THE SHAREHOLDER SERVICE

OPTIMIZER

HELPING PUBLIC COMPANIES—AND THEIR SUPPLIERS—DELIVER BETTER AND MORE COST-EFFECTIVE PROGRAMS

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IN THIS ISSUE:

OUR TOP TAKEAWAYS FROM THE SPRING ANNUAL MEETING SEASON

The biggest takeaway, by far, is how much smooth sailing those proxy access proposals with 3% ownership and 3-year holding periods encountered… pretty much as we predicted. By mid-year, 67 companies adopted such provisions, with more to come, for sure. New York City Comptroller Scott Stringer, who submitted 75 proposals on their own – reported that nearly two out of three of his proposals achieved majority support so far.

We counted a half-dozen other companies– like **Chipotle** and **Community Health Systems** (both with 49.8% in favor) **Exxon** (49.4%), **Alexion** (49.2%), **Peabody Energy** (48.7%) and **Cabot Oil** (45.3%) where support was so close to 50% that companies will almost have to adopt something, or face retaliatory actions next year. And just as we were going to press, **Whole Foods** – which tried to float a counter-proposal on proxy access with much higher thresholds than gadfly **Jim McRitchie's** 3&3 proposal – unilaterally amended its bylaws to adopt a 3&3 proposal, and asked McRitchie to withdraw. We also saw results at a company that had both its own 5&5 proposal and a proponent's 3&3 on the same proxy cards, where the final results were mirror images: Company proposal 23% For, 77% Against; Shareholder proposal 77% For, 23% Against.

As we said in our last issue, this ship has sailed – and, much like Majority Voting proposals, will be voluntarily adopted by a large number of companies simply as a "best practice" – since a shareholder vote is not even needed - unless a company digs in its heels, or tries to float a proposal with "5 and 5" provisions vs. the 3&3 the SEC proposed way back when….The higher hurdles just ain't gonna fly no mo'.

A few other things you should know about proxy access:

First, it really is the stupidest thing ever…that would only be invoked against the stupidest of companies, should they foolishly try to totally stiff-arm a delegation of investors with even 1% in hand…at which time it would be invoked with a vengeance – and the offending company would almost certainly loose one director – or more.

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Second, trying to beat investors to the polling place, and float one's own 5 & 5 proposal, is stupider yet… Your editor had dinner with a client the night before his shareholder meeting, who said he was considering such a move for next year. *"What percentage of your outstanding shares are held by your top two investors?" we asked him. "About 2 ½ %" he said. "And how many would get you to 5%?" "Oh…I see" he said… "One more would get me to 3% and maybe only three or four more would get me to 5%…So yes, why in the world would I tick off my top five or six holders – and probably embarrass my directors too." Case closed.*

The second big development so far this season was the outcome of the DuPont-Trian proxy fight, where "opiners" have been all over the lot, but where there are several lessons to learn, we think:

First off, there seems to be little doubt that 'retail investors' were major factors in the outcomes here – as they are in almost every really "close election" – and who almost always vote overwhelmingly for the management slate. And, for sure, the biggest-money investors among them were DuPont officers, directors, employees, retirees, and their heirs, who have many economic, social and sentimental reasons to vote for the home team – which has produced mighty sweet returns for them over the years – and so they did.

Most surprising, however, with Train's Peltz coming up only 77 million votes short of a win, was the extent to which only a single one of DuPont's top-three investors could have swung the vote decidedly the other way. While a very large number of DuPont's institutional investors were willing to "roll the dice" on adding a few new directors – to "stir up the pot" – the basic conservatism of three of DuPont's biggest investors, **Vanguard, State Street** and **BlackRock**, and their willingness to trust, rather than second-guess the management team is worth noting…and is basically comforting to incumbent boards and management teams. If ever a case needs to be made for engaging pro-actively, and often, with one's largest investors, this is IT.

But the final takeaway also seems pretty clear: The incumbent directors – and most especially the Chairman & CEO and the Nominating Committee members – are decidedly "on probation" now - and won't be allowed to survive a failure to turn the recently receding economic tides mighty fast. We'd bet a quick $100 that DuPont will add at least one, and maybe two directors from the Trian slate before too long, come what may…

Another meeting we had on our radar screen was BofA's – where the board overrode a binding bylaw resolution it had honored initially – to separate the Chairman and CEO roles: They awarded CEO **Brian Moynihan** the Chairman's title almost as if it was a boy-scout medal for niceness and hard work - which he certainly exhibits, under loads of pressure - but without much advance discussion with its biggest investors. Then, yielding to screams from the activist crowd, they agreed – 48 hours before the meeting was to convene – to put it to a shareholder vote… "No later than next year's annual meeting." Then, they laid-low on disclosing the actual votes. Moynihan garnered a very robust 93.9% of the votes cast in favor of his election to the board. And most of the other nominees did about the same. But the Chairman of the Corporate Governance Committee got just 66.6% in favor, and the other three Governance Committee members polled just over 71% in favor…putting them all in the "danger zone" where future institutional investor votes are concerned.

There's no doubt that these days, the Governance/Nominating Committee seats are the hottest spots to be in on a board – and that institutional investors will apply the heat big time if they feel it's warranted.

Director Elections were mostly uneventful, as Broadridge's mid-year Proxy Pulse summary indicated clearly: At large-cap companies, average shareholder support for directors was unchanged at 97%, compared to 92% at microcap companies — which experienced a 2 percentage point decrease from the same period last year. But oops…458 directors (just under 4% of directors up for election) failed to receive at least 70% shareholder support and 126 directors at 60 different companies failed to achieve majority shareholder support – about the same as last year.

