side financing. *Id.* at 1006 n.46. In a footnote, the Vice Chancellor distinguished between a collective decision among the directors and financial advisors to provide traditional “stapled” financing and a middle-of-the-process request of a financial advisor to provide buy-side financing. *Id.* at 1006 n.46. The difference between traditional “stapled” financing and other buy-side financing is explained in *Bankers and Chancellors*:

Staples first appeared as part of a larger package deal: the selling corporation puts itself (or a piece of itself) up for auction and offers debt financing to potential purchasers in tandem with the sale—financing to be supplied by the seller’s banker-advisor. The financing package is thus “stapled” to the offering memorandum. The impetus for these couplings came from the banks themselves, which held out their lending capacity to lure potential selling companies into accepting their advisory services. Over time, the term “staple” has come to be used more loosely, applying in any case where the seller’s banker-advisor participates in financing the buyer’s purchase.

Bankers and Chancellors, *supra* note 5, at 18. Professors Bratton and Wachter report that “[s]tapled financing persists, but not in acquisitions likely to trigger *Revlon* scrutiny.” *Id.* at 9; *see also id.* at 5 n.18 (citing an article by Liz Hoffman that appeared in *LAW360* for the proposition that, after *Del Monte* and *El Paso*, “staples were said to have largely disappeared”). We do not read *Toys “R” Us* to question the use of “stapled financing” in the traditional sense (as described in *Bankers and Chancellors*), especially in a transaction where financing might not otherwise be readily available.

59. Restricted Services Covenants, such as the example above, often will provide an escape hatch allowing the committee or board to consent to the financial advisor providing otherwise restricted services. Of course, even absent an express escape hatch, the engagement letter always may be amended or the negative covenant may be waived.

60. If a financial advisor is a party to an existing credit facility of a potential transaction partner, we expect that fact will be disclosed in connection with the Relationships Representation or Relationships Covenant.

cial advisor. Those commentators noted that lawyers often obtain a broad advance waiver in their engagement letters, facially allowing lawyers to take on transactions involving conflicts similar to those that might arise should a financial advisor undertake a representation it would be restricted from taking under the Restricted Services Covenant. To this we note that, notwithstanding any advance waiver, lawyers are governed by professional rules of conduct. For example, Rule 1.7(b) of the Delaware Lawyers' Rules of Professional Conduct prohibits a lawyer from taking on a matter involving a "concurrent conflict of interest," notwithstanding an advance waiver, if, among other things, the lawyer does not reasonably believe she will be able to provide competent and diligent representation to each affected client.⁶¹ To the contrary, most financial advisor engagement letters disclaim any notion that the financial advisor has fiduciary duties to its client.⁶²

We acknowledge that, although an attorney with an advance waiver must judge for herself whether the advance waiver permits her firm to take on another assignment that may involve a conflict of interest without running afoul of ethical obligations, a financial advisor subject to a Restricted Services Covenant must seek express approval for taking on such a representation from her client. Professors Bratton and Wachter suggest that a board should "proactively extract[] a quo" for the "quid" of consenting to a representation that otherwise might be prohibited by a Restricted Services Covenant.⁶³ In theory, that makes a lot of sense. Practically, we believe that if market practice becomes "extract a quo for every quid of releasing a bank from a Restricted Services Covenant," financial advisors will not be willing to sign up to such covenants. In other words, financial advisors might be unwilling to risk having to forego an opportunity, for example, to provide financing on an unrelated transaction to one of five bidders in a months-long auction process if boards of directors felt too constrained in providing consent to a representation otherwise prohibited by a Restricted Services Covenant.⁶⁴

At times, we have seen financial advisors negotiate up front for specific exclusions to the Restricted Services Covenant (thus avoiding, or at least mitigating, the possibility that the target board would feel obligated to extract a "quo" for a consent midstream). These exclusions range from general advisory services and current assignments to financing arrangements not involving an acquisition of the target company or all or substantially all of its business or assets and any

61. DEL. LAWYERS' RULES OF PROF'L CONDUCT R. 1.7(b) (2010).

62. *But see Bankers and Chancellors*, *supra* note 5, at 42 ("Across-the-board provisions that disclaim a fiduciary duty to the client corporation and its board of directors present more of a problem, for they raise a theoretical question as to whether or not the common law of agency imports a mandatory fiduciary duty."); *supra* note 14.

63. *Bankers and Chancellors*, *supra* note 5, at 53.

64. In practice, we have represented clients who have provided their consent to a facial conflict pursuant to a Restricted Services Covenant. Such a decision was made only after the board understood the potential conflict, took stock of the stage of its own market check, and obtained assurances as to the creation of information walls by the financial advisor. Other "asks" we could imagine include a credit to the initial financial advisor's fairness opinion fee if a "conflict cleansing" second financial advisor is brought in (discussed in the next part of this article) and perhaps a fall away of a tail fee if the financial advisor does not abide by the information walls it created.

financing arrangements located on another side of an internal informational wall. The willingness of a board to include such up-front exclusions may be dependent upon whether it appears conflicts might arise in the board's review process (e.g., a board may be more willing to negotiate up-front for exclusions to the Restricted Services Covenant if it is engaging a bank to perform a broad pre-signing auction process as opposed to, say, a proposed go-private transaction). Once again, market practice, in our experience, is still developing.

