

# THE SHAREHOLDER SERVICE OPTIMIZER

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

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★★★ NOW IN OUR 16th YEAR ★★★

FOURTH QUARTER, 2010

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## A FEW HOT ISSUES TO WATCH AS ANNUAL MEETING SEASON APPROACHES

**Great news for public companies, though bad news for most proxy solicitors, the 2011 Proxy Season seems to be shaping up as the least contentious one in a decade or more:**

*Early returns indicate that the number of shareholder proposals – and management proposals too – will be down significantly. And this after a big downturn in 2010 – due in large part to the number of companies that have basically gotten the message about “good governance” and which now have pretty good governance practices in place..*

Says-on-pay will largely sail by with decent margins, if we can believe all the usually-activist investors we’ve heard at meetings and webcasts this year, and elsewhere in this issue, which we think we can.

Compensation proposals will be down big-time for sure – partly because corporations have fixed most of the areas where they were most vulnerable to shareholder proposals – and partly because they are not about to tempt fate with proposals of their own that require shareholder approval...And if they do, they’ll do their homework.

But as we always warn, the only company that you have to worry about is your own...and there are still some hot issues out there – along with some worrisome straws in the wind:

A large group of social investors – like **Walden Asset Management, Domini Social Investment, Green Century Balanced** fund and a host of Catholic orders – has targeted companies that sit on the Board of the **Chamber of Commerce** with resolutions asking Independent Directors for a “Review and disclosure of any direct and indirect expenditures supporting or opposing candidates, or for issue ads designed to affect political races, including dues and special payments made to trade associations, such as the U.S. Chamber of Commerce...or other organizations that can hide any contributions...” We think that the topic of political contributions – whether made by companies, trade associations, labor unions or other special interest groups – will resonate big with voters this year...witness the disillusionment with government in general we’re seeing...and may generate a lot more votes – and much more noise than usual at 2011 shareholder meetings.

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## A FEW HOT ISSUES...

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**Calpers** has targeted 58 of its largest portfolio companies that don't have a majority standard for Director elections...and while so far, at least 20 "have done the right thing" by agreeing to change, they say, they've filed proposals at **Apple, BB&T Corp, Capital Management Inc.** and **VF Corp.**...and will likely file more.

**Calsters**, which in 2010 filed NO proposals, will file 25 this year – mostly at small companies – calling for a majority voting standard. We say these proposals will draw big yes votes...and we bet a majority will pass.

**A bit scarier, perhaps, Calpers says they've changed the way they decide on companies to focus on...to put much more weight on short-term financial performance** "that will be more reactive to market developments"...and to focus on their top 500 companies rather than the top 1000... and to drop governance issues from their initial screening entirely! But once you're on their radar screen, they will place a "greater emphasis on board quality, skill sets and diversity"...So look for a few totally unexpected, last minute developments at meetings – and much bigger numbers for Calpers proposals we predict – thanks to a smaller and more carefully selected universe of targeted companies.

**Stay especially alert for both formal and ad-hoc Vote-No campaigns against Directors we advise:** In 2010 we saw more Directors with Votes No and Withhold Votes in the 30% – 48% range than we've seen *in total*...in 40+ years of watching. Often, it's hard to figure out what, exactly, triggered the big NO votes...We think that many of the same factors that are affecting attitudes toward the governmental sector are at work here too. If you smell trouble, ramp up your efforts to get out the normally pro-management individual investor and employee plan votes. At a minimum, make sure that no director gets surprised in the 11th hour.

**One new flash point, where savvy corporate citizens are already doing damage control, we hope, are "relocation subsidies"** for new or moved execs: We can see why it would be a "hot button" for all the ordinary investors with underwater real estate, but we have a hard time seeing why such payments – including outright buyouts of the old homes to forestall big monetary losses – are NOT warranted given the rotten housing market – where a company believes the relocation will produce better results for the business as a whole.