Say-On-Pay votes also encountered mostly smooth sailing to date: Average support levels were unchanged at 90% so far this season, according to the Broadridge report, although approximately 8% of pay plans failed to surpass the 70% shareholder support level and 3% of say-on-pay votes failed to achieve majority approval.

Another thing we can say for sure, companies spent a lot of money on their "outreach" and communications efforts this year, to assure their Say-On-Pay proposals would sail by – and stay well above the 70% "danger zone" - and, ideally, above the 90% level. One company we heard about spent over $1 million on a "proxy advisor/consultant" – to assure they'd beat the 90% mark – and we're sure there were a lot more such cases.

A few years ago, we opined that "80% is the new 50%." Today, "90% is the new 80%" - at least where director elections and say-on-pay ratifications are concerned.

THE BEST, THE WORST…AND THE WEIRDEST ANNUAL MEETING DEVELOPMENTS WE SAW THIS SPRING

Let's lead off on a high note, with some of the best meetings your editor attended – and where there were some nice innovations worth passing along:

Verizon, Inc. takes first prize in our book, for the wonderfully new and efficient way they handled the "shareholder question period." *Wonderfully respectful,* we thought, of the attendees' valuable time and attention: They set up signs around the edges of the room for five or six topics that investors would likely be interested in – like new products, consumer questions, HR & IR stations – and the Chairman stepped down from the podium to take questions directly, from any and all comers, at the front of the room. A nice hot breakfast for shareholders also opened up in an adjoining area – which almost everyone much preferred vs. having to listen to the usual and often argumentative array of questions that are rarely high on their own questions list. But every attendee had every opportunity to be heard, or merely to say, "Thanks, and nice job" - as many did.

UnitedHealth Group - which had four or five institutional-investor reps in attendance - was a very close first-runner-up - for the way the chair of the Governance and Nominating Committee answered an activist investor's question about Board "refreshment efforts." (It's a mighty rare thing for institutional investors to attend a shareholder meeting these days, much less to constitute a majority of the audience – unless they are very unhappy about something, which these definitely were *not*. We thought the turnout was very much due to the downtown Boston location, which was a lot more convenient place for the likes of **Fidelity, Vanguard** and **Walden Asset Management** to check out the management team up close and personal than is Minnetonka, MN.) But in any event, we ourselves were astonished – which doesn't happen very often at shareholder meetings – and totally impressed – by the clarity, cogency and detail of the Governance Committee Chair's seemingly impromptu response: Clearly (and we really don't think she was tipped off to the question) a lot of effort WAS being devoted to this subject at UnitedHealth. And wow, did she ace it! Turns out that among other things, UnitedHealth actually has a panel of outside advisors from a wide number of disciplines, who try to identify important business, technological, scientific, 'social' and other strategic issues – and to look for director candidates that will keep them ahead of the curve. "Does any other company have a program like this?" the investor asked… "Not to our knowledge" they said… But stay tuned for more companies to tune into this, we feel sure. And please remember that you read both our top two tidbits here FIRST, if, as we suspect, you did…

Here are a few other nifty things we saw in proxy documents this season:

BEST EXECUTIVE COMPENSATION DISCLOSURE AND DISCUSSION: Exxon Mobil, hands down. They produced a 12 page glossy "Overview" that they asked shareholders to review "Before you cast your vote on Management Resolution Item 3 – Advisory Vote to Approve Executive Compensation"…along with the "more detailed information" in the CD&A section, comp-tables and narrative in the proxy statement. Colored bar-charts and graphs made their stand-out performance vs. their top four peers – and vs. the petroleum industry overall – quick and easy to appreciate… like Safety Performance, the lead-off item, where Exxon beats its industry peers consistently, and by a wide margin, and which they see as a KEY performance metric…and yet again on item 2 – Return on Average Capital Employed – and Free Cash Flow (a strong number-2) – and your editor's favorite metric, Total Cash Distribution Yield where the *"Dividends per share [were] up 10 percent per year over the past ten years" and Exxon "Distributed 46 cents of every dollar generated from operating cash flow and asset sales…from 2010 to 2014."* Their charts and plain English explanations of arcane and usually indecipherable executive comp-speak – like Realized and Unrealized Pay, Equity Incentive Programs, Vesting Periods, and The Exxon Mobil Program vs, Formula-Based Pay are all must reviewing – both for content and for presentation.

BEST – AND CHEAPEST MEETING-EMBARRASMENT PROTECTION: Exxon Mobil again, for its short section in the proxy statement on People with Disabilities: *"We can provide reasonable assistance to help you participate in the meeting if you tell us about your disability and your plans to attend. Please call or write the Secretary at least two weeks before the meeting at the telephone number, address or fax number listed under Contact Information on page 3"* Cost of time, ink and paper? Near zero. *Value,* vs. having someone ask about this from the floor, as at least two people did at meetings this year…making your company look clueless – and cold hearted? Priceless!

BEST VOTE-NOW MESSAGE: Lockheed Martin, which placed a very eye-catching, full-color photo of their Chairman & CEO, **Marillyn A. Hewson** on page-one of the Notice of Meeting, with a message that resonated with us; The first such message that ever did, thanks to the personal touch – and maybe because Lockheed has been one of our most rewarding investments: *"As a stockholder, your vote is important to our continued success. Please vote your shares today"* – which we took special pains to do.

