

CONTESTED VIRTUAL SHAREHOLDER MEETINGS: A NEW FRONTIER

By Igor Kirman, Sabastian Niles and Natalie Wong

Igor Kirman and Sabastian Niles are partners, and Natalie Wong is an associate, in the corporate department of Wachtell, Lipton, Rosen & Katz. The authors are grateful for the helpful review of their colleague, Elina Tetelbaum.

Contact: IKirman@wlrk.com or SVNiles@wlrk.com or NSWong@wlrk.com.

Even prior to the COVID-19 pandemic environment, virtual shareholder meetings, also known as VSMs, had been on the rise in recent proxy seasons as public companies sought to increase the attendance of their investor base, decrease administrative costs of holding a physical meeting and embrace the use of technology in engaging with investors. VSMs, like in-person shareholder meetings, occur in settings that can be placed on a spectrum from least contested to most contested: ranging from routine management-only proposals on the ballot, to Rule 14a-8 shareholder proposals in which proponents solicit using the company's proxy cards, to withhold-the-vote campaigns against the company's recommended director slate, to full-fledged proxy contests in which companies and dissident shareholders battle over which directors will be elected to the board. This last context—the fully contested VSM—is the focus of this article.

From the first major use of virtual capabilities at an annual meeting in 2009, by Intel Corporation, using technology pioneered by Broadridge Financial Solutions, the number of VSMs has

been on the increase. The use of hybrid¹ or virtual-only annual shareholder meetings more than doubled from 93 meetings in 2014 to 187 meetings in 2016, and has steadily increased to 236, 285, and 326 meetings in 2017, 2018, and 2019 respectively.² This steady rise became a torrent in 2020, as companies turned to hybrid or, more frequently, virtual-only annual shareholder meetings due to the COVID-19 pandemic, shelter-in-place regulations and public health considerations. Broadridge reported hosting close to 1,500 virtual-only and hybrid shareholder meetings on its platform during the 2020 proxy season.³

Yet companies have traditionally been reluctant to use VSMs for contested proxy fights, involving multiple proxy cards and competing director slates, due to the extra complexity and high stakes of such meetings, which present a slew of legal risks that are absent from non-contested situations. Another challenge has been, until recently, the absence of a commercial platform for implementing contested VSMs. But, being as necessity is often the mother of invention, the pandemic led some companies, starting with TEGNA Inc. in April 2020, to conduct their contested VSMs virtually. Given that the year ahead will likely see an elevated number of VSMs and an increase in shareholder activism, we expect that the need to conduct proxy fights on digital platforms will continue. Looking beyond 2021, when it is hoped safety concerns will diminish and companies could return to the annual meeting choices they had pre-pandemic, the questions—and opportunities—raised by VSMs will remain. This article discusses some of the benefits and considerations involved in conducting contested shareholder meetings virtually.

Virtual Shareholder Meetings: The Rise of the Machines

The concept, legal groundwork and technology to host virtual shareholder meetings have existed for several years, beginning with Delaware amending its business corporation laws to permit such meetings in 2000. Most states now permit virtual-only or hybrid meetings. At least 33 states permit virtual-only meetings and 45 states permit hybrid meetings.⁴

In 2020, a major evolution in the regulatory framework for VSMs occurred as a result of the pandemic. Much of this was done in “real time” as pandemic concerns and shelter-in-place orders were being promulgated just as the annual spring proxy season was getting under way. Delaware took the lead and issued an emergency order in April 2020 that allowed companies to change scheduled in-person meetings to VSMs without having to re-notice such meetings so long as the company filed the notice of change with the SEC and posted a copy on its website.⁵ A number of other states followed,⁶ and the staff of the SEC issued guidance in April 2020 permitting issuers to change the format of their shareholder meetings to a virtual-only meeting or hybrid meeting without mailing additional solicitations if they issued a press release announcing such change, filed the press release as definitive additional soliciting material with the SEC, and took all reasonable necessary steps to inform other intermediaries and market participants of such change.⁷

