

# Corporate Minutes: A Guide for the Corporate Secretary



October 2022

# ABOUT THE SOCIETY

**The Society for Corporate Governance is an association of corporate secretaries and governance professionals.**

Founded in 1946, the Society for Corporate Governance, Inc. is a non-profit organization (Section 501(c)(6)) comprised of more than 3,600 corporate and assistant secretaries, in-house counsel, outside counsel, and other governance professionals in governance, legal, ESG/sustainability, and compliance functions at public, private, and not-for-profit organizations. Members are responsible for supporting their board of directors and executive management with respect to matters such as board practices; compliance, regulatory, and legal matters; investor communications and engagement; ESG/sustainability matters and disclosures; and subsidiary management.

The Society seeks to be a positive force for responsible corporate governance, providing news, research and "best practice" advice and professional development and education through seminars and conferences. The Society is administered by a national staff located in New York City, by members who serve on national board and standing committees, and through the member activities of local chapters.

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## ACKNOWLEDGMENT

October 2022

Dear Reader:

The Society's Corporate Practices Committee is pleased to issue an updated edition of *Corporate Minutes: A Guide for the Corporate Secretary*. The Committee would like to thank the following members who contributed to this update:

Jean Hugueneel, Pfizer, Inc.  
Caitlin Kobialka, Booking Holdings Inc.  
Madelyn Purcell, Pfizer, Inc.

Sincerely,  
Suzanne Rolon  
Chair, Corporate Practices Committee

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## WHY ARE MINUTES NECESSARY?

### Corporate Function

Corporate minutes serve many purposes, including:

- Providing an official record of discussions, decisions reached, and actions taken by the organization's governing body;
- Serving as a resource for identifying or communicating to outside parties the fact that a particular action was taken by the board;
- Confirming a record of director diligence in addressing particular matters, which could be in the context of a dispute over directors' adherence to their fiduciary duties;
- Providing evidence of the corporate existence of the organization; and
- Preserving company history.

### Statutory Requirements

Corporate minutes are often required by statute.<sup>1</sup> In the absence of a statutory requirement, the lack of written minutes does not affect the validity of the board or committee action taken. But as a practical matter, minutes are almost always prepared and permanently retained.

### Key Tips

- Minutes are legally required and confirm evidence of corporate existence.
- Minutes provide an official record of actions taken.

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## PREPARING THE MINUTES

### Points To Remember

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<sup>1</sup> 8 Del. C. §142 (a). See also §22: "Any records maintained by a corporation in the regular course of business, including its stock ledger, books of account, and minute books, may be kept on, or by means of, or be in the form of, any information storage device, or method provided that the records so kept can be converted into clearly legible paper form within a reasonable time." (Italics added). The Model Business Corporation Act provides that: "A corporation shall keep as permanent records minutes of all meetings of its shareholders and board of directors" and "A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time." In addition, many state statutes require, directly or indirectly, that minutes be kept. Delaware General Corporation Law, for example, provides in part that: "One of the officers [of a Delaware corporation] shall have the duty to record the proceedings of the meetings of the stockholders and directors in a book to be kept for that purpose." Model Business Corporation Act, § 16.01

- It is important that minutes accurately reflect items presented at each meeting and the actions taken. Minutes also may be used to infer what actions were not taken at the meeting and what matters were not considered. For this reason, the axiom of "less is more" does not necessarily apply.
- Minutes that include information about the way directors exercised their business judgment can often be helpful when that judgment is questioned. Delaware law presumes that directors act honestly, on an informed basis, and in the best interests of the company in making a business decision. However, that presumption can be rebutted in several ways, including by showing that the board acted without informing itself of all reasonably available, material information. The minutes create an opportunity to demonstrate the completeness of the information considered by the board and thoroughness of the decision-making process.
- Corporate secretaries should strive to ensure that minutes clearly set forth what discussions or other matters occurred during the meeting and actions taken on particular matters (if any). If documents are incorporated by reference or attached to the minutes, identify them in the minutes. The minutes should note any limitations placed on the action taken or authority granted.

## **Outline the Minutes**

While there is little statutory or regulatory guidance on what should be included in corporate minutes or the form minutes should take, in practice, minutes typically cover each item set forth on the board or committee meeting agenda.<sup>2</sup> They also typically cover any significant or substantive discussion of other items related to the performance of the board's or committee's duties.

In preparing for an upcoming meeting, the corporate secretary may refer to the meeting agenda to prepare an outline, or "skeleton," of the board or committee minutes.<sup>3</sup> The skeleton can be very brief, or it can include language indicating what information was provided to directors in advance that describes a proposed action, with blank space for summaries of the discussion and the final action. If the agenda item is recurring, it can be drafted in advance as a placeholder.

## **A Minutes Checklist**

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<sup>2</sup> Case law guidance on the types of matters to include in minutes to protect directors is discussed below.

<sup>3</sup> It is usually the corporate secretary's responsibility to provide briefing materials to directors for their review. Sometimes it may be necessary for the corporate secretary to provide written documents at the meeting, and to provide copies to any directors participating remotely. Sending copies of proposed resolutions to directors in advance assists the development of a common understanding of proposals under consideration and can prove useful to the corporate secretary in drafting the minutes. The written information supporting the proposal, filed as a supplement to the minutes, also can help document the matters considered by the board in reaching its decision.

