

NetApp, Inc.  
Form S-4  
June 04, 2009

**Table of Contents**

As filed with the Securities and Exchange Commission on June 4, 2009

Registration No. 333-

**UNITED STATES SECURITIES AND EXCHANGE COMMISSION**  
**Washington, D.C. 20549**

**Form S-4**  
**REGISTRATION STATEMENT**  
**UNDER**  
**THE SECURITIES ACT OF 1933**

**NetApp, Inc.**

*(Exact name of Registrant as specified in its charter)*

**Delaware**  
*(State or other jurisdiction  
of incorporation)*

**3572**  
*(Primary Standard Industrial  
Classification Code Number)*

**77-0307520**  
*(I.R.S. Employer  
Identification Number)*

**495 East Java Drive**  
**Sunnyvale, California 94089**  
**(408) 822-6000**

*(Address, including Zip Code, and Telephone Number, including Area Code, of Registrant's Principal Executive  
Offices)*

**Daniel J. Warmenhoven**  
**Chief Executive Officer and Director**  
**NetApp, Inc.**  
**495 East Java Drive**  
**Sunnyvale, California 94089**  
**(408) 822-6000**

*(Name, Address, including Zip Code, and Telephone Number, including Area Code, of Agent for Service)*

*With copies to:*

**Steven E. Bochner, Esq.**  
**Michael S. Ringler, Esq.**  
**Nathaniel P. Gallon, Esq.**  
**Wilson Sonsini Goodrich & Rosati**  
**Professional Corporation**  
**650 Page Mill Road**  
**Palo Alto, California 94304-1050**  
**(650) 493-9300**

**Robert G. Specker, Esq.**  
**Vice President, In-house Counsel**  
**Data Domain, Inc.**  
**2421 Mission College Blvd.**  
**Santa Clara, California 95054**  
**(408) 980-4800**

**Gordon K. Davidson, Esq.**  
**Dennis R. Debroeck, Esq.**  
**Robert A. Freedman, Esq.**  
**R. Gregory Roussel, Esq.**  
**Fenwick & West LLP**  
**801 California Street**  
**Mountain View, California 94041**  
**(650) 938-5200**

**Approximate date of commencement of the proposed sale of the securities to the public:** As soon as practicable after this Registration Statement becomes effective and upon completion of the merger described in the enclosed document.

If the securities being registered on this Form are being offered in connection with the formation of a holding company and there is compliance with General Instruction G, check the following box.

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

If this Form is a post-effective amendment filed pursuant to Rule 462(d) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of large accelerated filer, accelerated filer and smaller reporting company in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer  Accelerated filer  Non-accelerated filer  Smaller reporting company   
(Do not check if a smaller reporting company)

If applicable, place an X in the box to designate the appropriate rule provision relied upon in conducting this transaction:

Exchange Act Rule 13e-4(i) (Cross-Border Issuer Tender Offer)

Exchange Act Rule 14d-1(d) (Cross-Border Third-Party Tender Offer)

#### CALCULATION OF REGISTRATION FEE

Title of Each Class of Securities to be Registered(1)	Amount to be Registered(2)	Proposed Maximum Offering Price per Unit	Proposed Maximum Aggregate Offering Price(3)	Amount of Registration Fee
Common Stock, par value \$0.001 per share	54,695,347	N/A	\$613,152,900	\$34,214

(1) This Registration Statement relates to shares of common stock, par value \$0.001 per share, of the Registrant ( NetApp ) issuable to holders of shares of common stock, par value \$0.0001 per share, of Data Domain, Inc., a Delaware corporation ( Data Domain ), in the proposed acquisition of Data Domain by the Registrant pursuant to the terms of the Agreement and Plan of Merger, dated as of May 20, 2009, as amended on June 3, 2009, by and among the Registrant, Kentucky Merger Sub One Corporation, Derby Merger Sub Two LLC and Data Domain.

(2) Based on the maximum number of shares of NetApp common stock to be issued in connection with the merger, calculated as the product of (a) 70,275,404 shares, the maximum number of shares of Data Domain common stock that may be cancelled and exchanged in the merger and (b) the maximum exchange ratio of 0.7783 shares of the Registrant's common stock for each share of Data Domain common stock, which represents the highest possible exchange ratio pursuant to the Agreement and Plan of Merger.

(3) Estimated solely for purposes of calculating the registration fee in accordance with Rules 457(c) and 457(f) of the Securities Act of 1933, as amended, the market value of the securities to be registered was calculated as the product of (A) \$25.175, the average of the high and low prices per share of Data Domain common stock on

May 29, 2009, as quoted on the NASDAQ Global Select Market, multiplied by (B) 70,275,404, the maximum number of shares of Data Domain common stock that may be cancelled and exchanged in the merger; less \$1,156,030,396, the aggregate amount of cash that would be payable to the holders of Data Domain common stock in the merger assuming 70,275,404 shares of Data Domain common stock were outstanding and assuming a per share cash amount of \$16.45.

**The Registrant hereby amends this Registration Statement on such date or dates as may be necessary to delay its effective date until the Registrant shall file a further amendment which specifically states that this Registration Statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933, as amended, or until the Registration Statement shall become effective on such dates as the Commission, acting pursuant to said Section 8(a), may determine.**

---

**Table of Contents**

Information contained herein is subject to completion or amendment. A registration statement relating to these securities has been filed with the Securities and Exchange Commission. These securities may not be sold nor may offers to buy be accepted prior to the time the registration statement becomes effective. This document shall not constitute an offer to sell or the solicitation of any offer to buy nor shall there be any sale of these securities in any jurisdiction in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such jurisdiction.

**PRELIMINARY SUBJECT TO COMPLETION DATED JUNE 3, 2009**

**MERGER PROPOSAL  
YOUR VOTE IS VERY IMPORTANT**

Dear Stockholder:

On May 20, 2009, Data Domain, Inc., referred to as Data Domain, and NetApp, Inc., referred to as NetApp, announced a business combination in which a direct, wholly owned subsidiary of NetApp will merge with Data Domain, with Data Domain continuing as the interim surviving entity, and, immediately thereafter, subject to certain conditions, Data Domain will merge with a second direct, wholly owned subsidiary of NetApp, with such subsidiary continuing as the final surviving entity. On June 3, 2009, NetApp and Data Domain amended the original merger agreement to reflect the terms described in this proxy statement/prospectus. The first merger is referred to herein as the first-step merger, the second merger is referred to herein as the second-step merger, and together such mergers are referred to herein as the merger. If the first-step merger is completed, you will have the right to receive \$16.45 in cash, without interest and less any applicable withholding, referred to as the cash consideration, subject to adjustment, and a number of shares of NetApp common stock equal to the exchange ratio, referred to as the stock consideration, and together with the cash consideration, referred to as the merger consideration, for each outstanding share of common stock of Data Domain that you hold immediately prior to the first-step merger.

The exchange ratio is equal to (i) 0.7783 shares of NetApp common stock if the closing average (as described below) is less than \$17.41, (ii) 0.6370 shares of NetApp common stock if the closing average is greater than \$21.27, and (iii) that fraction of a share of NetApp common stock (rounded to the nearest ten thousandth) equal to the quotient obtained by dividing \$13.55 by the closing average, if the closing average is (A) less than or equal to \$21.27 and (B) greater than or equal to \$17.41. The closing average means the average of the closing sales prices for NetApp common stock (rounded to the nearest one-hundredth of a cent) as reported on the NASDAQ Global Select Market for the 10 most recent consecutive trading days ending on the third trading day immediately prior to the closing of the first-step merger. Data Domain stockholders may contact Innisfree M&A Incorporated, Data Domain's information agent, toll free at (888) 750-5834, and banks or brokers may call collect at (212) 750-5833, for information regarding the approximate merger consideration payable in connection with the first-step merger based on information available as of the date of inquiry. In addition, on the third trading day preceding the date of the special meeting of the Data Domain stockholders described below, NetApp and Data Domain will issue a joint press release announcing the aggregate merger consideration that would be payable to the Data Domain stockholders, assuming that the merger closed on the date of the special meeting. As further described in this proxy statement/prospectus, under certain conditions, NetApp may elect to reduce, or be required to reduce, the stock consideration, and in the event of such a reduction, NetApp will be required to increase the cash consideration.

If the closing average is less than \$17.41, the value of the merger consideration will be less than the aggregate \$30.00 value of the merger consideration on June 3, 2009, the date on which the revised terms of the merger were announced. If the closing average is greater than \$21.27, the value of the merger consideration will be greater than the aggregate \$30.00 value of the merger consideration on June 3, 2009. The following table shows the closing sale prices of NetApp common stock and Data Domain common stock as reported on the NASDAQ Global Select Market on May 19, 2009, the last trading day before the initial announcement of the potential merger, on June 2, 2009, the last trading day before the revised terms of the merger were announced and on [ ], 2009, the last trading day before the distribution of the enclosed proxy statement/prospectus for which data was available. This table also shows the implied value of the merger consideration proposed for each share of Data Domain common stock, which was calculated by adding to \$16.45, or the cash consideration, the product obtained by multiplying the closing price of NetApp common stock on those dates by the implied exchange ratio for the stock consideration that would apply if the closing average were equal to such closing price on such dates.

	NetApp Common Stock	Data Domain Common Stock	Implied Value of One Share of Data Domain Common Stock
May 19, 2009(1)	\$ 18.07	\$ 17.43	\$ 25.00
June 2, 2009	\$ 19.34	\$ 31.58	\$ 30.00
[ ], 2009	\$ [ ]	\$ [ ]	\$ [ ]

(1) Based on the terms of the original merger agreement.

The market prices of both NetApp common stock and Data Domain common stock will fluctuate before the merger. You should obtain current stock price quotations for NetApp common stock and Data Domain common stock. NetApp common stock is quoted on the NASDAQ Global Select Market under the symbol NTAP. Data Domain common stock is quoted on the NASDAQ Global Select Market under the symbol DDUP.

We cannot complete the merger unless Data Domain's stockholders adopt the merger agreement, the proposal to adopt the merger agreement being referred to in the proxy statement/prospectus as the merger proposal. Data Domain will hold a special meeting of its stockholders to vote on the merger proposal at 2421 Mission College Blvd., Santa Clara, CA 95054 at [ ], local time, on [ ], 2009. **Your vote is important. The market price of NetApp common stock will continue to fluctuate following the date of the stockholder vote on the merger proposal at the special meeting. Consequently, at the time of the stockholder vote, the value of the stock consideration will not yet be determined. Regardless of whether you plan to attend the special meeting, please take the time to vote your shares in accordance with the instructions contained in this proxy statement/prospectus. Failing to vote will have the same effect as voting against the merger proposal. You will also have an opportunity to vote to approve the adjournment or postponement of the special meeting, if necessary, to solicit additional proxies in favor of the approval of the merger proposal, referred to as the adjournment proposal.**

**The Data Domain board of directors unanimously recommends that Data Domain stockholders vote FOR approval of the merger proposal and FOR the adjournment proposal.**

This proxy statement/prospectus describes the special meeting, the merger proposal and the adjournment proposal, the documents related to each proposal, and other related matters. **Please carefully read this entire proxy statement/prospectus, including Risk Factors beginning on page 16, for a discussion of the risks relating to the merger proposal.** You also can obtain information about NetApp and Data Domain from documents that each of us has filed with the Securities and Exchange Commission.

By Order of the Board of Directors

Sincerely,

Frank Sloatman  
President and Chief Executive Officer

**Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of the NetApp common stock to be issued under this proxy statement/prospectus or determined if this proxy statement/prospectus is accurate or adequate. Any representation to the contrary is a criminal offense.**

The date of this proxy statement/prospectus is [        ], 2009, and it is first being mailed or otherwise delivered to Data Domain stockholders on or about [        ], 2009.

---

**Table of Contents**

**DATA DOMAIN, INC.  
2421 Mission College Blvd.  
Santa Clara, CA 95054**

**NOTICE OF SPECIAL MEETING OF STOCKHOLDERS**

[ ], 2009

To the Stockholders of Data Domain, Inc.:

Data Domain, Inc., or Data Domain, will hold a special meeting of stockholders at 2421 Mission College Blvd., Santa Clara, CA 95054 at [ ], local time, on [ ], 2009 to consider and vote upon the following proposals:

1. To adopt the Agreement and Plan of Merger, dated as of May 20, 2009, as amended on June 3, 2009, by and among NetApp, Kentucky Merger Sub One Corporation, Derby Merger Sub Two LLC and Data Domain, as the agreement may be amended from time to time, which proposal is referred to as the merger proposal; and
2. To approve the adjournment or postponement of the special meeting, if necessary, to solicit additional proxies, in the event that there are not sufficient votes at the time of the special meeting to approve the merger proposal, which proposal is referred to as the adjournment proposal.

The Data Domain board of directors has fixed the close of business on [ ], 2009 as the record date for the special meeting. Only Data Domain stockholders of record at that time are entitled to notice of, and to vote at, the special meeting, or any adjournment or postponement of the special meeting. In order for the merger proposal to be approved, the holders of at least a majority of the Data Domain shares outstanding and entitled to vote thereon must vote in favor of approval of the merger proposal. In the event that a quorum is not present in person or represented by proxy at the special meeting, the chairman of the meeting may adjourn the meeting to another place, date or time. If a quorum is present in person or represented by proxy at the special meeting, approval of the adjournment proposal requires the affirmative vote of the majority of the outstanding shares that are present in person or represented by proxy and entitled to vote at the special meeting.

**Regardless of whether you plan to attend the special meeting, please submit your proxy with voting instructions. Please vote as soon as possible. If you hold stock in your name as a stockholder of record, please vote your shares by (i) completing, signing, dating and returning the enclosed proxy card, (ii) using the telephone number on your proxy card, or (iii) using the Internet voting instructions on your proxy card. If you hold your stock in street name through a bank, broker, or other nominee, please direct your bank, broker, or other nominee to vote in accordance with the instructions you have received from your bank, broker, or other nominee.** This will not prevent you from voting in person, but it will help to secure a quorum and avoid additional solicitation costs. Any holder of Data Domain common stock who is present at the special meeting may vote in person instead of by proxy, thereby canceling any previous proxy. In any event, a proxy may be revoked in writing at any time before the special meeting in the manner described in the accompanying document.

**The Data Domain board of directors has unanimously approved the merger proposal and unanimously recommends that Data Domain stockholders vote FOR approval of the merger proposal and FOR approval of the adjournment proposal.**

BY ORDER OF THE BOARD OF DIRECTORS,



Sincerely,

Frank Sloodman  
President and Chief Executive Officer

[        ], 2009

**YOUR VOTE IS IMPORTANT.**

**PLEASE VOTE YOUR SHARES PROMPTLY, REGARDLESS OF WHETHER YOU PLAN TO ATTEND  
THE SPECIAL MEETING.**

---

**Table of Contents**

**REFERENCES TO ADDITIONAL INFORMATION**

This proxy statement/prospectus incorporates important business and financial information about NetApp and Data Domain from documents that are not included in or delivered with this document. You can obtain documents incorporated by reference in this proxy statement/prospectus, other than certain exhibits to those documents, or filed as exhibits to the registration statement of which this proxy statement/prospectus is a part, by requesting them in writing or by telephone from the appropriate company at the following addresses:

**NetApp, Inc.**  
495 East Java Drive  
Sunnyvale, CA 94089  
Attention: Investor Relations  
Telephone: (408) 822-7098

**Data Domain, Inc.**  
2421 Mission College Blvd.  
Santa Clara, CA 95054  
Attention: Investor Relations  
Telephone: (408) 980-4909

*You will not be charged for any of these documents that you request. Data Domain stockholders requesting documents should do so by [        ], 2009 (which is five business days prior to the date of the special meeting) to ensure that they receive them before the special meeting.*

See Where You Can Find More Information on page 119.

**ABOUT THIS PROXY STATEMENT/PROSPECTUS**

This proxy statement/prospectus, which forms a part of a registration statement on Form S-4 filed with the Securities and Exchange Commission, referred to as the SEC, by NetApp, constitutes a prospectus of NetApp under Section 5 of the Securities Act of 1933, as amended, referred to as the Securities Act, with respect to the shares of NetApp common stock to be issued to Data Domain stockholders in connection with the merger. This document also constitutes a proxy statement under Section 14(a) of the Securities Exchange Act of 1934, as amended, referred to as the Exchange Act, and the rules thereunder, and a notice of meeting with respect to the special meeting of Data Domain stockholders to consider and vote upon the merger proposal and the adjournment proposal.

Except as otherwise provided herein, all descriptions of and calculations made under the terms of the merger agreement and the transactions contemplated by the merger agreement, including the merger, assume that no Data Domain stockholders exercise appraisal rights under Delaware law.

To facilitate the reading of this proxy statement/prospectus, in referring to we, us and other first person declarations, we are referring to both NetApp and Data Domain or, in some instances, the combined company as it would exist following the completion of the merger.

---

**Table of Contents****TABLE OF CONTENTS**

	<b>Page</b>
<u>QUESTIONS AND ANSWERS ABOUT VOTING PROCEDURES FOR THE DATA DOMAIN SPECIAL MEETING</u>	ii
<u>SUMMARY</u>	1
<u>SELECTED CONSOLIDATED HISTORICAL FINANCIAL DATA OF NETAPP</u>	8
<u>SELECTED CONSOLIDATED HISTORICAL FINANCIAL DATA OF DATA DOMAIN</u>	10
<u>SELECTED UNAUDITED PRO FORMA CONDENSED COMBINED FINANCIAL DATA</u>	12
<u>COMPARATIVE HISTORICAL AND PRO FORMA PER SHARE DATA</u>	13
<u>CAUTIONARY STATEMENT REGARDING FORWARD-LOOKING STATEMENTS</u>	15
<u>RISK FACTORS</u>	16
<u>THE DATA DOMAIN SPECIAL MEETING</u>	43
<u>Time, Date and Place</u>	43
<u>Matters to Be Considered</u>	43
<u>Proxies</u>	43
<u>Solicitation of Proxies</u>	44
<u>Record Date</u>	44
<u>Voting Rights and Vote Required</u>	44
<u>Recommendation of the Data Domain Board of Directors</u>	45
<u>Attending the Meeting</u>	45
<u>Voting By Telephone or Via the Internet</u>	45
<u>Adjournments and Postponements</u>	45
<u>Appraisal Rights</u>	46
<u>Other Matters</u>	46
<u>Questions and Additional Information</u>	46
<u>INFORMATION ABOUT THE COMPANIES</u>	47
<u>NetApp, Inc.</u>	47
<u>Kentucky Merger Sub One Corporation</u>	47
<u>Derby Merger Sub Two LLC</u>	47
<u>Data Domain, Inc.</u>	47
<u>DATA DOMAIN PROPOSAL 1 THE MERGER</u>	48
<u>Background of the Merger</u>	48
<u>Data Domain's Reasons for the Merger: Recommendation of the Data Domain Board of Directors</u>	59
<u>Opinion of Qatalyst Partners LP</u>	62
<u>Data Domain Officers and Directors Have Financial Interests in the Merger</u>	68
<u>NetApp's Reasons for the Merger</u>	71
<u>Board of Directors and Management of NetApp Following Completion of the Merger</u>	72
<u>Public Trading Markets</u>	72
<u>NetApp's Dividend Policy</u>	72
<u>Appraisal Rights</u>	72
<u>Regulatory Approvals Required for the Merger</u>	74
<u>THE MERGER AGREEMENT</u>	76
<u>The Merger</u>	76
<u>Per Share Merger Consideration</u>	76
<u>Treatment of Data Domain Stock Options and Other Equity-Based Awards</u>	77
<u>Completion of the Merger</u>	78



**Table of Contents**

	<b>Page</b>
<u>Conversion of Shares; Exchange of Certificates</u>	78
<u>Representations and Warranties</u>	79
<u>Material Adverse Effect</u>	80
<u>Covenants; Conduct of Business Prior to the Merger</u>	81
<u>Limitation on the Solicitation, Negotiation and Discussion of Other Acquisition Proposals by Data Domain</u>	83
<u>Reasonable Best Efforts of Data Domain to Obtain the Required Stockholder Vote</u>	85
<u>Employee Matters</u>	87
<u>Indemnification and Insurance</u>	88
<u>Conditions to Complete the Merger</u>	88
<u>Termination of the Merger Agreement</u>	90
<u>Expenses and Termination Fees</u>	92
<u>Amendment and Waiver</u>	93
<u>VOTING AGREEMENTS</u>	93
<u>ACCOUNTING TREATMENT</u>	95
<u>MATERIAL U.S. FEDERAL INCOME TAX CONSEQUENCES OF THE MERGER</u>	95
<u>U.S. Federal Income Tax Consequences to U.S. Holders If the Merger is a Reorganization</u>	96
<u>U.S. Federal Income Tax Consequences to U.S. Holders If the Second-Step Merger Does Not Occur</u>	97
<u>Backup Withholding</u>	97
<u>UNAUDITED PRO FORMA CONDENSED COMBINED FINANCIAL STATEMENTS</u>	98
<u>NOTES TO UNAUDITED PRO FORMA CONDENSED COMBINED FINANCIAL STATEMENTS</u>	103
<u>COMPARISON OF STOCKHOLDERS' RIGHTS</u>	111
<u>COMPARATIVE MARKET PRICES AND DIVIDENDS</u>	117
<u>DATA DOMAIN PROPOSAL 2 – POSSIBLE ADJOURNMENT OR POSTPONEMENT OF THE DATA DOMAIN SPECIAL MEETING</u>	118
<u>LEGAL MATTERS</u>	118
<u>EXPERTS</u>	118
<u>OTHER MATTERS</u>	119
<u>DATA DOMAIN STOCKHOLDER PROPOSALS</u>	119
<u>WHERE YOU CAN FIND MORE INFORMATION</u>	119
<u>APPENDIX A – Agreement and Plan of Merger and Amendment No. 1 thereto</u>	A-1-1
<u>APPENDIX B – Form of Voting Agreement</u>	B-1
<u>APPENDIX C – §262 of the General Corporation Law of the State of Delaware – Appraisal Rights</u>	C-1
<u>APPENDIX D – Opinion of Qatalyst Partners LP</u>	D-1
<u>PART II – INFORMATION NOT REQUIRED IN PROSPECTUS</u>	II-1
<u>Indemnification of Directors and Officers</u>	II-1
<u>Exhibits and Financial Statement Schedules</u>	II-2
<u>Undertakings</u>	II-3
<u>EXHIBIT INDEX</u>	
<u>EXHIBIT 5.1</u>	
<u>EXHIBIT 8.1</u>	
<u>EXHIBIT 8.2</u>	
<u>EXHIBIT 23.2</u>	
<u>EXHIBIT 23.3</u>	
<u>EXHIBIT 99.1</u>	
<u>EXHIBIT 99.2</u>	

---

## QUESTIONS AND ANSWERS ABOUT VOTING PROCEDURES FOR THE DATA DOMAIN SPECIAL MEETING

### **Q: Why am I receiving this proxy statement/prospectus?**

A: NetApp, Inc., referred to as NetApp, has agreed to acquire Data Domain, Inc., referred to as Data Domain, by means of a merger of Data Domain with a subsidiary of NetApp. Please see *Data Domain Proposal 1 The Merger* beginning on page 48 and *The Merger Agreement* beginning on page 76 for a description of the merger and the merger agreement. A copy of the merger agreement is attached to this proxy statement/prospectus as Appendix A.

To complete the merger, Data Domain stockholders must vote to approve the merger proposal. Data Domain will hold a special meeting of stockholders to obtain this approval. You will also be given an opportunity to vote to approve the adjournment or postponement of the special meeting, if necessary, to solicit additional proxies in favor of the merger proposal, referred to as the adjournment proposal.

### **Q: What will happen in the merger?**

A: As the first step in the transaction, a direct, wholly owned subsidiary of NetApp will merge with Data Domain, with Data Domain continuing as the surviving entity, and as a direct, wholly owned subsidiary of NetApp. Immediately thereafter, provided that certain conditions described below are satisfied, Data Domain will merge with a second direct, wholly owned subsidiary of NetApp, with such second subsidiary continuing as the surviving corporation. The first merger is referred to herein as the first-step merger and the second merger is referred to herein as the second-step merger. If the second-step merger occurs, the first-step merger and the second-step merger together are referred to herein as the merger. If the second-step merger does not occur, references herein to the merger shall mean the first-step merger. Upon completion of the first-step merger, Data Domain common stock will cease trading on the NASDAQ Global Select Market, and Data Domain common stockholders will be entitled to receive the merger consideration for each outstanding share of Data Domain common stock held immediately prior to the first-step merger.

### **Q: What will Data Domain stockholders receive in the merger?**

A: In the merger, subject to the possible adjustments to the cash consideration and the stock consideration described below, each Data Domain stockholder will have a right to receive a cash amount of \$16.45, without interest and less any applicable withholding, plus a number of shares of NetApp common stock equal to the exchange ratio for each outstanding share of Data Domain common stock. The exchange ratio will depend on the closing average of NetApp common stock. The closing average is the average of the closing sales prices for NetApp common stock as reported on the NASDAQ Global Select Market for the 10 most recent consecutive trading days ending on the third trading day immediately prior to the closing of the first-step merger.

The exchange ratio is equal to (i) 0.7783 shares of NetApp common stock if the closing average is less than \$17.41, (ii) 0.6370 shares of NetApp common stock if the closing average is greater than \$21.27, and (iii) that fraction of a share of NetApp common stock equal to the quotient obtained by dividing \$13.55 by the closing average, if the closing average is (A) less than or equal to \$21.27 and (B) greater than or equal to \$17.41.

## Edgar Filing: NetApp, Inc. - Form S-4

For example, if the closing average of NetApp common stock is \$16.00, a holder of 100 shares of Data Domain common stock will receive \$1,645 in cash and 77 shares of NetApp common stock (i.e.,  $100 \times \$16.45 = \$1,645$  in cash and  $100 \times 0.7783 = 77$  shares of common stock), plus cash equal to the value of the fractional share of NetApp common stock to which such holder would otherwise be entitled.

If the closing average of NetApp common stock is \$18.00, a holder of 100 shares of Data Domain common stock will receive \$1,645 in cash and 75 shares of NetApp common stock (i.e.,  $100 \times \$16.45 = \$1,645$  in cash and  $100 \times (\$13.55/\$18.00) = 75$  shares of common stock), plus cash equal to the value of the fractional share of NetApp common stock to which such holder would otherwise be entitled.

Finally, if the closing average of NetApp common stock is \$22.00, a holder of 100 shares of Data Domain common stock will receive \$1,645 in cash and 63 shares of NetApp common stock (i.e.,  $100 \times \$16.45 = \$1,645$  in cash and  $100 \times 0.6370 = 63$  shares of common stock), plus cash equal to the value of the fractional share of NetApp common stock to which such holder would otherwise be entitled.

**Table of Contents**

The range of outcomes is illustrated by the following graph:

Stockholders of Data Domain should bear in mind, however, that under the merger agreement, if the exchange ratio is greater than or equal to 0.7006 and less than 0.7783, NetApp, in its sole discretion may reduce the number of shares of NetApp common stock you will receive and proportionately increase the amount of cash you will receive. However, NetApp may not reduce the amount of stock consideration and increase the cash consideration to the extent that it would reasonably be expected to cause the merger to fail to qualify as a tax-free reorganization under the Internal Revenue Code, except as may be required as described herein.

If the aggregate amount of the stock consideration issuable in the merger (including the stock consideration issuable to holders of Data Domain options and restricted stock units) would exceed 19.5% of the outstanding shares of NetApp common stock immediately prior to the effective time of the first-step merger, the stock consideration will be decreased to the minimum extent necessary so that no more than 19.5% of the outstanding shares of NetApp common stock will be issued in the merger (with such percentage measured immediately prior to the effective time of the first-step merger). In such event, the cash consideration will be increased by an amount equal to the product of (a) the amount of the reduction in the stock consideration multiplied by (b) the closing average. In the event that the stock consideration is decreased in accordance with this paragraph, the merger may fail to qualify as a tax-free reorganization under the Internal Revenue Code.

Data Domain stockholders may contact Innisfree M&A Incorporated, Data Domain's information agent, toll free at (888) 750-5834, and banks or brokers may call collect at (212) 750-5833, for information regarding the approximate merger consideration payable in connection with the merger. In addition, on the third trading day preceding the date of the special meeting of the Data Domain stockholders, NetApp and Data Domain will issue a joint press release announcing the aggregate merger consideration that would be payable to the Data Domain stockholders and whether the merger would qualify as a tax-free reorganization, assuming that the merger closed on the date of the special meeting. However, there can be no assurance that the merger will close on the date of the special meeting of the stockholders, and, as such, the assumptions in that announcement may differ from the actual merger consideration payable in, and the tax treatment of, the merger at the closing.

**Q: What do I need to do now?**

A: After you have carefully read this proxy statement/prospectus and have decided how you wish to vote your shares, please vote your shares promptly. If you hold stock in your name as a stockholder of record, please vote your shares by (i) completing, signing, dating and returning the enclosed proxy card, (ii) using the telephone number on your proxy card or (iii) using the Internet voting instructions on your proxy card. If you have Internet access, you are encouraged to record your vote via the Internet.



**Table of Contents**

If you hold your stock in street name through a bank, broker or other nominee, you must direct your bank, broker or other nominee to vote in accordance with the instructions you have received from your bank, broker or other nominee. Submitting your proxy card or directing your bank, broker or other nominee to vote your shares will ensure that your shares are represented and voted at the special meeting.

**Q: Why is my vote important?**

A: If you do not vote by proxy or vote in person at the special meeting, it will be more difficult for us to obtain the necessary quorum to hold the special meeting. In addition, your failure to vote, by proxy or in person, or failure to instruct your broker, will have the same effect as a vote against the merger proposal. The merger proposal must be approved by the holders of a majority of the outstanding shares of Data Domain common stock entitled to vote at the special meeting. In the event that a quorum is not present in person or represented by proxy at the special meeting, the chairman of the meeting may adjourn the meeting to another place, date or time. Approval of the adjournment proposal requires the affirmative vote of the majority of the outstanding shares that are present in person or represented by proxy and entitled to vote at the special meeting. The Data Domain board of directors unanimously recommends that you vote to approve the merger proposal and the adjournment proposal.

**Q: If my shares of common stock are held in street name by my broker, will my broker automatically vote my shares for me?**

A: No. Your broker cannot vote your shares without instructions from you. You should instruct your broker as to how to vote your shares, following the directions your broker provides to you. Please check the voting form used by your broker.

**Q: What if I abstain from voting or fail to instruct my broker?**

A: If you abstain from voting, the abstention will be counted toward a quorum at the special meeting, but it will have the same effect as a vote against the merger proposal and against the adjournment proposal. If you fail to instruct your broker, a broker non-vote, those shares would be counted towards a quorum at the special meeting, but the shares would not be considered entitled vote, and thus it will have the same effect as a vote against the merger proposal, but it will have no effect on the adjournment proposal.

**Q: Can I attend the special meeting and vote my shares in person?**

A: Yes. All stockholders, including stockholders of record and stockholders who hold their shares through banks, brokers, nominees or any other holder of record, are invited to attend the special meeting. Holders of record of Data Domain common stock can vote in person at the special meeting. If you are not a stockholder of record, you must obtain a proxy, executed in your favor, from the record holder of your shares, such as a broker, bank or other nominee, to be able to vote in person at the special meeting. If you plan to attend the special meeting, you must hold your shares in your own name or have a letter from the record holder of your shares confirming your ownership, and you must bring a form of personal photo identification with you to be admitted. Data Domain reserves the right to refuse admittance to anyone without proper proof of share ownership or without proper photo identification.

**Q: Can I change my vote?**

A: Yes. You may revoke any proxy at any time before it is voted by signing and returning a proxy card with a later date, delivering a written revocation letter to the Data Domain Corporate Secretary, or by attending the special

meeting in person, notifying the Corporate Secretary and voting by ballot at the special meeting. The Data Domain Corporate Secretary's mailing address is 2421 Mission College Blvd., Santa Clara, CA 95054.

Any stockholder entitled to vote in person at the special meeting may vote in person regardless of whether a proxy has been previously given, but the mere presence (without notifying the Data Domain Corporate Secretary) of a stockholder at the special meeting will not constitute revocation of a previously given proxy.

**Q: If I am a Data Domain stockholder, should I send in my Data Domain stock certificates now?**

**Table of Contents**

A: No. You should not send in your Data Domain stock certificates at this time. After the merger is completed, NetApp will send you instructions for exchanging Data Domain stock certificates for the merger consideration. Unless Data Domain stockholders specifically request to receive NetApp stock certificates, the shares of NetApp stock they receive in the merger will be issued in book-entry form.

**Q: Is the merger subject to the approval of stockholders of NetApp?**

A: No. NetApp is not required to obtain the approval of its stockholders with respect to the merger proposal.

**Q: When do you expect to complete the merger?**

A: Data Domain currently expects to complete the merger in the late summer or early fall of 2009. However, there can be no assurance as to when, or if, the merger will occur. Data Domain must first obtain the approval of Data Domain stockholders at the special meeting and the necessary regulatory approvals.

**Q: What are the material U.S. tax consequences of the merger?**

A: The U.S. tax consequences of the merger depend on whether the second-step merger occurs. The second-step merger will occur only if Wilson Sonsini Goodrich & Rosati, Professional Corporation, counsel to NetApp, and Fenwick & West LLP, counsel to Data Domain, deliver opinions to the effect that the first-step merger and the second-step merger together will qualify as a reorganization within the meaning of Section 368(a) of the Internal Revenue Code of 1986, as amended, or the Code. The tax opinions are conditioned upon receipt of customary written representations from NetApp and Data Domain, including representations that the stock consideration, valued as of the last business day immediately prior to the closing date of the first-step merger, will constitute at least 40% of the total consideration paid or payable to Data Domain stockholders in the first-step merger, referred to as the continuity of interest test.

Whether the continuity of interest test will be satisfied depends primarily upon the market value of the NetApp common stock immediately before the first-step merger. No assurances can be given that the continuity of interest test will be met. As a result, in deciding whether to approve the merger, you should consider the possibility that it may be taxable to you because the continuity of interest test is not satisfied and the second-step merger does not occur. You will not be entitled to change your vote in the event that the merger is taxable.

If the second-step merger occurs and the merger qualifies as a reorganization, a U.S. holder of Data Domain common stock receiving NetApp common stock and cash in exchange for Data Domain common stock in the merger generally will recognize gain equal to the lesser of (i) the amount of cash received by the U.S. holder (excluding any cash received in lieu of fractional shares) and (ii) the excess of the amount realized by the U.S. holder over the U.S. holder's tax basis in the Data Domain common stock. The amount realized by the U.S. holder will equal the sum of the fair market value of the NetApp common stock and the amount of cash (including any cash received in lieu of fractional shares) received by the U.S. holder. Losses will not be permitted to be recognized. Realized gain or loss must be calculated separately for each identifiable block of shares (i.e., shares acquired at different times and prices) exchanged in the merger, and a loss realized on the exchange of one block cannot be used to offset a gain recognized on the exchange of another block.

If the second-step merger does not occur, the exchange of Data Domain common stock for NetApp common stock and cash in the first-step merger will be a fully taxable transaction in which a U.S. holder generally will recognize gain or loss equal to the difference between the amount realized (as defined above) and the U.S. holder's tax basis in the Data Domain common stock. Gain or loss must be calculated separately for each

identifiable block of shares (i.e., shares acquired at different times and prices) exchanged in the first-step merger.

Please see Material U.S. Federal Income Tax Consequences of the Merger beginning on page 95.

**Q: Whom should I call with questions?**

A: If you need any assistance in completing your proxy card or have questions regarding the special meeting, you may call Innisfree M&A Incorporated, Data Domain's proxy solicitor, at (888) 750-5834 (toll-free) if you are a stockholder or (212) 750-5833 (collect) if you are a bank or broker.

Table of Contents**SUMMARY**

**This summary highlights material information from this proxy statement/prospectus. It may not contain all of the information that is important to you. Data Domain urges you to read carefully the entire proxy statement/prospectus and the other documents to which we refer to fully understand the merger and the related transactions. See **Where You Can Find More Information** on page 119. Each item in this summary refers to the page of this proxy statement/prospectus on which that subject is discussed in more detail.**

**Following the first-step merger, for each share of Data Domain common stock held by them, Data Domain stockholders will have a right to receive a cash amount of \$16.45, without interest and less any required withholding under United States federal, state, or local law or under foreign law, plus a number of validly issued, fully paid and non-assessable shares of NetApp common stock equal to the exchange ratio. The exchange ratio is equal to (i) 0.7783 shares of NetApp common stock if the closing average (as described below) is less than \$17.41, (ii) 0.6370 shares of NetApp common stock if the closing average is greater than \$21.27, and (iii) that fraction of a share of NetApp common stock equal to the quotient obtained by dividing \$13.55 by the closing average, if the closing average is (A) less than or equal to \$21.27 and (B) greater than or equal to \$17.41. The closing average means the average of the closing sales prices for NetApp common stock as reported on the NASDAQ Global Select Market for the 10 most recent consecutive trading days ending on the third trading day immediately prior to the closing of the first-step merger. Under certain conditions, NetApp may elect to reduce, or may be required to reduce, the stock consideration, and, in the event of such a reduction, NetApp will be required to increase the cash consideration. See **The Merger Agreement Per Share Merger Consideration**. Data Domain stockholders may contact Innisfree M&A Incorporated, Data Domain's information agent, toll free at (888) 750-5834, and banks or brokers can call collect at (212) 750-5833, for information regarding the merger consideration to be received upon exchange of each share of Data Domain common stock in connection with the merger. In addition, on the third trading day preceding the date of the special meeting of the Data Domain stockholders, NetApp and Data Domain will issue a joint press release announcing the aggregate merger consideration that would be payable to the Data Domain stockholders and whether the merger would qualify as a tax-free reorganization, assuming that the merger closed on the date of the special meeting. However, there can be no assurance that the merger will close on the date of the special meeting of the stockholders, and, as such, the assumptions in that announcement may differ from the actual merger consideration payable in, and the tax treatment of, the merger at the closing.**

On May 20, 2009, NetApp entered into an Agreement and Plan of Merger, referred to as the original merger agreement, by and among NetApp, Kentucky Merger Sub One Corporation, a wholly owned subsidiary of NetApp, referred to as Merger Sub One, Derby Merger Sub Two LLC, a wholly owned subsidiary of NetApp, referred to as Merger Sub Two, and Data Domain, pursuant to which for each share of Data Domain common stock held by them, Data Domain stockholders would have had a right to receive a cash amount of \$11.45 plus a number of validly issued, fully paid and non-assessable shares of NetApp common stock equal to an exchange ratio of (i) 0.833 shares of NetApp common stock if the closing average was less than \$16.26, (ii) 0.682 shares of NetApp common stock if the closing average was greater than \$19.88, and (iii) that fraction of a share of NetApp common stock equal to the quotient obtained by dividing \$13.55 by the closing average, if the closing average was (A) less than or equal to \$19.88 and (B) greater than or equal to \$16.26. On June 3, 2009, NetApp and Data Domain amended the original merger agreement to reflect the terms described in this proxy statement/prospectus. The merger agreement provides for the acquisition of Data Domain by NetApp by means of a merger of Merger Sub One with and into Data Domain, referred to as the first-step merger, with Data Domain as the interim surviving entity. Immediately thereafter, subject to certain conditions, Data Domain, as the interim surviving entity, will merge with and into Merger Sub Two, referred to as the second-step merger, with Merger Sub Two as the final surviving entity. Unless otherwise specified

herein, the second-step merger, taken together with the first-step merger, is referred to in this proxy statement/prospectus as the merger. As a result of the first-step merger, Data Domain will become a wholly owned subsidiary of NetApp. See Material U.S. Federal Income Tax Consequences of the Merger for an explanation of the two-step merger structure. Based on NetApp's stock trading price as of June 2, 2009, the aggregate value of the consideration payable in connection with the merger, is \$1.9 billion on a fully diluted basis (net of cash on Data

## **Table of Contents**

Domain's balance sheet). The aggregate value of the consideration payable at closing is subject to change, as further described in this proxy statement/prospectus.

Each share of Data Domain common stock issued and outstanding immediately prior to the effective time of the merger will be cancelled and extinguished and automatically converted into the right to receive a cash amount of \$16.45, or the cash consideration, without interest and less any required withholding under United States federal, state, local or foreign law, plus a number of validly issued, fully paid and non-assessable shares of NetApp common stock equal to the exchange ratio, referred to as the stock consideration, and together with the cash consideration, the merger consideration.

The merger agreement is included as Appendix A to this proxy statement/prospectus.

### **What Holders of Data Domain Stock Options and Other Equity-Based Awards Will Receive (page 77)**

Each of the vested and unvested options to purchase shares of Data Domain common stock that is outstanding at the effective time of the first-step merger will be assumed and converted into an option to acquire shares of NetApp common stock, subject to the option exchange ratio, at the effective time of the merger, and will otherwise be subject to the terms and conditions of such award prior to the completion of the first-step merger, including vesting and exercisability.

Each of Data Domain's restricted stock units outstanding at the effective time of the first-step merger will be assumed and converted into a restricted stock unit representing the right to receive the merger consideration payable for shares underlying each assumed and converted Data Domain restricted stock unit. The assumed and converted restricted stock units will otherwise be subject to the same terms and conditions, including vesting restrictions, applicable to such Data Domain restricted stock units prior to the effective time of the first-step merger.

Each of Data Domain's unvested shares of restricted stock outstanding at the effective time of the first-step merger will be assumed and converted into the right to receive the merger consideration payable for such shares. The merger consideration payable for such unvested shares of restricted stock will be subject to the same terms and conditions, including vesting restrictions, applicable to such shares of Data Domain restricted stock prior to the effective time of the first-step merger.

### **Material U.S. Federal Income Tax Consequences of the Merger to Data Domain Stockholders (page 95)**

The U.S. tax consequences of the merger depend on whether the second-step merger occurs. The second-step merger will occur only if Wilson Sonsini Goodrich & Rosati, Professional Corporation, counsel to NetApp, and Fenwick & West LLP, counsel to Data Domain, deliver tax opinions to the effect that the merger will qualify as a reorganization within the meaning of Section 368(a) of the Code. The tax opinions are conditioned upon receipt of customary written representations from NetApp and Data Domain, including representations that continuity of interest test will be satisfied, requiring that the stock consideration constitute at least 40% of the total consideration paid or payable to Data Domain stockholders in the first-step merger.

Whether the continuity of interest test will be satisfied depends primarily upon the market value of the NetApp common stock immediately before the first-step merger. No assurances can be given that the continuity of interest test will be met. As a result, in deciding whether to approve the merger, you should consider the possibility that the it may be taxable to you because the continuity of interest test is not satisfied and the second-step merger does not occur. You will not be entitled to change your vote in the event that the merger is taxable.

If the second-step merger occurs and the merger qualifies as a reorganization, a U.S. holder of Data Domain common stock receiving NetApp common stock and cash in exchange for such Data Domain common stock in the merger generally will recognize gain equal to the lesser of (i) the amount of cash received by the U.S. holder (excluding any cash received in lieu of fractional shares) and (ii) the excess of the amount realized by the U.S. holder over the U.S. holder's tax basis in the Data Domain common stock. The amount realized by the U.S. holder will equal the sum of the fair market value of the NetApp common stock and the amount of cash (including any cash received in lieu of fractional shares) received by the U.S. holder. Losses will not be permitted to be recognized. Realized gain or loss must be calculated separately for each identifiable block of shares (i.e., shares acquired at different times and prices) exchanged in the merger, and a loss realized on the exchange of one block



**Table of Contents**

cannot be used to offset a gain recognized on the exchange of another block. Any gain recognized by a U.S. holder of Data Domain common stock generally will be long-term capital gain if the U.S. holder's holding period of the Data Domain common stock is more than one year, and short-term capital gain if the U.S. holder's holding period is one year or less, at the time of the first-step merger. Long-term capital gains of individuals are eligible for reduced rates of taxation.

If the second-step merger does not occur, the exchange of Data Domain common stock for NetApp common stock and cash in the first-step merger will be a fully taxable transaction in which a U.S. holder generally will recognize gain or loss equal to the difference between the amount realized (as defined above) and the U.S. holder's tax basis in the Data Domain common stock. Gain or loss must be calculated separately for each identifiable block of shares (i.e., shares acquired at different times and prices) exchanged in the first-step merger. Any gain or loss recognized by a U.S. holder of Data Domain common stock generally will be long-term capital gain or loss if the U.S. holder's holding period of the Data Domain common stock is more than one year, and short-term capital gain or loss if the U.S. holder's holding period is one year or less, at the time of the first-step merger. Long-term capital gains of individuals are eligible for reduced rates of taxation. The deductibility of capital losses is subject to limitations.

*The U.S. federal income tax consequences described above may not apply to all holders of Data Domain common stock. Your tax consequences will depend on your individual situation. Accordingly, NetApp and Data Domain strongly urge you to consult with your tax advisor for a full understanding of the particular tax consequences of the merger to you.*

**Comparative Market Prices and Dividends (page 177)**

NetApp common stock trades on the NASDAQ Global Select Market under the symbol NTAP, and Data Domain common stock trades on the NASDAQ Global Select Market under the symbol DDUP. The following table shows the closing sale prices of NetApp common stock and Data Domain common stock as reported on the NASDAQ Global Select Market on May 19, 2009, the last trading day before the signing of the original merger agreement, on June 2, 2009, the last trading day before the signing of the amended merger agreement, and on [ ], 2009, the last trading day before the distribution of this proxy statement/prospectus for which data was available. This table also shows the implied value of the merger consideration proposed for each share of Data Domain common stock, which was calculated by adding to \$16.45, or the cash consideration, the product obtained by multiplying the closing price of a share of NetApp common stock on those dates by the implied exchange ratio for the stock consideration that would apply if the closing average were equal to the closing sale price on those dates.

	<b>NetApp Common Stock</b>	<b>Data Domain Common Stock</b>	<b>Implied Value of One Share of Data Domain Common Stock</b>
May 19, 2009(1)	\$ 18.07	\$ 17.43	\$ 25.00
June 2, 2009	\$ 19.34	\$ 31.58	\$ 30.00
[ ], 2009	\$ [ ]	\$ [ ]	\$ [ ]

(1) Based on the terms of the original merger agreement.

*The market price of NetApp common stock and Data Domain common stock will fluctuate prior to the closing of the first-step merger. You should obtain current market quotations for the shares.*

**The Data Domain Board of Directors Unanimously Recommends that Data Domain Stockholders Vote FOR the Proposals (pages 48 and 118)**

The Data Domain board of directors believes that the merger is in the best interests of Data Domain and its stockholders and has unanimously approved the merger and the merger agreement. The Data Domain board of directors unanimously recommends that Data Domain stockholders vote FOR the merger proposal and FOR the adjournment proposal.

**Table of Contents**

**Qatalyst Partners Provided an Opinion to the Data Domain Board of Directors (page 62)**

As financial advisor to Data Domain, on May 20, 2009, Qatalyst Partners LP, which is referred to herein as Qatalyst, rendered to the Data Domain board of directors its opinion that, as of such date and based upon and subject to the various assumptions, qualifications and limitations set forth in its opinion, the merger consideration to be received by the holders of shares of Data Domain common stock, other than affiliates who have executed voting agreements, pursuant to the original merger agreement was fair, from a financial point of view, to such holders.

The full text of the written opinion of Qatalyst, dated May 20, 2009, is attached hereto as Appendix D and is incorporated by reference herein. The opinion sets forth, among other things, the assumptions made, procedures followed, matters considered and limitations and qualifications of the review undertaken by Qatalyst in rendering its opinion. You should read the opinion carefully in its entirety. Qatalyst's opinion was provided to the Data Domain board of directors and addresses only the fairness, from a financial point of view, of the merger consideration to be received by the holders of shares of Data Domain common stock pursuant to the original merger agreement as of the date of the opinion. It does not address any other aspect of the transaction and does not constitute a recommendation to the stockholders of Data Domain as to how to vote with respect to the merger proposal or act on any other matter.

**Data Domain's Officers and Directors Have Financial Interests in the Merger That Differ From Your Interests (page 68)**

Data Domain's executive officers and directors have interests in the merger that are different from those of other Data Domain stockholders. As of the record date, all directors and executive officers of Data Domain, together with their affiliates, beneficially owned approximately [ ]% of the outstanding shares of Data Domain common stock, which includes shares of common stock and shares of restricted stock that will vest within 60 days of the record date, shares underlying vested options and options that will vest within 60 days of the record date, and shares issuable upon settlement of restricted stock units and that will be issuable within 60 days of such date. Additionally, certain executive officers and the non-employee directors of Data Domain will be entitled to additional benefits as a result of the completion of the merger or upon certain events following the completion of the merger.

**Directors and Executive Officers of Data Domain Have Agreed to Vote in Favor of the Merger Proposal (page 93)**

In connection with the execution of the merger agreement, directors and executive officers of Data Domain and certain of their affiliates entered into voting agreements pursuant to which they have agreed to vote all shares of Data Domain common stock owned by them in favor of the merger proposal. As of the record date these directors, executive officers and affiliates owned shares representing approximately [ ]% of Data Domain's issued and outstanding common stock. They have also agreed to comply with certain restrictions on the disposition of their shares, subject to the terms and conditions contained in the voting agreements. Pursuant to their terms, these voting agreements will terminate concurrently with any termination of the merger agreement.

The form of voting agreement is included as Appendix B to this proxy statement/prospectus.

**Holders of Data Domain Common Stock Are Entitled to Appraisal Rights (page 72)**

Under the Delaware General Corporation Law, referred to as the DGCL, holders of Data Domain common stock who do not vote for the approval of the first-step merger proposal have the right to seek appraisal of the fair value of their shares as determined by the Delaware Court of Chancery if the merger is completed, but only if they comply with all requirements of Delaware law, which are summarized in this proxy statement/prospectus. This appraisal amount could be more than, the same as, or less than the amount a Data Domain stockholder would be entitled to receive under the

merger agreement. Any holder of Data Domain common stock intending to exercise appraisal rights, among other things, must submit a written demand for appraisal to Data Domain prior to the vote on the approval of the merger proposal and must not vote or otherwise submit a proxy in favor of approval of the merger proposal. Failure to follow exactly the procedures specified under Delaware law will result in the loss of appraisal rights. Because of the complexity of the Delaware law relating to appraisal rights, if you are considering exercising your appraisal right, Data Domain encourages you to seek the advice of your own legal counsel.

## **Table of Contents**

A copy of Section 262 of the DGCL is also included as Appendix C to this proxy statement/prospectus.

### **Conditions That Must Be Satisfied or Waived for the Merger to Occur (page 88)**

Currently, NetApp and Data Domain expect to complete the first-step merger in the late summer or early fall of 2009. As more fully described in this proxy statement/prospectus and in the merger agreement, the completion of the first-step merger depends on a number of conditions being satisfied or, where legally permissible, waived. These conditions include, among others, approval of the merger proposal by Data Domain stockholders, the expiration or termination of the applicable Hart-Scott-Rodino waiting period, the receipt of all required regulatory approvals.

Neither NetApp nor Data Domain can be certain when, or if, the conditions to the merger will be satisfied or waived, or that the merger will be completed.

### **Termination of the Merger Agreement (page 90)**

Either NetApp or Data Domain may terminate the merger agreement under certain circumstances, which would prevent the merger from being completed.

### **Termination Fee (page 92)**

A termination fee of \$57,000,000 may be payable by Data Domain to NetApp upon the termination of the merger agreement under several circumstances.

### **Regulatory Approvals Required for the Merger (page 74)**

NetApp and Data Domain have agreed to use reasonable best efforts to obtain as promptly as practicable all regulatory approvals that are required to complete the transactions contemplated in the merger agreement. This includes filing all required notices to governmental authorities, including the required filings with the Department of Justice and the Federal Trade Commission pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, referred to herein as the HSR Act. NetApp and Data Domain are not permitted to complete the merger until the applicable waiting periods under the HSR Act have expired or been terminated.

Although neither NetApp nor Data Domain know of any reason why regulatory approvals would not be obtained in a timely manner, NetApp and Data Domain cannot be certain when, or if, the approvals will be obtained.

### **Board of Directors and Management of NetApp following Completion of the Merger (page 72)**

The directors of Data Domain and its subsidiaries will resign in connection with the first-step merger. The composition of NetApp's board of directors and management is not anticipated to change in connection with the completion of the first-step merger, although it is possible that following the first-step merger, one or more members of Data Domain's management may be asked to join NetApp's board of directors and/or management.

### **The Rights of Data Domain Stockholders will Change as a Result of the Merger (page 111)**

The rights of Data Domain stockholders will change as a result of the merger due to differences in NetApp's and Data Domain's governing documents. This proxy statement/prospectus contains a summary description of stockholder rights under each of the NetApp and Data Domain governing documents and describes the material differences between them.

**Data Domain will Hold its Special Meeting on [        ], 2009 (page 43)**

The special meeting will be held on [        ], 2009 at [        ], local time, at 2421 Mission College Blvd., Santa Clara, CA 95054. At the special meeting, Data Domain stockholders will be asked to:

Adopt the merger agreement; and

**Table of Contents**

Approve the adjournment or postponement of the special meeting, if necessary, to solicit additional proxies, in the event that there are not sufficient votes at the time of the special meeting to adopt the merger agreement.

*Record Date.* Only holders of record at the close of business on [ ], 2009 will be entitled to vote at the special meeting. Each share of Data Domain common stock is entitled to vote. As of the record date, [ ] shares of Data Domain common stock were outstanding, held by approximately [ ] registered holders.

*Required Vote.* Approval of the merger proposal requires the affirmative vote of the holders of a majority of the outstanding shares of Data Domain common stock entitled to vote at the special meeting. Because approval of the merger proposal is based on the affirmative vote of a majority of shares outstanding, a Data Domain stockholder's failure to vote, abstention or failure to instruct a broker, a broker non-vote, will have the same effect as a vote against the merger proposal.

In the event that a quorum is not present in person or represented by proxy at the special meeting, the chairman of the meeting may adjourn the meeting to another place, date or time. If a quorum is present in person or represented by proxy at the special meeting, approval of the adjournment proposal requires the affirmative vote of the majority of the outstanding shares that are present in person or represented by proxy and entitled to vote at the special meeting. A Data Domain stockholder's abstention will have the same effect as a vote against the adjournment proposal. A broker non-vote will have no effect on the adjournment proposal.

**Information about the Companies (page 47)**

***NetApp, Inc.***

NetApp, a Delaware corporation, was established in 1992. NetApp is a leading provider of storage and data management solutions. NetApp common stock is traded on the NASDAQ Global Select Market under the symbol NTAP. The principal executive offices of NetApp are located at 495 East Java Drive, Sunnyvale, CA 94089, and its telephone number is (408) 822-6000.

Additional information about NetApp and its subsidiaries is included in documents incorporated by reference in this proxy statement/prospectus. See *Where You Can Find More Information* beginning on page 119.

***Kentucky Merger Sub One Corporation***

Kentucky Merger Sub One Corporation, a wholly owned subsidiary of NetApp, was formed solely for the purpose of completing the merger. Kentucky Merger Sub One Corporation has not carried on any activities to date, except for activities incidental to its formation and activities undertaken in connection with the transactions contemplated by the merger agreement. The principal executive offices of Kentucky Merger Sub One Corporation are located at 495 East Java Drive, Sunnyvale, CA 94089, and its telephone number is (408) 822-6000.

***Derby Merger Sub Two LLC***

Derby Merger Sub Two LLC, a wholly owned subsidiary of NetApp, was formed solely for the purpose of completing the merger. Derby Merger Sub Two LLC has not carried on any activities to date, except for activities incidental to its formation and activities undertaken in connection with the transactions contemplated by the merger agreement. The principal executive offices of Derby Merger Sub Two LLC are located at 495 East Java Drive, Sunnyvale, CA 94089, and its telephone number is (408) 822-6000.

