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WHY MINUTES MATTER: Best Practices for Corporate Secretaries

WHITE PAPER

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Executive Summary

In the lingering aftermath of the financial market meltdown, there has been a pronounced uptick in litigation and regulatory investigations against banks and bank directors. In the course of these proceedings, it is becoming increasingly evident that banks can and should improve the way they create and maintain accurate and adequate board meeting minutes. Board meeting minutes are too often treated as a ministerial afterthought, but have taken on newfound significance as they are increasingly subject to enhanced scrutiny by shareholders, government regulators, auditors, potential acquirers and others. Boards of banks should reexamine best practices for minutes, which serve as the official record of board activity, in light of the current economic and regulatory environment.

Evidentiary Value of Minutes

In most jurisdictions, a corporation is statutorily required to keep a record of all meetings of its board of directors. Many jurisdictions impose a concurrent duty on corporations to designate an officer to prepare board meeting minutes.

Maintaining proper board minutes is more than just a statutory recordkeeping requirement—board minutes serve a critical evidentiary purpose. In a growing number of jurisdictions, including California, New York and Delaware, minutes of a board meeting are considered prima facie evidence of board actions. Minutes are often scrutinized to determine whether a board fulfilled its fiduciary duties of due care and loyalty, avoided conflicts of interest, determined matters on an informed decision basis, relied on the advice of experts, or duly approved particular transactions. Because corporate shareholders typically have a statutory right to access and inspect board minutes, board minutes may be used as the basis of a lawsuit or an investigation.

Shareholder Litigation

Shareholder litigation, such as *In re Walt Disney Company Litigation* and *In re Netsmart Technologies, Inc. Shareholders Litigation*, highlights the importance of adopting minute-taking best practices. In the Disney case, the Delaware Supreme Court acknowledged in 2006 that effective minute-taking practices would have cut short what turned out to be drawn-out and costly litigation. In the 2007 Netsmart case, the court was critical of the defendant's "tardy omnibus consideration of meeting minutes" and failure of the board to promptly review and approve meeting minutes.

Regulatory Compliance

Aside from litigation concerns, documenting regulatory compliance is another reason that maintaining complete and accurate board minutes is important. The Sarbanes-Oxley Act of 2002 created a comprehensive regulatory framework designed to improve accounting oversight and corporate governance responsibility. Section 302 of Sarbanes-Oxley requires chief executive officers and chief financial officers to certify financial reports and oversee internal control over financial reporting. The board of directors also plays a key role in monitoring a company's internal control compliance. Board and committee minutes are essential elements to documenting compliance with SOX regulatory obligations.

Guidelines for the Preparation of Effective Minutes

What follows are suggestions for "best practices" in preparing for and documenting board meetings. Obviously there is not a "one size fits all" approach for all financial institutions; the key is finding the right balance between too much content and too little content. Minutes should not be a transcript of the proceedings or bury important actions within pages of minutiae. Minutes should convey the appropriate amount of deliberation, due care and thoughtful review.

Preparation for Board Meetings

- Schedule regular board meetings in advance.
- Aim for full board participation.
- Circulate board materials (agenda, proposed resolutions, material agreements, filings) to board members several days in advance of each regularly scheduled meeting.
- Circulate minutes of prior meeting(s) for review and approval.
- Ask your legal counsel to attend your board meetings—he or she should agree to do so with out charge.

Objectives at Meeting

- Make the minutes a summary, not a transcript.
- Preserve official record of proceedings, noting: date; approximate time of meeting being called to order; directors present and absent; invited guests present; determination of quorum; minutes of previous meeting approved; matters reported on; matters voted on; any privileged discussions with legal counsel; approximate time of adjournment; and the signature of the secretary of the meeting.
- Achieve optimal level of detail:
 - avoid verbatim recitation;
 - avoid vague/cursory descriptions;
 - memorialize the abstention or recusal of any board member who has a conflict of interest regarding the matter at hand; and
 - describe votes as either "unanimous" or "passed" and note any directors who voted against or abstained, but avoid recording each director who "moved" and "seconded" items on which action is taken.
- The secretary should not be a board member or member of senior management who is presenting at the meeting (i.e. your chief financial officer has more than enough tasks); preferably, the minute taker should be the corporate secretary or legal counsel.
- Discussions with legal counsel should be identified as privileged and describe only the topics covered, not the advice provided.
- If you are a director who raised a material

issue as a result of a “red flag” or otherwise, you will want the minutes to reflect that these issues were raised and, if applicable, addressed by management.

- Note all breaks taken for executive sessions outside the presence of senior management.

Length of Minutes

- Commensurate with actual discussions and matter importance
- Convey board reflection, review, and information gathering proportional to issue significance.

Consider audience (Assume it to be all readers of the front page of your local newspaper)

- Shareholders
- Bank regulatory examiners/investigators
- Auditors
 - Plaintiffs’ counsel
 - Investment bankers and legal counsel for potential acquirers
 - Underwriters/placement agents and their legal counsel

Neutrality

- Maintain neutral, objective tone.
- Avoid opinionated/judgmental language, editorials.
- Use unambiguous language.

Completeness

- Sloppy minutes may cause an auditor or regulator to infer sloppy internal controls or a nonchalant attitude regarding compliance with internal policies.
- Implement clear document retention policy as to source materials for minutes.
- Generally, avoid retention of extra copies of additional materials (notes/drafts/investment bankers’ pitch books).
- Notes/drafts have been held discoverable and not protected by privilege or work-product protection.

- Directors should not keep their own notes during or after meetings; the minutes as approved should be the official, and only, record of the meeting.

Consistency

- Maintain consistency in minute writing style.
- Maintain subject-matter consistency with public disclosures: SEC reports and call reports, for example.

Prompt review/approval

- Each board member should carefully read/review minutes and raise any issues prior to final approval.
- For public banks/bank holding companies, directors should carefully consider Form 8-K reporting requirements. Some decisions require an 8-K filing. Discussion without a decision does not require an 8-K filing.
- Prompt preparation facilitates external auditor quarterly reviews, and could protect against future attacks for hastily and less thoughtfully prepared minutes.

Other Issues

- The tape recording of meetings is not recommended.
- Board committee meeting minutes should be kept with consistent form and content as board meeting minutes, to the extent possible.
- Check your bylaws—Robert’s Rules of Order or other rules of parliamentary procedure are generally not required and not recommended for the conduct of your meetings.
- Do not use written consent actions in lieu of meetings to take action on significant matters.
- Do not style a document “minutes” if a meeting was not duly called and held, as was reported to have occurred in the WorldCom and Enron cases.

- A bank and its parent holding company are not the same legal person, even if they share common boards of directors; to the extent practicable, maintain separate sets of minutes. (Don't hand plaintiffs two defendants at once.)

At the end of the day, as a board member, ask yourself:

"How would I feel if these minutes were printed on the front page of The Wall Street Journal?"

"How would I feel answering questions of a Senate subcommittee regarding the content of my bank's minutes?"

If the answer to both of these questions is "good," or better yet, "great," your job is done.