**INTRODUCTION**

Not every shareholder-litigation-related valuation engagement is a Delaware General Corporation Law Section 262 matter—that is, a dissenting shareholder action matter. In a Delaware Section-262-type engagement, the standard of value, premise of value, and level of value are well established.

In other states and in other matters, the standard of value, premise of value, and level of value may not be judicially settled matters. Accordingly, the analyst should be informed of the appropriate (1) standard of value, (2) premise of value, and (3) level of value in the applicable legal jurisdiction.

In litigation involving dissenting shareholder appraisal rights claims and shareholder oppression claims, legal counsel will often engage an analyst to provide forensic valuation services. In these matters, counsel will typically provide guidance as to the appropriate standard—or definition—of “value.” This guidance is often communicated by way of a legal instruction.

The analyst should seek and accept the instructions from legal counsel in shareholder litigation engagements. Nonetheless, the analyst should also have a general familiarity with the legal statutes and the judicial precedent that generally determine the appropriate valuation process for these shareholder disputes.

The *Uniform Standards of Professional Appraisal Practice*—and other generally accepted valuation standards in the United States—require the valuation to include a statement of the purpose and objective of the analysis. That statement of the valuation objective should define the standard of value being sought in the analysis.

Without a clear definition of value, the subject valuation analysis may not be credible and the subject value conclusion may not be meaningful to the party relying on that valuation.

This discussion addresses the differences between, and the importance of considering, the following elements of a business valuation:

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**Valuation analysts (“analysts”) who provide forensic valuation services for controversy-related purposes should have a fundamental understanding of the alternative standards of value. Depending on (1) the legal jurisdiction and (2) the nature of the legal claim, the relevant valuation standard—and how to interpret the relevant valuation standard—may be an unsettled matter. Because shareholder disputes are typically governed by state law, analysts should rely on instructions from legal counsel regarding the appropriate standard of value to apply in the forensic analysis. Nonetheless, analysts who practice in this area should be generally familiar with all the alternative standards of value, premises of value, and levels of value. Even when a generally accepted business valuation standard is defined by statute or judicial precedent, the analyst should select and apply appropriate methods to develop the conclusion of value. With regard to fair value controversies decided in the Delaware courts, the analyst should be aware of recent judicial developments—and the fair value implications of such developments.**
1. Standard of value
2. Premise of value
3. Level of value

This discussion explains how the same private company stock may have materially different—and equally credible—values on the same day, depending on the combination of these three elements.

In the Delaware Court of Chancery (the “Chancery Court”), the fair value standard of value is typically applied in shareholder disputes. However, in the Chancery Court, the court’s interpretation of the fair value standard may run counter to the analyst’s expectations. At trial, the vice chancellor may decide that the fair value of a company is best determined by:

1. the merger price,
2. generally accepted business valuation methods such as the discounted cash flow (DCF) method,
3. the merger price or the DCF value minus perceived synergistic value,
4. the historical trading price, or
5. any prior valuation evidence.

According to the textbook *Financial Valuation Application and Models*, “before analysts can attempt to value a business, they must [emphasis added] identify and understand the applicable standard of value for the valuation of the subject interest. The standard of value is related to and determined by the purpose of the valuation.”

In other words, an analysis prepared in compliance with business valuation professional standards and practices should provide a generally accepted definition of the type of value sought. The selected definition of value should comport to the purpose and objective of the business valuation.

While there are many alternative standards (or definitions) of value, there are five principal standards. These principal standards of value are listed as follows:

1. Fair market value
2. Investment value
3. Intrinsic value
4. Fair value (state rights)
5. Fair value (financial reporting)

### Fair Market Value

The fair market value standard of value is often applied by private companies for purposes of shareholder buyouts. In many cases, the fair market value standard is the agreed upon standard written into the private company shareholder agreements.

One reason why this standard is commonly applied is that fair market value is the principal “standard of value” required by the Internal Revenue Service for measuring private company stock transfers for federal estate and gift tax matters.