Shareholder Reactions

While the VSM has been seen as a welcome technological development by many companies, a growing group of institutional shareholders, proxy advisory firms and activists alike have

cautioned that the VSM may restrict the full shareholder participation that an in-person meeting would otherwise afford. There is a growing suspicion that the VSM format permits the Board and management to “cherry pick” and reword innocuous questions and comments, gives them discretion over which questions to answer, and restricts follow-up comments by limiting each shareholder to one question.⁸ There has been meaningful pushback against these suspicions as well, and a number of institutional and retail investors are supportive of the opportunities that a well-run and fair VSM could provide. The Council of Institutional Investors, among several other interest groups that prefer in-person attendance, has publicly expressed that the near-universal VSMs conducted during the 2020 proxy season were a “poor substitute for in-person shareholder meetings, notwithstanding the potential for virtual technology to expand participation.”⁹ Proxy advisory firms ISS and Glass Lewis have also cautioned that VSMs need to be conducted in a way that allows for comparable rights and opportunities for shareholders to participate electronically as they would have during an in-person meeting, and institutional investors such as BlackRock and State Street, among others, have expressed similar views.¹⁰

Companies and investors also now recognize that by providing for virtual attendance, what would typically be a physical meeting attended, at most, by employees, union representatives where applicable, a handful of local retail holders, localized interest groups and proponents of shareholder proposals (where applicable), the meeting may become a virtual forum akin to another “investor day,” where analysts and other institutional investor representatives focus the dialogue on the company’s business and financial

performance. This business focus is often apparent as part of a general “Q&A” session at the end of the VSM. It remains less common for companies to provide a “Q&A” session after each proposal, or two “Q&A” sessions for proposal and non-proposal matters. Whether companies and shareholders prefer a more robust discussion of business issues, rather than the items relating to corporate governance and shareholder proposals, varies based on the circumstances.

Finally, activist investors and proponents of shareholder proposals in particular have sometimes asserted that during VSMs, their live participation may be limited, their questions risk being ignored, and that their engagement rate would be much higher in an in-person meeting.¹¹ Companies have generally disputed these assertions and have pointed to ways in which they have tried to replicate, as much as possible, the engagement of an in-person, given the constraints of a digital platform.

Contested Virtual Shareholder Meetings

Contested meetings, due to their high stakes and adversarial nature, have traditionally been fraught with the potential for every action by the company to be examined and potentially challenged in court. As a result, even as some companies migrated to virtual-only annual meetings, prior to 2020 none chose to do so for proxy contests—whether in connection with an unsolicited takeover effort, activism, or other situations involving competing proxy cards. In 2020, however, a number of companies, led initially by TEGNA Inc., faced proxy contests and had no choice but to conduct contested VSMs in light of the COVID-19 pandemic. In all, there were 13 proxy contests that went to a shareholder vote in the 2020 proxy season and 25 board seats won

through a contested election, compared to six proxy contests and four board seats won in 2019.¹² In addition to the TEGNA proxy contest, which TEGNA won, other notable contests included the partially successful attempt by Senator Investment Group and Cannae Holdings to replace the entire board of CoreLogic (they ended up replacing a minority of the board); Starboard’s control slate at GCP Applied Technologies that was backed by GCP’s largest investor and periodic activist 40 North; and GameStop’s loss of two director seats to nominees advanced by Hestia Capital Partners and Permit Capital Enterprise Fund. These contests hold several lessons and observations for the future use of VSMs in contested situations

Attendance and Shareholder Access

One significant benefit of VSMs is that they make it easier for all constituents, including shareholders, to attend the meeting by allowing them to do so from their homes, without the need to travel to what is often an out-of-state location. In the 2020 proxy season, Broadridge reported an average of 146 attendees for VSMs with shareholder proposals and 37 attendees for VSMs without,¹³ both significant increases in number from in-person meetings. These also translate to a greater amount of questions asked and answered, and to a lesser extent, a larger number of votes received at the meeting itself. In this regard, a case can be made that VSMs contribute to shareholder access and engagement. In particular, especially with the rise of index funds that hold major positions in most publicly-traded companies, especially companies in the S&P 500, VSMs enable index funds that would normally not be well positioned to attend many in-person meetings in their portfolio to have a more practical opportunity to do so.

