Best Practices for Corporate Minutes

By Elizabeth C. Hinck

Claims against directors have shown the crucial role corporate minutes can play in determining whether directors met their fiduciary obligations. Good minutes reflecting a sound deliberative process can help a court dismiss a lawsuit alleging breach. Poor minute keeping can result in protracted litigation to determine the care that went into a board’s decision to act.

For example, in shareholder litigation over the proposed sale of Netsmart Technologies to a private equity buyer, the Delaware Court of Chancery viewed the absence of minutes supporting key aspects of the board’s decision-making process to be a critical problem when evaluating their actions.1 Vice Chancellor Strine chided the board, noting that its minutes practices were, “to state the obvious, not confidence-inspiring.”2

Also, given that activist shareholders may gain access to board minutes under most state corporation codes,3 companies should take care to keep an accurate, precise and complete record of director decision making and oversight. When the minutes of meetings come under the microscope, directors will want to know these records reflect the care, consideration and hard work that went into their actions.

Despite the clear and convincing benefits of good minutes, then, why does the record of so many board and committee meetings fall short? The answer may lie in the lack of a clear understanding by boards and their corporate secretaries of some fundamental best practices. Consider these suggestions for keeping good corporate minutes.

Be Complete and Precise About Actions and Deliberations

Most simply, minutes are the best record of actions and deliberations of a board or committee. Courts and regulators frequently look to minutes as the most reliable source for evaluating what directors did or did not do. For example, in Netsmart, the court considered the minutes to be a better record than a description in a proxy statement or a director’s testimony.4

Minutes need to reflect the basics, such as compliance with procedural requirements, identification of the directors present, the matters considered and the actions taken or approved, as well as other decisions reached. A checklist of some of the basic elements that should be identified for each meeting is provided below under “Be Prepared.”

Ensuring that minutes are complete and precise in describing each action taken and the scope of approval or authorization can provide clarity in the short-term (such as determining which officers are authorized to sign a loan agreement at closing) and down the road (such as when searching for specific authorization of all stock issuances in pre-IPO due diligence).

Take Care to Show Care

High-profile shareholder litigation, from Smith v. Van Gorkom,5 to the Walt Disney Co. Derivative Litigation,6 reveals that minutes matter when evaluating whether director fiduciary duties have been met in making specific business decisions. The minutes of Disney’s board and compensation committee were primary evidence not only of the actions taken on Disney executive Michael Ovitz’s employment package, but also of the quality of the deliberative process: what documents were reviewed, what questions were asked, what expert reports were heard, what information was disclosed and how much time was spent? Although the Delaware court found that the Disney directors were not liable for breach of fiduciary duty for their actions, the board minutes offered little help to the defendants and failed to prevent a lengthy and costly trial.

Minutes also may reflect the extent to which a board or committee exercised diligent oversight. The court in In re Caremark International Inc. Derivative Litigation,7 noted the significance of a

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record showing active and informed consideration by the Caremark directors when concluding that the directors satisfied their duty of care, despite their failure to detect wrongdoing.

Active, attentive, informed and independent-minded service remains at the core of fiduciary requirements. Minutes cannot reflect these crucial behaviors where they do not occur. But when directors act in good faith, with care and loyalty, the minutes should be written carefully to demonstrate that fact.

Reflect the Deliberative Process with Appropriate Details

In order to best reflect a careful deliberative process, consider these examples:

Scope of discussion. Capture the substance of inquiry and response without taking a “who said what” approach. For example, the minutes could reflect that “members of the audit committee then asked specific questions, and the CFO responded in detail, concerning the assumptions and estimates made in preparing the financial statements.”

Time devoted to discussion. Consider showing the real time devoted to agenda items in the minutes. At trial before the Delaware Chancery Court, the plaintiffs in the Disney case pointed out that important items were referred to cursorily in the minutes, implying that little time was spent on those items. Consider saying things like, “the board then discussed this matter at length” or even referring to the amount of time spent, to overcome this problem.

Information and documents presented and considered. Time devoted to a topic or depth of discussion may not be the key to understanding the board’s care. Sometimes, it is the quality of the information provided and presented to the board that makes detailed discussion and Q&A unnecessary. In these circumstances, the full meeting record should be clear as to information and material presented to the board and if documents were provided for advance consideration. Make sure the record reflects that directors had an adequate opportunity to review key documents before acting on them.

Incorporation by reference. If possible, be specific as to any documents considered by the board or committee, referring to the title and the date, without attaching the documents into the minute book itself. The company should maintain a complete but usually separate file of supporting documentation. Keeping a clear record (in the minutes or otherwise) of the documents delivered, as well as the timing of delivery, can be instrumental in showing that the directors were fully informed. In addition, where a knowledgeable expert further explains documents such as key employment or transaction agreements, the minutes should be clear on this fact. If significant discussions or actions preceded a meeting but formed an essential part of the ultimate actions taken or decisions made, consider making an appropriate reference to these in the minutes.

