THE SHAREHOLDER SERVICE

OPTIMIZER

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

VOLUME 15, NUMBER 3 ★ ★ ★ NOW IN OUR 15th YEAR ★ ★ ★ THIRD QUARTER, 2009

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COPING WITH THE LOSS OF THE BROKER VOTE: OUR TOP-TEN "STRATEGIC TIPS" ON WHAT YOU SHOULD BE DOING....NOW

Unless you've been living under a rock somewhere, you know of course that NYSE Rule 452, aka the "broker-may-vote rule", aka the "ten-day-rule" – which allows brokers to cast votes in their own discretion on "routine matters" if no votes have been received from their customers 10 days before the meeting – will no longer apply to director elections for Annual Meetings held in 2010 and thereafter.

We've been amazed by how much confusion there has been as to the real effect of the new regime…and by how much heat, and how little light has been shed on this matter by most commentators. No surprise, we guess, since most of the comments have been coming from proxy solicitors who are literally salivating at the chance to call all of your retail shareholders during the dinner hour to "get out the vote".

Here are our OWN top-ten tips on what you need to know and do to be properly prepared…plus one to grow on:

1. Inform your top-management – and especially your Directors – about the rule change, and about what, exactly, it means to the voting results, and potentially to them. And do so as soon as you can figure it out: For example, you can expect a lower Quorum than usual – about 20% lower *on average*…and there is the potential for even more troubling outcomes if a "Vote-No Campaign" should target one or more specific directors, since the old "broker vote" was always in their favor, and won't be there in 2010 to pad the percentages with added "yes" votes.

2. Before you go before the top-management team, be sure you *have* figured it out, of course, and gotten your own company's projected numbers nailed down tightly: Please remember that the "averages" don't really matter here: All that counts is how your *own company's* votes turn out. It is a simple matter to find out exactly how many broker-votes there were at your last annual meeting, so you can compute the likely 2010 quorum number and assess the impact that "votes no" against given directors – or, heaven forbid, a potential Vote-No campaign, or worse, a Vote-No recommendation from one or more proxy advisory firms could potentially have on the outcomes.

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3. Plan to have at least one "routine item" on your ballot, to assure that you will HAVE a quorum when your meeting convenes: Brokers can still, and *will*, cast votes in favor of "routine items" that are on the ballot, which , of course will count toward the quorum. Several proxy solicitors have told us that some companies are resisting this approach – maybe because they're not *required* to ratify the auditors. Maybe they're just being stubborn…or maybe it's because they're afraid their tabulator will charge them extra. But folks, the cost of getting it right vs. the cost of having to adjourn, and reconvene the meeting later is peanuts, compared to the downside risk here.

4. Handicap the likely votes for – and against each director – strictly on the q-t at first: The most common reason for big Votes No against directors is low meeting attendance. But this, as we'll note below, can often be headed-off at the pass, with a well-written explanation in the proxy statement, plus an assurance that a repeat in the coming year is not expected. If there have been "performance problems" at your company – or even a spell of "bad press" – you can expect the audit committee and comp-committee members to get more than the usual number of "reflexive" Votes No. Another thing that tends to draw fire, and often takes people by surprise, is a director who is on the board of some *other company* that has had bad press, or who is "over-boarded". If you have failed to implement a shareholder proposal that got a majority vote last season, you can virtually guarantee a higher than usual number of Votes No against nominating committee members and/or the lead director. Here, by the way, is where good proxy solicitors will fully earn their keep.

5. *Consider* sharing your best-case and worst-case scenarios for the 2010 meeting with the directors: This, of course, is a mighty ticklish situation. But often, such sharing can solve the problem if there is one, since NO director wants to run a serious risk of having high votes-no, much less failing to get 50%+ votes-Yes. And frankly, YOU can't afford to have a director who receives such news "by surprise" at the meeting itself. Plus - and make sure you present it this way - you're only *sharing info*, and ideally it should be info with a lot of solid third-party input that you can cite, to be sure that there ARE no surprises.

6. Start drafting your "expanded information" about board members and board composition NOW: At every one of the many industry conferences we've attended this fall, the main takeaway from SEC staff in attendance has been this: the SEC's proposed rules for expanded disclosure here WILL be largely adopted. But also, as we've been reminding for five or more years now, director elections are more like political elections with every passing year. And, as we've also been reminding – only half in jest, or less – directors who are "old, ugly…academics, or ex politicians, or who are on more than two or three boards" are increasingly at risk – even though YOU may know they are among your best directors. So start prettying up those bios – and do the best you can with those pictures (but easy on the airbrushing, so as not to be accused of false-disclosures) starting NOW.