Design and Technical Considerations

Key features of the VSM platform in a contested situation should include the registration of shareholders and permitted guests of the company and the dissident in advance of the virtual meeting (including the ability to submit evidence needed to establish the identity of the foregoing), as well as the ability of shareholders to inspect the company's shareholder list online and vote by ballot. In addition, the dissident in a proxy fight should be given the opportunity to present their nomination or proposal unless the company and the dissident agree to waive such opportunity and be given the opportunity to ask questions like other shareholders during the meeting itself. In implementing VSM procedures in a legally protected and compliant manner, Delaware companies may rely on DGCL § 211(a), which provides that a company may conduct a VSM "subject to such guidelines and procedures as the board of directors may adopt." In response to the COVID-19 pandemic, most of the other states granted issuers temporary relief through executive orders or emergency legislation to allow VSMs, with conditions substantially similar to the requirements set forth in DGCL § 211(a). That said, not all of these orders or legislation are permanent, and some have expired (and need to be renewed to apply), so a non-Delaware company will need to check the applicable state corporate statute, as well as its organizational documents, to determine whether a virtual-only VSM is permitted (and what the applicable requirements and parameters are). On a federal level, an issuer should also take into consideration the guidance issued by the staff of the SEC, which requires issuers to "disclose clear directions as to the logistical details of the 'virtual' or 'hybrid' meeting, including how shareholders can remotely access,

participate in, and vote at such meeting" and, with respect to Rule 14a-8 shareholder proposals, encourages issuers to "provide shareholder proponents or their representatives with the ability to present their proposals through alternative means, such as by phone."¹⁴

When TEGNA hosted the first contested VSM in April 2020, it faced technical obstacles, in large part because Broadridge and other VSM platform providers had yet to develop contested VSM platforms. TEGNA eventually had to develop and customize its own contested VSM platform in collaboration with third party service providers, while managing the considerations listed below. Since then, at least one commercial provider, Corporate Election Services ("CES"), has emerged to provide a contested commercial platform and Broadridge is working on its own. At the moment, the Broadridge platform reportedly will include a call center equipped to handle management and dissident voting instructions, with live operators taking instructions from shareholders during the contested VSM. Broadridge will then provide voting reports to the inspector of elections after the conclusion of the contested VSM. Since such a delay may prove to be unattractive in contested situations, we expect that companies will seek alternatives until Broadridge is able to automate the tabulation of votes in contested VSM, something which it says it is also working on.¹⁵ Due consideration must also be given to technical difficulties that may interrupt the VSM or prevent it from starting, and the company should adopt a contingency plan and be able to communicate this plan in advance. In addition, it is possible that hackers may attempt to hijack or disrupt a VSM, as has occurred in other contexts. Companies should clearly communicate how shareholders can seek technical support

where they have individual technical issues in accessing the VSM. In addition, companies need to be prepared for the possibility of full-scale technical failures that may occasion a need to postpone or adjourn the meeting. Companies should consult with their organizational documents and applicable state law in this regard, and try to anticipate (and possibly disclose) these possibilities in advance. Even though in theory video could be available for VSMs, and the demand for this is growing, almost all companies that have held contested VSMs have made them audio-only to minimize data usage and the possibility of technical failures. Finally, in the event that an adjournment needs to take place, companies need to consider in advance whether they will be able to delay or reconvene the VSM. When planning meetings on a commercial platform, the platforms—and associated staff—book up, so a company seeking a last-minute adjournment may find that it has no slots available. Companies that believe this to be a possibility may need to reserve commercial platforms for backup plans. Companies should consult state laws as to how notice of a reconvened meeting should be disseminated.

