

Fair Summary: Delaware’s Framework for Disclosing Fairness Opinions

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Directors of Delaware corporations owe to their stockholders a duty of disclosure derived from their ordinary fiduciary duties of care and loyalty. A common disclosure claim is that the target company’s disclosure document in a business combination was materially misleading or incomplete with respect to the fairness opinion relied on by the target’s board in evaluating the transaction. The Delaware courts have decided numerous cases involving claims that disclosure as to some element of a fairness opinion—projections, analyses, assumptions—is defective. This Article describes the general duty of disclosure, discusses the principles behind the cases on fairness opinions, and sets out a framework for predicting the information that must be disclosed with respect to fairness opinions under Delaware law.

Directors of a Delaware corporation owe a duty of disclosure to the corporation’s stockholders.¹ This duty, which “derives from the duties of care and loyalty,”² often comes into play in mergers or other business combinations (such as tender offers by majority stockholders) in which stockholders receive cash for their stock.³ Plaintiffs commonly bring disclosure claims in litigation challenging such business combinations, likely because of the potency of a disclosure claim in convincing a court to enjoin the transaction—even if temporarily.⁴ One of the

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1. See, e.g., *Pfeffer v. Redstone*, C.A. No. 2317-VCL, 2008 WL 308450, at *8 (Del. Ch. Feb. 1, 2008).

2. *Id.*

3. Because this duty of disclosure is rooted in directors’ fiduciary duties, the duty as discussed in this Article applies to all Delaware corporations, regardless of their status under federal securities laws—whether public or private, reporting or non-reporting.

4. See, e.g., *In re Lear Corp. S’holder Litig.*, 926 A.2d 94, 123 (Del. Ch. 2007) (“For the foregoing reasons, the plaintiffs’ motion for a preliminary injunction is largely denied, with the exception that a preliminary injunction will issue preventing the merger vote until supplemental disclosure of the kind required by the decision is issued.”); *In re Netsmart Techs., Inc. S’holders Litig.*, 924 A.2d 171, 208 (Del. Ch. 2007) (“[T]his court has not hesitated to use its injunctive powers to address disclosure deficiencies. When stockholders are about to make a decision based on materially misleading or incomplete information, a decision not to issue an injunction maximizes the potential that the crudest of judicial tools (an appraisal or damages award) will be employed down the line, because the stockholders’ chance to engage in self-help on the front end would have been vitiated and lost forever.”); *id.* at

most common types of disclosure claims is a claim that the target company's proxy statement or disclosure document was materially misleading or incomplete with respect to the fairness opinion relied on by the target's board in evaluating the transaction.⁵ What is at issue in such a case is, of course, the directors' duty to disclose material facts to the stockholders. In this Article, we discuss primarily cases in which the underlying issue is the financial value of the challenged transaction and in which the directors have put the fairness of the value at issue by disclosing a fairness opinion (and the bankers' underlying analysis) to the stockholders.⁶

Stockholders are entitled to such financial information in several situations. For example, when a target board adopts a resolution approving a merger agreement, the stockholders must decide whether to approve the merger (or, in many cases, whether to seek appraisal).⁷ When a tender offeror makes an offer to the stockholders of a public company, the target board must state its position on the offer—acceptance or rejection, no opinion, or unable to take a position—for the stockholders' information.⁸ When a majority stockholder effects a short-form merger or otherwise merges the company into itself, acting by written consent, the minority stockholders must be given a chance to decide whether to demand appraisal.⁹

Fairness opinions are typically produced at the request of the target's board (or a special committee of the board)¹⁰ by investment bankers who value the target company and come up with a range of values. The bankers then opine on whether the consideration to be received by the target company's stockholders in

209–10 (enjoining the stockholder vote on the merger until the desired disclosure was provided); see also *Globis Partners, L.P. v. Plumtree Software, Inc.*, C.A. No. 1577-VCP, 2007 WL 4292024, at *10 (Del. Ch. Nov. 30, 2007) (“Delaware courts have stated a preference for having this type of proxy-related disclosure claim brought as one for a preliminary injunction before the shareholder vote, as opposed to many months after.”).

5. See, e.g., *Netsmart*, 924 A.2d at 199.

6. Disclosure relating to fairness opinions is often challenged, likely because fairness opinions are used as evidence of financial fairness and because the complexity of the bankers' underlying analysis may make it easy to find a potential area for attack.

7. DEL. CODE ANN. tit. 8, §§ 251(b)–(c), 262(d)(1) (2001); see also *Glassman v. Unocal Exploration Corp.*, 777 A.2d 242, 248 (Del. 2001) (noting that, if there is no fraud or illegality, a minority stockholder facing a short-form merger only must decide whether to accept the merger consideration or seek appraisal).

8. 17 C.F.R. § 240.14e-2(a) (2008).

9. DEL. CODE ANN. tit. 8, § 262(d)(2) (2001).

10. *Id.* § 141(e) (providing that directors may rely on reports of experts); see *Wacht v. Cont'l Hosts, Ltd.*, C.A. No. 7954, 1994 WL 525222, at *3 (Del. Ch. Sept. 16, 1994) (“Delaware law . . . does not require directors to consult independent valuation experts or negotiate with minority shareholders during the course of a going private merger. Nonetheless, our law does impose a duty on the directors to ensure that the terms in a merger are entirely fair to the minority shareholders.” (citation omitted)), modified on other grounds, 1994 WL 728836 (Del. Ch. Dec. 23, 1994); cf. *Klang v. Smith's Food & Drug Ctrs., Inc.*, C.A. No. 15012, 1997 WL 257463, at *4–5 (Del. Ch. May 13, 1997) (holding that directors were entitled to rely on valuation by investment banker of their company's assets to determine whether capital was impaired for purposes of paying dividends), *aff'd*, 702 A.2d 150 (Del. 1997). *But cf.* *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 984 (Del. Ch. 2000) (“[F]airness opinions prepared by independent investment bankers are generally not essential, as a matter of law, to support an informed business judgment.”).

the business combination is fair, i.e., whether the consideration being offered is consistent with the range of fair values placed on the company.

The Delaware courts have decided many cases involving claims that some element of a fairness opinion—projections, analyses, assumptions, etc.—is omitted or is misstated such that the disclosure is materially misleading. These cases often appear to contradict one another. As the Delaware Court of Chancery recently stated, “[T]here is no ‘checklist’ of the sorts of things that must be disclosed relating to an investment bank fairness opinion.”¹¹ In this Article, we try to provide guidelines for disclosure, with the caveat that disclosure obligations are by nature fact-specific. We first describe the general duty of disclosure and discuss the principles behind the cases discussing fairness opinions. We then build on those principles to set out a framework for the disclosure of fairness opinions.

THE DUTY OF DISCLOSURE IN GENERAL

In disclosing matters relating to a business combination to a corporation's stockholders, a board of directors must disclose fully all material information within its control that would have a significant effect on the stockholders' decision to approve or reject the transaction or to demand appraisal.¹² When the affirmative duty to disclose information applies, the directors must truthfully and accurately disclose that information.¹³ Moreover, directors may not make partial disclosures that create an impression that is materially misleading.¹⁴

Delaware's duty of disclosure is not absolute; it requires only disclosure of facts in the directors' possession that would be material to a stockholder's decision, for example, to approve or reject a proposed transaction.¹⁵ Indeed, the Delaware courts police the line on over-disclosure, just as they do for under-disclosure: “[A] reasonable line has to be drawn or else disclosures in proxy solicitations will become so detailed and voluminous that they will no longer serve their purpose.”¹⁶

11. *In re CheckFree Corp. S'holders Litig.*, C.A. No. 3193-CC, 2007 WL 3262188, at *3 (Del. Ch. Nov. 1, 2007).

12. *See, e.g., Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1276–77 (Del. 1994); *see also Glassman*, 777 A.2d at 248 (“Although fiduciaries are not required to establish entire fairness in a short-form merger, the duty of full disclosure remains, in the context of this request for stockholder action.”); *Malone v. Brincat*, 722 A.2d 5, 9 (Del. 1998) (“This Court has held that a board of directors is under a fiduciary duty to disclose material information when seeking shareholder action. . . .”); *Shell Petroleum, Inc. v. Smith*, 606 A.2d 112, 114 (Del. 1992) (“As the majority shareholder, Holdings bears the burden of showing complete disclosure of all material facts relevant to a minority shareholder[s] decision whether to accept the short-form merger consideration or seek an appraisal.”).

13. *Zirn v. VLI Corp.*, 681 A.2d 1050, 1058 (Del. 1996) (“The goal of disclosure is . . . to provide a balanced and truthful account of those matters which are discussed in a corporation's disclosure materials.”); *see also Malone*, 722 A.2d at 10–12.

14. *Arnold*, 650 A.2d at 1281–82; *see also id.* at 1280 (noting that, “once defendants traveled down the road of partial disclosure of the history leading up to the Merger and used the vague language described, they had an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events”).

15. *Cf. Clements v. Rogers*, 790 A.2d 1222, 1236 (Del. Ch. 2001) (“The Delaware fiduciary duty of disclosure is not a full-blown disclosure regime like the one that exists under federal law; it is an instrumental duty of fiduciaries that serves the ultimate goal of informed stockholder decision making.”).

16. *TCG Sec., Inc. v. S. Union Co.*, C.A. No. 11282, 1990 WL 7525, at *7 (Del. Ch. Jan. 31, 1990).

The Delaware courts have therefore resisted requiring disclosures that “would turn proxy statements into vast compilations of information of little utility.”¹⁷ As the Court of Chancery has stated, “[T]he law ought [to] guard against the fallacy that increasingly detailed disclosure is always material and beneficial disclosure. In some instances the opposite will be true.”¹⁸ To be sure, the Delaware courts do not impose a word limit on disclosures; rather, over-disclosure merely may obfuscate or bury the material facts, and stockholders should not have to sift through purposefully extensive disclosures to locate the material facts.