ANOTHER GREAT USE OF THE "PERSONAL TOUCH" in that dry old proxy statement: United Parcel Service had neat little photos of each and every Committee Chairperson - using the UPS "shield" to frame them attractively - at the head of each Committee description in the proxy statement. It made you want to look, and read on. Best of all, it made you feel that *"Real people are actually in charge here!"*

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BEST USE OF TECHNOLOGY TO GET ONE'S POINTS ACROSS: Trian, in its fight to elect four directors at DuPont, for posting videotaped interviews with each candidate on www.DuPontCanBeGreat.com What a way to showcase the candidates, their very impressive qualifications, their compellingly stated reasons for signing up to run – and their ideas as to how DuPont can become great(er). None won, for reasons we try to decode above…but what a grand run they made. And if DuPont's stock-price, which fell when the Trian results were announced, does not become a lot greater over the next few months, look for them to come back again – with guns blazing, we bet…

NOW FOR THE WORST MEETING OUTCOME OF THE SEASON:

First prize surely goes to T. Rowe Price, who filed to exercise their appraisal rights in the course of the **Dell** buyout of shareholders – and who, with some 30 million shares in various funds was Dell's third largest shareholder - and became the lead plaintiff in the appraisal case. But Oh! Woe! Despite their statements that they had voted NO against the going-private deal, it turned out that their voting agent, **ISS** – who rightly needs to share the first-prize honors here for 'worst' - voted YES, when it changed its own recommendation. So T. Rowe, and its attorneys, got booted from the case, since one must vote no (or in some states simply not voting is OK) in order to exercise appraisal rights – or to benefit from any added payments that may be awarded to dissenters. Dell moved quickly in Delaware Chancery Court to disqualify them from the class of claimants altogether. We are betting that the court will cut them no slack - even though the yes vote was a mistake – and not made by them. Ultimately, if there IS a higher appraisal, and an award, T. Rowe Price does have another remedy, of course - to sue ISS for the dough.

FINALLY, THE WEIRDEST EVENTS WE SAW THIS SEASON, THANKS TO OUR TEAM OF INSPECTORS OF ELECTION, WHO SERVED AT 500+ MEETINGS:

Remember our 1st Quarter warnings about so-called "Floor Proposals"? Here's a little horror story straight from the proxy-war front, to get your attention: One of our Inspector of Election clients, a small and 'financially troubled' bank, got four proposals from a shareholder who did not meet the deadline in the company's Notice Provision, so they did not appear in the proxy statement. But – weird fact 1 – the company's bylaws also provided that with 30 – 60 day's 'notice' – shareholders could present proposals *from the floor.* But – weird fact 2 – the wannabe proponent did not provide proper proof that he met the required share ownership criteria. Nonetheless – weird fact 3 – somewhere along the line, the bank said they'd let the shareholder introduce his proposals at the meeting anyway. Our Inspector reminded them that unless there was an actual tabulation of the votes that ran to the proxy committee on "all other business" (which there was not) we would have no number to enter on behalf of street-name voters. But – weird fact 4 – the client's outside lawyer insisted that in their state of incorporation, and as also stated in the proxy statement, the company's proxy committee was entitled to vote as they wished on "all other business." Since it seemed to the Inspector that the company votes would prevail under any scenarios – and since the company could still disallow votes for the proposals due to the proof-of-ownership issue – which, clearly, the proponent failed to meet – there was no need for concern just yet. But then – weird and troubling fact 5 – the proponent showed up with over a dozen supporters, all of them looking to vote. But no big surprise to the Inspector, all but a small handful of the wannabe voters held their shares in street name…and had no Legal Proxies in hand. So, even if one counted only the votes of people who voted in the room on this "other business" - as the company considered doing so as not to rub their defeat in the noses of the dissidents - the company prevailed by an overwhelming majority. But as we've warned before – we HAVE seen instance where dissidents had enough votes to carry the day on proposals raised "from the floor." *So readers…please note this important takeaway too: It does not cost a single penny extra to tabulate the street votes on "all other business to come before the meeting." And while yes, increasingly, many institutional investors will NOT check the box to give management a 'blank check' here, most times management WILL prevail on proposals that have not been submitted to ALL shareholders.*

And how's this for another hairy-scary meeting moment: Shortly before their meeting was set to convene, a well-known company we'll allow to remain anonymous – and which had a shareholder-sponsored proposal on the agenda that they did NOT want to see pass – had 12,817,985 shares FOR the proposal and 12,643,343 shares against. And OH! More woe! The Chairman (whose minions obviously did not read our 1st Quarter tips on being sure that all the key officer and director votes got voted in time) suddenly realized that he had not voted his own shares…some 200,000+ shares that were held at a broker…And, oops again, naturally, he had no Legal Proxy in hand that would have enabled him to vote his shares then and there. But a happy ending here too, thanks to a smart and savvy Inspector of Election, who was willing to allow time for him to get his broker on the phone, and get the required paperwork issued. And thanks to some very fast scrambling by the **Broadridge** staff too – the final count ended up as 12,817,985 For and 12,890,145 Against.