The Internal Revenue Service Revenue Ruling 59-60 provides a definition of fair market value. According to Revenue Ruling 59-60, fair market value is “the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of...
relevant facts. Court decisions frequently state in addition that the hypothetical buyer and seller are assumed to be able, as well as willing, to trade and to be well informed about the property and concerning the market for such property.”

Investment Value
In contrast to the general market participant fair market value standard, investment value is a buyer-specific standard of value. Investment value is generally defined as the price that a specifically identified buyer or group of buyers will pay for a private company ownership interest, based on investment criteria and expected post-purchase events that are unique to the identified buyer or buyers.

According to the textbook Standards of Value Theory and Application, “for some companies, investment value may reflect the added value to that company of vertical or horizontal integration. For a manufacturer, it may reflect added value of a distributor in order to control the channel of distribution of the manufacturer’s particular products. For other companies, it may reflect the added value of acquiring a competitor in order to achieve the cost savings of combined operations and possibly eliminate some price competition.”

A valuation analysis developed under the investment value standard may conclude a higher value estimate than an analysis developed under other standards of value. That is because, under this investment of value standard, the analysis includes the synergistic potential of the private company based on the implied investor-specific improvements to the subject business made possible through a controlling ownership interest business transaction.

Intrinsic Value
The intrinsic value standard is primarily applied by equity analysts who follow publicly traded companies. Those equity analysts make security pricing and buy/sell recommendations. Intrinsic value is generally based on a DCF method valuation analysis. To recommend investment decisions, equity analysts typically compare:

1. the DCF valuation analysis conclusion for the public company to
2. the market-derived stock price for the public company.

The comparison generally informs and provides support to the equity analyst for the decision regarding a public stock buy, sell, or hold recommendation.

According to the International Glossary of Business Valuation Terms, intrinsic value is defined as the “value that an investor considers, on the basis of an evaluation or available facts, to be the ‘true’ or ‘real’ value that will become the market value when other investors reach the same conclusion. When the term applies to options, it is the difference between the exercise price or strike price of an option and the market value of the underlying security.”

In certain litigation situations, “courts have used the term intrinsic value rather liberally. Because of this, if analysts are requested to determine the intrinsic value of a company or a fractional interest in a company, they should seek further definition or clarification of what type of value is being sought.”

Fair Value (State Rights)
Both dissenting shareholder appraisal rights claims and shareholder oppression claims are governed by state law, which includes state corporation statutes. State courts often conclude fair value as the standard to estimate the value of the noncontrolling shareholder shares. Fair value is the standard for certain shareholder appraisal rights actions in 47 states and the District of Columbia.

However, the definition of fair value and the application of fair value may vary from state to state.

According to the textbook Financial Valuation Application and Models, “in most states, fair value refers to fair market value without discounts for lack of control and lack of marketability.”

The Delaware Supreme Court clarified the meaning of fair value in that state in 1950. That Supreme Court decision defined fair value as the value that had been taken from the dissenting shareholder.

The basic concept of value under the appraisal statute is that the shareholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern. By value of the stockholder’s proportionate interest in the corporate enterprise is meant the true intrinsic value of his stock which has been taken by the merger.

This judicial interpretation has been cited in many shareholder appraisal rights cases and shareholder oppression cases. This interpretation was further expanded in recent years, identifying “what has been taken from the shareholder” as the pro rata share of the value of the company as a whole.
The Model Business Corporation Act (“MBCA”) of 1984, published by the American Bar Association (“ABA”), is a often cited source to provide the definition of the fair value standard. The MBCA defines fair value as follows: “The value of the shares immediately before the effectuation of the corporate action to which the shareholder objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.”

In 1999, the MBCA revised the definition of fair value as follows:

The value of the corporation’s shares determined immediately before the effectuation of the corporate action to which the shareholder objects using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal without discounting for lack of marketability or minority status except, if appropriate, for amendments to the articles pursuant to section 13.02(a)(5).

While most state statutes vary, many rely on the MBCA of 1984—and the 1999 revision—as the foundation for their statutes. Statutes and judicial precedent in many states do not allow discounts for lack of control or discounts for lack of marketability in the measurement of fair value. However, a few states still allow pricing discounts by precedent:

1. at the court’s discretion or
2. in special circumstances.