To satisfy their duty of disclosure, however, directors must inform the stockholders of all “material” information regarding the subject of the communication. Thus, when a corporation seeks or recommends stockholder action in connection with a potential merger, it must disclose all material facts concerning the merger.¹⁹ The determination whether a fact is material is a mixed question of law and fact. This determination is an objective test, determined from the standpoint of a reasonable investor.²⁰ A material omission, for example, is “not rendered immaterial simply because the party making the omission honestly believes it insignificant.”²¹ That is, directors’ subjective views as to the materiality of a particular piece of information will not be controlling.²²

Adopting the standard of disclosure employed under the federal securities laws, the Delaware Supreme Court has stated that “[a]n omitted fact is material if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote.”²³ The court follows the federal standard in holding that, to establish the materiality of an omitted fact, “a plaintiff must demonstrate a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable stockholder.”²⁴ The court also borrows the “total mix” standard from federal securities cases, holding that plaintiffs must demonstrate “a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable stockholder as having significantly altered the ‘total mix’ of information made available.”²⁵ Materiality is situation-specific; that is, it is “determined with respect to the shareholder action being sought.”²⁶

17. *Clements*, 790 A.2d at 1245.

18. *Zirn v. VLI Corp.*, C.A. No. 9488, 1995 WL 362616, at *4 (Del. Ch. June 12, 1995), *aff'd*, 681 A.2d 1050 (Del. 1996).

19. *See, e.g.*, *Zirn v. VLI Corp.*, 621 A.2d 773, 778 (Del. 1993).

20. *Id.* at 779.

21. *Id.*

22. *Id.* (“[The materiality standard] does not contemplate the subjective views of the directors, nor does it require that the information be of such import that its revelation would cause an investor to change his vote.”).

23. *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 (Del. 1997); *see also Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

24. *Loudon*, 700 A.2d at 143.

25. *Id.*

26. *Malone v. Brincat*, 722 A.2d 5, 12 (Del. 1998).

Directors are not required to disclose information that is not factual, so disclosures need not include “opinions or possibilities [or] legal theories.”²⁷ The law likewise “does not require disclosure of inherently unreliable or speculative information which would tend to confuse stockholders or inundate them with an overload of information.”²⁸ Along these lines, the Delaware courts have also held that “self-flagellation” is not required of directors—they need not “confess[] to wrongdoing that has not been formally adjudicated by a court of law.”²⁹

PRINCIPLES GOVERNING THE DISCLOSURE OF FAIRNESS OPINIONS

The Delaware courts have addressed disclosure claims relating to fairness opinions in many cases. An exhaustive review of all those cases would be exhausting, so we discuss below the principles underlying some of the important cases in this area. Because investment bankers typically rely on management projections in arriving at fairness opinions,³⁰ we discuss cases on the disclosure of management projections in this context as well.³¹ As can be seen, the courts constantly try to strike a balance between potentially confusing over-disclosure and potentially misleading under-disclosure.³² Important to note, however, is that the duty of disclosure is situation-specific. That is, the information that must be disclosed will depend on the particular business combination (e.g., long-form merger, tender offer, short-form merger) and on the particular circumstances (e.g., negotiated third-party transaction, hostile tender offer, controlling-stockholder transaction).³³

27. *Seibert v. Harper & Row, Publishers, Inc.*, C.A. No. 6639, 1984 WL 21874, at *6 (Del. Ch. Dec. 5, 1984).

28. *Arnold v. Soc’y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994).

29. *Brody v. Zucha*, 697 A.2d 749, 754 (Del. 1997) (“It is settled Delaware law that a director need not make self-accusatory statements nor engage in ‘self-flagellation’ by confessing to wrongdoing that has not been formally adjudicated by a court of law.”); *Stroud v. Grace*, 606 A.2d 75, 84 n.1 (Del. 1992) (“We recognize the long-standing principle that to comport with its fiduciary duty to disclose all relevant material facts, a board is not required to engage in ‘self-flagellation’ and draw legal conclusions implicating itself in a breach of fiduciary duty from surrounding facts and circumstances prior to a formal adjudication of the matter.”).

30. *Cf. In re Topps Co. S’holders Litig.*, 926 A.2d 58, 75 (Del. Ch. 2007) (“According to counsel, Lehman [Brothers] will not base a fairness opinion on projections that have not been prepared entirely by management.”).

31. The Court of Chancery has noted that “it is common that [disclosures regarding fairness opinions] omit the specific management projections on which the banker’s analyses were based.” *In re Staples, Inc. S’holders Litig.*, 792 A.2d 934, 958 n.44 (Del. Ch. 2001). But the court did not approve of the practice, noting that “the projections are the information that most stockholders would find the most useful to them.” *Id.*

32. *See id.* at 954 (“Always at the forefront of the thinking behind these cases has been the need to avoid rules of disclosure that simply inflate the already-weighty proxy statements that stockholders receive, while at the same time encouraging the disclosure of genuinely useful decisionmaking information.”); *see also id.* (“In the area of investment bankers’ fairness opinions, the cases also display a certain modesty that recognizes the natural limits of the common law decisionmaking process. That process is ill-suited to the rational articulation of broad disclosure principles that adequately consider all the competing values at stake.”).

33. *Cf., e.g., Ortsman v. Green*, C.A. No. 2670-N, 2007 WL 702475, at *1 (Del. Ch. Feb. 28, 2007) (“Many of these claims are based on the faulty premise that every detail of Credit Suisse’s work product, including every underlying assumption, should be disclosed and explained in the context of this third-party transaction.”).

Therefore, none of the principles listed below are absolutes; each may vary in application or scope depending on the particular facts involved.

DIRECTORS MUST DISCLOSE SOME FINANCIAL INFORMATION

First, the Delaware courts generally require the disclosure of some measure of the company's value, whether that be audited financial statements, management projections, or a fairness opinion. In *Erickson*, a 2003 Court of Chancery case, the controlling stockholder's disclosure to the minority stockholders in a short-form merger tested the limits of minimal disclosure.³⁴ The court held it "incredible . . . for defendant to assert that it satisfied its disclosure duty as to the value of the [subsidiary] ACLC shares by providing plaintiff with nothing more than a one-and-a-half page 'Valuation' based entirely upon the calculation of a single multiple lacking any supporting data."³⁵ The court, noting that "defendant did not include any financial statements or any comparable information for review or analysis by its minority stockholders" and that the stockholders therefore "were not provided with any basic financial material upon which they could make an informed judgment about ACLC's value," held that the omissions were material.³⁶

The Court of Chancery has also suggested that management projections may alter the total mix of information: "In the context of a cash-out merger, reliable management projections of the company's future prospects are of obvious materiality to the electorate. After all, the key issue for the stockholders is whether accepting the merger price is a good deal in comparison with remaining a shareholder and receiving the future expected returns of the company."³⁷ The courts have not held,

34. *Erickson v. Centennial Beaugard Cellular LLC*, C.A. No. 19974, 2003 WL 1878583 (Del. Ch. Apr. 11, 2003); see also *id.* at *9 ("I conclude that the valuation analysis presented to the ACLC stockholders was so bereft of actual information that, while all of the requested information may not have been required, defendants had a duty to provide at least some further indication of the company's value to its stockholders. A single number (EBITDA) purporting to encompass the value of ACLC that was not supported with any financial information whatsoever is simply not sufficient, as a matter of law. Further explanation of this number, including the derivation of revenues, allocation of expenses, basis for selecting the EBITDA multiple, and so on, could have been material to the stockholders of ACLC.").

35. *Id.* at *6 ("Furthermore, ACLC was not a public company, which means the stockholders had no objective market data upon which to measure the fairness of the proposed merger consideration.").

36. *Id.* ("Importantly, no information was provided related to ACLC's revenue streams, levels of working capital, or any other financial information that would permit a stockholder to perform even the most basic financial ratio analysis. Defendant's disclosures related to the Valuation analysis were so sparse that the disclosure of the company's recent or historical financial statements would surely have altered the total mix of information in a significant manner.").

37. *In re PNB Holding Co. S'holders Litig.*, C.A. No. 28-N, 2006 WL 2403999, at *15 (Del. Ch. Aug. 18, 2006); see also *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002) (noting that "investment bankers' analyses . . . usually address the most important issue to stockholders—the sufficiency of the consideration being offered to them for their shares in a merger or tender offer"); *Staples*, 792 A.2d at 958 n.44 ("The typical disclosures of information regarding investment banker fairness opinions have a certain quirky character. For example, it is common that such disclosures omit the specific management projections on which the banker's analyses were based. In this case, that occurred even though the management projections were the foundation for all the valuation information provided in the proxy statement. . . . One suspects that the projections are the information that most stockholders would find the most useful to them.").

however, that projections must be disclosed in every situation, even if the projections underlie a fairness opinion.³⁸

In its 2007 *Netsmart* opinion, the Court of Chancery reiterated the importance of disclosing financial information: “When stockholders must vote on a transaction in which they would receive cash for their shares, information regarding the financial attractiveness of the deal is of particular importance.”³⁹ The court stated that this was “because the stockholders must measure the relative attractiveness of retaining their shares versus receiving a cash payment, a calculus heavily dependent on the stockholders’ assessment of the company’s future cash flows.”⁴⁰

The proxy statement in *Netsmart* contained two sets of projections—one set used in selling the company and one set used by the buyer to solicit financing—but it did not include the final projections (“management’s best estimate of the company’s future cash flows”) used by the company’s financial advisor (William Blair) in providing the fairness opinion.⁴¹ The court noted that “[i]nvestors can come up with their own estimates of discount rates or . . . market multiples. What they cannot hope to do is replicate management’s inside view of the company’s prospects.”⁴² Moreover, neither of the projections that were disclosed contained data for years 2010 and 2011, even though William Blair’s DCF analysis covered those years.⁴³ For several reasons, then, management’s final projections had to be disclosed;⁴⁴ these projections were the most reliable evidence of management’s estimate of the company’s value, these projections underlay the fairness opinion, and the two projections that were disclosed were either incomplete or misleading (to the extent they purported to be the basis for the fairness opinion). The court held that, “when a banker’s endorsement of the fairness of a transaction is touted to shareholders, the valuation methods used to arrive at that opinion as well as the

38. Those situations typically involve projections that are not reliable. The Court of Chancery has held in such a circumstance that “[t]here is no *per se* duty to disclose financial projections furnished to and relied upon by an investment banker. To be a subject of mandated disclosure, the projections must be material in the context of the specific case. In cases where the inherent unreliability of the projections is disclosed to stockholders in the proxy statement or is otherwise established, the projections have been found not material.” *McMillan v. Intercargo Corp.*, C.A. No. 16963, 1999 WL 288128, at *6 (Del. Ch. May 3, 1999) (footnote omitted); see also *infra* text accompanying notes 54–71.