*Data Domain, Inc.*

Data Domain, a Delaware corporation, was incorporated in Delaware in October 2001. Data Domain is a leading provider of storage solutions for backup and archive applications based on deduplication technology.

Data Domain common stock is traded on the NASDAQ Global Select Market under the symbol DDUP. The principal executive offices of Data Domain are located at 2421 Mission College Blvd., Santa Clara, CA 95054, and its telephone number is (408) 980-4800.



**Table of Contents**

Additional information about Data Domain and its subsidiaries is included in documents incorporated by reference in this proxy statement/prospectus. See **Where You Can Find More Information** beginning on page 119.

**Table of Contents****SELECTED CONSOLIDATED HISTORICAL FINANCIAL DATA OF NETAPP**

The tables below present selected consolidated financial data of NetApp prepared in accordance with U.S. generally accepted accounting principles, or GAAP. The data below are only a summary and should be read in conjunction with NetApp's consolidated financial statements and accompanying notes, as well as NetApp's management's discussion and analysis of financial condition and results of operations, all of which can be found in publicly available documents, including those incorporated by reference in this proxy statement/prospectus. For a complete list of documents incorporated by reference in this proxy statement/prospectus, see "Where You Can Find More Information" beginning on page 119.

NetApp derived the consolidated statements of income data for the years ended April 25, 2008, April 27, 2007 and April 28, 2006, and the consolidated balance sheet data as of April 25, 2008 and April 27, 2007, from its audited consolidated financial statements incorporated by reference in this proxy statement/prospectus. NetApp derived the consolidated statements of income data for the years ended April 29, 2005 and April 30, 2004, and the consolidated balance sheet data as of April 28, 2006, April 29, 2005 and April 30, 2004, from its audited consolidated financial statements not included or incorporated by reference in this proxy statement/prospectus. The unaudited consolidated statements of income data for the nine month periods ended January 23, 2009 and January 25, 2008, and the unaudited consolidated balance sheet data as of January 23, 2009, are derived from its unaudited consolidated financial statements incorporated by reference in this proxy statement/prospectus. NetApp has prepared the unaudited information on the same basis as the audited consolidated financial statements and has included, in its opinion, all adjustments, consisting only of normal recurring adjustments, that it considers necessary for a fair presentation of the financial information set forth in those statements. NetApp's historical results are not necessarily indicative of the results to be expected in the future.

	<b>Nine Months Ended January 23, 2009</b>	<b>Nine Months Ended January 25, 2008</b>	<b>Year Ended April 25, 2008</b>	<b>Year Ended April 27, 2007</b>	<b>Year Ended April 28, 2006</b>	<b>Year Ended April 29, 2005</b>	<b>Year Ended April 30, 2004</b>
--	---	---	--	--	--	--	--

(In thousands, except per share amounts)

**Consolidated  
Statements of  
Income Data:**

Total revenues(1)	\$ 2,526,750	\$ 2,365,436	\$ 3,303,167	\$ 2,804,282	\$ 2,066,456	\$ 1,598,131	\$ 1,170,310
Total cost of revenue(2)	1,070,730	924,932	1,289,791	1,099,782	809,995	623,083	465,789
Gross profit	1,456,020	1,440,504	2,013,376	1,704,500	1,256,461	975,048	704,521
Total operating expenses	1,442,773	1,230,111	1,699,776	1,403,258	948,170	721,861	546,058
Income from operations	13,247	210,393	313,600	301,242	308,291	253,187	158,463
Net income(1)	\$ 11,461	\$ 219,918	\$ 309,738	\$ 297,735	\$ 266,452	\$ 225,754	\$ 152,087

Edgar Filing: NetApp, Inc. - Form S-4

Net income per share, basic	\$	0.03	\$	0.62	\$	0.88	\$	0.80	\$	0.72	\$	0.63	\$	0.44
Net income per share, diluted	\$	0.03	\$	0.60	\$	0.86	\$	0.77	\$	0.69	\$	0.59	\$	0.42
Shares used in basic net income per share calculation		330,067		354,799		351,676		371,204		371,061		361,009		346,965
Shares used in diluted net income per share calculation		335,070		365,290		361,090		388,454		388,381		380,412		366,195

**Table of Contents**

	<b>January 23, 2009</b>	<b>April 25, 2008</b>	<b>April 27, 2007</b>	<b>April 28, 2006</b>	<b>April 29, 2005</b>	<b>April 30, 2004</b>
	(In thousands)					
<b>Consolidated Balance Sheet Data:</b>						
Cash and cash equivalents and short-term investments	\$ 2,460,869	\$ 1,164,390	\$ 1,308,781	\$ 1,322,892	\$ 1,169,965	\$ 807,965
Working capital	1,599,034	653,331	1,053,256	1,116,047	1,055,700	745,013
Total assets	5,189,740	4,070,988	3,658,478	3,260,965	2,372,647	1,877,266
Short-term debt			85,110	166,211		
Long-term debt and other	1,430,687	318,658	9,487	138,200	4,474	4,858
Total stockholders equity	1,527,393	1,700,339	1,989,021	1,923,453	1,660,804	1,415,848

- (1) Total revenues and net income for the nine months ended January 23, 2009 included a reserve for GSA contingency of \$128,000. Net income for fiscal 2006 included an income tax expense of \$22,500 related to the American Jobs Creation Act and the repatriation of foreign subsidiary earnings back to the U.S. net income for fiscal 2004 included an income tax benefit of \$16,800 associated with a favorable foreign tax ruling. .
- (2) In the first quarter of fiscal 2009, NetApp implemented a change in the reporting of warranty costs and reported these costs in cost of product revenues. These costs were included in cost of service revenues in previous periods. This change had no effect on the reported amounts of total cost of revenue, gross profit or net income for any period presented. NetApp's Consolidated Statements of Income data for fiscal years 2008, 2007 and 2006 reflect a reclassification of \$26,997, \$22,082 and \$18,532, respectively, to conform to current period presentation.

**Table of Contents****SELECTED CONSOLIDATED HISTORICAL FINANCIAL DATA OF DATA DOMAIN**

The tables below present selected consolidated financial data of Data Domain prepared in accordance with GAAP. The data below are only a summary and should be read in conjunction with Data Domain's consolidated financial statements and accompanying notes, as well as Data Domain's management's discussion and analysis of financial condition and results of operations, all of which can be found in publicly available documents, including those incorporated by reference in this proxy statement/prospectus. The unaudited consolidated financial statements have been prepared on the same basis as the audited consolidated financial statements and include, in the opinion of management, all adjustments, which include only normal recurring adjustments that management considers necessary for the fair presentation of the financial information set forth in those statements. Historical results are not necessarily indicative of future results. For a complete list of documents incorporated by reference in this proxy statement/prospectus, see "Where You Can Find More Information" beginning on page 119.

The consolidated statements of operations data for the three months ended March 31, 2009 and 2008, and the consolidated balance sheet data as of March 31, 2009 are derived from the unaudited consolidated financial statements of Data Domain and the related notes thereto that are incorporated by reference into this proxy statement/prospectus. The consolidated statement of operations data for the fiscal years ended December 31, 2008, 2007 and 2006, and the consolidated balance sheet data as of December 31, 2008 and 2007 are derived from the audited consolidated financial statements of Data Domain and the related notes thereto that are incorporated by reference into this proxy statement/prospectus. The consolidated statements of operations data for the fiscal years ended December 31, 2005 and 2004, and the consolidated balance sheet data as of December 31, 2006 and 2005 are derived from audited consolidated financial statements not included, or incorporated by reference, in this proxy statement/prospectus. The consolidated balance sheet data as of December 31, 2004 are derived from unaudited consolidated financial statements not included, or incorporated by reference, into this proxy statement/prospectus.

	<b>Three Months Ended March 31, 2009</b>	<b>Three Months Ended March 31, 2008</b>	<b>Year Ended December 31, 2008</b>	<b>Year Ended December 31, 2007</b>	<b>Year Ended December 31, 2006</b>	<b>Year Ended December 31, 2005</b>	<b>Year Ended December 31, 2004</b>
--	--	--	---	---	---	---	---

**(In thousands, except per share amounts)**

**Consolidated  
Statements of  
Operations Data:**

Total revenue	\$ 79,036	\$ 52,615	\$ 274,085	\$ 123,622	\$ 46,434	\$ 8,121	\$ 779
Total cost of revenue	22,831	13,806	76,180	35,901	14,523	5,170	1,424
Gross profit (loss)	56,205	38,809	197,905	87,721	31,911	2,951	(645)
Total operating expenses	54,083	37,574	181,095	94,910	36,449	16,984	9,370
Operating income (loss)	2,122	1,235	16,810	(7,189)	(4,538)	(14,033)	(10,015)
Net income (loss)	\$ 1,250	\$ 2,741	\$ 21,593	\$ (3,660)	\$ (4,026)	\$ (13,783)	\$ (9,828)

Net income (loss) per common share, basic	\$ 0.02	\$ 0.05	\$ 0.37	\$ (0.12)	\$ (0.56)	\$ (2.38)	\$ (2.10)
Net income (loss) per common share, diluted	\$ 0.02	\$ 0.04	\$ 0.33	\$ (0.12)	\$ (0.56)	\$ (2.38)	\$ (2.10)
Shares used in computing basic net income (loss) per share	60,157	56,414	58,254	31,482	7,128	5,801	4,672
Shares used in computing diluted net income (loss) per share	65,739	65,378	65,814	31,482	7,128	5,801	4,672

**Table of Contents**

**March 31,    December 31,    December 31,    December 31,    December 31,    December 31,**  
**2009            2008            2007            2006            2005            2004**  
(In thousands)

**Consolidated Balance Sheet Data:**

Cash and cash equivalents and short-term investments	\$ 246,852	\$ 233,892	\$ 207,136	\$ 11,857	\$ 12,505	\$ 9,358
Working capital	248,058	232,996	203,688	12,856	9,692	8,233
Total assets	400,713	386,981	261,364	30,913	18,896	11,394
Other liabilities	2,058	2,910	594	3,319		
Mandatorily redeemable convertible preferred stock				41,514	41,309	26,273
Common stock and additional paid-in capital	308,619	295,564	248,078	3,049	1,542	1,293
Total stockholders equity (deficit)	289,748	276,884	207,862	(33,566)	(31,037)	(17,516)

11

**Table of Contents****SELECTED UNAUDITED PRO FORMA CONDENSED COMBINED FINANCIAL DATA**

The following selected unaudited pro forma condensed combined financial data was prepared using the purchase method of accounting. The NetApp and Data Domain selected unaudited pro forma condensed combined balance sheet data assume that the merger of NetApp and Data Domain took place on January 23, 2009, and combines the NetApp historical consolidated balance sheet at January 23, 2009 with Data Domain's historical consolidated balance sheet at March 31, 2009. The NetApp and Data Domain selected unaudited pro forma condensed combined statement of operations data assume that the merger of NetApp and Data Domain took place as of April 28, 2007. The selected unaudited pro forma condensed combined statement of operations data for the fiscal year ended April 25, 2008 combines NetApp's historical consolidated statement of income for the fiscal year then ended with Data Domain's results of operations for the twelve months ended March 31, 2008. The selected unaudited pro forma condensed combined statement of operations data for the nine months ended January 23, 2009 combines NetApp's historical consolidated statement of income for the nine months then ended with Data Domain's historical consolidated statement of operations for the nine months ended December 31, 2008.

The selected unaudited pro forma condensed combined financial data is presented for illustrative purposes only and is not necessarily indicative of the combined financial position or results of operations of future periods or the results that actually would have been realized had the entities been a single entity during these periods. The selected unaudited pro forma condensed combined financial data as of and for the nine months ended January 23, 2009 and for the fiscal year ended April 25, 2008 is derived from the unaudited pro forma condensed combined financial statements included elsewhere in this proxy statement/prospectus and should be read in conjunction with those statements and the related notes. See Unaudited Pro Forma Condensed Combined Financial Statements.

	<b>Nine Months Ended January 23, 2009</b>	<b>Fiscal Year Ended April 25, 2008</b>
	<b>(In thousands, except per share data)</b>	
<b>Selected Unaudited Pro Forma Condensed Combined Statements of Operations Data:</b>		
Net revenues	\$ 2,748,220	\$ 3,459,195
Gross profit	1,580,016	2,081,320
Income (loss) before income taxes	(41,425)	291,615
Net income (loss)	(12,228)	251,087
Net income (loss) per share: basic	\$ (0.03)	\$ 0.63
Net income (loss) per share: diluted	\$ (0.03)	\$ 0.61
Weighted average number of shares used in computing net income (loss) per share:		
Basic	378,198	399,807
Diluted	378,198	412,596

**As of**



**January 23,  
2009****Selected Unaudited Pro Forma Condensed Combined Balance Sheet Data:**

Cash and cash equivalents and short-term investments	\$ 1,668,449
Working capital	819,185
Total assets	6,435,350
Long-term liabilities	2,267,860
Stockholders' equity	2,537,715

**Table of Contents**

**COMPARATIVE HISTORICAL AND PRO FORMA PER SHARE DATA**

The following table shows historical information about NetApp's and Data Domain's respective income (loss) per share and book value per share, and similar information reflecting the merger, referred to as pro forma information. As NetApp has a fiscal year ending on the last Friday in April and Data Domain has a fiscal year ending on December 31, the unaudited pro forma condensed combined balance sheet combines the historical balances of NetApp as of January 23, 2009 with the historical balances of Data Domain as of March 31, 2009, plus pro forma adjustments as if the merger had occurred on January 23, 2007. In addition, the unaudited pro forma condensed combined statements of operations combine the historical results of NetApp for the year ended April 25, 2008 and for the nine months ended January 23, 2009 with the historical results of Data Domain for the twelve months ended March 31, 2008 and the nine months ended December 31, 2008, respectively, plus pro forma adjustments as if the merger had occurred on April 28, 2007. Data Domain's data has been calculated by combining its reported interim data for each quarter within the respective period.

NetApp is required to account for the merger using the purchase method of accounting under GAAP, for accounting and financial reporting purposes. Under the purchase method of accounting, the assets acquired and liabilities assumed from Data Domain as of the completion of the merger will be recorded at their respective fair values and added to those of NetApp. Any excess of the purchase price over the fair value of assets acquired and liabilities assumed will be recorded as goodwill. The consolidated financial statements of NetApp issued after the merger will reflect these fair values and will not be restated retroactively to reflect the historical financial position or results of operations of Data Domain.

The pro forma financial information includes estimates of the purchase price and adjustments to record certain assets and liabilities of Data Domain at their respective fair values. These pro forma adjustments are subject to updates as additional information becomes available and as additional analyses are performed. Certain other assets and liabilities of Data Domain will also be subject to adjustment to their respective fair values. Pending more detailed analyses, no pro forma adjustments are included for those assets and liabilities, including additional intangible assets that may be identified. Any change in the fair value of the net assets of Data Domain will change the amount of the purchase price allocable to goodwill. Additionally, changes to Data Domain's stockholders' equity, including net income through the date the merger is completed, will change the amount of goodwill recorded. The final adjustments may differ materially from the pro forma adjustments reflected in this proxy statement/prospectus.

NetApp also anticipates that the merger will provide it with financial benefits that include, with respect to the combined entity, revenue and operating expense synergies, but these financial benefits are not reflected in the pro forma information. Accordingly, the pro forma information does not attempt to predict or suggest future results. It also does not necessarily reflect what the historical results of NetApp would have been had NetApp and Data Domain been combined during the periods presented.

The information in the following table is based on historical financial information and related notes for Data Domain and NetApp, as well as the unaudited pro forma condensed combined financial statements. You should read the summary financial information provided in the following table together with historical financial information and related notes. The historical financial information of Data Domain and NetApp is also incorporated by reference into this proxy statement/prospectus. See "Where You Can Find More Information" beginning on page 119 for a description of where you can find this historical information. Neither NetApp nor Data Domain has declared dividends on its common stock during the last three fiscal years.

	<b>NetApp</b>		<b>Data Domain(1)</b>	
	<b>Fiscal Year</b>			
	<b>Fiscal</b>	<b>Ended</b>	<b>Twelve</b>	
	<b>Year</b>	<b>April 25,</b>	<b>Months</b>	
	<b>Ended</b>	<b>2008</b>	<b>Ended</b>	
	<b>April 25,</b>	<b>Pro Forma</b>	<b>March 31,</b>	<b>Pro Forma</b>
	<b>2008</b>	<b>Combined</b>	<b>2008</b>	<b>Equivalent(2)</b>
	<b>Historical</b>		<b>Historical</b>	
Income (loss) per share:				
Basic	\$ 0.88	\$ 0.63	\$ 0.01	\$ 0.01
Diluted	\$ 0.86	\$ 0.61	\$ 0.01	\$ 0.01
Book value per share at period end	\$ 4.98	n/a	\$ 3.86	\$ 2.99

**Table of Contents**

	<b>NetApp</b>		<b>Data Domain(1)</b>	
	<b>Nine Months Ended January 23, 2009</b>		<b>Nine Months Ended December 31, 2008</b>	
	<b>Historical</b>	<b>Pro Forma Combined</b>	<b>Historical</b>	<b>Pro Forma Equivalent(2)</b>
Income (loss) per share:				
Basic	\$ 0.03	\$ (0.03)	\$ 0.32	\$ 0.25
Diluted	\$ 0.03	\$ (0.03)	\$ 0.29	\$ 0.22
Book value per share at period end	\$ 4.62	\$ 6.70	\$ 4.65	\$ 3.60

(1) Data Domain book value per share is stockholders' equity divided by total shares outstanding reduced by shares subject to repurchase.

(2) The pro forma Data Domain equivalent per share amounts were calculated by applying an exchange ratio of 0.7738 to the pro forma combined income (loss) and book value per share, as described in Note 4 to the Unaudited Pro Forma Condensed Combined Financial Statements. The exchange ratio used in this pro forma table reflects the value of the per share merger consideration, exclusive of the cash portion of \$16.45, of \$14.28 divided by the value of a share of NetApp common stock of \$18.46 (as of May 22, 2009), with each of the numerator and denominator calculated based on the average of the closing price for NetApp common stock for the 10 trading day period ended May 19, 2009. The final ratio of the per share merger consideration to the value of a share of NetApp common stock will vary based on the trading price of NetApp common stock.

**Table of Contents**

**CAUTIONARY STATEMENT REGARDING FORWARD-LOOKING STATEMENTS**

In addition to historical information, this proxy statement/prospectus contains or incorporates by reference certain forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995.

Forward-looking statements are not historical facts but instead represent NetApp's beliefs and expectations regarding future events, many of which are, by their nature, inherently uncertain and outside NetApp's control. Forward-looking statements include statements preceded by, followed by, or including the words could, would, should, may, will, target, plan, believe, expect, intend, anticipate, estimate, project, potential, possible, objective, seek, strategy and other similar expressions. In particular, the forward-looking statements contained in this proxy statement/prospectus include, but are not limited to, statements regarding:

the expected financial condition, results of operations, earnings outlook and prospects of NetApp, Data Domain and the combined company;

the expected benefits and synergies of the merger;

the likelihood that NetApp and Data Domain will receive the regulatory approvals required to complete the merger;

NetApp's expectation that customers will continue to adopt deduplication technology;

the expectation that the acquisition of Data Domain will complement NetApp's storage and data management business;

the expectation that the merger will allow NetApp to capture a greater share of the capacity optimized disk market;

the expectation that the merger will result in increased operational efficiency and create opportunities for cost reduction through the elimination of redundant overhead expenses and public company costs; and

the expectation that the second-step merger will occur.

The forward-looking statements contained or incorporated by reference herein are subject to certain risks and uncertainties that may cause actual results to differ materially from those reflected in the forward-looking statements. Such risk and uncertainties include those set forth on page 16 under the heading Risk Factors, as well as, among others, the following:

the expenses of the merger being greater than anticipated, including as a result of unexpected factors or events and unanticipated tax consequences of the merger;

the exposure to litigation, including the possibility that litigation relating to the merger agreement and related transactions could delay or impede the completion of the merger;

the integration of Data Domain's business and operations with those of NetApp taking longer than anticipated, being costlier than anticipated and having unanticipated adverse results relating to Data Domain's or NetApp's existing businesses; and

the anticipated cost savings and other synergies of the merger taking longer to be realized or failing to be achieved in their entirety, and attrition in key client, partner and other relationships relating to the merger greater than expected.

You are cautioned not to place undue reliance on the forward-looking statements contained herein, which speak only as of the date of this proxy statement/prospectus or the date of any document incorporated by reference in this document. Except to the extent required by applicable law or regulation, neither NetApp nor Data Domain undertakes any obligation to update these forward-looking statements to reflect events or circumstances after the date of this proxy statement/prospectus or to reflect the occurrence of unanticipated events.

All subsequent written and oral forward-looking statements concerning the merger or other matters addressed in this proxy statement/prospectus and attributable to NetApp or Data Domain or any person acting on their behalf are expressly qualified in their entirety by the preceding cautionary statement.

**Table of Contents**

**RISK FACTORS**

*In addition to the other information included in and incorporated by reference into this proxy statement/prospectus, including the matters addressed in the section entitled **Cautionary Statement Regarding Forward-Looking Statements** beginning on page 15, you should carefully consider the following risk factors before deciding whether to vote for approval of the merger proposal and the adjournment proposal. In addition, you should read and consider the risks associated with the business of NetApp and the business of Data Domain because these risks will also affect the combined company. These risks can be found in NetApp's and Data Domain's respective Forms 10-K and Forms 10-Q, which are filed with the SEC and incorporated by reference into this proxy statement/prospectus. You should also read and consider the other information in this proxy statement/prospectus and the other documents incorporated by reference into this proxy statement/prospectus. See the section entitled **Where You Can Find More Information** beginning on page 119.*

**Risks Relating to the Merger**

***The consideration that you will receive in the merger depends upon the price of NetApp's common stock at the closing of the first-step merger and may fall below \$30 per share of Data Domain stock.***

At the closing of the first-step merger, each share of Data Domain common stock will be converted into the right to receive a cash payment of \$16.45, plus a fraction of a share of NetApp common stock equal to the exchange ratio. The exchange ratio is based on the closing average of NetApp common stock and, within a certain range of possible closing averages, will result in the right to receive NetApp common stock with a market value of \$13.55 per share of Data Domain stock, or a total merger consideration of \$30 per share. Under the terms of the merger agreement, the exchange ratio will be calculated as follows:

if the closing average is less than \$17.41, then the exchange ratio will be 0.7783;

if the closing average is greater than \$21.27, then the exchange ratio will be 0.6370; and

if the closing average is less than or equal to \$21.27 and greater than or equal to \$17.41, then the exchange ratio will be calculated as the fraction obtained by dividing \$13.55 by the closing average.

As a result of the collar mechanism described above, if the closing average (as described in the second paragraph of the section entitled **Summary** beginning on page 1) is less than \$17.41, then for each share of Data Domain stock you own, you will receive less than \$13.55 worth of NetApp common stock, resulting in a total merger consideration of less than \$30 per share.

***The market price of NetApp's common stock may decline as a result of the merger.***

The market price of NetApp's common stock may decline as a result of the merger for a number of reasons, including:

the integration of Data Domain by NetApp may be unsuccessful;

NetApp may not achieve the perceived benefits of the merger as rapidly as, or to the extent, anticipated by financial or industry analysts; or

the effect of the merger on NetApp's financial results may not be consistent with the expectations of financial or industry analysts.

These factors are, to some extent, beyond NetApp's control. In addition, for Data Domain stockholders who hold their shares in certificated form, there will be a time period between the effective time of the merger and the time when Data Domain stockholders actually receive book-entry shares evidencing NetApp common stock. Until book-entry shares are received, Data Domain stockholders will not be able to sell their shares of NetApp common stock in the open market and, thus, will not be able to avoid losses resulting from any decline in the market price of NetApp common stock during this period.



**Table of Contents**

***The failure of NetApp to operate and manage the combined company effectively could have a material adverse effect on NetApp's business, financial condition and operating results.***

NetApp will need to meet significant challenges to realize the expected benefits and synergies of the merger. These challenges include:

- integrating the management teams, strategies, cultures, technologies and operations of the two companies;
- retaining and assimilating the key personnel of each company;
- retaining existing Data Domain customers; and
- creating uniform standards, controls, procedures, policies and information systems.

The accomplishment of these post-merger objectives will involve considerable risk, including:

- the potential disruption of each company's ongoing business and distraction of their respective management teams;
- the difficulty of incorporating acquired technology and rights into NetApp's operations;
- unanticipated expenses related to the integration;
- potential unknown liabilities associated with the merger; and
- managing the risks related to Data Domain's business as described in Data Domain's Annual Report on Form 10-K for the period ending December 31, 2008, as amended, that may continue to impact the business following the merger.

NetApp and Data Domain have operated and, until the completion of the merger, will continue to operate, independently. It is possible that the integration process could result in the loss of the technical skills and management expertise of key employees, the disruption of each company's ongoing businesses or inconsistencies in standards, controls, procedures and policies due to possible cultural conflicts or differences of opinions on technical decisions and product roadmaps that adversely affect NetApp's ability to maintain relationships with customers, suppliers and employees or to achieve the anticipated benefits of the merger.

Even if NetApp is able to integrate the Data Domain business operations successfully, this integration may not result in the realization of the full benefits of synergies, cost savings, innovation and operational efficiencies that may be possible from this integration, and these benefits may not be achieved within a reasonable period of time.

***The merger may be a fully taxable transaction for U.S. federal income tax purposes.***

The U.S. tax consequences of the merger depend on whether it meets the requirements of Section 368(a) of the Code, including the continuity of interest test, which will be satisfied if the stock consideration, valued as of the last business day immediately prior to the closing date of the merger, constitutes at least 40% of the total consideration paid or payable to Data Domain stockholders in the first-step merger. Whether the continuity of interest test will be satisfied depends primarily upon the market value of the NetApp common stock immediately before the first-step merger and the extent to which NetApp is required to substitute cash for stock at the closing pursuant to the terms of merger

agreement. No assurances can be given that the continuity of interest test will be met. If the test is not met, the second-step merger will not occur, and the merger will be a fully taxable transaction. In deciding whether to approve the merger, you should consider the possibility that the merger may be fully taxable to you, because you will not be entitled to change your vote in that event.

***Failure to retain key employees could diminish the anticipated benefits of the merger.***

The success of the merger will depend in part on the retention of personnel critical to the business and operations of the combined company due to, for example, their technical skills or management expertise. Employees may experience uncertainty about their future role with Data Domain and NetApp until strategies with regard to these employees are announced or executed. If Data Domain and NetApp are unable to retain personnel, including Data Domain's key management, technical and sales personnel, who are critical to the

## **Table of Contents**

successful integration and future operations of the companies, Data Domain and NetApp could face disruptions in their operations, loss of existing customers, loss of key information, expertise or know-how, and unanticipated additional recruitment and training costs. In addition, the loss of key personnel could diminish the anticipated benefits of the merger.

***Uncertainty regarding the merger may cause customers, suppliers or strategic partners to delay or defer decisions concerning NetApp and Data Domain and adversely affect each company's ability to attract and retain key employees.***

The merger will happen only if stated conditions are met, including the approval of the merger proposal by Data Domain's stockholders, the receipt of regulatory approvals, and the absence of any material adverse effect in the business of Data Domain or NetApp. Many of the conditions are outside the control of Data Domain and NetApp, and both parties also have stated rights to terminate the merger agreement. Accordingly, there may be uncertainty regarding the completion of the merger. This uncertainty may cause customers, suppliers or strategic partners to delay or defer decisions concerning Data Domain or NetApp, which could negatively affect their respective businesses. Any delay or deferral of those decisions or changes in existing agreements could have a material adverse effect on the respective businesses of Data Domain and NetApp, regardless of whether the merger is ultimately completed. Moreover, diversion of management focus and resources from the day-to-day operation of the business to matters relating to the merger could have a material adverse effect on each company's business, regardless of whether the merger is completed. Current and prospective employees of each company may experience uncertainty about their future roles with the combined company. This may adversely affect each company's ability to attract and retain key management, sales, marketing and technical personnel.

***The market price of NetApp common stock after the merger may be affected by factors different from those affecting the shares of Data Domain or NetApp currently.***

The businesses of NetApp and Data Domain differ in important respects and, accordingly, the results of operations of the combined company and the market price of the combined company's shares of common stock may be affected by factors different from those currently affecting the independent results of operations of NetApp and Data Domain. For a discussion of the businesses of NetApp and Data Domain and of certain factors to consider in connection with those businesses, see the documents incorporated by reference in this proxy statement/prospectus and referred to under "Where You Can Find More Information" beginning on page 119.

***The merger may go forward in certain circumstances even if NetApp or Data Domain suffers a material adverse effect.***

In general, either party can refuse to complete the merger if a material adverse effect (as defined below under the heading "The Merger Agreement - Material Adverse Effect") occurs with regard to the other party before the closing. However, neither party may refuse to complete the merger on that basis as a result of any fact, circumstance, change or effect resulting from:

changes in the general economic conditions in the United States or any other country or region in the world, or changes in conditions in the global economy generally, to the extent that they do not have a disproportionate impact on NetApp or Data Domain relative to other companies and operating in the same industries in which NetApp or Data Domain operates;

changes in general conditions in the industries in which NetApp or Data Domain operates, to the extent that they do not have a disproportionate impact on NetApp or Data Domain relative to other companies operating in the same industries in which NetApp or Data Domain, as a operates;

changes in generally accepted accounting principles or other accounting standards, or the interpretation of such principles or standards by a third party, applicable federal, state, local, municipal, foreign or other law or regulatory conditions, or the interpretation of such law or regulations by a third party;

any failure to take any action or the taking of any specific action by NetApp or Data Domain taken with the prior written consent or written direction of the other party;

**Table of Contents**

the taking of any specific action expressly required by the merger agreement;

acts of war, armed hostilities or terrorism, to the extent that they do not have a disproportionate impact on NetApp or Data Domain relative to other companies operating in the same industries in which NetApp or Data Domain operates;

changes in the trading price or trading volume of NetApp's or Data Domain's common stock, in and of itself, provided that the exception described in this bullet shall not in any way prevent or otherwise affect a determination that any fact, circumstance, change or effect that has resulted in, or contributed to, a material adverse effect;

the public announcement of the merger agreement or pendency of the merger, including any loss of employees, provided that the exception described in this bullet shall not apply to any fact, circumstance, change or effect related to or caused by any legal proceedings resulting from the announcement and pendency of the merger and the transactions contemplated by the merger agreement;

any failure of NetApp or Data Domain to meet any public or internal estimates or expectations of revenue, earnings or other financial performance or results of operations for any period, or failure to meet any internal budgets, plans, or forecasts of revenues, earnings or other financial performance or results of operations (it being understood that any underlying cause of any such failure may be deemed to constitute, in and of itself, a material adverse effect and may be taken into consideration when determining whether a material adverse effect has occurred); or

stockholder class action, derivative litigation or other legal proceedings made or brought by any of the current or former stockholders of NetApp or Data Domain against NetApp or Data Domain arising out of the merger or any other transactions contemplated by the merger agreement.

If adverse changes occur but NetApp and Data Domain must still complete the merger, NetApp's stock price may suffer. This in turn may reduce the value of the merger to Data Domain stockholders.

***Data Domain stockholders will have a reduced ownership and voting interest after the merger and will exercise less influence over management.***

Data Domain stockholders currently have the right to vote in the election of the board of directors of Data Domain and on other matters affecting Data Domain. When the merger occurs, each Data Domain stockholder that receives shares of NetApp common stock will become a stockholder of NetApp with a percentage ownership of the combined company that is much smaller than the stockholder's percentage ownership of Data Domain. It is expected that the former stockholders of Data Domain as a group will own less than [ ]% of the outstanding shares of NetApp immediately after the completion of merger. Because of this, Data Domain's stockholders will have less influence on the management and policies of NetApp than they now have on the management and policies of Data Domain.

***The merger agreement limits Data Domain's ability to pursue alternatives to the merger.***

The merger agreement contains no shop provisions that, subject to limited exceptions, limit Data Domain's ability to discuss, facilitate or commit to competing third-party proposals to acquire all or a significant part of Data Domain, as well as a termination fee that is payable by Data Domain under certain circumstances. These provisions might discourage a potential competing acquiror that might have an interest in acquiring all or a significant part of Data Domain from considering or proposing that acquisition even if it were prepared to pay consideration with a higher per

share market price than that proposed in the merger or might result in a potential competing acquiror proposing to pay a lower per share price to acquire Data Domain than it might otherwise have proposed to pay.

**Table of Contents**

***The merger is subject to the receipt of consents and approvals from regulatory authorities that may impose conditions that could have an adverse effect on NetApp or, if not obtained, could prevent completion of the merger.***

Before the merger may be completed, various approvals or consents must be obtained from various regulatory and other authorities. While NetApp and Data Domain believe that they will receive the requisite regulatory approvals from these governmental authorities, there can be no assurance of this. If such approvals are not obtained, the merger will not be completed. In addition, these governmental authorities may impose conditions on the completion of the merger or require changes to the terms of the merger. Although NetApp and Data Domain do not currently expect that any such conditions or changes would be imposed, there can be no assurance that they will not be, and such conditions or changes could have the effect of delaying completion of the merger or imposing additional costs on or limiting the revenues of NetApp following the merger, any of which might have a material adverse effect on NetApp following the merger. For a full description of the regulatory clearances, consents and approvals required for the merger, please see Data Domain Proposal 1 The Merger Regulatory Approvals Required for the Merger beginning on page 74.

***Failure to complete the merger could negatively affect Data Domain's stock price and its future business and operations.***

If the merger is not completed for any reason, Data Domain may be subject to a number of material risks, including the following:

- Data Domain may be required under certain circumstances to pay NetApp a termination fee of \$57.0 million;
- the price of Data Domain's common stock may decline; and
- costs related to the merger, such as financial advisory, legal, accounting and printing fees, must be paid even if the merger is not completed.

If the merger agreement is terminated, Data Domain may be unable to pursue another business combination transaction on terms as favorable as those set forth in the merger agreement, or at all. This could limit Data Domain's ability to pursue its strategic goals.

***NetApp and Data Domain may waive one or more of the conditions of the merger without re-soliciting stockholder approval for the merger.***

Each of the conditions to NetApp's and Data Domain's obligations to complete the merger may be waived, in whole or in part, to the extent permitted by applicable law, by agreement of NetApp and Data Domain, if the condition is a condition to both NetApp's and Data Domain's obligation to complete the merger, or by the party for which such condition is a condition of its obligation to complete the merger. The boards of directors of NetApp and Data Domain may evaluate the materiality of any such waiver to determine whether amendment of this proxy statement/prospectus and re-solicitation of proxies are necessary. NetApp and Data Domain, however, generally do not expect any such waiver to be significant enough to require re-solicitation of stockholders. In the event that any such waiver is not determined to be significant enough to require re-solicitation of stockholders, the companies will have the discretion to complete the merger without seeking further stockholder approval.

***If Data Domain stockholders sell the NetApp common stock received in the merger, they could cause a decline in the market price of NetApp common stock.***

NetApp's issuance of common stock in the merger will be registered with the SEC. As a result, those shares will be immediately available for resale in the public market. The maximum number of shares of NetApp common stock to be issued to Data Domain stockholders in connection with the merger and immediately available for resale will equal approximately [ ]% of the number of outstanding shares of NetApp common stock currently in the public market. Data Domain stockholders may sell the stock they receive commencing immediately after the merger. If this occurs, or if other holders of NetApp common stock sell significant amounts of NetApp common stock immediately after the merger is completed, the market price of NetApp common stock may decline.



**Table of Contents**

*A shift or decline in the demand for deduplication technology could substantially reduce the anticipated benefits of the merger.*

NetApp expects that customers will continue to adopt deduplication technology and that the acquisition of Data Domain will result in certain market synergies. However, if customer demand in the deduplication market decreases or is less than expected, or if customer preferences shift to a new or different technology, then NetApp may not realize all of the anticipated benefits of the merger.

*Although NetApp has traditionally used a single operating system, NetApp's ability to realize the expected benefits of the merger will depend upon its ability to successfully operate the Data Domain operating system as a separate platform.*

NetApp currently runs a single platform, Data ONTAP, and expects to run the Data Domain operating system as a separate platform. Running two platforms could require significant investments of time and financial resources. If NetApp is unable to effectively maintain and support both platforms or otherwise adjust its infrastructure and processes to accommodate the parallel operation of both platforms in a timely manner, then the strategic benefits of the merger may not be realized or could be significantly reduced.

*Failure to achieve significant cost synergies could harm NetApp's business and operating results.*

NetApp anticipates that the merger will result in cost synergies associated with combining facilities, IT infrastructure, and certain functions such as finance, human resources and administrative services. However, differences between the two companies' operations could cause unforeseen delays in the integration process, result in lower savings than originally anticipated, or both, which could adversely affect NetApp's business and operating results.

**Risks Relating to NetApp's Business, Generally**

*NetApp's operating results may be adversely affected by unfavorable economic and market conditions, including the current economic downturn.*

NetApp is subject to the effects of general global economic and market conditions challenging economic conditions worldwide have from time to time contributed, and are currently contributing, to slowdowns in the computer, storage, and networking industries at large, as well as the market for information technology or IT, resulting in:

Reduced demand for our products as a result of continued constraints on IT related spending by our customers;

Increased price competition for our products from competitors;

Deferment of purchases and orders by customers due to budgetary constraints or changes in current or planned utilization of our systems;

Risk of excess and obsolete inventories;

Excess facilities costs;

Higher overhead costs as a percentage of revenue;

Increased risk of losses or impairment charges related to our investment portfolio;

Negative impacts from increased financial pressures on customers, distributors and resellers;

Negative impacts from increased financial pressures on key suppliers or contract manufacturers; and

Potential discontinuance of product lines or businesses and related asset impairments.

The turmoil in the global credit markets, the recent instability in the geopolitical environment in many parts of the world and other disruptions may continue to put pressure on global economic conditions. The economic challenges we initially experienced in the United States have spread throughout the world. If global economic and market conditions,

**Table of Contents**

or economic conditions in the United States or other key markets, remain uncertain, persist, or deteriorate further, we may experience material adverse impacts on our business, operating results, and financial condition.

*NetApp's quarterly operating results may fluctuate, which could adversely impact its common stock price.*

NetApp believes that period-to-period comparisons of its results of operations are not necessarily meaningful and should not be relied upon as indicators of future performance. Our operating results have in the past, and will continue to be, subject to quarterly fluctuations as a result of numerous factors, some of which may contribute to more pronounced fluctuations in an uncertain global economic environment. These factors include, but are not limited to, the following:

Fluctuations in demand for our products and services, in part due to changes in general economic conditions and specific economic conditions in the computer, storage, and networking industries;

A shift in federal government spending patterns;

Changes in sales and implementation cycles for our products and reduced visibility into our customers spending plans and associated revenue;

The level of price and product competition in our target product markets;

The impact of the current adverse economic and credit environment on our customers, channel partners, and suppliers, including their ability to obtain financing or to fund capital expenditures;

The overall movement toward industry consolidations among both our competitors and our customers;

Our reliance on a limited number of suppliers due to industry consolidation, which could subject us to periodic supply-and-demand, price rigidity, and quality issues with our components;

The timing of bookings or the cancellation of significant orders;

Product configuration and mix;

The extent to which our customers renew their service and maintenance contracts with us;

Market acceptance of new products and product enhancements;

Announcements and introductions of, and transitions to, new products by us or our competitors;

Deferrals of customer orders in anticipation of new products or product enhancements introduced by us or our competitors;

Our ability to develop, introduce, and market new products and enhancements in a timely manner;

Technological changes in our target product markets;

Our levels of expenditure on research and development and sales and marketing programs;

Our ability to achieve targeted cost reductions;

Adverse movements in foreign currency exchange rates as a result of our international operations;

Excess or inadequate facilities;

Actual events, circumstances, outcomes and amounts differing from judgments, assumptions, and estimates used in determining the values of certain assets (including the amounts of valuation allowances), liabilities, and other items reflected in our consolidated financial statements;

Disruptions resulting from new systems and processes as we continue to enhance and scale our system infrastructure;

Future accounting pronouncements and changes in accounting rules, such as the increased use of fair value measures and the potential requirement that U.S. registrants prepare financial statements in accordance with International Financial Reporting Standards, or IFRS;

**Table of Contents**

Seasonality, such as our historical seasonal decline in revenues in the first quarter of our fiscal year and seasonal increase in revenues in the second quarter of our fiscal year, with the latter due in part to the impact of the U.S. federal government's September 30 fiscal year end on the timing its orders; and

Linearity, such as our historical intraquarter revenue pattern in which a disproportionate percentage of each quarter's total revenues occur in the last month of the quarter.

Due to such factors, operating results for a future period are difficult to predict, and, therefore, prior results are not necessarily indicative of results to be expected in future periods. Any of the foregoing factors, or any other factors discussed elsewhere herein, could have a material adverse effect on our business, results of operations, and financial condition. It is possible that in one or more quarters our results may fall below our forecasts and the expectations of public market analysts and investors. In such event, the trading price of our common stock would likely decrease.

***NetApp's revenue for a particular period is difficult to forecast, and a shortfall in revenue may harm its business and operating results.***

NetApp's revenues for a particular period are difficult to forecast, especially in light of the current global economic downturn and related market uncertainty. Product sales are also difficult to forecast because the storage and data management market is rapidly evolving, and our sales cycle varies substantially from customer to customer. New or additional product introductions also increase the complexities of forecasting revenues.

Additionally, we derive a majority of our revenue in any given quarter from orders booked in the same quarter. Bookings typically follow intraquarter seasonality patterns weighted toward the back end of the quarter. If we do not achieve bookings in the latter part of a quarter consistent with our quarterly targets, our financial results will be adversely impacted.

We use a pipeline system, a common industry practice, to forecast bookings and trends in our business. Sales personnel monitor the status of potential business and estimate when a customer will make a purchase decision, the dollar amount of the sale and the products or services to be sold. These estimates are aggregated periodically to generate a bookings pipeline. Our pipeline estimates may prove to be unreliable either in a particular quarter or over a longer period of time, in part because the conversion rate of the pipeline into contracts varies from customer to customer, can be difficult to estimate, and requires management judgment. Small deviations from our forecasted conversion rate may result in inaccurate plans and budgets and could materially and adversely impact our business or our planned results of operations. In particular, the continued adverse events in the economic environment and financial markets have made it even more difficult for us to forecast our future results and may result in a reduction in our quarterly conversion rate as our customers' purchasing decisions are delayed, reduced in amount, or cancelled.

Uncertainty about current and future global economic conditions has caused consumers, businesses and governments to defer purchases in response to tighter credit, decreased cash availability and declining customer confidence. Accordingly, future demand for our products could differ from our current expectations.

***NetApp has experienced periods of alternating growth and decline in revenues and operating expenses. If it is not able to successfully manage these fluctuations, our business, financial condition and results of operations could be significantly impacted.***

The ongoing global financial crisis has led to a worldwide economic downturn that has negatively affected NetApp's business. If the current economic downturn continues or worsens, demand for our products and services and our revenues may be further reduced. A prolonged downturn can adversely affect our revenues, gross margin and results

of operations. During such economic downturns, it is critical to appropriately align our cost structure with prevailing market conditions and to minimize the effect of such downturns on our operations, while also maintaining our capabilities and strategic investments for future growth.

Our expense levels are based in part on our expectations as to future revenues, and a significant percentage of our expenses are fixed. We have a limited ability to quickly or significantly reduce our fixed costs, and if revenue levels are below our expectations, operating results will be adversely impacted. During uneven periods of growth,

**Table of Contents**

we may incur costs before we realize some of the anticipated benefits, which could harm our operating results. We have significant investments in engineering, sales, service support, marketing programs and other functions to support and grow our business. We are likely to recognize the costs associated with these investments earlier than some of the anticipated benefits, and the return on these investments may be lower, or may develop more slowly, than we expect, which could harm our business, operating results and financial condition.

Conversely, if we are unable to effectively manage our resources and capacity, during periods of increasing demand for our products, we could experience a material adverse effect on operations and financial results. If the network storage market fails to grow, or grows slower than we expect, our revenues will be adversely affected. Also, even if IT spending increases, our revenue may not grow at the same pace.

***NetApp's gross margins have varied over time and may continue to vary, and such variation may make it more difficult to forecast its earnings.***

NetApp's product gross margins have been and may continue to be affected by a variety of factors, including:

Demand for storage and data management products;

Pricing actions, rebates, initiatives, discount levels, and price competition;

Direct versus indirect and Original Equipment Manufacturer or OEM sales;

Changes in customer, geographic, or product mix, including mix of configurations within each product group;

Product and add-on software mix;

The mix of services as a percentage of revenue;

The mix and average selling prices of products;

The mix of disk content;

The timing of revenue recognition and revenue deferrals;

New product introductions and enhancements;

Excess inventory purchase commitments as a result of changes in demand forecasts and possible product and software defects as we transition our products; and

The cost of components, manufacturing labor, quality, warranty, and freight.

Changes in software entitlements and maintenance gross margins may result from various factors, such as:

The size of the installed base of products under support contracts;

The timing of technical support service contract renewals;

Demand for and the timing of delivery of upgrades;

The timing of our technical support service initiatives; and

The level of spending on our customer support infrastructure.

Changes in service gross margins may result from various factors, such as:

The mix of customers;

The size and timing of service contract renewals;

The volume and use of outside partners to deliver support services on our behalf; and

Product quality and serviceability issues.

Due to such factors, gross margins are subject to variations from period to period and are difficult to predict.



**Table of Contents**

***NetApp's cost-reduction initiatives and restructuring plans may not result in anticipated savings or more efficient operations. NetApp's most recently-announced restructuring may disrupt its operations and adversely affect its operations and financial results.***

On February 11, 2009, in response to the worsening global economic conditions and uncertainty about future IT spending, NetApp announced a restructuring of our worldwide operations in an effort to strategically align its cost structure with expected revenues, as well as to reallocate resources into areas of our business with more growth potential.

Additionally, in December 2008, we decided to cease development and availability of our SnapMirror® for Open Systems product, or SMOS product, and as a result recorded restructuring and other charges attributable primarily to severance and employee-related and facility closure costs, as well as the impairment of certain acquired intangible assets.

We may not be able to successfully complete and realize the expected benefits of these restructuring plans. Our restructuring plans may involve higher costs or a longer timetable, or they may fail to improve our gross margins, results of operations and cash flows as we anticipate. Our inability to realize these benefits may result in an ineffective business structure that could negatively impact our results of operations. In addition to costs related to severance and other employee-related costs, our restructuring plans may also subject us to litigation risks and expenses.

In addition, our restructuring plans may have other adverse consequences, such as attrition beyond our planned reduction in workforce, the loss of employees with valuable knowledge or expertise, a negative impact on employee morale, or a gain in competitive advantage by our competitors over us. The restructuring efforts could also be disruptive to our day-to-day operations and cause our remaining employees to be less productive, which in turn may affect our revenue and other operating results in the future. In the event that the economy recovers sooner than we expect and results in increased IT spending, we may not have sufficient capacity to capitalize on the related increase in demand for our products and services.

We may undertake future cost-reduction initiatives and restructuring plans that may adversely impact our operations; and we may not realize all of the anticipated benefits of our prior or any future restructurings.

***Changes in market conditions have led, and in the future could lead, to charges related to the discontinuance of certain of NetApp's products and asset impairments.***

In response to changes in economic conditions and market demands, NetApp may be required to strategically realign our resources and consider cost containment measures including restructuring, disposing of, or otherwise discontinuing certain products. Any decision to limit investment in, dispose of, or otherwise exit products may result in the recording of charges to earnings, such as inventory and technology-related or other intangible asset write-offs, workforce reduction costs, charges relating to consolidation of excess facilities, cancellation penalties or claims from third parties who were resellers or users of discontinued products, which would harm our operating results. Our estimates with respect to the useful life or ultimate recoverability of our carrying basis of assets, including purchased intangible assets, could change as a result of such assessments and decisions. Additionally, we are required to perform goodwill impairment tests on an annual basis, and between annual tests in certain circumstances when impairment indicators exist or if certain events or changes in circumstances have occurred. Future goodwill impairment tests may result in charges to earnings, which could materially harm our operating results.

***NetApp's OEM relationship with IBM may not continue to generate significant revenue.***

In April 2005, NetApp entered into an OEM agreement with IBM, which enables IBM to sell IBM branded solutions based on NetApp® unified solutions, including NearStore® and V-Series systems, as well as associated software offerings. While this agreement is an element of our strategy to expand our reach into more customers and countries, we do not have an exclusive relationship with IBM, and there is no minimum commitment for any given period of time; therefore, this relationship may not continue to contribute revenue in future years. In addition, we have no control over the products that IBM selects to sell, or its release schedule and timing of those products; nor do we control its pricing. In the event that sales through IBM increase, we may experience distribution channel conflicts between our direct sales force and IBM or among our channel partners. If we fail to minimize channel conflicts, our operating results and financial condition could be harmed. We cannot assure you that this OEM

**Table of Contents**

relationship will continue to generate significant revenue while the agreement is in effect, or that the relationship will continue to be in effect for any specific period of time.

***If NetApp is unable to maintain our existing relationships and develop new relationships with major strategic partners, our revenue may be impacted negatively.***

An element of NetApp's strategy to increase revenue is to strategically partner with major third-party software and hardware vendors that integrate our products into their products and also co-market our products with these vendors. We have significant partner relationships with database, business application, backup management and server virtualization companies, including Microsoft, Oracle, SAP, Symantec and VMware. A number of these strategic partners are industry leaders that offer us expanded access to segments of the storage market. There is intense competition for attractive strategic partners, and even if we can establish relationships with these or other partners, these partnerships may not generate significant revenue or may not continue to be in effect for any specific period of time. If these relationships fail to materialize as expected, we could suffer delays in product development or other operational difficulties.

We intend to continue to establish and maintain business relationships with technology companies to accelerate the development and marketing of our storage solutions. To the extent that we are unsuccessful in developing new relationships or maintaining our existing relationships, our future revenue and operating results could be impacted negatively. In addition, the loss of a strategic partner could have a material adverse effect on our revenues and operating results.

***Disruption of or changes in NetApp's distribution model could harm our sales.***

If NetApp fails to manage distribution of our products and services properly, or if our distributors' financial condition or operations weaken, our revenue and gross margins could be adversely affected.

We market and sell our storage solutions directly through our worldwide sales force and indirectly through channel partners such as value-added resellers, systems integrators, distributors, OEMs and strategic business partners, and we derive a significant portion of our revenue from these channel partners. For the three and nine-month periods ended January 23, 2009, revenues generated from sales through our channel partners accounted for 81.3% and 69.3%, respectively, of our revenues. In order for us to maintain or increase our revenues, we must effectively manage our relationships with channel partners.

Several factors could result in disruption of or changes in our distribution model, which could materially harm our revenues and gross margins, including the following:

We compete with some of our channel partners through our direct sales force, which may lead these partners to use other suppliers who do not directly sell their own products;

Our channel partners may demand that we absorb a greater share of the risks that their customers may ask them to bear;

Our channel partners may have insufficient financial resources and may not be able to withstand changes and challenges in business conditions; and

Revenue from indirect sales could suffer if our channel partners' financial condition or operations weaken.

In addition, we depend on our channel partners to comply with applicable regulatory requirements in the jurisdictions in which they operate. Their failure to do so could have a material adverse effect on our revenues and operating results.

**Table of Contents**

***The U.S. government has contributed to NetApp's revenue growth and has become an important customer for us. Future revenue from the U.S. government is subject to shifts in government spending patterns. A decrease in government demand for our products could materially affect our revenues. In addition, our business could be adversely affected as a result of future examinations by the U.S. government.***

The U.S. government has become an important customer for the storage market and for NetApp; however, government demand is unpredictable, and there can be no assurance that we will maintain or grow our revenue from the U.S. government. Government agencies are subject to budgetary processes and expenditure constraints that could lead to delays or decreased capital expenditures in IT spending. If the government or individual agencies within the government reduce or shift their capital spending patterns, our revenues and operating results may be harmed.

In addition, selling our products to the U.S. government also subjects us to certain regulatory requirements. The failure to comply with these requirements could subject us to fines and other penalties, which could have a material adverse effect on our revenues and operating results. For example, in April 2009, we entered into a settlement agreement with the United States of America, acting through the United States Department of Justice, or the DOJ, and on behalf of the General Services Administration, or the GSA, under which we agreed to pay the United States \$128.0 million, plus interest, related to a dispute regarding our discount practices and compliance with the price reduction clause provisions of its GSA contracts between August 1997 and February 2005. If we were subject to an adverse outcome of any future examinations, or if we were suspended or debarred from contracting with the federal government generally, or with any specific agency, or if the government otherwise ceased doing business with us or significantly decreased the amount of business it does with us, our revenue and operating results could be materially adversely affected.

***A portion of NetApp's revenue is generated by large, recurring purchases from various customers, resellers and distributors. A loss, cancellation or delay in purchases by these parties has and could continue to negatively affect our revenue.***

During the three-month period ended January 23, 2009, two U.S. distributors accounted for approximately 11.5% and 12.1% of NetApp's revenues, respectively. During the nine-month period ended January 23, 2009, the same two U.S. distributors accounted for approximately 10.8% and 10.5% of our revenues, respectively. The loss of continued orders from any of our more significant customers, strategic partners, distributors or resellers could cause our revenue and profitability to suffer. Our ability to attract new customers will depend on a variety of factors, including the cost-effectiveness, reliability, scalability, breadth and depth of our products.

We generally do not enter into binding purchase commitments with our customers for an extended period of time, and thus we may not be able to continue to receive large, recurring orders from these customers, resellers or distributors. For example, our reseller agreements generally do not require minimum purchases and our customers, resellers and distributors can stop purchasing and marketing our products at any time.

Recent turmoil in the credit markets may further negatively impact our operations by affecting the solvency of our customers, resellers and distributors, or the ability of our customers to obtain credit to finance purchases of our products. If the global economy and credit markets continue to deteriorate and our future sales decline, our financial condition and operating results could be adversely impacted.

Because our expenses are based on our revenue forecasts, a substantial reduction or delay in sales of our products to, or unexpected returns from, customers and resellers, or the loss of any significant customer or reseller, could harm our business. Although our largest customers may vary from period to period, we anticipate that our operating results for any given period will continue to depend on large orders from significant customers. In addition, a change in the mix of our customers could adversely affect our revenue and gross margins.

*NetApp is exposed to the credit risk of some of our customers, resellers, and distributors, as well as credit exposures in weakened markets, which could result in material losses.*

Most of NetApp's sales to customers are on an open credit basis, with typical payment terms of 30 days in the United States and, because of local customs or conditions, longer in some markets outside the United States. We

**Table of Contents**

monitor individual customer payment capability in granting such open credit arrangements, and seek to limit such open credit to amounts we believe the customers can pay. Beyond our open credit arrangements, we also have recourse or nonrecourse customer financing leasing arrangements with third party leasing companies through preexisting relationships with customers. Under the terms of recourse leases, which are treated as off-balance sheet arrangements, we remain liable for the aggregate unpaid remaining lease payments to the third party leasing company in the event that any customers default. We expect demand for customer financing to continue. During periods of economic downturn in the storage industry and the global economy, our exposure to credit risks from our customers increases. In addition, our exposure to credit risks of our customers may increase if our customers and their customers or their lease financing sources are adversely affected by the current global economic downturn, or if there is a continuation or worsening of the downturn. Although we have programs in place to monitor and mitigate the associated risks, such programs may not be effective in reducing our credit risks.

