THE SHAREHOLDER SERVICE

OPTIMIZER

PROVIDING STRATEGIC AND PRACTICAL ADVICE - AND MONEY-SAVING TIPS…SINCE 1994

VOLUME 27, NUMBER 4 | NOW IN OUR 31ST YEAR! | FOURTH QUARTER 2021

IN THIS ISSUE

The Outlook - And Our Advice - For In-Person, VSM And Hybrid Meetings In 2022… Straight From The Frontlines

The number-one question we're being asked as readers gear up for the 2022 Meeting Season, and as Covid cases began rising again, is "What are most companies planning to do this year?"

So far, as our sister-company, that will provide Inspectors of Election at over 500 companies of every size, shape and description is seeing - the vast majority are opting for VSMs, which seems smart to us.

And - equally smart, we think - an unusually large number of companies are booking them extra early - to get first-dibs on their preferred dates and times - and on the VSM A-Team too, we think - and, very important to smart companies - to be sure they will have the Inspector of their choice. In our 50+ years of involvement with scheduling and staffing shareholder meetings, we have never seen so many companies book so early.

Here's our own analysis of the "Covid-Climate" for meetings in 2022:

- Companies with historically low or no meeting attendance will be mostly safe, we think, to schedule small-scale in-person meetings in mid-April through August - with no more that 25 or so attendees in total, but in a big and airy space, and with pre-registration, proof of vaccination and mandatory masking required.
- Nonetheless, if it were *our own meeting*, we would stick to the most prudent course and go virtual only - which is what most companies are doing so far.
- To date, we have been hearing that quite a few companies really miss their in-person meetings, and are still keeping options open. But we ourselves would opt for the most prudent course, rather than risk hosting a "spreader event" or having to scramble if the Covid-climate turns worse.

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- Note well: We have seen two cases in the past two months where the in-person option had to be abandoned on very short notice - and where it was too late to give adequate notice to retail investors. Both companies had to send staffers to the original site to meet, greet and explain to retail investors - and to collect any proxies or ballots.
- So far, we'd noted only one mega-cap-company that has announced an in-person meeting - in mid-May - and in a warm climate. But they have a well-developed contingency plan to go virtual-only, just in case. And oops! Just as we were going to press, **Berkshire Hathaway** announced that they would hold an in-person meeting in Omaha on April 30 - drawing speculation from the *NY Times* reporter on how they planned to protect the health of Warren Buffett (91) and Charlie Munger (98.) Nice news for the tens of thousands of Berkshire Hathaway meeting fans, the meeting will again be streamed "live" with details on the in-person admission provisions to come in late February or early March.
- Our own bet is that Covid cases will decline as the weather warms up - and some folks are saying that we are "past the peak" now - but we are betting on an upswing right after the Labor Day holiday, and as the weather cools off again. So companies with meetings in the increasingly busy September through December period would be well advised to hold their horses for now, we say, where in-person meetings are concerned - and maybe to book your dates and times for a virtual meeting well in advance...just in case.
- Another trend we have been noting is the rise in interest in having a Hybrid-Meeting. This idea has been particularly popular with smallish and *newer public companies* that have a real desire to reach out to - and to "engage" their brand new investors - including retail investor owners and fans. We ourselves are big fans of hybrid-meetings - in principle - but we still have concerns about the ability of most companies to pull in the required technologies - and to work on the "playbook" - and on the needed dress rehearsals to pull one off in a good way. Currently, in our experience, smaller and *tech-savvy companie*s have a much better chance of doing so than large and mega-cap companies, where both the cast of characters involved and the number of issues to be addressed tend to be so much larger.
- **Please remember our warnings in the last issue that institutional investors - and shareholder proponents - and the press - will be tuning in and critiquing shareholder meetings with special care - and promising to withhold votes for some or all directors at companies next year that fail to insure adequate "engagement" and a real "dialogue" with investors.**
- **Our best advice of all is to go to our website to review our Virtual Meeting Playbook, our sample Run of Show and our easily modified Rules of Conduct for virtual-only and hybrid meetings, which we have posted on our website - to make sure your meeting will pass muster with flying colors.**

In 2022 Issuers Will Have To Fight Harder Than Ever For The More-Important-Than-Ever Retail Vote:

This year, The OPTIMIZER believes that the battle for the management-friendly retail investor vote will be harder to win than ever before - even while the retail vote will be a bigger decider than ever before. Here's why:

- As noted elsewhere in this issue - by several of the most knowledgeable firms out there - there has been a huge surge in retail investment in individual stocks: Over the past 18 months more than 22 million individual investors have entered, or belatedly re-entered the stock market - and two-thirds of them are in the Millennial and Gen-Z cadre of voters. We'd also bet, based on our longtime observations of retail shareholder records, that they hold at least three stocks each, on average.

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- This big and growing cadre of people have very different ideas about making their voices heard - and on the issues themselves - than their overwhelmingly management-friendly but mostly 'passive voters' their parents and grandparents mostly were in the past.
- A very high percentage of Millennial and Gen-Z voters identify social and environmental issues as being "very important" to them as investors - and in making investment decisions - witness the enormous growth in so-called "socially-conscious" funds and EFTs we've seen over the past two years.
- While yes, the old estimate that retail investors as a group hold roughly 30% of common stocks - on average - is still mostly correct - at many companies, and particularly at companies that have special appeal for retail investors, the actual percentage of shares held by them has grown dramatically higher. (This development has also been exacerbated, as noted elsewhere in this issue, by big share-repurchases at many of the companies that have high appeal to individual investors.)
- And oops! In case you failed to note it - in 2021 more retail investors than ever before are voting FOR social and environmental proposals - and for "governance proposals" too….and they are increasingly passing.

WHAT ISSUERS SHOULD BE DOING NOW…

1. Make sure you know exactly how many retail investors you really have in 2022 - and exactly what percentage of the total vote they represent.
2. Carefully consider every "ESG" proposal you receive in light of today's voter demographics, and try to work out a reasonable compromise, rather than to rack up a loss.
3. If you decide to recommend Votes NO on ESG or other shareholder proposals, work especially hard on making your case to retail investors - in language they can understand - and in an investor-friendly format that will motivate them to read carefully - and act on.

A Quick Look At Retail Investor Loyalty Programs - And Other Incentives To Get Out The Retail Vote

In the last few weeks of 2021 we had inquiries from three readers on this subject - one of our favorite ones - so we placed calls to a few colleagues who've had success here, and reviewed some of our own past articles for other ideas:

Peggy Foran, who pioneered the program of "tree-plantings or totes for votes" at **Prudential** many years ago promptly wrote back…"Bags and trees still on and have been a hit!"

