The Art and Science of Board Minutes

The purpose of board minutes is to memorialize the proceedings of a meeting, in order to provide information to both directors and shareholders.

Issues

Over the last few years, board minutes have been used in litigation to both defend and attack directors in connection with accusations of impropriety or failure to fulfill fiduciary duties. It is impossible to predict how a specific set of minutes will be used in the future, so best practices set out in various articles suggest that board minutes be detailed enough to record compliance with procedural matters, to provide sufficient information to enable any absent board members to understand what occurred, and to create a record of compliance with various legal obligations.

In light of the Sarbanes-Oxley Act and other corporate governance initiatives over the past two years, many lawyers are advising that minutes reflect more completely what happened at a meeting than some companies’ minutes may have reflected in the past. The corporate governance initiatives have made it clear that directors’ board minutes reflecting director decision-making can help rebut any later charges of director malfeasance or nonfeasance. The minutes can memorialize the actions taken by the board, however, the value of being comprehensive must be counterbalanced against the dangers of creating--through seemingly extensive detail--the incorrect negative implication that matters that do not appear in the necessarily limited minutes were not discussed simply because they were not recorded. No set of minutes records every aspect of a meeting.

Another issue is whether directors should retain notes of the meeting. Opinions can be found on both sides of the issue, and each director should make his or her own decisions about taking and retaining notes of meetings after the minutes have been approved, recognizing the fact that notes may be incomplete and may not fully reflect meeting events or discussions, and are potentially discoverable in litigation involving the company, the board or the director.

There are no state statutes that directly apply to the keeping of minutes, and most company bylaws do not provide guidance. A review of legal articles suggests the following general guidelines for the drafting of minutes.

Proposed Board Minute Guidelines

- The minutes should serve as evidence of compliance with procedural matters, including: (a) date, time and place of meeting and compliance with notice requirements, (b) attendance to show compliance with quorum requirements, and (c) name and title of person presiding over meeting, attending officers, and person recording the minutes.

- The minutes should list other individuals in attendance, excused, or absent. The points at which various individuals join and leave the meeting should be noted.

- The minutes should identify each agenda item that was discussed.

- The minutes generally should reflect whether directors asked questions and discussed matters, without going into extensive detail of such discussions.
• The minutes should reflect the factors considered in making a decision as needed to serve as evidence of compliance with the duty of care, the business judgment rule or other board fiduciary duties. However, they need not be (and should not be construed to be) a comprehensive listing of each and every such factor, as opposed to an attempt to record the gist of the considerations, recognizing that minutes are inherently significantly condensed writings. These factors should be generally described, not detailed; for example, minutes might reflect that the board considered the dilutive impact of an acquisition on shareholders, but need not detail the specifics of the analysis of such consideration. In summarizing, the collective discussion of these factors, comments and questions generally would not be attributed to individual directors, as the minutes are not intended to be a verbatim transcript, but rather a summary record.

• The minutes should reflect the board's receipt of legal advice as well as reports of other advisors, including accountants, a committee, a consultant or an officer.

• All decisions and resolutions made to take action or not to take action should be recorded. Individual votes need not be recorded; however, the minutes should reflect any persons who recused themselves from a decision to show compliance with duty of loyalty, any abstentions, and, at the request of a director, any dissent.

• Privileged discussions with legal counsel should not be described, other than to note that a privileged discussion with counsel on a particular matter was held. Similarly, executive sessions should be noted, but the discussions therein should not be summarized.

• The minutes constitute the record of the meeting.

Such guidelines may be useful in memorializing the board’s understanding of the scope and content of the minutes of the board and its committees. They are, of course, general guidelines and not a substitute for considered judgment in particular circumstances. Deviation from a set of established guidelines—for example, because a member of the board or management believes additional details are warranted with respect to a specific matter—should be the subject of discussion and agreement by the board.

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Sources:

• Board Member (www.boardmember.com <http://www.boardmember.com>)
• Association of Corporate Counsel
• American Society of Corporate Secretaries
• The Directors Handbook 2005 Edition by Thomas J. Dougherty, Skadden Arps, published by CSC
• Corporate Governance Manual, published by BNA