Corporate Minutes – Best Practices and Traps for the Unwary
Presentation for the ACC Corporate and Securities Law Committee

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Purpose of Minutes – Why Keep Them?

• Legal record of the proceedings of the corporation, LLC or other entity
  – Memorialize decision-making inputs
  – Formalize analysis
  – Document decisions

• Provides record of compliance with legal formalities
  – Shareholder meetings – election of directors and other shareholder actions
  – Meetings of Board of Directors and Board Committees
    • Establish basis for actions by directors
    • Foundation for establishing compliance with fiduciary duties of loyalty and care
      – Record of deliberations by board, who else was present, what they discussed and what material they reviewed
    • Formal resolutions specify precisely what was approved by the shareholders or directors
Applicable Statutory Provisions

- Delaware GCL section 142(a) provides: “One of the officers 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.”
- Minutes constitute "other books and records" of a corporation under Delaware GCL section 220 so minutes are potentially subject to demand for inspection by stockholders
- Bylaws may contain provisions that effect minute-taking
Relevant Judicial Decisions

- Under Delaware law, minutes are viewed as *prima facie* evidence of the actions taken. Extrinsic evidence will be admitted only if the minutes are incomplete or ambiguous. *Young v. Janas*, 34 Del. Ch. 287, 103 A.2d 299 (1954)

- Approval of minutes of a meeting is simply a record of what transpired at the meeting; it cannot validate otherwise unauthorized or illegal actions. *In re Chelsea Exch. Corp.*, 18 Del. Ch. 287, 159 A. 432 (1932); *Belle Isle Corp. v. MacBean*, 29 Del. Ch. 261, 49 A.2d 5, aff'd sub nom., *Belle Isle Corp. v. Corcoran*, 29 Del. Ch. 554, 49 A.2d 1 (1946)

- Minutes did not discuss the nature of Board deliberations and the basis for decisions regarding the terms of termination of employment of Michael Ovitz by Walt Disney Company. *In re Walt Disney Company Derivative Litigation*, 907 A. 2d 693 (2005)

- Matters considered by a special committee of directors were not documented in the minutes of meetings and therefore court could not determine what was said or done at the meetings. *In re Netsmart Technologies, Inc. Shareholders Litigation*, 924 A.2d 171 (Del.Ch. 2007)
Who Should Keep the Minutes?

• Generally the secretary of the company or his or her designee
• Minutes should state who acted as secretary
• In executive sessions of directors, a director can keep minutes, if minutes are kept; sometimes minutes simply reflect that an executive session was held
What Information Should Minutes Include?

• Date, time and place of meeting
• Whether the meeting is a regularly scheduled or special meeting
• Times meeting began and ended
• Details of notice of the meeting sufficient to establish statutory compliance
  – Notice of meeting also should specify matters to be considered at the meeting
    • Agenda for Board meeting
    • Statutory requirements may limit actions that can be taken at a meeting of shareholders to matters included in the notice of meeting
What Information Should Minutes Include?

- Who was present, and for how long; record departures and arrivals
  - Should specify whether those present constituted a quorum
  - For shareholder meetings, this will include the number of shares present in person and by proxy along with how shares were voted
  - For director and committee meetings, whether those present were in person or by telephone or other means
    - DGCL section 141(i) permits attendance by telephone so long as everyone can hear, speak and be heard
- Who acted as secretary of the meeting
- Any material that was distributed to attendees
  - State whether it was distributed in advance
  - Attach copy to final minutes of meeting
What Information Should Minutes Include?

- What was discussed; description can be general
- Any specific resolutions passed by those present with details regarding who raised the matter for vote, whether it was seconded, how each person voted, including any abstentions and any conflicts of interest that may have been noted
  - Description of the discussion leading up to a resolution should describe the deliberations of directors in sufficient detail to establish that the directors have complied with their fiduciary duties in connection with the subject of the resolutions
  - Level of detail will vary depending on the matter being addressed
    - More sensitive matters generally require more detail, although there are exceptions
    - This is an art, not a science and often a matter of style
What Information Should Minutes Include?

- If any directors have conflicts of interest, the minutes should specify that the potential conflict was disclosed to the other directors and what action was taken by the disinterested directors.

- Whether an executive session was held:
  - Minutes may be kept but are not required for executive sessions.
  - Minute taker need not be the secretary of the primary meeting.
What Should Minutes **Not** Include?

- Discussion of privileged information; description of legal advice should be kept very general
  - “The directors received legal advice from [name of lawyer or firm]”
  - Advice should not be characterized or described
- Confidential information; common examples include
  - Potential mergers or acquisitions
  - Highly sensitive information regarding compensation
  - Discussion of litigation or other material contingencies
Potential Uses and Misuses of Minutes

• Defense in litigation challenging corporate actions
  – Refresh recollections of directors and officers
  – Lend more credibility to the narrative
  – Show adherence to form

• Support for legal opinions regarding due authorization of transactions
Issues in Litigation

• Discovery
  – Pre-suit demands under DGCL section 202
  – Production requirements in litigation

• Use in depositions
  – Defense use in refreshing recollections
  – Offense use as a means to facilitate cross-examination

• The challenge: too little vs. too much
  – Too little: unhelpful because insufficient detail
  – Too much: unhelpful because too much detail
Best Practices

• Schedule regular meetings well in advance of meeting dates
• Distribute agenda and materials well in advance of meeting dates to allow sufficient time for advance review
  – Consider tablet software
• Prepare minutes promptly and distribute drafts for review promptly after meeting while events are fresh in the minds of participants
  – Consider privilege issues
  – Drafts may be circulated to key individuals first if desired - e.g., CEO, GC, CFO, Chair or Lead Director
• Take comments and have minutes of previous meeting approved at next meeting whenever possible
**Best Practices**

- Have only one set of final minutes that will serve as the legal record of the meeting
  - Participants should not retain any notes or copies of material distributed at the meeting
  - Notes and copies of materials can be left with secretary of the meeting and destroyed after minutes are finalized
  - Destruction should be consistent with company’s document retention policy
- Minimize use of email and never use email to comment substantively on matters to be considered at the meeting
Traps to Avoid

- Waiver of privilege
- Draft control
- Abrupt change in format
- Error
- Missing resolutions, exhibits
- Insufficient pre-read material
- Losing minutes
- Inconsistent committee practices
- Relegating minute keeping
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