THE SHAREHOLDER SERVICE

OPTIMIZER

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

VOLUME 17, NUMBER 2 ★★★ NOW IN OUR 18th YEAR ★★★ SECOND QUARTER, 2011

 ISSN:1091-4811

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OUR FINAL WRAP-UP ON THE SPRING 2011 ANNUAL MEETING SEASON...

The biggest take-away from this season – as we noted last issue too – is the ease with which Says On Pay sailed by: A just-released Conference Board study, "A Closer Look at Negative Say On Pay Votes" that reports on the roughly 2200 of the Russell 3000 Index companies that held meetings through June 17 reveals that only 36 companies ended up with NOs on their Say On Pay proposals.

But the dirtiest and least-noted "secret" we think, is that the vast majority of the "failures" would have sailed by too…if only corporate issuers, and sometimes the not-so-savvy proxy solicitors they'd hired …actually knew what they should have known and done what they should have done: At most of the companies where CTH&A Inspectors oversaw the voting, individual investors were typically voting ten-to-one – and many times as high as 90 to one in favor of the Pay plan. But at most of these same companies, individuals were voting only 10% to 15% of the shares they owned as a group…And in several cases we saw with our own eyes, individual investors held between 30% and 40% of the total voting power! Ouch! Just a few well-placed calls or emails to a few well-placed holders could have turned the tide – on pay, or on many other matters we saw where the management position failed to carry the day.

We also saw more than a few companies where executive officers – and directors – with very large positions in the aggregate - failed to vote their own proxies…And, though we are not privy to ALL the votes by such folks, since we don't normally look for this (it's the issuers' job – and the proxy solicitors job) - and many such positions are in Plans, or in street-name, where they are not visible to onlookers - we'd bet big that they alone could have turned the tide in many cases where there were close votes!

Another important take-away; Clearly, those Proxy Advisory Firms do not have nearly the clout that some proxy solicitors - and way too many hysterical corporations too –seem to have thought they have: Through June 17, **ISS** recommended NO votes on Pay Plans at 276 companies…while only 36 companies ended up with failures, as noted…And at least half of them could have avoided failure with relative ease, as also noted above.

The most important take-away, perhaps – and something else we've been pointing out with regularity – small cap companies are the most vulnerable to NOs on Say On Pay – and are usually the least prepared to counter, as well: 17 of the 36 companies with NO votes had market cap of $1 billion or less…and most

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FINAL WRAP-UP...
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of such companies, in our experience, don't seem to know there is a problem – with say on pay or any other issues – until it's too late to turn around.

A real problem with NOs on pay, however - for this year at least - is that four derivative suits have been filed against directors at such companies, alleging breach of duty and "waste of corporate assets" due to "too-high pay" - and another 18 cases are under study, the Conference Board reported: We would not expect these suits to go far, although a few seem to be getting settled. Read the excellent and reassuring posting in the ***Harvard Law School Forum on Corporate Governance and Financial Regulation*** by **Paul Rowe** of **Wachtell, Lipton**, we advise, which reminds that "a negative vote on say on pay does not change the board's fiduciary duty to implement compensation policies that the directors believe are the best way to attract, retain and incentivize top-quality managers…Directors face no prospect of legal liability if they decide to act in a manner contrary to a negative say on pay vote…[i]f a Board follows appropriate procedure in determining not to revise compensation."

One of the newer, and more bizarre - and more troubling tactics we observed at several large-cap companies this year - were agreements to allow "floor votes" on matters that had not been presented to all shareholders in the official proxy materials. We feel there are significant problems with this tactic, some of which can come back to bite the unwary company and their uninformed shareholders as well: Most of the cases we saw were in connection with "gentlemen's agreements" that were made with **Walden Asset Management** regarding the role of Company directors who are also on the board of directors of the **U.S. Chamber of Commerce** – where Walden asserts, correctly, as it seems to us, that the Chamber often acts, or endorses acts on the social, political and environmental fronts that are in direct contradiction to a member Company's own policies:

As to the "floor votes" the **Pfizer** proxy statement said *"The board is not aware of any matters that are expected to come before the 2011 Annual Meeting other than those referred to in this Proxy Statement and the possible submission of the Walden Proposal, which is not included in this Proxy Statement but may be presented by Walden…If …presented at the Annual Meeting….the Proxy Committee appointed by the Board of Directors will have discretionary authority pursuant to Rule 14a-4(c) under the Securities Exchange Act of 1934…and intends to… vote AGAINST the proposal."*

JP Morgan Chase and several other companies in similar positions *vis-a-vis* the Chamber also allowed Walden to initiate "floor votes" like this if they chose to do so at the Meeting…while several other large companies relied on the notice provisions in their bylaws – the most carefully drafted of which specifically disallow any proposals that are not officially described in the proxy statement from being considered as "other business that can come before the meeting." Yes, they said, you can bring up the proposal during the discussion period, but not during the business portion of the meeting, because no "floor votes" are *allowable* under our bylaws.

When the "floor vote" stuff first crossed our desk we called our good and usually very savvy friend at Walden, Tim Smith: "What the heck are you doing here?" we asked him: "How can you folks – 'good governance advocates' you say – advocate something that is so clearly bad governance…by trying to bring proposals to a vote at the Annual Meeting that the overwhelming majority of shareholders will have had no chance to consider, much less to vote on?"

"We think it's a good way to get a hearing on this issue, and get a dialogue going… without having to file an official shareholder proposal" he told us. And it struck us - though we didn't tell him at the time - that many companies would think of this as a 'cheap and easy way' to dispense with the issue…without having a really serious debate, much less an up-or-down vote….OR…thinking that they had more than enough discretionary votes "in the bag" to vote it down overwhelmingly…so the proponents would slink away defeated and maybe not come back.

And guess what? This season we encountered three companies with entirely different kinds of shareholder matters being put forth - where the company seemed to think that allowing a "floor vote" would be better than filing for a No Action Letter…or engaging in a debate in the proxy statement… and thinking too that they would have the discretionary votes 'in the bag' to vote it down big-time.