Reliance on advisors. Reflect participation by advisors (legal, financial, accounting, tax, compensation consultants or other professionals) and whether the board or committee relied upon the advisor’s report, advice or opinion.

Do not Delay or Short-Cut Review

Minutes should be drafted and circulated to directors as soon as possible after the meeting itself. In Netsmart, the fact that minutes were not prepared until shareholder litigation had been commenced, and then were prepared all at once, seriously undermined the Delaware court’s confidence in the record.

Prompt consideration of the minutes by directors and other participants will ensure that the meeting remains fresh in everyone’s mind and will minimize potential uncertainty over what occurred. Explain to directors regularly how essential careful review of draft minutes is to their fiduciary obligations and to avoiding liability. Review of minutes by directors must not be a last-minute, perfunctory process.

Be Prepared

It is nearly impossible for a meeting secretary to keep a good record of board or committee proceedings without plenty of advance preparation. Proposed resolutions for anticipated actions should be drafted and circulated to the board or committee before the meeting. In addition, the secretary can be considerably more effective when using a checklist or template to record key information, such as:
• Date and location
• Whether the meeting is a regular, organizational or special meeting
• Whether the meeting is held by telephone conference call or in person
• Beginning and ending time
• Names of attendees and those absent
• Acting chairman and secretary
• Names of presenters or other participants
• Headings indicating general topic under discussion (which may be taken from the agenda)
• Indication of action taken (action terms to consider: discussed, agreed, approved, authorized, deferred, noted receipt of)
• Comings and goings of members or participants
• Resolutions adopted
• References to briefing materials disseminated in advance or material discussed or presented at the meeting by specific date and title.

Give Committee and Subsidiary Minutes Due Attention

The Disney and Netsmart cases both demonstrated clearly that committee minutes are just as important as full board minutes. Minutes of major board committees (such as audit, compensation, governance, nominating or other special independent committees) must be given as much care and attention as those of the full board.

Increasingly, directors are asking to see the minutes of committees on which they do not serve, due to the significant role these committees undertake on behalf of the board. Routinely providing minutes of audit, compensation and governance committees to all directors is a best practice, allowing the full board to understand and evaluate the activity, deliberations and performance of these critical committees.

Compensation committees should be especially careful to document in the minutes the steps taken to properly inform themselves when fixing the compensation of senior executives. For example, make specific reference to reports or presentations of compensation committee consultants, review of “tally sheets” setting forth all the elements of an executive’s compensation or explanations by experts of change in control provisions in employment agreements.

Governance reforms since the Sarbanes-Oxley Act of 2002 also have imposed more specific duties on the audit committees of public companies. These rules affect the content of the minutes of audit committees. In particular, audit committee minutes should demonstrate that the audit committee addressed each of the responsibilities required under its charter, as well as an annual review of the charter itself. While no one recommends that audit committees take a “check the box” approach to their duties, these committees should have a clear meeting checklist to assess key items covered so that the minutes can accurately reflect this fact. Audit committee minutes of US public companies are becoming increasingly detailed to reflect the significant oversight role these committees perform.

Board minutes of subsidiaries should also be given careful consideration in many cases. Even where subsidiaries are wholly-owned, cutting corners or being less than punctilious in memorializing actions and deliberations can have disastrous results.

Seek Clarification When Needed

In order to be accurate, the meeting secretary may need to seek clarification of points of discussion or action during the meeting itself. While a corporate secretary may be reluctant to interrupt the discussion, it is in the best interest of all concerned that they do so if there is a question as to what has been decided or approved. In many cases, if the secretary is not sure, at least some of the directors are unsure also.

Write Well and Edit

Principles of good drafting applicable to contracts or other legal writing also apply to drafting minutes. Use concise, unambiguous language to avoid having a court look to other sources for
clarification, explanation or definition. Take care to ensure that the minutes are accurate and complete, consistent in language and approach and free from unnecessary information or potential traps. Carefully review and edit the minutes to eradicate stupid mistakes (such as indicating the presence of an absent director or vice versa) that call the entire record into question.

Strive to use language that is as neutral as possible, and stay away from adjectives or adverbs reflecting your own value judgments. Avoid confusion by using “standard English” (all words used in their ordinary and normal sense).*

**Set Clear Document Retention Policies**

Companies should set clear document retention policies for meeting notes, board packages and related documents, and directors should be fully informed (and periodically reminded) of these policies. Notes of individual directors or other meeting attendees should not survive once final minutes have been approved. The best practice for many companies is either to have only the meeting secretary keep notes or to collect and destroy the notes of meeting participants at the end of the meeting. Once the minutes have been reviewed and approved by the board or committee, all drafts and notes of the meeting secretary should be destroyed, as well. Generally, the final minutes (as kept in the official minute book), together with a clean copy of the official board package and any other materials specifically referred to in the minutes, should be the only permanent record maintained by the company.

