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When Appraisal is Likely to Be Below the Deal Price in Arm's-Length Mergers…and When It is Not — The Meaning of Aruba, AOL *and* SWS

Since the Delaware Supreme Court issued its landmark *Dell* appraisal decision in December 2017, the Delaware courts have issued three appraisal decisions—*Verition Partners v. Aruba Networks* (Feb. 15, 2018), *In re Appraisal of AOL Inc.* (Feb. 23, 2018), and *In re Appraisal of SWS Group* (affirmed by the Delaware Supreme Court Feb. 23, 2018). In *Dell*, the Supreme Court held that, in the case of an arm's-length merger with a "robust" sale process, the deal price is generally the best "proxy" for appraised fair value and should be given "heavy, if not determinative weight" in determining fair value. The Supreme Court also directed that, even if the deal price were not *fully* reliable for determining fair value (for example, because the sale process was not fully robust), the Court of Chancery still should consider the deal price and accord it an appropriate weight (and that weight is to be specified in the court's opinion). However, in *Aruba* and *AOL*, as well as previously in *SWS*, the Court of Chancery ascribed zero weight to the deal price and determined that fair value was *below* the deal price.

Key Points

- *Aruba*, *AOL* and *SWS* underscore that there is now a meaningful risk of a below-the-deal-price appraisal result in most cases involving arm's-length mergers. These decisions indicate that a below-the-deal-price result may be reached, in the context of an arm's-length merger case, whether the court deems the sale process to have been fully robust (as in *Aruba*) or not (as in *AOL* and *SWS*). The court is more likely to continue to reach *above*-the-deal-price results, however, in arm's-length merger cases involving a *seriously flawed* sale process (as well as in *non*-arm's-length merger cases—such as controller transactions, squeeze-outs, and certain MBOs).

- **A below-the-deal-price result leads to an actual economic loss for the appraisal claimants.** In recent years, appraisal claimants had a realistic worst case scenario of an at-the-deal-price appraisal result, which meant that no return would be achieved on the "investment" in the appraisal action (and, with the high rate of statutory interest payable on an award even at the deal price, costs of the action typically would be recouped). Appraisal claimants also had a realistic expectation of extracting a quick settlement, given some of the structural advantages to petitioners in appraisal proceedings. Now, however, the new trend of below-the-deal-price results in arm's-length merger cases creates a meaningful risk of a potentially significant loss from seeking appraisal rather than accepting the merger consideration—which, no doubt, will accelerate the trend already underway of appraisal claims becoming rarer in the context of arm's-length mergers.

- **Likelihood of appeals.** In our view, given the inconsistency of the approaches taken in *Aruba* and *AOL* with the directional approach prescribed in *Dell*, it is unclear whether the other members of the Court of Chancery will follow *Aruba* and *AOL*, and it seems likely that the decisions will be appealed and may not be upheld. Nonetheless, as discussed below, given the strong focus in the opinions on the exclusion of the value of merger synergies in the context of reliance on *either* the deal price (based on the statutory mandate to exclude from fair value any value "arising from the merger itself") *or* a DCF analysis (based on the methodology not taking merger synergies into account), we expect that the risk of below-the-deal-price results in arm's-length merger cases (without serious sale process flaws) is likely to continue absent further clarification from the Supreme Court or legislative change. It should be noted, however, that, if below-the-deal-price results in arm's-length merger cases do *not* continue, the results will be *at* the deal price instead—which itself still will discourage appraisal claims in this type of case.