39. *In re Netsmart Techs., Inc. S’holders Litig.*, 924 A.2d 171, 200 (Del. Ch. 2007); see also *id.* at 205 (“Logically, the cursory nature of [a typical fairness opinion] is a reason why the disclosure of the bank’s actual analyses is important to stockholders; otherwise, they can make no sense of what the bank’s opinion conveys, other than as a stamp of approval that the transaction meets the minimal test of falling within some broad range of fairness.”).

40. *Id.* at 200; see also *id.* at 203 (“It would therefore seem to be a genuinely foolish (and arguably unprincipled and unfair) inconsistency to hold that the best estimate of the company’s future returns, as generated by management and the Special Committee’s investment bank, need not be disclosed when stockholders are being advised to cash out.”).

41. *Id.* at 202–03.

42. *Id.* at 203.

43. *Id.* at 202–03; see also *id.* at 202 (noting that “approximately 82% to 86% of the present value of Netsmart’s calculated enterprise value was attributable to the terminal value calculated from the 2011 projected EBITDA.”).

44. The court also reiterated the not-done-not-disclosed principle, see *infra* notes 46–53 and accompanying text, noting that, “so long as what the investment banker did is fairly disclosed, there is no obligation to disclose what the investment banker did not do.” *Id.* at 204.

key inputs and range of ultimate values generated by those analyses must also be fairly disclosed.⁴⁵ What was missing in *Netsmart* were the “key inputs” to the fairness opinion—management’s final projections underlying the fairness opinion.

DIRECTORS NEED ONLY DISCLOSE WHAT THEY RECEIVED OR RELIED ON

Although it may seem obvious, the Court of Chancery has held that, “[u]nder Delaware law, there is no obligation on the part of a board to disclose information that simply does not exist.”⁴⁶ In *JCC Holding*, the plaintiffs argued that “the proxy statement was materially misleading insofar as it failed to include any ‘valuation’ of [certain pending litigations].”⁴⁷ But no such valuations existed, the court found, so the omission of that information was not material.⁴⁸ In another case, the Court of Chancery held an omission not material in part because the directors did not possess the desired valuation information, noting also that the directors had no affirmative duty to create the information.⁴⁹ If, on the other hand, information is withheld from the investment banker furnishing the fairness opinion and that information would clearly be essential to the banker’s valuation of the company and analysis of the fairness of the consideration, the fact that the information was withheld must be disclosed.⁵⁰

The Court of Chancery has also held that, if the directors did not receive or rely on a particular piece of information, they should not be required to disclose that information.⁵¹ For example, in *Van de Walle*, the plaintiff claimed that the “proxy statement should have disclosed certain ‘comparable company’ data that Drexel [Burnham Lambert] considered in arriving at its fairness opinion.”⁵² The Court of Chancery held that information to be “immaterial, because neither Drexel nor the

45. *Id.* at 203–04.

46. *In re JCC Holding Co., Inc. S’holders Litig.*, 843 A.2d 713, 721 (Del. Ch. 2003).

47. *Id.*

48. *Id.*; see also *id.* at 721 n.17 (“The proxy statement described the lawsuits and indicated that they were in their early stages and that the outcomes could not be predicted with certainty.”).

49. *In re Dataproducts Corp. S’holders Litig.*, C.A. No. 11164, 1991 WL 165301, at *8 (Del. Ch. Aug. 22, 1991) (“[P]laintiffs do not allege that the defendants possessed or concealed such valuation information, and they offer no reasoned argument why, in these circumstances, the defendants were affirmatively obligated to create (and then disclose) such valuations.”).

50. *Joseph v. Shell Oil Co.*, 482 A.2d 335, 341–42 (Del. Ch. 1984) (“[T]he disclosures made to the stockholders failed to clearly and unequivocally disclose that essential and necessary information had been withheld from the appraiser. A disclosure to the effect that ‘Morgan Stanley based its opinion of value on publicly disclosed information’ falls far short of the full and complete disclosure with absolute candor required by Delaware law.”). *But cf.* Transcript of Oral Argument on Plaintiffs’ Motion for Preliminary Injunction and Rulings of the Court at 100, *In re BEA Sys., Inc. S’holder Litig.*, Consol. C.A. No. 3298-VCL (Del. Ch. Mar. 26, 2008) (The court stated, “[T]he fact that something is included in materials that are presented to a board of directors does not, ipso facto, make that something material.”).

51. See *Van de Walle v. Unimation, Inc.*, C.A. No. 7046, 1991 WL 29303, at *16 (Del. Ch. Mar. 7, 1991); see also *id.* at *17 (“Because neither set of figures was intended to serve as a valuation of the company, they were not sufficiently reliable evidence of value to be the subject of mandated disclosure to stockholders.”).

52. *Id.* at *16.

Unimation directors relied on such data in determining the fairness of the merger price.”⁵³

ONLY RELIABLE AND NON-SPECULATIVE INFORMATION
NEED BE DISCLOSED

Delaware courts will not force disclosure of unreliable or out-of-date projections or other speculative information.⁵⁴ “[I]t is not our law that every extant estimate of a company’s future results, however stale or however prepared, is material.”⁵⁵ On the other hand, otherwise-reliable management projections completed shortly before a merger or other transaction will generally be regarded as material.⁵⁶ The Delaware courts have indicated that speculative pricing information developed in the merger context is not material and thus need not be included in the relevant disclosure document⁵⁷—disclosure of unreliable material may even be misleading.⁵⁸ A corollary to this reliability principle is that directors typically need not disclose intermediate draft fairness opinions.⁵⁹

In the 2007 *Netsmart* case, plaintiffs complained that the proxy failed to include projections made by Kevin Scalia, Netsmart’s executive vice president, that were presented to the board and that helped the board decide to take the company private by selling to a financial buyer.⁶⁰ The court held that the nondisclosure of the Scalia projections was not material because the “later disclosed projections, which were relied upon by William Blair and shaped by management input, including

53. *Id.*

54. “In determining the reliability of such information, the Court must consider several factors, including the purpose for which the information was originally prepared and intended to be used.” *Id.* at *17; *see also* Transcript of Oral Argument on Plaintiffs’ Motion for Preliminary Injunction and Rulings of the Court at 92, *In re BEA Sys., Inc. S’holder Litig.*, Consol. C.A. No. 3298-VCL (Del. Ch. March. 26, 2008) (The court stated, “[T]he information available is certainly not considered in any way to be a reliable indication of the synergies that would actually be achieved in this transaction. For that reason alone, I think there’s clear precedent that such information does not need to be disclosed.”); *id.* at 93–94 (The court stated, “I don’t understand why it would have been material to disclose that information, as it is considered to be unreliable and could well mislead shareholders rather than inform them.”).

55. *In re PNB Holding Co. S’holders Litig.*, C.A. No. 28-N, 2006 WL 2403999, at *16 (Del. Ch. Aug. 18, 2006); *see also* *McMillan v. Intercargo Corp.*, C.A. No. 16963, 1999 WL 288128, at *7 (Del. Ch. May 3, 1999).

56. *Cf. PNB*, 2006 WL 2403999, at *15 (“Had the Merger been proposed in 2001, months after Criswell prepared the projections [created in December 2000 and presented to the board in February 2001], the failure to disclose those projections would have created a material deficiency.”).

57. *Arnold v. Soc’y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1282 (Del. 1994) (“Goldman’s share valuation was too unreliable to be material.”); *see also PNB*, 2006 WL 2403999, at *18 (stating that, “[b]ecause the Criswell Projections were outdated and unreliable, they would not have significantly altered the ‘total mix’ of information made available to shareholders”).

58. *Globis Partners, L.P. v. Plumtree Software, Inc.*, C.A. No. 1577-VCP, 2007 WL 4292024, at *13 (Del. Ch. Nov. 30, 2007).

59. *In re Anderson, Clayton S’holders Litig.*, 519 A.2d 680, 691 (Del. Ch. 1986) (stating that “to go beyond disclosure of the opinion itself (where that is appropriate) and require disclosure of intermediate opinions would, in my view, risk far more mischief than it would promise benefit”); *see also Rosser v. New Valley Corp.*, C.A. No. 17272-NC, 2005 WL 1364624, at *7 (Del. Ch. May 27, 2005) (noting that “[p]laintiff has not brought forth any authority to show that draft fairness opinions must be disclosed to shareholders”).

60. *In re Netsmart Techs., Inc. S’holders Litig.*, 924 A.2d 171, 180–82, 199 (Del. Ch. 2007).

from Scalia himself, were more current and more bullish.”⁶¹ The court held the Scalia projections not material because they were unreliable and because they showed the merger consideration to be even fairer than the proxy implied, a fact that would not influence the vote of rational stockholders.⁶²

In *Lear*, another 2007 Court of Chancery case, stockholder plaintiffs claimed that the directors should have disclosed in the proxy “one of the various DCF models run by JPMorgan during its work leading up to its issuance of a fairness opinion.”⁶³ The undisclosed model—“the first of eight drafts circulated before a final presentation”—“used modestly more aggressive assumptions” than the model that supported the final fairness opinion.⁶⁴ Under a straightforward application of the reliability principle, the court found no proof that the model at issue was particularly reliable and held that its omission was not material.⁶⁵ Sufficient information underlying the fairness opinion had already been disclosed,⁶⁶ so the lack of the draft model would not have added anything to the “total mix” of information available.