7. Start work on the section regarding the director nominating process at your company - and in light of the very particular business environment you find yourselves in: This is the best place, we think, to address those hard to describe but critically important issues of board composition and group dynamics; and how things like "diversity" and particularly important "skills and skill sets"…and yes, "continuity" – and even the sometimes dumb-sounding ideal of "collegiality" – really need to be continually reassessed and re-balanced, and planned ahead. Above all, you need to make it crystal clear that this is what your board is actually DOING. If you really want to head self-appointed nominating committees and Vote-Noers off at the pass, this is the place to begin.

8. Do not foolishly think that because you still have *plurality voting*, you have no need to worry about directors who may not achieve a majority of the votes cast: As we've warned before, this argument does not cut the mustard with professional investors…And face it; such a situation can be deeply embarrassing to affected directors…and is indeed a red flag…And it is one that WILL get press attention in 2010, we guarantee.

9. Regardless of the way your *hypothetical handicapping* comes out, recognize that IF a Vote No campaign should arise unexpectedly – or if there should suddenly be some unexpected "bad press" around your meeting time — your individual investor votes – which are almost always more favorable than not – will be your "swing votes": They will likely make the difference between a targeted director achieving a majority vote…or not. Also, please note well, individual investors have been voting less and less often with every passing year. So understanding your company's numbers, and having a plan – and a program in place – to educate your individual investors about the voting process, the importance of the issues….and the importance of THEIR VOTE is essential, we believe. (See our next two articles for more.)

10. Pay special attention to getting out your employee votes in 2010: Check your numbers for 2009 here. Often, employee ownership – via various kinds of employee plans you may have, coupled with shares that employees and their families own as individuals – adds up to 10% or more of the

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total voting power. And ordinarily, you should be able to count on all of them as "friendly votes." If not, you really need to get cracking! But note that *employees* have been voting less and less often with every passing year. So plan to educate them too. And be sure to guarantee them complete confidentiality where their votes are concerned. In our experience, virtually every employee has at least one director they just don't like and just won't vote for. If they think there's the slightest chance that the management will ever know how they've voted, they will not vote at all.

A tip to grow on: Do rely on experts if you think you need help here. And do recognize that having a good proxy solicitor on board, both before and during the meeting, is usually mighty cheap insurance. But please…use those outward-calling-programs sparingly, and with special care. Pay attention to what will be said, and by whom…and when: Badly timed and badly executed programs can and will backfire on you, and can actually cost you votes in the end.

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COPING WITH THE LOSS OF THE BROKER VOTE... AND THE POTENTIAL 50% DECLINE IN THE INDIVIDUAL INVESTOR VOTE, IF YOU FAIL TO USE THE N&A MODEL WISELY: OUR TOP *"PRACTICAL TIPS"* ON WHAT TO DO... TO HEAD-OFF A POTENTIALLY CAREER-ENDING SNAFU

With our top-ten strategic tips under your belt, it's not too early to begin planning the practical side of your 2010 Election Campaign – a proxy season that we predict will be more challenging than any season we've ever seen. So here goes:

1. Do NOT abandon the idea of using the N&A model – probably the biggest money-saving deal there IS in our "space" – But DO begin to work on your "stratification plan… NOW.

2. Have a conference call, or better yet, a sit-down with your Broadridge rep, with your Transfer Agent rep, and with your proxy solicitor, if you used one, to review the 2009 vote, the number of "broker votes" you got last year - which you won't get this year, where director elections are concerned - to work-up the stratification plan for 2010.

3. Call or meet with your Employee Ownership Plan trustees, and the Plan administrators too, and all of the other service providers you may use here for data conversion and/or proxy tabulation, to make sure you have a good plan to "get out the employee vote"... and that all of the people involved are "on the same page".

4. Unless your 2009 Quorum was 85% or higher AND your "broker vote" was 20% or lower, be sure to have at least one "routine proposal" on your ballot, to assure that you will HAVE a quorum – plus a decent "cushion" just in case – when you convene your meeting in 2010.

5. Plan to mail paper materials to every registered and street-name investor who voted a proxy in 2009: Make sure you know how many of such people there were – and exactly how many shares were voted by them. This will virtually guarantee that those very same people will cast their votes again this year. You can not afford to loose a single vote from this group.

6. Make sure you know how many of your registered holders, and how many of your street-name holders have signed up for paper-delivery. Currently, 3.5 million street name holders have signed up to *always get paper*. You need to know how many of them hold YOUR stock, and Broadridge can tell you. The number of registered holders who always want paper varies widely from company to company…So be sure you know your own numbers here too before ordering any printed materials.

7. Now go to your list of "strategic actions" that may be required in 2010, paying particular attention to the kinds of proposals you expect to have on your ballot: If you have any proposals that need a majority – or worse, a super-majority of the outstanding shares, and not merely of the quorum in order to pass – you will probably want to "push" paper materials to your larger individual investors, since paper-getters DO vote at roughly twice the rate of Notice-only recipients. The same principle of "stratification" should hold true if you expect to have shareholder proposals that you do NOT want to pass. (Please think of the 80/20 rule here, and check your own numbers: Most times, less than 20% of your holders will hold more than 80% of the voting power, so you can "stratify" accordingly and still save BIG MONEY with N&A.)