**It looks as if the number of proposals to lower the threshold for calling a special shareholder meeting will be down a bit this year, which is a good thing.** We think that companies should push back harder on proposals that seek to lower the threshold to a mere 10% and give shareholders a

better idea of the extent to which low thresholds simply encourage mischief-makers to waste the valuable time and money of serious long-term investors.

**Another relatively new development – and a bad one, we say – are proposals that would allow investors to take action by written consent:** Twenty years or so ago – when consent solicitations to oust the board were being used routinely as a powerful extra "club" in bear-hugs and other low-ball tender offers – the trend was to *eliminate* the right to act by written consent, which was a good thing for most investors, we think. And such attempts were quite successful, back in the days of frequent "shark attacks." Consent solicitations are like a "nuclear action": They can be launched quickly and inexpensively – and with no warning at all: No need to wait for an annual meeting. And they tend to be unusually "dirty" bombs too – where pointed attacks on the character, reputation and performance of the incumbent directors, along with any and all juicy tidbits that can be dredged up – are standard operating procedures. And, of course, the outcome is final...and effective immediately.

Scariest of all, however, the right to act by written consent is like giving a blank check to any malcontent that comes along...with almost any proposal that strikes his or her fancy. (Wow! The last time we wrote about this was in December of 1999, when we counted nine mostly-successful consent situations in a matter of months... including companies like **Birmingham Steel & the Pfizer/Warner Lambert/American Home Products** deals. We also ran a special supplement on Consent Solicitations – and potential defense measures, written by our good friend **Merrill Stone, Esq. of Kelly Drye & Warren**. Call or email us if you'd like copies, to bone up on the issues here.)

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**The scariest development of all to watch for in 2011? “Big Investors Appear From Thin Air”**...as a recent article by NY Times reporter Ross Sorkin described this new phenomenon...where investors like hedge fund manager **Bill Ackman** used the 10-day disclosure “window” to quickly exceed the SEC’s 5% disclosure requirement and buy up nearly 27% of **J. C. Penney**... and where **Bernard Arnault** of LVMH bought “equity swaps” on **Hermès** in 2008, then, “through subsidiaries, entered amendments to these contracts” to get

physical securities later...and Voila! Surprise! A 17% stake in 2010!

*We predict that a LOT of “investors” (read ‘short-term speculators’) will pop up this season out of thin air with moves like this...and probably with some short-slates to put companies into play. Plus, stocks are cheap...cash is king... and record breaking amounts are in hand. Bear hugs are back...So, as we always say about Annual Meetings, “Hope for the best...but prepare for the worst.”*

## **MORE ON VIRTUAL MEETINGS: WE COME UP WITH A SIMPLE SOLUTION TO ACTIVIST OBJECTIONS TO “VIRTUAL ONLY” FORMATS**

*Regular readers know that we have been following developments on the “Virtual Only” Annual and Special Meeting front from the get-go, and that we are big fans of the concept – and especially of the big potential money-savings that can be realized.*

Yes, we still love the many well-attended meetings we go to – and we know that literally hundreds of companies want to have them, and will continue to have them for years and years to come. And yes, we also know that there are many annual and special meetings each year where investors will want to ask questions, and to “look the management and the directors in the eye.” And we can attest that this opportunity is often a very important and a very effective governance-improving one – and one that can keep the management, and the board, very much on their toes.

But we also know that at well over 12,000 of the roughly 14,000 Annual and Special Meetings that take place each year, nothing significant happens, and there is no earthly reason for even a single investor to attend in person...and most of the time, none do. So for companies like these, the Virtual-Only option can be a big time and money saver – which benefits investors too, who foot the bills.

Several activist investors – and **Tim Smith** of **Walden Asset Management** has been in the forefront here – have been saying that Virtual-Only Meetings can enable companies that do have governance issues to hide from investors – or worse, consign them to a “cyber-ghetto” where their concerns will go unheard... which would, of course, be a bad thing.