In *CheckFree*, also a 2007 chancery case, plaintiffs sought to enjoin a proposed all-cash merger between CheckFree Corporation and Fiserv, Inc., claiming deficiencies in CheckFree’s proxy statement.⁶⁷ The plaintiffs’ relevant claim was that the “proxy does not disclose management’s projections for the company and the Goldman [Sachs] fairness opinion relied on those projections.”⁶⁸ Plaintiffs “argue[d] that the proxy otherwise indicates that management prepared certain financial projections, that these projections were shared with Fiserv, and that Goldman utilized these projections when analyzing the fairness of the merger price.”⁶⁹ The court, following the reliability principle, held that CheckFree’s disclosure was sufficient, noting that the proxy “explicitly warn[ed] that Goldman had to interview members of senior management to ascertain the risks that threatened the accuracy of [the management] projections.”⁷⁰ The proxy did not disclose the projections at all—so no need for balancing misleading disclosures came into play—and the court found that the “raw, admittedly incomplete projections [we]re not material” and may themselves have been misleading.⁷¹

61. *Id.* at 200.

62. *Id.* at 200–01.

63. *In re Lear Corp. S’holder Litig.*, 926 A.2d 94, 110 (Del. Ch. 2007).

64. *Id.* at 111.

65. *Id.* (noting that plaintiffs “did not develop any evidence in discovery that suggested that this model was embraced as reliable by either the senior bankers in charge of the deal or by Lear management”).

66. *Id.* at 110–11 (“The plaintiffs admit that the proxy statement provides a full set of the projections used by JPMorgan in the DCF it prepared that formed part of the basis of its fairness opinion. The plaintiffs also admit that the proxy statement discloses the range of values generated from a DCF analysis using a more optimistic set of projections derived from the July 2006 Plan, an analysis that was also fully disclosed in Lear’s Rule 13E-3 public disclosure concerning the merger.”).

67. *In re CheckFree Corp. S’holders Litig.*, C.A. No. 3193-CC, 2007 WL 3262188, at *1 (Del. Ch. Nov. 1, 2007).

68. *Id.* at *2.

69. *Id.*

70. *Id.* at *3.

71. *Id.* The proxy statement otherwise provided sufficient detail; the court noted that the proxy “details the various sources upon which Goldman relied in coming to its conclusions, explains some

DIRECTORS SHOULD DISCLOSE A “FAIR SUMMARY OF THE
SUBSTANTIVE WORK PERFORMED” ON THE FAIRNESS OPINION

The level of detail required for disclosure as to the basis of an investment advisor's fairness opinion is probably the most disputed aspect of fairness-opinion disclosure. This dispute plays out in a seeming clash in two Delaware Supreme Court cases decided in 2000, *Skeen*⁷² and *McMullin*.⁷³ In *Skeen*, the Delaware Supreme Court held that financial information—“a summary of ‘the methodologies used and ranges of values generated by [the banker]’ in reaching its fairness opinion”—even though it “would be helpful in valuing the company,” was not required to be disclosed because it did not “significantly alter the total mix of information already provided.”⁷⁴ That is, the information the plaintiffs wished disclosed was not “inconsistent with, or otherwise significantly differ[ent] from, the disclosed information.”⁷⁵ On the other hand, the court in *McMullin* (though “adher[ing] to [the] holding in *Skeen*”) held that disclosure claims in which plaintiff alleged that the directors failed to disclose “the information provided to Merrill Lynch and the valuation methodologies used by Merrill Lynch” survived a motion to dismiss.⁷⁶

In *Pure Resources*, the Court of Chancery tried to bridge this apparent gap by issuing a “firm statement that stockholders are entitled to a fair summary of the substantive work performed by the investment bankers upon whose advice the recommendations of their board as to how to vote on a merger or tender rely.”⁷⁷ As the court noted, “[T]he disclosure of the banker's ‘fairness opinion’ alone and without more[] provides stockholders with nothing other than a conclusion, qualified by a gauze of protective language designed to insulate the banker from liability.”⁷⁸

of the assumptions and calculations management made to come to its estimates, notes exactly the comparable transactions and companies Goldman used, and describes or otherwise discloses management's estimated earnings and estimated EBITDA for 2007 and 2008 and a range of earnings derived from management estimates for 2009.” *Id.*

72. *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170 (Del. 2000).

73. *McMullin v. Beran*, 765 A.2d 910 (Del. 2000).

74. *Skeen*, 750 A.2d at 1173–74.

75. *Id.* at 1174. The disclosed information included “a copy of the fairness opinion given by HF's investment banker, Donaldson, Lufkin & Jenrette (DLJ); the company's audited and unaudited financial statements through January 31, 1998; and HF's quarterly market prices and dividends through the year ended January 31, 1998.” *Id.* at 1173.

76. *McMullin*, 765 A.2d at 925–26.

77. *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002).

78. *Id.* The Court of Chancery has made other similar comments regarding fairness opinions. See, e.g., Transcript of Office Conference on Plaintiffs' Motion for Expedited Proceedings and Ruling of the Court at 3–4, *Berg v. Ellison, C.A. No. 2949-VCS* (Del. Ch. June 12, 2007) (The court stated, “I'm reminded by my friends in the investment banking industry, whenever they get the chance to tell me, that, you know, nothing about their work should really have to be disclosed other than, you know, the relevant factor that[] subject to the 700 caveats in their fairness opinion, they've concluded that the deal was financially fair. Of course, no one can rely upon that, but that's really all that should be—you know, the name of the bank, the caveats, and their bottom line, which is really all that is relevant. I don't obviously, take that view, and I believe that stockholders are entitled to financial information about deals.”); *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 205 (Del. Ch. 2007) (“William Blair's bare bones fairness opinion is typical of such opinions, in that it simply states a conclusion that the offered Merger consideration was ‘fair, from a financial point of view, to the shareholders’ but plainly does not opine whether the proposed deal is either advisable

“The real informative value of the banker’s work is not in its bottom-line conclusion,” the court noted, “but in the valuation analysis that buttresses that result.”⁷⁹ Therefore, the court held that, because the disclosure documents did not “disclose any substantive portions of the work of [banks] First Boston and Petrie Parkman,” the directors needed to disclose three items: “the basic valuation exercises that First Boston and Petrie Parkman undertook, the key assumptions that they used in performing them, and the range of values that were thereby generated.”⁸⁰

That said, companies do not have to disclose the detailed procedures by which their financial advisors came to their fairness opinions: “A proxy statement need not disclose all the wealth of detail presented to or considered by the corporation’s directors and advisors, whether or not material.”⁸¹ Delaware courts also “reject[] the proposition that disclosure of the detailed facts and specific analyses underlying a financial advisor’s valuation methodology is automatically mandated in all circumstances.”⁸²

Once particular details of a valuation are disclosed, however, further disclosures must be made to avoid any misimpressions created by those details.⁸³ As the Court of Chancery has noted, “the inaccurate description of the valuation methodology or results of a financial advisor, in the right circumstances, can constitute a disclosure violation.”⁸⁴

In 2007, the Court of Chancery held in *Globis* that plaintiff did not state a disclosure claim in alleging that the company’s proxy statement failed to disclose several elements of a fairness opinion.⁸⁵ Plaintiff argued that the company “should have disclosed the discount rate used [particularly since the banker provided no DCF analysis], the reasons for using different sets of comparable companies in different analyses, and additional details regarding the private companies used in the analyses.”⁸⁶ The court held that: (1) although the proxy did not disclose the

or the best deal reasonably available. Also in keeping with the industry norm, William Blair’s fairness opinion devotes most of its text to emphasizing the limitations on the bank’s liability and the extent to which the bank was relying on representations of management.” (footnote omitted); see also *In re Lear Corp. S’holder Litig.*, 926 A.2d 94, 111 (Del. Ch. 2007) (describing a particular draft fairness opinion as “just one of many cases being prepared in Sinatra time by a no-doubt extremely-bright, extremely-overworked young analyst, who was charged with providing input to the senior bankers”). See generally Randall Smith, *‘Fair’ Deal at \$2 or \$10*, WALL ST. J., Mar. 25, 2008, at C1 (discussing criticisms of fairness opinions).

79. *Pure Res.*, 808 A.2d at 449.

80. *Id.* at 448–49.

81. *Van de Walle v. Unimation, Inc.*, C.A. No. 7046, 1991 WL 29303, at *16 (Del. Ch. Mar. 7, 1991).

82. *In re Dataproducts Corp. S’holders Litig.*, C.A. No. 11164, 1991 WL 165301, at *8 (Del. Ch. Aug. 22, 1991).

83. See *In re Staples, Inc. S’holders Litig.*, 792 A.2d 934, 957–58 (Del. Ch. 2001). This is analogous to the standard under the federal securities laws. See, e.g., 17 C.F.R. § 240.14a-9(a) (2008) (providing that proxy solicitations may not “omit[] to state any material fact necessary in order to make the statements therein not false or misleading”).

84. *In re PNB Holding Co. S’holders Litig.*, C.A. No. 28-N, 2006 WL 2403999, at *20 (Del. Ch. Aug. 18, 2006).

85. *Globis Partners, L.P. v. Plumtree Software, Inc.*, C.A. No. 1577-VCP, 2007 WL 4292024, at *12–13 (Del. Ch. Nov. 30, 2007).

86. *Id.* at *12.

discount rate used, the proxy disclosed the “derivation” of the discount rate; (2) the proxy gave indications as to why different sets of companies were used for the two comparable-company analyses; and (3) details about the private companies were unnecessary because plaintiff did not need the ability to “confirm the accuracy of [the] analysis.”⁸⁷ In short, the court held that a “fair summary” of the banker’s substantive work had been given.⁸⁸

THE AVAILABILITY OF APPRAISAL DOES NOT RAISE THE LEVEL OF DISCLOSURE REQUIRED

Although stockholders arguably may need more information to decide whether to seek appraisal than to decide whether to approve or reject a proposed transaction,⁸⁹ the Delaware courts have rejected attempts to impose a higher standard for disclosure when the stockholders have to decide whether to seek appraisal. “The parent need not provide *all* the information necessary for the stockholder to reach an independent determination of fair value; only that information material to the decision of whether or not to seek appraisal is required.”⁹⁰

In *Skeen*, plaintiffs sought the disclosure of additional financial information “because it would help stockholders evaluate whether they should pursue an appraisal.”⁹¹ Stating that the plaintiffs were “advocating a new disclosure standard in cases where appraisal is an option,” the Delaware Supreme Court saw “no reason to depart from [its] traditional standards.”⁹² The court therefore held that stockholders need not “be given all the financial data they would need if they were making an independent determination of fair value.”⁹³ Stockholders deciding

87. *Id.* at *13.