Background

<u>*Aruba*</u>. Hewlett-Packard Company acquired Aruba Networks, Inc. in an arm's-length cash merger for $24.67 per share. The deal price represented an almost 49% premium to Aruba's 30-day average unaffected market price. With 81% of the outstanding shares voting, the merger was approved by a 98% vote. At trial, both parties relied on their respective DCF analyses to determine fair value (as frequently occurs in appraisal cases because the DCF methodology lends itself to widely varying results, so that the petitioner can present a result well above the deal price while the respondent can present a result well below it). The petitioner's DCF result was $32.57 per share; the respondent company's was $19.75. Following the issuance of *Dell* during the *Aruba* trial, the respondent argued for greater reliance on the deal price and/or the unaffected market price. Vice Chancellor Laster viewed (a) the "deal-price-less-synergies" (which it calculated to be $18.20 per share) and (b) the unaffected market price as the two reliable indicators of fair value; but he viewed the latter as the *more* reliable of the two and, relying solely on it, determined fair value to be $17.13 per share—about 31% below the deal price.

<u>*AOL*</u>. Verizon Communications Inc. acquired AOL Inc., in an arm's-length tender offer followed by a cash merger, for $50 per share. More than 60% of the outstanding shares were tendered. At trial, the parties relied solely on their respective DCF analyses. The respondent company's DCF result was $44.85 per share. The petitioners' DCF result was $68.98—but the petitioners accepted the respondent's result "as a starting point" for the court's analysis as there were questions (which were not addressed in the opinion) about the impartiality of the petitioners' expert. Following the issuance of *Dell* during the trial, the respondent argued that the court should rely on the respondent's DCF result "as [it was] consistent with the 'ceiling' of deal price, from which the DCF excludes synergy value." Vice Chancellor Glasscock found that the sale process (which, we note, appeared to be far more robust than the process in *Aruba*) was not sufficiently robust for full reliance on the deal price. The Vice Chancellor relied solely on the court's own DCF analysis (while considering the deal price as a "check" on the DCF result), and determined fair value to be $48.70 per share—about 3% below the deal price. The Vice Chancellor attributed the below-the-deal-price result to the fact that the DCF methodology does not take into account the value of merger synergies. (The Vice Chancellor stated in a footnote that he had not considered the unaffected market price as the parties had not argued for reliance on it.)

SWS. Hilltop Holdings Inc., a substantial creditor of SWS Group Inc., acquired SWS in a cash-and-stock merger valued at $6.92 per share. Although SWS was sold in a public auction, Vice Chancellor Glasscock held that the deal price was not a reliable indicator of fair value, primarily because of the "probable influence" of the veto power that the buyer, under its credit agreement with SWS, had over competing bids. Relying solely on a DCF analysis, the Vice Chancellor determined fair value to be $6.38 per share—about 19% below the deal price as valued at the time the deal was announced (and appraisal arbitrageurs bought up approximately 15% of the company's shares) and 9% below at closing. The Vice Chancellor attributed the below-the-deal-price result to the fact that merger synergies are not taken into account in a DCF analysis.

Discussion

***Aruba, AOL* and *SWS* indicate a new trend of *below*-the-deal-price results in the context of arm's-length mergers—whether the court relies on the deal price or a DCF analysis.** In recent years, in arm's-length merger cases with a robust sale process, the court has relied on the deal price and typically has found fair value to be *equal to* the deal price. *Aruba* represents a change to this pattern, as the court found that, although the merger was at arm's-length and the sale process was robust, rather than the deal price itself, the court should rely either on the "deal-price-less-synergies" or on the unaffected market price—both of which almost invariably will produce a *below*-the-deal-price result. *AOL*, where the court relied on a DCF analysis, represents a change from the court's pattern of generally finding the sale process in an arm's-length merger to have been sufficiently robust to support sole or primary reliance on the deal price. Moreover, in previous cases in which the court has relied on a DCF analysis (which were cases involving non-arm's-length mergers), the court's DCF result has generally been *above* (often, well above) the deal price. *AOL* and *SWS* represent a change to this pattern, with the court's DCF result in both being *below* the deal price.