ADDRESSING IDENTIFIED CONFLICTS: SUBSTITUTE FINANCIAL ADVISOR PROVISIONS AND TAIL FEE PROVISIONS

Substitute Financial Advisor Provisions

As mentioned above, conflicts not identified at the onset of a financial advisor engagement may surface during the course of a transaction process, and on a few occasions we have seen parties to financial advisor engagement letters negotiate at the time of engagement for the possibility of a conflict arising because the financial advisor requests to be released from the Restricted Services Covenant for a particular engagement. Such negotiation often will lead to a provision offering a "credit" to the target for the cost of the financial advisor delivering a fairness opinion, thus allowing the board to obtain a "conflict cleansing" second financial advisor.⁶⁵ The following is based on a form we have seen to address this issue, and it could be included following the first sentence of the Restricted Services Covenant:

The Bank acknowledges and agrees that in the event that Bank provides such services with the prior written consent of the Board ("Other Services"), any Sale Transaction Fee that becomes payable to Bank hereunder shall have deducted from it an amount equal to the Opinion Fee. In addition, Bank shall ensure that employees of the Bank working on this engagement (i) will not simultaneously work on any team providing the Other Services, and (ii) will not share with any team providing the Other Services any confidential information received from the Company or the Board under this Agreement unless the Board has otherwise authorized such information to be shared.

Of course, this language need not be in the initial engagement letter and could be negotiated as a condition to the board giving consent to the financial advisor providing services otherwise prohibited by the Restricted Services Covenant. That said, in some circumstances we have seen this language appear in financial advisor engagement letters *ab initio*.⁶⁶

65. In *El Paso*, Morgan Stanley was engaged as a "conflict cleansing" financial advisor. However, the court observed that Morgan Stanley would not be paid any transaction fees if the El Paso board chose not to move ahead with the Kinder Morgan merger and instead to move ahead with a spinoff of certain El Paso assets—which would net fees only for Goldman and not for Morgan Stanley. Accordingly, the court found, the "conflict cleansing" bank had a compensation structure that incentivized it to favor the deal it was brought in to evaluate. *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 442 (Del. Ch. 2012).

66. In addition, if certain exclusions from a Restricted Services Covenant are negotiated at the time the engagement letter is executed, those exclusions could be tied to some of the affirmative covenants contained in the language above.

It bears mentioning that we have seen financial advisors try to add to this language an acknowledgement by the target that, if the target obtains a second financial advisor to perform “conflict cleansing,” the original financial advisor need not deliver a fairness opinion.⁶⁷ Counsel should, however, be aware of then-Chancellor Strine’s discussion in *In re Transatlantic Holdings, Inc. Shareholders Litigation*.⁶⁸ In *Transatlantic*, the Chancellor suggested that the financial advisor running the process should provide a fairness opinion regardless of whether a subsequent financial advisor is brought in to provide a fairness opinion:

I don’t understand the idea of a banker running a process, doing all the cool and important stuff, and not having to back it up with a fairness opinion. It in no way addresses the conflict for the person who plays the operative role to not actually have to put the fairness opinion on the line. In fact, it would seem more vital when someone acts in a conflicted basis to make them render a fairness opinion. So, what, I’m going to pay someone the most, [L]et them do the really important advisory role, let them do the really important stuff, which is testing the market, giving strategic advice, but I’m going to hand off to someone else giving the fairness opinion because the person I’m asking to do the most important stuff is conflicted? That is a very strange cure.⁶⁹

Finally with respect to Substitute Financial Advisor Provisions, it bears noting that we have not yet seen financial advisors willing to forego their fairness opinion fee if a conflict arises through no fault of their own—i.e., where a new potential bidder, with whom the financial advisor has a prior relationship, becomes actively involved in the process, thereby causing significant potential for a disabling conflict. In that situation, it may be wise for the board to hire a conflict-cleansing second financial advisor (and for this reason, we often try to strike any language requiring the board to retain a financial advisor as an exclusive one). But, perhaps because one benefit of hiring larger banks as financial advisors—as opposed to boutiques—is the larger banks’ relationships with potential transaction partners (especially financial sponsors), we have not yet seen an agreement that the initial financial advisor will forego its fairness opinion fee in this circumstance, nor do we expect one.

Tail Fee Provisions

Even if a sell-side company is able to negotiate for a Relationships Representation, Relationships Covenant, and Restricted Services Covenant from a financial advisor, addressing a breach of those provisions in the middle of a sale process may be impractical. In fact, depending on conflicts that might arise from such a breach, the most practical action for the target board to take may be to hire a

67. In *Rural/Metro* itself, “RBC had delayed working on a fairness analysis because the firm still hoped to secure a buy-side financing role and did not want to render a fairness opinion under those circumstances.” *Rural I*, 88 A.3d at 76.

68. Transcript of Status Conference and Motion to Expedite, C.A. Nos. 6574 & 6776 (Del. Ch. Aug. 22, 2011).

69. *Id.* at 92.

new financial advisor.⁷⁰ Most financial advisor engagement letters require the target to pay a tail fee (i.e., a full transaction fee and not just a fairness opinion fee) if the target engages in a transaction for a specific period after termination of the financial advisor's engagement absent a termination for "cause," which is typically a high benchmark such as "willful misconduct or bad faith." This could make remediation of such a mid-process breach expensive for the target.