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8. If you think that one or more of your directors MIGHT become the target of a Vote-No campaign - or worse yet, get a Vote-No recommendation from one or more of the proxy advisory services - call in a proxy solicitor if you don't have one, and begin to draft a more elaborate battle-plan.

9. Start drafting your proxy materials ASAP – and pay special attention this year to the "look, feel, and overall readability and user-friendliness" of ALL your materials if you want to maximize the vote. (We promise to have a separate list of practical tips on drafting, design and layout of paper and web-hosted materials in our annual Special Supplement…coming in early December.)

10. Think seriously about an investor education program, beginning NOW: Just as with institutional investors, the time to reach out is NOT when you have an "issue" or a "problem", or when your meeting is next week. Sadly, most companies send NOTHING to investors anymore, except for the Notice, and maybe a paper proxy-package that comes one time a year. We think it IS time to invest a bit of time and money to "get out the vote" – and that it is usually a lot cheaper than when you have to send such stuff "in extremis". Please see the next section for more of our thoughts on this.

###

SEC PROPOSES NEW RULES FOR "NOTICES" TO FOSTER "ACCESS": WE TELL YOU…AND THEM… WHAT YOU *REALLY* NEED TO DO…

At long last, recognizing that under the current N&A "regime" issuers have lost fully one-half of the votes of individual investors that they'd been getting before N&A – but still insisting there might be "other explanations" for this coincident phenomenon – the SEC has issued "Proposed Amendments" to the rules: See www.sec.gov/rules/proposed/2009/33-9073.pdf for the full text.

But the "centerpiece" of the proposed rulemaking misses the mark entirely; specifically, "to develop a program designed to educate and inform shareholders – especially individuals – about the Notice and Access Model, explain how shareholders may participate and explain shareholder rights."

Hello: It's not about the "Model" folks…or even about our rights: the whole damned system needs a fix – starting, we say, with a major re-thinking of what voters really need to SEE, and READ, in order to cast an informed vote.

But meanwhile, as the NYSE sponsored study of a few years ago clearly indicated, and as a quick chat with any investor under 60 will quickly reveal, the average investor does not understand why his or her vote is important. He or she does not know where to go, or how to go about making up his or her mind if they DO think that maybe their vote is important…And clearly, the average Jane or Joe really has no time at all to page through and try to decipher proxy statements that are getting longer and more complicated every year…thanks entirely to the tender ministrations of SEC. Plus - let's remember: the basic M-O of the N&A model is to send a piece of paper that, if you bother to read it at all, invites you to go someplace else - to look for and read something different - more or less in your "spare time"…of which we all, of course, have plenty….Duuuh!

***The OPTIMIZER,* of course, thinks that it has a solution…in the form of its little booklet from 2003 (!). It has three sections: one to explain exactly HOW "Votes Have Value"; a second section that outlines a simple and totally impartial "strategy" for finding and mulling over the info one needs to make up one's mind on proxy voting issues, and a third section on the various ways to CAST one's vote, with a view toward making it habitual – and as easy as possible, whether one likes the phone, the web, or plain old-fashioned snail-mail…all of which have different pulls, often at different times, for different folks.**

We heartedly endorse THIS statement in the SEC release, and hope that our readers will take it to heart: "Issuers who have experienced a significant cost savings, but may also have experienced a significant decrease in participation rates may wish to consider using ["some of" the Optimizer would say] those cost savings in educational efforts designed to increase participation by shareholders."

Readers: if you would like a copy of our educational booklet – which we believe you can and should consider sending to your retail shareholders before the 2010 annual meeting season kicks in – just call or email us.

###

ISSUERS GET A STAY OF EXECUTION ON DIRECT PROXY ACCESS… BUT IT'S COMING TO OUR NEIGHBORHOOD SOON, WE GUARANTEE:

The SEC – which was expected to vote on Direct Access to the corporate proxy machinery for the purpose of nominating director candidates on Nov. 8th, announced in early October that it would delay a vote on the final rules until early 2010 – to be sure that they would "get it right."

As we've noted before, a majority of the Commissioners are on record as being in favor of Proxy Access – and we are absolutely sure that some sorts of access provisions WILL be mandated by SEC rules. But it does seem that even the most rabid supporters were taken aback by the many practical issues that were raised by the corporate and legal community comments AND, even more so we think, by the huge burden that would suddenly fall on the SEC if 150+ years of legal and administrative precedents that have evolved under our current State-governed system were to be suddenly tossed into the dumpster.

