THE SHAREHOLDER SERVICE

OPTIMIZER

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

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EARLY RETURNS FROM THE ANNUAL MEETING FRONT: LOTS OF GOOD NEWS, BUT SOME BIG, BAD SURPRISES ARE STILL IN STORE FOR THE UNWARY

The big news from the Annual Meeting front in the early going is that says-on-pay are mostly sailing by nicely…And bigger news, perhaps; big companies have been ditching the three-year-say-when-on-pay recommendations that many of them planned to recommend…based on early returns that indicate a rapidly snowballing preference for annual "says" by institutional and individual investors alike…exactly as we had predicted.

In just one week in mid March, three Fortune-50 companies told us they were making last minute switches in their proxy statements – from the three-year says they initially intended to recommend to an annual say…And this seems to be fast percolating down to smaller companies too.

The irony here is that three-year says actually provide a much stronger governance structure, and a much deeper and broader framework for evaluating executive pay, we think – which requires a LOT more work on the part of corporate pay-crafters. Thus, we predict that those currently intractable institutional investors will wake up before the next vote on saying-frequency comes up and insist on a three-year say…if they are really smart, that is. "Think about it" we consoled the folks who felt sad that they had 'retreated' from the 3-year say; "With a 3-year say, you give all those Monday-morning-quarterbacks a three year look-back to second-guess…plus a 3-year look-*ahead* to evaluate and second-guess as well. Good for governance, yes…Good for YOU, if you have to craft and draft all this stuff? Probably not. And let's note the way those one-year says are mostly sailing through when teed-up as 'routine matters' to be rubber-stamped like the ratification of auditors – and how this will soon give activists and other second-guessers some very compelling reasons to re-think, we predict.

But in a not so happy development, four companies have had voters say NO on pay so far – most recently the much picked-on Hewlett Packard – and

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EARLY RETURNS...
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many companies have had very large votes NO – including quite a few "squeakers" – as executive pay "bounces back" from the financial crisis period. And we sense that momentum to vote NO is beginning to build as the season rolls ahead: A recent WSJ article noted for example that at **Monsanto,** even though the CEO "didn't collect a penny for the year ending Aug. 31, because [the Co.] missed key financial goals…34% of the voting shares opposed executive pay packages at the Jan. 25 annual meeting...Monsanto directors are now discussing the large minority vote with investors so they can understand why shareholders 'voted the way they did' according to a company spokesperson." But Duuuh! As the WSJ story also noted, the CEO's direct compensation climbed 17.4% in fiscal 2010, while shareholder return fell 36%. Duuuh indeed!

We can think of quite a few "household names" that may be in big trouble on the say-on-pay front…like **BofA**, for so publicly flunking the Fed's fitness test on their plan to restore a dividend…or **Citicorp**, for its absurdly low – *insultingly low*, many will say – penny-a-share dividend declaration…or **Johnson & Johnson** for merely *cutting* the bonus its CEO will get, following a disastrous year of product recalls and related blows, both to the bottom line and to J&J's once golden reputation. How could the board justify a "bonus" after a year like this???

Equally alarming is the press attention that says on pay are currently getting – especially when coupled with the simplicity and the instant 'feel-good feeling' one can get simply by voting NO on pay…and maybe on all the directors…or across the board if one feels cross: A recent WSJ "Intelligent Investor" column prominently touted "A Chance to Veto a CEO's Bonus" – citing a **Drexel University** study that "Each 1% increase in 'no' votes knocks up to $222,000 off the excess compensation of the CEO the next year." (An awful lot of fuzzy numbers here we have to say…like "up to $222,000" (??) and how one might calculate "excess compensation"…but highly compelling to a skim reader, for sure.) Another study cited, from the **University of Maryland**, on the "gaming" of peer groups, asserts, very compellingly, that the intentional selection of "peer companies" with higher than average pay scales does take place – and "makes CEOs $1.2 million richer a year on average."

"Vote against the pay package" the "Intelligent Investor" urges…and "Don't stop there; vote against every director. That will show them you are paying attention" he asserts. We would say "No; that seems to indicate you are voting no reflexively…and not really 'paying attention' at all"...But we must also add, as a daily observer of voting returns, that a growing number of voters seem to be doing just that.

Even more alarming – at least for companies in the S&P 500 – GovernanceMetrics International – formed from a merger of The Corporate Library, Audit Integrity and GovernanceMetrics – has rolled out a new Executive Pay Scorecard that rates pay at the 500 vs. their peers using 10 sets of very specific metrics. The model – and the objectivity and *simplicity* it appears to offer – plus the very attention-getting "red flags" they post next to each metric the subject company flunks – is a very compelling one, at least at first glance. (Your editor found three companies of their bottom-eight in his own portfolio, one of which he agreed was a bummer, one of which he'd just bought – partly for the yield and partly in the belief it was in a turnaround mode, and one of which has been a best-performer over the long-term, where we found no particular cause for anger or alarm.) Go to **Francis Byrd**'s wonderful website, we advise at **www.laurelhill.com** and find The Byrd Watch V22 for a full report, and for links to the Governance Metrics materials. Byrd, by the way, says he's predicting at least 100 pay packages will not get yeses this season, and we'd second

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that. We also bet that the new pay-rating product will soon spread to the **Russell 5000** – so stay tuned.

On a much more positive note, several companies have, at long last, been paying attention to the need to put the matters to be voted on "up front" – at the very beginning of the proxy statement: A very sensible way to improve their chances of getting average investors to vote…and to vote with the management recommendations. **General Electric** made a nice try at it this year – and managed to get a bit of nice press attention too. But as we responded to inquiries through the blogosphere, the real gold-standard this year is **Prudential.** Get thee to their Investor Page asap we advise – especially if you're still drafting your own proxy statement – to see how much improvement can be made, simply by putting the important voting info up-front…where really it belongs: It begins with a statement of how important it *is* to vote…and offers that nifty little incentive again – a tree or a tote – if one does vote. Then it cuts straight to the chase, with the matters to be voted upon – with a clear summary of the things an average voter most needs to know – and what the management's recommendation is – and why. All in nice plain English – very neatly and helpfully laid out – in fact, the best layout we've seen. Little dropdowns help the skim readers and info-surfers…Plus, voters can readily surf between the "campaign literature" and the voting site – and even to the tables, footnotes and other "heavy stuff" that's discussed further down…if one feels the need to do so.