THE SHAREHOLDER SERVICE *OPTIMIZER*

is published quarterly by
CARL T. HAGBERG & ASSOCIATES
P.O. Box 531 • Jackson, New Jersey 08527-0531

SUBSCRIPTION PRICE: $300 per year

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

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But think again, dear readers: ***As we've been repeating over and over – the only "discretionary votes" the company has 'in the bag' – and can VOTE at the meeting are represented by proxies – from registered holders…. Unless, that is, you have given street- name shareholders a box to check on the VIF they get, that specifically authorizes the Proxy Committee to "vote in its discretion on any other business that may come before the meeting." Yes, the SEC rules do give companies broad discretion regarding "other business" – but the 'rules of proxy' – and what makes a valid proxy - are State-Law matters.*** Without such a box, the Proxy Committee has no discernable number of votes that they can automatically assume run to them and that they can simply "plug in" to the vote totals.

So if your company is like the vast majority of companies we've seen this year – where the registered vote is a mere 10-15% of the total votes cast…and where there are lots of abstainers and broker non votes in your quorum that don't count as "votes cast" – and where Tim Smith, or some other proponent of something comes to your Meeting with Legal Proxies – it's not as hard for them to carry the day as you might think.

Let's do the math: Say you have 100 shares outstanding, to keep it simple, and your quorum at the opening of your meeting is 80%...with 15% coming from the registered holders, or 12 votes, all running to you….And all of them, because the signers did not scratch out the authorizing language that appears on the back of the proxy card, granted your Proxy Committee discretionary authority to vote on "all other business". But for the remaining 68 votes that came from the street-name holders, you have no actual instructions or information as to your discretionary authority, since you did not have an "all other business" box to check. Thus, the only "discretionary votes" your Proxy Committee has in hand are 12 votes.

Now comes Tim Smith, or someone else, to introduce a proposal from the floor…And lo and behold, they have 2 votes from registered holders who've given them proxies and 11 votes from institutional holders who've given them Legal Proxies to vote as they wish. So it's 12 votes where your Proxy Committee can vote NO - and 13 YES votes from the floor…Ouch! If the standard for "approval" is "a majority of the votes cast" on the matter, you lose…And with only 25% of the 100 *shares outstanding* actually voting on the issue from "the floor" of the Meeting, please note.

A FEW RANDOM NOTES ON THE 2011 SEASON THAT SEEM WORTH NOTING:

- We were especially struck this year by the number of corporate folks who were totally new to the Annual Meeting scene…and where, no big surprise, they really needed help…which many times they were not getting from predecessors in the job…or from outside counsel either, where many of them were "newbies" too…

- We were also struck by the large number of companies where the rep from the proxy solicitation firm they'd hired seemed to be either a newbie…or someone who was not paying all the attention to the voting that was required…

- We were delighted to discover *three* former Corporate Secretaries and/or Chief Governance Officers among the Board nominees as we studied those bios with extra care – as we promised ourselves we'd actually do.prior to voting – two of whom had more than one corporate Directorship. We have been pointing out for over ten years now that there is a big and hugely talented talent pool here, with serious and much-needed Boardroom experience and expertise. And wow! Folks seem to be catching on.

- We were amazed, once again, at how long it actually takes to vote proxies thoughtfully these days…and to wade through so much "stuff" to do it right…But we were also gratified to note that the more proxies one votes, the easier and faster it becomes…Not just because you can shove lots of them in the same envelope…but because the faces - and bios - and the issues – become quite familiar, fast…a tip that our little primer on proxy voting also points out…

- We were gratified to note that those awful proposals to allow a very small minority of holders to enforce actions via Consent Solicitations fared *a lot worse* this year than they did last year… thanks to much stronger pushback language from issuers. And we do think that our own noisemaking here – aided and abetted by the excellent article written by **Merrill Stone** and **Matthew Kane** of **Kelley Drye & Warren** – helped the cause. Of the 23 shareholder proposal that came to a vote be the end of May, only 3 received majority support…vs. 12 of 43 in the 2010 season.

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RANDOM NOTES..
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- We were intrigued by an unusual tactic on the part of **Dynergy**…to "recess" its Annual Meeting for seven days, rather than to adjourn or postpone it – so that shareholders could consider a higher bid for the company. Good common sense – and a good money-saver too – since, apparently, they did not have the VOTES for an adjournment in hand…and apparently allowable under Section 231(c) of the Delaware Corporation Law…

- We were astounded at the way Mobile Voting took off…with only a modicum of marketing on Broadridge's part, it seemed to us…and on the surprisingly big potential it seems to have, going forward: Over 150,000 people voted their proxies via a Smartphone, or some other Mobile device between March 11 when the feature was launched and the end of June …And an even more astounding 30% of these folks – who clearly represent a "demographic" that is entirely different from the typical old proxy-recipient – had votable positions in the past, but had never voted a proxy before, according to Broadridge records!

- We are still modestly optimistic about the possibility of some modest "proxy reform" this year, in time for next season: We think there will be action to improve the accountability of Proxy Advisory Firms – mainly to assure that mistakes will be uncovered and fixed faster, we think. We also think the industry has finally "cracked the code" – and realized that pre-reconciliation of outgoing proxies is the *only* way to prevent over-voting AND to assure the basic integrity of our voting systems. We think there MAY be some modest tinkering with proxy fees… and end-to-end vote confirmation seems to be moving along well…But as to any big "proxy plumbing" changes…No way, we say, given SEC resource constraints, coupled with their total *cluelessness* about the proxy system and how it really works: When we read all the stuff that's out there on "proxy plumbing" these days, we think of the 12 blind sages and the elephant…where each "sage" pokes and grasps and massages a *piece* of the elephant…and opines on just what sort of animal it is…and on what seems to each of them to be most worthy of our attention… But no one is able to envision what only one sage has by the tail…or how little important info that actually conveys about the elephant as a whole. Do we think a newer, wiser, bigger "elephant committee" will do any better any time soon? No.

OUR TOP TEN TIPS ON PREPARING FOR THE 2012 PROXY SEASON

1. **Our number-one tip is simply to understand exactly what kind of voters OWN your stock as of the record date, along with the percentage of the total voting power that each segment owns and how each "segment" voted…or failed to vote at your last meeting.** The key segments to start with are (i) the true "Institutional Investor" owners – by type – like mutual funds, pure index funds, hedge funds, state, union and other pension funds (all of which have very different voting characteristics and hot-button "voting issues") …(ii) "Retail Owners" – which include both the registered owners and the "retail" portion of the broker and bank positions, please remember…and (iii) "Employee Owners" who, increasingly, hold their shares in an increasing number of places. (You can and probably should take the first crack at this on your own; Go to **www.optimizeronline.com**, click on **The Basics**, then on **"Analyzing and Understanding Your Shareholder Base"** - a two-part primer). If you already use a proxy solicitation firm, or whenever you feel you are in over your head, get a trusted proxy firm to help you.

