

Recent Delaware Appraisal Rights Developments Address Interest Rate Risk but Leave Certain Transactions Vulnerable on Deal Price

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In recent months, there have been a number of important developments relating to stockholder appraisal rights in Delaware. Appraisal rights are generally available to dissenting stockholders in all-cash or cash/stock mergers and entitle the dissenting stockholders to an appraisal of the fair value of their stock by the Delaware Court of Chancery. Stockholders seeking appraisal, including appraisal arbitrage funds that buy stock prior to a merger for the purpose of exercising appraisal rights, also receive interest at a statutory rate that accrues on the eventual fair value – even if fair value is determined to be no greater than the deal price – from the effective date of the merger to the date of payment. While amendments to the Delaware General Corporation Law (“DGCL”) mitigate some appraisal risk with respect to this interest accrual, recent case law highlights that buyers continue to face the prospect of potentially significant post-closing economic exposure in deals where appraisal rights are available. In light of this case law, it is possible that we will begin to see an increased focus by parties to M&A deals, and their lenders, on contractual provisions intended to limit this appraisal risk, especially in transactions that are most vulnerable to appraisal arbitrage claims.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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