Our friends at **Bank of America** are still *very satisfied* with the charitable donations of $1 for every retail account that votes a proxy and will continue again this year (no charity determined yet.) They also mentioned a very interesting thing - that with their continuing share-buyback programs, the retail base is actually increasing noticeably as a factor in their Meeting quorum - something all companies with buyback programs need to be alert to this year.

IBM has also been very satisfied with its similar program - $1 to a designated charity per retail position voted - and they noted yet another important factor to pay attention to - a big surge in the numbers of their retail investor accounts, where there have been over 22 million first-time retail investors added to the 'pool' (on a nationwide basis) over the past 18 months or so. Many of these newcomers LOVE brand-name companies…but are new and naive re: proxy voting, and need some education - and some encouragement!

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We have been telling one mega-cap company that asked about voting incentives that we'd bet $1000 they can raise their Quorum at the shareholder meeting by 4-5 percentage points if they can motivate their non-voting retail owners... and with "mostly company-friendly votes" so we are hoping they will give it a try this season. (This is a company that has had a lot of "squeakers" on shareholder proposals over the years...but, ouch - in the end, a tight-budget nixed the idea for this year.)

Here's a link to the BofA success story, from 2018 (The Biggest And Best Thing We Saw This Season: A 41% Increase In Retail Investor Voting Participation...following An 8% Increase Last Year... At Bank Of America) and a link to a 2011 article that still has good ideas for incenting retail investors to vote proxies - and warnings about major turnoffs (A Short-List Of Incentives That Might Get More Folks To Vote Their Proxies)

Some of the very best tips for winning-over the big and fast growing "new investor" vote, please note, can be found in this very issue - and they revolve around using modern technologies - and also, more compellingly written and 'engaging materials' to truly "engage" - and convince - and motivate shareholders - and to make it fast - and easy for retail investor voters to cast their votes.

Covid Boosts "Virtual Inspections Of Elections" A Big Potential Money-Saver... Our Tips On Acting Smartly

In 2021 - thanks largely to sensible Covid-era precautions - U.S. companies overwhelmingly relied on "Virtual" attendance of Inspectors of Election - and auditor representatives too - at their shareholder meetings. Our sister-company, CT Hagberg LLC, logged fewer than two dozen in-person appearances out of the 560 meetings handled by Team members. In many cases this generated significant dollar-savings in IOE travel and lodging expense over the cost of in-person appearances. So far this year, the ratio of "virtual" vs. in-person appearances being scheduled seems to be running at the same high rate.

Our Inspectors still love to attend shareholder meetings in person - but if the meeting is to be virtual only - or if few or no outside shareholders are expected - and nothing new or controversial is on the agenda - the savings in "virtual attendance" by the IOE can often be considerable. Here are a few tips on thinking this through:

- First, of course, is to estimate how many outside attendees are likely to show up, and likely to bring proxies or want to vote in person. If it's more than a handful, you will likely want the IOE to be there in person too, to collect and take charge of the votes.

- Next, think about the meeting location - and the location of your Inspector: At many meetings, the IOE is only a short drive away - and sometimes, literally within walking distance to your meeting site. So no big deal for the IOE to come - and no big expenses at stake either way.

- Very important, we suggest, is to think for a second about your senior management team: At most meetings the Inspector of Election is the only outside person in the room that your management team actually knows by sight. And many meeting chairmen - and their senior staff too - really appreciate having that one 'friendly face' and 'meeting-seasoned person' in the room - and feel comforted to know, at an always tense time, that the IOE is a meeting-veteran who can smartly step up to the plate if something unexpected arises "from the floor."

- As we have been noting, the advent of virtual and hybrid meetings has made the know-how - and the

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involvement of Inspectors in the planning and delivery phases more important than ever. So if you are new to the Shareholder Meeting game - and/or new to the VSM and Hybrid-Meeting game - be sure that your Inspector thoroughly knows the ropes and will be appropriately proactive - both in sharing info gleaned from other meetings AND in rising to the occasion quickly and expertly if unexpected circumstances should arise.

- If you decide to have the IOE attend virtually, as so many companies are planning to do this year, be sure to have a brief written script you can read in the event proxies or ballots ARE handed in at the meeting… to assure voters that you will transmit the forms to the IOE for validation and tabulation right away, for inclusion in the Final Report on the Voting.

Readers: Please take a few seconds to review the truly outstanding group of IOEs on our Team - at Inspectors-of-Election.com. Please note too that we are ready, willing and able to work with any reputable tabulator you may use.

The Badly Mis-Named And Imperfectly Understood "Universal Proxy Rule" Three Little-Noted Practice Tips To Observe This Season

On November 18, 2021 the SEC mandated the use of "Universal Proxy Cards" in contested elections of directors and made at least one change that will effect ALL proxy cards for elections that will be held after August 1, 2022: All proxy cards will have to provide Against and Abstain options where such options have "legal effect under state law" - instead of the old For and Withheld options that companies with "plurality voting provisions" have traditionally used, since time immemorial…So readers - **Practice Tip 1:** Note this detail well if you still have plurality rather than majority voting, as roughly half of all US companies still do.

The new rules also require disclosure in the proxy statement as to the effect of all voting options that are provided: **Practice Tip 2:** Be super-careful in drafting these disclosures. Double-check your own Bylaw provisions re; each proposal and be careful to avoid statements that confuse folks into thinking that Abstentions are somehow 'the same' as Votes-No.

Another big, and ill-considered change in our view, is the SEC's calling them "Universal Proxy Rules": A terribly bad and totally incorrect name, we say, since the vast majority of Proxy Rules are -and should properly BE - tried and tested State Law Rules, and related case law. **Practice Tip 3:** how about insisting on a hyphen, to correctly label them as Universal-Proxy Rules, or much better, Universal Proxy-Card Rules!

In any event, as a Sidley Austin memo notes, they do "confer substantially more significant rights to shareholders without any minimum ownership requirements (i.e., owning only one share for one minute will be sufficient they say.) But we'd note that this feckless provision only applies where there is an official proxy fight - where there are more candidates than there are "seats."

Sidley, and numerous other firms have been warning (or more correctly perhaps, simply licking their chops for more fights) that the new rules will somehow generate more proxy fights, though we don't think there is a logical nexus here at all. But they will - almost certainly - make it somewhat easier for opposition directors to obtain votes…although, at the end of the day, as we always say, "The best fighter, with the best advisors - and with the most convincing and compelling arguments will win in the end" - Universal Proxy-Card rule or no.

