THE SHAREHOLDER SERVICE

OPTIMIZER

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

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PROXY ACCESS: ACTIVISTS WILL HAVE TO USE IT - OR LOSE IT

Ever since "proxy access" was first put forward as the biggest and strongest tool in an activist investor's tool-kit, we have been trying to convince the world what a total farce it is. Why do we say this? Because (a) only the most foolish of companies would be so stupid as to totally stiff-arm a big investor – or worse, a group of disgruntled investors – who feel that some serious 'board refreshment' is in order and who might want to suggest a few candidates… And (b) investors like these have a much stronger tool at their disposal, namely, to launch a Vote No campaign against one or more directors they feel should be replaced. Even if a company has not formally adopted a majority voting standard, every director who polls less than half the vote (and most others who get only 70% or so of the vote) will be forced to step down in today's environment - or embarrassed into doing so voluntarily, before the votes are made public for all to see.

And yes, there is a (c) as we've also pointed out: Investors who are really serious about seating one or more candidates of their own will definitely NOT try to piggy-back on the issuer's own proxy statement, but would run a contested slate, using their own proxy forms and their very own barrage of allegations, arguments and assertions – IF they want to win, that is.

But another thing we opined about proxy access from the get-go - that once they had it, activist investors would be forced to use it or lose it – came true this fall, way before the Big 2017 Voting Season opened up, when **GAMCO**, one of **Mario Gabelli's** funds, nominated a director at **National Fuel Gas** under the proxy access bylaw the company had adopted.

And then…a happy surprise...National Fuel fought back, saying that the Gabelli group, which had been calling for over a year for an overhaul of the business, and maybe a spin-off or two, was really trying to effect "control" over the company's business decisions - and that was NOT what the company's proxy access bylaw envisioned, or allowed. Then, very shortly thereafter, and with no further explanation, the dissident director withdrew his name from nomination.

Nonetheless; Don't breathe easy, we say: With dozens and dozens of companies having adopted proxy access - and with many more "volunteers" to come, for sure - it can still be a cheap and easy way to rattle the corporate cage, and maybe win concessions beforehand. And yes, it really IS a use it or lose it proposition. Activists WILL have to try to use it…and probably - now that the first attempt failed so quickly - before too long. We are betting our money that we will see at least one such test-case, and maybe more, in the 2017 meeting-season.

Our guess is that the activist investor community is very carefully scrutinizing a list of companies that (a) lag their peer group, performance-wise and (b) outperform their peer group when it comes to hewing to the old "Directors and the CEO know best" model and (c) have a preponderance of very long-serving directors and (d) a striking lack of "diversity" when it comes not just to age, but to diversity in terms of gender, ethnicity and business experiences - and looking hard for the lowest hanging fruit to literally pick off.

Sad to say, there are an awful lot of companies out there that fit the "low-hanging fruit" bill to a T. And where once, not so long ago, most companies could count on activists to approach them cordially at first – and maybe give the management a chance to meet them halfway, and strike a mutually agreeable deal…we would not bet much money on THAT theory anymore…Forewarned should be forearmed here, say we: En Garde!

THE SEC RELEASE ON A "UNIVERSAL PROXY" FOR CONTESTED ELECTIONS: "NOT READY FOR PRIME TIME" WE SAY

Here are some excerpts from the editor's comment letter to the SEC, written "from the perspective of someone who has closely observed hundreds and hundreds of formal proxy contests over more than 40 years, and who has served as the Inspector of Elections at well over 100 of them - and who has witnessed, and has sometimes been the target of hundreds of formal 'challenges' to the reported results.

"While I truly believe that both the Council of Institutional Investors and the SEC had the best of intentions when they advanced the idea of making a "Universal Proxy" mandatory in contested elections - and while I personally think that the objective, of allowing shareholders the same ability to vote by proxy that they would have if they attended meetings in person is a laudable one - there are several unforeseen and potentially undesirable consequences to the many options that are currently up for comment that I believe the SEC needs to address if indeed it decides to move forward.

"The biggest set of problems I find with the release arise from the name of the thing: Asking for parties to a proxy contest to use a "Universal Proxy" strongly implies that in every situation, every proxy on both sides of a proxy contest should look the same, and cover - and say basically the same things - in essentially the same way – maybe even down to things like listing candidates from each slate in alphabetical order - and maybe even regulating the size of the typefaces that are used, as the release suggested. This approach would decidedly not foster "good corporate governance" - for the reasons I will try to explain below:

"The release, as it stands now, presents daunting drafting difficulties for issuers and opponents alike - and provides no clear guidance for drafters of so-called "universal proxies": While it seems fair to us, as it did to the Council of Institutional Investors, that every shareowner should be able to know about every item that is on the meeting agenda – and be able to cast a vote, or abstain if they choose to do so - this approach can and will create some daunting drafting difficulties - and sometimes, some hard strategic decisions too - for both sides: Each side would have to state whether they are recommending a vote for or against each such item - or maybe they will decide to make no recommendation at all on certain items - which will make the two versions look, and be, entirely different. So much for the "universal" part we say…So coming up with a new and better name for the desired form(s) - and coming up with something much shorter, and clearer - and studiously avoiding a "one size fits all approach" - should be top priorities in any next steps.