Further, price premiums in the company value that result from synergies achieved by the transactions are typically excluded in the measurement of fair value in most shareholder appraisal rights statutes.

In states where there is no specific shareholder oppression statute, the courts may act under their own equitable authority. For example, Delaware does not have a shareholder oppression statute.

If the Delaware court concludes there is a conflict of interest in the actions of the majority shareholder, or oppressive corporate behavior has occurred, it may allow a breach of fiduciary duty entire fairness action to be filed. Entire fairness cases involve the controlling shareholder breaching his or her fiduciary duties—often in a corporate action that was not fair to the nonecontrolling shareholder.

If the case is recognized as a fairness case, the Delaware court will generally apply the same standard of value it uses in dissenting shareholder appraisal rights cases (i.e., fair value) to determine the noncontrolling share value.

**Fair Value (Financial Accounting)**

Fair value is the standard of value for financial-accounting fair value measurements, as set forth in the Financial Accounting Standards Board (“FASB”) Accounting Standards Codification (“ASC”).

Specifically, ASC Topic 820 defines fair value as follows: “the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date.”

According to the textbook *Financial Valuation Application and Models*, “fair value for financial reporting purposes often has been equated with fair market value. However, in certain situations, for example, purchase of a business, fair value for a company or a segment of a company would include synergies within a transaction, if present. As such, in those situations, the purchase price may have more aspects of investment value than fair market value or fair value. In other situations, such as the value of certain individual assets, synergies may not be included, and fair value would be more similar to fair market value. It is important for the analyst to look for guidance from FASB and the SEC in terms of their views on fair value and its applications.”

It may be confusing to some parties that the FASB adopted a standard called fair value for fair value measurement purposes. Typically, the fair value (financial accounting) standard described above is applicable only for U.S. generally accepted accounting principles compliance purposes.

**Premises of Value**

There are two principal premises of value related to private company business valuation include the following:

1. the going-concern premise of value and
2. the liquidation premise of value.

The going-concern premise is sometimes referred to as the value in use (or value in continued use) premise. The liquidation premise is sometimes referred to as the value in exchange premise. The selection of the intended premise of value may have a direct influence on the business value conclusion.
The International Glossary of Business Valuation Terms defines premise of value as “an assumption regarding the most likely set of transactional circumstances that may be applicable to the subject valuation, e.g., going concern, liquidation.”

**Going-Concern Premise of Value**

For a private company business valuation, the going-concern premise of value is more frequently applied than the liquidation premise of value. Assuming the private company business valuation is based on a highest and best use assumption, the going-concern premise analysis will often conclude a greater value than the liquidation premise—for a financially successful private company.

The International Glossary of Business Valuation Terms defines going-concern value as “the value of a business enterprise that is expected to continue to operate into the future. The intangible elements of going concern value result from factors such as having a trained work force, an operational plant, and the necessary licenses, systems, and procedures in place.”

Black’s Law Dictionary defines going-concern value as “the value of a commercial enterprise’s assets or of the enterprise itself as an active business with future earning power, as opposed to the liquidation value of the business or of the assets.”

**Liquidation Premise of Value**

The International Glossary of Business Valuation Terms defines liquidation value as “the net amount that would be realized if the business were terminated and the assets were sold piecemeal. Liquidation can be either forced or orderly.”

In a forced (or involuntary) liquidation, the private company assets (both tangible assets and intangible assets) are assumed to be sold involuntarily and will likely yield a value less than in an orderly (or voluntary) liquidation. Forced liquidation premise of value analyses are often performed to estimate private company value in a bankruptcy-related matter. In this context, asset-based lenders often base their lending decisions on the forced liquidation premise of value.

In an orderly (or voluntary) liquidation, the private company assets (both tangible assets and intangible assets) are assumed to be sold over time in order to maximize their value. Orderly liquidation premise of value assumptions are often used to estimate private company value related to the scheduled or planned business termination.