2. **Using the information you've gathered in step-one, conduct a thorough, numbers-intensive "post mortem" of your 2011 voting…now…while the information is still fresh and where any "puzzle pieces" you uncover can still be found and filled-in:** *This is especially important to do if your quorum was below 80%...OR if you had 20% or more of the votes cast either withheld from one or more directors, or voted-no…OR if 20% or more of the votes cast were voted against any of the management recommendations. Key facts to obtain are the significant sources of voting support…and of votes-no...down to the actual voter's name if you can find it, which usually you can, with perseverance, and the right help.*

3. **Develop a very specific game-plan to reach out to voters who voted against any of your proposals…**Most important, we think, is to decide on the best possible person to do the reaching out - to make sure you'll come away with an understanding of exactly why they voted as they did…and whether there are misconceptions or misperceptions you might correct…or if, indeed, they have issues that need to be brought to the attention of

senior management and the Board. At the very least, you will want to develop a better working relationship, and ideally a better mutual rapport with the voting decision-makers.

4. **If, like most companies this season, you have 25% or more of your shares held by retail investors – and they actually voted only 10-15% of their holdings in total (remembering to analyze both the street and registered voting results combined) – come up with a game-plan to improve these results: Remember; individual investors typically support the company positions by 80-90% or better.** *Among our top tips are (i) writing your proxy materials in Plain English; (ii) keeping them as short and simple as possible; (iii) putting the info that's needed to understand what the issues are - and what the management position is - as close to the front of your proxy statement as humanly possible; (iv) doing a better-than average job of explaining to people that their vote IS important (v) sending hard-copy materials from the get-go to all of your larger holders and to all investors who voted last year…a really major vote-improver… (vi) doing a better job of explaining HOW to vote…and the various merits and demerits of mail, phone, internet, mobile…and in-person, where, son of a gun, there has been a lot of confusion too of late…with people showing up with VIFs…or without the Legal Proxy street-name voters need; (vii) offering some tips on making up one's mind…or why one or more issues on the ballot really deserves their particular attention and support; (viii) using an email link on your "electronic deliveries" that recipients directly to a user-friendly voting site, with, maybe, a special short video message from the Chairman; (ix) considering some sort of reward for voting one's proxy… like* **Prudential Financial's** *"trees or totes for votes" (which in 2010 induced 63,000 new voters to vote – a 23% increase – followed in year two by another 20,000 new voters…for a 9% increase in the overall quorum!)… or maybe making a small contribution to a financial literacy project for each vote cast… and now…ta-da …(x) using a prominent QR code to get those new Mobile voters to the voting site, simply by scanning the code with their phones…*

5. **Count up and analyze your "employee votes" with particular care:** *We never cease to be amazed at what a big trove of basically friendly votes this usually uncovers… and by how little most companies do to round up these vote…AND by the big results that can be achieved if you do this correctly: Amazingly (?) we have been finding that some of the biggest "forgetters" are the company's top officers…and directors…who almost always have big positions in the aggregate. The increasing number of places where such shares are "parked" – like some at brokers, some with various Plan trustees and some on the registered-holder file – has contributed to the problem… so do your inventory carefully…and make sure that officers and directors vote their shares well before the morning of the meeting - when it's simply too late to vote Plan or street-name shares.*

6. **Develop a plan to increase the participation of *regular employees*, who often have significant numbers of shares in the aggregate - also parked in various places.** *At the recent SSA conference,* **Dannette Smith***, Board Secretary at* **United Healthcare***, described the special efforts they made this season to get out the employee vote: advance notice that meeting materials would be coming their way, and that their votes were important…followed by emailed materials that needed no password to access, and that came with a simple, click-through voting site…followed by reminders to the non voters…and assurances all along that no one would be peeking at the way they voted. Employee voting went from 7% of the employee shares to 28% - and they expect to build on this in future years.*

7. **While individual investor votes are indeed important to round up, please be sure you don't throw good money into the garbage can, and maybe make some enemies besides, with ill-designed outreach and response programs:** *At the SSA conference at least three companies bemoaned the angry calls they got from shareholders – almost all of them tiny ones - who'd been interrupted at dinner by hungry proxy solicitors. A major retail broker cited similar complaints from street-name holders…many of whom were concerned that their private info and phone numbers had been "hacked." One of the biggest money-wasters we saw all season was the* **Eli Lilly** *proxy package…which enclosed a postage-prepaid reply envelope addressed to the Inspector of Election (at $.44 per pop just for the postage) with all of the packages that were mailed to individual investors, regardless of size: Your editor got one for an account with less than one full share – addressed to him as custodian for #-3 son…no longer a minor, and someone who thought he'd sold all his shares…But a tiny dividend that was paid on the fractional-share that remained in the DRP after the sale is still out there…and it's been impossible to liquidate without doing more paperwork than the still-fractional share is worth.*

8. **Be sure to review the Notice Provisions in your Company's Bylaws and amend them if you can, so that NO "other business" – other than what is in your official Proxy Statement – can be brought before the meeting "from the floor."**

9. **And while you're at it, make sure your Charter and Bylaws are clear on what it takes to adjourn the Annual Meeting if the need arises…and…**

10. **Bone up on whether or not you might be able to "recess" your meeting in a pinch.**

APPEALS COURT VACATES THE SEC'S PROXY ACCESS RULE, WITH MAJOR CRITICISMS OF THE SEC'S SLOPPY WORK...BUT BEWARE OF WHAT YOU WISHED FOR ISSUERS....YOU MAY BE WORSE OFF THAN WITH THE ACCESS RULE

In a stinging rebuke to the SEC, a three-judge federal appeals panel unanimously ruled against the SEC's "proxy access" proposal, saying they "acted arbitrarily and capriciously [and] failed yet again [for the fourth time in the past few years!] …adequately to assess the economic effects of a new rule." (See the Quote of the Quarter for more of the Court's scathing performance-review).