"Proxy forms are critically important 'strategic weapons' in a proxy contest: In a formal proxy contest, the Proxy Forms - and the Voting Instruction Forms too - are important, and ideally powerful strategic weapons in terms of "soliciting proxies" – regardless of which side the sender is on. Each side wants – and needs – and should be allowed to make its "best and most convincing case" – AND, we say, to use their best and most creative efforts to present the most compelling document it possibly can. For example, a smart drafter on the opposition side of a proxy contest will want

to single out one or more of the management candidates (as many of them as they have opposing candidates to offer) and specifically solicit a vote NO against them. This is a very effective tactic when there are more candidates than seats up for grabs, since it allows opponents to target specific candidates for criticism in their proxy materials - and to single out the "weakest" candidates to be taken down from the "management herd" via a vote-No. This greatly improves their odds of winning seats, vs. allowing voters to pick and choose among, let's say, ten or twelve management candidates on an alphabetical list.

"The release needs to provide clear guidance to assure that voters do not invalidate their votes, by casting more votes than allowable: A very important aspect of a so-called Universal Proxy that needs to be addressed with more care is how to assure that shareholders (who often fill out cards for both sides in a proxy contest, strange as it may seem) do not end up voting for more directors than there are seats available to be filled. Doing so will make their card or cards totally invalid. To prevent this, voters need to be instructed to vote either Yes or No - and voters on both sets of proxies need to be warned - in a very prominent way - that they may "Vote for no more than 'X number' of candidates in total." No "Abstain" or "Withhold" boxes should be allowed, in order to remove any ambiguities and to reduce the chances that more boxes will be checked than there are seats to be filled.

"Parties to a proxy contest should not be permitted to solicit a proxy, or tabulate a proxy using a "Universal Proxy" unless investors simultaneously receive a copy of the soliciting entity's own proxy statement: This is another set of practical and "good governance" difficulties that the release did not adequately address, but one the SEC can and should cure if it decides to go forward with a so-called Universal Proxy" In accordance with longstanding SEC rules, neither side should be allowed to solicit a proxy on its own form - unless the voters who are being solicited have received proxy statements that fully explain all the matters to be voted upon. Perhaps, as some have suggested, voters could be directed to a website where the proxy statement can be found - but this option, it should be noted, is currently not allowable under SEC rules in a non-contested election.

"How could it possibly be fair to require an issuer - who typically makes a mailing to every shareholder in a proxy fight - to show all of the items up for a vote, and to tabulate all such votes, if the opposition side has not sent a similar form - along with their own proxy statement - to every holder? And surely it would not be fair to require issuers to publicize, and refer all of its shareholders to opposition materials that are posted on another site if the opposition is conducting an "exempt solicitation" - and soliciting proxies only from a small group of holders.

"Any new rules governing proxy contests should not allow abstentions, and so-called 'broker votes' on routine matters, to be counted as part of the quorum for holding a contested election of directors: It seems fair - and a good thing - at first blush - to allow voters on both sides a chance to ratify the appointment of auditors, for example (or to vote no, or to abstain) even if the "opposition" is not offering a recommendation one way or the other. But in practice, this would be a very bad thing to do in a proxy contest, in that not just the yes and no votes – but abstentions - and "broker votes" too on this and other "routine matters" - make it much easier to achieve a quorum. This would allow contested meetings to proceed even if a majority of "the shareholders present in person or by proxy", i.e., "the quorum," is made up of abstainers, and/or represented by large numbers of "broker-votes" on so-called "routine matters"

"It is critically important to understand that trying to prevent a quorum is often a *very important tactic* in contested elections – and a legitimate one, we'd say – when one side or the other believes they will prevail if given more time to solicit proxies…So, on balance, helping one side or the other to achieve a quorum with the help of "broker votes" - simply because there is one "routine item" on the agenda - is not so fair or so good a thing to allow in a proxy contest when all is said and done. We are not sure that the SEC can fix this situation. It might be something that each issuer would have to address by amending its charter documents if the SEC were to rule that every shareholder must be able to vote on every matter on the agenda in a contested meeting.

"The SEC draft fails to fully appreciate that the conduct of corporate elections is - and should be, we say - largely a matter of state law: When there are "challenges" as to the way a specific proxy form was designed and/or executed (as there almost always are in proxy contests) there are, almost always, state court rulings that come into play – which become the deciding factors in determining whether a given proxy is valid - or not. Do we really need or want new SEC "Universal Proxy Rules and Regulations" that run the risk of muddling up, or perhaps negating the numerous state court rulings that already exist, and that often differ in important respects from state to state? We think the answer is no.

"To sum up, we feel, as has often been noted, that "The strongest corporate governance measure there is, is to maintain a vigorous market for corporate control."

Accordingly, we feel strongly that both sides in a proxy contest need to be allowed to take their very best shot at winning the votes they need to carry the day, consistent, of course, with the need for full and fair disclosure.

"While we basically agree with the idea that every shareholder should have a right to know about, and to vote if desired on every item on the agenda in a proxy contest, we also feel strongly that a new set of SEC-prescribed "Universal Proxy Rules and Regulations" - as currently proposed for comment - could have a *chilling effect* on the ability of both sides to design their materials in the clearest and most compelling way possible, and to "electioneer" as effectively as possible for their positions.

"We also believe that even if all of the technical shortcomings in the subject release were to be successfully addressed, there is no need whatsoever for new SEC-promulgated standards for proxy contests - and that state laws, and their time-tested practices and procedures should continue to prevail."