We tried to convince Tim that getting caught out in such shenanigans is inevitable in today’s E-connected world...and the consequences to a company’s reputation would be so severe they actually serve as a strong self-policing system, but he was not convinced. We also pointed out that Virtual Meetings not only open the proceedings up to an infinitely large number of people – both live and via archived versions – they offer a huge new opportunity to activist investors to reach out to and engage a huge new audience. But he was still not ready to concede that Virtual-Only Meetings were ready for “prime time.”

After much more head-scratching, we emailed Smith with the proposition that “*Smaller companies – and even big ones, acting at their own risk of guessing wrong about shareholder enthusiasm for attending in person – and that have only routine matters on the agenda – and that also have a “notice provision” in place, so that no new business can be considered – and that ask shareholders who may want to attend in person to give 3-5 days notice, at a minimum, so arrangements can be made to accommodate them – ought to be able to feel that they can safely proceed to have a Virtual-Only meeting.*”

Hard to argue with, we’d say...and Tim emailed back that “Certainly, if an investor could ‘register’ that they were attending (many companies do that as you know) a company gets the lay of the land clarified. If you leave the door open for walk-ins, you solve the ‘exclusion problem’ of course.” Case closed, we think.

## MORE ON VIRTUAL FORUMS: MAYBE THE BEST GOOD GOVERNANCE IDEA EVER

*While Virtual Meetings have been getting lots of notice of late, we think that Virtual Investor Forums have the potential to transform the corporate governance landscape in an even bigger and better way:*

We like the idea of making the discussion of important governance issues a 24/365 process rather than a once a year event – where at one extreme, thousands of meetings last 15 minutes or less, and not a single question is asked – and at the other extreme, like at **Citicorp**, for example, gadflies and assorted other no-nothings yammer on for six hours or more about basically trivial concerns.

We also like the idea of allowing the dialogue to take place on a central, company-sponsored site – to be sure the company IS tuning in – and can respond if they feel some factual info or a broader perspective is warranted – and if they want to offer it. We very much *dislike* the special interest group chat rooms that have sprung up – and there are several of them out there – where basically malcontented and typically ill-informed people share opinions and egg each other on to

vote their proxies against management. Company-sponsored forums will quickly put these sites out of business – at least with respect to the sponsoring company's affairs.

We especially like the fact that company-sponsored forums can surface, and often solve problems, before they can become big ones; A great thing for companies and investors alike. And, while we think there may be some value in allowing current investors to self-identify themselves as such if they wish to, and for the Forum's "system" to validate the fact that they *are* investors, we think it doesn't matter all that much and that smart companies will want to keep their Forums open to anyone who wants to participate.

Finally, while we noted with interest that Broadridge petitioned the SEC to mandate such Forums, we feel confident that market forces alone will provide sufficient impetus for them to take off, and to flourish...And who knows? Maybe one day all the governance issues will have been resolved... though we doubt it.

## ON THE SUPPLIER FRONT:

**COST BASIS COST ROLLOUTS BEGIN TO ROIL THE T-A INDUSTRY:** Our phones rang off the hook in October as Transfer Agents began to roll-out their cost-recovery plans for their cost-basis programming efforts. The first wave of calls came from folks who felt they'd been "sandbagged" at the 11<sup>th</sup> hour – by the size of the increases, the lack of well-reasoned and well-explained cost-justification and/or by a feeling that the announcement was timed so they had no time to look for a better deal and maybe leave. The angriest callers were folks who were taken by surprise while on various client-advisory panels. Ouch!

A lot of last minute 'splainin' – and some last minute negotiations too – seem to have mostly calmed the waters...for now. But some callers sounded like they will be harboring a grudge, and some, as predicted

here over a year ago, will be prompted to start shopping around where otherwise they wouldn'ta. Hats off to AST for telling clients they were absorbing it as a cost of doing business...although earlier, let's note, they had very cleverly initiated a cost-of-living adjustment – mostly well-warranted, most clients felt – which went down smooth as silk...and raised a lot more money we'd bet than a cost-basis surcharge could or would.

