Washington and Lee Law Review

Volume 42 | Issue 3 Article 7

Summer 6-1-1985

Disclosure of Soft Information in Tender Offers After Flynn V. Bass Brothers Enterprises, Inc.

NOTES

DISCLOSURE OF SOFT INFORMATION IN TENDER OFFERS AFTER *FLYNN V. BASS BROTHERS ENTERPRISES, INC.*

In response to the stock market crash of October 1929,[1] Congress passed the Securities Act of 1933[2] ('33 Act) and the Securities Exchange Act of 1934[3] ('34 Act) to place emphasis on disclosure of information to the investing public.[4] The '33 Act focuses on the registration, offer, and sale of new issues of securities.[5] The '34 Act focuses on the trading of securities, the regulation of securities exchanges, and the activities of securities brokers, dealers, and

1. *See* 1 L. Loss, Securities Regulations 120-21 (2d ed. 1961). On September 1, 1929, the aggregate value of all stocks listed on the New York Stock Exchange was $89 billion. *Id.* at 120. During October 1929, the total value of the stock fell by $18 billion. *Id.* By 1932 the aggregate value of New York Stock Exchange stocks had fallen to $15 billion. *Id.*

2. Securities Act of 1933, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§77a-77aa (1982)).

3. Securities Exchange Act of 1934, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§78a-78kk (1982)).

4. *See* 1 L. Loss, *supra* note 1, at 21. Throughout the Securities Act of 1933 ('33 Act) and the Securities Exchange Act of 1934 ('34 Act), Congress expressed a recurrent theme of disclosure. *Id.* In adopting the '33 Act, Congress sought to supervise the investment in securities in interstate commerce by requiring every issue of new securities to provide to the public full publicity and information regarding the securities issue, and to refrain from concealing any important elements attending the securities issue from the buying public. *See* H. R. Rep. No. 85, 73d Cong., 1st Sess. (1933), *reprinted in* 1 Federal Securities Laws Legislative History 1933-1982 138, 138-39. Congress stated that the '33 Act disclosure requirements would provide investors with adequate public information to enable investors to make an accurate judgment concerning the value of the security. *Id.* at 140. In enacting the '34 Act, Congress sought to deal with the problem of secrecy surrounding the financial condition of corporations whose securities are publicly traded. *See* S. Rep. No. 792, 73d Cong., 2d Sess. (1934), *reprinted in* 1 Federal Securities Laws Legislative History 1933-1982 708, 712, 717-18. The '34 Act requires corporations to file reasonably up to date information with the Securities Exchange Commission (SEC) as long as the security is traded on a national exchange. *Id.* at 717. Congress stated that the disclosure of updated information is necessary to enable the investor to have an intelligent basis for forming his judgment as to the value of the securities he buys or sells. *See* H. R. Rep. No. 1383, 73d Cong., 2d Sess. (1934), *reprinted in* 1 Federal Securities Laws Legislative History 1933-1982 794, 804.

5. *See, e.g.,* 15 U.S.C. §77e(c) (1982) (15 USC §77e(c) of '33 Act prohibits any person from selling or offering to buy any unregistered security); *id.* §77e(b) (15 USC § 77e(b) of '33 Act prohibits any person from using mails or interstate commerce to carry any security for purpose of sale or for delivery after sale, unless such security is accompanied or preceded by prospectus); *id.* §§77k-l (15 USC §§77k-l of the '33 Act provide that persons involved in filing materially false or incomplete registration statements or violating prospectus requirements shall be liable and may be sued at law or in equity in any court of competent jurisdiction); id. §77t (15 USC §77t empowers SEC to seek federal court injunctive relief against any person engaged or about to engage in any acts that violate '33 Act).

underwriters.[6] In 1968, Congress passed the Williams Act amendments[7] to require the disclosure of pertinent information to stockholders in the event of a tender offer.[8] Prior to the adoption of the Williams Act, a void in investor protection existed because the securities laws did not regulate tender

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6. See, *e.g.*, *id.* §78l (15 USC § 78l of '34 Act prohibits any member, broker, or dealer from effecting any transaction in any security on national security exchange unless security is registered with exchange); *id.* §78m (15 USC §78m of '34 Act requires that every issuer registered pursuant to 15 USC §78l must file periodic and other reports with SEC); *id.* §78j (15 USC §78j of '34 Act prohibits any manipulative or deceptive device or contrivance in connection with purchase or sale of securities); *id.* §78e (15 USC §78e of '34 Act prohibits use of any exchange facility to effect any transaction or to report such transaction involving any security unless such exchange is registered as national securities exchange with SEC); *id.* §78f (15 USC § 78f states that exchange may not register as national securities exchange unless SEC determines that exchange has adopted rules to prevent fraudulent and manipulative acts, to promote just and equitable principles of trade, and to provide for appropriate discipline of exchange members for any violation of securities laws); *id.* §78o(a) (15 USC §78o(a) prohibits any persons from engaging in broker or dealer transactions unless such persons are registered with SEC); *id.* §78o(b) (15 USC §78o(b) states that SEC may revoke or suspend brokers' or dealers' registration, or impose censure for violation of securities laws).

7. Williams Act, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§78m(d)-(e), 78n(d)-(f) (1982)). In response to the significant increase in cash tender offers during the 1960's, Congress enacted the Williams Act to ensure that tender offerors would provide target company shareholders with material information concerning the tender offer so that shareholders could decide rationally the best possible course of action. *See* H. R. REP. No. 1711, 90th Cong., 2d Sess. 2 (1968), *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2811, 2812-13 (hereinafter cited as H. R. REP. No. 1711). Senator Williams stated that Congress attempted to avoid regulating in favor of management or the tender offeror. *See* 113 Cong. Rec. 854 (1967). Senator Williams further stated that the Act requires full and fair disclosure to the investors while providing the offeror and management an equal opportunity fairly to present their cases. *Id.* at 854-55.

8. *See* 15 U.S.C. §§78m(d), n(d) (1982). 15 U.S.C. §78n(d) prohibits any person from making a tender offer that would result in that person's beneficial ownership of greater than 5% of such security unless at the time of the tender offer such person has disclosed the information specified in 15 U.S.C. §78m(d). *Id.* §78n(d). 15 U.S.C. §78m(d) provides that a tender offeror under 15 U.S.C. §78n(d) must file with the SEC and send to the issuer of the security a statement disclosing the identity and background of the purchaser, the source and amount of consideration paid and any borrowings required to purchase the securities, the number of shares of the target company of which the offeror is the beneficial owner, any side agreement entered into with respect to the stock, any plans regarding the disposal of all or part of the target corporation's assets, any intended merger activity, and any major change intended in the business or corporate structure. Id. §78m(d).

Although Congress did not define the term "tender offer" in the Williams Act, Senator Williams stated that a cash tender offer is a public invitation from the tender offeror to all shareholders of a corporation to sell their shares at a specific price within a specific time. *See* 113 Cong. Rec. 855 (1967) (Senator Williams' definition of tender offer). The United States District Court for the Southern District of New York noted that seven elements are generally present in a tender offer. *See* Wellman v. Dickinson, 475 F. Supp. 783, 823-24 (1979). The *Wellman* court stated that tender offerors usually engage in active and widespread solicitation of public shareholders of an issuer, solicit for a substantial percentage of issuer's stock, offer to purchase stock at a premium over market price, offer a firm price rather than negotiable, make offer contingent on the tender of a minimum number of shares, extend offer for a limited period of time, and subject offeree to pressure to tender the stock. *Id.*

offer activities.[9] To achieve the goal of investor protection, section 14(e) of the Williams Act prohibits false or misleading statements, material omissions, and fraudulent, deceptive, or manipulative practices in connection with any tender offer.[10] The broad antifraud provisions of section 14(e) apply to the parties extending the tender offer as well as to the management of the target company.[11]

Both the '33 Act and the '34 Act, including the Williams Act amendments, require the filing of informational documents with the Securities Exchange Commission (SEC).[12] Companies may include both "hard information" and "soft information" in documents filed with the SEC.[13] Soft

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9. *See* Piper v. Chris-Craft Indus. Inc., 430 U.S. 1, 22 (1976) (Senator Williams introduced original form of bill subjecting tender offerors to advance disclosure requirements in October 1965 to remedy gap in federal regulation of securities). In introducing his proposed legislation, Senator Williams illustrated the need to fill the gap in the securities regulations by noting that when a party seeks control of a corporation through either an exchange offer of stock or a proxy contest, the party is subject to disclosure requirements under the Securities Act of 1933. 113 Cong. Rec. 855 (1967). In situations involving cash tender offers to shareholders, however, Senator Williams noted that the tender offeror is not required to disclose any information. *Id.* Senator Williams concluded that the ability of a tender offeror to operate in almost complete secrecy is inconsistent with the disclosure pattern prevailing in American securities markets. *Id.; see also* H. R. Rep. No. 1711, *supra* note 7, at 2812. In 1968, the House Interstate and Foreign Commerce Committee stated that under current law the investor is severely limited in obtaining all of the facts on which to base a decision whether to reject or accept the tender offer unless the management of the target company publicly responds to the tender offer. *Id.* The Committee concluded that the Federal securities laws are specifically designed to prevent investors from having to make decisions without adequate information. *Id.*

10. *See* 15 U.S.C. §78n(e) (Williams Act §14(e)). §14(e) provides in part:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statement made, in light of all the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer. . . .