Three valuable 'practice points' to note here: First, we believe that it is always appropriate for an Inspector of Election to allow a "reasonable amount" of time for voters who ask to make last-minute vote changes, and/or to assure they have a "fair and reasonable chance" to get their votes into the final tally as desired. We had several such instances this season – many of which involved tardy institutional voters, with big and determinative positions – including two that involved last minute changes of mind that changed the outcome. Second, it's always smart to keep close tabs on large 'un-voted positions' where the votes may have gotten "lost in the shuffle" thanks to the bad habit so many big institutions have of waiting 'til the very last moment to vote. And third – do review our article on "Getting Out the Often Decisive Officer and Director Votes."

LASTLY, JUST SO YOU CAN SAY, 'THANK GOD IT WASN'T ON MY WATCH' - AN EMBARRASSING REPORTING FLUB, by Intel: According to a press release from **The Holy Land Principles, Inc.**, correcting their initial press release about their shareholder proposal, *"A top Intel official twice emphasized to us that we would not be able to resubmit our Resolution next year because we had obtained only 2.6% of the vote. But our expert attorney refuted that, declaring that 'I have just checked, and Intel's numbers, as reported to the SEC show that the Holy Land Principles received just over 3.2% of the vote (as calculated for resubmission purposes, disregarding abstentions.'")* Mistakes happen, as we all know, but this was a surprising 'rookie-like error' - on a fairly sensitive matter - by the usually meticulous Intel - which gave proponent **Fr. Sean McManus** an extra turn at bat in press-release-land.

NEW ACTIONS EXPECTED IN THE DRIVE FOR "UNIVERSAL BALLOTS"

"SEC Chief Tilts Again to Activists" the WSJ headline screamed, on page-1 of the June 26 Money & Investing section, reporting on Chairman Mary Jo Wight's remarks at the Society of Corporate Secretaries conference where she endorsed the universal ballot idea, and urged companies to adopt one voluntarily in a proxy fight. It is perfectly permissible to do so now if both sides agree – but she also promised to study rule-making on the subject.

"This is not "tilt to activists at all" say we…Think again *WSJ* – and you too, M-J: At first blush, a "universal ballot" that would give all investors in a proxy contest the ability to choose among all the candidates, and vote on all the other issues up for a vote, *seems* like the best and fairest way to do things.

It makes it less likely, for example, that shareholders will accidentally cast votes for all the management candidates – and all the opposition candidates too – or for more candidates in total than there are seats at stake – thereby voiding all of their votes on directors.

It also allows voters to vote on all the items up for a vote – since, very often, the opposition takes no position on, and does not solicit or record votes on things like the ratification of auditors, or other items of business that are not directly related to "the fight".

Smart Inspectors of Election also urge the use of a "universal" or "combined ballot" at the meeting site when there is a contest…although they are not in control here: Both sides need to agree – and they usually do. A single consolidated ballot is quicker and easier to pass out to the audience – and it does provide the ability to remind voters to "Be Sure to Vote for No More than X Directors" …and it should also, out of simple fairness to all investors, have a place for attendees to vote on all matters before the meeting. Also worth noting, we have never seen the contestants disagree about clearly identifying and separating the management nominees from the opposition nominees, which is a help we find, in helping people make up their minds if they haven't already done so… and is perfectly "fair" to all concerned.

But this is not to say that a 'universal ballot" is needed – much less is a cure-all for shareholder confusion – or pure carelessness. One can have the same reminder as to the maximum number of directors that can be voted upon on the two competing ballots – and really…why should dissidents NOT offer voters the opportunity to vote on all other items…if they want to, and as they really should?

The really important thing to note here is that in a proxy fight, having separate cards, whether to avoid confusion (?) and to say "Vote the green card…or the gold card…or the white card NOW! Is actually a GOOD thing in a fight – where both sides want to make their own best case – and NOT to inadvertently help to drum up opposition votes, It also allows both sides to "hide their votes" as long as possible…just as one does in a card game, where none of the parties want to tip their real hand or to give up even the slightest tactical advantage. This, by the way, is also why NO SERIOUS PROXY COMBATANT WILL *EVER* USE THE COMPANY'S OWN PROXY CARD TO LAUNCH A PROXY FIGHT…UNLESS THEY ARE SERIOUSLY MIS-ADVISED!

There is another valuable take-away here regarding fight-strategy that even the most sophisticated proxy advisors often fail to note: In a proxy fight – where, say, there are 13 candidates for 10 seats – the *really smart* thing is for the opposition to list its own three candidates, then the seven management directors they least dislike – leaving three management directors out entirely…and effectively running a "Vote No" campaign against the "weakest" or most vulnerable three. Remember; in a proxy contest, it's the candidates that get the highest vote totals that get elected…so this is a way for dissidents to target and thus to minimize the number of votes that are cast for three "bad guys." And this creates a bigger and better opportunity for the three dissident "good guys" to win, vs. what otherwise may be a near dead-heat where the two opposing *slates* are concerned, where individual directors tend to be invisible in or indistinguishable from 'the herd.'

So Mary Jo, we hate to mess with you – and your friends (?) at the Council of Institutional Investors…but you are all seriously misguided, misinformed – and actually, your "universal ballot" is not a good tool for activist investors to use at all…except at the meeting site, and solely for the sake of meeting logistics…If they want to WIN that is.

MESSIN' WITH MARY JO: SHE – AND THE SEC AS A WHOLE – ARE FACING A FIRESTORM OF CRITICISM

"I am disappointed that you have not been the strong leader that many had hoped for and that you promised to be" Senator Elizabeth Warren, D-MA and a member of the Senate Banking Commission wrote in early June - in a stinging 13-page letter to SEC Chairman Mary Jo White: "I hope you will step up to the job for which you were confirmed."