**Don’t Record Meetings or Transcribe “Who Said What”**

Minutes should summarize, rather than transcribe verbatim, what occurred at a board or committee meeting. Minutes generally should not reflect who said what, and, instead, should more generically refer to discussion between directors and other participants in the meeting. Audio or video taping a meeting is a particularly bad idea. The presence of recording equipment may have the tendency to chill a healthy exchange of information. In addition, comments made in the ordinary give-and-take of a board meeting may prove embarrassing or harmful later when taken out of context.

**Build Board Meetings into Disclosure Controls and Procedures**

US public companies are required to report on SEC Form 8-K within four business days specific events, including entry into material agreements (such as M&A agreements), new and amended executive compensation arrangements and conclusions about asset impairments, restatements and restructurings. Board or committee action with respect to these matters may trigger the four-day period. As a result, minutes must be drafted to distinguish between discussions about possible actions and the approval of the action itself. In addition, the lesson of the SEC’s 1992 enforcement action against Caterpillar is that minutes need to be carefully considered in the context of securities filings, particularly in connection with MD&A disclosure. The Caterpillar decision noted discrepancies between the company’s board minutes—which showed that the board was apprised of a volatile situation involving a major foreign subsidiary—and its MD&A disclosure—which was silent on the subject.

**Special Situations**

**Conflicts of interest.** A director has a duty to put the interests of the corporation above his or her own in all matters relating to the corporation. In a transaction involving a conflict between the director’s personal interests and those of the corporation, the duty of loyalty requires the director to act in a manner that is “entirely fair” to the corporation. If the conflict-of-interest transaction has been approved, after full disclosure, by a disinterested decision-making body (such as the disinterested directors or shareholders), Delaware courts have held that the burden of proof shifts. Instead of the director in question having to prove that the transaction or taking was fair, the challenging party must prove that it was not fair. For this reason, minutes reflecting approval of a conflict-of-interest transaction must be drafted with special care and attention to memorialize formal details—such as the conflicted director’s recusal from discussion and abstention from voting on the matter—observed in the process.
Privileged discussions. Meeting discussions with legal counsel may be privileged. The details of these discussions should not be memorialized in the minutes due to the fact that minutes are readily shared with third parties. Rather, the minutes should indicate that the board or committee participated in a privileged discussion with counsel, with only the most general reference to the subject matter of the discussion.

Executive sessions. The NYSE requires non-management directors to meet in regularly scheduled executive session in which management is not present. Executive sessions are intended to serve as a vital “safety valve” for open dialogue among independent directors. Keeping complete minutes of these discussions is unnecessary and inconsistent with their purpose. However, a record should be kept that an executive session was held, who attended it and when, where and how long the meeting was held. The chair of these sessions should also report to the company’s secretary if any actions were approved as well as a brief list of items discussed.

Informal discussions. In Netsmart, a critical decision was made at a meeting later dubbed “informal” (as no minutes were prepared). Significant discussions and decisions should occur at formal meetings and recorded in the minutes. If important conversations among directors, or between directors and their advisors, occur outside of a formal meeting, however, consider whether these discussions can be referred to in the minutes in a manner that provides an appropriate understanding of the directors’ actions or decisions at the meeting.

Conclusion

Excellence in keeping corporate minutes not only ensures that an accurate record of corporate actions exists, it actually improves corporate governance and helps ensure that governance is linked to disclosure controls and procedures. The process of producing an accurate, precise and complete record of director decision-making and oversight imposes a discipline on the process that drives better preparation, engagement and careful consideration every step of the way.

Keeping corporate minutes is far more than a ministerial function. It is essential that the function be overseen and guided by someone with the experience, education and position to appreciate best practices and the extent to which excellence in corporate minutes can foster excellence in corporate governance.

Notes
1. See In re Netsmart Technologies, Inc. Shareholder Litigation, 924 A.2d 171 (Del. Ch. 2007). In Netsmart, proving adequacy of the deliberative process was made difficult by poor minute keeping. The meeting at which the directors claimed to have actually decided to sell was “informal” and never memorialized in minutes. And, minutes for the 10 meetings at which directors formally considered the transaction over a period of four months were not approved until after shareholders filed litigation.
2. Id. at 191.
4. See 924 A. 2d at 187. In Netsmart, no minutes existed for special committee deliberations that were described in the company’s proxy statement. The court noted, “as such, one cannot determine who was present at this meeting or what specifically was said or done.”
5. 488 A.2d 858 (Del. 1985).
8. In his article “Legal Usage in Drafting Corporate Resolutions,” The Practical Lawyer (Sept. 2002), Ken Adams gives numerous suggestions and examples for removing legalisms and archaic terms to enhance the clarity of corporate actions.