Kudos to Eric Scalia and Amy Goodman & staff at Gibson Dunn, attorneys for the plaintiffs, The Business Roundtable and the U.S. Chamber of Commerce, and a pox on the SEC for presenting such an incredibly sloppy and ill-considered cost-benefit justification for the rule. A major blow to what we see as a self-evident RIGHT of shareholders… a short-term blow to those currently beleaguered proxy solicitors, who've been beating the drums and trying to drum up new business as if "access" would be the equivalent of Armageddon…but a blow to public companies too, we predict, down the road a bit.

Problem-one in our book is that the SEC should have accomplished this by simply revoking the exception it had in its rule book regarding shareholder proposals that excluded "matters relating to an election" – as it appears to have done anyway: How can one argue that allowing the incumbents to have sole control over the election machinery is "good governance'? Or that it's "good governance" to let professional agitators and gadflies enter proposals on basically trivial issues like separating the Chairman and CEO roles, and on all sorts of social and environmental matters…but it's NOT good governance to foster a more competitive director election process? Or, for that matter, to paint oneself into a corner by being forced to prove that such an obvious and *basic* shareholder right needs to be cost-justified…then failing to properly do the math, as the rules require???

Problem two in our book, both the SEC and the corporate community missed a chance to arrive at a good deal all around, by agreeing on a higher hurdle for proxy access than the one the SEC ultimately proposed: Corporate America seemed to be "OK" with a rule that had a 5% hurdle…but the SEC stubbornly – and stupidly we say – held out for 3%. Now, by gum, we have activist **Robert Monks** lobbying for proposals that will let investors call a special meeting with a mere 5% of the shares - to oust directors with or without cause!

Problem-three, of course, was the incredibly sloppy job the SEC did of laying out likely scenarios, and how exactly they'd play out…in order to "cost-justify" things that were mostly hypothetical anyway: Come the end, even the most rabid opponents of proxy access had to admit that this was a tactic that would be used only in the most extreme and egregious of cases…and that almost every serious challenger would continue to use its own election machinery…if they wanted to win. How come *this* was not part of the SEC's math???

So why do we say to issuers "Beware of what you wished for here"?

First, as noted above, and as the SEC's Meredith Cross affirmed, shareholders will be able to get "proxy access" via the shareholder proposal process. So look for activists to line up a bunch of companies for such proposals…and to propose terms for access that are equal to, or maybe just a bit higher than the too-low hurdles the SEC proposed. And expect a lot of wins here, we'd say.

Second, we are betting that thwarted activists will be focusing *intensively* on companies with leaders on the Business Roundtable and the Chamber of Commerce – where many of them have *other* axes to grind with these two trade associations, And don't expect them to be so willing to compromise this time around…or to rely, foolishly, as we've outlined elsewhere, on "floor votes" to simply make some noise rather than to score a victory.

So in the worst of all worlds, companies will have to submit to a two-step process…since once you've won the right to make director nominations, you'll surely want to exercise it under the "use it or lose it principle"… And if we're right that natural selection will single out the most vulnerable victims, activists will chalk up some big wins along the way…and with more than the usual amount of mud-slinging too.

Third, as noted above, look for even more of those proposals to call special meetings – or to oust directors with written consents – with low, low hurdles that *truly* serve to favor "special interests." These, as we've written before, are NOT "good governance measures" at all: They're BAD ones…

LAWSUITS ROCK THE PROXY WORLD: SHADES OF THE BAD OLD DAYS!

We hardly knew whether to laugh or cry when we read the first of several emails we got with the **AST v Alliance Advisors** ***Complaint:*** A disaffected former-Altman Group employee at Alliance, egged on, it's also alleged, by a more senior Alliance officer, faxed anonymous emails from "a concerned shareholder" to several public company clients of AST's Phoenix Advisors unit, and to officers and directors of the SSA, alleging that Phoenix was winning business at above-market rates with kickback schemes…just as Phoenix was set to purchase the remaining chunk of the old Altman business.

The sad part of this sorry tale is that there was absolutely nothing to be gained here…while there was a lot for the "anonymous" dumb-and-dumber faxer to lose…come the laughable part: AST could see at a glance that the nasty-grams had been faxed from a **Staples** store in downtown NYC…subpoenaed the film from the security camera for that fateful date and time …and lo and behold…they saw at a glance – and *knew* the ex-Altman guy who was caught on the candid camera. And, of course, they absolutely *had* to bring suit. Your editor has known the Alliance Advisors founders for nearly 30 years…and knows that neither of them would *ever* condone much less allow such an unprofessional and totally *stupid* thing to happen, had they known of it. And clearly, as the dimwit faxer should have known, there were not likely to be – and there *are* no winners here…So we'd hope to see this thing settled-out as quickly as possible, and promptly forgotten as the stupid stunt it was. We asked both sides for a comment, hoping that a resolution was drawing nigh: "No comment" from Alliance, as we expected, really…and "AST does not comment on pending litigation" from them.

But then…with the ink barely dry on the first Complaint, came another spate of emails with the **Laurel Hill v AST, Phoenix Advisors et al. Complaint** ***attached.*** Remember our earlier take on the foundation of Phoenix Advisory Partners where we reported that "the [Laurel Hill] talent took the elevator down one night…and took another elevator up next day"? The lawsuit alleges that "While AST engaged in preliminary discussions with Laurel Hill to acquire Plaintiff, it ultimately decided it would be easier and cheaper to steal Laurel Hill's business"…and continues with a long list of alleged wrongful acts. Re this complaint, AST did comment officially that "AST believes the allegations set forth by Laurel Hill are meritless. The company will vigorously defend itself against the complaint." And as a good industry-friend reminded wisely, we all deserve the presumption of innocence until it's proven otherwise…so stay tuned for what looks to be shaping up as a riveting battle.

Sadly, tales like these conjure up shades of the bad old days…Inevitably, they bring back visions of the "old-time proxy-world" – where influence peddling, information-buying and some client-buying too were often S-O-P, and where some rogue firms were known for running proxy-vote manufacturing shops when no one was looking. The real tragedy here is that stuff like this tends to wipe out a lot of the nice, new and mostly well-earned image of proxy advisors as wise and trusted and trustworthy advisors – an image the industry has worked so hard to burnish. Our own hope is for a very quick and proper resolution here, so the much-needed and hardworking people in this industry can concentrate on business.

QUOTE OF THE QUARTER...

"…the commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters."

Judge Douglas H. Ginsburg, writing for the DC Circuit Court of Appeals

WHAT'S THE NEXT BIG THING ON THE CORPORATE GOVERNANCE FRONT?

