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## Institutional Investors Promise To Monitor And Act On VSMs That Short-Circuit Investor Participation

*As the big Spring Shareholder Meeting Season begins we want to renew our warnings that "Big Brother is watching" - and rightly so, we say - to be sure that all shareholders are given a fair chance - not just to listen passively, but to be HEARD at VSMs - AND that they are given sufficient time to CAST THEIR VOTES after the "discussion period" is over.*

*Please be sure to visit our website, [www.optimizeronline.com](http://www.optimizeronline.com) for numerous practical tips on how to deal with these issues, including "Rules of Conduct" and a sample "Run of Show" for handling the Q&A periods and for opening and closing the polls in a way that will give listeners a fair chance to be heard - and the time that's needed to consider and cast their votes online.*

Also, if you can, try to tune in the April 2nd podcast from CCR Corp featuring Chevron's **Mary Francis** on "How to Host a Best-in-Class Annual Meeting" (which she surely does), **Carl and Peder Hagberg** with many timely and practical practice tips, **Matt Kane**, Associate GC at **Lucky Strike Entertainment** on post-mortems and "understanding voting outcomes" and **Jason Vinick** of **Alliance Advisors** with tips on Shareholder Engagement - and a movement to do away with OBOS. (We will try to post a transcript for you to read.)

## Awful Advice On VSMs From A Big T-A: Take It At Your Peril

*In the run-up to the annual podcast covering "The Conduct of the Annual Meeting," a prospective attendee wrote in to ask if they could pre-record their entire Meeting, and to answer only pre-recorded questions, saying that their transfer agent (one of the biggest ones, that we will allow to remain anonymous) recommended this to them as part of a "major trend." Ouch!*

We responded that Meetings that do not allow shareholders to ask questions during the course of the Meeting do not meet the test as being "Meetings of Shareholders" at all - and they probably flout the rules for VSMs that have been promulgated (with a few minor differences) in all 50 states - in our layman's opinion.

"Yes, there has been a big trend to having the Chair's opening speech - and the introduction of management and shareholder proposals being pre-recorded, which, on the whole, has been useful. But there is big and well justified pushback from many institutional investors on Meetings that do NOT allow for live questions - and especially on

agendas that do not allow sufficient time for shareholders to vote or change their votes online after the discussion period is over. Also, trying to put the entire Meeting on "automatic pilot" is a risky thing to do - in that there is always a chance that "breaking developments" will need to be discussed at the Meeting...but where? And how? And by whom? The logistics here would be formidable.

***The biggest issue however, is that such a move will incur the wrath of Institutional Investors - particularly the Public Pension Funds - and likely give rise to even more activism - and to public naming and shaming - and could well result in the Meeting results being declared null and void!" The T-A in question is way out of its lane here - and needs to wise up immediately.***

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## A Quick Review Of The Apple VSM (We Were Pretty Happy Until We Realized We'd Been Snookered)

In keeping with our plans to tune in and review more VSMs this year we were happy to attend Apple's nice (and early, for West-Coasters) Feb. 25th Meeting, held at 8:00 a.m. Pacific time; 11:00 Eastern.

Apple is one of our top-two investments - with an amazing 54,526.7% return, and we LOVE them - but with a sorta' bad record for shareholder meetings, having mis-reported the voting results TWICE (once when they counted Abstentions as No Votes!!) - and where, before there were VSMs, they never booked near enough space to accommodate the thousands of investors who wanted to attend in person.

We tuned in way early - at 10:40 - so as not to miss a thing...but no luck. On a second try we got a message to tune in at 10:45 where we were greeted by a giant, amorphous "blob" that slowly changed its shape and its colors, and which we finally realized was meant to be an apple - all to the tune of hip-hop, tick-toc music with an all-girl rap vocal group. Oh. Then, at 8-Pacific time, a guy, dancing and flipping fake weights... to illustrate "Effortless Power." Who was the creative director here, we wondered. Yuck! Then, a cartoon portrait of Tim Cook, as SVP, GC, and Secretary Kat Adams (no cartoon for her) led off the official business, noting that "polls will close after the presentations" - directing attention to the "Vote Here button" and noting that "additional questions can be asked using the Question Box." Oh.

All of the proposals - the intros of the three usual management proposals and four shareholder proposals were pre-recorded and all moved quickly along, under two minutes each. And Apple, to my mind, did a good job of not protesting them too much but very succinctly pointing out that Apple was not guilty of any of the deeds that allegedly required corrective action.

At 11:13 Kat announced that the polls would be "Open for another minute" which, by my watch stretched close to two minutes, and good thing: There was barely time to finish voting - and without a touch-screen it would have been humanly impossible.

At 11:17 Tim Cook gave a brief review of 2024, citing "All-time EPS, All-time Record Revenue" and "A very optimistic outlook for 2025." Yeay! - At 11:32 - a film, showing "New Hearing Aid Features," tearjerker shots of kids opening presents, nuzzling a puppy and a girl with a guitar. Oh. Where DID they find that 'creative director'?