Accordingly, companies may negotiate for a provision eliminating the tail fee if the financial advisor has "materially breached" (i.e., lower than "willful" or "in bad faith") any of the Relationships Representation, Relationships Covenant, or Restricted Services Covenant. For example:

If, at any time prior to the expiration of 12 months following the termination of this agreement (other than a unilateral termination by the Bank or termination for Cause (as defined below) by the Company), the Company enters into an agreement that subsequently results in a Transaction or consummates a Transaction, then the Company will pay the Bank the Transaction Fee specified above in cash promptly upon the closing of the Transaction. Termination for "Cause" means termination by the Company prior to entering into a definitive agreement with respect to a Transaction because of a material breach of representation by the Bank with respect to the representation contained in Section __ hereof or a material breach of the covenants contained in Section __ and Section __ hereof, or willful misconduct, bad faith or gross negligence by the Bank in performing this engagement which conduct is not substantially remedied by the Bank after 10 days written notice from the Company stating that the Company believes such conduct constitutes Cause.

Of course, the efficacy of this provision depends on when the breach is identified. Let's return to the hypothetical set out at the beginning of this article. Bank A has been providing financial advice throughout a process. The process began when Party A lobbed a bid over the transom. Bank A indicated it had a few small prior engagements for Party A in its Relationships Representation, and the board decided those small prior engagements did not result in a disabling conflict. A few alternative bidders are contacted, but a broad-based auction is not run. At the end of the process, Party A emerges the winner. As we are negotiating the short strokes of the acquisition agreement, we receive a call from counsel to Bank A that it has noted a few more conflicts while updating its conflicts check for purposes of disclosure in its fairness opinion. At that time, it may not be feasible to hire a new financial advisor and, despite the frustration, the client may have to swallow the risk.⁷¹

70. In theory, a board could bring an action for specific performance of a Restricted Services Covenant against its financial advisor. Practically, we suspect that if a board is suing its financial advisor, that financial advisor no longer is the correct one to be assisting the board in its review of strategic alternatives.

71. In the *PLX* litigation, the plaintiff alleged that Deutsche Bank belatedly disclosed conflicts vis-à-vis the acquiror, but that the special committee failed appropriately to respond to that disclosure. Although some of the following observations from Vice Chancellor Laster pertain to issues arising outside the scope of an engagement letter, they are worthwhile considerations for any attorney who finds herself advising a client in a similar situation:

CONCLUSION

Delaware corporate law affords directors significant leeway in their substantive decisions so long as those decisions result from a “good” process. *Rural/Metro* tells us that a “good” process requires “active and direct oversight” over financial advisors.⁷² A case decided only a month after *Rural I* illustrates how the provisions discussed above, which encourage the surfacing of conflicts, can protect directors and advisors. In *Houseman v. Sagerman*, plaintiffs alleged that a board that had used the company’s largest creditor as its financial advisor breached its duty of care and that the financial advisor aided and abetted that breach.⁷³ Vice Chancellor Glasscock rejected the argument:

the Plaintiffs do not contend that the Universata Board was unaware of that fact [that the financial advisor was the target’s largest creditor]. . . . Without allegations that KeyBanc actively concealed information to which it knew the Board lacked access . . . the Plaintiffs fail to adequately plead knowing participation in a breach of duty: the Plaintiffs have simply not pled that KeyBanc misled the Universata Board or created an “informational vacuum” sufficient for a finding of knowing participation in a breach.⁷⁴

As discussed, the complaint suggests that the committee considered only whether PLX needed to hire a second banker. What the directors should have considered was the magnitude of Deutsche Bank’s conflict, whether it tainted the sale process up to that point, whether it suggested any steering, and the implications of Deutsche Bank’s work to date and for the sale process going forward.

There were a wide range of options available to the directors both in terms of the Deutsche Bank relationship and the sale process. The alternatives ranged from doing nothing, which the directors actually chose—that would be one extreme—to firing Deutsche Bank, seeking legal remedies and starting all over. That’s the other extreme. Those are both the fat tails of the distribution. The spectrum of intermediate possibilities is limited only by the resourcefulness of the directors and their legal advisors. But one could envision lots of potential fixes that would likely fall within the range of reasonableness even at the pleading stage. They could range from Deutsche paying for the retention of a second bank to review the process and recommend any corrective action and carry it out. They could have ranged, as I suggested, to reaching out again to particular competing bidders, providing them with additional time or releasing them from their standstills. It could have extended to contacting new bidders.

We know from Vice Chancellor Strine, then Vice Chancellor Strine’s decision in *Pennaco* as well as the Supreme Court’s decision in *C&J* that there is a relationship between what you do pre-agreement and what you can agree to post-agreement. In other words, the degree of pre-agreement exploration and price discovery affects the amount of post-agreement lockup. Once you had Deutsche’s taint revealed, the board, in my view, had to rethink that calibration.

PLX II Transcript, *supra* note 7, at 40–41.