Revised Transfer Agent Market Share Numbers... And What They Mean

On December 21, data-gathering experts at AuditAnalytics posted new and very interesting data on transfer agent market share, covering all SEC-registered issuers and noting changes in the most recent period, which covered Dec. 1, 2020 through Nov. 1. 2021 - vs. the year-earlier period. The numbers have particular importance in light of the dramatic changes in the competitive dynamics that will arise from the consolidation of the number-two and number three of the top-four agents - when measured, please note, by the number of shareholders served and by their gross revenues, which is, we believe, the proper way to measure T-A market share:

TRANSFER AGENT MARKET SHARE
ALL SEC REGISTEREED ISSUES

AGENT	% SHARE - 2021	% SHARE IN 2020
Comptershare U.S.	32.4	37.4
American Stock Transfer & Trust	17.6	21.2
Continental Stock Transfer & Tust	11.9	5.6
EQ (formerly Wells Fargo Shareowner Services)	4.5	4.5
Broadridge	3.2	3.2
ALL OTHERS	30.4	30.4

What a shocker at first glance to see Computershare lose 5 points of share and AST lose 3.6 points - with Continental gaining 6.3 points - until one reads down a bit and discovers that Continental has been winning a big chunk of the record number of IPO accounts in 2021 (where there were 956 in 2021 - a 22-year record - vs. only 124 in 2020) and continues to hold a near lock on SPACs, where they won 86.75% of the 2021 deals. Taking all 2021 IPOs into account, Continental won a whopping 55.75% of them, with AST at 17.25% and Computershare at 14.85% - for a total of 87% of all IPOs in 2021.

But bear in mind that most of the IPOs (and of Continental's entire portfolio) are very small companies, with minimal TA servicing needs, so the numbers above are not indicative of total revenues - and have not moved that needle much at all where the share of total market revenue is concerned. The AuditAnalytics scorecard of agents for the S&P 500 companies, below - where the lion's share of TA revenues reside - presents a very different view of the marketplace and a much better idea of "who's really who" where the dollars are concerned..

***Also, please note that the 30.4% market share attributed to all others does not seem right to the OPTIMIZER: AutoAnalytics notes elsewhere in its study that** "there are an additional 40 transfer agents that have at least 20 clients in our database" - and there are still a fair number of companies that maintain their own shareholder records as well - but we have a very hard time coming even close to having nearly a third of all publicly traded issues, much less of SEC registered ones, served by "all others." And, as we will see in the next chart, the top-four agents (and the top-three in 2022) control over 98% of all the largest U.S. public company accounts. We ourselves put the share of "all other agents" at "around 10% at best...and probably less.

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Questions, comments or letters to the editor about material in this newsletter are also most welcome.

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TRANSFER AGENT MARKET SHARE S&P 500 COMPANIES		
AGENT	**% SHARE - 2021**	**PROJECTED 2022***
Comptershare U.S.	56.4	56.4
"New EQ" (AST + EQ)	-	34.8
EQ (formerly Wells Fargo Shareowner Services)	19.2	-
American Stock Transfer & Trust	15.6	-
Broadridge	7.0	7.0
Continental Stock Transfer & Tust	0.8	0.8
ALL OTHERS	1.0	-

Source: AutoAnalytics December 21, 2021 report…*Projected 2022 share, The Shareholder Service OPTIMIZER **Note also that projected "Transfer Agent Market Share" significantly understates their projected share of revenues derived from shareholder meeting activities, where approximately 2000 public companies now use Broadridge rather than their transfer agent to handle these activities.

Why Should Public Companies Care About Transfer Agent Market Share? And What Measures Should They Care Most About?

Well, dear readers, take it from a 32 year TA industry veteran: It is really the gross share of industry revenues that counts in the ongoing struggle for dominance - and for that matter, for long term survival and stability in what is still a very fast-changing, demanding - and very risky environment. So we say, the number of shareholder records maintained is the most important metric by far, since this is still the main driver of industry revenue - along with the amount of revenue derived from the much higher-value-added services that Fortune 500 and S&P 500 companies need to have.

We say again, as we so often do, that "Everyone wants to be with a winner" - and with good reason. The biggest and most successful public companies tend to follow the "lead steers" when it comes to selecting a Transfer Agent - and pay particular attention to which agents are losing, and gaining big-company clients…to again, follow the lead steers as the safest path.

That said, here is our own chart ranking TAs by shareholders of record maintained:

TRANSFER AGENT MARKET SHARE Ranked by shareholder records maintained (millions)		
AGENT	**AS OF YEAR-END 2017**	**AS OF YEAR-END 2019**
COMPUTERSHARE	16.6mm (51%)	16.6mm (53.5%)
EQ (Formerly Wells Fargo)	7.7mm (24%)	7.3mm (23.5%)
AST	3.7mm (11%)	3.6mm (11.6%)
BROADRIDGE	1.6mm (5%)	750m (2.4%)
ALL OTHERS	2.9mm (9%)	2.74mm (8.9%)
TOTALS:	32.5mm	31mm

Source: Transfer Agent TA-2 filings, with adjustments for "secular roll-off" by the Shareholder Service OPTIMIZER

Note that movements of public companies from one transfer agent to another were minimal in 2021, but we will publish updated numbers in mid-year 2022 when new SEC filings are in.

Will The AST-EQ Deal Mark The End-Game In The Fragmented TA Business?

We sure would like to say yes. But as former "players" in the business for 32 years ourselves - and as avid "industry watchers and reporters" for 30+ years more - we have to say the game is far from over - although the broad outcomes seem increasingly clear:

The **"new EQ"** is facing formidable challenges in the near term to merge operating systems and staff, widely scattered operating locations - and three - count'em, *three* - "corporate cultures" - all distinctively different, we'd note. And, perhaps the biggest challenge of all, they need to articulate a clear and compelling message - both to current clients and to prospective ones - that they should be their "agent of choice" But to date, they seem to us to be alarmingly late out of the gate on that last score - but wise, perhaps, to hold their peace until they have their overall plans firmly in place.

Meanwhile, even after the merger of the number-two and number-three agencies, **Computershare** maintains a formidable 56.4% to 34.8% lead where the "lead steers" - and most of the money too - are currently lodged. But so far, they have had relatively little luck in "dynamiting away" new clients from their traditional rivals, due, we say, in no small part to the reluctance of clients to move in what has been an unstable environment for some years… plus the fact that most corporate stewards have been over-busy with far more pressing matters than evaluating, and maybe changing T-As. This last factor will certainly change over the coming year since corporate purchasing policies alone make this way overdue for a look-see, but currently, CPU seems to be spending a lot more of its sales and marketing time - and money - on flogging brand new products and services.

Also, as noted elsewhere, **Broadridge**, which *looks* like a small player by some measures, continues to gain share where the high-profile, high-value-added and, consequently, high-margin Shareholder Meeting services are concerned - making year-over-year growth in the proxy distribution and tabulation areas and where, currently, they seem to have a near lock on providing Virtual Meeting services to investment-worthy companies.