We think that in the little bit of time that remains here, there is still a chance to convince the SEC – and the proponents of a Federal Shareholder Bill of Rights too – that there needs to be room for shareholders themselves to cast votes that would modify, and supersede the "particulars" of any Federal rules regarding such things as required thresholds for submitting proposals… and what it takes to pass such proposals. The potential wild-card is the Federal Bill itself, which, once passed, may make the idea of "private ordering" by shareholders themselves suddenly illegal. We'd urge an all-out effort to slow, and ideally to stop the train here, so that shareholders – and not some new and bigger bunch of bureaucrats – ARE put in charge of the director election process. Meanwhile…here are….

OUR TOP TIPS ON HOW TO USE THE ADDED TIME TO YOUR ADVANTAGE

1. Start NOW to contact your top-ten or top-twenty investors to ask if they have any governance issues or objectives or observations they'd like to discuss with you. This is really our "top tip" if your goal is to build a strong bulwark against potential "noisemakers" and "professional troublemakers" who will be the most likely kinds of people to seize the Direct Access opportunity: We've said it before…as has every institutional investor we've ever heard on this subject: The time to talk to them is BEFORE there is an "issue"… or a problem…or a case where you really need their vote. And don't expect they'll have time during "proxy season". So the time to talk really IS now. Be sure you talk to the folks who actually *decide* on the way the institution will vote, of course…and recognize too that many people won't admit it's not them, so do your homework here. **No serious investor (excluding raiders and noisemakers, of course, who are NOT "investors" in the real sense of the word) will ever try to nominate candidates to run against your slate…as long as a "reasonable dialogue" is open to them.**

2. Cool your jets on Direct Access before you start calling around or writing anyone: Start by recognizing that Direct Access will only be employed in the most egregious of cases – and that's not your company…Or if it is, it's better to stay in the weeds. Over-the-top rhetoric and Chicken-Little clucking that the sky will fall if Direct Access comes along were big factors behind the mess we're in right now. **Stick to *logical* and *well reasoned* opinions about Direct Access, please, and focus on the practical issues…And please remember that your company is probably not in line for this anyway…so cool your jets, as we said.**

3. Do recognize however that there ARE two areas of vulnerability here, and maybe your company IS in the danger zone: Case-one, and the most common sorts of case by far, are small and mid-sized companies that are thinly-owned and thinly traded, where a proxy fight can and will trigger either a quick pop in the stock (where dissidents can and usually do cash out pronto) or an actual change of control, where a dissident group – even if they are not, and have no intention of being the eventual acquirer – figure they can buy on the cheap. Among the primary victims here are companies that are largely owned by family members of the second or third generation, where there is a "parting of ways"; small financial institutions – like community banks, thrifts and smallish REITS – and small manufacturing companies, and even a few "tech-companies" with lots of patient long-term owners who like the slow but steady status quo, but where the company - like those banks and REITS - suddenly "gets discovered" by investors who want them to be on a faster track. Almost all of the proxy fights here, by the way, end up in a virtual *dead-heat* between investors with long-term and short-term horizons for ultimately cashing in.

Case-two, as a colleague pointed out - and at whose company this sorry situation happened - is a sideswipe by **Carl Icahn**, or someone of his ilk, for whom a "totally free ride" on the company's proxy statement will be simply too good to resist. **If you find that your company might be vulnerable to either of these situations, be smart and get your "proxy fighting plan" and your proxy fighting team in place asap.**

4. Once you have figured out, as we did, that federalizing the proxy process is NOT a good idea, and that Direct Access will have a huge and hugely disproportionate

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ISSUERS GET A STAY OF EXECUTION…

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impact on small and midsize companies, write your Congressman, and your Senators, in support of our traditional State-governed system of corporate governance. Bone up first, by reading the Society's letter to the SEC on this subject, the excellent letter from the Delaware Bar Association and the refreshing and rather surprising letter from Ed Durkin of the Carpenter's Union, who makes the case that majority voting is the real preventive measure against 'bad boards'…and a sure cure should one slip in. (Durkin is right on the money too, when he notes, in his in-person discussions, that nominating directors is not in his pay-grade.)

5. We are still OK with the idea of making Direct Access part of a "Shareholder Bill of Rights" but we think that the best way by far for these rights to be protected…and perfected…is via our traditional, and deep, and richly evolved and still evolving systems of State law. We are deeply concerned, and we think you should be too, that by making Direct Access part of such a Bill, and by making the SEC the primary rule maker here, we will not only preclude issuers - and their shareholders - from freely choosing the kind of "Access Rules" that THEY deem best, we will be throwing out over 150 years of invaluable case law, leaving an already overburdened SEC to try to "reinvent the wheels of corporate governance" that have been evolving rapidly over the past few years, and which have been serving investors of every stripe quite nicely we say…as the current debate is actually *demonstrating.*

THE CORPORATE GOVERNANCE CORNER

❑ **The big news this quarter, The United Brotherhood of Carpenters withdrew the 18 shareholder proposals they'd planned to enter to request a Triennial Say-On-Pay.** "We'll spend our energy and focus on the legislative side" **Ed Durkin**, the union's governance director told the press, in light of the mandatory SOP that's in most of the proposed federal platforms. Annual SOPs are "a process that does not allow for thoughtful analysis and voting" and this year's actual vote results on SOP "reinforce our belief that annual votes would be a mindless process" Durkin said, and we agree.