In the past, there have been bankruptcies by our customers both who have open credit and who have lease financing arrangements with us, causing us to incur bad debt charges, and, in the case of financing arrangements, a loss of revenues. There can be no assurance that additional losses will not occur in future periods. Any future losses could harm our business and have a material adverse effect on our operating results and financial condition. Additionally, to the extent that the recent turmoil in the credit markets makes it more difficult for customers to obtain open credit or lease financing, those customers' ability to purchase our product could be adversely impacted, which in turn could have a material adverse impact on our financial condition and operating results.

***The market price for NetApp's common stock has fluctuated significantly in the past and will likely continue to do so in the future.***

The market price for NetApp's common stock has experienced substantial volatility in the past, and several factors could cause the price to fluctuate substantially in the future. These factors include but are not limited to:

Fluctuations in our operating results;

Variations between our operating results and either the guidance we have furnished to the public or the published expectations of securities analysts;

Economic developments in the storage and data management market as a whole;

Fluctuations in the valuation of companies perceived by investors to be comparable to us;

Changes in analysts' recommendations or projections;

Inquiries by the SEC, NASDAQ, law enforcement, or other regulatory bodies;

International conflicts and acts of terrorism;

Announcements of new products, applications, or product enhancements by us or our competitors;

Changes in our relationships with our suppliers, customers, channel and strategic partners; and

General market conditions, including the recent financial and credit crisis and global economic downturn.

In addition, the stock market has experienced volatility that has particularly affected the market prices of the equity securities of many technology companies. Certain macroeconomic factors such as changes in interest rates, the market

climate for the technology sector, and levels of corporate spending on IT, as well as variations in our expected operating performance, could continue to have an impact on the trading price of our stock. As a result, the market price of our common stock may fluctuate significantly in the future, and any broad market decline may materially and adversely affect the market price of our common stock.



**Table of Contents**

***If NetApp is unable to develop and introduce new products and respond to technological change, if our new products do not achieve market acceptance, if we fail to manage the transition between our new and old products, or if we cannot provide the expected level of service and support for our new products, our operating results could be materially and adversely affected.***

NetApp's future growth depends upon the successful development and introduction of new hardware and software products. Due to the complexity of storage subsystems and storage security appliances and the difficulty in gauging the engineering effort required to produce new products, such products are subject to significant technical risks. In addition, our new products must respond to technological changes and evolving industry standards. If we are unable, for technological or other reasons, to develop and introduce new products in a timely manner in response to changing market conditions or customer requirements, or if such products do not achieve market acceptance, our operating results could be materially and adversely affected. New or additional product introductions increase the complexities of forecasting revenues, and if not managed effectively, may adversely affect our sales of existing products.

As new or enhanced products are introduced, we must successfully manage the transition from older products in order to minimize disruption in customers' ordering patterns, avoid excessive levels of older product inventories, and ensure that enough supplies of new products can be delivered to meet customers' demands.

As we enter new or emerging markets, we will likely increase demands on our service and support operations and may be exposed to additional competition. We may not be able to provide products, service and support to effectively compete for these market opportunities.

***An increase in competition and industry consolidation could materially and adversely affect NetApp's operating results.***

The storage markets are intensely competitive and are characterized by rapidly changing technology. In the storage market, NetApp's primary and near-line storage system products and our associated software portfolio compete primarily with storage system products and data management software from EMC, Hitachi Data Systems, HP, IBM, and Sun Microsystems. In addition, Dell, Inc. is a competitor in the storage marketplace through its business arrangement with EMC, which allows Dell to resell EMC storage hardware and software products, as well as through Dell's acquisition of EqualLogic, through which Dell offers low-priced storage solutions. In the secondary storage market, which includes the disk-to-disk backup, compliance and business continuity segments, our solutions compete primarily against products from EMC and Sun Microsystems. Our VTL products also compete with traditional tape backup solutions in the broader data backup/recovery space. Additionally, a number of small, newer companies have recently entered the storage systems and data management software markets, the near-line and VTL storage markets and the high-performance clustered storage markets, some of which may become significant competitors in the future.

There has been a trend toward industry consolidation in our markets for several years. We expect this trend to continue as companies attempt to strengthen or hold their market positions in an evolving industry and as companies are acquired or are unable to continue operations. We believe that industry consolidation may result in stronger competitors that are better able to compete as sole-source vendors for customers. In addition, current and potential competitors have established or may establish cooperative relationships among themselves or with third parties. Accordingly, it is possible that new competitors or alliances among competitors may emerge and rapidly acquire significant market share. We may not be able to compete successfully against current or future competitors. Competitive pressures we face could materially and adversely affect our business and operating results.

***NetApp's future financial performance depends on growth in the storage and data management markets. If these markets do not perform as we expect and upon which we calculate and forecast our revenues, our operating results will be materially and adversely impacted.***

All of NetApp's products address the storage and data management markets. Accordingly, our future financial performance will depend in large part on continued growth in the storage and data management markets and on our ability to adapt to emerging standards in these markets. The markets for storage and data management have been

## **Table of Contents**

adversely impacted by the current global economic downturn and may not grow as anticipated or may continue to decline.

Additionally, emerging standards in these markets may adversely affect the UNIX<sup>®</sup>, Windows<sup>®</sup> and the World Wide Web server markets upon which we depend. For example, we provide our open access data retention solutions to customers within the financial services, healthcare, pharmaceutical and government market segments, industries that are subject to various evolving governmental regulations with respect to data access, reliability and permanence (such as Rule 17(a)(4) of the Securities Exchange Act of 1934, as amended) in the United States and in the other countries in which we operate. If our products do not meet and continue to comply with these evolving governmental regulations in this regard, customers in these market and geographical segments will not purchase our products, and we will not be able to expand our product offerings in these market and geographical segments at the rates which we have forecasted.

***Supply chain issues, including financial problems of contract manufacturers or component suppliers, or a shortage of adequate component supply or manufacturing capacity that increase NetApp's costs or cause a delay in our ability to fulfill orders, could have a material adverse impact on our business and operating results, and our failure to estimate customer demand properly may result in excess or obsolete component supply, which could adversely affect our gross margins.***

The fact that NetApp does not own or operate our manufacturing facilities and supply chain exposes us to risks, including reduced control over quality assurance, production costs and product supply, which could have a material adverse impact on the supply of our products and on our business and operating results.

Financial problems of either contract manufacturers or component suppliers could limit supply, increase costs, or result in accelerated payment terms. The loss of any contract manufacturer or key supplier could negatively impact our ability to manufacture and sell our products. Qualifying a new contract manufacturer and commencing volume production is expensive and time-consuming. If we are required to change contract manufacturers, we may lose revenue and damage our customer relationships. Disruption or termination of manufacturing capacity or component supply could delay shipments of our products and could materially and adversely affect our operating results. Such delays could also damage relationships with current and prospective customers and suppliers, and our competitive position and reputation could be harmed.

A return to growth in the economy is likely to put greater pressures on us, our contract manufacturers and our suppliers to accurately project demand and to establish optimal purchase commitment levels. Additionally, the reservation of manufacturing capacity at our contract manufacturers by other companies, inside or outside of our industry, or the inability by us to appropriately cancel, reschedule, or adjust our manufacturing or components requirements based upon business needs could result in either limitation of supply or increased costs from these suppliers.

If we inaccurately forecast demand for our products or if there is lack of demand for our products, we may have excess or inadequate inventory or incur cancellation charges or penalties, which would increase our costs and have an adverse impact on our gross margins.

We rely on a limited number of suppliers for components such as disk drives, computer boards and microprocessors utilized in the assembly of our products. In recent years, rapid industry consolidation has led to fewer component suppliers, which has and could subject us to future periodic supply constraints and price rigidity.

Furthermore, as a result of binding price or purchase commitments with suppliers, we may be obligated to purchase components at prices that are higher than those available in the current market, or in amounts greater than our needs.

In the event that we become committed to purchase components at prices in excess of the current market price when the components are actually used, or are committed to buy components in amounts greater than our needs, our gross margins could decrease.

Component quality is a risk and is particularly significant with respect to our suppliers of disk drives. In order to meet product performance requirements, we must obtain disk drives of extremely high quality and capacity.

## **Table of Contents**

As suppliers upgrade their components, they regularly end of life older components. As we become aware of an end of life situation, we attempt to make purchases or purchase commitments to cover all future requirements or find a suitable substitute component. We may not be able to obtain a sufficient supply of components on a timely and cost effective basis. Our failure to do so may lead to an adverse impact on our business. On the other hand, if we fail to anticipate customer demand properly or if there is reduced demand or no demand for our products, an oversupply of end of life components could result in excess or obsolete components that could adversely affect our gross margins.

We intend to regularly introduce new products and product enhancements, which will require us to rapidly achieve volume production by coordinating with our contract manufacturers and suppliers. We may need to increase our material purchases, contract manufacturing capacity and quality functions to meet anticipated demand. The inability of our contract manufacturers or our component suppliers to provide us with adequate supplies of high-quality products and materials suitable for our needs could cause a delay in our ability to fulfill orders.

### ***Our acquisitions may not provide the anticipated benefits and may disrupt our existing business.***

As part of our strategy, we are continuously evaluating opportunities to buy other businesses or technologies that would complement our current products, expand the breadth of our markets, or enhance our technical capabilities. On May 20, 2009, we announced that we have entered into a definitive agreement to acquire Data Domain. We subsequently amended the terms of the definitive agreement on June 3, 2009.

The success of this and any future acquisition is impacted by a number of factors, and may be subject to the following risks:

The inability to successfully integrate the operations, technologies, products and personnel of the acquired companies;

The diversion of management's attention from normal daily operations of the business;

The loss of key employees; and

Substantial transaction costs and accounting charges.

This and any future acquisitions may also result in risks to our existing business, including:

Dilution of our current stockholders' percentage ownership to the extent we issue new equity;

Assumption of additional liabilities;

Incurrence of additional debt or a decline in available cash; adverse effects to our financial statements, such as the need to make large and immediate write-offs or the incurrence of restructuring and other related expenses;

Liability for intellectual property infringement and other litigation claims, which we may or may not be aware of at the time of acquisition; and

Creation of goodwill or other intangible assets that could result in significant future amortization expense or impairment charges.

In addition, failure to complete the Data Domain acquisition as planned could negatively impact our stock price.

The failure to achieve the anticipated benefits of an acquisition may also result in impairment charges for goodwill or acquired intangibles. For example, in fiscal 2009 we announced our decision to cease the development and availability of our SMOS product, which was originally acquired through our acquisition of Topio, Inc. in fiscal 2007, resulting in the impairment of acquired intangibles related to such acquisition. Additional or realized risks of this nature could have a material adverse effect on our business, financial condition and results of operations.

The occurrence of any of the above risks could seriously harm our business.

**Table of Contents*****NetApp is exposed to fluctuations in the market values of our portfolio investments and in interest rates; impairment of our investments could harm our financial results.***

As of January 23, 2009, NetApp had \$2.7 billion in cash, cash equivalents, available-for-sale securities and restricted cash and investments. We invest our cash in a variety of financial instruments, consisting principally of investments in U.S. Treasury securities, U.S. government agency bonds, corporate bonds, corporate securities, auction rate securities, certificates of deposit, and money market funds, including the Primary Fund. These investments are subject to general credit, liquidity, market and interest rate risks, which have been exacerbated by unusual events such as the financial and credit crisis, and bankruptcy filings in the United States which have affected various sectors of the financial markets and led to global credit and liquidity issues. These securities are generally classified as available-for-sale and, consequently, are recorded on our Consolidated Balance Sheets at fair value with unrealized gains or losses reported as a component of accumulated other comprehensive income (loss), net of tax.

Investments in both fixed rate and floating rate interest earning instruments carry a degree of interest rate risk. Fixed rate debt securities may have their market value adversely impacted due to a rise in interest rates, while floating rate securities may produce less income than expected if interest rates fall. Due in part to these factors, our future investment income may fall short of expectations due to changes in interest rates. Currently, we do not use derivative financial instruments in our investment portfolio. We may suffer losses if forced to sell securities that have experienced a decline in market value because of changes in interest rates. Currently, we do not use financial derivatives to hedge our interest rate exposure.

The fair value of our investments may change significantly due to events and conditions in the credit and capital markets. These securities/issuers could be subject to review for possible downgrade. Any downgrade in these credit ratings may result in an additional decline in the estimated fair value of our investments. Changes in the various assumptions used to value these securities and any increase in the markets' perceived risk associated with such investments may also result in a decline in estimated fair value. If such investments suffer market price declines, as we experienced with some of our investments during the first nine months of fiscal 2009, we may recognize in earnings the decline in the fair value of our investments below their cost basis when the decline is judged to be other-than-temporary.

As a result of the bankruptcy filing of Lehman Brothers, which occurred during the first nine months of fiscal 2009, we recorded an other-than-temporary impairment charge of \$11.8 million on our corporate bonds related to investments in Lehman Brothers securities and approximately \$9.3 million on our investments in the Primary Fund that held Lehman Brothers investments. As of January 23, 2009, we have an investment in the Primary Fund, an AAA-rated money market fund at the time of purchase, with a par value of \$128.5 million and an estimated fair value of \$119.2 million, which suspended redemptions in September 2008 and is in the process of liquidating its portfolio of investments. We received total distributions of \$478.8 million in the third quarter of fiscal 2009 and an additional \$40.3 million on February 20, 2009 from the Primary Fund. The Primary Fund suspended redemptions in September 2008, and on December 3, 2008, it announced a plan for liquidation and distribution of assets that includes the establishment of a special reserve to be set aside out of its assets for pending or threatened claims, as well as anticipated costs and expenses, including related legal and accounting fees. On February 26, 2009, the Primary Fund announced a plan to set aside \$3.5 billion of the fund's remaining assets as the special reserve which may be increased or decreased as further information becomes available. Our pro rata share of the \$3.5 billion special reserve is approximately \$41.5 million. The Primary Fund plans to continue to make periodic distributions, up to the amount of the special reserve, on a pro-rata basis. We could realize additional losses in our holdings of the Primary Fund and may not receive all or a portion of our remaining balance in the Primary Fund as a result of market conditions and ongoing litigation against the fund.

If the conditions in the credit and capital markets continue to worsen, our investment portfolio may be impacted and we could determine that more of our investments have experienced an other-than-temporary decline in fair value, requiring further impairments, which could adversely impact our financial position and operating results.



**Table of Contents**

***Funds associated with certain of NetApp's auction rate securities may not be accessible for more than 12 months and our auction rate securities may experience further other-than-temporary declines in value, which would adversely affect our earnings.***

Auction rate securities, or ARS, held by NetApp are securities with long-term nominal maturities, which, in accordance with investment policy guidelines, had credit ratings of AAA and Aaa at time of purchase. Interest rates for ARS are reset through a Dutch auction each month, which prior to February 2008 had provided a liquid market for these securities.

Substantially all of our ARS are backed by pools of student loans guaranteed by the U.S. Department of Education, and we believe the credit quality of these securities is high based on this guarantee. However liquidity issues in the global credit markets resulted in the failure of auctions for certain of our ARS investments, with a par value of \$75.6 million at January 23, 2009. For each failed auction, the interest rate resets to a maximum rate defined for each security, and the ARS continue to pay interest in accordance with their terms, although the principal associated with the ARS will not be accessible until there is a successful auction or such time as other markets for ARS investments develop.

As of January 23, 2009, we determined there was a total decline in the fair value of our ARS investments of approximately \$6.5 million, of which we recorded temporary impairment charges of \$5.1 million, offset by unrealized gains of \$0.7 million, and \$2.1 million was recognized as an other-than-temporary impairment charge. In addition, we have classified all of our auction rate securities as long-term assets in our consolidated balance sheet of January 23, 2009 as our ability to liquidate such securities in the next 12 months is uncertain. Although we currently have the ability and intent to hold these ARS investments until liquidity returns to the market or until maturity, if the current market conditions deteriorate further, or the anticipated recovery in market liquidity does not occur, we may be required to record additional impairment charges in future quarters.

***NetApp's leverage and debt service obligations may adversely affect our financial condition and results of operations.***

As a result of NetApp's sale of \$1.265 billion of 1.75% convertible senior notes in June 2008, or the Notes, we have a greater amount of long-term debt than we have maintained in the past. We also have a credit facility and various synthetic lease arrangements. In addition, subject to the restrictions in our existing and any future financings agreements, we may incur additional debt.

Our maintenance of higher levels of indebtedness could have adverse consequences including:

Adversely affecting our ability to satisfy our obligations;

Increasing the portion of our cash flows from operations may have to be dedicated to interest and principal payments and may not be available for operations, working capital, capital expenditures, expansion, acquisitions or general corporate or other purposes;

Impairing our ability to obtain additional financing in the future;

Limiting our flexibility in planning for, or reacting to, changes in our business and industry; and

Making us more vulnerable to downturns in our business, our industry or the economy in general.

Our ability to meet our expenses and debt obligations will depend on our future performance, which will be affected by financial, business, economic, regulatory and other factors. We will not be able to control many of these factors, such as economic conditions and governmental regulations. Furthermore, our operations may not generate sufficient cash flows from operations to enable us to meet our expenses and service our debt. As a result, we may be required to repatriate funds from our foreign subsidiaries, which could result in a significant tax liability to us. If we are unable to generate sufficient cash flows from operations, or if we are unable to repatriate sufficient or any funds from our foreign subsidiaries, in order to meet our expenses and debt service obligations, we may need to utilize our existing line of credit to obtain the necessary funds, or we may be required to raise additional funds. If we determine it is necessary to seek additional funding for any reason, we may not be able to obtain such funding or, if funding is

**Table of Contents**

available, obtain it on acceptable terms. If we fail to make a payment on our debt, we could be in default on such debt, and this default could cause us to be in default on our other outstanding indebtedness.

***NetApp is subject to restrictive and financial covenants in our credit facility and synthetic lease arrangements. The restrictive covenants may restrict our ability to operate our business.***

NetApp's access to undrawn amounts under our credit facility and the ongoing extension of credit under our synthetic lease arrangements are subject to continued compliance with financial covenants, which could be more challenging in a difficult operating environment. If we do not comply with these restrictive and financial covenants or otherwise default under the facility or arrangements, we may be required to repay any outstanding amounts under this credit facility or repurchase the properties and facility which are subject to the synthetic lease arrangements. If we lose access to these credit facility and synthetic lease arrangements, we may not be able to obtain alternative financing on acceptable terms, which could limit our operating flexibility.

The agreements governing our credit facility and synthetic lease arrangements contain restrictive covenants that limit our ability to operate our business, including restrictions on our ability to:

- Incur indebtedness;
- Incur indebtedness at the subsidiary level;
- Grant liens;
- Sell all or substantially all our assets;
- Enter into certain mergers;
- Change our business;
- Enter into swap agreements;
- Enter into transactions with our affiliates; and
- Enter into certain restrictive agreements.

As a result of these restrictive covenants, our ability to respond to changes in business and economic conditions and to obtain additional financing, if needed, may be significantly restricted. We may also be prevented from engaging in transactions that might otherwise be beneficial to us, such as strategic acquisitions or joint ventures.

We are also required to comply with financial covenants under our credit facility and synthetic lease arrangements, and our ability to comply with these financial covenants is dependent on our future performance, which will be subject to many factors, some of which are beyond our control, including prevailing economic conditions.

Our failure to comply with the restrictive and financial covenants could result in a default under our credit facility and our synthetic lease arrangements, which would give the counterparties thereto the ability to exercise certain rights, including the right to accelerate the amounts owed thereunder and to terminate the arrangement, and could also result in a cross default with respect to our other indebtedness. In addition, our failure to comply with these covenants and the acceleration of amounts owed under our credit facility and synthetic lease arrangements could result in a default under the Notes, which could permit the holders to accelerate the Notes. If all of our debt is accelerated, we may not

have sufficient funds available to repay such debt.

***Future issuances of NetApp common stock and hedging activities by holders of the Notes may depress the trading price of our common stock and the Notes.***

Any new issuance of equity securities, including the issuance of shares upon conversion of the Notes, could dilute the interests of NetApp's existing stockholders, including holders who receive shares upon conversion of their Notes, and could substantially decrease the trading price of our common stock and the Notes. We may issue equity securities in the future for a number of reasons, including to finance our operations and business strategy (including in connection with acquisitions, strategic collaborations or other transactions), to increase our capital, to adjust our

**Table of Contents**

ratio of debt to equity, to satisfy our obligations upon the exercise of outstanding warrants or options, or for other reasons.

In addition, the price of our common stock could also be affected by possible sales of our common stock by investors who view the Notes as a more attractive means of equity participation in our company and by hedging or arbitrage trading activity that we expect to develop involving our common stock by holders of the Notes. The hedging or arbitrage could, in turn, affect the trading price of the Notes, or any common stock that holders receive upon conversion of the Notes.

***Conversion of NetApp's Notes will dilute the ownership interest of existing stockholders.***

The conversion of some or all of NetApp's outstanding Notes will dilute the ownership interest of existing stockholders to the extent we deliver common stock upon conversion of the Notes. Upon conversion of a Note, we will satisfy our conversion obligation by delivering cash for the principal amount of the Note and shares of common stock, if any, to the extent the conversion value exceeds the principal amount. There would be no adjustment to the numerator in the net income per common share computation for the cash settled portion of the Notes as that portion of the debt instrument will always be settled in cash. The number of shares delivered upon conversion, if any, will be included in the denominator for the computation of diluted net income per common share. Any sales in the public market of any common stock issuable upon such conversion could adversely affect prevailing market prices of our common stock. In addition, the existence of the Notes may encourage short selling by market participants because the conversion of the Notes could be used to satisfy short positions, or anticipated conversion of the Notes into shares of our common stock could depress the price of our common stock.

***The note hedges and warrant transactions that NetApp entered into in connection with the sale of the Notes may affect the trading price of our common stock.***

In connection with the issuance of the Notes, NetApp entered into privately negotiated convertible note hedge transactions with certain option counterparties, which are expected to reduce the potential dilution to our common stock upon any conversion of the Notes. At the same time, we also entered into warrant transactions with the counterparties pursuant to which we may issue shares of our common stock above a certain strike price. In connection with these hedging transactions, the counterparties may have entered into various over-the-counter derivative transactions with respect to our common stock or purchased shares of our common stock in secondary market transactions at or following the pricing of the Notes. Such activities may have had the effect of increasing the price of our common stock. The counterparties are likely to modify their hedge positions from time to time prior to conversion or maturity of the Notes by purchasing and selling shares of our common stock or entering into other derivative transactions. Additionally, these transactions may expose us to counterparty credit risk for nonperformance. We manage our exposure to counterparty credit risk through specific minimum credit standards and the diversification of counterparties. The effect, if any, of any of these transactions and activities on the market price of our common stock or the Notes will depend, in part, on market conditions and cannot be ascertained at this time, but any of these activities could adversely affect the value of our common stock. In addition, if our stock price exceeds the strike price for the warrants, there could be additional dilution to our stockholders, which could adversely affect the value of our common stock.

Lehman Brothers OTC Derivatives, Inc., or Lehman OTC, is the counterparty to 20% of our Note hedges. The bankruptcy filing by Lehman OTC on October 3, 2008 constituted an event of default under the hedge transaction that could, at our option, lead to termination under the hedge transaction to the extent we provide notice to Lehman OTC. We have not terminated the Note hedge transaction with Lehman OTC, and will continue to carefully monitor the developments impacting Lehman OTC. This event of default is not expected to have an impact on our financial position or results of operations. However, we could incur significant costs if we elect to replace this hedge

transaction originally held with Lehman OTC. If we do not elect to replace this hedge transaction, then we would be subject to potential dilution upon conversion of the Notes if on the date of conversion the per-share market price of our common stock exceeds the conversion price of \$31.85. The terms of the Notes, the rights of the holders of the Notes and other counterparties to Note hedges and warrants were not affected by the bankruptcy filings of Lehman OTC.

**Table of Contents**

***NetApp's synthetic leases are off-balance sheet arrangements that could negatively affect our financial condition and results. We have invested substantial resources in new facilities and physical infrastructure, which will increase our fixed costs. Our operating results could be harmed if our business does not grow proportionately to our increase in fixed costs.***

NetApp has various synthetic lease arrangements with BNP Paribas Leasing Corporation, or BNPPLC, as lessor for our headquarters office buildings and land in Sunnyvale, California. On April 1, 2009, we terminated two of the synthetic lease arrangements in an effort to manage our capital structure in light of the current economic environment. The lease payments commitments associated with the remaining arrangements as of the termination date totaled \$141.5 million through fiscal 2013. These synthetic leases qualify for operating lease accounting treatment under SFAS No. 13, *Accounting for Leases (as amended)*, and are not considered variable interest entities under FIN No. 46R *Consolidation of Variable Interest Entities (revised)*. Therefore, we do not include the properties or the associated debt on our condensed consolidated balance sheet. However, if circumstances were to change regarding our or BNPPLC's ownership of the properties, or in BNPPLC's overall portfolio, we could be required to consolidate the entity, the leased facilities and the associated debt.

Our future minimum lease payments under these synthetic leases limit our flexibility in planning for, or reacting to, changes in our business by restricting the funds available for use in addressing such changes. If we are unable to grow our business and revenues proportionately to our increase in fixed costs, our operating results will be harmed. If we elect not to purchase the properties at the end of the lease term, we have guaranteed a minimum residual value to BNPPLC. Therefore, if the fair value of the properties declines below that guaranteed minimum residual value, our residual value guarantee would require us to pay the difference to BNPPLC, which could have a material adverse effect on our cash flows, financial condition and operating results.

Reductions in headcount growth have resulted in excess capacity and vacant facilities. In addition, we may experience changes in our operations in the future that could result in additional excess capacity and vacant facilities. We will continue to be responsible for all carrying costs of these facilities' operating leases until such time as we can sublease these facilities or terminate the applicable leases based on the contractual terms of the operating lease agreements, and these costs may have an adverse effect on our business, operating results and financial condition.

***Risks inherent in NetApp's international operations could have a material adverse effect on our operating results.***

NetApp conducts a significant portion of our business outside the United States. A substantial portion of our revenues is derived from sales outside of the U.S. During fiscal 2008 and 2007, our international revenues accounted for 47.1% and 44.7% of our total revenues, respectively. In addition, we have several research and development centers overseas, and a substantial portion of our products are manufactured outside of the U.S. Accordingly, our business and our future operating results could be materially and adversely affected by a variety of factors affecting our international operations, some of which are beyond our control, including regulatory, political, or economic conditions in a specific country or region, trade protection measures and other regulatory requirements, government spending patterns, and acts of terrorism and international conflicts. In addition, we may not be able to maintain or increase international market demand for our products.

We face exposure to adverse movements in foreign currency exchange rates as a result of our international operations. These exposures may change over time as business practices evolve, and they could have a material adverse impact on our financial results and cash flows. Our international sales are denominated in U.S. dollars and in foreign currencies. An increase in the value of the U.S. dollar relative to foreign currencies could make our products more expensive and therefore potentially less competitive in foreign markets. Conversely, lowering our price in local currency may result in lower U.S.-based revenue. A decrease in the value of the U.S. dollar relative to foreign currencies could increase the cost of local operating expenses. Additionally, we have exposures to emerging market currencies, which can have

extreme currency volatility. We utilize forward and option contracts to hedge our foreign currency exposure associated with certain assets and liabilities as well as anticipated foreign currency cash flows. All balance sheet hedges are marked to market through earnings every quarter. The time-value component of our cash flow hedges is recorded in earnings while all other gains and losses are marked to market through other



**Table of Contents**

comprehensive income until forecasted transactions occur, at which time such realized gains and losses are recognized in earnings. These hedges attempt to reduce, but do not always entirely eliminate, the impact of currency exchange movements. Factors that could have an impact on the effectiveness of our hedging program include the accuracy of forecasts and the volatility of foreign currency markets as well as widening interest rate differentials and the volatility of the foreign exchange market. There can be no assurance that such hedging strategies will be successful and that currency exchange rate fluctuations will not have a material adverse effect on our operating results.

Additional risks inherent in our international business activities generally include, among others, longer accounts receivable payment cycles and difficulties in managing international operations. Such factors could materially and adversely affect our future international sales and consequently our operating results. Our international operations are subject to other risks, including general import/export restrictions and the potential loss of proprietary information due to piracy, misappropriation or laws that may be less protective of our intellectual property rights than U.S. law.

Moreover, in many foreign countries, particularly in those with developing economies, it is common to engage in business practices that are prohibited by regulations applicable to us, such as the Foreign Corrupt Practices Act. Although we implement policies and procedures designed to ensure compliance with these laws, our employees, contractors and agents, as well as those companies to which we outsource certain of our business operations, may take actions in violation of our policies. Any such violation, even if prohibited by our policies, could subject us to fines and other penalties, which could have a material adverse effect on our business, financial condition or results of operations.

***NetApp also has credit exposure to our hedging counterparties.***

In order to minimize volatility in earnings associated with fluctuations in the value of foreign currency relative to the U.S. Dollars, NetApp utilizes forward and option contracts to hedge our exposure to foreign currencies. As a result of entering into these hedging contracts with major financial institutions, we may be subject to counterparty nonperformance risk. Should there be a counterparty default, we could be exposed to the net losses on the original hedge contracts or be unable to recover anticipated net gains from the transactions.

***A significant portion of NetApp's cash and cash equivalents balances is held overseas. If we are not able to generate sufficient cash domestically in order to fund our U.S. operations and strategic opportunities and service our debt, we may incur a significant tax liability in order to repatriate the overseas cash balances, or we may need to raise additional capital in the future.***

A portion of NetApp's earnings which is generated from our international operations is held and invested by certain of our foreign subsidiaries. These amounts are not freely available for dividend repatriation to the United States without triggering significant adverse tax consequences, which could adversely affect our financial results. As a result, unless the cash generated by our domestic operations is sufficient to fund our domestic operations, our broader corporate initiatives such as stock repurchases, acquisitions, and other strategic opportunities, and to service our outstanding indebtedness, we may need to raise additional funds through public or private debt or equity financings, or we may need to expand our existing credit facility to the extent we choose not to repatriate our overseas cash. Such additional financing may not be available on terms favorable to us, or at all, and any new equity financings or offerings would dilute our current stockholders' ownership. Furthermore, lenders, particularly in light of the current challenges in the credit markets, may not agree to extend us new, additional or continuing credit. If adequate funds are not available, or are not available on acceptable terms, we may be forced to repatriate our foreign cash and incur a significant tax expense or we may not be able to take advantage of strategic opportunities, develop new products, respond to competitive pressures or repay our outstanding indebtedness. In any such case, our business, operating results or financial condition could be materially adversely affected.



**Table of Contents**

***Changes in NetApp's effective tax rate or adverse outcomes resulting from examination of our income tax returns could adversely affect our results.***

NetApp's effective tax rate could be adversely affected by several factors, many of which are outside of our control, including:

Earnings being lower than anticipated in countries where we are taxed at lower rates as compared to the U.S. statutory tax rate;

Material differences between forecasted and actual tax rates as a result of a shift in the mix of pretax profits and losses by tax jurisdiction, our ability to use tax credits, or effective tax rates by tax jurisdiction that differ from our estimates;

Changing tax laws or related interpretations, accounting standards, regulations, and interpretations in multiple tax jurisdictions in which we operate, as well as the requirements of certain tax rulings;

An increase in expenses not deductible for tax purposes, including certain stock-based compensation expense, write-offs of acquired in-process research and development, and impairment of goodwill;

The tax effects of purchase accounting for acquisitions and restructuring charges that may cause fluctuations between reporting periods;

Changes related to our ability to ultimately realize future benefits attributed to our deferred tax assets, including those related to other-than-temporary impairments;

Tax assessments resulting from income tax audits or any related tax interest or penalties could significantly affect our income tax expense for the period in which the settlements take place; and

A change in our decision to indefinitely reinvest foreign earnings.

We receive significant tax benefits from sales to our non-U.S. customers. These benefits are contingent upon existing tax regulations in the United States and in the countries in which our international operations are located. Future changes in domestic or international tax regulations could adversely affect our ability to continue to realize these tax benefits. We have not provided for United States federal and state income taxes or foreign withholding taxes that may result on future remittances of undistributed earnings of foreign subsidiaries.

The Obama administration recently announced several proposals to reform United States tax rules, including proposals that may result in a reduction or elimination of the deferral of United States income tax on our future unrepatriated earnings. Absent a restructuring of some legal entities and their functionality, some of the future unrepatriated earnings would be taxed at the United States federal income tax rate. Additionally, the United States Court of Appeals for the Ninth Circuit on May 27, 2009 held in *Xilinx Inc. v. Commissioner* that stock-based compensation must be included in the research and development cost base of companies that have entered into a cost sharing arrangement and must, therefore, be allocated among the participants based on anticipated benefits. The Court's reversal of the prior U.S. Tax Court decision could change our estimate of tax benefits that were required to be recognized in connection with our adoption of Financial Interpretation No. 48, *Accounting for Uncertainty in Income Taxes*—an interpretation of FASB Statement No. 109 (FIN 48) at the beginning of fiscal year 2008. We are currently evaluating the impact of the *Xilinx* case for FIN 48 purposes for the first quarter of fiscal 2010. Our international operations currently benefit from a tax ruling concluded in the Netherlands, which expires in 2010. If we are unable to negotiate a similar tax ruling upon expiration of the current ruling, our effective tax rate could increase and our

operating results could be adversely affected. Our effective tax rate could also be adversely affected by different and evolving interpretations of existing law or regulations, which in turn would negatively impact our operating and financial results as a whole. The price of our common stock could decline to the extent that our financial results are materially affected by an adverse change in our effective tax rate.

We are currently undergoing federal income tax audits in the United States and several foreign tax jurisdictions. The rights to some of our intellectual property, or IP, are owned by certain of our foreign subsidiaries, and payments are made between U.S. and foreign tax jurisdictions relating to the use of this IP in a qualified cost sharing arrangement. In recent years, several other U.S. companies have had their foreign IP arrangements challenged as part of IRS examinations, which has resulted in material proposed assessments and/or pending litigation with

**Table of Contents**

respect to those companies. During fiscal 2009, we received Notices of Proposed Adjustments from the IRS in connection with federal income tax audits conducted with respect to our fiscal 2003 and 2004 tax years. If the ultimate determination of income taxes assessed under the current IRS audit or under audits being conducted in any of the other tax jurisdictions in which we operate results in an amount in excess of the tax provision we have recorded or reserved for, our operating results, cash flows and financial condition could be adversely affected.

***NetApp may face increased risks and uncertainties related to our current or future investments in nonmarketable securities of private companies, and these investments may not achieve our objectives.***

On occasion, NetApp makes strategic investments in nonmarketable securities of development stage entities. As of January 23, 2009, the carrying value of our investments in nonmarketable securities totaled \$6.6 million. Investments in nonmarketable securities are inherently risky, and some of these companies are likely to fail. Their success (or lack thereof) is dependent on product development, market acceptance, operational efficiency and other key business success factors. In addition, depending on these companies' future prospects, they may not be able to raise additional funds when needed, or they may receive lower valuations, with less favorable investment terms than in previous financings, and our investments in them would likely become impaired. We could lose our entire investment in these companies. For example, during the three and nine-month periods ended January 23, 2009 we determined that our investments in nonmarketable securities of two companies had been impaired, and we recorded impairment charges of \$1.7 million and \$3.7 million, respectively.

***If NetApp is unable to establish fair value for any undelivered element of a sales arrangement, all or a portion of the revenue relating to the arrangement could be deferred to future periods.***

In the course of our sales efforts, NetApp often enters into multiple element arrangements that include our systems and one or more of the following undelivered software-related elements: software entitlements and maintenance, premium hardware maintenance, and storage review services. If we are required to change the pricing of our software related elements through discounting, or otherwise introduce variability in the pricing of such elements, we may be unable to maintain Vendor Specific Objective Evidence of fair value of the undelivered elements of the arrangement, and would therefore be required to delay the recognition of all or a portion of the related arrangement. A delay in the recognition of revenue may cause fluctuations in our financial results and may adversely affect our operating margins.

***NetApp's business could be materially and adversely affected as a result of a natural disaster, terrorist acts or other catastrophic events.***

NetApp depends on the ability of our personnel, raw materials, equipment and products to move reasonably unimpeded around the world. Any political, military, world health or other issue that hinders this movement or restricts the import or export of materials could lead to significant business disruptions. Furthermore, any strike, economic failure or other material disruption caused by fire, floods, hurricanes, power loss, power shortages, telecommunications failures, break-ins and similar events could also adversely affect our ability to conduct business. If such disruptions result in cancellations of customer orders or contribute to a general decrease in economic activity or corporate spending on information technology, or directly impact our marketing, manufacturing, financial and logistics functions, our results of operations and financial condition could be materially adversely affected. In addition, our headquarters are located in Northern California, an area susceptible to earthquakes. If any significant disaster were to occur, our ability to operate our business could be impaired.

***NetApp depends on attracting and retaining qualified technical and sales personnel. If we are unable to attract and retain such personnel, our operating results could be materially and adversely impacted.***

NetApp's continued success depends, in part, on our ability to identify, attract, motivate and retain qualified technical and sales personnel. Because our future success is dependent on our ability to continue to enhance and introduce new products, we are particularly dependent on our ability to identify, attract, motivate and retain qualified engineers with the requisite education, background and industry experience. Competition for qualified engineers, particularly in Silicon Valley, can be intense. The loss of the services of a significant number of our

## **Table of Contents**

engineers or salespeople could be disruptive to our development efforts or business relationships and could materially and adversely affect our operating results.

***Undetected software errors, hardware errors, or failures found in new products may result in loss of or delay in market acceptance of NetApp's products, which could increase our costs and reduce our revenues. Product quality problems could lead to reduced revenue, gross margins and operating results.***

NetApp's products may contain undetected software errors, hardware errors or failures when first introduced or as new versions are released. Despite testing by us and by current and potential customers, errors may not be found in new products until after commencement of commercial shipments, resulting in loss of or delay in market acceptance, which could materially and adversely affect our operating results.

If we fail to remedy a product defect, we may experience a failure of a product line, temporary or permanent withdrawal from a product or market, damage to our reputation, inventory costs or product reengineering expenses, any of which could have a material impact on our revenue, gross margins and operating results.

In addition, we may be subject to losses that may result from or are alleged to result from defects in our products, which could subject us to claims for damages, including consequential damages. Based on our historical experience, we believe that the risk of exposure to product liability claims is low. However, should we experience increased exposure to product liability claims, our business could be adversely impacted.

***NetApp is exposed to various risks related to legal proceedings or claims and protection of intellectual property rights, which could adversely affect our operating results.***

NetApp is a party to lawsuits in the normal course of our business, including our ongoing litigation with Sun Microsystems. Litigation can be expensive, lengthy and disruptive to normal business operations. Moreover, the results of complex legal proceedings are difficult to predict. An unfavorable resolution of a particular lawsuit could have a material adverse effect on our business, operating results, or financial condition.

If we are unable to protect our intellectual property, we may be subject to increased competition that could materially and adversely affect our operating results. Our success depends significantly upon our proprietary technology. We rely on a combination of copyright and trademark laws, trade secrets, confidentiality procedures, contractual provisions, and patents to protect our proprietary rights. We seek to protect our software, documentation and other written materials under trade secret, copyright and patent laws, which afford only limited protection. Some of our U.S. trademarks are registered internationally as well. We will continue to evaluate the registration of additional trademarks as appropriate. We generally enter into confidentiality agreements with our employees and with our resellers, strategic partners and customers. We currently have multiple U.S. and international patent applications pending and multiple U.S. patents issued. The pending applications may not be approved, and our existing and future patents may be challenged. If such challenges are brought, the patents may be invalidated. We may not be able to develop proprietary products or technologies that are patentable, or where any issued patent will provide us with any competitive advantages or will not be challenged by third parties. Further, the patents of others may materially and adversely affect our ability to do business. In addition, a failure to obtain and defend our trademark registrations may impede our marketing and branding efforts and competitive position.

Litigation may be necessary to protect our proprietary technology. Any such litigation may be time consuming and costly. Despite our efforts to protect our proprietary rights, unauthorized parties may attempt to copy aspects of our products or obtain and use information that we regard as proprietary. In addition, the laws of some foreign countries do not protect proprietary rights to as great an extent as do the laws of the United States. Our means of protecting our proprietary rights may not be adequate or our competitors may independently develop similar technology, duplicate

our products, or design around patents issued to us or other intellectual property rights of ours.

We are subject to intellectual property infringement claims. We may, from time to time, receive claims that we are infringing third parties' intellectual property rights. Third parties may in the future claim infringement by us with respect to current or future products, patents, trademarks or other proprietary rights. We expect that companies in the network storage market will increasingly be subject to infringement claims as the number of products and competitors in our industry segment grows and the functionality of products in different industry segments overlaps.



## **Table of Contents**

Any such claims could be time consuming, result in costly litigation, cause product shipment delays, require us to redesign our products or enter into royalty or licensing agreements, any of which could materially and adversely affect our operating results. Such royalty or licensing agreements, if required, may not be available on terms acceptable to us or at all.

***NetApp is continually seeking ways to make our cost structure more efficient, including moving activities from higher-to lower-cost owned locations, as well as outsourcing certain business process functions. Problems with the execution of these changes could have an adverse effect on our business or results of operations.***

NetApp continuously seeks to make our cost structure more efficient. We are focused on increasing workforce flexibility and scalability, and improving overall competitiveness by leveraging our global capabilities, as well as external talent and skills worldwide. For example, certain engineering activities and projects that were formally performed in the U.S. have been moved to lower cost international locations. The challenges involved with these initiatives include executing business functions in accordance with local laws and other obligations while maintaining adequate standards, controls and procedures.

In addition, we will rely on partners or third party service providers for the provision of certain business process functions in IT and accounting, and as a result, we may incur increased business continuity risks. For example, we may no longer be able to exercise control over some aspects of the future development, support or maintenance of outsourced operations and processes, including the internal controls associated with those outsourced business operations and processes, which could adversely affect our business. If we are unable to effectively utilize or integrate and interoperate with external resources or if our partners or third party service providers experience business difficulties or are unable to provide business process services as anticipated, we may need to seek alternative service providers or resume providing these business processes internally, which could be costly and time consuming and have a material adverse effect on our operating results.

***NetApp's business could be materially adversely affected by changes in regulations or standards regarding energy efficiency of our products.***

NetApp continually seeks ways to increase the energy efficiency of our products. Recent analyses have estimated the amount of global carbon emissions that are due to information technology products. As a result, governmental and non-governmental organizations have turned their attention to development of regulations and standards to drive technological improvements and reduce such amount of carbon emissions. There is a risk that the rush to development of these standards will not fully address the complexity of the technology developed by the IT industry or will favor certain technological approaches. Depending on the regulations or standards that are ultimately adopted, compliance could adversely affect our business, financial condition or operating results.

***NetApp's business is subject to increasingly complex corporate governance, public disclosure, accounting and tax requirements that have increased both our costs and the risk of noncompliance.***

Because NetApp's common stock is publicly traded, we are subject to certain rules and regulations of federal, state and financial market exchange entities charged with the protection of investors and the oversight of companies whose securities are publicly traded. These entities, including the Public Company Accounting Oversight Board, the SEC, and NASDAQ, have implemented requirements and regulations and continue developing additional regulations and requirements in response to corporate scandals and laws enacted by Congress, most notably the Sarbanes-Oxley Act of 2002. Our efforts to comply with these regulations have resulted in, and are likely to continue resulting in, increased general and administrative expenses and diversion of management time and attention from revenue-generating activities to compliance activities.

We completed our evaluation of our internal controls over financial reporting for the fiscal year ended April 25, 2008 as required by Section 404 of the Sarbanes-Oxley Act of 2002. Although our assessment, testing and evaluation resulted in our conclusion that as of April 25, 2008, our internal controls over financial reporting were effective, we cannot predict the outcome of our testing in future periods. If our internal controls are ineffective in future periods, our business and reputation could be harmed. We may incur additional expenses and commitment of

**Table of Contents**

management's time in connection with further evaluations, either of which could materially increase our operating expenses and accordingly reduce our operating results.

Because new and modified laws, regulations, and standards are subject to varying interpretations in many cases due to their lack of specificity, their application in practice may evolve over time as new guidance is provided by regulatory and governing bodies. This evolution may result in continuing uncertainty regarding compliance matters and additional costs necessitated by ongoing revisions to our disclosure and governance practices.

***Changes in financial accounting standards may cause adverse unexpected fluctuations and affect NetApp's reported results of operations.***

A change in accounting standards or practices and varying interpretations of existing accounting pronouncements, such as the increased use of fair value measures and the potential requirement that U.S. registrants prepare financial statements in accordance with IFRS, could have a significant effect on NetApp's reported financial results or the way we conduct our business.

**Table of Contents**

**THE DATA DOMAIN SPECIAL MEETING**

This section contains information about the special meeting of Data Domain stockholders that has been called to consider and approve the merger proposal and the adjournment proposal.

Together with this proxy statement/prospectus, Data Domain is also sending you a notice of the special meeting and a form of proxy that is solicited by the Data Domain board of directors.

**Time, Date and Place**

The special meeting will be held on [            ], 2009 at [            ], local time, at 2421 Mission College Blvd., Santa Clara, CA 95054.

**Matters to Be Considered**

The purpose of the special meeting is to vote on the following proposals:

1. To adopt the Agreement and Plan of Merger, dated as of May 20, 2009, as amended on June 3, 2009, by and among NetApp, Kentucky Merger Sub One Corporation, Derby Merger Sub Two LLC and Data Domain, as the agreement may be amended from time to time, which proposal is referred to as the merger proposal; and
2. To approve the adjournment or postponement of the special meeting, if necessary, to solicit additional proxies, in the event that there are not sufficient votes at the time of the special meeting to approve the merger proposal, which proposal is referred to as the adjournment proposal.

**Proxies**

Each copy of this proxy statement/prospectus mailed to holders of Data Domain common stock is accompanied by a form of proxy with instructions for voting. If you hold stock in your name as a stockholder of record, you should vote your shares by (i) completing, signing, dating and returning the enclosed proxy card, (ii) using the telephone number on your proxy card or (iii) using the Internet voting instructions on your proxy card to ensure that your vote is counted at the special meeting, or at any adjournment or postponement of the special meeting, regardless of whether you plan to attend the special meeting.

If you hold your stock in street name through a bank, broker or other nominee, you must direct your bank, broker or other nominee to vote in accordance with the instructions you have received from your bank, broker or other nominee.

If you hold stock in your name as a stockholder of record, you may revoke any proxy at any time before it is voted by signing and returning a proxy card with a later date, delivering a written revocation letter to Data Domain's Secretary, or by attending the special meeting in person, notifying Data Domain's Corporate Secretary, and voting by ballot at the special meeting.

Any stockholder entitled to vote in person at the special meeting may vote in person regardless of whether a proxy has been previously given, but the mere presence (without notifying Data Domain's Corporate Secretary) of a stockholder at the special meeting will not constitute revocation of a previously given proxy.

Written notices of revocation and other communications about revoking your proxy should be addressed to:

Data Domain, Inc.  
2421 Mission College Blvd.  
Santa Clara, CA 95054  
Attention: Corporate Secretary

If your shares are held in street name by a bank, broker or other nominee, you should follow the instructions of your bank, broker or other nominee regarding the revocation of proxies.

According to the Data Domain amended and restated bylaws, business to be conducted at a special meeting of stockholders may only be brought before the meeting by or at the direction of the Data Domain board of directors, or by any Data Domain stockholder who is entitled to vote at the meeting and who complies with the notice provisions

## **Table of Contents**

set forth in the Data Domain amended and restated bylaws. No matters other than the matters described in this document are anticipated to be presented for action at the special meeting or at any adjournment or postponement of the special meeting.

Data Domain stockholders should not send Data Domain stock certificates with their proxy cards. After the merger is completed, NetApp will mail to holders of Data Domain common stock a transmittal form with instructions on how to exchange their Data Domain stock certificates for the merger consideration.

## **Solicitation of Proxies**

Since many Data Domain stockholders may be unable to attend the special meeting, Data Domain's board of directors is soliciting proxies to be voted at the special meeting to give each stockholder an opportunity to vote on all matters scheduled to come before the meeting and set forth in this proxy statement/prospectus. Data Domain's board of directors is asking stockholders to designate Frank Slooman and Michael P. Scarpelli, or any one of them, as their proxies.

NetApp will pay the costs of printing and mailing this proxy statement/prospectus to Data Domain's stockholders, and Data Domain will pay all other costs incurred by it in connection with the solicitation of proxies from its stockholders on behalf of its board of directors, including the entire cost of soliciting proxies from you. In addition to solicitation of proxies by mail, Data Domain will request that banks, brokers, and other record holders send proxies and proxy material to the beneficial owners of Data Domain common stock and secure their voting instructions. Data Domain will reimburse the record holders for their reasonable expenses in taking those actions. Data Domain has also made arrangements with Innisfree M&A Incorporated to assist it in soliciting proxies and has agreed to pay them \$50,000 plus reasonable expenses for these services over a three month period. Data Domain has agreed to indemnify Innisfree M&A Incorporated for claims related to these services. If necessary, Data Domain may use several of its directors, executive officers and employees, who will not be specially compensated, to solicit proxies from Data Domain stockholders, either personally or by telephone, facsimile, letter or other electronic means.

## **Record Date**

The close of business on [            ], 2009 has been fixed as the record date for determining the Data Domain stockholders entitled to receive notice of and to vote at the special meeting. At that time, [            ] shares of Data Domain common stock were outstanding, held by approximately [            ] registered holders.

## **Voting Rights and Vote Required**

The presence, in person or by proxy, of the holders of a majority of the outstanding shares of Data Domain common stock entitled to vote is necessary to constitute a quorum at the special meeting. Abstentions will be counted for the purpose of determining whether a quorum is present.

Approval of the merger proposal requires the affirmative vote of the holders of a majority of the outstanding shares of Data Domain common stock entitled to vote at the special meeting. You are entitled to one vote for each share of Data Domain common stock you hold as of the record date.

Because the affirmative vote of the holders of a majority of the outstanding shares of Data Domain common stock entitled to vote at the special meeting is needed to approve the merger proposal, the failure to vote by proxy or in person will have the same effect as a vote against the approval of the merger proposal. Abstentions and broker non-votes will also have the same effect as a vote against the approval of the merger proposal. Accordingly, the Data Domain board of directors urges Data Domain stockholders to promptly vote by (i) completing, signing, dating and

returning the enclosed proxy card, (ii) using the telephone number on your proxy card, or (iii) using the Internet voting instructions on your proxy card, or, if you hold your stock in street name through a bank, broker or other nominee, by following the voting instructions of your bank, broker or other nominee.

Approval of the adjournment proposal requires the affirmative vote of the holders of a majority of the shares entitled to vote and present in person or by proxy. Because approval of this proposal requires the affirmative vote of a majority of shares present in person or by proxy, abstentions will have the same effect as a vote against this

## **Table of Contents**

proposal. However, the failure to vote, either by proxy or in person, and broker non-votes, will have no effect on the adjournment proposal.

Stockholders may vote at the meeting by ballot. Votes cast at the meeting, in person or by proxy, will be tallied by Innisfree M&A Incorporated, Data Domain's proxy solicitor.

As of the record date, directors and executive officers of Data Domain, and their affiliates, had the right to vote [ ] shares of Data Domain common stock, or [ ]% of the outstanding Data Domain common stock at that date. Data Domain currently expects that each of these individuals will vote their shares of Data Domain common stock in favor of the proposals to be presented at the special meeting. Certain executive officers of Data Domain and their affiliates, collectively holding [ ] shares of Data Domain common stock, or [ ]% of the outstanding Data Domain common stock as of the record date have entered voting agreements with NetApp. Pursuant to the voting agreements, these officers have agreed to vote such shares of Data Domain common stock in favor of the approval of the merger proposal, and have granted a proxy to NetApp to vote the shares in such manner.

## **Recommendation of the Data Domain Board of Directors**

The Data Domain board of directors has unanimously approved and adopted the merger agreement and the transactions contemplated thereby. The Data Domain board of directors determined that the merger agreement and the transactions contemplated thereby are advisable and in the best interests of Data Domain and its stockholders and unanimously recommends that you vote FOR approval of the merger proposal and FOR approval of the adjournment proposal. See Data Domain Proposal 1 The Merger Data Domain's Reasons for the Merger; Recommendation of the Data Domain Board of Directors on page 48 for a more detailed discussion of the Data Domain board of directors recommendation.

## **Attending the Meeting**

All holders of Data Domain common stock, including stockholders of record and stockholders who hold their shares through banks, brokers, nominees or any other holder of record, are invited to attend the special meeting. Stockholders of record can vote in person at the special meeting. If you are not a stockholder of record, you must obtain a proxy executed in your favor, from the record holder of your shares, such as a broker, bank or other nominee, to be able to vote in person at the special meeting. If you plan to attend the special meeting, you must hold your shares in your own name or have a letter from the record holder of your shares confirming your ownership and you must bring a form of personal photo identification with you in order to be admitted. Data Domain reserves the right to refuse admittance to anyone without proper proof of share ownership and without proper photo identification.

## **Voting By Telephone or Via the Internet**

In addition to voting by proxy or in person at the special meeting, Data Domain stockholders that hold their shares as the stockholder of record also may vote their shares by using the telephone number on the proxy card or using the Internet voting instructions on the proxy card. Data Domain stockholders that hold their shares in street name through a bank, broker or other nominee may also vote their shares by following the telephone or Internet voting instructions provided by the bank, broker or other nominee. If you have access to the Internet, you are encouraged to vote via the Internet.

## **Adjournments and Postponements**

Although it is not currently expected, the special meeting may be adjourned for the purpose of soliciting additional proxies if Data Domain has not received sufficient votes to approve the merger proposal at the special meeting of



stockholders. Any adjournments may be made without notice, other than an announcement at the special meeting, by approval of the affirmative vote of holders of at least a majority of shares of Data Domain common stock who are present in person or represented by proxy at the special meeting. Any adjournment of the special meeting for the purpose of soliciting additional proxies will allow stockholders who have already sent in their proxies to revoke them at any time prior to their use.

**Table of Contents**

At any time prior to convening the special meeting, Data Domain's board of directors may postpone the special meeting for any reason without the approval of Data Domain stockholders. If postponed, Data Domain will provide notice of the new meeting date as required by law. Although it is not currently expected, Data Domain's board of directors may postpone the special meeting for the purpose of soliciting additional proxies if Data Domain has not received sufficient proxies to constitute a quorum or sufficient votes for adoption of the merger agreement. Similar to adjournments, any postponement of the special meeting for the purpose of soliciting additional proxies will allow stockholders who have already sent in their proxies to revoke them at any time prior to their use.

**Appraisal Rights**

Under Delaware law, Data Domain stockholders are entitled to appraisal rights in connection with the merger. Failure to take any of the steps required under Delaware law on a timely basis may result in the loss of these appraisal rights, as more fully described in Data Domain Proposal 1 The Merger Appraisal Rights beginning on page 72.

**Other Matters**

As of the date of this proxy statement/prospectus, the Data Domain board of directors does not know of any other business to be presented for consideration at the special meeting. If other matters properly come before the special meeting, the persons named in the accompanying form of proxy intend to vote on such matters based on their best judgment and they intend to vote the shares as the Data Domain board of directors may recommend.

**Questions and Additional Information**

Data Domain stockholders who would like additional copies, without charge, of this proxy statement/prospectus or have additional questions about the merger, including the procedures for voting their shares of Data Domain common stock, should contact:

Data Domain, Inc.  
2421 Mission College Blvd.  
Santa Clara, CA 95054  
Attention: Investor Relations  
Telephone: (408) 980-4909

or Data Domain's solicitation agent:

Innisfree M&A Incorporated  
501 Madison Avenue, 20<sup>th</sup> Floor  
New York, NY 10022  
Stockholders Call Toll-Free at: (888) 750-5834  
Banks and Brokers Call Collect at: (212) 750-5833

**Table of Contents**

**INFORMATION ABOUT THE COMPANIES**

**NetApp, Inc.**

NetApp is a supplier of enterprise storage and data management software and hardware products and services. NetApp provides solutions to help global enterprises meet major information technology challenges such as managing storage growth, assuring secure and timely information access, protecting data and controlling costs by providing innovative solutions that simplify the complexity associated with managing corporate data. NetApp was incorporated in 1992 and shipped the world's first networked storage appliance a year later. Since then, NetApp has brought to market many significant innovations and industry firsts in storage and data management.