Corporate secretaries should include the following specific items in the minutes:

- Date and location of the meeting
- Whether the meeting is a regular or special meeting
- Recital of notice having been given or waived
- Meeting beginning time (some companies also note the meeting ending time)
- Attendance by directors and those directors not in attendance
- Recital of quorum being present
- Names of person chairing the meeting and the person taking minutes
- Attendance by management, consultants, or other guests (names and titles)
- Indication of action taken (e.g., discussed, approved, deferred, noted receipt of information, etc.)
- Comings and goings of directors after the start of the meeting (e.g., if a vote is taken, or a sensitive issue is discussed while one or more directors are absent)
- Resolutions adopted
- Reference to briefing materials either distributed in advance of the meeting or presented at the meeting
- Whether executive sessions were held

### **Key Tips**

- Because minutes are the official record of what actions were taken, and not taken, at the meeting, it is important that minutes contain an accurate account of key discussions and resolutions.
- Once the minutes are drafted, prior to distribution for comment, review the checklist above to confirm each item is included, if relevant.
- Once the minutes have been approved, all draft documents should be discarded in compliance with the organization's approved document retention policy.

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## **TAKING THE MINUTES**

### **Methodology**

Corporate minutes are NOT a transcript of the meeting. Producing a verbatim transcript or recording a board meeting are not recommended practices. Rather, the minutes are an account of what occurred at a particular meeting of a board or a committee, not a recitation of everything said or done.

Many corporate secretaries find it efficient to edit and add to skeleton (or outlined)



minutes prepared before the meeting.

Corporate secretaries can take minutes electronically or by longhand. Keep in mind that data recorded on a computer can be retrieved in litigation and used to impeach directors' testimony or even the final minutes themselves. This can be a significant risk, since the wording of notes prepared during the meeting may differ significantly from the wording of final minutes, which are given considerably more thought and review. (Of course, some also refrain from using computers during the meeting because of the keyboard noise distraction.) Each corporate secretary should adopt the method most comfortable and useful for them and that facilitates compliance with the organization's document retention policy.

Regardless of the method used, it is important to remember that any notes of the meeting may be discoverable in litigation. Avoid writing personal or irrelevant remarks on meeting notes and remember that poor handwriting or sloppy shorthand will not exempt notes from discovery. Document retention practices (discussed more fully below) should cover the routine retention and disposal of any notes taken by the corporate secretary, as well as any notes made by individual directors, including marginal notations on briefing materials or other documents distributed at the meeting.

Deleting an electronic document will not remove it permanently from a hard drive nor erase the metadata which, along with the use of Google Docs, shows the authors, editors, and reviewers of a particular document, and the work done by each of them on such document. Accordingly, special consideration should be given to the retention of documents saved in electronic form.

## **Director Notes**

While it is not the primary focus of this publication, director note-taking is a matter of concern to many corporate secretaries. Ideally, directors should be reminded that the corporate secretary will memorialize the meeting and advised to refrain from taking their own notes. They should be reminded that any notes they take belong to the company, and that all such notes will be collected at the end of meetings. Individual directors' records do not reflect the official acts of the company and if there is more than one official set of the company's records, the company cannot properly control their retention and/or limit their disclosure to persons entitled to review them. The failure to control documents properly and to limit their disclosure could result in the inadvertent waiver of privilege and privacy rights. As a practical matter, however, it is difficult to prevent directors from taking notes, and there are legitimate reasons why a director may choose to do so.

## **Dealing with Issues of Content**

The corporate secretary has the responsibility for deciding what to record and what parts of the board or committee meeting discussions are relevant. This is paramount when a significant transaction, such as a merger, is considered at the meeting, or when any other matter addressed at the meeting becomes the subject of dispute or litigation. In cases like these, the corporate secretary must capture the substance of the discussions, as well as key words in formulating motions (if resolutions have not been drafted in advance of the meeting). Particularly in an era of ever-increasing litigation and shareholder activism, the corporate secretary must always be alert to the risks associated with board action.

The corporate secretary should have a copy of any material distributed for consideration at the meeting (whether it was distributed before or during the meeting) for later destruction or filing with the minutes.

Another factor to appreciate, especially in crisis situations, is the difficulty of keeping track of all matters being discussed at the meeting and various directors' views on these matters. Side conversations among directors may compound the challenge. Depending on the circumstances, it may be advisable for the corporate secretary to check with other meeting attendees as to what was stated, and it may be wise to consider more than one attendee's impressions. For example, the corporate secretary may talk with the chief financial officer when drafting the financial report or with the chief human resources officer when drafting compensation resolutions. All notes taken at the meeting should be provided to the corporate secretary after the meeting so that the corporate secretary can synthesize the notes into formal minutes and ensure that the notes are retained or disposed of in accordance with the organization's policy.

## **Exposure Risk**

The corporate secretary should always keep in mind that minutes are generally discoverable in litigation and to regulators when asked, or if a company is the subject of an enforcement action. For this reason, minutes must be accurate and complete and contain no unnecessary information, but also must correspond to an evidentiary record appropriate for public disclosure. Care should be taken to edit minutes to make certain no future traps or waivers of privileges or privacy rights are created. If possible, the corporate secretary should consider writing minutes to exclude privileged matters, such as the advice of counsel regarding litigation. The Caterpillar enforcement action (see below) provides an example of how minutes need to be considered carefully in the context of securities filings, particularly in terms of consistency with the Management Discussion and Analysis (MD&A) in periodic filings on Form 10-Q, Form 10-K, or the

Annual Report.