❑ **Quick on the heels of Durkin's announcement, even bigger news: Microsoft announced that IT was voluntarily adopting a Triennial Say On Pay, with the first vote to take place November 19th.** The announcement, via a blog authored by **Brad Smith**, the G-C and Secretary and **John Seethoff**, V.P. and Deputy G-C is very worth reading and reflecting on. A valuable takeaway, most executive pay plans have multi-year rollouts, and periodic new plans or grants. Thus, the Triennial look – coupled with the likelihood that there may be new plans to ratify each year anyway – does indeed make a great deal more sense…even before reflecting on Durkin's point the investors can't possibly spend "quality time" on 3,000 – 6,000 Pay Plans a year.

❑ **"I was expecting that a lot of companies would be changing the payouts from cash to stock** [in 2009] **and then restricting the stock for three to five years…**Or paying out half the bonus in cash and half in stock that must be held for three years…But I didn't see any of that" comp-consultant **Jim Reda** told the inimitable **Gretchen Morgenson** of the *NY Times* in August, following his study of pay practices at 191 of the largest US companies. "Corporate America needs to deflate the compensation packages because with higher leverage comes higher risk"…In 1987, the salary of a typical CEO was equal to about 30% of the total comp-package, Reda said. "Today it's about 10%. So over the last 20 years leverage has increased dramatically."

❑ **Here's another non-surprise on pay practices; Two recent statistical studies on the selection and composition of peer groups show that companies tend to pick peer groups that support high pay levels:** The good news for investors…and the potentially bad news for public companies is that the same kind of statistical modeling can and will rat-out the baddest actors. A recent WSJ article on peer groups and pay led off with **Tootsie Roll Industries**, with $496 million in 2008 sales, which uses **Kraft Foods** – with $42.8 billion, or 85 times as many sales – as a "peer" for comp purposes.

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THE SHAREHOLDER SERVICE OPTIMIZER

is published quarterly by

CARL T. HAGBERG & ASSOCIATES

P.O. Box 531, Jackson New Jersey 08527-0531

SUBSCRIPTION PRICE…………$300 per year

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FAILING GRADES FOR THE PAY CZAR: "F'd" FOR SURE:

In our last issue we opined that a Pay-Czar was "probably NOT a good thing"…and his recent actions have proven us right:

For starters, he's diddled and daddled – dangerously – in terms of disbursing the "retention bonuses" that were awarded, pre-TARP, to key AIG employees. OK, we'd have to say; maybe $7000 for a "kitchen attendant" *is* way too much. (And probably, the kitchen should not have been "retained" anyway: Most folks we know at AIG are working 14 hour days, with no *time* – or *appetite* - to go to the dining room). But we know for a fact that loyal AIG-ers are struggling desperately to hang on to high-value clients – at a time when potential poachers are everywhere, and where the poaching, let's face it, is sort of easy – even while THEY are getting offers to move elsewhere and to bring their clients with them. This, of course, would soon bring down the entire edifice. AIG investors – even those of us who think it's mostly a write-off these days – ought to be mad as hell at Feinberg's fiddling and faddling and diddling and daddling here, while the franchise itself is so seriously at risk: **A big fat F…for you, Tsar Feinberg.**

Worse yet, we say, is the *total giveaway* of Citigroup's enormously profitable Phibro energy-trading business that Tsar Fienberg forced on Citi and its hapless shareholders: Here's a business that had revenue of $667 million last year – and $1.86 billion in earnings over the last five years – that went to **Occidental Petroleum** for a paltry $250 million. This, as the **WSJ** pointed out, was merely "the net value of the unit's assets, essentially its trading positions." Oxy officers laughed out loud in the WSJ at the huge, premium-free coup they scored - while shareholders cried - with nary a *penny* to take to the bank - thanks to Tsar-F: "If you've got to sell, why should I pay a premium? What leverage does the seller have?" Oxy's president and CFO crowed. "They would never sell this if it wasn't for the pressure of the government in my opinion" he added, which, clearly was right on-the-money. All of this so the evil **Andrew Hall**, who was the brains and the brawn behind all the money Phibro made, would not get his anticipated bonus of approximately $100 million for 2009…from Citigroup, that is. You can bet he'll get every penny – plus maybe a "signing bonus" on top from Oxy. And, as the Oxy CEO also noted about the Hall bonus in a neighboring article, "This would withstand any rational scrutiny that anyone would put on it. I hope they make a lot of money, because we'll make even more." As Citi shareholders ourselves, we have to say… ***"Thanks for giving away one of Citi's best assets for a big fat NOTHING, Tsar F".***