At 11:34 the question period opened and there were some good ones - and good answers too, covering capital investments, the likelihood of a second-quarter increase in the dividend, noting that they'd doubled since 2012, benefits of health-innovation efforts and a good answer re D&I citing "no targets," Apple's "unique culture" and its "north star - dignity and respect for everyone" and a feeling of "belonging." There was a question about "emerging markets" where Cook singled out India - and we had submitted a question too - about the outlook regarding Apple's relationships with China - a hard one to answer, of course, but a very important one to address in some way, we thought. If you are Apple, it's probably the most important question of all.

But oh - no - at 11:50 Cook opined there was "time for one more question" (where WE felt there should be time for quite a few more) but Cook decided to freewheel it with his thoughts on "innovation" where he said there "had been a lot of interest."

So no China on the table for us that day. At 11:52 Cook said thanks and by 11:53 the Meeting was over - seven minutes early by our reckoning.

***After we wrote this, however, we realized we'd been snookered: We are certain that they'd booked the airtime till noon - so there really was plenty of time to take our timely and highly germane question, rather than to unilaterally offer an unprompted "commercial" about innovation. (In fact, Cook could well have said "We plan to continue to out-innovate them.")***

***No wonder that shareholders are concerned about companies "cherry-picking" questions and ditching those that don't suit them. Had this been an in-person or hybrid meeting - and had we lined up at a microphone - they would HAVE TO HAVE ANSWERED OUR QUESTION. Apple, we still love you - but please clean up your act before your next AGM.***

## Slow USPS Deliveries Add To Low Retail-Voting Woes

***We were unpleasantly startled, to say the least, to receive our proxy materials from Apple on Feb. 11th - just 14 days before the AGM. Wow, we realized - if we were to mail our proxy back that very day, it would be unlikely to get there in time for the Meeting, based on the time it takes for the checks we send from our winter address in Florida to clear the banks these days.***

We also realized that we were lucky to get the materials at all at our winter address, because, fortunately, we use it as our official address. Most of our other wintertime mail is forwarded, using the USPS "Priority Forwarding Service" (which gets saved-up for seven days and takes another 7 to 10 days to be received) but where second-class mail is not forwarded at all - a situation that we're certain will prevent the receipt of proxy materials for numerous "snowbird shareholders" where there are a LOT of them at most big companies.

***With this in mind - and bearing in mind too that shareholders who receive "full packages" of printed proxy materials have the largest propensity, by far, to actually CAST their votes - we suggest that issuers consider mailing proxy materials via First-Class Mail to any and all retail investors with larger positions... IF, that is, the "retail vote" is important to them. Sometimes, it's not - but many times, the mostly pro-management retail vote will avert embarrassing "squeakers" and often, literally save the day for the management side.***

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## Two Fascinating Proxy Fights: A Move To Count Votes Cast Before Newer Fight Materials Were Mailed - And A Virtual-Only Fight From The "Harry Houdini Séance Room"

***Your Editor in Chief served this summer as an expert witness in a fascinating court case in Israel, Murchison v. Nano, where he testified remotely that it is unthinkable to try to count votes for company directors from proxy cards that were issued and returned before new materials were issued following a court-ordered proxy fight, and where U.S. holders of ADRs voted overwhelmingly in favor of the dissident slate once they had the full facts in hand.***

An open and shut case, one would think - especially in light of SEC guidance that was issued to clarify the use of Universal Proxy Cards, on which the management largely modeled its required mailings, which addressed this very situation. How could one possibly conclude that the old and clearly superseded Proxy Cards - that no longer reflected the official agenda of the court-ordered Meeting - should be considered as valid?

Somewhat surprisingly, the management used a senior manager of their proxy solicitation firm - that had planned the entire campaign for them, and who obviously was conflicted - to opine that they had proceeded perfectly in every respect. (What else *could they say*??) But more surprisingly, they found the head of a major law school - and a former SEC Chairman no less - but who had no experience at all with proxy fights, and who was clearly unaware that these are "state" and not federal matters - to opine that what management tried to do is perfectly OK...and in line with various statistical studies he cited, which have nothing to do with what actually happened. The voting was over. Statistical projections were irrelevant, and the real "question before the court" is whether the superseded proxy cards could be counted at all.

***Sadly, the case has not yet been decided... We guess they have much bigger fish to fry there... But actually, as we mentioned in our testimony, it could indeed become a precedent where currently - for reasons we feel are obvious - there are NO PRECEDENTS that would justify such an outrageous outcome. And meanwhile, Murchison won board seats in this year's election.***

## Now - On To The “Harry Houdini Séance Room” - Where All The Paperwork Disappeared Like Magic!

***On Wednesday evening, January 26th, one of our sister-company’s Inspectors of Election (the estimable Wendy Shiba, Esq.) served at the Special Meeting of Members of The Academy of Magical Arts in Los Angeles - that had been called pursuant to a petition from over 150 of the 4500-odd Voting Members - to oust one of the Directors, which would require a majority of the quorum to take effect.***

Notably, while the Chairman, Secretary, Wendy and a few other staffers were assembled in the Harry Houdini Séance Room of the legendary “Magic Castle” - a sprawling, multi-storied and ‘magically adorned’ Victorian building in LA - the Meeting was conducted entirely in a “Virtual” manner: The Notice of Meeting, Agenda, Rules of Conduct and Voting instructions were all sent to Members via e-mail - and also posted on the Member website. Members could download a form and execute and send a Proxy form electronically that would include the Members’ voting instructions and an electronic signature, as many did. Otherwise, all voting would be in real time - over the Internet, during a fixed period, with one vote per Member.