On the 'small T-A scene' one has to note the current dominance of **Continental Stock Transfer** in the small-IPO and SPAC world - but also to note the stats from AutoAnalytics that reveal some recent cracks in their lock on SPACs - plus the existence of 40 small T-As with 20 or more clients - and to note, as we have been doing, a sudden upsurge in new entrants to the TA biz…with more to come, we guarantee.

For now, we say, "The current environment presents a once-in-a-lifetime - and a very much long overdue opportunity - for public companies to take a careful look at the TA scene - and to benefit from what will surely be a buyer's market" over the next two years or so. Readers: "Don't sleep through it!"

The Craziest Shareholder Meeting Events We Saw In 2021…Starting With…

THIS YEAR'S "FICKLEFINGER AWARD"- FOR THE MOST OUTRAGEOUS RULE IMPOSED ON A SHAREHOLDER PROPONENT WE'VE EVER SEEN… ***"The barking orders from Cintas Corporation" - issued in writing to shareholder proponent John Chevedden, who circulated to the world at large what he aptly described as 'barking orders' … sent to him with "Best Regards" (!!??) by the Cintas SVP, Corporate Secretary and General Counsel, who wrote,***

"Attached please find the Rules of Conduct and Procedures for the upcoming Cintas Shareholders Meeting. When prompted by the Chairman, you will read your shareholder proposal exactly as it is included in the proxy materials. No deviations from the statement in the proxy materials is permitted." Please use the following number to dial into the shareholders meeting:

What in the world prompted a Corporate Secretary and GC to insist on such an odd and restrictive rule - and to deliver it in such a rude and peremptory manner to a well-known shareholder proponent? Most companies reach out early - and personally - to shareholder proponents to discuss the way their proposal will be presented (pre-recorded, over a phone line or in person) and by whom.

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At the overwhelming majority of the hundreds and hundreds of Shareholder Meetings your Editor in Chief has been to over 50+ years, proponents are reminded that they do not need to read their entire (and needlessly time-consuming) resolution, and invited to offer a brief, and usually time-delimited summary statement instead. Was it fear that the typically mild-mannered and polite Chevedden would offer up a fiery and convincing speech…that would somehow win the day? Or just a need to assert authority, and to rudely bark at a well-known shareholder - about what is widely known, after all, as "The Annual Meeting of Shareholders"? Was it to let him know who the real boss is…in the GC's ill-informed opinion?

We call it the *Ficklefinger Award* for a very good reason: When someone flicks the finger to a shareholder as this guy did, the finger of fate immediately turns it around and raises it squarely in the face of the flicker…much to his or her own embarrassment and dismay, as a rule. And what a bad reflection on the company as a whole!

More Craziness - Two Sets Of Dissident Shareholders Fail To Observe The Rules Regarding Director Nominations - Then Expect Companies To Give Them A Free Pass!

In December, a good friend forwarded a memo seeking advice re: a call with a client about the universal proxy rules, and "came away with an interesting question" – should companies be amending their advance notice bylaws to address whether a director nomination can be properly brought if the shareholder indicates that they will comply with Rule 14a-19(a) but then does not meet all of the requirements? Specifically:

The new Universal Proxy rules:

- Require that the dissident send its solicitation materials at least 67% of the voting power of the company (either through the mail or notice and access).
- Require that the dissident file their proxy materials by the later of 25 calendar days before the meeting date or 5 calendar days after the registrant files its materials
- Require that the company include disclosure in its proxy statement advising shareholders how it intends to treat proxy authority granted in favor of a dissident's nominees in the event the dissident abandons its solicitation or fails to comply with Regulation 14A.
- The adopting release notes that the dissident might be subject to liability for violation of proxy rules and material misstatements if it failed to file on time or complete its solicitation.

Question:

> What if the dissident represents to the company that it will meet these requirements and the company therefore mails its proxy materials with a universal proxy card, but then the dissident does not file its materials on time, does not actually send materials to at least 67% of the voting power, or otherwise abandons its campaign. Under state law and most company advance notice bylaws, how should a company treat proxy cards it receives with votes for the dissident's nominees if the dissident fails to comply with Regulation 14A? If they otherwise complied with the company's advance notice bylaw, would they be able to not count those votes? Should companies be updating their advance notice bylaws to address this issue specifically?

Here was our answer: "This is a good one and, believe it or not, we are dealing with this very issue in yet another pending fight now! As the Inspector of Elections I would absolutely NOT count dissident votes if the subject company demonstrates that they have failed to comply with any of the above mentioned rules. No need I'd say to amend bylaws to deal with such failures on the part of the insurgents."

Cheers. And Happy New Year! And please, dear readers, also remember our advice to NEVER waive your own Notice Provisions and allow anyone - no matter how 'innocent' they may seem to be, or how many votes of your own you may think you "have in the bag" - to submit a proposal from the floor! Check out our website for the scary details of doing so…

More From Our In-Box

NYSE finally fixes its mixed-up vote tabulating rule: In late November, **John Jenkins** of the **CorporateCounsel.net** blogged re the NYSE: "SEC approves amendment clarifying 'votes cast': Last week, the SEC approved an amendment clarifying the definition of "votes cast" in Section 312.07 of the NYSE's Listed Company Manual…The amendment eliminates a disparity that previously existed in the treatment of abstentions under the laws of many states and the NYSE's treatment of them in determining whether a particular action has been authorized by a majority of the votes cast by shareholders. This excerpt from Arnold & Porter's memo on the amendment explains the NYSE's action and its consequences:

"The NYSE has historically advised companies that abstentions should be treated as votes cast for purposes of Section 312.07, such that a proposal would be deemed approved only if the votes in favor exceed the aggregate of the votes cast against plus abstentions (i.e., giving abstentions the effect of a vote against). The corporate laws of many states, however, including Delaware, allow companies to specify in their governing documents that votes cast for purposes of a shareholder vote include yes and no votes (but not abstentions), such that a proposal succeeds if the votes in favor exceed the votes against. Consistent with those state laws, many public companies have bylaws indicating that abstentions are not treated as votes cast.

"The NYSE has amended Section 312.07 to provide that a company must determine whether a proposal has been approved by a majority of the votes cast for purposes of Section 312.07 in accordance with its own governing documents and any applicable state law, which would permit a company to disregard abstentions if its governing documents and any applicable state law so provide. In its proposal, the NYSE noted that this is consistent with Nasdaq's approach. The NYSE also noted that the amendment will help ensure that shareholders properly understand the implications of choosing to abstain on a proposal subject to approval under NYSE rules."

We can't resist adding an historical footnote of our own - that the old NYSE rule was also in contravention of the SEC rule - and clear SEC guidance - which should always have been obvious to educated readers of English…that "abstentions" are absolutely NOT "votes cast." THEY are "abstentions" (from voting)…Duhh!! Over the years we've encountered the pesky NYSE rule several times in our work as Inspectors of Election, and we would simply advise clients to follow the SEC guidance and to tell the NYSE that they could threaten to de-list them if they thought there was a big issue… and they'd promptly go elsewhere; whereupon, 'case closed.'… So glad to have this properly resolved however, after so many years of deafness and dumbness.