But the dealin's far from done, we say: Watch for more roiling, and we bet, a lot more unbudgeted cost increases as individual investors react to the cost-basis info they'll be getting from TAs ...a year from now. We predict that phones will really ring off the hook at TAs when cost basis reporting becomes *reality*.

## **GROUP FIVE ROLLS OUT NEW SURVEY**

**RESULTS:** By early November, our phones were ringing off the hook again – as news of the 2010 Group Five surveys of 1,006 clients of the four largest Transfer Agents began to leak out: First came some early bragging from the highest-scorers, saying “Watch for those results: We did great!” Then came a flurry of calls, mainly from sales folks at the “runners up” – looking to put the best possible spin on their own results...and a few calls from folks who were looking for advice on doing “damage control.” God bless **Jack Sunday** and **Kathy Huston**: their 2010 surveys generated more buzz than ever ...and lots of healthy soul-searching among the suppliers. This year, Group Five also did a high-level overview of issuer satisfaction with their abandoned property search firm and their proxy solicitor – where one firm in each category stood out significantly from the average scorers. (Readers, you will be hearing this from all the suppliers directly, no doubt, so we won’t spill any of the beans here.) Another interesting finding – and something of an odd one, in light of the steady gains **Broadridge** has been making on the registered-shareholder servicing front – issuers that were surveyed expressed significantly higher satisfaction with annual meeting services provided by their transfer agents as compared to Broadridge, which is, we think, largely a “perception-management” issue... But hey, the *perception of satisfaction* is what actual satisfaction boils down to for most people.

## **POOR LITTLE PGI TURNS OVER ITS CLIENTS TO GLASS LEWIS:**

**PROXY Governance, Inc.** – which began providing proxy voting advice and analysis in 2004 – and which had been shopping itself around, as reported in our last issue, has entered into an agreement with proxy advisor **Glass Lewis & Co.** “which provides for a seamless transfer of customer contracts to Glass Lewis.” No information as to the number of clients or the value of the deal was provided in the 12/20 Glass Lewis press release. We liked little PGI – which was the first to give credit for financial performance in formulating its voting recommendations on governance matters – and we are sad to see them go.

**SSA’s James R. Smith Scholarship Fund Hits \$120k:** The 2010 annual golf outing and dinner raised over \$20,000 and brought the Fund balance to

\$120,000, which should make it fully self-sustaining. We love this fund for a lot of reasons; First because it was set up by the SSA to honor an SSA stalwart and man of all work, Jimmy Smith, ex of **ITT** and one of the hardest working but most modest and self-effacing guys one will ever meet...and one of the nicest too. And just as much, we love the fact that the Fund benefits high-achieving kids of our own industry colleagues; kids who often don’t qualify for financial assistance thanks to hard-working parents, but who sure deserve the recognition, and the few extra bucks they get every year they’re in college - as long as their grades continue to measure up. And it should come as no real surprise that every winner over the 6-year history of the fund has qualified for four full years. So hats off to Jimmy...and hats off to the Fund donors, who seem to have made the fund a self-sustaining one...and to the SSA Board, which has increased the annual stipend from \$1,000 a year to \$1,500...And hats off to those hard working students...and their proud parents!

**The STA TURNS 100:** A truly historic event; The **Securities Transfer Association**, originally called the Stock Transfer Association, is certainly the oldest trade association in our industry (**The Society of Corporate Secretaries**, for example, is a mere babe of 64)...And it is undoubtedly one of the oldest trade associations *anywhere* in our country. Much as we sometimes pick on them, and as endangered as the industry sometimes seems to be, fact is; you’ve gotta’ have a TA if you are a publicly traded company. So cheers! And here’s to the next 100 years!

**UNCLAIMED PROPERTY RECOVERY and REPORTING, LLC (UPRR)** opened a new office in Boston in December, staffed with two prominent industry experts – **Jennifer Borden**, a former partner at **Holland & Knight**, tax-practice leader at **Ernst & Young**, and former General Counsel for Abandoned Property for the **Commonwealth of Massachusetts**, who will serve as General Counsel & EVP – and **Charles “Chuck” Booth**, SVP Sales & Business Development, formerly of **Affiliated Computer Services**, a **Xerox** company.

