

## OPTIMIZER

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

VOLUME 23, NUMBER 3

NOW IN OUR 24<sup>th</sup> YEAR!

THIRD QUARTER 2017

© CARL T. HAGBERG &amp; ASSOCIATES • P.O. BOX 531, JACKSON, NJ 08527-0531

ISSN:1091-4811

ALL RIGHTS RESERVED

## IN THIS ISSUE

**PROXY FIGHTS SHRINK IN NUMBER BUT INTENSITY GROWS BIG-TIME**

**TIPS ON HOW TO PREPARE FOR THAT “KNOCK” ON YOUR DOOR**

**UK’S EQUINITY SET TO ACQUIRE WFB’S TRANSFER AGENCY BIZ**

**ELSEWHERE ON THE SUPPLIER SCENE...A NEW OWNER FOR ISS, BIG NEWS AT BROADRIDGE, GROUP-5 AND PWC ...AND WOW - A NEW TRANSFER AGENT ENTRANT!**

**BEST PRACTICES FOR DEALING WITH EMPLOYEE STOCK OWNERSHIP PLANS - AND PLAN PROVIDERS**

**NON-VOTING SHARE-SCHEMES ENCOUNTER SETBACKS**

**OUT OF OUR IN-BOX**

**PEOPLE**

**REGULATORY NOTES...AND COMMENT**

**WATCHING THE WEB**

## PROXY FIGHTS SHRINK IN NUMBER... BUT THE INTENSITY GROWS BIG-TIME

*The just-out issue of Broadridge’s Proxy Pulse newsletter reports that so far this year, proxy contests have decreased markedly vs. last. Their survey of the 3,379 shareholder meetings that occurred from Jan. 1 through June 30, 2017 reports that there were 38 contests, compared to 47 last year - a 19% decline - and that “Some high-profile contested solicitations” [actually, at least as many as the nine “missing fights,” we’d say, and probably more] “were decided in negotiations before a shareholder vote”...and in many cases, we’d add, well before the first fight-letter was even filed.*

*Also noteworthy, “The average length of campaigns decreased drastically in the first half of 2017: 44 days, compared to 109 days for the entire year in 2016” Broadridge reported - but this was due almost entirely to the big number of quickly settled fights, we’d say, which cut the multiple mailings of fresh proxies and new “fight letters” on both sides by more than half. During Q1 and Q2 2017, 63 total board seats were won in proxy contests, compared to 139 for all of 2016 Broadridge reported - but we would estimate that activists picked up 40 or more board seats in 2017 to date as part of settlement deals.*

The steadily growing trend to settle with activists was certainly a good thing for activists - who mostly - and sometimes entirely got their way without a fight. And arguably it was good for shareholders too - who otherwise would have had to pick up the huge bills that proxy fights generate, and who almost always see a short-term pop in the strike price to boot whenever activists knock.

*The flip side of these developments, however, is that when corporate targets decide to fight rather than to settle, the intensity of the campaigns on both sides ratchets up in a huge way...witness the still ongoing fight by Trian to seat a single - and singularly successful and well-regarded director like Nelson Peltz on the P&G board.*

**THE MOST EXPENSIVE PROXY FIGHT IN HISTORY?** In one of his early fight letters, Peltz estimated that the fight will cost P&G shareholders over \$100 million...citing their multiple mailings, the hiring of two proxy solicitors,

*cont’d →*

four investment banks, a financial public relations firm and two “High Powered Law Firms.” ...plus the whopping out-of-pocket expenses for “millions of retail shareholder calls.” He estimated his own costs at \$35 million - but that did not include his own bevy of SEC lawyers, PR flaks, proxy-fighters and other “advisors” and the millions (?) of telephone calls that his side made - where the costs are never disclosed.

In another big and ultimately costly ratcheting-up move that’s characteristic of fights to the bitter end, P&G’s fight letters were intensely personal from the get-go. This, in our experience, is always a signal that the management side is on the ropes, which is not a good signal to send. But that aside, the P&G potshots at Peltz - who has made literally billions of dollars for investors in companies in once similarly-stodgy and underperforming companies like Snapple, Heinz and Kraft/Mondelez - were clearly not on the money. And depicting their highly successful and still very much with-it former CFO, an acknowledged mentor of the current CEO no less, who is still widely admired by P&G staffers but who joined the Trian team, as being “out of touch” - did not comport with reality either, as his presentations to shareholders clearly indicated. *“Going negative” usually strikes a very sour note with voters....But please note the biggest cost to shareholders of all: It makes it infinitely harder to move on in a good way, whether or not the insurgent(s) win a board seat.*

#### **WE WERE BETTING THAT PELTZ WOULD WIN A SEAT:**

Mid-campaign, P&G earnings - while modestly improved over recent quarters - showed declining market share in every major product line. Hardly a good case for the idea that the Management plans were fast kicking in as advertised. And while yes, the results were basically in line with peers for a change, much of the vaunted increase in TSR seemed to us to be due directly to the Peltz campaign that hyped the stock price, rather than to the fundamentals.

Both Glass-Lewis and ISS recommended a vote for Peltz, and large investors seemed to be weighing in for him every day. (As it turned out, Vanguard, with a 7% stake, voted for the management slate, while BlackRock and State Street, with 10% combined, voted for Peltz, as did CalSTERS, which noted a nearly 50:50 split in the vote in a post-meeting call for action.)

In a move that we felt would tip the scales in Trian’s favor, the very day before the P&G vote, GE - which is suffering essentially identical ailments - voluntarily added Peltz’s partner at Trian, Ed Gardner, to the GE board - and replaced three of their top managers with younger blood.