HOW THE MIGHTY HAVE FALLEN: A few months ago we received a little note from a good friend and former Manny-Hanny colleague, **Alan S. Michaels**, the founder and owner of **Industry Building Blocks**, a firm that tracks U.S. businesses according to "category" and ranks them, which follows: **"In 1992, Shareholder Services was industry #7…. Now it's Industry #20,077** at IndustryBuildingBlocks.com

On The Supplier Scene:

Computershare goes on a diversification "tear" - with **Computershare Limited** announcing that "it has completed the acquisition of the assets of **Wells Fargo Corporate Trust Services** ("CTS"), originally announced on March 23, 2021. The business, which will now be known as **Computershare Corporate Trust,** includes around 2,000 employees based across the U.S. who have transferred to Computershare as part of the acquisition. The US corporate trust business line will operate as a standalone business within the overall Computershare organization, and provides a wide variety of trust and agency services in connection with debt securities issued by public and private corporations, government entities, and the banking and securities industries. The business is annually ranked among the top service providers in most league tables by deal count and dollars serviced and has a best-in-class reputation built on its high-touch approach to client service. In the United States, the Computershare Corporate Trust business serves more than 14,000 clients and has significant market and product-level expertise that has been built over 85 years of U.S. corporate trust experience. Computershare's **Frank Madonna** will lead the migration of and integration of the Computershare Corporate Trust business into the company.

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Readers: We have been meaning to do an update on the little-followed Corporate Trust industry for some time now, because of its access to senior financial officers and thus, the potential to extend financial services across many similar product lines…We will do this in our next issue, so watch for it.

In October, Computershare's Georgeson unit launched a very ambitious-sounding "Global ESG Advisory Service" - "to help companies manage risk, improve their environmental, social and governance (ESG) strategies and improve engagement…The 2021 proxy season in the US and Europe highlighted how focused investors have become on ESG concerns – and how companies must increasingly focus on aligning their ESG strategies with shareholder demands and expectations," said **Cas Sydorowitz**, Global CEO of Georgeson. Their new ESG Advisory Service offers: Strategy, implementation and shareholder engagement programs, Peer analysis and benchmarking against ESG standards and frameworks such as TCFD and SASB, Guidance with rating agencies and ESG scores such as MSCI and Sustainalytics, ESG reporting, education and training for directors and management and Investor profiling and roadshows specifically focused on ESG ***And, in what seems to us to be something of a major stretch, the press release notes that "Georgeson has expanded its global team to include expertise in supply chain management, equity research and asset stewardship to cover the spectrum of Environmental, Social and Governance issues."***

And wow - in yet another horizontal-extension move, Computershare Governance Services announced the acquisition of Worldwide Incorporators, "a highly respected provider of Delaware filing and retrieval services to over 4,000 global clients. This builds upon our commitment to disrupt the status quo and provide new ways to address long standing process inefficiencies across the Registered Agent landscape."

Not to be left behind in the ESG expansion game, "Glass Lewis Expands ESG Capabilities," as **David Lynn** noted in his blog on October 21, 2021…via "a strategic partnership with Arabesque, a provider of ESG data and insights" where "The partnership will see Arabesque provide company ESG profiles for Glass Lewis' Proxy Paper research reports, enabling clients to gain the latest ESG data and insights on over 8,000 companies worldwide…

And close on the heels of the October announcement, Glass Lewis Launches an Equity Plan Advisory Service, which as David Lynn noted in his blog, "appears to be similar to that provided by ISS Corporate Solutions,"

Group Five released its 2021 Equity Compensation Administration Benchmarking Study in October, measuring value for the first time - "giving study participants both the opportunity to assess the value they receive from their service provider and to explain in detail, from their perspective, how service providers can add greater value. These additional measurements help service providers identify opportunities to improve their offering and better meet the needs of plan sponsors. Now in its 23rd year, Group Five's annual study includes responses from 961 U.S. public companies who use a third party to manage equity compensation award recordkeeping and execution of plan participant transactions. The study is the only independent forum for plan sponsors to confidentially make their opinions and priorities known to service providers.

No big surprise, we'd guess, "The study reveals that plan sponsors find the greatest value in a provider who continually invests in technology that is easy to use, provides client support personnel who proactively engage with clients when issues arise, and provides responsive service to both the company and their plan participants at a fair price."

But some heartburn among the many service providers in this space, for sure, we'd opine: "Value is measured in the study using a 0-to-10 scale, with 10 labeled "extremely valuable" and 0 labeled "not at all valuable," and results are reported as an average score. **Equity Edge Online** received the highest value rating at 8.80, followed by Charles Schwab at 8.67 and UBS at 8.58. In addition, Equity Edge Online achieved the highest overall satisfaction rating at 95% favorable, followed by **Fidelity** at 92% and **Charles Schwab** at 90%. A favorable response is a 4 or 5 on a 1-to-5 scale. "With this added measurement of value, we are able to bring the full picture of service delivery and decision-making into focus for service providers and plan sponsors, so the quality of service and technology solutions can continue to rise," says **Kathy Huston**, President of **Group Five**. A complimentary summary of the study results is available for download on Group Five's website.

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In another flurry of activity, in late October Institutional Shareholder Services (ISS) "announced a definitive agreement to acquire **Discovery Data Holdings, Inc**...a globally recognized and trusted provider of data and analytics to the financial services industry. The acquisition is expected to close later this year... Discovery Data's platform empowers asset and wealth management firms, insurance companies, financial technology companies, and service providers to understand their target markets and to identify, assess, and seize new opportunities...[and] brings market-leading solutions that will help our clients better support the firms and people directing the flow of assets into investment products across major distribution channels."

Fast on the heels of their previous announcement, ISS ESG - "the responsible investment arm of **Institutional Shareholder Services Inc**...today announced the forthcoming launch of its suite of dedicated **Net Zero Solutions** with automated portfolio reporting which will go live in Q1 2022." As the release explains, "Ahead of COP26, a significant number of global institutional investors have pledged commitments to reduce their investment portfolios' CO2 emissions to Net Zero by 2050. Those investors will now need to track the alignment of their portfolios beyond the Paris Agreement's aim of limiting global temperature rise to below 2°C, to a further science-based Net Zero target of limiting it to no more than 1.5°C. Investors are sharpening their focus on implementation and will need to monitor companies' specific, substantive plans to reduce their carbon footprints with short, medium and long-term targets...supports investors in identifying the most suitable KPIs, analysis, and data to transition portfolios and set relevant net zero targets in accordance with their net zero initiatives, and will enable them to provide meaningful Net Zero statements through a data driven approach with automated portfolio reporting...When launched in Q1 2022, ISS ESG Net Zero Solutions coverage will include 29,000 issuers for Climate data, 23,000 issuers for Energy and Extractives data and 8,000 issuers for EU Taxonomy eligibility data, powered by data and insights from a broad range of high-quality research products within the ISS ESG universe.