In the case of an operating private company assumed to continue business operations, an orderly liquidation premise of value may be estimated if the value of the operating assets is greater on a value in exchange basis than it is on a value in use basis.

In order for the analyst to conclude an orderly liquidation premise of value, the subject business interest should be a controlling ownership interest level of value. The reason why the business interest should be a controlling ownership interest, for a liquidation-based premise of value analysis, is that only a controlling interest can direct a company to liquidate and sell substantially all of its assets.

**Levels of Value**

According to the textbook Financial Valuation Application and Models, “level of value of the subject interest or asset must be identified at the outset of any engagement. Prior to applying any discounts or premiums to an analysis, the level of value of the preliminary indication should be determined and compared to the level of value required. For example, if the subject interest is a minority, nonmarketable interest in a company, but the preliminary indication of value is on a control, marketable basis, applications of discounts for lack of control and lack of marketability may be necessary.”

**Fair Market Value Compared to Fair Value**

The analysis and conclusion based on the fair market value standard of value may not be the same as the analysis and conclusion based on the fair value standard of value. The fair market value standard of value is intended to emulate the result of an interaction of hypothetical market participants.

That is, fair market value is intended to represent a price that an arm’s-length buyer would pay to an arm’s-length seller, given their individual abilities to influence the market in which they will transact. In contrast, the fair value standard of value is intended to conclude a price that is fair and equitable to all parties to the transaction. That is, fair value represents the value where no party is economically advantaged—and no party is economically disadvantaged—after the sale transaction.

The private company example described below compares the fair market value standard of value to the fair value standard of value through the analysis of hypothetical transactions in a private company stock. In a private company, there can be different fair market values per share depending on:
1. the level of value in the subject transaction and
2. the parties to the subject transaction.

A simple example may illustrate this point. Private company Alpha Corporation ("Alpha") has two shareholders:
1. Adam owns 60 percent of the stock and
2. Brian owns 40 percent of the stock.

For the purposes of this example, let’s assume that (1) the value of the total company is $1,000 and (2) there are 100 shares outstanding. Therefore, the pro rata total company value is $10 per share.

Brian decides to sell his stock. Brian meets Chris at the train stop. Chris wants to invest in private company stock. Chris offers Brian $6 per share for Brian’s 40 shares. Brian accepts the $6 per share offer price. The price of $6 per share is the fair market value of 40 shares (a noncontrolling interest) of Alpha stock. Chris is a willing buyer and Brian is a willing seller.

Either party could reject the offer. Brian understands that he is selling his stock for a 40 percent ($10 per share - $6 per share) price discount compared to the pro rata total company value. In this case, the $10 per share value is not available to Brian.

Because Brian owns a noncontrolling, nonmarketable ownership interest in Alpha stock, no one will pay Brian $10 per share for his block of stock. Also, the fair market value of Adam’s stock may be equal to or greater than $10 per share. However, the fair market value of Adam’s ownership interest in Alpha stock is not influenced by the market participant transaction between Brian and Chris.

On the contrary, there is typically only one fair value per share in a private company—and that is the pro rata allocation of the total company value. That price per share will be fair to all transaction participants under all circumstances. In the Alpha example described above, the pro rata amount of the total company value is $10 per share. Therefore, $10 per share becomes the fair value.

At a $10 per share transaction price, no transaction participant will be economically advantaged—or disadvantaged—as a result of the transaction.

The “market”—that is, the marketplace where unrelated parties (like Brian and Chris) transact—may not always be willing to pay the fair value for a share of private company stock. For example, Chris would not pay Brian $10 per share for Brian’s stock. The negotiated fair market value price was $6 per share.

However, the consideration of a different transaction illustrates how the fair market value price of $6 per share in the transaction between Brian and Chris does not represent the fair value per share.

Expanding on the Alpha example, let’s assume that Adam has the ability to call in (i.e., require Brian to sell) Brian’s stock. If Adam paid Brian the $6 per share fair market value price, Adam would be advantaged, and Brian would be disadvantaged.