*In March 1992, Caterpillar Inc. entered into a consent decree with the Securities and Exchange Commission (SEC) in which the company agreed to comply with the SEC's MD&A requirements and to establish new procedures to prevent future violations.<sup>4</sup>*

*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 that could have "significant [negative] impact" on Caterpillar's "overall results for 1990"-- and the company's MD&A discussion in its 1989 Form 10-K filing, which failed to focus on the company's potential problems with its subsidiary. A review of board minutes should be incorporated in the due diligence process for preparing a company's MD&A disclosure and other securities filings.*

What is not recorded in the minutes can also present an exposure risk. Just because something is not included in the minutes does not mean it did not happen or cannot be discovered in litigation. For example, when someone says, "This is off the record" or "Don't put that in the minutes," the corporate secretary should--subject to ethical obligations--generally keep the remark out of the minutes. However, that does not mean that it was not said or that a meeting attendee will not remember it and be required to testify that the statement was made. In such case, the fact that a meeting attendee asked for a statement to be omitted from the minutes may demonstrate their knowledge that the statement was problematic. Accordingly, corporate secretaries should be prepared to explain to officers and directors that off-the-record requests should be made only about matters that are irrelevant—not about comments that are germane to the board's or committee's business.

In a legal proceeding, the minutes are ordinarily considered prima facie evidence of what occurred at the meeting. The more incomplete or ambiguous the minutes, the broader the extrinsic evidence a court will likely allow to clarify the matter or to explain the intent of a motion or other action. For example, oral testimony concerning the circumstances of a meeting may be used to explain the purpose of a recorded transaction and, if the minutes are erroneous, the presumption that the minutes are correct may be rebutted.

### **Choosing Words Carefully**

Minutes serve to confirm participants' common perceptions of events that took place at

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<sup>4</sup> *In re Caterpillar, Inc.*, SEC Rel. No. 34-30532, AAER 363 (1992).

the meeting. The evidentiary function of minutes is particularly well-served by simple, unambiguous language, without color or unnecessary adjectives. Descriptive terms should not be value judgments. It is usually advisable to avoid internal company or industry terminology or jargon unless it is essential to accuracy. Acronyms, if used in the minutes, should be defined so minutes can be understood later. See the following for additional considerations about phrasing and meaning in minutes.

### *How You Say It Can Make A Difference*

*Consider the nuances and risks of the phrasings in Example A and Example B*

A) "The chair noted that the committee had not been diligent in its efforts to ... "

B) "The chair requested each member of the committee to increase its efforts to ... "

*Consider the clarity factor in Example A and Example B*

A) "The board approved the proposed changes in authority."

B) "The board reviewed the company's Delegation of Authority Policy, dated January 10, 2013, a copy of which was previously distributed. Following a discussion, upon motion duly made and seconded, it was unanimously agreed that Mr. Jim Smith, treasurer of the company, would be included ... "

*Remember to use clear and concise language when drafting minutes.*

## **Documenting Executive Sessions**

When directors meet in executive session, without any members of management present, preparing minutes can be challenging. Depending on board culture, one of the following scenarios might be useful.

If no particular topics were scheduled for the executive session, the corporate secretary may check with the director who led the session and ask if there were items discussed that should be recorded. If not, the minutes might read:

*All of the members of management left the meeting and the directors met in a private session. No action was taken.*

If the director thinks it is important that a topic be noted, the minutes might read:

*All of the members of management left the meeting and the directors met in a private session. Among other things, the directors discussed the CEO 's performance metrics and the board succession planning process. No action was taken.*

If an action was taken during the executive session, the corporate secretary will need to

talk with the presiding director about what transpired in the session in greater detail so that the resolution can be accurately recorded.

## **Key Tips**

- Notes should be taken with care. Avoid writing irrelevant notations and personal reminders.
- Minutes should not be a word-for-word transcript but should incorporate sufficient facts to show evidence of thorough discussions and should contain concise and accurate resolutions.
- Remember that how you say it can make a difference.

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## **STYLE**

### **Consistency vs. Flexibility**

The style of minutes is determined by the personal preferences of the board chair, the corporate secretary, other senior officers of the company, and the directors, as well as by company tradition. Minute templates may be provided by the company's outside counsel and the form of certain resolutions may accommodate requirements of external stakeholders, such as financial institutions. The style of minutes should remain consistent because style changes might inadvertently prompt inaccurate perceptions or conclusions about what transpired at a particular meeting. Following a consistent approach from one set of minutes to the next—at least with respect to each committee or board, if not within the entire corporate family—will minimize questions as to why certain sets of minutes are more detailed than others, and it will avert confusion or skepticism arising from any stylistic variations.

### **Special Circumstances**

Although it is good practice for minutes to be consistent, special circumstances such as an impending merger or acquisition or the approval of stock buyback plans may necessitate greater detail to demonstrate application of the business judgment rule and that directors met their duty of care. In these circumstances, reference to the exercise of judgment can be included in the minutes expressly. However, the corporate secretary should state facts rather than conclusions based on the facts. For instance, the minutes may identify categories of facts considered by the board and its decision that the specified action would be the most prudent way to proceed.