ACTIVISTS TAKE AIM AT VIRTUAL MEETINGS FIRING MISGUIDED MISSILES… THAT THE SEC SHOOTS DOWN

Activist investor **John Chevedden** filed a shareholder proposal with **Hewlett Packard Enterprises** in October, calling for the company shareholders to *"request that our Board adopt a corporate governance policy to initiate or restore in-person annual meetings and publicize this policy to investors"* - noting that *"Our management has adopted procedures allowing it to discontinue a Corporate America tradition – a physical stockholders meeting and "substitute" a virtual meeting – an alarming decision."* The proposal goes on to cite a list of reasons why *"Cyber meetings should only be a supplement to traditional in-person shareholder meetings, not a substitute."* It is likely that he will introduce basically identical resolutions at **Comcast** and **Intel**.

As we've written here before, we think that in-person shareholder meetings are very good things for most big, and widely held companies - and for their "retail shareholders" too. We do not expect them to go away in the foreseeable future. If anything, we see more and more companies trying to make them more valuable - and more attractive to attendees over the past few years.

But, at the same time, we have been noting how good a thing, and how cost-effective a Virtual Meeting can be, when used appropriately. When there are no big or controversial issues on the ballot, or on the company's own agenda, as is the case for most companies, in most years, VSMs are big money-savers for issuers - and, of course, for their investors. A huge number of them take place in the outside counsels' office space…so no hall to rent, no catering to buy, no need for outside "security forces" or for expensive A-V services at a hotel or conference hall for example. Out-of-town Directors can attend from anywhere in the world…with no travel expense. We particularly like the fact that they create a record of the proceedings that are available to anyone in the world - and on the web for a year or more. Best of all, shareholders - including activists - and often, any other interested party can attend too, simply by dialing in. (We served at a VSM a year ago where all of the attendees, except for one director who logged in from out of town, were securities analysts - who stayed for the entire presentation! When's the last time you saw an analyst at your company's meeting?)

Ironically, and most important to note, we think, is that Virtual Meetings represent a powerful way for activist investors not just to manage their own travel budgets, but to reach an audience that is infinitely bigger than any they could hope to address at an in-person-only meeting. Our own favorite model is the so-called Hybrid Meeting, that permits attendance in person as well as over the web - and that provides a full, real-time and archived audio-visual record of the full proceedings. In fact, we see this as such a powerful tool that we have advised companies that may be having "issues" that VSMs can provide activists not only with a huge "bully pulpit" but with an opportunity for a "sneak attack" where activists - including lots of big "passive investors" too - could weigh-in with last minute votes that could take them totally by surprise.

So our real fear here is that Chevedden's campaign - which so far fails to distinguish between "routine meetings" and

those where in-person questioning, and maybe even a direct confrontation with management may be appropriate - will have a chilling effect on something that is clearly a good thing - and the wave of the future.

But Yippee! Just before we went to press, we learned that the SEC had issued a no-action letter to HPE based on procedural issues - and, a bigger surprise, deemed the proposal submitted to Hewlett Packard as being about "ordinary business" so a no-go. Do we expect Chevedden & companions to try again, with a craftier-crafted proposal? Yes…

But on balance, we are not that worried about the future of VSMs: The "economics" of VSMs - at the vast majority of companies with nothing controversial on the agenda, and with a scanty retail following - are inarguable.

The number of VSMs nearly doubled in 2016 - to roughly 200 meetings. And we heard from a good, inside source, that inquiries about VSM went through the roof, following the long rant against them in a NY Times **DealB%k** column… proving, as we always say, that 'there is no such thing as bad publicity'…so take that, Mr. Chevedden. And, more positive news, Broadridge is reassembling a broad panel of experts, of every stripe, to reassess and republish an updated version of best practices to consider when considering a VSM…so stay tuned...The real trick here, which Chevedden seems to miss entirely, is that different strokes are appropriate for different folks - and for different situations.

OUR NEWLY REVISED PRIMER ON TABULATING AND REPORTING SHAREHOLDER MEETING VOTES

We last issued our primer on tabulating and reporting on shareholder meeting votes in 2009 - and, since then, there have been so many changes in the landscape, we realized that an updated version was due…right about now…so here it is:

The first commandment when it comes to tabulating and reporting Meeting results is this: "Always prove every item to the Quorum." Doing this will essentially guarantee that all of the numbers you report will be correct. As we reminded way back in 2008, it would immediately have uncovered the tens of millions of votes that went missing in that year's election of directors at Yahoo, to the painful embarrassment of all concerned.

- What does this mean in practice? Add up (and ideally, have your tabulating system automatically add up) the For, Withheld, Against, Abstain and any "non-votes" and "no-votes" (in the case of offsetting split-votes by co fiduciaries) for each director and each item on the ballot – to be sure that each of the totals you are reporting are the same as the total you are reporting as the Quorum.
- What is the Quorum? It is the sum-total of all the shares (or voting power, if there are classes of stock with more or less than one vote per share that are entitled to be part of the quorum) that are "present at the meeting in person or by proxy". Thus, there may be a different quorum, please note, for different agenda items.
- Please note too that simply being present in the meeting hall – even if one does not cast one's vote on a single matter – is normally considered as being "present" for the purposes of determining whether or not there IS a quorum. But this is only important to consider where there is the possibility that some voters may try to postpone or prevent a meeting by preventing a quorum from being present. If this may be a potential issue, have every attendee sign in, and verify the shares they have - then sign them out and subtract their shares from the quorum if they leave without voting..
- **The second commandment of tabulating and reporting is to always know – and to always disclose clearly in the proxy statement – exactly what it takes for a proposal to "be approved".** These facts should always be findable in a company's Articles of Incorporation or Bylaws. Typically they arise from the corporate code of the company's state of incorporation, but very often, the company, or its shareholders, have adopted special provisions (like a super-majority provision, for example) that supersede the "standard" state law provisions.
- **A very important corollary to the second commandment - let's call it the third commandment - is to pay particular attention to all the "classes" of stock your company may have outstanding, since shareowners of such classes may or may not have a vote on particular matters, and**

often, the voting power is more, or less, than one vote per share. (Every single year we encounter dozens of cases where this critical information – on exactly what it takes to pass a proposal - is not disclosed, or in some cases is disclosed on one page, but contradicted on another… or is contradicted by an "explanation" – like the wacky explanations of the effect of abstentions and of "broker non-votes" that are being gratuitously inserted like mad these days by eager-beaver lawyers).

