

## Delaware Chancery Court Brings Further Clarity to the Influence of Deal Price on Fair Value In Statutory Appraisal Actions

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The Delaware Chancery Court continues to refine how it may consider the deal price in a post-transaction statutory appraisal action following *DFC Global Corp. v. Murifield Value Partners, L.P.* and *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.* The most recent effort comes in the *In re Appraisal of AOL, Inc.* decision issued on February 23rd. There the court coined the phrase “Dell Compliant” to describe circumstances where the deal price must be given “particular and serious” consideration as evidence of fair value.

Whether “Dell Compliant” joins the ranks of the Delaware corporate law lexicon remains to be seen. It does however connote a readily-understood concept. That is, where information sufficient for market participants to make a bid is widely disseminated and structural prohibitions do not unduly limit such market participation, the transaction will be deemed Dell Compliant. And, although *DFC* and *Dell* teach us that there is no presumption in favor of the deal price, a Dell Compliant deal price will be strongly favored as indicative of fair value.

As the *AOL* court explained, and deal counsel should appreciate, there is no formulaic method for determining if a particular transaction is Dell Compliant. This fact intensive inquiry turns on the circumstances of the at-issue transaction. Nevertheless, *AOL* offers much practical guidance that should aid deal counsel when structuring transactions to be Dell Compliant. For example, the *AOL* court considered that the company was widely known to be in play, had been shopped to numerous potential purchasers, there was not a prohibitive break-up fee associated with the post-agreement no-shop, and the unaffiliated directors appeared compliant with their fiduciary obligations. Unfortunately, there was a prohibitive matching rights clause associated with the no-shop and more importantly in the court’s mind, AOL’s CEO publicly signaled to the market that a deal was “done” with a particular strategic, suggesting that no other bidders need waste their time. Whether these circumstances were Dell Compliant was a close call according to the court. One must wonder if the absence of a talkative CEO may have found the transaction to be Dell Compliant.

Despite not being Dell Compliant, the *AOL* court did not entirely disregard the deal price. Rather, it clarified that in such circumstances the deal price serves as a check on its value determinations. The court then dissected the parties’ competing discounted cash flow analyses, and determined that the fair value was \$48.70 per share, which was less than the \$50 per share deal price. While it appears incongruous to have rejected the deal price as reflective of fair value because the transaction structure may have dissuaded bidding, only to find the fair value was less than the deal price, the court suggested that the deal price premium over fair value might have arisen from synergies to the seller. Practitioners can accordingly take from the *AOL* decision that deal price will be strongly considered fair value in a Dell Compliant transaction and for those transactions within range of being Dell Compliant, the deal price will serve as a check on the court’s fair value calculations. It is also worth mentioning that *AOL* is the second post-*DFC* / *Dell* decision to



appraise a public company, both of which found fair value to be less than the deal price. The next round of appraisal decisions will signal if this is a new normal for appraisal determinations.

We will continue to monitor this evolving area of Delaware law and are available to answer your questions on this or any other business law topic. If you have questions or would like additional information, please contact Marc Casarino (casarinom@whiteandwilliams.com; 302.467.4520), Lori Smith (smithl@whiteandwilliams.com; 212.714.3075) or another member of the Corporate and Securities Group.

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