Question 4 – July 2018 – Selected Answer 1

(A) The rescheduling of the annual shareholder's meeting was not proper because the board did not properly act, either at a director's meeting, or by way of unanimous written resolution, to authorize the rescheduling.

A Texas business corporation must have an annual shareholder's meeting. If a meeting is not held within 13 months of the previous meeting, a shareholder can get a court order requiring the board of directors to call the annual shareholder's meeting. Annual shareholder's meetings can be rescheduled for various reasons, however proper notice must be sent to each shareholder entitled to vote at that meeting as of the date of record (the date the corporation establishes who owns each share of stock for purposes of the upcoming meeting). Each such shareholder is entitled to notice before every shareholder meeting, annual or special. Directors call the shareholder's meeting. The board of directors must act as a single board, not by the separate and individual acts of each director. The Board acts by approving a board resolution duly executed at a board meeting. In leiu of a board meeting the board may act by way of a written resolution, but such resolution must be unanimous (signed by all board members). At a meeting, to have quorum, a majority of all board members must be present. If quorum is met, a majority of all directors present is sufficient for valid board action.

Here, there are three directors, only two of which (Preston and one other director) purportedly authorized the rescheduling of the annual shareholder's meeting. Although at a proper board meeting, Preston and the other director would be able to affect board action (constitution 2/3 of the board), here the two directors merely discussed over the telephone. This was not action at a proper board meeting. THerefore, the board never authorized the rescheduling. Absent a unanimous written resolution of the entire board, or a majority vote of present directors at a board meeting, the rescheduling could not have properly been authorized by the board. The rescheduling was not proper. Also, any meeting where a fundamental transaction is to be voted on must state in the notice to such meeting, that a fundamental transaction is going to be voted on. This includes a sale of subtantially all assets of the business. This requirement applies only to special shareholder's meetings, but does not apply to annual shareholder's meeting.

(B) The ten dissenting shareholders may not successfully object to the rescheduled meeting they attended, because by attending without objection and participating in the voting, such shareholders effectively waived all voidable defects in the rescheduling and noticing of the meeting.

A corporation can set a date of record, between 10 and 60 days from the date of any meeting, for the purpose of establishing shareholders who are entitled to vote at such meeting (and thus entitled to notice of such meeting). If the meeting is for the purpose of making a fundamental transaction (such as a merger or sale of substantially all assets), then the notice must be given at least 21 days in advance (21-60 days before the meeting). All holders of record as of such date are entitled to notice of the meeting. A shareholder who does not recieve such notice may object and action taken at the meeting is voidable. However, such a shareholder may waive the lack of notice by appearing at the meeting. A waiver does not occur despite the appearance of such a shareholder, as long as the shareholder appears solely to object to the meeting and does not participate in the voting. In fact, if the meeting is voidable on any grounds (as opposed to void), then the shareholders attendance and participation will bar them from complaining about the meeting.

Here, the ten shareholders were not given any notice of the rescheduled meeting (in fact no notice was given to any shareholders). Although the ten dissenting shareholders appeared at the meeting, a waiver of the lack of notice would not occur if the ten shareholders merely objected to the meeting and did not participate in the voting. In the present case, however, the ten shareholders announced that they were revoking the proxies and were going to vote their own shares. Because the shareholders did not object (and even if they did, they are apparently about to participate in the voting), the shareholders may not now complain about the rescheduled meeting.

(C) Yes, the ten shareholders have a legal right to revoke their proxies because the proxies were not irrevocable, and the shareholders attending the shareholder's meeting and voted their own shares.

A shareholder may authorize another person to vote that shareholder's shares by several means, including by written proxy. Generally, a proxy is revocable. A proxy may be made irrevocable if: (i) the proxy says it's irrevocable; and (ii) such proxy is coupled with an interest. "Coupled with an interest" may be found if the holder of the proxy has any interest in the shares apart from the proxy.

Here, Preston is a director not up for election this year, so his solicitation of the proxies was proper. As a director (and presumably also a shareholder), Preston has an interest in the corporation and its shares, apart from the proxy. Therefore, the proxy is deemed to be "coupled with an interest." However, the proxies here did not recite whether they were revocable or irrevocable--in other words, the proxy did not say that it was irrevocable. Because the proxy does not meet both requirements for irrevocability, the proxies are revocable.

A shareholder may revoke a revocable proxy by: (i) written notice to the corporation of such revocation; or (ii) by attending the shareholder's meeting and voting that shareholder's own shares.

Here, the ten dissenting shareholders attended the shareholder's meeting and announced they were revoking their proxies and will be voting their own shares. This is sufficient to revoke a revocable proxy.

Question 4 – July 2018 – Selected Answer 2

A) No, the rescheduling of the annual shareholders meeting was improper. The issue is whether an annual shareholder meeting can be rescheduled without notice without consent of the shareholders or change of bylaws.

The bylaws usually provide the date and time of the annual shareholder meeting. The annual shareholder meeting is important and mandatory, and can be demanded by any shareholder if one has not occurred within a year. The annual shareholders meeting is not moveable, especially within a short period of time, without an approved change in the bylaws or by a majority of the shareholders, and for an invalid reason.

The bylaws of Company provided that the annual shareholders meeting would occur on the first Monday in June of each year, where directors will be elected according to their staggered terms. Shortly before the meeting was to occur, the shareholders found out the reasoning of Preston's "pooling of proxies," and Preston wanted to make sure he was not voted off the board and fired, as the shareholders wanted. He talked to another director and rescheduled the meeting without any notice to the shareholders, and without any approval. The shareholders did not vote in majority or pass a unanimous written consent to change the bylaws to amend the shareholder meeting time. The shareholders did not all approve for the quick rescheduling of the meeting. The shareholders were not given notice of the newly rescheduled meeting. Not only did Preston not follow any of the required procedures, he was trying to move the meeting for a self-beneficial reason, to keep himself on the board and continue this improper self-dealing transaction.