The trend of below-the-deal-price results is based primarily on a new focus on the statutory mandate to exclude value arising from the merger itself. The Delaware appraisal statute states that "fair value" for appraisal purposes excludes any value arising from the merger itself. Historically, the Court of Chancery, when relying on the deal price, has acknowledged the statutory mandate but has not made any downward adjustment to exclude the value of merger synergies or other value arising from the merger itself. The court has cited the practical difficulties involved in calculating an adjustment to satisfy the statutory mandate, given the uncertainty as to (i) which synergies may be properly viewed as arising from the merger itself (rather than being part of the "intrinsic" going concern value of the company because they could be achieved in *any* merger or by the company on a stand-alone basis); (ii) how to value any such synergies; and (iii) how to determine to what extent the value of such synergies is reflected in the deal price. Notably, the Supreme Court, in *Dell*, followed the same approach of acknowledging the statutory mandate but not making any adjustment to the deal price to exclude the value of merger synergies or other value arising from the merger itself. *Aruba* suggests a new emphasis on the statutory mandate, however. The parties addressed the mandate in their briefs to the court and Vice Chancellor Laster held that, based on the statutory mandate, the deal price *with a downward adjustment* to exclude the value of merger synergies would be a reliable measure of fair value (although he relied on the unaffected market price, finding it to be *more* reliable as it avoided the uncertainties involved in calculating the adjustment).

An emphasis on the statutory mandate is reflected also in *AOL* and *SWS*, although the court relied in these cases on a DCF analysis. As noted, historically, when the court has relied on a DCF analysis to determine fair value, the result has been *above* the deal price. In *AOL* and *SWS*, however, the DCF result was *below* the deal price and the court observed that this result could be explained by the fact that the DCF methodology automatically excludes the value of merger synergies (while the deal price typically reflects some portion of that value). We note that widely varying results are possible with the DCF methodology (as there are myriad inputs, with the selection of most of them based on highly subjective determinations, and even a small change to just one of the inputs can produce a significant change in the result).

The appraisal result may, however, still be *above* the deal price in some arm's-length merger cases. As discussed, given the new emphasis by practitioners and the Court of Chancery on the statutory mandate to exclude value arising from the merger itself, we expect that, absent legislative change with respect to the mandate or clarification by the Supreme Court, below-the-deal-price results will continue to be seen in arm's-length merger cases—whether the court (a) views the sale process as having been robust (and thus relies on the deal price-less-synergies) (or even if the court relies on the unaffected market price) or (b) views the sale process as *not* having been robust (and thus relies on a DCF analysis). We note, however, that the a below-the-deal-price result in the case of (b) is potentially "incongruous" (as Vice Chancellor Glasscock characterized the result in *AOL*)—because, intuitively, an appraisal result should be higher than a deal price that resulted from a deficient sale process. For this reason, when the court relies on a DCF analysis due to the sale process for an arm's-length merger having been less than *fully* robust (not seriously flawed), we expect that the result typically will be reasonably close to the deal price (as it was in *AOL*). However, we expect that, when the court views the sale process as having been *seriously flawed*, the appraisal result may well be *above* (even significantly above) the deal price. As noted, the DCF methodology can produce a very wide range of results depending on the inputs selected—and should produce a result above the deal price if the deal price undervalues the company by more than the value of the merger synergies which the DCF methodology excludes. For this same reason, in our view, appraisal results in *non*-arm's-length merger cases generally will continue to be above the deal price, notwithstanding that the deal may be synergistic and the DCF methodology would not take the synergies value into account.

***Aruba* and *AOL* appear to reject (or at least to substantially call into question) the directional approach, set by the Delaware Supreme Court in *Dell*, for reliance on *the deal price itself* in the context of an arm's-length merger with a robust sale process.** While the *Aruba* and *AOL* opinions were framed as being consistent with *Dell*, they appear to have rejected what, by our reading, was the essential thrust of *Dell* that, in the context of an arm's-length merger: (a) the most reliable factor in determining fair value is the deal price itself (absent a non-robust sale process, misconduct or highly unusual circumstances); (b) even when the sale process is not *fully* robust, the court should rely on the deal price to some extent; and (c) the DCF methodology is inherently unreliable for appraisal purposes and is generally not preferable to reliable market-based factors.