NetApp common stock is traded on the NASDAQ Global Select Market under the symbol NTAP. The principal executive offices of NetApp are located at 495 East Java Drive, Sunnyvale, CA 94089, and its telephone number is (408) 822-6000.

On May 22, 2009, NetApp commenced an option exchange program pursuant to which employees of NetApp (other than executive officers and directors) who hold certain options to purchase shares of NetApp's common stock are being given the opportunity to exchange such options for restricted stock units. The option exchange program was approved by NetApp's stockholders on April 21, 2009. Unless extended by NetApp, the option exchange offer will expire on June 19, 2009. For more information, please see NetApp's tender offer statement on Schedule TO, as filed with the SEC on May 22, 2009, as may be amended from time to time.

Additional information about NetApp and its subsidiaries is included in documents incorporated by reference in this document. See "Where You Can Find More Information" beginning on page 119.

**Kentucky Merger Sub One Corporation**

Kentucky Merger Sub One Corporation, a wholly owned subsidiary of NetApp, was formed solely for the purpose of completing the merger. Kentucky Merger Sub One has not carried on any activities to date, except for activities incidental to its formation and activities undertaken in connection with the transactions contemplated by the merger agreement. The principal executive offices of Kentucky Merger Sub One Corporation are located at 495 East Java Drive, Sunnyvale, CA 94089, and its telephone number is (408) 822-6000.

**Derby Merger Sub Two LLC**

Derby Merger Sub Two LLC, a wholly owned subsidiary of NetApp, was formed solely for the purpose of completing the merger. Derby Merger Sub Two has not carried on any activities to date, except for activities incidental to its formation and activities undertaken in connection with the transactions contemplated by the merger agreement. The principal executive offices of Derby Merger Sub Two LLC are located at 495 East Java Drive, Sunnyvale, CA 94089, and its telephone number is (408) 822-6000.

**Data Domain, Inc.**

Data Domain, a Delaware corporation, was incorporated in Delaware in October 2001. Data Domain is a leading provider of storage solutions for backup and archive applications based on deduplication technology. Data Domain deduplication storage systems are designed to deliver reliable, efficient and cost-effective solutions that enable enterprises of all sizes to manage, retain and protect their data.

Data Domain common stock is traded on the NASDAQ Global Select Market under the symbol DDUP. The principal executive offices of Data Domain are located at 2421 Mission College Blvd., Santa Clara, CA 95054 and its telephone number is (408) 980-4800.

Additional information about Data Domain and its subsidiaries is included in documents incorporated by reference in this proxy statement/prospectus. See *Where You Can Find More Information* beginning on page 119. Data Domain also plans to file a proxy statement for its 2009 annual meeting of stockholders with the SEC. The annual meeting is expected to be held on July 2, 2009, and the purpose of the meeting is to reelect three members of Data Domain's board of directors and to ratify Data Domain's independent registered public accounting firm for the fiscal year ending December 31, 2009.

**Table of Contents**

**DATA DOMAIN PROPOSAL 1 THE MERGER**

The stockholders of Data Domain are being asked to adopt the Agreement and Plan of Merger, dated as of May 20, 2009, as amended on June 3, 2009, by and among NetApp, Inc., Kentucky Merger Sub One Corporation, Derby Merger Sub Two LLC and Data Domain, as the agreement may be amended from time to time. This proposal is referred to as the merger proposal.

**Background of the Merger**

Since 2006, Frank Sloodman, President and Chief Executive Officer of Data Domain, and Daniel J. Warmenhoven, Chairman and Chief Executive Officer of NetApp, have from time to time had informal discussions regarding their respective businesses and the data storage industry in general.

Goldman Sachs & Co., or Goldman Sachs, had served as co-managing underwriters in Data Domain's initial public offering in June 2007. In November 2008, prior to the engagement of Goldman Sachs by NetApp, a representative of Goldman Sachs arranged for a meeting between Messrs. Sloodman and Warmenhoven to discuss the possibility of a business combination involving NetApp and Data Domain.

On November 4, 2008, Messrs. Sloodman and Warmenhoven and a representative of Goldman Sachs met to discuss the merits of a potential business combination involving NetApp and Data Domain. Messrs. Sloodman and Warmenhoven agreed that although there was value in a potential business combination, considering current market conditions and trading prices of the stock of the respective companies, such a business combination was not feasible at that time. Messrs. Sloodman and Warmenhoven agreed that no further discussions of a potential business combination involving NetApp and Data Domain would occur for the foreseeable future.

In early 2009, Mr. Sloodman and a representative of Goldman Sachs had ongoing discussions of potential strategic transactions involving Data Domain. A representative of Goldman Sachs arranged for a meeting on March 17, 2009, between Mr. Sloodman and Thomas Georgens, President and Chief Operating Officer of NetApp to discuss potential strategic opportunities involving NetApp and Data Domain.

On March 17, 2009, Messrs. Sloodman and Georgens and a representative of Goldman Sachs met to discuss potential strategic opportunities involving NetApp and Data Domain. Mr. Georgens inquired as to whether Data Domain would be interested in a potential business combination with NetApp at that time. Mr. Sloodman agreed to discuss such a potential business combination with members of the Data Domain board of directors.

On March 17, 2009, Mr. Sloodman briefed Aneel Bhusri, Chairman of the Data Domain board of directors, and some of the other members of the Data Domain board of directors on his discussions with Mr. Georgens regarding a potential business combination with NetApp. The members of the Data Domain board of directors agreed to open a dialogue with NetApp regarding a potential business combination dependent upon the value of the consideration offered by NetApp.

On March 18, 2009, Mr. Sloodman telephoned Mr. Georgens to inform him that Data Domain was receptive to a potential business combination with NetApp, but that further discussions would be dependent upon the value of the consideration offered by NetApp to the Data Domain stockholders.

On March 24, 2009, Mr. Sloodman, Michael P. Scarpelli, Senior Vice President and Chief Financial Officer of Data Domain, Mr. Georgens and Steven J. Gomo, Executive Vice President and Chief Financial Officer of NetApp, met to

discuss a potential business combination involving NetApp and Data Domain. After discussing the potential synergies, cultural fit and strategic benefits of a potential business combination involving NetApp and Data Domain, the parties expressed their respective continued interests in further exploring such a business combination.

On March 26, 2009, the Data Domain board of directors held a meeting to discuss a potential business combination with NetApp. Mr. Sloatman reviewed the conversation he and Mr. Scarpelli had with Messrs. Georgens and Gomo regarding a potential proposal from NetApp to acquire Data Domain. Mr. Sloatman proposed hiring Qatalyst Partners LP, or Qatalyst, as Data Domain's financial advisor to advise the Data Domain board of directors regarding the evaluation of a potential NetApp proposal and other strategic alternatives for Data Domain. Mr. Sloatman noted that Goldman Sachs had been previously engaged by NetApp to serve as its financial advisor. The Data Domain board of directors approved the engagement of Qatalyst as Data Domain's financial advisor.

**Table of Contents**

Mr. Sloodman also reviewed potential benefits and synergies from a potential business combination with NetApp. Representatives of Fenwick & West LLP, or Fenwick & West, Data Domain's legal counsel, then reviewed considerations regarding the Data Domain board of directors' fiduciary duties in the context of such a potential business combination. Representatives of Qatalyst led a discussion regarding current macro economic market conditions, recent strategic developments in the technology sector, potential deal structures, processes and other issues to consider in such a potential business combination. The Data Domain board of directors expressed concerns regarding the potential harm to Data Domain's business relating to any uncertainty perceived by its current or future customers should they learn of discussions regarding a potential business combination involving Data Domain and the ability of Data Domain's competition to take advantage of any such perceived uncertainty. At the conclusion of the meeting, the Data Domain board of directors confirmed that it had not been seeking a sale of Data Domain, however should NetApp elect to proceed with an offer it would merit further consideration.

On March 27, 2009, NetApp and Goldman Sachs executed an engagement letter for Goldman Sachs to act as NetApp's financial advisor.

On April 1, 2009, the NetApp board of directors met to discuss the potential business combination between NetApp and Data Domain.

On April 2, 2009, Messrs. Sloodman and Warmenhoven met to further discuss the opportunities and strategic benefits of a potential business combination involving NetApp and Data Domain. Mr. Warmenhoven indicated his interest in Data Domain's business and his respect for the long-term value of Data Domain as an enterprise. Mr. Warmenhoven indicated that NetApp was serious about making an offer for Data Domain and that the value of the consideration that NetApp would offer would reflect NetApp's commitment to securing such a potential business combination with Data Domain. Later that day representatives of Qatalyst had a call with Mr. Warmenhoven in which he informed them that the NetApp board of directors had authorized him to move forward with discussions regarding a potential business combination with Data Domain and the parties discussed the potential timing of a potential business combination.

On April 3, 2009, Messrs. Warmenhoven and Bhusri met to discuss the strategic rationale and benefits of a potential business combination involving NetApp and Data Domain. Both parties reiterated their interest in considering such a potential business combination. Mr. Bhusri indicated that the amount and certainty of the value of the consideration to be delivered to the Data Domain stockholders at closing was a priority of the Data Domain board of directors given the general economic uncertainty and volatile stock market conditions over the past several months. Mr. Bhusri indicated that the Data Domain board of directors intended to continue operating Data Domain as an independent entity absent a potential business combination at a sufficient value and therefore he expressed concern over the risks to Data Domain's business if competitors or customers became aware of discussions regarding a business combination involving Data Domain. Mr. Warmenhoven informed Mr. Bhusri that NetApp intended to place discussions of a potential business combination with Data Domain on hold temporarily. Mr. Bhusri agreed that the parties should not move forward at all until such time as both of the parties were in a position to move forward expeditiously.

On April 6, 2009, Mr. Sloodman met with a representative of Company A to discuss the terms of a proposed commercial relationship that was being negotiated. The representative of Company A indicated that Company A might be interested in a business combination involving Data Domain and asked Mr. Sloodman when a discussion of such a potential business combination would be appropriate. Mr. Sloodman informed the representative of Company A that such a discussion should happen sooner rather than later. After this meeting, the parties continued to discuss the proposed commercial relationship, but no representatives of Company A contacted Mr. Sloodman or any other representatives of Data Domain regarding a business combination involving Data Domain and Company A.

On April 9, 2009, the Data Domain board of directors met to further discuss the potential business combination with NetApp. Mr. Bhusri reviewed the status of discussions with Mr. Warmenhoven regarding NetApp's potential interest

in pursuing a business combination, but noted that no offer or specific terms had been proposed to date and that NetApp did not wish to engage in further conversations regarding a business combination for the time being and likely would not be in a position to reengage in such discussions until near the end of NetApp's fiscal quarter. Mr. Slotman reviewed his discussion with the representative of Company A. Representatives of Qatalyst summarized their conversations with Mr. Warmenhoven regarding the potential business combination with NetApp.



**Table of Contents**

Representatives of Fenwick & West reviewed the Data Domain board of directors' fiduciary duties and commented on legal considerations in the event Data Domain were to receive an offer from NetApp. At the conclusion of the meeting, the Data Domain board of directors confirmed that it was not seeking a sale of Data Domain absent a potential business combination involving sufficient value. However, the Data Domain board of directors acknowledged that should NetApp elect to proceed with an offer that provided for significant value to Data Domain's stockholders a transaction with NetApp would merit further consideration. The Data Domain board of directors further determined that Data Domain would not initiate any further discussions with NetApp or any other parties at this time.

On April 14, 2009, the NetApp board of directors held a meeting to discuss a potential business combination with Data Domain. Certain members of management presented the board of directors with a market analysis, as well as evaluations of the potential market opportunities and Data Domain's valuation and discounted cash flows. Following discussion among the NetApp board of directors and management, the NetApp board of directors authorized NetApp management to approach Data Domain with an offer to acquire Data Domain, subject to the parameters discussed and approved by the NetApp board of directors.

On April 21, 2009, the Data Domain board of directors held a meeting, during which it discussed, among other matters, trends in the data storage market and potential consolidation in the data storage market. Mr. Slootman reviewed the opportunities and challenges of remaining an independent entity in the current and foreseeable market environment in light of the storage market trends toward vertically integrated product offerings, noting that Data Domain may need to consider strategic alternatives or partnerships in the future to provide a more complete product offering in order to grow and remain competitive in the marketplace.

On April 22, 2009, Data Domain and Qatalyst executed an engagement letter for Qatalyst to act as Data Domain's financial advisor.

On April 24, 2009, Mr. Warmenhoven contacted Mr. Slootman to arrange a meeting to reinstate discussions about a potential business combination involving NetApp and Data Domain.

On April 27, 2009, Fenwick & West provided a mutual non-disclosure agreement to Wilson Sonsini Goodrich & Rosati P.C., or Wilson Sonsini, NetApp's legal counsel, which, after some discussions between respective counsel, was executed later that day by Data Domain and NetApp.

On April 27, 2009, Messrs. Slootman, Bhusri, Warmenhoven and Georgens met to further discuss a potential business combination involving NetApp and Data Domain. Messrs. Warmenhoven and Georgens presented a written summary of proposed terms for the potential transaction, including, among other items, consideration consisting of a mix of \$7.00 to \$8.00 per share in cash and 0.805 shares of NetApp common stock per share of Data Domain common stock, representing an implied value of \$22.00 to \$23.00 per share. The proposed terms also provided for a limited period of exclusivity for discussions with NetApp. Messrs. Slootman and Bhusri indicated that an exclusivity agreement was not acceptable to Data Domain, but that they would discuss the other aspects of the proposal with the Data Domain board of directors. Mr. Warmenhoven informed Mr. Bhusri of the potential for a role on the NetApp board of directors for Mr. Bhusri and a role in the management of NetApp for Mr. Slootman.

On April 28, 2009, the Data Domain board of directors met to discuss the status of the potential business combination with NetApp. Mr. Slootman reviewed the discussions that occurred with Messrs. Warmenhoven and Georgens regarding NetApp's interest in a business combination with Data Domain and the written terms that were proposed by NetApp, including the proposed per share consideration. Mr. Bhusri informed the Data Domain board of directors of the potential for a role on the NetApp board of directors for Mr. Bhusri and a role in the management of NetApp for Mr. Slootman. A discussion then ensued among the Data Domain board of directors, Qatalyst and Fenwick & West

regarding the NetApp proposal and potential responses thereto. Representatives of Fenwick & West reviewed the Data Domain board of directors' fiduciary duties, the various processes the Data Domain board of directors might adopt and discussed potential responses to the offer from NetApp. Given the recent fluctuations of the trading prices of the respective companies' stock and fluctuations in the market indices generally, the Data Domain board of directors determined that establishing a collar mechanism around any portion of the stock consideration was important to providing some protection for the value to be received to the Data Domain stockholders in the event that the market price of NetApp's common stock price fluctuated within a given range.

**Table of Contents**

between signing and closing of the proposed transaction. The Data Domain board of directors also expressed concerns regarding the timing of a potential business combination and the certainty of closing such a transaction once a definitive agreement was signed. Of particular concern was the negative impact of any uncertainty to Data Domain's business perceived by its current or future customers and the ability of Data Domain's competition to take advantage of any such uncertainty. The Data Domain board of directors considered the heightened risk of these harms to Data Domain's business if any of Data Domain's competitors were contacted regarding a potential strategic transaction. The Data Domain board of directors agreed that Mr. Bhusri would talk to Mr. Warmenhoven regarding NetApp's offer, specifically to seek to increase the amount of total consideration in the potential transaction, to increase the cash component of the mix of consideration and to provide further protection from fluctuations in NetApp's stock price between signing and closing of the potential transaction. The Data Domain board of directors also instructed representatives of Qatalyst to contact representatives of NetApp to seek favorable financial terms consistent with the objectives they provided to Mr. Bhusri.

Following the meeting of the Data Domain board of directors on April 28, 2009, Mr. Bhusri called Mr. Warmenhoven to discuss the potential business combination with NetApp. Mr. Bhusri indicated that the Data Domain board of directors was interested in pursuing a potential business combination with NetApp, however, they believed enhanced financial terms would be necessary for discussions to continue. Mr. Bhusri also informed Mr. Warmenhoven that the Data Domain board of directors thought the cash component of the mix of consideration should be increased and that the Data Domain board of directors wanted down-side protection around the stock component of the consideration to protect the value to the Data Domain stockholders in the event that the market price of NetApp's common stock price fluctuated between signing and closing of the proposed transaction. Mr. Bhusri reiterated that Data Domain could not agree to an exclusive negotiating period for NetApp. Mr. Warmenhoven said that he would review this information with the NetApp board of directors.

On April 28, 2009 Fenwick & West provided a form of standstill agreement to Wilson Sonsini that provided that NetApp would not acquire shares of Data Domain, subject to limited exceptions.

On April 29, 2009, representatives of Qatalyst had a call with representatives of Goldman Sachs seeking a proposal with enhanced financial terms along the lines described above.

On May 1, 2009, Messrs. Sloatman and Georgens met to further discuss the potential market, customer, product and cost synergies that could be achieved through a business combination of NetApp and Data Domain, the corporate culture of the two companies and how the companies would fit together and generally discussed the business of their respective companies. Messrs. Sloatman and Georgens did not negotiate or discuss the substantive terms of the proposed business combination at this meeting.

On May 1, 2009, the NetApp board of directors held a meeting to further discuss the potential acquisition of Data Domain. The board of directors discussed with management the status of negotiations with Data Domain and NetApp's strategy with respect to the transaction. The NetApp board of directors then authorized management to present Data Domain with a revised offer, subject to the parameters discussed and approved by the board of directors.

On May 4, 2009, Mr. Warmenhoven called Mr. Bhusri and indicated that NetApp would increase the proposed aggregate consideration to Data Domain stockholders in the business combination to \$24.00 per share, comprised of \$6.00 in cash and \$18.00 dollars worth of shares of NetApp common stock for each share of Data Domain common stock, with a symmetrical 7.5% collar on the stock portion of the consideration so that Data Domain stockholders would receive a fixed amount of consideration in the event that the market price of NetApp's common stock price fluctuated within that range between signing and closing of the proposed transaction. Mr. Bhusri informed Mr. Warmenhoven that while the Data Domain board of directors was interested in the potential business combination with NetApp, there were still several issues with the offer that needed to be resolved before the parties could move

forward, including an increase in the aggregate consideration, the need for a greater portion of the aggregate consideration to be provided in cash and for a wider collar to be placed around the stock component of the consideration. On that same day, Mr. Sloodman and Mr. Georgens also discussed NetApp's revised proposal. Mr. Sloodman also indicated that amount of the aggregate consideration, price certainty and protection against fluctuations NetApp's common stock price were important to Data Domain and that the terms of any business combination involving Data Domain should include an increase in the aggregate consideration, an increased amount of cash and an appropriate collar on the stock portion of the consideration. Also on May 4, 2009, a

**Table of Contents**

representative of Qatalyst discussed the details of Data Domain's views regarding the financial terms of a potential business combination involving Data Domain and NetApp with a representative of Goldman Sachs.

On May 5, 2009, Mr. Warmenhoven emailed a revised written summary of proposed terms of the potential business combination with NetApp to Mr. Bhusri. The revised offer consisted of \$24.00 per share in aggregate consideration, comprised of \$9.50 per share in cash and \$14.50 worth of shares of NetApp common stock for each share of Data Domain common stock, with a symmetrical 7.5% collar on the stock portion of the consideration.

On May 6, 2009, the Data Domain board of directors held a meeting at which it had an extensive discussion with Qatalyst and Fenwick & West regarding, among other matters, NetApp's original offer, NetApp's subsequent offers and the current offer of \$24.00 per share (consisting of \$9.50 per share in cash and \$14.50 per share in NetApp common stock, with a 7.5% symmetrical collar around the stock portion of the consideration), NetApp's desire to sign a merger agreement for any potential transaction by May 20, 2009 (the scheduled date for the announcement of NetApp's fiscal fourth quarter results) and other parties that may potentially be interested in a strategic transaction with Data Domain. Representatives of Fenwick & West reviewed the fiduciary duties of the Data Domain board of directors and the various processes the Data Domain board of directors might adopt. The Data Domain board of directors considered conducting a market check prior to the signing of a merger agreement with NetApp only if it could be conducted in a manner that did not jeopardize securing a firm proposal from NetApp and did not disrupt Data Domain's relationships with its current and future customers during the process. However, the Data Domain board of directors ultimately determined that it was not clear that Data Domain could come to mutually agreeable terms regarding a business combination with NetApp and therefore such a market check would involve a high degree of risk to Data Domain's customer relationships. The Data Domain board of directors authorized Mr. Bhusri and representatives of Qatalyst to propose a counteroffer to NetApp seeking a higher price of \$26.00 per share in the aggregate and wider collar of 15% around the stock portion of the consideration.

After the Data Domain board of directors meeting on May 6, 2009, Mr. Bhusri called Mr. Warmenhoven to make a counter proposal at a higher price of \$26.00 in aggregate consideration per share. After further negotiation, the parties tentatively agreed on \$25.00 in aggregate consideration per share, with the remaining financial terms to be negotiated the following day at a meeting that included Mr. Bhusri, representatives of Qatalyst, Messrs. Georgens and Gomo, J.R. Ahn, Vice President, Corporate Development of NetApp, and representatives of Goldman Sachs.

On May 6, 2009, representatives of Qatalyst contacted representatives of Goldman Sachs to discuss the revised terms of the proposed transaction.

On May 7, 2009, Data Domain and NetApp executed a revised mutual non-disclosure agreement that contained a standstill provision with respect to shares of Data Domain common stock.

On May 7, 2009, Mr. Bhusri, representatives of Qatalyst, Messrs. Georgens, Gomo and Ahn, and representatives of Goldman Sachs met to discuss the detailed financial terms of the proposed business combination between NetApp and Data Domain. The parties agreed to a mix of consideration consisting of \$11.00 per share in cash and \$14.00 per share in NetApp common stock. The parties also agreed to a 10% symmetrical collar so that Data Domain stockholders would receive a fixed amount of consideration in the event that the market price of NetApp's common stock price fluctuated within a that range between signing and closing of the proposed transaction.

On May 7, 2009, Mr. Slooman, David L. Schneider, Senior Vice President Worldwide Sales of Data Domain, Mr. Georgens and Robert E. Salmon, Executive Vice President, Field Operations of NetApp, met to get acquainted and discuss potential product sales synergies to be derived from a business combination between NetApp and Data Domain.

On May 7, 2009, a member of the board of directors of EMC, a competitor of Data Domain, contacted Mr. Sloomman. The EMC board member sought to arrange a meeting between Mr. Sloomman and the Chief Executive Officer of EMC to share with them EMC's vision for the future. Mr. Sloomman asked for more specific information on the nature of the meeting, but the board member of EMC did not provide any further detail.

On May 7, 2009, the Data Domain board of directors held a meeting to further discuss the potential business combination with NetApp. At this meeting, Mr. Bhusri reviewed for the Data Domain board of directors his discussion with Mr. Warmenhoven regarding valuation and informed the Data Domain board of directors that they

**Table of Contents**

had negotiated an increase in NetApp's offer from \$24.00 to \$25.00 per share in aggregate consideration, consisting of \$11.00 per share in cash and \$14.00 per share in NetApp common stock, with a 10% symmetrical collar around the value of the stock portion of the consideration. The Data Domain board of directors then discussed with representatives of Qatalyst the negotiations regarding the collar mechanism around the value of the stock portion of the consideration, the progression of the proposed terms from NetApp and the value of the current NetApp proposal. Mr. Slootman reviewed for the Data Domain board of directors the call he received from a director of EMC asking whether Mr. Slootman would be available to meet with the Chief Executive Officer of EMC. The Data Domain board of directors engaged in an extensive discussion regarding the NetApp offer and the whether to call other companies, including competitors, that could be candidates for a strategic transaction prior to signing a definitive merger agreement with NetApp. The Data Domain board of directors expressed further concerns regarding the high risk of potential harm to Data Domain's business relating to any uncertainty perceived by its current or future customers should they learn of discussions regarding a business combination involving Data Domain prior to the announcement of a definitive agreement and the ability of Data Domain's competition to take advantage of any such perceived uncertainty. The Data Domain board of directors further evaluated the heightened risk of these harms to Data Domain's business if any of Data Domain's competitors were contacted regarding a potential strategic transaction. Representatives of Fenwick & West then discussed the fiduciary duties of the Data Domain board of directors and the various processes the Data Domain board of directors might adopt. The Data Domain board of directors was concerned that initiating a market check at this time could jeopardize securing a firm agreement from NetApp and could disrupt Data Domain's relationships with its current and future customers during the process. The Data Domain board of directors determined that Data Domain should move forward with the potential business combination with NetApp without contacting other companies that might be candidates for a strategic transaction with Data Domain, but that the Data Domain board of directors would continue to evaluate this strategy and consider the matter further based upon the progress and terms of the potential business combination with NetApp.

On May 7, 2009, with the authorization of the Data Domain board of directors, Mr. Bhusri called Mr. Warmenhoven to inform him of the conversation between the EMC board member and Mr. Slootman earlier that day.

On May 8, 2009, Wilson Sonsini delivered an initial draft of the merger agreement to Data Domain and Fenwick & West. Also on May 8, 2009, Fenwick & West granted access to an online data room containing Data Domain due diligence materials to representatives of NetApp, Wilson Sonsini and Goldman Sachs.

On May 8, 2009, the Chief Executive Officer of EMC contacted Mr. Slootman via email to request a meeting the next time that the Chief Executive Officer was in the San Francisco Bay Area and suggested proposed dates. Mr. Slootman agreed via email to such dates, resulting in a meeting being scheduled on May 27, 2009.

On May 9, 2009, Messrs. Scarpelli and Slootman and Robert Specker, Vice President, In-house Counsel to Data Domain provided financial and business due diligence on Data Domain to representatives of NetApp and Goldman Sachs.

Between May 9 and May 20, 2009, Messrs. Warmenhoven, Georgens and Gomo, other executive officers of NetApp, and other employees of NetApp met numerous times with Messrs. Bhusri, Slootman, Scarpelli and Specker, other executive officers and employees of Data Domain to discuss various aspects of the potential business combination. During this period, NetApp and its advisors reviewed due diligence materials relating to Data Domain made available to NetApp in an online data room, requested and reviewed additional materials relating to Data Domain and engaged in due diligence discussions with their counterparts.

On May 11, 2009, the Data Domain board of directors met to further discuss, among other matters, the potential business combination with NetApp. Mr. Slootman informed the Data Domain board of directors that the Chief Executive Officer of EMC had contacted him to schedule a meeting and, based upon the availability of the Chief

Executive Officer of EMC, the meeting had been scheduled for May 27, 2009. A representative of Qatalyst reviewed a discussion with Mr. Warmenhoven in which Mr. Warmenhoven had reiterated NetApp's position that NetApp would not engage in a bidding contest if additional parties emerged seeking to acquire Data Domain. Representatives of Fenwick & West reviewed key terms of the initial draft of the merger agreement, including the omission of the ability of Data Domain to accept such a superior proposal and terminate the merger agreement with NetApp and the Data Domain board of directors' ability to change its recommendation in favor of the proposed



**Table of Contents**

business combination with NetApp for any reason consistent with its fiduciary duties and NetApp's initial request of a termination fee of 5.00% of the transaction value, and then discussed the fiduciary duties of the Data Domain board of directors and the various processes the Data Domain board of directors might adopt. The Data Domain board of directors and its advisors determined that in the negotiations with NetApp, Data Domain would insist on a process that would permit a superior proposal from a third party to surface after the signing of the merger agreement with NetApp and for the Data Domain board of directors to consider and accept such a superior proposal and terminate the merger agreement with NetApp, the Data Domain board of directors' ability to change its recommendation in favor of the proposed business combination with NetApp for any reason consistent with its fiduciary duties and an amount of the termination fee that would not be preclusive of a superior proposal. The Data Domain board of directors reaffirmed the priority of its objectives of retaining the compelling valuation of the proposed business combination with NetApp, obtaining deal certainty with respect to the proposed business combination with NetApp and not exposing Data Domain's business and customers to uncertainty and risk. The Data Domain board of directors and its advisors discussed the fact that NetApp's board of directors would be meeting on May 13, 2009, and that it would be important to assess NetApp's continued resolve to pursue a deal with Data Domain before deciding whether to taking any action relative to soliciting the interest of other parties with respect to a strategic transaction with Data Domain. In the interim, the Data Domain board of directors determined that Data Domain should move forward with the due diligence and other aspects of the potential business combination with NetApp.

On May 12, 2009, Fenwick & West delivered proposed revisions to the draft merger agreement to NetApp and Wilson Sonsini. Between May 12 and May 20, 2009, in addition to continuing their due diligence investigations of each other, NetApp and Data Domain, along with their respective legal and financial advisors, negotiated the terms of the merger agreement.

On May 12 and 13, 2009, Messrs. Warmenhoven, Georgens, Gomo and Ahn, other employees of NetApp and representatives of Goldman Sachs met with Messrs. Sloodman, Scarpelli and Specker, other employees of Data Domain and representatives of Qatalyst to discuss specific functional areas of diligence with respect to Data Domain and the potential business combination between NetApp and Data Domain, including financial, sales and marketing, human resources, services, product, supply chain and manufacturing, information technologies and facilities, and legal and intellectual property.

On May 13, 2009, the Data Domain board of directors held a meeting at which it discussed with representatives of Qatalyst the current financial terms of the transaction, the significant premiums the proposed business combination from NetApp provided and the likelihood that another party would offer more value to the Data Domain stockholders. The Data Domain board of directors engaged in further extensive discussions regarding the NetApp offer. The Data Domain board of directors reviewed the value of the NetApp offer, the significant premiums implied by the offer, the current economic conditions and stock market volatility. The Data Domain board of directors confirmed the desire to avoid the downside risk of further economic and stock market uncertainties by securing the attractive deal value reflected in the proposed business combination with NetApp, while obtaining protection of this deal value with the cash component of the offer and the collar around the stock portion of the consideration. Representatives of Fenwick & West discussed key terms of the merger agreement and the fiduciary duties of the Data Domain board of directors. The Data Domain board of directors discussed with representatives of Fenwick & West the legal issues surrounding its decision of whether to contact other companies, including competitors, that could be candidates for a strategic transaction with Data Domain prior to signing a definitive merger agreement with NetApp in light of the applicable merger agreement terms proposed by NetApp. The Data Domain board of directors expressed further concerns regarding the potential harm to Data Domain's business relating to any uncertainty perceived by its current or future customers should they learn of discussions regarding a business combination involving Data Domain prior to the announcement of a definitive agreement and the ability of Data Domain's competition to take advantage of any such perceived uncertainty. The Data Domain board of directors acknowledged the heightened risk of these harms to Data Domain's business if any of Data Domain's competitors were contacted regarding a potential strategic transaction.

The Data Domain board of directors was concerned that initiating a market check at this time could jeopardize securing the proposed business combination with NetApp. The Data Domain board of directors also expressed concerns regarding additional delay and uncertainty associated with soliciting the interest of other parties with respect to a strategic transaction with Data Domain. The Data Domain board of directors determined that Data Domain should move forward with the potential

**Table of Contents**

business combination with NetApp without contacting other companies and reaffirmed its commitment to insisting on merger agreement terms that would not unduly preclude the possibility of Data Domain receiving and implementing a superior proposal after the signing of a merger agreement with NetApp.

On May 13, 2009, the NetApp board of directors held a meeting to discuss the progress of the potential acquisition of Data Domain. Members of NetApp's management team were present to update the board of directors on work completed to date, initial findings from the due diligence process and next steps. The board of directors reviewed with management the preliminary terms of the potential transaction and discussed at length the stand-alone prospects of the potential transaction as well as expected net synergies. Following such discussion, the members of the board of directors authorized management to continue with its diligence review and discussions with Data Domain regarding a potential transaction.

On May 14, 2009, Messrs. Warmenhoven, Georgens, Gomo and Ahn, other employees of NetApp and representatives of Goldman Sachs met with Messrs. Bhusri, Slooman, Scarpelli and Specker, and representatives of Qatalyst to discuss due diligence of NetApp with respect to the potential business combination between NetApp and Data Domain. Between May 14 and May 19, 2009, representatives of NetApp and its advisors met with representatives of Data Domain and its advisors to engage in further due diligence discussions regarding the potential business combination between NetApp and Data Domain.

On May 14, 2009, Messrs. Bhusri and Warmenhoven met to discuss the terms of the proposed merger agreement. Mr. Bhusri indicated that, among other items, the Data Domain board of directors considered it important that the merger agreement allow for a process by which other parties could submit offers for alternate strategic transactions after the signing of a definitive merger agreement and that the Data Domain board of directors maintain the ability to consider such offers presented to it after the signing of a merger agreement with NetApp consistent with its fiduciary duties. Specifically, the Data Domain board of directors insisted on the ability to change its recommendation in favor of the proposed business combination with NetApp for any reason consistent with its fiduciary duties, a right to terminate the merger agreement after receipt of an alternative offer with respect to a strategic transaction that it determines to be a superior proposal and that the termination fee proposed by NetApp to be reduced. Mr. Warmenhoven also mentioned to Mr. Bhusri that NetApp was currently conducting a search for a new member of its board of directors of Directors and suggested that Mr. Bhusri consider participating in the search process. Both parties agreed that no determinations would be made with respect to Mr. Bhusri's consideration for a position on the NetApp board of directors until after completion of the business combination between Data Domain and NetApp. On the same day, representatives of Qatalyst placed a follow-up call to Mr. Warmenhoven to underscore the views that Mr. Bhusri had communicated regarding the deal protection terms of the merger agreement.

Also on May 14, 2009, Wilson Sonsini delivered an initial draft of the form of voting agreement to Fenwick & West.

On May 16, 2009, the Data Domain board of directors met to further discuss the potential business combination with NetApp. Representatives of Qatalyst reviewed due diligence that had been conducted on NetApp with respect to, among other matters, NetApp's recent financial results and outlook. Representatives of Fenwick & West then led a discussion regarding the voting agreements that were requested from officers, directors and associated funds and the status of the previous day's negotiations on key terms of the merger agreement. Representatives of Fenwick & West informed the Data Domain board of directors that NetApp agreed to include a process that would permit a superior proposal from a third party to surface after the signing of the merger agreement with NetApp and for the Data Domain board of directors to consider and accept such a superior proposal and terminate the merger agreement with NetApp and had proposed a termination fee of 4.50% of the transaction value, and the impact of the outcome of these negotiations on the Data Domain board of directors' fiduciary duties. The Data Domain board of directors discussed the fact that NetApp still appeared to be committed to the transaction. The Data Domain board of directors reaffirmed its commitment to the need for a provision of the merger agreement that provided for the Data Domain board of

directors' ability to change its recommendation in favor of the proposed business combination with NetApp for any reason consistent with its fiduciary duties and agreeing to an amount of the termination fee that would not be preclusive of a superior proposal. At the conclusion of this meeting, the Data Domain board of directors reiterated its commitment to continue negotiating the potential business combination with NetApp.

**Table of Contents**

On May 17, 2009, Fenwick & West delivered proposed revisions to the draft form of voting agreement to Wilson Sonsini. Between May 18 and May 20, 2009, NetApp, Data Domain and certain parties that were asked to sign the voting agreements, along with their respective legal advisors, negotiated the terms of the form of voting agreement.

On May 16 and 17, 2009, Mr. Sloodman exchanged emails with Mr. Georgens regarding whether NetApp would be providing offer letters to any Data Domain employees prior to the signing of a merger agreement. No such offer letters were provided to any Data Domain employees by NetApp prior to the signing of the merger agreement.

On May 18, 2009, Messrs. Schneider and Warmenhoven, James Lau, Co-Founder, Chief Strategy Officer and Executive Vice President of NetApp and David Hitz, Co-Founder and Executive Vice President of NetApp, met to get acquainted and discuss potential synergies to be derived from a business combination between NetApp and Data Domain.

On May 18, 2009, the Data Domain board of directors held a meeting to further discuss the potential business combination with NetApp. At this meeting, Mr. Bhusri and representatives of Fenwick & West reviewed for the Data Domain board of directors the results of the negotiations that had taken place earlier that day between Mr. Sloodman, representatives of Fenwick & West, Mr. Georgens, in-house attorneys for NetApp and representatives of Wilson Sonsini. Specifically, they noted that as a result of the negotiations the merger agreement would now provide for the Data Domain board of directors' ability to change its recommendation in favor of the proposed business combination with NetApp for any reason consistent with its fiduciary duties, a right to terminate the merger agreement after receipt of an alternative offer with respect to a strategic transaction that the Data Domain board of directors determines to be a superior proposal and the amount of the termination fee had been reduced to 3.25% of the transaction value. Representatives of Qatalyst reviewed the stock and cash components of the consideration to be received by the Data Domain stockholders proposed by NetApp, and other financial terms of the proposed merger. At the conclusion of this meeting, the Data Domain board of directors reiterated its commitment to finalize the terms of the potential business combination with NetApp.

On May 19, 2009, several conversations occurred among representatives of Qatalyst and Goldman Sachs and Mr. Bhusri and Mr. Georgens to discuss the exchange ratio, collar mechanics and final mix of consideration. As a result of these meetings and conference calls, the parties agreed to use the closing stock price of NetApp common stock on May 19, 2009 of \$18.07 in order to calculate the stock exchange ratio for the basis for the 10% symmetrical collar on the stock portion of the consideration that will provide adjustments to maintain the \$25 per share merger consideration for variations in NetApp's stock price of up to 10% in either direction between signing and closing of the merger, thereby providing downside protection for Data Domain stockholders if NetApp's stock declines by up to 10% while maintaining the upside potential if NetApp's stock increases in value by more than 10%. The parties also agreed that the cash portion of the merger consideration would be increased from \$11.00 to \$11.45 and the stock portion of the merger consideration would be decreased from \$14.00 to \$13.55.

On May 19, 2009, the NetApp board of directors held a meeting to further discuss the potential business combination with Data Domain. Representatives of Wilson Sonsini reviewed the board of directors' fiduciary duty obligations in the context of the potential acquisition, and the board of directors members took note of the significant legal and financial due diligence that had been conducted over the past several weeks, including the analyses and various detailed models prepared by Goldman Sachs. Next, the board of directors reviewed the key terms of the merger agreement and engaged in extensive discussions in this regard. Representatives of Goldman Sachs then provided a summary of the potential transaction, presented various detailed financial analyses, and provided a review of its fairness opinion, which concluded that the merger consideration was fair to NetApp from a financial point of view. The members of the board of directors made inquiry of management and its advisors in this regard, and further discussion then ensued. At the conclusion of the meeting, the board of directors unanimously approved the acquisition of Data Domain, the merger agreement and related matters.

On May 20, 2009, the Data Domain board of directors held a meeting at which the proposed business combination with NetApp was further discussed and considered for final approval. At this meeting, Mr. Bhusri updated the Data Domain board of directors on the current status of negotiations with NetApp. Representatives of Fenwick & West reviewed in detail with the Data Domain board of directors the outcome of further negotiations and the terms of the merger agreement and related agreements, as well as the fiduciary duties of the Data Domain board

## **Table of Contents**

of directors. Mr. Sloodman reviewed analyses, objectives, opportunities and challenges of Data Domain remaining as a stand alone company. Representatives of Qatalyst presented to the Data Domain board of directors its financial analysis of the proposed transaction and delivered to the Data Domain board of directors its oral opinion, subsequently confirmed in writing as of May 20, 2009, that, as of that date the consideration to be received by holders of shares of Data Domain common stock, other than affiliates who had executed voting agreements, pursuant to the original merger agreement, was fair, from a financial point of view, to such holders. The full text of the written opinion of Qatalyst, dated May 20, 2009, which sets forth, among other things, the assumptions made, procedures followed, matters considered and limitations and qualifications of the review undertaken by Qatalyst in rendering its opinion, is attached hereto as Appendix D. Following the presentations, and after further review and discussion, the Data Domain board of directors unanimously voted to approve the merger, the merger agreement and related matters and resolved to recommend that Data Domain stockholders adopt the merger agreement, which was subsequently filed with the SEC as an exhibit to Data Domain's Current Report on Form 8-K filed on May 21, 2009.

Following the adjournment of the meeting of the Data Domain board of directors on May 20, 2009, the parties signed the merger agreement. The signing of the merger agreement was publicly announced later that day, following the closing of trading on the NASDAQ Global Select Market.

On May 20, 2009, after the announcement of the signing of the merger agreement, Mr. Sloodman contacted the Chief Executive Officer of EMC to cancel the meeting previously scheduled for May 27, 2009.

### **Additional Background to the Merger**

On numerous occasions after the announcement of the signing of the merger agreement on May 20, 2009 and through June 1, 2009, individual representatives of EMC and members of the board of directors of EMC contacted individual representatives of Data Domain and members of the Data Domain board of directors regarding an alternative acquisition proposal from EMC. None of the representatives of Data Domain or members of the Data Domain board of directors responded to such inquiries other than to inform the respective representatives of EMC and members of the board of directors of EMC that they could not discuss the matter since they were bound by the non-solicitation provisions of the merger agreement.

On June 1, 2009, EMC announced an unsolicited \$30.00 per share all cash tender offer to the stockholders of Data Domain. EMC sent a letter to Mr. Sloodman that same day regarding the cash tender offer to the stockholders of Data Domain and enclosed a proposed form of merger agreement.

On June 1, 2009, the Data Domain board of directors held a meeting at which EMC's announcement of a cash tender offer to the stockholders of Data Domain and the proposed business combination with NetApp were discussed. Representatives of Qatalyst and Fenwick & West reviewed the terms of EMC's cash tender offer. After further review and discussion, the Data Domain board of directors determined (after consultation with Qatalyst and Fenwick & West) that EMC's announcement of a \$30.00 per share all cash tender offer to the stockholders of Data Domain was reasonably likely to lead to a Superior Proposal (as that term is defined in the merger agreement). In accordance with the merger agreement, Data Domain then informed NetApp of this determination and of Data Domain's intent to contact EMC and offer to enter into discussions if EMC entered into a nondisclosure and standstill agreement as required by the merger agreement.

On June 2, 2009, EMC formally commenced a \$30.00 per share all cash tender offer to the stockholders of Data Domain. Unless extended by EMC, the tender offer expires at midnight, New York City time, on Monday June 29, 2009.

On June 2, 2009, Mr. Warmenhoven called Mr. Bhusri to inform him that NetApp would be willing to increase the aggregate consideration in the proposed business combination with Data Domain from \$25.00 to \$30.00, and maintaining the 10% symmetrical collar around the value of the stock portion of the consideration.

On June 2, 2009, the Data Domain board of directors held a meeting at which both EMC's cash tender offer to the stockholders of Data Domain and the proposed business combination with NetApp were discussed. At this meeting, Mr. Bhusri updated the Data Domain board of directors on the revised proposal from NetApp to increase the aggregate consideration from \$25.00 to \$30.00. Representatives of Qatalyst and Fenwick & West reviewed the



**Table of Contents**

terms of EMC's cash tender offer to the stockholders of Data Domain. In addition, the Data Domain board of directors discussed potential additional terms to seek in connection with the revised oral proposal from NetApp and determined to review and seek to negotiate the terms of the revised proposal from NetApp once they were received.

On June 2, 2009, a representative of Qatalyst called Mr. Gomo to discuss the financial terms of NetApp's revised proposal regarding the proposed business combination involving Data Domain and NetApp and proposed additional terms that would enhance the proposal from Data Domain's point of view.

Late in the evening on June 2, 2009, Mr. Georgens delivered a letter to Messrs. Bhusri and Sloodman containing the financial terms of the revised proposal regarding the proposed business combination involving Data Domain and NetApp, which provided for \$30.00 per share in aggregate consideration, consisting of \$16.45 per share in cash and \$13.55 per share in NetApp stock, with a 10% symmetrical collar around the value of the stock portion of the consideration. At this time, Mr. Georgens also delivered to Messrs. Bhusri and Sloodman an initial draft of the amendment to the original merger agreement to effect this revised proposal.

On June 2, 2009, the NetApp board of directors held a meeting to discuss EMC's announcement of an all cash tender offer and the business combination with Data Domain. Representatives of Wilson Sonsini and Goldman Sachs reviewed the key terms of EMC's cash tender offer to the stockholders of Data Domain. Next, representatives of Goldman Sachs provided a summary of potential responses and presented various detailed financial analyses associated with these responses. Then, the board of directors reviewed the key terms of a potential response and engaged in extensive discussion in this regard. Representatives of Goldman Sachs have provided a fairness opinion to the board of directors, which concluded that the revised proposal which provided for \$30.00 per share in aggregate consideration, consisting of \$16.45 per share in cash and \$13.55 per share in NetApp stock, with a 10% symmetrical collar around the value of the stock portion of the consideration was fair to NetApp from a financial point of view. The board of directors unanimously approved the terms of NetApp's revised proposal and approved the amendment to the merger agreement and related matters.

Following receipt of the revised proposal from NetApp, representatives of Qatalyst and Goldman Sachs discussed the financial terms of NetApp's revised proposal regarding the proposed business combination involving Data Domain and NetApp and continued to request additional terms that would enhance the proposal from Data Domain's point of view.

On the morning of June 3, 2009, the Data Domain board of directors held a meeting at which both EMC's cash tender offer to the stockholders of Data Domain and the revised financial terms of the proposed business combination with NetApp were discussed. At this meeting, representatives of Fenwick & West and Qatalyst updated the Data Domain board of directors on the terms of the revised proposal regarding the proposed business combination with NetApp and the related amendment to the merger agreement. After further review and discussion, the Data Domain board of directors unanimously determined that the revised terms of NetApp's proposal were advisable, fair to and in the best interests of Data Domain's stockholders and voted to approve the amendment to the original merger agreement, which was filed with the SEC as an exhibit to Data Domain's Current Report on Form 8-K filed later that day. The Data Domain board of directors further considered and discussed EMC's cash tender offer to the stockholders of Data Domain and, after consultation with Qatalyst and Fenwick & West, the Data Domain board of directors reaffirmed its determination that EMC's \$30.00 per share all cash tender offer to the stockholders of Data Domain was reasonably likely to lead to a Superior Proposal (as that term is defined in the merger agreement). Later that day, the parties executed the amendment to the merger agreement.

On June 3, 2009, a representative of Fenwick & West delivered to a representative of Skadden, Arps, Slate, Meagher & Flom LLP, or Skadden Arps, legal counsel to EMC, a form of mutual non-disclosure agreement that contained a "standstill" provision with respect to shares of Data Domain common stock, which, under the original merger agreement, is a pre-condition to Data Domain's discussions or negotiations with a third party, such as EMC,

with respect to a potential Superior Proposal (as that term is defined in the merger agreement). Later in the day, EMC issued a press release reaffirming its \$30.00 per share tender offer for all Data Domain shares.

**Table of Contents**

**Data Domain's Reasons for the Merger; Recommendation of the Data Domain Board of Directors**

In the course of reaching its decision to approve the merger, adopt the merger agreement and recommend that Data Domain stockholders vote FOR the adoption of the merger agreement, the Data Domain board of directors consulted with senior management, legal counsel and its financial advisor. The Data Domain board of directors also consulted with outside legal counsel regarding its fiduciary duties, legal due diligence matters and the terms of the merger agreement and related agreements. The following discussion includes all material reasons and factors considered by the Data Domain board of directors in making its recommendation, but is not, and is not intended to be, exhaustive:

*Merger Consideration.* The Data Domain board of directors considered the following with respect to the merger consideration to be received by the Data Domain stockholders:

that our stockholders will receive merger consideration of \$30.00 per share consisting of \$16.45 per share in cash and \$13.55 per share in NetApp stock upon the completion of the merger (assuming NetApp's common stock price remains within the 10% symmetrical collar discussed below), as compared to the uncertain future long-term value to our stockholders that might be realized if we remained independent;

the fact that the cash portion of the merger consideration will provide liquidity and certainty of value to our stockholders;

the fact that the stock portion of the merger consideration has a 10% symmetrical collar around the closing stock price of NetApp common stock on June 2, 2009 (the last trading day prior to the Data Domain board of directors' approval of the Merger) of \$19.34 that will provide adjustments to maintain the \$30.00 per share merger consideration for variations in NetApp's stock price of up to 10% in either direction between signing and closing of the merger, thereby providing downside protection for Data Domain stockholders if NetApp's stock declines by up to 10% while maintaining a portion of the upside potential if NetApp's stock increases in value by more than 10%;

the fact that the \$30.00 per share value of the consideration for Data Domain common stock in the merger (assuming NetApp's stock price remains within the 10% collar discussed above) represents significant premiums to our stockholders of approximately 115% premium over the average closing price of our common stock on The NASDAQ Global Select Market over the 60 trading day period ending on May 19, 2009 (the last trading day prior to the Data Domain board of directors' approval of the merger) and a 72% premium over the closing price of our common stock on The NASDAQ Global Select Market on May 19, 2009 (the last trading day prior to the Data Domain board of directors' approval of the merger) and the levels of those premiums as compared to the premiums in other comparable merger transactions; and

the then current financial market conditions and the recent and historical market prices of Data Domain common stock, including the market price performance of Data Domain common stock relative to those of other industry participants. See *Comparative Market Prices and Dividends* for information about our common stock prices over the past two years.

*Synergy between NetApp and Data Domain.* The Data Domain board of directors considered NetApp's prospects following the closing of the merger. NetApp's sales and distribution channels and international reach to offer the Data Domain product line to more customers, accelerating growth and market adoption. The Data Domain board of directors believed that the combination of the two companies would increase the value of NetApp and thereby the value of the NetApp common stock that Data Domain stockholders would receive in

the merger.

*Review of Prospects in Remaining Independent.* The Data Domain board of directors considered the possibility of continuing to operate Data Domain as an independent public company. The Data Domain board of directors also considered the perceived risks and uncertainties of remaining an independent public company, the range of possible values to its stockholders arising from this alternative and the timing and uncertainty of successfully accomplishing meaningful growth under Data Domain's strategic plan. The Data

**Table of Contents**

Domain board of directors' assessment was that pursuit of a growth strategy as an independent company was not reasonably likely to create greater value for the Data Domain stockholders than the merger, after discounting for the elapse of time and considering the factors reviewed below. In considering the alternative of pursuing growth as an independent company, the Data Domain board of directors considered the following factors:

increased competition, especially from competitors with greater name recognition, more resources, financial and otherwise, broader product offerings and more vertically integrated product offerings than Data Domain;

Data Domain's slowing growth rates and the challenge of expanding beyond its core deduplication product offerings in the context of enterprise customers and large data centers increasing requests for a broader suite of data storage products and services;

the increasing preference of enterprises to consolidate vendors and use one vendor for all of its data center needs instead of using multiple vendors that offer best-of-breed products independently;

customer concern regarding Data Domain's relatively small size compared to its competitors due to the critical nature of its storage products in customer data centers; and

the time and risk involved in integrating new management members and key employees if Data Domain were successful in recruiting new management and key employees.

*Economic Conditions.* The Data Domain board of directors considered the fact that the United States economy, in general, appears to be in a downturn. This turmoil and uncertainty could adversely affect the demand for Data Domain's products and services. In addition, because Data Domain's sales are primarily to corporate customers, Data Domain's business depends on general economic and business conditions.

*Opinion of Qatalyst Partners LP.* The Data Domain board of directors considered the financial presentation of Qatalyst and the opinion of Qatalyst, dated May 20, 2009, that, as of the date of the opinion, and subject to and based on the assumptions made, procedures followed, matters considered and limitations and qualifications of the review undertaken in such opinion, the merger consideration to be received by holders of shares of Data Domain common stock, other than affiliates who have executed voting agreements, pursuant to the original merger agreement was fair, from a financial point of view, to such holders, as more fully described in the section entitled "Data Domain Proposal 1 - The Merger - Opinion of Qatalyst Partners LP" on page 62.

*Likelihood and Timing of Closing.* The Data Domain board of directors considered the likelihood that the proposed acquisition would be completed on a timely basis, in light of:

the customary closing conditions included in the merger agreement;

the fact that the merger does not need to be approved by foreign anti-trust authorities;

the available cash resources of NetApp to pay the cash portion of the merger consideration without the need for outside financing and the representation that NetApp made in the merger agreement to that effect; and

the fact that the merger does not need to be approved by NetApp's stockholders and the representation that NetApp made in the merger agreement to that effect.

*Terms of the Merger Agreement.* The Data Domain board of directors considered the terms and conditions of the merger agreement and the course of negotiations thereof, including:

the limited conditions to NetApp's obligation to complete the merger, including the absence of a financing condition or vote of NetApp's stockholders and limited ability of NetApp to terminate the merger agreement under clearly defined circumstances;

**Table of Contents**

the structure of the transaction as a merger, requiring approval by Data Domain's stockholders, which would result in detailed public disclosure and a period of time prior to completion of the merger during which an unsolicited superior proposal, if any, could be brought forth;

the ability of the Data Domain board of directors, under certain circumstances, to furnish information to and conduct negotiations with a third party, if the Data Domain board of directors determines in good faith (after consultation with its financial advisor and its outside legal counsel) that (A) the third party has made an acquisition proposal that either constitutes or is reasonably likely to lead to a superior proposal and (B) the failure to take such action is reasonably likely to result in a breach of its fiduciary duties to the Data Domain stockholders;

the ability of the Data Domain board of directors, under certain circumstances, to change its recommendation that the Data Domain stockholders adopt the merger agreement if the Data Domain board of directors determines in good faith (after consultation with its outside counsel) that the failure to change its recommendation is reasonably likely to be a breach of its fiduciary duties to the Data Domain stockholders;

the ability of Data Domain to terminate the merger agreement in order to accept a superior proposal, subject to certain conditions and payment to NetApp of \$57.0 million, representing approximately 2.7% of the total equity value of the proposed transaction at the time of the execution of the merger agreement;

the belief of the Data Domain board of directors that the termination fee is within the range of reasonable termination fees provided for in comparable transactions and is not a significant deterrent to possible competing offers; and

that Data Domain's stockholders will be entitled to appraisal rights under Delaware law.

*NetApp's Reputation.* The Data Domain board of directors considered the business reputation of NetApp and its management and the substantial financial resources of NetApp, which the Data Domain board of directors believed supported the conclusion that the merger could be completed relatively quickly and in an orderly manner.

In the course of its deliberations, the Data Domain board of directors also considered a variety of risks and factors weighing against the merger, including:

*Risks of Announcement and Completion.* The Data Domain board of directors considered:

the risks and contingencies related to the announcement of the merger, including our ability to retain key employees and maintain our relationships with customers, commercial partners and third parties;

the conditions to NetApp's obligation to complete the merger and the right of NetApp to terminate the merger agreement under certain circumstances; and

the risks and costs to Data Domain if the merger is not completed, including the diversion of management and employee attention, potential employee attrition, the potential impact on our stock price and the effect on our business relationships.

*Limitations on Data Domain's Business.* The Data Domain board of directors considered the potential limitations on Data Domain's pursuit of business opportunities due to pre-closing covenants in the merger agreement whereby Data Domain agreed that it will carry on its business in the ordinary course of business consistent with past practice, and subject to specified exceptions, will not take certain actions related to the conduct of its business without the prior written consent of NetApp.

*Absence of Pre-Signing Solicitation.* The Data Domain board of directors considered the absence of contacting other companies or other effort to solicit interest from other potential buyers that might be a likely candidates for a strategic transaction with Data Domain prior to the execution and delivery of the merger agreement.