The Meeting was held in real time - over a Zoom app that allowed the proponents - and the targeted director - to make a statement, and then a rebuttal statement, and then for a 20-minute period where their various allies were permitted to make statements of their own, up to two minutes each. Attendees were able to hear - and in most cases to see the various speakers, after which the polls were open for five minutes for attendees to vote - or to change their earlier proxy votes - after which there was a brief pause for the Inspector to announce the Preliminary Report on the Voting, where the targeted Director was ousted by a large margin.

The one smallish kink in the process was that instead of using a special “voting app” as originally planned, the votes were recorded via Zoom, which required Wendy to check each vote against the Master List of Eligible Voters, where some votes were found to be ineligible and where there were a fair number of duplicate votes that had to be cast out, since the app did not automatically replace previous votes with the last ones cast. And, as is usual on proxy fights, many members voted more than once. The Final Results were announced and posted on the website on Friday morning.

*But - “magically” - there was no paperwork at all, other than Wendy’s Excel spreadsheet that showed all of her adjustments - and a few of her notes. What a wonderfully efficient way to conduct a proxy fight!*

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## Tales From The Snakepit - Cautionary Tales From Some Of The Wildest And Craziest Proxy Fight Events We’ve Ever Seen - And What To Learn From Them. En Garde, We Say!

***As the 2025 Shareholder Meeting Season gears up, we are betting that the number of threatened and actual Proxy Fights will continue to ramp up big-time - seriously aided and abetted by the so-called Universal Proxy Card, that absolutely does make it easier for dissidents to win board seats, and often, total control of boards.***

***Accordingly we have made a special effort in this issue to provide a lengthy primer on Proxy Fights - and to focus on what we have found to be the biggest issues - and the biggest potential traps for the unwary - based on our 50+ years of experience on the front lines - and in the “snake pits” ... starting with this story:***

### **Grandma Sinks Her Childhood Best Friend Following A Bedside Visit From Greedy Grandkids: “Never Rest On Your Laurels And Never Count On Your Friends - Or Relatives”**

***We’ve told this story before, but it bears repeating in that it illustrates four of the most important things to know about proxy fights.***

One morning, 20 or so years ago, we got a call from a courtly southern gentleman who was the Chairman of a small but highly successful bank in a very rural area of Virginia. “I’ve been told I may need to hire an Inspector of Election: he said. “I’m not really worried because we have a great business (in fact, they were the strongest bank in their peer group by far in terms of earnings, ROA and reserves) and we have three generations of highly loyal shareholders, but a former executive who now heads a somewhat larger, neighboring bank, is looking to oust our management directors and take us over.” (As we later learned, the Chairman had hired the “attacker” straight out of college - and mentored him - and promoted him rapidly and regularly. So much for loyalty on that front.)

“I hate to tell you this,” I said, “but you have put your finger on what may turn out be your biggest problem. Sad to say, the ‘third generation’ is very different from their parents and grandparents. They tend to be far less loyal, eager for ‘change for the sake of change’ - and far more susceptible to the lure of the fast, and often very large profits that often arise in takeovers of three-generation businesses.

*"The second thing I need to tell you is that they call them Proxy Fights for a reason. You need to prepare yourself for a fight that will likely get down and dirty before it's over.*

*"The third thing to know, is never to sell your opponents short: No one starts a proxy fight unless they think they have a path to victory.*

*"The fourth thing to know is that you absolutely must have a strong and capable proxy solicitor, which, fortunately, you do. In fact, I call him "the king of small-community proxy fights."*

As predicted, the fight soon got down and dirty: Aside from citing the Chairman's advanced age (he was going on 80) - and the lack of high-tech services, like ATMs and 'paperless statements' - which the attacker belabored but which were hardly needed or desired in the tiny towns where their branches were - the other side accused him of being a misogynist, when, in fact, two of his top-three officers were women and they - and many other female employees -- got up at the Shareholder Meeting to set the record straight. The bank also had an investment banker take the attendees through the numbers, where the bank stood out strongly on every measure of success. So going into the Meeting all looked pretty good for the Chairman and his team.

***But then - when it came time to open the polls for the vote - the other side's solicitor stepped up to hand us a proxy from the bank's third largest shareholder, thanks to three generations of regular stock splits. She was a lifelong friend of the Chairman, who'd never sold a single share. Three of her grandchildren visited her at the nursing home that very morning, and got her to sign a proxy card that, unbeknownst to her, we are certain, ousted the Chairman and all but two directors, giving the dissident control of the bank.***

***Her bank's counsel ask if we could delay certifying the vote until the next morning - which we were happy to do, given the late hour. So at 8:00 AM the next day we were let into the bank early, so we could do so, then drive three hours to make our plane in time. Two of the dissidents aggressively pushed in behind us, to survey their new turf. The Chairman was in his office, putting his 50+ years' worth of personal effects into a cardboard box. It was one of the saddest sights I've ever seen.***

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## The Telltale Coffee Stain... "Details Count"

***Here's another very important thing to know about proxy fights: "All of the details count" when deciding on the validity of proxies, before preparing the Final Report on the Voting.***

