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## TOP TAKE-AWAYS on THE SPRING '08 ANNUAL MEETING SEASON:

*Every year around this time we try to reflect on the Spring Annual Meeting Season - to try to make some sense out of all the things we saw, and heard, and read...and to see what, if anything, our readers might be able to anticipate and prepare for next year. This year, we attended, and were otherwise involved in way more meetings than usual; some 50 of them.*

*And this year, for the first time in over 30 years of inspecting at meetings, your editor got personally sued. This in itself was kind of emblematic of the 2008 Season: More meetings that we can ever recall ended up in the courthouse - either before, or after, or on both ends of the meeting. Our own experience had a happy ending, we're pleased to report...in part because we had an iron-clad indemnification clause, as Inspectors should always have, but in larger part because the Inspector's ruling was completely correct - of course - and was very specifically upheld in the settlement. **But fair warning we say, to issuers - and to wannabe Inspectors - as you look to next year.***

*Another noteworthy change we witnessed this season was the amount of public-ity Annual Meetings received - not just in the press, but on TV. Mobs of TV reporters and camera crews waited outside the last Bear Stearns meeting, for example, looking to interview any of the 400+ people who'd attended what for all intents and purposes was a wake, and who might be willing to talk to them about the proceedings, from which, quite understandably, they were excluded. Many of the reporters were representing European and Asian TV stations, which was something *entirely new* in our experience.*

*We tuned in the stock market report on the morning of the AIG meeting, only to see a live feed, literally "straight from the street" and anchored by a chirpy young lady who was apparently popping in and out regularly to report on the doings: "They're just about to vote now" she enthused, "I'll be back in a few minutes." The EXXON meeting got multi-page press coverage and analysis *weeks beforehand*, thanks to the Rockefeller family's agitation for change - an effort that sort of fized, at least vote-wise.*

*The contested CSX meeting was also heavily covered by TV - as if it was a hostage-taking situation we thought, as reporters tried to build excitement: The activists, and many of reporters too, seemed to think it was being held in an intentionally hot and humid warehouse - in an intentionally ill-marked section of New Orleans - and willfully prolonged - just to irritate people (which really would have*

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## THE SPRING 2008 ANNUAL MEETING SEASON...

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been dumb) or maybe to punish the dissidents, or to make them take the blame for the heat - instead of being at the super-comfy CSX-owned Greenbrier resort, as usual. But the locals, many of whom were first time annual meeting goers, and N'Orleans boosters like us, loved the locale. Come the end, the activists put on quite a show, declaring victory and dissing the management, and the overall management of the meeting itself over live TV. Meanwhile, CSX seemed totally flummoxed by the media feeding frenzy and maybe by the "heat" in general, and ended up looking like the bad guys, at least on TV and in the press. (See "In the Courthouse" for more on this).

***So fair warning to issuers on this too: Be well prepared for crowds, and press-people...and if they don't show up, simply, be grateful. Remember, too, excluding the press is really NOT the American Way...and can backfire bigtime.***

A few weeks before, we'd served as the Inspector at a hotly contested meeting in a very small Southern town - which began with a prayer for God's will to be done, and for everyone to be friends come the end. Here, as at Bear Stearns, the press was specifically excluded. How come? we asked, since this was the biggest thing to happen there since the Civil War. The answer, which made sense, was "We're not looking to make additional headlines for the dissidents."

***Another major trend, and one we witnessed at virtually every meeting we were involved in - even the relatively routine ones - is a greatly heightened interest in the voting particulars on the part of directors:*** This year, virtually every director wanted to peruse the voting results...and wanted an explanation as to why the high vote-getters were high and the low vote-getters were low, even when we thought the results were statistically insignificant.

***On a very happy meeting note, your editor, and his number-one fellow Inspector of Election, extended their stay in Nebraska to attend the Berkshire Hathaway meeting,*** purely as a busmen's holiday. The press was crawling *all over* this meeting - and they got a royal welcome. Your editor actually got the last word in the May 18th *Time* magazine article on the big Buffett bash. (We'll report on this next issue).

***The major surprise this season was the extent to which Say-On-Pay proposals appear to have fizzled.*** So far this year only eight or nine such proposals achieved a majority vote - of roughly 100 that came to a vote; a few more wins than last year, but a much lower percentage of wins. The vast majority of the say-on-pay proposals that were up for a second vote did significantly less well than they did last year: At **Citi**, SOP garnered 38% vs. 46% last year; at **Merrill Lynch**, 36% vs. 46%.

***Another big surprise was the falloff in voting for proposals to separate the Chairman and CEO positions:*** At **Exxon Mobil** - despite all the publicity arising from the founding Rockefeller-family push, it garnered only 39.5% of the votes, down a half-of-one-percent from last year. At **Chevron**, the proposal got a mere 15%, vs. 35% last year. On average, support for these proposals garnered only 34% of the vote, according to **Carol Bowie**, who heads the **Governance Institute**, the research arm of **Risk Metrics**.

Some pundits say it's all due to "meeting fatigue" - to being so fed up with so many proposals, and so much of the same old proxy statement boilerplate - pro and con - that it's become a total turnoff.

Opponents of Say-On-Pay say it's because voters realize it's really the directors' job to say on pay...or that the "message" a NO vote sends is too vague to be useful...or that voters realize they have a much better weapon by voting-No on committee directors if they don't like the pay plan...But that's giving voters credit for being much more focused and rational than they are, we say.

***We say, Say-On-Pay is here to stay...and will gradually become as common as ratifying the auditors.*** Why? Because it rhymes nice; it's catchy...and it sounds good... like motherhood and apple pie. And, as we've pointed out here before, how could one logically justify the ratification of auditors, but not the ratification of executive pay? No harm is done...and we think directors get a free pass this way to boot. And frankly, giving shareholders a say-on-pay is a *lot better* than watching them give a *director* the boot. Time will tell, but the S-O-P proponents we know have no plans to quit.

