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October 14, 2015

## **Delaware Court of Chancery: There Is No *Per Se* Rule That All Management Inputs to Financial Advisor Valuations Must Be Disclosed**

In *Nguyen v. Barrett*, the Delaware Court of Chancery denied a motion for a certification of an interlocutory appeal, holding that where financial advisors derived their own unlevered, after-tax free cash flow analysis, rather than relying on management projections alone, the inputs on which they rely are not *per se* subject to disclosure.

Plaintiff sought to enjoin an all-cash tender offer by AOL Inc. to purchase all of the outstanding stock of Millennial Media, Inc. Plaintiff alleged that the proxy statement was materially misleading because it implied that management, rather than the financial advisor, produced the unlevered, after-tax free cash flows disclosed in the proxy, or, alternatively, that all management projections and inputs relied on by the financial advisor must be disclosed as a matter of law.

The Delaware Court of Chancery declined to enjoin the tender offer, holding that the proxy accurately disclosed that management did not prepare forecasts of unlevered, after-tax free cash flows, but did provide certain revenue projections and other inputs from which the financial advisor derived unlevered, after-tax free cash flows and a DCF valuation. The court then denied plaintiff's motion for an emergency certification of interlocutory appeal, holding that Delaware case law did not support a *per se* rule requiring disclosure of all management inputs into a financial advisor's valuation. In so holding, the court stated that:

- *A “disclosure that does not include all financial data needed to make an independent determination of fair value is not per se misleading or omitting a material fact.”*
- *“Where the bankers derive unlevered, after-tax free cash flows rather than relying on management projections, the inputs on which they rely are not per se subject to disclosure.”*

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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