M&A Fairness Opinions and Projections in Financial Disclosure Summaries

Leveraging Developments on Disclosure of Management Projections, Financial Advisors’ Potential Conflicts, Fair Summary Requirements and More

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1pm Eastern    |    12pm Central    |   11am Mountain    |    10am Pacific

Today’s faculty features:

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Director 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. This duty, which “derives from the duties of care and loyalty,” 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. 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. One of the

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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. Shareholder Litig., 926 A.2d 90, 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. Shareholders 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. 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.

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). 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. 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.

Fairness opinions are typically produced at the request of the target's board (or a special committee of the board) 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).


10. Id. § 141(c) (providing that directors may rely on reports of experts); see Wacht v. Cont'l Hosts, Ltd., C.A. No. 7954, 1994 WL 529222, 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.” 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. When the affirmative duty to disclose information applies, the directors must truthfully and accurately disclose that information. Moreover, directors may not make partial disclosures that create an impression that is materially misleading.

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. 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.”

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.”).
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.
20. Id. at 779.
21. 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.").
24. Loudon, 700 A.2d at 143.
25. Id.
Directors are not required to disclose information that is not factual, so disclosures need not include “opinions or possibilities [or] legal theories.” 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.” 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.”

**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, we discuss cases on the disclosure of management projections in this context as well. As can be seen, the courts constantly try to strike a balance between potentially confusing over-disclosure and potentially misleading under-disclosure. 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).
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. 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.”

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.

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.”

The courts have not held,

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34. *Erickson v. Centennial Beauregard 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 938 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; 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. Shareholders 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. 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.” 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].” But no such valuations existed, the court found, so the omission of that information was not material. 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. 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.

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. 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.” The Court of Chancery held that information to be “immaterial, because neither Drexel nor the

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45. *Id.* at 203–04.
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. Shareholders 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.* Shareholders 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.”).


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”).


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. 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.

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.” 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. 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. Sufficient information underlying the fairness opinion had already been disclosed, 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. 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.” 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. 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.” 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.

61. Id. at 200–01.
62. Id. at 200–01.
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.”).
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 and McMullin. 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.” That is, the information the plaintiffs wished disclosed was not “inconsistent with, or otherwise significantly different from, the disclosed information.” On the other hand, the court in McMullin (though adhering 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.

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.” 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.”

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. 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.

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.
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.”).
“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.” 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.”

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.” 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.”

Once particular details of a valuation are disclosed, however, further disclosures must be made to avoid any misimpressions created by those details. 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.”

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. 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.” The court held that: (1) although the proxy did not disclose the

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80. *Id.* at 448–49.
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. *Sec. 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”).
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.” In short, the court held that a “fair summary” of the banker’s substantive work had been given.

**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, 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.”

In *Skeen*, plaintiffs sought the disclosure of additional financial information “because it would help stockholders evaluate whether they should pursue an appraisal.” 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.” 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.”

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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. Sholders 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) Sholder 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).
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 [were] 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.
96. Id. at 955.
97. Id. at 956.
98. Id. at 956 n.38.
100. Id.
101. Id.
“not less than $200,000,000 . . . and could be substantially greater.” 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.”

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.” 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.

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. 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.

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. 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. 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.” 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.
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.


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 333, 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. Shareholder Litig., 845 A.2d 1057, 1072 (Del. Ch. 2001) (“[P]laintiffs allege that Piper [Jaffray] 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 "Jeffries 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 "Jeffries 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 Jeffries’ 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 “[i]t is the board’s duty 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-Communs. Inc. Sh’sholders Litig., C.A. No. 16470, 2005 WL 3652727*, 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.”).


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. Sh’sholders 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 preferred 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.

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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 1 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, 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 analysis (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, 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. 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. 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. 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 [were] 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”).
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.\footnote{131. See Transcript of Oral Argument on Plaintiffs’ Motion for Preliminary Injunction and Rulings of the Court at 96, \textit{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.”).} 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,\footnote{132. See supra note 115.} but Delaware law also requires such disclosure.\footnote{133. See \textit{La. Mun. Police Employees’ Ret. Sys. v. Crawford}, 918 A.2d 1172, 1191 (Del. Ch. 2007), review refused sub nom. \textit{Express Scripts, Inc. v. Crawford}, 931 A.2d 1006 (Del. 2007) (unpublished table decision).} The proxy statement in \textit{Globis}, for all its opacity, at least made clear that a “customary fee” would be paid if the merger were successfully concluded.\footnote{134. \textit{Globis}, 2007 WL 4292024, at *13.} 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.\footnote{135. \textit{Cf. Ortsman}, 2007 WL 702475, at *1.}

\textbf{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.”\footnote{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. 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. 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. 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. If particular assumptions are used, those must be disclosed—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. If the analysis employs a unique methodology, more details will have to be provided. Finally, the range of values resulting from the analyses must also be disclosed. Of course, disclosures may not be misleading or create an incorrect impression about the assumptions or analyses. 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., Shareholders 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.”).


139. See id.

140. See In re Netsmart Techs., Inc. Shareholders 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.


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

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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.\textsuperscript{149} The two projections disclosed were \textit{not} the projections underlying the fairness opinion and, indeed, lacked information regarding two years covered by the fairness opinion.\textsuperscript{150} \textit{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 \textit{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 \textit{Netsmart}’s language regarding “[o]nce a board broaches a topic in its disclosures” refers to the disclosure of a fairness opinion, \textit{not} to the disclosure of some projections versus others.\textsuperscript{151}

The \textit{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.\textsuperscript{152} But the undisclosed projections in that case were described in the proxy as unreliable.\textsuperscript{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 \textit{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.\textsuperscript{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.”\textsuperscript{155}

\textsuperscript{149} Id. at 203.
\textsuperscript{150} Id. at 202–03.
\textsuperscript{151} See id. at 203–04.
\textsuperscript{152} \textit{CheckFree}, 2007 WL 3262188, at *3.
\textsuperscript{153} Id.
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.\textsuperscript{156} For example, “in the context of cash-out mergers,” the Delaware courts have held that even “soft” information must be disclosed if reliable.\textsuperscript{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.\textsuperscript{158} The proxy materials must disclose the projections, or disclose why the projections are unreliable,\textsuperscript{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.\textsuperscript{160}

\textsuperscript{156} See, e.g., Weinberger, 519 A.2d at 128.

\textsuperscript{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 Siliconix 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”).

\textsuperscript{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.”).

\textsuperscript{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).

\textsuperscript{160} See, e.g., In re PNB Holding Co. S’holders Litig., C.A. No. 28-N, 2006 WL 2403990, at *16 (Del. Ch. Aug. 18, 2006) (“The projections at issue fall into the category of documents on which 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.

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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.”).

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Fair Summary II: An Update on Delaware’s Disclosure Regime Regarding Fairness Opinions

By Blake Rohrbacher and John Mark Zeberkiewicz *

In May 2008, the authors published an article discussing the general principles behind Delaware cases involving disclosure regarding fairness opinions and the financial advisors that provide them. This Article updates that prior article and discusses the evolution of Delaware law on this topic. Principally, this Article discusses developments in three areas: disclosure regarding the financial advisor’s analysis, disclosure regarding management’s projections, and disclosure regarding the financial advisor’s potential conflicts. Included are analyses of the most recent Delaware cases, including transcript rulings, as well as general discussions of other issues relating to Delaware’s fiduciary duty of disclosure.

Three years ago, we published an article in this journal setting forth a general framework for fiduciary disclosure regarding fairness opinions under Delaware law. 1 While the issues we discussed in the prior article are still litigated with some frequency, the Court of Chancery has noted that financial disclosures in recent years have been far more robust than they had been in the past—undoubtedly due largely to the court’s rulings. 2 In response, plaintiffs have sought new lines of

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2. See, e.g., Transcript of Settlement Hearing at 40, In re Alberto-Culver Co. S’holder Litig., C.A. No. 5873-VCS (Del. Ch. Feb. 21, 2011) (“The reality is that practices are, in general, far better. It’s far fuller disclosure about the economics of a deal, much more disclosure about the bankers, which means that a lot of times things that get attacked are more tangential.”); Transcript of Status Conference at 4–5, Fortho v. Health Grades Inc., C.A. Nos. 5716-VCS & 5732-VCS (Del. Ch. Aug. 18, 2010) (“You’ll start realizing the reality, which is that in past cases the plaintiffs’ bar has had substantial success. As a result of that, and as a result of changes at the Securities and Exchange Commission, . . . in part because of the SEC itself but also recognizing decisions from this Court, there’s a lot more disclosure out there. More disclosure and more high quality disclosure because, frankly, you didn’t get projections 20 years ago.”); Transcript of Argument and Ruling on Motion to Expedite in C.A. No. 5149-VCS and Scheduling Conference in C.A. No. 5214-VCS at 20, Pirrello v. James, C.A. Nos. 5149-VCS & 5214-VCS (Del. Ch. Feb. 17, 2010) (“The quality and thoroughness of banker disclosure has never been greater than it is in the current year. I think it does have something to do with decisions of this Court
attack, and the Delaware courts have therefore begun to focus not only on the disclosure of underlying financial analyses broadly, but also on specific and discrete issues involving fairness opinions and projections as well as on issues beyond the fairness opinion itself, most notably the financial advisor’s potential conflicts and incentives. In this article, we discuss the current state of Delaware’s fiduciary disclosure regime and the developments over the last three years.

In particular, we discuss three major areas of development in Delaware disclosure cases. First, we discuss the “fair summary” requirement for disclosure of the financial analysis underlying a banker’s fairness opinion. Next, we discuss the court’s recent statements regarding disclosure of management’s projections, including cash flow measures. Finally, we discuss developments regarding the disclosure of financial advisors’ potential conflicts, including compensation arrangements and buy-side work.

**Disclosure Regarding the Financial Advisor’s Analysis**

In the last three years, the Delaware Court of Chancery has addressed a number of issues regarding disclosure of the financial aspects of fairness opinions. As we noted in our earlier article, directors are generally required, if they rely on a fairness opinion to support their recommendation of a particular transaction, to

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3. Fair Summary, supra note 1, at 882–83 (“Fairness opinions are typically produced at the request of the target’s board (or a special committee of the board) 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 the business combination is fair . . . .” (footnote omitted)).

4. One aspect that has not changed is the balance that the Delaware Court of Chancery tries to strike between under- and over-disclosure. See, e.g., In re Answers Corp. S’holders Litig., C.A. No. 6170-VCN, 2011 WL 1366780, at *5 (Del. Ch. Apr. 11, 2011) (“Non-material facts need not be disclosed, and additional details underlying financial projections are not necessarily material, especially where they would tend to confuse stockholders or inundate them with an overload of information.”) (internal quotation marks omitted)); Transcript of Telephonic Rulings of the Court on Plaintiffs’ Motion to Expedite at 16, In re Cal. Micro Devices Corp. S’holders Litig., C.A. No. 5159-VCP (Del. Ch. Jan. 15, 2010) (“In light of the information disclosed, I cannot see how the requested information would be material to a shareholder in determining whether to tender his or her shares or would do anything more than bury the shareholder in an avalanche of trivial information.”); see also Fair Summary, supra note 1, at 883–84.

5. We note that a “fair summary” disclosure might also be required of any advisor’s analysis that was presented to the board and relied on by it in recommending a transaction to the stockholders, even if the board did not receive a formal fairness opinion. See Berger v. Pubco Corp., C.A. No. 3414-CC, 2008 WL 2224107, at *3 (Del. Ch. May 30, 2008) (“Because Kanner utilized the short-form merger statute, he did not have to set a fair price and, therefore, could have used any method—no matter how absurd—to set the merger consideration. Defendants argue that disclosure of his methodology is...
unnecessary. Defendants’ argument entirely misses the mark, however, because the issue is not about necessity—it is about materiality. In the context of Pubco, an unregistered company that made no public filings and whose Notice was relatively terse and short on details, the method by which Kanner set the merger consideration is a fact that is substantially likely to alter the total mix of information available to the minority shareholders. Where, as here, a minority shareholder needs to decide only whether to accept the merger consideration or to seek appraisal, the question is partially one of trust: can the minority shareholder trust that the price offered is good enough, or does it likely undervalue the Company so significantly that appraisal is a worthwhile endeavor? When faced with such a question, it would be material to know that the price offered was set by arbitrarily rolling dice. In a situation like Pubco’s, where so little information is available about the Company, such a disclosure would significantly change the landscape with respect to the decision of whether or not to trust the price offered by the parent. This does not mean that Kanner should have provided picayune details about the process he used to set the price; it simply means he should have disclosed in a broad sense what that process was, assuming he followed a process at all and did not simply choose a number randomly.” (footnote omitted)), rev’d on other grounds, 976 A.2d 132 (Del. 2009); see also Wacht v. Cont’l Hosts, Ltd., C.A. No. 7954, 1994 WL 525222, at *3 (Del. Ch. Sept. 16, 1994) (“While it may be true that [defendant] Stanley Lewin knew more about Continental than an outside investment banker, he did not apply this knowledge, or disclose it to the shareholders, in any rational, logical way, from which the shareholders could determine how he arrived at the $12 per share figure. . . . A shareholder, in determining whether to seek appraisal or accept the terms of the Merger, would surely deem information regarding how the merger price was determined to be material.”). This proposition is based on, among other things, Delaware law regarding “partial disclosure.” See In re Netsmart Techs., Inc. S’holders Litig., 924 A.2d 171, 203 (Del. Ch. 2007) (“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 facts.’”). Thus, when directors have relied on a financial analysis and tout it to the stockholders as a basis for approving a given transaction, they should probably provide a “fair summary” of that analysis. See id.

6. Fair Summary, supra note 1, at 902.

7. In re Pure Res., Inc. S’holders Litig., 808 A.2d 421, 449 (Del. Ch. 2002); see also Fair Summary, supra note 1, at 891–92.


9. Fair Summary, supra note 1, at 897–98; In re JCC Holding Co. S’holders Litig., 843 A.2d 713, 721 (Del. Ch. 2003) (stating that “kind of quibble with the substance of a banker’s opinion does not constitute a disclosure claim”).
work performed by an investment banker must be accurately described and appropriately qualified.\textsuperscript{10}

Nevertheless, the “fair summary” requirement does not mean that every aspect of a banker's analysis (or the banker's entire presentation to the directors) must be disclosed. For example, the Delaware Court of Chancery has held that a corporation “committed no disclosure violation by failing to include the manner in which [its financial advisor] derived the discount rate it used in its analysis.”\textsuperscript{11} Similarly, the court has stated that Delaware law does not require a corporation “to disclose why [its] advisor chose one method of analysis over another.”\textsuperscript{12}

But the results may be quite different when the court determines that directors have engaged in “partial disclosure”\textsuperscript{13} or have otherwise been misleading\textsuperscript{14} or incomplete.\textsuperscript{15} For example, in \textit{Maric Capital}, the Court of Chancery required the defendant directors to make corrective disclosure regarding their financial advisor's range of discount rates.\textsuperscript{16} The proxy statement of target PLATO Learning indicated that the board's financial advisor had selected discount rates “based upon an analysis of PLATO Learning's weighted average cost of capital” and that the advisor had used a range of 23 percent to 27 percent when conducting its DCF analysis.\textsuperscript{17} But the advisor's calculations of the company's weighted average cost of capital—disclosed to PLATO's special committee—had actually generated discount rates of 22.5 percent and 22.6 percent (below the 23 percent at the bottom of the disclosed range).\textsuperscript{18} The financial advisor representative, at his deposition, provided various reasons why the higher range was used and disclosed, but there

\begin{itemize}
\item \textsuperscript{10} In re 3Com, 2009 WL 5173804, at *6.
\item \textsuperscript{11} Merrill Lynch, 2008 WL 4824053, at *12.
\item \textsuperscript{12} Transcript of Telephonic Rulings of the Court on Plaintiffs' Motion to Expedite, \textit{supra} note 4, at 14 (“Delaware law . . . does not require an investment banker to perform a discounted cash flow analysis or the Company to disclose why the advisor chose one method of analysis over another.”); see \textit{also In re Best Lock Corp. S'holder Litig.}, 845 A.2d 1057, 1073 (Del. Ch. 2001) (“Delaware courts have held repeatedly that a board need not disclose specific details of the analysis underlying a financial advisor's opinion.”); Sauer-Danfoss, 2011 WL 2519210, at *13 (holding that a supplemental disclosure was “immaterial” when the original “Schedule TO accurately stated that [bidder] Danfoss obtained a premiums analysis and attached a copy of that analysis”).
\item \textsuperscript{13} 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).” \textit{Fair Summary, supra} note 1, at 902.
\item \textsuperscript{14} See, \textit{e.g.}, Gantler v. Stephens, 965 A.2d 695, 711 (Del. 2009) (holding that “a board cannot properly claim in a proxy statement that it had carefully deliberated and decided that its preferred transaction better served the corporation than the alternative, if in fact the Board rejected the alternative transaction without serious consideration”). The Delaware Supreme Court held in \textit{Gantler} that the board's disclosure was materially misleading. \textit{Id.} (“By stating that they 'careful[ly] deliberat[ed],' the Board was representing to the shareholders that it had considered the Sales Process on its objective merits and had determined that the Reclassification would better serve the Company than a merger.” (alterations in original)).
\item \textsuperscript{15} See, \textit{e.g.}, \textit{Fair Summary, supra} note 1, at 892 (“Once particular details of a valuation are disclosed, . . . further disclosures must be made to avoid any misimpressions created by those details.”).
\item \textsuperscript{16} Maric Capital Master Fund, Ltd. v. PLATO Learning, Inc., 11 A.3d 1175, 1177–78 (Del. Ch. 2010).
\item \textsuperscript{17} \textit{Id.} at 1176.
\item \textsuperscript{18} \textit{Id.} The range disclosed in the proxy statement also served to make the proposed transaction appear fairer. \textit{Id.} at 1177.
\end{itemize}
was no evidence that he had explained these reasons to the special committee and no explanation had been provided to the stockholders in the proxy statement.19