Id.

11. *See* Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 945 (2d Cir. 1969) (Williams Act insures that target company shareholders will have benefit of complete statement from offeror and opportunity to hear incumbent management explain its position); Texasgulf, Inc. v. Canada Dev. Corp., 366 F. Supp. 374, 420 (S.D. Tex. 1973) (Williams Act designed to guarantee that shareholders have sufficient information about tender offer from both tender offeror and management of target company); *see also* 17 C.F.R. §240.14e-2 (1984) (SEC rule 14e-2). Rule 14e-2 provides that to effectuate §14(e) of the '34 Act, the target company must publish or send to shareholders one of three responses to the tender offer no later than ten business days from the date of the tender offer. *Id.* Management of the corporation may recommend acceptance or rejection of the offer, state that the company expresses no opinion and is remaining neutral toward the offer, or state reasons for being unable to take a position with respect to the tender offer. *Id.*

12. *See, e.g.,* 17 C.F.R. §§229.10-230.656 (1984) (Regulation S-K) (listing nonfinancial information that persons must file pursuant to '33 Act and '34 Act); 17 C.F.R. §§210.1-01-210.12-29 (1984) (Regulation S-X) (listing financial information that persons must file pursuant to '33 Act and '34 Act); Regulation 13D (reporting requirements for tender offerors pursuant to 15 USC §78m of '34 Act).

13. *See, e.g.,* 17 C.F.R. §229.10 (1984) (Regulation S-K, Item 10(b)) (SEC encourages

information includes forecasts of earnings, revenues, budgets for capital expenditures, future dividend policies, management analyses of financial statements, and any other forward looking information.[14] Soft information is often unreliable because soft information is based upon inferences and speculation rather than hard data.[15] In contrast, hard information includes historical and objectively verifiable data such as current or past financial information.[16] Prior to 1973, the SEC limited disclosure requirements to hard information because the SEC feared that unsophisticated investors[17] would accord soft information a greater measure of validity than such information

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disclosure, in documents filed with SEC under '33 Act and '34 Act, of management's projections of future economic performance that have reasonable basis and are presented in appropriate format); 17 C.F.R. §229.301 (1984) (Regulation S-K, Item 301) (registrant must file with SEC financial data for last five fiscal years representing net sales or operating revenues, income from operations, income per share, total assets, long-term obligations and redeemable preferred stock, and cash dividends declared per common share).

14. *See* House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess., Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission 347 (Comm. Print 1977) [hereinafter cited as Report] (soft information includes opinions, predictions, analyses and other subjective evaluations). Professor Schnieder identified five categories of soft information. *See* Schnieder, *Nits, Grits, and Soft Information in SEC Filings*, 121 U. Pa. L. Rev. 254, 255 (1972). The first category contains forward-looking statements such as projections, forecasts, predictions, and statements concerning plans and expectations. *Id.* The second category of soft information includes statements concerning past or present information when the maker of the statement lacks the data necessary to prove the accuracy of the statement. *Id.* An example of the second type of soft information is when a company provides historical market share percentages within an industry without access to precise statistics concerning each competitor. *Id.* The third category involves information based primarily on subjective evaluations, such as representations concerning the competence or integrity of management, the relative efficiency of a manufacturing operation, or the appraised value of assets. *Id.* The fourth category involves unverified statements of motive, purpose, or intention of management, such as an explanation of the reasons for which the company discharged an auditor. *Id.* The fifth category involves statements containing qualifying words for which no generally accepted objective standards of measurement exist. *Id.* Examples of such qualifying words include excellent, ingenious, efficient and imaginative. *Id.*

15. *See supra* note 14 and accompanying text (discussing types of soft information).

16. *See* Report, *supra* note 14, at 347 (hard information includes statements concerning objectively verifiable historical facts). No sharp dividing line exists between hard and soft information. *See* Schnieder, *supra* note 14, at 256. For example, audited historical financial statements are considered a classic type of hard information although many subjective evaluations and other types of soft information such as reserves for bad debts and extent of completion and profitability of open contracts must be considered in preparing audited financials. *Id.* at 256 & 256 n.5.

17. *See* Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544, 565 (E.D.N.Y. 1971) (unsophisticated investor is investor that lacks substantial knowledge of finance). The *Leasco* court equated the unsophisticated investor with the average small investor who is not a knowledgeable student of finance. *Id.* The *Leasco* court further stated that three distinct classes of investors exist, including amateurs who read for the most obvious sorts of disclosures, professional advisors and managers who study disclosures closely and make their decisions on insights that they gain from such disclosures, and security analysts who use disclosures as one of the many sources of an investment opportunity. *Id.* at 565-66.

would deserve.[18] In 1973, however, the SEC reversed its position of discouraging the disclosure of soft information and began to encourage such disclosure.[19] The SEC presently encourages but does not require the disclosure of soft information.[20] Accordingly, courts have not required the disclosure of soft information in tender offer transactions.[21] Recently, however, the United

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18. *See* Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1294 (2d Cir. 1973) (policy against disclosure of asset appraisals is based on SEC's distrust of appraisals' reliability and SEC's fear that investors would accord such appraisals more weight than warranted).

19. *See* Securities Act Release No. 5362 (February 2, 1973). As a result of public hearings held in 1972, the SEC announced that a change in its policy not to permit inclusion of projections in registration statements and reports filed with SEC would assist in the protection of investors and serve the public interest. *Id.* In April 1975, the SEC proposed an elaborate disclosure system regarding projections of economic performance. *See* Securities Act Release No. 5581 (April 25, 1975). The SEC later withdrew the 1975 proposal and in April 1976 issued a statement that the SEC would not object to disclosure of projections made in good faith with a reasonable basis and in an appropriate format, provided that such disclosure is accompanied by sufficient information for investors to make their own judgment. *See* Securities Act Release No. 5696 (April 23, 1976).

In 1978, the SEC issued a statement encouraging companies to disclose management projections both in filings with the SEC and in general, and authorized the Division of Corporation Finance to publish Revised Guide 62 to assist in the implementation of such disclosures. *See* Securities Act Release No. 5992 (November 7, 1978). Guide 62 reaffirmed the SEC's requirement that projections of future performance must be made in good faith and with a reasonable basis. *Id.* Although the Guide did not set forth items that had to be included in projections, the Guide did caution management to avoid misleading inferences through selective disclosure of only favorable items. *Id.* When previously disclosed projections no longer had a reasonable basis, the Guide established that management had a duty to update such projections. *Id.* Finally, the Division of Corporation Finance also encouraged the disclosure of the assumptions on which the parties based the projections. *Id.* the SEC rescinded Guide 62 in 1982 and incorporated the substance of the Guide in Regulation S-K. *See* 17 C.F.R. §229.10 (1984).

In 1979, to encourage disclosure of projections, the SEC established a safe harbor provision protecting issuers of projections reasonably based and disclosed in good faith from liability under the federal securities laws whenever the projected results fail to materialize. *See* Securities Act Release No. 6084 (June 25, 1979). The safe harbor rule applies to projections of revenues, income, earnings per share, capital expenditures and financing, dividends, capital structure, statements of managements' plans and objectives for future operations and future economic performance included in management's discussion and analysis of the summary of earnings or quarterly income statements. *Id.* Release No. 6084 establishes that the burden of proof concerning the applicability of the safe harbor rule is on the plaintiff. *Id.*

20. *See* Securities Act Release No. 5992. The SEC adopted the Advisory Committee's view that a voluntary projection disclosure system is more appropriate than a mandatory system. *Id.* The Advisory Committee suggested that the SEC did not yet have an adequate basis for formulating a mandatory system. *Id.* Further, the Committee stated that all companies should not be required to bear the expense and burden of such disclosure, especially because many companies would find it difficult to prepare appropriate projections due to a lack of operating history, general economic factors, or industry conditions. *Id.*

21. *See* Biechele v. Cedar Point, Inc., 747 F.2d 209, 216 (6th Cir. 1984) (management of target company has no duty to disclose reports containing financial projections and speculative assumptions); South Coast Services Corp. v. Santa Ana Valley Irrigation Co., 669 F.2d 1265, 1271 (9th Cir. 1982) (target company has no duty to disclose asset valuations in proxy materials concerning proposed sale of substantially all corporate assets to purchasing corporation); Panter

States Circuit Court of Appeals for the Third Circuit, in *Flynn v. Bass Brothers Enterprises, Inc.*,[22] held that a party extending a tender offer has a duty to disclose material soft information to target company shareholders to avoid liability under section 14(e) of the Williams Act.[23]

In *Flynn*, the president of Prochemco, Inc. (Prochemco) contacted the privately held Bass Brothers Enterprises, Inc. (Bass Brothers) in 1974 attempting to persuade Bass Brothers to finance Prochemco's planned purchase of a controlling interest of outstanding stock of the National Alfalfa Dehydrating and Milling Company (National Alfalfa).[24] National Alfalfa's businesses consisted of farming, farm supply operations, and the sale of animal feed.[25] Prochemco, a corporation engaged in ranching and cattle feeding, had previous acquisition experience.[26] As part of the financing proposal presented to Bass Brothers and other financial sources, Prochemco prepared two reports containing appraisals of National Alfalfa's assets based on alternative hypothetical valuations.[27] Bass Brothers declined to finance the proposed purchase, but indicated an interest in purchasing National Alfalfa's stock should Prochemco's plans fail to materialize.[28] Following Prochemco's unsuccessful attempts to procure financing, in December 1975 Bass Brothers purchased 1.3 million shares of National Alfalfa stock for 6.47 dollars per

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v. Marshall Field & Co., 646 F.2d 271, 292 (7th Cir.) (neither management nor directors have duty to disclose financial projections prepared in response to tender offer), *cert. denied*, 454 U.S. 1092 (1981); Resource Exploration v. Yankee Oil and Gas, 566 F. Supp. 54, 64 (N.D. Ohio 1983) (Williams Act does not require disclosure of soft information). *But see* Radol v. Thomas, 556 F. Supp. 586, 594 (S.D. Ohio 1983) (parties involved in tender offer transaction have duty to disclose material soft information to target company shareholders), *aff'd*, 772 F.2d 244 (6th Cir. 1985); *infra* notes 62-77 (discussion of *Radol*).

