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Lessons From the Future – The First Contested Virtual Annual Meeting

The 2020 proxy season has been anything but routine, with the COVID-19 pandemic and the resulting state shelter-in-place orders requiring many companies to make the shift from physical to virtual annual meetings, and state corporate laws being amended to allow these virtual meetings to occur. Yet we had not seen a virtual annual meeting used in a proxy contest until April 30, 2020, when shareholders of TEGNA Inc. participated in the first election contest conducted at a virtual, rather than physical, annual meeting (all of the company's twelve nominees were re-elected).

While the concept and technology have existed for several years, virtual annual meetings were slow to become widespread. The trickle that began after Delaware amended its business corporation laws to permit such meetings in 2000 gained steam after 2009, when Intel Corporation hosted the first virtual annual meeting using technology pioneered by Broadridge Financial Solutions. According to Broadridge, the number of virtual annual meetings more than doubled from 93 meetings in 2014 to 187 meetings in 2016, and there have been over 200 virtual annual meetings every year since 2017. This year, in light of the COVID-19 pandemic and lockdown requirements, most public companies are using virtual annual meetings, with a large majority doing so for the first time. Yet companies have been reluctant to use virtual meetings for contested situations, due to the extra complexity of such meetings and the unavailability of a commercial platform to do so.

Some key considerations to take into account when navigating a contested virtual meeting are set forth below:

Design and Technical Considerations. Since Broadridge and other virtual meeting platform providers have yet to develop contested virtual meeting platforms, companies may need to design and customize their own platforms with the help of third-party vendors. Key features of the virtual meeting platform 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 and for the dissident to ask questions during the meeting itself. In this regard, Delaware companies may rely on DGCL § 211(a), which provides that a company may conduct a virtual shareholder meeting "subject to such guidelines and procedures as the board of directors may adopt." Due consideration must also be given to technical difficulties that may interrupt the virtual meeting 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 virtual meeting, as has occurred in other contexts.

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Cross-Functional Planning and Support. Planning and implementing an effective contested virtual meeting 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 virtual meeting webcast cannot be overstated. Without sufficient trial and error, companies run the risk of technological failures or human error derailing the virtual meeting, which is a significant risk to run in a contested election.

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 the inspector is not physically present to receive proxies from the two sides in the 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. 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 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 virtual meeting 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 meeting 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 virtual meeting, including as to how the virtual meeting will be conducted and the handling of requested accommodations that may be sought by the dissident. 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. 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.

Is Virtual Meeting Voting a Step Toward a “Universal Ballot”? One significant benefit of virtual meetings is that they make it easier to attend the meeting by allowing shareholders to do so from their homes, without the need to travel to what is often an out-of-state location. For example, the TEGNA virtual meeting had over 100 attendees.

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 virtual meetings, a question that naturally arises is whether virtual meetings provide more opportunities than physical meetings to vote by ballot, and therefore allow shareholders to “split the ballot.” The answer, for now, is a maybe. Voting by ballot at the meeting under current SEC and state law frameworks, regardless of whether the meeting is physical or virtual, 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 virtual meeting setting may also add a timing consideration. That said, if virtual contested meetings become the norm, we may see more shareholders decide to vote by ballot.

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As with physical meetings, most contests are won or lost through advance proxy voting before the meeting starts. Given the stakes involved and the risk of challenges and litigation if technological or voting issues arise, contested virtual meetings require extra planning, including a high degree of customization, testing and coordination with the dissident and the inspector of elections. It remains to be seen whether we will have more contested virtual meetings once the COVID-19 pandemic restrictions are lifted and they become optional. TEGNA’s recent successful contested virtual meeting demonstrates that this is a practical option and not just a theoretical possibility.

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