The court therefore ordered disclosure of the values that would be obtained by using the discount rates generated by the company’s weighted average cost of capital.20

Where, on the other hand, the range of discount rates disclosed was “actually calculated and used” by the financial advisor, no further disclosure should be required.21 In *Atheros*, the proxy statement disclosed that a range of discount rates from 10 percent to 14 percent was used in the advisor’s analysis. The advisor’s presentation to the directors showed two ranges, using different methodologies: one from 9.9 percent to 13 percent and one from 9.9 percent to 13.8 percent.22 The court held that the advisor’s “decision not to use a slightly narrower range of rates, calculated using a different methodology, does not form the basis of a disclosure claim.”23

The “fair summary” requirement also includes the “range of values” generated by the financial advisor’s analysis.24 In one case, where (among other information) the value ranges were disclosed, the court found that a fair summary had been given.25 In another case, the court described as a “partial disclosure” a failure to disclose a range of values generated by one of the advisor’s methodologies where ranges generated by the other methodologies had been disclosed.26 The court therefore required disclosure of the value range resulting from each valuation methodology: “You need to give the range. You gave the ranges for all the others, but for some reason, on accretion/dilution, you just said accretive or not accretive. So that’s an incomplete summary. Stockholders are entitled to a fair summary.”27

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19. *Id.* at 1176–77.
20. *Id.* at 1178.
22. *Id.*
23. *Id.*
24. *In re Pure Res., Inc. S’holders Litig., 808 A.2d 421, 449 (Del. Ch. 2002); see also *In re Netsmart Techs., Inc. S’holders Litig., 924 A.2d 171, 203–04 (Del. Ch. 2007) (“[W]hen 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.”); *Fair Summary, supra* note 1, at 901 (stating that the “range of values resulting from the analyses must also be disclosed”).
25. *In re 3Com S’holders Litig., C.A. No. 5067-CC, 2009 WL 5173804, at *6 (Del. Ch. Dec. 18, 2009) (“These summaries include the final range of value estimates for each analysis.”).
27. *Id.* at 12; see also Transcript of Scheduling Office Conference at 12–13, Maric Capital Master Fund, Ltd. v. PLATO Learning, Inc., C.A. No. 5402-VCS (Del. Ch. Apr. 23, 2010) (“There may be some things that are actually . . . partial disclosure problems. I mean, I had a situation yesterday . . . in a motion to expedite where I noted that, for example, . . . the multiple that was used by the banker [in] the comparable companies analysis was set forth, but the very next paragraph with the comparable transaction analysis, they didn’t disclose the multiple or the median or the mean, which created a lack of symmetry in the disclosure.”).
Regarding partial disclosure, a pair of cases decided a month apart provides instructive guidance. In the Starent case, the Court of Chancery granted a motion to expedite on a disclosure claim—that the proxy statement had inconsistently treated stock-based compensation as an expense. Two of the advisor’s methodologies had treated stock-based compensation as a non-cash expense, but the advisor’s DCF analysis treated it instead as a cash expense (allegedly resulting in a lower valuation range). The court’s primary concern was that “this detour is not disclosed or otherwise highlighted in the relevant proxy statement section.” On the other hand, in 3Com, the opposite result was obtained on a similar claim. Goldman Sachs had “departed from the norm by treating stock-based compensation expense as a cash expense in its discounted cash flow analysis.” But the 3Com court distinguished Starent and reached the opposite conclusion: “[I]n Starent Networks it was nowhere disclosed in the proxy that the financial advisor had embarked on this departure from the norm. In contrast, in this case, it is plainly disclosed that Goldman treated stock-based compensation as a cash expense in its DCF Analysis.” Thus, even if the financial advisor uses an unconventional methodology in a given valuation, so long as the advisor’s analysis is described so that stockholders can understand what the advisor did, the Delaware courts will generally accept the disclosure as sufficient.

29. Id.
30. Id.
32. Id. at *3.
33. Id. (footnote omitted); see also id. (“Thus, shareholders can plainly determine from reading the proxy that Goldman made a departure from the norm in conducting its discounted cash flow analysis. There is no disclosure violation here, merely a disagreement with Goldman’s methodology.”).

Similarly, the court in Micro Devices denied a motion to expedite on disclosure claims where the plaintiff contended that the 14D-9 statement failed to disclose the criteria that the board’s financial advisor (Needham) used to select precedent transactions or the multiples observed for those precedent transactions. Transcript of Telephonic Rulings of the Court on Plaintiffs’ Motion to Expedite, supra note 4, at 17. The court held that the disclosures contained “sufficient information on the criteria Needham used to select precedent transactions and the multiples related to these transactions to satisfy the Company’s disclosure requirements.” Id. The disclosures in the 14D-9 were simple but explained clearly what Needham did; no more is typically required. Cal. Micro Devices Corp., Solicitation/Recommendation Statement (Schedule 14D-9), at 27 (Dec. 28, 2009) (“Needham & Company analyzed publicly available financial information for 16 all-cash merger and acquisition transactions involving selected technology companies completed after January 1, 2007 with transaction values between $50 million and $150 million, where both the acquirer and the target company were publicly traded.”); id. at 26 (“In reviewing the transactions identified above, Needham & Company calculated, for the selected transactions and for California Micro Devices implied by the Transaction, the ratio of the enterprise value implied by the consideration offered in the transaction to the target company’s LTM revenue and EBITDA, as well as the ratio of the transaction value to LTM net income, as set forth in the following table.”).

34. Transcript of Settlement Hearing and Rulings of the Court at 9, In re Hawk Corp. S’holders Litig., C.A. No. 5925-VCL (Del. Ch. May 3, 2011) (“I’m with you as far as the fact that applying the size discount was weird. You know, it’s not something that one sees all the time; but they were completely open about it.”); id. at 27–28.
Finally, the Court of Chancery has generally not required directors to go beyond their advisor’s analysis and make a “negative” disclosure (that is, disclose what was not done or not analyzed). As then-Vice Chancellor Strine has noted, “if you fairly disclose what you did, you’ve met your disclosure obligations. You don’t have to disclose what you did not do.”35 Those comments responded to a disclosure claim demanding explanation of why a board’s financial advisor used trailing rather than projected multiples.36 Because what the advisor had done was disclosed, the court refused to require disclosure of what the advisor did not do (and why).37 Similarly, the court has refused to require disclosure of which comparables were not selected when the comparables that were selected (along with description of the selection criteria used) are disclosed.38

The Delaware Court of Chancery has generally held directors to the “fair summary” requirement and not required additional details. Nevertheless, directors must be careful not to create asymmetrical (or “partial”) disclosure by omitting information about one aspect of a fairness opinion where similar information about other aspects is disclosed. Further, when the advisor uses methodologies that depart from the norm, those departures should be fully disclosed to the shareholders. Directors should also be careful to ensure that disclosures match the analyses actually performed.

**DISCLOSURE REGARDING MANAGEMENT’S PROJECTIONS**

In our earlier article, we also discussed the need to disclose management’s reliable projections underlying the advisor’s fairness opinion39: “[P]rojections 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.”40 The Delaware Court of Chancery has generally required

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35. Transcript of Scheduling Office Conference, supra note 27, at 13; see also In re Sauer-Danfoss Inc. Shareholders Litig., C.A. No. 5162-VCL, 2011 WL 2519210, at *13 (Del. Ch. Apr. 29, 2011) (“If a disclosure document does not say that the board or its advisors did something, then the reader can infer that it did not happen.”); In re Netsmart Techs., Inc. Shareholders Litig., 924 A.2d 171, 204 (Del. Ch. 2007) (“[T]his court has noted 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.”).


37. See also Transcript of Argument and Ruling on Motion to Expedite in C.A. No. 5149-VCS and Scheduling Conference in C.A. No. 5214-VCS, supra note 2, at 19 (stating that “[y]ou need a fair summary of what the banker did . . . , not everything that the banker didn’t do.”).

38. Id. at 19–20 (“I think there are eight or nine comparables listed. We have a commercial world. That means thousands of other companies were not selected. Do they have to disclose why they selected those comparables? They gave . . . a range of medians. You can assess if the deal is outside the median. You can make the calculation for yourself.”); see also In re Ness Techs., Inc. Shareholders Litig., C.A. No. 6569-VCN, slip op. at 11–12 (Del. Ch. Aug. 3, 2011) (“[T]he Plaintiffs seek additional details regarding the financial advisors’ analyses, such as the reasons why different companies were selected for each advisor’s comparable company analysis or information regarding how the advisors arrived at the multiples they used for those comparable companies. Again, the Preliminary Proxy provides shareholders with fair summaries of the financial advisors’ work, and the Plaintiffs have not shown that additional detail would be material to shareholders.” (footnote omitted)).

39. Fair Summary, supra note 1, at 902–05.

40. Id. at 904.
directors to disclose the projections provided to their financial advisors. Then-Vice Chancellor Strine has stated his view that “projections of cash flow are more useful to investors, probably, than bankers’ opinions.”

Issues regarding multiple sets of target management’s projections often lead to disputes. In Simonetti, target management had prepared three sets of projections. The plaintiff argued that the target’s proxy statement failed to disclose that the financial advisor used the most conservative set of projections in formulating its fairness opinion and that the “failure to disclose the existence of more optimistic projections . . . was a material omission.” Citing Netsmart’s requirement that a “proxy statement should ‘give the stockholders the best estimate of the company’s future cash flows,’” the Simonetti court rejected this argument. The proxy statement disclosed the projections actually given to the banker and disclosed that management believed those projections to be the best estimates of the target’s financial performance. The court therefore rejected the plaintiff’s argument, noting that the plaintiff had not met its “burden of showing how disclosing lower-probability projections would have been considered material by the reasonable stockholder.”

41. See, e.g., Transcript of Settlement Hearing and Rulings of the Court at 31, In re Burlington N. Santa Fe Sholder Litig., C.A. No. 5043-VCL (Del. Ch. Oct. 28, 2010) (“I like projections. I like to see people disclosing projections. I think they’re material. I think people ought to have them in there.”); see also Transcript of Defendants’ Motion to Proceed in One Jurisdiction and Dismiss or Stay Litigation in Other Jurisdictions and the Court’s Ruling at 13, Kahn v. Chell, C.A. No. 6511-VCL (Del. Ch. June 7, 2011) (suggesting that the Court of Chancery might scrutinize an intentional failure to disclose projections under concepts of bad faith: “to the extent that people are consciously or can be inferred to have been consciously leaving things out that are covered by prior decisions [for purposes of accommodating disclosure-based settlements], that’s something we’re going to have to take into account on an ongoing basis”).

42. Transcript of Argument and Ruling on Motion to Expedite in C.A. No. 5149-VCS and Scheduling Conference in C.A. No. 5214-VCS, supra note 2, at 18–19; see also Transcript of Argument and Ruling on Motion to Expedite, supra note 2, at 23–24 (“[M]y understanding of corporate finance is that when you are being asked to accept money for something, and the something you are giving up is the equity of a company, that what you most want to know, based on finance theory, is the expected future cash flows of the company, and that in comparison, actually, to a banker’s opinion, it’s probably, for sophisticated investors, more important to know the projections of management, and to know that there aren’t any undisclosed projections out there, that you have all the information, so that you can make your own judgment as an investor about whether to give up what you have now, which is your stake in those future cash flows, for a fixed price. . . . And there is about everything else in the proxy statement that I would strip out before the projections.”).

43. See Fair Summary, supra note 1, at 889–90 (discussing In re Netsmart Techs., Inc. S’holders Litig., 924 A.2d 171 (Del. Ch. 2007)).


45. Id.

46. Id. at *10 (quoting In re Netsmart Techs., 924 A.2d at 203).

47. Id.

48. Id. (“Although including the more optimistic projections in the Proxy Statement and then explaining why they were not relied upon may have been somewhat helpful to stockholders, it is doubtful that any such additional disclosures would have materially altered the total mix of information provided.”).
(generally, management’s “best” projections) and/or the bidder be disclosed. 49 On the other hand, if the advisor used more than one set of projections, they should all be disclosed. 50

Another issue that occasionally arises is the level of divisional detail that must be provided in the projections disclosed to the stockholders. Generally, the Court of Chancery has held that “divisional information is material and must be disclosed where the purchaser utilizes such information in formulating its bid.” 51 Where plaintiffs have been unable to demonstrate that the bidder used such information in formulating its bid, therefore, the court has rejected the disclosure claim as not colorable. 52 Nevertheless, if the target board or its financial advisor used divisional information in determining whether an offer was fair, the Delaware courts would likely require disclosure of that information. Noting that there is generally no “obligation to disclose what you did not do,” the Court of Chancery has rejected a claim that divisional information must be provided, in the absence of evidence that the target considered such information. 53

A major development in the last three years regarding the disclosure of management’s projections has involved the free cash flow numbers provided to the board’s financial advisors. In Maric Capital, then-Vice Chancellor Strine addressed disclosure claims in the context of the acquisition of PLATO Learning, Inc. by Thoma Bravo, LLC. 54 PLATO’s proxy statement had “selectively” excised the free cash flow estimates from the projections that PLATO had provided to its financial advisor, Craig-Hallum. 55 The court required PLATO to disclose those free cash flow estimates to its stockholders. 56 In then-Vice Chancellor Strine’s view, “management’s best estimate of the future cash flow of a corporation that is proposed to be sold in a cash merger is clearly material information.” 57 If stock value is based on expected future cash flows, “as is encouraged under sound corporate finance theory,” the then-vice chancellor stated, the free cash flow estimates would let

49. See also, e.g., In re Orchid Cellmark Inc. S’holder Litig., C.A. No. 6373-VCN, 2011 WL 1938253, at *11 (Del. Ch. May 12, 2011) (finding no reasonable probability of success on a claim that the company should have disclosed optimistic management projections when a set of projections deemed more reliable by the board of directors and used by the financial advisor in its fairness opinion had already been disclosed).

50. See In re 3Com S’holders Litig., C.A. No. 5067-CC, 2009 WL 5173804, at *5 (Del. Ch. Dec. 18, 2009) (“I am aware of no rule that precludes management or its financial advisor from using alternative sets of financial projections in evaluating the advisability and fairness of a merger. Indeed, given the unpredictability of the future, it is common for companies to have multiple sets of projections based on different assumptions about what will transpire going forward. 3Com management disclosed both sets of projections in the Proxy and clearly explained that both were used.”).

51. Id. (citing In re Enviroydne Indus., Inc. S’holders Litig., C.A. No. 10702, 1989 WL 40792, at *3 (Del. Ch. Apr. 20, 1989)).

52. Id.

53. Transcript of Argument and Ruling on Motion to Expedite, supra note 2, at 28, 26–30.

54. Maric Capital Master Fund, Ltd. v. PLATO Learning, Inc., 11 A.3d 1175 (Del. Ch. 2010).

55. Id. at 1178.

56. Id.

57. Id.
PLATO’s stockholders determine whether the offer price was a fair trade for their interest in the company.\textsuperscript{58}

Shortly after \textit{Maric Capital} was decided, however, the court distinguished that opinion in a significant manner. In \textit{Walter}, the Court of Chancery denied a motion to expedite, holding that the disclosure of free cash flow estimates would not be material to the stockholders of inVentiv Health, Inc., which had entered into a transaction with Thomas H. Lee Partners, L.P.\textsuperscript{59} Goldman Sachs (inVentiv’s financial advisor) provided a fairness opinion based on projections of the company’s net revenue, net income, earnings per share, and EBITDA estimates for five years—but inVentiv had not provided free cash flow estimates to Goldman Sachs.\textsuperscript{60} Therefore, Chancellor Chandler held that the free cash flow estimates would not be material; he distinguished \textit{Maric Capital} on the ground that, in that case, the free cash flow estimates had been given to (and used by) the financial advisor and later excised from the proxy statement.\textsuperscript{61}

In \textit{Scully}, the court confirmed that free cash flow estimates are not material unless they were provided to the board’s financial advisor.\textsuperscript{62} Vice Chancellor Laster denied a motion to expedite in a suit challenging the acquisition of Nighthawk Radiology Holdings, Inc. by Virtual Radiology, finding only one disclosure claim to have potential merit. Nighthawk’s proxy statement had omitted the free cash flow estimates from the disclosure of management’s projections. While the court agreed with the principles set forth in \textit{Maric Capital} regarding the materiality of free cash flow estimates generally, it held that the disclosure claim was not colorable, based on counsel’s representation that those numbers had not been provided to Nighthawk’s financial advisors.\textsuperscript{63}

\textsuperscript{58} \textit{Id.}; \textit{cf}. Transcript of Settlement Hearing and Rulings of Court, \textit{supra} note 34, at 19, 24, 29 (suggesting that, while a plaintiff should not litigate over one particular missing input to the free cash flow calculation, supplemental disclosure of free cash flow numbers calculated by the financial advisor from inputs given it by the company—and not derivable from the projections disclosed—was sufficiently material to support a settlement).

\textsuperscript{59} Transcript of Ruling on Motion to Expedite, Steamfitters Local Union 447 v. Walter, C.A. No. 5492-CC (Del. Ch. June 21, 2010).

\textsuperscript{60} \textit{Id.} at 9.