***As to the 'separation of powers' debate, arguments by Chairmen - especially at troubled companies, or companies in-transition - that followers need one leader, not two, to "call the signals on the battlefield" seem to be gaining a great deal of traction with voters.***

***If we had to pick one issue to watch for next year however - and it's something that shareholder and board members really should be watching - it would be "Total Wealth Accumulation" on the part of the named executive officers. In other words, "When, exactly, is enough enough when it come to pay."(Warren Buffett has a lot of good stuff to say on this - and sets a mighty good example here too).***

***But we also expect a lot of questions to be asked, and new demands to be made via the proxy process on clawback provisions when there are restatements, losses, etc....and on the newest and most potentially-attention-getting subject of all - salary and bonus continuation, "severance" and "non-compete" payments for execs who die in office. Amazingly, a lot of already super-rich execs seem to qualify for these "golden coffins"...where the stench is just now leaking out.***

## MORE ON NOTICE AND ACCESS...AND THE BEST TIP EVER ON MAXING-OUT ON SAVINGS WHILE MINIMIZING "LOST VOTES"

*The Broadridge statistics on N&A are out for the period ending May 31, 2008 - the high season for annual meeting mailings - and the numbers are impressive:*

- 634 companies used N&A to some degree between July 1, 2007 and May 31, 2008 (just shy of 10% of the companies that had their meetings through this period). Some 468 of them had concluded their meetings by 5/31 so there's a tiny bit more news still to come on how they did vote-wise, but no real surprises are expected.

- As compared to our analysis of the last Broadridge report, many more companies in the "mega-shareholder range" of 150,000 or more holders have now tried N&A - 104 of them to be exact - compared to only 16 in the early going. And a whopping 435 of the 634 pioneers had shareholder populations of 10,000 or more, so we have a much better idea of the potential savings, as well as the potential drop-offs in individual investor voting.

- Smaller issuers largely held back, much as we predicted in our last analysis, since the workload for them is proportionately much larger, the scheduling tends to be much tighter and the savings, if any, are relatively small ones. But, nonetheless, there were 99 pioneers in the less than 1000 shareholder range and 100 in the 1000-4999 range.

- As the earlier Broadridge reports indicated, retail investor voting drops *precipitously* with N&A: While 34.30% of their **shares** are voted *without* N&A, only 16.44% are voted if the N&A "notice" is the only notice individual voters get...*So issuers, please note well: you must be sure to have smart strategies - and smart stratification in place - and to do your math with special care if individual investor votes are needed to pass, or to defeat, a proposal you care about.*

- Thanks to the fact that most individual investor holdings are just a small percentage of the outstanding at many large companies - but also to "smart stratification" techniques on the part of most early adopters - average quorums dropped by only two percentage points. (*American Express, for example, saved over \$1 million by not mailing paper materials to investors with fewer than 750 shares, unless they asked, with barely a blip vs. last year's quorum. But DO remember as you read this that averages shouldn't cut much mustard with YOU: What you need to care about is your own quorum...so do your homework.*)

- A very important statistic to be aware of, the number of investors who have filed to *always* get paper materials is now up to 2.5 million (up from 1.7 million at the last report) - and will probably top out at around 3 million...as long as issuers don't screw up and turn people off with bad websites, as some

are doing already. (*The important take-away here, is that if you are a large and well-known company, you will probably have a goodly share of paper-lovers to provide for...But no worries, Broadridge can tell you exactly how many of your holders have pre-filed to get paper - and your transfer agent, if you're using them to distribute materials too, will be able to tell you in advance how many paper-huggers you are likely to have on the registered side.*)

- Only 1.02% of the people who got a Notice called or emailed to request paper materials! This is up from the earlier period, as we predicted, because the early returns were skewed by a large number of high-tech companies, with lots of investors who were web-savvy. We would be very surprised if this number were to go over 3% when all is said and done...unless, as noted above, too many issuers screw up their websites...and people actually go there to notice it. *But DO REMEMBER our advice about averages: All you should care about is your company: If you have a lot of retail investor interest and appeal, you will have a higher-than-average number of investors wanting paper.*

- The bottom line - and it's an impressive one - is that on average, the N&A pioneers sent full sets of paper proxy materials to only 11.42% of their investors...And most of these sets were sent because the *issuer* decided to send them to their larger individual investors. This, according to Broadridge, resulted in savings of paper and postage - net of processing fees - of \$140 million so far.

***So far, and rather amazingly, we've only heard a few negative remarks about N&A:***

- The 40 day posting deadline pre-meeting - coupled with the fact that at least five extra days is required to be really comfortable - is a problem for very many companies. We'd been saying, "quit the whining and start earlier" and we still say so. But much to our surprise, the SEC seems willing to revisit this and to add some slack here, since people who ask for paper are getting it much earlier than the SEC ever expected they would.

- Some small-cap companies have been complaining that the game ain't worth the candle, and hoping to be excused from the mandatory deadline for posting proxy materials on the net in "readable, searchable and printable form". But we say, suck it up...and recognize that having robust and easy to find and read materials on the web can give you a major *competitive advantage* - both in terms of your business strategies and if there are proxy "issues" of concern.

- A few activist investors and other "proxy-nannies" have

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## **MORE ON NOTICE AND ACCESS...**

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been whining that individual investors are being “disenfranchised” by N&A. This is just plain bunk...since anyone who wants paper can get it, and will get it pronto.

- Our own big gripe is that the vast majority of the websites we’ve visited are really bad. The biggest gripe by far – and a potential deal-breaker for people who would like to be rid of paper but who still want to be informed – is that many companies are totally ignoring the advice of our good friend and E-Proxy pioneer Rhoda Anderson, and forcing investors to turn into financial printers. One big vendor, for example, sets the materials up as two side-by-side pages at a time – with no navigation tool. Then, to add insult to injury, the pages are too small to even skim, much less read. If you try to enlarge one of the pages, the whole site logs off! If you still want to read the darned stuff, you’ll have to re-boot it and print it out - and you’ll burn up \$75 worth of ink cartridges if there are even a

few full-color pages. So readers, be sure to do some careful comparison shopping before you chose a vendor, and/or a host for your proxy voting site...and be sure to “try your own cooking” before you dish the stuff up to us stockholders.