There is case law guidance on the types of matters to include in minutes to protect

directors. Much of this guidance comes from cases arising out of takeover situations; however, this guidance may be relevant in many other circumstances. For example, in light of the Delaware Supreme Court's decision in *Smith v. Van Gorkom*,<sup>5</sup> in a corporate control battle, it is best practice for minutes to include:

- An indication that the board consulted with members of senior management and other knowledgeable individuals, particularly in-house counsel;
- An indication that the board consulted with experts, such as an investment banker, together with the report of the financial adviser and any inquiry or discussions regarding the banker's report;
- An indication of other studies made and the fact that such studies were distributed to directors with ample time for review and discussion;
- An indication that documents were considered and notation of the fact that such documents were distributed to directors with adequate time for review and discussion;
- An indication of efforts made by the board and by experts retained by the board to find the highest stockholder value (if, indeed, a sale is considered appropriate and in best interests of the company and its stockholders); and
- An indication that the board acted in a business-like manner and that ample time was given for the consideration of the offer or all alternatives, in addition to all reports and documents.

Again, many of these topics need to be considered by the board (or a committee), and documented in the minutes, in areas other than merger and acquisition activity.

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## CHOOSING THE FORM OF MINUTES

### Long-Form and Short-Form Meeting Minutes

In general, there are two alternative styles for writing minutes—the abbreviated or short-form style, and the narrative, detailed, or long-form style. Historically, the preference in writing minutes has been for an abbreviated style. However, in the context of litigation, the long-form style may help demonstrate that the board acted appropriately and is therefore eligible for “business judgment rule” protection. The following chart identifies some of the advantages and disadvantages of short- vs. long-form minutes.

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<sup>5</sup>*Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

## Short-Form Minutes

### *Advantages*

- Concise, easy way to determine action taken by the board or committee
- Helps avoid ambiguity
- Presents less language to be misconstrued in a litigation context

### *Disadvantages*

- Does not spell out reasoning for action taken by the board or committee
- Does not demonstrate the board's diligence in dealing with specific matters
- Case law or regulators may require more detail for certain kinds of transactions

## Long-Form Minutes

### *Advantages*

- Describes reasons the board has taken an action and provides evidence of the board's diligence in dealing with specific matters
- Presents clearer picture of total deliberation process
- Forms basis to defend against litigation for material transactions

### *Disadvantages*

- Provides greater opportunity for misinterpretation of language, particularly in a litigation context
- May include extraneous information which may be confusing
- Not as direct in explaining action taken by the board or committee

## The Hybrid Form

The corporate secretary has flexibility to select the style and form of minutes that may be appropriate in a particular instance. When taking minutes of a meeting where directors are considering matters that are material to the company or that may be challenged, it could be useful to build a more robust record of the board's diligence by including more detail in the minutes. But at the same time, the long-form minutes can pose the challenges described above, so one could use a "hybrid" form -- fuller disclosure of the action taken on important items, and less disclosure on routine items.

Of course, one risk in this approach is that a matter that may seem routine at the time can become significant in hindsight, and the contrast as to how different matters are treated in the same set of minutes could prove disadvantageous. Thus, careful consideration needs to be given to the style of the minutes in the context of the matters addressed by the board or committee. The corporate secretary should seek to use a "Goldilocks" approach -- not too long and not too short, but "just right."

## Key Tips

- Be consistent in the style and format of your minutes.
- Write minutes using plain English.

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## WRITING RESOLUTIONS

### When are Resolutions Required?

The purpose of a properly drafted resolution is to accurately and completely describe a board action. A clear, concise statement of the action of the board of directors in a formal resolution minimizes ambiguities, but the adoption of a formal resolution is not the only way to bind the corporation or to give authority to bind the corporation. Evidence can be introduced that the board took the necessary action even if no formal resolution was recorded in the minutes. Also, if the corporate secretary is convinced that a formal resolution will not be required, they may indicate in the minutes that after discussion of the matter, the directors took a certain action. However, while there are no absolute rules, formal resolutions are generally considered to be either required or appropriate with respect to the following matters:

- When required by statute, charter, or the company's by-laws;
- When the corporate secretary is required to furnish evidence to an outside party that the board or appropriate committee of the board performed a certain act;
- Establishment of board committees and their authority and responsibilities;
- Dividend declarations;
- Matters in excess of management's authority, such as real estate matters, mergers or acquisitions, or large capital transactions;
- Matters that pertain to an amendment of the corporate organizational documents;
- A third-party request that the action taken be evidenced by a formal resolution.

Resolutions are generally drafted by the corporate secretary; however, resolutions may be drafted by outside counsel or other persons with knowledge of the content required. Also, certain action may require the adoption of resolutions in a form required by a third party, such as a financial institution.

Because the purpose of resolutions is to prevent ambiguity, their language cannot always be concise, simple, or easily readable. Many resolutions look like bond indentures, but if done properly, they leave no doubt as to what was intended.



## Simplification

When not required by a third party, traditional preambles to resolutions, such as "Thereupon, after discussion, upon motion duly made and seconded, the following resolution(s) was/were duly adopted:" are used less and less frequently. For many, the following is sufficient:

"RESOLVED, the Board... "

While "Whereas" clauses may be utilized to introduce complicated resolutions, or where background information may help to convey fully the basis for the board's action, lengthy and numerous "Whereas" clauses are not always favored. The resolutions themselves should contain all the vital facts. As with other aspects of the minutes, consistency in the use of "Whereas" clauses will prevent unintended inferences from being drawn from the presence or absence of "Whereas" clauses in a particular matter.

### *Plain English Resolutions*

Resolutions can also be written in "plain English," without use of the traditional "Resolved" format. For example:

The board of directors of [ABC Corporation] authorizes and determines:

It is in the best interest of the Company to [insert whatever action is proposed] in order to [insert reason as appropriate].