Dissident's Right to Speak; Questions and Answers

A key consideration for companies using a virtual platform for contested VSMs is how best to permit dissidents, or other shareholders, the ability to make their views known on such a platform, whether it be through an allotted amount of time to speak, or through the “Q&A” session. As noted above, we have seen some companies adopt some (if not all) of the following restrictions in contested VSMs (similar to restrictions adopted at in-person contested meetings): (i) only permitting shareholders of record to submit questions, (ii) limiting questions to one question per

shareholder, (iii) requiring that questions be submitted in writing and in advance and not in real time during the meeting (eliminating the ability of the shareholder to respond to or follow up on management's responses) and/or (iv) giving management the ability to “group” questions by topic and rephrase in their own discretion. In general, having too many restrictions in contested situations is risky and could open companies to challenge by the dissident or other shareholders. In the interests of full and fair disclosure, a growing number of companies undertake to post the transcript of the VSM and/or unanswered questions (in some cases, together with responses) on their website after the VSM. Most companies in contested proxy situations give dissidents the right to speak live for a short period of time, and typically have the dissident call in to make a prepared speech, all by advance agreement. Ultimately, companies will need to balance shareholders' desire for enhanced participation in a VSM with the need to keep the meeting orderly and moving on time, but where possible should seek to consider and accommodate reasonable requests from the dissident.

Cross-Functional Planning and Support

Planning and implementing an effective contested VSM requires the cooperation of a multi-disciplinary task force, including in-house information-technology and legal personnel and third-party experts and advisors such as outside counsel, proxy solicitors and public-relations advisors. The critical importance of conducting dry runs, testing the platform and making any necessary adjustments prior to the VSM webcast cannot be overstated. Without sufficient trial and error, companies run the risk of technological failures or human error derailing the VSM, which is especially a significant risk to run in a contested

election. The use of a commercial platform should alleviate some of the technical needs, but testing remains a necessity even with a commercial platform. Companies should also consider updating corporate governance documents to authorize virtual meetings, updating annual meeting rules, agendas and proxy materials, and otherwise working with their VSM task-force to execute a VSM in compliance with state law and best practices.

Physical Contested Meeting Parallels

Veterans of proxy fights and activism campaigns will be familiar with dynamics unique to proxy fights, such as “war rooms,” in-person delivery of voted proxies to the inspector of elections by each side’s proxy solicitor, “snake pits” and real-time, high-pressure communication and consultation by representatives of the two sides with each other.

Many of these concepts remain relevant in the virtual realm but require adaption—for example, since there are not separate “war rooms” set up alongside in-person presence for both parties to observe the contested meeting and communicate with the inspector of elections in real time, alternative means of communications for both parties are needed. If a dissident wishes to have the opportunity to address shareholders at the meeting, a separate phone line may be made available to enable this, to be activated during the period when such remarks are scheduled. If each side’s team members are not physically together for a contested VSM and related webcast, they will need to use phone lines (or other means, such as Zoom conferences, text messaging or other communication platforms) to communicate amongst themselves during the VSM and discuss various questions or issues that may arise.

Communication Between the Company and the Dissident

As with a physical meeting, representatives of the company and the dissident should communicate prior to the VSM, including as to how the VSM will be conducted and the handling of requested accommodations that may be sought by the dissident. In fact, such communications are even more important in the VSM context, especially since dissidents may be suspicious of company motives since virtual platforms under a company’s control are less well-understood than physical meeting spaces and procedures. It is prudent to begin such discussions a little earlier than for physical meetings, given the novelty (for now) and complexity of the issues to be discussed. Sometimes, the parties will enter into agreements for the conduct of the meeting. As discussed more fully below, it also may make sense to involve the inspector of elections in some of these discussions, so that both parties understand the rules and mechanisms (including, while not legally required, prudent backup plans) for submitting votes.