***Most of the "details" on what, exactly, constitutes a "valid proxy" are enshrined in the Corporate Code of the company's state of incorporation. But also, there is a huge amount of case law that has accumulated for well over a century. Accordingly, before the Final Report is issued in a proxy contest it is customary for the Inspector of Elections to preside over a "Challenge Period" during which, both sides try to challenge the validity of cards submitted by the "other side".***

***One would ordinarily expect the Proxy Solicitors from both sides to be experts here. But while someone really knew their stuff in this case, we are constantly amazed at how many solicitors - and how many so-called Inspectors too - don't have a clue, as we will also see further down.***

One day in Delaware, my long term colleague and partner Ray Riley and I presided over a challenge period that took a totally unexpected turn: Management appeared to be winning by a small but decent margin - until a young solicitor from the "other side" handed us a dozen proxies that had been faxed to the management side at meeting site, declaring them all null and void. "Look at the backs of each set of faxes," he said. You'll see the identical coffee-stain, or soda stain, on each and every set." We - and the management team too - were stunned, because we all knew that in order to be valid under the Delaware code an "electronic transmission" needed to be a "complete copy" of the proxy card - including the front and back. And here - in what was an obviously innocent step to save time, the "backs", as usual, contained the "appointing language" - all came - quite obviously - from a single card.

Our own Official Presumptions as to the Validity of Proxies include this provision, of course - and, while we also have a Presumption that calls for us to "favor validity" in truly questionable cases, there was no argument from the Management side either - who lost, literally by a hair's breadth... over a coffee stain.

## More On Details Counting: The Disastrously Expensive Failure Of The Proxyholder To Execute A Ballot: "Proxies Are Not Votes!" Ruled The Judge

***Our sister company, CT Hagberg LLC and our partner Ray Riley, became the subjects of a landmark court case in Washington state when Ray refused to count the proxies in a hard-fought contest because the Proxy Holder did not execute a Ballot to officially cast their votes. He'd actually thrown the dissident's proxy solicitor a tentative life-line when he mentioned he'd not found a ballot in the papers she handed over, to which she replied, "We don't need one" - in the hearing of the management's proxy solicitor who immediately challenged her statement.***

The ruling led the dissident - who had been winning by a large margin but ended up with a mere handful of good proxies that ran to the Management's proxy committee - to challenge Ray's ruling in court. While we knew we were right - and did what we had to do - we were a bit concerned that the judge would make an exception here in view of the totally upside-down outcome. Happily for us - many months and many millions of dollars of legal fees later - she upheld the Plain English meaning and role of a "proxy" - and the letter of the law - and clarified for all times, in case anyone were to doubt again - that "Proxies are not votes."

***Next, however, the loser - who continues to be a serial launcher of proxy fights against smallish banks - sued the proxy solicitor - and his own lawyer - which ended in the sale of the solicitor's business. Whether it was to satisfy the judgement and/or simply to take their money off the table and retire to their yachting we don't know. But proof positive that in proxy fights, all the details matter.***

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## The Sneaky Bait And Switch Tactic That Put Your Editor In The Proxy Solicitation Business

***Back in the 1980s at the "Old Manny Hanny" one of the bank's officers served as usual as Inspector of Election in a proxy fight where we were the tabulating agent. The client was a state-chartered S&L, looking to reincorporate as a federally chartered commercial bank, which seemed like a good deal for the shareholders. The Chairman of a nearby bank, however, saw an opportunity to snap up the S&L on the cheap - if he could thwart the deal and elect a few Directors of his own, so he launched a proxy fight to do so.***

The dissident got off to a strong start. Having accumulated a big position himself he was able to round up a number of allies looking for a big payday if they could seize control, so the early voting seemed quite close. But as the target counter-attacked, the tide turned and the reincorporation seemed absolutely certain to succeed - especially after a very large holder voted Yes on the day before the Meeting.

***As soon as the Management pulled ahead, their proxy solicitor urged the Chairman to close the polls immediately and declare victory, which he did. But OH! The opposing solicitor jumped to his feet and shouted "NO! These numbers are not correct, as I will demonstrate tomorrow morning" - which he did.***

***How did he know?*** He'd intentionally held back most of the votes for his side until the polls officially opened - but to guarantee the victory he'd "seeded the polls" with the big YES vote - which he officially revoked in the minutes before the polls were closed. The company experienced the dreaded "Double-Whammy" when a million shares in favor were reversed - and cast instead AGAINST the company's proposal.