72. *Rural II*, 102 A.3d at 218.

73. *Houseman v. Sagerman*, C.A. No. 8897-VCG, 2014 WL 1600724 (Del. Ch. Apr. 16, 2014).

74. *Id.* at *9. In *Rural II*, Vice Chancellor Laster suggested that “[d]irectors may breach their duties and yet be ‘fully protected’ under Section 141(e) if they reasonably rely on advisors.” *Rural II*, 102 A.3d at 239. Based on that statement, one might surmise a situation where the directors “reasonably relied” on a conflicts disclosure that turned out to be incorrect such that the directors have breached their duty of care and an underlying breach exists for purposes of an aiding and abetting claim. If a board were to negotiate for the type of provisions discussed above and simply receives incorrect information, it may be difficult to prove the board breached its duty of care in learning about actual and potential conflicts faced by its financial advisors. In any event, the text above from *Houseman* provides some comfort that, should the board obtain contractual provisions similar to those discussed above,

In our view, the provisions discussed above will aid in director oversight. There is legitimate debate whether the disclosures contemplated by these provisions are best addressed in an engagement letter or some other form of writing. For the reasons discussed above, engagement letters are an effective route for addressing these issues. Regardless of the medium, should the post-*Rural/Metro* trend toward conflicts disclosures continue, we should see more opinions of the *Houseman* variety and less of the *Rural/Metro* one.

EXHIBIT A—FORM OF ENGAGEMENT LETTER, MARKED TO SHOW
COMMENTS FROM COMPANY'S COUNSEL

STRICTLY CONFIDENTIAL

[Company and Address]

Attention:

Ladies and Gentlemen:

Pursuant to our recent discussions, we are pleased to confirm the arrangements under which _____ (the "Investment Bank") is engaged by the Board of Directors (the "Board") of _____ (the "Company") to act as its financial advisor in connection with evaluating strategic and financial alternatives including a possible Transaction (as defined below) between the Company and any other person (any such person, together with its affiliates, a "Purchaser"). For purposes hereof, the term "Transaction" shall mean, whether in one or a series of transactions, (a) any merger, consolidation, joint venture or other business combination pursuant to which the shareholders of the Company immediately prior to the consummation of such Transaction cease to own at least 50 percent of the resulting entity; (b) the acquisition by a Purchaser, directly or indirectly, of more than 50 percent of the capital stock of the Company by way of tender or exchange offer, negotiated purchase or any other means; and/or (c) the acquisition by a Purchaser, directly or indirectly, of all or substantially all of the assets, properties and/or businesses of the Company, by way of a direct or indirect purchase, lease, license, exchange, joint venture or other means.

1. Financial Advisory Services. During the term of this agreement ("Agreement") we will:
 - a. familiarize ourselves with the financial condition and business of the Company and, to the extent necessary, any prospective Purchaser, and advise and assist the Board in considering the desirability of effecting a Transaction or other strategic or financial alternatives;
 - b. if requested, assist the Board in preparing a memorandum (based entirely on information supplied by the Company) for distribution to potential Purchasers as approved in advance by the Board, describing the Company, its business and financial condition;
 - c. assist the Board in identifying and contacting potential Purchasers as approved in advance by the Board, to ascertain their interest in a Transaction or other strategic or financial alternatives; and
 - d. advise and assist the Board in its negotiation of the financial aspects of a Transaction or other strategic or financial alternatives.

In addition, at the request of the Board, the Investment Bank will render an opinion (in writing if so requested) to the Board (the “Opinion”) as to the fairness, from a financial point of view, of the consideration to be received by the Company or its shareholders in connection with the Transaction, or, in the case of a stock-for-stock merger, the fairness of the exchange ratio. The nature and scope of our investigation as well as the scope, form and substance of the Opinion shall be such as the Investment Bank considers appropriate.

The Board acknowledges that the scope of the Investment Bank’s assignment hereunder does not include or constitute an express or implied commitment by the Investment Bank to purchase or place securities, or to provide or be responsible to provide any financing or enter into any other principal transactions, or include any obligation to provide financial advice with respect to any financing or markets transaction to be undertaken by the Company.

The Board, the Company and the Investment Bank agree that the Standard Terms and Conditions attached hereto form an integral part of this Agreement and are hereby incorporated herein by reference in their entirety.

2. Compensation. The fees payable to the Investment Bank for the foregoing services shall be as follows:
 - a. a fee of \$_____, payable upon delivery by the Investment Bank of an Opinion at the request of the Board, which shall be credited against any Transaction Fee (as defined below); and
 - b. a fee (the “Transaction Fee”), payable upon the closing of a Transaction, in an amount equal to \$_____.

The Investment Bank will be entitled to receive the compensation provided for above if the events specified above occur (or in the case of clause (b), an agreement is entered into which subsequently results in a consummated Transaction) during the term of this Agreement or at any time within 12 months after expiration or termination of this Agreement, as the case may be. All fees payable hereunder are nonrefundable.