Role of the Inspector of Elections

Since the inspector is not physically present to receive proxies from the two sides in the proxy contest (or attending shareholders), advance coordination with the inspector is needed to determine the process for submitting all proxies and ballots before the polls close. Where the parties use a commercial platform like CES, the platform is designed to take care of the communication with the inspector of elections; thus, a shareholder voting at the meeting presses a button on the website, and the platform communicates that vote to the inspector of elections. However, the shareholder seeking to vote at the

meeting itself (as opposed to prior to the meeting) still needs to obtain a legal proxy to do so and upload that to the platform in advance. Where the parties are not using a ready-made product like CES, arrangements must be made directly with the inspector of elections. The company and the dissident might agree that the inspector of elections may receive each side's master ballots by email, to be held in escrow until the polls open on the meeting date, and that the inspector of elections may accept all other proxies by email until the polls close. In any event, it is crucial that the procedures to be used are properly documented and aligned on between the parties, given the possibility of either party challenging the preliminary voting results.

Inching Toward a “Universal Ballot”?

“Attendance” at a VSM, even if remotely, permits shareholders the flexibility of voting for both management and dissident nominees. The SEC's “bona fide nominee” rule effectively means that shareholders largely vote on either the company's or the dissident's proxy card, but cannot “mix and match” votes unless they vote on a ballot that is provided at the meeting (which includes all nominees) and have the legal authority to do so. Under the corporate laws of most states, including Delaware, for a meeting held solely in a physical location, voting by ballot at the meeting requires in-person attendance by the shareholder of record or a proxy holder for such shareholder. Since it is easier to attend a VSM, more shareholders can attend and vote by ballot, which allows them to “split the ballot.” But voting by ballot at the meeting under current SEC and state law frameworks is still more cumbersome than voting by proxy due to the administrative burden and execution risks of obtaining legal proxies, especially when ownership is split across

multiple accounts. Advance registration requirements for a VSM setting may also add a timing consideration. As the United States is seeing more early “mail in” voting (which can be analogized to pre-VSM proxy voting), the question of whether VSMs will encourage a move in the opposite direction—towards more voting on “election day”—is still an open one.

One knock-on effect of this potential trend is that more “election day” voting may reduce advance visibility into the likelihood of shareholder approval or rejection of a particular matter. Having shareholders more able and likely to vote *at* an annual meeting can reduce both sides' visibility into voting results, which is particularly critical if the contest seems close and the parties are considering settlement. Of course, this uncertainty will arise only if shareholders choose to vote in meaningful numbers at the VSM itself, which remains an open question.

Conclusion

As we head towards the 2021 proxy season and beyond, whether contested VSMs will become a permanent fixture in the public company shareholder engagement landscape will depend not only on the perceptions of various stakeholders—the institutional investors, proxy advisory firms, activist investors, and the board and management itself—but also on the state of commercially-available technology and platforms to host these meetings, as well as how companies are able to manage risks. The experiences of the 2020 proxy season have shown some of the key considerations—both positive and negative—involved in hosting contested VSMs on a virtual platform. It has also shown that with a bit of diligence and care, such meetings can be handled effectively.

ENDNOTES:

¹A hybrid virtual meeting gives shareholders the option to attend and vote virtually, unlike an in-person meeting with live streaming (in which only in-person attendees can vote).

²Broadridge Financial Solutions, Virtual Shareholder Meetings: 2020 Mid-Year Facts and Figures, *available at* https://www.broadridge.com/assets/pdf/broadridge-am_00315_br_20-203401-bfs-vsm_brochure_082520.pdf.

³Broadridge Financial Solutions and PricewaterhouseCoopers LLP, ProxyPulse: 2020 Proxy Season Review, October 2020, *available at* <http://www.pwc.com/us/en/governance-insights-center/publications/assets/pwc-and-broadridge-2020-proxy-season-review.pdf>.