Each of the officers listed below is authorized to effectuate the [describe transaction]:

The Chair

The President

Any Executive Vice President

## Incorporation by Reference

Resolutions frequently refer to indentures, loan agreements, registration statements, prospectuses, contracts, and other voluminous documents presented to the board for approval. To avoid lengthy minutes, the resolutions may specifically identify and incorporate these documents by reference or otherwise refer to them or to brief memoranda explaining them, with the documents themselves and any supporting papers retained as part of the record of the meeting.

## Key Tips

- Use plain English.

- If the corporate secretary is not a lawyer, they should have in-house or outside counsel review resolutions.

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## **NOTING REPORTS, DISSENTS, APPROVALS, ETC.**

### **Reports**

If a report made or given to the directors is especially important or if it contains crucial technical information, management may wish to have it recorded permanently in the minute book. In such a case, the corporate secretary should mark the report as, for example, "Appendix A" or "Exhibit A" to the minutes, refer to it in the body of the minutes, and physically attach it to the minutes. The incorporated document is then part of the minutes, and a copy of the document should accompany the draft of minutes when reviewed by directors. In addition, a copy of the incorporated document should be made available to anyone who, after approval of the minutes, is given the opportunity to read the minutes.

Corporate secretaries should exercise caution in selecting documents to be incorporated because those documents become part of the permanent record. By the approval of the minutes, the content of documents attached to them is also ratified in its entirety unless specified to have been attached for a limited purpose. Without such an explanation, the attachment of a document which is later argued (or proven) to be wrong or misleading could result in unintended consequences.

### **Board Committee Reports**

In the past, board minutes frequently contained little or no detail concerning board committee reports other than matters requiring board action. However, in recent years, because of the increasing importance of board committees under the Sarbanes-Oxley Act, organizations increasingly describe committee reports in the same amount of detail as the description of any other important report made to the board. As with board reports, another approach is to mention that the committee reviewed and discussed a report and provide the name of the report as well as the title of each section or slide heading.

### **Dissents**

In practice, most board resolutions are adopted unanimously. In the case of a non-unanimous vote or in the case of abstention, the name of the abstainer or the dissenting voter should be listed in the minutes. Dissenting directors often insist on having their

dissents recorded in the minutes, especially if they believe the majority's actions are in any way improper.

## **Conflicts of Interest**

Directors have an obligation under most state laws to declare any interest that they or their relatives or associates have in a matter being brought before the board for action. Where a director or his or her affiliates or associates is personally interested in a matter, the corporate secretary should first determine how the conflict of interest should be handled under state law.<sup>6</sup> Some states permit the interested director to vote on the matter, as long as the actual or potential conflict of interest is disclosed to the full board; in other cases, the director may need to abstain. It may also be advisable for the director to leave the room during the discussion. In addition, the minutes should state the nature of the matter discussed and, if required or appropriate, that the interested director abstained. Depending upon the nature of the conflict, it may also be advisable to describe it in the minutes.

## **Seconders**

The names of proposers and seconders of board and committee resolutions are generally NOT included in the minutes.

## **Informal Approvals**

When no vote is taken on a certain matter and the board chair obtains the consensus of the directors in an informal manner, it is sufficient to note this consensus in the minutes with a general phrase such as: "The directors concurred in ... ", or "The directors expressed their approval of ... ", or "The board approved ... ", and to follow this language with a statement of the facts.

## **Key Tips**

- If the board requests that a report be made an official part of the minutes, attach the report to the original minutes on file.
- Make sure all attachment references match the reference in the minutes, (e.g., Attachment A should be the document referenced as Attachment A in the minutes.)

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## **COMMITTEE MINUTES**

<sup>6</sup> The corporate secretary should also review the organization's governance documents for any relevant policies or guidelines.

## Points to Remember

Minutes of meetings of board committees may provide greater specificity than board minutes since committees typically perform more focused reviews of matters within their areas of responsibility than does the board as a whole. Nonetheless, committee minutes may also become evidence to be used by or against the company and its directors in litigation.

As indicated above, committee actions are typically reported to the full board during the next regular meeting of the board. While minutes of committee meetings are generally approved by the committee itself and are rarely presented to the full board for approval, some companies submit all committee minutes to the full board for informational purposes. Some companies also include copies of committee agendas in the materials for contemporaneous board meetings so that all directors have an understanding of the matters being addressed by the committees. These practices have developed due to the increased responsibilities delegated by the board to its committees in recent years and to ensure that the board is aware of the matters being addressed by its committees.

For those reasons, and because the board frequently relies upon the recommendations of its committees, an appropriate level of detail should be used to demonstrate that the committees have exercised sound business judgment and their diligent exercise of the discretion granted to them by the board.

In addition, committee minutes must reflect that the committees have carried out their responsibilities as outlined in the committee charters and in applicable SEC regulations and exchange listing standards.

While each of the key committees shares these common characteristics, some particular issues for the minutes of each committee are discussed below.

### *Compensation Committee*

The compensation committee deals with perhaps one of the most sensitive topics boards address: executive compensation. As a result, compensation committee minutes have traditionally been stored under lock and key (or its virtual equivalent). However, with executive compensation under continually increasing scrutiny by the SEC, investors, and the plaintiffs' bar, minutes of meetings of the compensation committee need to be at least as detailed as board minutes in terms of demonstrating that compensation decisions are made in good faith and using sound business judgment, and that appropriate decision-making processes are employed. Further, as shown by

the Disney case<sup>7</sup>, decisions as to termination arrangements must be similarly documented. At the same time, compensation committees routinely consider confidential information about senior management; consequently, compensation committee minutes should balance appropriately detailed minutes with concerns as to confidentiality. Additionally, compensation committee minutes should be drafted to demonstrate that the committee is meeting its assigned responsibilities under its charter and, for public companies, that committee actions are consistent with legal requirements and properly disclosed in the Compensation Discussion and Analysis section and compensation committee report required to be included in the annual proxy statement or Form 10-K pursuant to Regulation S-K.