**NOW FOR THE BIGGEST AND BEST TIP EVER ABOUT USING N&A...which we heard from Kathy Gibson, the Corporate Secretary at Prudential, at the Society’s annual-conference in June:**

*Do not mail proxy materials to people who haven’t voted their proxies in recent years. Wow! You get the best of all worlds, we’d say, without missing a single vote...simply by sending the required Notice, but no other paper, to the 60% or so of your investors who are (a) demonstrably not interested in getting your materials and (b) who never vote anyway! Broadridge says they can easily identify the perennial non-voters...and many transfer agents can do this too.*

## **OH, OH...GET OUT THE TRANQUILIZERS... IT’S TIME TO REPORT ON OUR ANNUAL TAX-SEASON STRESS TEST OF TRANSFER AGENT CALL CENTERS**

Heaven help us, we were so stressed out with our own regular work we almost forgot to take the tax-season stress test this year.

But a good friend and colleague reminded us in the nick of time...and made it sound like a mighty high priority: “I just hung up my speaker phone after a one hour wait” he told us “And once they cut off the elevator music, I couldn’t really tell for sure if I was still connected, which I think is part of their plan” he said. So here’s the poop, agent-by-agent, on the three calls we made to each of the four “biggies” on the 14th and 15th of April:

### **AST:**

**April 14th @ 11:10 a.m.** Answered on one ring with a recorded message asking us to press one if we were a shareholder and two if we were a prospective shareholder or broker dealer, followed by a message about “longer than normal wait times” and the info that a 1099 MAY be available on their website. “Please call back during non-peak hours”...followed by a sound that we thought was a disconnect, but we hung in...followed by “Please hold”...then some harp music with an orchestral background for one minute...then another apology...then, after 1 ½ minutes more, a person. “Do you have any information about **Duke Realty**?” we asked, “and if they have a dividend reinvestment or direct stock purchase plan?” Nikko, in Brooklyn took one minute to look, then took our name and address...and yes, by golly, we got the Plan materials a few days later. All in? Five minutes.

**April 14th @ 3:14 p.m.** Answered on one ring again, with the same message about wait times...then 1min/45 secs on hold, to that basically soothing harp music. Then an apology, then harp for 3mins/27 secs before the next apology...more harp...an apology after 5mins/38 secs...then a person. “Are you the agent for **Wachovia Bank**...and do they have a Direct Stock Purchase Plan?” (Thank God they don’t, with the benefit of hindsight!) “Sorry, you would have to purchase 50 shares from a broker first, then you could enroll in the plan and buy more.” OK...only 5 mins/45 secs all-in.

**April 15th – D-Day – at 12:30** Answered as before, but wow, only a 1min/39 second wait to a live operator...on D-Day. “Does **Yum** have a direct stock purchase plan?” we asked. “Do you have access to the internet?” (This, usually, is T-A code for ‘get off the line and find the answer for yourself’)...and Yes, we admitted. “But we would like to read a hard copy of the documents.” No problem. “And can we buy shares of YUM over the web if we want to?” “Yes...just go to [www.amstock.com](http://www.amstock.com) ...enter Y for Yum, and you can purchase.” Total time expended here, a mere 3mins/55 secs to get what we wanted.

### **BNY MELLON:**

**April 14th @ 1:16 p.m.** We dial the number, get a recorded message, then, “To speak to an operator press pound” which we do. “Please enter your Investor ID number” which we didn’t know...so we entered our TIN. “Your call will be

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## OUR ANNUAL "TAX-SEASON STRESS TEST"

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answered momentarily...we apologize for the inconvenience" ...which we took to be a bad sign, since we hadn't had any inconvenience...yet. Then, dead silence...then a very faint, hollow echo on the line: We began to understand what our buddy was trying to tell us. After seven minutes in the dead zone – with no apologies, no estimated wait times...no nothin' to tell us they, and we might still be connected - we were set to hang up...but hell, let's hang on a bit more...and at 7 mins/20 secs...a person..to tell us, we hoped about our **Hershey Foods** holdings, all of which *they* held. "Can I have your Investor ID?" "No, sorry, I don't have one...or if I do, I don't know it. How about my Social Security number?" No good: "We will have to go through an online authorization program...bear with me for one second" the nice young lady told us. "We have to go through some scripting, to guard against wrongful access." "But I can give you my name, address and social security number, which I know you have on file...and which is good enough for every agent I've called...and at my bank it's good enough to let me move my *money*...and all I'm looking for here is a bit of *information*" we pushed back. "This will only take a few seconds" she promised. "Can I have your date of birth? Then I'll give you three multiple choice questions. It will be easy...I'm loading the first question...Oh my goodness, I have four names (which she read me). Can you tell me the age of XXX?? (the maiden name of my oldest daughter-in-law! What's going on here?? BNY-Mel seems to know more about US than we would normally want a temp to have, thought we, and as we later discovered, all this info had been exported to Canada...But we figured we'd go on, and thank goodness, we guessed right about D-O-L's age). "Can you tell me the date of birth of XXX (our youngest son, where, once again, we needed to venture a guess as to the year...Hey, we have two others besides). "Very good" (apparently, 2 out of 3 is OK with BNY-Mel). "Your Investor ID is (a twelve digit number!). What would you like to know?" "Can you just tell me the total dividend I received in 2007?" By now, we had been on the phone for 12 and a half minutes! "Let me put you on hold for a quick second"...then, after 30 of them she came back with the answer. All in? Thirteen fun-filled minutes.

**April 14th– at 3:30 p.m.** We dial the toll free number for **Pepsico**, which is answered on no rings by a robotic voice, thanking us for calling Pepsico, and the information that "for your convenience (?) you can access your account online"...followed by a menu with more than 20 options, which we can maybe shortcut if we "say 'shortcut', or 'help'. Guess which one we shouted out. "I will transfer your call...For faster service, if you know your Investor ID please enter it now." Normally, we wouldn't do this...but after the last call we figured we *all* needed every break we could get. At 2 mins/20 seconds we got Brandon in Hamilton, Ontario, who was able to answer our question right away.