Apropos…since this is something the Optimizer has been writing about for eighteen years now…we hope you will go to our own website, www.optimizeronline.com and look under "What's New" for the story we wrote for Directors & Boards Magazine on "What To Do About The Annual Meeting." We do think it needs fixing…and that it can be fixed…And at a minimum, you'll be up to speed if any of your Directors ask about this in response to the very robust discussions about the usefulness of AMs – or lack thereof – in Directors & Boards 1st quarter issue, as we bet some will.

ACTIVIST INVESTORS ARE MOVING FAST TO TAKE BACK THE RIGHT TO FORCE CORPORATE ACTIONS VIA WRITTEN CONSENT SOLICITATIONS: GET YOUR DEFENSES IN ORDER, WE WARN

We hate these damned things – which, in effect, hold Saturday-Night-Specials to Directors' foreheads – and we have been amazed at the size and strength of recent efforts to revive them. Back in the 70's – when raiders and green-mailers launched, or merely threatened to launch a consent solicitation to remove the board, most Directors caved at once. And once investors realized that most such companies got bought on the cheap – and that it was THEIR money that was given away – a lot of companies were able to convince investors that acting, or threatening to act by written consent was not such a good idea after all.

Well…they're baaaack. And we were surprised to find that younger folks have no idea of what they really are, much less the mischief they can cause. And we were even more surprised when Rachel Posner, Georgeson's General Counsel and her team gave us some numbers: There were 17 such proposals last year – and 14 of them passed – at companies like Alaska Air, Allstate, FedEx, Heinz, Home Depot & JPMorgan Chase. So far in 2011 there are 11 proposals – where the vote is still pending – with more to come we'd guess. Our own advice is to bone up on these things – and develop the strongest possible come-back for your official Recommendations as you possibly can.

We are *very pleased* to share an update from Merrill Stone, Esq. of Kelley Drye & Warren – who wrote an article on Consent Solicitations for the OPTIMIZER way back in Y-2k – and his colleague Matthew Kane. It's on pages 5 & 6.

(Merrill's original article is on our website, www.optimizeronline.com, as well, so you can see, as the French say: Plus ça change, plus c'est la même chose).

LOTS OF FRESH QUESTIONS…AND ANSWERS… ON MEETING ADJOURNMENTS, ON "ALL OTHER BUSINESS" AND ON CALCULATING, REPORTING ON AND DESCRIBING THOSE SAY-ON-PAY AND SAY-WHEN-ON-PAY RESULTS….

Whenever he participates in one of Broc Romanek's Corporate Counsel webcasts, your editor's emails and phone calls spike dramatically. This year's discussion on "Planning for the Annual Meeting" – which starred Kathy Salmas of Northrop Grumman, Peggy Foran of Prudential, John Seethoff of Microsoft, Bret Dimarco of Coherent Corp. and Broc himself – and where your editor had a small "supporting role" on the subject of "tabulating and reporting issues" – drew more calls than ever…several of them, literally in the nick of time to prevent a mess.

The webcast transcript is up on our website – and on Broc's – so we'll hit just a few of the tabulating high-spots and focus mostly on the questions that have come in since.

The first email – from outside corporate counsel in Chicago – was about our often repeated but still often ignored advice on being sure you have the authority to adjourn the annual meeting if you need to do so because you do not have enough votes in hand to pass a proposal you want to pass: In a nutshell, you can not assume that the company has the necessary authority from its street-side voters unless they have specifically asked to have it, and provided For, Against and Abstain boxes, so the number of votes can be tabulated and reported.

"How is the VIF different than a proxy card? And why isn't the same authority to vote on "all other business that may come before the meeting" conveyed in exactly the same way as it is conveyed by the proxy?" our e-mailer asked.

Here's the difference: On a proxy card, recipients have the ability to strike out the "all other business" language on the card itself – and a small number of savvy old-timers actually do this. So in a pinch, the Inspector of Election can examine the cards, count the votes that do not run to the proxy committee for an adjournment, and count the rest as allowing the proxy committee to vote FOR it. But currently, there is no procedure to record or tabulate such instructions on VIFs – unless there are For, Against and Abstain boxes on the form. Plus, the Inspector does not have the ability to examine the VIFs. Clearly, there is no way that an Inspector can make a "leap of faith" and simply assume that say, all the votes for directors, or for some other matter can be cast FOR adjournment.

As it turned out in round-two – the company that asked this question actually had both a potential "adjournment issue" AND a totally separate "all other business" issue: A shareholder had given notice that they had a matter to put before the meeting. Apparently, it was not timely, and not in good order…and thus, not in the proxy statement. But nonetheless – as often happens in our experience – the company did not want to exclude the motion on procedural grounds. They wanted to have the votes in hand to vote the motion down. "Well, guess what…you probably need both an adjournment box – to be absolutely sure of your authority to adjourn and continue to solicit proxies – AND an 'all other business' box too" we told them "unless, that is, you are sure you will have enough votes from registered holders in hand, where the "all other business phrase" has not been struck through."

We have also had several inquiries about Say-When-On-Pay vote counting – and on what it takes the Say When choice to "pass": A lot of companies have language in their Bylaws that specify what it takes for specific kinds of proposals to pass – then go on to specify that "all other matters will require a majority of the shares present in person or by proxy" (the Quorum). Well guess what? With four choices to be made – for 1, 2 & 3 years plus an Abstain box – and with more voters marking abstain on ALL matters than ever before, it is often a mathematical impossibility to get a majority of the Quorum in favor of anything…And especially when there are "low-ish" quorums. But good news! Since these proposals are precatory, the board can simply decide on its own which frequency to adopt. And unless they are total dummies, or are just spoiling for a fight to have their own way, which is dumb too – they will adopt the frequency that gets the highest vote.