And just as we were about to go to press, comes news that General Motors can't find a qualified CFO for the $1 million cap on cash pay that the Pay-Tsar, in his god-like wisdom, think should be the max: Most other companies under Tsar-F's thumb can offer up-front grants of stock to attract new talent and stock awards to flesh-out the pay package. But the *literally poor* GM, please note, has no stock that's publicly traded yet, with no firm date for an IPO. Meanwhile, the current CFO is trying to keep his head up after a leak that Obama's "car committee" questioned his abilities. The good news for GM is that it's cost the poor incumbent two jobs so far, so at least they HAVE a CFO… for now. ***"So who needs a good CFO anyway?"* as Tsar-F seems to be asking himself. Ouch! "F'ed" again!**

ON THE SUPPLIER SCENE:

Interesting doin's in the Transfer Agent world…

American Stock Transfer, and it's majority owner, the Australian conglomerate PEP, have announced the appointment of a new CEO, with some big-time credentials; Mark Healy, formerly an EVP at Fidelity's National Investor Services unit.

BNY-Mellon has hired the well-known industry entrepreneur Peter Breen, to reinforce its sales staff.

Computershare has announced that former National City star, Marlene Jeanclerc, will head-up the newly-combined Computershare Cleveland office, starting Nov. 1st.

On another T-A note, we were startled to realize the other day that despite all the industry consolidation that's taken place, there seems to be more overcapacity than ever. It's due to two reasons, we think; first the fact that the former "second-tier agents" – all of them run by individual entrepreneurs these days – have become *real competitors* vs. the "big agents". And second, thanks to the steadily falling numbers of registered owners – plus the incredibly low activity levels – especially if one does a halfway decent job, so as not to attract rafts of calls and letters – there is simply not enough work to go around. Watch for our annual "Transfer Agent Merry-Go-Round Update" in the fourth quarter issue…and watch for more news to come in this space before too long…we guarantee.

OUT OF OUR IN-BOX: SEVERAL NEW REPORTS ON T-As HOLDING CORPORATE RECORDS FOR RANSOM:

A good friend from a Fortune-50 company called to give us an early-fall scoop: ***"I use a firm that's not my transfer agent to handle our abandoned property administration, and the person I deal with told me that one of the big transfer agents had charged his company a hefty five-figure number to provide them with the files of lost holders they needed to price-out and handle the search and escheatment duties. This sure doesn't sound right. I don't want to mention the TA by name, but I bet you will know who it is."***

We asked if he'd go back to his supplier to see if they'd speak to us off the record, and next day we heard straight from the source: *"This really isn't right" he told us. "I really object to the lack of disclosure, and the lack of transparency here. This T-A has its own 'preferred vendor' - where I'm sure there is a revenue sharing arrangement in place that the issuer knows nothing about. This results in very unfair competition: We need to pay a substantial sum up-front just to evaluate the job. And to add insult to injury, the process gives the T-A and its preferred vendor a window into our own processes."*

Here's what we told him…and what we want to tell YOU, dear readers: First-off, the shareholder records belong to the *issuer* – and not the transfer agent. T-As have no right to be auctioning them off, or holding them for ransom…or using them to make money for themselves without the express permission of the issuer. And what kind of issuer would consent to this if there was proper and full disclosure? Actually, a Transfer Agent should NEVER release shareholder records to ANYONE (except pursuant to a valid court order) without the issuer's express permission.

Our source is clearly right, of course, about the anti-competitive aspects of the T-A's behavior. But that is not the half of it we say: The T-A owes an absolute duty to its client to disclose what it is doing with these highly sensitive records. And we say; if there is money to be made from third parties – or from share-owners, to whom, by the way, the *issuer* owes a DUTY to deal fairly with them - they should be disclosing THAT, so the issuer will either have a chance to share the loot (which no ethical issuer would ever want to do) or at a minimum, to understand the kind of revenue-sharing that is going on, and factor it into whatever pricing they may be offered in a truly competitive environment. (And, by the way, the SEC has already fined T-As for such scummy non-disclosure…and they've apparently assumed – wrongly as it turns out – that this cured the problem.) Not only should the search-firm's request for data come from the issuer, we told our source, but the issuer should be sure that the fees for providing such data are in line with market rates. And finally, this sure seems to us not just *unethical,* but almost certainly *illegal* anti-competitive behavior: an example of "tying" that is prohibited by our anti trust laws.

And here's yet another payoff punch: Everybody in the industry seems to know who this agent is! And how dumb can you be, Agent-X, to think that maybe they don't know…and don't tell each other…and each other's clients…and the world at large.