The key to the final outcome will turn, as expected, on the “retail vote” - and, in the case of P&G, primarily on the employee and retiree votes: P&G has one of the largest percentages of individual investors anywhere - over 40% the newspapers say. And the registry is top-heavy with employees, retirees - and with current and former members of the very-senior-management ranks, who hold much bigger than average stakes. Most of these people truly love P&G - and have made huge amounts of money with P&G, often over multiple generations. For well over `100 years the first commandment of P&G retirees has been “Never sell your P&G stock” - which has been good advice indeed: A recent Forbes magazine look-back over the hundred years since its own founding noted that \$1,000 invested in P&G in 1917 would amount to \$1,596,006.38 today - producing a mind-boggling return of 159,509%. And that is excluding all of the dividends, as well as all of the huge compounding that loyal dividend re-investors would have gotten to boot. Our own grandchildren are sixth generation P&G investors, and we know that they, and we, as fourth generation investors are far from alone here.

But the past ten years of massive underperformance that persisted until Peltz came on the scene has clearly left retail investors far behind where they’d be on a ten-year basis if they’d invested in peer companies instead: *“Each share you own would be worth as much as \$160 [vs. the then current \$92] if P&G had simply kept pace with its peers”* Trian’s Sept. 25th letter to shareholders noted.

We were betting that this would resonate with long-termers big-time - and be enough for Peltz to eke out a victory in what seemed to us like a very modest “ask” for a single seat. Current employees were clearly and very understandably rooting for the management slate - and for “no change.” But if the final results are as close as they seem to be at present - a huge percentage of retirees were indeed in favor of change, and were unhappy enough to vote FOR change in fairly large numbers..

**AN ACE IN THE HOLE FOR P&G - OR RATHER, A BIG WILD-CARD IN THE DECK - APPEARS TO BE THE EMPLOYEE OWNERSHIP PLAN VOTING,** which reportedly comprises 7 ½% of the outstanding shares, and where the Plan Trustee appears to have voted the entire position “proportionately.” This surely gave management a huge edge in what is, apparently, a dead heat - even *after* the big boost. As close observers of proxy fights, the *OPTIMIZER* has repeatedly pointed out the “wild-card aspect” of proportional voting, and why, as a result - and also because one cannot cite a sensible rationale for having

it, other than to give management an added edge most times - we hate it and feel it should be abandoned: In this case, as is normally the case, it seems to have worked to skew the vote very much in P&G's favor. But before you look to have proportional voting in your own employee plans, please remember the Walt Disney election a few years back, when the small number of employee owners who bothered to vote, voted against Michael Eisner - and where proportional voting took him down.

*We would not be at all surprised to see Peltz challenge the propriety of the Plan Trustee voting proportionately in such a close election - even though they may have had the right to do so. One could argue, of course, that the non-voters were, ipso facto, "indifferent" - but that, in our opinion, is a very different thing than having a significant number of them being automatically recorded as voting for the management slate by a Plan Trustee - especially in an election where the overall vote seems close to a 50:50 split. A very bad governance provision say we.*

#### **WE STILL PREDICT AN ULTIMATE VICTORY FOR PELTZ:**

As we go to press, Peltz - who said his early morning count on the day of the meeting had him winning, is claiming not just a "dead heat" but having a 1% margin in his favor. The Inspectors of Election are scrambling to sort out and cast out the tens of thousands of duplicate and triplicate votes that were surely cast for both sides along the way, with no news yet as to when they will be prepared to report.

Regardless of the final tally however, one should note that the P&G fight is almost a precise re-run of Trian's try to gain seats at DuPont - and to oust the CEO. There, however, "retail investor votes" ultimately decided the outcome by a fairly comfortable 5% margin for management. *But please note well; while officially Peltz "lost" the proxy fight at DuPont, when the next quarter's results were down instead of up, the CEO was gone in a flash, and Trian got virtually every other thing they'd asked for, literally overnight... We are betting that the same thing is likely to happen here.*

*We were stunned by the hubris of the P&G CEO - and his most senior board members as well - who asserted that they essentially had everything figured out and running on-track - and had no need for advice from the likes of Nelson Peltz. "I'm fired up!" the CEO noted post-meeting, when really, he should have been fired up long beforehand. So we're betting that the CEO will soon meet the fate of all hubristic heroes, and get "fired up" for real unless he can work a miracle in six months or less.*

**ANOTHER BIG CHANGE ON THE PROXY FIGHT SCENE IS PLAYING OUT THESE DAYS:** *More and more non-public and non-profit organizations - like professional and trade associations - and even homeowners' associations, for those of you in gated communities and condos - are experiencing proxy fights than ever before.*

One major driver; many associations like these start out as "contested elections" - with more candidates than seats. And the old Gaston-Alphonse routine ("after YOU, dear Alphonse") is no longer the *mode du jour*. This season our Team of Independent Inspectors handled two contested "association elections" and passed on two others as being too crazy to want to deal with. At one of the elections we Inspected, there were 28 candidates for 13 seats - and oops, the previous Inspector had announced the wrong winners last year. (Shades of the 2017 Oscar Awards!) *This year, a fresh surprise, when a candidate that was way back in the pack passed up one of the most senior incumbents (an expected shoo-in) on the day of the meeting!*

At another large association meeting - of physicians, that also had an "Insurance Trust" with its own board of Trustees - a director who had been ousted mid-year decided to run her own slate in opposition, and, while her slate did not win, she handily prevented the election of the management slate by pulling them below the required threshold, which was "a majority vote of all the eligible members."