We also got a question about that perfectly awful phrase that has found its way into so many proxy statements, that "abstentions will have the same effect as votes against the proposal." A blogger was questioning whether the company's Say-On-Pay vote actually passed, given this phrase. "Yes, abstentions have the same "effect" as a NO vote we advise – but only to the extent that they do not contribute to the YES votes that are needed for a proposal to pass. They are NOT the same thing as a NO vote – as Apple Computer initially concluded in 2009 – to its great chagrin. So in this instance, the S-O-P proposal was "approved by shareholders" because it got more YES votes than NO votes….which, by the way, is not the same thing as its having "passed"…since THAT is up to the Board.

But if the company bylaws had required a majority of the Quorum – or worse yet, of the shares outstanding – it would NOT have been approved, because of the high number of Abstentions…and broker non-votes on that matter. So folks, get out your Bylaws we advise – yet again – and consider re-writing them to require a simple "majority of the votes cast" and please add, to avoid any ambiguity, "*on the matter being voted on*"… in order to pass basically routine proposals.

CONSENT SOLICITATIONS

By Merrill Stone and Matthew Kane

Kelley Drye & Warren*

Back in 2000, we discussed in the *Optimizer* how would-be acquirers were increasingly using consent solicitations in attempts to ambush boards and to effect changes of control. Consent solicitations still hold a notable place in the corporate takeover landscape, even if they are perhaps not as widely publicized or notorious as they were a decade ago.

In the hostile takeover and unsolicited offer context, consent solicitations are most often employed to remove the target's directors who are opposed to the acquirer's advances and replace them with a handpicked slate of friendly candidates who support the merger or acquisition. We noted in 2000 that this practice would likely persist because launching a consent solicitation is relatively inexpensive compared to other options and directors remain easy targets for shareholder backlash, often acting as magnets for blame and accusations of self-interest.

Today, consent solicitation bids are often not carried out to fruition, but they are still alive and well as an important element of takeover strategy. Thus, companies and their directors should continue to think about them.

One reason that hostile consent solicitations were and still are viable options for many would-be acquirers is that Delaware law permits, as it did in 2000, any action that can be taken at an annual or special meeting of stockholders to be taken instead, without prior notice and without putting the matter to a formal vote, by the written consent of the minimum number of stockholders that would be necessary to act on the matter at a stockholder meeting at which all shares entitled to vote were present and voted. Nevada, also a popular choice as a state of incorporation, has substantively similar statutory provisions. Other states, however, have more restrictive rules and offer more protection to existing boards. California, for example, has a similar written consent statute to that of Delaware except that it has a specific carve out for the election of directors that requires the written consent of <u>all</u> of the holders of outstanding stock, not just the number that would be required to act at a meeting. Similarly, under New Jersey law, unless the certificate of incorporation provides for a more liberal standard, shareholders can not act by written consent in connection with the annual election of directors and in other contexts written consents must be signed by at least all shareholders entitled to vote. New York law also requires the consent of all stockholders entitled to vote for any actions taken outside of a meeting unless the certificate of incorporation permits the action to be taken by the minimum number of shareholders that would be necessary to act at a meeting at which all shares entitled to vote were present and voted. It is important to note that regardless of which "default" mechanism is contained in a state's statutes, a corporation may always restrict or eliminate the power of shareholders to act by written consent in its certificate of incorporation.

One of the most high profile hostile takeovers to employ a consent solicitation in recent years involved InBev's 2008 acquisition of Anheuser-Busch. For InBev, the consent solicitation was an element of a larger strategic plan to acquire Anheuser-Busch. InBev initially announced an unsolicited non-binding proposal for a friendly combination of the two beer makers, offering to acquire all outstanding Anheuser-Busch common shares for $65 per share, which was a 35% premium over the then current market value and an 18% premium over the all-time high. Two weeks later, the Anheuser-Busch board rejected the $65 per share offer but said it was open to higher-value offers. InBev immediately filed a lawsuit in Delaware seeking a declaratory judgment that a consent solicitation could remove all thirteen of the directors on the Anheuser-Busch board,[1] and launched the formal consent solicitation shortly thereafter. InBev used this vehicle to avoid the delay and cost of going hostile while still maintaining negotiating strength. The two companies restarted negotiations the next day and a deal was approved within a week. The consent solicitation threat proved so effective that InBev never actually had to follow through on the effort. The companies agreed on a price of $70 per share, and Anheuser-Busch became a wholly owned subsidiary of InBev.

There are several noteworthy lessons from the InBev/Anheuser-Busch story. Perhaps the most foreboding point is that while a consent solicitation can be costly and cumbersome, it has the potential to be such an effective tool that even threatening it in itself constitutes a strong bargaining chip. It is also important to note, however, that one of the reasons InBev was able to launch a fairly successful consent solicitation at all was that Anheuser-Busch did not have many of the standard take-over defense mechanisms in place to block such a move. Anheuser-Busch is a Delaware corporation and as such could have amended its certificate of incorporation to bar shareholders from acting by written consent altogether, but it did not. Anheuser-Busch also did not have different classes of stock, a staggered board, or a poison pill, all hallmarks of standard hostile takeover defense. Essentially, the St. Louis brewer made itself fairly easy prey for InBev.

Consent solicitations have also been used to defend against an unwanted transaction. Dynegy Inc. is a New York Stock Exchange-listed energy company that owns and operates power plants, provides wholesale power to utilities and municipalities and employs more than 1,800 people nationwide. In 2010, Carl Icahn, Dynegy's largest shareholder, helped Dynegy fend off a takeover bid by Blackstone Group. Following that successful defense, Icahn and the Dynegy board agreed on a deal for Icahn to acquire the company for $5.50 per share – fifty cents per share more than Blackstone offered. Dynegy's second largest shareholder, hedge fund Seneca Capital, publicly opposed the bid, arguing the price was inadequate and the company was really worth between

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[1] A recent amendment to Anheuser-Busch's bylaws left some doubt whether all of the board members could be removed in this fashion.