But here's still *another* payoff punch: While yes, there seems to be one *major offender,* they are far from being alone when it come to peddling records that don't belong to them, or charging far more than market rates when they fail to get a job they think "belongs to them": We had another call in the spring from a firm that specializes in "post-merger cleanups" - saying that when they submitted information on "found holders" to a big transfer agent, the agent wanted to charge \$30 - \$50 per item simply to *record* the replacement of a lost security, and another \$30 - \$50 to "process the exchange" and "post-down" each of the records. (We told *this caller* to have the issuer look at the original Exchange Agency Agreement – since almost all of them are priced to cover any and all "exchanges" – and that we'd bet \$100 that the agent was trying to charge for something they'd already been paid to do. How's *that* for ethical dealing?) Last year, we had a call from still another firm that specialized in odd-lot buyback programs, saying that one big T-A (actually, it was the first agent cited here…again) wanted similarly big money to hand over files, record lost-certificate replacements and "debit-out" the records when odd-lotters sold shares through their firm. (That agent backed down, that time, when our source told them they were ready to sue, which they were.)

Here's our closing punch on this subject – and we hope it's a knockout punch: We warned in two earlier issues that if we found T-As failing to do the right thing…again… we'd rat them out…again… to the SEC – even though they ignored us last time. And so we will, albeit without mentioning any firms by name. So if you ARE that infamous firm – and you DO know who you are, we feel sure – or if you are any other firm in this space who needs to clean up your act, you probably have a few months to do so before the SEC comes calling. This time, we'll be watching THEM more closely…And we'll be looking to rat them out too if they drop the ball, as they mostly did before.

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RFP-NAPPERS: One of our transfer agent buddies called us in September to report a call he got from someone who was looking to choose a transfer agent. *"We are using the Jack Sunday RFP"* she told our source…But no, she admitted when asked, she was not using **Jack Sunday**, or his firm, **Group-5**. "Tell me a little bit about your company" our buddy asked. "We expect to go public in the next few months" she volunteered. "Did you happen to notice that the RFP form you intend to use is designed for companies that are *already public?"* he asked… "And that there is absolutely nothing in that extremely long document that asks about the IPO process or the recipient's experience in handling IPOs?" Our friend was kind enough to spend more time than WE would have spent with that "double-napper" – who was not only asleep at the switch, but who'd kidnapped a document she had no right to be using. No interest in bidding on THAT piece of business, or working with that piece of bad baggage for sure. But maybe her signoff was worth his time after all: "Thank you so much for the tutelage" she said.

PEOPLE:

Marianne Drost, who we think was the hardest working lady in the telecommunications industry, has retired as Senior Vice President, Deputy General Counsel and Corporate Secretary of **Verizon Communications, Inc.**, "to do some of the things I've always wanted to do, but never had enough time for." **Bill Horton**, who joined Verizon in 2008 from the DC law firm of **Pillsbury Winthrop Shaw Pittman LLP**, where he was a partner, is the new Corporate Secretary, where he will have overall responsibility for Verizon's corporate governance and SEC reporting and disclosure matters.

Peggy Foran has returned to the NYC area from Chicago, where she had been the General Counsel, Corporate Secretary and Governance Officer at **Sara Lee**, following her stellar run at **Pfizer Inc.** - to become Vice President, Chief Governance Officer and Secretary at **Prudential Financial.** "I am delighted Peggy has joined Prudential and will assist the board in furthering our work in the governance area" said Pru's Chairman and CEO **John Strangfeld.** And, as Peggy's new boss **Susan Blount** added, and as Peggy's many fans all know, "Foran is a globally recognized leader in corporate governance matters. Her depth of knowledge on key issues affecting investor confidence in the capital markets is more important than ever."

Kathy Gibson, who had formerly filled the Corporate Secretary's spot at Prudential, has moved closer to *her* natural home territory, as Corporate Secretary and Governance Officer at **Campbell Soup** in Camden NJ, just across the river from your editor's own "second city", Philadelphia.

Henry Hu, formerly a law professor at the **University of Texas** - whose groundbreaking studies of "empty voting" via "artificial securities" have been referenced here before - has joined the **SEC** to head a new unit there, the **Division of Risk, Strategy and Financial Innovation.** Please forgive us for saying this, Henry, but it *is* a new ballgame there, and we're mighty glad that Hu's on first at the SEC.

REGULATORY NOTES...AND COMMENT:

ON THE HILL...Both houses of congress are grinding away on new laws to deal with hedge funds and derivatives, create a new consumer-protection agency to regulate financial institutions and, ta-da, pass a Shareholder Bill of Rights. Interestingly, they seem to be finding all this to be much harder than they'd first assumed, which may be a good thing…but money still talks on Capitol Hill, and the 'grinding process' always seems to favor the lobbyists who've got plenty, and who are there every day to grind away even harder.