Therefore, Preston did not properly reschedule the annual meeting.

B) The 10 dissenting shareholders can object to the rescheduled meeting if they came to the meeting to object the rescheduling, but they did not object to improper notice and stayed at the meeting, so they waived notice The issue is whether shareholders can object to a lack of notice of a rescheduled meeting by attending the rescheduled meeting.

According to the Texas Business Organizations Code, no notice is required for an annual shareholders meeting. However, if there is a special or rescheduled meeting, a notice is required, at least 10 days before the new meeting is to take place, or 21 days if there the shareholders will be voting on a fundamental change of the corporation. Shareholders may attend the newly rescheduled meeting and still not waive their lack of notice if they object when they first appear and make sure their objections are clearly recorded in the meeting minutes.

Here, the annual shareholder meeting was rescheduled, so at least a 10-day notice was required to be sent to all the shareholders. Since there was no notice, the shareholders could object and make sure that any action taken at this rescheduled meeting would be void. However, they attended the meeting and announced that they were revoking their proxies and voting their own shares. This means that they waived the lack of notice requirement and did not successfully object to the rescheduled meeting.

C) Yes, the shareholders had a legal right to revoke their proxies. The issue is whether proxies are generally revocable or irrevocable when neither is recited.

Generally, proxies can be given and are freely revocable by shareholders. Proxies automatically expire in 11 months and revocable proxies are generally favored, so that shareholders can use and have their voting rights when they want them. Proxies are irrevocable when coupled with a separate interest, such as money consideration, a separate agreement, or exchange of other stock. Proxies that are solicited improperly are also not transferred validly.

Here, the proxies were not declared revocable or irrevocable on its face, so the presumption is that it's revocable. There are no facts indicating that the ten shareholders who gave their written proxies to Preston received anything in return to make the proxies irrevocable. Furthermore, Preston solicited proxies as a non-shareholder to further and complete a self-dealing transaction, which would be a breach of his duty of loyalty as a director. He either did not let the shareholders know why he was soliciting proxies or falsely represented to them. The collection of the proxies were impermissible, making the proxies even more revocable by the shareholders. A court could hold that they were not even given to Preston in the first place because it was done improperly.

Question 4 – July 2018 – Selected Answer 3

(A) The rescheduling of the annual meeting was not proper.

The issue here is whether proper notice was given. In order to have a valid sharedholder meeting, there must be propert notice to all shareholders. For an annual meeting, there must be a date of record notice, that determine who is entitled to vote certain shares. This notice must be at least 60 days before the meeting is scheduled. Additionally, there must be propert notice of the actual date of the meeting. For annual meetings, the notice must be between 10 and 60 days. For special meetings, the notice must be between 21 and 60 days. The notice must tell the shareholders where and when the meeting will occur. Additionally, the notice must state the meeting's purpose. The stated purposes is all that can occur at the meeting.

Here, the question of whether the notice is proper is easy. There was no notice of the rescheduling, so there is no way for it be proper. There is no way to evaluate whether the notice came within the proper date ranges or complied with substantive requirements, because there was no attempt. Preston and the other directors didn't attempt to notice shareholders in any way. The directors didn't even try to e-mail the shareholders (which shareholders must specifically cosent to).

And even if they had made an attempt, the purpose of the meeting is a fundamental corporate change. The sale of all or substantiall of the assets is one of the fundamental corporate changes listed by the TBOC. In these cases, there are specialized requirements for notice. The directors must meet and agree to the change, then they must give notice to the shareholders. None of these additional actions were attempted either.

And if notice is not waived, this would make any actions at the meeting void.

(B) The 10 dissenting shareholders will likely not be able to object to the rescheduled meeting.

The issue here is whether waiver of improper notice occurred. The notice was obviously improper as not even an attempt was made to give notice. There was no mailing, no e-mail, no description of the meeting details. None of the required elements for meeting notice appear.

To waive notice, a shareholder need to attend and participate. The shareholders can properly object by putting their objection in the record or sending written notice to the secretary. Additionally, the shareholders must not attend or abstain. None of these actions occurred in this case. Instead, all of the shareholders learned of the change in date and attended the rescheduled August meeting. This likely means that the notice issues were waived.

(C) The dissenting shareholders did have the legal right to revoke their proxies.

The issue is the revocability of written proxies. The TBOC makes it clear that all proxies are revocable, even if they state to be irrevocable. The only time that a proxy becomes irrevocable is if it is accompanied by some sort of consideration or interest. One of the ways to revoke a proxy is to actually attend the meeting and vote.

So, here, the 10 dissenting shareholders were fully within their legal rights to revoke their proxies. By attending, announcing their revocation, and voting, the proxy is revoked. The shareholders may have waived notice by attending and voting, but they were more than entitled to show up and vote their shares. There was no consideration to make the proxies revocable, and even written "irrevocable" proxies are revocable.

Additionally, there may be an argument that the proxy was secured by fraud. Additionally, the director seems to be actively breaching his duty of loyalty. The duty of loyalty is an un-waivable fiduciary duty owed by each director to the corporation. The duty of loyalty requires a director to consider the corporation's interests first, not to self-deal and not to usurp corporate opportunities unless the actions are fair or permission is given by uninterested directors. Preston is attempting to sell all or substantially all of the assets to an entity that he owns. This is per se self-dealing. This is likely a violation of the duty of loyalty. All of these arguments only compound the reason why the shareholders needed to revoke their proxy and vote against the fundamental corporate change.

Finally, if for some reason, the fundamental corporate change was approved, the shareholders would likely have appraisal rights they could invoke.