**April 15th – D-Day - @ 12:34 p.m.** We dial the toll free number for **JPMorgan Chase**, which gets picked up on NO rings...Then a welcome...a menu, where we press for an operator...then a request for the dreaded Investor ID, which we failed to tattoo on our arm, so we enter our TIN instead. "We are experiencing longer than average delays...The estimated wait-time can be greater than five minutes. This will be the last recorded message you will hear." (A big improvement over yesterday, we figure: *sort of* an estimated wait time...and some music to let us know we're still in line).

After almost 12 minutes we're told that "if you are JPMorgan employee, and you sold stock in 2007, please be informed that there is a dedicated number..." At 14 minutes, we realize it's lunchtime, so we put the phone on speaker...get out some ham, some cheese, butter, bread, and begin to make ourselves a grilled cheese sandwich. It's barely on the griddle when a person comes on to ask for the investor ID. Just shy of 17 minutes on the phone, we begin a new "authentication process." "I am going to ask a series of multiple choice questions, obtained from public data-bases...but first, your mailing address and date of birth please. Now for the questions...Some have more than one right answer. They are time sensitive...so please answer as quickly as you can...I will read four names...Which ones have you done business with?" (This is kind of fun in a weird sort of way, and a bit like having one's fortune told...but having one's real 'fortune' revealed to someone you don't even know, besides). Of the four names, one was a business that one son owned, then sold we told her...but we never 'did business' with them. The second was number-three son again. The third was Sees? Or Sea's? or maybe Seize-Tees No match, said we...and the fourth was our daughter in law's maiden name again. "Does she own property?" our fortune teller (who was really a lovely sounding lady, despite the totally impertinent questions she was obliged to ask) wanted to know? "If she does, it's probably jointly, under her married name" and this seems to be good enough to get a passing grade, the Investor ID and the info we wanted. By now, the sandwich had been eaten...and more than 22 minutes had gone by. "Where are you located?" we asked, wondering where all this personal information had been assembled for the quiz...and where all our personal account info was clearly visible on her computer screen: "Manila, in the Philippines."

## COMPUTERSHARE:

**April 14th @ 12:30 p.m.** We dial a toll free number we had for **Mattell**, and it's answered on one ring. "If you are a shareholder of Mattell, and you have a specific question, press 1; for tax information, press 2." OK we figure, let's try the automated system, and we get the info right away...then info on how to get a replacement copy if we want one...then pound, for other choices. We're in for a minute now...then six more

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## OUR ANNUAL "TAX-SEASON STRESS TEST"

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options...then two more, "or press O for an operator" which we do. *Mirabile dictu*, in 30 secs we hear "Hi" from a live rep. "Can you tell us if we made a sale of Mattell in 2007?" we ask. "Sure" and she begins to sing as she looks: "Bum, bum, bum...do-too-too...do...You didn't make a sale, but you transferred out some shares to a broker...on March 1st." Mystery solved: "You sure sound happy today!" "You gotta be" she replies cheerily. "Where are you working from?" we want to know. "Canton, Mass." All and all done in 4 ½ minutes!

**April 14th @ 3:25 p.m.** We dial the toll free number we have for **AT&T**, which is answered on the first ring. "For dividend information, please enter your tax ID number, which we do. "We have some important tax information for you" the AT&T fem-bot tells us cheerfully, and we get the 1099 info on the spot. We feel happy. "To continue, just remain on the line"...where we get four options, then our favorite, to reach a service rep, press 5. "We're sorry to keep you waiting...we anticipate your wait to be"...and then, oh joy again, the line starts to ring through...and we get a person. "Can I have the full name and address on your account?"...and we discover, to our chagrin, that we need to give them an address correction. No problem. "Did we sell any shares of AT&T in 2007?" No...but, sure enough, we delivered some to our broker here too. All done in 4 minutes, fifty-one seconds, by a helpful person "outside of Boston."

**April 15th @ 12:58** We dial the toll free number we have for **Sunoco**, which, once again, gets picked up before the first ring is done: "To access your account, enter your Social Security number or Taxpayer ID." "What?" we wonder, "No third-born's birthday, or daughter-in-law's approximate age, weight and Tee-size? Or the make and model of our car?" Once again, the system anticipates what's usually Question Number-One on April 15th and gives us the 2007 dividend total...in one minute flat. Forging ahead, we press O for a person...and after holding 1 minute and 33 secs we get one. "Did we sell any Sunoco in 2007?" we ask...and thank goodness we did not, since it's been going up nicely since March. Nor did we move any to our nephew the broker. "Where are you located?" we asked...and this time, it's Edison, New Jersey. All done in 5 mins/53 secs.

## WELLS FARGO SHAREOWNER SERVICES

**April 14th @ 12:35 p.m.** We dial the toll free number for **Kraft Foods**, which was on an old statement, knowing that Kraft had just moved to WFB a short time ago. The number's still good, of course, and it's answered on one ring. "To obtain information about your account, press 1...Please enter your social security number"...and we promptly get the bal-

ance in our account...then nine – count'em nine options... but no option for tax info, so we press O. "Dunk..dunk..da-dunk" goes the automated switcheroo, then some of the worst music we've ever heard: a pounding piano, surrounded by an aimlessly drifting orchestral wail...punctuated every 15 seconds or so by "thanks for holding...the next available representative will be with you shortly"...for 6 excruciating minutes and 15 seconds of pounding piano. "Can you tell me how much we received in dividends from Kraft in 2007?" "So sorry, we just acquired Kraft from another agent a few months ago...you will have to call the former agent" (not the ideal handoff of year-end data think we, but at least she gives us the number...and it one of the *faster agents* this year.) All in - eight minutes.

**April 14th @ 3:30 p.m.** We dial the toll free number for **Eli Lilly**. After eight rings, we hear "Thank you for calling Eli Lilly shareholder relations. Currently, we are experiencing higher than normal call volumes. To obtain tax information press 6...otherwise, please hold for the next available representative." We hold for five minutes of some barely audible (thank God) jazz piano music...But midway, the relentless tick-tock beat seems to be mocking us...and them too. Then come some horns...slightly louder, and more upbeat...which makes us think we're getting closer. No. And the horns swing to the same tick tock beat too. Yikes! At 8 minutes and change we get some guitar music, and the news that they have walk-in office hours. Too late to start walking to St. Paul *now*. At 17 minutes comes a moaning jazz horn solo, with some tinkling piano music in the background...which reminds us...It's nearly the cocktail hour! At 21 minutes, we say, Give up! But no...we hung on until 21 minutes and 35 seconds passed...and it WAS time for a drink.