On the homeowners' association front, a realtor friend had advised us to watch for major election battles here too, as "climate change issues" - like hurricanes, earthquakes and rising sea levels are causing needs for major infrastructure improvements, teeing up bitter battles royal between older and newer investors who'll need to foot the bills. This is really the "wild west" of proxy fights, where we fielded four sets of frantic calls and e-mails from various association board members this season, with horror stories alleging rigged elections and severely conflicted Inspectors of Election who were appointed by and allegedly in cahoots with long entrenched board members and who were vastly overstepping the "duties of Inspectors" by attending "meet-and-greets," officially "vetting candidates" - and summarily disqualifying some on specious grounds - and conducting bogus "electronic voting" during the meeting, where a running tally of their vote-counting work-in-progress was displayed while voting was still going on!!!

## WHAT SHOULD YOUR COMPANY BE DOING TO PREPARE FOR, AND IDEALLY TO AVERT, ACTIVIST KNOCKS ON YOUR DOORS?

- Step-one should be to review the top-ten tips on our website, with the same title as our headline. It dates from the 2013 “Special Supplement” but is still required reading.
- The one critically important point we’d add in 2017 is that today, every public company is vulnerable to an activist attack; Not just those below the top quartile performance-wise - OR, on the other hand, a cash-rich company, with a low debt-to-equity ratio and decent fundamentals, but where stock price performance has been weak - due to your company’s small size or low market float, for example. In either case an activist investor can make a quick killing simply by putting you in play.
- But today, a new wrinkle; Activists are using massive data collection and screening technologies every single day to look for, and to suddenly descend on companies that are “undervalued” to their minds - and where they think a major corporate reorganization, or a series of sales and spinoffs - or just the news that an activist has made an approach - can generate a fast buck with little effort on their part.
- Perhaps the most important point to make: Do not try to follow the recipe in our 2013 article on your own - or with your usual cast of financial, legal, strategic and corporate communications advisors. You need to take a totally fresh, highly rigorous and highly critical look at your current situation - with fresh eyes, fresh perspectives and fresh worst-case scenarios - from experts who are not already “overly-invested” in rationalizing and defending the status quo, or their latest strategic plan, as so many senior managers and board members tend to do...witness the P&G fight.
- Last but far from least, based on the huge numbers of proxy fights we’ve been involved in: Be sure you have a “best in class proxy solicitor” on tap and ready to spring into action if activists knock. An activist with such an advisor will always win over a company that tries to go it alone...And a best-in-class solicitor will always prevail over the party that chooses a second-tier player.
- P.S. - Be sure to hire a best-in-class Inspector of Election too - whether activists are knocking... or not, just yet.

### THE SHAREHOLDER SERVICE **OPTIMIZER**

is published quarterly by  
CARL T. HAGBERG & ASSOCIATES

SUBSCRIPTION PRICE:  
\$300 per year print/\$275 e-edition

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

ALL RIGHTS RESERVED: Reproduction or transmission of this newsletter, in part or whole, by any means whatsoever, is prohibited unless the permission of the editor is first obtained. Such requests are welcome and permission will be liberally granted.

P.O. Box 531, Jackson New Jersey 08527-0531  
Telephone (732) 928-6133 Fax: (732) 928-6136  
E-mail: [cthagberg@aol.com](mailto:cthagberg@aol.com)

[www.OptimizerOnline.com](http://www.OptimizerOnline.com)

## U.K. OUTSOURCER EQUINITI TO PURCHASE WELLS FARGO'S SHAREOWNER SERVICES BUSINESS

*Equiniti - which handles share registration services for half of the UK's FTSE-100 - will purchase the WFB business unit for approximately \$227 million in order to enter what one UK reporter described as "the lucrative US market." The deal is expected to close in the fourth quarter.*

**Great news - at least in the short term - for Computershare,** the largest transfer agent in the US - and in the world - since Wells Fargo had been luring away some of CPU's largest clients, with the largest shareholder populations and widest product usage...year after year, using their deep banking relationships with most of the most-creditworthy US companies, their deep bench of talented, experienced and super-friendly people, and also, their once golden reputation for a very robust internal control environment, which is still mighty robust we think, in the transfer agency area.

**Great news for the WFB staff** - all of whom will be retained, and some of whom are reportedly getting nice retention bonuses. Virtually all of them would have been out of a job had the business been acquired by a US competitor, where overcapacity is growing every day as "registered ownership" is decidedly out of fashion and the number of publicly traded companies keeps shrinking too.

**Longer term, Computershare, and the other two top-TAs as well, will have to assume that the new entity will move as quickly as they can to avidly pursue the thousands of US companies that WFB previously ignored** as being 'not in their banking sweet spot' - or as simply being composed of poor-to-middling credit risks, with few or no cross-selling opportunities for WFB...So this will not be a good thing for CPU - or for the rest of the players in the already overcrowded universe of providers. The WFB unit has reportedly been lowering fees to existing clients, in a bid to prevent shopping expeditions. We would also be very surprised if the new Equiniti doesn't become highly aggressive on pricing, as the only short-term way for them to make growth here. Further...we'd be very surprised if this move does not rev up the already intense rivalry between Equiniti and CPU in the UK, and possibly spark a price war there - in a marketplace that is basically a two-

firm oligopoly that has traditionally been rather sedate - in fact, distinctly "clubby" where pricing was concerned.

**As to Equiniti, they will, reportedly, switch the primary operating platform** from the rented system that WF had been using as its main engine to Equiniti's own - which naturally entails some operational risk, along with potential customer complaints that "someone has moved my cheese" - especially if any US-specific functionality is lost along the way. All of this will likely hinder any significant growth until the conversion is successfully completed.

**A major challenge for Equiniti going forward will be, of course, to convince US issuers that they have a significantly "better mousetrap" than their long-entrenched US competitors have,** which strikes us as a formidable challenge indeed. Equiniti is also banking on the idea that they will be able to cross-sell many of their other products and services to US issuers...but so far, we at least, do not see any big synergies in Equiniti's current product lineup.