**VENIO**, as reported more extensively in our 2010 annual Special Supplement, has acquired abandoned property service-provider **KEANE**...and will adopt the Keane name.

## OUT OF OUR INBOX:

### **VIRTUAL MEETING VIRGIN POSTS ENTIRE SHAREHOLDER LIST ON THE WEB:**

**Ouch! And ouch again! What WERE they thinking?** Yes, Delaware law, and the laws of most states we've looked at, require that the shareholder records be "open for inspection by shareholders" – always at the offices of the company, usually for 10 days or so before the Meeting – and *sometimes* at the Annual Meeting itself – but *always*, if one reads the Delaware law with care, and if one has drafted one's own bylaws with care – strictly for "a proper purpose." We can hardly imagine a greater corporate impropriety than posting such sensitive information on the web, for any browser, human or otherwise, to see and to copy out, virtually at will.

*We've mentioned this sometime-dilemma on several webcasts we've spoken at, and opined that "public companies should do everything in their power to avoid posting this information on the web."*

**A few practical tips we offered were these:**

- Amend the bylaws if possible, to specify the availability of such info at a physical-site only...

- Insist that shareholders who ask to look demonstrate a "proper purpose"

- If you still feel you must comply...offer a one-off, company-supervised private viewing only, via a fast scroll-down capability...and don't be flummoxed if you are not ready right then and there, since one can not imagine any legitimate reason for a shareholder to demand immediate gratification here, except, perhaps to see his or her own account.

**We went so far as to say that if it were US, we'd make the list available to requestors in their own home town, or even at their house, if absolutely necessary...and under company-provided supervision, rather than to post it on the web.** After all, how many people really want to look at this list for a "proper purpose" – absent a proxy fight – where the wannabe lookers will all be there in person anyway or will kook later, during a formal challenge process?

**So we'll say yet again, even though it should really go without saying: NEVER POST YOUR SHAREHOLDER RECORDS ON THE WEB!**

## PEOPLE

**Alliance Advisors** hired two more proxy industry veterans in November; widely regarded **Shirley Westcott**, who spent 14 years at **PROXY Governance** and **ISS** and **Richard Ward**, a 15 year specialist in proxy solicitation, mutual holding company conversions, M&A transactions, tender offerings and rights offerings.

**BNY-Mellon's** west-coast stock transfer sales specialist, **Mike Goedecke** has moved on to a new job at **NASDAQ OMX** in LA.

**FASBI** has named **Leslie F. Seidman**, a former **JPMorgan** accountant and auditor and a current FASBI board member as chairwoman of the board, to replace **Robert H. Hertz**, who retired unexpectedly in September. Her top priority will be to reconcile U.S. Financial Accounting Standards with those of the International Accounting Standards Board by June of 2011, where mark-to-market rules for bank loans and the much more detailed and industry-specific U.S. revenue recognition rules are still being hotly debated.

**FINRA** has tapped **J. Bradley Bennett**, a **Baker Botts** LLP partner, as its enforcement chief, effective Jan. 1st

**Scott Gallagher**, a long-term **Georgeson** exec has moved to **Venio** – now to be known as **Keane**, fol-

lowing a recent purchase – as an Executive Vice President, Sales.

**Henry Hu** is no longer on first as the **SEC's** first Director of Risk, Strategy and Financial Innovation. He's returned to the **University of Texas**, to take his seat again as the Allan Shivers Chair in the Law of Banking and Finance, from which he will continue to agitate, we hope, against the crimes of over-voting and vote-napping.

**Keith Meister**, widely considered to be **Carl Icahn's** "right hand man" in proxy fights is starting an "event-driven hedge fund" of his own...starting with \$250 million in seed capital provided by financier **George Soros**.