**April 15th – D-Day – at 1:07 p.m.** We decide to try the **Kraft Foods** number again, just to see how long it might take to get a person on D-Day. What luck! We get a person after 2 mins/45 secs...but, as we knew, there wasn't much to learn. Then we figured, let's try **Eli Lilly** again...and yes, she could help us. "My son has a fraction of a share of Eli Lilly - where I am still the custodian - and which arose when he cashed out while a dividend payment was still pending. How can we get rid of it?" "We can sell the shares for you." "Will there be a charge for this?" "Yes" said she, reading from a playbook, we guess, "It'll be fifteen dollars." "Wait...we're from *New York* You wanna charge \$15 to sell stock worth about two bucks?" "Let me transfer you to an account specialist" she volunteered...for whom we waited 3 ½ minutes...and after she heard our tale, "Can I put you on hold?" After a 15 full minutes expended, we were told that they could sell the fractional share, keep the two bucks and change...and waive the rest. Do YOU think we agreed to that?

## THE CORPORATE GOVERNANCE CORNER:

Good golly, it's been many years since we warned readers about Consent Solicitations, and gave them a road-map, written by our good friend Merrill Stone, Esq., of Kelley Drye and Warren on how to head 'em off at the pass. But now, out of the blue comes InBev, threatening Anheuser-Busch with a Consent Solicitation to remove its entire board if they don't embrace the InBev bear-hug. Forget the fact that, according to FactSet Shark Watch, not a single Consent Solicitation has succeeded in ousting directors since they started shark-watching in 2001: The *real* fact-set to watch is that these things are no-win deals for targets from the get-go, thanks to the big bucks, the big distractions and the major slings of mud that come with them. If your bylaws still permit shareholders to do things like this by written consent, get your hands on Merrill's article pronto! (If you need a copy, just call your editor at 732-928-6133).

**No Majority? No matter it seems. A huge majority of directors that drew a majority of NO votes are still serving!** From the very beginning of the still fast-growing movement to substitute majority election standards for the old plurality model, we've been predicting that each year, more and more companies would move to majority voting. (It's now up to 66% of the S&P 500 and climbing). We also predicted that with every passing year we'd see more and more directors with a majority of the votes withheld from them. But we *also* predicted that most companies could and would come up with good reasons not to accept directors' resignations in such instances.

Now, from **The Corporate Library**, comes a study showing that in 2006 there were ten directors who failed the test...and, guess what...eight of them were still serving as of April 8, 2008. In 2007, 18 directors saw a majority of the voters vote NO on them...and all but three of them are still serving as of April 8th when the study was published. No big surprise to *us*, the biggest reason for the Votes-NO is not "poor performance" - since how would a shareholder really *know* - but "poor attendance". And most of the time, as we also predicted, the offenders have a reasonable explanation, caused, in the case of the stayers-on, by a non-recurring set of circumstances. All of the eight "stayers-on" from 2006 received a majority of Votes-YES in 2007, and we'll bet the same held true for the class of '08.

**Don't let this lull you into complacency however:** This year, based only on the 50 or so meeting we observed up close, the numbers and the percentages of Votes-NO are higher yet. Directors are also paying more attention than ever...and asking why, so you'd better know the answer.

**Activists are asking questions too, and, as we've noted here before, they want to know how many of the YES votes were cast by brokers, rather than the real owners...**And they don't count such votes in their own calculations...like at **Change to Win**, where they have WAMU in their sights for the two directors who squeaked in only with the 'uninstructed votes', and where CTW is demanding they step down.

**Finally, let's not ignore the fact that an awful lot of troubled directors at "troubled companies" stepped down on their own in 2008**, as reported in our last issue, rather than risk a majority of votes-NO. You'll be doing yourselves, and some of your directors a favor we think, if you take our advice from last year, and "handicap" each director in terms of their potential negatives, and deal with them proactively, in advance. So, despite all the initial wailing and whining and gnashing of teeth on the part of Corporate America, the new system seems to be working...and working rather well.

**Are Corporate Governance Ratings a Fraud on the Market?** A June 26, 2008 study by three **Stanford University** researchers, "**Rating the Ratings**" seems to indicate that this may very well be the case...since there is essentially ZERO correlation among the various grades the various rating agencies award for the same basic behaviors...And, far more important, there's essentially ZERO correlation between good grades and good performance, whether audit-wise or profit-wise.

The paper pulls no punches, but also says "Please do not quote without permission from the authors" so we'll let you read it and decide for yourselves. See: [http://www.law.stanford.edu/display/images/dynamic/publications\\_pdf/dgl\\_2008-06-28.pdf](http://www.law.stanford.edu/display/images/dynamic/publications_pdf/dgl_2008-06-28.pdf) The *Optimizer*, however, has been pointing out since the get-go that *economic performance* is the number-one hallmark of "good governance" by a million miles - at least from an *investor's* point of view, and that the raters award few if any points for this...so no surprises here at all from our perspective.

###

## ELSEWHERE ON THE SUPPLIER SCENE:

**XBRL “tagging” of all financial statements filed with the SEC by ‘accelerated filers’ will be required by 2010 if the SEC has its way, and all other companies will have to soon follow suit:** No surprise then that a host of consultants, financial printers and numerous others are lining up to help you. A lot of them seem to be mainly out to confuse you however - to hide rather than clarify ‘the basics’ - and thus to jack up and hide their prices too behind a thick smokescreen of geek-speak. **We’re here to tell you that it ain’t that scary:** All the *good suppliers* have *software* that will read your documents, recognize what they *are* (like an income statement, or a statement of cash flows, for example), recognize what kind of key-words and associated key-numbers they need to “tag” for that kind of document (they like to refer to this as a ‘taxonomy’ since it sounds like a rare and hard to produce and expensive thing). Then they insert invisible electronic tags that let third parties search for and extract these key sections automatically when they

open your documents, so they can be downloaded *automatically* to *their spreadsheets* and other modeling tools instead of having to be laboriously cut and pasted, or typed in by hand. One speaker we heard recently first tried to hide the penny by skipping over the cost-consideration slide...then ventured, when questioned, that it would cost \$30k to XBRL the average AR...But no sooner was the meeting over when we were besieged by other vendors proffering lower estimates. So prepare to shop around.