Among the shortcomings Warren cited; the long delay in proposing new executive-comp disclosure rules – and a rule, mandated by Dodd-Frank and first proposed in 2013 to disclose the gap between CEO pay and that of the median pay; on the SEC's failures to require more admissions of guilt in settlement actions; for declining to use penalties that are at the SEC's disposal – like revoking an offender's "well-known seasoned issuer" status – and for being too lenient with waivers of penalties on repeat offenders. "These waivers apparently reflect the commission's view that these banks deserve to continue to enjoy special privileges under the securities law despite the deep breaches of trust and evidence mismanagement displayed in these cases" she wrote.

Meanwhile, the SEC has been scrambling to defend its use of in-house vs. federal judges – which has drawn public criticism from a large number of former SEC officials – like William McLucas, a former director of the Division of Enforcement and **Matthew Martens**, formerly the SEC's chief litigation counsel, in a *WSJ* Op-Ed article – and **George Cannelos**, who stepped down last year as co-director of the Enforcement Division, and who recently called on the SEC to "end the very grave appearance of injustice" when the SEC commissioners first decide to approve enforcement actions, then decide on appeals against the judgments of their in-house judges. At least seven cases are currently at risk, after a federal judge in Atlanta ruled that the in-house tribunals were "likely unconstitutional" because the judges should be "officials" – appointed by the commissioners themselves – rather than being "employees" hired by lower level staffers.

And Ouch! The SEC's CAT – or Consolidated Audit Trail project – supposedly the answer to preventing more "Flash Crashes" – seems to be totally out of control – exactly as we'd predicted it would end up when it was first announced, in 2010. The ten industry orgs that were supposed to manage the project – obviously a bad way to manage *any* large project – have still not chosen anyone to organize, build or run it. There's no consensus on what it will cost to do so – with estimates that vary from $150 - $500 million for just the first five years…or on how to pay for it…or on when it might be up and running…although the smart money says way more than five years. And now there are serious doubts that a 'consolidated audit trail" – while it might help to do a postmortem, and maybe assist in cleaning up some of the mess - would do a single thing to prevent future flash-crashes…or help to spot rogue traders, as also promised, back when. (The CAT, it should be noted, was first let out of the bag and unleashed on **Mary Shapiro**'s watch…but small consolation for M-J we're sure.)

All of the flak seems to have set off a sudden flurry of activity at the SEC (see our Regulatory Notes and Comments section below)…which MAY prove to be a "good thing" for Mary Jo, and for the markets, so here's hopin'. And hey! In fairness to Mary Jo, let's note that this is the most politicized set of SEC commissioners in living memory – who are beset and beleaguered by the most politicized bunch of so-called "legislators" we've ever seen, to boot.

QUOTE OF THE QUARTER

"Executive officers should not be permitted to retain incentive based compensation that they should not have received in the first instance"

SEC Chairman Mary Jo White's statement before the vote on proposed claw-back rules, as reported in the July 22 Wall Street Journal

ON THE SUPPLIER SCENE:

More consolidation in the Transfer Agency business as AST buys First American Stock Transfer, Inc. , a Phoenix AZ company that specializes in small and micro-cap companies, and in shareholder-paid stock transfer services.

More signs of the growing popularity - and acceptability of corporate activism - Cadwalader, Wickersham & Taft – the oldest and whitest of the white-shoe law firms, founded in 1792 – has hired Richard Brand away from Kirkland & Ellis to focus on working for activists as well as on the defense side of deals. A mere lad of 35, who's become famous as an advisor to the likes of **Pershing Square** and **Sachem Capital Management**, but who has worked both on offense and defense, Brand adds a nice brand name – and a nice brash panache to the old-time firm…. with lots of new money to come their way, we bet.

Wonder why so many people tend to think of law firms, and lawyers, as heedless, heartless money-grubbers? *"Major law firms, which had record revenues of more than $100 billion last year are donating only a tenth of 1 per-cent of their proceeds to legal aid to low income people." This according to The American Lawyer,* as quoted in the June 30 **nytimes.com/dealbook** column. This prompts another reminder, dear readers, to check out the article on our website on "Putting Your Legal Work Out to Bid"- where, among other things, the author's company - and cheers for them - award extra points for a firm's pro-bono work.

WATCHING THE WEB

What's the biggest threat to corporate data security, and to exposing networks to spy-ware, mal-ware and thefts of highly confidential info? The CEO, according to a recent Verizon report on data breaches issued in April. Senior execs top the list of employee categories that are targeted by "spear-pfishing" and other "social engineering attacks." "Not only do [senior execs] have a higher public profile than average" – which allows spear-pfishers to obtain convincing info that causes execs to open emails, and click on links they think they can trust – "they're also likely to have greater access to proprietary information" the report says. (This is something that we reported in this space some five years ago, by the way.) Another study, reported in a May 22 *WSJ* story, sent emails to various staffers to test their "security savvy" – and found top execs to be 25% more likely than other workers to open links of the type that contain mal-ware, spy-ware or outright scams.

But oops…Maybe the biggest threat is our kids! An April 20 *WSJ* supplement on Information Security reported that more than half of all U.S. parents reported that children under 18 had breached their own security systems in one or more ways over the past year: 64% had kids who'd made unauthorized purchases online; 39% installed software on a household computer (not their own); 35% had downloaded a virus and 32% had changed network settings on a parent's computer, mobile device, router or local network.