\textsuperscript{61} \textit{Id.} ("Unlike in \textit{Maric}, in this case no free cash flow estimates were actually provided to Goldman Sachs. The internal analyses that were approved by management for Goldman’s use in this case didn’t have a line item for free cash flow estimates, and so unlike the \textit{Maric} decision, there was no deliberate excising of free cash flow numbers. . . . The proxy here gave management’s projections that were actually used by Goldman, and those projections included net revenue, net income, EPS and EBITDA estimates for five years. So based on all of that, there doesn’t appear to me to be a colorable claim of a misrepresentation or omission of material information that would alter the total mix of information already available to the stockholders.” (italics added)). Recognizing the different approaches taken in the court’s decisions, Chancellor Chandler suggested that he would certify an interlocutory appeal to the Delaware Supreme Court in an attempt to provide clarity on the question whether free cash flow estimates must always be disclosed. \textit{Id.} at 10–11. The plaintiffs, however, did not appeal.

\textsuperscript{62} Transcript of Telephonic Oral Argument on Plaintiff’s Motion for Expedited Proceedings and Rulings of the Court at 24, Scully v. Nighthawk Radiology Holdings Inc., C.A. No. 5890-VCL (Del. Ch. Oct. 21, 2010); \textit{see also Fair Summary, supra} note 1, at 888 (setting forth a disclosure principle that directors need only disclose what they reviewed and relied on).

\textsuperscript{63} Transcript of Telephonic Oral Argument on Plaintiff’s Motion for Expedited Proceedings and Rulings of the Court, \textit{supra} note 62, at 23–24; \textit{see also In re 3Com S’holders Litig.}, C.A. No. 5067-CC, 2009 WL 5173804, at *2 (Del. Ch. Dec. 18, 2009) (holding that the directors did not have to disclose
In summary, projections provided to the board's financial advisor should be disclosed. Of course, if those projections are not reliable, they may not have to be fully disclosed (so long as the proxy materials describe why the projections are not reliable and not disclosed). If the bidder's financial projections were provided to the target board's banker for purposes of determining the fairness of the transaction—for example, in a stock-for-stock merger—a court might also conclude that those projections should be disclosed under the principles set forth above. Of course, directors “cannot disclose projections that do not exist.” Further, if the projections provided to the target board's financial advisors are already disclosed, the Court of Chancery generally will not require the disclosure of additional details underlying the projections.

**Disclosure Regarding the Financial Advisor's Potential Conflicts**

The third area in which major developments have been made relates less to the fairness opinion itself, and more to the financial advisor providing the fairness opinion. The Delaware courts have long been sensitive to issues regarding banker conflicts, but the last three years have seen several developments in this area. The Court of Chancery in *Del Monte* recently stated that, “[b]ecause of the central cash flow measures or EBIT or EBITDA estimates, where the projections (which contained operating profit numbers) provided to the board’s financial advisor were disclosed).


65. *See Fair Summary,* supra note 1, at 904–05; *see also* Transcript of Settlement Hearing and Rulings of the Court at 54, IBEW Local Union 98 v. Noven Pharms. Inc., C.A. No. 4732-CC (Del. Ch. Dec. 8, 2009) (Laster, V.C.) (“Like Vice Chancellor Strine, I share the belief that projections are important and particularly when a discounted cash flow analysis is used. That’s the type of thing that is important for stockholders to have. I know in our law that we have talked about whether projections are sufficiently reliable, and that’s certainly a consideration. But as the disclosures in this case show[]), it’s perfectly possible for corporations to qualify those disclosures and explain the degree of reliability that they place on the projections.”); Transcript of Rulings of the Court from Oral Argument on Plaintiffs’ Motion for a Preliminary Injunction at 14–15, *In re Zenith Nat’l Ins. Corp. S’holders Litig.*, C.A. No. 5296-VCL (Del. Ch. Apr. 22, 2010) (similar).

66. *In re CNX Gas Corp. S’holders Litig.*, 4 A.3d 397, 419 (Del. Ch. 2010).

67. *Id.* (“The Offer to Purchase and the Schedule 14D-9 already disclose the projections that were provided to Stifel and Lazard. The plaintiffs have not convinced me that anything more is needed in this case, such as the ‘price deck’ underlying the projections.”); *see also In re Ness Techs., Inc. S’holders Litig.*, C.A. No. 6569-VCN, slip op. at 11 (Del. Ch. Aug. 3, 2011) (“[T]he Plaintiffs seek additional detail regarding management’s projections of Ness's continued performance as a standalone entity. The Preliminary Proxy provides a fair summary of these projections; the Plaintiffs have not offered a theory as to how additional detail would be relevant to shareholders’ decisions regarding the Proposed Transaction.” (footnote omitted)); *In re Answers Corp. S’holders Litig.*, C.A. No. 6170-VCN, 2011 WL 1366780, at *7 (Del. Ch. Apr. 11, 2011) (“Although all of this granular information might be of interest to Answers’ shareholders, the information regarding revenue, EBITDA, and cash-on-hand already provided in the Proxy Materials is sufficient to allow shareholders to evaluate the Proposed Transaction in light of these factors. That is, the three charts would not be material to the shareholders’ vote, and they need not be disclosed.”).

68. *See Fair Summary,* supra note 1, at 899–900.
role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives, this Court has required full disclosure of investment banker compensation and potential conflicts.”

Because stockholders need to be aware of a banker’s potential conflicts in determining how much weight to place on the fairness opinion, the court has required disclosures in several areas relating to bankers’ engagement and their potential interest in the transaction on which they are opining.

The court has also discussed claims regarding disclosure of the reasons that a financial advisor was retained. Generally, so long as the disclosure statement provides rational reasons for the advisor’s retention—and no special circumstances or suspicious facts exist—the Court of Chancery will likely find that sufficient disclosure has been made.

The most basic area of “banker conflict” disclosure involves the fee paid to the target’s banker. Three years ago, we discussed the principles regarding disclosure of the financial advisor’s fee structure. Globis had recently been decided, suggesting 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.”

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69. In re Del Monte Foods Co. S’dors Litig., C.A. No. 6027-VCL, 2011 WL 532014, at *16 (Del. Ch. Feb. 14, 2011); see also Transcript of Oral Argument at 96, Continuum Capital v. Nolan, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011) (“I think two of these disclosures were quite critical. First, that the banker was engaged in discussions with the buyer about potential business; and, second, the details of the banker’s fee. Bankers play a key role in the M&A process. They are out there advising the board about how to go about the process of maximizing stockholder value. They’re usually the one conducting the negotiations with potentially interested parties. They are the ones giving the presentations to the board; the board books that we all see so often on which the board relies heavily in making its decisions about a deal. They ultimately opine as to fairness. And they typically give advice—at least they should be giving advice, and I think usually do give advice, about whether the transaction really is the best transaction reasonably available, or whether further efforts would be likely to develop a superior transactional proposal. So I think information about the banker’s interests is quite material.”).

70. See, e.g., David P. Simonetti Rollover IRA v. Margolis, C.A. No. 3694-VCN, 2008 WL 5048692, at *7 (Del. Ch. June 27, 2008) (terming disclosures “sufficient” when the proxy statement stated that “[advisor] UBS and its affiliates had ‘acted as joint bookrunner in connection with a convertible notes offering by [target] TriZetto in April 2007,’ ‘acted as a counterparty in connection with the related bond hedge and warrant transactions entered into by TriZetto (referred to as the BHW Transaction),’ ‘provided certain cash management services to TriZetto,’ and acted as ‘a participant in a credit facility of TriZetto’” and explained that “the Board selected UBS as its financial advisor ‘because UBS is an internationally recognized investment banking firm with substantial experience in similar transactions and because of UBSs familiarity with TriZetto and its business’”); Cnty. of York Emps. Ret. Plan v. Merrill Lynch & Co., C.A. No. 4066-VCN, 2008 WL 4824053, at *11 (Del. Ch. Oct. 28, 2008) (“These passages sufficiently disclose the material facts regarding [target] Merrill’s selection of [advisor] MLPFS. It was an entity known to Merrill and BAC, and it had done a substantial amount of financial advisory work for both entities in the past. And Defendants were not required to cast this relationship in a negative light. Therefore, Plaintiff has failed to plead a colorable disclosure violation.” (footnote omitted)).

71. See, e.g., supra note 70; Transcript of Telephonic Rulings of the Court on Plaintiffs’ Motion to Expedite, supra note 4, at 12–13 (denying a motion to expedite on, among others, the following grounds: “It is disclosed, for example, in the 14D-9 that [the financial advisor] Needham had done work . . . in the past for the Company at its customary rates, that they were selected to do this job because they had done these kinds of matters many times before; they had experience in this particular industry and, in fact, with CAMD itself.”).

72. Fair Summary, supra note 1, at 899.

holding should be “seen as a floor” and doubted whether the Delaware courts would follow Globis “in all situations.” The Court of Chancery confirmed this prediction in Atheros, stating that the “differential between compensation scenarios may fairly raise questions about the financial advisor’s objectivity and self-interest.”

In Atheros, the proxy statement disclosed that the target’s financial advisor would be “paid a customary fee, a portion of which is payable in connection with the rendering of its opinion and a substantial portion of which will be paid upon completion of the Merger.” The total fee was not disclosed, and approximately 98 percent of the fee was contingent on the merger’s completion. Because that contingency percentage “exceeds both common practice and common understanding of what constitutes ‘substantial,’” the court required disclosure of the percentage of the fee that was contingent. The court declined to draw any “bright line” rule on what percentage would trigger disclosure, but it stated that “it is clear that an approximately 50:1 contingency ratio requires disclosure.” Finally, the court declined to resolve the debate over “whether the amount of a financial advisor’s fee needs to be disclosed or whether merely disclosing that the fee is customary (which it is in this instance) suffices.” Nevertheless, in the context of the large contingent fee (and the late-in-the-process fee agreement), the court required disclosure of the fee amount as well.

The Atheros decision is consistent with recent statements that Vice Chancellor Laster made in approving a settlement. In discussing the value of particular disclosures agreed to in the settlement, the vice chancellor referred to disclosures of the banker’s fee as “material.” The court further distinguished Globis: “[I do not think ‘[customary fee’] provides meaningful insight to stockholders as to the banker’s incentives. Some of these fees are quite large—they’re quite large and can be on the order of—particularly in small deals—almost termination fee-sized consideration. So I think that the details of the banker’s fee are quite important.”

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74. Id.
76. Id.
77. Id.
78. Id.; see also id. (“Stockholders should know that their financial advisor, upon whom they are being asked to rely, stands to reap a large reward only if the transaction closes and, as a practical matter, only if the financial advisor renders a fairness opinion in favor of the transaction. In essence, the contingent fee can readily be seen as providing an extraordinary incentive for [the financial advisor] to support the Transaction.”).
79. Id. at *9. But see Cnty. of York Emps. Ret. Plan v. Merrill Lynch & Co., C.A. No. 4066-VCN, 2008 WL 4824053, at *11 (Del. Ch. Oct. 28, 2008) (holding “not colorable” a claim that the amount of the bankers’ contingent compensation needed to have been disclosed). In Merrill Lynch, the advisor was the target’s subsidiary, and the proxy statement disclosed that a “substantial portion” of the banker’s fee was contingent on the merger’s consummation. Id. The total amount of consideration ($25 million) was, however, disclosed, and the court cited Globis in rejecting the plaintiff’s claims. Id. (“And this Court has held that the precise amount of consideration need not be disclosed, and that simply stating that an advisor’s fees are partially contingent on the consummation of a transaction is appropriate.”).
81. Id.
82. Transcript of Oral Argument, supra note 69, at 97.
83. Id.
While the court noted that cases in the past had “been dismissive of banker-oriented disclosure,” it stated that, “given the banker’s role in the process, this is the type of thing that is quite material.”  

Over time, it appears that the Delaware courts are likely to require more disclosure of the fees to be paid to a board’s financial advisor and of how much of those fees are contingent.

In a similar context, the Delaware Court of Chancery has required disclosure of a banker’s other financial interests in the transaction under consideration. For example, in Simonetti, the court analyzed disclosures in the context of a proposed acquisition by Apax Partners, L.P. of The TriZetto Group, Inc. TriZetto’s financial advisor, UBS, held a not insubstantial amount of notes and warrants in TriZetto and would be entitled to cash payments upon, or shortly after, the merger’s consummation. Noting that a “financial advisor’s own proprietary financial interest in a proposed transaction must be carefully considered in assessing how much credence to give its analysis,” the court ordered disclosure of the range of value of UBS’s note holdings in TriZetto. 

What is no longer a close question is whether buy-side business relationships must be disclosed at all. The Court of Chancery has “stressed the importance of disclosure of potential conflicts of interest of financial advisors,” noting that it is “imperative that stockholders be able to decide for themselves what weight to place on a conflict faced by the financial advisor.” Significantly, the requirement to disclose conflicts includes all advisors—both financial and legal. 

For example, the Court of Chancery recently required detailed disclosure of the target banker’s buy-side fees and engagements. For example, in Art Technology, the court enjoined a merger until the target company disclosed to its stockholders additional information about its financial advisor’s prior work for the buyer. Art Technology involved a challenge to a proposed merger of Oracle Corporation and Art Technology Group, Inc. Morgan Stanley was Art Technology’s financial advisor

84. Id. (noting also that “[e]ach case obviously turns on its own facts and circumstances”).


86. Id. at *8.

87. Id. see also id. (“The financial advisor’s opinion of financial fairness for a proposed transaction is one of the most important process-based underpinnings of a board’s recommendation of a transaction to its stockholders and, in turn, for the stockholders’ decisions on the appropriateness of the transaction. Thus, it is imperative for the stockholders to be able to understand what factors might influence the financial advisor’s analytical efforts.”).

88. In re John Q. Hammons Hotels Inc. S’holder Litig., C.A. No. 758-CC, 2009 WL 3165613, at *16 (Del. Ch. Oct. 2, 2009) (“Such disclosure is particularly important where there was no public auction of the Company and ‘shareholders may be forced to place heavy weight upon the opinion of such an expert.’ ”).

89. Id. (denying summary judgment to defendants on disclosure claims regarding potential conflicts of a special committee’s financial and legal advisors); see also id. at *17 (“Again, the compensation and potential conflicts of interest of the special committee’s advisors are important facts that generally must be disclosed to stockholders before a vote. This is particularly true, where, as here, the minority stockholders are relying on the special committee to negotiate on their behalf in a transaction where they will receive cash for their minority shares.”).

in the transaction, but Morgan Stanley had also performed work for Oracle for a number of years. The court ruled that Art Technology and Oracle had to disclose (i) the aggregate annual compensation paid by Oracle to Morgan Stanley from 2007 to 2010 and (ii) a description of the nature of services that Morgan Stanley provided to Oracle.91 While this level of detail should not always be required (for example, a two-year period is more typical),92 practitioners should be aware that the Court of Chancery appears to be moving toward more stringent disclosure requirements regarding banker's buy-side work.

The Court of Chancery in Hammons denied summary judgment to the defendants on a disclosure claim regarding the target special committee's banker's contacts with the bidder about potentially underwriting a significant security offering planned by the bidder after the merger.93 Following trial in Hammons, the court found for the defendants on that claim, stating that the evidence demonstrated that the employee of [target advisor] Lehman's real estate finance group that contacted [bidder] Eilian never actually received “the numbers” regarding the hotels Eilian intended to refinance, never submitted a written bid or term sheet for the business, and never got any business from Eilian. In addition, the Lehman representatives that advised the Special Committee never actually spoke with the Lehman representative who contacted Eilian.94

91. Id. at 1; cf. also In re Del Monte Foods Co. S’holders Litig., C.A. No. 6027-VCL, 2011 WL 2535256, at *11 (Del. Ch. June 27, 2011) (“Equally important, the Proxy Supplement disclosed Barclays’ extensive financial conflicts, including the $21 to $24 million in fees that the bank would receive for providing buy-side financing for the Sponsors (comparable to and potentially more than its $23.5 million fee for serving as a sell-side advisor) and the over $70 million in fees that Barclays had received from the Sponsors in the prior two years.”). As a side note, Oracle’s payments to Morgan Stanley over the four-year period were not significantly greater than Art Technology’s payment to Morgan Stanley for its work on the merger.

92. See also, e.g., In re Ness Techs., Inc. S’holders Litig., C.A. No. 6569-VCN, slip op. at 10 (Del. Ch. Aug. 3, 2011) (“If the amount of business that one of the financial advisors has done with [buyer] CVCI or its affiliates is material, then the failure to disclose fully the extent of that business could violate the duty of disclosure. By contrast, if the amount of business involved is not material to either financial advisor, then the existing disclosures would likely be adequate.” (footnote omitted)); David P Simonetti Rollover IRA, 2008 WL 5048692, at *7 (“Although the Proxy Statement perhaps does not provide as much information as a shareholder would think optimal, the Court concludes that its disclosures regarding Deutsche Bank are adequate. The Proxy Statement discloses that [target] TriZetto was considering the PIPE Transaction in November of 2007 and that Deutsche Bank had acted as its financial advisor. It also discloses that Deutsche Bank advised [bidder] Apax on the Merger. Thus, the stockholders are made aware that the same investment bank that had represented TriZetto in November 2007 was representing its potential acquirer through the Merger. No further disclosures on this point would have altered the total mix of information available, viz., that the same investment bank had represented parties with opposed interests in the Merger in temporal proximity.” (footnotes omitted)).

93. Hammons, 2009 WL 3165613, at *16 (“There is no rule, however, that conflicts of interest must be disclosed only where there is evidence that the financial advisor’s opinion was actually affected by the conflict. Thus, defendants cannot defend the alleged omission as immaterial by arguing that any contacts between [advisor] Lehman and [bidder] Eilian regarding the refinancing occurred after Lehman opined in December 2004 that the then-high bid of $21 per share was fair to the minority stockholders.”).

As important, the court found that the directors did not know of these potentially conflicting contacts: “Under Delaware law, directors do not owe a duty to disclose facts that they are not aware of.”