**Kekst & Company**, the financial PR firm that has honed the fight-letters for over 3,000 deals since its founding in 1970 – and which is typically the first choice of dealmakers like **Kohlberg Kravis** and **Marty Lipton** and the **Wachtell** crowd – has sold itself to monster-media company **Publicis Groupe**, which is based in France...A move that very clearly underscores the rapid growth and *globalization* of deal markets.

## OUT OF OUR IN-BOX:

Our good buddy, T-A veteran and former Securities Transfer Association president Ray Riley sent us the **craziest thing we’ve seen from a transfer agent ever...** a notice he got from **BNY Mellon** when he tried to have the dividends reinvested in one of his long-term holdings: “*in order for financial institutions to assist the government’s fight against terrorism and money laundering activities, Federal law (USA PATRIOT Act of 2001) requires us to obtain, verify and record information that identifies each person who opens or makes significant changes to an account*” the notice read. “*To process your request, please present the following document(s): A. Copy of your current driver’s license (or) B. Copy of your passport or National ID card with a copy of a current utility bill with your current name and street address (PO Boxes cannot be used).*” **A passport and a drivers license to reinvest one’s own dividends? (And since we would like to prevent terrorism too, we wouldn’t let ANYBODY photocopy our passport, much less send a copy off to a clerk at BNY Mellon, or anywhere else in the world!) What in the world can they be thinking?**

**Another good buddy, who chose to remain anonymous (and the former Chairman of a very well known firm) emailed us about a letter he’d sent to each of the directors of Bank of America, by name,** followed by the word Director, then by the BofA name and address, regarding the

then-pending acquisition of **Countrywide**. Almost all the letters he sent to their headquarters in Charlotte came back...as undeliverable! In the old days, of course, such letters would have been acknowledged immediately...and answered almost as fast...even if they *weren’t* from a former CEO, as these were. But today’s mailroom clerks seem to look no further than the latest employee directory – where typically, there are daily deletions...of people, and of jobs where no forwarding address is recorded anywhere...so it was “nothing personal” we explained to him, just the modern-American way of dealing with mail.

**“Hi [F name]”...** began the attention-getting email your editor received from **NIRI’s** Advertising Sales exec...just as we were drafting this issue: “How are you? It has been some time since we have communicated” (We can’t recall ever communicating with the author...and frankly, we don’t recall being called the “F-name” either...at least not recently, although it *did* prompt a hearty belly-laugh, so thanks, we guess). In any event, we were being invited to participate in a huge number of advertising and marketing activities, the scope of which – and the prices of which – caused us to wonder if NIRI has abandoned its own non-profit status and converted to a for-profit model. Even before getting the “F-name” letter we’ve been wondering “What DO we get for our dues these days?”

## PEOPLE:

**Margaret “Peggy” Foran**...who, more than anyone we can think of, is responsible for putting the Corporate Secretary’s job - and the Governance Officer’s job “high on the radar screens” of the press, and the general public – and with CEOs and Directors too – is moving on from **Pfizer Inc.** to **Sara Lee Corp.** where they will now have the advantage of her *overall* legal and managerial skills: She has been elected Executive Vice President, General Counsel and Secretary, effective June 30.

**Dick Grasso** scored a monster victory in his quest to keep all of the \$187.5 million the old NYSE board awarded him – an amount that now disgraced Eliot Spitzer tried to claw back by \$100mm+ via a long-running lawsuit, as “unreasonably high” under New York State non-profit company rules. Although Dick won on a technicality (the court ruled that since the NYSE is now a for-profit entity, the suit was essentially moot) you have to give him credit for sticking to his guns. (Although we should also note that the NYSE’s D&O policy paid for all of Dick’s - and Frank Langone’s costs too – to stick them out, where their legal bills were estimated at \$70mm+). But if one looks at what’s happened to NYSE specialist firms since Dick stopped guarding their gates – and the extent to which trading volumes have been migrating away from the “old NYSE” model - *and* the number of NYSE workers (and now ex **American Stock Exchange** workers too) who’ve been laid off since Dick

was booted out so unceremoniously – one has to conclude that he was, indeed, well worth the money!

**Lennie Kaufman**, the much-liked former head of the **Wells Fargo Shareowner Services** business has signed up as an EVP with abandoned property specialist **SMS Vanacore**. Ahoy!

**Your editor** recently received the biggest honor he has ever received...and the biggest he’s ever *likely to receive* when he was awarded the Bracebridge H. Young Distinguished Service Award from the **Society of Corporate Secretaries and Governance Professionals** at their annual conference in June. The award was nearly revoked, however, when the recipient’s acceptance speech ran into overtime, but here’s a *very short summary* of the career tips he tried to impart: (1) Half or more of any successes we achieve in life are really attributable to simply *showing up*. (2) It’s far, far better to be *lucky* than to be smart...But (3) smart people *always place themselves in the way of good luck*...by volunteering a lot, which *guarantees* they’ll show up in exactly the right places at exactly the right times to *find* good luck...and (4) While it may *sound* like a cliché, volunteers *always* get back far, far more than they give.

## REGULATORY NOTES...and comment

### ON THE HILL:

Proposed “say on pay” legislation has passed in the House, and both presidential candidates say they’re in favor of federalizing this important corporate governance matter. This, in our view, is a *horrible development* that issuers should make haste to debunk and derail. The traditional State regulated governance systems are working just fine, thank you, witness the current vigorous debating on both sides of SOP...And *especially*, please note the fact that by and large this presumably “democratic” concept is not racking up very many majority votes when actually put to the voters!