$7.50 - $8.50 per share. In an effort to fight Icahn's tender offer, Seneca also filed a preliminary consent solicitation statement with the Securities and Exchange Commission, seeking, among other things, to remove two directors from Dynegy's board and replace them with Seneca's handpicked candidates. Seneca planned to use its new board seats, along with the seats it already had, to take the corporation in a new direction, one that would better maximize shareholder value according to the hedge fund. Ten days after Seneca filed its preliminary consent solicitation statement, Dynegy issued a press release announcing that it was terminating its merger agreement with Icahn because the tender offer failed. The press release also announced that its Chairman of the Board had resigned and the rest of its directors would stand down at the next annual meeting and that the company had offered a director position to a Seneca-named nominee.

In a similar situation, earlier this year hedge fund Ramius LLC launched a consent solicitation to remove six independent directors of Zoran Corporation. Zoran Corporation is a semiconductor company that specializes in digital audio and video imaging applications with 1,550 employees and $357.3 million in revenue in 2010. Ramius, a holder of 7.3 percent of Zoran's stock, felt that Zoran was underperforming because of poor management, that there was untapped stockholder value and that the existing board did not serve the stockholders' best interests. The consent solicitation was successful and ousted the board chair and two other directors, replacing them with three Ramius candidates. The Zoran board had urged stockholders not to vote with Ramius, and even announced a merger with CSR plc, a British wireless technology company, that gave Zoran shareholders a 40 percent premium over the current share price. This, however, was still not enough to save the existing board. This dramatic example of shareholder activism underscores just how vulnerable a corporation can be to a shareholder consent solicitation.

These examples show how consent solicitations continue to play an active role in corporate takeovers, both to push bids forward and to block them. Even just launching a serious solicitation bid can be an effective negotiating tool. InBev secured its friendly acquisition just days after launching its consent solicitation. Seneca Capital's preliminary consent solicitation statement was similarly the last step in the hedge fund's successful campaign to force the Dynegy board to abandon the Icahn acquisition. Finally, Ramius forced a new merger, in addition to taking over Zoran's board, with its successful consent solicitation.

As noted in the InBev example, and as we said in our 2000 article, a hostile acquirer's ability to launch a consent solicitation depends on the laws of the state in which a corporation is organized. If a company is incorporated in Delaware or Nevada, or a state with a similar written consent statute, inserting a prohibition in the certificate of incorporation is the most effective way to insure that the company's board remains insulated from consent solicitations.

A certificate of incorporation, of course, cannot be amended without shareholder approval. While having to ask shareholders to enact provisions that limit their own rights could present risks from a shareholder relations perspective, according to published reports the majority of publicly held corporations formed in Delaware have such restrictions in their certificates of incorporation. Amending the certificate of incorporation to prevent shareholders from acting by written consent was our recommendation in 2000, and it remains the most surefire way to eliminate the risk of a hostile consent solicitation. Any board that considers this option should be aware, however, that the leading proxy advisors tend not to favor limiting shareholder power in this respect. Historically, Institutional Shareholder Services, Inc. ("ISS") effectively disapproved such measures across-the board. In its *2011 U.S. Proxy Voting Guidelines Summary*, however, while it continues generally to recommend that shareholders vote against such proposals, ISS has somewhat modified its position by stating:

> ISS acknowledges that a meaningful right to act by written consent is a fundamental shareholder right that enables shareholders to take action between annual meetings. However, the potential risk of abuse associated with the right that enables shareholders to take action by written consent such as bypassing procedural protections, particularly in a hostile situation, may outweigh its benefits to all shareholders in certain circumstances. Due to alternative mechanisms that have evolved for shareholders to express concern (e.g., a majority vote standard, the right to call a special meeting) and an evolving governance landscape, ISS will be taking a more holistic evaluation of a company's overall governance practices and takeover defense when evaluating these proposals.

Glass Lewis and Co. also stated in its *Proxy Paper Guidelines: 2011 Proxy Season* that while it is generally in favor of permitting shareholders to act by written consent, it suggests requiring a shareholder to own at least 15 percent of outstanding shares before it is eligible to launch a consent solicitation in order to prevent abuse and waste by small shareholders. The point for companies to bear in mind, however, is that ISS and Glass Lewis may well scrutinize proposals to restrict acting by written consent before issuing a recommendation.

If amending the certificate of incorporation is not practical or possible, our other previous recommendation for companies incorporated in Delaware or similar states was to consider reincorporating in another state with a more favorable set of laws. Reincorporation could present similar investor relations risks. ISS recommends a case-by-case evaluation for any reincorporation proposals with careful attention to management's reason for the reincorporation. Our final recommendation, from 2000 and now, is to do your homework on the rules governing your company. Check your state's laws to see whether unanimous shareholder consent is required to act without a meeting. Even if your company is incorporated in a state that requires the written consent of all shareholders to take action, review the corporation's certificate of incorporation and bylaws to confirm that no provisions in those documents modify the default laws in a manner that makes it easier for shareholders to act by written consent.

Finally, even if your corporation is protected against consent solicitations, directors should still be on guard against would-be acquirers trying to remove them. Hostile minority shareholders may still wage traditional proxy fights. Additionally, it is still too early to predict the extent to which the proxy access provisions of SEC Rule 14a-11, the effectiveness of which has been stayed pending resolution of legal challenges, will change the landscape if and when the rule begins to apply.

APPLE COMPUTER DOES IT AGAIN – WITH A RAFT OF ANNUAL MEETING GAFFES: HOW CAN SUCH A SMART COMPANY BE SO DUMB ON IR MATTERS?

Let's say for starters that we LOVE Apple Computer. We bought when it was around $7…and love it more every day. We love their products too. And we love Steve Jobs – and think he is one of the smartest, savviest, most-focused and most dedicated managers in the world. And a famously successful micro-manager to boot…Usually. But golly…What ARE they thinking in the IR department?

Back in 2009 Apple made the Annual Meeting "blooper of the year" by boasting that the shareholder proposal to have a say-on-pay was soundly defeated…only to have to admit, after a web-watcher immediately smelled a rat, that they had counted the Abstain Votes as No votes (!!)…and the proposal had, in fact, passed handily.