In *Aruba*, Vice Chancellor Laster reasoned that, although the sale process was robust and the deal price was reliable, the unaffected market price was a *more* reliable indicator of fair value because it better comports with (a) the Supreme Court's emphasis in *Dell* on the efficient market hypothesis (given that the unaffected market price reflects the "consensus view" of the "mass of market investors" rather than the view of a single buyer) and (b) the statutory mandate that any value arising from the merger itself be excluded (given that the unaffected market price does not include such value, without any of the "uncertainty," "judgements," and potential for "human error" involved in a downward adjustment to the deal price to exclude such value). In *AOL*, Vice Chancellor Glasscock relied solely on a DCF analysis and found fair value to be below the deal price. The Vice Chancellor found the sale process to be not sufficiently robust to support full reliance on the deal price (although the sale process appeared to be far more robust than the process in *Aruba* or many other cases in which the court has relied on the deal price); and, further, the Vice Chancellor stated that there was no "principled" way to ascribe any weight to the deal price once it could not be relied on fully.

In our view, it is unlikely that the unaffected market price will replace the deal price (or the deal-price-less-synergies) as the most reliable indicator of fair value in arm's-length merger cases. Vice Chancellor Laster stated in *Aruba* that the Supreme Court, in *Dell*, had "endorsed" reliance on both the deal price and the unaffected market price. The Vice Chancellor concluded that the unaffected market price was the *more* reliable of the two because (i) it better comports with the efficient market hypothesis championed by the Supreme Court in *Dell* (as it reflects the "consensus view" of the "mass of market investors" rather than the view of a single buyer); and (ii) it avoids the "uncertainty," "judgments" and potential for "human error" involved in calculating a deduction from the deal price for value arising from the merger itself (such as merger synergies and the value "created by the buyer in reducing agency costs"). We note, *first*, that the unaffected market price has never before been used to determine fair value in appraisal cases. *Second*, the Supreme Court's commentary in *Dell* relating to reliance on the unaffected market price was primarily directed at refuting the *Dell* petitioners' argument that there had been a significant gap between the market's and management's view of the value of Dell, which had "anchored" the deal price to the "artificially low" market price of the stock. The Supreme Court rejected the concept of a "valuation gap" based on its confidence in the efficient market hypothesis (*i.e.*, the capability of the market to take all factors into account). While the Supreme Court mentioned that the unaffected market price is "likely a possible proxy for fair value," the clear thrust of the opinion is that, in the context of an arm's-length merger with a robust sale process, the deal price is the best proxy for fair value. *Third*, we note that the unaffected market price arguably reflects an inherent minority discount (attributable to the non-control status of shares trading in the market). It is well-established under the common law that the dissenting stockholders are entitled to their proportionate share of the going concern value of the company *as a whole* and that, therefore, fair value is to be determined exclusive of any minority discount. Presumably, an upward adjustment to the unaffected market price to take into account the minority discount would be as fraught with "uncertainty," "judgments" and the potential for "human error" as a downward adjustment to the deal price to exclude value arising from the merger itself. *Finally*, we note the difficulty in determining the unaffected market price itself—as what the appropriate reference date (the day preceding the merger announcement or preceding the beginning of market rumors?) or period (the 30-day average, as was used in *Aruba*?) is, in each case, will depend on the specific facts and circumstances and will involve a subjective judgment.