***Following this debacle, the company's solicitor urged the company to hold another vote immediately - and wanted our bank to pay for the entire thing - though he himself was the proximate cause of the loss! What a scoundrel that old Rumpelstilskin was! We paid, and the company ultimately won, as was likely all along.***

***Your editor vowed never to be fooled like that again. We quickly worked up a business plan to enter the proxy solicitation business, which we were the first bank ever to do. When we presented the case to our Chairman, Vice Chair and Corporate Planner our VC said, "Gee, this is a pretty dirty business for our bank to enter." We heartily agreed, and noted that our reputation, and our entry alone, would be the key to our success. Everyone burst out laughing at what a coup it would become - as it quickly did.***

CONT'D →

*P.S. Old Rumpelstilskin, whose dirty tricks you'll read more about further down, wrote a fiery "Dear John" letter to our Chairman - who'd never met him - threatening to sue the Bank, which, of course, he had no grounds to do. "Who the hell is this nut-job?" our Chairman scrawled on the note that he forwarded without acknowledgement to my then boss, who was a close personal friend of his.*

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## The "Mole" Who Tried To Rig The Election On The Q-T

*Here's another case where your Editor, who'd served as the Inspector at yet another down-and-dirty fight to control a "community bank" in New Jersey was sued personally over another seemingly small but critical detail. This one, as we soon discovered, involved a "mole" - an Assistant Treasurer who'd likely been promised a nice reward if the election could be swung to a cabal of Director candidates - including a few turncoat Directors that were already on the board.*

The Shareholder Meeting was packed with local shareholders, and so close at the start that management considered "unregistering" and departing the room to withhold a quorum until more votes could be rounded up. As shareholders queued up to register - and handed in their proxies - it became clear that the management slate would carry the day. Many people held on to their proxies until voting officially began, however, when they were asked to present their proxies directly to the Inspector as thirty or forty holders did.

We issued our Preliminary Report on the Voting that evening, and first thing next morning we received a call from the Assistant Treasurer asking about the vote from Mr. "X" who was a sitting director. "Sorry," we said... "No vote from anyone matching that name is on file with us." "I'm sure he voted at the Meeting" the now suspected mole told us, so we looked in the "junk pile" and there was a blank (unimprinted) proxy in favor of the dissidents, but with a totally undecipherable name.

***"Let me get this straight" said we. "You are calling to tell us that this proxy belongs to Director "X" - and would, if held to be valid, tip the election in favor of three dissidents???" We realized that the AT must have tipped the Director off to the fact that he would have likely been replaced in a spit-election, then slipped him a blank ballot that he used to ditch the Management candidates on spite - then slipped it into the good pile when we were not looking!***

*"We may need to reflect on this a bit more, but offhand I must tell you that this proxy does not meet one of our key Presumptions as to the Validity of Proxies - that the Inspector must be able to find the voter on the Official Shareholder List - but whose name is clearly illegible on the proxy card at issue." Ultimately, we ruled the proxy invalid, and your editor was promptly sued, as was the issuer.*

***Interestingly, the Director in question was at the preliminary hearing to attempt a settlement of the case - but failed to acknowledge that it WAS his signature on the challenged card. Even if he had done so, however, we would have stuck to our ruling that the card itself was invalid - and ultimately, the court specifically ruled in our favor. Details absolutely DO count in proxy fights!***

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## Faxed Proxies From The Local Gas Station!

***At the very same Meeting described above, we also began to get a stream of faxes in favor of the dissident slate. And yes, we have a Presumption regarding those too: To be valid, the Inspector must be able to determine the source of the fax - and that it is from a legitimate shareholder who is entitled to vote. Here, company counsel was able to quickly confirm that all of the faxes were being sent from a nearby auto repair shop and gas station (!) where someone with access to the shareholder records was clearly fabricating the various signatures. (The mole and his confederates at work, for sure, who all appear to have gotten off scot-free.)***

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# The Big And Blustery Pile Of Proxy Challenges That Vanished In A Blizzard: Check Our Presumptions, Dummies!

***Another of our most memorable Proxy Contests began with a last-minute flight change to avoid a blizzard - then a four-hour drive through sleet and freezing rain - only to be confronted with a blizzard of ridiculously challenged proxies by clueless solicitors for the dissident group.***

Following a four-hour delay at Kennedy Airport caused by a winter storm in Texas, Ray Riley and your editor took a tip from a few native Texans and re-booked from Dallas to San Antonio, whereupon we drove through sleet and freezing rain to Roseland Texas and arrived the evening before the Proxy Fight - at yet another smallish bank.

The results, in favor of the Management slate, were not at all close, but Ray and I repaired to our hotel rooms to put the paperwork in order and to prepare for a review by the solicitors from the "other side." Come early evening two reps arrived - from what was then one of the largest proxy-fight solicitors, who has never once hired us as Inspectors (and we know why) and who'd begun (rightly) to lose market share here year after year. They sat down at a desk, quickly flipped through each of the thousands of proxy cards and began to set aside an enormous pile of proxies to challenge.

***"Wait a minute," said we, after a quick look. "What exactly are you challenging here?" "The signatures" said they - "some of them are illegible to us and some are in pencil."***

*"Haven't you reviewed our Presumptions as to the Validity of Proxies? Here are copies for you. Please note that (1) Inspectors are not, nor are they expected or required to be "signature experts" nor (2) are we even allowed under 'the rules of proxy' to seek out third-party verification - and thus (3) that as long as we can identify the voter on the shareholder list the card is "presumptively valid" and (4) signatures by pencil are, specifically, valid - and (5) even those signed with an X" or some other "mark" are valid too.*

***The two dummies took the big stack of cards to their car, turned on the car, the lights and the heater and began to shuffle through the pile as the sleet and freezing rain continued to fall like mad. After a half hour, they knocked on the door, handed back the stack and said, "We are OK now" and went away.***

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## The Adjournment Cum Booty-Call To Save The Management Slate: Another Fascinating Fight-Story From Our History File That Illustrates Several Critically Important Points... Know Your Math! Know What It Takes To Adjourn The Meeting If You Need More Time To Win... Watch Out For Your Relatives!