*Two last observations; Equiniti's entry comes at a time when corporate mandates to periodically review large outlays are being laid down by a lot of US companies - and where many of the biggest US companies, whose stocks are 'fully valued' these days, are calling for billion-dollar-plus cost cuts to turbocharge their earnings. Many of them seem to be mandating a zero-based budgeting approach across the boards. As a result, the WFB exit will open many new doors for AST and for Broadridge we think - and it's surely not the best timing one could think of for a 'new kid on the block' in an overcrowded playing field.*

*To end on a happier note for Equiniti, they seem to be a major provider of Employee Stock Ownership and numerous other Retirement Plan Services in the UK - an important and growing area where companies are more willing to spend their money, but where US transfer agents have failed to keep up with other kinds of Plan providers. So if Equiniti is able to make the needed investments here, they could yet rule the day in the Transfer Agency wars.*

## ELSEWHERE ON THE SUPPLIER SCENE

### BROADRIDGE ACQUIRES SUMMIT FINANCIAL DISCLOSURE: A BIG BOOST FOR MORE ONE-STOP-SHOPPING WE THINK

As the early October press release noted, Summit Financial Disclosure, is “a full-service financial document management solutions provider. Summit’s document composition and regulatory filing services will be integrated with Broadridge’s proxy voting and shareholder communications services to create an end-to-end solution that spans the entire corporate disclosure lifecycle from private funding, through capital markets transactions and ongoing communications to regulators and shareholders” enhancing its “30-year history of providing corporate issuer solutions including proxy voting, transfer agency, data, print, omni-channel delivery and annual meeting services.”

“Joining Summit’s technology and expertise with Broadridge’s leading communications solutions will create the ideal end-to-end resource for corporations in a market that demands greater speed, convenience and cost efficiency,” said Robert Schifellite, Broadridge’s corporate senior vice president and president, Investor Communication Solutions. “This previously unavailable, efficient, single-source model will better serve our clients by streamlining the disclosure and communications process, eliminating redundancies, increasing speed and reducing costs for corporations.”

“Summit was founded in 2013, and acquired EDGARfilings from Thomson Reuters in 2014. Summit’s transactional capabilities support clients in the preparation, filing and dissemination of offering documents and related materials for capital markets transactions and merger and acquisition transactions. Summit’s compliance offerings include SEC EDGAR preparation and filing for ongoing regulatory and shareholder communications. Solutions are offered as a managed service, self-service software or hybrid approach.” Terms of the transaction were not disclosed.

*Normally we are not big fans of “one-stop-shopping” - whether in business or in daily life. But when you think of this deal as potentially providing seamless, end-to-end services throughout the corporate lifecycle - and that has*

*the potential to take out a host of intermediaries in today’s intensely over-busy and cost-conscious world - one has to think again.*

### IN A VERY BIG MOVE, BIG-FOUR ACCOUNTING FIRM PWC OPENS A NEW LAW FIRM IN D.C.

While the other big-three firms - Deloitte, Ernst & Young and KPMG - already have over 2,000 lawyers on staff now, as a big NY Times article noted, PwC is the first to create a separate legal entity - ILC Legal - and to place such a big emphasis on building a global network of lawyers - and to focus specifically on multinational firms needing counsel on matters like digital security, data protection, international corporate structuring and mergers and acquisitions, the firm’s London-based leader Richard J. Edmundson told the Times. All of these areas seem to us to becoming more “global” in scope every day.

*In our last issue, we noted that in your editor’s 50-year career he has never seen so many people, and firms, fishing in other people’s ponds...Mainly he thinks, it’s because so many traditional fishing grounds have been over-fished or fished out entirely...by too many fishermen...while the ponds themselves have all continued to shrink in size. That seems to be the case here, for sure.*

### NEW PRIVATE EQUITY OWNERS AT ISS - TO “HELP FACILITATE CONTINUED GROWTH”

In early September, Institutional Shareholder Services Inc. (ISS), “a leading provider of corporate governance and responsible investment solutions to financial market participants, announced that Genstar Capital has entered into a definitive agreement to acquire ISS from Vestar Capital Partners for \$720 million. The transaction is expected to close by early fourth quarter.

ISS will continue to operate independently once the transaction is completed and the current ISS executive leadership team will remain in place. “The ISS leadership team and I are extremely pleased to partner and collaborate with Genstar, whose deep experience and successful track record working with industry-leading firms such as ours, will help us further accelerate the growth of our product and

service offerings for the benefit of clients,” said ISS President & CEO **Gary Retelny**.

“Our partnership with Gary Retelny and the ISS management team has been extremely productive and highly successful, including the completion of five acquisitions, which significantly broadened its products and services,” said Rob Rosner, co-president of Vestar. “We are proud of how ISS has expanded its business over the past several years and strengthened its global position as the leading authority in corporate governance.

“ISS currently has more than 1,000 employees operating across 19 global offices in 13 countries. Its approximately 3,000 clients include many of the world’s-leading institutional investors who rely on ISS’ objective and impartial proxy research and data to vote portfolio holdings, as well as public companies focused on governance risk mitigation as a shareholder-value enhancing measure”

*Unlike most corporate issuers, who grit their teeth and cringe over most everything ISS does, we are mostly fine with them. None of us can really live without them. And wow...(and here, even we cringe a bit)...even more new ISS products will surely be coming our way down the road.*

## **MARK KOPELMAN JOINS GROUP FIVE LLC AS CEO**

*Group Five LLC - a major provider of process quality and service measurement programs, customer and shareholder satisfaction and loyalty studies, service provider evaluation, selection and contracting services - announced in September that Mark Kopelman, a former senior exec at Broadridge Financial Solutions has joined Group Five as Chief Executive Officer and equity partner in the firm. Founder Jack Sunday will continue to serve as Chairman and remain involved in both Group Five’s overall strategy and key client relationships. Kathy Huston will continue in her role as Managing Partner and Director of Research.*

*“More than ever, our clients value the independent research and insight that we deliver in support of their business objectives. We have been looking for a leader who shares our commitment to service leadership and passion for the markets we serve. Mark’s unique ability to translate market needs into proven solutions will enhance the value we bring to our clients. He brings tremendous energy, perspective and creativity to Group Five and we could not be more excited*

*about the growth potential of our company,”* the press release announced, quoting Jack Sunday.