3. Expenses and Payments. In addition to our fees for professional services, the Company agrees to reimburse us for, and we will separately bill, our reasonable expenses as incurred, including travel costs, document production and other similar expenses, and reasonable fees of counsel and other professional advisors, provided that the aggregate amount of expenses subject to reimbursement hereunder (excluding, for the avoidance of doubt, any expenses contemplated by Section 1 of the Standard Terms and Conditions) shall not exceed \$_____ without the consent of the Company (not to be unreasonably withheld). All amounts

payable under this Agreement (including the Standard Terms and Conditions) shall be paid in immediately available funds in U.S. dollars, without setoff and without deduction for any withholding, value-added or other similar taxes, charges, fees or assessments.

4. Term. This Agreement will be effective as of _____ (the “Effective Date”) and will expire on the date twelve months after the Effective Date. Our services hereunder may be earlier terminated with or without cause by the Board or by us at any time and without liability or continuing obligation to the Board or the Company or to us (except for any expenses incurred by us to the date of termination); provided that the provisions of Sections 2 and 3 hereof and Sections 1, 2 and 4 of the Standard Terms and Conditions- and the last sentence of this Section 4, shall survive any termination or expiration of this Agreement. The Investment Bank agrees that, from the date on which this Agreement terminates, whether by expiration or termination, and continuing through the first anniversary of said date, the Investment Bank shall not engage in discussions with any third person regarding the possibility of engaging in a Transaction with the Company.
5. Representations and Warranties. The Investment Bank represents and warrants to the Company and the Board that, except as set forth on Schedule A annexed hereto and made a part hereof:
 - a. Neither the Investment Bank nor IB Parent (as defined in the Standard Terms and Conditions) is, or has, within the past one (1) year, engaged in any discussions with any third party regarding the possibility of effecting, causing or participating in a Transaction regarding the Company; and
 - b. Neither the Investment Bank nor IB Parent has, within the past two (2) years, had any relationship¹ with the following third parties that the Company believes may be interested in engaging in a Transaction with the Company: [list].
6. Covenants of Investment Bank. During the term of this Agreement:
 - a. The Investment Bank will promptly disclose to the Board any existing relationship it has, and any relationship¹ it has had within the prior two years, with any third person that the Investment Bank, in good faith, determines is a potential participant in a Transaction, or expresses interest to the Investment Bank in participating in a Transaction. The Board and the Company shall keep this information confidential, except to the extent they determine, upon advice of counsel, that they are required to disclose the same in a public filing or otherwise.

1. We can discuss a materiality qualifier.

b. The Investment Bank will not, without the express written permission of the Board, grant a waiver or consent, on behalf of the Company or the Board, to any third party allowing said third party to take an action, or not take an action, that its agreements with the Company and/or the Board would otherwise prohibit it from taking or require it to take (for example, and without limitation, allowing a bidder that has agreed not to discuss the possibility of a joint bid with any other potential bidder to engage in such discussions, or a bidder that has agreed to maintain the confidentiality of the Company's confidential information from using it for a purpose otherwise prohibited).

c. The Investment Bank shall perform its services under this Agreement as a fiduciary to the Board, the Company and its shareholders.

If the terms of our engagement as set forth in this Agreement (including the attached Standard Terms and Conditions) are satisfactory, kindly sign the enclosed copy of this letter and return it to the undersigned. We look forward to working with the Board on this assignment.

Very truly yours,

Accepted and Agreed As Of
The Date First Written Above:
Board of Directors of _____

With respect to the obligations of the Company hereunder:

Company

By: _____

Name:

Title:

STANDARD TERMS AND CONDITIONS

The following general terms and conditions shall be incorporated by reference into the engagement letter dated _____ between the Board of Directors of _____ (the “Board”) and the Investment Bank to which these terms are attached (the “Engagement Letter”). Capitalized terms used below without definition shall have the meanings assigned to them in the Engagement Letter and any references herein to the “Agreement” shall mean the Engagement Letter together with these Standard Terms and Conditions.

1. Indemnification and Contribution.

- a. The Company agrees (i) to indemnify and hold harmless the Investment Bank and its affiliates, and the respective directors, officers, agents, and employees of the Investment Bank and its affiliates (the Investment Bank and each such entity or person being referred to

as an “Indemnified Person”) from and against any losses, claims, demands, damages or liabilities of any kind (collectively, “Liabilities”) relating to or arising out of activities performed or services furnished pursuant to the Agreement, any Transaction or the Investment Bank’s role in connection therewith, and (ii) to reimburse each Indemnified Person for all reasonable expenses (including reasonable fees and disbursements of counsel) incurred by such Indemnified Person in connection with investigating, preparing or defending any investigative, administrative, judicial or regulatory action or proceeding in any jurisdiction related to or arising out of such activities, services, Transaction or role, whether or not in connection with pending or threatened litigation to which any Indemnified Person is a party, in each case as such expenses are incurred or paid. The Company will not, however, be responsible for any such Liabilities or expenses to the extent that they are finally judicially determined to have resulted primarily from the Investment Bank’s bad faith, gross negligence or willful misconduct. Each of the Board and the Company also agrees that no Indemnified Person shall have any liability (whether direct or indirect, in contract, tort or otherwise) to the Board (or any member thereof) or to the Company or any of its securityholders or creditors for or in connection with the Agreement, any Transaction or the Investment Bank’s role or services in connection therewith, except to the extent that any such Liabilities or expenses incurred by the Board (or any member thereof) or the Company are finally judicially determined to have resulted primarily from the Investment Bank’s bad faith, gross negligence or willful misconduct. In no event shall the Company or any Indemnified Person be responsible for any special, indirect or consequential damages incurred by the other; provided that nothing in this sentence shall be deemed to (i) relieve the Company of any obligation it may otherwise have hereunder to indemnify an Indemnified Person for any such damages asserted by an unaffiliated third party or (ii) relieve the Investment Bank of any liability it may otherwise have hereunder to the Company for any such damages which the Company becomes legally obligated to pay to an unaffiliated third party.