PEOPLE: As 2021 came to a close, many industry super-stars moved on…

"I thought you should know that **Charlotte Brown** has retired!" former boss **Michael Mackey**, recently 'retired' wrote us: "This after a 42 year career in the proxy biz – a great operations person providing invaluable support to the proxy solicitors. First at **CIC** for 20+ years [where Michael's dad was a founder] as head of Corporate Services – then a stint at the **Altman Group** in the same capacity and for the last 11 years at **Alliance Advisors** [CIC-redux, we used to call it] "even expanding her role into proxy logistics and virtual shareholder meetings. She has to be one of the most dedicated, knowledgeable and loyal operations people to ever work in the proxy industry." We would add that Charlotte is also one of the best-known and best-liked people in the entire proxy world - who had many clients that followed her as she moved along in the industry - thanks in small part to the big assortment of candy she'd hand around during breaks at NIRI conventions, but mostly because she was always cheerful - and smiling - and never forgot a face - or a client's name and company name.

The peripatetic proxy-fight expert, **Tom Cronin** - who's worked at nearly half the proxy solicitation firms out there over the years - has left the **EQ** proxy start-up venture, where he served a brief stint - to become Senior Vice President - Proxy at **Alliance Advisors**...bringing with him a proxy fight in progress and another scheduled for April. More fights to come, for sure, from Tom's large and very loyal cadre of financial institution clients - which are usually among the most common proxy-fight targets. And Tom is highly valued by their outside legal experts as well: In our own experience, unlike a surprising number of solicitors we see at fights, he always "knows his numbers to a tee" going into every meeting he is involved in.

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The unforgettable **David Epstein** - who literally invented abandoned property "clearinghouses" - and initiated forced "audits" by state bounty-hunters too - passed away on Dec. 8th at the age of 82.

As **Richard J. Chivaro**, former Chief Counsel, **California State Controller's Office** and **Lyndon Lyman** of *"Unclaimed Advisor"* reported to David's many followers, "In the early 1980s, David left a successful sports and entertainment legal practice and the opportunity to be appointed to the California judiciary to focus exclusively on unclaimed property. He helped to re-establish **NAUPA** (the National Association of Unclaimed Property Administrators...whose own bank account had fallen inactive in the 1960s, with its business account reported as unclaimed to the State of Florida) [!!!] ... acted as co-reporter for the 1981 Uniform Unclaimed Property Act, authored the legal treatise *Unclaimed Property Law and Reporting Forms* ...testified before Congress about bank service charges on dormant accounts, wrote numerous amicus briefs as NAUPA special counsel, and acted as an advisor to the **World Jewish Congress** on abandoned accounts in Swiss banks arising from the Holocaust—along with undertaking numerous other activities....Forty years ago, he crisscrossed the country as consultant to more than 30 states. In this capacity... created unclaimed property compliance and outreach programs, testified for the adoption of stronger and more modern legislation, and participated in litigation that resulted in significant holdings that established important public policies still functioning today... The forerunner to modern contract audit firms, the Clearinghouse collected hundreds of millions [actually many *billions*] of dollars on behalf of all states [where David earned a significant percentage of the reported proceeds right off the top, and was, understandably, but to our own dismay, not a fan of "finding" lost shareholders]...and launched or expanded the careers of many talented men and women...In 2007, David endowed the David J. Epstein Program in Public Interest Law and Policy at his alma mater, the UCLA School of Law [which] has since had over 500 graduates, who serve in government, nonprofits, the judiciary, and the private sector."

Michael J. Foley, who for many years was the Senior Relationship Manager in **Chemical Bank**'s stock transfer division - and an active and involved participant in the **Securities Transfer Association** - passed away on Dec. 14, 2021 at the age of 77, leaving behind his beloved wife Nancy, sons Matthew and grandsons Owen, Patrick and Jack. Michael was "widely known and admired as a speaker of eloquence" - an art he enjoyed enormously - and also as "a gentleman, chivalrous to his last day...and a 'gentle man'" his obituary noted. He also had a delightful sense of humor and, we would add, not a mean or petty bone in his body - at a time when competition within the business was often crude and cutthroat.

Michael (Mike) Nespoli - another of the very best people ever in the stock transfer business - who for many years was the Executive Director and chief Relationship Manager at **AST** - retired from the stock transfer business at year-end after 41 amazing years. Mike started out in the early 1970s with **"The Old Manny Hanny"** where he rose rapidly in the ranks. Then he soldiered on through the **Chemical Bank/Manny Hanny** merger, the aptly-named **"Chemical Mellon"** deal...then **BONY-Mellon** (whose industry nickname is unprintable) and, briefly, at **Computershare**, before joining AST. We never met a client who did not literally love Mike. He always remained cool, calm and totally unflappable, no matter what - and he was always able to help clients - and his own team - to navigate the way through the knottiest of issues and bring them to a good conclusion. Mike plans to pursue a life-long desire to be an Emergency Medical Responder...and we say he sure has had lots of preparation - as one of the stock transfer industry's most experienced and successful "Emergency Responders in Chief."

SEC Commissioner Elad L. Roisman wrote to **President Biden** in December that he will resign his position by the end of January. "Serving the American people as a Commissioner and an Acting Chairman of this agency has been the greatest privilege of my professional life" he wrote in his statement. "It has been the utmost honor to work alongside my extraordinary SEC colleagues, who care deeply about investors and our markets. Over the next several

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weeks, I remain committed to working with my fellow Commissioners and the SEC's incredible staff to further our mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation" We have to give Roisman a solid A for volunteering to head-up a detailed review of aptly-named, creaky, leaky and sometimes smelly "proxy plumbing" issues - and also to spearhead the SEC's long-promised updating of Transfer Agency regulations, which have not been overhauled in over 30 years, despite many promises to do so...But sad to say, no real progress has been made on either front. The SEC is simply not sufficiently staffed - and funded - for such complex work in our view, and the political slant that seems to infect a lot of the work of the SEC of late does not further progress either. We guess it would take a major disaster in one or both arenas to move the needle even a little.

We were very sad to see the announcement on LinkedIn that **Michael A. Smith**, an "experienced Corporate Trust Professional – specializing in Default Administration (Bankruptcy & Restructuring)" has been riffed:

"After seven terrific years with **Computershare**, their acquisition of **Wells Fargo Corporate Trust Business** has left me seeking a new position in the corporate trust world. This newly merged business is in a great position to continue its course of providing outstanding service for its customers and their investors and I wish the new team all the best in their business endeavors" he graciously informed us. Your editor in chief has known Michael since he started in the Corporate Trust Division at the "Old Manny Hanny" - when it was the consistent new-business leader, year after year, and we have followed his career for more than 30 years. We can attest that he would be an asset to any Corporate Trust unit, and we would recommend him wholeheartedly. We feel certain that he will soon land in a good spot.