22. 744 F.2d 978 (3d Cir. 1984).

23. *Id.* at 988; *see supra* note 10 (text of '34 Act §14(e)).

24. *See* 744 F.2d at 981. In *Flynn*, Prochemco, Inc. (Prochemco) advanced a proposal to secure financial support from Bass Brothers Enterprises, Inc. (Bass Brothers) to enable Prochemco to purchase a controlling interest of National Alfalfa Dehydrating and Milling Company (National Alfalfa) stock from National Alfalfa's former president, Charles Peterson. *Id.* Bass Brothers rejected Prochemco's request for financial backing and Bass Brothers decided to purchase Peterson's block of stock and extend a tender offer for National Alfalfa stock. *Id.* at 981-82. Former National Alfalfa shareholders filed suit against Bass Brothers alleging that by failing to disclose appraisal valuations of National Alfalfa's assets to National Alfalfa's shareholders, Bass Brothers, as tender offeror, violated §14(e) of the '34 Act. *Id.* at 982-83.

25. *Id.* at 981.

26. *Id.* at 981, 988.

27. *Id.* at 981. In *Flynn*, Prochemco prepared asset valuation reports that contained several alternative valuations of National Alfalfa. *Id.* at 982. The first report stated that $6.40 per share could be realized through liquidation of National Alfalfa under stress conditions, $12.40 per share could be realized through liquidation over a reasonable period of time, and $16.40 per share represented National Alfalfa's value as an ongoing operation. *Id.* The second report prepared by Prochemco stated that $17.28 per share represented the value of National Alfalfa according to Peterson's calculations and $7.60 per share represented the value according to Prochemco's calculations. *Id.*

28. *Id.* at 981.

share.[29] On March 2, 1976, Bass Brothers made public its tender offer for any and all outstanding shares of National Alfalfa stock at 6.45 dollars per share.[30] Bass Brothers did not disclose the contents or existence of the reports Prochemco had prepared.[31] At the expiration of the tender offer, Bass Brothers owned more than 92 percent of the outstanding shares of National Alfalfa and took control of the company.[32]

Subsequent to Bass Brothers' acquisition of National Alfalfa, minority shareholders of National Alfalfa initiated a class action against Bass Brothers in the United States District Court for the Eastern District of Pennsylvania.[33] The plaintiffs alleged that Bass Brothers violated the '34 Act by failing to disclose the Prochemco asset appraisal valuations.[34] The plaintiffs asserted that the asset appraisal valuations would have aided the class members in deciding whether to accept the tender offer.[35] The plaintiffs also alleged that by not disclosing the valuations, Bass Brothers violated section 10(b)[36] and rule 10b-5[37] of the '34 Act.[38] The district court denied Bass Brothers' motion

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29. *Id.* In *Flynn,* prior to Bass Brothers' purchase of Peterson's stock, Prochemco informed Bass Brothers that Peterson's stock was available for purchase since Prochemco was unable to obtain financing to purchase Peterson's stock. *Id.* Bass Brothers paid Prochemco $130,000 in exchange for the two reports and for Prochemco's assistance in analyzing National Alfalfa's current and potential performance. *Id.* In December 1975, Bass Brothers entered into an option agreement to purchase Peterson's 52% controlling interest in National Alfalfa. *Id.* Bass Brothers later exercised this option and purchased approximately 1.3 million shares for $8.44 million. *Id.*

30. *Id.* In *Flynn,* prior to the tender offer, Bass Brothers purchased an additional 9.1% of National Alfalfa stock at $6.45 per share. *Id.* at 982.

31. *Id.* On March 15, 1976, Bass Brothers issued a supplement to the tender offer advising National Alfalfa shareholders that the fair market values of National Alfalfa's land could be substantially higher than the original costs represented on National Alfalfa's books. *Id.* The supplement further provided that in the case of liquidation, stockholders could receive an amount per share significantly higher than book value and possibly higher than the $6.45 tender offer price. *Id.* The supplement to the tender offer added that the offeror had no reason to believe that National Alfalfa intended a liquidation of assets and that the offeror had no intention of liquidating the company. *Id.*

32. *Id.* In *Flynn,* after the completion of the tender offer, Bass Brothers elected a new board of directors. *Id.* Soon thereafter, Bass Brothers effected a short-form merger under Delaware law between National Alfalfa and Bass Brothers Farming Company, a wholly owned subsidiary of Bass Brothers. *Id.*

33. *Id.*

34. *Id.* at 981-83.

35. *Id.* at 983.

36. *See* 15 U.S.C. §78j(b) (1982) (§10(b) of the '34 Act prohibits any manipulative or deceptive device or contrivance in connection with purchase or sale of securities).

37. *See* 17 C.F.R. §240.10b-5 (1984) (rule 10b-5 prohibits manipulative and deceptive devices, untrue statements or omissions of material facts, and any fraudulent acts or practices in connection with purchase or sale of securities).

38. 744 F.2d at 983. In addition to their §14(e), §10(b), and rule 10b-5 claims, the plaintiffs in *Flynn* challenged the merger of National Alfalfa with Bass Brothers Farming Company by asserting that the merger had no business purpose and thus violated Delaware law. *Id.* at 991.

for summary judgment, stating that a genuine issue of material fact existed as to whether a reasonable investor would have viewed the omitted valuations as significant to the decision concerning the tender offer.[39] At the conclusion of the plaintiffs' case, however, the district court granted the defendant's motion for a directed verdict concerning the plaintiffs' allegation that Bass Brothers had a duty to disclose the Prochemco valuations.[40] In granting the directed verdict in favor of the defendant, the district court held that Bass Brothers did not have a duty to disclose the valuations because Prochemco did not base the valuations on sufficient information.[41]

Although the Third Circuit on appeal affirmed the district court's decision,[42] the Third Circuit formulated new law for application in the future concerning the duty of a tender offeror to disclose soft information.[43] The Third Circuit first acknowledged that Congress enacted the Williams Act to ensure that shareholders faced with a tender offer would not be forced to respond without adequate information regarding the qualifications and intentions of the offeror.[44] Comparing the thrust of section 14(e) of the Williams Act to that of rule 10b-5, the *Flynn* court stated that the broad antifraud provision of section 14(e) protects shareholders by requiring tender offerors to disclose in advance any material fact in connection with the tender offer.[45]

Relying on previous United States Circuit Courts of Appeal decisions, the *Flynn* court held that the definition of material fact promulgated by the Supreme Court in *TSC Industries, Inc. v. Northway, Inc.*[46] involving a rule 14a-9 claim also is applicable in situations involving section 14(e).[47] Rule 14a-9 proscribes any statement made in connection with a proxy solicitation

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39. Flynn v. Bass Bros. Enterprises, Inc., 456 F. Supp. 484, 491 (E.D.Pa. 1978), *aff'd,* 744 F.2d 978 (3d Cir. 1984).

40. *See* 744 F.2d at 983.

41. *Id.* In granting the defendant's motion for a directed verdict, the district court in *Flynn* indicated that the data contained in the Prochemco reports lacked an adequate basis because Prochemco prepared the reports for a different transaction than the Bass Brothers' tender offer. *Id.*

42. *See* 744 F.2d at 991.

43. *See id.* at 988; *see also infra* text accompanying notes 78-81 (Flynn court established balancing test for determining tender offeror's duty to disclose soft information).

44. *Id.* at 984; *see also* Pondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975) (purpose of Williams Act is to insure that public shareholders confronted with tender offer will have adequate information concerning qualifications and intentions of offering party); *supra* note 7 (legislative history concerning adoption of Williams Act).

45. *See* 744 F.2d at 984; *see also supra* note 10 (Williams Act §14(e) mandates disclosure of material facts); *supra* notes 36-37 (discussing §10(b) and rule 10b-5 of '34 Act).

46. 426 U.S. 438 (1976).