Adam would pay Brian $6 per share for stock that Adam could turn around and sell for $10 per share by selling the entire Alpha company. Adam could quickly recognize a windfall of $4 per share on the stock that he bought from Brian. Also, Brian would lose out on the opportunity to sell his stock for $10 per share when the entire Alpha company ultimately sold.

This share price differential is not fair because:
1. Adam (unlike Chris) is economically advantaged by the transaction and
2. Brian is economically disadvantaged by the transaction (he lost the opportunity to quickly receive his pro rata share of an Alpha sale).

Furthermore, it is not fair because (unlike the transaction with Chris), Brian cannot reject the offer; Adam has exercised his right to call in Brian’s stock. In this hypothetical involuntary transaction between Adam and Brian, the fair value (i.e., the fair and equitable price) for the transaction is $10 per share—the pro rata allocation of the total company value.
There is one instance when the fair market value of private company stock can equal the fair value of private company stock. Let’s consider the situation where a financial acquirer makes a tender offer to buy 100 percent of the private company. In that case, the buyer (the acquirer) and the seller (the private company) negotiate at arm’s length. Both parties can reject the price offer—or accept the price offer.

Therefore, the acquisition of the entire private company would qualify as a fair market value transaction.

Continuing with the Alpha example above, let’s assume that a financial acquirer offers $10 per share for all of the Alpha shares. Based on an arm’s-length transaction involving the entire private company sale, $10 per share would become the fair market value per share.

At the same time, $10 per share would be the fair value per share because $10 per share represents the pro rata total company value; $10 per share is the fair and equitable way to allocate the total company share price; and every Alpha stockholder would expect to receive the same $10 per share.

For shareholder controversy matters, the application of the fair value standard as opposed to the fair market value standard (or the investment value standard) strikes a balance between:

1. the dangers of shareholder oppression valuation—awarding a windfall to an opportunistic controlling shareholder who forced out noncontrolling shareholders or
2. incentivizing litigation by noncontrolling shareholders attempting to capture value from controlling shareholders whose actions have resulted in increased value.

**OTHER FAIR-VALUE-RELATED FACTORS TO CONSIDER**

Even in courts that have decided that fair value means pro rata value excluding synergies and valuation discounts, the analyst may consider other factors. These other factors include the following:

1. The recognition of historical transactions in the subject stock
2. Estimates of value using generally accepted business valuation methodology minus synergies
3. Indicated merger price
4. Indicated merger price minus synergies

As discussed below, recent judicial decisions in the Chancery Court have provided varying guidance as to how it views the fair value standard. Of course, the recent Chancery Court decisions have generally cited and adhered to the judicial guidance provided by the Delaware Supreme Court (the “Supreme Court”) decisions in *DFC Global Corporation v. Muirfield Value Partners, L.P.* (“DFC”) and *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.* (“Dell”).

The Supreme Court decision in *Dell* and its implications to the Chancery Court are observable in a recent dissenting shareholder rights decision, *In re Appraisal of AOL Inc.* (“AOL”), the Chancery Court relied on the discounted cash flow business valuation method. That was because the court found that the deal process was not “Dell Compliant.”

According to the Chancery Court in *AOL*, for a transaction to be “Dell Compliant” generally means the following:

Where, however, transaction price represents an unhindered, informed, and competitive market valuation, the trial judge must give particular and serious consideration to the transaction price as evidence of fair value. Where information necessary for participants in the market to make a bid is widely disseminated, and where the terms of the transaction are not structurally prohibitive or unduly limiting to such market participation, the trial court in its determination of fair value must take into consideration the transaction price as set by the market.

In *DFC*, the Supreme Court rejected the Chancery Court’s decision to give equal weight to the DCF analysis value conclusion, the comparable companies analysis value conclusion, and the deal price in determining fair value.

On remand, the Supreme Court concluded (1) that the Chancery Court should reconsider the weighting applied to the value conclusions to arrive at fair value and (2) that the Chancery Court it may conclude that its findings regarding the sales process, when considered in conjunction with other relevant factors, suggest that the deal price was the most reliable indication of fair value.