Patrick Tracey - another of the most talented people anywhere in the Stock Transfer and Proxy Solicitation arenas - whom your editor-in-chief hired away from the old **Morrow & Co.** over 30 years ago - and who has consistently excelled at bridging the usually unbridgeable gulf between "sales" and product delivery, customer service and product innovation too, at a variety of industry-leading firms since then - was also riffed in December by Morrow Sodali. (What were they *thinking*???) He is now a "free agent," he recently posted. But not for long, we are certain.

On a happier note, **Nicole Mauney** of **Duke Energy** and **Larry Karp** of **Brighthouse Financial** move into President and Vice President Roles at the **SSA** as Shareholder Service Association's most recent president **Kim Hanlon** enters retirement.

Nicole is manager of shareholder operations within Duke Energy Corporation's Investor Relations Department. She began her career in shareholder services on the telephone, answering shareholder inquiries. Since then, she has served multiple roles within Shareholder Servicers, providing support to Duke Energy's in-house transfer agent function. During her 20-year tenure, Duke Energy underwent several significant corporate actions, including three mergers, a reverse stock split, and a spin-off.

Larry is the vice president and head of shareholder services at Brighthouse Financial. He is responsible for defining the strategy, providing oversight and managing shareholder services, in addition to leading high-profile initiatives within Treasury. Before his current role at Brighthouse, Larry was responsible for working on the spin-off of Brighthouse Financial from MetLife. Before joining the insurance industry, he had a 25-year banking career at HSBC, National Australia Bank and J.P. Morgan Chase, primarily focused on developing financial solutions for global insurers.

Regulatory Notes…and Comments

ON THE HILL:

BIG NEWS FROM THE DOJ - Starting with a roll-out of tough new enforcement policies for business entities, execs and recidivists: "Deputy Attorney General **Lisa Monaco** delivered an exacting message to the white-collar defense bar at the **ABA**'s 36th National Institute on White Collar Crime" as reported by **Jamie Schafer** & **Gina LaMonica** on Nov. 8th in QUICK ALERTS, and excerpted here : "The DOJ is stepping up its enforcement of corporate crime… through several new initiatives that will roll back more lenient enforcement policies adopted during the prior administration. This increase in enforcement will be buoyed by a surge of resources provided to DOJ prosecutors, including a new squad of FBI agents embedded in the DOJ's Criminal Fraud Section—placing "agents and prosecutors in the same foxhole," as DAG Monaco described it" with four major prongs:

"Focus on Individual Accountability…the DOJ is renewing its focus on holding individual actors responsible for corporate wrongdoing…Monaco announced that the DOJ is reviving its policy that companies will only be eligible for cooperation credit in resolutions with the DOJ if they provide prosecutors with non-privileged information about all individuals involved in or responsible for the misconduct at issue—regardless of the individual's position, status, or seniority. This pronouncement reverses the DOJ's prior guidance, which allowed companies to receive cooperation credit for disclosing only those individuals "substantially involved" in the misconduct.

"An Expansive View of Corporate Recidivism….Monaco announced a significant change in how historical misconduct will factor into corporate resolutions. Under new DOJ guidance, prosecutors will evaluate a company's full criminal, civil, and/or regulatory record in evaluating the appropriate resolution for a subject or target of a criminal investigation, not just similar violations. This broader vantage of historical misconduct—including whether a company has been targeted by another regulatory agency or even another country—brings in a host of additional, potentially relevant, misconduct…Monaco explained that this policy change will usher in an amendment to the DOJ's "Principles of Federal Prosecution of Business Organizations," which should provide further detail on how prosecutors will weigh a corporation's criminal and regulatory record in determining an appropriate resolution to corporate misconduct…Monaco also suggested that the DOJ will be considering data on corporate recidivism with an eye toward guidance as to whether pretrial diversionary avenues—including declinations, non-prosecution agreements (NPAs), and deferred prosecution agreements (DPAs)—should be available to recidivist companies.

"Corporate Monitorship Comeback…Monaco advised that, where appropriate, the DOJ will deploy corporate monitors to verify compliance and disclosure obligations imposed by the terms of NPAs and DPAs entered into between companies and the DOJ. Monaco's pronouncement explicitly revoked 2018 guidance issued by then-Assistant Attorney General Brian Benczkowski. The "Benczkowski memo" was generally viewed as a more "business-friendly" approach to the DOJ's practice of imposing corporate monitorships as a condition of settlement, setting a presumption against monitorships except in extenuating circumstances. However, in her recent remarks, DAG Monaco suggested the DOJ may more frequently utilize monitorships to ensure that companies live up to their end of requirements imposed through corporate resolutions.

"More broadly, the DOJ will also evaluate corporate criminal enforcement through the newly-formed "**Corporate Crime Advisory Group**," which will be comprised of representatives from every department involved in corporate criminal enforcement, which will have a broad mandate to study corporate resolutions, recidivism, monitorships, and benchmarks for cooperation credit in enforcement penalties, and make recommendations to DOJ leadership on potential enhancements to the enforcement of corporate crime. For companies negotiating resolutions, there is no default presumption against corporate monitors, as there was before. Corporate monitors will be imposed on a case-by-case basis…As DAG Monaco alluded, these recently announced policy shifts are just "a start" to this administration's corporate compliance mission."

DOJ also launches a large scale investigation of short sellers, hedge funds and so-called "research firms" that fuel the marketplace for short sales, according to a recent Bloomberg report:

"The U.S. Justice Department has launched an expansive criminal investigation into short selling by hedge funds and research firms, scrutinizing their symbiotic relationships and hunting for signs that they improperly coordinated trades or broke other laws to profit, according to people familiar with the matter. The probe, run

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by the department's fraud section with federal prosecutors in Los Angeles, is digging into how hedge funds tap into research and set up their bets, especially in the run-up to publication of reports that move stocks.

"Authorities are prying into financial relationships between hedge funds and researchers, and hunting for signs that money managers sought to engineer startling stock drops or engaged in other abuses, such as insider trading, said two of the people, asking not to be named because the inquiries are confidential.