This year, their Annual Meeting results made headlines yet again…in a New York Times article focusing on "Apple's Secrecy Vs. Governance" – which chided them for saying at the meeting that "shareholders had defeated the succession-planning proposal, but [Apple] did not report the vote tallies, something that is standard procedure at many big companies [and] instead slipped the results into a filing with the SEC the next day"… implying that the 30% vote in favor, was, in fact, big news that Apple intentionally tried to bury.

We went to the Apple website at once – and were literally taken aback by the astonishingly sparse – and incredibly balky – Investor Relations page: We found the 8-K – after much hunting around – and it did seem to us to be pretty well "buried" – especially in light of Apple's basic and otherwise wildly successful business of providing information technology – and all kinds of information at one's fingertips.

This little visit caused us to re-read the Apple proxy statement – and especially their recommendations on the succession-planning proposal -- and on the majority voting proposal too (which got 73.6% in favor despite Apple's recommendation to vote no) and where we had told a reporter the Apple discussion struck us as "disingenuous at best." And wow! The back-story here seemed even worse:

The Central Laborers' Pension Fund proposal asked the Board to "adopt and disclose a written and detailed *succession planning policy* (italics ours) with five specific features. The Board's recommendation AGAINST asserted that adopting it "would give the Company's competitors an unfair advantage…publicize the Company's confidential objectives and plans…undermine the Company's efforts to recruit and retain executives… requires a report identifying the candidates being considered for CEO…[and] By naming these potential successors, Proposal 5 invites competitors to recruit high-value executives away [while] executives who have not been identified as successors may choose to voluntarily leave the Company."

Did we see any of this called for in the shareholder proposal? No. Would we really imagine that proponents expected the Board to make these kinds of detailed disclosures in the annual "report on its succession plan to shareholders"? Frankly, this strikes us as being closer to a material misstatement of the proposal, rather than merely being "disingenuous."

The Directors' recommendation against Proposal No. 6 – to "Adopt a Majority Voting Standard for Director Elections" also struck us as being badly reasoned at best…and misleading at worst: Noting that "Under California's statutory majority vote requirement, election of a director requires not only the affirmative vote of a majority of the shares represented and voting at the meeting, but also the affirmative vote of more than half of the shares requires for a quorum…which equals just over 25% of the outstanding shares" …the Directors' statement went on to say "Applying this standard would mean that even if there were no "Withheld" votes with respect to a director, and thus no indication of shareholder disapproval, that director would still fail to be elected if he or she did not obtain the affirmative vote of more than 25% of the outstanding shares. Apple could therefore lose its directors simply because too few shareholders cast their votes."

Hey Apple! Aren't your folks supposed to be whiz kids where mathematics – and logical thinking are concerned? Putting aside for the moment the fact that rounding up fewer than 25% of the votes to elect a director would indeed be a sign of significant shareholder disapproval…how likely is it, really, for this to happen…given the fact that Apple, almost certainly has more than 50% of its shares held by institutional investors – who *always vote*? In fact, the quorum at this year's meeting was 81.86%...So it is virtually impossible to imagine a scenario where Apple directors would get less than 25% in favor…unless investors were very seriously ticked off…which majority voting is meant to *indicate* to Directors!

Bottom line: Work a lot harder on being as user-friendly to your basically happy investors as you are to your customers, Apple…before we DO start to get ticked off at Directors where honestly, the woeful drafting of "their" Recommendations has served them poorly.

INVESTOR RELATIONS OFFICERS CONTINUE TO STRUGGLE TO PROVE THEIR WORTH – AND FOR A "SEAT" – IF ONLY ON OCCASION – AT THE BOARD TABLE: WE OFFER OUR TOP-FIVE IDEAS FOR GETTING THERE

A recent IRO consultant's posting on the NIRI-NY Linkedin page, bemoaning the much-fallen status of the IRO these days, moved us to move this topic up on our own agenda, and to think on what might be done.

Your editor was on the scene at the very beginning of the IR profession – when virtually every large company, and many mid-cap and small companies too, had an IRO who was at the SVP level or above – and who had regular access to the entire C-suite – and to the Board. We have our own thoughts about what's happened since – and why – which you can dredge up from the NIRI-NY site if you'd like, but let's cut to the chase and summarize five things IROs can do to make the big and highly valued impact they did in days of old:

1. **One of the most important things – and maybe THE most important thing a Board should be actively watching – and taking responsibility for – is the firms' cost of capital. In other words, the interest rates the company has to pay for borrowed capital and the company's stock price – relative to peers, and to "best in class companies too. Yes, it is largely the CFO who bears the heaviest burden on this subject, but in the "old days" IROs were viewed as key sources of info for the Board – and also as key "influencers" – and "key players" when it came to doing everything possible to assure that the company would be "fully valued" in the marketplace. IROs need to reclaim their OLD "place at the table" here.**

2. **As we, and several wise guest columnists too have written here on many occasions, the best way to "get to the table" is to become the primary source for totally unvarnished information about what investors actually think, and say, and do about the company and its stock…and what their "perceptions" are. Sometimes, the reason a big investor prefers to buy your peers vs. you – or maybe thinks you have "governance issues" – will turn out to be based on misperceptions…But unless you know what investors are really thinking – and get a chance to make "corrections" – or just to correct misperceptions – your chances of being "fully valued" are slim. In the "old days" one of an IRO's top roles was to constantly gather info about investor perceptions from investors themselves – sometimes via visits or friendly chats; sometimes through more rigorous, and sometimes anonymous "perception studies": IRO's need to go back to basics like these – and bring the findings to the table.**

3. **In our last issue – devoted to "Reaching Out to Investors" – Steven Brown of TIAA CREF offered some awesome suggestions on making the IRO a valuable part of the "governance team" – and as part of a company's overall plan for "reaching out." He also offered some very practical dos and don'ts for IROs and others, worth reviewing. If nothing else, the IRO ought to be urging institutional investors to be giving heavy weight to actual company performance vs. check-the-box formulae for "good governance" – many of which are poorly correlated with financial performance – which, when all is said and done, is what investors most want to have.**