**NIRI** has named four new directors, **John Chevalier**, IR Director at **Proctor & Gamble**, **Ruth Cotter**, VP-IR at **Advanced Micro Devices**, **Jane Okun Bomba**, SVP & Chief Customer Process Officer at **IHS** and **William Walkowiak**, VP Finance & IR for **Novatel Wireless, Inc.**

Former **Wells Fargo** shareholder-service-sales-star **Karri Van Dell** has moved to **AST** where she will work from a new **AST** office in Minneapolis/St. Paul.

## REGULATORY NOTES...and comment

**ON THE HILL:** The chronically crisis-ridden Congressional panel to investigate and report on the causes of the financial crisis has delayed the report, which was due on Dec. 15, to the end of January “to make sure we can appropriately complete our ongoing investigations” said **Phil Angelides**, the panel chairman. The four Republicans on the 10 member panel – What a surprise! – voted unanimously against the delay...

**AT THE SEC:** Good news – the Commissioners voted unanimously to ban “Naked Access” to securities trading platforms by flash traders...closing a big loophole in the original plan that would have let traders who are not registered and regulated as brokers (and have negligible capital to back their huge flash-trades, we’d note) continue to have naked access to “alternative trading systems.”

**Bad news – at least to people who believe that securities markets DO need regulation...**many of the new SEC programs that arose from the financial crisis are largely “on hold” due to congressional funding delays and the possibility that the 12% budget increase proposed by the administration may not pass at all, the Dec. 15 WSJ reported.

**But meanwhile, the SEC investigation of hedge funds that were trading on inside information seems to be moving along briskly**, thanks to assistance from federal and state prosecutors...and has, in fact, expanded to so-called “expert networking firms” – many of which were allegedly providing market-moving info based on *insider info*.

**The biggest news – revised whistleblower-reward guidelines are out for comment...and the comments are coming thick and fast...**with many corporate commenters saying that the rules as proposed will seriously weaken existing corporate compliance programs. While some tweaking of the proposed rules seems

necessary, we think – as we wrote in the **Conference Board’s Governance Center blog** – that ex-SEC chairman **Harvey Pitt** went straight to the heart of the real issue – albeit by accident, as so often happens with him – when he told the New York Times: “*Compliance departments will now be competing with the S.E.C. for who gets the tip first.*” It sure strikes us that this is exactly what compliance departments SHOULD be doing – with or without cash whistleblower awards. And let’s please note that big cash awards will only be doled out when there have been even bigger cash frauds....As an example, see the cautionary tale immediately below...

**IN THE COURTHOUSE:** GlaxoSmithKilne agreed to pay a \$750 million fine and plead guilty to a criminal charge of releasing adulterated drugs into interstate commerce...with the whistleblower – a former employee, who had been sent by Glaxo to investigate the renegade plant, and who had blown the whistle twice – and who was fired for her trouble...now scheduled to receive a \$96 million bounty.

**A federal appeals court reversed the fraud conviction of former Hollinger International chairman Conrad Black on two counts, relying on the recent Supreme Court ruling against “honest services” provisions** but it upheld his conviction on one count of fraud and one for obstruction of justice.

**The board and management of Citadel Broadcasting, Inc. agreed to reverse the \$110 million in stock grants they awarded as the firm exited bankruptcy** – \$55 million of which went to the CEO and \$1.35 million of which went to each of the directors – awarding stock options instead, after activist investor **R-2 Investments** petitioned the court “to prevent one of the most egregious frauds by a company emerging from bankruptcy under Chapter 11.”

### WATCHING THE WEB:

**A Holiday for Holliday:** Bank of America deprived the world of 439 websites the *WSJ* reported in December, using a company called **MarkMonitor** to buy up domain names like **BrianMoynihanBlows.com** and **BrianTMoynihanSucks.net** - and twelve variations with the name of Chairman **Charles O. Holliday, Jr.** But domain names like **BrianMoynihanREALLYBlows.com** and **BofAisEvil.com** were still available – the last for a mere \$9.95 the *WSJ* reported.