Other cases have also discussed the need for directors to disclose their advisors’ buy-side business relationships. In Zenith, the Court of Chancery denied a motion for preliminary injunction on such a disclosure claim, finding sufficient the disclosure in the proxy statement of the advisor’s “five key engagements” with the bidder as well as the total compensation paid to the advisor by the bidder. The court was concerned that the disclosure created a “partial disclosure” problem because the individual banker who worked on the bidder’s recent engagement was the “No. 2” on the target’s team. Nevertheless, different factors pushed the court the other way: it was a cash deal, it was an arm’s-length deal, and the advisor was only acting in an advisory capacity—it was not negotiating with the bidder or running the shopping process. For those reasons, and because the amount of the buy-side compensation had been disclosed, the court denied the motion for preliminary injunction. The court noted that the disclosure regarding the banker’s buy-side compensation was “really the key disclosure that you ought to have.”

The Court of Chancery has even suggested that disclosure of bankers’ buy-side contacts that do not lead to business may need to be disclosed, particularly if those contacts occur during the pendency of the transaction. For example, in approving a settlement, Vice Chancellor Laster stated: “It may well be that [we] are jaded about the degree to which bankers talk and pitch business and sell. But that doesn’t mean that stockholders wouldn’t find it material that the sell-side banker

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95. Id. (“[N]one of the directors . . . were even aware that Eilian was contacted by any employee of Lehman; nor is there any basis to suggest that they should have been aware of the contact . . . Moreover, plaintiffs offered no evidence regarding how Lehman’s alleged conflict actually affected the advice it provided to the Special Committee.”). We do not believe, however, that the court’s statement should be read to allow directors to engage in non-disclosure through willing blindness. Directors are still required to “fully and fairly disclose all material information within [their] control when seeking shareholder action.” Pfeffer v. Redstone, 965 A.2d 676, 686 (Del. 2009). That is, directors will generally be responsible for disclosing all material information that they know or should know, but not otherwise. See id. at 686–87 (“For the Viacom Directors to have either misstated or failed to disclose the cash flow analysis in the Prospectus, those directors must have had reasonable access to that Blockbuster information. . . . If the Viacom Directors did not know or have reason to know the allegedly missing facts, however, then logically the directors could not disclose them.”).

96. Transcript of Rulings of the Court from Oral Argument on Plaintiffs’ Motion for a Preliminary Injunction, supra note 65, at 17 (“[T]he banker conflict issue . . . has really been the one that has given me the most problems throughout this. And there are pros and cons. There are reasons why this additional disclosure should be required and there are reasons why it shouldn’t be required.”).

97. See generally Fair Summary, supra note 1, at 902 (discussing “partial disclosure”).

98. Transcript of Rulings of the Court from Oral Argument on Plaintiffs’ Motion for a Preliminary Injunction, supra note 65, at 18.


100. Transcript of Rulings of the Court from Oral Argument on Plaintiffs’ Motion for a Preliminary Injunction, supra note 65, at 19 (“I also, again, return to the fact that there is good disclosure in the proxy on the . . . prior engagements and on the $9 million fees.”).

101. Id.
was making a buy-side pitch for business.” 102 Then-Vice Chancellor Strine made similar remarks during the preliminary-injunction hearing in Maric Capital: if “the same banker who was doing the representation on [target] PLATO is talking to [bidder] Thoma Bravo about potential situations in which Thoma Bravo might be the client of [the banker], that would be troubling. It should be disclosed.” 103 But the court was careful to distinguish between the types of buy-side contacts that the target’s advisor was making, suggesting that general contacts need not be disclosed, while contacts with the specific bidder did. 104

If the target’s banker does not have any past or present business relationships with the bidder, however, directors generally need not make negative disclosures of that nature. The Court of Chancery stated in 2007 that, “[t]o the extent that defendants disclosed the existence of one such relationship, shareholders may infer that no other material relationships exist.” 105 Similarly, the court in 2010 approved of a proxy statement silent as to any business relationship between the target’s financial advisor and the bidder, where there was none: “The Schedule 14D-9 is silent as to any work that Lazard is currently doing for CONSOL because Lazard is not currently doing any work for CONSOL.” 106

To summarize, the Delaware Court of Chancery has become increasingly concerned about potential conflicts affecting directors’ advisors and has required significant disclosures regarding banker compensation and buy-side conflicts. 107 “[T]he role of the financial advisors, including its authorship of the fairness opinion in the sale scenario, is critical and, oftentimes, . . . an important underpin-
ning of the directors’ recommendation of support for a particular transaction.” 108 Accordingly, the court has not been impressed with the excuse that directors “are limited in their ability to make these disclosures because [the advisor] is unwilling to share the necessary information.” 109 In fact, the court in Simonetti suggested two possible solutions to that issue:

First, perhaps the Board should reconsider its choice of financial advisor. . . . Second, perhaps (and the Court need not express a view at this time) disclosure of the financial advisor’s unwillingness to provide the appropriate information should be shared with the stockholders and then they would be able to consider that recalcitrance in their own assessment of whether to rely upon the fairness opinion and to approve the proposed transaction. 110

Further, the court recently made comments suggesting that bankers should bear some financial responsibility for withholding disclosures desirable under Delaware law. 111 Practitioners should consider addressing these issues at the outset in the engagement letter.

indicates that, as of a date earlier than December 14, 2010, [target CEO] Barratt had overwhelming reason to believe he would be employed by [bidder] Qualcomm after the Transaction closed. Because the Proxy Statement partially addresses the process by which Barratt negotiated his future employment with Qualcomm, the Board must provide a full and fair characterization of that process.”);

Transcript of Ruling of the Court: Plaintiffs’ Motion for a Preliminary Injunction, supra note 26, at 12–13 (“It is, therefore, incorrect for the proxy to say that nobody has any clue who the [director on the surviving company board] is going to be. So the defendants need to disclose that it is currently anticipated, or there is an agreement in principle, or whatever the apt view of it is, and is consistent with the deposition testimony that [target director] Pardun will be the director. That could be material to the stockholders’ view of his interest in supporting the merger.”);

Maric Capital Master Fund, Ltd. v. PLATO Learning, Inc., 11 A.3d 1175, 1179 (Del. Ch. 2010) (requiring the proxy statement to clarify the extent of discussions between the target’s CEO and bidder Thoma Bravo “in which the typical equity incentive package given by Thoma Bravo to management was discussed”);

Cnty. of York Emps. Ret. Plan v. Merrill Lynch & Co., C.A. No. 4066-VCN, 2008 WL 4824053, at *12–13 (Del. Ch. Oct. 28, 2008) (discussing an amended proxy that mooted plaintiff’s claims regarding disclosure of the target chairman’s discussions with the bidder regarding his future employment and noting that the “material facts regarding the Chairman’s compensation package and on-going employment have all been disclosed”);

In re Lear Corp. S’holder Litig., 926 A.2d 94, 114 (Del. Ch. 2007) (requiring disclosure of target CEO’s conflict of interest where he acted as the negotiator and stating that “a reasonable stockholder would want to know an important economic motivation of the negotiator singularly employed by a board to obtain the best price for the stockholders, when that motivation could rationally lead that negotiator to favor a deal at a less than optimal price, because the procession of a deal was more important to him, given his overall economic interest, than only doing a deal at the right price”).

108. David P. Simonetti Rollover IRA v. Margolis, C.A. No. 3694-VCN, 2008 WL 5048692, at *14 (Del. Ch. June 27, 2008) (“Perhaps it is unavoidable that financial advisors regularly seem to suffer from conflicts of one degree or another, but, if that is the likely state of affairs, then the stockholders are entitled to know what material factors, if any, may be motivating the financial advisor. The Company is asking its stockholders to have faith in UBS and to rely upon its expertise; UBS may well be deserving of that confidence, but the stockholders have every right to expect the Company to share with them any extraneous, substantial reasons UBS may have for seeing that the transaction is consummated.”).

109. Id. at *14 n.66.

110. Id. ("One wonders how a board should expect its stockholders to rely upon the sponsor of a fairness opinion who is unwilling to disclose the nature and scope of its potential conflicts.").

111. Transcript of Oral Argument, supra note 69, at 44–45 (“I get the feeling that a lot of these disclosures are driven by banker’s counsel’s own willingness to put information in a proxy statement. It’s too bad the bankers can’t be required to pay the fee. I sometimes wonder if there shouldn’t be a carve-out in the bankers’ indemnification letter that says, if we are required to pay a fee or a successor of the
CONCLUSION

The Delaware Court of Chancery routinely addresses many types of disclosure claims—for example, one common type of non-financial disclosure claim involves alleged deficiencies in the “background” section of the proxy materials. Nevertheless, disclosure claims regarding fairness opinions and the analyses, acquirer is required to pay a fee to the plaintiffs’ lawyer as a result of a disclosure that we asked you to put in and you refused to put in, like the actual amount of your fee as opposed to just describing it as reasonable and customary, which, frankly, is the standard with a spectrum about as broad as the electromagnetic one, why the banker doesn’t pick that up. It’s an odd thing. But maybe that can be something for [counsel] to negotiate next time they’re negotiating a banker’s engagement letter.”).

112. With the exception of injunctions to rectify inadequate, misleading, or “partial” disclosures in the process background section, the Delaware Court of Chancery typically will not require directors to disclose all the details of the process leading up to the proposed acquisition. Compare In re Atheros Commc’ns, Inc. S’holder Litig., C.A. No. 6124-VCN, 2011 WL 864928, at *11–12 (Del. Ch. Mar. 4, 2011) (requiring disclosure of CEO’s negotiation of future employment with bidder), Transcript of Ruling of the Court: Plaintiffs’ Motion for a Preliminary Injunction, supra note 26, at 12–13 (requiring disclosure of likely identity of target director who will serve on surviving company’s board), Transcript of Telephonic Oral Argument on Plaintiffs’ Motion for Expedited Proceedings and Rulings of the Court, supra note 62, at 21 (referring to disclosures regarding background of merger as “breezy” and “subpar in terms of details” and noting that additional detail of CEO-to-CEO negotiations is generally preferred), and Maric Capital Master Fund, Ltd. v. PLATO Learning, Inc., 11 A.3d 1175, 1179 (Del. Ch. 2010) (requiring the proxy statement to rectify misleading disclosure by clarifying the extent of discussions between the target’s CEO and bidder), with In re Ness Techs., Inc. S’holders Litig., C.A. No. 6569-VCN, slip op. at 12–13 (Del. Ch. Aug. 3, 2011) (“The Preliminary Proxy describes, over fourteen pages, the eleven-month sale process in which the Special Committee and the Board engaged. The Plaintiffs have not indicated how additional information regarding the contacts the Board had with over thirty potential buyers, the extensive negotiations with Bidder D and [buyer] CVCI, or the role [the financial advisor] played in these negotiations would affect shareholders’ decisions regarding the Proposed transaction. Shareholders are not entitled to a play-by-play description of merger negotiations, but, instead, to a fair summary of the sale process. The Plaintiffs’ allegations do not state a colorable claim that the Preliminary Proxy failed to provide such a fair summary.” (alteration, footnotes, and internal quotation marks omitted)), In re Sauer-Danfoss Inc. S’holders Litig., C.A. No. 5162-VCL, 2011 WL 2519210, at *12 (Del. Ch. Apr. 29, 2011) (“Delaware law does not require that a fiduciary disclose its underlying reasons for acting.”), Atheros, 2011 WL 864928, at *12 (refusing to require disclosure of the “rejected proposals of each side”), Transcript of Telephonic Rulings of the Court on Plaintiffs’ Motion to Expedite, supra note 4, at 16–17 (“[O]ur cases hold that shareholders are not entitled to a play-by-play description of merger negotiations and the lead-up to it.”), Globis Partners, L.P. v. Plumtree Software, Inc., C.A. No. 1577-VCP, 2007 WL 4292024, at *14 (Del. Ch. Nov. 30, 2007) (noting that the duty of disclosure does not require that a board “give its shareholders a ‘play-by-play description of merger negotiations’”), McMillan v. Intercargo Corp., C.A. No. 16963, 1999 WL 288128, at *9 (Del. Ch. May 3, 1999) (noting that a disclosure statement need not describe all of the “bends and turns in the road” when summarizing a proposed transaction), In re Lukens Inc. S’holders Litig., 757 A.2d 720, 736 (Del. Ch. 1999) (holding that the company was not required to disclose why it “chose not to take particular courses of action” or “did not take other steps or follow another process”), aff’d sub nom. Walker v. Lukens, Inc., 757 A.2d 1278 (Del. 2000) (TABLE), Skeen v. Jo-Ann Stores, Inc., C.A. No. 16836, 1999 WL 803974, at *7 (Del. Ch. Sept. 27, 1999) (stating that “shareholders are not entitled to a ‘play-by-play’ description of merger negotiations”), aff’d, 750 A.2d 1170 (Del. 2000), Kahn v. Corporella, C.A. No. 13248, 1994 WL 89016, at *8 (Del. Ch. Mar. 10, 1994) (holding that a failure to disclose an indication of interest received by a third party was not material, where that potential bidder did not make a competing offer), Van de Walle v. Unimation, Inc., C.A. No. 7046, 1991 WL 29303, at *15 (Del. Ch. Mar. 7, 1991) (“Where, as here, arms-length negotiation has resulted in an agreement which fully expresses the terms essential to an understanding by shareholders of the impact of the merger, it is not necessary to describe all the bends and turns in the road which led to that result.” (internal quotation marks omitted)), and Repairman’s Serv. Corp. v. Nat’l Intergroup, Inc., C.A. No. 7811, 1985 WL 11540, at *8 (Del. Ch. Mar. 15, 1985) (same).
materials, and potential conflicts regarding those fairness opinions will probably remain among the most common disputes in Delaware deal litigation. The Delaware courts will likely continue to eschew a bright-line approach to these disclosure issues; this article therefore attempts to provide, along with our prior article, a helpful guide to practitioners regarding the Delaware courts’ facts-and-circumstances approach.

113. See generally Fair Summary, supra note 1, at 881–82 (discussing reasons for the prevalence of disclosure claims in deal litigation).

114. See, e.g., In re Atheros Comm’ns, 2011 WL 864928, at *9; cf. also Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309 (2011) (eschewing use of bright-line rule for materiality in federal securities law context). Given the infinite combinations of business-specific factors (like what projections have been created and when), advisor-specific factors (like what methodologies are employed and what data are analyzed), board-specific factors (like what information is considered), and transaction-specific factors (like the transaction’s form and the counterparty’s identity), a bright-line rule seems particularly unsuitable for policing directors’ duty of disclosure. See Fair Summary, supra note 1, at 885–86.
Fair Summary: Delaware’s Framework for Disclosing Fairness Opinions

By Blake Rohrbacher and John Mark Zeberkiewicz*

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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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. Shareholder 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. Shareholders 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).


\(^10\) Id. § 141(c) (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 237763, 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 1 Partners, L.P. v. Turner, 846 A.2d 963, 984 (Del. Ch. 2000) (“If fairness opinions prepared by independent investment bankers are generally not essential, as a matter of law, to support an informed business judgment.”).
Delaware’s Framework for Disclosing Fairness Opinions

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

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.”).
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

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17. Clements, 790 A.2d at 1245.
20. Id. at 779.
21. 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, 700 A.2d at 143.
24. Id.
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

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29. Brody v. Zaucha, 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 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. 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.” 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.

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.”

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34. *Erickson v. Centennial Beauregard 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 938 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

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45. *Id.* at 203–04.
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. Shareholders 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. Shareholder 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.\footnote{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.\footnote{54} “[I]t is not our law that every extant estimate of a company’s future results, however stale or however prepared, is material.”\footnote{55} On the other hand, otherwise-reliable management projections completed shortly before a merger or other transaction will generally be regarded as material.\footnote{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 document\footnote{57}—disclosure of unreliable material may even be misleading.\footnote{58} A corollary to this reliability principle is that directors typically need not disclose intermediate draft fairness opinions.\footnote{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.\footnote{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...
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.
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.”).
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 and McMullin. 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.” That is, the information the plaintiffs wished disclosed was not “inconsistent with, or otherwise significantly different from, the disclosed information.” 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.

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.” 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.”

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. 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.

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 they subject to the 700 caveats in our 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. Sholders 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.” 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.”

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.” 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.”

Once particular details of a valuation are disclosed, however, further disclosures must be made to avoid any misimpressions created by those details. 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.”

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. 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.” 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 926, 928–933 (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).

80. Id. at 448–49.
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”).
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.” In short, the court held that a “fair summary” of the banker’s substantive work had been given.

**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, 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.”

In *Skeen*, plaintiffs sought the disclosure of additional financial information “because it would help stockholders evaluate whether they should pursue an appraisal.” 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.” 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.”

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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. Shareholder 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) Shareholder 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).
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 [were] 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
“not less than $200,000,000 . . . and could be substantially greater.” 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.” 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.” 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.

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. 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. 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. 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. 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.” 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.

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”).
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.

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. Shareholder Litig., 845 A.2d 1057, 1072 (Del. Ch. 2001) (“[P]laintiffs allege that Piper [Jaffray] 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 shareholders.’ 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 Aldina 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 “[i]n 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 “*by

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-Commcs, 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.”).


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. 2940-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 preferred 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.

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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, and 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, 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 analysis (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, 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. 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. 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. Moreover, the identity of the financial advisor or unusual

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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”).
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) (“[I]t has 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. 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, but Delaware law also requires such disclosure. 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. 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.

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.”

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.


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.
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). 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 ‘once a board broaches a topic in its disclosures,’ the [Netsmart] Court held that further disclosure was required.”

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. The proxy statement in Netsmart did

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. The two projections disclosed were not the projections underlying the fairness opinion and, indeed, lacked information regarding two years covered by the fairness opinion. 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.

