Governance Notes

August 2015

The Basic Principles of Corporate Minute Taking

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Whether considered an "art" or a "science," a premium is attributed to effective minute taking for meetings of corporate boards and their committees. The development of an accessible, accurate, and well-prepared meeting record is essential to efficiently establishing the good faith exercise by officers and directors of their fiduciary duties. This is particularly the case with respect to the demonstration of attentiveness, diligence, and judgment in connection with both decision making and oversight. The written boardroom record is a critical concern given the intense regulatory and litigious environment that exists in the healthcare industry, and the increasing focus on officer and director accountability.

There is no accepted best practice when it comes to the style and preparation of board and committee minutes—no "one size fits all" approach. The fundamental role of corporate minutes is to preserve an accurate and official record of governance proceedings. Ultimately, meeting documentation should reflect a balance between a) the unique boardroom culture of a particular organization and b) an awareness of how a thoughtfully prepared record can support the sustainability of board decisions, and reduce the potential legal exposure of officers and directors. The organization's general counsel should play a leading role in guiding the style of minute taking to be adopted by the board and its committees. In connection with such guidance, the following five basic principles should be explored.

1. It's the Law

Any evaluation of an organization's minute-taking practices is grounded in an appreciation of the relevant provisions of state law. Most corporation codes require a non-profit corporation to keep, as permanent records, minutes of meetings of its members, board of directors, and any designated body, and a record of all actions taken by consent by those groups without a meeting. In addition, these codes typically require that the corporation keep a record of all actions taken by a committee of the board of directors or a designated body that has been authorized to act on behalf of the corporation (e.g., action taken by an executive committee between scheduled board meetings, or the final action of a special purpose committee, such as a litigation committee).[1]

Interestingly, these types of provisions typically do not require a record of *actions* taken by a committee without board delegated authority (e.g., a committee that acts for the purpose of formulating recommendations for consideration by the full board of directors, or for addressing policy considerations). They often do not require either minutes or a record of committee *deliberations* under any circumstances.[2] However, as discussed below, there may be valid and proper reasons to prepare a written record for such committee meetings.

2. "Style" of Minutes

"Long form" or "short form"—what's the board's pleasure? There's certainly no best practice here, and state corporation codes typically do not address the amount of detail that should be contained in the minutes. Minutes content is traditionally viewed as a matter of informed board judgment; i.e., the board "makes the call" as to whether the organization's minute-taking practice simply recites the action taken following due consideration, or goes into great detail as to the background, rationale, and reasons for the particular action.

Proponents of the "long form" approach point to the benefits of documenting the elements of the board's decision-making process or oversight actions. According to this view, detailed minutes are more likely to establish the prudence and clarity of the decision making or oversight process.[3] More comprehensive minutes may also function as an effective "memory aid" should future controversies arise with respect to the action taken by the board, and the reasons for such action.[4] However, long form minutes should reflect a balance between discussions on "ministerial" or "housekeeping" matters and more material agenda items.

Proponents of the "short form" approach point to the litigation risks (from discovery, deposition, and conflicting

[1] American Bar Association, *Model Nonprofit Corporation Act*, Third Edition, August 2008, Section 16.01(a); Official Comment 1.

[2] American Bar Association, August 2008; the policy consideration is that committee meetings are viewed as forums for open and frank discussion, and for discussion of proprietary corporate information, without fear of recordation or disclosure.

[3] Michael Peregrine and Russell Hayman, "Corporate Minute Taking: A General Counsel's Guide," *Health Lawyers News*, American Health Lawyers Association, January 2006; National Association of Corporate Directors, *Corporate Board Minutes: A Director's Guide*, 2013.