47. *See* 744 F.2d at 985 (citing *TSC Industries, Inc. v. Northway,* 426 U.S. 438, 449 (1976)); *see also* Staffin v. Greenberg, 672 F.2d 1196, 1205 (3d Cir. 1982) (Third Circuit adopted *TSC Industries* standard of materiality in case involving claims under §14(e)); Panter v. Marshall Field & Co., 646 F.2d 271, 289 (7th Cir.) (Seventh Circuit adopted *TSC Industries* definition of materiality in claim involving misrepresentations and omissions of material facts in connection with tender offer), *cert. denied,* 454 U.S. 1092 (1981).

that is false or misleading with respect to any material fact, or which omits to state any material fact.[48] In *TSC Industries*, the plaintiffs alleged that the defendants violated rule 14a-9 by omitting material facts from a proxy statement concerning the liquidation and sale of TSC Industries' assets to the defendants by means of a stock transfer.[49] The Supreme Court held that an omitted fact is material when a substantial likelihood exists that a reasonable investor would have viewed the disclosure of the fact as important in deciding how to vote.[50] The Supreme Court added that the standard contemplates a showing that the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder and not that the disclosure necessarily would have caused the reasonable investor to change his vote.[51]

Turning to the issue of disclosure involving soft information, the *Flynn* court stated that as a matter of public policy the SEC and the courts have not required the disclosure of such information in connection with tender offers and proxy materials.[52] The *Flynn* court noted that previous courts addressing the issue relied on several rationales in not requiring the disclosure of soft information in materials concerning proxies or tender offers.[53] First, courts have relied on the SEC's former policy of discouraging the disclosure of soft information.[54] Second, courts have not required disclosure of soft information where the particular data at issue lacked reliability.[55] Finally, courts have been reluctant to impose liability for nondisclosure when the law

48. *See* 17 C.F.R. §240.14a-9 (1984) (rule 14a-9 prohibits use of any false, misleading or omitted statements with respect to any material fact in connection with proxy solicitation).

49. 426 U.S. at 442-43.

50. *Id.* at 449.

51. *Id.* In reversing the Seventh Circuit's decision that material facts include all facts that a reasonable shareholder *might* consider important, the Supreme Court in *TSC Industries* stated that the Seventh Circuit's lower standard of materiality would force managers to inundate shareholders with trivial information to protect the company from substantial liability. *Id.* at 448.

52. 744 F.2d at 985.

53. *Id.*

54. *See id.* at 986; *see also* South Coast Services Corp. v. Santa Ana Valley Irrigation Co., 699 F.2d 1265, 1271 (9th Cir. 1982) (courts and SEC have discouraged inclusion of asset appraisals in proxy materials); Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1294 (2d Cir. 1973) (SEC's policy against disclosure of asset appraisals in proxy statements stems from concern that investors would accord appraisals more weight than warranted and because of impracticability of SEC staff having to determine reliability of each appraisal); Kohn v. American Metal Climax, Inc., 458 F.2d 255, 265 (3d Cir.) (SEC and courts discourage presentations of future earnings, appraised asset valuations and other hypothetical data in proxy materials), *cert. denied*, 409 U.S. 874 (1972); Denison Mines Ltd. v. Fibreboard Corp., 388 F. Supp. 812, 819 (D. Del. 1974) (SEC discourages insertion of asset valuations in filings with SEC).

55. *See* 744 F.2d at 986; *see also* South Coast Services Corp. v. Santa Ana Valley Irrigation, Co., 699 F.2d 1265, 1272 (9th Cir. 1982) (valuations are properly excludable when no objective or reasonably certain data exists to support such valuations); Panter v. Marshall Field & Co., 646 F.2d 271, 293 (7th Cir.) (no duty exists to disclose tentative estimates hastily prepared for enlightenment of management with no expectation for publication), *cert. denied*, 454 U.S. 1092 (1981); Vaughn v. Teledyne, Inc., 628 F.2d 1214, 1221 (9th Cir. 1980) (no duty

at the time of the alleged violation discouraged disclosure of soft information.[56] The *Flynn* court, however, stated that the law has begun to favor disclosure of soft information in response to current trends in corporate activity such as an increase in corporate mergers.[57] In this regard, the Third Circuit in *Flynn* noted that the SEC has issued three releases indicating the SEC's intention to promote disclosure of soft information.[58] First, in 1976 the SEC deleted future earnings from the list of potentially misleading disclosures.[59] Second, in 1978 the SEC issued a safe harbor rule for "forward-looking" statements.[60] Most recently, in 1980 the SEC authorized disclosure of good faith appraisals made on a reasonable basis during the pendency of proxy contests when the principal issue is the liquidation of all or a portion of the target company's assets.[61]

To further illustrate that the present status of the law favors disclosure of soft information, the *Flynn* court noted that the United States District Court for the Southern District of Ohio, in *Radol v. Thomas*,[62] held that asset valuations are not immaterial as a matter of law and that the determination of materiality is for the jury to decide.[63] In *Radol*, the Mobil Corporation (Mobil) announced a tender offer for 40 million shares of

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exists to disclose estimates of sales and earnings for upcoming year unless estimates are made with reasonable certainty); Kohn v. American Metal Climax, Inc., 458 F.2d 255, 265 (3d Cir.) (no duty exists for managers to disclose asset valuations advanced as part of their bargaining strategies because no truly reliable estimates ever materialized), *cert. denied*, 409 U.S. 874 (1972); Berman v. Gerber Products Co., 454 F. Supp. 1310, 1328 (W.D. Mich. 1978) (defendant has no duty to disclose speculative figures regarding earnings).

56. *See* 744 F.2d at 986; *see also* South Coast Services Corp. v. Santa Ana Valley Irrigation Co., 669 F.2d 1265, 1271 n.3 (9th Cir. 1982) (Ninth Circuit refused to consider SEC releases that encourage disclosure of management's projections and provide safe harbor rule for such disclosures because alleged violations predated publication of releases); Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1293 (2d Cir. 1973) (court applied law as it existed in 1963 in determining that defendant had no duty to disclose appraisals).

57. 744 F.2d at 986; *see* Note, *Standstill Agreements:* Enterra *Validates Use of Standstill Agreements to Govern Minority Investment Programs*, 42 WASH. & LEE L. REV. 1015, 1015, n.1. (1985) (noting increase in corporate takeover activity in recent years).

58. 744 F.2d at 986-87; *see infra* notes 59-61 and accompanying text (discussion of recent releases indicating SEC's intention to promote disclosure of soft information); *cf. supra* note 19 and accompanying text (SEC began to encourage disclosure of soft information in 1973).

59. *See* Securities Act Release No. 5699 (April 23,1976) (SEC deleted predictions of future earnings from list of potentially misleading disclosures in note accompanying rule 14a-9).

60. *See* Securities Act Release No. 6084 (announcing adoption of safe harbor rule for companies disclosing projections and other forward-looking data); *see also supra* note 19 (discussing provisions of safe harbor rule as set forth in Securities Act Release No. 6084).

61. *See* Securities Exchange Act Release No. 16833 (May 23, 1980). (SEC authorized disclosure of asset valuations provided such valuations are made in good faith, on reasonable basis, and concern proxy contests in which principal issue concerns liquidation of all or part of company's assets or equity).

62. 556 F. Supp. 576 (S.D. Ohio 1983), *aff'd*, 772 F.2d 244 (6th Cir. 1985).

63. *See* 744 F.2d at 987 (citing *Radol v. Thomas*, 556 F. Supp. 576, 594 (S.D. Ohio 1983)).

Marathon Oil Company (Marathon) for 85 dollars per share.[64] In response to Mobil's tender offer, Marathon retained First Boston Corporation (First Boston), an investment banker, to investigate alternative defenses to the tender offer and to prepare a valuation report regarding Marathon's assets.[65] During the period that Mobil's offer remained open, United States Steel Corporation (U.S. Steel) made a tender offer to purchase 30 million shares of Marathon's outstanding stock at 125 dollars per share.[66] Marathon shareholders tendered 91.18 percent of Marathon's outstanding shares to U.S. Steel and subsequently approved the Marathon-U.S. Steel merger.[67] Marathon first advised the shareholders of the asset valuation reports in the proxy statement regarding the U.S. Steel merger vote dated February 8, 1982.[68] The proxy statement included the range of asset valuations of 189 dollars to 226 dollars per share and a disclaimer by the board of directors as to the reliability and relevance of the reports.[69]

Marathon shareholders initiated a class action suit alleging that Marathon violated sections 14(e), 10(b), and rule 10b-5 of the '34 Act[70] by failing to disclose the projected asset valuations to Marathon shareholders during the

64. *See* 556 F. Supp. at 587.

65. *Id.* In *Radol,* in response to the Mobil Corporation's (Mobil) tender offer for Marathon Oil Company (Marathon) stock, Marathon directed the First Boston Corporation (First Boston) to base the First Boston asset valuation report on Marathon solely upon information available to the public. *Id.* The First Boston Report valued Marathon's assets at $189 to $226 per share. *Id.* at 588. An asset valuation report generated internally by Marathon valued Marathon's assets at $276 to $323 per share. *Id.* Marathon and First Boston prepared the reports as selling documents and based their calculations on economic predictions and projections of oil prices extending as far as fifty years into the future. *Id.* at 587-88. The asset values contained in the First Boston and the Marathon reports included all of Marathon's proven, probable and possible oil reserves. *Id.*

66. *Id.* at 588. During the period that Mobil's tender offer remained open, U.S. Steel contacted Marathon concerning U.S. Steel's interest in acquiring Marathon. *Id.* During negotiations, Marathon provided U.S. Steel with copies of the asset valuation reports. *Id.* After nine days of negotiations, Marathon and U.S. Steel entered into a merger agreement. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* In *Radol,* the Marathon board of directors issued a proxy statement to Marathon shareholders concerning the proposed merger between Marathon and U.S. Steel accompanied by a disclaimer. *Id.* The proxy statement indicated that the directors did not view First Boston's or Marathon's internally calculated asset valuations as representing per share values that could realistically be received in a negotiated sale of the company as a going concern or through liquidation of Marathon's assets. *Id.* n.6.