88. *Id.* at *12.

89. For example, when determining whether to accept or reject a proposed transaction, a stockholder need only decide whether the consideration being offered is superior or inferior to that stockholder’s expected future return. When determining whether to seek appraisal, the stockholder may wish to determine the corporation’s fair value so as to determine whether an appraisal action would ultimately be profitable and worth the time and expense. Accordingly, the Delaware courts have described short-form mergers—and their accompanying decision of appraisal or acceptance of the merger consideration—as presenting “a more compelling case for the application of the recognized disclosure standards.” *Wacht v. Cont’l Hosts, Ltd.*, C.A. No. 7954, 1986 WL 4492, at *2 (Del. Ch. Apr. 11, 1986); *see also* *Erickson v. Centennial Beauregard Cellular LLC*, C.A. No. 19974, 2003 WL 1878583, at *5 (Del. Ch. Apr. 11, 2003).

90. *In re Unocal Exploration Corp. S’holders Litig.*, 793 A.2d 329, 352 (Del. Ch. 2000); *see also* *Globis Partners*, 2007 WL 4292024, at *13 (“Delaware law does not require disclosure of all the data underlying a fairness opinion such that a shareholder can make an independent determination of value.”); *In re Gen. Motors (Hughes) S’holder Litig.*, C.A. No. 20269, 2005 WL 1089021, at *16 (Del. Ch. May 4, 2005) (“A disclosure that does not include all financial data needed to make an independent determination of fair value is not . . . *per se* misleading or omitting a material fact. The fact that financial advisors may have considered certain non-disclosed information does not alter this analysis.” (footnote omitted)), *aff’d*, 897 A.2d 162 (Del. 2006).

91. *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000).

92. *Id.*

93. *Id.*

whether to seek appraisal should be given information “material” to that decision, the court held, but nothing more than that is necessary.⁹⁴

Accordingly, the Court of Chancery has held that financial disclosures must make clear which method of valuation is used. In *In re Staples*, for example, the proxy statement stated that certain shares were valued based on a “fair market value,” even though the proxy noted that the per-share price “‘did not reflect any private market discounts, tracking stock discounts, or future financing.’”⁹⁵ The court held that, “to the extent that the Staples board did not take into account the type of factors that normally would be given weight in a determination of the fair market value of shares, this needed to be made clear.”⁹⁶ The mention of the term “fair market value” created potential confusion as to whether a marketability discount or control premium had been included, and the “stockholders [we]re entitled to additional disclosures to clarify the method by which management and the bankers generated their determinations of value.”⁹⁷ Then, the stockholders could apply their own presumed marketability discounts and assess the financial attractiveness of the transaction for themselves.⁹⁸

The Court of Chancery has also noted, though, that the clear and accurate disclosure of valuation methodology can counteract the use of “fair value” as a (mildly inaccurate, in that case) descriptor.⁹⁹ The court noted that Delaware law does not require full disclosure of the “discrepancy between [the bank’s] DCF and the Delaware fair value standard.”¹⁰⁰ “So long as the valuation work is accurately described and appropriately qualified, that is sufficient. . . . Stockholders were cautioned that the value reached was a ‘subjective’ estimate and that an appraisal in this court could result in a different value.”¹⁰¹

DIRECTORS CANNOT DISCLOSE A FAVORABLE VALUATION AND HIDE AN UNFAVORABLE ONE

Generally speaking, the Delaware courts will prevent directors from “gaming the system” by disclosing only valuations that support the directors’ desired outcome. In *Lynch v. Vickers*, the Delaware Supreme Court analyzed a disclosure claim in which a member of management (also a petroleum engineer) had done estimates of an oil and gas company’s assets, arriving at a net asset value of \$250 to \$300 million.¹⁰² The majority stockholder (which knew of this valuation) disclosed in its tender offer circular only that the company’s net asset value was

94. *Id.*

95. *In re Staples, Inc. S’holders Litig.*, 792 A.2d 934, 954–55 (Del. Ch. 2001).

96. *Id.* at 955.

97. *Id.* at 956.

98. *Id.* at 956 n.38.

99. *In re PNB Holding Co. S’holders Litig.*, C.A. No. 28-N, 2006 WL 2403999, at *20 (Del. Ch. Aug. 18, 2006).

100. *Id.*

101. *Id.*

102. *Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 280 (Del. 1977).

“not less than \$200,000,000 . . . and could be substantially greater.”¹⁰³ The court held that, though the disclosure was technically accurate, “that kind of generality is hardly a substitute for hard facts when the law requires complete candor.”¹⁰⁴ The court went on to say that “when, as here, management was in possession of two estimates from responsible sources—one using a ‘floor’ approach defining value in terms of its lowest worth, and the other a more ‘optimistic’ or ceiling approach defining value in terms of its highest worth—it is our opinion that complete candor required disclosure of both estimates.”¹⁰⁵ Management had the option to explain why one estimate was “more accurate or realistic than another” and to approve one particular estimate, but the court held that both were to be disclosed.¹⁰⁶

In *Topps*, plaintiffs brought disclosure claims, alleging that the proxy failed to disclose Lehman Brothers’ “detailed presentation to the Topps board” done just over a month before the projections disclosed in the proxy.¹⁰⁷ The proxy disclosed two sets of projections—an aggressive case and a more moderate case—but the earlier presentation, also providing two sets of projections, showed higher DCF ranges barely including (buyer) Eisner’s proposed merger price.¹⁰⁸

The court held the proxy was materially misleading for omitting the earlier projections, finding no evidence that the earlier projections, which made the merger bid look less attractive, were unreliable.¹⁰⁹ The *Topps* court’s concern appeared to be that, although management’s projections had changed slightly from the earlier presentation to the later presentation, Lehman’s analytical approach also shifted between the two presentations.¹¹⁰ Though the court did not find “a purposeful intent on Lehman’s part to generate a range of value that eased its ability to issue a fairness opinion,” it noted that the record reflected that Lehman might have “manipulate[d] its analyses to try to make the Eisner offer look more attractive once it was clear Eisner would not budge on price.”¹¹¹ Therefore, because the earlier presentation had no reliability issues (the court noted that it could not “be slighted as a selling document”) and because Lehman made “major subjective changes” that were unexplained, the court held the omission of the earlier presentation material.¹¹²

103. *Id.* (emphasis and internal quotation marks omitted).

104. *Id.* at 281.

105. *Id.*

106. *Id.* *But cf.* *PNB*, 2006 WL 2403999, at *17 (noting that “*Vickers* represents the minority of cases where this court has found that the disclosure of projections was required” and that, “[m]ore frequently, this court has found projections too unreliable to warrant disclosure”).

107. *In re Topps Co. S’holders Litig.*, 926 A.2d 58, 75 (Del. Ch. 2007).

108. *Id.* at 74–75.

109. *Id.* at 76–77.

110. *Id.* at 75–76 (noting that Lehman used a different cost of capital and different ranges of exit multiples).

111. *Id.* at 76.

112. *Id.* at 76–77 (“Given the major subjective changes that Lehman made that were not explained, given that those changes made the Eisner bid look much more attractive, and given that those changes were made only after Feder’s attempts to negotiate a price higher than \$9.75 had finally failed, the

DIRECTORS MAY HAVE TO DISCLOSE CERTAIN CIRCUMSTANCES SURROUNDING THE PREPARATION OF A FAIRNESS OPINION

Related somewhat to the reliability principle, certain circumstances may affect the weight that stockholders would give to a fairness opinion. The Delaware courts have noted these circumstances and have required appropriate disclosures. “[B]ecause of their essentially predictive nature, our law has refused to deem projections material unless the circumstances of their preparation support the conclusion that they are reliable enough to aid the stockholders in making an informed judgment.”¹¹³ Thus, if the fairness opinion has been hurriedly drafted, for example, the haste in which it was prepared may be material in certain circumstances.¹¹⁴

The independence and disinterestedness of the investment bank providing the fairness opinion may also be held to be material.¹¹⁵ In 2007, the Court of

Proxy Statement is materially misleading for failing to discuss the advice given to the Board about valuation on January 25.”).

113. PNB Holding Co. S’holders Litig., C.A. No. 28-N, 2006 WL 2403999, at *16 (Del. Ch. Aug. 18, 2006).

114. Van de Walle v. Unimation, Inc., C.A. No. 7046, 1991 WL 29303, at *16 (Del. Ch. Mar. 7, 1991); see also Weinberger v. UOP, Inc., 457 A.2d 701, 712 (Del. 1983) (“There was no disclosure [to the minority stockholders] of the circumstances surrounding the rather cursory preparation of the Lehman Brothers’ fairness opinion.”); Joseph v. Shell Oil Co., 482 A.2d 335, 343 (Del. Ch. 1984) (“Lastly, the failure of the tender offer materials to completely and with utmost candor make clear that the initial valuation opinion of Morgan Stanley was arrived at after only eight days of scrutiny violates the rule set forth in *Weinberger*. The fact that Morgan Stanley had prepared a similar preliminary report [two years earlier] in 1982 does not relieve the tender offeror from fully disclosing the circumstances surrounding the presentation of Morgan Stanley’s fairness opinion.” (citation omitted)).