- b. The Company shall not be liable for any settlement of any litigation or proceeding effected without its written consent. The Company will not, without the Investment Bank’s written consent, settle, compromise, consent to the entry of any judgment in or otherwise seek to terminate any claim, action or proceeding in respect of which indemnity may be sought hereunder, whether or not any Indemnified Person is an actual or potential party thereto, unless such settlement, compromise, consent or termination includes an unconditional release of each Indemnified Person from any liabilities arising out of

such claim, action or proceeding. If the Company enters into any agreement or arrangement with respect to, or effects, any proposed sale, exchange, dividend or other distribution or liquidation of all or substantially all of its assets in one or a series of transactions, the Company shall use its reasonable efforts to provide for the assumption of its obligations under this Section 1 by the purchaser or transferee of such assets or another party reasonably satisfactory to the Investment Bank.

- c. If the foregoing indemnification is unavailable or insufficient to hold an Indemnified Person harmless in respect of any Liabilities (and related expenses) referred to therein then, in lieu of indemnifying such Indemnified Person hereunder, the Company shall contribute to the amount paid or payable by such Indemnified Person as a result of such Liabilities (and related expenses relating thereto) in such proportion as is appropriate to reflect the relative benefits to the Company, on the one hand, and the Investment Bank, on the other hand, of the Transaction (whether or not the Transaction is consummated) and also the relative fault of each of the Company and the Investment Bank, as well as any other relevant equitable considerations; provided, however, that except to the extent that any such Liabilities or expenses are finally judicially determined to have resulted primarily from the Investment Bank's bad faith, gross negligence or willful misconduct, in no event shall the Indemnified Persons be required to contribute an aggregate amount in excess of the aggregate amount of fees actually received by the Investment Bank under the Engagement Letter. For the purposes of this Agreement, the relative benefits to the Company and the Investment Bank of the Transaction shall be deemed to be in the same proportion as (i) the total value paid or contemplated to be paid or received or contemplated to be received by the Company or its securityholders, as the case may be, in connection with the Transaction or Transactions that are the subject of the Engagement Letter, whether or not any such Transaction is consummated, bears to (ii) the fees paid or to be paid to the Investment Bank under the Engagement Letter.
- d. The Investment Bank agrees (i) to indemnify and hold harmless the Company and the Board (the Company and the Board each being referred to as a "Company Indemnified Person") from and against any Liabilities relating to or arising out of activities performed or services furnished by the Investment Bank pursuant to the Agreement that are in breach of this Agreement or that otherwise are found by a court of competent jurisdiction to have caused the members of the Board to have violated their fiduciary duties to the Company and/or its shareholders, and (ii) to reimburse each Company Indemnified Person for all reasonable expenses (including reasonable fees and disbursements

of counsel) incurred by such Company Indemnified Person in connection with investigating, preparing or defending any investigative, administrative, judicial or regulatory action or proceeding in any jurisdiction related to or arising out of such activities or services. The indemnification provided for in this Section 1(d) shall have priority over any indemnification or contribution required elsewhere in this Section 1, and neither the Investment Bank nor any Indemnified Person shall be entitled to indemnification, contribution or reimbursement pursuant to Sections 1(a) through (c) above for any matter for which indemnification and/or reimbursement is required pursuant to this Section 1(d).

2. Financial Advisory Role, Information, Reliance, Confidentiality, etc.
 - a. The Board and the Company understand that the Investment Bank is acting solely as a financial advisor to the Board, is acting as an independent contractor and is not undertaking to provide any legal, accounting or tax advice in connection with its engagement under the Agreement and that the Investment Bank's role in any due diligence will be limited solely to performing such review as it shall deem necessary to support its own advice and analysis and shall not be on behalf of the Board or the Company.
 - b. Each of the Board and the Company agrees to provide to the Investment Bank all information reasonably requested by the Investment Bank for the purpose of its engagement under the Agreement and also to provide access to employees and directors of the Company (including the members of the Board), so long as such access is reasonable given the confidential nature of the contemplated process. The Company also agrees that upon closing of any Transaction, the Company shall notify the Investment Bank, in writing, (i) whether it expects to treat the consummated Transaction as a "reportable transaction" within the meaning of Treasury Regulation Section 1.6011-4(b), and (ii) if so, the applicable category of "reportable transaction." The Investment Bank shall be entitled to rely upon and assume, without any obligation of independent verification, the accuracy and completeness of all information that is publicly available and of all information that has been furnished to it by the Company or any Purchaser or otherwise reviewed by the Investment Bank, and the Investment Bank shall not assume any responsibility or have any liability therefor. The Investment Bank has no obligation to conduct any appraisal of any assets or liabilities or to evaluate the solvency of the Company or any Purchaser under any state or federal laws relating to bankruptcy, insolvency or similar matters. It is specifically agreed that (x) the Company shall be solely responsible for the accuracy and completeness of the memorandum referred to in Section 1(b) of the

Engagement Letter, and (y) other than as contemplated by such Section l(b) of the Engagement Letter, such memorandum may not be disclosed publicly or made available to third parties, except with the Investment Bank's prior written consent.