70. *Id.* at 593. Along with the allegations concerning Marathon's failure to disclose the asset valuations, the plaintiffs in *Radol* challenged the two-tier merger as coercive and manipulative in violation of §14(e) of the Williams Act and §10(b) of the '34 Act. *Id.* at 589-90. The plaintiffs also challenged Marathon's communications to its shareholders as unlawful proxy solicitations under §14(a) of the '34 Act, and Marathon's mandatory fairness opinion as inadequate under rule 13e-3 of the '34 Act. *Id.* at 591-92; *see* 15 U.S.C. §78n(a) (§14(a) of the '34 Act prohibits any person from soliciting any proxy or consent or authorization in respect of any security in contravention of such rules and regulations as the Commission may prescribe); 17 C.F.R. §240.13e-3 (Item 8(a) of Schedule 13e-3 requires issuers or affiliates to state in proxy statement whether proposed transaction is fair or unfair to unaffiliated security holders).

tender offer.[71] Marathon sought summary judgment on the plaintiffs claims.[72] After adopting the standard for materiality articulated in *TSC Industries,*[73] the district court in *Radol* rejected Marathon's contention that the asset valuations reflected too great a level of uncertainty to meet the materiality standard.[74] The district court acknowledged that the Supreme Court in *TSC Industries* cautioned that some information is so unreliable that disclosure may cause more harm to shareholders than good.[75] The *Radol* court, however, held that asset valuations are not immaterial as a matter of law.[76] The *Radol* court concluded that the jury should decide the issue of whether a reasonable shareholder would have accorded the asset valuations actual significance.[77]

In accordance with *Radol,* the Third Circuit in *Flynn* held that asset valuations are not as a matter of law immaterial.[78] Rather, the *Flynn* court stated that in determining whether a tender offeror has a duty to disclose asset valuations and other soft information, courts must weigh the potential benefits of disclosure to shareholders against the potential harm to shareholders.[79] The Third Circuit further stated that when evaluating the potential

71. *Id.* at 593.

72. *Id.*

73. 426 U.S. 438; *see supra* notes 46-51 and accompanying text (discussing standard of materiality under *TSC Industries).*

74. 556 F. Supp. at 593-94 (citing TSC *Industries, Inc. v. Northway, Inc.,* 426 U.S. 438, 449-50 (1976)).

75. 556 F. Supp. at 594 (citing *TSC Industries, Inc. v. Northway, Inc.,* 426 U.S. 438, 448 (1976)); *see* James V. Gerber Products Co., 587 F.2d 324, 327 (6th Cir. 1978) (sales figures, projections, and forecasts are material only if calculated with substantial certainty). *Accord* Panter v. Marshall Field & Co., 646 F.2d 271, 292 (7th Cir.) (projections, estimates and other information must be reasonably certain before management may release such information to public), *cert. denied,* 545 U.S. 1092 (1981); Vaughn v. Teledyne, Inc., 628 F.2d 1214, 1221 (9th Cir. 1980) (management must calculate internal projections with reasonable certainty before disclosing such projections to public); Kohn v. American Metal Climax, Inc., 458 F.2d 255, 265 (3d Cir. 1972) (no duty exists to disclose asset valuations because no truly reliable estimates ever materialized).

76. 556 F. Supp. at 594. In affirming the district court's decision in *Radol v. Thomas,* the Sixth Circuit specifically overruled the district court's determination that the asset valuations were not immaterial as a matter of law. 772 F.2d 244, 253. The Sixth Circuit noted that in *Starkman v. Marathon Oil Co.*, the Sixth Circuit held that as a matter of law Marathon did not have a duty to disclose the asset valuations involved in *Radol* and, therefore, the district court erred in submitting the issue to the jury. *Id.; see* Starkman v. Marathon, 772 F.2d 231, 242 (6th Cir. 1985) (court held that Marathon did not have duty to disclose particular asset valuations because valuations were not substantially certain to hold).

77. *Id.; see* TSC Industries, Inc. v. Northway, 426 U.S. 438, 449 (1976) (defining materiality as when omitted fact would have assumed actual significance in deliberations of reasonable shareholder).

78. *See* 744 F.2d at 988. In holding that asset valuations are not as a matter of law immaterial, the *Flynn* court noted that the general time lag between the date of an alleged violation and judicial resolution has tended to retard the evolution of disclosure laws because courts have shown a reluctance to impose liability where the law has evolved in the interim. *Id.* at 987-88; *see supra* note 56 and accompanying text (courts have refused to impose liability on parties for failing to disclose soft information when law at time of alleged violation discouraged such disclosure).

79. *See* 744 F.2d at 988.

harm to shareholders arising from disclosure of soft information, courts should assess the potential harm under the assumption that a proper cautionary note accompanied the disclosed information.[80] The *Flynn* court stated that factors relevant in determining whether a duty to disclose soft information exists include the facts on which the information is based, the qualifications of the individual or individuals who prepared the information, the purpose for which the individuals prepared the information, the relevance of the information to the stockholders' impending decision, the degree of subjectivity or bias reflected in the preparation of the information, the degree to which the information is unique, and the availability to the shareholder of more reliable sources of information.[81] After establishing an affirmative duty for future tender offerors to disclose to target company shareholders all material soft information, the Third Circuit analyzed the *Flynn* case according to the disclosure laws as they existed at the time of the alleged violation.[82] The Third Circuit concluded that under the law in effect at the time of the alleged violation, the district court did not err in holding that Bass Brothers did not have a duty to disclose asset appraisal valuations.[83]

The *Flynn* court's determination that in the future a tender offeror has a duty to disclose material soft information is a positive step forward in removing what some commentators have described as a troubling anomaly.[84] These commentators have suggested that the SEC's view that soft information is important enough to justify disclosure is inconsistent with the SEC's decision not to make such disclosure mandatory.[85] An unfortunate aspect of the *Flynn* decision, however, is that after establishing the factors relevant to the balancing test for determining when a tender offeror has a duty to disclose soft information, the Third Circuit failed to give meaningful guidance concerning the relative significance of the seven factors.[86] For example, in stating that courts should first examine the facts upon which the preparer of the soft information based the calculations, the *Flynn* court did not discuss the appropriate characteristics that courts should consider in determining whether the underlying facts form an adequate basis for calculating the soft

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80. *Id.; see* Alaska Interstate Co. v. McMillian, 402 F. Supp. 532, 573 (D. Del. 1975) (approving release of appraisal values with appropriate disclaimer).

81. *See* 744 F.2d at 988; *see also infra* notes 86-115 and accompanying text (discussion of proper analysis under *Flynn* balancing test).

82. *Id.*

83. *Id.* at 989.

84. *See infra* note 85 (citing commentators who suggest that disclosure of soft information should be mandatory).

85. *See* Gray, *Proposals for Systematic Disclosure of Corporate Forecasts,* FINANCIAL ANALYSTS J., Jan.-Feb., 64, 67 (1973) (forecasting should remain voluntary through trial period, but fairness to investors requires more systematic disclosure); Merrifield, *Projections in SEC Filings: Debate Rages Over Worth,* 2 SEC 149, 154 (1974) (all investors should have access to forward-looking information because institutional investors have access to such information); Reiling & Burton, *Financial Statements: Signposts As Well As Milestones,* HARV. BUS. REV. Nov.-Dec. 1972 at 45, 53 (decision whether to disclose forecasts to public should not be in hands of corporate management).

86. *See* 774 F.2d at 988; *see also supra* text accompanying note 81 (listing factors that courts must analyze in applying *Flynn* balancing test).

information.[87] While the *Flynn* court probably would require the disclosure of soft information when the preparer calculated the information by relying on historical data and reasonable assumptions regarding expected changes in levels of sales, costs, and other relevant forecasting data, the *Flynn* court would not require or even allow the disclosure of soft information based on far less dependable sources, such as the preparer's favorite psychic.

In between these two extremes, assuming that the facts are sufficiently current, courts should consider two characteristics of the facts upon which the soft information is based. First, as the facts upon which the soft information is based become more complex and speculative, a court should be less inclined to find that the resulting calculations will be more of an aid than a harm to the shareholders. For example, in *Resource Exploration v. Yankee Oil and Gas, Inc.*,[88] Resource Exploration (Resource) hired a petroleum engineering firm to prepare a report evaluating the extent and value of its oil and gas reserves.[89] In calculating the value of Resource's reserves, the engineering firm analyzed individual well information relative to past production data, performance history, well location, percent of interest in each well, status of any leases regarding the wells, gas and oil prices, production reserves and temperatures and other engineering data, and operating costs.[90] On the basis of this information, the engineering firm arrived at the estimated present value of the reserves by factoring in projected future prices of oil and gas, operating costs, and present value discount rates.[91] In view of the first factor of the *Flynn* balancing test, the complex and speculative nature of the facts upon which the engineering firm in *Resource Exploration* based its calculations may render the resulting valuations so unreliable that the potential harm to shareholders relying on such information may outweigh the benefits. However, the speculative nature of the facts underlying the soft information may not in and of itself preclude a duty to disclose the information. In Securities Act Release No. 5992, for example, the SEC recognized that in situations involving new and promotional companies, speculative forecasts may be the most valuable information available to investors.[92] The SEC, however, noted that the disclosure of soft information without the disclosure of the assumptions underlying the information may render such information misleading.[93]

Another characteristic of the facts upon which the preparer based the soft information which courts should consider is the procedure the preparer employed to determine the relevant facts and assumptions underlying the

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87. *See supra* text accompanying note 81 (first factor that courts must analyze in applying *Flynn* balancing test is facts on which preparer of soft information based information).