HOLDING DIRECTORS' FEET TO THE FIRE OVER THE COST OF CAPITAL – AND ESPECIALLY OVER THEIR STEWARDSHIP OF THE COMPANY'S STASH OF SHAREHOLDERS' CASH:

FINALLY...A GOVERNANCE REFORM WORTH MAKING WE SAY

Get ready: The OPTIMIZER has been pretty good at looking ahead, and around the corner, to scope out the big new trends in corporate governance…and do remember you saw it here first:

Smart investors will begin to use the shareholder proposal process, we predict, to hold Directors feet to the fire on the way shareowners' money is doled out... Here's why we say so…and also say that such actions are way overdue:

U.S. public companies are currently sitting on $1.24 trillion in cash as we write this…a record-breaking and truly staggering amount of cash… that legally belongs to shareholders…So what have companies been doing with it?

Over the past decade – and now, once again, as the economy slowly recovers – many of our biggest and best-known companies have been earmarking the lion's share of free cash to stock buyback programs. And these programs, please note, have had *historically horrible results*: A recent **Morgan Stanley** study of buybacks at 26 industrial companies since 2007 found that more than half had zero or negative return on stock repurchases.

Turn for a second of the tens of billions U.S. *banks* spent to buy back shares between 2000 and 2007: All of this cash could, in theory at least, have gone directly to shareowners – but all of it went up in smoke instead – never to be seen again – in the financial crash. And now, big banks are once again allocating the lion's share of their free cash to buybacks rather than to dividends: **JP Morgan Chase**, for example, recently announced it would increase the annual dividend by $3.1 billion - and buyback $8 billion in stock. At **Wells Fargo**, the company authorized a $1.5 billion dividend increase…and a buyback program that could go as high as $6.4 billion. How did they come up with these ratios? And what is the expected return to shareowners on these "investments" of *their cash*? If one is a long-term investor, one oughta' be asking questions like this…and demanding answers we say.

Other serial buyback practitioners – who hoped that buybacks would prop up the stock price – or at the very least, increase earnings per share - like **Cisco** and **Home Depot** - haven't done any better than financial or industrial companies...and have had the same knack for buying big at the highs and waiting on the sidelines during stock price lows: In the last quarter of 2007, Home Depot spent more than $10 billion buying stock at an average price of $37 a share. Early this year, they sat the bench while the stock was at $18…and now, with the stock at $34.93 as we write, they're set to plunge in again. **Microsoft**, another big buyer-back of its own stock – which currently has $41 billion of cash on hand - generated total returns to shareholders of *negative 0.2%* over the past decade.

We have two other major problems with stock buyback programs – both in need of serious fixing: The biggest issue, we say, is the common corporate-speak that describes buyback programs as "returning money to investors." This is a perversion of the English language – and of the facts – that comes mighty close to being fraudulent language in our book. Yes, one might argue that buy-back programs tend to hype the stock price when first announced, allowing short-term oriented shareholders to maybe make a few bucks by selling quickly…But look at the long-term results cited above…where the true effect was to fritter the cash that really belongs to long-term investors completely away! And hello…we stockholders can get our investment "returned" any day we want by simply calling our broker, or going on E-Trade. Our second big gripe is the fact that many of the biggest

buyers-back use the shares to "offset" the issuance of *new shares* to employees…and frankly, it appears to us, to hide the dilution from investors. In any event, "returning cash to investors" *may* arise from buybacks - IF they increase earnings per share and the long-term ROI going forward - but NOT if new shares totally cancel-out the effect…or worse, end in *negative returns to investors*.

Bad as all this seems, there's worse news yet when it comes to corporate use of their free cash: When companies have used free cash to make acquisitions, roughly 70% of them failed to meet owners' and shareholders' expectations for return on investment - as an article from **McKinsey & Company** - "Perspectives on Merger Integration" - pointed out in June.

In fact, when one drills down deeper, the numbers are even worse: Somewhere between 53% and 61% or mergers actually destroy shareholder value…and all but 17% of the remainder are basically costly distractions that end as an economic "wash" for shareholders in terms of stock price appreciation…but with the shareowners' cash - which they could have invested safely in T-bills, for example - gone, irretrievably, down the drain.

How's this for a recent horror story to emphasize the point in spades: **Bank of America** spent $4.5 billion to acquire **Countrywide Financial** in 2008…and by mid-year 2011 it has racked up losses on the purchase of $30 billion…from write-offs, penalties and legal fees.

At the other end of the spectrum, even a conservative company like Apple – which has generated mega-returns to investors – but which is sitting on $70 billion or so in cash as we write – does not seem to be doing what a fiduciary is supposed to be doing – to manage shareholders' cash as a "prudent person" would: The current rate of return on their huge cash-stash and other investments fell to 0.79% in 2010, a May 23 WSJ article noted…with total return, after unrealized gains, estimated as a mere 1%: Far less than the rate of inflation…and less than even a novice investor could safely make elsewhere! Hey Apple…this is supposed to be the *stockholders' money*…not yours!

Here are three "straws in the wind" that add to our belief that corporate use of cash – and the company's overall cost of capital too – will draw increasing attention from activist investors going forward:

Let's start with Ralph Nader…who's currently mounting a challenge to Cisco Systems and demanding a $1 per share special dividend from their big stash of cash - $43 billion, or nearly 50% of Cisco's market cap (!!!) on the day he made the newspapers …plus a raise in the recently instituted dividend to 50 cents annually from 24 cents. Where *have* directors been here? Since the start of 2001 Cisco has earned a negative return of 55% (!!!) while the NASDAQ composite gained 13%...and repurchased $70 billion of its shares at $20+… and sank another $34 billion into acquisitions, a *NY Times* article reported on 4/16…while, as we write, the stock has fallen even further, to around $15 per share. That's $104 billion of shareholder cash that totally vaporized over the past ten years…with not a single cent of the company's free cash paid out to shareholders until October, 2010.

Next, let's note that at a recent Wall Street Journal convocation of "a select group of the world's leading chief financial officers" – four of their top five priorities called for more strategic use of cash, specifically, "Become a Strategic CFO… Drive Value Through Capital Appreciation…View Cash as a Strategic Tool…Provide Short-term and Long-term Balance and "ensure that the board of directors understands the sources of the company's long-term value creation and how those sources are being nurtured."