4. **IROs should become key members of the company's crisis management team. Just look at the extra damage that was done to BP's stock price when they failed to address the investment community quickly and clearly. Billions of dollars of shareholder value evaporated in an instant. Yes, there was a huge "financial hit" for physical damage control and remediation. But the hit to the stock price due purely to *reputational damage* was bigger, and is likely to last even longer. And, relative to the overriding need to be "fully valued" mentioned above – an unwanted takeover attempt is another of the biggest crises a company is likely to face – And here, the IRO simply *must* have a "seat at the table."**

5. **IROs need to play a much bigger role in the way a company "reaches out to investors" – and to the public at large – via its written materials, its website, its marketing and PR efforts and increasingly, via "social media." The place we'd most like to see them start is with a top-to-bottom overhaul of the annual report and proxy statement – and with the related "meeting machinery." Recently, Dominic Jones, who edits the IR WEB Report noted that IROs – along with Corporate Secretaries and Governance Officers too, we'd add – have been conceding major chunks of turf due to a lack of "tech-savviness." Right on the money, we say. But if one *wanted* to create a really readable and usable proxy statement, a user-friendly voting site, a simple but compelling investor education program that would WORK – by increasing investor engagement, and voting behaviors – AND a campaign to take better advantage of the web – one really needs to bring IR, Legal, PR, Marketing and IT experts together. Someone needs to take the lead role here…and who better than the IRO, who, typically, has some experience in all these fields?**

Readers; we'd love to hear from you on these issues – and on these ideas – and with any ideas that YOU may have.

HACKERS INVADE NASDAQ OMX BOARD PORTAL: WE ASK, "ARE THESE THINGS REALLY READY FOR PRIME TIME?"

We are great fans of "secure board portals" – because they are huge time and money savers for corporate citizens charged with preparing "Board Books" – and because they provide great convenience to even modestly-tech-savvy Directors, who are constantly on-the-go these days – and because we believe their widespread adoption is inevitable.

But just as they seemed to be gaining major traction with public companies and Directors alike – came news that hackers had invaded the **NASDAQ OMX** data center – to gain access to their **Directors Desk** board portals…in the hope, one would presume, of gaining access to potentially market-moving information.

Hard information about the hacking attempts is scarce at the moment – as one might imagine given the sensitivity here – and the *ultimate goals* of indentifying the perpetrators and what they might actually have gleaned – and making sure that all the ramparts have been completely secured. Here, all the players in this space are reluctant to talk too much about their defenses since this has the potential to be of use to future challengers to the corporate bulwarks.

We called big-provider **Diligent Board Books**, to see what they might have to say…which said. "No comment" – although they did offer to direct us to their PR agency. (And no comment from us either, thank you). **BoardVantage** sponsored a webcast on the subject, still available at **www.directors&boards.com**, that started off by noting that much "dis-information and mis-information" is out there, and promising to explain "What makes one system vulnerable and one not"…But frankly, aside from a pretty long list of essential security features a secure board portal should have in their view, it failed to answer the "sixty-four dollar question" – at least for us: "Are *any* of the Board Portals out there totally protected against invaders?" We think the honest answer is no. Hackers have invaded supposedly iron-clad Federal sites, atomic energy installations…inserted fast-replicating viruses into corporate computers, swiped earnings releases in advance from some of the highest-tech companies out there…and then comes the guy with the Pringle can, hacking into our own networks from his car!

We also called several of the corporate folks we know who use "automated board books" to get their thoughts: "Would you be adopting them right now, if you didn't have them?" No, most said, although every one we spoke to said they can't imagine giving them up. "Did you get much blowback from Directors?" Yes…of course…as one would expect…but everyone pretty much recognized that attempted invasions 'come with the territory'…and that paper records get lost, stolen or otherwise invaded by prying eyes – and are at least as vulnerable as "secure" web-portals and are probably *more* vulnerable. And none of the Directors at companies we called suggested abandoning the service.

The bottom line? Short-term, the once-growing momentum to move to "secure board portals" has hit a major speed-bump, for sure. But Directors know – maybe better than most folks – that you can't stop progress – and the idea of abandoning Board Portals because there are hackers out there is a lot like abandoning cars because there are reckless drivers and car thieves around. More information will likely help big-time to get these programs back on track, so let's hope that more will be forthcoming…soon.

THE 8TH "END OF ANNUAL MEETING CELBRATION" WILL HONOR THE SOCIETY'S FORMER PRESIDENT DAVID SMITH AT THE JUNE 3RD GALA

Who better to honor at a celebration of the "End of Annual Meeting Season" – and at what has become a celebration of our entire industry – than David Smith, who retired this year after 20 years as the Society's president.

David has been a strong and highly effective advocate for our industry – and an advisor, mentor and friend to Society members both new and old: He was the first person in our industry to call on public companies to designate a Chief Governance Officer – and to make excellence in corporate governance the major focus of our jobs that is has since become. He participated in major governance-focused initiatives, such as the SEC's Wallman Commission, its Proxy Review Committee, the Shareholder Approval Task Force and the NYSE's Individual Investors Advisory Committee. Under his leadership, the Society added "Corporate Governance" to its name – and grew from 2800 to nearly 4000 members. David has also exhibited outstanding leadership in the non-profit world – as a founding member of Midnight Run, which feeds and clothes the homeless in New York City and as a Trustee of Children's Village, a NYC residential treatment center for society's most vulnerable children.

As in previous years, the Celebration will also be a Benefit for Fountain House, which, for 63 years has been providing rehabilitative services – and meaningful work – to members with serious mental illnesses – and for its Fountain Gallery, which is celebrating its 10th anniversary this year, as a place where member artists can collaborate, create, show and sell their art. The Fountain House "club-house model" – with its "work-ordered day" – has been successfully replicated in hundreds of clubhouses around the globe. Our industry has really taken these amazing organizations to heart: Last year, we had over 30 sponsors from the pubic company and supplier universe, and raised over $100,000. If you have not received a save the date and would like more information – and if you would like to become a sponsor – or place a congratulatory message to David in the event journal, please email **cthagberg@aol.com** We hope to see you at the Celebration!