Meanwhile, Treasury Secretary Henry Paulson has been warning that “we must improve the tools at our disposal for facilitating the orderly failure of a large complex financial institution.”

Senator Charles Schumer (D-NY) says he’s working on legislation that would clarify the treatment of equity

swaps, require greater disclosure and provide stiff penalties for failures to disclose – to close the big loophole the CSX proxy fight revealed at long last...if the SEC doesn’t get cracking on its own.

### AT THE SEC:

A *major ruling*; that companies like Boeing, GM, United Technologies, Wendy’s, Xcel Energy...and now, all others, can not exclude proposals under the “ordinary business” exemption that would ask companies to adopt “principles” for comprehensive health care reform...as long, that is, as the proposals are not too ‘prescriptive’. Many observers, including most of the ex SEC senior-staffers that spoke at the recent **Society** conference, fear that this will open the doors to many other kinds of proposals where a case can be made that they rise to the level of “significant social policy issues” rather than being “ordinary business” matters... and we’d agree.

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## REGULATORY NOTES...

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After a shamefully long delay there's now a full bench of Commissioners...and they - and the staff - are promising to take up "direct access" to the company's ballot for the purpose of nominating directors ...and to roll all the *other* philosophical, mechanical, competitive and pricing issues into this big and sticky ball of wax too (which virtually *guarantees* another torturously long and ultimately failed process, we say)...next year.

An exception *might* be made, Corp-Fin-head John White told the Society, when questioned, to deal with the huge loophole that exists, allowing groups of investors to wink, nod and accumulate positions – via derivatives, and via votes that are bought and borrowed – and often *stolen*, we say – without having to disclose their interest under present rules...Like at CNet...and at CSX...and at numerous other companies where big spikes in the number of shares bought and/or borrowed, and/or taken without compensation on A-M record dates clearly indicate that something sneaky is going on (to everyone but the SEC, it seems). We'll see...

In a sudden flurry of activity – deemed by most observers as an attempt by Chairman Cox to leave a "legacy" other than the absentee landlord one he's recently being cited for – there are proposals out for comment to let GAAP fall between the cracks in favor of International Accounting Standards, for ratings agencies to do more...but for buyers of securities to rely on them less, and to do their own research instead...and for XBRL to become mandatory for "primary financial statements, notes and financial statement schedules"...and ultimately for comp-disclosures too, down the line, at dates TBD.

## AT THE EXCHANGES:

A fond *adieu* to the American Stock Exchange, aka "The Curb"...which came in from the curb and under its historic Trinity Place roof in 1921...and which was acquired by NYSE Euronext in June.

## IN THE COURTHOUSE: FOUR, COUNT'EM, FOUR LANDMARK CASES IN THE WORLD OF PROXY VOTING...WITH ANOTHER ONE, AND MAYBE TWO...OR THREE, IN THE OFFING, WE BET:

The biggest case this quarter, by far, revolves around the ruling of New York Federal District Judge Lewis Kaplan that two hedge funds – The Children's Investment Fund and 3G Capital Partners – could vote

the CSX shares they colluded to acquire and to conceal from public view - by buying "equity swaps" – in order to vote out five management-sponsored directors and seat candidates of their own. Despite finding that the hedges had formed "a group...many months before they filed the necessary disclosure statement"...and wrongly "sought to justify their actions on the basis of formalistic legal arguments, even when it is apparent that they have defeated the purpose of the law"...and that there were "persuasive reasons" to conclude that they 'beneficially owned' at least some and possibly all" of the equity swaps they purchased on the Q-T, the judge said it was too late for him to reverse their actions, and, because of a legal precedent, he could not "sterilize" their votes, as clearly, he'd have liked to do.

In Delaware, another biggie, and on similar grounds that the damage, if any, was already done; Chancellor Chandler granted summary judgment in June, in favor of three directors of Transkaryotic Therapies, Inc. who were alleged - three years after the deal was done - to have breached their fiduciary duties by voting in favor of an acquisition by Shire Pharmaceuticals. Even though he implied they *may* have been remiss, "once this irreparable harm has occurred – i.e. when shareholders have voted without complete and accurate information – it is, by definition, too late to remedy the harm" he wrote. There were two *other* interesting wrinkles however...as Travis Laster noted in Broc Romaneks' new DealLawyers.com newsletter and blog: First, the Chancellor also granted summary judgment in favor of a director who had been accused by the plaintiffs of soliciting "empty votes" (not the kind that we have been railing about, but votes from shareholders who may have sold their shares between the record date and the actual meeting date). He very sensibly ruled that the director's efforts were "consistent with – rather than at odds with – his fiduciary duties." But, *most significant of all*, we say, the Chancellor allowed plaintiffs to proceed with a statutory challenge to the merger (three years later, mind you) based on an assertion that sufficient votes were not received, which was based on testimony that the Inspectors of Election did not properly investigate apparent over-votes!

The real takeaways, as the blog points out, are (a) to expect more, and much faster challenges as to "full, fair and complete disclosures" in proxy contests and (b) to make sure you have Inspectors of Election who know what they're supposed to do – and do it.

And, sure enough, before the ink was dry, another, eerily similar case is blowin' in the wind, we hear, involving a regional bank and RiskMetrics and its ISS unit...where the losers of a contested election were *much quicker to act*...asserting that the ISS recommendation to vote FOR management directors was based on incorrect and/or

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## REGULATORY NOTES...

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improperly disclosed and/or improperly interpreted information. Stay tuned here, because Delaware law does, of course, allow the losers to go to court to overturn the Inspector-certified results....IF they act promptly...and if they have “the goods”.

**Delaware’s 2007 constitutional amendment, that allows its Supreme Court to rule on matters where the SEC formally asks for its assistance, will get its first test any day now**, in a proxy access dispute between **CA Inc.** (which readers will remember as former serial-good-governance-non-complier **Computer Associates**) and **AFSCME**, which has submitted a binding bylaw proposal that would require CA to reimburse activists if they nominate directors on their own, run their own short slates... and win. CA, in a request for a no action letter said this violates Delaware law, because spending decisions are the province of directors...and not of shareholders. The Delaware court is racing to decide the issue in time for CA’s annual meeting on Sept. 9th...so say tuned.