88. 566 F. Supp. 54 (N.D. Ohio 1983).

89. *Id.* at 58.

90. *Id.* at 59.

91. *Id.*

92. *See* Securities Act Release No. 5992 (November 7, 1978) (previous history of operations is not necessary in all instances for company to provide reasonable based projections).

93. *Id.*

calculations.[94] Under the *Flynn* balancing test, courts should require disclosure of soft information only when the preparer selected and weighed the relevant data and determined the basic assumptions in a consistent and logical manner.[95] As data selection and assumption determinations become arbitrary and inconsistent, the resulting calculations become less useful to the shareholder. For example, the case of *South Coast Service Corp. v. Santa Ana Valley Irrigation Co.*[96] represents such an informal approach to property valuations which the *Flynn* court probably would not require disclosure. In *South Coast,* the Santa Ana Valley Irrigation Co. (SAVI) board of directors prepared valuations of SAVI's assets in response to a possible tender offer.[97] To arrive at the overall property valuations, each director suggested a high, medium, and low value for each parcel on the basis of his own experience and knowledge.[98] The directors did not set guidelines for calculating their individual valuations and did not discuss their assumptions.[99] From the pool of estimates, the SAVI general manager selected a figure to represent the high, medium, and low values for each item of property and instructed SAVI's accounting firm to prepare a report displaying the valuations in balance sheet format.[100] Because each director relied solely on his own experience, knowledge and assumptions in arriving at the valuations, without first setting forth basic guidelines or assumptions, the potential harm in the case of shareholder reliance probably would weigh against disclosure under the *Flynn* balancing test.

The second factor that the *Flynn* court directed courts to consider when determining whether the disclosure of soft information will aid or harm the shareholder is the qualifications of the individual or individuals who prepared the information.[101] Two aspects of the preparer's expertise that could influence the reliability of soft information are the preparer's knowledge of the particular business and industry and the preparer's experience with financial valuations and forecasting. In *South Coast,* the Ninth Circuit suggested that courts should not require disclosure of property valuations unless the preparers of the valuations were professional or expert appraisers.[102] Contrary to the Ninth Circuit's opinion, however, in Securities Act Release No. 5992 the SEC stated that experience in projecting may not be necessary in all

94. *See supra* note 81 and accompanying text (listing factors that courts must analyze in applying *Flynn* balancing test).

95. *See supra* text accompanying note 81 (courts must analyze facts on which preparer based soft information in applying *Flynn* balancing test).

96. 669 F.2d 1265 (9th Cir. 1982).

97. *Id.* at 1267-68.

98. *Id.* at 1268.

99. *Id.*

100. *Id.*

101. *See* 744 F.2d at 988 (*Flynn* court listing factors that courts must analyze in applying *Flynn* balancing test).

102. *See* 669 F.2d 1265, 1272 (9th Cir. 1982) (in affirming district court's decision that defendant properly excluded asset valuations from proxy statement, Ninth Circuit noted that preparers of valuations were not experts).

instances to provide reasonably based projections.[103] This appears to be a rational rule because any lack of sophistication on the part of the preparer could be offset in most cases if the preparer sets forth the assumptions underlying the calculations. For example, an unsophisticated preparer could make projections based on historical data adjusted for estimated percentage increases or decreases in net sales, operating costs, and any other appropriate economic and financial factors. By disclosing such assumptions, the preparer allows each shareholder to determine whether such assumptions appear reasonable.

When a preparer lacks knowledge regarding the particular industry or business, however, there may be no way for the shareholder to determine whether the preparer has considered the appropriate factors that may effect a company's performance in the future. For example, a preparer lacking expertise concerning the oil and gas industry would be unable to analyze the technical aspects of the business with the degree of sophistication necessary to ensure that the resulting valuations would be sufficiently reliable. Since any technical aspects of the business or industry that the preparer overlooks in the calculations will not surface in the disclosed assumptions, courts applying the *Flynn* test should not require disclosure when the preparer is unfamiliar with the industry.

The third factor enumerated in the *Flynn* opinion requires courts to consider the purpose for which the preparer originally intended to use the information.[104] Courts should examine the original purpose of the soft information according to the impact that such purpose has on the fifth factor listed by the *Flynn* court. The fifth factor requires courts to consider the degree of subjectivity or bias reflected in the preparation of the soft information.[105] Assuming that the bias or subjectivity reflected in the soft information is not a function of inadequate or incorrect information or the result of inexperience on the part of the preparer of the soft information, then any remaining bias or subjectivity probably is directly related to the purpose for which the individual prepared the information. Informational distortions relating to the purposes of the calculations can be categorized as goal-oriented or procedural.[106] Goal-oriented bias results when the preparer frames the underlying facts and assumptions in a manner that best serves the purpose of the document.[107] Goal-oriented bias commonly will arise when

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103. *See* Securities Act Release No. 5992 (November 7, 1978) (experience in calculating projections is not necessary in all instances to provide reasonably based projections).

104. *See* 744 F.2d at 988 (*Flynn* court listing factors that courts must analyze in applying *Flynn* balancing test).

105. *Id.*

106. *See infra* text accompanying notes 107-10 (discussing difference between goal-oriented and procedural bias).

107. *See, e.g.*, Biechele v. Cedar Point, Inc., 747 F.2d 209, 210 (6th Cir. 1984) (defendant prepared cash flow projections to be used as selling document to secure financial alternatives to proposed tender offer); Panter v. Marshall Field & Co., 646 F.2d 271, 293 (7th Cir.) (defendant updated earnings projections used internally for planning and development to

the preparer provides soft information for selling documents, such as documents designed to encourage investors to buy shares, because such calculations generally will be based on optimistic assumptions in order to present the company in the most favorable light.[108] Procedural bias or subjectivity will arise when conditions that precipitate the need for the soft information require the preparer to take short cuts in evaluating the available information. For example, in *Panter v. Marshall Field & Co.*,[109] Marshall Field employees hastily updated a five-year plan in one day in an effort to provide the Marshall Field board members with information necessary to evaluate a tender offer.[110] Under the *Flynn* balancing test, the procedural bias evident in the preparation of the updated plan should weigh against disclosure because preparers cannot present adequately in a statement of assumptions the short cuts employed in the analysis of the available information. When the purpose for which the preparer calculated the soft information results in goal-oriented bias, however, courts should require disclosure under the third factor of the *Flynn* balancing test because presentation of the underlying assumptions on which the preparer based the calculations would enable the shareholder to evaluate the reasonableness of the assumptions and take into account the degree of goal-oriented bias reflected in the calculations.

The fourth factor which courts must consider under the *Flynn* balancing test is the relevance of the soft information to the shareholders' decision whether to accept or reject the tender offer.[111] The Third Circuit's inclusion of this factor in the balancing test requires a comparison of the relevance of the soft information to the soft information's reliability. For example, a possibility exists that soft information would be relevant to a shareholder's decision, and yet be unreliable.[112] In addition, the degree of the relevance of

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evaluate adequacy of proposed tender offer), *cert. denied*, 545 U.S. 1092 (1981); Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1284-85 (2d Cir. 1973) (defendant prepared earnings projections for each of its manufacturing plants to be used for selling purposes); Resource Exploration v. Yankee Oil & Gas, Inc., 566 F. Supp. 54, 64 (N.D. Ohio 1983) (defendant prepared valuations for purpose of securing bank loan); Radol v. Thomas, 556 F. Supp. 586, 588 (S.D. Ohio 1983) (defendant prepared asset valuations to be used as selling document to attract more favorable tender offers); Alaska Interstate Company v. McMillian, 402 F. Supp. 532, 544 (D. Del. 1975) (defendant calculated cash flow projections to be used internally for planning process and to be used in connection with debt refinancing).

108. *See, e.g.*, Biechele v. Cedar Point, Inc., 747 F.2d 209, 210 (6th Cir. 1984) (defendant prepared cash flow projections to be used as selling document to secure financial alternatives to proposed tender offer); Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1284-85 (2d Cir. 1973) (defendant prepared earnings projections for each of its manufacturing plants to be used for selling purposes); Radol v. Thomas, 556 F. Supp. 586, 588 (S.D. Ohio 1983) (defendant prepared asset valuations to be used as selling document to attract more favorable tender offers).

109. 646 F.2d 271 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

110. 646 F.2d at 292.

111. *See* 744 F.2d at 988 (*Flynn* court listing factors that courts must analyze in applying *Flynn* balancing test).

112. *See* Resource Exploration v. Yankee Oil and Gas, 566 F. Supp. 54, 59 (N.D. Ohio 1983) (although valuation of target company's potential oil and gas resources would be quite

soft information to a shareholder's decision and the degree of the soft information's reliability can vary. The *Flynn* factors discussed up to this point address the reliability aspect of soft information.[113] Courts should examine the previously discussed *Flynn* factors to determine the degree of the soft information's reliability.[114] If soft information is highly relevant but not reliable, then the soft information would have a greater potential for harm than aid to the shareholder. Courts, therefore, should not impose a duty to disclose highly relevant soft information that is not reliable. Conversely, if highly relevant soft information is reliable, a greater potential exists for aid to the shareholder than harm. The tender offeror, therefore, should have a duty to disclose highly relevant soft information that is reliable. As the degree of the relevance of soft information to the shareholders' decision diminishes, a correspondingly higher degree of reliability should be necessary to justify the imposition of a disclosure duty. Whenever the soft information is not relevant at all to the shareholders' decision, courts should hold that the soft information is not material as a matter of law no matter how reliable the information is, and decide the issue on summary judgment.