Last, let's note that we in the U.S. are way behind the curve here: U.K. and European governance rules have called for shareholders to authorize the size of proposed share buybacks, and the basic terms, for as long as we can remember.

How stupid it is, really, to brand things like ratifying the selection of auditors as a "good governance measure" – or those shareholder proposals to separate the Chairman & CEO roles… or all those calls for more reports to shareholders on various social and environmental issues for that matter – when the vast majority of companies are not doing an adequate job of explaining, and asking for ratification of their stewardship of our cash – something that goes straight to the heart of directors' fiduciary duties! If we weren't so busy doing what we do, we'd be filing shareholder proposals like crazy….

NUMBER-TWO TRANSFER AGENT COMPUTERSHARE SET TO ACQUIRE THE BNY-MELLON BUSINESS, THE COUNTRY'S LARGEST BY FAR: A MAJOR GAME-CHANGER, FOR SURE, THOUGH FAR FROM THE END-GAME, WE PREDICT

Melbourne Australia-based Computershare Limited (ASX: CPU) "the world's largest transfer agent" – and the number-two US agent by a fairly big margin – signed a definitive agreement in April to acquire the BNY Mellon Shareowner Services business – a move that will affect more than 950 US issuers and roughly 200 corporate sponsors of equity ownership plans if approved by US regulators, as both parties, and we, expect.

A stunning coup for Computershare in several respects: For openers, the BNYMellon business alone serves more shareholders of record than all the other US transfer agents combined, and a huge number of the 1000 largest companies to boot. So the acquisition will create an almost unbreakable lead in terms of US market share, although, please note, if one uses the number of *customers* as the measurement, AST will still be the biggest agent on that basis.

Second, as long as the acquisition can be concluded while the M&A and business restructuring markets continue their recent upsurge, Computershare is in line to harvest a bonanza of big-ticket, high-margin corporate-action processing fees…with a likely big-bump for their **Georgeson** advisory and "information agent" businesses…and a long tail of "asset reunification" business too… in the bargain.

And Computershare has snagged the deal at what we'd consider a bargain price: U.S. $550 million: Just 3 ½ years ago, Australian-owned **Pacific Equity Partners (PEP)** reportedly paid $1.2 billion U.S. for a controlling interest in **AST** - a business that's only a third or so as large when measured by shareholder accounts…although, we'd note that the *operating margins*, though not the gross income, were a *lot higher* than BNY Mellon's by our reckoning. And just a year ago, the Australian press reported that PEP was prepared to pay over $1 billion for the BNY Mellon business.

Most stunning of all, perhaps, our own sources tell us that another bidder was the expected winner until the day before the formal announcement. Ouch!

What are the odds the deal won't get approved? Long ones, we'd say. If **BofA** can acquire **Merrill Lynch**, it's hard to imagine good grounds to object to *this* deal. Further, there are still nearly 1,000 U.S. transfer agents…and there have been at least three new entrants – including big, bold and NYSE-listed **Broadridge Financial Solutions** – in the past three years. Even more to the point, the mere announcement of the deal has triggered massive action on the competitive scene: An issuer – or a competitor – would have to perjure themselves to say the deal is "anti-competitive… although we hear on the grapevine that at least one T-A is trying to make that case. While some competitors would have much preferred a partner other than CPU, most of them are clearly licking their chops… and working their phones…and running the roads like never before, since all of the 1000 or so BNY Mellon customers need to take some sort of action here eventually…and run it by their Boards for approval please remember.

Do we think the "consolidation phase" that has rocked the industry for the past fifteen years is finally coming to a close? No…as our sub-head says. This business is still contracting at a dizzying rate…and the current, global M&A scene, while a short term boon, will hurt big in the end. We were shocked, for example, to see that the BNY Mellon T-A client list had shrunk to 950: When your editor left the biz 19 years ago, the Chemical Bank T-A business (mostly a Manny Hanny legacy) had more than 1700 corporate clients…*before* the Mellon

deal, much less before the BNY deal! Recent figures show that since 1997 U.S. stock exchange listed companies have declined a whopping 43% - from more than 8800 to just over 5,000 today. IPOs are down by 72% vs. 1990s levels…and more and more listings are going to non-US exchanges, where they now total roughly 40,000 to our 5,000. And, as old-time registered shareholders continue to meet their makers - and their heirs opt overwhelmingly for street-name registration - the business has "secular erosion" from this long-running and clearly unstoppable phenomenon of 5% or more per year. Yes, corporate spin-offs, which are also back in fashion these days, will help some…But long-term, the U.S. T-A business will get smaller and smaller, so more consolidation is inevitable. One of our secret-sources says another big change may happen this year…So stay tuned…and if you do need to shop around, shop with care.

So what's our advice for BNY Mellon customers? And for any other issuers who may be shopping around in today's environment? Five tips on what to do now:

1. If you've issued an RFP and surveyed the field over the past three years - and are basically "OK" with the service you've been getting - sit tight for now, we'd say. Staying put is clearly the path of least resistance – and less work for YOU. And frankly, while one vendor we spoke with cited "significant execution risks" in the Computershare deal, we think there are some in *any move*…And we'd bet that with so much riding on this, "execution" will be the number-one focus at Computershare. Further, in our long experience, most agents have records conversions down pat these days, so the process is likely to be super-smooth *whoever* one ultimately chooses…when the time comes.

2. If you have *not* surveyed the field in a fairly formal way for three years or more, you are really overdue for a look anyway. So listen up when you get those calls – and entertain visitors from wannabe providers – but urge them to keep their pitches short, sweet and to-the-point in step-one…to help you narrow down the field for the really thorough look-see and number-crunching efforts that should be mandatory before making such an important decision…and bringing it before your Board, as indeed you have to.

3. If, God forbid, someone at your company signed a contract that permits a transfer agent to transfer the business to another provider without your express permission - regardless of who that T-A may be, by the way - give yourself 1000 "mental lashes" for your hastiness…then reflect on the fact that "the customer is always right"…*and* the fact that no one wants to have a customer dragged kicking and screaming into a new fold.

4. Go to our website, **www.optimizeronline.com** and click on our article - under "The Basics" - entitled ***"A Checklist of Best Practices in Selecting a Transfer Agent."*** The author was a salesperson for Shareowner Services for over ten years…and was the business manager for another ten at what was then the country's largest T-A, so he knows whereof he speaks…and where, exactly, the many "tricks" of the T-A RFP trade are often expressly designed to go unnoticed by the "uninitiated."