*“Mark joins Group Five from Broadridge, where he led its successful entry into the Transfer Agent market. Mark contributed to their rapid growth with his deep understanding of market needs and by bringing a fresh perspective to a well-established market. Prior to joining Broadridge, Mark was a key member of the **RR Donnelley Financial Services Executive Team** as they reinvented their business with an intense focus on service differentiation”* the press release noted.

*We are big admirers of Mark - and of Group Five - and especially of their quality measurement programs, which have clearly raised to bars for suppliers of shareholder services year after year. They - and we - know the truth of the old saying, “You can’t manage what you don’t measure” - and we feel that many issuers, in a penny-wise but pound-foolish way, are way behind the curve here...So there’s very good room for growth going forward we think.*

## **GADZOOKS...ANOTHER TRANSFER AGENT JOINS AN ALREADY OVERCROWDED SPACE!**

Maybe things will be different in Canada, where Odyssey Trust Company announced in September that it received Letters Patent to operate as a non-deposit taking, Special Purpose Trust Company.

*“Odyssey is fully operational and has dedicated teams in both transfer agent services and corporate trustee appointments...with offices in Calgary (Stock Exchange Tower) and Vancouver (United Kingdom Building), as well as sub-agent offices in Toronto and Nevada”* its press release announced.

*“Odyssey is led by the former leadership team of Valiant Trust and Pacific Corporate Trust, and is pleased to have Randy Gregory, the former head of Olympia Trust’s corporate services division, as the Chairman of its Board. Rounding out its Board of Directors are Sadiq Lalani (CFO, Kelt Exploration), Scott Saxberg (CEO, Crescent Point Energy), Nicholas Johnson (Co-Head Energy Investment Banking, GMP FirstEnergy), Jenna Kaye (CEO, Odyssey Trust) and Dan Eisner (CEO, True North Mortgage).*

*“We started Odyssey because we saw a clear void in the Western Canadian market for transfer agent and trust services. With the recent sales of Olympia Trust (2013) and Valiant*

*Trust (2015) to Computershare, issuers and their counsel are demanding more competition in this space. As a local, independent firm, we're committed to providing our clients and their shareholders with exceptional service, reasonable pricing and flexible solutions. We're specifically designed to provide value-added service to private companies, venture issuers and small-midcap TSX issuers" said CREO Jenna Kaye.*

*We actually know a fair amount about the Canadian marketplace for Stock Transfer and Corporate Trust services - and we know for sure that Western-Canada companies - and people - prefer to deal with regional providers when they can. So we think that Odyssey has a good chance to make a decent mark there. We wish them well, and will be watching to see how this affects the top-two players who now have a near monopoly in Canada.*

## **BEST PRACTICES FOR DEALING WITH EMPLOYEE STOCK OWNERSHIP PLANS - AND PLAN PROVIDERS**

*Recently, your editor responded to a request on the "Society Huddle" for ideas about software to handle the host of Employee Stock Ownership Plans - and Plan Providers - that have sprung up like wild over the past ten years, and he ended up promising a more in-depth update on this subject, so here it is.*

Where once, not so long ago, most companies had only a simple, payroll-system-driven Employee Stock Purchase Plan - and maybe a smallish list of optionees to contend with once or twice a year - there has been a literal explosion of nifty new stock compensation plans, like Phantom Shares Restricted Share Plans with assorted hurdles and RSUs, where the comp-consultants seem to add new bells and whistles every year. Also, while there has been a fair bit of pullback from stock options in the total-comp scheme of things, there's been a huge jump in the number of stock option plans - and plan participants overall. Even those "global stock ownership plans" that were so popular 20 years ago, but oh so hard and often impossible to administer, seem to be making a comeback these days. As a result, many companies, who had been dealing with only one or two service providers are now dealing with three or four... or more.

Whenever your editor speaks to an audience about shareholder services, he asks for a show of hands on how many plan providers the members of the audience use - where three or more has become the norm. Then he asks for a show of hands on how many people are "basically satisfied" with their providers (where typically half the hands may be raised} ...then "completely satisfied" - where most of the hands go down...then "dissatisfied with one or more providers" - where a lot of hands go up again.

Your editor sees a lot of the burdens that having many plan providers can create in his practice as an Inspector of

Elections and as a sometime consultant to public companies on their service providers. Numerous "issues" come to light every year - especially around record dates for dividends and shareholder meetings. Sometimes there are discrepancies because of timing issues in the issuance of new shares - or the retirement of shares due to stock repurchase programs. We also see several instances each year where comp consultants have represented that unissued RSUs or "Phantom Shares" come with voting rights...which is simply not correct, since shares need to be "outstanding, fully paid and non-assessable" in order to get a vote.

One responder to the Huddle pointed colleagues to a Transfer Agent website, which was very much on target - at least for step one: All transfer Agents are required by SEC rules to maintain a "Control Book" for every securities issue where they serve, and this should be both the starting point and the "home base" for all data on all Employee Stock Ownership programs. It should cover all programs and all providers. In fact, now that we've thought longer on this subject, we think that issuers would be well advised to simply clone or copy the basic format of a good Control Book onto an Excel spreadsheet of their own, that they could compare periodically to the transfer agent's Control Book.