- **There has been a major set of voting developments since we first wrote this primer in 2009 that also need increasing attention as a codicil to the 'third commandment":** We have been witnessing a big upsurge in the existence of "Voting Agreements" - both in connection with major investors in IPOs, where the founders want to exert continued control - and also in terms of merger agreements - when insiders and other major holders are being required to vote with the management positions on a wide variety of matters that may arise. Another big trend is to require that a merger vote needs to achieve a "majority of the minority holdings" or a majority vote without the votes of "interested parties" in order to bullet-proof the merger against law suits. Arrangements like these require special efforts on the part of public companies - and their vote tabulators - to identify the individual accounts and the share-holdings that are affected - and exactly where there holdings are held, which often proves to be a mix of registered accounts and, very often, multiple accounts at various brokers, banks or other custodians.

DETERMINING WHETHER A PROPOSAL HAS BEEN APPROVED - OR NOT:

- **The most common standard for "passing" a proposal – and generally the easiest to meet - is "a majority of the shares present at the meeting in person or by proxy"**… or, in other words, one-half the Quorum (once there IS a quorum of course) plus one vote. Thus, many proposals can "pass" with as little as 25% of the outstanding shares plus one vote. (There has been a new wrinkle here too since 2009, in that many companies have changed the standard for approving certain proposals to be "a majority of the votes present and entitled to vote on the matter" - which makes it clear that broker non-votes are not to be included in the denominator - which can often take companies by surprise, when there are a large number of Abstentions and Broker-Non-Votes relative to actual voters on a given matter.

The next most common standard for passing a proposal is "a majority of the votes cast": Here is where it becomes important to recognize that "abstentions" – and so-called "broker-non-votes" are NOT "votes cast"…and thus, such votes and "non votes" make it harder for the proponent to get the needed Yes votes. Only the For and Against votes count – and they are the only votes to be included in the denominator if you feel obliged to report percentages.(There is a rather weird NYSE rule worth noting here - that abstentions ARE to be considered as "votes cast" on certain kinds of stock-compensation matters - which increases the denominator used to determine the percentage of votes cast in favor of the proposal - thus creating a higher, and sometimes hard to overcome hurdle for such proposals to be approved.)

- **Many proposals – and typically, the most important ones to shareholders in terms of the economic implications – require "a majority of the shares outstanding" – and often of "the total voting power" to be cast in favor of the proposal if there are additional classes of stock outstanding.**

- **Some proposals – like proposals to change the Bylaws, oust directors or to merge the company - require a "super- majority" - often two-thirds or even more of the shares outstanding to be cast in favor, in order to pass.**

- **Several "standards" currently exist for electing directors, so it is critically important to know exactly what standard applies:** The majority of public companies still have a "plurality standard", where votes may be "Withheld" from a director, but where there is no opportunity to cast an "Against" vote. Thus, as long as a director gets even one vote "For", he or she will be elected, unless there is a "proxy fight" with a competing slate. A rapidly growing number of companies have adopted a "majority voting standard" where shareholders get to vote "For", "Against" or to "Abstain" on the election of each director candidate. (We have been amazed, year after year, to see how many companies that said they had majority voting failed to give shareholders the For, Against and Abstain choices!) While most such companies simply require more "For" votes than "Against" votes for directors to be elected, some require directors to attain a majority of the Quorum, or even a majority of the shares outstanding. Requirements like these are becoming harder and harder to meet with each passing year, as the numbers of abstainers - and non-voters - have been growing steadily.