It remains uncertain whether the court, when it determines to rely on the deal price to determine fair value, will now make a downward adjustment to exclude value arising from the merger itself. As noted, the Court of Chancery almost invariably has *not* made any downward adjustment to the deal price based on the statutory mandate—and the Supreme Court in *Dell* did not direct that the Court of Chancery do so, did not itself make an adjustment to the Dell deal price, and did not provide guidance as to how an adjustment would be made. Rather, the Supreme Court appeared to emphasize that the deal price itself is the best proxy for fair value (in what we would call a rough justice kind of way). However, as discussed, *Aruba*—and, to a lesser extent, *AOL* and a number of pre-*Dell* Court of Chancery appraisal decisions—indicate that practitioners and the Court of Chancery are now more focused on the statutory mandate. Based on this increased focus, and the results in this trio of post-*Dell* cases, we believe that there is a significantly greater likelihood of below-the-deal-price results going forward. As noted above, the difference between an appraisal result at the deal price and one below it is the difference between the appraisal claimant achieving no return from the appraisal action versus realizing an actual economic loss.

Aruba represents one of the only times that the court has actually calculated an adjustment to exclude value arising from the merger itself based on the statutory mandate. Vice Chancellor Laster used the buyer's planning estimates for the value of *all* revenue and cost synergies—that is, (a) he did not distinguish between synergies that arose from the merger itself and those that could be characterized as not arising from the merger itself because they could be achieved in *any* merger or by the company on a standalone basis, and (b) he did not undertake a judicial valuation of the synergies but accepted the buyer's view of value. To determine to what extent the synergies value had been reflected in the deal price, the Vice Chancellor took the midpoint of data that a study of deals (presented by the respondent) indicated for the percentage of expected merger synergies that targets had "extracted" from buyers to be shared with the target stockholders. The Vice Chancellor noted that, even with the exclusion of merger synergies from the deal price, the statutory mandate still was not satisfied as the deal price would also include "value created by the buyer in reducing agency costs" (in other words, as we read it, the amount of the control premium attributable to obtaining sufficient shares for control; or, put another way, the portion of the control premium beyond the value of merger synergies). We note that the reduction-in-agency-costs amount is so uncertain that the Vice Chancellor did not attempt to calculate it—and the court has not before even mentioned it as value to be excluded based on the statutory mandate even though it clearly arises from the merger itself. Although Vice Chancellor Laster took a relatively broad-brush approach in calculating the "deal-price-less-synergies" amount, the approach may be viewed as acceptable given that, without any adjustment for a reduction-in-agency-costs, the calculated amount will almost invariably still understate the adjustment that would fully satisfy the statutory mandate. We note that, as appraisal actions involving arm's-length mergers are likely to become increasingly rare, the issues relating to the statutory mandate may effectively become moot, without resolution by the court.

What constitutes a "robust" sale process for appraisal purposes? As discussed, if the court views the sale process as having been sufficiently robust, the court may rely (a) on the deal price—in which case the result will be equal to the deal price (in accordance with *Dell*), or below the deal price (if a downward adjustment is made based on the statutory mandate to exclude value arising from the merger itself) (as the court related in *Aruba*); or (b) possibly, on the unaffected market price—in which case fair value will be below the deal price (in accordance with *Aruba*). If the court views the sale process as *not* sufficiently robust for reliance on "market-based" factors, then the court generally will rely on a DCF analysis—in which case fair value could be *above or below* the deal price. We note that there is a significant degree of subjectivity in any determination as to whether a particular process was "sufficiently robust" for reliance on the deal price—a challenge that the Delaware Supreme Court underscored in *Dell* as one of the several reasons why the Supreme Court declined to adopt a formal judicial presumption that "deal price" was the best indicator of fair value.