OUT OF OUR IN-BOX:

Class action suits have been filed, or are set to be filed, against all the major ADR Depositary banks – Citi, JPMorgan Chase (both filed) BNY-Mellon and Deutsche Bank – asserting that for at least 15 years, the banks have been secretly "assigning" foreign exchange rates that are far below the amounts actually realized, and systematically and illegally pocketing the "spread" between the U.S. dollar dividends and other distributions they pay out to ADR holders and what they actually realize in the marketplace. The **Benjamin Merryman et al. v. Citigroup et al.** suit in USDC for the Western Division of Arkansas, cites a survey of 610 cash distributions, covering 22 currencies and 83 distinct ADR issues, where in 71% of the cases the distributions were below the median exchange rate for the day, and where 27% were at or near the lowest rates of the day.

Whistleblowers, who indeed have 'inside knowledge' about the ADR industry, have told the *OPTIMIZER* that there's a lot more juicy stuff to come – including a film documentary exposing the **"Greatest Cover Up in International Capital Markets History"** that will detail "crimes the Depositary banks commit/committed, enabled and/or facilitated" including "Billions of dollars in bribes to foreign private issuers and government officials. Billions of dollars in tax evasion by these banks. Share-Price and Shareholder Voting Right manipulation…the destruction of global shareholder wealth through carefully crafted Global Naked Short Positions issued by the banks for market-price effect and [market] manipulation as well as continuous Phantom Share distribution [and] global money laundering using ADRs and GDRs" which the whistleblowers say "represent a substantial threat to the homeland security of every nation." Stay tuned for more…

DIRECT STOCK PURCHASE AND DIVIDEND REINVESTMENT PLANS: WE GUARANTEE THAT YOUR COMPANY WILL BENEFIT FROM A FRESH AND CAREFUL RE-LOOK…AND MAYBE A MAJOR MAKEOVER…AND IF YOU DON'T HAVE ONE, YOU SHOULD TAKE A LOOK AT THAT TOO

While preparing for this issue - with its special focus on "Essential Products and Services" for public companies - we were surprised at how long it's been since we published an update on Dividend Reinvestment Plans, commonly known - and sometimes, sadly performing - as "DRIPs" - and their slightly more sophisticated cousins, Direct Stock Purchase Plans, or "DSPPs."

Our last full-blown coverage was way back in 1999, when we responded to companies' pleas to "Show Us The Money" that was being spent on - and generated by - these products…and how to determine what the ROI actually looked like - in order to decide whether offering such plans was worth the time, the trouble and the money one needs to spend on them.

And wow…times have sure changed since then, in many significant ways. Here are a few excerpts from our 1999 list of money-*making* results:

• **JC Penney** compared the buying behaviors of stockholder and non–stockholder credit card holders and found that stockholders visited JC Penney stores more than twice as often and spent 52% more money per visit than non–stockholders, thus spending more than three times as much. (Source: *The Shareholder Service Optimizer*, Sept/Oct '95)

• **Real Goods Trading Corp.**, a company that sells environmentally friendly products via catalog, and that went public over the Internet , found that its stockholders bought twice as much as other buyers. (Source: *Wall Street Journal*, 6–29–99)

• **A major Midwestern financial institution**, which, like most of its peers, conducts continuous direct–mail campaigns for gold and platinum cards, car loans, CDs, mortgages and home equity loans, etc., found that its stockholders accepted such offers at three times the rate of non–stockholders. In the expensive direct–mail marketing business, this added "edge" has major financial significance, even before the added benefits of prompter than average payments and much lower than average default rates that arise from having stockholders as customers. (Source: *Carl T. Hagberg and Associates*)

• **Sears Roebuck**, which included a broad array of product coupons in its mid–year 1997 report to shareholders, garnered 43,000 redemptions. The profits generated by the incremental sales paid for the entire interim report. (Source: *IR Update*, Sept. '97)

• **Texaco**, which has been cultivating "affinity groups" for as long as we can remember, took two investor surveys in recent years. They found "the correlation between stock ownership and a preference for Texaco products is overwhelmingly positive." No wonder they have one of the best–marketed and best performing Direct Stock Purchase Plans in the country.

• **A study of 500 stockholders who participate in DRP/DSPP programs**, commissioned by **First Chicago Trust Co.,** found that 77% recommend products and services of companies in which they own stock to friends and associates, 47% would use products of the companies they own even if it were more convenient for them to use those of competing companies and 44% would buy where they own stock "even if a competitor offered a better price." (Source: *First Chicago Trust Co. Investor Purchase Behavior Study*, Nov. '97)

Yikes! While we feel sure that JC Penney shareholders still shop their stores as loyally as ever, we truly doubt that JCP has the time to focus on their retail investors as they did back then. And poor Sears, with its mostly poor-looking stores, has become more of a REIT than a retail company, while Texaco has disappeared into **Chevron**, which is not much of a retail-player at all nowadays. And, on the TA scene, First Chicago has morphed and acquired its way to become DRIP & DSPP Giant **Computershare**…but where they have indeed continued to sell the benefits of such plans – adding two or three new Plans per month of late…so the scene is far from dormant. (The full text of the article is still available on our website, or at http://www.optimizeronline.com/investorsascustomers.aspx)

Subsequently, in our 3rd Quarter 2012 edition, we published an equally compelling set of arguments, we think, as to the significant economic value of having a robust population of retail investors – and gave "Our Top-Ten Reasons to Grow and to Guard Your Individual Investor Population, which details benefits like raising equity capital at low cost, building brand value, and thus, stock price, lowering volatility…and thus one's cost of capital, to cite just a few of the ten tips – plus one to grow on.. (This article too is still available at www.optimizeronline.com)

Actually, we think this article has become more important than ever, thanks to three newish factors: the constantly declining levels of retail investor analysts and analysis, that leaves small, mid-cap and even large-cap companies under-reported-on; the very significant stock-price volatility we've been seeing of late, that a strong retail base helps to dampen – and last, but far from least, the increasing value of retail investor VOTES in closely contested matters, where individual investors still vote overwhelmingly with management – when they vote at all, that is.