### *Audit Committee*

As a result of the Sarbanes-Oxley Act, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the Jumpstart Our Business Startups Act of 2012, and related regulations, as well as securities exchange listing standards, the audit committee is often improperly perceived as the guarantor of the organization's financial reporting and internal controls. This can create challenges for an organization experiencing financial reporting, internal control, or related problems, particularly if those issues occur notwithstanding appropriate audit committee oversight. Thus, the minutes of the audit committee need to make clear that the committee has adequately performed its responsibilities under its charter and clearly evidence the committee's role as overseer and monitor, and not as a financial statement preparer or managers responsible for day-to-day internal control matters.

### *Nominating or Corporate Governance Committee*

Regulation and exchange listing standards and stakeholder expectations have significantly expanded the responsibilities of the nominating/corporate governance committee. The responsibilities include assessments of the board and its committees (and sometimes the individual directors themselves), evaluating the independence of nominees, and overseeing compliance with ever-changing corporate governance standards. Many corporate governance committees also oversee the company's sustainability matters. Because of the importance of these functions and the fact that they often involve information of a personal or private nature, the minutes of nominating or corporate governance committee meetings must reflect the same level of care and discretion as those of audit and compensation committees. Additionally, for public companies, minutes of this committee should be drafted carefully to ensure robust discussion of director qualifications and attributes to be disclosed in the company's proxy statement.

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<sup>7</sup> *In re: The Walt Disney Company Derivative Litigation*, C.A. No. 15452, 907 A 2d 693 (Del. Ch. 2005)

## The Corporate Secretary's Role in Committee Meetings

The skills and experience that enable the corporate secretary to document the minutes of board meetings also qualify the corporate secretary to perform the same function for board committees. The corporate secretary should bring a comprehensive, uniform approach to the style and content of committee meeting minutes and a special capacity for facilitating information flow among committee members and between a committee and the board. A secretary to one or more committees may not be the corporate secretary because of company custom or because committee meetings are scheduled concurrently. Even when the corporate secretary is not the secretary of a particular board committee, it remains optimal for the corporate secretary to review all minutes before distribution to the board and to work with the committee secretary to ensure consistency in style and approach as discussed above.

### Key Tips

- Committee minutes should demonstrate the committee's use of sound business judgment and diligent exercise of the discretion granted by the board.
- Minutes of the board committee meetings should reflect that the committees have carried out their responsibility as outlined in the committee charters and, to the extent applicable, SEC regulations and exchange listing standards.
- Committee minutes should reflect a comprehensive, uniform approach to style and content.

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## REVIEWING AND FINALIZING MINUTES

### Reviewing Drafts

Preparation of draft minutes as promptly as feasible following a board or committee meeting when recollections are freshest is a best practice. Moreover, minutes may be required immediately or soon after the board meeting to facilitate or effect a transaction, notification, or filing, or for another legitimate business purpose. For example, meeting minutes may be required to provide certified resolutions to close a financing; to notify stock exchanges regarding dividend declarations or stock splits; to issue letters to newly elected directors and officers explaining their obligations or restrictions; to file Section 16 forms with the SEC; or for other staff members who need confirmation of action taken by the board.

Meeting minute drafts should be circulated to those individuals within the organization who may need to review them, for example, the general counsel, chief financial officer,

or others. If draft minutes are circulated to presenters for a particular item, the corporate secretary should provide them only the relevant section of the draft minutes, not the complete draft. The minutes should be distributed to the full board, although some companies send them to the board chair (if other than the CEO) or the lead or presiding director before full board distribution.

Even within one organization, the review process may not be the same for all meetings, depending on the matters addressed during a meeting. For example, minutes of a meeting during which a significant acquisition or other matter is considered may require review by outside counsel or other third parties that attended the meeting. The same process should be followed for meetings of the board committees.

### **Retention of Drafts**

Because a corporate secretary's minute-keeping practices could become an important issue in litigation, the corporate secretary should develop, in advance, a policy for keeping and disposing of draft minutes and related documents. The purpose of destroying notes and drafts is not to obscure the record or subvert legal process. It is to ensure that there is one final and official record of the considerations and actions of the board. It is necessary to unify the minutes so that the notes or preliminary thoughts of a single director, or incomplete materials considered by the board, are neither taken out of context nor misconstrued to have been ratified by the company in some way.

Such a policy should include:

- An established sequential order for review of the draft minutes and destruction of previous drafts as each revision is made.
- A procedure for limiting the circulation and disclosure of drafts of minutes.
- A procedure for handling and destroying all prior drafts (including electronic versions) of the minutes once the final minutes are approved. Note that board materials, including all notes, documents, binder contents, etc., left by board members after a meeting, should be destroyed immediately.
- Consistency in following the established procedures, so that notes and preliminary drafts are retained and destroyed in accordance with the document retention policy.

Well-established procedures for the routine retention and destruction of drafts of minutes and related documents are critical. A regular review process for examining minutes should be followed, to make sure that drafts are distributed to the right parties in the right order to maintain version control.

## **Formal Review and Approval of Minutes**

Following the completion of the review process (including, if appropriate, the distribution of draft minutes to the full board), it is common practice to distribute final drafts of the minutes with the materials for the next meeting of the board so that the minutes can be formally approved at that meeting.

