

Choosing Fair Value over Auction Price for Dell

[Unconfused valuation standards for appraisal rights](#)

[Practical value realization and “no brainer” options](#)

[Process for reserving appraisal rights eligibility](#)

[Refinements of investor support requirements](#)

Now that the Dell buyout proposal appears to be on its path to an expected voting approval in three weeks, we have been updating and refining the Forum’s support of investor interests in appraisal rights.¹

Issues raised by Forum participants who are planning to reserve their rights to “fair value,” or are considering it, are summarized below.

Unconfused valuation standards for appraisal rights

There has been continuing confusion in public reports of supposed experts about the standards of valuation that a Delaware court will apply in an appraisal case. It does *not* depend on the integrity or effectiveness of the board’s conduct of a sale process, and is *not* based on marketplace bidding. Delaware’s Supreme Court has very clearly defined the law’s requirement for a judge’s independent valuation of a “going concern” based on a company’s long-term value as a business enterprise – essentially the same as what securities analysts call “intrinsic value” – without considering the price set by an auction. This has been addressed in past Forum reports² and has more recently been explained in the following authoritative legal review (presented with linked references to the cited cases):

- [August 7, 2013, Lawrence M. Rolnick and Steven M. Hecht of Lowenstein Sandler LLP in *Law360*: "Del. Weighs In On Fair Value In Appraisal Rights Cases"](#)

You will of course have to do your own thinking about how a judge may apply this standard to Dell. You will also have to make your own estimates of how long the appraisal process may take, adjusting for the interest that compounds quarterly at a statutory rate of 5% over the Federal Reserve discount rate.³ Anyone who understands basic investment analysis should be able to do this, but you need to know the rules.

Practical value realization and “no brainer” options

Moving beyond recent public speculation about the tactical use of appraisal rights to negotiate a higher offering price for the proposed buyout, the more significant value enhancement opportunity is to use appraisal rights for their intended purpose: securing the “fair value” for your own account. This can generate much more than a little price bump, and

¹ See [August 16, 2013 Forum Report: Resumption of Attention to Dell Appraisal Rights](#).

² See [July 16, 2013 Forum Report: Informed Investing in Appraisal Rights](#).

³ See [Delaware General Corporation Law \(“DGCL”\) § 262\(h\)](#).

whatever it generates will be allocated selectively to appraisal rights investors rather than dispersed to all your competitors. These will be your practical alternatives for value realization:

- (a) 60-day option to take merger price – The widely promoted “60 day free option” does in fact allow investors up to 60 days after the effective date of the merger to decide whether to withdraw appraisal rights (assuming they’ve been established) and take the offered merger price.⁴ For the Dell buyout, this means that you should be able to consider all of the alternatives below until December, and possibly longer, to determine whether you can realize more value from appraisal rights than the price offered in the buyout.
- (b) Hold your appraisal rights – If your risk-adjusted estimate of a court valuation exceeds both the merger price and any offers to buy your appraisal rights at the end of the option period, you can hold your rights as long as you want, until the appraisal proceeding is concluded and you receive the fair value plus accrued interest (net of costs). You would of course remain able to consider offers to sell at any time after the option period, as indicated below, and other holders would not be able to force a settlement to terminate your rights.
- (c) Sell your appraisal rights – If someone offers to pay more for your appraisal rights than you think they are worth – whether during the 60 day option period or later – you will be able to sell all or any portion of the rights. The buyer could be another investor, or possibly Dell as a means of settling your portion of the appraisal rights.

It should be noted that the marketability of your interests and your ability to make selling, settlement or other decisions independently of other holders assumes administrative management of your appraisal rights by the Dell Valuation Trust. If you are considering traditional arrangements or other alternatives for management of appraisal rights, you should determine the provisions for your control as well as for access to information needed by investors.

Process for reserving appraisal rights eligibility

The new September 12 voting date with a new August 13 record date for stock ownership raised some questions that were not addressed in Dell’s revised proxy statement about requirements for the written demand that must be delivered to secure appraisal rights.⁵ Since Dell’s legal officer declined to clarify the requirements, Fish & Richardson has informed the company as counsel to the Dell Valuation Trust that they will take the position that a stockholder who had already presented a demand for appraisal will not need to repeat the demand.⁶ This means that the Trust will certify eligibility of appraisal rights based on demands for appraisal

⁴ See [DGCL § 262\(e\)](#).

⁵ See [August 14, 2013 Dell Inc. SEC Schedule 14A Proxy Statement \(Revised\) for September 12, 2013 Special Meeting of Stockholders](#), which addresses appraisal rights in a [summary](#) on its pages 15-16 (PDF pages 24-25) that refers to the original proxy statement.

⁶ See [August 22, 2013 letter of Jeremy D. Anderson, Fish & Richardson to Janet B. Wright, Dell Inc.](#)

delivered in relation to the original merger proposal and meeting, and that it will not charge the rights holder for legal costs of responding to any Dell challenge of eligibility on that basis.

If you own Dell stock that was acquired after the old June 3, 2013 record date, you will need to process another written demand for appraisal to reserve your rights for those new shares. A previous demand for appraisal rights would apply only to stock owned at that time.

Whether for new demands or updates for added shares, it is important to understand that the *administrative processing through custodians and Depository Trust Company normally takes about ten days*, and you should not expect things to go more smoothly than usual around Labor Day. For those of you who want the Trust to assume administrative responsibility for processing the demand for appraisal, its deadline for accepting requests is August 30, 2013.

Refinements of investor support requirements

The adjournments of the Dell vote, while wearing, have actually proved to be valuable in providing an opportunity to consider a broader range of investor interests as well as a broader range of buyout situations for our support of investor interests in appraisal rights.

- ▶ **Dell Valuation Trust** – Plans for the Trust’s administration of Dell appraisal rights as standardized units of investment are being refined to increase the flexibility of holders to make independent decisions about buying, selling, borrowing or settling, including participation in any public registration of investment interests. Each holder of rights, including future buyers, will be able to act separately.
- ▶ **Review Panel** – The panel of investor-selected legal and valuation experts that had been planned for oversight of the Trust is being reorganized to address broader investor interests in appraisal rights. This continuing panel will then establish committees responsible for Dell and other Forum-supported appraisal cases to confer with the attorneys responsible for each of those proceedings and to publicly report on their progress.
- ▶ **Program for Appraisal Rights Investments** – We are in the process of organizing a program for investors who anticipate regular attention to opportunities for value enhancement relating to buyouts, developing the broadened Review Panel and other projects to support their leadership in the use of appraisal rights.

I will welcome your interest in the progress of these efforts, as well as your questions about securing appraisal rights to realize the fair value of a long-term investment in Dell.

GL – August 23, 2013

Gary Lutin
Chairman, The Shareholder Forum
575 Madison Avenue, New York, New York 10022
Tel: 212-605-0335
Email: gl@shareholderforum.com