

FORESEEABLE AND UNFORESEEABLE SUBSEQUENT EVENTS:

ANALYZING PERTINENT FACTS MINIMIZES THE RISKS OF A VALUATION REPORT CHALLENGE



Cases decided over the years support the concept that potential or subsequent events can be considered for the purposes of preparing a business valuation or damages report.

Hindsight is usually inadmissible unless it can be used to test the validity of conclusions that existed as of the valuation date. Pre-valuation date events can be probative, but not necessarily determinative, of value.

Potential or actual post-valuation events can play a role in the analysis as long as they are at arm's length, relevant, and provide evidence of value as of the valuation date. Those events that affect the value may not be considered unless they were foreseeable as of the valuation date.

Unforeseeable post-valuation events, such as 9-11, the death of a key employee, or property contamination, should clearly not be considered at an earlier valuation date. Contingent events that are known but not specifically quantifiable, however, need to be addressed.

The Internal Revenue Service and the courts in both tax and damage claim cases often have the benefit of comparing a subsequent actual transaction against the original valuation/damages report in critiquing its conclusions. Unless the intervening events that contributed to the change in value were unknown as of the valuation date, the courts often place greater weight on the subsequent event.

For example, a registration statement prepared in the post-valuation period included information known prior to the valuation date. It was considered probative of value in an employment agreement lawsuit when an initial public offering subsequently followed and was beneficial to a plaintiff. See *Mark Boyce v. Soundview Technology Group, Inc.* No. 05-1685-CV (2nd Cir. Sept. 29, 2006).

But the question remains as to what constitutes a reasonable time period to consider a post-valuation event. Court decisions have considered events well beyond the valuation date as being applicable. See *Noble v. Commissioner T.C. Memo 2005-2* where an actual

transaction that took place more than 13 months after the valuation date was considered to be essentially indicative of value. In this case, it involved the same percentage interest even though there was a transaction by the same buyer at a lower price two months prior to the valuation date.

Additionally, in the *Morton v. Commissioner T.C. Memo 1997-166*, a noncontrolling interest valuation was made nine months after — and a private placement memorandum 15 months after — the valuation date. The court considered these two factors because reliable valuation indicators were not present on the valuation date.

On the other hand, regardless of whether or not the transaction materialized, or occurred soon after or well after the valuation date, its impact could be minimized since there was sufficient risk that it would be completed as of the valuation date.

As a result, the subsequent event price should not be the starting point in the valuation process to determine the value at the earlier valuation date. The relevance of potential or actual subsequent events, however, must necessarily be considered to determine if, indeed, it provided evidence as of the valuation date.

Thorough analysis of relevant factors minimizes the risks associated with having a valuation report challenged based on subsequent events. ☺



BY PETER GAMPEL, CPA, ABV, ASA,
CBV, CA
CROWE CHIZEK AND COMPANY LLC
350 E. LAS OLAS BLVD., SUITE 1420
FORT LAUDERDALE, FL 33301
954-202-8619
PGAMPEL@CROWECHIZEK.COM