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. But the undisclosed projections in that case were described in the proxy as unreliable. 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. 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.”

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149. Id. at 203.
150. Id. at 202–03.
151. See id. at 203–04.
152. CheckFree, 2007 WL 3262188, at *3.
153. Id.
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. \textsuperscript{156} For example, “in the context of cash-out mergers,” the Delaware courts have held that even “soft” information must be disclosed if reliable. \textsuperscript{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. \textsuperscript{158} The proxy materials must disclose the projections, or disclose why the projections are unreliable, \textsuperscript{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. \textsuperscript{160} In other

\begin{itemize}
\item \textsuperscript{156} See, e.g., \textit{Weinberger}, 519 A.2d at 128.
\item \textsuperscript{157} Glassman v. Wometco Cable TV, Inc., C.A. No. 7307, 1989 WL 1160, at *6 (Del. Ch. Jan. 6, 1989); see also \textit{In re Siliconix 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”).
\item \textsuperscript{158} This prediction of Delaware law is the inverse of a principle rejected by the Court of Chancery in 1999. See \textit{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 \textit{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.”).
\item \textsuperscript{159} See, e.g., id. (noting that, “where the inherent unreliability of the projections is \textit{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-VCF, 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).
\item \textsuperscript{160} See, e.g., \textit{In re PNB Holding Co. S'holders Litig.}, C.A. No. 28-N, 2006 WL 2403990, at *16 (Del. Ch. Aug. 18, 2006) (“The projections at issue fall into the category of documents on which 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)); \textit{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), \textit{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 \textit{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.”).
\end{itemize}
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.\footnote{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.’).}

**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.
Fair Summary II: An Update on Delaware’s Disclosure Regime Regarding Fairness Opinions

By Blake Rohrbacher and John Mark Zeberkiewicz*

In May 2008, the authors published an article discussing the general principles behind Delaware cases involving disclosure regarding fairness opinions and the financial advisors that provide them. This Article updates that prior article and discusses the evolution of Delaware law on this topic. Principally, this Article discusses developments in three areas: disclosure regarding the financial advisor’s analysis, disclosure regarding management’s projections, and disclosure regarding the financial advisor’s potential conflicts. Included are analyses of the most recent Delaware cases, including transcript rulings, as well as general discussions of other issues relating to Delaware’s fiduciary duty of disclosure.

Three years ago, we published an article in this journal setting forth a general framework for fiduciary disclosure regarding fairness opinions under Delaware law.1 While the issues we discussed in the prior article are still litigated with some frequency, the Court of Chancery has noted that financial disclosures in recent years have been far more robust than they had been in the past—undoubtedly due largely to the court’s rulings.2 In response, plaintiffs have sought new lines of
attack, and the Delaware courts have therefore begun to focus not only on the disclosure of underlying financial analyses broadly, but also on specific and discrete issues involving fairness opinions and projections as well as on issues beyond the fairness opinion itself, most notably the financial advisor’s potential conflicts and incentives. In this article, we discuss the current state of Delaware’s fiduciary disclosure regime and the developments over the last three years.

In particular, we discuss three major areas of development in Delaware disclosure cases. First, we discuss the “fair summary” requirement for disclosure of the financial analysis underlying a banker’s fairness opinion. Next, we discuss the court’s recent statements regarding disclosure of management’s projections, including cash flow measures. Finally, we discuss developments regarding the disclosure of financial advisors’ potential conflicts, including compensation arrangements and buy-side work.

**Disclosure Regarding the Financial Advisor’s Analysis**

In the last three years, the Delaware Court of Chancery has addressed a number of issues regarding disclosure of the financial aspects of fairness opinions. As we noted in our earlier article, directors are generally required, if they rely on a fairness opinion to support their recommendation of a particular transaction, to

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as well as the SEC.”); Transcript of Settlement Hearing at 22, Masucci v. Fibernet Telecom Grp., Inc., C.A. No. 4680-VCS (Del. Ch. Nov. 25, 2009) (“But as a combination of some of my rulings and those of my colleagues, and frankly some of the lead the SEC took from those rulings, the disclosure about financial information and projection is much fuller and richer than it’s ever been. That should actually lead people to file fewer suits about financial information rather than more.”); Transcript of Argument and Ruling on Motion to Expedite at 25, In re Hiland Partners, LP Unit Holders Litig., C.A. No. 4397-VCS (Del. Ch. Sept. 11, 2009) (“But there has been a trend toward [disclosing projections], which is good for investors. It may not be good for people who bring cases, because the more there is thorough disclosure, the less there is to shoot at.”).

3. *Fair Summary, supra* note 1, at 882–83 (“Fairness opinions are typically produced at the request of the target’s board (or a special committee of the board) 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 the business combination is fair . . . .” (footnote omitted)).

4. One aspect that has not changed is the balance that the Delaware Court of Chancery tries to strike between under- and overdisclosure. See, e.g., In re Answers Corp. S’holders Litig., C.A. No. 6170-VCN, 2011 WL 1366780, at *5 (Del. Ch. Apr. 11, 2011) (“Non-material facts need not be disclosed, and additional details underlying financial projections are not necessarily material, especially where they would tend to confuse stockholders or inundate them with an overload of information.” (internal quotation marks omitted)); Transcript of Telephonic Rulings of the Court on Plaintiffs’ Motion to Expedite at 16, In re Cal. Micro Devices Corp. S’holders Litig., C.A. No. 5159-VCP (Del. Ch. Jan. 15, 2010) (“In light of the information disclosed, I cannot see how the requested information would be material to a shareholder in determining whether to tender his or her shares or would do anything more than bury the shareholder in an avalanche of trivial information.”); see also *Fair Summary, supra* note 1, at 883–84.

5. We note that a “fair summary” disclosure might also be required of any advisor’s analysis that was presented to the board and relied on by it in recommending a transaction to the stockholders, even if the board did not receive a formal fairness opinion. See Berger v. Pubco Corp., C.A. No. 3414-CC, 2008 WL 2224107, at *3 (Del. Ch. May 30, 2008) (“Because Kanner utilized the short-form merger statute, he did not have to set a fair price and, therefore, could have used any method—no matter how absurd—to set the merger consideration. Defendants argue that disclosure of his methodology is
unnecessary. Defendants’ argument entirely misses the mark, however, because the issue is not about necessity—it is about materiality. In the context of Pubco, an unregistered company that made no public filings and whose Notice was relatively terse and short on details, the method by which Kanner set the merger consideration is a fact that is substantially likely to alter the total mix of information available to the minority shareholders. Where, as here, a minority shareholder needs to decide only whether to accept the merger consideration or to seek appraisal, the question is partially one of trust: can the minority shareholder trust that the price offered is good enough, or does it likely undervalue the Company so significantly that appraisal is a worthwhile endeavor? When faced with such a question, it would be material to know that the price offered was set by arbitrarily rolling dice. In a situation like Pubco’s, where so little information is available about the Company, such a disclosure would significantly change the landscape with respect to the decision of whether or not to trust the price offered by the parent. This does not mean that Kanner should have provided picayune details about the process he used to set the price; it simply means he should have disclosed in a broad sense what that process was, assuming he followed a process at all and did not simply choose a number randomly.

(footnote omitted)), rev’d on other grounds, 976 A.2d 132 (Del. 2009); see also Wacht v. Cont’l Hosts, Ltd., C.A. No. 7954, 1994 WL 525222, at *3 (Del. Ch. Sept. 16, 1994) (“While it may be true that [defendant] Stanley Lewin knew more about Continental than an outside investment banker, he did not apply this knowledge, or disclose it to the shareholders, in any rational, logical way, from which the shareholders could determine how he arrived at the $12 per share figure. . . . A shareholder, in determining whether to seek appraisal or accept the terms of the Merger, would surely deem information regarding how the merger price was determined to be material.”). This proposition is based on, among other things, Delaware law regarding “partial disclosure.” See In re Netsmart Techs., Inc. S’holders Litig., 924 A.2d 171, 203 (Del. Ch. 2007) (“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 facts.’ “). Thus, when directors have relied on a financial analysis and tout it to the stockholders as a basis for approving a given transaction, they should probably provide a “fair summary” of that analysis. See id.

6. Fair Summary, supra note 1, at 902.

7. In re Pure Res., Inc. S’holders Litig., 808 A.2d 421, 449 (Del. Ch. 2002); see also Fair Summary, supra note 1, at 891–92.


9. Fair Summary, supra note 1, at 897–98; In re JCC Holding Co. S’holders Litig., 843 A.2d 713, 721 (Del. Ch. 2003) (stating that “kind of quibble with the substance of a banker’s opinion does not constitute a disclosure claim”).
work performed by an investment banker must be accurately described and appropriately qualified.\textsuperscript{10}

Nevertheless, the “fair summary” requirement does not mean that every aspect of a banker’s analysis (or the banker’s entire presentation to the directors) must be disclosed. For example, the Delaware Court of Chancery has held that a corporation “committed no disclosure violation by failing to include the manner in which its financial advisor derived the discount rate it used in its analysis.”\textsuperscript{11} Similarly, the court has stated that Delaware law does not require a corporation “to disclose why its advisor chose one method of analysis over another.”\textsuperscript{12}

But the results may be quite different when the court determines that directors have engaged in “partial disclosure”\textsuperscript{13} or have otherwise been misleading\textsuperscript{14} or incomplete.\textsuperscript{15} For example, in \textit{Maric Capital}, the Court of Chancery required the defendant directors to make corrective disclosure regarding their financial advisor’s range of discount rates.\textsuperscript{16} The proxy statement of target PLATO Learning indicated that the board’s financial advisor had selected discount rates “based upon an analysis of PLATO Learning’s weighted average cost of capital” and that the advisor had used a range of 23 percent to 27 percent when conducting its DCF analysis.\textsuperscript{17} But the advisor’s calculations of the company’s weighted average cost of capital—disclosed to PLATO’s special committee—had actually generated discount rates of 22.5 percent and 22.6 percent (below the 23 percent at the bottom of the disclosed range).\textsuperscript{18} The financial advisor representative, at his deposition, provided various reasons why the higher range was used and disclosed, but there

\textsuperscript{10} \textit{In re 3Com}, 2009 WL 5173804, at *6.

\textsuperscript{11} \textit{Merrill Lynch}, 2008 WL 4824053, at *12.

\textsuperscript{12} Transcript of Telephonic Rulings of the Court on Plaintiffs’ Motion to Expedite, \textit{supra} note 4, at 14 (“Delaware law . . . does not require an investment banker to perform a discounted cash flow analysis or the Company to disclose why the advisor chose one method of analysis over another.”); see also \textit{In re Best Lock Corp. S’holder Litig.}, 845 A.2d 1057, 1073 (Del. Ch. 2001) (“Delaware courts have held repeatedly that a board need not disclose specific details of the analysis underlying a financial advisor’s opinion.”); \textit{Sauer-Danfoss}, 2011 WL 2519210, at *13 (holding that a supplemental disclosure was “immaterial” when the original “Schedule TO accurately stated that [bidder] Danfoss obtained a premiums analysis and attached a copy of that analysis”).

\textsuperscript{13} 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).” \textit{Fair Summary}, \textit{supra} note 1, at 902.

\textsuperscript{14} See, e.g., \textit{Gantler v. Stephens}, 965 A.2d 695, 711 (Del. 2009) (holding that “a board cannot properly claim in a proxy statement that it had carefully deliberated and decided that its preferred transaction better served the corporation than the alternative, if in fact the Board rejected the alternative transaction without serious consideration”). The Delaware Supreme Court held in \textit{Gantler} that the board’s disclosure was materially misleading. \textit{Id.} (“By stating that they ‘carefully deliberat[ed],’ the Board was representing to the shareholders that it had considered the Sales Process on its objective merits and had determined that the Reclassification would better serve the Company than a merger.” (alterations in original)).

\textsuperscript{15} See, e.g., \textit{Fair Summary}, \textit{supra} note 1, at 892 (“Once particular details of a valuation are disclosed, . . . further disclosures must be made to avoid any misimpressions created by those details.”).

\textsuperscript{16} \textit{Maric Capital Master Fund, Ltd. v. PLATO Learning, Inc.}, 11 A.3d 1175, 1177–78 (Del. Ch. 2010).

\textsuperscript{17} \textit{Id.} at 1176.

\textsuperscript{18} \textit{Id.} The range disclosed in the proxy statement also served to make the proposed transaction appear fairer. \textit{Id.} at 1177.
was no evidence that he had explained these reasons to the special committee and no explanation had been provided to the stockholders in the proxy statement. The court therefore ordered disclosure of the values that would be obtained by using the discount rates generated by the company's weighted average cost of capital.

Where, on the other hand, the range of discount rates disclosed was “actually calculated and used” by the financial advisor, no further disclosure should be required. In *Atheros*, the proxy statement disclosed that a range of discount rates from 10 percent to 14 percent was used in the advisor's analysis. The advisor's presentation to the directors showed two ranges, using different methodologies: one from 9.9 percent to 13 percent and one from 9.9 percent to 13.8 percent. The court held that the advisor's “decision not to use a slightly narrower range of rates, calculated using a different methodology, does not form the basis of a disclosure claim.”

The “fair summary” requirement also includes the “range of values” generated by the financial advisor's analysis. In one case, where (among other information) the value ranges were disclosed, the court found that a fair summary had been given. In another case, the court described as a “partial disclosure” a failure to disclose a range of values generated by one of the advisor's methodologies where ranges generated by the other methodologies had been disclosed. The court therefore required disclosure of the value range resulting from each valuation methodology: “You need to give the range. You gave the ranges for all the others, but for some reason, on accretion/dilution, you just said accretive or not accretive. So that's an incomplete summary. Stockholders are entitled to a fair summary.”

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19. *Id.* at 1176–77.
20. *Id.* at 1178.
22. *Id.*
23. *Id.*
24. *In re Pure Res., Inc. S’holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002); see also *In re Netsmart Techs., Inc. S’holders Litig.*, 924 A.2d 171, 203–04 (Del. Ch. 2007) (“[W]hen 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.”); *Fair Summary, supra* note 1, at 901 (stating that the “range of values resulting from the analyses must also be disclosed”).
25. *In re 3Com S’holders Litig.*, C.A. No. 5067-CC, 2009 WL 5173804, at *6 (Del. Ch. Dec. 18, 2009) (“These summaries include the final range of value estimates for each analysis.”).
27. *Id.* at 12; see also Transcript of Scheduling Office Conference at 12–13, Maric Capital Master Fund, Ltd. v. PLATO Learning, Inc., C.A. No. 5402-VCS (Del. Ch. Apr. 23, 2010) (“There may be some things that are actually . . . partial disclosure problems. I mean, I had a situation yesterday . . . in a motion to expedite where I noted that, for example, . . . the multiple that was used by the banker [in] the comparable companies analysis was set forth, but the very next paragraph with the comparable transaction analysis, they didn’t disclose the multiple or the median or the mean, which created a lack of symmetry in the disclosure.”).
Regarding partial disclosure, a pair of cases decided a month apart provides instructive guidance. In the *Starent* case, the Court of Chancery granted a motion to expedite on a disclosure claim—that the proxy statement had inconsistently treated stock-based compensation as an expense. Two of the advisor's methodologies had treated stock-based compensation as a non-cash expense, but the advisor's DCF analysis treated it instead as a cash expense (allegedly resulting in a lower valuation range). The court's primary concern was that “this detour is not disclosed or otherwise highlighted in the relevant proxy statement section.” On the other hand, in *3Com*, the opposite result was obtained on a similar claim. Goldman Sachs had “departed from the norm by treating stock-based compensation expense as a cash expense in its discounted cash flow analysis.” But the *3Com* court distinguished *Starent* and reached the opposite conclusion: “[I]n *Starent Networks* it was nowhere disclosed in the proxy that the financial advisor had embarked on this departure from the norm. In contrast, in this case, it is plainly disclosed that Goldman treated stock-based compensation as a cash expense in its DCF Analysis.” Thus, even if the financial advisor uses an unconventional methodology in a given valuation, so long as the advisor's analysis is described so that stockholders can understand what the advisor did, the Delaware courts will generally accept the disclosure as sufficient.

29. Id.
30. Id.
32. Id. at *3.
33. Id. (footnote omitted); see also id. ("Thus, shareholders can plainly determine from reading the proxy that Goldman made a departure from the norm in conducting its discounted cash flow analysis. There is no disclosure violation here, merely a disagreement with Goldman’s methodology."). Similarly, the court in *Micro Devices* denied a motion to expedite on disclosure claims where the plaintiff contended that the 14D-9 statement failed to disclose the criteria that the board's financial advisor (Needham) used to select precedent transactions or the multiples observed for those precedent transactions. Transcript of Telephonic Rulings of the Court on Plaintiffs' Motion to Expedite, supra note 4, at 17. The court held that the disclosures contained “sufficient information on the criteria Needham used to select precedent transactions and the multiples related to these transactions to satisfy the Company's disclosure requirements.” Id. The disclosures in the 14D-9 were simple but explained clearly what Needham did; no more is typically required. Cal. Micro Devices Corp., Solicitation/Recommendation Statement (Schedule 14D-9), at 27 (Dec. 28, 2009) ("Needham & Company analyzed publicly available financial information for 16 all-cash merger and acquisition transactions involving selected technology companies completed after January 1, 2007 with transaction values between $50 million and $150 million, where both the acquirer and the target company were publicly traded."); id. at 26 ("In reviewing the transactions identified above, Needham & Company calculated, for the selected transactions and for California Micro Devices implied by the Transaction, the ratio of the enterprise value implied by the consideration offered in the transaction to the target company's LTM revenue and EBITDA, as well as the ratio of the transaction value to LTM net income, as set forth in the following table.").
34. Transcript of Settlement Hearing and Rulings of the Court at 9, *In re Hawk Corp. S’holders Litig.*, C.A. No. 5925-VCL (Del. Ch. May 3, 2011) ("I’m with you as far as the fact that applying the size discount was weird. You know, it’s not something that one sees all the time; but they were completely open about it."); id. at 27–28.
Finally, the Court of Chancery has generally not required directors to go beyond their advisor’s analysis and make a “negative” disclosure (that is, disclose what was not done or not analyzed). As then-Vice Chancellor Strine has noted, “if you fairly disclose what you did, you’ve met your disclosure obligations. You don’t have to disclose what you did not do.” Those comments responded to a disclosure claim demanding explanation of why a board’s financial advisor used trailing rather than projected multiples. Because what the advisor had done was disclosed, the court refused to require disclosure of what the advisor did not do (and why). Similarly, the court has refused to require disclosure of which comparables were not selected when the comparables that were selected (along with description of the selection criteria used) are disclosed.