- c. In order to enable the Investment Bank to bring relevant expertise to bear on its engagement under the Agreement from among its global affiliates, the Company agrees that the Investment Bank may share information obtained from the Company hereunder with its affiliates, and may perform the services contemplated hereby in conjunction with its affiliates, and that any of the Investment Bank affiliates performing services hereunder shall be entitled to the benefits (other than the right to receive fees) and subject to the terms of the Agreement. The Board and the Company agree that, following closing of any Transaction, the Investment Bank may, at its option and expense, place an advertisement or announcement in such newspapers and periodicals as it may determine describing the Investment Bank's role as financial advisor to the Board; provided that any such advertisement or announcement shall be in form and substance reasonably acceptable to the Board. Each of the Board and the Company agrees that the Investment Bank shall have the right to review and pre-approve any reference to it or its role as financial advisor under the Agreement in any public statement made by the Board or the Company (such approval not to be unreasonably withheld).
- d. The Investment Bank's financial advice is intended solely for the benefit and use of the members of the Board (in their respective capacities as such) in considering a Transaction, is not on behalf of, and shall not confer rights or remedies upon, any shareholder or creditor of the Company or any other person, and may not be used or relied upon for any other purpose. Except as otherwise required by applicable law or governmental or stock exchange regulation, each of the Board and the Company will treat the Investment Bank's advice and the terms of the Agreement as confidential and will not disclose them to any third party (other than, on a confidential basis, to its counsel and other advisors in connection with a Transaction, it being understood that the Company will be responsible for any breach by such counsel or advisors of the provisions of this sentence) in any manner without the Investment Bank's prior written approval; provided, that each of the Board and the Company shall be entitled to utilize the Opinion in connection with its defense of any action, suit or proceeding relating to the Transaction; provided, further, that the Company may reproduce the Opinion in full in any proxy or information statement or Schedule 14D-9 or other filing relating to the Transaction which the Company must, under applicable law, file with any government agency or distribute to its shareholders. In

such event, the Company may also include references to the Investment Bank and summarize the Opinion (in each case in such form as the Investment Bank shall provide or pre-approve in writing) in any such document.

- e. Notwithstanding any other provision herein, the Board and the Company and each of its employees, representatives or other agents may disclose to any and all persons, without limitation of any kind, the U.S. income and franchise tax treatment and the U.S. income and franchise tax structure of the transactions contemplated hereby and all materials of any kind (including opinions or other tax analyses, if any) that are provided to the Board or the Company relating to such tax treatment and tax structure insofar as such treatment and/or structure relates to a U.S. income or franchise tax strategy, if any, provided to the Board or the Company by the Investment Bank or its affiliates.

3. Other Business Relationships.

- a. Each of the Board and the Company understands that the Investment Bank and its affiliates (collectively, “IB Parent”) comprise a full service securities firm and a commercial bank engaged in securities trading and brokerage activities, as well as providing investment banking, asset management, financing, and financial advisory services and other commercial and investment banking products and services to a wide range of corporations and individuals. In the ordinary course of our trading, brokerage, asset management, and financing activities, IB Parent may at any time hold long or short positions, and may trade or otherwise effect transactions, for our own account or the accounts of customers, in debt or equity securities or senior loans of any Purchaser, the Company or any other company that may be involved in a Transaction. IB Parent recognizes its responsibility for compliance with federal securities laws in connection with such activities.
- b. In addition, IB Parent may have and may in the future have investment and commercial banking, trust and other relationships with parties other than the Company, which parties may have interests with respect to the Company, a Purchaser or a Transaction. Notwithstanding anything contained herein, during the term of the Agreement, IB Parent shall not (i) act as M&A financial advisor to any party (other than the Board) in connection with a Transaction; or (ii) arrange and/or provide financing to potential Purchasers in respect of a Transaction. In addition, nothing in this Agreement shall be deemed to restrict (CA) any direct or indirect principal activities undertaken by any fund or portfolio company in which any IB Parent entity has non-controlling investments, (DB) any ordinary course sales and trading activity undertaken by employees who have not

had access to the information received by the Investment Bank under the Agreement or (EC) any IB Parent entity or business engaged in providing private banking or investment management services. Although IB Parent in the course of its other relationships may acquire information about a Transaction, a Purchaser or such other parties, IB Parent shall have no obligation to disclose such information, or the fact that IB Parent is in possession of such information, to the Board or the Company or to use such information on the Board's behalf. Furthermore IB Parent may have fiduciary or other relationships whereby IB Parent may exercise voting power over securities of various persons, which securities may from time to time include securities of the Company, a Purchaser, or others with interests with respect to a Transaction. Each of the Board and the Company acknowledges that IB Parent may exercise such powers and otherwise perform its functions in connection with such fiduciary or other relationships without regard to its relationship to the Board hereunder.