5. Pay particular attention to the recommendation to hire a T-A RFP expert…at least if the total tab is $50,000 or more per year…which generally translates into a "total spend" of $150,000 or more once the out-of-pocket expenses are added in. We have *never* seen a case where the expert's advice wasn't more than covered in year-one by the savings he or she helped to generate…Plus…an expert will make sure you don't get snookered by self-perpetuating renewal clauses, onerous termination penalties, unwarranted caps on the T-A's liability…. not to mention the risks to YOU of making the wrong choice for your company…even if you *think* you know what you're doing when you ink the deal.

PEOPLE

Sam Berrios – a well-known industry veteran who'd been with **Shareholder Communications Company**, **Georgeson** and **Laurel Hill Partners** – has signed on with unclaimed/un-exchanged property experts **Milestone Corporate Services** as a Senior Vice President.

Broadridge Financial Solutions has made three strong new hires for its Transfer Agency business: **Lynnette Samuels** – who learned the business from the ground up at the venerable old-**Manny Hanny** before moving on to a managerial slot at **Computershare Plan Services** – signed-on to manage the day to day transfer agency operations. **Gordon Garney** – a veteran of both the T-A and proxy-solicitation businesses at **Bank of Boston**, **Equiserve**, **Computershare** and **D.F. King** – and a former **CTH&A** Inspector of Election too, we're pleased to note – came on board in late May as T-A Product Manager where he will focus in particular on sales in the eastern and south-eastern US. In mid July, industry veteran and serial entrepreneur **Peter Breen** came aboard from **BNY-Mellon Shareowner Services** to serve as Vice President and General Manager of Broadridge's fast-growing transfer agency business. Prior to a brief stint as Managing Director of the **BNY-Mellon Shareowner Services** sales group, Breen – a 20+ year veteran of the brokerage and shareholder servicing businesses – was a founder and CEO of online broker **BUYandHOLD**, which he sold before forming and later selling his own consulting company before joining BNY-Mellon..

Judith Cion, a former Chairman of the **Society of Corporate Secretaries**, former General Counsel and Secretary at **Hibernia Bank**, died in her Norwalk, CT home on June 6 after a five year battle with cancer. A **Harvard Law School** graduate, Judy had also filled senior positions in the legal departments at **Mellon Bank** and **Coca Cola**. Judy – who was one of the most unique, hard-working and thoroughly opinionated people in our industry – stayed active and engaged right to the end…managing to finish co-editing a new edition of the ***Nonprofit Governance and Management*** handbook and see it off to press just days before she died. A joint project of the Society of Corporate Secretaries & Governance Professionals and the **American Bar Association**, the book will be available within a few weeks.

Your editor had the wonderfully fun experience of working with Judy on a USAID funded corporate governance project in Bishkek, Kyrgyzstan in the late '90s – one of the many cities that Nikita Kruschev built in the '60s with too much sand and too little cement… when he was threatening to "bury us." The former Kyrgyz Commissars – all men, in a city where women did all the work – had been re-branded as the "Managing Directors" of the same old smog-spewing government agencies and creaky factories they'd run beforehand. Whenever they saw Judy coming, they literally trembled in their boots - essential gear, by the way, for navigating the crumbling and crazily-heaving sidewalks of Bishkek. With her mane of platinum hair, her white fox greatcoat and hat, white boots and "let's get busy… right NOW" approach, they called her "The White Tornado" – which fit her to a T. Donations in her honor can be made to The Joyce Theatre Foundation or the Memorial Sloane-Kettering Cancer Center. A memorial celebration will be held in the Fall. To register your interest, go to **JudycionMemorial@gmail.com**

Corporate Secretary Magazine has a new editor, **Matthew Scott**, formerly of ***AOL DailyFinance*** and, before that, ***Crain's Financial Week*** and earlier, ***Black Enterprise***, where he was managing editor.

Gadfly **Evelyn Y. Davis** - who's been notably mellower, and notably scarcer at annual meetings of late - drew a feature article in the 5/5 ***New York Times***, noting that **Goldman Sachs** cancelled their $7,200 a year set of subscriptions to her annual newsletter, ***"Highlights and Lowlights."*** Each subscription costs $600 – with a minimum of two – and several of the banks the *Times* contacted admitted to spending $5,000 or more each year…in an effort, as one exec admitted, to "shut her up." *"I don't keep up with that"* she told the Times. *"I am a multi-millionaire, and I don't need anyone's subscription."* And indeed, she *is* a multi-millionaire, thanks to her long-running publishing racket.

The Delaware Court of Chancery made news this quarter, as chief justice **William Chandler III** stepped down "to seize the moment and take the opportunity for new challenges" in the for-profit world he told the *WSJ*…and vice-chancellor **Leo E. Strine, Jr.** was confirmed as Chancellor, the 21st since 1792, a *NY Times* profile noted. Both Chancellors have taken decidedly conservative approaches in their rulings and both are noted for the entertainment value of their written opinions as well…so three cheers for both of these fine folks!

Group Five has made two strong new hires; **Joan Oshinski,** the former manager of shareholder services at **Quest** and **Jeff Sunday**…son of founder **Jack Sunday**… who has replaced **Mark Mason** to manage the Group-Five transaction satisfaction surveys. Jeff had been with **Bessemer Trust** in Woodbridge NJ, following a brief stint at **AIG**.

David Smith, the former president of the **Society of Corporate Secretaries & Governance Professionals** has signed on as a Senior Advisor with **Reda Associates** – one of the best and most shareholder-focused comp consultants out there, we say, effective August 1st. We would expect him to open a lot of new doors for Reda….

Need mediation? Disbarred lawyer **Melvyn I. Weiss** – who pleaded guilty to paying illegal kickbacks to drive business to his once high-flying class action firm **Milberg Weiss Bershad Hynes & Lerach** – now called **Milberg** after the one partner who was *not* disbarred – is available and anxious to be of service. Not that he needs the money…Although he paid a $10 million fine…and reportedly lost about $20 million more by investing with **Bernie Madoff**…and is currently locked in arbitration himself over the millions in legal fees the Milberg firm expended to defend him… he made over $210 million with Milberg Weiss between 1983 and 2005, a *NY Times* profile reported in June.