A more common and difficult problem arises, however, when the soft information is neither clearly reliable nor clearly unreliable. In such situations, the degree of relevance to the shareholders' decision does not address the overriding issue of whether disclosure of the soft information would result in greater potential harm or aid to the shareholder. For example, when the soft information is slightly unreliable, the fact that the information is highly relevant does not enable the court to infer that disclosure of the slightly unreliable information will have a greater potential for aiding than harming the shareholder. Therefore, when the soft information is neither clearly reliable nor clearly unreliable, courts should analyze the degree of relevance of the information only to determine whether the information has some relevance to the decision of the shareholder. If the information has some degree of relevance, courts should then analyze the other *Flynn* factors to determine whether the tender offeror has a duty to disclose the soft information.

The last two factors that the *Flynn* court found to be relevant to deciding whether soft information must be disclosed are the degree to which information is unique and the availability of more reliable sources.[115] Both of

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relevant to shareholders' decision of whether to tender their shares, such calculations are so complex and speculative that any such valuations necessarily would be somewhat unreliable).

113. *See supra* text accompanying notes 87-110 (discussing appropriate analysis of facts on which soft information is based, qualifications of individuals who prepared information, purpose for which individuals prepared information, and degree of subjectivity and bias reflected in preparation of information).

114. *Id.*

115. *See* 744 F.2d at 988 (*Flynn* court listing factors that courts must analyze in applying *Flynn* balancing test).

these factors address the issue of whether the target company shareholders have access to substantially the same information that the tender offeror possesses. Accordingly, the *Flynn* court probably would place great weight on these two factors when the tender offeror has sole control of the information at issue. Similarly, courts should take into account any barriers to access of information from alternative sources such as cost and time constraints when determining whether a tender offeror has a duty to disclose under the last two factors of the *Flynn* balancing test.

Had the *Flynn* court analyzed the Prochemco reports under the proposed balancing test the outcome of the decision may have been different. Although evidence introduced at trial demonstrated that the basis for the first Prochemco report was a report that a Prochemco employee previously had prepared,[116] the presence of public reports and documents, historical operating costs and asset values concerning National Alfalfa included as part of the Prochemco report provided a sufficient basis of information on which to calculate asset valuations. Moreover, Prochemco had considerable experience regarding acquisitions.[117] While the evidence did not demonstrate that the company possessed expertise in appraising the type of land involved in the National Alfalfa tender offer, Prochemco did have considerable experience in dealing with land acquisitions for the purpose of ranching.[118] Further, in conducting its investigation of National Alfalfa, Prochemco relied on persons knowledgeable in farm real estate, as well as the Soil Conservation Service.[119] Since Prochemco prepared the reports as documents to obtain financing for the acquisition of National Alfalfa,[120] Prochemco probably presented the calculations in the most favorable light possible. While this bias may have resulted in overly optimistic calculations, such an outcome is not fatal to the plaintiffs' claim. Disclosure of the basic assumptions on which Prochemco based the calculations would allow shareholders to determine for themselves whether the assumptions appear valid in light of present economic conditions. Another important consideration weighing in favor of requiring Bass Brothers to disclose the Prochemco asset valuations is that other, more reliable asset valuations concerning National Alfalfa were not available. On balance, the potential aid to shareholders that would result from Bass Brothers' disclosure of Prochemco's asset valuations would outweigh the potential harm from such disclosure. Moreover, Bass Brothers could minimize any potential for shareholder harm arising from undue reliance by providing a cautionary note disclaiming the reliability of the valuations.

The balancing test set forth by the Third Circuit in *Flynn* entails more than simply weighing the factors to determine whether the potential benefits

116. *Id.* at 989.
117. *Id.* at 988.
118. *Id.* at 988-89.
119. *Id.* at 989.
120. *Id.*

of disclosure to the shareholders outweigh any countervailing harm. The *Flynn* court held that courts must examine the potential harm to shareholders, such as undue reliance on the soft information, with the assumption that a disclaimer as to the reliability of the information will accompany the soft information.[121] Arguably, such a warning to shareholders could defuse substantially the potential for undue reliance by investors and tip the scales in favor of potential aid to the shareholders. Even when the soft information may be quite unreliable, disclosure of the information along with the underlying assumptions on which the preparer based the calculations and an appropriate cautionary note would be more beneficial to the shareholder than no disclosure at all. The *Flynn* court may have established a rule that stops just short of mandatory disclosure in all cases. Under the *Flynn* rule, the prudent attorney should advise tender offerors to disclose soft information with appropriate disclaimers to target company shareholders in all circumstances unless the soft information clearly lacks a reasonable basis in fact.

Williams Act proponents generally advanced three justifications for placing disclosure requirements on tender offerors. First, shareholders need to possess the same data as the tender offeror to enable shareholders to make an informed decision concerning the offer.[122] Second, the securities laws should impose disclosure requirements on tender offerors that are similar to those requirements applied in other transfer situations such as exchange offers and proxy contests.[123] Third, disclosure requirements will aid in protecting corporations from corporate raiders by enabling shareholders to make an informed decision regarding whether to tender their shares to tender offerors planning to sell all or some of the corporate assets.[124] The disclosure requirements supported and passed by the Williams Act proponents impose

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121. *See supra* note 80 and accompanying text (discussing *Flynn* court's requirement of disclaimer accompanying disclosure of soft information).

122. *See* Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 BUS. LAW 149, 150 (1966) (disclosures by tender offeror are necessary to enable public investors to stand on equal footing in assessing value of company's shares); *see also supra* note 7 (Congress enacted Williams Act to ensure that tender offerors would provide target company shareholders with sufficient information to make best possible investment decision).

123. *See* Cohen, *supra* note 122, at 152 (cash tender offerors should be under same duty of disclosure as exchange offerors). Mr. Cohen, the former Chairman of the SEC, reasoned that a shareholder's decision not to tender shares in response to a tender offer is quite similar to a shareholder's decision to accept an exchange offer in that both decisions amount to an investment in a new company. *Id.; see supra* note 9 (discussion of Senator Williams noting need to fill gap in securities laws by subjecting tender offerors to same disclosure requirements that are imposed on individuals seeking control of corporations through either exchange offers or proxy contests).

124. *See* 111 *Cong. Rec.* 8257-58 (Oct. 22, 1965) (Congress should protect corporations from corporate raiders). Commenting on an earlier version of the Williams Act, Senator Williams stated that white-collar pirates must be prevented from seizing control of "proud old companies," selling or trading away the best assets, and dividing the proceeds among themselves. *Id.* The Williams Act as enacted, however, disavowed any desire to discourage tender offers. *See supra* note 7 (discussion of legislative history concerning Williams Act).

an affirmative duty on the tender offeror to disclose information about the identity and background of the purchaser, the tender offer transaction itself, and any intended merger activity or change in the business structure.[125] By extending tender offer disclosure requirements to include soft information regarding the target company, the *Flynn* court is ignoring a basic premise that underlies other disclosure requirements present in the federal securities laws.[126] Generally, the securities laws impose a duty to disclose information about a corporation on corporate insiders[127] or persons who owe some fiduciary duty to the corporation.[128] In tender offer situations, the initial tender offeror incurs significant costs to locate and evaluate potential target corporations.[129] Under the *Flynn* rule the tender offeror having no relationship with the target company is required to disclose to the shareholders, and for practical purposes to potential competing tender offerors, a significant amount of information that the tender offeror has learned through his own efforts and expertise concerning the worth of the target company. The *Flynn* court's soft information disclosure rule will result in the loss of at least a portion of the reward that an informational advantage will give the tender offeror. By requiring the tender offeror to disclose material soft information such as asset valuations or projected earnings, courts may place the target company shareholders in a position to force the tender offeror to increase the offering price or risk the success of the takeover bid. Moreover, disclosure requirements may result in lower rewards to the tender offeror by enabling

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125. *See supra* note 8 and accompanying text (discussing tender offer disclosure requirements).

126. *See infra* notes 127-28 and accompanying text (discussion of cases holding that duty to disclose under securities laws generally arises out of some special relationship between person possessing information and company).

127. *See* S.E.C. v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968) (corporate insiders or any person in possession of material inside information must either disclose such information to investing public or abstain from trading while information remains undisclosed), *cert. denied,* 394 U.S. 976 (1969).