The Delaware Court of Chancery has generally held directors to the “fair summary” requirement and not required additional details. Nevertheless, directors must be careful not to create asymmetrical (or “partial”) disclosure by omitting information about one aspect of a fairness opinion where similar information about other aspects is disclosed. Further, when the advisor uses methodologies that depart from the norm, those departures should be fully disclosed to the shareholders. Directors should also be careful to ensure that disclosures match the analyses actually performed.

DISCLOSURE REGARDING MANAGEMENT’S PROJECTIONS

In our earlier article, we also discussed the need to disclose management’s reliable projections underlying the advisor’s fairness opinion: “[P]rojections 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.” The Delaware Court of Chancery has generally required

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35. Transcript of Scheduling Office Conference, supra note 27, at 13; see also In re Sauer-Danfoss Inc. S’holders Litig., C.A. No. 5162-VCL, 2011 WL 2519210, at *13 (Del. Ch. Apr. 29, 2011) (“If a disclosure document does not say that the board or its advisors did something, then the reader can infer that it did not happen.”); In re Netsmart Techs., Inc. S’holders Litig., 924 A.2d 171, 204 (Del. Ch. 2007) (“[T]his court has noted 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.”).


37. See also Transcript of Argument and Ruling on Motion to Expedite in C.A. No. 5149-VCS and Scheduling Conference in C.A. No. 5214-VCS, supra note 2, at 19 (stating that “[y]ou need a fair summary of what the banker did . . . , not everything that the banker didn’t do”).

38. Id. at 19–20 (“I think there are eight or nine comparables listed. We have a commercial world. That means thousands of other companies were not selected. Do they have to disclose why they selected those comparables? They gave . . . a range of medians. You can assess if the deal is outside the median. You can make the calculation for yourself.”); see also In re Ness Techs., Inc. S’holders Litig., C.A. No. 6569-VCN, slip op. at 11–12 (Del. Ch. Aug. 3, 2011) (“[T]he Plaintiffs seek additional details regarding the financial advisors’ analyses, such as the reasons why different companies were selected for each advisor’s comparable company analysis or information regarding how the advisors arrived at the multiples they used for those comparable companies. Again, the Preliminary Proxy provides shareholders with fair summaries of the financial advisors’ work, and the Plaintiffs have not shown that additional detail would be material to shareholders.” (footnote omitted)).

39. Fair Summary, supra note 1, at 902–05.

40. Id. at 904.
directors to disclose the projections provided to their financial advisors. Then-Vice Chancellor Strine has stated his view that “projections of cash flow are more useful to investors, probably, than bankers’ opinions.”

Issues regarding multiple sets of target management’s projections often lead to disputes. In Simonetti, target management had prepared three sets of projections. The plaintiff argued that the target’s proxy statement failed to disclose that the financial advisor used the most conservative set of projections in formulating its fairness opinion and that the “failure to disclose the existence of more optimistic projections . . . was a material omission.” Citing Netsmart’s requirement that a “proxy statement should ‘give the stockholders the best estimate of the company’s future cash flows,’” the Simonetti court rejected this argument. The proxy statement disclosed the projections actually given to the banker and disclosed that management believed those projections to be the best estimates of the target’s financial performance. The court therefore rejected the plaintiff’s argument, noting that the plaintiff had not met its “burden of showing how disclosing lower-probability projections would have been considered material by the reasonable stockholder.” No matter how many sets of projections have been created, the Delaware courts likely will require only that the set used by the financial advisor

41. See, e.g., Transcript of Settlement Hearing and Rulings of the Court at 31, In re Burlington N. Santa Fe Sholder Litig., C.A. No. 5043-VCL (Del. Ch. Oct. 28, 2010) (“I like projections. I like to see people disclosing projections. I think they’re material. I think people ought to have them in there.”); see also Transcript of Defendants’ Motion to Proceed in One Jurisdiction and Dismiss or Stay Litigation in Other Jurisdictions and the Court’s Ruling at 13, Kahn v. Chell, C.A. No. 6511-VCL (Del. Ch. June 7, 2011) (suggesting that the Court of Chancery might scrutinize an intentional failure to disclose projections under concepts of bad faith: “to the extent that people are consciously or can be inferred to have been consciously leaving things out that are covered by prior decisions [for purposes of accommodating disclosure-based settlements], that’s something we’re going to have to take into account on an ongoing basis”).

42. Transcript of Argument and Ruling on Motion to Expedite in C.A. No. 5149-VCS and Scheduling Conference in C.A. No. 5214-VCS, supra note 2, at 18–19; see also Transcript of Argument and Ruling on Motion to Expedite, supra note 2, at 23–24 (“[M]y understanding of corporate finance is that when you are being asked to accept money for something, and the something you are giving up is the equity of a company, that what you most want to know, based on finance theory, is the expected future cash flows of the company, and that in comparison, actually, to a banker’s opinion, it’s probably, for sophisticated investors, more important to know the projections of management, and to know that there aren’t any undisclosed projections out there, that you have all the information, so that you can make your own judgment as an investor about whether to give up what you have now, which is your stake in those future cash flows, for a fixed price. . . . And there is about everything else in the proxy statement that I would strip out before the projections.”).

43. See Fair Summary, supra note 1, at 889–90 (discussing In re Netsmart Techs., Inc. S’holders Litig., 924 A.2d 171 (Del. Ch. 2007)).


45. Id. at *10 (quoting In re Netsmart Techs., 924 A.2d at 203).

46. Id.

47. Id.

48. Id. (“Although including the more optimistic projections in the Proxy Statement and then explaining why they were not relied upon may have been somewhat helpful to stockholders, it is doubtful that any such additional disclosures would have materially altered the total mix of information provided.”).
(generally, management’s “best” projections) and/or the bidder be disclosed. On the other hand, if the advisor used more than one set of projections, they should all be disclosed.

Another issue that occasionally arises is the level of divisional detail that must be provided in the projections disclosed to the stockholders. Generally, the Court of Chancery has held that “divisional information is material and must be disclosed where the purchaser utilizes such information in formulating its bid.” Where plaintiffs have been unable to demonstrate that the bidder used such information in formulating its bid, therefore, the court has rejected the disclosure claim as not colorable. Nevertheless, if the target board or its financial advisor used divisional information in determining whether an offer was fair, the Delaware courts would likely require disclosure of that information. Noting that there is generally no “obligation to disclose what you did not do,” the Court of Chancery has rejected a claim that divisional information must be provided, in the absence of evidence that the target considered such information.

A major development in the last three years regarding the disclosure of management’s projections has involved the free cash flow numbers provided to the board’s financial advisors. In Maric Capital, then-Vice Chancellor Strine addressed disclosure claims in the context of the acquisition of PLATO Learning, Inc. by Thoma Bravo, LLC. PLATO’s proxy statement had “selectively” excised the free cash flow estimates from the projections that PLATO had provided to its financial advisor, Craig-Hallum. The court required PLATO to disclose those free cash flow estimates to its stockholders. In then-Vice Chancellor Strine’s view, “management’s best estimate of the future cash flow of a corporation that is proposed to be sold in a cash merger is clearly material information.” If stock value is based on expected future cash flows, “as is encouraged under sound corporate finance theory,” the then-vice chancellor stated, the free cash flow estimates would let

49. See also, e.g., In re Orchid Cellmark Inc. S’holder Litig., C.A. No. 6373-VCN, 2011 WL 1938253, at *11 (Del. Ch. May 12, 2011) (finding no reasonable probability of success on a claim that the company should have disclosed optimistic management projections when a set of projections deemed more reliable by the board of directors and used by the financial advisor in its fairness opinion had already been disclosed).

50. See In re 3Com S’holders Litig., C.A. No. 5067-CC, 2009 WL 5173804, at *5 (Del. Ch. Dec. 18, 2009) (“I am aware of no rule that precludes management or its financial advisor from using alternative sets of financial projections in evaluating the advisability and fairness of a merger. Indeed, given the unpredictability of the future, it is common for companies to have multiple sets of projections based on different assumptions about what will transpire going forward. 3Com management disclosed both sets of projections in the Proxy and clearly explained that both were used.”).

51. Id. (citing In re Envirodyne Indus., Inc. S’holders Litig., C.A. No. 10702, 1989 WL 40792, at *3 (Del. Ch. Apr. 20, 1989)).

52. Id.

53. Transcript of Argument and Ruling on Motion to Expedite, supra note 2, at 28, 26–30.

54. Maric Capital Master Fund, Ltd. v. PLATO Learning, Inc., 11 A.3d 1175 (Del. Ch. 2010).

55. Id. at 1178.

56. Id.

57. Id.
PLATO's stockholders determine whether the offer price was a fair trade for their interest in the company. 58

Shortly after Maric Capital was decided, however, the court distinguished that opinion in a significant manner. In Walter, the Court of Chancery denied a motion to expedite, holding that the disclosure of free cash flow estimates would not be material to the stockholders of inVentiv Health, Inc., which had entered into a transaction with Thomas H. Lee Partners, L.P. 59 Goldman Sachs (inVentiv's financial advisor) provided a fairness opinion based on projections of the company's net revenue, net income, earnings per share, and EBITDA estimates for five years—but inVentiv had not provided free cash flow estimates to Goldman Sachs. 60 Therefore, Chancellor Chandler held that the free cash flow estimates would not be material; he distinguished Maric Capital on the ground that, in that case, the free cash flow estimates had been given to (and used by) the financial advisor and later excised from the proxy statement. 61

In Scully, the court confirmed that free cash flow estimates are not material unless they were provided to the board's financial advisor. 62 Vice Chancellor Laster denied a motion to expedite in a suit challenging the acquisition of Nighthawk Radiology Holdings, Inc. by Virtual Radiology, finding only one disclosure claim to have potential merit. Nighthawk's proxy statement had omitted the free cash flow estimates from the disclosure of management's projections. While the court agreed with the principles set forth in Maric Capital regarding the materiality of free cash flow estimates generally, it held that the disclosure claim was not colorable, based on counsel's representation that those numbers had not been provided to Nighthawk's financial advisors. 63

58. Id.; cf. Transcript of Settlement Hearing and Rulings of Court, supra note 34, at 19, 24, 29 (suggesting that, while a plaintiff should not litigate over one particular missing input to the free cash flow calculation, supplemental disclosure of free cash flow numbers calculated by the financial advisor from inputs given it by the company—and not derivable from the projections disclosed—was sufficiently material to support a settlement).


60. Id. at 9.

61. Id. ("Unlike in Maric, in this case no free cash flow estimates were actually provided to Goldman Sachs. The internal analyses that were approved by management for Goldman's use in this case didn't have a line item for free cash flow estimates, and so unlike the Maric decision, there was no deliberate excising of free cash flow numbers. . . . The proxy here gave management's projections that were actually used by Goldman, and those projections included net revenue, net income, EPS and EBITDA estimates for five years. So based on all of that, there doesn't appear to me to be a colorable claim of a misrepresentation or omission of material information that would alter the total mix of information already available to the stockholders." (italics added)). Recognizing the different approaches taken in the court's decisions, Chancellor Chandler suggested that he would certify an interlocutory appeal to the Delaware Supreme Court in an attempt to provide clarity on the question whether free cash flow estimates must always be disclosed. Id. at 10–11. The plaintiffs, however, did not appeal.

62. Transcript of Telephonic Oral Argument on Plaintiff's Motion for Expedited Proceedings and Rulings of the Court at 24, Scully v. Nighthawk Radiology Holdings Inc., C.A. No. 5890-VCL (Del. Ch. Oct. 21, 2010); see also Fair Summary, supra note 1, at 888 (setting forth a disclosure principle that directors need only disclose what they reviewed and relied on).

63. Transcript of Telephonic Oral Argument on Plaintiff's Motion for Expedited Proceedings and Rulings of the Court, supra note 62, at 23–24; see also In re 3Com S'holders Litig., C.A. No. 5067-CC, 2009 WL 5173804, at *2 (Del. Ch. Dec. 18, 2009) (holding that the directors did not have to disclose
In summary, projections provided to the board’s financial advisor should be disclosed. Of course, if those projections are not reliable, they may not have to be fully disclosed (so long as the proxy materials describe why the projections are not reliable and not disclosed). If the bidder’s financial projections were provided to the target board’s banker for purposes of determining the fairness of the transaction—for example, in a stock-for-stock merger—a court might also conclude that those projections should be disclosed under the principles set forth above. Of course, directors “cannot disclose projections that do not exist.” Further, if the projections provided to the target board’s financial advisors are already disclosed, the Court of Chancery generally will not require the disclosure of additional details underlying the projections.

**Disclosure Regarding the Financial Advisor’s Potential Conflicts**

The third area in which major developments have been made relates less to the fairness opinion itself, and more to the financial advisor providing the fairness opinion. The Delaware courts have long been sensitive to issues regarding banker conflicts, but the last three years have seen several developments in this area. The Court of Chancery in *Del Monte* recently stated that, “because of the central...
role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives, this Court has required full disclosure of investment banker compensation and potential conflicts.” Because stockholders need to be aware of a banker’s potential conflicts in determining how much weight to place on the fairness opinion, the court has required disclosures in several areas relating to bankers’ engagement and their potential interest in the transaction on which they are opining.

The court has also discussed claims regarding disclosure of the reasons that a financial advisor was retained. Generally, so long as the disclosure statement provides rational reasons for the advisor’s retention—and no special circumstances or suspicious facts exist—the Court of Chancery will likely find that sufficient disclosure has been made.

The most basic area of “banker conflict” disclosure involves the fee paid to the target’s banker. Three years ago, we discussed the principles regarding disclosure of the financial advisor’s fee structure.\(^\text{72}\) \textit{Globis} had recently been decided, suggesting 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.”\(^\text{73}\) We noted that this

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69. \textit{In re} Del Monte Foods Co. S’holders Litig., C.A. No. 6027-VCL, 2011 WL 532014, at *16 (Del. Ch. Feb. 14, 2011); \textit{see also} Transcript of Oral Argument at 96, Continuum Capital v. Nolan, C.A. No. 5687-VCL (Del. Ch. Feb. 3, 2011) (I think two of these disclosures were quite critical. First, that the banker was engaged in discussions with the buyer about potential business; and, second, the details of the banker’s fee. Bankers play a key role in the M&A process. They are out there advising the board about how to go about the process of maximizing stockholder value. They’re usually the one conducting the negotiations with potentially interested parties. They are the ones giving the presentations to the board; the board books that we all see so often on which the board relies heavily in making its decisions about a deal. They ultimately opine as to fairness. And they typically give advice—at least they should be giving advice, and I think usually do give advice, about whether the transaction really is the best transaction reasonably available, or whether further efforts would be likely to develop a superior transactional proposal. So I think information about the banker’s interests is quite material.”).

70. \textit{See, e.g.}, David P. Simonetti Rollover IRA v. Margolis, C.A. No. 3694-VCN, 2008 WL 5048692, at *7 (Del. Ch. June 27, 2008) (terming disclosures “sufficient” when the proxy statement stated that “[advisor] UBS and its affiliates had ‘acted as joint bookrunner in connection with a convertible notes offering by [target] TriZetto in April 2007,’ ‘acted as a counterparty in connection with the related bond hedge and warrant transactions entered into by TriZetto (referred to as the BHW Transaction),’ ‘provided certain cash management services to TriZetto,’ and acted as ‘a participant in a credit facility of TriZetto’ ” and explained that “the Board selected UBS as its financial advisor ‘because UBS is an internationally recognized investment banking firm with substantial experience in similar transactions and because of UBS’s familiarity with TriZetto and its business’”); Cnty. of York Emps. Ret. Plan v. Merrill Lynch & Co., C.A. No. 4066-VCN, 2008 WL 4824053, at *11 (Del. Ch. Oct. 28, 2008) (“These passages sufficiently disclose the material facts regarding [target] Merrill’s selection of [advisor] MLPFS: It was an entity known to Merrill and BAC, and it had done a substantial amount of financial advisory work for both entities in the past. And Defendants were not required to cast this relationship in a negative light. Therefore, Plaintiff has failed to plead a colorable disclosure violation.” (footnote omitted)).

71. \textit{See, e.g.}, supra note 70; Transcript of Telephonic Rulings of the Court on Plaintiffs’ Motion to Expedite, supra note 4, at 12–13 (denying a motion to expedite on, among others, the following grounds: “It is disclosed, for example, in the 14D-9 that [the financial advisor] Needham had done work . . . in the past for the Company at its customary rates, that they were selected to do this job because they had done these kinds of matters many times before; they had experience in this particular industry and, in fact, with CAMD itself.”).

72. \textit{Fair Summary}, supra note 1, at 899.

holding should be “seen as a floor” and doubted whether the Delaware courts would follow *Globis* “in all situations.” The Court of Chancery confirmed this prediction in *Atheros*, stating that the “differential between compensation scenarios may fairly raise questions about the financial advisor’s objectivity and self-interest.”