115. Cf. *In re Best Lock Corp. S’holder Litig.*, 845 A.2d 1057, 1072 (Del. Ch. 2001) (“[P]laintiffs allege that Piper [Jafray] was not independent, contrary to the defendants’ representations in the Information Statement. This is important to the public shareholders of the Best Companies, plaintiffs contend, because they may rely on Piper’s independence to ‘conclude that the merger consideration and the methodology by which it was determined are fair to the public stockholders.’ Although the Information Statement refers to Piper as an ‘independent financial advisor,’ the Information Statement does not attempt to hide any of the relationships between Piper and the Best Companies. In fact, the Information Statement clearly describes the extent of the relationship between Piper and the defendants, including fee arrangements, past relationships, and the like. Therefore, I do not think that further disclosure regarding the purported independence of Piper (or lack thereof) would change the total mix of information available to the shareholders.” (footnotes omitted)); cf. also *Alidina v. Internet.com Corp.*, C.A. No. 17235-NC, 2002 WL 31584292, at *9 (Del. Ch. Nov. 6, 2002) (“Plaintiffs successfully contend that the tender offer materials did not adequately disclose the source of the \$22.5 million valuation of Internet.com. The Amended 14D-9 parenthetically explains that the agreed valuation of iWorld was ‘based upon [Meckler’s] payment of \$18 million for an 80.1% equity interest in iWorld.’ This statement—which was buried in a subpart of multiple factors Meckler considered when opining upon the fairness of the iWorld transaction—fails to point out the fact that no independent valuation of iWorld was ever attempted. . . . Although shareholders are generally able to draw their own conclusions about valuations when given the valuation method and results, here there was no attempt to provide the shareholders with a valuation of Internet.com, leaving them with no basis, other than Meckler’s own self-serving fairness opinion, to determine whether they were receiving adequate value for their stake in Internet.com. Thus, it seems reasonable that further disclosure regarding the \$22.5 million valuation of Internet.com may have altered the total mix of information available to the shareholders.” (alteration in original) (footnote omitted)).

In October 2007, the SEC approved Rule 2290 of the Financial Industry Regulatory Authority. Self-Regulatory Organizations, Exchange Act Release No. 56,645 (Oct. 11, 2007). Rule 2290 provides for the disclosure of certain information regarding fairness opinions, including whether the bank acted as a financial advisor to any party to the transaction, whether the bank will receive compensation contingent on the transaction’s successful completion, and any material relationships in the last two

Chancery held in *Crawford* that, “where a significant portion of bankers’ fees rests upon initial approval of a particular transaction, that condition must be specifically disclosed to the shareholder. Knowledge of such financial incentives on the part of the bankers is material to shareholder deliberations.”¹¹⁶

In *Globis*, a later 2007 Chancery case, the plaintiff challenged the disclosure of the banker’s fees. The proxy statement in that case stated that “Jefferies Broadview acted as financial advisor to our board of directors, received a customary fee from Plumtree upon delivery of its opinion and will receive an additional customary fee upon the successful conclusion of the merger.”¹¹⁷ It also stated that “Jefferies Broadview will also be reimbursed for its reasonable and customary expenses.”¹¹⁸ The Court held that, “[w]ithout a well-pled allegation of exorbitant or otherwise improper fees, there is no basis to conclude the additional datum of Jefferies’ actual compensation, *per se*, would significantly alter the total mix of information available to stockholders.”¹¹⁹

A COMPLAINT ABOUT THE SUBSTANCE OF THE VALUATION IS NOT A DISCLOSURE CLAIM

A disclosure claim differs from an appraisal claim. Stockholders may not bring disclosure claims to challenge the valuation placed on a company by the investment banker. Thus, if a plaintiff does not contend that “the proxy statement did not fairly describe the actual analysis [the bank] undertook,” but contends only that “the analysis was flawed and therefore misleading,”¹²⁰ a Delaware court will likely dismiss the claim. The Court of Chancery has held that “[t]his kind of quibble with the substance of a banker’s opinion does not constitute a disclosure claim.”¹²¹ The board’s duty is merely to disclose the material facts, and “[b]y

years between the bank and any party to the transaction. FIN. INDUS. REGULATORY AUTH. R. 2290 (effective Dec. 8, 2007).

116. *La. Mun. Police Employees’ Ret. Sys. v. Crawford*, 918 A.2d 1172, 1191 (Del. Ch.) (noting that “the contingent nature of an investment banker’s fee can be material and have actual significance to a shareholder relying on the banker’s stated opinion”), *review refused sub nom. Express Scripts, Inc. v. Crawford*, 931 A.2d 1006 (Del. 2007) (unpublished table decision); *see also In re Tele-Comm’ns, Inc. S’holders Litig.*, C.A. No. 16470, 2005 WL 3642727, at *10 (Del. Ch. Dec. 21, 2005, revised Jan. 10, 2006) (“Furthermore, the contingent compensation of the financial advisor, DLJ, of roughly \$40 million creates a serious issue of material fact, as to whether DLJ (and DLJ’s legal counsel) could provide independent advice to the Special Committee.”).

117. *Plumtree Software, Inc., Proxy Statement* (Form DEFM14A), at 30 (Sept. 19, 2005).

118. *Id.*

119. *Globis Partners, L.P. v. Plumtree Software, Inc.*, C.A. No. 1577-VCP, 2007 WL 4292024, at *13 (Del. Ch. Nov. 30, 2007). *But see Ortsman v. Green*, C.A. No. 2670-N, 2007 WL 702475, at *1–2 (Del. Ch. Feb. 28, 2007) (finding a “colorable disclosure claim[]” where “a reader of the proxy statement is not told how much Credit Suisse was paid, whether it would have received the same payment even if it was unable to render a fairness opinion at \$27.85, or how much Credit Suisse has earned in recent periods from Kelso or other members of the buyer group” and even though the fee was described as “‘customary’”).

120. *In re JCC Holding Co., Inc. S’holders Litig.*, 843 A.2d 713, 721 (Del. Ch. 2003).

121. *Id.*; *see also Globis*, 2007 WL 4292024, at *11 (same (quoting *In re JCC*)); Transcript of Office Conference on Plaintiffs’ Motion for Expedited Proceedings and Ruling of the Court at 3, *Berg v. Ellison*, C.A. No. 2949-VCS (Del. Ch. June 12, 2007) (The court stated, “The disclosure claims were the kind of quibbles like investment bankers should have done things different than they in fact did, which are not disclosure claims.”).

setting forth a fair summary of the valuation work [the bank] in fact performed, the board [meets] its obligation under our law.”¹²² As noted above, if stockholders are deciding whether to seek appraisal, the directors are required to provide information material to that decision—challenges to the corporation’s valuation should therefore be brought in an appraisal action, not in a disclosure claim.

FRAMEWORK FOR DISCLOSURE OF FAIRNESS OPINIONS

The principles elucidated above provide some guidance for predicting how the Delaware courts would rule on a particular disclosure claim. Here, we build on those principles to set out a framework for disclosure of a fairness opinion under Delaware law. The three elements of fairness-opinion disclosure we discuss here—the elements most often disputed—are the banker’s fee structure, the methodology of the analysis, and the company’s projections.

It bears noting at the outset that, though fairness opinions are not required as a matter of law,¹²³ as a practical matter they will be required in many circumstances. When directors seek stockholder action on a transaction that will terminate the stockholders’ interest in the corporation, the directors must disclose information sufficient to allow the stockholders to determine whether to approve the transaction or, if applicable, exercise appraisal rights. These disclosures must inform the stockholders on whether approving the transaction (and accepting the proffered consideration) is likely to be more profitable than rejecting it (and retaining an economic interest in the company) or, if applicable, exercising appraisal rights. It seems unlikely that directors of a public corporation would view themselves as complying with these obligations today in the context of a cash-out merger by merely disclosing management projections.¹²⁴ Of course, for certain private-company or other deals, directors may have more leeway to dispense with fairness opinions and to disclose instead projections containing sufficient detail to allow the stockholders to make an informed vote on the financial desirability of the transaction.

122. *In re JCC*, 843 A.2d at 722; see also *Rosser v. New Valley Corp.*, C.A. No. 17272-NC, 2005 WL 1364624, at *7 (Del. Ch. May 27, 2005) (“Unexplained, material differences between drafts and the final version of a fairness opinion may raise concerns about its adequacy and a board’s reliance on that opinion; however, the case at hand is about disclosure and does not directly concern the adequacy of PMG’s fairness opinion or how it projected a value for the warrants.”).

123. See, e.g., *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 984 (Del. Ch. 2000) (“[F]airness opinions prepared by independent investment bankers are generally not essential, as a matter of law, to support an informed business judgment.”).

124. See Steven M. Davidoff, *Fairness Opinions*, 55 AM. U. L. REV. 1557, 1599 (2006) (“[T]he Delaware courts’ assertions that a fairness opinion is not explicitly required in connection with the board’s consideration of a corporate control transaction have been undermined by the credence and weight paid by the courts to fairness opinions in such paradigms. In case after case where a board’s decision-making process has been challenged, the Delaware courts have noted the receipt of a fairness opinion, in and of itself, as a strong, if not dispositive, indicator that the board properly acted in making the relevant decision to proceed with the transaction.”); see also *id.* at 1611 (“Since *Van Gorkom*, the Delaware courts have consistently encouraged, if not ostensibly required, these opinions in corporate control transactions.”).

Delaware law is not, like the federal securities laws,¹²⁵ a mandatory check-the-box disclosure regime. A director's fiduciary duty of disclosure depends on no statute; the bounds of the duty have evolved over time, built not on bright-line rules but on specific determinations regarding particular facts and circumstances. Thus, the Delaware courts may never hold that disclosure of a fairness opinion, or any specific information underlying the opinion, is required per se. Once a fairness opinion is disclosed, however, additional disclosure obligations will be triggered regarding, among other things, the integrity of the opinion provider's analysis¹²⁶ (i.e., a "fair summary of the substantive work performed").