## **Table of Contents**

*Potential Taxable Transaction.* The Data Domain board of directors considered that the merger agreement allows for NetApp to increase the cash portion of the merger consideration in the event that the issuance of additional shares of its common stock would require NetApp to obtain a vote of its stockholders to approve the issuance and that the increase in the cash portion could result in the stock portion of the merger consideration being taxable to the Data Domain stockholders.

*Stockholder Vote.* The Data Domain board of directors considered the requirement that, unless the merger agreement is earlier terminated by Data Domain as a result of a receipt of a superior proposal, Data Domain must submit the merger agreement for adoption by Data Domain's stockholders even if the Data Domain board of directors withdraws its recommendation of the merger.

*Voting Agreements.* The Data Domain board of directors considered that the directors, executive officers and affiliated entities holding shares that represent approximately 22% of Data Domain outstanding common stock as of May 20, 2009, would be entering into voting agreements to vote in favor of the merger and that even if the Data Domain board of directors changed its recommendation to vote against the merger under circumstances in which Data Domain is not entitled to terminate the merger agreement, those directors, executive officers and affiliated entities would still be required to approve the merger proposal.

*Termination Fee and Other Alternative Acquirers.* The Data Domain board of directors considered the possibility that the \$57.0 million termination fee payable to NetApp under clearly defined circumstances might discourage a competing proposal to acquire Data Domain or reduce the price of any such proposal.

*Interests of Directors and Officers.* The Data Domain board of directors considered the interests that certain of our directors and executive officers have with respect to the merger in addition to their interests as Data Domain stockholders generally, as described in Data Domain Proposal 1 The Merger Data Domain Officers and Directors Have Financial Interests in the Merger on page 68.

The preceding discussion of the information and factors considered by the Data Domain board of directors is intended to be illustrative and not exhaustive. In light of the variety of factors considered in connection with its evaluation of the merger and the complexity of these matters, the Data Domain board of directors did not find it practicable to, and did not, quantify or otherwise attempt to assign relative weights to the various factors considered in reaching its determination, and individual directors may have given different weight to different factors. In addition, the Data Domain board of directors did not reach any specific conclusion with respect to any of the factors or reasons considered. Instead, the Data Domain board of directors conducted an overall analysis of the factors and reasons described above and determined that, in the aggregate, the potential benefits considered outweighed the potential risks or possible negative consequences of approving the merger, adopting the merger agreement and recommending that Data Domain stockholders vote FOR the adoption of the merger agreement.

## **Opinion of Qatalyst Partners LP**

Data Domain retained Qatalyst to act as its financial advisor in connection with a potential transaction involving Data Domain. Data Domain selected Qatalyst to act as its financial advisor based on Qatalyst's qualifications, expertise, reputation and knowledge of the business and affairs of Data Domain. As financial advisor to Data Domain, on May 20, 2009, Qatalyst rendered to the Data Domain board of directors its written opinion that, as of such date and based upon and subject to the various assumptions, limitations and qualifications set forth in its opinion, the merger consideration to be received by the holders of shares of Data Domain common stock, other than affiliates who have executed voting agreements, pursuant to the original merger agreement was fair, from a financial point of view, to such holders.

**The full text of Qatalyst's written opinion, dated May 20, 2009, to the board of directors of Data Domain is attached hereto as Appendix D and is incorporated by reference herein. The opinion sets forth, among other things, the assumptions made, procedures followed, matters considered and limitations and qualifications of the review undertaken by Qatalyst in rendering its opinion. You should read the entire opinion carefully in its entirety. Qatalyst's opinion was provided to the Data Domain board of directors and addressed only the fairness, from a financial point of view, of the merger consideration to be received by the holders of shares of Data Domain common stock, other than affiliates who have executed voting**

**Table of Contents**

**agreements, pursuant to the original merger agreement as of the date of the opinion. It did not address any other aspect of the transaction and does not constitute a recommendation to the stockholders of Data Domain as to how to vote or act on any matter with respect to the merger. The summary of Qatalyst's opinion set forth herein is qualified in its entirety by reference to the full text of the opinion.**

In arriving at its opinion, Qatalyst reviewed the original merger agreement and certain publicly available financial statements and other business and financial information of Data Domain and NetApp. Qatalyst also reviewed certain financial projections and operating data prepared by the management of Data Domain (the Data Domain Projections) and by the management of NetApp (the NetApp Projections) and reviewed information relating to certain strategic, financial and operational benefits anticipated from the merger, prepared by the managements of Data Domain and NetApp, respectively. Additionally, Qatalyst discussed the past and current operations and financial condition and the prospects of Data Domain and NetApp, including information relating to certain strategic, financial and operational benefits anticipated from the merger, with senior executives of Data Domain and NetApp. Qatalyst also reviewed the historical market prices and trading activity for Data Domain common stock and NetApp common stock and compared the financial performance of Data Domain and the prices and trading activity of Data Domain common stock with that of certain other selected publicly-traded companies and their securities. In addition, Qatalyst reviewed the financial terms, to the extent publicly available, of selected acquisition transactions and performed such other analyses, reviewed such other information and considered such other factors as it deemed appropriate.

In arriving at its opinion, Qatalyst assumed and relied upon, without independent verification, the accuracy and completeness of the information that was publicly available or supplied or otherwise made available to, or discussed with, it by Data Domain and NetApp. With respect to the Data Domain Projections and the NetApp Projections, including information relating to certain strategic, financial and operational benefits anticipated from the merger and other matters covered thereby, Qatalyst was advised by the management of Data Domain and NetApp, respectively, and Qatalyst assumed, that they had been reasonably prepared on bases reflecting the best currently available estimates and judgments of the management of Data Domain and NetApp, respectively, of the future financial performance of Data Domain and NetApp, respectively. Qatalyst assumed that the merger would be completed in accordance with the terms set forth in the original merger agreement, without any modification or delay. In addition, Qatalyst assumed that in connection with the receipt of all the necessary approvals of the proposed merger, no delays, limitations, conditions or restrictions would be imposed that would have an adverse effect on Data Domain, NetApp or the contemplated benefits expected to be derived in the proposed merger. Qatalyst also assumed that the merger would qualify as a tax-free reorganization under the Internal Revenue Code of 1986, as amended. Qatalyst did not make any independent evaluation or appraisal of the assets or liabilities (contingent or otherwise) of Data Domain or NetApp, nor was it furnished with any such evaluation or appraisal. In addition, Qatalyst relied, without independent verification, upon the assessments of the managements of Data Domain and NetApp as to (i) the existing and future technology and products of Data Domain and NetApp and the risks associated with such technology and products, (ii) their ability to integrate the businesses of Data Domain and NetApp and (iii) their ability to retain key employees of Data Domain and NetApp. In arriving at its opinion, Qatalyst was not authorized to solicit, and did not solicit, interest from any party with respect to an acquisition, business combination or other extraordinary transaction involving Data Domain.

Qatalyst's opinion has been approved by its opinion committee in accordance with its standard practice. Qatalyst's opinion does not constitute a recommendation to any holder of shares of Data Domain common stock as to how to vote with respect to the merger and does not in any manner address the prices at which Data Domain common stock or NetApp common stock will trade at any time. Qatalyst's opinion was necessarily based on financial, economic, market and other conditions as in effect on, and the information made available to it as of, the date the opinion was delivered. Events occurring after the date of the opinion may affect Qatalyst's opinion and the assumptions used in preparing it, and Qatalyst has not assumed any obligation to update, revise or reaffirm its opinion. Qatalyst's opinion did not address the underlying business decision of Data Domain to engage in the merger, or the relative merits of the merger

as compared to any strategic alternatives that may have been available to Data Domain. Qatalyst's opinion was limited to the fairness, from a financial point of view, of the merger consideration to be received by the holders of shares of Data Domain common stock, other than affiliates who have executed voting agreements, pursuant to the original merger agreement and Qatalyst expressed no opinion with

**Table of Contents**

respect to the fairness of the amount or nature of the compensation to any of Data Domain's officers, directors or employees, or any class of such persons, relative to such merger consideration.

The following is a summary of the material analyses performed by Qatalyst in connection with its opinion dated May 20, 2009. The analyses described below must be considered as a whole; considering any portion of such analyses and of the factor considered, without considering all analyses and factors, could create a misleading or incomplete view of the process underlying Qatalyst's opinion. Except as otherwise noted, for purposes of its analyses, Qatalyst utilized equity research analyst projections for both Data Domain and NetApp, or the street projections, and the Data Domain Projections (which consisted of two sets of projections, denoted as Management Case 1 and Management Case 2 herein) for Data Domain.

*Illustrative Discounted Cash Flow Analysis.* Qatalyst performed an illustrative discounted cash flow analysis, which is designed to imply a value of a company by calculating the net present value of estimated future cash flows of the company. Qatalyst calculated ranges of implied equity values per share for Data Domain based on discounted cash flow analyses utilizing the Data Domain Projections for the fiscal years 2009 through 2013. Qatalyst computed the unlevered free cash flows for Data Domain for the years 2009 through 2013 and calculated the terminal value based on the year 2013 unlevered free cash flow by applying a range of perpetual growth rates ranging from 3.0% to 5.0%. These values were then discounted to present values using cost of equity ranging from 12.0% to 15.0%. Qatalyst then applied a range of dilution factors from 5.0% to 10.0% to illustrate the terminal value dilution to current stockholders due to projected equity compensation grants by Data Domain. Based on the calculations set forth above, this analysis implied a range for Data Domain common stock of approximately \$18.70 to \$29.22 per share based on Management Case 1 and approximately \$12.96 to \$19.43 per share based on Management Case 2, in each case, net of Data Domain's cash, in each case, including Data Domain's net cash balance.

*Selected Company Analysis.* Qatalyst performed a selected company analysis, which attempts to provide an implied value of a company by comparing it to selected publicly-traded companies. Qatalyst compared selected financial information and public markets multiples for Data Domain with publicly available information and public market multiples for selected technology ecosystems companies and data management companies. The companies used in this comparison included those companies listed below:

*Technology Ecosystems Companies:*

Microsoft Corporation

International Business Machines Corporation

Cisco Systems, Inc.

Oracle Corporation

Hewlett-Packard Company

EMC Corporation

Dell Inc.

VMware, Inc.

*Data Management Companies:*

Symantec Corporation

Citrix Systems, Inc.

F5 Networks, Inc.

Open Text Corporation

Riverbed Technology, Inc.

CommVault Systems, Inc.

**Table of Contents**

3Par Inc.

Netezza Corporation

Based upon equity research analyst estimates for calendar year 2009 and the Data Domain Projections and using the closing prices as of May 19, 2009 for shares of the selected companies, Qatalyst calculated the following ratios for each of these companies:

the enterprise value divided by the estimated revenue for calendar year 2009;

the enterprise value divided by the estimated revenue for calendar year 2010;

the closing stock price divided by the estimated earnings per share for calendar year 2009; and

the closing stock price divided by the estimated earnings per share for calendar year 2010.

Based on the analysis of the relevant ratios for each of the selected companies, Qatalyst selected representative ranges of financial multiples of the selected companies and applied these ranges of multiples to the relevant Data Domain statistic. Based on the calculations set forth above, this analysis implied a range for Data Domain common stock of approximately \$11.34 to \$22.43 based on street projections, approximately \$12.69 to \$24.24 based on Management Case 1 and approximately \$10.25 to \$20.38 based on Management Case 2.

No company included in the selected company analysis is identical to Data Domain. In evaluating the selected companies, Qatalyst made judgments and assumptions with regard to industry performance, general business, economic, market and financial conditions and other matters. Many of these matters are beyond the control of Data Domain, such as the impact of competition on the business of Data Domain and the industry in general, industry growth and the absence of any material adverse change in the financial condition and prospects of Data Domain or the industry or in the financial markets in general. Mathematical analysis, such as determining the arithmetic mean or median, or the high or low, is not in itself a meaningful method of using selected company data.

**Table of Contents**

*Selected Transaction Analysis.* Qatalyst performed a selected transaction analysis, which is designed to imply a value of a company based on publicly available financial terms of selected transactions that share some characteristics with the merger. Qatalyst compared the multiples paid in (i) 10 transactions from June 2005 through April 2009 involving public and private companies in the hardware/systems industry and (ii) 14 transactions from July 2003 through January 2009 involving public companies in the software industry. These transactions are listed below:

<b>Target</b>	<b>Acquiror</b>
<i><u>Hardware/Systems Companies</u></i>	
Sun Microsystems, Inc.	Oracle Corporation
Foundry Networks, Inc.	Brocade Communications Systems, Inc.
LeftHand Networks	Hewlett-Packard Company
Diligent Technologies	International Business Machines Corporation
XIV	International Business Machines Corporation
EqualLogic, Inc.	Dell Inc.
McDATA Corporation	Brocade Communications Systems, Inc.
Advanced Digital Information Corporation	Quantum Corporation
Maxtor Corporation	Seagate Technology
Storage Technology Corporation	Sun Microsystems, Inc.
<i><u>Software Companies</u></i>	
Interwoven, Inc.	Autonomy Corporation plc
BladeLogic, Inc.	BMC Software, Inc.
BEA Systems, Inc.	Oracle Corporation
Opsware Inc.	Hewlett-Packard Company
WebEx Communications, Inc.	Cisco Systems, Inc.
Altiris, Inc.	Symantec Corporation
Internet Security Systems, Inc.	International Business Machines Corporation
FileNet Corporation	International Business Machines Corporation
Mercury Interactive Corporation	Hewlett-Packard Company
RSA Security Inc.	EMC Corporation
MicroMuse Inc.	International Business Machines Corporation
Veritas Software Corporation	Symantec Corporation
Documentum, Inc.	EMC Corporation
Legato Systems, Inc.	EMC Corporation

For each of the transactions listed above, Qatalyst calculated the following ratios:

the ratio of the enterprise value to the estimated next twelve months revenue; and

the estimated next twelve months price to earnings multiple.

Based on the analysis of the relevant metrics for each transaction noted above, Qatalyst selected representative ranges of multiples of the transactions and applied these ranges of multiples to the relevant Data Domain financial statistic. Based on the calculations set forth above, this analysis implied a range for Data Domain common stock of approximately \$15.96 to \$25.96 based on street projections, approximately \$17.50 to \$27.05 based on Management Case 1 and approximately \$14.26 to \$25.96 based on Management Case 2.



No company or transaction utilized in the selected transactions analysis is identical to Data Domain, NetApp or the merger. In evaluating the selected transactions, Qatalyst made judgments and assumptions with regard to general business, market and financial conditions and other matters, many of which are beyond the control of Data Domain and NetApp, such as the impact of competition on the business of Data Domain, NetApp or the industry generally, industry growth and the absence of any adverse material change in the financial condition of Data Domain, NetApp or the industry or in the financial markets in general, which could affect the public trading value of the companies and the aggregate value of the transactions to which they are being compared.

Qatalyst also performed and considered various other financial statistics in connection with its opinion dated May 20, 2009 as set forth below.

*Future Trading Analysis.* Qatalyst performed an illustrative analysis of the implied present value of the future price per share of Data Domain common stock on a stand-alone basis, which is designed to provide an

**Table of Contents**

indication of the present value of a theoretical future value of a company's equity as a function of its estimated future earnings and assumed price to future earnings per share multiple. For this analysis, Qatalyst used the street projections for calendar year 2010 only and the Data Domain Projections for Management Case 1 and Management Case 2 for calendar years 2010 and 2011. Qatalyst first calculated the implied value per share of Data Domain common stock for calendar year 2010 with respect to the street projections and each of calendar years 2010 and 2011 with respect to Management Case 1 and Management Case 2 by applying a representative range of public market price to forward earnings per share multiples to earnings per share estimates for Data Domain. Qatalyst then discounted these values using a cost of equity of 13.5%. Based on the calculations set forth above, this analysis implied a range for Data Domain common stock of approximately \$15.81 to \$19.76 per share based on street projections, approximately \$17.09 to \$25.10 per share based on Management Case 1 and approximately \$12.04 to \$15.69 per share based on Management Case 2.

*Contribution Analysis.* Qatalyst reviewed estimated 2009 and 2010 operating and financial information based on the street projections for Data Domain and NetApp. Such operating and financial information included, among other things, revenues, gross profits, operating profits and net income. Qatalyst analyzed the relative potential financial contribution of Data Domain to the combined company following completion of the merger, the implied equity ownership determined by valuing such contributions and the implied value per share. Based on the calculations set forth above, this analysis implied a range for Data Domain common stock of approximately \$9.64 to \$14.07 per share.

*Premia Paid Statistics.* Qatalyst reviewed the premia paid in selected domestic public company cash and cash/stock mix transactions that have been completed or are pending since 2003 in which the target company was a publicly-traded technology company and the transaction value was greater than \$500 million. Qatalyst selected a representative range of implied premia (representing the 25th percentile and 75th percentile) and applied this range of premia to the price of Data Domain common stock of \$17.43 as of May 19, 2009, which implied a range for Data Domain common stock of approximately \$20.36 to \$24.16 per share.

*Equity Research Analyst Price Targets Statistics.* Qatalyst reviewed and analyzed the price targets for Data Domain common stock prepared and published by equity research analysts during the period from April 23, 2009 through April 28, 2009. These targets reflect each analyst's estimate of the future public market trading price of Data Domain common stock and are not discounted to reflect present values.

Qatalyst noted that the range of undiscounted equity research analyst price targets of Data Domain common stock was between \$11.00 and \$24.00 per share. Qatalyst further calculated that using a cost of equity of 13.5% and a discount period of one year, the present value of the equity research analyst price target range for Data Domain common stock was approximately \$9.69 to \$21.15 per share.

The public market trading price targets published by equity research analysts do not necessarily reflect current market trading prices for Data Domain common stock and these estimates are subject to uncertainties, including the future financial performance of Data Domain and future financial market conditions.

*Miscellaneous*

In connection with the review of the transaction by the Data Domain board of directors, Qatalyst performed a variety of financial and comparative analyses for purposes of rendering its opinion. The preparation of a financial opinion is a complex process and is not necessarily susceptible to a partial analysis or summary description. In arriving at its opinion, Qatalyst considered the results of all of its analyses as a whole and did not attribute any particular weight to any analysis or factor it considered. Qatalyst believes that selecting any portion of its analyses, without considering all analyses as a whole, would create an incomplete view of the process underlying its analyses and opinion. In addition, Qatalyst may have given various analyses and factors more or less weight than other analyses and factors, and may

have deemed various assumptions more or less probable than other assumptions. As a result, the ranges of valuations resulting from any particular analysis described above should not be taken to be Qatalyst's view of the actual value of Data Domain or NetApp. In performing its analyses, Qatalyst made numerous assumptions with respect to industry performance, general business, economic, market and financial conditions and other matters, many of which are beyond the control of Data Domain and NetApp. Any estimates contained in

## **Table of Contents**

Qatalyst's analyses are not necessarily indicative of future results or actual values, which may be significantly more or less favorable than those suggested by such estimates.

Qatalyst conducted the analyses described above solely as part of its analysis of the fairness of the merger consideration pursuant to the original merger agreement, from a financial point of view, to holders of shares of Data Domain common stock, other than affiliates who have executed voting agreements, and in connection with the delivery of its opinion to the Data Domain board of directors. These analyses do not purport to be appraisals or to reflect the prices at which shares of Data Domain common stock might actually trade.

Qatalyst's opinion and its presentation to the Data Domain board of directors was one of many factors taken into consideration by the Data Domain board of directors in deciding to approve the merger agreement. Consequently, the analyses as described above should not be viewed as determinative of the opinion of the Data Domain board of directors with respect to the merger consideration or of whether the Data Domain board of directors would have been willing to agree to a different merger consideration. The merger consideration was determined through arm's-length negotiations between Data Domain and NetApp and was approved by the Data Domain board of directors. Qatalyst provided advice to Data Domain during these negotiations. Qatalyst did not, however, recommend any specific merger consideration to Data Domain or that any specific merger consideration constituted the only appropriate merger consideration for the merger.

Qatalyst provides investment banking and other services to a wide range of corporations and individuals, domestically and offshore, from which conflicting interests or duties may arise. In the ordinary course of these activities, affiliates of Qatalyst may at any time hold long or short positions, and may trade or otherwise effect transactions in debt or equity securities or loans of Data Domain, NetApp or their respective affiliates. During the two year period prior to the date of Qatalyst's opinion, no material relationship existed between Qatalyst and its affiliates and Data Domain or NetApp pursuant to which compensation was received by Qatalyst or its affiliates; however Qatalyst and its affiliates may in the future provide investment banking and other financial services to Data Domain and NetApp and their respective affiliates for which they would expect to receive compensation.

Under the terms of its engagement letter, Qatalyst provided Data Domain with financial advisory services in connection with the transaction for which it will be paid a customary fee, a portion of which became payable upon execution of the letter agreement, a portion of which became payable upon delivery of its opinion and a substantial portion of which is contingent upon, and will become payable upon, completion of the merger. Data Domain has also agreed to reimburse Qatalyst for its expenses incurred in performing its services. In addition, Data Domain has agreed to indemnify Qatalyst and its affiliates, their respective members, directors, officers, partners, agents and employees and any person controlling Qatalyst or any of its affiliates against certain liabilities and expenses related to or arising out of Qatalyst's engagement.

### **Data Domain Officers and Directors Have Financial Interests in the Merger**

In considering the recommendation of the Data Domain board of directors that you vote to approve the merger proposal, you should be aware that Data Domain's executive officers and directors have financial interests in the merger that are different from, or in addition to, those of Data Domain's stockholders generally and that are described below. The members of Data Domain's board of directors were aware of and considered these interests, among other matters, in evaluating and negotiating the merger agreement, and in recommending to the stockholders that the merger agreement be approved and adopted. For purposes of all of the Data Domain and NetApp agreements and plans described below, the completion of the transactions contemplated by the merger agreement will constitute a change in control.

### ***Equity Compensation Awards***

The merger agreement provides that, upon completion of the merger, each Data Domain option will be assumed and converted, based on the option exchange ratio, into an option to purchase NetApp common stock subject to the same vesting restrictions and other terms and conditions of such Data Domain option. The merger agreement also provides that, upon completion of the merger, each then outstanding restricted stock unit or share of restricted stock of Data Domain will be assumed and converted into the right to receive the merger consideration, but will otherwise be subject to the same vesting restrictions and other terms and conditions of the Data Domain

**Table of Contents**

awards. Please see *The Merger Agreement – Treatment of Data Domain Stock Options and Other Equity-Based Awards* beginning on page 77 for a detailed discussion of the treatment of equity-based awards.

Our executive officers, Frank Sloatman, Michael P. Scarpelli, David L. Schneider, Daniel R. McGee and Nick Bacica, are participants in the Data Domain Management Change in Control Plan, which provides for vesting acceleration of their equity awards upon an involuntary termination (without cause or voluntary resignation for good reason) following a change in control of Data Domain. Pursuant to the Data Domain Management Change in Control Plan, upon such an involuntary termination following a change in control of Data Domain, 50% (or 100% in the case of Mr. Sloatman) of their then unvested equity awards will immediately vest.

Pursuant to agreements with the non-employee directors of Data Domain, namely Aneel Bhusri, Ronald Bernal, Ronald Codd, Reed Hundt, Kai Li, Jeffrey Miller and Scott Sandell, certain of their awards of Data Domain stock options and restricted stock will fully vest as a result of the completion of the merger. Upon completion of the merger, the directors of Data Domain will cease to be directors. The following table identifies, for each of Messrs. Bhusri, Bernal, Codd, Hundt, Li, Miller and Sandell (A) the number of unvested options to acquire shares of Data Domain common stock (at exercise prices ranging from \$1.00 to \$8.90) that would vest upon completion of the merger and the corresponding value representing the difference between the exercise price and the assumed share price multiplied by the number of shares accelerated, and (B) the number of shares of unvested Data Domain restricted stock that would vest upon completion of the merger, and the corresponding value of shares accelerated based on the assumed share price assuming a closing date of August 31, 2009:

Name	Unvested Data		Unvested Data	Value of Accelerated Restricted Stock Vesting Upon Completion of the Merger
	Domain Options Vesting Upon Completion of the Merger	Value of Accelerated Option Vesting Assuming \$30 Share Price	Domain Restricted Stock	
Mr. Bernal	39,584	\$ 835,222		\$
Mr. Bhusri	39,584	835,222		
Mr. Codd	58,334	1,691,686		
Mr. Hundt	79,167	1,670,423		
Mr. Li			83,997	2,519,910
Mr. Miller	58,334	1,691,686		
Mr. Sandell	39,584	835,222		

***Severance Benefits in Certain Employment Agreements***

Each of Mr. Sloatman, Mr. Scarpelli, Mr. Schneider, Mr. McGee and Mr. Bacica are party to employment agreements that provide for severance benefits in the event their employment is terminated for any reason other than cause or permanent disability, provided they sign a general release of claims. In the event Mr. Sloatman's employment is terminated for any reason other than cause or permanent disability, he would be entitled to receive continued cash severance payments equal to his base salary for a period of six months. In the event Mr. Scarpelli's employment is terminated for any reason other than cause or permanent disability, he would be entitled to receive continued cash severance payments equal to his base salary for a period of three months and reimbursement for the premiums paid for

continued health coverage through COBRA for up to three months; however, if such termination occurs within twelve months following a change in control of Data Domain, the cash severance will instead be a lump sum equal to six months of his base salary and 50% of his target bonus in effect at the time of termination. Each of the employment agreements for Mr. Schneider, Mr. McGee and Mr. Bacica provide that in the event they are terminated for any reason other than cause or permanent disability, they would be entitled to receive continued cash severance payments equal to their base salary for a period of three months and reimbursement for the premiums paid for continued health insurance through COBRA for up to three months.

**Table of Contents**

The information for each of Mr. Sloodman, Mr. Scarpelli, Mr. Schneider Mr. McGee and Mr. Bacica regarding vesting acceleration and severance payments in the event their employment is terminated for certain reasons, as of June 1, 2009 assuming a share price of \$30.00 per share, is set forth in the table below.

<b>Name</b>	<b>Benefit</b>	<b>Termination Other Than for Cause or Disability Prior to Change in Control</b>	<b>Termination Other Than for Cause or Disability After a Change in Control</b>	<b>Resignation for Good Reason After a Change in Control</b>
Frank Sloodman	Severance	\$ 175,000	\$ 175,000	\$
	Option Acceleration	1,306,958	17,130,958	17,130,958
	RSU Acceleration		1,500,000	1,500,000
	COBRA Premiums			
	Total Value	1,481,958	18,805,958	18,630,958
Michael P. Scarpelli	Severance	72,500	217,500	
	Option Acceleration		4,365,385	4,365,385
	RSU Acceleration		375,000	375,000
	COBRA Premiums(1)			
	Total Value	72,500	4,957,885	4,740,385
David L. Schneider	Severance	61,250	61,250	
	Option Acceleration		1,947,852	1,947,852
	RSU Acceleration		350,010	350,010
	COBRA Premiums	5,141	5,141	
	Total Value	66,391	2,364,253	2,297,862
Daniel R. McGee	Severance	68,750	68,750	
	Option Acceleration		2,019,069	2,019,069
	RSU Acceleration		300,000	300,000
	COBRA Premiums	3,544	3,544	
	Total Value	72,294	2,391,363	2,319,069
Nick Bacica	Severance	62,500	62,500	
	Option Acceleration		1,071,700	1,071,700
	RSU Acceleration		300,000	300,000
	COBRA Premiums	3,544	3,544	
	Total Value	66,044	1,437,744	1,371,700

(1) Pursuant to his offer letter, Mr. Scarpelli is eligible for three months of company-paid COBRA premiums if he is terminated other than for cause or disability. However, he currently has elected not to participate in Data Domain's health plan.

***Protection of Data Domain Directors and Officers Against Claims***

NetApp has agreed to cause the surviving entity in the merger to indemnify and hold harmless each present and former director and officer of Data Domain and its subsidiaries from liability for matters arising at or prior to the completion of the merger to the fullest extent provided by applicable law. NetApp also has agreed that it will maintain



in place existing indemnification and exculpation rights in favor of Data Domain s and its subsidiaries directors and officers for six years after the merger, and that it will enter into a policy of directors and officers liability insurance coverage providing at least equivalent insurance coverage of Data Domain s and its subsidiaries directors and officers for six years following completion of the merger, except that NetApp is not required to incur annual premium expenses in excess of two hundred percent (200%) of the amount paid by Data Domain for coverage for its last fiscal year.

**Table of Contents**

**NetApp's Reasons for the Merger**

NetApp's board of directors approved the merger agreement at a special meeting held on June 2, 2009, and determined that the merger agreement and the merger are in the best interests of NetApp and its stockholders. At a special meeting on June 2, 2009, the board of directors approved an amendment to the merger agreement and determined that the merger agreement, as amended, and the merger are in the best interests to NetApp and its stockholders. In reaching this decision, NetApp's board of directors considered the financial performance and condition, business operations and prospects of each of NetApp, Data Domain and the combined company, the terms and conditions of the merger agreement and the ancillary documents, the results of the due diligence investigation conducted by NetApp's management, accountants and legal counsel, and the analysis of NetApp's legal and financial advisors.

NetApp's board of directors also considered a number of potential benefits of the merger, including those listed below:

the acquisition of Data Domain is expected to complement NetApp's storage and data management business, and maximize growth of the combined company and market adoption of NetApp and Data Domain product offerings;

the merger will permit NetApp to enhance product offerings to international markets and a greater number of enterprise customers;

the merger will expand NetApp's product portfolio, including the addition of multi-vendor disk-based backup solutions currently offered in the Data Domain product line;

the merger will provide NetApp's resellers with access to an industry-leading deduplication solution for disk-based backup solutions and channel partners with a more robust partner program;

the merger will allow NetApp to capture a greater share of the capacity optimized disk market;

the merger advances NetApp's ability to enable customers to adopt disk-based backup in any storage environment; and

the merger is expected to increase operational efficiency and create opportunities for cost reduction through the elimination of redundant overhead expenses and public company costs.

NetApp's board of directors also considered a number of potentially negative factors, including those listed below:

the risk that the value of the Data Domain business could decline after the execution of the merger agreement, particularly in light of the fact that the merger consideration would not be adjusted to reflect declines in the market price of Data Domain common stock;

the risk that the potential benefits of the merger would not be realized fully as a result of challenges the companies might face in integrating their technology, personnel and operations, as well as general industry-wide or economic conditions or other factors;

the risk that, if the merger is not completed, NetApp's management would have devoted substantial time and resources to the combination at the expense of attending to and growing NetApp's business or other business opportunities;

the risk associated with the additional demands that the acquisition of Data Domain would place on NetApp and its management, including the potential disruption of NetApp's ongoing business as NetApp's management and employees are required to dedicate significant time and effort in order to integrate the two companies' systems, cultures, processes, controls and two separate client experiences; and

the risk that the potential growth, perceived synergies and anticipated opportunities considered by NetApp's board of directors will not be achieved through the completion of the merger.

The foregoing list comprises the material factors considered by NetApp's board of directors in its consideration of the merger and intended to be a summary rather than an exhaustive list. In view of the variety and complexity of factors and information considered, NetApp's board of directors did not find it practicable to, and did

## **Table of Contents**

not, make specific assessments of, quantify or otherwise assign relative weights to the specific factors considered in reaching its decision. Rather, the decision was made after consideration of all of the factors as a whole. In addition, individual members of NetApp's board of directors may have given different weight to different factors.

## **Board of Directors and Management of NetApp Following Completion of the Merger**

Upon completion of the merger, the current directors and officers of NetApp are expected to continue in their current positions. Information about the current NetApp directors and executive officers can be found in the documents listed under the heading "NetApp SEC Filings" in the section entitled "Where You Can Find More Information" beginning on page 119.

## **Public Trading Markets**

NetApp's common stock trades on the NASDAQ Global Select Market under the symbol "NTAP." Data Domain's common stock trades on the NASDAQ Global Select Market under the symbol "DDUP." Upon completion of the merger, Data Domain common stock will be delisted from the NASDAQ Global Select Market and deregistered under the Exchange Act. The newly issued NetApp common stock issuable pursuant to the merger agreement will be listed on the NASDAQ Global Select Market. The shares of NetApp common stock to be issued in connection with the merger will be freely transferable under the Securities Act.

## **NetApp's Dividend Policy**

NetApp has never paid cash dividends on its capital stock. NetApp currently anticipates retaining all available funds, if any, to finance internal growth and product development as well as other possible management initiatives, including stock repurchases and acquisitions. Payment of dividends in the future will depend upon NetApp's earnings and financial condition and such other factors as the directors may consider or deem appropriate at the time.

## **Appraisal Rights**

Under Section 262 of the DGCL, any holder of Data Domain common stock who does not wish to accept the merger consideration may elect to exercise appraisal rights in lieu of receiving the merger consideration. A stockholder who exercises appraisal rights may petition the Delaware Court of Chancery to determine the fair value of his, her or its shares, exclusive of any element of value arising from the accomplishment or expectation of the first-step merger, and receive payment of fair value in cash, together with interest, if any. However, the stockholder must comply with the provisions of Section 262 of the DGCL.

The following discussion is a summary of the law pertaining to appraisal rights under the DGCL. The full text of Section 262 of the DGCL is attached to this proxy statement/prospectus as Appendix C. All references in Section 262 of the DGCL and in this summary to a stockholder are to the record holder of the shares of Data Domain common stock who exercises appraisal rights.

Under Section 262 of the DGCL, when a merger is submitted for approval at a meeting of stockholders, as in the case of the merger agreement, the company, not less than 20 days prior to the meeting, must notify each of its stockholders entitled to appraisal rights that appraisal rights are available and include in the notice a copy of Section 262 of the DGCL. This proxy statement/prospectus constitutes the required notice, and the applicable statutory provisions are attached to this proxy statement/prospectus as Appendix C. This summary of appraisal rights is not a complete summary of the law pertaining to appraisal rights under the DGCL and is qualified in its entirety by the text of Section 262 of the DGCL attached as Appendix C. Any holder of Data Domain common stock who wishes to exercise appraisal rights or who wishes to preserve the right to do so should review the following discussion and Appendix C.

carefully. Failure to comply with the procedures of Section 262 of the DGCL in a timely and proper manner will result in the loss of appraisal rights. A stockholder who loses his, her or its appraisal rights, will be entitled to receive the merger consideration described in the merger agreement.

**Table of Contents**

Stockholders wishing to exercise the right to seek an appraisal of their shares must do ALL of the following:

the stockholder must not vote in favor of the proposal to adopt the merger agreement. Because a proxy that does not contain voting instructions will, unless revoked, be voted in favor of the proposal, a stockholder who votes by proxy and who wishes to exercise appraisal rights must vote against the proposal, abstain or not vote its shares;

the stockholder must deliver to Data Domain a written demand for appraisal before the vote on the merger agreement at the special meeting;

the stockholder must continuously hold the shares from the date of making the demand through the effective time of the first-step merger. A stockholder will lose appraisal rights if the stockholder transfers the shares before the effective time of the merger; and

the stockholder or the surviving company must file a petition in the Delaware Court of Chancery requesting a determination of the fair value of the shares within 120 days after the effective time of the first-step merger. The surviving company is under no obligation to file any petition and has no intention of doing so.

Voting, in person or by proxy, against, abstaining from voting on or failing to vote on the proposal to adopt the merger agreement will not constitute a written demand for appraisal as required by Section 262 of the DGCL. The written demand for appraisal must be in addition to and separate from any proxy or vote.

Only a holder of record of shares of Data Domain common stock issued and outstanding immediately prior to the effective time of the first-step merger may assert appraisal rights for the shares of stock registered in that holder's name. A demand for appraisal must be executed by or on behalf of the stockholder of record, fully and correctly, as the stockholder's name appears on the stock certificates. The demand must reasonably inform Data Domain of the identity of the stockholder and that the stockholder intends to demand appraisal of his, her or its common stock. **STOCKHOLDERS WHO HOLD THEIR SHARES IN BROKERAGE ACCOUNTS OR OTHER NOMINEE FORMS, AND WHO WISH TO EXERCISE APPRAISAL RIGHTS, SHOULD CONSULT WITH THEIR BROKERS TO DETERMINE THE APPROPRIATE PROCEDURES FOR THE NOMINEE HOLDER TO MAKE A DEMAND FOR APPRAISAL OF THOSE SHARES. A PERSON HAVING A BENEFICIAL INTEREST IN SHARES HELD OF RECORD IN THE NAME OF ANOTHER PERSON, SUCH AS A BROKER OR NOMINEE, MUST ACT PROMPTLY TO CAUSE THE RECORD HOLDER TO FOLLOW PROPERLY AND IN A TIMELY MANNER THE STEPS NECESSARY TO PERFECT APPRAISAL RIGHTS.**

A stockholder who elects to exercise appraisal rights under Section 262 of the DGCL should mail or deliver a written demand to:

Data Domain, Inc.  
2421 Mission College Blvd.  
Santa Clara, CA 95054  
Attention: Corporate Secretary

If the merger is completed, NetApp will give written notice of the effective time of the merger within 10 days after the effective time to each former Data Domain stockholder who did not vote in favor of the merger proposal and who made a written demand for appraisal in accordance with Section 262 of the DGCL. Within 120 days after the effective time of the merger, but not later, either the surviving company or any dissenting stockholder who has complied with the requirements of Section 262 of the DGCL may file a petition in the Delaware Court of Chancery demanding a determination of the value of the shares of Data Domain common stock held by all dissenting stockholders. The

surviving company is under no obligation to file any petition and has no intention of doing so. Stockholders who desire to have their shares appraised should initiate any petitions necessary for the perfection of their appraisal rights within the time periods and in the manner prescribed in Section 262 of the DGCL.

Within 120 days after the effective time of the first-step merger, any stockholder who, to that point in time, has complied with the provisions of Section 262 of the DGCL, may receive from the surviving company, upon written request, a statement setting forth the aggregate number of shares not voted in favor of the merger proposal and with

## **Table of Contents**

respect to which Data Domain has received demands for appraisal, and the aggregate number of holders of those shares. The surviving company must mail this statement to the stockholder within the later of 10 days of receipt of the request or 10 days after expiration of the period for delivery of demands for appraisal.

If any party files a petition for appraisal in a timely manner, the Delaware Court of Chancery will determine which stockholders are entitled to appraisal rights and may require the stockholders demanding appraisal who hold certificated shares to submit their stock certificates to the court for notation of the pendency of the appraisal proceedings and any stockholder who fails to comply with this direction may be dismissed from the proceedings. The Delaware Court of Chancery will thereafter determine the fair value of the shares of Data Domain common stock held by dissenting stockholders, exclusive of any element of value arising from the accomplishment or expectation of the merger, but together with interest, if any, to be paid on the amount determined to be fair value.

In determining the fair value, the Delaware Court of Chancery will take into account all relevant factors. The Delaware Supreme Court has stated that proof of value by any techniques or methods that are generally considered acceptable in the financial community and otherwise admissible in court should be considered in the appraisal proceedings. In addition, Delaware courts have decided that the statutory appraisal remedy, in cases of unfair dealing, may or may not be a dissenter's exclusive remedy. If no party files a petition for appraisal in a timely manner, then stockholders will lose the right to an appraisal, and will instead receive the merger consideration described in the merger agreement. The fair value of their shares as determined under Section 262 of the DGCL could be greater than, the same as, or less than the merger consideration. An opinion of an investment banking firm as to the fairness from a financial point of view of the consideration payable in a merger is not an opinion as to, and does not in any manner address, fair value under Section 262 of the DGCL.

The Delaware Court of Chancery will determine the costs of the appraisal proceeding and will allocate those costs to the parties as the Delaware Court of Chancery determines to be equitable under the circumstances. Upon application of a stockholder, the Delaware Court of Chancery may order all or a portion of the expenses incurred by any stockholder in connection with the appraisal proceeding, including reasonable attorneys' fees and the fees and expenses of experts, to be charged pro rata against the value of all shares entitled to appraisal.

Any stockholder who has duly demanded an appraisal in compliance with Section 262 of the DGCL may not, after the effective time of the first-step merger, vote the shares subject to the demand for any purpose or receive any dividends or other distributions on those shares, except dividends or other distributions payable to holders of record of shares as of a record date prior to the effective time of the first-step merger.

Any stockholder may withdraw a demand for appraisal and accept the merger consideration by delivering a written withdrawal of the demand for appraisal to the surviving company, except that any attempt to withdraw made more than 60 days after the effective time of the first-step merger will require written approval of the surviving company, and no appraisal proceeding in the Delaware Court of Chancery will be dismissed as to any stockholder without the approval of the Delaware Court of Chancery, and may be conditioned on the terms the Delaware Court of Chancery deems just. If the stockholder fails to perfect, successfully withdraws or loses the appraisal right, the stockholder's shares will be converted into the right to receive the merger consideration.

**Failure to follow the steps required by Section 262 of the DGCL for perfecting appraisal rights may result in the loss of appraisal rights. In that event, you will be entitled to receive the consideration for your dissenting shares in accordance with the merger agreement. In view of the complexity of the provisions of Section 262 of the DGCL, if you are a Data Domain stockholder and are considering exercising your appraisal rights under the DGCL, you should consult your own legal advisor.**

## **Regulatory Approvals Required for the Merger**



NetApp and Data Domain have agreed to use reasonable best efforts to obtain as promptly as practicable all regulatory approvals that are required to complete the transactions contemplated in the merger agreement. This includes filing all required notices to governmental authorities, including the required filings with the Department of Justice, or the DOJ, and the Federal Trade Commission, or the FTC, pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, referred to herein as the HSR Act. NetApp and Data Domain have

**Table of Contents**

completed, or will complete, the filing of the applications to obtain the applicable regulatory approvals. NetApp and Data Domain are not permitted to complete the merger until the applicable waiting periods under the HSR Act have expired or been terminated.

Based upon an examination of information available relating to the businesses in which the companies are engaged, NetApp and Data Domain believe that the completion of the merger will not violate any U.S. antitrust laws. However, either the DOJ or FTC could open an investigation of the merger that could extend the statutory waiting period, and could also challenge or seek to block the merger under the antitrust laws, as it deems necessary or desirable in the public interest, before or after the statutory waiting period, and even after completion of the merger. State attorneys general in the various states in which NetApp and Data Domain operate may also open an investigation of the merger. In addition, in some jurisdictions, a competitor, customer or other third party could initiate a private action under the antitrust laws challenging or seeking to enjoin the merger, before or after completion of the merger. NetApp and Data Domain cannot be sure that a challenge to the merger will not be made or that, if a challenge is made, NetApp and Data Domain will prevail.

**Table of Contents**

**THE MERGER AGREEMENT**

*The following description describes the material terms of the merger agreement. This description of the merger agreement is qualified in its entirety by reference to the full text of the merger agreement which is attached as Appendix A to this proxy statement/prospectus and is incorporated herein by reference. The merger agreement has been included to provide you with information regarding its terms. NetApp and Data Domain encourage you to read the entire merger agreement. The merger agreement is not intended to provide any other factual information about NetApp or Data Domain. Such information can be found elsewhere in this proxy statement/prospectus and in the other public filings each of NetApp and Data Domain makes with the Securities and Exchange Commission, which are available without charge at [www.sec.gov](http://www.sec.gov).*

**The Merger**

Each of the Data Domain board of directors and NetApp board of directors has approved the merger agreement, as amended, which provides for the merger of Kentucky Merger Sub One Corporation with and into Data Domain, with Data Domain, as a wholly owned subsidiary of NetApp, remaining as the interim surviving entity, immediately followed (subject to the satisfaction of certain conditions described below) by the merger of the interim surviving entity with and into Derby Merger Sub Two LLC, with Derby Merger Sub Two LLC remaining as the surviving entity. The second step will occur only if Wilson Sonsini Goodrich & Rosati, Professional Corporation and Fenwick & West LLP deliver tax opinions at the closing, as further described below. The first-step merger and the second-step merger are referred to collectively as the merger unless otherwise indicated herein.

**Per Share Merger Consideration**

Each share of Data Domain common stock issued and outstanding immediately prior to the effective time of the first-step merger will be converted into the right to receive (a) \$16.45 per share in cash, without interest and less any required withholding under United States federal, state, local or foreign law, referred to as the cash consideration, plus (b) a number of validly issued, fully paid and non-assessable shares of NetApp common stock equal to the following exchange ratio, which shares are referred to as the stock consideration:

- (i) 0.7783 shares of NetApp common stock if the closing average (as defined below) is less than \$17.41;
- (ii) 0.6370 shares of NetApp common stock if the closing average is greater than \$21.27; and
- (iii) that fraction of a share of NetApp common stock (rounded to the nearest ten thousandth) equal to the quotient obtained by dividing \$13.55 by the closing average, if the closing average is (A) less than or equal to \$21.27 and (B) greater than or equal to \$17.41.

The closing average is the average of the closing prices for NetApp common stock, rounded to the nearest one-hundredth of a cent, on the NASDAQ Global Select Market for the 10 most recent consecutive trading days ending on the third trading day immediately prior to the effective time of the first-step merger. Data Domain stockholders may contact Innisfree M&A Incorporated, Data Domain's information agent, toll free at (888) 750-5834, and banks or brokers may call collect at (212) 750-5833, for information regarding the merger consideration payable in connection with the merger based on information available as of the date of inquiry.

In the event that the exchange ratio is greater than or equal to 0.7006 and less than 0.7783, NetApp, in its sole discretion, may (a) reduce the stock consideration by such amount as NetApp may determine and (b) increase the cash

consideration by an amount equal to the product of (i) the amount of such reduction in the stock consideration multiplied by (ii) the closing average. However, NetApp may not reduce the amount of the stock consideration and increase the cash consideration to the extent that it would reasonably be expected to cause the merger to fail to qualify as a tax-free reorganization under the Internal Revenue Code, except as may be required as described below.

If the aggregate amount of the stock consideration issuable in the merger (including the stock consideration issuable to holders of Data Domain options and restricted stock units) would exceed 19.5% of the outstanding shares of NetApp common stock immediately prior to the effective time of the first-step merger, the stock consideration will be decreased to the minimum extent necessary so that no more than 19.5% of the outstanding shares of NetApp common stock will be issued in the merger (with such percentage measured immediately prior to

## **Table of Contents**

the effective time of the first-step merger). In such event, the cash consideration will be increased by an amount equal to the product of (a) the amount of the reduction in the stock consideration multiplied by (b) the closing average. In the event that the stock consideration is decreased in accordance with this paragraph, the merger may fail to qualify as a tax-free reorganization under the Internal Revenue Code. In addition, on the third trading day preceding the date of the special meeting of the Data Domain stockholders, NetApp and Data Domain will issue a joint press release announcing the aggregate merger consideration that would be payable to the Data Domain stockholders and whether the merger would qualify as a tax-free reorganization, assuming that the merger closed on the date of the special meeting. However, there can be no assurance that the merger will close on the date of the special meeting of the stockholders, and, as such, the assumptions in that announcement may differ from the actual merger consideration payable in, and the tax treatment of, the merger at the closing.

The stock consideration will be adjusted appropriately to reflect the effect of any stock split, reverse stock split, stock dividend (including any dividend or distribution of securities convertible into shares of NetApp's common stock), reorganization, recapitalization, reclassification or other similar change with respect to NetApp's common stock having a record date on or after the date of the merger agreement but before the completion of the first-step merger. No fractional shares of NetApp common stock will be issued in the first-step merger. Instead, each Data Domain stockholder otherwise entitled to a fraction of a share of NetApp common stock (after aggregating all fractional shares of NetApp common stock issuable to such stockholder) will be entitled to receive in cash the dollar amount (rounded to the nearest whole cent), without interest, determined by multiplying such fraction by the closing price of a share of NetApp common stock as reported on the NASDAQ Global Select Market on the trading day immediately prior to the date the first-step merger is completed.

As a result of the first-step merger, each share of common stock of Kentucky Merger Sub One issued and outstanding immediately prior to the effective time of the first-step merger will be converted into common stock of the interim surviving entity. If the second-step merger occurs, each share of common stock of the interim surviving entity issued and outstanding immediately prior to the effective time of the second-step merger will be converted into membership interests of Merger Sub Two.

## **Treatment of Data Domain Stock Options and Other Equity-Based Awards**

### ***Data Domain Stock Options***

Each outstanding option to acquire Data Domain common stock granted under Data Domain's stock incentive plans will be assumed and converted automatically at the effective time of the first-step merger into an option to purchase NetApp common stock and will continue to be governed by the terms of the applicable Data Domain stock plan and related grant agreement under which it was granted, except that:

The number of shares of NetApp common stock subject to each converted Data Domain stock option will equal the product, rounded down to the nearest whole share of NetApp common stock, of (A) the number of shares of Data Domain common stock previously subject to the Data Domain stock option and (B) the option exchange ratio, which is the sum of (X) the exchange ratio for the stock consideration payable to Data Domain stockholders in the merger (which will be a number greater than or equal to 0.6370 shares and less than or equal to 0.7783 shares of NetApp common stock) and (Y) a fraction (represented as a decimal) whose numerator is the cash consideration and whose denominator is the closing average as defined herein; and

The exercise price of NetApp common stock subject to each converted Data Domain stock option will equal the exercise price for each share of Data Domain common stock previously subject to the Data Domain option, divided by the option exchange ratio, rounded up to the nearest cent.

***Data Domain Restricted Stock Units and Restricted Shares***

Each of Data Domain's restricted stock units outstanding at the effective time of the first-step merger will be assumed and converted into a restricted stock unit representing the right to receive the merger consideration payable for shares underlying each assumed and converted restricted stock unit. The assumed and converted restricted stock units will otherwise be payable or distributable in accordance with the same terms and conditions of the agreements

## **Table of Contents**

and the applicable Data Domain stock plans, including vesting restrictions, that applied to such Data Domain restricted stock units immediately prior to the effective time of the first-step merger.

Each of Data Domain's unvested shares of restricted stock outstanding at the effective time of the first-step merger will be assumed and converted into the right to receive the merger consideration payable for such shares. The merger consideration payable for such unvested shares of restricted stock will otherwise be payable or distributable in accordance with the terms and conditions, including vesting restrictions that applied to such shares of Data Domain restricted stock immediately prior to the effective time of the first-step merger.

NetApp has agreed to file a Form S-8 registration statement within two business days of the effective time of the first-step merger with the SEC to the extent necessary to register the NetApp common stock subject to the assumed and converted stock options and restricted stock units.

## **Completion of the Merger**

The merger agreement requires the parties to complete the merger after all of the conditions to the completion of the merger contained in the merger agreement are satisfied or waived, including the adoption of the merger agreement by the stockholders of Data Domain. The first-step merger will become effective upon the filing of a certificate of merger with the Secretary of State of the State of Delaware, or at such later time as is agreed to by NetApp, Kentucky Merger Sub One and Data Domain and specified in the certificate of merger. The second-step merger will become effective, if at all, at the time of filing of a certificate of merger with the Secretary of State of the State of Delaware. Because the completion of the merger is subject to the receipt of governmental and regulatory approvals and the satisfaction of other conditions, the exact timing of the completion of the merger cannot be predicted.

## **Conversion of Shares; Exchange of Certificates**

The merger agreement provides that NetApp will select a reputable bank or trust company, reasonably acceptable to Data Domain, to act as the exchange agent. The merger agreement provides that on or prior to the date of completion of the first-step merger, NetApp will deposit with the exchange agent a sufficient amount of cash to make the payment of the cash consideration, a sufficient number of shares of NetApp common stock to provide for the issuance of the stock consideration, and a sufficient amount of cash to make payments in lieu of fractional shares and any dividends or distributions to which holders of Data Domain common stock are entitled pursuant to the terms of the merger agreement. The exchange agent will be entitled to deduct and withhold from the cash amounts payable to any Data Domain stockholder the amounts it is required to deduct and withhold under any federal, state, local or foreign tax law. If the exchange agent withholds any amounts, these amounts will be treated for all purposes of the merger as having been paid to the stockholders from whom they were withheld.

The merger agreement contemplates that, promptly following the completion of the first-step merger, the exchange agent will mail to each record holder of Data Domain common stock immediately prior to the completion of the first-step merger a letter of transmittal and instructions for surrendering and exchanging the record holder's Data Domain stock certificates. The merger agreement provides that, upon surrender of a Data Domain common stock certificate for exchange to the exchange agent (or upon receipt of an appropriate agent's message in the case of book-entry shares), together with a duly signed and completed letter of transmittal, and such other documents as the exchange agent or NetApp may reasonably require, the holder of the Data Domain stock certificate will be entitled to receive the following:

the number of shares of NetApp common stock calculated based on the exchange ratio (which, at NetApp's election, may be in book-entry form unless a physical stock certificate is requested or is otherwise required by applicable law);

the per share cash amount payable for each share of Data Domain common stock;

cash in lieu of any fractional share of NetApp common stock; and

cash in respect of any dividends or other distributions declared or made by NetApp after the date of the merger agreement.



## **Table of Contents**

After the completion of the first-step merger, all holders of certificates representing shares of Data Domain common stock that were outstanding immediately prior to the completion of the first-step merger will cease to have any rights as stockholders of Data Domain, other than the right to receive the merger consideration (or, in the alternative, the appraisal rights described under the heading "Data Domain Proposal 1 – The Merger – Appraisal Rights," if so elected) and any rights to dividends or other distributions. In addition, no transfer of Data Domain common stock after the completion of the first-step merger will be registered on the stock transfer books of Data Domain.

If any Data Domain stock certificate has been lost, stolen or destroyed, the exchange agent will issue in exchange for such lost, stolen or destroyed stock certificate the merger consideration upon the delivery of an affidavit by the owner of such stock certificate claiming that such stock certificate has been lost, stolen or destroyed. However, NetApp and/or the exchange agent may, in its discretion and as a condition to the payment of cash or the issuance of any shares of NetApp common stock in exchange therefor, also require the owner of such lost, stolen or destroyed stock certificate to deliver a bond as indemnity against any claim that may be made with respect to that stock certificate against NetApp, the interim surviving entity, the surviving entity or the exchange agent.

**Stock certificates should not be surrendered for exchange by Data Domain stockholders before the completion of the first-step merger and should be sent only pursuant to instructions set forth in the letters of transmittal, which the merger agreement provides will be mailed to Data Domain stockholders promptly following the completion of the first-step merger. In all cases, the cash payments, shares of NetApp common stock and cash in lieu of fractional shares will be delivered only in accordance with the procedures set forth in the letter of transmittal.**

## **Representations and Warranties**

In the merger agreement, Data Domain, NetApp, Kentucky Merger Sub One Corporation and Derby Merger Sub Two LLC each made representations and warranties relating to, among other things:

organization and standing;

corporate power and authority to enter into and perform its obligations under, and enforceability of, the merger agreement;

the absence of conflicts with organizational documents, other contracts and applicable laws;

required regulatory filings and consents and approvals of governmental entities;

capitalization;

documents filed with the SEC and other governmental authorities;

financial statements and controls;

the absence of undisclosed liabilities;

the absence of certain changes since a recent balance sheet date (in the case of NetApp and Data Domain only);

the absence of litigation and orders; and

broker's fees.

In the merger agreement, NetApp, Kentucky Merger Sub One Corporation and Derby Merger Sub Two LLC also each made representations and warranties relating to:

their not owning any shares of Data Domain common stock; and

available funding.

In the merger agreement, Data Domain also made representations and warranties relating to:

subsidiaries;

**Table of Contents**

compliance with laws and orders;

permits;

material contracts;

tax matters;

employee benefits;

labor matters;

real property;

environmental matters;

assets and personal property;

intellectual property;

insurance;

the absence of transactions with related parties;

state anti-takeover statutes; and

receipt by the Data Domain board of directors of an opinion from Qatalyst Partners LP.