### **The All New *OptimizerOnline.com***

Our new website is designed to expand and better deliver our premium content to you, including our Online Directory of Pre-Vetted Service Providers, interviews with industry experts, a searchable database on topics from A to Z, plus an archive of past issues...all available with a few clicks.

**WWW.OPTIMIZERONLINE.COM**



The Control Book should show the number of shares authorized for issuance, the number of shares outstanding, and in the Treasury account - and, Plan by Plan, the number of shares “reserved for issuance” under each plan.

The Control Book should detail and describe the reason for every change made to it: It should reduce the outstanding shares whenever shares are retired due to a corporate repurchase program. It should decrease the appropriate reserve and increase the shares outstanding whenever new shares are issued - whether due to an exchange or conversion of securities or to the exercise of options, or to the vesting of Restricted Stock or RSUs.

The Control Book should be checked periodically by the issuer - and, whenever there is a record date, without fail - and the numbers should be verified with the transfer agent, all exchange agents, and with each Plan provider.

Ideally, a single go-to person or group should be specifically charged with keeping all of these records up to date, and with periodically confirming the numbers with plan providers, transfer agents, exchange agents - and repurchasing agents - where very often a company ‘spreads the wealth around a bit’

among several banks and brokers, but where confusion often breaks out as a result of not knowing exactly who has what on a given day.

**So now, a few words on trying to reduce the number of suppliers, which is a good goal to shoot for:** Designating a single person or group as the mandatory go-to-folks for all Plan and T-A and Treasury activities is a good first step. This also helps to spot the best and the weakest providers. Sad to say, we ourselves have never found a single, sole-source provider that can handle every kind of plan in a first-class manner...But there are many who get high marks on two or more kinds of Plans. So start looking around, we advise. A good starting point for this is the satisfaction survey of Plan Providers that’s conducted by Group Five - which can help you to narrow the field considerably.

*Aside from ending up with a much tighter control environment, simply dealing with fewer, and better players will prove to be a big time and money saver, we guarantee...And it always pays to shop in today’s highly competitive world, so the game will be more than worth the proverbial candle.*

## NON-VOTING SHARE-SCHEMES ENCOUNTER SETBACKS

**A very good thing indeed, we say: For openers, both the S&P Dow Jones and the FTSE Russell Indices moved this quarter to restrict multi-class share listings. Effective immediately, the S&P Composite 1500 and its component indices (S&P 500, S&P MidCap 400, and S&P SmallCap 600) won’t add companies with multi-class voting structures. The FTSE Russell will require a minimum 5% of voting rights to be in the free-float (aggregated across all of the company’s equity securities) in order to be listed, effective September 2017.**

Sad to say, existing companies that don’t meet the S&P indices’ new requirements will be grandfathered in on the S&P 1500, as will any companies that may be spun off by them.

Companies on the FTSE Russell will have five years (until September 2022) to become compliant, or to be excluded.

***In another big development, the ten largest Institutional Investors uniformly oppose dual/multi-class share structures.***

***In a bigger development yet, CalPERS Wins its “Dual-Class” Suit against Interactive Corp,*** which attempted to create a new non-voting class of stock that would have given

perpetual voting control to the board chair – despite the fact that he owned only 8% of outstanding economic rights. After months of litigation, the company has abandoned its proposed issuance.

***Then, happy day, Facebook, which was also facing a lawsuit over voting rights, announced that it had abandoned its plan to create a new class of stock for Mark Zuckerberg*** that would let him keep his super-voting rights even as he gave away big chunks of his shares to charity...just before he was scheduled to take the stand in a Delaware court.

***And then...whoopee...the much-embattled board at Uber moved to limit the super-voting rights that had been granted to founder Travis Kalanick,*** in order to facilitate the sale of new stock to a new investor, prior to an expected IPO, which would likely have failed without the move.

***The Kalanick case is a perfect example of why issuing stocks with perpetual super-voting rights is so very dumb, and so very bad. Who would really expect that any person - founder or not - would retain their original brilliance in perpetuity? And what DO you do if that person literally goes off the rails or when, inevitably, they are no longer effective?***

## PEOPLE

**Alice Brennan**, formerly Associate General Counsel, Chief Compliance Officer, and Chief Trademark & Copyright Counsel at **Verizon Wireless**, and before that, the Vice President, Secretary and Chief Compliance Officer at **Bristol-Myers Squibb**, has been appointed as a Director of the **RENN Fund**, a publicly traded closed-end mutual fund. Three cheers for Alice, one of the brightest and nicest people you'd ever know...and for **RENN**... In another shout-out and heads-up to you **headhunters** - whose clients are supposedly looking hard for female Directors and mostly coming up dry - the Corporate Secretary/Corporate Governance world is one of the first places you should be looking. Many of these folks - like Alice - have spent more time in boardrooms, and more time wrestling with tetchy corporate issues, and sometimes tetchy directors too - than most board members have logged in total!

**Patrick Burke**, formerly in charge of various governance and shareholder relations matters at **American International Group (AIG)** has been named Executive Director & Control Officer within the Legal Oversight and Control areas of **JPMorgan Chase & Co.** where he will focus on the firm-wide control framework with respect to corporate governance-related processes, systems and controls. Pat recently completed a term as President of the **Shareholder Services Association (SSA)** during which time the SSA created and staffed an Executive Director role, re-engaged with the NYSE and Nasdaq, increased its e-learning programs and embarked on a so-far successful program to grow the membership.