OUR "BEST PRACTICE TIPS" ON SELECTING A PROXY TABULATING AGENT

- **Our Number-One Tip: While you can be your own tabulating agent - and a surprising number of companies do just that, when they use company employees to serve as Inspectors of Election and to collect and add-in votes at the meeting site - our best advice is this: "Do not try this at home"** - even if you think you have a good safety net: You will almost certainly find yourself "in over your head" one day, you will likely leave a lot of votes 'on the table' as un-voted…and, worst of all, your tabulation will have virtually no credibility if challenged.
- **Tip-Two is to recognize that there are at least four sets of "tabulators" out there, serving different segments of a company's investor base, or designed to be a sort of "one-stop-shop" for meeting services…so it IS smart to try to OPTIMIZE your mix of providers to best suit your own situation, as best you can:** As most readers know, Broadridge Financial Solutions tabulates about 98%+ of the "street votes" - which, in a large-cap company often total 90%+ of the total vote. Most transfer agents still specialize in tabulating the votes of registered shareholders (although there are some that 'farm some or all of this work out' to others) and they will, typically, add in the votes reported by Broadridge, and other tabulating agents, and serve as the official tabulators and Inspectors at the meeting itself. There are several very fine entities that specialize in aggregating the files of various Employee-Ownership Plans - and in providing custom-built platforms to tabulate Plan votes - often on behalf of the various Plan Sponsors, who typically need to receive the reports and issue voting instructions directly to the main tabulator. Many of these agents also serve as "full-service tabulators." Lastly, there are several smaller companies - including a few that compete with Broadridge on the "street-side" - that provide various "meeting management services" - including such things as site selection and meeting staff-support, printing and mailing services, tabulation and (not so 'independent' we must opine) Inspector of Election services. For many companies, the one-stop-shopping aspect has great appeal. Others place special emphasis on rounding up the retail vote - and an increasing number of savvy issuers that have 6% - 10% or more of the voting power in a variety of employee plans have been placing special emphasis on providing highly customized programs of late, to help them max out on this usually friendly voting segment. ***With more and more close and potentially contested votes each year, it is becoming increasingly important to have the right providers - and the right mix of providers - in order to achieve the margins a company needs and wants to have where its own proposals, and those of shareholder proponents are concerned.***
- **Tip-Three, and the most important tip of all; Make sure that any and all of the service providers you select have highly rigorous quality-control standards - and have formal Q-C procedures in place - along with very strong cyber-security measures:** Many of the 'professional tabulators' whose work we have reviewed in the course of our own Inspecting duties have serious weaknesses here. Some tabulators check only a small sample of the voted proxies - often at random, and without regard to the size of the vote! Others have weak and sometimes no documentation as to what, exactly, constitutes a "valid proxy" - or an invalid one. Other, mostly smaller providers, have dangerously weak internal control and cyber-security systems vs. the best-in-class providers.
- **Make sure that your "primary tabulator" will provide strong support at the meeting site - and that their representative will be well prepared if anything unusual should come up, or if the final report is questioned or, heaven forbid, formally challenged - in terms of (1) their overall know-how when it comes to proxy voting and (2) in terms of their ability to *handle conflict* in an expeditious, diplomatic and totally professional manner: These skill-sets are increasingly hard to find in this arcane and rapidly contracting field of work.**

THE "WORST PRACTICE" IN SELECTING A PROXY TABULATING AGENT

NEVER use your proxy solicitor as your main tabulating agent - if there is a shareholder proposal or other contested or likely "close" matter on the agenda…UNLESS you also have an Independent Inspector of Election who will closely inspect the tabulator's procedures - and the tabulations themselves - and certify the Final Report: While it is "probably OK" to have your proxy solicitor serve as the main tabulating agent, to help you track the voting and to consolidate the reports from Broadridge, and maybe from your transfer agent and one or more employee-plan tabulators, let's say, this is as far as one could get from a "best practice" if there are close or potentially contested items on the ballot. Using the same entity to solicit - and to tabulate proxies - and to certify the vote as well - creates a clear-cut conflict of interest. Aside from being a 'bad governance practice' it could invalidate the results if they were to be challenged and force an embarrassing and expensive do-over, which we have indeed seen and reported on in this space.

OUR BEST-PRACTICE TIPS ON REPORTING THE RESULTS AT THE MEETING ITSELF:

- **Our Number-One Tip is "Never Rush to Report the Final Results":** We have seen way too many cases where last minute votes, or vote reversals, have changed the final outcomes in unexpected ways, or where a rush to report has led to mistakes in the reported outcomes - especially when the voting on one or more matters is "close." Also, it *looks terrible* - and it can be a terrific waste of valuable time - to try and report the Final Results if dozens and dozens of votes have been handed in at the meeting.

- **It is always best to report the "Final Results"… if one can do so safely and in a timely manner: But often, the best practice is to give a "Preliminary Report on the Voting:"** Ideally, it will note that the final results are not expected to change materially, based on the Inspector's review of the proxies received at the meeting, and that the Final Report will be posted on the company web-site.

- **Who should report on the voting outcomes? We continue to maintain that the *"very best practice"* and especially in terms of "bullet-proofing" the report - is to have an independent Inspector of Election report the results:** There is no need, please note, for the Inspector to read out all of the individual votes and percentages, as was so common in the old days. The Inspector can simply say that "I can report that all of the directors have received a majority of the votes cast (or whatever the specific standard for their election may be); that a majority of the shares present have been cast in favor of the ratification of Auditor X, to serve until date Y"…and then to report, proposal by proposal, on the outcomes, citing the standards for approval that apply. The Inspector (and smart Chairmen too) should not try to "characterize" the results - by saying, for example, that proposals have "passed" (it is up to the board to "pass" proposals) - or "were defeated" (they are just 'proposals' - not declarations of war.)

- **It is the Chairman's job, however, to declare that the directors have been "duly elected" and to declare whether the other proposals have been 'ratified,' 'approved' or 'not approved' by the shareholders, based on the Inspector's report**…and then to announce that the formal business portion of the meeting has been concluded.

- **What if one or more of the outcomes are "too close to call"?** We hate this expression - and say, "avoid it at all costs" - but if any of the outcomes are within one-half of one percentage point either way -or have changed direction overnight - our advice is to report on the outcomes that are crystal clear, but to indicate that *"because there were so many votes cast overnight - and/or at the meeting - the Inspector(s) of Election need to conduct a review of the voting with respect to items 3 and 4 (or re: X) and that a Final Report will be issued and posted on the company website within the next 2-3 days."*

- **What about reporting percentages?** We do not consider it a "best practice" to report percentages. It is not a required procedure - and every year, we see many companies that calculate and report them incorrectly. **If you feel you should report percentages, be sure to re-read our primer on tabulating results with care - and make absolutely sure that you have used the right *denominator* in making each of your calculations.**

- **What about sharing voting information with shareholder proponents, other shareholders and/or the press at the meeting site?** Shareholder proponents, or their designated representatives, almost always ask to look at the Preliminary or Final Report, and there is no real point in denying them a look-see. **The Corporate Governance Officer or the meeting Secretary should give permission before any results, other than what has been read out at the meeting - are shared with any of the above parties. Also, the parties should be advised that the report should not be considered as Final until the 8-k is filed and posted on the company web-site.**