While the Court of Chancery has emphasized "meaningful competition" in the sale process, it has found the deal price to be fully reliable even in the context of some quite limited sale processes (including where there was not any actual competition so long as the sale process was designed to promote or not be prohibitive of competition). Consistent with this approach, in *Aruba*, Vice Chancellor Laster found the targeted, non-public sale process there, with no competing bidder, to have been sufficiently robust. Six parties (all of them strategic buyers) were contacted pre-signing and none expressed any interest; the merger agreement prohibited a post-signing go-shop (although there was a fiduciary out and a non-prohibitive termination fee in the event a superior offer); HP's internal analyses estimated the pro forma value of Aruba as potentially as high as $32.50 per share, based on expected synergies from the merger, while the deal price was $24.65; the negotiations were conducted against a backdrop of conflicts of interest by Aruba's management and bankers (as, the court found, HP had engaged the CEO in discussions about post-merger employment and the bankers likely were currying favor with HP for future business); and the stock was experiencing a 52-week low (according to Aruba's bankers, due to a "misperception in the market" that the company was going to miss quarterly estimates, which the company actually was on track to meet and then did meet). Importantly, however, Vice Chancellor Laster stated that the purpose of appraisal is not to ensure that dissenting stockholders receive the best price that would have been obtainable in the merger—in other words, we note, "robust" does not necessarily suggest a *Revlon*-like standard. Rather, Vice Chancellor Laster stated, the purpose of appraisal is only to ensure that the stockholders were not "exploited" in the merger—and the significant premium of the Aruba deal price over the unaffected market price established that the stockholders had not been exploited.

By contrast, in *AOL*, Vice Chancellor Glasscock found that the AOL sale process was *not* sufficient to support reliance on the deal price (other than as a "check" on the DCF result). Vice Chancellor Glasscock compared the sale process to the process in *Dell* and found it less robust (although the court did not address that the process was apparently more robust than the process in *Aruba* and other decisions where the court has relied solely on the deal price). Although AOL declined to conduct a formal auction, the Vice Chancellor concluded that it was widely known in the market that AOL was considering a sale, and that, pre-signing, AOL had contacted "numerous" strategic and financial potential buyers and had "engaged with anyone that indicated a serious interest in doing a deal." In finding the sale process not reliable, the Vice Chancellor emphasized the comments made by AOL's CEO, after signing, which the court characterized as "unusually preclusive" in their likely effect on the emergence of potential topping bids. The CEO's statements were to the effect that "the deal was 'done'," that a deal with Verizon was the culmination of "a natural process" for AOL, that AOL was fully "committed" to the deal, and that AOL "intended to see [the deal] to closing." The Vice Chancellor reasoned that, although the AOL directors had "fulfilled their fiduciary duties," because of the CEO's statements—combined with the CEO's "prospect of post-closing employment" that the CEO had discussed with Verizon (as well as the post-signing prohibition on a go-shop, the "unlimited three-day matching rights" for unsolicited superior offers, and "the fact that Verizon "already had ninety days between expressing interest in acquiring the entire company and signing the Merger Agreement, including seventy-one days of data room access")—the court "[could] not be assured that a less restrictive environment was unlikely to have resulted in a higher price for AOL." We note that, arguably, the CEO's statements were not substantially different from the types of statements that parties often make after signing with respect to their commitment to the deal. We note also that, unlike Vice Chancellor Laster's approach in *Aruba*, Vice Chancellor Glasscock's focus on whether a higher price might have been obtained suggests a *Revlon*-like approach to robust-ness for appraisal purposes.

The lesson from *SWS*. *SWS* involved an arm's-length merger and a sale process that included a number of competing bids. Vice Chancellor Glasscock relied on a DCF analysis, however, because he viewed the sale process as likely having been "influenced" by the unusual circumstance that the third-party buyer had effective veto power over competing bids. In that respect, the decision is *not* inconsistent with *Dell*, which prescribed reliance on the deal price only in arm's-length mergers with a robust sale process. What appears to be anomalous, however, is that the court's DCF result was significantly below fair value when the sale process was apparently significantly flawed (indeed, one could argue, that a buyer with a veto power is effectively like a controller). As we read the opinion, the incongruous result of a significantly below-the-deal-price determination of fair value may be explained by the fact that the court seemed to be not fully convinced that the buyer's veto power actually negatively affected the sale process. As discussed, in most cases where the sale process was significantly deficient, we expect that the court would find fair value to be above the deal price. *SWS* highlights, however, the *possibility* in *any* highly synergistic case that the court's DCF result could be significantly below the deal price.