Absent anything to the contrary in state law or the company's charter or bylaws, there is no requirement that the minutes of a preceding board or committee meeting be subsequently approved by the board or the committee. Such approval is recommended to assure consensus of all who participated. Approval of the minutes by the directors is an acknowledgment that the minutes constitute an appropriate record of the proceedings of the meeting.

If a director has any concerns with a final draft of minutes, the director will typically raise the concern at the next meeting of the board. The corporate secretary can normally resolve the problem on the spot, but if a controversial change to the draft minutes is proposed, the approval of the minutes should be tabled until the requested change can be resolved. Furthermore, the change should be noted in the minutes of the current meeting, e.g., "The minutes were approved with the following change..." or "The minutes were approved with a change to the financials to reflect that ..."

## **Circulating Committee Meeting Minutes**

Corporate secretaries may furnish minutes of the meetings of all committees to all members of the board of directors. This is a good practice because it keeps members of the board updated on the activities of each of the board's committees. Directors have oversight responsibility with respect to their committees, and reviewing the minutes enables them to be reasonably assured that all board committees are functioning properly and that the issues being addressed are appropriate. In addition, this will save considerable time at meetings of the full board since it will obviate the need for a committee chair to elaborate in detail on committee activities. Instead, the committee chair can simply present a brief summary or a recap to the board and then respond to questions. As noted above, some companies also include copies of the committee agendas in the board materials to keep the full board apprised of their activities.

## **Circulating Minutes Outside the Company**

Although it may sometimes be desirable or appropriate for third parties to review minutes, many corporate secretaries don't allow final copies of minutes to be provided to anyone outside the company as a matter of policy.



This may be crucial in preserving the attorney-client privilege or the regulatory privilege applicable to some industries. Outside counsel or auditors are frequently granted access to review company minutes but a corporate secretary and/or a company's general counsel must consider the potential waiver of privilege and the disclosure of private business information. If it is necessary to include attorney-client privileged information in the minutes, note the portions of the meeting where attorney-client privileged information is discussed and that such discussions occurred in the presence of counsel. Consideration should also be given as to whether the privileged portion of minutes should be retained in a separate confidential document.

While auditors frequently request to see draft board and committee meeting minutes, some practitioners will only allow them to view the minutes physically at the company's office, without photographing them or any electronic dissemination.

### **Correcting the Minutes after Approval**

The substance of minutes should not be changed after approval. However, it may become necessary to make a typographical or spelling correction to the minutes after they have been approved by the directors. If such a minor change needs to be made, it can be done without calling attention to it in any formal way in the minutes themselves or in a subsequent set of minutes. However, if a change of any substance whatsoever is being made after the minutes have been approved and signed, the appropriate procedure is to raise the matter at a subsequent meeting of the board or committee and to request authority to make the change.

### **Signing the Minutes**

Corporate secretaries customarily sign the minutes, but the board chair may also sign, or minutes may not be signed at all. Even when required by by-law or by custom, a failure of the proper officer to sign the minutes does not invalidate the action taken at the meeting.

The most common practice is to sign the minutes after approval by the directors at a subsequent board meeting. In general, it is advisable to sign minutes only at that time, since the existence of duplicate signed minutes may lead to confusion as to which set is actually the final version.

### **Certification by the Secretary**

The corporate secretary is often requested to present a signed certificate, sometimes under the corporate seal, evidencing that certain action was duly taken or authorized by the board of directors. In almost all instances the best evidence of this action is the

resolution adopted by the board or committee.

The certificate of the secretary generally states that the resolution in or attached to the certificate (including all preambles) is a true, correct, and complete excerpt from the minutes of a meeting of the board of directors of the corporation duly convened and held on the date specified at which a quorum was present and acting throughout. The certificate should also indicate that the resolution has not been modified, amended, rescinded, or repealed, and is in full force and effect as of the date of the certificate. If a period of time has elapsed since the adoption of the resolution or resolutions to be certified, it will be necessary for the corporate secretary to research the minutes to ensure that no modifications, amendments, or rescissions have been made. The resolution may be included in the body of the certificate or attached to the certificate.

### **Key Tips**

- Well-established procedures for the routine retention and destruction of drafts of minutes and related documents are critical.
- Ensure that appropriate care is taken with respect to the distribution of minutes to avoid a waiver of privilege or the disclosure of private business information.
- Never give minutes to third parties outside the company without permission from in-house or outside counsel.
- Backup materials on computers, servers, or other electronic devices are also subject to discovery and a corporate secretary should ensure that all electronic copies are deleted (including backup copies).

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## **STORING MINUTES**

### **Points to Remember**

The minutes are the official record of actions taken by the corporation, and all the records created before the meeting, in the meeting, and after the meeting, including drafts of the minutes, are business records of the corporation subject to discovery in litigation. This includes hard copies and electronic copies of documents, including e-mails. Accordingly, all such documents should be retained and discarded in compliance with the organization's approved document retention policy. Sample retention policies can be accessed from the Society's practical resource pages.

Developing standard procedures with respect to review and approval of minutes, retention of handwritten notes, filing and retention of approved minutes and supporting documents, distribution of copies, access to minute books by auditors and other parties,

handling of attorney-client privileged discussions in minutes, and similar types of issues, helps promote consistency and may avoid inadvertent waiver of attorney-client privilege or a failure to document a particular action.