OUT OF OUR INBOX:

"Alarming news" from NIRI President Jeff Morgan: "I have been informed there are some IR service providers who are planning external events during [NIRI's June 12-15] Conference in nearby locations without intent to participate in Conference. This type of 'poaching' takes away from service providers and others who sponsor events and exhibit" he wrote in his March 15 weekly update. "As you receive invitations to events, please ensure the host is a Conference sponsor or is participating in the service provider showcase. If they are not, please decline the invitation unless the host becomes part of the NIRI community" he asked. What a sorry indicator this is about the current state of the supplier community, we thought. But let's also recognize, we thought, that as long as the host is a *registrant* at the conference, he or she ought to be able to entertain clients and friends – without paying big-bucks up front to sponsor or exhibit – as long as the events are for clients and friends, and are relatively small-scale: If not, however, what a very sad and very scummy thing to do – and something that like most scummy stuff, tends to backfire big-time on the perps in the end, as it almost certainly will in this instance. Who *ARE* those people?

Even scummier stuff crossed our desk this quarter…right on the heels of the 13 "Horror Stories" about abandoned property we'd published in the 4th quarter *OPTIMIZER:* A supplier of abandoned property search services called to say that one of his clients had been offered a $25,000 rebate on their Transfer Agency fees…if they would switch the search business from the caller's company to an entity selected by the TA. "What do you think someone like us should say about this? Is this really an OK thing to do?" he asked. We were stunned: "In effect, the TA is asking the company to breach its own fiduciary duty to its investors in exchange for a kickback to the corporation itself" we responded. "This is an outrage – and, in fact, it opens up the company itself to liability if 'found shareholders' wake up and assert a breach of duty to them, based on any fees they may have paid were later alleged to have been 'too high.' And indeed they HAVE TO BE 'too high' if the TA is willing to grant such a big kickback to the company itself! If there are any 'savings' to be realized by switching vendors, they should be realized by the affected shareholders themselves – not the company. That vendor – and the TA as well – must be expecting to make quite a mint from charges to shareholders, to put a $25,000 kickback on the table."

More news about the scummy tricks the State of California is up to on abandoned property – and some very practical and detailed tips on what to do about it – came our way from Registrar & Transfer Company president Tom Montrone: Rather than print it all here –and it really is MUST-reading for public companies – we put Tom's advisory letter up on our website – under "What's New" and it's on the R&T site too: **www.rtco.com**

First American Stock Transfer, Inc. of Phoenix AZ found themselves "hopping like toads on hot coals" – but happily so as 2010 came to a close – as they added 30 new clients from former competitors **X-Clearing** and **X-Pedited Transfer**, along with a nice influx of clients from other small TA competitors and a handful of IPOs…"moving us very close, if not over the threshold, into being a mid-sized vs. a small transfer agent" a note from First American's President and CEO **Salli Marinov** informed us.

Georgeson Inc. was the 2010 market leader in US M&A transactions – and by quite a large margin – in the **Corporate Control Alert** annual survey of M&A activity. Georgeson was named a proxy solicitor in 34% of the US M&A deals worth $100 million or more; 62 deals and a rather eye-popping 27% more deals than the next-ranked solicitor. As their press release also noted, this was the 10th time in 11 years that Georgeson led the category.

ELSEWHERE ON THE SUPPLIER SCENE…

Many, many moves of prominent industry players as competitive pressures continue to ratchet up:

Alliance Advisors launched a new division in January, **Alliance Shareholder Communications,** to focus on asset reunification, odd-lot buybacks and mutual fund proxy solicitation, headed by **Jonathan Duquette**, formerly of **The Altman Group**, as its President. On another front, Alliance Advisors hired **Waheed Hassan**, CFA – who had been leading the M&A/Proxy Contest research team at **ISS** – to become a Managing Partner, where he "will help clients engage with Institutional Shareholder services (ISS) as well as guide them through M&A transactions and proxy contests." Hassan's departure from ISS came during the same general time frame as the departure of **Qin Tuminelli** from ISS, where *he too* had been a M&A/ Proxy Contest Research manager…following the depar-

ture of ISS's *previous Manager* **Chris Young**…leading **CNBC** reporter Kayla Tausche to speculate that "ISS… may lose its expert grip" as a result. But with M&A activity still mostly sluggish – at least where potentially contested deals are concerned – and with proxy contests scarcer these days than any time in memory, one wonders what there *is* to "manage" at the ISS M&A and proxy-fight units.

AST, which recently hired **Ray Dunn**, the long-term shareholder services manager at the **Southern Company** has hired **The Walt Disney Company**'s long-term manager of shareholder services, **James Alden**. Two 'heavy hitters' for sure; both of them expert industry-veterans and long-term *factoti* at the **Shareholder Services Association (SSA).**

Broadridge Financial Solutions hired **Bob Perniciaro** from **Computershare Trust Company**'s Golden, CO transfer agency unit in March to be Director and Transfer Agency Manager as part of the Corporate Issuer Sales Team in their West Region, "to help us achieve our new sales and market share objectives and fulfill our vision to become the leading supplier of corporate issuer shareholder communications and transfer agency solutions to the US marketplace."

Keane, the unclaimed property reporting company, announced in January that "unclaimed property veteran **Valerie M. Jundt** has been selected to lead its National Consulting and Advisory group as its Managing Director." Jundt is a former State Unclaimed Property Administrator and Executive Director of the **National Association of Unclaimed Property Administrators (NAUPA)**, the current president of the **Unclaimed Property Professionals Organization (UPPO)** and a former consultant with **Deloitte & Touche.** In Feb, they announced the hiring of **Pamela Wentz** as a Senior Manager – a former director of audits for the **North Dakota Unclaimed Property Division**, a Certified Fraud Examiner and most recently, a quality review expert at **Deloitte Touche/Thompson Reuters.**

Former corporate investigator **Jules Kroll –** who sold his eponymous "private-eye-arm" to **Marsh & McLennan** in 2004 – launched **Kroll Bond Rating Agency,** Inc. in January, to compete with **McGraw Hill**'s **Standard & Poors, Moody's Investor Services** and **Fitch Ratings,** now owned by **Fimalac SA** of France, which, Kroll says, "avoid doing due diligence…We are embracing due diligence, the legacy of my prior life" he told the press. He will also exploit yet another legacy of his prior life by relying heavily on the consulting and security firm **K2 Global**, run by his 39 year old son **Jeremy Kroll** to do a "deep dive" from K2 into the background of issuers. Initially, the focus will be on rating structured deals, before moving on to rating sovereign and corporate debt issues.