The Supreme Court did conclude that the Chancery Court has the discretion to apply various business valuation methods and attribute weight to each value indication. The weighting, however, should be explained and supported by the record.

In *AOL*, the Chancery Court decided that the fair value was 2.6 percent lower than the $50 per share deal price. The Chancery Court concluded that the
fair value indicated by the discounted cash flow method was lower than the deal price because the deal price “may contain synergies that have been shared with the seller in the deal that are not properly included in fair value.”

In the In re Appraisal of SWS Group, Inc. (“SWS”) matter, the Chancery Court also concluded a lower than deal price fair value based on a discounted cash flow method.

The Chancery Court found that, in SWS, the “public sales process that develops market value is often the best evidence of statutory fair value.”

However, in the instant case, the respondent analyst, the petitioner analyst, and the Chancery Court agreed that the merger price was not a fair value indication. As a result, the Chancery Court found the fair value of SWS Group, Inc., the company that is the subject of the litigation, to be lower than the merger price.

In SWS, several of the petitioning shareholders had acquired shares in the subject company, with the hope of perfecting an appraisal arbitrage strategy. Based on its discounted cash flow method fair value estimate, the Chancery Court concluded that the fair value was approximately 7.8 percent less than the deal price.

In recognizing its concluded value was below the merger price, the Chancery Court stated that the result is “not surprising.” This is because “the record suggested that this was a synergies-driven transaction whereby the acquirer shared value arising from the merger with SWS.”

Perhaps because of more recent emphasis on the transaction deal price, the Delaware courts appear to be focused on evidence of deal price synergies. According to recent professional guidance, documented evidence of acquisition related synergistic value is considered to be “less than scientifically precise,” and “the treatment of synergies in finance literature [has] largely [been] neglected.”

Synergistic value is considered to be a somewhat ambiguous concept because there is “relatively sparse literature . . . and inconsistent” literature that addresses how much synergistic value is included in an acquisition.

In a recent breach of fiduciary duty matter related to a sale transaction, In Re PLX Technologies Inc. (“PLX”), the Chancery Court assessed the fair value of PLX Technologies, Inc.

The Chancery Court concluded that (1) the company’s directors in PLX did breach their fiduciary duties to the plaintiffs and (2) the sale process by which the company was sold was flawed.

However, because the plaintiff’s analyst relied on aggressive financial projections—the company had a history of underperforming its projections—and a questionable beta estimate, the Chancery Court concluded that the plaintiff’s evidence did not provide sufficient evidence to base a damages award.

In PLX, the Chancery Court referenced the Dell decision in its damages decision by way of the following citation:

A far more persuasive source of valuation evidence is the deal price that resulted from the Company’s sale process. The Delaware Supreme Court has explained that when a widely held, publicly traded company has been sold in an arm’s-length transaction, the deal price has “heavy, if not overriding, probative value.” Although this decision has found that the sale process was flawed, largely because of Singer and Deutsche Bank’s failure to disclose Avago’s tip to the rest of the Board, I believe the sale process was sufficiently reliable to exclude the plaintiffs’ damages contention.

According to counsel for the PLX plaintiffs, Randall J. Barron, the plaintiffs agreed that the vice chancellor in PLX made the right decision regarding the breach of fiduciary duty claim.

However, according to Barron, the concern is the vice chancellor was “constrained by the recent Delaware Supreme Court opinions on appraisal.”

In other words, it is apparent that the DFC and Dell decisions were significantly influential to the vice chancellor’s ruling in PLX.

It is sometimes appropriate for the analyst to consider data from sources other than generally accepted business valuation methods when performing a valuation for a shareholder rights litigation case. For example, in cases that involve a merger, the analyst may consider whether the deal price includes synergies that should be excluded from the deal price to net to fair value. Further, the analyst may confer with legal counsel as to whether the deal process was fair and robust with information widely disseminated.

