greatly limit their ultimate utility on a takeover position.

What Are the Disadvantages of a Toehold?

Premature Public Leak

Implementing large stock purchases or derivative positions can present a high risk of leaks even before the legally required disclosure. If a toehold position becomes public, its advantages would be significantly curtailed, *e.g.*, stock prices may go up, which would make it more expensive and potentially more difficult for the deal to get done.

Negative Target Reaction

A toehold acquisition may be perceived as a hostile tactic by the target, which may then act to block the toehold acquirer (such as by implementing a shareholder rights plan) or favor other "non-hostile" potential acquirers.

Getting Trapped in the Toehold

Potential acquirers can find themselves trapped in a toehold position if they decide to sign a non-disclosure agreement to gain access to inside information. In connection with the entry into a non-disclosure agreement, the target will likely seek a standstill restriction. The standstill would prohibit the toehold acquirer from acquiring any additional shares for an agreed period of time, while the acquirer's receipt of the target's material non-public information may simultaneously restrict the acquirer from selling its target securities for an uncertain amount of time as a violation of federal insider trading laws. Thus, the potential toehold acquirer could be stuck in a position where it can neither buy more stock nor sell its stake. Further, the advantage of the toehold as ammunition for a hostile approach goes away if a non-disclosure agreement has a standstill that would prohibit the use of the confidential information for the purpose of anything other than a negotiated deal. If the toehold acquirer is left holding the position for a significant amount of time, it would have to mark its target holdings to market on its income statements, which could have significant impact depending on the size of the toehold (though generally less relevant for private equity firms as compared to public companies).

Conclusion

Given the foregoing, we continue to believe that toeholds will be suitable for few acquirers, but there will be circumstances in which the advantages outweigh the disadvantages. Whether to make such a move will be driven by the specific context and strategic considerations. In addition, toeholds would only make sense for an acquirer with ready cash and who is prepared to navigate a potentially more complex approach than the typical consensual transaction.

ENDNOTES:

[1]Please *see* this article (https://www.paulweiss.com/media/3980384/22july20-sec-13f.pdf) for additional information on the proposed changes to Form 13F reporting requirements.

DELAWARE SUPREME COURT UPHOLDS UNAFFECTED MARKET PRICE IN STATUTORY APPRAISAL ACTION

By Michael J. McConnell, Marjorie P.

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The Situation: Stockholders sought appraisal—judicial determination of the "fair value" of their stock—in connection with a merger. The Delaware Court of Chancery found that the fair value was equal to the company's unaffected market price, which was less than the deal price. The Delaware Supreme Court affirmed in *Fir Tree Value Master Fund, LP v. Jarden Corp.*[1]

The Result: The unaffected market price may be the most reliable indicator of fair value where a public company's stock trades in an informationally efficient market.

Looking Ahead: *Jarden* makes clear the deal price does not operate as a valuation floor. Because stockholders seeking appraisal agree to accept the judicially determined value of their shares, they risk that the court may determine that fair value is below the deal price—and perhaps substantially so.

Unaffected Market Price as Fair Value

This statutory appraisal action arose out of the acquisition of Jarden by Newell, both large consumer products companies, for $59.21 per share. Certain of Jarden's large stockholders refused to accept the deal price, asserting that it undervalued Jarden. They sought appraisal and, in so doing, agreed to accept the judicially determined "fair value" of their shares, whether the court found that to be higher than, equal to, or lower than the deal price itself.

The stockholders offered competing valuation methods and related expert testimony. The Court of Chancery ultimately determined that Jarden's fair value was equal to its unaffected market price of $48.31—that is, the market price on the last day Jarden's stock traded without being affected by news of the merger negotiations, which leaked about a week before the deal was announced.

The court found that it was reasonable to rely exclusively on Jarden's unaffected market price because Jarden's stock traded in a semi-strong efficient market, which quickly integrated all publicly available information into Jarden's stock price. The court also concluded, based on an event study performed by Jarden's expert, that the stockholders had failed to prove that the market lacked material, nonpublic information about Jarden's financial prospects.

On appeal, the Delaware Supreme Court affirmed the Court of Chancery's decision and its findings. The stockholders argued that, under the Supreme Court's earlier *Aruba* decision,[2] the fair value of a corporation's stock is not its market price. The Supreme Court rejected this argument, noting that the *Aruba* court recognized that the market price of a stock trading in an efficient market should be given weight because it "is an important indicator of its economic value." The Court also made clear that *Aruba* and its other recent appraisal decisions did not rule out any recognized valuation method to support the fair value determination in a statutory appraisal action, including the unaffected market price, as

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long as the valuation method was supported by evidence in the record.

Effect of *Jarden*

To the extent there was lingering uncertainty after *Aruba*, the Delaware Supreme Court's *Jarden* decision makes clear that unaffected market price may be used as the primary indicator of fair value in statutory appraisal actions where the stock trades in an informationally efficient market.

The Supreme Court acknowledged that the unaffected market price is not always a better indicator of fair value than the deal price because, during deal negotiations, a buyer typically has an informational advantage over third parties. Nor does the deal price set a valuation "floor" where it results from a flawed sales process. The Supreme Court rejected the argument that Jarden would have received a higher deal price but for flaws in the sales process relating to Jarden's negotiation of the merger, and thus declined to find error in the Court of Chancery's determination that fair value was below the deal price, which reflected significant synergies.

The *Jarden* decision thus increases the risk for stockholders seeking appraisal, as they may ultimately be awarded a fair value for their shares that is well below the deal price.

Three Key Takeaways

- Unaffected market price may be used to determine the fair value of a corporation's stock where the stock trades in an informationally efficient market.
- Deal price does not act as a floor for fair value in statutory appraisal actions where synergies would be realized in the deal and were captured in the deal price, and the deal price-minus-synergies can be used to corroborate the unaffected market price.
- The Delaware Supreme Court has not ruled out using any recognized valuation method to support fair value in its recent appraisal decisions.

ENDNOTES:

[1] *Fir Tree Value Master Fund, LP v. Jarden Corporation*, 2020 WL 3885166 (Del. 2020).

[2] *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128 (Del. 2019).

BREAKING THE VICIOUS CYCLE: ESTABLISHING A GOLD STANDARD FOR EFFICIENCIES

By Christine S. Wilson

Christine Wilson is the Commissioner of the U.S. Federal Trade Commission. The following is edited from a speech which she gave at the Bates White Antitrust Webinar on June 24, 2020.

While there has been halting progress in the treatment of efficiencies, merger policy continues to be focused almost entirely on anticompetitive effects.[1] In other words, when it comes to efficiencies, we still live in the antediluvian era.

The overarching problem is that while courts and the U.S. antitrust Agencies—the Federal Trade Commission and Department of Justice—are comfortable with probabilistic assessments of merger harms, they seem to require certainty in efficiencies forecasts. For instance, in *Brown Shoe* the Supreme Court interpreted the Clayton