**Material Adverse Effect**

Several of the representations, warranties, covenants, closing conditions and termination provisions in the merger agreement use the phrase material adverse effect. The merger agreement provides that material adverse effect means, with respect to either NetApp or Data Domain, as the case may be, any fact, circumstance, change or effect that, individually or when taken together with all other such facts, circumstances, changes or effects that exist at the date of determination of the occurrence of the material adverse effect that:

is or would reasonably be expected to have a material adverse effect on the business, operations, financial condition or results of operations of NetApp or Data Domain, as applicable, taken as a whole; or

is or would reasonably be expected to have a material adverse effect on NetApp's or Data Domain's ability, as applicable, to complete the merger in accordance with the terms of the merger agreement and applicable law.

The merger agreement provides, however, that none of the following (by themselves or when taken with any other fact, circumstance, change or effect) will be deemed to constitute, or be taken into account in determining whether there has occurred or could reasonably be expected to occur, a material adverse effect on NetApp or Data Domain, as applicable:

changes in the general economic conditions in the United States or any other country or region in the world, or changes in conditions in the global economy generally, to the extent that they do not have a disproportionate impact on NetApp or Data Domain relative to other companies and operating in the same industries in which NetApp or Data Domain operates;

changes in general conditions in the industries in which NetApp or Data Domain operates, to the extent that they do not have a disproportionate impact on NetApp or Data Domain relative to other companies operating in the same industries in which NetApp or Data Domain operates;

changes in generally accepted accounting principles or other accounting standards, or the interpretation of such principles or standards by a third party, applicable federal, state, local, municipal, foreign or other law or regulatory conditions, or the interpretation of such law or regulations by a third party;

any failure to take any action or the taking of any specific action by NetApp or Data Domain taken with the prior written consent or written direction of the other party;

**Table of Contents**

the taking of any specific action expressly required by the merger agreement;

acts of war, armed hostilities or terrorism, to the extent that they do not have a disproportionate impact on NetApp or Data Domain relative to other companies operating in the same industries in which NetApp or Data Domain operates;

changes in the trading price or trading volume of NetApp's or Data Domain's common stock, in and of itself, provided that the exception described in this bullet shall not in any way prevent or otherwise affect a determination that any fact, circumstance, change or effect that has resulted in, or contributed to, a material adverse effect;

the public announcement of the merger agreement or pendency of the merger, including any loss of employees, provided that the exception described in this bullet shall not apply to any fact, circumstance, change or effect related to or caused by any legal proceedings resulting from the announcement and pendency of the merger and the transactions contemplated by the merger agreement;

any failure of NetApp or Data Domain to meet any public or internal estimates or expectations of revenue, earnings or other financial performance or results of operations for any period, or failure to meet any internal budgets, plans, or forecasts of revenues, earnings or other financial performance or results of operations (it being understood that any underlying cause of any such failure may be deemed to constitute, in and of itself, a material adverse effect and may be taken into consideration when determining whether a material adverse effect has occurred); or

stockholder class action, derivative litigation or other legal proceedings made or brought by any of the current or former stockholders of NetApp or Data Domain against NetApp or Data Domain arising out of the merger or any other transactions contemplated by the merger agreement.

**Covenants; Conduct of Business Prior to the Merger**

***Interim Conduct of Data Domain's Business***

Data Domain has undertaken customary covenants that place restrictions on it and its subsidiaries until the effective time of the first-step merger. In general, Data Domain agreed to (1) carry on its business in the ordinary course in all material respects in substantially the same manner as previously conducted and in material compliance with all applicable laws and (2) use commercially reasonable efforts consistent with its past practices to (A) preserve intact its present business organization, (B) keep available the services of its present officers and employees and (C) preserve its relationships with customers, suppliers, distributors, licensors, licensees and others with which it has significant business dealings.

Data Domain further agreed that, except (a) as expressly contemplated or permitted by the merger agreement, (b) as specifically set forth in Data Domain's disclosure schedule that was delivered to NetApp at the time of signing the merger agreement, (c) as required by applicable law or the terms of any Data Domain employee benefit plan, or (d) with NetApp's prior written consent, Data Domain will not, and will not permit any of its subsidiaries to, among other things, undertake the following actions:

amend its certificate of incorporation or bylaws;

authorize for issuance, issue, sell, deliver or agree or commit to issue, sell or deliver securities of Data Domain or any of its subsidiaries, except for the issuance and sale of capital stock pursuant to outstanding stock awards, the issuance of shares pursuant to the Data Domain 2007 Employee Stock Purchase Plan and the issuance of up to 250,000 restricted stock units granted in the ordinary course of business after the date of the merger agreement;

acquire, redeem, or amend any securities of Data Domain or any of its subsidiaries, except to the extent that such acquisition or redemption is pursuant to the terms of any employee benefit plan or any agreement subject to any such employee benefit plan;

other than dividends or distributions made by any direct or indirect wholly owned subsidiary of Data Domain to Data Domain or one of its subsidiaries, set any record or payment dates for the payment of any dividends

**Table of Contents**

or distributions on capital stock, split, combine or reclassify any shares of capital stock, declare, set aside or pay any dividend or other distribution in respect of any shares of capital stock, or make any other actual, constructive or deemed distribution in respect of the shares of capital stock;

propose or adopt a plan of complete or partial liquidation, dissolution, merger, consolidation, restructuring, recapitalization or other reorganization of Data Domain or any of its subsidiaries;

(i) except to or from subsidiaries of Data Domain, incur or assume any indebtedness or issue any debt securities, assume or guarantee the obligations of any other person or acquire or make any capital contributions to or investments in any other person, (ii) except for advances made in the ordinary course of business consistent with past practice, make any loans or advances to employees of Data Domain or any of its subsidiaries, or (iii) mortgage or pledge any of its or its subsidiaries assets, tangible or intangible, or create or suffer to exist any lien, subject to certain exceptions;

(i) except as may be required by applicable law or the terms of any employee benefit plan in effect at the time of the merger agreement, enter into, adopt, amend, modify or terminate any employee benefit plan in any material respect, (ii) except for certain limited increases made in the ordinary course of business, increase or decrease the compensation or fringe benefits of any employee or director of Data Domain or any of its subsidiaries, pay any bonus or special remuneration to any employee, consultant, independent contractor or director, or pay any benefit not required by any employee benefit plan, or (iii) amend the targets or the goals of the 2009 Executive Bonus Plan;

forgive any loans to any employees, officers or directors of Data Domain or any of its subsidiaries, or any of their respective affiliates;

make any deposits or contributions to or fund the compensation or benefits under the employee benefit plans or contracts subject to the employee benefit plans, other than as required pursuant to the terms of the employee benefit plans or any contracts subject to the employee benefit plans in effect as of the date of the merger agreement;

enter into, amend, or extend any collective bargaining agreement or similar contract;

(i) acquire, lease or license any property or assets with a fair market value in excess of \$5,000,000 in the aggregate per fiscal quarter, except transactions required pursuant to existing contracts, or (ii) sell, lease, license or dispose of any property or assets with a net book value in excess of \$100,000 in any individual transaction, except (A) transactions required pursuant to existing contracts or (B) transactions in the ordinary course of business consistent with past practice;

except as may be required as a result of a change in applicable laws or in the generally accepted accounting principles (as applied in the United States), make any change in any of the accounting principles or practices used by Data Domain;

make or change any tax election, settle or compromise any material United States federal, state, local or foreign tax liability, change any material tax accounting method, or consent to any extension or waiver of any limitation period with respect to any claim or assessment for material taxes;

enter into or amend any licenses of Data Domain intellectual property, except, in the ordinary course of business, to customers, or for non-exclusive in-bound licenses for commercially available technology, in each case in the ordinary course of business consistent with past practice;

grant any exclusive rights with respect to any Data Domain intellectual property, divest any Data Domain intellectual property, or materially modify Data Domain's warranty terms, except if such divestiture, amendment or modification individually or in the aggregate, is not material to Data Domain or any of its subsidiaries;

authorize, incur or commit to incur any capital expenditures that do not exceed \$5,000,000 in the aggregate per fiscal quarter, other than pursuant to existing contracts as in effect as of the date of the merger agreement;



**Table of Contents**

settle or compromise any pending or threatened legal proceeding or pay, discharge or satisfy or agree to pay, discharge or satisfy any claim, liability or obligation, unless such settlement has been reserved for in, or incurred since the date of, the Data Domain balance sheet, is covered by existing insurance policies or such payment does not exceed \$200,000 in the aggregate;

except as required by applicable laws or the generally accepted accounting principles (as applied in the United States), revalue in any material respect any of its properties or assets including writing-off accounts receivable;

other than in the ordinary course of business consistent with past practice, enter into, renew, extend or terminate any material contract or make any material amendment or change in any such material contract;

enter into any lease or sublease of material real property (whether as a lessor, sublessor, lessee or sublessee) with a term that exceeds six (6) months; (ii) modify, amend or exercise any right to renew any lease or sublease of real property; or (iii) make application for the opening, relocation or closing of any, or open, relocate or close any, branch office or other real property;

make any representations or issue any communications to current or former employee, independent contractor or director that are inconsistent with the merger agreement or the transactions contemplated thereby, including any representations regarding offers of employment from NetApp, any subsidiary of NetApp, or the surviving entity;

enter into a contract to do any of the foregoing or make any arrangement or understanding with respect to any of the foregoing; or

take any action which would materially impair Data Domain's ability to complete the transactions contemplated by the merger agreement or materially delay the completion of the merger and the other transactions contemplated by the merger agreement.

***Interim Conduct of NetApp's Business***

NetApp has agreed that, unless approved by Data Domain in writing in advance, neither NetApp nor any of its subsidiaries will acquire or agree to acquire any other entity to the extent that such acquisition would reasonably be expected to (i) impair the ability of NetApp, Merger Sub One, Merger Sub Two and Data Domain to complete the merger or (ii) delay the completion of the merger in any material respect.

***Other Covenants***

The merger agreement also contains covenants relating to the preparation of this proxy statement/prospectus and the holding of the annual and special meeting of Data Domain stockholders, the granting of access to information of the other company and the coordination of public announcements with respect to the transactions contemplated by the merger agreement, cooperation regarding regulatory filings, employee matters, efforts to develop and use commercially reasonable efforts to implement any reasonable remediation plan requested by NetApp with respect to any open source materials used by Data Domain in its products and other matters as described further below.

***Limitation on the Solicitation, Negotiation and Discussion of Other Acquisition Proposals by Data Domain***

Data Domain also has agreed that neither it nor its subsidiaries will, and that they will not authorize or permit their respective directors, officers, or other employees, controlled affiliates, advisors or other agents to, directly or

indirectly:

solicit, initiate or knowingly encourage or facilitate or knowingly induce any inquiry with respect to, or the making, submission or announcement of, an acquisition proposal or an acquisition transaction (each as defined below);

furnish to any person any non-public information relating to Data Domain or any of its subsidiaries, or afford access to the business properties, assets, books or records of Data Domain or any of its subsidiaries to any

**Table of Contents**

person or entity, or take any other action in a manner that is intended or would reasonably be expected to assist or facilitate any inquiries or the making of any proposal that constitutes or could lead to an acquisition proposal or an acquisition transaction;

participate or engage in discussions or negotiations with any person with respect to an acquisition proposal or an acquisition transaction;

approve, endorse or recommend an acquisition proposal or an acquisition transaction;

enter into any letter of intent, memorandum of understanding or other agreement contemplating or otherwise relating to an acquisition proposal or acquisition transaction;

terminate, amend or waive any material rights under (or fail to enforce by seeking an injunction or by seeking to specifically enforce the material terms of) any confidentiality or standstill or other similar agreement between Data Domain or any of its subsidiaries and any other person;

take any action to exempt any person from applicable anti-takeover laws; or

agree with a third party to do any of the foregoing, or propose to third parties, including Data Domain stockholders, to do any of the foregoing.

As used in the merger agreement, an acquisition proposal is any indication of interest, offer or proposal relating to an acquisition transaction (as defined below) from any person other than NetApp or any of its affiliates.

As used in the merger agreement, an acquisition transaction is any transaction or series of related transactions (other than a transaction with NetApp or any of its affiliates) involving:

any direct or indirect purchase or other acquisition by any person or group from Data Domain of 15% or more of Data Domain's total outstanding equity interests or voting securities, or any tender offer or exchange offer that, if completed, would result in any person or group beneficially owning 15% or more of Data Domain's outstanding equity interests or voting securities;

any direct or indirect purchase or other acquisition of 50% or more of any class of equity or other voting securities of one or more of Data Domain's subsidiaries that, individually or in the aggregate, generate or constitute 15% or more of Data Domain's consolidated net revenues or net income (for the 12-month period ending on the last day of Data Domain's most recently completed fiscal year) or assets (measured by the lesser of book value or fair market value thereof as of the date of such transaction), which are referred to as significant subsidiaries;

any merger, consolidation, business combination, liquidation, dissolution, recapitalization, reorganization or other similar transaction involving Data Domain or one or more of its significant subsidiaries, pursuant to which Data Domain's stockholders (as a group) or the stockholders of such significant subsidiary would hold less than 85% of the equity interests in or voting securities of the surviving or resulting entity of such transaction;

any direct or indirect sale, transfer or disposition of assets (other than in the ordinary course of business) of Data Domain or one or more of its significant subsidiaries; or

any combination of the foregoing that results in one of the effects in the first two bullets above.

Data Domain and its subsidiaries have also agreed:

to cease any and all existing activities, discussions or negotiations with respect to any acquisition proposal or acquisition transaction;

to notify NetApp promptly (but no later than 48 hours) after it receives any acquisition proposal, any request for information that would reasonably be expected to lead to an acquisition proposal, or any inquiry with respect to, or which would reasonably be expected to lead to, an acquisition proposal, and to provide NetApp with the material terms and conditions of the acquisition proposal, request or inquiry, as well as all related agreements, commitment letters and other documents relating thereto, and the identity of the person or group making any such acquisition proposal, request or inquiry;

**Table of Contents**

to keep NetApp reasonably informed of the status and any changes in the material terms and conditions of any such acquisition proposal or request; and

to provide NetApp with at least 24 hours prior written notice (or any shorter period of advance notice provided to members of Data Domain's board of directors) of a meeting of its board of directors (or any committee thereof) at which the board of directors (or any committee thereof) is reasonably expected to consider an acquisition proposal or acquisition transaction.

***Exception to the Limitation on the Negotiation and Discussion by Data Domain of Other Acquisition Proposals***

However, prior to obtaining approval of the merger proposal from its stockholders, Data Domain may engage and participate in discussions and negotiations with respect to an unsolicited, written acquisition proposal, and furnish non-public information regarding Data Domain to the party making such acquisition proposal if:

the Data Domain board of directors determines in good faith, after consultation with its financial advisor and outside legal counsel, that the acquisition proposal either constitutes or is reasonably likely to lead to a superior proposal (as defined below) and the failure to take such action is reasonably likely to result in a breach of the Data Domain board of directors' fiduciary duties to the Data Domain stockholders under Delaware law;

none of Data Domain, any of its subsidiaries or any of their respective directors, officers or other employees, controlled affiliates, advisors or agents, collectively referred to as representatives, have breached or violated in any material respect, with respect to such acquisition proposal or any other acquisition proposal, the restrictions on solicitation of other offers;

Data Domain has first entered into a confidentiality and standstill agreement with the party making the acquisition proposal on terms no less favorable to Data Domain than those contained in the Data Domain's confidentiality agreement with NetApp, and with standstill provisions that do not include a sunset, fall-away or other similar exception that would result in the standstill provisions applicable to such other party becoming inapplicable at any time prior to the valid termination of the merger agreement;

Data Domain provides NetApp's Chief Executive Officer with at least 24 hours prior written notice of its intent to participate in discussions or furnish non-public information regarding Data Domain with respect to such acquisition proposal (including disclosing the identity of the party making the acquisition proposal and the material terms and conditions of such acquisition proposal); and

Data Domain contemporaneously provides NetApp with any non-public information provided to the party making such acquisition proposal, to the extent that such information has not been previously furnished or made available by Data Domain to NetApp.

**Reasonable Best Efforts of Data Domain to Obtain the Required Stockholder Vote**

Data Domain has agreed to hold a meeting of its stockholders as promptly as practicable following the date of the merger agreement (which shall be within 45 days following the date that this proxy statement/prospectus is first disseminated to Data Domain stockholders) for the purpose of obtaining stockholder approval of the merger proposal. Data Domain will use its reasonable best efforts to solicit proxies from its stockholders to obtain such approval. Unless the merger agreement is terminated, Data Domain has agreed to submit the merger agreement to a stockholder vote even if its board of directors no longer recommends approval of the merger proposal.

***Data Domain Board Recommendation of the Merger***

Pursuant to the merger agreement, Data Domain's board of directors is required to recommend that Data Domain's stockholders adopt the merger agreement at the special meeting in accordance with the applicable provisions of Delaware law. Moreover, except as described in the merger agreement and as set forth below under the headings Board Recommendation Change for Superior Proposal and Board Recommendation Change in the Absence of a Superior Proposal, neither Data Domain's board of directors nor any committee thereof is permitted

**Table of Contents**

to (i) withhold, withdraw, amend or modify the board of directors' recommendation or (ii) approve, endorse or recommend any indication of interest, offer or proposal relating to an acquisition proposal from any person other than NetApp or its affiliates or any agreement pursuant to which any such acquisition proposal would be completed. Any of the actions listed above is referred to as a board recommendation change. However, notwithstanding the foregoing, stop, look and listen communications by Data Domain's board of directors to Data Domain stockholders pursuant to Rule 14d-9(f) of the Exchange Act will not be deemed to be a board recommendation change if such communications are accompanied by a statement of Data Domain's board of directors expressly and publicly reaffirming the board recommendation in connection with such statement or disclosure.

***Board Recommendation Change for Superior Proposal***

Notwithstanding the foregoing, prior to obtaining approval of the merger proposal from the Data Domain stockholders, Data Domain's board of directors may effect a board recommendation change if all of the following conditions have been met:

Data Domain's board of directors has received an unsolicited acquisition proposal in writing after May 20, 2009;

neither Data Domain nor any of its subsidiaries nor any of their respective representatives has materially breached any of the non-solicitation provisions of the merger agreement in connection with the acquisition proposal (or in connection with any other acquisition proposal made by any other person) (as described in "The Merger Agreement - Limitation on the Solicitation, Negotiation and Discussion of Other Acquisition Proposals by Data Domain");

Data Domain's board of directors has determined in good faith (after consultation with its financial advisor and its outside legal counsel) that such acquisition proposal constitutes a superior proposal (as defined below) and, in light of such superior proposal, the failure to effect the board recommendation change is reasonably likely to be breach of the board of directors' fiduciary duties to Data Domain's stockholders under Delaware law;

Data Domain's board of directors has given NetApp at least five business days prior written notice of the superior proposal, which notice must include the identity of the persons making the superior proposal, all of the material terms and conditions of the superior proposal, copies of the superior proposal as well as related agreements and material documents (if available in written form), a statement that Data Domain's board of directors intends to effect a board recommendation change in response to such superior proposal, and an opportunity for NetApp to meet with Data Domain's board of directors, financial advisors and outside legal counsel at such times as NetApp may reasonably request for the purpose of enabling NetApp and Data Domain to discuss in good faith any modifications to the terms and conditions of the merger agreement that NetApp may propose in response to the superior proposal; and

after such five business day period and any extensions thereof and, if requested by NetApp, meetings with NetApp and its financial advisors and legal counsel during such period, (i) NetApp has not made a proposal at least as favorable or more favorable to Data Domain's stockholders as such acquisition proposal and (ii) Data Domain's board of directors has determined in good faith (after consultation with its financial advisor its outside legal counsel) that such acquisition proposal continues to constitute a superior proposal and, in light of such superior proposal and after good faith consideration of all proposals by NetApp, the failure to effect such board recommendation change is reasonably likely to constitute a breach of the board of directors' fiduciary duties to Data Domain's stockholders under Delaware law.

As used in the merger agreement, the term "superior proposal" means any unsolicited written offer or proposal (that has not been withdrawn) for a transaction or a series of related transactions providing for the acquisition of all of Data Domain's outstanding voting securities, where Data Domain's board of directors has determined in good faith (after consultation with its financial advisor and its outside legal counsel) that such proposal is more favorable to Data Domain's stockholders than the merger described in this proxy statement/prospectus. Any such determination by Data Domain's board of directors must take into consideration of all factors it deems to be relevant, including, but not limited to, (i) all relevant financial considerations, including conditions in the financial and credit



## **Table of Contents**

markets, (ii) the identity of the person or persons making such offer or proposal and their sources of financing, (iii) the anticipated timing, conditions and prospects for completion of the transaction contemplated by such offer or proposal, (iv) the other terms and conditions of such offer or proposal and the implications thereof to Data Domain, including relevant legal, regulatory and other aspects of such offer or proposal deemed relevant by Data Domain's board of directors, and (v) any proposal made by NetApp in connection therewith or response thereto.

### ***Board Recommendation Change in the Absence of a Superior Proposal***

Prior to obtaining approval of the merger proposal from Data Domain's stockholders, Data Domain's board of directors may effect a board recommendation change for a reason unrelated to an acquisition proposal if the conditions set forth below have been satisfied:

Data Domain's board of directors has determined in good faith (after consultation with its outside legal counsel) that the failure to make a board recommendation change is reasonably likely to be a breach of the board of directors' fiduciary duties to Data Domain's stockholders under Delaware law;

Data Domain's board of directors has given NetApp at least five business days prior written notice that Data Domain's board of directors intends to effect such board recommendation change and the opportunity to meet with Data Domain's board of directors and the Company's financial advisors and outside legal counsel at such times as NetApp may reasonably request for the purpose of enabling NetApp and Data Domain to discuss in good faith (i) the basis and rationale for proposing to effect such board recommendation change, and/or (ii) possible modifications of the terms and conditions of the merger agreement in such a manner that would obviate the need for Data Domain's board of directors to effect such board recommendation change; and

after such five business day period and, if requested by NetApp, meetings with NetApp and its financial advisors and legal counsel during such period, Data Domain's board of directors has determined in good faith (after consultation with its outside legal counsel) that the failure to effect such board recommendation change is reasonably likely to result in a breach of its fiduciary duties to Data Domain's stockholders under Delaware law.

### **Employee Matters**

NetApp has agreed to provide Data Domain employees who are offered and accept employment with NetApp or any subsidiary after the merger with substantially similar types and levels of benefits as those provided to similarly situated NetApp employees. Until such employees are enrolled in comparable NetApp employee benefit plans, NetApp has agreed to continue to maintain the Data Domain plans providing health, dental, vision, accidental death or disability and life insurance coverage.

NetApp has agreed, to the extent any Data Domain employee becomes eligible to participate in employee benefit plans of NetApp or any affiliate following the merger:

generally to recognize each employee's service with Data Domain prior to the completion of the merger for purposes of eligibility and vesting credits, except under defined benefit pension plans or to the extent it would result in a duplication of these benefits;

to cause any exclusion for pre-existing conditions or eligibility waiting periods under any NetApp health plans to be waived, to the extent the employee (and their eligible dependents) was not subject to such pre-existing conditions and eligibility waiting periods under comparable Data Domain plans as of the time immediately before the completion of the merger; and

to provide each employee with credit for any deductibles paid under any Data Domain plan that provides medical, dental or vision benefits in the plan year in effect as of the closing of the merger for purposes of satisfying any applicable deductible or out-of-pocket requirements under any NetApp medical, dental or vision plans to the same extent that such expenses were recognized under the comparable Data Domain plan.

## **Table of Contents**

The merger agreement provides that prior to the effective time of the merger the Data Domain 401(k) plan shall be terminated unless NetApp provides prior notice that such plan will instead be continued and assumed by NetApp. Prior to the effective time of the merger, the Data Domain employee stock purchase plan will be terminated.

### **Indemnification and Insurance**

The merger agreement provides that NetApp will honor and fulfill in all respects the obligations of Data Domain and its subsidiaries with respect to the indemnification of Data Domain and its subsidiaries' directors and officers under their certificates of incorporation, bylaws and indemnification agreements effective as of the date of the merger agreement. The merger agreement also provides that, upon completion of the merger, NetApp will cause the surviving entity to indemnify and hold harmless, and provide advancement of expenses to, all past and present officers and directors of NetApp and its subsidiaries against all losses or liabilities incurred in their capacities as such to the fullest extent permitted by applicable laws.

The merger agreement provides that NetApp shall maintain in effect Data Domain's current directors' and officers' liability insurance for a period of six (6) years, NetApp may substitute the policies of NetApp or the surviving entity, so long as the policies are no less favorable in the aggregate to the directors and officers of Data Domain than Data Domain's current policy. Additionally, NetApp is not required to incur annual premium expenses in excess of two hundred percent (200%) of the amount paid by Data Domain for coverage for its last fiscal year. Prior to the effective time, Data Domain may also obtain a prepaid tail directors' and officers' liability insurance policy with a claims period of six years following the effective time of the merger.

### **Conditions to Complete the Merger**

#### ***Conditions to the Obligations of NetApp and Data Domain***

The respective obligations of Data Domain and NetApp to complete the first-step merger are subject to the satisfaction or waiver of certain conditions, including:

the effectiveness of the registration statement of which this proxy statement/prospectus is a part with respect to the NetApp common stock to be issued in the merger under the Securities Act and the absence of any stop order or proceedings initiated or threatened by the SEC for that purpose;

the approval of the merger proposal by Data Domain stockholders;

the expiration or termination of all applicable waiting periods under the HSR Act;

the approval of the listing of the NetApp common stock to be issued in the merger on the NASDAQ Global Select Market, subject to official notice of issuance; and

the absence of any order, decree or injunction, or the threat of any order decree or injunction, by any court or other governmental entity or other law that prohibits or makes illegal completion of the transactions contemplated by the merger agreement.

#### ***Conditions to the Obligations of NetApp***

The merger agreement provides that the obligations of NetApp, Merger Sub One and Merger Sub Two to complete the first-step merger are subject to the satisfaction or waiver of each of the following conditions:

the accuracy in all respects as of the date of the merger agreement and the closing date of certain representations and warranties made by Data Domain in the merger agreement, relating to corporate organization, authorization to enter into the merger agreement, required consents, and inapplicability of state anti-takeover statutes;

the accuracy in all respects as of the date of the merger agreement and the closing date of certain representations and warranties made by Data Domain in the merger agreement, relating to Data Domain's capitalization, other than inaccuracies in such representations and warranties (i) that would not result in the issuance or payment of an aggregate value of merger consideration and consideration allocated to Data Domain stock options, restricted stock and restricted stock units equal to or in excess of 101% of the

**Table of Contents**

aggregate value of the merger consideration otherwise issuable and payable and consideration allocated to Data Domain stock options, restricted stock and restricted stock units in the absence of such inaccuracies or (ii) that would not result in the issuance of shares of NetApp common stock equal to or in excess of 19.5% of the shares of NetApp common stock outstanding as of immediately prior to the effective time of the merger;

the accuracy in all respects as of the date of the merger agreement and the closing date of the remaining representations and warranties not qualified by material adverse effect made by Data Domain in the merger agreement, provided that inaccuracies in such representations and warranties will be disregarded to the extent that such inaccuracies, individually or in the aggregate, do not constitute, and would not reasonably be expected to have or result in, a material adverse effect on Data Domain;

the accuracy in all respects as of the date of the merger agreement and the closing date of the remaining representations and warranties qualified by material adverse effect made by Data Domain in the merger agreement;

Data Domain's performance, in all material respects, of all of its obligations and compliance, in all material respects, with all of its covenants or other agreements set forth in the merger agreement that are required to be performed or complied with by Data Domain at or prior to the effective time of the first-step merger;

no material adverse effect with respect to Data Domain having occurred since May 20, 2009 that is continuing;

Data Domain's chief executive officer and chief financial officer having delivered to NetApp a certificate confirming that certain conditions have been satisfied; and

there are no pending legal proceedings brought by a governmental body seeking to restrain or prohibit the completion of any of the transactions contemplated by the merger agreement or the voting agreements, or the performance of any of the transactions contemplated by the merger agreement or the voting agreements, or seeking to prohibit or impose any limitations on the ownership or operation by NetApp or any of its subsidiaries of all or any portion of Data Domain's businesses or assets, or compelling NetApp or Data Domain or any of their subsidiaries to dispose of or hold separate any portion of Data Domain's businesses or assets.

***Conditions to the Obligations of Data Domain***

The merger agreement provides that the obligations of Data Domain to complete the first-step merger are subject to the satisfaction or waiver of each of the following conditions:

the accuracy in all respects as of the date of the merger agreement and the effective time of the merger of certain representations and warranties made by NetApp in the merger agreement, including those relating to corporate organization, authorization to enter into the merger agreement, and required consents;

the accuracy in all respects as of the date of the merger agreement and the effective time of the merger of the remaining representations and warranties not qualified by material adverse effect made by NetApp in the merger agreement, provided that inaccuracies in such representations and warranties will be disregarded to the extent that such inaccuracies, individually or in the aggregate, do not constitute, and would not reasonably be expected to have or result in, a material adverse effect on NetApp;

the accuracy in all respects as of the date of the merger agreement and the effective time of the merger of the remaining representations and warranties qualified by material adverse effect made by NetApp in the merger agreement;

NetApp's performance of or compliance with, in all material respects, all of its agreements and covenants set forth in the merger agreement that are required to be performed or complied with by NetApp at or prior to the effective time of the first-step merger;

no material adverse effect with respect to NetApp having occurred since May 20, 2009 that is continuing; and

**Table of Contents**

NetApp's chief executive officer and chief financial officer having delivered to Data Domain a certificate confirming that certain conditions have been satisfied.

**Termination of the Merger Agreement**

The merger agreement provides that, at any time prior to the completion of the first-step merger, NetApp and Data Domain may terminate the merger agreement by mutual written consent.

The merger agreement also provides that, at any time prior to the completion of the first-step merger, either NetApp or Data Domain may terminate the merger agreement if:

the merger has not been completed by December 31, 2009, provided that if the failure to complete the merger by December 31, 2009 is due solely to the failure to satisfy certain closing conditions relating to the expiration or termination of applicable waiting periods under the HSR Act, orders, decrees or injunctions by any court or other governmental entity relating to the merger, or legal proceedings brought by a governmental body seeking to restrain or prohibit the completion of any of the transactions contemplated by the merger agreement, then the right to terminate the merger agreement under this provision will not be available until March 30, 2010;

a court or governmental body has enacted or issued a law or a final and non-appealable order prohibiting the completion of the merger or any other transaction contemplated by the merger agreement or otherwise rendering the merger illegal; or

the Data Domain special stockholder meeting (including any adjournments and postponements thereof) has been held, a final vote on the approval of the merger proposal has been taken and Data Domain's stockholders do not approve the merger proposal;

provided that in each instance, the right to terminate the merger agreement shall not be available to a company whose action or failure to act has been the cause of any of the conditions to the merger not being satisfied.

***NetApp's Termination Rights***

The merger agreement further provides that NetApp may terminate the merger agreement at any time prior to the completion of the first-step merger, either before or after the requisite approval of Data Domain's stockholders has been obtained, if:

any of the following events have occurred (which are each referred to as a Data Domain triggering event):

Data Domain (and, in the case of (A), any of its representatives or subsidiaries) breaches or violates in any material respect the provisions of the merger agreement relating to (A) prohibitions on the solicitation of other acquisition proposals (other than an inadvertent breach that does not result in an acquisition proposal), (B) Data Domain's obligation to hold a meeting of its stockholders for the purpose of obtaining stockholder approval of the merger proposal, or (C) Data Domain's obligations in connection with its board of directors recommendation that the Data Domain stockholders adopt the merger agreement, which collectively are referred to as the first Data Domain triggering event;

the Data Domain board of directors or a committee of the board of directors makes a board recommendation change;

Data Domain fails to include in this proxy statement/prospectus its board of directors' recommendation in favor of the adoption of the merger agreement;

a tender or exchange offer relating to Data Domain common stock is commenced and (A) Data Domain does not issue a public statement (and make applicable SEC filings), within 10 business days, reaffirming the Data Domain board of directors' recommendation of the merger and recommending rejection of the tender or exchange offer or (B) at any time after such 10 business day period, Data Domain issues a press release or files a Schedule 14D-9 with the SEC relating to the tender or exchange offer that fails to reaffirm its board of directors' recommendation of the merger and recommendation to reject the tender or exchange offer; or



**Table of Contents**

the Data Domain board of directors fails to reaffirm its recommendation in favor of the adoption of the merger agreement within 10 business days after NetApp requests such a reaffirmation;

subject to certain limitations, there are inaccuracies of any representation or warranty made by Data Domain in the merger agreement, provided that if any inaccuracy is curable, NetApp may not terminate the merger agreement under this provision unless the inaccuracy remains uncured for a period of 30 days following notice thereof; or

subject to certain limitations, Data Domain has breached any of its covenants and obligations under the merger agreement, provided that if any breach is curable, NetApp may not terminate the merger agreement under this provision unless the breach remains uncured for a period of 30 days following notice thereof.

***Data Domain's Termination Rights***

The merger agreement provides that Data Domain may terminate the merger agreement at any time prior to the completion of the first-step merger, either before or after the requisite approval of Data Domain's stockholders has been obtained, if:

subject to certain limitations, there are inaccuracies of any representation or warranty made by NetApp in the merger agreement, provided that if any inaccuracy is curable, Data Domain may not terminate the merger agreement under this provision unless the inaccuracy remains uncured for a period of 30 days following notice thereof; or

subject to certain limitations, NetApp has breached any of its covenants and obligations under the merger agreement, provided that if any breach is curable, Data Domain may not terminate the merger agreement under this provision unless the breach remains uncured for a period of 30 days following notice thereof.

Finally, the merger agreement provides that Data Domain may terminate the merger agreement at any time prior to Data Domain's special stockholder meeting, if all of the following conditions are satisfied, referred to as the superior proposal termination event:

Data Domain has received an unsolicited, written acquisition proposal and Data Domain's board of directors determines in good faith, after consultation with its financial advisor and outside legal counsel, that such acquisition proposal constitutes a superior proposal (as described in Data Domain Proposal 1 – The Merger Data Domain's Reasons for the Merger; Recommendation of the Data Domain Board of Directors );

neither Data Domain nor any of its subsidiaries nor any of their respective representatives has materially breached or violated any of the non-solicitation provisions of the merger agreement with such superior proposal or in connection with any other acquisition proposal made by any other person;

Data Domain's board of directors has determined in good faith (after consultation with its financial advisor and its outside legal counsel) that, in light of the superior proposal, the failure to terminate the merger agreement is reasonably likely to be a breach of the board of directors' fiduciary duties to Data Domain's stockholders under Delaware law;

Data Domain's board of directors has given NetApp at least five business days prior written notice of the superior proposal, which notice must include the identity of the persons making the superior proposal, all of the material terms and conditions of the superior proposal, copies of the superior proposal as well as related

agreements and material documents (if available in written form), a statement that Data Domain's board of directors intends to terminate the merger agreement in response to such superior proposal, and an opportunity for NetApp to meet with Data Domain's board of directors, financial advisors and outside legal counsel at such times as NetApp may reasonably request for the purpose of enabling NetApp and Data Domain to discuss in good faith any modifications to the terms and conditions of the merger agreement that NetApp may propose in response to the superior proposal;

after such five business day period and any extensions thereof and, if requested by NetApp, meetings with NetApp and its financial advisors and legal counsel during such period, (i) NetApp has not made a proposal

**Table of Contents**

at least as favorable or more favorable to Data Domain's stockholders as such acquisition proposal and (ii) Data Domain's board of directors has determined in good faith (after consultation with its financial advisor its outside legal counsel) that, in light of such superior proposal and after good faith consideration of all proposals by NetApp, the failure to terminate the merger agreement is reasonably likely to constitute a breach of the board of directors' fiduciary duties to Data Domain's stockholders under Delaware law; and

concurrently with the termination of the merger agreement, Data Domain enters into a definitive agreement for the superior proposal and pays NetApp a fee of \$57.0 million.

**Expenses and Termination Fees**

The merger agreement provides that except as provided below, all fees and expenses incurred in connection with the merger agreement and the merger will be paid by the party incurring such expenses.

The merger agreement provides that Data Domain will pay NetApp a termination fee of \$57.0 million if any one of the following events occur:

(A) an acquisition proposal is publicly announced or otherwise becomes generally publicly known after the date of the merger agreement and prior to the date of the Data Domain special stockholder meeting, (B) the merger agreement is terminated by Data Domain or NetApp under the provision of the merger agreement permitting such termination in the event that the stockholders of Data Domain have voted not to adopt the merger agreement (or the merger agreement is terminated by Data Domain after such vote for any other reason), and (C) within twelve months following the termination of the merger agreement, Data Domain either closes a specified acquisition transaction (as defined below) or enters into a letter of intent, memorandum of understanding or other agreement with any third party providing for a specified acquisition transaction and such specified acquisition transaction or any other specified acquisition transaction is subsequently completed (whether or not such transaction is completed within twelve months following the termination of the merger agreement);

(A) an acquisition proposal is publicly announced or otherwise becomes publicly known after May 20, 2009 and prior to the date of the Data Domain special stockholder meeting, (B) the merger agreement is terminated by Data Domain or NetApp under the provision of the merger agreement permitting such termination in the event that the merger is not completed by December 31, 2009 (or by NetApp at such later date as described in The Merger Agreement - Termination of the Merger Agreement ), and (C) within twelve months following the termination of the merger agreement, Data Domain either closes a specified acquisition transaction or enters into a letter of intent, memorandum of understanding or other agreement with any third party providing for a specified acquisition transaction and such specified acquisition transaction or any other specified acquisition transaction is subsequently completed (whether or not such transaction is completed within twelve months following the termination of the merger agreement);

(A) the merger agreement is terminated by NetApp as a result of a Data Domain triggering event, or (B) the merger agreement is terminated due to a failure of Data Domain to obtain stockholder approval of the merger proposal and such termination is preceded by a Data Domain triggering event (other than the first Data Domain triggering event) (as defined in The Merger Agreement - Termination of the Merger Agreement - NetApp's Termination Rights); or

the merger agreement is terminated pursuant to a superior proposal termination event (as described in The Merger Agreement - Termination of the Merger Agreement - Data Domain's Termination Rights ).

A specified acquisition transaction has the same meaning as an acquisition transaction except all references to 15% or 85% are replaced by 50%.

In addition, the merger agreement provides that if the merger agreement is terminated by either NetApp or Data Domain after the Data Domain special stockholder meeting (including any adjournments and postponements thereof) has been held, a final vote on the approval of the merger proposal has been taken and Data Domain's stockholders do not approve the merger proposal, Data Domain will pay NetApp all of NetApp's out-of-pocket fees

## **Table of Contents**

and expenses incurred by NetApp and its affiliates on or prior to the valid termination of the merger agreement in connection with the transactions contemplated by the merger agreement, but in no event more than \$3 million.

If NetApp receives the \$57.0 million termination fee, such fee will be considered liquidated damages for any and all losses or damages suffered or incurred by NetApp or its affiliates in connection with the merger agreement or the merger (including the abandonment of the merger), and neither NetApp nor any of its affiliates will be entitled to bring any other claim, action or proceeding against Data Domain or any of its affiliates arising from the merger agreement or the merger (including the abandonment of the merger).

## **Amendment and Waiver**

The merger agreement provides that the parties may amend the merger agreement by written instrument signed by each of the parties to the agreement. However, following approval of the merger proposal by Data Domain's stockholders, any amendment that would require the approval of Data Domain's stockholders may not be made without such approval.

The merger agreement also provides that, at any time before completion of the first-step merger, any party to the merger agreement may:

- extend the time for the performance of any of the obligations or other acts of the other parties to the merger agreement;

- waive any inaccuracies in the representations and warranties made to such party contained in the merger agreement or in any document delivered pursuant to the merger agreement; and

- waive compliance with any of the agreements or conditions for the benefit of such party contained in the merger agreement.

The parties will disclose any material amendments or waivers to the merger agreement on a current report on Form 8-K. In addition, NetApp and Data Domain will issue a joint press release concurrently with the filing of the Form 8-K to notify stockholders promptly upon the occurrence of a material amendment or waiver to the merger agreement.

## **VOTING AGREEMENTS**

### **Voting Agreements**

As a condition and inducement to NetApp's willingness to enter into the merger agreement, NetApp has entered into voting agreements with each of the beneficial owners of Data Domain's common stock listed on the table below. According to the terms of such voting agreements, each party has agreed to vote (or to cause the holder of record of such shares to so vote) and has granted NetApp an irrevocable proxy to vote such party's beneficially owned shares (i) in favor of the merger proposal, (ii) against any proposal made in opposition to or in competition with the merger or that would result in a breach of the merger agreement, and (iii) against certain other proposed business transactions that would interfere with the merger, including transactions that would result in any other merger, the sale, lease or transfer of any significant part of the assets of Data Domain or its subsidiaries or any material change in Data Domain's capitalization.

Subject to certain exceptions described in the voting agreements, the parties to the voting agreements have agreed not to sell, pledge, encumber, assign, grant options with respect to, transfer, tender or dispose of the shares of Data

Domain common stock beneficially owned by such parties or to enter into any agreement related to any of the foregoing transactions.

Subject to certain exceptions described in the voting agreements, each of the parties to the voting agreements has made representations and warranties to NetApp regarding, among other things, such party's power and authority to enter into the voting agreement and deliver the proxy, such party's unencumbered beneficial ownership of the shares of Data Domain common stock subject to the voting agreement, and such party's sole voting power and sole power of disposition with respect to such shares of common stock.

**Table of Contents**

The voting agreements will terminate at the earliest to occur of (i) the valid termination of the merger agreement, (ii) the date on which Data Domain has received the affirmative vote of the holders of a majority of the outstanding shares of Data Domain's common stock, voting together as a single class, in favor of the merger proposal, or (iii) the date on which the parties to the voting agreements have agreed in writing to terminate such agreements.

As of May 22, 2009, the stockholders listed below together owned 13,544,221 shares of Data Domain common stock, or approximately 21.6% of the voting power of Data Domain common stock. In addition, such stockholders hold Data Domain stock awards to purchase an additional 4,628,797 shares of Data Domain common stock.

<b>Parties to the Voting Agreement</b>	<b>Number of Shares of Common Stock</b>	<b>Number of Shares of Common Stock Issuable Upon Settlement of Restricted Stock Units</b>	<b>Number of Shares of Common Stock Issuable Upon Exercise of Outstanding Options</b>
NEA Partners 10, L.P.	21,887		
Scott D. Sandell			115,000
Nick Bacica		20,000	160,000
New Enterprise Associates 10, L.P.	9,647,459		
SHV Profit Sharing Plan FBO Ronald D. Bernal, Wells Fargo Bank, Trustee	25,650		
Ronald E. F. Codd	100,000		115,000
Aneel Bhusri	382,749		115,000
Bernal Family Trust U/D/T/11/3/95, Ronald Daniel Bernal and Pamela Mayer Bernal, Trustees	125,966		
Charles Ross Partners Investment Fund Number 29	761		
The Codd Revocable Trust Dated 3/06/98, Ronald E. and Susan T. Codd, Trustees	10,000		
Frank Slooman	1,602	50,000	2,284,990
J. Miller 2007 Grantor Retained Annuity Trust	112,100(1)		
Jeffrey A. Miller			15,000
K. Miller 2007 Grantor Retained Annuity Trust	112,100(1)		
Kai Li	659,956(2)		215,000
Michael P. Scarpelli	137,554	25,000	449,596
Miller Living Trust	6,496		
Reed E. Hundt	30,000		195,000
Ronald D. Bernal			115,000
Daniel R. McGee	2,006	20,000	394,984
David L. Schneider	49,366	23,334	315,893
Greylock XI Principals LLC	195,948		
Greylock XI Limited Partnership	1,712,529		
Greylock XI-A Limited Partnership	47,819		
	162,273		

Schneider 2001 Living Trust, David & Barbara Schneider  
Trustees, August 31, 2001

- (1) Includes 37,500 shares of restricted stock.
- (2) Includes 94,997 shares of restricted stock.



**Table of Contents**

**ACCOUNTING TREATMENT**

The merger will be accounted for using the purchase method of accounting as a purchase of a business, as that phrase is used under U.S. generally accepted accounting principles, for accounting and financial reporting purposes. Under the purchase method of accounting, the assets acquired (including identifiable intangible assets) and liabilities assumed (including executory contracts and other commitments) from Data Domain as of the acquisition date (*i.e.*, the completion of the merger) will be recorded at their respective fair values and added to those of NetApp. Any excess of purchase price over the fair value of assets acquired and liabilities assumed will be recorded as goodwill. The consolidated financial statements of NetApp issued after the merger will reflect these fair values and will not be restated retroactively to reflect the historical financial position or results of operations of Data Domain.

**MATERIAL U.S. FEDERAL INCOME TAX CONSEQUENCES OF THE MERGER**

The following summary represents the opinion of Wilson Sonsini Goodrich & Rosati, Professional Corporation, counsel to NetApp, and Fenwick & West LLP, counsel to Data Domain, with respect to the material U.S. federal income tax consequences of the merger to U.S. holders of Data Domain common stock who hold their stock as capital assets (generally, for investment).

The summary is based on the Internal Revenue Code of 1986, as amended, or the Code, the Treasury regulations issued under the Code, and administrative rulings and court decisions in effect as of the date of this proxy statement/prospectus, all of which are subject to change at any time, possibly with retroactive effect. For purposes of this discussion, the term "U.S. holder" means:

a citizen or resident of the United States;

a corporation (including any entity treated as a corporation for U.S. federal income tax purposes) created or organized under the laws of the United States or any of its political subdivisions;

a trust that (i) is subject to the supervision of a court within the United States and the control of one or more U.S. persons or (ii) has a valid election in effect under applicable U.S. Treasury regulations to be treated as a U.S. person; or

an estate that is subject to U.S. federal income tax on its income regardless of its source.

A "non-U.S. holder" means a beneficial owner of Data Domain common stock (other than a partnership) that is not a U.S. holder. If a partnership (including any entity or arrangement, domestic or foreign, treated as a partnership for U.S. federal income tax purposes) holds Data Domain common stock, the tax treatment of a partner will generally depend on the status of the partners and the activities of the partnership. If a holder is a partner in a partnership holding Data Domain common stock, the holder should consult its tax advisors.

This summary is not a complete description of all the tax consequences of the merger and, in particular, may not address U.S. federal income tax considerations applicable to holders of Data Domain common stock who are subject to special treatment under U.S. federal income tax law (including, for example, non-U.S. holders, certain former citizens or residents of the United States, financial institutions, dealers in securities, insurance companies or tax-exempt entities, holders who acquired Data Domain common stock pursuant to the exercise of an employee stock option or right or otherwise as compensation, holders exercising dissenters' rights or appraisal rights, and holders who hold Data Domain common stock as part of a hedge, straddle, constructive sale or conversion transaction). This

summary does not address the tax consequences of any transaction other than the merger, whether or not such transaction is in connection with the merger. This summary does not address the tax consequences to any person who actually or constructively owns 5% or more of Data Domain common stock. Also, this summary does not address U.S. federal income tax considerations applicable to holders of options to purchase Data Domain common stock, or holders of debt instruments convertible into Data Domain common stock. In addition, no information is provided with respect to the tax consequences of the merger under applicable state, local or non-U.S. laws or under estate, gift, excise or other non-income tax laws.

## **Table of Contents**

The U.S. tax consequences of the merger depend on whether the second-step merger occurs. The second-step merger will occur only if Wilson Sonsini Goodrich & Rosati, Professional Corporation, counsel to NetApp, and Fenwick & West LLP, counsel to Data Domain, deliver tax opinions to the effect that the merger will qualify as a reorganization within the meaning of Section 368(a) of the Code. The tax opinions are conditioned upon receipt of customary written representations from NetApp and Data Domain, including representations that continuity of interest test will be satisfied, requiring that the Stock Consideration constitute at least 40% of the total consideration paid or payable to Data Domain stockholders in the first-step merger.

Whether the continuity of interest test will be satisfied depends primarily upon the market value of the NetApp common stock immediately before the first-step merger. No assurances can be given that the continuity of interest test will be met. As a result, in deciding whether to approve the merger, you should consider the possibility that it may be taxable to you because the continuity of interest test is not satisfied and the second-step merger does not occur. You will not be entitled to change your vote in the event that the merger is taxable.

Neither the tax opinions nor the discussion that follows is binding on the Internal Revenue Service, referred to as the IRS, or the courts. The parties do not intend to request a ruling from the IRS with respect to the merger. Accordingly, there can be no assurance that the IRS will not challenge the discussion below or the conclusions expressed in the tax opinions if they are delivered, or that a court will not sustain such a challenge.

### **U.S. Federal Income Tax Consequences to U.S. Holders If the Merger is a Reorganization**

If the second-step merger occurs and the merger qualifies as a reorganization within the meaning of Section 368(a) of the Code, a U.S. holder of Data Domain common stock receiving NetApp common stock and cash in exchange for such Data Domain common stock in the merger generally will recognize gain equal to the lesser of (i) the amount of cash received by the U.S. holder (excluding any cash received in lieu of fractional shares) and (ii) the excess of the amount realized by the U.S. holder over the U.S. holder's tax basis in the Data Domain common stock (generally the purchase price paid by the U.S. holder to acquire such stock). The amount realized by the U.S. holder will equal the sum of the fair market value of the NetApp common stock and the amount of cash (including any cash received in lieu of fractional shares) received by the U.S. holder. Losses will not be permitted to be recognized by U.S. holders of Data Domain common stock in the merger, except in connection with the receipt of cash in lieu of fractional shares, as discussed below. Any gain recognized by a U.S. holder of Data Domain common stock generally will be long-term capital gain if the U.S. holder's holding period of the Data Domain common stock is more than one year, and short-term capital gain if the U.S. holder's holding period is one year or less, at the time of the first-step merger. Long-term capital gains of individuals are eligible for reduced rates of taxation.

The aggregate tax basis of the NetApp common stock received (including fractional shares deemed received and redeemed as described below) will be equal to the aggregate tax basis of the Data Domain common stock surrendered, reduced by the amount of cash the U.S. holder of Data Domain common stock received (excluding any cash received in lieu of fractional shares), and increased by the amount of gain that the U.S. holder of Data Domain common stock recognizes, but excluding any gain or loss from the deemed receipt and redemption of fractional shares described below. The holding period of NetApp common stock received by a U.S. holder of Data Domain common stock in the merger will include the holding period of the U.S. holder's Data Domain common stock.

For a U.S. holder who acquired different blocks of Data Domain common stock at different times and at different prices, realized gain or loss generally must be calculated separately for each identifiable block of shares exchanged in the merger, and a loss realized on the exchange of one block of shares cannot be used to offset a gain recognized on the exchange of another block of shares. If a U.S. holder has differing bases or holding periods in respect of shares of Data Domain common stock, the U.S. holder should consult its tax advisor prior to the exchange with regard to identifying the bases or holding periods of the particular shares of NetApp common stock received in the merger.

Cash received by a U.S. holder of Data Domain common stock in lieu of fractional shares generally will be treated as if the U.S. holder received the fractional shares in the merger and then received the cash in redemption of the fractional shares. The U.S. holder generally should recognize capital gain or loss equal to the difference between the amount of the cash received in lieu of fractional shares and the portion of the U.S. holder's tax basis allocable to the fractional shares.

## **Table of Contents**

U.S. holders of shares of Data Domain common stock receiving NetApp common stock and cash in the merger will be required to retain records pertaining to the merger. U.S. holders who owned at least 5% (by vote or value) of the total outstanding Data Domain common stock before the first-step merger or whose tax basis in the Data Domain common stock surrendered pursuant to the first-step merger equals or exceeds \$1 million are subject to certain reporting requirements with respect to the merger. U.S. holders are urged to consult with their tax advisors with respect to these and other reporting requirements applicable to the merger.

### **U.S. Federal Income Tax Consequences to U.S. Holders If the Second-Step Merger Does Not Occur**

If the second-step merger does not occur, the exchange of Data Domain common stock for NetApp common stock and cash in the first-step merger will be a fully taxable transaction in which a U.S. holder generally will recognize gain or loss equal to the difference between the amount realized (as defined above) and the U.S. holder's tax basis in the Data Domain common stock. Gain or loss must be calculated separately for each identifiable block of shares (i.e., shares acquired at different times and prices) exchanged in the first-step merger. Any gain or loss recognized by a U.S. holder of Data Domain common stock generally will be long-term capital gain or loss if the U.S. holder's holding period of the Data Domain common stock is more than one year, and short-term capital gain or loss if the U.S. holder's holding period is one year or less, at the time of the first-step merger. Long-term capital gains of individuals are eligible for reduced rates of taxation. The deductibility of capital losses is subject to limitations. The aggregate tax basis of a Data Domain stockholder in the NetApp common stock received in the first-step merger will equal its fair market value at the time of the closing, and the holding period for the NetApp common stock will begin the day after the closing.

### **Backup Withholding**

Backup withholding may apply with respect to the consideration received by a holder of Data Domain common stock in the first-step merger unless the holder is a corporation or comes within certain other exempt categories and, when required, demonstrates this fact, or provides a correct taxpayer identification number (typically by completing and signing an IRS Form W-9), certifies as to no loss of exemption from backup withholding and that such holder is a U.S. person (including a U.S. resident alien) and otherwise complies with applicable requirements of the backup withholding rules. Further, a holder of Data Domain common stock who does not provide NetApp (or the exchange agent) with its correct taxpayer identification number may be subject to penalties imposed by the IRS. Any amounts withheld under the backup withholding rules may be allowed as a refund or a credit against the holder's federal income tax liability, provided that the holder timely furnishes certain required information to the IRS.

**The foregoing discussion of U.S. federal income tax consequences is not intended to constitute a complete description of all tax consequences relating to the merger. The tax consequences of the merger to a holder of Data Domain common stock will depend upon the facts of a holder's particular situation. Because individual circumstances may differ, holders of Data Domain common stock are urged to consult with their own tax advisor regarding the applicability of the rules discussed above and the particular tax effects of the merger, including the application of state, local and foreign tax laws, and, in the case of non-U.S. holders, possible eligibility for benefits under applicable income tax treaties.**

**Table of Contents**

**UNAUDITED PRO FORMA CONDENSED COMBINED FINANCIAL STATEMENTS**

**Introduction to Unaudited Pro Forma Condensed Combined Financial Statements**

On May 20, 2009, NetApp entered into an Agreement and Plan of Merger, referred to as the merger agreement, by and among NetApp, Kentucky Merger Sub One Corporation, a wholly owned subsidiary of NetApp, referred to as Merger Sub One, Derby Merger Sub Two LLC, a wholly owned subsidiary of NetApp, referred to as Merger Sub Two, and Data Domain. On June 3, 2009, NetApp and Data Domain amended the original merger agreement to reflect the terms described in this proxy statement/prospectus. The merger agreement provides for the acquisition of Data Domain by NetApp by means of a merger of Merger Sub One with and into Data Domain, referred to as the first-step merger, with Data Domain as the interim surviving entity, immediately followed by a merger of Data Domain, as the interim surviving entity, with and into Merger Sub Two, referred to as the second-step merger, with Merger Sub Two as the final surviving entity.