Sadly, just as we were about to go to press, we learned that **Alan Miller**, the Co-founder, Co-Chairman and Managing Director, and major superstar at leading proxy solicitor/advisor **Innisfree M&A,** passed away on July 23 at 62, after a battle with lymphoma. Alan was a true industry giant - and a truly unforgettable person - as anyone who ever saw him walk into a room full of suited-up lawyers, bankers and fidgety corporate clients - wearing his trademark shorts, sandals and a Hawaiian shirt - will remember with fondness…and admiration. His thinking – and his strategies and tactics – were equally "outside the box" – and helped to make him the big star he was. His list of big proxy-wins is a virtual "Who's Who" of prominent corporate names and fights and deals …like the recent **Airgas, Barnes & Noble** and **Potash** wins, **H-P/Compaq, Lockheed/Simmons, Texaco/Icahn, Norfolk Southern/Conrail, Glaxo/Welcome, Viacom/Paramount, Northrop/Grumman, Johnson & Johnson/Cordis** to name just a few. Alan was also an extremely generous supporter of non-profit causes – including the End of Annual Meeting Celebrations to benefit Fountain House and Fountain Gallery – where he was a major patron of the arts as well …Fortunately for Innisfree, Alan was an amazing *recruiter* and *teacher* of similarly smart and hands-on people. He will be greatly missed by friends, colleagues and clients. Donations in Alan's memory can be sent to UJA-Federation of New York, **www.ujafedny.org**, The Leukemia & Lymphoma Society, **www.lls.org** or The Lymphoma Research Foundation, **www.lymphoma.org.**

A LETTER FROM THE EDITOR

Dear readers,

This issue is a coming to you a little later than usual – in part because there is so much going on in our industry…and in part because we wanted to see what we might glean from the SSA Conference, in July…which was one of the most useful, practical and informative conferences we've been to all year…and in part, we confess, because it's summer.

Here's a quick list of some of the things we learned, and the practical tips we gleaned from the SSA meeting: "QR codes" – new to us – will direct the new and huge crowd of Mobile-device users – and Mobile-voters – directly to specially designed websites…where they take fast action, as we also learned; the migration at the Postal Service to "Intelligent Mail Barcodes" that track mail at every single step…and that allow issuers of dividend checks, or retirement checks, or proxy packages to identify if any batches have gone astray…to take fast action…and to have better answers on the "hotline" as several issuers reported they do now; the fact that FINRA is "on the case" – and concerned about the need for brokers to have strong processes and strong controls over their outsourced proxy voting operations…including "books and records that support the fees that are charged to issuers"…which many do not have, upon inspection…plus the news about the highly successful outreach to individual and employee investors at Prudential and United Healthcare…and lots of other practical tips…too many to cite here.

We feel so strongly about the many benefits of SSA membership that we are enclosing their little booklet…and encouraging our public-company readers - and suppliers too - to have at least one staff member as an SSA member. This membership will help you "Optimize" the service you give your shareholders, and the costs of doing so…and will pay for itself many times over, we know.

With all best wishes...Carl

OUT OF OUR INBOX

Broadridge Financial Solutions has scored its first "big-company T-A win" – after being named as the transfer agent for **Spectra Corp**. The Houston based utility has over 150,000 registered shareholders and, we hear, a robust DRP…A seminal development for Broadridge, and a portent of more to come, we think.

The State of Texas is facing two big class-action suits – one seeking $3.5 billion in damages –for a massive security breach when the State Comptroller's office exposed the names and Social Security numbers of 3.5 million Texans with unclaimed property. "Since the problem was discovered in March, the state has had to expend $1.8 million to alert potential victims of the problem, establish a call center to answer questions related to the breach, conduct a technology review, and offered credit monitoring at a reduced price to potential victims for a year" as the Client Alert from **Unclaimed Property Recovery and Reporting (UPRR)** reported in May.

REGULATORY NOTES...and comment

ON THE HILL:

Ooof! A pox on both your houses, we say…along with most folks we know…as deficit dealings turn into a pathetic political sideshow, with no good end in sight.

A bi-partisan bill (!) is brewing to make it easier for closely held companies to trade without extensive SEC reporting requirements…which ordinarily we'd quibble with. (Excluding employee shareholders from the threshold number is a BAD idea, we think…if the idea is to better "protect investors" with SEC rules and regs…Just raise the damned number that would trigger registration requirements…and focus on actual market cap!) But after our little review of U.S. vs. non-US listings these days, we say that maybe Congress DOES need to make it easier to trade and to list here…or maybe make it harder to sell non-US-listed companies to the U.S. general public.

AT THE SEC:

Whistleblower provisions went into effect after the partisan 3-2 vote in favor…and rumblings of a possible challenge to the cost-justification proceedings here too, arose in a flash.

In a unanimous action, for a change, the Commissioners issued proposed rules to ensure that buyers of both "security-based" and "credit –default" swaps are "treated fairly"… and given the info an informed investor is normally expected to get…

AT THE EXCHANGES:

NASDAQ withdrew its offer to merge with the NYSE, when it became clear they'd never get regulatory approval… and the NYSE received shareholder approval to be acquired by Deutsche Börse…both as projected here…As an aside, we're still considering delisting both exchanges from our "regulatory section" - since they've been notably AWOL on this front of late…

New troubles for both NASDAQ & NYSE on the stock-listing front…as electronic exchange BATS Global Markets hires up to enter the listing game too…by the 4th quarter

WATCHING THE WEB:

Are you Linkedin yet? The whopping IPO in the 2nd Q stunned even them we think…with internet gurus touting it as the social networking site that will revolutionize the executive recruiting and employment market. So get your profile – and your face out there asap we say. We LOVE Linkedin – even though our broker got us zilch in the initial offering – and even though Linkedin seems to be encouraging users to flood the site with questions and comments of dubious merit…other than to promote the posters themselves - a major turnoff we warn.

We think that posting a decent photo adds immeasurably to one's listing…and fair warning…since we need to keep our own contacts down to a manageable number, we plan to use the lack of a photo as grounds for de-linking… starting in Sept.

We would love to have readers post a recommendation on our own Linkedin page if you feel you're getting good advice and good value from the *OPTIMIZER*…It's easy to do and we'd be most grateful.

COMING SOON:

A LONG OVERDUE RE-LOOK AT SMALL-SHAREHOLDER BUYBACK PROGRAMS