**Peter Descovich**, a former director of shareholder relations at **IBM**, and currently a very busy Independent Inspector of Elections, observed 50 years as a member of the **Shareholder Services Association (SSA)** during their annual conference this year. Three cheers for Peter, one of the best-liked guys around for 50+ years. What an amazing and truly distinguished record on industry service!

**Joan DiBlasi**, another of the **SSA's** most stalwart and effective leaders, thanks to her long and very hands-on experience as the manager of shareholder services at **AFLAC**, was presented with the **Tony Fireman Award** at the conference - the **SSA's** highest honor - and truly well-deserved.

**Rick E. Hansen**, a former Assistant Secretary at **Chevron**, a two-time cover-guy in the **OPTIMIZER's** Special Supplements - and a true industry star if ever there was one, who moved to **General Motors Company** a year or so ago, has been named as GM's Corporate Secretary and Lead Counsel, Securities and Corporate Governance.

**Dana Kahney**, another fast rising industry star and a joy to know and work with, has been named Managing Associate

General Counsel and Assistant Corporate Secretary at **Verizon Communications Inc.**

**Charlie Koons**, a former Managing Director at **MacKenzie Partners** - who your editor has known since he joined them, straight out of Vanderbilt University, when he cut his first proxy-fighting teeth at one of the wildest fights ever - has signed on with **Morrow Sodali** as Managing Director, Activism and Contested Situations Advisory Group. *"Five Questions with Morrow Sodali's Charlie Koons"* is a featured interview in **IR Magazine's** September issue.

**More movement on the super-busy abandoned property servicing scene; Melissa McCarthy**, formerly an EVP of client relations at **Keane** is now VP Product Management at **Wells Fargo Shareowner Services**.

**Breaking news: Jay McHale is stepping down in October after 10 years as President, US Equity Services at Computershare.** He's not retiring, or getting pushed or packaged out he told us - just thinking that after 10 years in the Transfer Agency business it was time for him to move on. Jay engineered one of the biggest business turnarounds we've ever seen: When he came onboard at Computershare 10 years ago, the business was reeling from a rocky conversion of the old and loosely cobbled together **Equiserve** operating systems to Computershare's Australian system. Aside from the usual bumps in the road that such conversions entail, much of the customized software the old clients were used to disappeared in the process, since Australian customers had never needed such functions. (Take heed, dear Equiniti.) Customer satisfaction statistics were in the dumpster, disgruntled customers were leaving like crazy and there was a real danger that there'd be a fatal run on the business if people continued to follow the herd as so many corporate citizens tend to do. Every year, for more than five straight years, performance, staff morale and customer satisfaction improved under Jay's steady hand - and today, CPU ranks at the very top in terms of size, breadth and revenue - and at or near the top in most other measurements of T-A success. We expect we'll be hearing a lot more about Jay, once he takes a bit of time off to smell the roses...

**Nicole (Silsby) Sandford**, another long-term industry star, has been named as the U.S. Regulatory and Operational Risk Market Leader at **Deloitte**. A hot and growing area, for sure.

**Mike Spelman** - one of the savviest people out there when it comes to financial printing with flair - and to delivering smart, savvy and easy to read digital communications too - has signed on as Business Development Manager, Compliance Solutions at **Toppan Vintage**, another firm that seems to be making hay of late in a field where most competitors have been fruitlessly flailing away...and often failing altogether.

## REGULATORY NOTES ...AND COMMENTS

### ON THE HILL:

**The Labor Department will delay the compliance deadline for the Fiduciary Rule** by 18 months...But oops...as predicted here from the get-go, state consumer protection agencies - and market forces too - will almost certainly preserve the basic principle that brokers, and others who provide advice to investors, must act in the best interests of the investors - and not their own. BTW, state agencies are stepping up big-time on a wide variety of other areas, like emission controls and by filing lawsuits vs. the recent executive orders on the Affordable Care Act.

### AT THE SEC:

**Two key vacancies set to be filled:** Columbia Law Professor **Robert Jackson**, at the urging of Senator **Chuck Schumer** (D-NY), was nominated in September by the President to fill the Democratic Commissioner vacancy at the SEC. Jackson's academic work focuses on corporate governance and the use of advanced data science techniques to improve transparency in securities markets. Jackson was among the ten corporate and securities law-focused academics who petitioned the SEC in 2011 to develop rules mandating corporate political spending disclosure - which was the primary issue that derailed the nominations of Obama's choices, Republican **Hester Peirce** and Democratic **Lisa Fairfax** last year. In July, Trump re-nominated Obama's Republican pick, Hester Peirce.

**SEC's Office of Inspector General exonerates Piwowar**, sending a letter to Democratic Sens. Elizabeth Warren (MA), Robert Menendez (NJ), Sherrod Brown (OH), and Brian Schatz (HI) clearing Piwowar of wrongdoing they'd alleged with respect to the Pay Ratio and Conflict Minerals rules during his January - May tenure as Acting Chair, which, they'd asserted, lacked adequate justification, exceeded his authority, violated procedural requirements and "may serve to undermine the SEC's mission or could potentially prove to be a waste of the SEC staff's time and resources."

**Much needed relief in August, as the SEC issues interpretive guidance on the Pay Ratio Rule** that "includes examples illustrating how reasonable estimates and statistical methodologies may be used" and "is intended to assist companies with their compliance efforts and reduce the costs associated with preparing disclosures."