In *Atheros*, the proxy statement disclosed that the target’s financial advisor would be “paid a customary fee, a portion of which is payable in connection with the rendering of its opinion and a substantial portion of which will be paid upon completion of the Merger.” The total fee was not disclosed, and approximately 98 percent of the fee was contingent on the merger’s completion. Because that contingency percentage “exceeds both common practice and common understanding of what constitutes ‘substantial,’” the court required disclosure of the percentage of the fee that was contingent. The court declined to draw any “bright line” rule on what percentage would trigger disclosure, but it stated that “it is clear that an approximately 50:1 contingency ratio requires disclosure.” Finally, the court declined to resolve the debate over “whether the amount of a financial advisor’s fee needs to be disclosed or whether merely disclosing that the fee is customary (which it is in this instance) suffices.” Nevertheless, in the context of the large contingent fee (and the late-in-the-process fee agreement), the court required disclosure of the fee amount as well.

The *Atheros* decision is consistent with recent statements that Vice Chancellor Laster made in approving a settlement. In discussing the value of particular disclosures agreed to in the settlement, the vice chancellor referred to disclosures of the banker’s fee as “material.” The court further distinguished *Globis*: “I do not think [‘]customary fee[‘] provides meaningful insight to stockholders as to the banker’s incentives. Some of these fees are quite large—they’re quite large and can be on the order of—particularly in small deals—almost termination fee-sized consideration. So I think that the details of the banker’s fee are quite important.”

74. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*; see also *id.* (“Stockholders should know that their financial advisor, upon whom they are being asked to rely, stands to reap a large reward only if the transaction closes and, as a practical matter, only if the financial advisor renders a fairness opinion in favor of the transaction. In essence, the contingent fee can readily be seen as providing an extraordinary incentive for [the financial advisor] to support the Transaction.”).
79. *Id.* at *9. But see Cnty. of York Emps. Ret. Plan v. Merrill Lynch & Co., C.A. No. 4066-VCN, 2008 WL 4824053, at *11 (Del. Ch. Oct. 28, 2008) (holding “not colorable” a claim that the amount of the bankers’ contingent compensation needed to have been disclosed). In *Merrill Lynch*, the advisor was the target’s subsidiary, and the proxy statement disclosed that a “substantial portion” of the banker’s fee was contingent on the merger’s consummation. *Id.* The total amount of consideration ($25 million) was, however, disclosed, and the court cited *Globis* in rejecting the plaintiff’s claims. *Id.* (“And this Court has held that the precise amount of consideration need not be disclosed, and that simply stating that an advisor’s fees are partially contingent on the consummation of a transaction is appropriate.”).
81. *Id.*
83. *Id.*
While the court noted that cases in the past had “been dismissive of banker-oriented disclosure,” it stated that, “given the banker’s role in the process, this is the type of thing that is quite material.” Over time, it appears that the Delaware courts are likely to require more disclosure of the fees to be paid to a board’s financial advisor and of how much of those fees are contingent.

In a similar context, the Delaware Court of Chancery has required disclosure of a banker’s other financial interests in the transaction under consideration. For example, in Simonetti, the court analyzed disclosures in the context of a proposed acquisition by Apax Partners, L.P. of The TriZetto Group, Inc. TriZetto’s financial advisor, UBS, held a not insubstantial amount of notes and warrants in TriZetto and would be entitled to cash payments upon, or shortly after, the merger’s consummation. Noting that a “financial advisor’s own proprietary financial interest in a proposed transaction must be carefully considered in assessing how much credence to give its analysis,” the court ordered disclosure of the range of value of UBS’s note holdings in TriZetto.

What is no longer a close question is whether buy-side business relationships must be disclosed at all. The Court of Chancery has “stressed the importance of disclosure of potential conflicts of interest of financial advisors,” noting that it is “imperative that stockholders be able to decide for themselves what weight to place on a conflict faced by the financial advisor.” Significantly, the requirement to disclose conflicts includes all advisors—both financial and legal.

For example, the Court of Chancery recently required detailed disclosure of the target banker’s buy-side fees and engagements. For example, in Art Technology, the court enjoined a merger until the target company disclosed to its stockholders additional information about its financial advisor’s prior work for the buyer. Art Technology involved a challenge to a proposed merger of Oracle Corporation and Art Technology Group, Inc. Morgan Stanley was Art Technology’s financial advisor

84. Id. (noting also that “[e]ach case obviously turns on its own facts and circumstances”).
86. Id. at *8.
87. Id.; see also id. (“The financial advisor’s opinion of financial fairness for a proposed transaction is one of the most important process-based underpinnings of a board’s recommendation of a transaction to its stockholders and, in turn, for the stockholders’ decisions on the appropriateness of the transaction. Thus, it is imperative for the stockholders to be able to understand what factors might influence the financial advisor’s analytical efforts.”).
88. In re John Q. Hammons Hotels Inc. S’holder Litig., C.A. No. 758-CC, 2009 WL 3165613, at *16 (Del. Ch. Oct. 2, 2009) (“Such disclosure is particularly important where there was no public auction of the Company and ‘shareholders may be forced to place heavy weight upon the opinion of such an expert.’ ”).
89. Id. (denying summary judgment to defendants on disclosure claims regarding potential conflicts of a special committee’s financial and legal advisors); see also id. at *17 (“Again, the compensation and potential conflicts of interest of the special committee’s advisors are important facts that generally must be disclosed to stockholders before a vote. This is particularly true, where, as here, the minority stockholders are relying on the special committee to negotiate on their behalf in a transaction where they will receive cash for their minority shares.”).
in the transaction, but Morgan Stanley had also performed work for Oracle for a number of years. The court ruled that Art Technology and Oracle had to disclose (i) the aggregate annual compensation paid by Oracle to Morgan Stanley from 2007 to 2010 and (ii) a description of the nature of services that Morgan Stanley provided to Oracle.91 While this level of detail should not always be required (for example, a two-year period is more typical),92 practitioners should be aware that the Court of Chancery appears to be moving toward more stringent disclosure requirements regarding banker’s buy-side work.

The Court of Chancery in *Hammons* denied summary judgment to the defendants on a disclosure claim regarding the target special committee’s banker’s contacts with the bidder about potentially underwriting a significant security offering planned by the bidder after the merger.93 Following trial in *Hammons*, the court found for the defendants on that claim, stating that the evidence demonstrated that the employee of [target advisor] Lehman’s real estate finance group that contacted [bidder] Eilian never actually received “the numbers” regarding the hotels Eilian intended to refinance, never submitted a written bid or term sheet for the business, and never got any business from Eilian. In addition, the Lehman representatives that advised the Special Committee never actually spoke with the Lehman representative who contacted Eilian.94

91. Id. at 1; cf. also *In re Del Monte Foods Co. S’holders Litig.*, C.A. No. 6027-VCL, 2011 WL 2535256, at *11 (Del. Ch. June 27, 2011) (“Equally important, the Proxy Supplement disclosed Barclays’ extensive financial conflicts, including the $21 to $24 million in fees that the bank would receive for providing buy-side financing for the Sponsors (comparable to and potentially more than its $23.5 million fee for serving as a sell-side advisor) and the over $70 million in fees that Barclays had received from the Sponsors in the prior two years.”). As a side note, Oracle’s payments to Morgan Stanley over the four-year period were not significantly greater than Art Technology’s payment to Morgan Stanley for its work on the merger.

92. See also, e.g., *In re Ness Techs.*, Inc. S’holders Litig., C.A. No. 6569-VCN, slip op. at 10 (Del. Ch. Aug. 3, 2011) (“If the amount of business that one of the financial advisors has done with [buyer] CVCI or its affiliates is material, then the failure to disclose fully the extent of that business could violate the duty of disclosure. By contrast, if the amount of business involved is not material to either financial advisor, then the existing disclosures would likely be adequate.” (footnote omitted)); *David P Simonetti Rollover IRA*, 2008 WL 5048692, at *7 (“Although the Proxy Statement perhaps does not provide as much information as a shareholder would think optimal, the Court concludes that its disclosures regarding Deutsche Bank are adequate. The Proxy Statement discloses that [target] TriZetto was considering the PIPE Transaction in November of 2007 and that Deutsche Bank had acted as its financial advisor. It also discloses that Deutsche Bank advised [bidder] Apax on the Merger. Thus, the stockholders are made aware that the same investment bank that had represented TriZetto in November 2007 was representing its potential acquirer through the Merger. No further disclosures on this point would have altered the total mix of information available, viz., that the same investment bank had represented parties with opposed interests in the Merger in temporal proximity.” (footnotes omitted)).

93. *Hammons*, 2009 WL 3165613, at *16 (“There is no rule, however, that conflicts of interest must be disclosed only where there is evidence that the financial advisor’s opinion was actually affected by the conflict. Thus, defendants cannot defend the alleged omission as immaterial by arguing that any contacts between [advisor] Lehman and [bidder] Eilian regarding the refinancing occurred after Lehman opined in December 2004 that the then-high bid of $21 per share was fair to the minority stockholders.”).

As important, the court found that the directors did not know of these potentially conflicting contacts: “Under Delaware law, directors do not owe a duty to disclose facts that they are not aware of.”

Other cases have also discussed the need for directors to disclose their advisors’ buy-side business relationships. In *Zenith*, the Court of Chancery denied a motion for preliminary injunction on such a disclosure claim, finding sufficient the disclosure in the proxy statement of the advisor’s “five key engagements” with the bidder as well as the total compensation paid to the advisor by the bidder. The court was concerned that the disclosure created a “partial disclosure” problem because the individual banker who worked on the bidder’s recent engagement was the “No. 2” on the target’s team. Nevertheless, different factors pushed the court the other way: it was a cash deal, it was an arm’s-length deal, and the advisor was only acting in an advisory capacity—it was not negotiating with the bidder or running the shopping process. For those reasons, and because the amount of the buy-side compensation had been disclosed, the court denied the motion for preliminary injunction. The court noted that the disclosure regarding the banker’s buy-side compensation was “really the key disclosure that you ought to have.”

The Court of Chancery has even suggested that disclosure of bankers’ buy-side contacts that do not lead to business may need to be disclosed, particularly if those contacts occur during the pendency of the transaction. For example, in approving a settlement, Vice Chancellor Laster stated: “It may well be that [we] are jaded about the degree to which bankers talk and pitch business and sell. But that doesn’t mean that stockholders wouldn’t find it material that the sell-side banker

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95. *Id.* (“[N]one of the directors . . . were even aware that Eilian was contacted by any employee of Lehman; nor is there any basis to suggest that they should have been aware of the contact . . . Moreover, plaintiffs offered no evidence regarding how Lehman’s alleged conflict actually affected the advice it provided to the Special Committee.”). We do not believe, however, that the court’s statement should be read to allow directors to engage in non-disclosure through willing blindness. Directors are still required to “fully and fairly disclose all material information within [their] control when seeking shareholder action.” *Pfeffer* v. *Redstone*, 965 A.2d 676, 686 (Del. 2009). That is, directors will generally be responsible for disclosing all material information that they know or should know, but not otherwise. *See id.* at 686–87 (“For the Viacom Directors to have either misstated or failed to disclose the cash flow analysis in the Prospectus, those directors must have had reasonable access to that Blockbuster information. . . . If the Viacom Directors did not know or have reason to know the allegedly missing facts, however, then logically the directors could not disclose them.”).

96. Transcript of Rulings of the Court from Oral Argument on Plaintiffs’ Motion for a Preliminary Injunction, *supra* note 65, at 17 (“[T]he banker conflict issue . . . has really been the one that has given me the most problems throughout this. And there are pros and cons. There are reasons why this additional disclosure should be required and there are reasons why it shouldn’t be required.”).

97. *See generally Fair Summary*, *supra* note 1, at 902 (discussing “partial disclosure”).

98. Transcript of Rulings of the Court from Oral Argument on Plaintiffs’ Motion for a Preliminary Injunction, *supra* note 65, at 18.


100. Transcript of Rulings of the Court from Oral Argument on Plaintiffs’ Motion for a Preliminary Injunction, *supra* note 65, at 19 (“I also, again, return to the fact that there is good disclosure in the proxy on the . . . prior engagements and on the $9 million fees.”).

101. *Id.*
was making a buy-side pitch for business.”¹⁰² Then-Vice Chancellor Strine made similar remarks during the preliminary-injunction hearing in *Maric Capital*: if “the same banker who was doing the representation on [target] PLATO is talking to [bidder] Thoma Bravo about potential situations in which Thoma Bravo might be the client of [the banker], that would be troubling. It should be disclosed.”¹⁰³ But the court was careful to distinguish between the types of buy-side contacts that the target’s advisor was making, suggesting that general contacts need not be disclosed, while contacts with the specific bidder did.¹⁰⁴

If the target’s banker does not have any past or present business relationships with the bidder, however, directors generally need not make negative disclosures of that nature. The Court of Chancery stated in 2007 that, “[t]o the extent that defendants disclosed the existence of one such relationship, shareholders may infer that no other material relationships exist.”¹⁰⁵ Similarly, the court in 2010 approved of a proxy statement silent as to any business relationship between the target’s financial advisor and the bidder, where there was none: “The Schedule 14D-9 is silent as to any work that Lazard is currently doing for CONSOL because Lazard is not currently doing any work for CONSOL.”¹⁰⁶

To summarize, the Delaware Court of Chancery has become increasingly concerned about potential conflicts affecting directors’ advisors and has required significant disclosures regarding banker compensation and buy-side conflicts.¹⁰⁷ “[T]he role of the financial advisors, including its authorship of the fairness opinion in the sale scenario, is critical and, oftentimes, . . . an important underpin-
nning of the directors’ recommendation of support for a particular transaction.”

Accordingly, the court has not been impressed with the excuse that directors “are limited in their ability to make these disclosures because [the advisor] is unwilling to share the necessary information.” In fact, the court in Simonetti suggested two possible solutions to that issue:

First, perhaps the Board should reconsider its choice of financial advisor. . . . Second, perhaps (and the Court need not express a view at this time) disclosure of the financial advisor’s unwillingness to provide the appropriate information should be shared with the stockholders and then they would be able to consider that recalcitrance in their own assessment of whether to rely upon the fairness opinion and to approve the proposed transaction.

Further, the court recently made comments suggesting that bankers should bear some financial responsibility for withholding disclosures desirable under Delaware law. Practitioners should consider addressing these issues at the outset in the engagement letter.
CONCLUSION

The Delaware Court of Chancery routinely addresses many types of disclosure claims—for example, one common type of non-financial disclosure claim involves alleged deficiencies in the “background” section of the proxy materials. Nevertheless, disclosure claims regarding fairness opinions and the analyses,

acquirer is required to pay a fee to the plaintiffs’ lawyer as a result of a disclosure that we asked you to put in and you refused to put in, like the actual amount of your fee as opposed to just describing it as reasonable and customary, which, frankly, is the standard with a spectrum about as broad as the electromagnetic one, why the banker doesn’t pick that up. It’s an odd thing. But maybe that can be something for [counsel] to negotiate next time they’re negotiating a banker’s engagement letter.”

112. With the exception of injunctions to rectify inadequate, misleading, or “partial” disclosures in the process background section, the Delaware Court of Chancery typically will not require directors to disclose all the details of the process leading up to the proposed acquisition. Compare In re Atheros Commc’ns, Inc. ’s Holder Litig., C.A. No. 6124-VCN, 2011 WL 864928, at *11–12 (Del. Ch. Mar. 4, 2011) (requiring disclosure of CEO’s negotiation of future employment with bidder), Transcript of Ruling of the Court: Plaintiffs’ Motion for a Preliminary Injunction, supra note 26, at 12–13 (requiring disclosure of likely identity of target director who will serve on surviving company’s board), Transcript of Telephonic Oral Argument on Plaintiffs’ Motion for Expedited Proceedings and Rulings of the Court, supra note 62, at 21 (referring to disclosures regarding background of merger as “breezy” and “subpar in terms of details” and noting that additional detail of CEO-to-CEO negotiations is generally preferred), and Maric Capital Master Fund, Ltd. v. PLATO Learning, Inc., 11 A.3d 1175, 1179 (Del. Ch. 2010) (requiring the proxy statement to rectify misleading disclosure by clarifying the extent of discussions between the target’s CEO and bidder), with In re Ness Techs., Inc. ’s Holder Litig., C.A. No. 6569-VCN, slip op. at 12–13 (Del. Ch. Aug. 3, 2011) (“The Preliminary Proxy describes, over fourteen pages, the eleven-month sale process in which the Special Committee and the Board engaged. The Plaintiffs have not indicated how additional information regarding the contacts the Board had with over thirty potential buyers, the extensive negotiations with Bidder D and [buyer] CVCI, or the role [the financial advisor] played in these negotiations would affect shareholders’ decisions regarding the Proposed transaction. Shareholders are not entitled to a play-by-play description of merger negotiations, but, instead, to a fair summary of the sale process. The Plaintiffs’ allegations do not state a colorable claim that the Preliminary Proxy failed to provide such a fair summary.” (alteration, footnotes, and internal quotation marks omitted)), In re Sauer-Danflos Inc. ’s Holder Litig., C.A. No. 5162-VCL, 2011 WL 2519210, at *12 (Del. Ch. Apr. 29, 2011) (“Delaware law does not require that a fiduciary disclose its underlying reasons for acting.”), Atheros, 2011 WL 864928, at *12 (refusing to require disclosure of the “rejected proposals of each side”), Transcript of Telephonic Rulings of the Court on Plaintiffs’ Motion to Expedite, supra note 4, at 16–17 (“[O]ur cases hold that shareholders are not entitled to a play-by-play description of merger negotiations and the lead-up to it.”), Globis Partners, L.P. v. Plumtree Software, Inc., C.A. No. 1577-VCP, 2007 WL 4292024, at *14 (Del. Ch. Nov. 30, 2007) (noting that the duty of disclosure does not require that a board “give its shareholders a ‘play-by-play description of merger negotiations’”), McMillan v. Intercargo Corp., C.A. No. 16963, 1999 WL 288128, at *9 (Del. Ch. May 3, 1999) (noting that a disclosure statement need not describe all of the “bends and turns in the road” when summarizing a proposed transaction), In re Lukens Inc. ’s Holder Litig., 757 A.2d 720, 736 (Del. Ch. 1999) (holding that the company was not required to disclose why it “chose not to take particular courses of action” or “did not take other steps or follow another process”), aff’d sub nom. Walker v. Lukens, Inc., 757 A.2d 1278 (Del. 2000) (TABLE), Skeen v. Jo-Ann Stores, Inc., C.A. No. 16836, 1999 WL 803974, at *7 (Del. Ch. Sept. 27, 1999) (stating that “shareholders are not entitled to a ‘play-by-play’ description of merger negotiations”), aff’d, 750 A.2d 1170 (Del. 2000), Kahn v. Corporella, C.A. No. 13248, 1994 WL 89016, at *8 (Del. Ch. Mar. 10, 1994) (holding that a failure to disclose an indication of interest received by a third party was not material, where that potential bidder did not make a competing offer), Van de Walle v. Unimation, Inc., C.A. No. 7046, 1991 WL 29303, at *15 (Del. Ch. Mar. 7, 1991) (“Where, as here, arms-length negotiation has resulted in an agreement which fully expresses the terms essential to an understanding by shareholders of the impact of the merger, it is not necessary to describe all the bends and turns in the road which led to that result.” (internal quotation marks omitted)), and Repairman’s Serv. Corp. v. Nat’l Intergroup, Inc., C.A. No. 7811, 1985 WL 11540, at *8 (Del. Ch. Mar. 15, 1985) (same).
materials, and potential conflicts regarding those fairness opinions will probably remain among the most common disputes in Delaware deal litigation. The Delaware courts will likely continue to eschew a bright-line approach to these disclosure issues; this article therefore attempts to provide, along with our prior article, a helpful guide to practitioners regarding the Delaware courts’ facts-and-circumstances approach.