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ON THE SUPPLIER SCENE:

A new "Powerhouse of Power" emerges on the governance scene, we say, as Sard Verbinnen & Co., a leading strategic, financial, and crisis communications consultancy, announced in late November that it will launch **Strategic Governance Advisors ("SGA") in January 2017**: "a new independent group dedicated to advising Boards of Directors and corporate leaders on a range of governance issues important to institutional investors" the press release noted. Along with SVC, SGA's founding partners are: **Chris Cernich**, formerly Managing Director for M&A and Contested Situations at ISS, the world's largest proxy advisor to shareholders; **Mark Harnett**, a co-founder and President of **MacKenzie Partners** until he left for Sard Verbinnen in 2015, and **Amy Bilbija**, formerly a Managing Director in **Evercore's** corporate advisory business, and before that an EVP for west coast operations at MacKenzie Partners.

The veritable powerhouse of expertise drew a half-page article from the ***New York Times*** **DealB%k** editor **Stephen Davidoff Solomon**, who noted in the headline that **"Engagement Has Become New Strategy for Shareholder Activism."** Among the big new shifts in the landscape, Cernich noted that big fund managers like **BlackRock** argue that shareholders should become more prominent and have an active role in shaping companies directly… and that shareholders will no longer be so tolerant of enormous pay packages for corporate chiefs. Corporate governance "is expanding, not evolving" Cernich noted. "Increasingly, shareholder activism is about the health of the balance sheet and income statement." (*We* want to note that the *OPTIMIZER* predicted this trend way back in our 2nd Quarter 2011 issue, "What's the Next Big Thing in Corporate Governance? Holding Directors' Feet to the Fire Over their Stewardship of the Corporate Cash Box." This is still worth a re-read, we say, at http://www.optimizeronline.com/search/article/101649/what-s-the-next-big-thing-on-the-corporate-governance-front)

We were mightily impressed with the press release, which noted that Cernich, "As Managing Director at Institutional Shareholder Services (ISS)…led an international team providing analysis of and voting recommendations on mergers & acquisitions, economic proposals, and fights for corporate control, for 1,400 institutional shareholder clients representing more than $20 trillion in AUM [and]covered more than 250 proxy contests for board seats, as well as numerous hostile takeover attempts and contested or contentious mergers." Harnett and Bilbija have extensive, hands-on experience, advising boards and top managers on how best to deal with hundreds of these very same deals…

And as to Sard Verbinnen…the release notes that "For nearly 25 years, SVC has consistently ranked among the top M&A communications advisory firms…named "PR Firm of the Year" in 2014 and 2015 by **M&A Advisor** and, for the 1st half of 2016 [was] named the #1 M&A advisory firm by volume (**Mergermarket**) and #1 for private equity transactions (The Deal)" and was recently "Recognized by **Bloomberg BusinessWeek** as "Wall Street's go to crisis firm."

MEANWHILE, ALL OF THE BIG-FOUR ACCOUNTING FIRMS HAVE BEEN RAMPING UP THEIR CORPORATE GOVERNANCE OFFERINGS AT A MIND-BOGGLING RATE: Nary a week goes by that we don't get a dozen or more studies, discussion papers, web-postings, tweets and invitations to webinars, seminars and other social events pushed to us by the Big-four firms, anxious to jump on the governance bandwagon and take us along for the ride. And most, if not all of them seem to be trying to invade a lot of space that a company's outside law firms had staked out as their own turf.

BUT OOOPS...DEFICIENT AUDITS CONTINUE TO DECLINE AT THE BIG FOUR AUDIT FIRMS" - OR SO A WALL STREET JOURNAL TALLY NOTED ON 12/13 - BUT WHERE "INSPECTORS FROM THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD FOUND DEFICIENCIES IN 28% OF THE BIG FOUR AUDITS THEY EXAMINED"- down from 35% in 2015 and 39% in 2014. Still an astonishingly large percentage in our book, and hardly a call for cheering. In prior years, Peekaboo apologists have explained that they intentionally choose larger and more complex audits to "peek at" with special care - which is exactly what they should do. But actually, that underscores the size and severity of 28% deficient audits by Big Four firms. Maybe the big-four should spend more time on their traditional business, and less on turf expansion - at least until they get deficient audits down to single-digit numbers per year...

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OUT OF OUR INBOX

No Q&A AT SHAREHOLDER MEETINGS?

In early November, your editor got an e-mail from a prominent securities lawyer asking, in response to a client inquiry we presume, "Are you aware of any major large-cap companies that prohibit Q&A during annual meetings?" Here's our answer:

"Shareholders have an absolute right to be heard at 'meetings of shareholders' I say. It's part of what shareholder meetings are FOR. So a company of any size would be nuts to try to prohibit shareholder questions - or comments, for that matter. Large cap companies would surely raise a *fire-storm* of protests - and not just from activists.

"That said, there HAS been an emerging mini-trend to try to prohibit shareholder questions until after the "formal business of the meeting" is over. I consider this a disgraceful practice, since, again, shareholders have an absolute right, I say, to ask questions - and to have them answered - IF they are germane to the official business at hand, that is. And this opportunity should be offered BEFORE the voting takes place. Companies that try to defer all Qs until after the voting takes place do so at the peril of being publicly and rightly shamed...And if there is a contested election item (and I have been at contested meetings where the subject of prohibiting, or severely limiting questions came up, and where the management was almost set on a prohibition) I think (as I told them) that shareholders would have good grounds to have the vote invalidated if their rights to be heard were abridged."

