

MEMORIALIZING BOARD AND COMMITTEE MEETINGS

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This memorandum provides general guidance for preparing minutes of the meetings of boards of directors and their committees.

Executive Summary

- Prepare minutes with a view to scrutiny by third parties.
- Emphasize actions taken rather than the substance of discussions.
- Where major decisions warrant additional detail, focus on the deliberative process and general topics rather than specific substantive matters.
- Excessive substantive detail may heighten the risk of opportunistic misinterpretation.
- Legal matters warrant special care to preserve the attorney-client privilege.

Discussion

The nature and purpose of minutes should guide their content. Minutes should provide an official, authoritative and accurate record of actions taken at the meetings of a corporation's board of directors, board committees and stockholders. Under Delaware law, a corporation's minute book must "record the proceedings of the meetings of the stockholders and directors."¹ For this purpose, minutes generally should include the items set forth in Annex A, together with additional considerations for significant compensation decisions set forth in Annex B. Minutes should document these matters as the official record of corporate action.

As official records, minutes should reflect the assumption that they may receive external scrutiny. Stockholders, regulators, litigants and others may obtain access to minutes under some circumstances. Stockholders may exercise their right under state law to inspect corporate books and records, which can include minutes.² Regulators and others may obtain access to minutes as part of an investigation or enforcement action. Legal proceedings may involve discovery of minutes, and courts may give significant evidentiary weight to minutes. Governmental authorities and private plaintiffs may seek to use minutes in litigation to form or bolster claims against a corporation and its directors and officers. Although witnesses may forget and memories can lack precision, minutes often provide the best available record of a meeting. Minutes should anticipate each of the different audiences who may scrutinize that record.

¹ Del. Gen. Corp. L. § 142(a).

² Del. Gen. Corp. L. § 220.

As a result, minutes should record what ultimately occurred at a meeting rather than a transcript of the proceedings:

“The minutes of an organization include a record of all official actions taken, the presiding officer, the presence of a quorum, and information showing that the meeting was duly called and thus legal. The other contents of the minutes will depend upon the degree of detail desired. The minutes should be an *official record of actions taken* by the organization, not a transcript of what individuals say in meetings.”³

In other words, “minutes should contain a record of mainly what was *done* at the meeting, not what was *said* by the members.”⁴

In documenting the record in this manner, the degree of desired detail will typically depend on the magnitude of the action taken. Major decisions, such as significant corporate transactions, call for proportionately increased detail demonstrating a process consistent with the satisfaction of directors’ fiduciary duties. Additional detail, where appropriate, should primarily document procedural aspects of a major decision rather than specific substantive information. This type of procedural record should reflect the broad topics of discussion, emphasizing the occurrence of discussions rather than their content. In these instances, minutes may record general topics under deliberation without recording details of specific discussions. The procedural record may also include, as applicable, reference to preparatory discussions that occurred before the meeting among directors or between directors and management.

In contrast, minutes that attempt to include substantive details can increase the corporation’s risk exposure both from what the minutes include and from what they omit. First, minutes that include substantive discussion, if later scrutinized, may not have recorded the details that will prove relevant and, even if relevant, may not prove helpful to the record upon later scrutiny.⁵ Second, minutes that document some but perhaps not all substantive details could create a record that incorrectly suggests, by negative inference from omitted information, that the deliberations failed to include issues deemed consequential when viewed in hindsight. In either case, documenting the procedural steps of the deliberative process would generally provide a more protective record.

Careful drafting can help minutes serve that purpose. Minutes should be accurate, complete, free of unnecessary information and consistent with contemporaneous public

³ Black’s Law Dictionary 1148 (10th ed. 2014) (quoting Ray E. Keeseey, *Modern Parliamentary Procedure* 84 (1994) (emphasis in original)).

⁴ Henry M. Robert III et al., *Robert’s Rules of Order Newly Revised* § 48, at 468 (11th ed. 2013) (emphasis in original).

⁵ In the Matter of Caterpillar, Inc., Release No. 34-30532 (Mar. 31, 1992) (finding violations of disclosure requirements where board minutes had highlighted the risk that a foreign subsidiary’s performance could adversely affect consolidated year-end results while contemporaneous public reporting omitted disclosure of that risk).

disclosures in all material respects. Minutes should record the actions taken at a meeting while reflecting appropriate sensitivity toward the issues considered during deliberations. Minutes should succinctly memorialize directors' care, deliberation and hard work, documenting the steps taken toward satisfying the board's fiduciary obligations while omitting excessive substantive detail. Minutes ordinarily should exclude attorney-client privileged or otherwise confidential details. Minutes can adequately document reliance on legal advice by indicating that a privileged discussion occurred and, as applicable, by referring to legal advice provided separately, outside of the minutes and in a privileged context. In those instances, minutes can record the deliberative process while referring to standalone analysis documented elsewhere.

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Annex A

Drafting Checklist for Minutes

- Meeting date, location, type of meeting (regular or special)
- Recital of notice having been given or waived
- Start time and adjournment time
- For telephonic meetings, confirmation that all participants could hear each other
- Presence of a quorum
- Presiding officer, list of participants (directors, officers, advisors, guests) and attendance times if some participants attended only a portion of the meeting
- Topics discussed in order of discussion and, as applicable:
 - Names of all presenters
 - Reference materials distributed at or before the meeting, information and reports that directors used or relied upon, and any significant discussions that occurred before the meeting or at prior meetings
 - Directors' reliance on reports, advice or opinions of advisors
 - Description of types of issues discussed, including transaction terms
 - General summary of the substance of lengthy discussions or notation that discussion occurred for shorter discussions tracking the meeting agenda
 - Any recusal from discussion or abstention from due to potential conflict
- Actions taken and the scope of approval or authorization, including any resolutions adopted
- For each vote, how each director voted, noting abstentions and unanimity, as applicable
- Whether executive session was held

Annex B

Drafting Checklist for Significant Compensation Decisions

- Reference reliance on outside advisors
- Explain pay formulas, caps or other thresholds
- Reference spreadsheets and analyses of pay
- Explain any changes from original proposal and rationale
- Calculate total pay package and financial impact
- Calculate total termination pay and the financial impact
- Reflect topics based on questions asked during the meeting
- Reflect any direct or indirect compensation committee involvement in negotiations, including through reports to the committee