113. See generally Fair Summary, supra note 1, at 881–82 (discussing reasons for the prevalence of disclosure claims in deal litigation).

114. See, e.g., In re Atheros Comm’ns, 2011 WL 864928, at *9; cf. also Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309 (2011) (eschewing use of bright-line rule for materiality in federal securities law context). Given the infinite combinations of business-specific factors (like what projections have been created and when), advisor-specific factors (like what methodologies are employed and what data are analyzed), board-specific factors (like what information is considered), and transaction-specific factors (like the transaction’s form and the counterparty’s identity), a bright-line rule seems particularly unsuitable for policing directors’ duty of disclosure. See Fair Summary, supra note 1, at 885–86.
Recent Disclosure-Based Fee Awards in Delaware

Steven M. Haas

February 21, 2013: M&A Fairness Opinions and Projections in Financial Disclosure Summaries
Proliferation of M&A Litigation

• Rise of disclosure-based settlements corresponds to explosion of M&A litigation
  – Avoids risk of injunction/delay
  – No additional consideration
• Nearly every public company M&A transaction attracts one or more lawsuits
  – Cornerstone Research found that 95% or more of transactions with a value over $500M were subject to litigation in 2010 and 2011
  – Even small M&A deals ($20M) attract suits
    • See, e.g., Craftmade ($24 million) and Access to Money ($10 million)
Settling M&A Litigation

- Cornerstone Research reviewed 605 lawsuits challenging M&A deals in 2010 and 2011.
  - 67% of these lawsuits settled
  - 24% were dismissed by the court
- Of the reported settlements:
  - 83% were based on additional disclosures
  - 13% included revisions to the merger agreement
  - 5% included payments to shareholders

Settlement-Based Disclosures

• Disclosure-based settlements generally focus on:
  – Management projections
    • Including line-items and free cash flow
  – Financial advisor’s analysis
  – Financial advisor’s compensation and prior relationships with target and buyer
  – Background of the merger
Attorney Fee Awards

• Cornerstone Research also reviewed the attorney fee awards reported in these settlements
  – 44% of fee awards were equal to or less than $500,000
  – But the average fee was $1.2M
  – 2 of the 9 settlements involving fees in excess of $2M were based solely on additional disclosures

Summary of Fee Awards

• In *In re Sauer-Danfoss Inc. S’holders Litig.*, C.A. No. 5162-VCL, mem. op. (Del. Ch. Apr. 29, 2011), the court categorized the types of disclosures and corresponding fee awards into three categories:
  – Disclosures of “questionable quality”
  – One or two “meaningful disclosures”
  – “Particularly significant or exceptional disclosures”

• Most of the settlements and descriptions in the following slides are taken from the appendices to the Court of Chancery’s opinion in *Sauer-Danfoss*.

• Note also that some of the following fee awards were not contested by defendants.
First Category

Disclosures of “Questionable Quality”
Fees awarded for “[d]isclosures of questionable quality.”

<table>
<thead>
<tr>
<th>Case</th>
<th>Fee Award</th>
<th>Plaintiff’s Efforts</th>
<th>Principal Disclosures/Benefit</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Brinckerhoff v. Tex. E. Prods. Pipeline Co., 986 A.2d 370 (Del. Ch. 2010)</strong></td>
<td>$80,000</td>
<td>• Sent pre-suit letter to board                                                       • Details of discount rates used in fairness opinion</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>• Filed complaint in Texas</td>
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<tr>
<td></td>
<td></td>
<td>• Objected to <em>Cox Communications</em> settlement</td>
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<tr>
<td></td>
<td></td>
<td>• Moved to compel discovery about settlement negotiations</td>
<td></td>
</tr>
<tr>
<td><strong>In re BEA Sys., Inc. S’holders Litig., 2009 WL 1931641 (Del. Ch. June 24, 2009)</strong></td>
<td>$81,297</td>
<td>• Supplemental disclosure made before preliminary injunction briefing, hearing, and discovery</td>
<td>• Corrected typographical error</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Injunction denied</td>
<td>• Corrected sequence of events regarding timing of press release</td>
</tr>
<tr>
<td><strong>Jeffrey Benison IRA v. Critical Therapeutics, Inc., C.A. 4039-VCL (Feb. 26, 2009)</strong></td>
<td>$175,000</td>
<td>• Two depositions (both confirmatory)</td>
<td>• Details on value of merger consideration</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Settled without an injunction hearing</td>
<td>• Buyer’s management projections of buyer’s standalone earnings, as adjusted by target’s management</td>
</tr>
<tr>
<td><strong>Augenbaum v. Forman, 2006 WL 1716916 (Del. Ch. June 21, 2006)</strong></td>
<td>$225,000</td>
<td>• Three depositions (all confirmatory)</td>
<td>• Details of negotiation process</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Settled without an injunction hearing</td>
<td>• Details of advisor’s previous work for buyer</td>
</tr>
<tr>
<td><strong>In re Triarc Cos. S’holders Litig., 2006 WL 903338 (Del. Ch. Mar. 29, 2006)</strong></td>
<td>$75,000</td>
<td>• None beyond filing of complaint and amended complaint</td>
<td>• Fact that chairman of special committee thought deal price was inadequate</td>
</tr>
<tr>
<td><strong>In re Sauer-Danfoss Inc. S’holders Litig., C.A. NO.5162-VCL (Apr. 29, 2011)</strong></td>
<td>$75,000</td>
<td>• Little beyond filing of complaint and reviewing a “standard package of documents”; no depositions taken</td>
<td>• Corrected error relating to the company’s 52-week high</td>
</tr>
</tbody>
</table>
"Disclosures of questionable quality" (continued)

<table>
<thead>
<tr>
<th>Case</th>
<th>Fee Award</th>
<th>Plaintiff’s Efforts</th>
<th>Principal Disclosures/Benefit</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>In re Compellent Techn., Inc. S’holder Litig.</em>, C.A. No. 6084-VLC, mem. op. (Del. Ch. Dec. 9, 2011)</td>
<td>$100,000</td>
<td>• 2,416 hours&lt;br&gt;• Retained law professor as expert&lt;br&gt;• Six depositions&lt;br&gt;• Reviewed “substantial document production”</td>
<td>• Details regarding prior engagements (and lack thereof) with respect to target’s investment banker&lt;br&gt;[Note: Plaintiff’s attorneys were awarded $2.3M for revisions to the merger agreement made in connection with settlement.]</td>
</tr>
</tbody>
</table>
Second Category

“One or two meaningful disclosures”
Fee awards “for one or two meaningful disclosures, such as previously withheld projections or undisclosed conflicts faced by fiduciaries or their advisors.”

<table>
<thead>
<tr>
<th>Case</th>
<th>Fee Award</th>
<th>Plaintiff’s Efforts</th>
<th>Principal Disclosures/Benefit</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Continuum Capital v. Nolan</em>, C.A. 5687-VCL (Del. Ch. Feb. 3, 2011)</td>
<td>$525,000</td>
<td>• Three depositions (all pre-MOU)</td>
<td>• Management projections&lt;br&gt;• Information about advisor’s buy-side conflict&lt;br&gt;• Information about advisor’s fee</td>
</tr>
<tr>
<td><em>In re Burlington N. Santa Fe S’holder Litig.</em>, C.A. 5043-VCL (Del. Ch. Oct. 28, 2010)</td>
<td>$450,000</td>
<td>• Three depositions (all confirmatory)</td>
<td>• Management projections&lt;br&gt;• Details about negotiation process</td>
</tr>
<tr>
<td><em>In re Zenith Nat’l Ins. Corp. S’holders Litig.</em>, C.A. 5296-VCL (Del. Ch. July 26, 2010)</td>
<td>$400,000</td>
<td>• Four depositions (all post-disclosures, but contested)&lt;br&gt;• Briefed and argued motion for preliminary injunction&lt;br&gt;• Injunction denied</td>
<td>• Management projections&lt;br&gt;• Details about negotiation process&lt;br&gt;• Details about advisor’s prior work for bidder</td>
</tr>
<tr>
<td><em>In re Wyeth S’holders Litig.</em>, C.A. 4329-VCN (Del. Ch. June 29, 2010)</td>
<td>$460,000</td>
<td>• Three depositions (one pre-MOU, two confirmatory)</td>
<td>• Details about management projections&lt;br&gt;• Details about negotiation process&lt;br&gt;• Details about contingent value right&lt;br&gt;• Details of advisors’ methodology</td>
</tr>
<tr>
<td><em>In re Sepracor Inc. S’holders Litig.</em>, C.A. 4871-VCS (Del. Ch. May 21, 2010)</td>
<td>$550,000</td>
<td>• Three depositions (two pre-MOU, one confirmatory)</td>
<td>• Management projections&lt;br&gt;• Additional multiples for comparable companies analysis&lt;br&gt;• Precedent transaction analysis used for negotiation but not valuation</td>
</tr>
</tbody>
</table>
Fee awards “for one or two meaningful disclosures, such as previously withheld projections or undisclosed conflicts faced by fiduciaries or their advisors.” (Continued)

<table>
<thead>
<tr>
<th>Case</th>
<th>Fee Award</th>
<th>Plaintiff’s Efforts</th>
<th>Principal Disclosures/Benefit</th>
</tr>
</thead>
</table>
| IBEW Local Union 98 v. Noven Pharms. Inc., C.A. 4732-CC (Del. Ch. Dec. 8, 2009) | $450,000  | • Two depositions (both confirmatory)  
 • Filed opening brief for preliminary injunction  
 • Settled without an injunction hearing  | • Management projections  
 • Details about negotiation process  
 • Details of fairness analysis |
| In re Nat’l City Corp. S’holders Litig., 2009 WL 2425389, at *6 (Del. Ch. July 31, 2009), aff’d, 998 A.2d 851 (Del. 2010) (TABLE) | $400,000  | • Three depositions (one pre-MOU, two confirmatory)  
 • Settled without an injunction hearing  | • Details about alternative transactions  
 • Additional details about potential participation in TARP  
 • Details about advisors’ potential conflict |
| N.J. Bldg. Laborers Pension and Annuity Funds v. Applebee’s Int’l, Inc., C.A. 3124-CC (Del. Ch. Feb. 27, 2008) | $358,185  | • Four depositions (all confirmatory)  
 • Settled without an injunction hearing  | • Management projections  
 • Details about advisors’ potential conflict |
| In re James River Gp., Inc. S’holders Litig., 2008 WL 160926 (Del. Ch. Jan. 8, 2008) | $400,000  | • Four depositions (all confirmatory)  
 • Settled without an injunction hearing  | • Management projections  
 • Details of activity during the ‘go-shop’ period  
 • Details about advisor’s prior work for bidder |
| In re Genencor Int’l, Inc. S’holders Litig., C.A. 1052-N (Del. Ch. June 2, 2005) | $450,000  | • Five depositions (all pre-MOU)  
 • Filed opening brief for preliminary injunction  
 • Settled without an injunction hearing  | • Disclosure of advisor’s fee  
 • Details about negotiations  
 • Confirmed that advisor did not place any value on subsidiary |
| In re Cardiac Sci., Inc. S’holders Litig., C.A. 1138-N (Del. Ch. Jan. 4, 2005) | $300,000  | • Five depositions (all pre-MOU)  
 • Filed opening brief for preliminary injunction  
 • Settled without an injunction hearing  | • Details of negotiation process  
 • Details on value of certain assets  
 • Additional details on CEO’s interest in merger |
Fee awards “for one or two meaningful disclosures, such as previously withheld projections or undisclosed conflicts faced by fiduciaries or their advisors.” (Continued)

<table>
<thead>
<tr>
<th>Case</th>
<th>Fee Award</th>
<th>Plaintiff’s Efforts</th>
<th>Principal Disclosures/Benefit</th>
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</table>
| In re Access to Money, Inc. S’holders Litig., CA. No. 6816-VCN, transcript ruling (Del. Ch. May 31, 2012) [Note: Transaction value was $10 million.] | $275,000  | • 300 hours  
• 2 depositions  
• Reviewed 4,000 pages of discovery | • Disclosure regarding company’s strategic alternatives and sale process  
• Additional detail regarding comparable companies analysis  
• Free cash flow and other line items used in DCF analysis |
| In re McCormick & Schmick’s S’holder Litig., C.A. No. 7058-VCL, transcript ruling (Del. Ch. Nov. 2, 2012) (post-Sauer-Danfoss) | $600,000  | • 230 hours  
• 4 depositions  
• Reviewed 10,000 pages of discovery | • Disclosure of financial advisor’s revised assumptions and methodologies (e.g., cost of capital)  
• Additional line-items relating to previously disclosed financial projections  
• Valuation ranges yielded from comparable companies and transactions analyses  
• Disclosure that company’s “revitalization” plan was not succeeding, thus supporting transaction |
Third Category

“Particularly Significant or Exceptional Disclosures”
Fee awards “reserved for plaintiffs who obtained particularly significant or exceptional disclosures.”

<table>
<thead>
<tr>
<th>Case</th>
<th>Fee Award</th>
<th>Plaintiff’s Efforts</th>
<th>Principal Disclosures/Benefit</th>
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</thead>
</table>
| *In re Lear Corp. S’holder Litig.*, C.A. 2728-VCS (Del. Ch. June 3, 2008) | $800,000  | • Ten offensive depositions and two defensive depositions  
• Full briefing and argument on application for preliminary injunction  
• Preliminary injunction granted | • Information about CEO’s conflict of interest  
• Information about CEO’s role in negotiations and sale process |
| *Globis Capital Partners, LP v. SafeNet, Inc.*, C.A. 2772-VCS (Del. Ch. Dec. 20, 2007) | $1,200,000 | • Four depositions (all pre-MOU)  
• Full briefing and argument on application for preliminary injunction  
• Settled after injunction hearing | • Extensive, detailed descriptions of bankers’ fairness opinions and underlying analyses  
• Two complete bankers’ books  
• More than 100 pages of disclosure |
| *In re Del Monte Foods Co. S’holders Litig.*, C.A. No. 6027-VCL (Del. Ch. June 27, 2011) (post-Sauer-Danfoss) | $2,750,000 | • Numerous depositions and discovery requests  
• Numerous depositions and discovery requests  
• Successful TRO on underlying claims, even though company voluntarily made supplemental disclosures | • Information about financial advisor’s conflict  
• Information about financial advisors’ fees  
• Disclosure of free cash flows and information about financial advisor’s analyses |
| *In re Craftmade Int’l, Inc. S’holders Litig.*, C.A. No. 6950-VCL (Del. Ch. Jan. 10, 2013) (post-Sauer-Danfoss) [Note: Transaction value was $24 million.] | $650,000 (but court indicated that a fee award of $2.4-2.8 million might be appropriate for a larger company) | • 2 depositions  
• 524 hours  
• Successful preliminary injunction | • Disclosure of financial advisor’s board book  
• Disclosure of projections  
• Information about how discounted cashflow analysis was conducted  
• Confirmatory press release regarding company’s ability to respond to third-party proposals |
About

Steven M. Haas is a partner focusing on corporate governance and mergers and acquisitions at Hunton & Williams LLP. He is a member of the Delaware and Virginia bars. He is co-editor of the treatise Corporate Governance: Law and Practice (LexisNexis) and an adjunct professor of law at the University of Richmond School of Law. Prior to joining Hunton & Williams LLP, he was a senior associate at Abrams & Laster LLP in Wilmington, Delaware. He is a graduate of the University of Virginia School of Law where he was notes editor of the Virginia Law Review.

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