In cases that involve interests in publicly traded companies, it may be appropriate for the analyst to determine whether the publicly traded price equals fair value. The analyst may consider whether the stock trades in an efficient market. The analyst may research the stock’s trading history, daily or weekly trading volume, float, analyst coverage, bid/ask spreads, and price responsiveness to new information.
In the matter of Verition Partners Master Fund Ltd. v. Aruba Networks, Inc. (“Aruba”), the Chancery Court concluded a fair value of $18.20 per share—the deal price less synergies—compared to the $24.67 per share merger price. In its decision, the Chancery Court gave significant weight to the guidance provided by the Supreme Court in DFC and Dell.

In the Aruba decision, the Chancery Court stated the following: “The Delaware Supreme Court’s decisions in Dell and DFC endorse using the market price of a widely traded firm as evidence of fair value. As in Dell and DFC, the market for the Aruba shares exhibited attributes associated with the premises underlying the efficient capital markets hypothesis. Under Dell and DFC, these attributes provide sufficient evidence of market efficiency to make the Aruba stock price a possible proxy for fair value.”

In the Aruba decision, the Chancery Court cited the publicly traded Aruba Networks, Inc., 30-day average unaffected market price of $17.13 per share as fair value consideration. Because the court did not have confidence in the financial experts in Aruba, the court concluded its own fair value estimate.

In controversy matters, the analyst considers all relevant data and information when performing a valuation analysis. For example, in disputes that involve a merger, the analyst may consider whether the deal price includes synergies. If there is evidence of synergistic value included in a dispute-related transaction, the analyst may address it in the valuation report.

If the subject company was publicly traded prior to the transaction, then the analyst may also consider publicly traded stock price evidence as a possible indication of fair value.

**Summary and Conclusion**

Analysts should have an understanding of the principal standards of value applicable to valuation analysis assignments. The principal standards of value include the following:

1. Fair market value
2. Investment value
3. Intrinsic value
4. Fair value determined by state statute
5. Fair value for financial reporting purposes

In addition to an understanding of the standards of value, the analyst should have an understanding of the alternative premises of value. The principal premises of value include the following:

1. Going-concern value
2. Liquidation premise of value

The level of value is also an important consideration—primarily the ability to affect controlling decision making. That importance is highlighted in the fair market value compared to fair value example.

As state statutes and judicial precedent vary by state, the analyst may seek guidance from legal counsel on the appropriate standard of value to apply when preparing an analysis within the construct of shareholder rights litigation. Even in jurisdictions where the standard of value is well informed, the court may consider other factors. In the Chancery Court, the considerations involve all relevant factors—and not just generally accepted business valuation methods—to determine fair value.

Recent Chancery Court and Delaware Supreme Court decisions provide fair value guidance—guidance primarily provided by decisions in Section 262 type matters—that may deviate from the analyst’s expectations.

Analysts should consider how the transaction deal price may be viewed by the Chancery Court. In other words, could the subject transaction be considered “Dell Compliant?” In order to be Dell Compliant, the subject transaction would likely be negotiated at arm’s-length and the result of a robust sale process.
The DCF method and other generally accepted business valuation methods may continue to be applied by the Chancery Court in its determination of fair value. That conclusion is particularly true for matters where the Chancery Court is not convinced that the transaction price is a reliable estimate of fair value.

In some instances, the Chancery Court may decide that neither the deal price nor a valuation of the company provides a reliable estimate of fair value. In such an instance, the Chancery Court may rely on the unaffected trading price of the target company in its determination of fair value.

In Delaware, the implications of Dell and DFC decisions extend beyond Section 262 dissenting shareholder type matters. By way of the PLX decision, the consideration of how all relevant factors affect fair value should also be considered in breach of fiduciary duty matters.

Notes:
2. Ibid., 3-4.
6. Fishman, Pratt, and Morrison, Standards of Value, 27.
7. Ibid., 121-122.
10. MBCA Section 13.01(3) (ABA 1984).
12. ASC Topic 820, “Fair Value Measurements and Disclosures.”
15. Ibid.
21. Id. at *1.
22. Id. at *21.
25. Id. at *18.
28. Id. at *54.
30. Ibid.
32. Id. at *1.

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