



SOCIETY

of Corporate Secretaries
& Governance Professionals

P U B L I C A T I O N

February 2014

*Corporate Minutes:
A Publication for the Corporate Secretary*

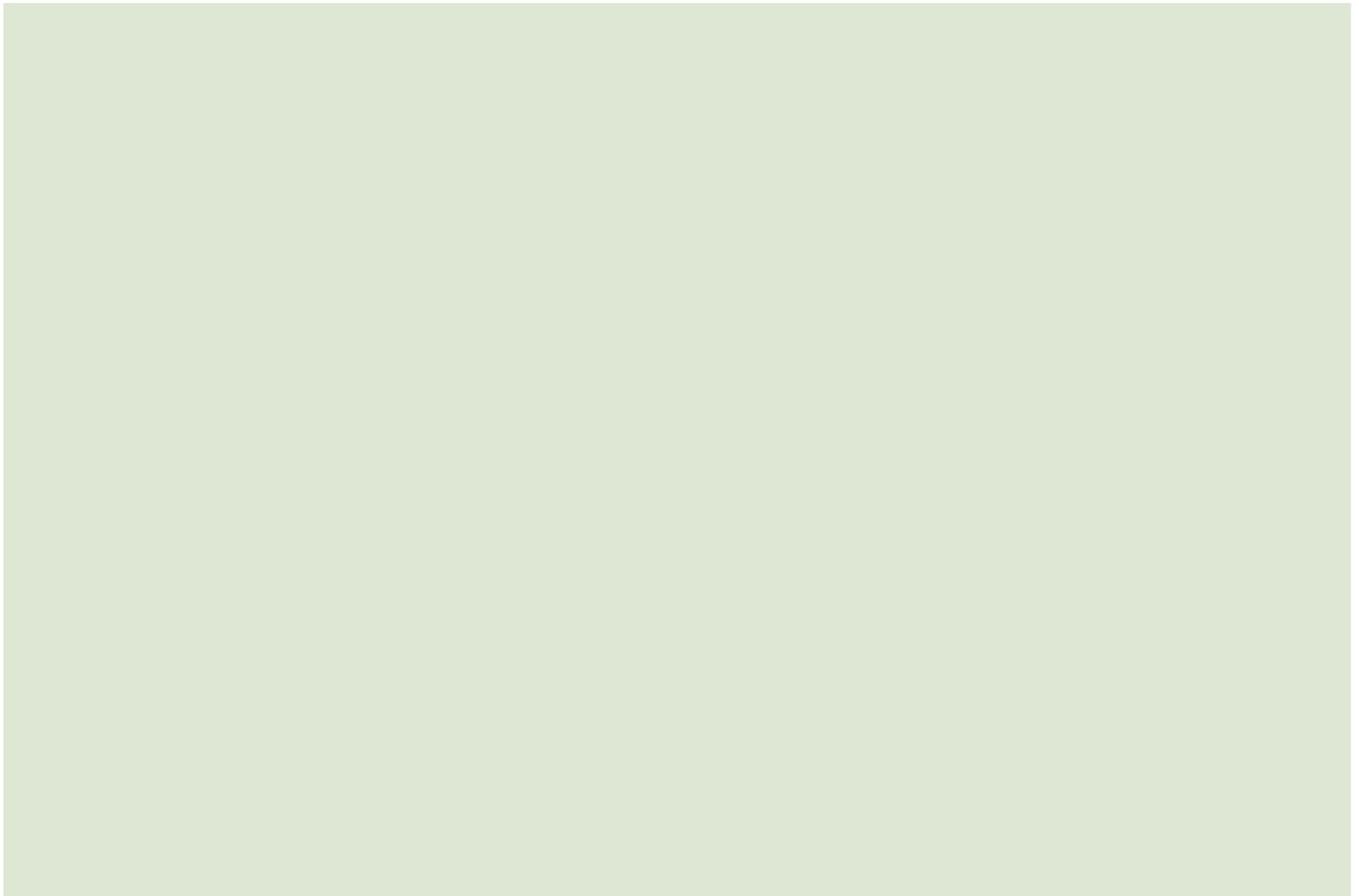


TABLE OF CONTENTS

I. Why Are Minutes Necessary?	5
A. Corporate Function	
B. Statutory Requirements	
C. Key Tips	
II. Preparing The Minutes	6
A. Points To Remember	
B. The Meeting Agenda	
C. A Minutes Checklist	
D. Key Tips	
III. Taking The Minutes	8
A. Methodology	
B. Director Notes	
C. Dealing With Issues of Content	
D. Exposure Risk	
E. Choosing Words Carefully	
F. Writing Minutes for an Executive Session	
G. Key Tips	
IV. Style	12
A. Consistency vs. Flexibility	
B. Special Circumstances	
V. Choosing the Form of Minutes	13
A. Long and Short Form Minutes	
B. The Hybrid Form	
C. Key Tips	

VI. Writing Resolutions	14
A. When are Resolutions Required?	
B. Simplification	
C. Incorporation by Reference	
D. Key Tips	
VII. Noting Reports, Dissents, Approvals, etc.	16
A. Reports	
B. Committee Reports	
C. Dissents	
D. Conflicts of Interest	
E. Seconders	
F. Informal Approvals	
G. Key Tips	
VIII. Committee Minutes	18
A. Points to Remember	
1. Compensation Committee	
2. Audit Committee	
3. Nominating or Corporate Governance Committee	
B. The Corporate Secretary's Role in Committee Meetings	
C. Key Tips	

IX. Reviewing and Finalizing Minutes **20**

- A. Reviewing Drafts
- B. Retention of Drafts
- C. Formal Review and Approval of Minutes
- D. Circulating Committee Meeting Minutes
- E. Circulating Minutes Outside the Company
- F. Correcting the Minutes after Approval
- G. Signing the Minutes
- H. Certification by the Secretary
- I. Key Tips

X. Storing Minutes **23**

- A. Points to Remember
- B. Minute Books and Meeting Files
- C. Intranets
- D. Indexing the Minutes

XI. Retention of Minutes and Other Board Materials **25**

- A. Creating a Policy
- B. What Should be Retained?
- C. A Recap
- D. Additional Concerns
- E. Key Tips

I. Why Are Minutes Necessary?

A. Corporate Function

Corporate minutes serve many purposes, including:

- providing an official record of discussions, decisions reached and actions taken by the corporation'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;
- providing evidence of the corporate existence of the company; and
- preserving company history.

B. Statutory Requirements