**More relief in early October, as the SEC issues a modest overhaul of Reg. S-K** that Commissioner Piwowar referred to as "not an exercise in slash and burn cost cutting [rather] incremental changes - a snip here, a snip there" that, as Corp-Fin Director **Bill Hinman** explained, "discourage repetitive and immaterial disclosures" and eliminate information about execs and employees that issuers believe should be confidential. *Three cheers, say we...But how about our pet*

*project...to drastically shorten and simplify the disclosures that ordinary investors need in order to vote their proxies... while keeping all the tables, notes and footnotes available on the web for investors who feel they need it?*

**More on "The Biggest Financial Industry Scandal Ever":** The SEC announced in August that broker **Banca IMI Securities Corp. (BISC)**, an indirect, wholly-owned U.S. subsidiary of Italian bank **Intesa Sanpaolo SpA**, has agreed to pay more than \$35 million to settle charges that it violated federal securities laws when it requested the issuance of and received American Depositary Receipts (ADRs) without possessing the underlying foreign shares.

BISC's improper handling of ADRs, which lasted from at least January 2011 to August 2015, made it possible for ADRs to be used for inappropriate short selling or inappropriate profiting around dividend record dates. In certain countries, demand for ADR borrowing increased around dividend record dates so that certain tax-advantaged borrowers could, through a series of transactions, collect dividends without any tax withholding. Pre-released ADRs that were improperly issued were used to satisfy that demand.

BISC is now the second financial institution to settle with the SEC, following broker **ITG**, which recently agreed to pay \$24 million in fines and another \$100k for failure to supervise. But these two are merely bit-players in an ongoing investigation by a five-person team at the SEC's NY office, we are told by the "Whistleblower Team: *"The SEC's Depositary Receipts Violation Schedule includes over 35 Global Brokers and second and third tier Institutional Borrowers of ADRs, the four major Depositary Banks - Bank of New York Mellon, Citibank, Deutsche Bank and JPMorgan Chase - and others such as foreign private Issuers and other Depositary Receipts service providers. The Whistleblower Team conservatively estimates that the total sum of the fines to be collected by the Securities and Exchange Commission with relation to Depositary Receipts will surpass the total value that the Whistleblower Program at the SEC has amassed since the inception of the Whistleblower Program."*

*The SEC seems to be working their way from the bottom up - to establish a firm basis for fines against the really big players, we're told. Stay tuned!*

### IN THE COURTHOUSE:

**The Circuit Court of Appeals in NYC overturns a 2014 Appeals Court decision that said plaintiffs needed to show "a meaningful close personal relationship" between the tipper and the tip-ee...and that the tipster received a "meaningful tangible reward" - which had thrown many insider-trading cases into the dumpster. *Three cheers for common sense!***

A big case for issuers to watch is the lawsuit before Delaware's Chancery Court, where two French scientists are suing the state of Delaware for seizing and selling their stock without their knowledge, depriving them of millions of dollars in gains. Plaintiffs allege that Delaware officials wrongfully seized their shares in **Idenix Pharmaceuticals Inc.** and sold it for \$1.7 million, which was all they were willing to return when the owners came forward...when the shares were then worth \$13.7 million because of a merger with **Merck**. In a court filing at the end of July, the plaintiffs called the state's actions "tortious and unconstitutional." In an earlier filing, they alleged Delaware "willfully, recklessly and negligently" failed to act as custodians of their property and violated the U.S. Constitution's takings and due process clauses, among other claims. *Stay tuned here, readers, and please remember that most states do as Delaware does - which, inevitably leads to lawsuits that the company did not do right by its investors, which cost big-money to defend, win or lose.*

#### **WATCHING THE WEB:**

Web-watchers had a truly horrific quarter - where a massive data-breach at Equifax exposed 145.5 million highly sensitive records of individual 'consumers' (who are nor really clients or 'consumers' of Equifax services at all) was rapidly followed with news that the SEC's EDGAR website had been hacked, in a bid to uncover and trade on confidential inside information

- and perhaps to plant negative news about public companies that could be profitably traded on too.

No wonder that cybersecurity has jumped to the number-one or number-two strategic priority at most public companies, and that corporate spending on it has been rising to the stratosphere.

One has to wonder if there IS a way to be truly safe from hackers these days - or if some magical cure might be in the offing anytime soon. We think not. Our good friend Broc Romanek has an excellent article on his blog, aimed at public companies, on 'What to do if you think you've been hacked.' We also think that our own advice - to maintain, police and enforce a "culture of security" from the very top to the very bottom of one's organization is the number-one, albeit far from failure proof step one can take.

Another horrific web-watching story crossed our desk this quarter, where a lawyer at Wilmer Hale and Pickering mistakenly copied a *Wall Street Journal* reporter on a communication being shared with other lawyers, saying that "The SEC now appears to be focused on allegations by Ms. Smith [a former Pepsico employee] that she was retaliated against in violation of SEC whistleblower rules." Ouch and double ouch! Let's all swear and double-swear to triple check all the cc and bcc recipients of all our e-mails.

THE SHAREHOLDER SERVICE  
**OPTIMIZER**

## **COMING SOON: OUR 21ST ANNUAL SPECIAL SUPPLEMENT**

**PREPARING FOR SUCCESS IN 2018**

### **OPTIMIZE YOUR SPENDING ON INVESTOR COMMUNICATIONS AND INVESTOR SERVICING PROGRAMS**

**PLUS...THE BIGGEST AND BEST-EVER DIRECTORY OF "PRE-VETTED SUPPLIERS OF PRODUCTS AND SERVICES TO PUBLICLY TRADED COMPANIES": THE GOLD STANDARD FOR FINDING AND SELECTING SERVICE SUPPLIERS IN THIS FAST CHANGING, HARD TO UNDERSTAND BUT CRITICALLY IMPORTANT SPACE.**

**THE LARGEST, MOST TARGETED DISTRIBUTION TO THE BUYERS OF YOUR PRODUCTS & SERVICES ... IN PRINT & ONLINE**

**TO ADVERTISE VISIT [WWW.OPTIMIZERONLINE.COM/ADVERTISE](http://WWW.OPTIMIZERONLINE.COM/ADVERTISE)**