"Underscoring the inquiry's sweep, federal investigators are examining trading in at least several dozen stocks, including well-known short targets such as ***Luckin Coffee Inc.****,* ***Banc of California Inc.****,* ***Mallinckrodt Plc*** *and* ***GSX Techedu Inc.*** *And they're scrutinizing the involvement of about a dozen or more firms — though it's not clear which ones, if any, may emerge as targets of the probe. Toronto-based* ***Anson Funds*** *and anonymous researcher* ***Marcus Aurelius Value*** *are among firms involved in the inquiry, the people said. Other prominent firms that circulated research on stocks under scrutiny include* ***Carson Block's Muddy Waters Capital*** *and* ***Andrew Left's Citron Research****."*

Three cheers for this long overdue review, we say.

AT THE SEC - A FLURRY OF ACTIONS TO END THE YEAR:

The SEC appointed four new PCAOB Board Members on Nov. 8th, - naming **Erica Y. Williams** as Chairperson and **Christina Ho**, **Kara M. Stein**, and **Anthony (Tony) C. Thompson** as Board members and stating that **Duane DesParte** - who was named Chair after the SEC fired former chair **William Duhnke** earlier in the year - will continue to serve as a Board member and will remain Acting Chairperson until Erica Williams is sworn in. Williams is a partner at Kirkland & Ellis LLP, previously served in various roles at the SEC and as Special Assistant and Associate Counsel to President Obama. Ho has held positions with the Treasury Department, University of Maryland, Deloitte & Touche LLP and Elder Research. Stein served as a Commissioner of the SEC from 2013 to 2019, and has also had roles at the University of Pennsylvania Carey Law School, the Center on Innovation at University of California Hastings Law and on the Hill. Thompson currently serves as the Executive Director and Chief Administrative Officer of the CFTC, has served in other federal government positions and is an Air Force veteran. Commissioners **Peirce** and **Roisman**, who had expressed concern with the firing of the PCAOB Board back in June, issued a statement expressing support for the new Board.

Three BIG cheers, we say, for this sweeping and long overdue housecleaning at the notoriously deaf, dumb, blind and totally clueless PCAOB.

On November 15, 2021, the SEC released its FY 2021 annual report on the SEC Whistleblower Program (covering October 1, 2020 through September 30, 2021.) In FY 2021the SEC awarded about $564 million (about $2 million more than all the money awarded in the past 10 years!) to 108 individuals - vs 106 in the ten years since the program began. Two awards in FY 2021 amounted to nearly 40% of the year's total amount awarded — $114 million to one whistleblower on October 22, 2020 and $110 million to one whistleblower on September 15, 2021, the two largest awards to date.

It sure looks like plans to "cap" awards are a dead issue these days, and WOW - good thing, we'd say yet again: In FY 2021 the SEC received over 12,200 whistleblower tips — a 76% increase from the previous fiscal year, and a more than 300% increase since the program began. "Money talks."

In perhaps the biggest move in 2021 where issuers are concerned, the SEC proposes real-time reporting of company buybacks: 3 Things to Know...from Andrew Moore & Allison Handy of **Perkins Coie** in their Dec. 16th *QUICK ALERTS:*

1. "Real-Time" Reporting on Form SR – The proposed rule would require "real-time" reporting of share repurchase activity via a new Form SR required to be filed on Edgar within one business day after the company executes a share purchase. A single business day. For companies that regularly engage in regular share repurchase programs, this would significantly increase the reporting burden – essentially "Section 16" reporting for share repurchase programs. Form SR would require reporting a range of information in tabular format, including total number of shares repurchased, average price paid, total shares purchased in open market transactions, total shares purchased in reliance on Rule 10b-18, and total shares purchased under a Rule 10b5-1 plan.

2. Additional Periodic Disclosures – In addition, disclosures in periodic reports would be updated to require disclosure of the rationale for the share repurchases and the process or criteria used to determine the amount of repurchases; any policies and procedures relating to purchases and sales of the company's securities by its

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directors and officers during a repurchase program; whether the repurchases were intended to qualify for Rule 10b5-1 safe harbor; and whether the repurchases were made in reliance on Rule 10b-18.

3. What's This All About? – The press release and proposal state that the proposed amendments are intended to improve quality, relevance and timeliness of information about company share repurchases. The proposal notes that many company share repurchase programs are: "…aligned with shareholder value maximization, such as to offset share dilution after new stock is issued, to facilitate stock- and stock option-based employee compensation programs, to help signal the issuer's view that its stock is undervalued, or because the issuer's board has otherwise determined that a repurchase program is a prudent use of the issuer's excess cash."

"But the proposal goes on to indicate a view that increased, and more timely disclosure is needed due to concerns about companies using share repurchase programs as an earnings management tool (such as decreasing the denominator of EPS calculations) or using announcements of share repurchase programs to effect short-term upward price pressure on the stock."

While the OPTIMIZER sees this as basically good news for investors - we must also note that the proposals fail to require clear disclosures of what intelligent shareholders should most want to know: "How much of the money spent on repurchases over, say, 1, 3 and 5 year periods has 'gone up in smoke - to 'money heaven' - instead of producing long-lasting increases in share prices?" The historical record at a great number of companies has been truly abysmal.

Let's never forget that if shareholders had been "rewarded" with cash dividends instead of share buybacks - where most retail investors never sell into such deals, but where they do indeed live with the consequences for better or for worse - they would have had the money in their very own hands - to spend or to reinvest elsewhere - or even to reinvest in more shares of the company itself - as they themselves decided to do! We feel strongly that directors have a duty to see exactly how their "rationales" worked out over 1, 2 and 5 year periods - AND to report it to shareholders - who have a right to know - when they stand for re-election.

Watching the Web:

More stolen data from Electronic Filing Services triggers illegal trading gains - and great advice from Dave Lynn of the CorporateCounsel.net:

"The SEC announced in mid-December that it had brought charges against yet another hacking ring accused of accessing earnings releases prior to issuance and trading based on the information obtained through the hack. The earnings announcements were accessed by hacking into the systems of two filing agent companies before the announcements were made public. In the complaint, the SEC alleges that the insider trading scheme yielded $82 million in profits during a period from February through August 2020. As has been the case with many of the Division of Enforcement's recent cases, the Staff credits powerful analytical tools for helping to make the case against the defendants. The complaint notes:

The trades by the Trader Defendants were disproportionately focused around the earnings announcements of publicly-traded companies that used the Servicers to make their EDGAR filings, as compared to earnings announcements where the required EDGAR filings were not made through the Servicers. Indeed, statistical analysis shows that there is a less than one-in-one-trillion chance that the Trader Defendants' choice to trade so frequently on earnings events tied to the EDGAR filings of the Servicers' public company clients would occur at random.

"This latest hacking scheme points to the vulnerability of material nonpublic information when it is stored in the cloud prior to making the EDGAR filing," Dave noted. "Despite all of the efforts to maintain the security of the systems used to process and store this information, sophisticated hackers can often find a way in. Unfortunately, there is not much that companies can do to protect themselves in this situation, other than to ***try to minimize the time that the submission is on the filing agent's system***" (emphasis ours.)