***Smallish banks continue to be among the major scenes of knockdown drag-out proxy fights and this one takes the cake - a smallish bank in one-time gold rush territory with (watch out below) cumulative voting.***

We gasped in surprise when we entered the late nineteenth century lobby of the largest bank in town. Every wall was hung with expertly taxidermized endangered species. Grizzlies and other big Black and Brown Bears were standing guard with claws outstretched; Bald and Golden Eagles, Bison and Mountain Sheep heads hung on every wall. And the Meeting itself was rife with wild-west features - a feud between third-generation branches of the founding family and a big "wild card" - we noted from our review of the Charter documents that they allowed for cumulative voting in the election of directors.

The 'junior members" of the family - and their small but savvy proxy solicitor - had done their homework well. With cumulative voting it was entirely possible for the right combination of cousins to seize control of the bank. And the solicitor made it clear from the get-go that he was prepared to - and did instruct us on the "Master Ballot" that he filed with us as the first order of business "to cumulate votes in order to elect the maximum number of directors from their slate, in the order indicated."



*The management team was taken a bit by surprise. Not only did they not anticipate, and have ballots on hand that would permit the cumulation of votes, most of the local family members - who were the current incumbents and their strongest supporters - were not AT the meeting in order to vote cumulatively, They made an amazingly fast recovery, however: the Chairman called for an adjournment until after lunchtime in order to prepare suitable ballots and, more importantly, round up their troops - which they did in the nick of time. While it was a "squeaker" the more senior branch of the family managed to retain full control of the board - by a hair's breadth.*

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## Never Try To Silence A Dissident: They Can Sue You ... And Often - Good For You - Their Filibuster Lacks Luster

***Among the most common things we encounter as Inspectors, or potential Inspectors at Proxy fights, are initial attempts to silence and short-circuit the dissidents. NEVER DO THIS, we always advise, and we won't take an assignment unless we are sure it will be carried out with fairness, and with strict impartiality.***

For one thing, they can sue you after the Meeting for failing to provide a "reasonable hearing" - and you run the risk that a court would agree and set the Meeting results aside. Also, "soviet style meetings" are not at all popular with regular meeting attendees - and can cost you their all-important good-will. But most important, as our headline notes, many times we have seen badly prepared and ineptly delivered speeches from inexperienced proponents backfire on them completely:

***Agree instead on specific, written rules of conduct that allow dissidents a 'reasonable opportunity' to state their case - and to have "seconding statements" if they wish, and to have a brief rebuttal period if they wish to have one - and to agree that rude and/or disparaging comments, and comments of a personal nature will not be allowed.***

We vividly recall a Meeting in Seattle where the dissident had accumulated a big following - only to have attendees line up to revoke almost all of their votes for him after hearing his longwinded, blustery and totally unfocused spiel.

***THIS MEETING ALSO ILLUSTRATED THE IMPORTANCE OF "KNOWING YOUR NUMBERS". After it was over we pointed out to the company - and its counsel and proxy advisor too - that they escaped by the skin of their teeth, because the other side failed to single out one or two of the sitting directors as "bad actors" from whom they should withhold their votes, thereby deep-sixing their chances of winning at least one, but maybe two seats! They had only three sitting directors, which, as we pointed out, made them especially vulnerable to losing control of the entire company if the dissidents could replace two of them - a defect they promptly planned to fix.***

## MORE ON KNOWING YOUR NUMBERS - AND THE RISKINESS OF ALLOWING "FLOOR PROPOSALS" AND "VOTES FROM THE FLOOR"

*We almost forgot to treat this subject until our good friend **Broc Romanek** brought up the subject in a recent blog - but to our mind, this is the most pernicious, dangerous and stupid thing a publicly traded company can do when it comes to proxy voting. In our long career as Inspectors of Election at Proxy Fights, we have seen at least a dozen companies lose control of the board - and the company itself - thanks to "floor votes."*

***Please note well that newer companies - even quite large-cap companies - which often take a while to hit their stride - and also tend to have a majority of their shares held in "impatient hands" - are especially vulnerable to be taken over here, "from the floor."***

Here's why we hate them so - and what to watch out for:

**First, we hate Floor Proposals because they allow votes to be held where the majority of the shareowners are totally unaware that there is to be a "Floor Fight."**

**But secondly, as noted, it often allows impatient raiders to win the day!**

**We also hate them because, in our view, they completely undermine - and maybe even negate - the real benefits derived from well-crafted Notice Provisions - that are expressly designed to avoid under-vetted proposals and improper "surprise outcomes."**

We are shocked at how many lawyers actually suggest allowing Floor Proposals - as a way, we think, to try to deny the proponents a real opportunity to properly air their issues, much less an even playing field - as if it is a sop - and as something that will always fail sort of success.