Practice Points

- **Settlement discussions.** Parties involved in pending appraisal cases should consider whether it is now a favorable time to try to settle the case, prior to possible review of *Aruba* and/or *AOL* by the Delaware Supreme Court.

- **Appraisal claimants.** Parties considering whether to make appraisal claims should consider that, in the case of an arm's-length merger, based on *Dell*, *Aruba*, *AOL* and *SWS*, there is a high likelihood of an appraisal result either at or below the deal price. In addition, potential claimants should recognize that, although they may view a transaction as not having been at arm's-length or as not having involved a robust sale process (and that, therefore, they may expect that the court would determine fair value based on a DCF analysis, with the potential for an above-the-merger-price result), (a) it is not entirely predictable what the court's view of the nature of the transaction and the sale process will be and (b) in any event, there is now a significant risk that a DCF result may be below (rather than above) the deal price. Finally, claimants and respondents should consider the new explication of appraisal by Vice Chancellor Laster in *Aruba* as being a process designed not to ensure that dissenters receive the best price but only that they were not "exploited"—and that a premium above market price could indicate that they were not exploited.

- **Valuations.** A respondent company should argue for reliance on (i) the deal price, with a downward adjustment to exclude value arising from the merger itself and (ii) the unaffected market price. Respondents should argue that any DCF result that is significantly above the deal price likely overstates fair value for appraisal purposes as the DCF methodology excludes the value of merger synergies and the value "created by the buyer in reducing agency costs." Respondents should emphasize the skepticism relating to the DCF methodology for appraisal purposes that the Supreme Court expressed in *Dell* and *DFC Global* and that the Court of Chancery expressed in a number of pre-*Dell* decisions. A respondent should maintain an adequate record with respect to the buyer's anticipated synergies and negotiations with respect to sharing the value of synergies with the target stockholders. Petitioners should consider whether there are "negative synergies" (*i.e.*, costs of the merger) that might mitigate any downward adjustment of the deal price. As fair value is measured as of the time immediately preceding the merger closing, petitioners and respondents should consider whether there were positive or negative developments at the target company between signing and closing that affect fair value.

- **DCF analyses.** First, based on the courts' recent skepticism about DCF results that diverge widely from the deal price, a petitioner should consider presenting a DCF result that is not *significantly* above the deal price; and a respondent should consider whether its below-the-deal- price DCF result is consistent with an exclusion of the value of the expected synergies (and consistent with the DCF value ranges produced by the target's bankers in connection with their fairness opinion). Second, as discussed, it is to be emphasized that a DCF analysis is susceptible to widely varying results and that, when the court relies on a DCF analysis, the result could be *above or below* the deal price. We expect that, generally, in the context of an arm's-length merger, the court's DCF result is likely to be significantly *above* the deal price only when there is strong evidence of a seriously flawed sale process (or of highly unusual circumstances or misconduct). In this connection, we note that, while the proxy statement description of the sale process is available before the stockholder vote, detailed information about the sale process typically is not obtainable until after the deadline for filing an appraisal petition and even the deadline for withdrawing an appraisal petition without the respondent's consent.

- **Market inefficiency.** Based on *Dell*, in the context of an arm's-length merger, the sole potential route to non-reliance on the deal price based on market inefficiency is the petitioner's establishing the unavailability to the market of information that typically is available for public companies that are widely held, traded and followed in the market. Thus, for example, an argument for market inefficiency could be successful if a private company is involved, there are few stockholders or limited trading, the company is not generally followed by analysts, the company is late in making public filings, or the company has withheld or misstated material information. Otherwise, the court generally would be unlikely to conclude that the deal price was unreliable based on factors such as a trough in the target company's market price, an inopportune time to sell, significant uncertainty as to prospects, and the like.

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