[4] Leo E. Strine, "Documenting The Deal: How Quality Control and Candor Can Improve Boardroom Decision-Making and Reduce the Litigation Target Zone," *The Business Lawyer*, Vol. 70, Summer 2015; Peregrine and Hayman, 2006.

interpretations) arising from more detailed minutes that seek to capture more of what was discussed at the meeting.[5] The argument is that minutes written in broad general terms can at least highlight topics discussed at the meeting, including the factors the board considered in its deliberations or in the exercise of its oversight. They also point to the confusion that can arise from lengthy, "transcript-style" minutes.[6]

However, corporations that favor a short form approach should be attentive to particular situations when it may be advisable to convert to a long form model. These might include its consideration of significant transactions such as M&A, a strategically important investment, or a major IT systems acquisition.[7] These are decisions for which a higher standard of board review may be required, or where the board's conduct in reaching a decision could become the subject of subsequent controversy. In those situations, however, the reasons for diverging from the traditional short form practice to the long form format should be documented in the minutes themselves and explained to the board.[8]

3. What to Emphasize

Effective minute taking can help demonstrate that, on any particular issue, the board acted in a manner consistent with relevant fiduciary obligations. Accordingly, the corporate secretary or other scrivener will need to be attentive to comments, statements, and actions made or taken in a meeting that evidence consistency with such obligations. These include, but are not limited to, comments that evidence: loyalty to the organization's mission and purposes; "constructive skepticism" and thoughtful consideration of relevant issues; attentive oversight; informed business judgment; good faith; disinterest, lack of bias, and attentiveness to potential conflicts of interest; consideration of alternatives and options; proper reliance on the advice of counsel or other professional advisors; consideration of committee reports or recommendations; and an intent to comply with applicable law and adherence to corporate and board policies and procedures in the decision-making process.

In particular, effective minute taking should emphasize board action taken to satisfy elements of specific statutory requirements, the business judgment rule, and elements of "safe harbor" treatment.[9] They can also document compliance with duty of loyalty-related requirements (e.g., the process by which disclosed conflicts of interest and/or corporate opportunity-related issues are impartially reviewed and resolved, and confidentiality requirements are maintained).

However, minutes are not an "antidote" for deficient board fiduciary conduct. They're not a substitute for poor or uniformed decision making or ineffective oversight. If it didn't happen in the meeting, or someone didn't say or do it, it can't be documented and it can't be included in the minutes. And, of course, if it can't be documented and it can't be included in the minutes, then from the perspective of a regulator or an aggressive plaintiff's counsel, it's as if it didn't happen or someone didn't say or do it. We can't make "a fact" from something that didn't actually happen simply by including it in the minutes.

4. The Benefits of Well-Prepared Minutes

Well-prepared minutes serve as a readily accessible record of corporate decisions, reflect director dissent where appropriate to do so, offer direction and guidance for future board action, record the advice provided to the board by management and outside advisors, serve as a valuable source of contemporaneous evidence in related regulatory proceedings, and reduce the potential for misunderstanding as to action taken by the board (and its reason for doing so). In a practical sense, well-prepared minutes can serve as a "board insurance policy" of sorts, offering protection where their decisions may subsequently become the subject of investigation or litigation—often years after the decisions occurred.

5. The Costs of Poorly Prepared Minutes

Poorly prepared minutes (e.g., those that are incomplete, inaccurate, or ambiguous) can deny the board a potentially dispositive resource from which to respond to questions or complaints from regulatory agencies, plaintiffs, or other third parties with respect to their boardroom conduct. They can, in certain situations, provide a potential "roadmap" for such third parties that seek a basis for challenging board member conduct. In addition, a failure to take and preserve minutes from key board and committee meetings can potentially create highly unfavorable inferences about underlying board member conduct. Adverse third parties frequently seek access to corporate minutes in order to find bases to support "breach of fiduciary duty" and related allegations.

In all circumstances, board/committee members should thoughtfully review draft minutes to confirm their accuracy yet should refrain from excessive revisions that might suggest "revisionist history."

Conclusion

Appropriate fiduciary conduct, supported by effective minute taking and other board support practices, will position the organization to respond promptly and thoroughly to challenges to board action. This can, in turn, result in substantial savings from the avoidance of legal fees and other costs of controversy. It can also make board service with the organization more attractive by helping to reduce the director's individual liability profile. The general counsel should be authorized to work with board support personnel to ensure the adoption of minute taking review and adoption protocols that are in compliance with the law and that serve to reduce the "litigation target zone."[10]

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[5] *Ibid*.; *See also* Strine, 2015.
[6] Strine, 2015.
[7] *Ibid.*
[8] *Ibid.*
[9] For example, the "rebuttable presumption of reasonableness" under the IRS intermediate sanctions rules.

[10] Strine, 2015.

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