4. Miscellaneous. The Agreement may not be assigned by the Board, the Company or the Investment Bank without the prior written consent of the others. The Agreement constitutes the entire understanding of the parties with respect to the subject matter thereof, supersedes all prior agreements with respect thereto, may not be amended except in writing signed by all of the parties, has been duly authorized and executed by each of the parties hereto and constitutes the legal, binding obligation of each such party. The Agreement shall be governed by and construed in accordance with the laws of the State of New York without reference to principles of conflicts of law. Each of the Board, the Company and the Investment Bank irrevocably and unconditionally submits to the exclusive jurisdiction and venue of any State or Federal court sitting in New York City over any action, suit or proceeding arising out of or relating to this Agreement. Each of the Board, the Company and the Investment Bank irrevocably and unconditionally waives any objection to the laying of venue of any such action brought in any such court and any claim that any such action has been brought in an inconvenient forum. The Investment Bank, the Board and the Company (on its own behalf and, to the extent permitted by law, on behalf of the shareholders of the Company) each waives any right to trial by jury in any action, claim, suit or proceeding with respect to the Investment Bank's engagement as financial advisor under the Agreement or its role in connection herewith.

EXHIBIT B—COLLECTED PROVISIONS

Engagement Representation

Except as set forth on Schedule A, the Bank has not, within the past three years, had investment banking, capital markets or lending engagements with respect to the parties identified thereon (the “Relevant Parties”), or to the Bank’s knowledge, a portfolio company of a Relevant Party. Schedule A also sets forth the total fees derived from such engagements by the Bank.

Holdings Representation

The Bank has previously disclosed to the Board, and hereby represents, that the Bank and its affiliates (including portfolio companies in which the Bank has investments) do not beneficially own any interests in the Company, a Relevant Party, or to the Bank’s knowledge, a portfolio company of a Relevant Party. In addition, the Bank has had discussions with the Vice President and Managing Directors that the Bank intends to work on this engagement (comprising _____ (the “Team Members”)) and has confirmed that, other than as set forth on Schedule B, no Team Member has any direct holding, as of the date hereof, in the Company, a Relevant Party, or, to the relevant Team Member’s knowledge, a portfolio company of a Relevant Party.

Prior Pitch Representation

The Bank has not within the past year engaged in any discussions with any third party concerning the possibility of effecting, causing, or participating in a Transaction with the Company.

Relationships Covenant

If the Board elects to engage in formal discussions with one or more parties other than the Relevant Parties about a Transaction, the Bank will, upon the request of the Board, disclose to the Board the information described above concerning such party or parties, and such party or parties will be, and will be deemed, a Relevant Party for purposes of this Agreement.

Bring-Down of Relationship Representation and Relationships Covenant

Alternative A

If, during the term of this letter agreement, the Bank becomes aware that any of the statements set forth in the Relationships Representation (or provided pursuant to the Relationships Covenant) is, or at the time of the execution of this letter agreement or disclosure of such information was, materially inaccurate, the Bank will promptly notify the Board and inform the Board of the manner in which such statement is or was materially inaccurate.

Alternative B

In addition, the Bank will immediately inform the Board upon the occurrence of the Bank’s or any of its affiliates’ (including portfolio companies in which the Bank has investments), or a Team Member’s having any direct holding in a Relevant Party (or,

to the knowledge of the Bank or Team Member, as applicable, a portfolio company of a Relevant Party) at any time before the termination of the engagement contemplated by this Letter Agreement.

Restricted Services Covenants (with Substitute Financial Advisor Provision in Brackets)

Notwithstanding anything herein to the contrary, during the term of this engagement, the Bank shall not provide M&A advisory services, new debt or equity capital markets or new bank financing to any Relevant Party without the prior written consent of the Board. [The Bank acknowledges and agrees that in the event that Bank provides such services with the prior written consent of the Board (“Other Services”), any Sale Transaction Fee that becomes payable to Bank hereunder shall have deducted from it an amount equal to the Opinion Fee. In addition, Bank shall ensure that employees of the Bank working on this engagement (i) will not simultaneously work on any team providing the Other Services, and (ii) will not share with any team providing the Other Services any confidential information received from the Company or the Board under this Agreement unless the Board has otherwise authorized such information to be shared.]

Tail Fee Provision

If, at any time prior to the expiration of 12 months following the termination of this agreement (other than a unilateral termination by the Bank or termination for Cause (as defined below) by the Company), the Company enters into an agreement that subsequently results in a Transaction or consummates a Transaction, then the Company will pay the Bank the Transaction Fee specified above in cash promptly upon the closing of the Transaction. Termination for “Cause” means termination by the Company prior to entering into a definitive agreement with respect to a Transaction because of a material breach of representation by the Bank with respect to the representation contained in Section ___ hereof or a material breach of the covenants contained in Section ___ and Section ___ hereof, or willful misconduct, bad faith or gross negligence by the Bank in performing this engagement which conduct is not substantially remedied by the Bank after 10 days written notice from the Company stating that the Company believes such conduct constitutes Cause.