Minute books should be stored according to an organization's document retention policy and disaster recovery plans. After developing a comprehensive disaster recovery plan, the organization should address its policies for document retention. The corporate secretary should establish document retention standards for the corporate minutes and other board-related materials.

### **Minute Books and Meeting Files**

Traditionally, minutes have been maintained in physical minute books (with archival paper) that were relatively sturdy and could withstand frequent use and time. Minutes of the board and board committees were kept in separate minute books to facilitate research. Alternatively, minutes of all meetings that occurred on the same day were retained together in the same minute book. Now, companies may store and file minutes and records both in hard copy and electronically. For very old records, some organizations scan minutes and store them electronically for ease of accessibility. Others store their minutes on microfiche or microfilm. Another option is to maintain a redundant set of minutes at a secure off-site location.

Corporate secretaries may also maintain separate meeting files for each board and committee meeting that include the material related to the meeting and materials referenced in the minutes. These files typically include a copy of the notice of meeting, the meeting agenda, reports, contracts, agreements, memoranda or other documents provided to the directors, and copies of any slides, charts, graphs or other presentations made to the directors at the meeting.

Organizing meeting files in hard copy or electronically in a consistent format can also help counsel, auditors, or the corporate secretary's staff review the files when necessary.

### **Secure Websites**

Most companies use board portals such as Nasdaq BoardVantage or Diligent to disseminate and archive board materials, including meeting materials, minutes, and other reference materials which may be used by directors and staff for meetings. These portals should be designed to abide by the company's record retention policy and disaster recovery plans.

## **Indexing the Minutes**

Since minutes are now typically created and stored electronically, there is usually no need to index current minutes, which was a common practice prior to electronic distribution and retention. An index may be particularly useful for tracking standing resolutions or resolutions of general authority. One way to index older paper-form minutes is to scan them into a full-text database. The minutes can then be searched by entering a key word or a series of key words to find the action taken by the board or committee. Storing a set of minutes on a full-text database may eliminate problems created by possible inconsistent cross-referencing.

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## **RETENTION OF MINUTES AND OTHER BOARD MATERIALS**

### **Creating a Policy**

The corporate secretary should establish a retention policy for material related to board and committee meetings and this should be incorporated into the organization's record retention practices. This broad category of materials may include meeting notices and related correspondence, meeting agendas, materials distributed to directors in advance of or at a meeting, reports and presentations made at the meeting, minutes in approved form, and post-meeting communications.

A retention policy should establish criteria for determining what materials are covered by the policy, which of the meeting-related materials are subject to retention schedules, which materials are to be retained on a permanent basis, and the criteria for determining the retention periods for materials not subject to permanent retention.

A retention policy should also account for future transitions to new document management software so that when the computer systems are updated, the permanent records of the company are also updated or are archived in a way that allows their economical and expeditious retrieval.

### **What Should Be Retained?**

The basic task in establishing the retention policy and procedure is to identify why each item is being retained. Consideration should include compliance with legal and regulatory requirements and historical or archival objectives.

Retention practices with regard to minutes-related materials vary widely. Agendas are sometimes retained if the minutes do not actually reflect the items of the agenda, and it

remains important to record how the meeting was actually planned.

Legal considerations have an important bearing on retention policies, particularly the applications of statutory provisions, administrative regulations, and rules of evidence and laws relating to the conduct of persons in anticipation of or during the pendency of legal proceedings. Therefore, outside counsel should be consulted when establishing retention periods to obtain an independent opinion that will aid the company in demonstrating that the retention periods selected are neither arbitrary, nor created to evade discovery obligations. Once litigation has begun, or is likely to begin, the otherwise routine destruction of documents should stop immediately, and steps should be taken to preserve documents related to the matter at issue.

Of course, the content of each organization's document retention policy will depend upon the kinds of records retained. An organization's custom and practices over the years may also have an important bearing on the current retention policy, particularly with respect to materials designated for permanent retention.

## **A Recap**

Minutes of board and committee meetings should be retained on a permanent basis. Documents incorporated into and made part of the minutes by reference are considered a part of the minutes for retention purposes. Corporate secretaries should not consider notes of the meeting taken in anticipation of drafting the minutes subject to the retention policy; any notes should be destroyed as soon as the minutes are approved. This supports the critical notion that minutes, when subjected to the review and approval process, are the only record of the meeting.

## **Key Tips**

- Minutes are legally required and confirm evidence of corporate existence and should be maintained on a permanent basis.
- Approved final minutes provide the official record of actions taken; therefore, drafts of such minutes should not be stored.
- Well-established procedures for the routine retention and destruction of drafts of minutes and related documents are critical.

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## ADDITIONAL RESOURCES

The Society for Corporate Governance website hosts practical resource pages including a [Minutes](#)-dedicated webpage for its members. The practical resource pages house many samples and templates, in addition to guidance, essential to the office of the corporate secretary. In addition, the Society Huddle and In-House Huddle are member communities that facilitate inquiry and the exchange of ideas and best practices about any topic, including corporate minutes.

## SELECTED CASES

*Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985)

*In re Caterpillar, Inc.*, SEC Rel. No. 34-30532, AAER 363 (1992)

*Grace Bros. v. UniHolding Corp.*, C.A. No. 17612, Civil Action No. 17612 (Del. Ch. 2000)

*In re Staples, Inc. Shareholders Litigation*, C.A. No. 18784, 792 A.2d 934 (Del. Ch. 2001)

*In re: The Walt Disney Company Derivative Litigation*, C.A. No. 15452, 907 A 2d 693 (Del. Ch. 2005)