⁴Rutgers Center for Corporate Law and Governance Council of Institutional Investors Society for Corporate Governance, Report of the 2020 Multi-Stakeholder Working Group on Practices for Virtual Shareholder Meetings (December 10, 2020) at p.4 and Appendix C, *available at* https://cclg.rutgers.edu/wp-content/uploads/VSM-Working-Group-Report-12_10_2020.pdf.

⁵State of Delaware, Executive Department, Tenth Modification of the Declaration of a State of Emergency for the State of Delaware due to a Public Health Threat (April 6, 2020).

⁶These include New York, Massachusetts and California. See State of New York, Continuing Temporary Suspension and Modifications of Law Relating to the Disaster Emergency, Exec. Order No. 202.8 (Mar. 20, 2020); Commonwealth of Massachusetts, Order Regarding the Conduct of Shareholder Meetings by Public Companies, COVID-19 Order No. 19 (Mar. 30, 2020); Executive Dep't of State of California, Executive Order N-40-20 (Mar. 30, 2020).

⁷U.S. Securities and Exchange Commission, Staff Guidance for Conducting Shareholder Meetings in Light of COVID-19 Concerns (Updated Apr. 7, 2020).

⁸A September 2019 report from Institutional Shareholder Services (the "ISS 2019 Update") undertook to evaluate whether companies shifted to virtual-only meetings in an effort to discourage

facing shareholders in person about poor governance practices. The ISS 2019 Update concluded that there does not seem to be a link between governance structure and company meeting format, and that companies with virtual-only meetings appear no more likely to have poor governance practices. The ISS 2019 Update further observed that dissent levels on key voting items do not appear to vary materially for both physical and virtual meeting shareholders.

⁹Council of Institutional Investors et. al., Virtual and Hybrid Meetings: Concerns from 2020 Proxy Season (July 6, 2020) *available at* https://www.cii.org/files/issues_and_advocacy/correspondence/2020/Virtual%20Meetings%20Letter%20-%20Corrected%20Copy_.pdf.

¹⁰See Council of Institutional Investors, Corporate Governance Policies (Updated September 22, 2020), *available at* https://www.cii.org/files/policies/09_22_20_corp_gov_policies.pdf ("Companies incorporating virtual technology into their shareowner meeting should use it as a tool for broadening, not limiting, shareowner meeting participation. With this objective in mind, a virtual option, if used, should facilitate the opportunity for remote attendees to participate in the meeting to the same degree as in-person attendees.") See also BlackRock Investment Stewardship, Proxy Voting Guidelines for U.S. Securities effective as of January 2021, *available at* <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf> ("We expect shareholders to have a meaningful opportunity to participate in the meeting and interact with the board and management in these virtual settings; companies should facilitate open dialogue and allow shareholders to voice concerns and provide feedback without undue censorship."); State Street Global Advisors, Proxy Season Review (Q2 2020), *available at* <https://www.ssga.com/library-content/product/esg/asset-stewardship-report-q2-2020.pdf>. ("When conducting an AGM virtually, we expect companies to preserve all of the rights and opportunities afforded to shareholders in a physical meeting.")

¹¹In one extreme such assertion, for example, prominent shareholder "gadfly" activist John

Chevedden alleged in a voluntary filing with the SEC with respect to a company that management cut his remote connection as his shareholder proposal was being read. Goodyear Tire & Rubber Company Shareholder Alert, voluntary submission by John Chevedden pursuant to Rule 14a-6(g)(1) promulgated under the Securities Exchange Act of 1934, filed with the SEC on April 7, 2020.

¹²FactSet; Activist Insight.

¹³*Supra* note 1. For example, the TEGNA contested virtual meeting had over 100 attendees.

¹⁴*Supra* note 7.

¹⁵The Independent Steering Committee of Broadridge Newsletter, January 2021, Volume 16, available at <https://www.broadridge.com/resource/news-from-the-independent-steering-committee-of-broadridge#article3>.