DISCLOSURE OF FEE STRUCTURES

Because the fee paid to the financial advisor delivering a fairness opinion could have a material bearing on the stockholders' judgment of the integrity of the advisor's analysis,¹²⁷ disclosure of the fee structure is often an issue. The Court of Chancery in *Globis* suggested that disclosure of the fees paid for delivering a fairness opinion need not be very detailed.¹²⁸ The court suggested that, so long as the proxy disclosed that there was a contingent fee and stated that the fee would be "customary," the disclosure was sufficient.¹²⁹ The *Globis* holding should probably be seen as a floor—the minimum allowable disclosure required for a standard merger transaction. It is also unclear that the Delaware courts will follow *Globis* in all situations. For example, while "customary" may be fairly informative in the context of a \$200 million merger, it may be insufficiently detailed for a multi-billion-dollar merger.¹³⁰ Moreover, the identity of the financial advisor or unusual

125. See, e.g., 17 C.F.R. § 240.13e-100 (2008) (Items 8, 9); see also *id.* §§ 229.1014–1015.

126. Cf. Transcript of Settlement Hearing at 48, *Globis Capital Partners, LP v. SafeNet, Inc.*, C.A. No. 2772-VCS (Del. Ch. Dec. 20, 2007) (The court stated, "But it's informative for somebody looking at this, if bankers are going to choose to do these methods of valuation, to know what w[ere] the comparables they chose, what was the information that it generates, and what was the multiple chosen by the banker, so that if there is some dose of skepticism out there in the stockholder electorate about these things, they can use their own judgment, from the objective disclosure, about the way the analyses were done.")

127. See Smith, *supra* note 78, at C1 (quoting a source who referred to fairness opinions as a "rubber stamp" partly because financial advisors "are motivated to encourage [transactions] because they are usually paid contingency fees based on their completions").

128. *Globis Partners, L.P. v. Plumtree Software, Inc.*, C.A. No. 1577-VCP, 2007 WL 4292024, at *13 (Del. Ch. Nov. 30, 2007).

129. *Id.* at *13.

130. See, e.g., *Ortsman v. Green*, C.A. No. 2670-N, 2007 WL 702475, at *1 (Del. Ch. Feb. 28, 2007) ("[T]he proxy statement says only that Credit Suisse was paid 'a customary fee in connection with its services, a significant portion of which was payable upon the rendering by Credit Suisse of its opinion.' Thus, a reader of the proxy statement is not told how much Credit Suisse was paid, whether it would have received the same payment even if it was unable to render a fairness opinion at \$27.85, or how much Credit Suisse has earned in recent periods from Kelso or other members of the buyer group."). The transaction at issue in *Ortsman* was valued in excess of \$2.5 billion. *Id.* And the meaning of the term "customary" is not perfectly clear. See, e.g., Davidoff, *supra* note 124, at 1586 n.151 (demonstrating variation in multi-million-dollar fees). Even if there is a customary percentage range for such fees, the dollar spread of that range increases along with the size of the transaction.

aspects of the transaction itself may strip the term “customary” of informative content so as to allow a disclosure claim to succeed.

On the other hand, it should be clear that proxy statements must disclose whether the fee is contingent on the successful closing of the transaction and, in some cases, how much of the fee is contingent.¹³¹ More important than the raw size of the fee paid to the financial advisor is the advisor’s financial incentive to ensure the transaction’s success. When judging the integrity of the advisor’s analysis, stockholders are likely to be concerned with potential financial biases that may affect the fairness opinion. Therefore, not only do the new rules of the Financial Industry Regulatory Authority require the disclosure of contingent-fee structures,¹³² but Delaware law also requires such disclosure.¹³³ The proxy statement in *Globis*, for all its opacity, at least made clear that a “customary fee” would be paid if the merger were successfully concluded.¹³⁴ What is not sufficient, on the other hand, is to omit any mention of a contingent fee or simply to say that a portion of the fee is payable upon delivery of the opinion or the success of the transaction.¹³⁵

DISCLOSURE OF METHODOLOGY

The “fair summary” principle is vague by design. Each fairness opinion is, optimally, tailored to the company to which it relates and is therefore, theoretically, unique. The Delaware courts are understandably unwilling to create bright-line rules to govern the universe of unique documents. Moreover, the disclosure obligations inherent in the “fair summary” principle are restricted by the principles that merely helpful information is not necessarily material and that disclosure need not be sufficiently detailed to allow stockholders to value the company themselves. In truth, overly detailed disclosure may be wasteful for two reasons. “Retail stockholders are more likely to find meaning in market prices and the headline number, rather than attempt to understand valuation practices. In addition, sophisticated investors tend to conduct their own analysis.”¹³⁶

131. See Transcript of Oral Argument on Plaintiffs’ Motion for Preliminary Injunction and Rulings of the Court at 96, *In re BEA Sys., Inc. S’holder Litig.*, Consol. C.A. No. 3298-VCL (Del. Ch. Mar. 26, 2008) (The court stated, “There is a claim about Goldman’s fee, and the issue is that the proxy statement discloses the total fee and discloses that the fee is at least in part contingent but doesn’t disclose which part of the fee was contingent and which part wasn’t. This might be a good claim if some very large part of the fee was in fact contingent. . . . And at least as I understand things, of the \$33 million that Goldman will be paid, only \$8 million is contingent. And given that it’s only 8 out of 33, I can’t see it’s materially misleading to have merely stated that a part of the fee was contingent without saying how much.”).

132. See *supra* note 115.

133. See *La. Mun. Police Employees’ Ret. Sys. v. Crawford*, 918 A.2d 1172, 1191 (Del. Ch. 2007), review refused *sub nom.* *Express Scripts, Inc. v. Crawford*, 931 A.2d 1006 (Del. 2007) (unpublished table decision).

134. *Globis*, 2007 WL 4292024, at *13.

135. Cf. *Ortsman*, 2007 WL 702475, at *1.

136. Davidoff, *supra* note 124, at 1620. Though, it should be fairly noted, this is not to suggest that detailed disclosure of the analyses in fairness opinions is without utility. See *id.* (“[I]f investment banks are required to disclose these points, they will be presumably more careful and deliberate in their

Directors do not have to make it possible for stockholders to re-run the analyses in the fairness opinion; it is only required that stockholders be able to evaluate the fairness opinion for themselves. Accordingly, what is most important is not the ultimate valuation (it can probably be assumed that, if the consideration offered were not within the ultimate valuation range, the board would not be putting the transaction before the stockholders). Rather, what is most important, and what must be disclosed to the stockholders, is the banker's analysis.¹³⁷ Thus, if the stockholders do not know the numerical value of a particular assumption, but they can assess the reliability of its derivation, the disclosure is likely sufficient.¹³⁸ Similarly, if details about why particular transactions were used for a comparables analysis are not given, but the stockholders can deduce the general selection criteria used to choose the transactions, the disclosure is likely sufficient.¹³⁹ Directors must disclose the method of the analyses and each key input to those analyses—if not the exact number, then a summary of the value or description of its source. Again, if stockholders can evaluate the validity of the methodologies used, they can make judgments as to the integrity of the financial opinion and whether they can rely on it.

Under that policy, directors generally must disclose the following elements of a fairness opinion to comply with their disclosure obligations: The analyses themselves (that is, the valuation methods) must be disclosed.¹⁴⁰ If particular assumptions are used, those must be disclosed¹⁴¹—or at least sufficient information to indicate why a given value or datum was used. The proxy need not disclose specific values if a summary or explanation of the source of the value is given.¹⁴² If the analysis employs a unique methodology, more details will have to be provided.¹⁴³ Finally, the range of values resulting from the analyses must also be disclosed.¹⁴⁴ Of course, disclosures may not be misleading or create an incorrect impression about the assumptions or analyses.¹⁴⁵ Depending on the specific factual context, disclosures following these guidelines would likely pass muster with the Delaware courts.

choices and, hopefully, boards, knowing this information will be disclosed, would probe it to a greater extent than they currently do. This would ultimately benefit stockholders by increasing the quality of information available to board decision makers, thereby facilitating more informed board choices to enter into corporate control transactions.”)

137. *Cf. In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002) (“The real informative value of the banker's work is not in its bottom-line conclusion, but in the valuation analysis that buttresses that result.”).

138. *See Globis*, 2007 WL 4292024, at *13.

139. *See id.*

140. *See In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 203–04 (Del. Ch. 2007); *Pure Res.*, 808 A.2d at 449.

141. *See Netsmart*, 924 A.2d at 203–04; *Pure Res.*, 808 A.2d at 449.

142. *See Globis*, 2007 WL 4292024, at *12–13.

143. *See In re PNB Holding Co. S'holders Litig.*, C.A. No. 28-N, 2006 WL 2403999, at *20 (Del. Ch. Aug. 18, 2006); *In re Staples, Inc. S'holders Litig.*, 792 A.2d 934, 955 (Del. Ch. 2001).

144. *See Netsmart*, 924 A.2d at 203–04; *Pure Res.*, 808 A.2d at 449.

145. *In re Staples*, 792 A.2d at 957–58.

DISCLOSURE OF PROJECTIONS

The question whether projections must be disclosed implicates two issues. First is the policy regarding partial disclosure. Second is the “soft information” doctrine, which we argue has ceased to have vitality in the fairness-opinion context.

We submit that partial disclosure in the context of disclosure of fairness opinions means something different than it does in other disclosure contexts. “Partial disclosure” normally refers to when a board has disclosed part of something but has not disclosed the whole thing to ensure the information provided is materially complete (and therefore not misleading by omission).¹⁴⁶ In the fairness-opinion context, however, we argue that partial disclosure also refers to when, once a board of directors (through its recommendation that stockholders approve the transaction or otherwise) has suggested to stockholders that a transaction is fair and has attached a fairness opinion to support its position, the board has not provided a “fair summary” of the analysis underlying the fairness opinion. Whether projections must be disclosed to the stockholders should therefore be evaluated in light of this concept of “partial fairness disclosure.” Consequently, if more than one set of projections exists, but not all projections are disclosed, the disclosure claim should not be evaluated in the context of the typical partial-disclosure paradigm; rather, the disclosure claim should be evaluated against the principle of “partial fairness disclosure” set forth above and whether a “fair summary” of the analysis was disclosed. Accordingly, in this hypothetical, while the typical partial-disclosure rules would suggest that both sets of projections must be disclosed, the “partial fairness disclosure” concept would require disclosure of the projections only to the extent that they are required to present a “fair summary” of the banker’s work.