*Many of these misguided folks wrongly believe that the company can easily defeat them - without "knowing their numbers" and realizing that the "Broker Votes" can't be cast in favor of what are essentially non-routine proposals. Thus, except with regard to Proxy Cards, which do grant the Proxy Committee the authority to vote as it decides, to garner Votes NO, the proposal must be put to an up-or-down vote on the Voter Instruction Cards. (We have had a half-dozen law firms argue strenuously against this proposition - until it's time to write down the actual numbers of Votes For and Votes Against, where no "tally" has been made.*

*Against this background, we have seen over a dozen companies taken over via "stealth solicitations" where a small handful of large investors band together to take the company by surprise - and we fully expect to see more of the to come. It is a very sad thing to witness.*

## **BEWARE THE DOUBLE NEGATIVE!**

*We are somewhat surprised that we have seen this only once in a proxy fight, given the complexities and all the legalese of so many proposals. But one otherwise fine day in May we needed to assemble counsel for both sides in a proxy contest to point out that there was a double-negative in the dissident's proposal. In Plain English it meant a vote YES properly amounted to a Vote NO for the proponent. Probably because Management was winning pretty handily, and once they got over the shock that no one had noticed this before, they graciously agreed to take the proposal at its intent, rather than literally and we were fine with this.*

## **THREATS TO SUE THE INSPECTOR**

***In our long career we have been threatened many times with lawsuits be the losers of proxy fights - mainly in attempts to bully us into submission. Bullying, by the way, is a favorite tactic of proxy solicitors - especially those who never recommend us since they know we can't be cowed - but we know they have good success with many other Inspectors.***

*There is never a need to sue a proxy solicitor, as we always try to point out. All a "loser" needs to do is to convince a court that a mistake has been made - and, if so, the court will order it to be promptly corrected.*

*One year, in a very much contested fight, a money manager from Delaware who attended the Meeting in person had been entrusted with the proxies of four other Delaware investment managers - which he forgot to submit while the polls were open. He descended on us like a madman - demanding that we add the votes into the final count and threatening to sue us if we didn't. "Oh, please do try to sue us," we urged him: "Just wait until your investor friends discover your failure to uphold your promise to vote. You'll be laughed out of town - and likely be sued by THEM." Case closed.*

## **THE RABIDLY MAD CHAIRMAN WHO VOTED FOR THE OTHER SIDE**

***On another unforgettable day your editor had just returned home from a Meeting in California when he received a frantic call from the Chairman. "What the hell did you do here? We should have won this election, and you show us as losing. I control over 30% of the votes myself!"***

Oops, this told us exactly where to look. Then we immediately called the proxy solicitor, as a courtesy, to tell him to expect an angry call - then we called the Chairman and told him to please consult his proxy solicitor for the answers.

The Chairman, who was indeed a 30% owner - and who had retuned a valid proxy card earlier, which was over-ridden by the latest one - was somehow inspired to vote again at the meeting, where he mistakenly checked all the YES boxes. Then, as we recalled, he handed the card to the proxy solicitor, who handed it to us without scrutinizing it (Ouch!) - thereby sinking his own case when it was our turn to review and count up the Final Votes and where we carefully avoid looking at the names of senders since they are not germane to the job of work, and where we must be totally impartial. Here, the deed was done, with no recourse for a do-over,

***Readers: Please note that Chairmen often fail to vote their proxies at all! But if they do - and hand them to you - be sure to remember that automatically checking the YES boxes is a very common reflex action - so double-check with care!***

## A Few Tales From The Bad Old Days:

***Back in the 1960s and 70s - and even into the 1980s - many proxy solicitors were experts at dirty tricks -operating under the old saying that "All is fair in love and war - and proxy fights." (And if you look at the story in this issue on the proxy fight in Israel, you'll see that at least one big solicitor seems to adhere to the same bad belief.)***

One former CEO and owner of a once prominent solicitation firm - whom we'll allow to remain nameless though he's in the ground now, adhered religiously to this dictum - to the point of outright fraud - which backfired on his firm in a way he never knew. (We called him Rumplestilskin, because of his fiery temper and the belief that one day his cheatings and lies would be revealed and he'd disappear in a big puff of smoke.)

When our bank officers served as Inspectors, as they did nearly a thousand times a year, they'd all hear noises at their hotel room doors as Rumplestilkin's minions shoved freshly minted proxies under the door at 3:00 in the a.m. (Another much larger firm was guilty here too, though only when the stakes were particularly high.) So naturally, when we were asked to recommend a proxy solicitor, which we often were, the names of these two firms were never on our list - and often we would say if asked that we "have some issues with them." To this day, the then small firm we recommended most often has, we think, the biggest book of steady clients in the business.

The biggest offender was uniquely bold when it came to tinkering with the votes. One day I attended the last meeting of a venerable public company that was losing a proxy fight that would merge it out of existence after 100+ years. Five minutes before the start, old Rumplestilskin showed up at the Grace Rainey Rogers Auditorium at the Metropolitan Museum of Art, bearing a blue proxy from the other side that, rather untypically, had an X in the box as a NO on the merger. He said he'd received it in his office that morning, which was also unusual, and "felt obliged to deliver it." The "broker proxy" had a number like 10, 427.075 shares - where someone (we wondered who) had used a pen to change the decimal point to a comma and which, he said, "he'd take as 10+ million" instead of 10+ thousand shares. The Corporate Secretary, whom he'd known for years and often entertained over dinners and golf stared at him in stunned amazement: "Do you really think we are THAT stupid?" she asked. "Well," he said, "I thought it was worth a try."