Very important to note when evaluating a DRIP or DSPP, these plans really WORK – IF, that is, they are properly designed, monitored and re-marketed from time to time. As our good friend **Chuck Carlson**, editor of the **DRIP Investor** newsletter noted in our 2012 Special Supplement (also on our website), "The combination of long-term investing, systematic dividend reinvestment and no-cost/low-cost investing is a very powerful strategy for wealth creation." So if properly designed and marketed, a "DRIP" can become a veritable gusher of money for public companies looking to raise equity at low rates, as well as for investors themselves.

But now, for some of the downside aspects of DRIP and DSPP investment plans:

First, they do cost money to run…And yes, while there has been a steady trend toward "shareholder-paid" plans over the past ten years, most companies still have to pay the transfer agents' "account maintenance fees" – plus most if not all of the out-of-pocket expenses that are incurred for producing and mailing quarterly statements, annual meeting materials and "miscellaneous expenses" which are sometimes surprisingly large.

Secondly – and here's why a fresh new look is warranted, we say – At many of the companies we look at, the overwhelming majority of Plan participants have a truly negligible amount of money in the stock. (Some agents have done a terrible job of monitoring, enforcing or even *having* Plan provisions that require accounts to be liquidated when the value drops below some minimum dollar level – or whenever all the full-shares are sold or transferred out. Many agents pay no attention at all when the full shares are sold or transferred to a brokerage account shortly after a record date – and where the dividend ends up buying .001 share – keeping the essentially dead account alive for billing purposes. (We have more than a few of these accounts ourselves, we must confess – simply because the proceeds of sale are not worth all the work involved in getting the agents to sell off the fractional share.)

One last point on the upsides and downsides of DRIPs and DSPPs: While you need to pay a regular dividend to have a true "DRIP" – you do NOT need to do so in order to reap the potentially huge benefits of having a well-designed DSPP.

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PEOPLE

Investment banker and attorney **William Anderson**, who many observers say was the first investment banker to practice the art and science of advising public companies on how to deal with activist investor "approaches" – and still the best – has left his perch at market leader **Goldman Sachs** to join relative newcomer **Evercore Partners** where both he, and Evercore, served as advisors to **DuPont** in the recent proxy fight vs. **Trian**. Evercore, founded by former deputy Treasury Secretary **Roger Altman**, had only one new company defense last year, the July 1 *WSJ* story noted, vs. the 23 defenses at Goldie - But as the story also noted - which is very much worth noting, readers - "The numbers don't include matters that never become public or instances where advisers weren't disclosed, which bankers say are myriad."

Amy Goodman, who recently retired as a partner in **Gibson, Dunn & Crutcher**'s Washington, D.C. office, was presented with the **Society of Corporate Secretaries and Governance Professionals' Bracebridge H. Young Distinguished Service Award** at the Society's annual conference in June. Amy was a member of Gibson, Dunn's Securities Regulation and Corporate Transactions groups, advising clients on securities law disclosure and regulatory issues and corporate governance matters, including the representation of independent board committees. She joined the firm in 1998 after serving as a free-lance editor and author of books and newsletters on securities and corporate law topics, including Editor-in-Chief of Insights: *The Corporate and Securities Law Advisor, The Investment Lawyer, and The Corporate Governance Advisor*, all published by **Aspen Law & Business**. Previously, she was with the **Securities and Exchange Commission** for 11 years, holding several senior positions with the SEC's Division of Corporation Finance, including Chief of the Task Force on Corporate Accountability. It is hard to imagine a more worthy award recipient: Amy was a frequent and always a clear, incisive and compelling speaker at Society and securities industry events. She was always ready and willing to listen, and to think and speak "outside the box" – while always representing the SEC – and later, Gibson, Dunn, with distinction.

New York State's top-banking-cop, Benjamin Lawsky, left the state Department of Financial Services in June – to start his own consulting and law firm. Unlike the half-dozen or more top securities cops "that have gone on to $3 million-and-up positions at major law firms" of late, noted Columbia Law School Professor **John Coffee** in a WSJ article, "he's not gotten a warm welcome from the [Wall Street] market." But no worries at all, we say: We think he will continue to go and grow like "gangbusters" in his new career. A man of rare integrity and skill.

Two SEC commissioners are reportedly planning to step down at roughly the same time, later this year; Democrat Luis Aguilar and Republican Daniel Gallagher. Let's hope we can 'trade up' a bit with the newbies.

Activist hedge fund Hudson Executive Capital has added two high-profile people to its roster – former SEC Chairman **Mary Shapiro**, who will advise the fund on regulatory and governance issues, and former **Wells Fargo Bank** Chairman & CEO **Richard Kovacevich**, as one of the fund's "CEO Partners.'