The following unaudited pro forma condensed combined financial statements are based on the historical consolidated financial statements of NetApp and Data Domain after giving effect to the acquisition of Data Domain by NetApp using the purchase method of accounting in accordance with Statement of Financial Accounting Standards (SFAS) No. 141(R), *Business Combinations*, and applying the assumptions and adjustments described in the accompanying notes. The unaudited pro forma condensed combined balance sheet is presented as if the merger had occurred on January 23, 2009. The unaudited pro forma condensed combined statements of operations for the nine months ended January 23, 2009 and the twelve months ended April 25, 2008 are presented as if the merger had occurred on April 28, 2007. The preliminary estimate of purchase consideration is calculated as if the acquisition had taken place on May 22, 2009. You should read this information in conjunction with the:

accompanying notes to the unaudited pro forma condensed combined financial statements;

separate unaudited historical condensed consolidated financial statements of NetApp as of and for the nine-month period ended January 23, 2009, included in NetApp's quarterly report on Form 10-Q for the nine months ended January 23, 2009, incorporated by reference into this proxy statement/prospectus;

separate audited historical consolidated financial statements of NetApp as of and for the fiscal year ended April 25, 2008, included in NetApp's annual report on Form 10-K for the fiscal year ended April 25, 2008, incorporated by reference into this proxy statement/prospectus;

separate unaudited historical condensed consolidated financial statements of Data Domain as of and for the three months ended March 31, 2009 included in Data Domain's quarterly report on Form 10-Q incorporated by reference into this proxy statement/prospectus; and

separate audited historical consolidated financial statements of Data Domain as of and for the year ended December 31, 2008 and 2007, included in Data Domain's annual report on Form 10-K for the year ended December 31, 2008, incorporated by reference into this proxy statement/prospectus.

As NetApp has a fiscal year ending on the last Friday in April and Data Domain has a fiscal year ending on December 31, the unaudited pro forma condensed combined balance sheet combines the historical balances of NetApp as of January 23, 2009 with the historical balances of Data Domain as of March 31, 2009, plus pro forma adjustments. In addition, the unaudited pro forma condensed combined statements of operations combine the historical results of NetApp for the fiscal year ended April 25, 2008 and for the nine months ended January 23, 2009 with the historical

results of Data Domain for the twelve months ended March 31, 2008 and the nine months ended December 31, 2008, respectively, plus pro forma adjustments. Data Domain's historical results have been calculated by combining its reported interim data for each quarter within the respective period.

Data Domain has filed its Form 10-Q for the quarter ended March 31, 2009 and reported revenues of \$79.0 million and net income of \$1.3 million.

For ease of reference, the unaudited pro forma condensed combined financial statements use NetApp's period-end date and no adjustments were made to Data Domain's reported information for the different quarter-end date. The pro forma condensed combined financial statements are presented for illustrative purposes only and are not necessarily indicative of the financial position or results of operations that would have been realized if the merger

**Table of Contents**

had been completed on the dates indicated, nor is it indicative of future operating results or financial position. The pro forma adjustments are based upon available information and certain assumptions that NetApp believes are reasonable.

The unaudited pro forma condensed combined financial statements do not reflect any cost savings, operating synergies or revenue enhancements that the combined company may achieve as a result of the merger or the costs to integrate the operations of NetApp and Data Domain or the costs necessary to achieve these cost savings, operating synergies and revenue enhancements.

Pursuant to the purchase method of accounting, the estimated preliminary purchase price, calculated as described in Notes 4 and 5 to the unaudited pro forma condensed combined financial statements, has been preliminarily allocated to assets acquired and liabilities assumed based on their respective fair values. NetApp's management has determined the preliminary fair value of the intangible assets and tangible assets acquired and liabilities assumed at the pro forma combined balance sheet date. Any differences between the fair value of the consideration issued and the fair value of the assets acquired and liabilities assumed is recorded as goodwill. Since these unaudited pro forma condensed combined financial statements have been prepared based on preliminary estimates of purchase consideration and fair values, the actual amounts recorded may differ materially from the information presented. The estimation and allocations of purchase consideration are subject to change pending changes in the market value of NetApp common stock and further review of the fair value of the assets acquired and liabilities assumed. Additionally, the fair value of assets acquired and liabilities assumed may be materially impacted by the results of Data Domain's operations up to the date of completion of the merger. A final determination of these estimated fair values will be based on the actual net tangible and intangible assets of Data Domain that will exist on the date of completion of the merger.

There were no significant intercompany transactions between NetApp and Data Domain as of the dates and for the periods of these pro forma condensed combined financial statements.

These unaudited pro forma condensed combined financial statements should be read in conjunction with the historical consolidated financial statements and notes thereto of NetApp and Data Domain and other financial information pertaining to NetApp and Data Domain including each company's management's discussion and analysis of financial condition and results of operations and risk factors incorporated by reference or included herein. For a complete list of documents incorporated by reference in this proxy statement/prospectus, see [Where You Can Find More Information](#) beginning on page 119.



**Table of Contents****UNAUDITED PRO FORMA CONDENSED COMBINED BALANCE SHEET**

	<b>Historical</b>			
	<b>NetApp</b>	<b>Data Domain</b>	<b>Pro Forma</b>	<b>Pro Forma</b>
	<b>January 23,</b>	<b>March 31,</b>	<b>Adjustments</b>	<b>Combined</b>
	<b>2009</b>	<b>2009</b>		<b>Combined</b>
	<b>(In thousands)</b>			
<b>ASSETS</b>				
<b>Current Assets:</b>				
Cash and cash equivalents	\$ 1,708,200	\$ 119,167	\$ (1,039,272)(a)	\$ 788,095
Short-term investments	752,669	127,685		880,354
Accounts receivable, net of allowances	344,437	60,563		405,000
Inventories	82,159	4,051	1,500(b)	87,710
Prepaid expenses and other assets	118,365	4,737		123,102
Short-term restricted cash	2,281			2,281
Short-term deferred income taxes	153,901	8,517		162,418
Total current assets	3,162,012	324,720	(1,037,772)	2,448,960
Property and equipment, net	705,153	39,333		744,486
Goodwill	680,054		1,466,997(c)	2,147,051
Intangible assets, net	51,495	100	418,900(d)	470,495
Long-term investments and restricted cash	199,392	30,931	(3,228)(e)	227,095
Long-term deferred income taxes and other assets	391,634	5,629		397,263
	<b>\$ 5,189,740</b>	<b>\$ 400,713</b>	<b>\$ 844,897</b>	<b>\$ 6,435,350</b>

**LIABILITIES AND STOCKHOLDERS EQUITY**

<b>Current Liabilities:</b>				
Accounts payable	\$ 122,924	\$ 10,804	\$	\$ 133,728
Accrued compensation and related benefits	185,011	11,692	1,072(f)	197,775
Other accrued liabilities	159,925	8,267		168,192
GSA contingency accrual	128,000			128,000
Income taxes payable	6,389	2,150		8,539
Deferred revenue	960,729	43,749	(10,937)(g)	993,541
Total current liabilities	1,562,978	76,662	(9,865)	1,629,775
1.75% convertible senior notes due 2013	1,265,000			1,265,000
Other long-term obligations	165,687	2,318	142,184(h)	310,189
Long-term deferred revenue	668,682	31,985	(7,996)(g)	692,671
	<b>3,662,347</b>	<b>110,965</b>	<b>124,323</b>	<b>3,897,635</b>

**Commitments and Contingencies**

**Stockholders Equity:**

Common stock	435		48(i)	483
Additional paid-in capital	2,909,696	308,619	717,655(j)	3,935,970
Treasury stock at cost	(2,927,376)			(2,927,376)
Retained earnings (deficit)	1,547,364	(17,420)	1,420(k)	1,531,364
Accumulated other comprehensive income (loss)	(2,726)	(1,451)	1,451(l)	(2,726)
Total stockholders equity	1,527,393	289,748	720,574	2,537,715
Total liabilities and stockholders equity	\$ 5,189,740	\$ 400,713	\$ 844,897	\$ 6,435,350

See the accompanying notes to the unaudited pro forma condensed combined financial statements, which are an integral part of these statements. The pro forma adjustments are explained in Note 6, Pro Forma Adjustments.

Table of Contents**UNAUDITED PRO FORMA CONDENSED COMBINED STATEMENT OF OPERATIONS**

	<b>Historical</b>			
	<b>NetApp</b>	<b>Data Domain</b>		
	<b>Fiscal Year</b>	<b>Twelve</b>	<b>Pro Forma</b>	<b>Pro Forma</b>
	<b>Ended</b>	<b>Months</b>	<b>Adjustments</b>	<b>Combined</b>
	<b>April 25,</b>	<b>Ended</b>		
	<b>2008</b>	<b>March 31,</b>		
		<b>2008</b>		
	<b>(In thousands, except per share data)</b>			
<b>Revenues:</b>				
Product	\$ 2,242,474	\$ 136,209	\$ 165(m)	\$ 2,378,848
Software entitlements and maintenance	486,896		17,433(m)	504,329
Service	573,797		2,221(m)	576,018
Support and service		19,654	(19,654)(m)	
Ratable product and related support and services		165	(165)(m)	
Net revenues	3,303,167	156,028		3,459,195
<b>Cost of Revenues:</b>				
Cost of product	911,434	36,113	45,128(m),(n)	992,675
Cost of software entitlements and maintenance	8,572		5,614(m)	14,186
Cost of service	369,785		1,229(m)	371,014
Cost of support and services		6,843	(6,843)(m)	
Cost of ratable product and related support and services		28	(28)(m)	
Total cost of revenues	1,289,791	42,984	45,100	1,377,875
Gross profit	2,013,376	113,044	(45,100)	2,081,320
<b>Operating Expenses:</b>				
Sales and marketing	1,075,588	74,990	36,600(o)	1,187,178
Research and development	452,205	27,696		479,901
General and administrative	171,536	14,834		186,370
Restructuring charges	447			447
<b>Total operating expenses</b>	<b>1,699,776</b>	<b>117,520</b>	<b>36,600</b>	<b>1,853,896</b>
<b>Income (loss) from operations</b>	<b>313,600</b>	<b>(4,476)</b>	<b>(81,700)</b>	<b>227,424</b>
<b>Other Income (Expenses), Net:</b>				
Interest income	64,610	5,906	(12,276)(p)	58,240
Interest expense	(7,990)			(7,990)
Gain (loss) on investments, net	12,614			12,614
Other income (expense), net	(135)	1,462		1,327

Total other income (expense), net	69,099	7,368	(12,276)	64,191
<b>Income (loss) before income taxes</b>	<b>382,699</b>	<b>2,892</b>	<b>(93,976)</b>	<b>291,615</b>
<b>Provision (benefit) for income taxes</b>	<b>72,961</b>	<b>2,338</b>	<b>(34,771)(q)</b>	<b>40,528</b>
<b>Net income</b>	<b>\$ 309,738</b>	<b>\$ 554</b>	<b>\$ (59,205)</b>	<b>\$ 251,087</b>
<b>Net Income per Share:</b>				
Basic	\$ 0.88	\$ 0.01		\$ 0.63
Diluted	\$ 0.86	\$ 0.01		\$ 0.61
<b>Shares Used in Net Income per Share Calculations:</b>				
Basic	351,676	42,988	5,143(r)	399,807
Diluted	361,090	45,061	6,445(s)	412,596

See the accompanying notes to the unaudited pro forma condensed combined financial statements, which are an integral part of these statements. The pro forma adjustments are explained in Note 6, Pro Forma Adjustments.

Table of Contents**UNAUDITED PRO FORMA CONDENSED COMBINED STATEMENT OF OPERATIONS**

	<b>Historical</b>			
	<b>NetApp Nine Months Ended January 23, 2009</b>	<b>Data Domain Nine Months Ended December 31, 2008</b>	<b>Pro Forma Adjustments</b>	<b>Pro Forma Combined</b>
	<b>(In thousands, except per share data)</b>			
<b>Revenues:</b>				
Product	\$ 1,646,489	\$ 187,492	\$ 60(m)	\$ 1,834,041
Software entitlements and maintenance	453,680		30,771(m)	484,451
Service	554,581		3,147(m)	557,728
Support and service		33,918	(33,918)(m)	
Ratable product and related support and services		60	(60)(m)	
Reserve for GSA contingency	(128,000)			(128,000)
Net revenues	2,526,750	221,470		2,748,220
<b>Cost of Revenues:</b>				
Cost of product	762,437	49,817	35,104(m),(n)	847,358
Cost of software entitlements and maintenance	6,765		10,855(m)	17,620
Cost of service	301,528		1,698(m)	303,226
Cost of support and services		12,553	(12,553)(m)	
Cost of ratable product and related support and services		4	(4)(m)	
Total cost of revenues	1,070,730	62,374	35,100	1,168,204
Gross profit	1,456,020	159,096	(35,100)	1,580,016
<b>Operating Expenses:</b>				
Sales and marketing	898,786	92,585	27,450(o)	1,018,821
Research and development	373,509	32,303		405,812
General and administrative	151,523	18,633		170,156
Restructuring charges	18,955			18,955
<b>Total operating expenses</b>	<b>1,442,773</b>	<b>143,521</b>	<b>27,450</b>	<b>1,613,744</b>
<b>Income (loss) from operations</b>	<b>13,247</b>	<b>15,575</b>	<b>(62,550)</b>	<b>(33,728)</b>
<b>Other Income (Expenses), Net:</b>				
Interest income	45,894	4,093	(4,975)(p)	45,012
Interest expense	(19,355)			(19,355)
Gain (loss) on investments, net	(26,926)			(26,926)

Edgar Filing: NetApp, Inc. - Form S-4

Other income (expense), net	(3,717)	(2,711)		(6,428)
Total other income (expense), net	(4,104)	1,382	(4,975)	(7,697)
<b>Income (loss) before income taxes</b>	9,143	16,957	(67,525)	(41,425)
<b>Provision (benefit) for income taxes</b>	(2,318)	(1,895)	(24,984)(q)	(29,197)
<b>Net income (loss)</b>	\$ 11,461	\$ 18,852	\$ (42,541)	\$ (12,228)
<b>Net Income (Loss) Per Share:</b>				
Basic	\$ 0.03	\$ 0.32		\$ (0.03)
Diluted	\$ 0.03	\$ 0.29		\$ (0.03)
<b>Shares Used in Net Income (Loss)</b>				
<b>Per Share Calculations:</b>				
Basic	330,067	58,567	(10,436)(r)	378,198
Diluted	335,070	65,730	(22,602)(s)	378,198

See the accompanying notes to the unaudited pro forma condensed combined financial statements, which are an integral part of these statements. The pro forma adjustments are explained in Note 6, Pro Forma Adjustments.

**Table of Contents****NOTES TO UNAUDITED PRO FORMA CONDENSED COMBINED  
FINANCIAL STATEMENTS****1. Description of Transaction**

On May 20, 2009, NetApp entered into an Agreement and Plan of Merger, referred to as the merger agreement, by and among NetApp, Kentucky Merger Sub One Corporation, a wholly owned subsidiary of NetApp, referred to as Merger Sub One, Derby Merger Sub Two LLC, a wholly owned subsidiary of NetApp, referred to as Merger Sub Two, and Data Domain. On June 3, 2009, NetApp and Data Domain amended the original merger agreement to reflect the terms described in this proxy statement/prospectus. The merger agreement provides for the acquisition of Data Domain by NetApp by means of a merger of Merger Sub One with and into Data Domain, referred to as the first-step merger, with Data Domain as the interim surviving entity, immediately followed by a merger of Data Domain, as the interim surviving entity, with and into Merger Sub Two, referred to as the second-step merger, with Merger Sub Two as the final surviving entity.

Upon the completion of the first-step merger, Data Domain will become a wholly owned subsidiary of NetApp, and each share of Data Domain common stock issued and outstanding immediately prior to the completion of the first-step merger, will be cancelled and converted into the right to receive, subject to adjustment as described below, a combination of \$16.45 in cash, or the cash consideration, without interest and less any required withholding, and a certain number of shares of NetApp common stock, or the stock consideration, and together with the cash consideration, the merger consideration. The number of shares of NetApp Common Stock issuable in exchange for Data Domain common stock will be determined by dividing \$13.55 by the closing average, defined as the average closing price of NetApp common stock on the NASDAQ Global Select Market for the 10 consecutive trading days ending on the third trading day immediately prior to the closing date of the first-step merger; provided, that if the closing average is less than \$17.41, each share of Data Domain common stock will be exchangeable for 0.7783 shares of NetApp common stock and if the closing average is greater than \$21.27, each share of Data Domain common stock will be exchangeable for 0.637 shares of NetApp common stock. In the event that the exchange ratio is greater than or equal to 0.7006 and less than 0.7783, NetApp, in its sole discretion, may (a) reduce the stock consideration by such amount as NetApp may determine and (b) increase the cash consideration by an amount equal to the product of (i) the amount of such reduction in the stock consideration multiplied by (ii) the closing average. However, NetApp may not reduce the amount of the stock consideration and increase the cash consideration as described in the immediately preceding sentence to the extent that it would reasonably be expected to cause the merger to fail to qualify as a tax-free reorganization under the Internal Revenue Code. In addition, if the aggregate amount of the stock consideration issuable in the merger (including the stock consideration issuable to holders of Data Domain options and restricted stock units) would exceed 19.5% of the outstanding shares of NetApp common stock immediately prior to the effective time of the first-step merger, the stock consideration will be decreased to the minimum extent necessary so that no more than 19.5% of the outstanding shares of NetApp common stock will be issued in the merger (with such percentage measured immediately prior to the effective time of the first-step merger). In such event, the cash consideration will be increased by an amount equal to the product of (a) the amount of the reduction in the stock consideration multiplied by (b) the closing average. In the event that the stock consideration is decreased in accordance with the immediately preceding sentence, the merger may fail to qualify as a tax-free reorganization under the Internal Revenue Code.

Upon the completion of the first-step merger, each outstanding Data Domain stock option, whether or not then vested and exercisable, will be assumed and converted by NetApp. In accordance with its terms and the requirements of applicable law, each option shall (i) be converted into an option to acquire that number of shares of NetApp common stock equal to the product obtained by multiplying (x) the number of shares of Data Domain common stock subject to

such option, by (y) the option exchange ratio, rounded down to the nearest whole share, and (ii) have an exercise price per share equal to the quotient obtained by dividing (x) the per share exercise price of Data Domain common stock subject to such option, by (y) the option exchange ratio, rounded up to the nearest cent. The option exchange ratio is calculated as the sum of (x) the stock consideration to be received pursuant to the merger agreement for a share of Data Domain common stock plus (y) the quotient obtained by dividing (1) the cash consideration to be received pursuant to the merger agreement for a share of Data Domain common stock, by (2) the average closing sales prices of NetApp's common stock, rounded to the nearest one-hundredth of a cent, for the ten most recent consecutive trading days ending on the third trading day immediately prior to the effective time of the



## **Table of Contents**

merger. Each assumed and converted option shall otherwise be subject to the same terms and conditions (including as to vesting and exercisability) as were applicable to the option immediately prior to the completion of the first-step merger.

Each of Data Domain's unvested restricted stock units and shares of restricted stock outstanding at the effective time of the first-step merger shall be assumed and converted into restricted stock units or shares of restricted stock, as applicable, representing the right to receive merger consideration payable for shares of Data Domain underlying each assumed and converted restricted stock unit or restricted share, as applicable. Each assumed and converted restricted stock unit and share of restricted stock shall otherwise be subject to the same terms and conditions, including vesting restrictions, as were applicable to such award immediately prior to the completion of the first-step merger.

The merger is subject to Data Domain stockholder approval and regulatory approvals and other usual and customary closing conditions. The merger is expected to be completed in the late summer or early fall of 2009.

## **2. Basis of Presentation**

The unaudited pro forma condensed combined financial statements were prepared in accordance with Securities and Exchange Commission Regulation S-X Article 11, using the purchase method of accounting based on Statement of Financial Accounting Standard (SFAS) No. 141R, Business Combinations, which NetApp adopted on April 25, 2009, and are based on the historical financial statements of NetApp and Data Domain after giving effect to the cash to be paid and the stock to be issued by NetApp to consummate the acquisition, as well as certain reclassifications and pro forma adjustments. As NetApp has a fiscal year ending on the last Friday in April and Data Domain has a fiscal year ending on December 31, the unaudited pro forma condensed combined balance sheet combines the historical balances of NetApp as of January 23, 2009 with the historical balances of Data Domain as of March 31, 2009, plus pro forma adjustments. In addition, the unaudited pro forma condensed combined statements of operations combine the historical results of NetApp for the year ended April 25, 2008 and for the nine months ended January 23, 2009 with the historical results of Data Domain for the twelve months ended March 31, 2008 and the nine months ended December 31, 2008, respectively, plus pro forma adjustments. Data Domain's historical results have been calculated by combining its reported interim data for each quarter within the respective period. For ease of reference, these pro forma statements use NetApp's respective period end dates. In addition, no adjustments were made to Data Domain's reported information for its respective historical three-month periods included in the unaudited pro forma condensed combined financial statements. Certain reclassifications have been made to the historical financial statements of Data Domain to conform with NetApp's presentation, primarily related to the presentation of revenues and the associated cost of revenues.

The unaudited pro forma condensed combined balance sheet is presented as if the merger had occurred on January 23, 2009. The unaudited pro forma condensed combined statements of operations for the nine months ended January 23, 2009 and the twelve months ended April 25, 2008 are presented as if the merger had occurred on April 28, 2007. The preliminary estimate of purchase consideration is calculated as if the acquisition had taken place on May 22, 2009.

SFAS No. 141R requires, among other things, that most assets acquired and liabilities assumed be recognized at their fair values, as determined in accordance with SFAS No. 157, Fair Value Measurements, as of the acquisition date and that the fair value of acquired in-process research and development be recorded on the balance sheet regardless of the likelihood of success as of the acquisition date. In addition, SFAS No. 141R establishes that the consideration transferred be measured at the closing date of the merger at the then-current market price, which may be different than the amount of consideration assumed in these unaudited pro forma condensed combined financial statements.

SFAS No. 157, as amended, defines the term "fair value" and sets forth the valuation requirements for any asset or liability measured at fair value, expands related disclosure requirements and specifies a hierarchy of valuation

techniques based on the nature of the inputs used to develop the fair value measures. Fair value is defined in SFAS No. 157, as amended, as the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date. This is an exit price concept for the valuation of the asset or liability. In addition, market participants are assumed to be buyers and sellers in the principal (or the most advantageous) market for the asset or liability. Fair value measurements for an asset assume

**Table of Contents**

the highest and best use by these market participants. As a result of these standards, NetApp may be required to record assets which are not intended to be used or sold and/or to value assets at fair value measures that do not reflect NetApp's intended use of those assets. Many of these fair value measurements can be highly subjective and it is also possible that other professionals, applying reasonable judgment to the same facts and circumstances, could develop and support a range of alternative estimated amounts.

Under the purchase method of accounting, the assets acquired and liabilities assumed will be recorded as of the completion of the merger, primarily at their respective fair values and added to those of NetApp. Financial statements and reported results of operations of NetApp issued after completion of the merger will reflect these values, but will not be retroactively restated to reflect the historical financial position or results of operations of Data Domain.

Under SFAS No. 141R, acquisition-related transaction costs (i.e., advisory, legal, valuation, other professional fees) and certain acquisition-related restructuring charges impacting the target company are expensed in the period in which the costs are incurred. Total advisory, legal, regulatory and valuation costs expected to be incurred by NetApp are estimated to be approximately \$14 million to \$18 million. An estimated \$16 million of these transaction costs have been reflected in the unaudited pro forma condensed combined balance sheet; however, these costs have been excluded from the unaudited pro forma condensed combined statements of operations. The transaction costs for Data Domain are estimated to be \$18 million. Data Domain's expenses and cash outflows have not been reflected in the unaudited pro forma condensed combined balance sheet and statements of operations.

**3. Accounting Policies**

Upon completion of the merger, NetApp will further review Data Domain's accounting policies. As a result of that review, it may become necessary to harmonize the combined entity's financial statements to conform to those accounting policies that are determined to be more appropriate for the combined entity.

**4. Preliminary Estimate of Consideration Expected to be Transferred**

The following is a preliminary estimate of consideration expected to be transferred to effect the acquisition of Data Domain.

<b>Purchase Price:</b>	<b>(In thousands)</b>
Cash	\$ 1,023,272
Common stock	888,506
Assumed and converted stock options	258,748
Assumed and converted restricted stock units	38,799
Total purchase price	2,209,325
Portion of assumed stock options and restricted stock units that are unearned or otherwise subject to future service requirements and therefore will be expensed in the financial statements prospectively rather than included in the purchase accounting	(159,731)
Net purchase price	\$ 2,049,594

The preliminary estimate of merger consideration is calculated as if the acquisition had taken place on May 22, 2009, based upon NetApp's closing common stock price of \$18.46. As described in Note 1. Description of Transaction, the total purchase price can change based on the average closing price for NetApp common stock prior to closing. Using NetApp's closing common stock price of \$19.34 on June 2, 2009, as well as the applicable exchange ratio calculated using NetApp's average closing common stock price for the 10 business days from May 14, 2009 to May 28, 2009, the preliminary estimate of merger consideration would have increased by approximately \$5.4 million. This increase would be recorded as additional goodwill.

The cash consideration is calculated by multiplying the outstanding common shares of Data Domain as of May 22, 2009 of approximately 62,205,000 by the agreed cash consideration amount of \$16.45 per share.

**Table of Contents**

The stock consideration has been calculated using an exchange ratio of 0.7738 NetApp shares per Data Domain share. The exchange ratio has been calculated as \$13.55 divided by the average closing price for NetApp common stock for the 10 business days from May 6, 2009 to May 19, 2009 of \$17.51. The stock consideration has been determined by multiplying the resulting 48,131,000 NetApp shares to be issued to Data Domain stockholders with the closing price on May 22, 2009 of \$18.46.

Based on the option exchange ratio in the agreement Data Domain's outstanding options have been assumed and converted into approximately 21,457,000 NetApp options using an exchange ratio of 1.7131 NetApp options per Data Domain option. The fair value of the assumed and converted options have been estimated using a Black-Scholes valuation model with the following weighted-average assumptions: volatility of 47.58%; risk-free interest rate of 0.50% to 3.05%, average expected remaining life of 2.1 years and dividend yield of zero.

Based on the same exchange ratio as described above for Common Stock, Data Domain's outstanding restricted stock units and restricted stock awards have been assumed and converted into approximately 946,000 NetApp restricted stock units. Upon vesting, the holders will receive \$16.45 in cash per unit and NetApp shares based on a conversion ratio of 0.7738. The fair value of the assumed and converted restricted stock units has been estimated using the closing price of NetApp's common stock as of May 22, 2009.

The expense associated with the portion of the assumed and converted stock options and restricted stock units that are subject to future service requirements and therefore not included in the purchase accounting have not been included in the pro forma statements of operations.

**5. Estimate of Assets to be Acquired and Liabilities to be Assumed**

The following is a preliminary estimate of the assets to be acquired and the liabilities to be assumed by NetApp in the merger, reconciled to the estimate of the consideration expected to be transferred:

	<b>(In thousands)</b>
Net tangible assets acquired	\$ 289,648
Other asset/liability adjustments related to:	
Inventory(a)	1,500
Deferred revenue(b)	18,933
Other(c)	(4,300)
Acquired intangibles(d)	419,000
Deferred tax liability(e)	(142,184)
Goodwill(f)	1,466,997
Contingencies(g)	
Total preliminary estimated purchase price	\$ 2,049,594

- a) As of the effective date of the merger, inventories are required to be measured at fair value. NetApp does not have detailed information at this time as to the specific finished goods on hand, evaluation units, or the specific types and nature of raw materials and supplies. The preliminary fair values adjustment to inventory is \$1.5 million primarily to the finished goods inventory and evaluation units of Data Domain.

- b) Data Domain's deferred revenue relates primarily to support and service obligations, which are deferred and recognized ratably over the term of each agreement. The preliminary fair values have been estimated based on preliminary assumptions and will be updated upon the closing of the acquisition.
- c) Other relates to certain assets that will not be assumed by NetApp and an additional liability for cash settlement of earned restricted stock units.
- d) As of the effective date of the merger, identifiable intangible assets are required to be measured at fair value and these acquired assets could include assets that are not intended to be used or sold or that are intended to be used in a manner other than their highest and best use. For purposes of these unaudited pro forma condensed combined financial statements, it is assumed that all assets will be used and that all assets will be used in a manner that represents the highest and best use of those assets.

**Table of Contents**

Under the HSR Act and other relevant laws and regulations, there are significant limitations regarding what NetApp can learn about the specifics of the Data Domain intangible assets. Obtaining the necessary information to complete the valuation of such intangible assets could take several months. As a result, the final determination of the values of such intangible assets will differ from these preliminary valuations and the differences could be material. As of the completion of the acquisition, NetApp will update the preliminary valuation of the acquired intangible assets.

The identifiable intangible assets acquired are as follows:

<b>Acquired Intangible Assets:</b>	<b>Estimated Fair Value</b>	<b>Estimated Useful Life</b>
	<b>(in thousands)</b>	
Existing technology	\$ 217,000	5 years
In-process research and development	17,000	5 years
Existing customer relationships	147,500	5 years
Trade name	35,500	5 years
Backlog	2,000	1 year
Total acquired intangible assets	\$ 419,000	

Existing technology acquired primarily consists of Data Domain's data invulnerability architecture, stream-informed segment layout architecture, replication technology and global compression. For the purposes of these pro forma financial statements it is assumed that these assets will be amortized using the straight line method over an estimated useful life of 5 years.

In-process research and development relates to R&D projects that as of the acquisition date have not been completed. Acquired in-process research and development assets are initially recognized at fair value and are classified as indefinite-lived assets until the successful completion or abandonment of the associated research and development efforts. Accordingly, during the development period after the acquisition date, these assets will not be amortized into earnings; instead these assets will be subject to periodic impairment testing. Upon successful completion of the development process for an acquired in-process research and development project, determination as to the useful life of the asset will be made; at that point in time, the asset would then be considered a finite-lived intangible asset and NetApp would begin to amortize the asset into earnings. For the purposes of these pro forma financial statements it is assumed that it will take approximately 6 months to complete the on-going projects and that the acquired asset then will be amortized using the straight line method over an estimated useful life of 5 years.

Existing customer relationships consists of Data Domain's contractual relationships and customer loyalty especially related to their resellers, value added resellers, distributors and direct end customers. For the purposes of these pro forma financial statements it is assumed that these assets will be amortized using the straight line method over an estimated useful life of 5 years.

Trade name primarily relates to the Data Domain brand and their various registered product names. For the purposes of these pro forma financial statements it is assumed that these assets will be amortized using the straight

line method over an estimated useful life of 5 years.

Backlog relates to Data Domain's backlog as of the date of the acquisition. It is expected that this asset will be amortized within the first year after the acquisition.

- e) To record the net deferred tax liability associated with the estimated fair value adjustment of assets to be acquired and liabilities to be assumed, offset by the deferred tax asset associated with assumed stock options and restricted stock units, recorded at an estimated 37% weighted average statutory tax rate in the jurisdictions where the fair value adjustments may occur, primarily the United States of America.
- f) Goodwill is calculated as the difference between the preliminary acquisition date fair value of the consideration expected to be transferred and the values assigned to the assets acquired and liabilities assumed. Goodwill is not amortized.
- g) As of the effective date of the merger, except as specifically excluded, contingencies are required to be measured at fair value, if the acquisition-date fair value of the asset or liability arising from a contingency can



**Table of Contents**

be determined. NetApp has currently not identified any pre-acquisition contingencies where a liability is probable and the amount of the liability can be reasonably estimated. If information becomes available prior to the end of the purchase price measurement period, which would indicate that a liability which existed at the acquisition date, is probable and the amount can be reasonably estimated, such items will be included in the purchase price allocation and result in additional goodwill.

In addition, Data Domain has recorded provisions for uncertain tax positions. Income taxes are exceptions to both the recognition and fair value measurement principles of SFAS No. 141R, as amended, and continue to be accounted for under the guidance of SFAS No. 109, Accounting for Income Taxes (SFAS 109), as amended, and related interpretative guidance. As such, the combined company would continue to account for the Data Domain uncertain tax positions using FIN 48, *Accounting for Uncertainty in Income Taxes*. NetApp has currently not identified any basis for modifying Data Domain's current application of these standards. Therefore, for the purpose of these unaudited pro forma condensed combined financial statements, NetApp has not adjusted the Data Domain recorded book values for uncertain tax positions. This assessment is preliminary and subject to change.

**6. Pro Forma Adjustments**

This note should be read in conjunction with *Note 1. Description of Transaction*; *Note 2. Basis of Presentation*; *Note 4. Estimate of Consideration Expected to be Transferred*; and *Note 5. Estimate of Assets to be Acquired and Liabilities to be Assumed*. Adjustments included in the column under the heading "Pro Forma Adjustments" represent the following:

- a) To record the cash portion of the merger consideration estimated to be \$1,023.3 million, as well as the estimated transaction costs of NetApp of approximately \$16.0 million.
- b) To adjust acquired inventory to an estimate of fair value. NetApp's cost of sales will reflect the increased valuation of Data Domain's inventory as the acquired inventory is sold, which for purposes of these unaudited pro forma condensed combined financial statements is assumed will occur within the first year post-acquisition. There is no continuing impact of the acquired inventory adjustment on the combined operating results and as such is not included in the unaudited pro forma condensed combined statement of operations.
- c) To record goodwill as a result of the merger.
- d) To record intangible assets acquired as a result of the merger and eliminate historical Data Domain intangible assets, as follows:

	<b>(In thousands)</b>
Eliminate Data Domain's historical intangible assets	\$ (100)
Estimated fair value of intangible assets acquired	419,000
<b>Total</b>	<b>\$ 418,900</b>

- e) To adjust the fair value of Data Domain's long-term investments and restricted cash.
- f) To record the earned portion of assumed restricted stock units that will be settled in cash.

g) To adjust the carrying value of deferred revenue to the estimated fair value and write-off deferred revenue where no legal performance obligation exists subsequent to the closing of the merger.

h) To record the net deferred tax liability associated with the estimated fair value adjustment of assets to be acquired and liabilities to be assumed, offset by the deferred tax asset associated with assumed stock options and restricted stock units, recorded at an estimated 37% weighted average statutory tax rate in the jurisdictions where the fair value adjustments may occur, primarily the United States of America.

i) To adjust for the par value of the additional NetApp common shares issued as part of the merger.

**Table of Contents**

j) To record the common shares issued as a portion of the merger consideration, at fair value less par, and to eliminate Data Domain's additional paid-in capital, as follows:

	<b>(In thousands)</b>
Eliminate Data Domain additional paid in capital	\$ (308,619)
Issuance of NetApp common stock, par value	(48)
Issuance of NetApp common stock	888,506
Additional Data Domain stock options assumed by NetApp	258,748
Additional Data Domain restricted stock units assumed and converted by NetApp	38,799
Portion of assumed stock options and restricted stock units that are unearned or otherwise subject to future service requirements and therefore will be expensed in the financial statements prospectively rather than included in the purchase accounting	(159,731)
<b>Total</b>	<b>\$ 717,655</b>

k) To eliminate Data Domain's accumulated deficit of \$17.4 million, and to reflect NetApp's estimated transaction costs of approximately \$16.0 million.

l) To eliminate Data Domain's accumulated other comprehensive loss.

m) To reclassify certain Data Domain historical revenue and cost of revenue amounts to conform to NetApp reporting methodology.

n) Related to the amortization of purchased existing technologies and in-process research and development included as a part of the cost of sales for the product revenue stream.

<b>Acquired Intangible Assets:</b>	<b>Estimated Value</b>	<b>Expected Life</b>	<b>Amortization for Twelve Months Ended April 25, 2008</b>	<b>Amortization for Nine Months Ended January 23, 2009</b>
Existing technologies	\$ 217,000	5 years	\$ 43,400	\$ 32,550
In process research and development	\$ 17,000	5 years	\$ 1,700	\$ 2,550
<b>Total</b>	<b>\$ 234,000</b>		<b>\$ 45,100</b>	<b>\$ 35,100</b>

For purposes of these pro forma financials, it is assumed that it will take 6 months to complete the acquired in-process research and development projects at which time the fair value will be amortized on a straight line basis over an estimated useful life of 5 years

o) To record the amortization of other acquired intangible assets included as a component of sales and marketing operating expenses.

<b>Acquired Intangible Assets:</b>	<b>Estimated Value</b>	<b>Expected Life</b>	<b>Amortization for Twelve Months Ended April 25, 2008</b>	<b>Amortization for Nine Months Ended January 23, 2009</b>
Existing customer relationships	\$ 147,500	5 years	\$ 29,500	\$ 22,125
Trade name	35,500	5 years	7,100	5,325
Total amortization	\$ 183,000		\$ 36,600	\$ 27,450

Since there is no continuing impact of the amortization of backlog on the combined operating results, the amortization of backlog has not been included in the unaudited pro forma condensed combined statement of operations.

**Table of Contents**

p) To adjust for the assumed reduction in interest income due to reduced cash balances as a result of the cash consideration issued as part of the merger.

	<b>Reduction for Twelve Months Ended April 25, 2008</b>	<b>Reduction for Nine Months Ended January 23, 2009</b>
<b>Assumed Interest Income Reduction</b>		
Reduction in interest income based on approximately \$1,023.3 million of cash used at an effective weighted average interest rate of 1.20% and 0.65% for the twelve months ended April 25, 2008 and the nine months ended January 23, 2009 respectively	\$ 12,276	\$ 4,975

The effective interest rate has been determined based on the actual interest recognized during the presented twelve-and nine-month periods.

q) To record the impact of the provision (benefit) for income taxes due to the merger.

**Additional Tax Provision (Benefit) related to the Pro Forma Adjustments**

	<b>For the Twelve Months Ended April 25, 2008</b>	<b>For the Nine Months Ended January 23, 2009</b>
Total impact of pro forma adjustments	\$ (93,976)	\$ (67,525)
Tax rate (1)	37%	37%
Tax (benefit) of pro forma adjustments	\$ (34,771)	\$ (24,984)

(1) Represents an estimate of the weighted-average statutory tax rates in the jurisdictions primarily the United States of America where the fair value adjustments may occur.

r) Related to the number of additional shares of common stock issued in relation to the merger based on the closing price of NetApp common stock as of May 22, 2009, the merger closing date assuming that the shares had been issued as of April 28, 2007.

s) Related to the additional diluted impact of the stock options and restricted stock units assumed upon closing of the merger. The diluted impact has been estimated using the treasury method assuming the shares for both the twelve months ended April 25, 2008 would be bought back at the closing price of NetApp's shares at May 22, 2009. The diluted impact of the outstanding and assumed stock options and restricted stock units for the nine months ended January 23, 2009 has been excluded as the impact would have been anti-dilutive.



**Table of Contents**

**COMPARISON OF STOCKHOLDERS RIGHTS**

NetApp and Data Domain are both incorporated under Delaware law. Any differences, therefore, between the rights of NetApp stockholders and Data Domain stockholders are due to differences in each company's respective certificate of incorporation, bylaws and agreements, if any, defining the rights of securityholders. Upon completion of the merger, Data Domain stockholders, other than those who elect to exercise their statutory appraisal rights, will exchange their shares of Data Domain common stock for cash and shares of NetApp common stock, at which time they will become stockholders of NetApp and their rights as stockholders will be governed by NetApp's certificate of incorporation and bylaws.

The summary below highlights certain material differences between the rights of holders of NetApp common stock and the rights of holders of Data Domain common stock. The summary does not purport to be a complete description of the differences. The certificates of incorporation and bylaws of NetApp and Data Domain are subject to amendment in accordance with their respective terms. Copies of the governing corporate instruments are available, without charge, to any person, including any beneficial owner to whom this proxy statement/prospectus is delivered, by following the instructions listed under "Where You Can Find More Information" beginning on page 119.

In addition to rights under Data Domain's certificate of incorporation and bylaws, certain Data Domain stockholders have rights under that certain Amended and Restated Investors' Rights Agreement, as amended, by and among Data Domain and the investors listed on Schedule A thereto (the "rights agreement"). The rights agreement, which provides for demand, "piggy back" and short-form registration rights, will terminate automatically upon the completion of the merger. A copy of the rights agreement is filed as an exhibit to Data Domain's Registration Statement on Form S-1, which was initially filed with the SEC on March 30, 2007, the November 2007 amendments thereto are filed as exhibits to Data Domain's Registration Statement on Form S-1, which was initially filed with the SEC on November 1, 2007.

**Table of Contents**

**NetApp**

**Data Domain**

**AUTHORIZED CAPITAL STOCK**

NetApp is authorized to issue two classes of stock to be designated common stock, consisting of 885,000,000 shares, par value \$0.001 per share, and preferred stock, consisting of 5,000,000 shares, par value \$0.001 per share.

NetApp's preferred stock may be issued from time to time in one or more series, without further stockholder approval. NetApp's board of directors is authorized to fix or alter the rights, preferences, privileges and restrictions granted to or imposed upon each series of preferred stock, and the number of shares constituting any such series and the designation thereof. The rights, privileges, preferences and restrictions of any such additional series may be subordinated to, pari passu with, or senior to the rights, preferences and restrictions of any present or future class or series of preferred stock or common stock.

NetApp's board of directors is also authorized to increase or decrease the number of shares of any series of preferred stock prior or subsequent to the issue of that series, but not below the number of shares of such series then outstanding. If the board of directors decreases the number of shares of any series in such manner, the shares constituting such decrease will resume the status they had prior to the adoption of the resolution originally fixing the number of shares of such series.

Data Domain is authorized to issue two classes of stock to be designated common stock, consisting of 300,000,000 shares, par value \$0.0001 per share, and preferred stock, consisting of 20,000,000 shares, par value \$0.0001 per share.

Data Domain's board of directors is authorized, without further stockholder approval, to provide for the issuance of preferred stock in series, and, by filing a certificate pursuant to the applicable provisions of Delaware law, to establish from time to time the number of shares to be included in the series and to fix the designation, powers, preferences and rights of each of these series and any qualifications, limitations or restrictions thereof.

The number of authorized shares of preferred stock may be increased or decreased (but not below the number of shares thereof then outstanding) by the affirmative vote of the holders of a majority of the voting power of all of the outstanding shares of Data Domain's capital stock entitled to vote thereon, without a vote of the holders of the preferred stock, or of any series thereof, subject to certain exceptions.



**Table of Contents**

**NetApp**

**Data Domain**

**AMENDMENT TO THE CERTIFICATE OF INCORPORATION**

Under Delaware law, an amendment to the certificate of incorporation requires (i) the approval of the board of directors, (ii) the approval of the holders of a majority of the outstanding stock entitled to vote upon the proposed amendment, and (iii) the approval of the holders of a majority of the outstanding stock of each class entitled to vote thereon as a class.

NetApp reserves the right to amend, alter, change or repeal any provision contained in its certificate of incorporation. Notwithstanding the foregoing, the affirmative vote of the holders of at least 66 and 2/3% of NetApp's outstanding voting stock entitled to vote at an election of directors is required to amend certain provisions of the certificate of incorporation, including provisions relating to (i) the amendment of the bylaws, (ii) the number and election of directors, (iii) stockholder meetings, (iv) the indemnification of officers and directors, and (v) the requirements for amending the certificate of incorporation.

Data Domain reserves the right to amend or repeal any provision contained in its certificate of incorporation in the manner prescribed by Delaware law. In addition to any vote of the holders of any class or series of Data Domain's stock required by law or by the certificate of incorporation, the affirmative vote of the holders of a majority of the voting power of all of the then outstanding shares of Data Domain's capital stock entitled to vote generally in the election of directors, voting together as a single class, shall be required to amend or repeal the provisions of the certificate of incorporation.

However, any amendment or repeal of the provisions of the certificate of incorporation relating to (i) the election of directors, (ii) the liability of directors, (iii) the amendment of Data Domain's bylaws, or (iv) the amendment of Data Domain's certificate of incorporation will require the affirmative vote of the holders of at least two-thirds of the voting power of all of the then outstanding shares of Data Domain's capital stock entitled to vote generally in the election of directors, voting together as a single class.

**AMENDMENT TO BYLAWS**

Under Delaware law, bylaws may be adopted, amended or repealed by the stockholders entitled to vote, and by the board of directors if the corporation's certificate of incorporation confers the power to adopt, amend or repeal the corporation's bylaws upon the directors.

NetApp's certificate of incorporation authorizes the board of directors to make, repeal, alter, amend and rescind any or all of NetApp's bylaws.

Data Domain's certificate of incorporation authorizes the board of directors to adopt, amend or repeal any or all of Data Domain's bylaws.

The certificate of incorporation also provides that the bylaws may be amended by the affirmative vote of the holders of at least 66 and 2/3% of the outstanding shares of NetApp's voting stock entitled to vote at an election of directors.

In addition, the certificate of incorporation authorizes Data Domain's stockholders to adopt, amend or repeal the bylaws, provided that, in addition to any vote of the holders of any class or series of Data Domain's stock required by law or by the certificate of incorporation, the affirmative vote of the holders of at least two-thirds of the voting power of all of the then-outstanding shares of Data Domain's capital stock entitled to vote generally in the election of directors, voting together as a single class, is required for any adoption, amendment or repeal of the bylaws.

**Table of Contents**

**NetApp**

**Data Domain**

**SPECIAL MEETING OF STOCKHOLDERS**

NetApp's certificate of incorporation provides that special meetings of the stockholders may only be called by NetApp's chief executive officer, president, chairman of the board, or a majority of the members of the board of directors.

Special meetings of Data Domain's stockholders may be called only by (i) the board of directors, (ii) the chairman of the board, or (iii) the chief executive officer.

**STOCKHOLDER ACTION**

**Action by Written Consent without a Meeting**

NetApp's certificate of incorporation and bylaws provide that NetApp's stockholders may only take action by meetings held pursuant to NetApp's certificate of incorporation and bylaws and may not take any action by written consent without a meeting.

Data Domain's certificate of incorporation provides that any action required or permitted to be taken by Data Domain's stockholders must be effected at a duly called annual or special meeting of stockholders and may not be effected by written consent.

**Quorum**

NetApp's bylaws provide that the holders of a majority of the stock issued and outstanding and entitled to vote at a meeting of the stockholders, present in person or represented by proxy, shall constitute a quorum at all meetings of the stockholders for the transaction of business, except as otherwise provided by statute or by NetApp's certificate of incorporation.

Data Domain's bylaws provide that the holders of a majority of the voting power of the outstanding shares entitled to vote generally in the election of directors, represented in person or by proxy, shall constitute a quorum at a meeting of stockholders, except that when specified business is to be voted on by a class or series voting separately as a class or series, the holders of a majority of the voting power of the shares of that class or series shall constitute a quorum for the transaction of such business for the purposes of taking action on the specified business.

**STOCKHOLDER PROPOSALS AND NOMINATIONS**

With respect proposals relating to the election of directors, NetApp's bylaws state that nominations by stockholders must be preceded by notification in writing received by the secretary of the corporation not less than 120 days prior to any meeting of stockholders called for the election of directors. Such notification shall contain the written consent of each proposed nominee to serve as a director if so elected and the following information as to each proposed nominee and as to each person, acting alone or in conjunction with one or more other persons as a partnership, limited partnership, syndicate or other group, who participates or is expected to participate in making such nomination or in organizing, directing or financing such nomination or solicitation of proxies to vote for the nominee:

the name, age, residence, address, and business address of each proposed nominee and of each

Data Domain's bylaws provide that nominations of persons for election to the board of directors and proposals of business to be transacted by the stockholders may be made at an annual meeting of stockholders by any stockholder of record who was a stockholder of record at the time of the giving of the notice provided for below who is entitled to vote at the meeting and who has complied with the notice provisions of the bylaws.

To be timely, a stockholder's notice must be delivered to Data Domain's secretary at the company's principal executive offices not less than forty-five (45) or more than seventy-five (75) days prior to the first anniversary of the date on which Data Domain first mailed its proxy materials for the preceding year's annual meeting of stockholders, provided that if no proxy materials were mailed by Data Domain in connection with the preceding year's

**Table of Contents**

**NetApp**

**Data Domain**

such person;

the principal occupation or employment, the name, type of business and address of the corporation or other organization in which such employment is carried on of each proposed nominee and of each such person;

the amount of NetApp's stock owned beneficially, either directly or indirectly, by each proposed nominee and each such person; and

a description of any arrangement or understanding of each proposed nominee and of each such person with each other or any other person regarding future employment or any future transaction to which NetApp will or may be a party.

With respect to stockholder proposals other than for the election of directors, the stockholder must have given timely notice thereof in writing to NetApp's secretary. To be timely, a stockholder's notice must be delivered to or mailed and received at NetApp's principal executive offices not less than 120 days prior to the date of the meeting. A stockholder's notice to the secretary shall set forth as to each matter the stockholder proposes to bring before the meeting (a) a brief description of the business desired to be brought before the meeting and the reasons for conducting such business at the meeting, (b) the name and address, as they appear on NetApp's books, of the stockholder proposing such business, and the name and address of the beneficial owner, if any, on whose behalf the proposal is made, (c) the class and number of NetApp's shares that are owned beneficially and of record by such stockholder of record and by the beneficial owner, if any, on whose behalf of the proposal is made and (d) any material interest of such stockholder of record and the beneficial owner, if any, on whose behalf the proposal is made in such business.

annual meeting, or if the date of the annual meeting is advanced more than thirty (30) days prior to or delayed by more than thirty (30) days after the anniversary of the preceding year's annual meeting, notice by the stockholder will be timely only if it is so delivered not later than the close of business on the later of (x) the 90th day prior to such annual meeting or (y) the 10th day following the day on which public announcement of the date of the meeting is first made.

For nominations or other business to be properly brought before an annual meeting by a stockholder, (i) the stockholder must have given timely notice thereof in writing to Data Domain's Corporate Secretary as described above, (ii) the proposed business must be a proper matter for stockholder action under the Delaware law, (iii) if the stockholder, or the beneficial owner on whose behalf a proposal or nomination is made, has provided Data Domain with a stockholder's notice (as described below), the stockholder or beneficial owner must, in the case of a proposal, have delivered prior to the meeting a proxy statement and form of proxy to holders of at least the percentage of Data Domain's voting shares required under applicable law to carry a proposal, or, in the case of a nomination or nominations, have delivered prior to the meeting a proxy statement and form of proxy to holders of a percentage of Data Domain's voting shares reasonably believed by the stockholder or beneficial holder to be sufficient to elect the nominee or nominees proposed to be nominated by the stockholder, and must, in either case, have included in the materials the solicitation notice and (iv) if the related solicitation notice has not been timely provided, the stockholder or beneficial owner proposing the business or nomination must not have solicited a number of proxies sufficient to have required the delivery of such a solicitation notice.

The stockholder's notice must set forth (a) as to each person whom the stockholder proposes to nominate for election or re-election as a director all information relating to the person as would be required to be disclosed in solicitations of proxies for the election of

the nominees as directors pursuant to Regulation 14A under the Securities Exchange Act of 1934, as amended, and the person's written consent to serve as a director if elected; (b) as to any other business that the stockholder proposes to bring before the meeting, a brief description of the business, the reasons for conducting the business at the meeting and any material interest in the business of the stockholder and the beneficial owner, if any, on whose behalf the proposal is made; and (c) as to the stockholder giving the notice and the beneficial owner, if any, on whose behalf the nomination or proposal is made (i) the name and address of the stockholder, as they appear on Data

**Table of Contents**

**NetApp**

**Data Domain**

Domain's books, and of the beneficial owner, (ii) the class and number of Data Domain's shares that are owned beneficially and of record by the stockholder and such beneficial owner, and (iii) whether either the stockholder or beneficial owner intends to deliver a proxy statement and form of proxy to holders of, in the case of a proposal, at least the percentage of the Data Domain's voting shares required under applicable law to carry the proposal or, in the case of a nomination or nominations, a sufficient number of holders of Data Domain's voting shares to elect the nominee or nominees.

**BOARD OF DIRECTORS**

**Number of Directors**

NetApp's certificate of incorporation provides that the number of directors is to be determined by resolution of the board of directors.

NetApp's bylaws provide that the number of directors constituting the whole board is to be determined by resolution of the board of directors, provided that no decrease in the number of directors shall have the effect of shortening the term of an incumbent director.

Subject to the rights of the holders of any series of preferred stock to elect additional directors under specified circumstances, Data Domain's certificate of incorporation and bylaws provide that the number of directors shall be fixed from time to time exclusively by the board of directors pursuant to a resolution adopted by a majority of the authorized number of directors, including vacancies, and may not be fixed by any other persons.

Data Domain's bylaws authorize the board of directors to fix the number of directors, subject to certain exceptions that are not applicable at the present time.

**Classification**

NetApp does not have a classified board of directors.

Subject to specified exceptions, Data Domain's board of directors shall be divided into three classes: Class I, Class II and Class III, and each director shall serve for a term ending on the third annual meeting of stockholders following the annual meeting of stockholders at which such director was elected.

**Removal**

NetApp's bylaws provide that any director or the entire board of directors may be removed, with or without cause, by the holders of a majority of NetApp's shares entitled to vote at an election of directors.

Subject to the rights of the holders of any series of preferred stock then outstanding, any director, or the entire board of directors, may be removed from office at any time, but only for cause and only by the affirmative vote of the holders of a majority of the voting power of all of the then-outstanding shares of Data Domain's capital stock entitled to vote generally in the election of directors, voting together as a single class.



**Table of Contents****NetApp****Data Domain****Special Meeting of the Board**

NetApp's bylaws provide that a special meeting of the board of directors may be called by the chairman of the board or the chief executive officer on 12 hours notice to each director. In addition, special meetings of the board of directors may be called by the chief executive officer or secretary in the same manner and with the same notice on the written request of a majority of the members of the board of directors, unless the board of directors consists of only one director, in which case special rules apply. A written waiver of notice, signed by the person entitled thereto, whether before or after the time of the meeting stated therein, shall be deemed equivalent to notice.

Data Domain's bylaws provide that special meetings of the board directors shall be called at the request of the chairman of the board, the chief executive officer or a majority of the number of directors necessary to constitute a quorum.

**COMPARATIVE MARKET PRICES AND DIVIDENDS**

NetApp and Data Domain common stock trades on the NASDAQ Global Select Market. The following table sets forth the high and low sales prices of shares of NetApp and Data Domain common stock as reported on the NASDAQ Global Select Market.

<b>NetApp Common Stock</b>	<b>High</b>	<b>Low</b>	<b>Data Domain Common Stock</b>	<b>High</b>	<b>Low</b>
<b>2007</b>			<b>2007</b>		
Quarter ended April 27, 2007			Quarter ended June 30, 2007 (beginning on June 27, 2007)	\$ 25.40	\$ 19.94
	\$ 40.62	\$ 34.69	Quarter ended September 30, 2007	32.73	21.47
Quarter ended July 27, 2007	39.08	28.50	Quarter ended December 31, 2007	41.14	23.86
Quarter ended October 26, 2007	32.38	22.51	<b>2008</b>		
<b>2008</b>			Quarter ended March 31, 2008	26.49	18.93
Quarter ended January 25, 2008	32.08	19.58	Quarter ended June 30, 2008	25.16	20.00
Quarter ended April 25, 2008	24.03	19.00	Quarter ended September 30, 2008	23.93	19.30
Quarter ended July 25, 2008	27.49	21.32	Quarter ended December 31, 2008	22.46	14.83
Quarter ended October 24, 2008	26.78	11.51	<b>2009</b>		
<b>2009</b>			Quarter ended March 31, 2009	19.61	10.25
Quarter ended January 23, 2009	15.69	10.39	Quarter ending June 30, 2009 (through June 3, 2009)	33.09	11.73
Quarter ended April 24, 2009	19.36	12.39			
Quarter ending July 31, 2009 (through June 3, 2009)	20.95	16.71			

- (1) NetApp's fiscal year ends on the last Friday of April.
- (2) Data Domain began trading on the NASDAQ Global Select Market on June 27, 2007.

Neither NetApp nor Data Domain has declared dividends on its common stock during the last three fiscal years.

On May 19, 2009, the last full trading day before the initial public announcement of the potential merger, the high and low sales prices of shares of NetApp common stock as reported on the NASDAQ Global Select Market were \$18.48 and \$17.35, respectively. On June 2, 2009, the last full trading day before the public announcement of the revised terms of the merger, the high and low sales prices of shares of NetApp common stock as reported on the NASDAQ Global Select Market were \$20.16 and \$19.20, respectively. On [ ], 2009, the last full trading

**Table of Contents**

day before the date of this proxy statement/prospectus, the high and low sale prices of shares of NetApp common stock as reported on the NASDAQ Global Select Market were \$[ ] and \$[ ], respectively.