But general questions are another matter altogether: Here, the best practice is for the Chair to defer all such questions until the official business of the meeting has been concluded. Most companies have been trying to limit the general Q&A period - and the length of time each holder or group of holders may speak on a given topic - in deference to the audience as a whole, which most shareholders appreciate. We also loved **Verizon's** innovative idea to have designated areas where shareholder could go to have specific kinds of question answered since, in our long experience, very few of the "general questions" asked at shareholder meetings are of interest to the general audience.

SECRET BALLOTS AT BOARD MEETINGS?

The 3rd Quarter issue of **Directors & Boards** magazine opened, as usual, with an interesting and thought provoking Letter From The Chairman, **Robert H. Rock**: *"At a recent board meeting my fellow directors voted unanimously to approve management's recommendation to make a major investment in a new market. During the presentation, the directors asked many probing questions, suggesting significant concerns. After a robust discussion, a motion was put forward and seconded, and the ayes appeared unanimous and no nays were noted. However, in the executive session that followed the formal board meeting, several directors voiced their objections, and one indicated her outright dissent."* Rock went on to opine that while he's never seen one at any of the boards on which he's served, "there may be times when a board should undertake a secret ballot."

We think he's on to something important here. There is always a strong desire for collegiality on boards - but there is also a strong desire to have closure - and to *get things done*. But often, as we've noted here before, re: the terrible track record that corporate mergers and acquisitions have had overall, once corporate decisions are made, they become very hard and expensive to un-do. Not only is secret ballot a quick and easy thing to do - to guard against excessive deference to the "collegiality imperative" - and to potentially fatal "group think" - it might re-open the discussion, and maybe a call for additional info before a final vote…And certainly, we say, no harm can come of it. We'd love to hear from readers about this about their thoughts - and experiences, if any.…

THREE CHEERS FOR THE T-A (and maybe for the subject company too) THAT READ OUR RANT ON "ORPHANED DRPs" AND RESPONDED FORTHWITH…The ink was barely dry on our last issue when we got a note - and a check - from "transfer agent X" about "company Y" where we were getting statements every quarter on our "investment" of .002 shares: "As Administrator of [Y's] Direct Stock Purchase and Dividend Reinvestment Program, we periodically review the status of participant accounts to determine if they are eligible for the Program. This review helps ensure that the Program terms are complied with as well as helps [agent X] and [company Y] manage the cost of offering the Program [and] indicates that your Y share balance is below the one share minimum required for the Program. Accordingly, as provided under the Program's terms we have redeemed this fractional share and closed your account. THE NORMAL $15 SALE FEE WAS WAIVED FOR THE PURPOSE OF THIS TRANSACTION." One down and about four other "orphaned DRPs" to go…but so far, no further news…We will keep you posted…

AN IMPORTANT "SECOND THOUGHT" ABOUT TOO-SMALL ORPHANED ACCOUNTS - AND THE DIFFICULTIES - AND SOMETIMES PROHIBITIVELY HIGH COSTS OF OBTAINING MEDALLION GUARANTEES:

Three boos for us, for forgetting to advise in our last issue that one very easy way around the high cost and inconvenience of having to replace lost securities in order to cash out a tiny investment - and something that can also solve the problem of the high cost of obtaining signature guarantees to liquidate investments with low value - is for the company to simply self-insure - by instructing the transfer agent to waive the bond of indemnity and/or the signature guarantee for items with truly negligible value. Some transfer agents will do this entirely on their own hook, when the cost of processing the paperwork is many times the value of the "orphaned investment."

Cleaning up and eliminating all one's very small and mostly "orphaned accounts" is, we think, our biggest and best moneysaving tip of the year!

PEOPLE

Preet Bharara, the hard-charging U.S. Attorney for Manhattan has "agreed to stay" in his current role under the Trump administration, "a move that could signal **Donald Trump** is serious about cracking down on Wall Street wrongdoing" - or so said a 12/1 WSJ column. After a meeting with Trump, Bharara "told reporters that Mr. Trump asked whether he was prepared to remain…and Mr. Bharara said he was." Let's hope this all pans out as the WSJ indicated.

Jamie Dimon, JPMorgan Chase Chair & CEO, has been named Chair of The Business Roundtable for a 2-year term beginning January 1st, succeeding **Doug Oberhelman**, Chair & CEO of **Caterpillar**. Dimon was one of the prime movers behind the recently published Commonsense Principles of Corporate Governance that aim to promote long-term-oriented governance, and in December he was among the approximately 15 CEOs and other business leaders appointed to the President-Elect's new Strategic & Policy Forum.

James Kristie, the distinguished editor and associate publisher of Directors & Boards magazine is retiring after more than three decades running the publication. Kristie is likely the longest-tenured magazine editor currently in the publishing industry, beginning his 36th year as editor of Directors & Boards in September - and he is, without a doubt, one of the best-connected and most widely regarded people in the corporate world, and in the corporate governance space. "I just put out a 40th anniversary issue of Directors & Boards, and I originally thought I would retire with this issue — the old 'going out on top…knowing when to quit' trick…But management asked me to stay on to put out the first issue of 2017 so it looks like my last day will be Feb. 3 when that issue gets shipped to press" he posted on **LinkedIn.** Jim is an advisory board member of the **Weinberg Center for Corporate Governance** at the **University of Delaware** and the **Center for Corporate Governance** at the LeBow School of Business at **Drexel** University - so we are hoping that he will remain an active observer and commenter on governance matters.