Our bet? AFSCME will win here...since clearly, we think, investors have the right both to amend bylaws and to override directors on *any matters* (since they are the owners) if they can muster the needed votes.

**And coming soon, we’re betting...it’ll be back to court for CSX – both in Federal Court, for an appeal, and maybe in a Delaware Court too:** While the dissident group claimed at the annual meeting to have won four of the five board seats they were seeking, CSX said it was “too close to call”...and that the results of the voting would not be available until July 25th – almost four weeks after the meeting itself. The dissident group has already claimed that CSX kept the polls open improperly, hoping to arm-wrestle some last minute votes in its favor...and they will certainly challenge any final report that doesn’t show them winning the four seats, as they’d announced. If WE were the Inspectors, we would be concerned that they’d also challenge our independence, accuse us being in-cahoots with management to keep the polls open and of dragging our feet to buy PR cover at best, and added maneuvering time at worst, by dawdling too long with the tabulation.

## WATCHING THE WEB:

**For a really fun excursion, go to Broc Romanek’s newest site, <http://friendfeed.com/rooms/society08>** for some “video interviews” with participants at the Society of Corporate Secretaries and Governance Professionals annual conference.

**Check out the OPTIMIZER’s site too, at [www.optimizeronline.com](http://www.optimizeronline.com) for two new sections, History**, wherein we plan to continually add factual, but ideally fun-filled articles on the history of the Corporate Secretary and IRO positions, and about the securities industry as a whole, and **Doing Well by Doing Good**, which highlights good deeds done by readers and their companies. New submissions and new ideas for both sections will be most welcome! Also, check out past articles on **The Basics**...another section we’ve been expanding, and where suggestions for new articles are most welcome.

**We promised a quick review of some “Corporate Governance oriented blogs” in our last issue, so here are a few worth a visit:**

**CTW (aka Change To Win) Investment Group:** The union sponsored activist investor site opens with a disclaimer that it’s not soliciting proxies (we don’t see the issue here that the SEC seems to *think* is out there, btw,

because, as we keep reminding, the First Amendment trumps the SEC every time, and in every way)...then it goes straight to its 2008 campaign to oust directors who sat on the risk management committees of the six largest U.S. financial institutions - unless they disclose what they *did*, and *will do* to mitigate risks... in a manner satisfactory to *them*. But oops...no report on how CTW did (except for their letter to WAMU, noted earlier) and no way to blog back that we could find. And OOOOPS again, they seem not to have noticed that most of the six didn’t even HAVE risk management committees!

**CALPERS Shareowner Forums** is a pretty handy resource, both for investors and for Governance Officers to visit, if only to find out how to stay below their radar - and for their Focus List. Their methodology here is extremely rigorous, easy to understand and *extremely useful* to investors...Unlike those pay-to-play governance raters, their number-one focus is on underperformance vs. peer companies in the Russell 3000 Indices...not on mostly-irrelevant stuff like in the CGQ.

**Dellshares.dell.com** was one of the first blogs to reach out to investors...and still one of the few to do so, despite the SEC’s naively conceived efforts to encourage “Investor Forums”. The mostly self-serving content is worth a *look*...but it’s

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**WATCHING THE WEB...**

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hardly compelling stuff: Not bookmarked in *our* faves.

**Carl Icahn's long promised blog The Icahn Report - has finally hit the web:** "It's me" he assures skeptics as to the actual authorship - And anyone who reads the part where he compares CEOs to his college fraternity president, who "provided sympathy when a girlfriend didn't show up, or call" will know it's him, for sure. (NOW we know why gets so mad at CEOs who don't embrace his overtures!) Carl really doesn't *need* a blog, given all the press attention he gets in his day job...but he promises to "put out petitions and form letters" - to pump up the volume to the max.

**Shareholder Forum.com**, the latest venture for noisemaker **Gary Lutin** (who first landed on the *Optimizer's* radar screen in 1999 when he tried, unsuccessfully, to put **National Presto** into play with a steady stream of critical info) was originally directed at **Verizon, Inc.** and its governance policies. Lutin allied himself with "retiree investor activists" early-on, and subsequently, seems to have learned that not rooting for Verizon is NOT the thing for smart INVESTORS in Verizon to be doing...so he's toned down the tone of late. (His latest posting is of a

rather adulatory interview with the CEO by two *Financial Times* reporters). He's got a new section to the site however, **Shareholder Forum for Options Policies**, that reprints a very large amount of material about executive compensation; well worth a look.

**Votepal.com** charts the ongoing efforts of **Alaska Airlines** pilot **Steve Nieman** and sidekick **Richard Foley**, a former railroad conductor, to nominate themselves and a few others as Alaska Air directors, rally employee-owners and to shake things up in general. The site offers a roadmap - and assistance - on running an Internet solicitation and voting campaign and includes a lengthy recitation of instances where, Nieman says, the company tried to "obstruct" their efforts. **Regardless of the reality, the perception that Alaska Air is not 'investor-friendly' - plus their refusal to issue a report on the voting until the 10-Q was due, plus their not-very-responsive response to the formal challenge that was raised to last year's results - clearly backfired on them in a big way this year: A binding bylaw proposal to adopt cumulative voting passed with 51% of the votes cast.** A harsh outcome indeed, which, Nieman says, will allow them to seat a director next year, and maybe it will. In a relatively minor coup, by comparison, Say on Pay got 53% in favor; *far higher* than most SOP votes this year. **Votepal's** cost to front-run the campaign, mainly through "noisemaking"? A whopping \$350, they say...plus the group's volunteered time.

**IN OUR NEXT ISSUE:**

**THE BEST AND WORST FROM OUR ANNUAL REVIEW OF ANNUAL MEETING MATERIALS...AND PRACTICES**

**WINING, DINING AND SHOPPING AT THE BUFFETT BUFFET AND BASH**

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**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

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Telephone (732) 928-6133 Fax: (732) 928-6136

e-mail: [cthagberg@aol.com](mailto:cthagberg@aol.com)  
WEBSITE: [www.optimizeronline.com](http://www.optimizeronline.com)