"THE SUPREMES" GET SET TO STEP OUT IN A BIG WAY ON BIG BUSINESS ISSUES...As a recent NY Times article pointed out, the Supreme Court is scheduled to hear a record breaking number of business-related and mostly "corporate governance-related" cases – many of them with far-reaching implications, such as **Free Enterprise Fund vs. Public Company Accounting Oversight Board**, which questions Peekaboo's constitutionality; **Jones V. Harris Associates**, which will decide the role that courts will play, if any, in regulating management comp at mutual funds…two cases about the rights that companies have to free speech…and whether they are really the same rights that "persons" have…a big case on whether intangible business processes can be patented…and two cases, one involving **Hollinger International's Conrad**

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Black and another the conviction of **Enron's Jeffrey Skilling** for failing to provide "honest services"…whatever the court decides THAT may really mean.

AT THE SEC... Black marks, as fully expected, were awarded to the SEC by the SEC Inspector General – and to FINRA and the NASD too – for their repeated failures to address the many warning they'd received about the **Bernie Madoff** and **R. Allen Stanford** Ponzi-schemes. He ordered the division of enforcement, and the division of inspections and examinations to submit written plans within 45 days, detailing exactly how they intend to respond to the dozens of specific recommendations that were made to improve their performance. We plan to issue our own "report card" on how the SEC is doing vs. our own prescriptions to fix the agency in our next issue.

On a happier note, the SEC actions re: naked short selling *seem* to be working (although the rising market is probably responsible for the falloff in short-selling in general, which may account entirely for the better stats). And they actually brought and settled two cases involving naked-shorters - the first ever for violating the short-selling rules. (One involved $3 million of restitution, $1 million fine and a 5-yr (!??) ban from the industry, and the other required $541,000 in restitution, a $250,000 fine and way-too-brief bans from engaging in and supervising trading). **They have also "cracked down" on flash trading…though it's not entirely clear how complete the needed ban actually is and exactly when it will take effect.**

But meanwhile, a much bigger and far more dangerous abuse – "FAST TRADING" – needs even more urgent attention. This should be *totally banned* from stock exchange trading platforms, we say. These activities are simply gambling games. They have nothing to do with buying and selling *"real stocks"*...and they contribute absolutely *nothing* to the "liquidity" of real markets, or to "potentially lower costs for investors" as traders wrongly assert…And they create nothing and contribute nothing of value to the economy (except for the gambling winnings of the traders themselves). The potential to destabilize the markets for real stocks is frightening: When a Fast Trader can borrow the ID of a real trader of real stocks – and buy and immediately sell and re-buy tens of billions of dollars worth of stock with no real stock on hand, and no possible way of laying hands on any…and with only tens of millions of actual capital – we are *guaranteed* to have a defalcation involving *billions*…with only *millions* on hand to honor the "contracts".

To end this section on a mostly happy note, the SEC, as noted elsewhere in this issue, has established a new division, under Prof. Henry Hu, to deal with the risks of "artificial securities" and other "financial innovations"…like Fast-Trading, we hope. They have also established a new Investor Advisory Committee, with three subcommittees; for Investor Education (three cheers!) and "Investor as Purchaser" and "Investor as Shareholder" subcommittees, this last one to deal with proxy solicitation and disclosure issues…and, they promise, the proxy system 'plumbing'.

THE NYSE...has also revived its own set of committees to deal with proxy issues…including those "plumbing issues" where, we say, the metaphor itself is a giveaway as to the level of hands-on attention the plumbing will actually get. We can see **Larry Sonsini** rolling up his sleeves and getting out his personal snake and plunger as we write this. (Formerly, btw, the proxy-plumbing area was known as "the sausage factory" – a place you never wanted to set eyes on if you expect to eat sausage again – so we've gone even further down the "feeding chain", metaphorically speaking.)

IN THE COURTHOUSE...A *major* set of corporate governance developments, we think, set up by US District Judge Jed Rakoff when he refused to sign off on a $33 million cash settlement that the SEC had made with BofA over allegations that BofA had not made proper to disclosures to shareholders concerning the financial condition of **Merrill Lynch** – and the bonus arrangements that were part of the merger deal. In a stinging rebuke to the SEC, Rakoff noted that "the proposed consent judgment would leave uncertain the very serious allegations made in the complaint" and "does not comport with the most elementary notions of justice and morality"…and he noted that it would be shareholders - who were the victims here - who would be the ones to pay the fine. What a denouement is shaping up: a jury trial, the waiver of lawyer-client privilege by BofA, a chance to see what **Wachtell Lipton and Shearman & Sterling** had to say about the obligations to disclose the 'bad news'…the resignation of **Ken Lewis**…and the strong possibility that he, and others involved in the disclosure flap may be indicted. Gosh, we can remember when corporate governance was *boring.*

In another sign of the times, a Delaware bankruptcy judge rejected Visteon Corp.'s proposal to pay $8.1 million in bonuses to its top-12 officers, although it approved to payment of $3.3 million to lower level staff. The proposed $11.4 million dollar deal was down from the $80 million that the top brass had originally proposed.

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