128. *See In re* Cady, Roberts & Co., 40 S.E.C. 907, 912 (1961). In *In re Cady, Roberts, & Co.,* the SEC stated that the obligation to disclose material, nonpublic information or refrain from trading rests on two elements. *Id.* The first element that courts must consider to establish a duty to disclose is the existence of a relationship between the corporation and a third party that results in giving the third party access to information intended to be available only for a corporate purpose. *Id.* The second element that courts must consider to establish a duty to disclose is the inherent unfairness of allowing the third party to take advantage of such inside information when the other party involved in the transaction does not have access to such information. *Id.*

129. *See* Easterbrook & Fischel, *Auctions and Sunk Costs in Tender Offers,* 35 STAN. L. REV. 1, 6 (1982) [hereinafter cited as *Sunk Costs in Tender Offers].* Along with the costs associated with investment banking fees, tender offerors invest their own time searching for potential target companies. *Id.* The search time invested by tender offerors results in substantial lost opportunity costs of managers' time because the search process generally covers many firms in addition to the firm eventually selected for a takeover bid. *Id.* Tender offerors also incur costs to assemble and hold capital ready for a possible acquisition. *Id.* Finally, tender offerors incur costs in the form of actual and potential losses arising from overbids which result from incomplete access to information. *Id.*

subsequent bidders, relying on the original tender offeror's information, to extend competing tender offers.[130] In order to receive the rewards of his search, the original tender offeror will be forced to outbid the competing tender offeror.[131] Furthermore, by avoiding the costs of procuring such information, the competing tender offeror may be able to outbid the original tender offeror, thus denying the original tender offeror any rewards from his work.[132] The demands for higher offering prices by target company shareholders and the increase in competing tender offers that will result from the tender offeror's disclosure of soft information will increase the costs for transacting takeover bids and thus will decrease the number of takeover bids.[133]

Professors Easterbrook and Fischel have argued persuasively that a decrease in tender offer activity will result in the entrenchment of inefficient management to the detriment of current shareholders.[134] The basic premise underlying their argument is that the securities market is an efficient capital market.[135] In an efficient capital market, all available information about a

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130. *See* Easterbrook & Fischel, *Takeover Bids, Defensive Tactics, and Shareholders' Welfare,* 36 Bus. Law 1733, 1739 (1981) [hereinafter cited as *Takeover Bids].* Competing tender offerors can lower their search costs by relying on information disclosed by the original tender offeror and by confining their investigations to identified target companies. *Id.* By reducing their search costs, competing tender offerors can outbid the original tender offeror and still earn a profit through the tender offer. *See* Easterbrook & Fischel, *The Proper Role of A Target's Management Responding to a Tender Offer,* 94 Harv. L. Rev. 1161, 1178-79 (1981) [hereinafter cited as *The Proper Role of Target's Management].* For example, if the original tender offeror incurred search costs of $10 per share and learned that outsiders could better manage corporation *X* so that the shares would be valued at $90 each, the original tender offeror could earn a profit on any offering price below $80 per share. *Id.* at 1178. By avoiding the $10 search costs incurred by the original tender offeror, however, the competing tender offeror could earn a profit on any offering price below $90 per share. *Id.* at 1178-79.

131. *See supra* note 130 (subsequent bidders can rely on information disclosed by original tender offeror to extend competing tender offer).

132. *See supra* note 130 (by avoiding search costs, competing tender offerors may be able to outbid original tender offerors).

133. *See* Easterbrook & Fischel, *Sunk Costs in Tender Offers, supra* note 129, at 7 (inability of original tender offerors to appropriate full value of information will result in reduction of number of tender offers).

134. *See infra* notes 135-43 and accompanying text (tender offer activity results in increased shareholder wealth). *See generally* Easterbrook & Fischel, *The Proper Role of Target's Management, supra* note 130 (arguing that target company strategies adopted to resist tender offers result in reduction in shareholders' wealth); Easterbrook & Fischel, *Takeover Bids, supra* note 130 (arguing that target company management should assume passive role in responding to tender offers and let shareholders decide whether to tender target company shares); Easterbrook & Fischel, *Sunk Costs in Tender Offers, supra* note 129 (arguing that target company managers should not solicit competing tender offer bids because such auctioneering results in reduction in shareholders' wealth). *But see* R. Reich, The Next American Frontier 146-51 (1983) (arguing that conglomerate mergers do not increase efficiency of America's capital market, serve useful industrial purpose, or benefit employees).

135. *See* Easterbrook & Fischel, *The Proper Role of Target's Management, supra* note 130, at 1165-68 & *infra* notes 136-37 and accompanying text (discussing efficient capital market theory). *See generally* Gilson & Kraakman, *The Mechanisms of Market Efficiency,* 70 Va. L. Rev. 549 (1984) (explanation of elements that lead to and limit market efficiency).

company's securities immediatey is reflected in the price of the securities.[136] Therefore, when a company is ineffectively or inefficiently managed, the market will accurately and promptly reflect this fact by setting the price of the security below the security's potential value under better management.[137] According to Easterbrook and Fischel, tender offerors monitor the activities of corporate managers and make tender offer bids for those corporations whose stock prices are low because of inferior management.[138] By replacing the inferior management team with a more competent team, the actual and anticipated improvements in management performance will result in an increase in the price of the security.[139] The result of a completed tender offer is that the shareholders of the target corporation obtain a profit because of the tender offeror's premium bid, and the tender offeror earns or expects to earn an ordinary profit on his investment.[140] Moreover, the tender offerors' monitoring process benefits all shareholders by motivating managers to reduce management costs and maximize share value, thus protecting man-

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136. *See* Easterbrook & Fischel, *The Proper Role of Target's Management, supra* note 130, at 1165. Under the efficient capital market theory the price of stock and the stock's value will be almost identical in large markets for shares. *Id.* Since a large number of sophisticated investors exist in the market place, investors would buy underpriced shares and sell overpriced shares so quickly that investors could not make systematic gains by finding undervalued shares. *Id.* As investors bought and sold shares on the basis of their knowledge, this arbitrage process would drive the stock price up or down to reflect the correct current value of the corporation. *Id.* Once information about a firm reached the market, prices would adjust immediately because no rational trader would sell shares at a lower price than the trader could obtain after the news became widespread. *Id.* This search for new information and continuous trading ensures that the market prices reflect all available information. *Id.*

137. *See supra* note 136 (discussing efficient capital market theory).

138. *See* Easterbrook & Fischel, *The Proper Role of Target's Management, supra* note 130, at 1173. Tender offerors monitor the performance of managerial teams by comparing the corporation's potential value with the corporation's current value as reflected in the price of the security. *Id.* At some point the variance between the corporation's potential value and its value as reflected by the market price become so great that a tender offeror can acquire the firm at a premium above market price and still profit by improving the management. *Id.* Easterbrook and Fischel describe the source of the variance between a corporation's potential value and stock market value as agency costs. *Id.* at 1170. Agency costs are the consequence of separation of ownership and control in large publicly owned corporations, where much of the benefit of each manager's performance inures to shareholders, bondholders, or other managers. *Id.* This sharing of benefits may cause some managers to avoid responsibilities, consume perquisites, or otherwise further their own interests at the expense of the company. *Id.* Easterbrook and Fischel state that some of the most important agency costs are incurred when managers fail to take all cost-justified steps to recruit and train employees for their jobs. *Id.*

139. *See* Easterbrook & Fischel, *Takeover Bids, supra* note 130, at 1739. Studies show that prices of target company securities generally decline relative to the market for approximately 40 months prior to the tender offer. *Id.* The tender offers generally result in restoring the prices of the securities to the levels that existed prior to the 40 month decline. *Id.* at 1739-40. *See generally* BENSTON, CONGLOMERATE MERGERS: CAUSES, CONSEQUENCES, AND REMEDIES (1980); WESTON, INDUSTRIAL CONCENTRATION, MERGERS, AND GROWTH, II MERGERS AND ECONOMIC EFFICIENCY (1980).

140. Easterbrook & Fischel, *The Proper Role of Target's Management, supra* note 130, at 1173-74.

agement from the threat of a tender offer.[141] Easterbrook and Fischel argue that the inability of tender offerors to recover the full value of their soft information will result in a reduction in monitoring activity by tender offerors.[142] Such a reduction in monitoring activity, according to Easterbrook and Fischel, will result in the entrenchment of inefficient management to the detriment of all shareholders.[143]

The *Flynn* court's decision to impose a duty upon tender offerors to disclose soft information ensures that shareholders of target companies will have the same material information as tender offerors.[144] Access to such soft information can be extremely important to the shareholders' decision whether to tender their shares. The *Flynn* court's balancing test, however, fails to provide tender offerors with clear guidance as to when a duty to disclose soft information arises.[145] Moreover, the ultimate result of requiring tender offerors to disclose soft information may be a reduction in the number of acquisitions and the amount of monitoring by tender offerors.[146] The decrease in monitoring could undermine the efficiency of our capitalist system by allowing the entrenchment of less efficient management, ultimately leading to lower returns on investment, and a reduction in shareholders' wealth.[147]

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141. *Id.* at 1174.

142. *See* Easterbrook & Fischel, *Sunk Costs In Tender Offers, supra* note 129, at 2-7 (arguing that target company managers should not solicit competing tender offer bids because such auctioneering reduces tender offeror monitoring and ultimately shareholders' wealth).

143. *Id.* at 2 (decrease in tender offeror monitoring activity results in higher agency costs and thus in lower returns on shareholders' investments).

144. *See supra* text accompanying note 79 (tender offerors must disclose soft information whenever potential benefits of disclosure to shareholders outweigh potential harm to shareholders).

145. *See supra* text accompanying note 86 (Third Circuit in *Flynn* failed to give meaningful guidance concerning the relative significance of various factors).

146. *See supra* notes 129-33 and accompanying text (requiring tender offeror to disclose soft information will lower rewards to tender offeror and result in reduction of tender offeror monitoring activity).

147. *See supra* notes 134-43 and accompanying text (reduction in tender offeror monitoring of corporate managers ultimately will lead to lower returns on investment and decrease in shareholders' wealth).