REGULATORY NOTES …AND COMMENTS

ON THE HILL: The new Republican-dominated House and Senate are targeting major regulatory roll-backs if not outright repeal of the Affordable Health Care Act, Dodd-Frank and the SEC's not yet effective "fiduciary standard" for providers of retirement plan services as among their top priorities - even as some calmer heads are saying, "Hey…how can we drop 19+ million people from the health-care roster, just like that?"… And many of Trump's newly anointed top-advisors are saying, "Hey…some of those Dodd-Frank provisions are good ones"… "And hey… we have spent tons of money to implement the fiduciary standard, which has many good points!" Meanwhile, the vast majority of Trump's Cabinet picks seem convinced that their new agencies are utterly useless, and maybe should be abolished altogether, while the Dems are promising to engage in some "extreme vetting" exercises of their own.

On a more positive note, however, it seems almost certain that somewhere between 2.4 and 3 trillion dollars of corporate profits that are now held overseas will be repatriated - which

we - and the stock market too, as we write this - believe will trigger much needed, and job-creating investments to rebuild plants, equipment and infrastructure here in the USA - and a major economic expansion. So let's hoist a glass to 2017 - and hope and pray for the best.

AT THE SEC:

"The poor staffers must be hunkered down in their bunkers," we wrote in late December, "waiting to see what former-commissioner **Paul Atkins** (an avowed despiser of regulations) and, God bless, **Carl Icahn** have up their sleeves where the SEC is concerned, going forward." Chairman **Mary Jo White** was set to depart by January 20 - and may have already 'left the building' mentally, as her chief enforcement officer, **Andrew Ceresney** was already gone - as was former Corp-Fin Director **Keith Higgins**, who'd been spearheading the SEC's "Disclosure Effectiveness Initiative" - a wobbly, slow moving, dull-edged and totally ineffective spearhead if ever there was one - but, reportedly a very nice guy. We really liked Mary Jo a lot - and Cheresny too - although we thought the "broken windows strategy" was mostly a waste of time and money. Mary Jo was the *first commissioner ever* to take the allegations about financial chicanery, fraudulent exchange rates, unwarranted fees, bribes - and money-laundering in the big ADR business seriously...and we are inclined to believe that the enforcement efforts that finally began, on her watch, will prove to be unstoppable.

"Why don't we just declare a regulatory holiday, like the old congress did, and hit the beach?" we wrote…**But then, Trump jumped out early to name a new SEC Chairman, almost out of the blue; Wall Street lawyer Jay Clayton, a partner with Sullivan & Cromwell LLP**. *"It's hard to see how an attorney who's spent his career helping Wall Street beat the rap will keep President-elect Trump's promise to stop big banks and hedge funds from 'getting away with murder"* said U.S. Senate Banking Committee Ranking Member **Sherrod Brown** (Dem)…But from our perspective, what's not to like here? Despite the ironic humor of former Wall Street basher Trump making yet another high ranking pick with deep ties to **Goldman Sachs** (Clayton represented them in the $5 billion investment that **Berkshire Hathaway** made during the financial crisis - and his wife works for Goldie in the wealth management group) - and while we hate to agree with much of anything Trump says, until he un-says it later - one can't disagree with his statement that *"Jay Clayton is a highly talented expert on many aspects of financial and regulatory law, and he will ensure our financial institutions can thrive and create jobs while playing by the rules at the same time."*

IN THE COURTHOUSE:

A huge decision from the Supreme Court, which ruled unanimously that prosecutors do not have to prove that something of value changed hands in order to win an insider trading case - at least where relatives are concerned. Although the WSJ quoted US Attorney General **Preet Bharara** as saying that "The court stood up for common sense and affirmed what we have been arguing form the outset - that the law absolutely prohibits insiders from *advantaging their friends and relatives* at the expense of the trading public" (italics ours) - oh shoot… **Justice Alito** specifically referred to a "gift to a trading relative" - and not to a "friend" - much less a "friend-of-a-friend" - in overruling the 2014 federal case that insisted there needed to be a "pecuniary benefit" received by the tipper in order to perfect an insider trading case. So maybe not so huge a decision after all.

WATCHING THE WEB

What a way to end a year at Yahoo, which in mid-December announced that a law enforcement agency informed them that over one billion (!!!) user names, telephone numbers, dates of birth, encrypted passwords and unencrypted security questions - that could be used by the hackers to re-set user passwords - had been hacked by persons unknown…way back in 2013. This on top of an October announcement that 500 million accounts had been hacked in 2014…after 450,000 accounts were hacked in 2012. "Security has taken a backseat at Yahoo in recent years, compared to competitors like Google and Facebook" the New York Times understatedly observed in its front page story - and "Yahoo's security team clashed with top executives, including the chief executive, Marissa Mayer, over the cost and inconvenience of proposed security measures." What a knock on her business judgment - and what a financial blow - if not a deathblow this may prove to be - to the pending sale of Yahoo to Verizon, Inc.

And what a reminder to all of us this should be - to be sure we work only over secure networks - and change our passwords frequently (Ugh!) - and not use our mother's maiden name, or our father's middle name, or the name of our high-school as our "challenge questions" - and to scrutinize the source of every incoming e-mail with care, before opening it - and to tape over our computer cameras - and to try to foster a "culture of security" in our offices - and in our homes, where, as mentioned a few issues back, our kids and grand-kids are MAJOR openers of doorways to hackers, cyber-worms and other forms of malware when they log on to our household networks. We wish you all a happy and hack-free New Year!