Brendan Sheehan, formerly the editor of **Corporate Secretary Magazine**, recently signed on as the Editorial Director at the **National Association of Corporate Directors NACD Directorship** unit. **Ty Francis** has taken over as the Publisher at Corporate Secretary Magazine and **Janine Sagar** has been named Editor as UK-based **Cross Border Group** transitions the magazine from a free publication, funded by advertisers, to a subscription-based offering.

PEOPLE

Richard Breeden, the former **SEC** Chairman who led a proxy fight at **H & R Block** in 2007 – which he won with 85% of the vote – is stepping down as Chairman, and from the board: "At the outset, we wanted to extricate the company from risky financial businesses, reorganize the financial staff, renew the leadership team and reignite growth in the tax business. After four years of work, the tax business is surging, the company's balance sheet is vastly stronger than when we began, we are out of the mortgage and securities businesses and there is an effective senior management team running each area. 'Mission accomplished'" he concluded. And wow, what a powerful reminder to shareholders about the huge difference a *good* good-governance activist can make.

Hapless **Harvey Pitt**, the former SEC Chairman who had to bolt like a rabbit after botching key SEC staff appointments, and who has become sort of famous on these pages for repeated wacky pronouncements, "got up and walked out of his own deposition" where he was serving as an expert witness for plaintiffs in a class action suit against **Fannie Mae**. This after defense counsel presented evidence in the form of expert testimony from former SEC Chief Accountant **Don Nicolaisen** that he said "would change his opinion." After Pitt refused to answer any questions at all about the Nicolaisen report, the defense asked the judge either to dismiss him as a witness or order him to continue testifying without changing his written report, according to an article in **IMS Expert Services***Expert News*. A Federal Judge in DC subsequently dismissed him as an expert, saying that his walkout was "inappropriate."

REGULATORY NOTES...and comment

ON THE HILL:

A major budget-battle is shaping up on the Hill...and prospects for adopting *any* of the independent bi-partisan committee suggestions seem to be fading fast. The CFTC and the SEC seem to be special targets for cuts, despite their bigger than ever pile of Dodd-Frank related tasks. Dumb real estate deals and seven years of sloppy bookkeeping found by the GAO – plus the flak over blatant conflicts of interest in former General Counsel **David Becker**'s involvement in **Madoff** claims-calculations bode especially ill for SEC funding requests.

AT THE SEC:

Chairman Schapiro warns of severe consequences if the budget is cut, rather than increased. In an unusual move, two senior SEC officials wrote a letter to the WSJ stressing the need for "a tough enforcement program and a strong examination program" and pointing out that last year the SEC returned a record $2.2 billion to harmed investors. In another unusual move, the SEC Inspector General, generally a very tough critic, told Republican lawmakers that cuts would damage the SEC's ability to enforce the law. In another unusual move, 41 prominent Wall Street lawyers signed an open letter to Congress, calling not only for a budget increase, but for the SEC to self-budget, using filing fees and the very significant fines they have been imposing each year. (Fat chance we'd say, even though it makes eminent social and economic sense).

The recently released study of the SEC by the Boston Consulting Group – pursuant to another Dodd-Frank mandate – concluded that while the SEC can still "further optimize its available resources" by implementing the initiatives reflected in the report… "Congress should reflect on whether or not such optimization adequately meets its expectations for the agency's efficiency and effectiveness." Effective tossing the gauntlet into the Congressional courtyard, they should either "Relax funding constraints to allow the SEC to better fulfill its current role" or "Change the SEC's role to fit available funding." (Ouch…this makes way too much sense to ever get anywhere on the Hill!)

AT THE EXCHANGES:

The NYSE and Deutsche Börse have agreed to merge – and the great debate has started on what to call the darned thing – even while regulatory approvals seem far from certain. And as we go to press, a competing bid from **NASDAQ OMX**, with help from **CME/Chicago Board of Trade** and **ICE** is widely expected – which would encounter even more regulatory issues, we'd think, given the near-monopoly a merged NASDAQ/NYSE would have on US listings alone.

IN THE COURTHOUSE:

The US Court of Appeals will begin to decide on the Chamber of Commerce/Business Roundtable lawsuit challenging the legality of the SEC's Proxy Access proposals on April 7th: Most observers are betting that the SEC will be upheld… and hedging their bets as to whether opponents can finagle another full year of no-access. (Our bet is yes, they will.)

WATCHING THE WEB:

The hottest site this season for us annual meeting watchers is www.say-on-pay.com.

Hackers have been making the news big-time of late – with the arrest of two men accused of hacking into **AT&T**'s website to steal e-mail addresses of 120,000 Apple iPad users, "including corporate chiefs, US government officials and prominent media figures" according to the WSJ – coming close on the heels of the NASDAQ security breach.

Apropos…a March 9th NBC Nightly News item sure grabbed our attention, where a reporter used a Pringles can (!) to hack into wireless internet services that were not password protected, and where, presumably, a savvy hacker could hack into our internal systems and monitor everything we are up to in the bargain.

Moxie-Vote has revamped its website www.moxievote.com and gotten a bit of free press. And it certainly has the *potential* to rally activist investors to vote on favored causes in droves. But somehow, we still find the site to be not very compelling…and we did not see anything that could propel a web-based campaign the way the anti-Eisner campaign took off several years ago...But the potential is there, for sure, so stay tuned.

COMING SOON:

MORE WAR STORIES FROM THE ANNUAL MEETING FRONT

A LONG OVERDUE RE-LOOK AT SMALL-SHAREHOLDER BUYBACKS

STOCK REPURCHASE PROGRAMS: THE NEXT ACTIVIST INVESTOR FRONT, WE PREDICT