Fred Marquardt, a much-valued advisor to public company clients of proxy solicitor **Morrow & Co.**, passed away unexpectedly in April. He too was a frequent speaker at industry events, whose presence and insights on the shareholder meeting scene will be missed.

REGULATORY NOTES... AND COMMENT

ON THE HILL: While Republican and Democratic legislators say that are making-nice, and cooperating more these days, it seems that all the real action is coming from federal agencies – and that a lot of it IS nice: The **FCC** adopted a rule that will give phone companies more room to block robo-calls and spam text-messages on both phone and mobile devices. Three cheers! The **FDIC** developed a few simple criteria for deciding on banks that can be exempted from regulations and exhaustive examinations without posing risks: No trading assets or liabilities, no derivatives positions other than 'plain vanilla' ones AND where the total derivatives exposure s are less than $3 billion – AND banks with shareholder equity that totals at least 10% of assets – which sure exempts a lot of banks. The **DOL** has also proposed rules to better safeguard individual retirement assets, by imposing "fiduciary standards" on sellers of funds and on "advisors" to retirees…which may not fly by as easily…but it's *another* thing the SEC has been dawdling on for decades now.

AT THE SEC: Suddenly, there's a heap of actual business landing in the SEC's in-box of late: Their proposed rules to improve disclosure and increase the ability of investors to understand and compare executive pay across industries have been out since April, and the comment period just expired.

And just out, in a rather brilliant move, the SEC punted the job of handling claw-back provisions when there are financial restatements with a "proposed rule and rule amendments [that] would direct the national securities exchanges and national securities associations to establish listing standards that would require each issuer to develop and implement a policy providing for the recovery, under certain circumstances, of incentive-based compensation based on financial information required to be reported under the securities laws that is received by current or former executive officers, and require the disclosure of the policy. A listed issuer would be required to file the policy as an exhibit to its annual report." *"Executive officers should not be permitted to retain incentive based compensation that they should not have received in the first instance"* Chairman White stated before the vote, which seemed obvious to the two Democratic Commissioners – and where most people would find it obvious too – but not to the two Republicans, who voted no.

Now if only the SEC could get the "median pay" issue out the door for comment, they'd be getting a solid C- we think…But Corp-Fin director **Keith Higgins** seems to have been totally flimflammed as to the alleged "difficulties" and allegedly "very, very expensive process" of calculating the median number: "You don't have to find every employee's compensation to get to a median" he said in a June 22 WSJ interview. "When you read your newspaper and it talks about the median home price in the U.S. my guess is that they don't take the data from every single home sale over a period of time. There's a statistical sampling that gets done." Well Keith, we are certain your guess is dead wrong: City, state and county databases routinely record the sales prices of every home sale where the deed is re-recorded – just as virtually every company has one or more databases that contain every employee's name and rate of pay…or how else would you pay them? Merging all the data, then putting it together in ascending or descending order, covering 12 months of pay - then counting how many data elements are there ARE – then finding the median – which is simply the "*middle one*" on the list – like the ten thousandth name in a database of twenty thousand – is a task that the average junior high-school student can handle these days with Excel…and in a jiffy!

IN THE COURTHOUSE: The Supreme Court ruled unanimously in May that companies that administer employee 401-k plans must *"monitor trust investments and remove imprudent ones. This continuing duty exists separate and apart from a trustee's duty to exercise prudence in selecting investments at the outset."* The case was brought by **Edison International** employee plan participants, who alleged that the company violated its fiduciary duties when it bought retail mutual funds while less expensive institutional-class funds, with essentially identical features, were available. It came to the Supremes when a lower court threw out the suit, ruling that a six-year time limit had expired. The case will go back to the lower court to review how often the administrator needs to review and reexamine investments, and how to calculate the deadline. This marks yet another victory for St. Louis attorney **Jerome Schlichter** who has brought 13 such suits over the past few years, and to date, has settled eight of them, including a $62 million settlement with **Lockheed Martin** earlier this year.

A federal judge upheld former AIG CEO Hank Greenberg's contention that the federal government had no legal right to "become the owner of AIG" in exchange for bailout loans, but refused to award any of the $400 billion of damages Greenberg was seeking – a decision that Greenberg will appeal. "*We respectfully disagree with the trial court's contention that…there is no remedy for the government's illegal conduct…[R] equiring shareholders to surrender 80% of their equity improperly cost the shareholders and improperly enriched the government by more than $23 billion*" the statement from Greenberg-led **Starr International** maintained, which we ourselves find hard to argue with, given the judge's ruling that this was an *"illegal exaction under the Fifth Amendment."*

The U.S. Court of Appeals (Delaware) issued its long awaited Opinion on the Trinity Wall Street v. Wal-Mart Stores case, affirming Wal-Mart's ability to exclude Trinity's shareholder proposal concerning the sale of guns at Wal-Mart stores from its proxy materials under Rule 14a-8(i)(7) – the "ordinary business provision." The July 6th must-read Opinion wrestles with the "social-policy exclusion" – sounding almost set to go the other way. And it concludes by noting the rise in shareholder proposals framed as social-policy proposals since the SEC's last guidance was given, way back in 1990 - suggesting that they consider updating their guidance, in what sounds like yet another slap at the agency: *"Although a core business of courts is to interpret statutes and rules, our job is made difficult where agencies, after notice and comment, have hard-to-define exclusions to their rules and exceptions to those exclusions. For those who labor with the ordinary business exclusion and a social-policy exception that requires not only significance but "transcendence," we empathize."*