On May 19, 2009, the last full trading day before the initial public announcement of the potential merger, the high and low sales prices of shares of Data Domain common stock as reported on the NASDAQ Global Select Market were \$17.53 and \$16.77, respectively. On June 2, 2009, the last full trading day before the public announcement of the revised terms of the merger, the high and low sales prices of shares of Data Domain common stock as reported on the NASDAQ Global Select Market were \$31.74 and \$30.80, respectively. On [ ], 2009, the last full trading day for which data was available before the date of this proxy statement/prospectus, the high and low sales prices of shares of Data Domain common stock as reported on the NASDAQ Global Select Market were \$[ ] and \$[ ], respectively.

As of [ ], 2009, the last date prior to printing this document for which it was practicable to obtain this information, there were approximately [ ] registered holders of NetApp common stock and approximately [ ] registered holders of Data Domain common stock.

NetApp stockholders and Data Domain stockholders are advised to obtain current market quotations for NetApp common stock and Data Domain common stock. The market price of NetApp common stock and Data Domain common stock will fluctuate between the date of this document and the completion of the merger. No assurance can be given concerning the market price of NetApp common stock or Data Domain common stock before or after the effective date of the merger.

**DATA DOMAIN PROPOSAL 2 POSSIBLE ADJOURNMENT OR POSTPONEMENT OF THE DATA DOMAIN SPECIAL MEETING**

In this proposal, we are asking you to authorize the holder of any proxy solicited by Data Domain's board of directors to vote in favor of granting discretionary authority to the proxy or attorney-in-fact to adjourn or postpone the special meeting to another time and place for the purpose of soliciting additional proxies. If our stockholders approve the adjournment proposal, we could adjourn or postpone the special meeting and any adjourned or postponed session of the special meeting and use the additional time to solicit additional proxies, including the solicitation of proxies from our stockholders that have previously voted.

If at the special meeting the number of shares of our common stock represented and voting in favor of adoption of the merger agreement is not sufficient to adopt the merger agreement, we may postpone or move to adjourn the special meeting in order to enable Data Domain's board of directors to solicit additional proxies in respect of such proposal. In the event of a motion to adjourn the special meeting, we will ask our stockholders to vote only upon the adjournment proposal, and not the proposal regarding the adoption of the merger agreement.

Failure of the adjournment proposal to pass will not affect the ability of the holder of any proxy solicited by us to adjourn the special meeting in the event that a sufficient number of shares of our common stock are not represented at the special meeting to establish a quorum, or for any other lawful purpose.

Accordingly, the Data Domain board of directors unanimously recommends that Data Domain stockholders vote FOR Proposal 2.

**LEGAL MATTERS**

The validity of the NetApp common stock to be issued in connection with the merger will be passed upon for NetApp by Wilson Sonsini Goodrich & Rosati, Professional Corporation. Wilson Sonsini Goodrich & Rosati, Professional Corporation and Fenwick & West LLP, on behalf of Data Domain, will pass upon certain legal matters with respect to

the tax consequences of the merger.

**EXPERTS**

The consolidated financial statements and the related consolidated financial statement schedule incorporated by reference in the proxy statement/prospectus by reference from NetApp's Annual Report on Form 10-K for the

## **Table of Contents**

fiscal year ended April 25, 2008, and the effectiveness of NetApp's internal control over financial reporting have been audited by Deloitte & Touche LLP, an independent registered public accounting firm, as stated in their reports, which are incorporated herein by reference (which report on the consolidated financial statements and the related consolidated financial statement schedule expresses an unqualified opinion and includes an explanatory paragraph regarding NetApp's adoption of FIN 48, *Accounting for Uncertainty in Income Taxes*—an interpretation of FASB Statement No. 109 and Statement of Financial Accounting Standards No. 123 (revised 2004), Share-Based Payment). Such financial statements and financial statement schedule have been so incorporated, in reliance upon the reports of such firm given upon their authority as experts in accounting and auditing.

The consolidated financial statements of Data Domain, Inc. appearing in Data Domain, Inc.'s Annual Report on Form 10-K for the year ended December 31, 2008, including the schedule appearing therein, and the effectiveness of Data Domain, Inc.'s internal control over financial reporting as of December 31, 2008, have been audited by Ernst & Young LLP, independent registered public accounting firm, as set forth in their reports thereon included therein and incorporated herein by reference. Such consolidated financial statements are incorporated herein by reference in reliance upon such reports given on the authority of such firm as experts in accounting and auditing.

## **OTHER MATTERS**

As of the date of this proxy statement/prospectus, the Data Domain board of directors does not know of any other business to be presented for consideration at the special meeting. If other matters properly come before the special meeting, the persons named in the accompanying form of proxy intend to vote on any other matters based on their best judgment, and they intend to vote the shares as the Data Domain board of directors may recommend.

## **DATA DOMAIN STOCKHOLDER PROPOSALS**

Data Domain will hold a 2010 annual meeting of stockholders only if the merger is not completed. If it is determined that the merger will not be completed as contemplated by the merger agreement, and stockholder proposals for inclusion in Data Domain's proxy statement and form of proxy relating to its annual meeting of stockholders to be held in 2010 must be received by Data Domain's Corporate Secretary at Data Domain's principal executive offices no later than February 18, 2010. Stockholders wishing to bring a proposal before the annual meeting to be held in 2010 (but not include it in the proxy materials) must provide written notice of such proposal to Data Domain's Corporate Secretary at 2421 Mission College Blvd., Santa Clara, CA 95054, between April 2, 2010 and May 4, 2010.

## **WHERE YOU CAN FIND MORE INFORMATION**

NetApp has filed with the SEC a registration statement under the Securities Act that registers the distribution to Data Domain stockholders of the shares of NetApp common stock to be issued in connection with the merger. The registration statement, including the attached exhibits and schedules, contains additional relevant information about NetApp and NetApp common stock. The rules and regulations of the SEC allow NetApp to omit certain information included in the registration statement from this proxy statement/prospectus.

You may read and copy this information at the Public Reference Room of the SEC at 100 F Street, NE, Room 1580, Washington, D.C. 20549. You may obtain information on the operation of the SEC's Public Reference Room by calling the SEC at 1-800-SEC-0330. The SEC also maintains an internet website that contains reports, proxy statements and other information about issuers, like NetApp and Data Domain, who file electronically with the SEC. The address of the site is <http://www.sec.gov>. The reports and other information filed by NetApp with the SEC are also available at NetApp's website at <http://www.netapp.com>. The reports and other information filed by Data Domain with the SEC are also available at Data Domain's website at <http://www.datadomain.com>. The web addresses of the SEC, NetApp, and Data Domain are included as inactive textual references only. Except as specifically incorporated

by reference in this proxy statement/prospectus, information on those web sites is not part of this proxy statement/prospectus.

**Table of Contents****Incorporation by Reference**

The SEC allows NetApp and Data Domain to incorporate by reference information in this proxy statement/prospectus. This means that NetApp and Data Domain can disclose important information to you by referring you to another document filed separately with the SEC. The information incorporated by reference is considered to be a part of this proxy statement/prospectus, except for any information that is superseded by information that is included directly in this proxy statement/prospectus.

In the first quarter of fiscal 2009, NetApp implemented a change in the reporting of warranty costs, and reported these costs in cost of product revenues. These costs were included in cost of service revenues in NetApp's Annual Report on Form 10-K for the fiscal year ended April 25, 2008 that is incorporated by reference into this proxy statement/prospectus. This change had no effect on the reported amounts of total cost of revenue, gross profit or net income for any period presented in such Annual Report on Form 10-K. NetApp's Consolidated Statements of Income data for fiscal years 2008, 2007 and 2006 that has been used to derive the Selected Consolidated Historical Financial Data of NetApp and the Selected Unaudited Pro Forma Combined Financial Data in this proxy statement/prospectus reflect a reclassification of \$27.0 million, \$22.1 million and \$18.6 million, respectively, to conform to NetApp's current period presentation.

This proxy statement/prospectus incorporates by reference the documents listed below that NetApp and Data Domain previously filed with the SEC, as well as the annexes to this proxy statement/prospectus. They contain important information about the companies and their financial condition.

**NetApp SEC Filings****(SEC File No. 0-27130; CIK No. 0001002047)**

Annual Report on Form 10-K (including the information incorporated by reference therein from NetApp's definitive proxy statement filed with the SEC on July 14, 2008)

Quarterly Report on Form 10-Q

Current Reports on Form 8-K

**Period or Date Filed**

Year ended April 25, 2008

Quarters ended July 25, 2008, October 24, 2008 and January 23, 2009

February 11, 2009; April 6, 2009; April 13, 2009; April 30, 2009; May 20, 2009 (with respect to information that was filed and not furnished) May 21, 2009; and June 3, 2009

The description of NetApp common stock set forth in a registration statement filed pursuant to Section 12 of the Exchange Act and any amendment or report filed for the purpose of updating those descriptions.

**Data Domain SEC Filings****(SEC File No. 001-33517; CIK No. 0001391984)**

Annual Report on Form 10-K, as amended on Form 10-K/A

Quarterly Report on Form 10-Q

Current Reports on Form 8-K

**Period or Date Filed**

Year ended December 31, 2008

Quarter ended March 31, 2009

February 3, 2009; May 21, 2009; and June 3, 2009

In addition, NetApp and Data Domain also incorporate by reference additional documents that either company files with the SEC under Sections 13(a), 13(c), 14 and 15(d) of the Exchange Act between the date of this proxy statement/prospectus and the date of the Data Domain special meeting. These documents include periodic reports, such as Annual Reports on Form 10-K, Quarterly Reports on Form 10-Q and Current Reports on Form 8-K, as well as proxy statements.

NetApp has supplied all information contained or incorporated by reference in this proxy statement/prospectus relating to NetApp, and Data Domain has supplied all information relating to Data Domain.

Documents incorporated by reference are available from NetApp and Data Domain without charge, excluding any exhibits to those documents unless the exhibit is specifically incorporated by reference as an exhibit in this proxy statement/prospectus. You can obtain documents incorporated by reference in this proxy statement/



**Table of Contents**

prospectus or filed as exhibits to the registration statement of which this proxy/statement prospectus is a part by requesting them in writing or by telephone from the appropriate company at the following addresses:

**NetApp, Inc.**

NetApp, Inc.  
495 East Java Drive  
Sunnyvale, CA 94089  
Investor Relations  
Telephone: (408) 822-7098

**Data Domain, Inc.**

Data Domain, Inc.  
2421 Mission College Blvd.  
Santa Clara, CA 95054  
Investor Relations  
Telephone: (408) 980-4909

*Data Domain stockholders requesting documents should do so by [        ], 2009 (which is five business days prior to the special meeting) in order to ensure you receive them before the special meeting. You will not be charged for any of these documents that you request. If you request any incorporated documents from NetApp or Data Domain, they will be mailed to you by first-class mail, or another equally prompt means, within one business day after receipt of your request.*

Neither NetApp nor Data Domain has authorized anyone to give any information or make any representation about the merger or the companies that is different from, or in addition to, that contained in this proxy statement/prospectus or in any of the materials that have been incorporated by reference in this proxy statement/prospectus. Therefore, if anyone does give you information of this sort, you should not rely on it. If you are in a jurisdiction where offers to exchange or sell, or solicitations of offers to exchange or purchase, the securities offered by this proxy statement/prospectus or the solicitation of proxies is unlawful, or if you are a person to whom it is unlawful to direct these types of activities, then the offer presented in this proxy statement/prospectus does not extend to you. The information contained herein speaks only as of the date of this proxy statement/prospectus unless the information specifically indicates that another date applies.

This proxy statement/prospectus contains a description of the representations and warranties that each of NetApp and Data Domain made to the other in the merger agreement. Representations and warranties made by NetApp, Data Domain and other applicable parties are also set forth in contracts and other documents (including the merger agreement) that are attached or filed as exhibits to this proxy statement/prospectus or are incorporated by reference into this proxy statement/prospectus. These representations and warranties were made as of specific dates, may be subject to important qualifications and limitations agreed to between the parties in connection with negotiating the terms of the merger agreement, and may have been included in the agreement for the purpose of allocating risk between the parties rather than to establish matters as facts. These materials are included or incorporated by reference only to provide you with information regarding the terms and conditions of the agreements, and not to provide any other factual information regarding Data Domain, NetApp or their respective businesses. Accordingly, the representations and warranties and other provisions of the merger agreement should not be read alone, but instead should be read only in conjunction with the other information provided elsewhere in this proxy statement/prospectus or incorporated by reference into this proxy statement/prospectus.

**Table of Contents**

**APPENDIX A**

**AMENDMENT NO. 1 TO  
AGREEMENT AND PLAN OF MERGER**

This Amendment No. 1 (this Amendment ) to that certain Agreement and Plan of Merger (the Merger Agreement ) by and among NetApp, Inc., a Delaware corporation ( Parent ), Kentucky Merger Sub One Corporation, a Delaware corporation and a direct, wholly-owned subsidiary of Parent ( Merger Sub One ), Derby Merger Sub Two LLC, a Delaware limited liability company and a direct, wholly-owned subsidiary of Parent ( Merger Sub Two ) and together with Merger Sub One, the Merger Subs ), and Data Domain, Inc., a Delaware corporation (the Company ) is made and entered into as of June 3, 2009 by and among Parent, Merger Sub One, Merger Sub Two and the Company. All capitalized terms that are used in this Amendment but not defined in this Amendment shall have the respective meanings ascribed thereto in the Merger Agreement.

WHEREAS, on June 1, 2009, the Company received an unsolicited acquisition proposal from EMC Corporation and EMC Corporation commenced a tender offer to acquire all outstanding shares of Company Common Stock;

WHEREAS, on June 2, 2009, Parent offered to amend the Merger Agreement on the terms set forth herein;

WHEREAS, each of the respective Board of Directors of Parent, the Merger Subs and the Company has approved this Amendment and the transactions contemplated hereby, and deems it advisable and in the best interests of their respective stockholders to enter into this Amendment and consummate the transactions contemplated hereby pursuant to which, among other things, and as a single integrated transaction, Merger Sub One will be merged with and into the Company (the First Step Merger or the Merger ) in accordance with the applicable provisions of the General Corporation Law of the State of Delaware (the DGCL ), the Company will continue as the surviving corporation of the First Step Merger and each share of the Company Common Stock outstanding immediately prior to the Effective Time will be cancelled and converted into the right to receive the consideration set forth herein, all upon the terms and subject to the conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the foregoing premises and the representations, warranties, covenants and agreements set forth herein, as well as other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and accepted, and intending to be legally bound hereby, Parent, the Merger Subs and the Company hereby agree as follows:

1. Amendments to Section 1.1(cc). Section 1.1(cc) of the Merger Agreement is hereby amended and restated in its entirety and replaced with the following:

(cc) Exchange Ratio shall mean, subject to adjustment pursuant to Section 2.7(b)(i) and Section 2.7(b)(ii):

**Table of Contents**

- (i) 0.7783 shares of Parent Common Stock if the Closing Average is less than \$17.41;
- (ii) 0.6370 shares of Parent Common Stock if the Closing Average is greater than \$21.27; and
- (iii) that fraction of shares of Parent Common Stock (rounded to the nearest ten thousandth) equal to the quotient obtained by dividing \$13.55 by the Closing Average, if the Closing Average is (A) less than or equal to \$21.27 and (B) greater than or equal to \$17.41.

2. Amendment to Section 2.7(b)(i). Section 2.7(b)(i) of the Merger Agreement is hereby amended and restated in its entirety and replace with the following:

(i) Each share of Company Common Stock issued and outstanding immediately prior to the Effective Time (other than any Dissenting Company Shares), including any Company Restricted Stock that shall have ceased, as a result of or immediately prior to the Effective Time, to be unvested or subject to a repurchase option, risk of forfeiture or other condition pursuant to the terms of such Company Stock Award or other agreement governing such Company Restricted Stock (which shall include any vesting as a result of any termination of employment or transaction contemplated by employee agreements and any resignation delivered pursuant to Section 6.13) shall be canceled and extinguished and automatically converted into the right to receive a combination of (A) \$16.45 in cash, without interest (such per share cash amount being referred to herein as the Cash Consideration ) plus (B) a number of validly issued, fully paid and nonassessable shares of Parent Common Stock equal to the Exchange Ratio (such per share amount being referred to herein as the Stock Consideration ) upon the surrender of the certificate representing such share of Company Common Stock (or the receipt of an agent's message in the case of Book-Entry Shares) in the manner set forth in Section 2.9 (or in the case of a lost, stolen or destroyed certificate, upon delivery of an affidavit (and bond, if required) in the manner set forth in Section 2.11). Notwithstanding the foregoing sentence, if the Exchange Ratio is (A) greater than or equal to 0.7006, and (B) less than 0.7783, then Parent, in its sole discretion and subject to the following sentence, may reduce the Stock Consideration by such amount as Parent may determine. If Parent elects to reduce the amount of the Stock Consideration pursuant to the preceding sentence, then the Cash Consideration shall be increased by an amount equal to the product of (A) the amount of such reduction in the Stock Consideration pursuant to the preceding sentence multiplied by (B) the Closing Average. For all purposes of and under this Agreement, the term Merger Consideration shall mean the Cash Consideration plus the Stock Consideration, each as adjusted by this Section 2.7(b)(i) and Section 2.7(b)(ii) together with any cash payable under Section 2.7(b)(iv) with respect to each share of Company Common Stock in lieu of a fractional share of Parent Common Stock otherwise issuable pursuant hereto.

**Table of Contents**

3. Additional Representations and Warranties of the Company. The Company hereby represents and warrants to Parent, Merger Sub One and Merger Sub Two as follows (each of which representations and warranties shall be deemed, for all purposes of and under the Merger Agreement, to form a part of Section 3.2 of the Merger Agreement):

(a) Corporate Approvals.

(i) The Company has all requisite corporate power and authority to execute and deliver this Amendment, to perform its obligations under the Agreement (as amended by this Amendment), and subject to obtaining the Requisite Merger Approval, to consummate the transactions contemplated by the Agreement (as amended by this Amendment). The execution and delivery of this Amendment by the Company, the performance by the Company of its obligations under the Agreement (as amended by this Amendment), and the consummation by the Company of the transactions contemplated by the Agreement (as amended by this Amendment) have been duly authorized by all necessary corporate action on the part of the Company other than, in the case of the consummation of the Merger, (i) the filing with the SEC of a proxy statement with respect to and obtaining the Requisite Merger Approval and (ii) the filing of the Certificate of Merger as required by the DGCL, and no additional corporate or other actions or proceedings on the part of the Company are necessary to authorize this Amendment or the consummation of the transactions contemplated by the Agreement (as amended by this Amendment). This Amendment has been duly executed and delivered by the Company and, assuming the due authorization, execution and delivery by Parent, Merger Sub One and Merger Sub Two, constitutes a legal, valid and binding obligation of the Company, enforceable against the Company in accordance with its terms, except that such enforceability may be limited by applicable bankruptcy, insolvency (including, without limitation, all laws relating to fraudulent transfers), reorganization, moratorium and other similar laws affecting or relating to creditors rights generally and is subject to general principles of equity (regardless of whether enforcement is considered in a proceeding in equity or at law).

(ii) At a meeting duly called and held on June 3, 2009, the Company Board unanimously (i) determined that the Agreement (as amended by this Amendment) is advisable, (ii) determined that the Agreement (as amended by this Amendment) is fair to, and in the best interests of, the Company's stockholders, (iii) approved the execution and delivery of this Amendment by the Company, the performance by the Company of its covenants and obligations set forth in the Agreement (as amended by this Amendment) and the consummation of the Merger and the transactions contemplated by the Agreement (as amended by this Amendment) upon the terms and conditions set forth in the Agreement (as amended by this Amendment), and (iv) resolved to recommend that the stockholders of the Company approve the Merger Proposal at the Company Stockholder Meeting. As of the date hereof, the Company Board has not rescinded or modified in any way the foregoing determinations and actions.

**Table of Contents**

4. Additional Representations and Warranties of Parent and the Merger Subs. Each of Parent, Merger Sub One and Merger Sub Two hereby represents and warrants to the Company as follows (each of which representations and warranties shall be deemed, for all purposes of and under the Merger Agreement, to form a part of Section 4.2 of the Merger Agreement):

(a) Corporate Approvals.

(i) Each of Parent, Merger Sub One and Merger Sub Two has all requisite corporate power and authority to execute and deliver this Amendment and to consummate the transactions contemplated by the Agreement (as amended by this Amendment) and to perform its obligations under the Agreement (as amended by this Amendment). The execution and delivery of this Amendment by Parent, Merger Sub One and Merger Sub Two, the performance by Parent, Merger Sub One and Merger Sub Two of their respective obligations under the Agreement (as amended by this Amendment), and, assuming the accuracy in all respects of the representations and warranties of the Company set forth in Section 3.4 and the compliance in all respects by the Company with the restrictions set forth in Section 5.2(b), the consummation by Parent, Merger Sub One and Merger Sub Two of the transactions contemplated by the Agreement (as amended by this Amendment) have been duly authorized by all necessary corporate action on the part of Parent, Merger Sub One and Merger Sub Two and no additional corporate or other actions or proceedings (including a vote of Parent's stockholders) on the part of Parent, Merger Sub One or Merger Sub Two are necessary to authorize this Amendment or the consummation of the transactions contemplated by the Agreement (as amended by this Amendment). This Amendment has been duly executed and delivered by each of Parent, Merger Sub One and Merger Sub Two and, assuming the due authorization, execution and delivery by the Company, constitutes a legal, valid and binding obligation of each of Parent, Merger Sub One and Merger Sub Two, enforceable against each of them in accordance with its terms, except that such enforceability may be limited by applicable bankruptcy, insolvency (including, without limitation, all laws relating to fraudulent transfers), reorganization, moratorium and other similar laws affecting or relating to creditors rights generally and is subject to general principles of equity (regardless of whether enforcement is considered in a proceeding in equity or at law).

(iii) At a meeting duly called and held on June 2, 2009, the Parent Board unanimously (i) determined that the Agreement (as amended by this Amendment) is advisable, (ii) determined that the Agreement (as amended by this Amendment) is fair to, and in the best interests of, the stockholders of Parent, and (iii) approved this Amendment and the transactions contemplated by the Agreement (as amended by this Amendment). As of the date hereof, the Parent Board has not rescinded or modified in any way the foregoing determinations and actions. Pursuant to action taken by written consent on June 2, 2009, the board of directors of Merger Sub One unanimously (i) determined that the Agreement (as amended by this Amendment) is advisable, (ii) determined that the Agreement (as amended by this Amendment) is fair to, and in the best interests of, the sole

**Table of Contents**

stockholder of Merger Sub One, and (iii) approved this Amendment and the transactions contemplated by the Agreement (as amended by this Amendment). As of the date hereof, the board of directors of Merger Sub One has not rescinded or modified in any way the foregoing determinations and actions. Pursuant to action taken by written consent on June 2, 2009, the board of managers of Merger Sub Two unanimously (i) determined that the Agreement (as amended by this Amendment) is advisable, (ii) determined that the Agreement (as amended by this Amendment) is fair to, and in the best interests of, the stockholder of Merger Sub Two, and (iii) approved this Amendment and the transactions contemplated by the Agreement (as amended by this Amendment). As of the date hereof, the board of managers of Merger Sub Two has not rescinded or modified in any way the foregoing determinations and actions.

5. Merger Agreement References. The parties hereto hereby agree that all references to the Agreement set forth in the Merger Agreement (including, without limitation, in the representations and warranties of the parties set forth therein) shall be deemed to be references to the Merger Agreement as amended by this Amendment.

6. Full Force and Effect. Except as expressly amended or modified hereby, the Merger Agreement and the agreements, documents, instruments and certificates among the parties hereto as contemplated by, or referred to, in the Merger Agreement shall remain in full force and effect without any amendment or other modification thereto.

7. Counterparts. This Amendment may be executed in one or more counterparts, all of which shall be considered one and the same agreement and shall become effective when one or more counterparts have been signed by each of the parties and delivered to the other party, it being understood that all parties need not sign the same counterpart.

*[Remainder of Page Intentionally Left Blank]*

A1-5

---

**Table of Contents**

IN WITNESS WHEREOF, the undersigned have caused this Amendment to be executed by their respective duly authorized officers to be effective as of the date first above written.

NETAPP, INC.

Name: Steven J. Gomo  
By: /s/ Steven J. Gomo  
Title: EVP & CFO

DATA DOMAIN, INC.

Name: Frank Slooman  
By: /s/ Frank Slooman  
Title: President & CEO

KENTUCKY MERGER SUB ONE CORPORATION

Name: Andrew Kryder  
By: /s/ Andrew Kryder  
Title: President

DERBY MERGER SUB TWO LLC

Name: Andrew Kryder  
By: /s/ Andrew Kryder  
Title: President

**AMENDMENT NO. 1 TO AGREEMENT AND PLAN OF MERGER**

A1-6

---

**Table of Contents**

**Execution Copy**

**AGREEMENT AND PLAN OF MERGER  
BY AND AMONG  
NETAPP, INC.  
KENTUCKY MERGER SUB ONE CORPORATION  
DERBY MERGER SUB TWO LLC  
AND  
DATA DOMAIN, INC.  
Dated as of May 20, 2009**

---



**Table of Contents****TABLE OF CONTENTS**

	<b>Page</b>
ARTICLE I DEFINITIONS & INTERPRETATIONS	A-1
1.1 Certain Definitions	A-1
1.2 Additional Definitions	A-8
1.3 Certain Interpretations	A-10
ARTICLE II THE MERGER	A-11
2.1 The Merger	A-11
2.2 The Closing	A-11
2.3 Effective Time of First Step Merger and Second Step Merger	A-11
2.4 Effect of the First Step Merger and Second Step Merger	A-11
2.5 Organizational Documents	A-12
2.6 Directors and Officers	A-12
2.7 Effect of First Step Merger on Capital Stock of Constituent Corporations	A-13
2.8 Company Stock Awards	A-14
2.9 Exchange Fund; Exchange of Shares	A-15
2.10 No Further Ownership Rights in Company Common Stock	A-17
2.11 Lost, Stolen or Destroyed Certificates	A-17
2.12 Tax Treatment	A-17
2.13 Taking of Necessary Further Action	A-17
ARTICLE III REPRESENTATIONS AND WARRANTIES OF THE COMPANY	A-18
3.1 Organization and Standing	A-18
3.2 Corporate Approvals	A-18
3.3 Non-contravention; Required Consents	A-19
3.4 Capitalization	A-19
3.5 Subsidiaries	A-20
3.6 SEC Reports; Other Reports	A-21
3.7 Financial Statements and Controls	A-22
3.8 No Undisclosed Liabilities	A-23
3.9 Absence of Certain Changes	A-23
3.10 Compliance with Laws and Orders	A-24
3.11 Permits	A-24
3.12 Litigation; Orders; Regulatory Agreements	A-24
3.13 Material Contracts	A-25
3.14 Taxes	A-27
3.15 Employee Benefits	A-28
3.16 Labor Matters	A-30
3.17 Real Property	A-31
3.18 Environmental Matters	A-31
3.19 Assets; Personal Property	A-31
3.20 Intellectual Property	A-31
3.21 Insurance	A-34
3.22 Related Party Transactions	A-34

3.23	State Anti-Takeover Statutes	A-34
3.24	Brokers	A-34
3.25	Opinion of Financial Advisor	A-34

**Table of Contents**

	<b>Page</b>
ARTICLE IV REPRESENTATIONS AND WARRANTIES OF PARENT AND THE MERGER SUBS	A-34
4.1 Organization and Standing	A-34
4.2 Corporate Approvals	A-35
4.3 Non-contravention; Required Consents	A-35
4.4 Capitalization	A-36
4.5 SEC Reports; Other Reports	A-36
4.6 Financial Statements and Controls	A-37
4.7 No Undisclosed Liabilities	A-38
4.8 Absence of Certain Changes	A-38
4.9 Litigation; Orders	A-38
4.10 Ownership of Company Capital Stock	A-38
4.11 Brokers	A-38
4.12 Financing	A-38
ARTICLE V INTERIM CONDUCT OF BUSINESS	A-38
5.1 Affirmative Obligations of the Company	A-38
5.2 Negative Obligations of the Company	A-38
5.3 Negative Obligations of Parent	A-41
ARTICLE VI ADDITIONAL AGREEMENTS	A-41
6.1 No Solicitation	A-41
6.2 Reasonable Best Efforts to Complete	A-43
6.3 Regulatory Filings	A-44
6.4 Anti-Takeover Laws	A-45
6.5 Registration Statement; Proxy Statement/Prospectus	A-45
6.6 Company Stockholder Meeting	A-46
6.7 Company Board Recommendation	A-47
6.8 Access; Notice and Consultation	A-49
6.9 Confidentiality	A-50
6.10 Public Disclosure	A-50
6.11 Employee Matters	A-50
6.12 Directors and Officers Indemnification and Insurance	A-51
6.13 Resignation of Officers and Directors of Company Subsidiaries	A-52
6.14 Section 16 Resolutions	A-52
6.15 Nasdaq Listing	A-53
6.16 Registration Statements for Assumed Options and Other Awards	A-53
6.17 Obligations of the Merger Subs	A-53
6.18 Tax Matters	A-53
6.19 Open Source Materials	A-53
ARTICLE VII CONDITIONS TO THE MERGER	A-54
7.1 Conditions to Each Party's Obligations to Effect the Merger	A-54
7.2 Additional Conditions to the Obligations of Parent and the Merger Subs	A-54
7.3 Additional Conditions to the Obligations of the Company	A-55
ARTICLE VIII TERMINATION, AMENDMENT AND WAIVER	A-56

8.1 Termination

A-56

A-ii

---

**Table of Contents**

	<b>Page</b>	
8.2	Notice of Termination; Effect of Termination	A-59
8.3	Fees and Expenses	A-59
8.4	Amendment	A-60
8.5	Extension; Waiver	A-61
 <b>ARTICLE IX GENERAL PROVISIONS</b>		 A-61
9.1	Survival of Representations, Warranties and Covenants	A-61
9.2	Notices	A-61
9.3	Assignment	A-62
9.4	Entire Agreement	A-62
9.5	Third Party Beneficiaries	A-62
9.6	Severability	A-62
9.7	Other Remedies	A-62
9.8	Governing Law	A-62
9.9	Specific Performance	A-63
9.10	Consent to Jurisdiction	A-63
9.11	Waiver Of Jury Trial	A-63
9.12	Counterparts	A-63
 <b>EXHIBITS</b>		
	Exhibit A Voting Agreement	A-65

**Table of Contents**

**AGREEMENT AND PLAN OF MERGER**

THIS AGREEMENT AND PLAN OF MERGER (this Agreement ) is made and entered into as of May 20, 2009 by and among NetApp, Inc., a Delaware corporation ( Parent ), Kentucky Merger Sub One Corporation, a Delaware corporation and a direct, wholly-owned subsidiary of Parent ( Merger Sub One ), Derby Merger Sub Two LLC, a Delaware limited liability company and a direct, wholly-owned subsidiary of Parent ( Merger Sub Two ) and together with Merger Sub One, the Merger Subs ), and Data Domain, Inc., a Delaware corporation ( the Company ). All capitalized terms that are used in this Agreement shall have the respective meanings ascribed thereto in Article I.

**WITNESSETH:**

WHEREAS, each of the respective Board of Directors of Parent, the Merger Subs and the Company has approved this Agreement and the transactions contemplated hereby, and deems it advisable and in the best interests of their respective stockholders to enter into this Agreement and consummate the transactions contemplated hereby pursuant to which, among other things, and as a single integrated transaction, Merger Sub One will be merged with and into the Company (the First Step Merger or the Merger ) in accordance with the applicable provisions of the General Corporation Law of the State of Delaware (the DGCL ), the Company will continue as the surviving corporation of the First Step Merger and each share of the Company Common Stock outstanding immediately prior to the Effective Time will be cancelled and converted into the right to receive the consideration set forth herein, all upon the terms and subject to the conditions set forth in this Agreement.

WHEREAS, immediately following the First Step Merger, (i) if the opinions described in Section 6.18 of this Agreement have been delivered, Parent will cause the Company to merge with and into Merger Sub Two, with Merger Sub Two continuing as the surviving entity (the Second Step Merger ) and, taken together with the First Step Merger, the Merger ; provided that, if the Second Step Merger occurs, the Second Step Merger shall be included in the meaning of the term the Merger ) and (ii) if the opinions described in Section 6.18 of this Agreement have not been delivered, then the Second Step Merger shall not occur.

WHEREAS, for U.S. federal income tax purposes, it is intended that (i) if the Second Step Merger occurs, the Merger will qualify as a reorganization within the meaning of Section 368(a) of the Internal Revenue Code of 1986, as amended, and that this Agreement will be, and is hereby, adopted as a plan of reorganization within the meaning of Treasury Regulations Section 1.368-2(g) and (ii) if the Second Step Merger does not occur, the First Step Merger will be treated as a taxable transaction.

WHEREAS, concurrently with the execution and delivery of this Agreement, and as a condition and inducement to the willingness of Parent and the Merger Subs to enter into this Agreement, certain stockholders of the Company, in their respective capacities as stockholders of the Company, are entering into Voting Agreements with Parent substantially in the form attached hereto as Exhibit A (each, a Voting Agreement and collectively, the Voting Agreements ).

NOW, THEREFORE, in consideration of the foregoing premises and the representations, warranties, covenants and agreements set forth herein, as well as other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and accepted, and intending to be legally bound hereby, Parent, the Merger Subs and the Company hereby agree as follows:

**ARTICLE I**

**DEFINITIONS & INTERPRETATIONS**

1.1 Certain Definitions. For all purposes of and under this Agreement, the following capitalized terms shall have the following respective meanings:

(a) Acquisition Proposal shall mean any indication of interest, offer or proposal relating to an Acquisition Transaction from any Person other than Parent or any of its Affiliates.

A-1

---

**Table of Contents**

(b) Acquisition Transaction shall mean any transaction or series of related transactions (other than a transaction with Parent or any of its Affiliates) involving:

(i) any direct or indirect purchase or other acquisition by any Person or group (as defined in or under Section 13(d) of the Exchange Act) from the Company of fifteen percent (15%) or more of the total outstanding equity interests in or voting securities of the Company, or any tender offer or exchange offer that, if consummated, would result in any Person or group (as defined in or under Section 13(d) of the Exchange Act) beneficially owning fifteen percent (15%) or more of the total outstanding equity interests in or voting securities of the Company;

(ii) any direct or indirect purchase or other acquisition of fifty percent (50%) or more of any class of equity or other voting securities of one or more direct or indirect Subsidiaries of the Company, the business(es) of which, individually or in the aggregate, generate or constitute (as applicable) fifteen percent (15%) or more of the consolidated net revenues or net income (for the twelve month period ending on the last day of the Company's most recently completed fiscal year) or assets (measured by the lesser of book value or fair market value thereof as of the date of such transaction) of the Company and its Subsidiaries, taken as a whole;

(iii) any merger, consolidation, business combination, liquidation, dissolution, recapitalization, reorganization or other similar transaction involving the Company or one or more of its Subsidiaries, the business(es) of which, individually or in the aggregate, generate or constitute (as applicable) fifteen percent (15%) or more of the consolidated net revenues or net income (for the twelve-month period ending on the last day of the Company's most recently completed fiscal year) or assets (measured by the lesser of book value or fair market value thereof as of the date of such transaction) of the Company and its Subsidiaries, taken as a whole, pursuant to which the stockholders of the Company (as a group) or such Subsidiary or Subsidiaries, as applicable, immediately preceding such transaction hold less than eighty-five percent (85%) of the equity interests in or voting securities of the surviving or resulting entity of such transaction;

(iv) any direct or indirect sale, transfer or disposition of assets (other than in the ordinary course of business) of the Company or one or more of its Subsidiaries, the business(es) of which, individually or in the aggregate, generate or constitute (as applicable) fifteen percent (15%) or more of the consolidated net revenues or net income (for the twelve month period ending on the last day of the Company's most recently completed fiscal year) or assets (measured by the lesser of book value or fair market value thereof as of the date of such transaction) of the Company and its Subsidiaries, taken as a whole; or

(v) any combination of the foregoing transactions that results in one of the effects referenced in clause (i) or (ii) above.

(c) Affiliate shall mean, with respect to any Person, any other Person which directly or indirectly controls, is controlled by or is under common control with such Person. For purposes of the immediately preceding sentence, the term control (including, with correlative meanings, the terms controlling, controlled by and under common control with ) used with respect to any Person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through ownership of voting securities, by contract or otherwise; *provided, however*, that for the avoidance of doubt, neither Artis Capital Management nor any affiliated entity thereof will be considered an Affiliate of the Company for purposes of this Agreement.

(d) Business Day shall mean any day, other than a Saturday, Sunday or any day which is a legal holiday under the laws of the State of California or is a day on which banking institutions located in the State of California are authorized or required by Law or other governmental action to close.



(e) Closing Average shall mean the average of the closing sales prices for Parent Common Stock, rounded to the nearest one-hundredth of a cent, on the Nasdaq for the ten (10) most recent consecutive trading days ending on the third (3rd) trading day immediately prior to the date on which the Effective Time occurs.

(f) Code shall mean the Internal Revenue Code of 1986, as amended, or any successor statute.

A-2

---

**Table of Contents**

- (g) Company Balance Sheet shall mean the consolidated balance sheet of the Company and its Subsidiaries as of December 31, 2008 set forth in the Company Form 10-K.
- (h) Company Board shall mean the board of directors of the Company.
- (i) Company Capital Stock shall mean the Company Common Stock and the Company Preferred Stock.
- (j) Company Common Stock shall mean the Common Stock, par value \$0.0001 per share, of the Company.
- (k) Company ESPP shall mean the Company 2007 Employee Stock Purchase Plan.
- (l) Company Form 10-Q shall mean the Company's Quarterly Report on Form 10-Q for the quarterly period ended March 31, 2009 (as filed with the SEC on May 5, 2009).
- (m) Company Intellectual Property shall mean any and all Intellectual Property Rights that are owned or purported to be owned by the Company or any of its Subsidiaries.
- (n) Company Intellectual Property Agreements means the In-Licenses and the Out-Licenses, collectively.
- (o) Company Option shall mean an option to purchase shares of Company Common Stock outstanding under any of the Company Option Plans.
- (p) Company Option Plans shall mean the Company 2002 Stock Plan and the Company 2007 Equity Incentive Plan.
- (q) Company Preferred Stock shall mean the Preferred Stock, par value \$0.0001 per share, of the Company.
- (r) Company Registered Intellectual Property means all Registered Intellectual Property owned by, or filed in the name of, the Company or its Subsidiaries.
- (s) Company Restricted Stock Units shall mean an award of restricted stock units outstanding under any of the Company Option Plans.
- (t) Company Stock Awards shall mean Company Options, Company Restricted Stock (as defined below) and Company Restricted Stock Units.
- (u) Company Source Code means Source Code with respect to the Company Products.
- (v) Contract shall mean any legally binding contract, subcontract, agreement, note, bond, mortgage, indenture, lease, sublease, license, sublicense, or other instrument, commitment, arrangement or understanding of any kind or character, whether oral or in writing, in any such case which is executory in nature and has outstanding performance obligations or under which any liabilities of any kind or nature may exist.
- (w) Delaware Law shall mean the DGCL and any other applicable Law of the State of Delaware.
- (x) Designated Employees shall mean each employee of the Company or its Subsidiary who (i) receives and accepts an offer of employment from Parent or any of its Subsidiaries, or the Final Surviving Entity prior to the Closing and (ii) is an employee of the Parent or any of its Subsidiaries, or the Final Surviving Entity immediately following the Closing.

(y) Environmental Law shall mean any and all applicable Laws relating to the protection of the environment (including ambient air, surface water, groundwater or land) or human health as affected by the environment or Hazardous Substances or otherwise relating to the production, use, emission, storage, treatment, transportation, recycling, disposal, discharge, release or other handling of any Hazardous Substances or any products or wastes containing any Hazardous Substances including any Laws related to product take-back or content requirements, or the investigation, clean-up or other remediation or analysis of Hazardous Substances, including the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, the Resource Recovery and Conservation Act of 1976, the Federal Water Pollution Control Act, the Clean Air

A-3

---

**Table of Contents**

Act, the Hazardous Materials Transportation Act, the Clean Water Act, European Union Directive 2002/96/EC on waste electrical and electronic equipment ( WEEE Directive ) and European Union Directive 2002/95/EC on the restriction on the use of hazardous substances ( EU RoHS Directive ) and the Administrative Measure on the Control of Pollution Caused by Electronic Information Products ( China RoHS ), and laws of similar import, all as amended at any time.

(z) ERISA shall mean the Employee Retirement Income Security Act of 1974, as amended, and the rules and regulations promulgated thereunder, or any successor statute, rules and regulations thereto.

(aa) ERISA Affiliate shall mean any other trade or business (whether or not incorporated) which would be treated as a single employer with the Company or any of its Subsidiaries under Section 414 of the Code.

(bb) Exchange Act shall mean the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder, or any successor statute, rules and regulations thereto.

(cc) Exchange Ratio shall mean, subject to adjustment pursuant to Section 2.7(b)(i) and Section 2.7(b)(ii):

(i) 0.833 shares of Parent Common Stock if the Closing Average is less than \$16.26;

(ii) 0.682 shares of Parent Common Stock if the Closing Average is greater than \$19.88; and

(iii) that fraction of shares of Parent Common Stock (rounded to the nearest ten thousandth) equal to the quotient obtained by dividing \$13.55 by the Closing Average, if the Closing Average is (A) less than or equal to \$19.88 and (B) greater than or equal to \$16.26.

(dd) GAAP shall mean generally accepted accounting principles, as applied in the United States.

(ee) Governmental Authority shall mean any government, any governmental or regulatory entity or body, department, commission, board, agency, instrumentality or self-regulatory organization (including Nasdaq), arbitrator or arbitration panel, and any court, tribunal or judicial body, in each case whether federal, state, county, provincial or local, and whether domestic or foreign.

(ff) Hazardous Substance shall mean any substance, material or waste that is characterized or regulated under any Environmental Law as hazardous, pollutant, contaminant, toxic or words of similar meaning or effect, including petroleum and petroleum products, polychlorinated biphenyls and asbestos, excluding however, materials that would otherwise be deemed to be Hazardous Substances that are contained in products typically used for office or janitorial purposes that are properly and safely maintained in accordance with Environmental Laws.

(gg) HSR Act shall mean the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and the rules and regulations promulgated thereunder, or any successor statute, rules and regulations thereto.

(hh) Intellectual Property Rights means rights in any or all of the following: (i) patents and applications therefor and all reissues, divisions, renewals, extensions, provisionals, continuations and continuations-in-part thereof ( Patents ); (ii) copyrights, copyright registrations and applications therefor, and all other rights corresponding thereto including moral and economic rights of authors and inventors, however denominated ( Copyrights ); (iii) industrial designs and any registrations and applications therefor; (iv) trade names, logos, common law trademarks and service marks, trademark and service mark registrations and applications therefor ( Trademarks ); (v) domain names, domain name registrations and applications therefor; (vi) trade secrets (including, those trade secrets defined in the Uniform Trade Secrets Act and under corresponding foreign statutory and common law), proprietary business, technical and

know-how information, and non-public and confidential information ( Trade Secrets ); and (vii) any similar or equivalent rights to any of the foregoing (anywhere in the world).

(ii) IRS shall mean the United States Internal Revenue Service or any successor thereto.

(jj) International Employee Plans shall mean each Employee Plan that has been established, adopted or maintained by the Company or any of its Subsidiaries, or with respect to which the Company or any of its Subsidiaries will or may have any liabilities with respect to any Foreign Employees.

**Table of Contents**

(kk) Knowledge of the Company, with respect to any matter in question, shall mean the actual knowledge of any of the directors and executive officers of the Company and those officers of the Company set forth on Schedule 1.1.

(ll) Law shall mean any and all applicable federal, state, provincial, local, municipal, foreign or other law, statute, treaty, constitution, principle of common law, resolution, ordinance, code, edict, decree, directive, guidance, order, rule, regulation, ruling or requirement issued, enacted, adopted, promulgated, implemented or otherwise put into effect by or under the authority of any Governmental Authority.

(mm) Legal Proceeding shall mean any action, suit, litigation, arbitration, criminal prosecution or other legal proceeding pending before any Governmental Authority.

(nn) Lien shall mean any lien, pledge, hypothecation, charge, mortgage, security interest, encumbrance, claim, option, right of first refusal, preemptive right, community property interest or other legal restriction of any nature (including any restriction on the voting of any security, any restriction on the transfer of any security or other asset, any restriction on the possession, exercise or transfer of any other attribute of ownership of any asset).

(oo) Loan shall mean any extension of credit (including any commitment to extend credit).

(pp) Material Adverse Effect shall mean, with respect to any Person, any fact, circumstance, change or effect (each, an Effect ) that, individually or when taken together with all other Effects that exist at the date of determination of the occurrence of the Material Adverse Effect, (x) is or would reasonably be expected to have a material adverse effect on the business, operations, financial condition or results of operations of such Person and its Subsidiaries, taken as a whole or (y) is or would reasonably be expected to have a material adverse effect on such Person's ability to consummate the Merger in accordance with the terms hereof and applicable Law; *provided, however*, that no Effects (by themselves or when aggregated with any other Effects) to the extent proximately resulting from the following shall be deemed to be or constitute a Material Adverse Effect, and no Effects to the extent proximately resulting from the following (by themselves or when aggregated with any other Effects) shall be taken into account when determining whether a Material Adverse Effect has occurred or would reasonably be expected to occur:

(i) changes in general economic conditions in the United States or any other country or region in the world, or changes in conditions in the global economy generally (to the extent that such Effects do not have a disproportionate impact on such Person and its Subsidiaries, taken as a whole, relative to other companies and operating in the same industries in which such Person operates);

(ii) changes in general conditions in the industries in which such Person and its subsidiaries operate (to the extent that such Effects do not have a disproportionate impact on such Person and its Subsidiaries, taken as a whole, relative to other companies operating in the same industries in which such Person operates);

(iii) changes in GAAP or other accounting standards (or the interpretation thereof by a third party), Law or regulatory conditions (or the interpretation thereof by a third party);

(iv) any failure to take any action or the taking of any specific action at the written direction, or with the prior written consent, of Parent (in the case of the Company) or the Company (in the case of Parent, Merger Sub One or Merger Sub Two);

(v) the taking of any specific action expressly required by this Agreement;

(vi) acts of war, armed hostilities or terrorism (to the extent that such Effects do not have a disproportionate impact on such Person and its Subsidiaries, taken as a whole, relative to other companies operating in the same industries in which such Person operates);

(vii) changes in the trading price or trading volume of such Person's common stock, in and of itself; *provided, however,* that the exception set forth in this clause (vii) shall not in any way prevent or otherwise affect a determination that any Effect underlying such change has resulted in, or contributed to, a Material Adverse Effect;

**Table of Contents**

(viii) Effects primarily resulting from the announcement and pendency of the Merger and the transactions contemplated by this Agreement (including any loss of employees); *provided, however*, that the exception set forth in this clause (viii) shall not apply to any Effects related to or caused by any Legal Proceedings resulting from the announcement and pendency of the Merger and the transactions contemplated by this Agreement;

(ix) any failure by any Person to meet any public estimates or expectations of such Person's revenue, earnings or other financial performance or results of operations for any period, or any failure by such Person to meet any internal budgets, plans or forecasts of its revenues, earnings or other financial performance or results of operations (it being understood that any underlying cause of any such failure may be deemed to constitute, in and of itself, a Material Adverse Effect and may be taken into consideration when determining whether a Material Adverse Effect has occurred); or

(x) stockholder class action, derivative litigation or other Legal Proceedings made or brought by any of the current or former stockholders of such Person (on their own behalf or on behalf of such Person) against such Person arising out of the Merger or any other transactions contemplated by this Agreement.

(qq) Nasdaq shall mean the Nasdaq Global Select Market, any successor stock exchange operated by The NASDAQ Stock Market LLC or any successor thereto.

(rr) Open Source License shall mean any license, including, the GNU General Public License (GPL), GNU Lesser General Public License (LGPL), Mozilla Public License (MPL), BSD licenses, the Artistic License, the Netscape Public License, the Sun Community Source License (SCSL), the Sun Industry Standards License (SISL) and the Apache License, requiring software to be disclosed or distributed as free software, open source software or in source code form or redistributable at no charge.

(ss) Option Exchange Ratio shall mean the sum of (x) the Stock Consideration plus (y) the quotient obtained by dividing (1) the Cash Consideration, by (2) the Closing Average.

(tt) Order shall mean any judgment, decision, decree, injunction, ruling, writ, assessment or order of any Governmental Authority that is binding on any Person or its property under applicable Laws.

(uu) Parent Board shall mean the board of directors of Parent.

(vv) Parent Common Stock shall mean the Common Stock, par value \$0.001 per share, of Parent.

(ww) Parent Form 10-Q shall mean Parent's Quarterly Report on Form 10-Q for the quarterly period ended January 23, 2009 (as filed with the SEC on March 2, 2009).

(xx) Parent Options shall mean an option to purchase shares of Parent Common Stock outstanding under any of the Parent option plans.

(yy) Parent Restricted Stock shall mean a share of Parent Common Stock outstanding under any of the Parent option plans that is subject to forfeiture or repurchase by Parent.

(zz) Parent Restricted Stock Units shall mean an award of restricted stock units outstanding under any of the Parent option plans.



(aaa) Permitted Liens shall mean any or all of the following: (i) Liens disclosed on the consolidated balance sheet of such Person included in the most recent annual or quarterly report filed by such Person with the SEC prior to the date of this Agreement, (ii) Liens for Taxes and other similar governmental charges and assessments which are not yet due and payable or liens for Taxes being contested in good faith by any appropriate proceedings for which adequate reserves have been established to the extent required by GAAP; (iii) Liens of landlords and liens of carriers, warehousemen, mechanics and materialmen and other like Liens arising in the ordinary course of business; (iv) undetermined or inchoate Liens, charges and privileges and any statutory Liens, licenses, charges, adverse claims, security interests or encumbrances of any nature whatsoever and claimed or held by any Governmental Authority; (v) security given in the ordinary course of business to any public utility, Governmental Authority or other statutory or public authority (vi) defects, imperfections or irregularities in title, covenants, easements and rights-of-way (unrecorded and of record) and other similar

**Table of Contents**

Liens (or other Encumbrances of any type) on zoning, building and other similar codes or restrictions, in each case that do not adversely affect in any material respect the current use of the applicable property owned, leased, used or held for use by the Company or any of its Subsidiaries; (vii) pledges or deposits to secure obligations under workers compensation laws or similar legislation; (viii) Liens imposed by applicable Law (other than Tax law); (ix) Liens imposed on the underlying fee interest in leased property that are not caused by the Company or any of its Subsidiaries; and (x) non-exclusive licenses granted by the Company or its Subsidiaries in the ordinary course of business.

(bbb) Person shall mean any individual, corporation (including any non-profit corporation), general partnership, limited partnership, limited liability partnership, joint venture, estate, trust, company (including any limited liability company or joint stock company), firm or other enterprise, association, organization, entity or Governmental Authority.

(ccc) Registered Intellectual Property means Intellectual Property Rights that have been registered, applied for, filed, certified or otherwise perfected, issued, or recorded with or by any Governmental Authority, including any quasi-public legal authority.

(ddd) Representatives shall mean, with respect to any Person, any directors, officers, employees, controlled Affiliates and any investment bankers, attorneys, advisors, representatives or other agents of such Person.

(eee) Sarbanes-Oxley Act shall mean the Sarbanes-Oxley Act of 2002 or any successor thereto.

(fff) SEC shall mean the United States Securities and Exchange Commission or any successor thereto.

(ggg) Securities Act shall mean the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder, or any successor statute, rules or regulations thereto.

(hhh) Source Code means computer software code, in form other than object code form, including related programmer comments and annotations, help text, data and data structures, instructions and procedural, object-oriented and other code, which may be printed out or displayed in human readable form.

(iii) Subsidiary of any Person shall mean (i) a corporation more than fifty percent (50%) of the combined voting power of the outstanding voting stock of which is owned, directly or indirectly, by such Person or by one of more other Subsidiaries of such Person or by such Person and one or more other Subsidiaries thereof, (ii) a partnership of which such Person, or one or more other Subsidiaries of such Person or such Person and one or more other Subsidiaries thereof, directly or indirectly, is the general partner and has the power to direct the policies, management and affairs of such partnership, (iii) a limited liability company of which such Person or one or more other Subsidiaries of such Person or such Person and one or more other Subsidiaries thereof, directly or indirectly, is the managing member and has the power to direct the policies, management and affairs of such company or (iv) any other Person (other than a corporation, partnership or limited liability company) in which such Person, or one or more other Subsidiaries of such Person or such Person and one or more other Subsidiaries thereof, directly or indirectly, has at least a majority ownership and power to direct the policies, management and affairs thereof.

(jjj) Superior Proposal shall mean any unsolicited written offer or proposal (that has not been withdrawn) for a transaction or a series of related transactions providing for the acquisition of all of the outstanding voting securities of the Company which the Company Board shall have determined in good faith (after consultation with its financial advisor and its outside legal counsel) is more favorable to the Company's stockholders (in their capacity as such) than the Merger, in each case taking into consideration, in addition to any other factors determined by the Company Board to be relevant, (i) all financial considerations relevant thereto, including conditions in the financial and credit markets,

(ii) the identity of the Person(s) making such offer or proposal and the parties providing any of the financing for the transaction contemplated thereby, and the prior history of such Person(s) and sources of financing in connection with the consummation or failure to consummate similar transactions, (iii) the anticipated timing, conditions and prospects for completion of the transaction contemplated by such offer or proposal, (iv) the other terms and conditions of such offer or proposal and the implications thereof on the Company, including relevant legal, regulatory and other aspects of

A-7

---

**Table of Contents**

such offer or proposal deemed relevant by the Company Board, and (v) any proposal made by Parent in connection therewith or response thereto.

(kkk) Tax shall mean (i) any and all U.S. federal, state, local and non-U.S. taxes, including taxes based upon or measured by gross receipts, income, profits, sales, use and occupation, and value added, ad valorem, transfer, franchise, withholding, payroll, recapture, employment, escheat, excise and property taxes, together with all interest, penalties and additions imposed with respect to such amounts, (ii) any liability for the payment of any amounts of the type described in clause (i) as a result of being or having been a member of an affiliated, consolidated, combined, unitary or similar group for any period (including any liability under Treasury Regulation Section 1.1502-6 or any comparable provision of foreign, state or local law, and including any arrangement for group or consortium relief or similar arrangement) and (iii) any liability for the payment of any amounts of the type described in clause (i) or (ii) as a result of any express or implied obligation to indemnify any other Person or as a result of any obligations under any agreements or arrangements with any other Person with respect to such amounts and including any liability for taxes of a predecessor or transferor or otherwise by operation of Law.

(lll) Tax Returns shall mean all returns, declarations, reports, estimates, statements and other documents filed or required to be filed in respect of any Taxes, including any attachments, addenda or amendments thereto.

(mmm) WARN shall mean the Worker Adjustment and Retraining Notification Act or any similar state or local law, including any similar law of a non-U.S. jurisdiction.

1.2 Additional Definitions. The following capitalized terms shall have the respective meanings ascribed thereto in the respective sections of this Agreement set forth opposite each of the capitalized terms below:

<b>Term</b>	<b>Section Reference</b>
401(k) Plan	6.11(a)
Agreement	Preamble
Antitrust Approval	7.1(c)
Annual Meeting	6.6(b)
Assets	3.19
As	