Arguably, the Court of Chancery’s 2007 *CheckFree* opinion could be read to the contrary, as the court characterized *Netsmart* as a typical partial-disclosure case—i.e., requiring fuller disclosure because the board stopped halfway. Noting that “the proxy in [*Netsmart*] affirmatively disclosed an early version of *some* of management’s projections,” the *CheckFree* court characterized *Netsmart*’s holding in the following way: “Because management must give materially complete information ‘[o]nce a board broaches a topic in its disclosures,’ the [*Netsmart*] Court held that further disclosure was required.”¹⁴⁷

But the court in *Netsmart* was arguably a case following the “partial fairness disclosure” concept described above. That is, *Netsmart* stands for the proposition that, once a board says that a transaction is fair and attaches its financial advisor’s fairness opinion as proof, it has broached the topic of fairness and must provide a “fair summary” of the work performed.¹⁴⁸ The proxy statement in *Netsmart* did

146. See, e.g., *In re MONY Group Inc. S’holder Litig.*, 852 A.2d 9, 24–25 (Del. Ch. 2004) (stating that, “once [directors] take it upon themselves to disclose information, that information must not be misleading”); see also *Arnold v. Soc’y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994).

147. *In re CheckFree Corp. S’holders Litig.*, C.A. No. 3193-CC, 2007 WL 3262188, at *3 (Del. Ch. Nov. 1, 2007) (second alteration in original) (quoting *Netsmart*, 924 A.2d at 203).

148. *Netsmart*, 924 A.2d at 203–04 (“Once a board broaches a topic in its disclosures, a duty attaches to provide information that is ‘materially complete and unbiased by the omission of material

not include the projections underlying the fairness opinion.¹⁴⁹ The two projections disclosed were *not* the projections underlying the fairness opinion and, indeed, lacked information regarding two years covered by the fairness opinion.¹⁵⁰ *Netsmart* therefore could be read as a case in which no “fair summary” of the analysis underlying the fairness opinion was given. The relevant projections in *Netsmart*—the “key inputs” to the fairness opinion—were completely missing. Without these key inputs, stockholders lacked sufficient information to determine whether the conclusion reached in the fairness opinion was derived through trustworthy methods and therefore reliable. So *Netsmart*’s language regarding “[o]nce a board broaches a topic in its disclosures” refers to the disclosure of a fairness opinion, *not* to the disclosure of some projections versus others.¹⁵¹

The *CheckFree* court reached its holding in part by finding that, because no projections had been disclosed, there was no partial-disclosure problem to be overcome by disclosing the projections.¹⁵² But the undisclosed projections in that case were described in the proxy as unreliable.¹⁵³ The court therefore could have reached its same conclusion under the reliability principle alone, without regard to either formulation of the partial-disclosure rule. Otherwise, the reasoning in *CheckFree* would signal that, so long as no projections are disclosed, no projections need be disclosed. Such a rule would undermine the “fair summary” principle and deprive stockholders of perhaps the most useful information in evaluating the merits of the transaction that faces them.

Under the rubric of “partial fairness disclosure” described above, we argue that reliable projections underlying the fairness opinion are generally presumed material—which raises the soft-information doctrine. For years, the Delaware courts have cited to the soft-information doctrine when holding that information, like projections, did not have to be disclosed.¹⁵⁴ The standard recapitulation of the soft-information doctrine involves a multi-factor balancing test: “the facts upon which the information is based; the qualifications of those who prepared or compiled it; the purpose for which the information was originally intended; its relevance to the stockholders’ impending decision; the degree of subjectivity or bias reflected in its preparation; the degree to which the information is unique; and the availability to the investor of other more reliable sources of information.”¹⁵⁵

facts.’ For this reason, when a banker’s endorsement of the fairness of a transaction is touted to shareholders, the valuation methods used to arrive at that opinion as well as the key inputs and range of ultimate values generated by those analyses must also be fairly disclosed.” (footnote omitted)).

149. *Id.* at 203.

150. *Id.* at 202–03.

151. *See id.* at 203–04.

152. *CheckFree*, 2007 WL 3262188, at *3.

153. *Id.*

154. *See, e.g., In re PNB Holding Co. S’holders Litig.*, C.A. No. 28-N, 2006 WL 2403999, at *16 (Del. Ch. Aug. 18, 2006).

155. *E.g., Weinberger v. Rio Grande Indus., Inc.*, 519 A.2d 116, 127 (Del. Ch. 1986) (internal quotation marks omitted); *see also, e.g., McMillan v. Intercargo Corp.*, C.A. No. 16963, 1999 WL 288128, at *6 n.15 (Del. Ch. May 3, 1999).

The soft-information doctrine has been somewhat limited in application, as the Delaware courts have refused to adopt a *per se* ban against soft information.¹⁵⁶ For example, “in the context of cash-out mergers,” the Delaware courts have held that even “soft” information must be disclosed if reliable.¹⁵⁷ In the context of “partial fairness disclosure,” however, the soft-information doctrine has no place. Reliable projections underlying fairness opinions are presumed material as part of the fairness opinion’s “fair summary” that should be disclosed.

Even if the soft-information doctrine still had credence in the fairness-opinion context, its substantive role would be performed by the reliability principle discussed above. That is, projections underlying a fairness opinion are presumed material—and therefore should be disclosed—so long as they are sufficiently reliable to help the stockholders make an informed decision.¹⁵⁸ The proxy materials must disclose the projections, or disclose why the projections are unreliable,¹⁵⁹ and the motivating concerns behind the soft-information doctrine will be satisfied. Indeed, of the courts holding that disclosure was not mandated under the soft-information doctrine, many used reliability as the touchstone.¹⁶⁰ In other

156. See, e.g., *Weinberger*, 519 A.2d at 128.

157. *Glassman v. Wometco Cable TV, Inc.*, C.A. No. 7307, 1989 WL 1160, at *6 (Del. Ch. Jan. 6, 1989); see also *In re Silicon Inc. S’holders Litig.*, C.A. No. 18700, 2001 WL 716787, at *10 (Del. Ch. June 19, 2001) (noting that “there are instances where such ‘soft information’ would be material”).

158. This prediction of Delaware law is the inverse of a principle rejected by the Court of Chancery in 1999. See *McMillan*, 1999 WL 288128, at *6 (“[T]he plaintiffs’ position necessarily boils down to the assertion that whenever company projections are provided to and used by a financial advisor for purposes of rendering a ‘fairness’ opinion, those projections must be disclosed in the proxy materials seeking shareholder approval. The argument is without legal foundation. There is no *per se* duty to disclose financial projections furnished to and relied upon by an investment banker. To be a subject of mandated disclosure, the projections must be material [i.e., not unreliable] in the context of the specific case.”).

159. See, e.g., *id.* (noting that, “where the inherent unreliability of the projections is disclosed to stockholders in the proxy statement or is otherwise established, the projections have been found not material” (emphasis added)); see also *Globis Partners, L.P. v. Plumtree Software, Inc.*, C.A. No. 1577-VCP, 2007 WL 4292024, at *13 (Del. Ch. Nov. 30, 2007) (holding that, where projections had been described as unreliable in the proxy materials, the projections did not need to be disclosed).

160. See, e.g., *In re PNB Holding Co. S’holders Litig.*, C.A. No. 28-N, 2006 WL 2403999, at *16 (Del. Ch. Aug. 18, 2006) (“The projections at issue fall into the category of documents that courts have referred to as ‘soft information,’ and the standard by which to determine whether or not soft information, such as pro formas and projections, must be disclosed has troubled courts and commentators. . . . Even in the cash-out merger context, though, it is not our law that every extant estimate of a company’s future results, however stale or however prepared, is material. Rather, because of their essentially predictive nature, our law has refused to deem projections material unless the circumstances of their preparation support the conclusion that they are reliable enough to aid the stockholders in making an informed judgment. The word reliable is critical here.” (footnote omitted)); *In re Oracle Corp., Derivative Litig.*, 867 A.2d 904, 938 n.149 (Del. Ch. 2004) (“Delaware courts . . . have been reluctant to require disclosure of information that does not bear reliably on firm value, particularly soft information such as projections of performance or estimates of value.”), *aff’d*, 872 A.2d 960 (Del. 2005) (unpublished table decision); *In re Pennaco Energy, Inc. S’holders Litig.*, 787 A.2d 691, 713 (Del. Ch. 2001) (“Our case law has similarly reflected a reluctance to require the disclosure of soft information that lacks sufficient guarantees of reliability.”); *cf. also Weinberger*, 519 A.2d at 128 (“In such transactions, where corporate fiduciaries were provided with information that, although arguably ‘soft,’ indicated with some degree of reliability that the corporation was worth more than the tender offer or merger price, our Courts have held that such information must be publicly disclosed to stockholders.”).

words, the soft-information doctrine notwithstanding, directors should disclose reliable projections underlying fairness opinions or make clear in the proxy materials why those projections are sufficiently unreliable so as to be misleading if disclosed.¹⁶¹

CONCLUSION

What constitutes sufficient disclosure of a fairness opinion may vary depending on the specific transaction at issue, but this Article sets out a predictive framework to serve as a guide for meeting the disclosure obligations imposed by the Delaware courts. While the duty of disclosure relies on general principles and specific facts and circumstances, this Article provides guidelines for disclosing fairness opinions, the methods and data used in arriving at the opinions, and the circumstances under which the opinions are furnished—to assist counsel involved in the transactions themselves and in the litigation of such claims.

161. *Cf. R.S.M. Inc. v. Alliance Capital Mgmt. Holdings L.P.*, 790 A.2d 478, 502 n.39 (Del. Ch. 2001) (“The defendants’ assertion that internal projections of company revenues are not material simply because they are projections of future events is erroneous. Certainly, courts are more reluctant to require disclosure of such ‘soft information,’ but that does not mean that such information cannot be material. Indeed, it would be impossible for there to be meaningful disclosure about many transactions if that was the case, because determining the advisability of a transaction often requires a comparison of the transactional value to be received to the value that would likely be received in the event that the transaction was not effected. The defendants’ disclosure of . . . Goldman Sachs’ valuation of the revenues projected from the Guaranteed Fees is an example of disclosure that incorporates reasoned assumptions in order to present stockholders with materially important information. Therefore, I cannot rule out the possibility that Holdings’ internal projections were sufficiently reliable to warrant disclosure.”).