This same guy testified under oath that the signature, "Mickey Mouse" was perfectly acceptable on a broker proxy - and later, in another proxy fight that lasted nearly a year, explained under oath that "the white-out fell off" on another broker proxy, to "correctly reveal" a much bigger number.

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## One Last Story On "The Bad Old Days Of Proxy Voting"

***Sad to say, in the bad old days, not so long ago, it was common for publicly traded companies to threaten - and to actually withdraw business from Bank Trust Companies that would not vote the "company line" on proxy proposals.***

During the heyday of unfriendly takeovers, "Old Manny Hanny" was the transfer agent and proxy tabulator for a large Long Island firm that had become the subject of an unfriendly takeover offer. It was also the Trustee, and thus the Voting Agent for its large set of Employee Ownership Plans, where we had a standing committee of three senior Trust Officers who served as the Proxy Voting Committee to evaluate and vote on shareholder proposals where the Trust Division held voting power.

***A few days before the Meeting, the company's Treasurer called one of the members of the Committee and told him that if the Bank did not vote against the takeover offer, they would close every account they had with us.***

***When he learned of this, as he immediately did, our then Chairman was enraged: He picked up the phone, called the client's Chairman and chewed him out royally. "We no longer want to do business with you," he said. "And by the way, you need to wake up and realize that there is no path forward for you - or your business - since the takeover makes economic sense and there will soon be no business for you to take or leave" - which quickly came to pass.***

## Out Of Our In-Box:

*A huge victory in the proxy fight front as dissidents at Mantle Ridge Capital elected three of their four candidates to the Air Products board in January, ousting the Chairman and ending what the WSJ called "one of the most fiercely contested board battles in recent memory."*

*A TRULY HUGE WIN for DF King... with a HUGE LOSS for management's proxy advisor Innisfree.*

### DELAYS AHEAD AT THE SEC:

*As Broc Romanek noted in his blog, a recent Reuters article noted that "over 600 SEC staffers have taken a buyout offer and will be leaving in the coming week or two. Many of these are senior staffers and it's roughly 12% of the overall staff."*

*"And that's before the round of mass layoffs that President Trump seeks as federal agencies submitted plans for these layoffs a few weeks ago. After that round of layoffs, the SEC likely will be a different federal agency than the one we have become accustomed to as such a large reduction means the SEC will need to change its processes and priorities."*

*We think this will likely cause some serious delays as issuers seek guidance on their 2025 Meeting agendas - and frankly, we are concerned that many junior staffers and relative newbies will issue Bad Advice.*

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## People

Proxy Industry veteran **Foster Bartko** has signed up with **Lioness Consulting LLC**, joining founder **Donna Ackerly** and **Keith Haynes** as the Lioness business continues to grow. ("We protect your pride" they promise.) Full disclosure, your editor in chief well remembers Foster from his Manny Hanny days - when a new client urged us to hire him as the client's rep, and where we were always glad we did.

**Robert "Bob" Pyle, long-term Secretary and Counsel of the subsequently renamed American Society of Corporate Secretaries passed away in March at the age of 86.** A Williams College grad, with a JD from UVA - and a Corporate Secretary of two listed companies before taking on the Society role, Bob was a prominent player at Society events - at the then-huge National Conferences and in the then very large and active NY Chapter, which held its own sold-out Fall Conferences - as an active participant in discussions - and on the tennis courts, where he was a formidable player. Old-timers will best remember Bob as a pianist par excellence for the impromptu after-parties and sing-alongs that followed the Black Tie dinner dances back then, where he knew every popular song from the 1850s through the 1950s and the school songs and fight songs of every major U.S. college and university - and also, as the long-term editor and drafter of the Society's then-regular and informative newsletters. Bob finished his career as Vice President and Assistant Secretary at **American Express**. He was truly one of a kind, and WOW, those good-old-days were truly amazing in terms of the prestige - and perks - and fun that Corporate Secretaries - and their service providers too - enjoyed back then.

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## Regulatory Notes ... And Comments

**ON THE HILL:** Chaos - and capitulations escalate as presidential "executive orders" single out law firms that somehow "wronged him" along the way.

As we go to press three major law firms - Perkins Coie, WilmerHale and Jenner and Block are fighting the orders in court as unconstitutional, where at least one court seem to agree, while Paul, Weiss and the once venerated Skadden Arps have cut deals to save their businesses where access to government agencies and government contracts were to be cut off, and where clients, understandably, were threatening to flee. "They're all bending and saying, 'Sir, thank you very much' Trump told the press, adding that they were asking, "Where do I sign? Where do I sign?"

**AT THE SEC:** New guidance on shareholder proposals may make it easier to deny them - which seems to be the intent - but, much as we think a reduction in truly meaningless and/or politically motivated proposals is warranted, we think most serial proponents will find ways to "write around the rules".

**IN THE COURTHOUSE:** A big deal in Delaware as new legislation aims to reduce the rights of minority holders vs. Big owners of big companies - and reduce defections to more lenient jurisdictions: we're a bit skeptical here too, and warn, "beware of what you wish for" since many investors feel that the protection of minority-investor rights is really delaware's "strongest suit"

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