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Applying Board Minute & Meeting Books Best Practices to Avoid Potential Liability

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 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 SOX and other corporate governance initiatives, minutes increasingly reflect more of what happened at board or committee meetings than in the past. Corporate governance initiatives have made it clear that directors' board minutes accurately reflecting director decision-making can help rebut any later charges of director malfeasance or nonfeasance. Minutes can and should memorialize the board's activities. But the value of increased comprehensiveness still has to be counterbalanced against the dangers of creating (through extensive detail) the incorrect negative implication that matters that do not appear in the necessarily limited form of minutes were not discussed. No set of minutes records every aspect of a meeting.

Proposed Board Minute Guidelines

- The minutes should demonstrate 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 in general terms.
- 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 nature of factors considered in making a decision needed to show compliance with the duty of care, the business judgment rule or other board fiduciary duties, though they need not be (and should not be construed to be) a comprehensive listing of each and every such factor. They should be considered an attempt to record the gist of the considerations, recognizing that minutes are inherently significantly condensed writings. Factors considered should be described generally, not in detail. For example, minutes may reflect that the board considered the accretive or dilutive impact of an acquisition on shareholder equity, but need not detail the specifics of analysis of such consideration. In summarizing the collective discussion of these factors, comments and questions usually would not be attributed to

individual directors, because the minutes are not intended to be a verbatim transcript but rather a summary record.

- The minutes should reflect the board's consideration of the advice, opinion, or report of advisors, including lawyers, accountants, a committee, or an officer.
- All decisions/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 directors who recused themselves from a decision (whether or not required by the 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. The discussions therein need not be detailed.
- The minutes constitute the record of the meeting.

Guidelines like these may be useful, but they are, of course, not a substitute for considered judgment in particular circumstances. Variation from a set of guidelines, once established — because, for example, 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 consensus of the board.

[Excerpted from *The Directors' Handbook (2009)* by Thomas J. Dougherty.]

Click [here](#) to order or for more information about the book.

Additionally, companies should ensure that board minutes are readily accessible. Paper minutes can be lost, destroyed, or rendered unreadable over time. As a result, more and more companies are choosing to scan their minute books and keep them in electronic format so that they can be accessible from any location and maintained indefinitely in perfect form.

Click [here](#) to request more information about how CSC can scan and maintain your company's minute books in a safe, secure digital format.

Finally, CSC also provides CSC[®] Virtual Boardroom[®], an online platform that facilitates board communications and meeting preparation. Board members use CSC Virtual Boardroom to access meeting documents and calendar upcoming events. CSC Virtual Boardroom enables companies to eliminate the time and cost of distributing paper copies of documents for board meetings and provides document retention so that documents can be retained securely for as long as they are needed.

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