Corporate minutes serve as the permanent, official record of the business transacted and action taken at meetings of the board of directors, board committees, and shareholders. 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."¹ 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."² 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.

C. Key Tips

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

¹ Model Business Corporation Act, § 16.01

² 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)

II. Preparing The Minutes

A. Points To Remember

Minutes constitute a company's history of the collective actions of its board of directors and its committees, and therefore serve as vital legal records. It is important, especially in a time of increasing litigation by shareholder activists and others scrutinizing the corporate business community that minutes accurately reflect the various items presented at each meeting, and the actions taken. Just as the minutes show what actions are taken at a meeting, they also may be used to infer what actions were not taken at the meeting and what matters were not considered. For this reason, the rule of "less is more" does not necessarily apply.

For example, minutes that include information about the way directors exercised their business judgment can often be more helpful than hurtful 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 judgment. However, that presumption can be rebutted in a number of ways, including by showing that the board acted without informing itself of all reasonably available, material information. The minutes create an opportunity to demonstrate not only the completeness of the information considered by the board, but also the thoroughness of the process by which the directors reached their conclusions.

Therefore, corporate secretaries should insure that minutes clearly set forth exactly what discussions or other matters occurred during the meeting and, if action was taken on a particular matter, that the minutes reflect that action. If documents are incorporated by reference or attached to the minutes, these papers should be specifically identified in the minutes. If any limitations were placed on the action taken or authority granted such limitations need to be explicit in the written resolution(s).

Additionally, although the minutes are the official record of actions taken by the corporation, all of the records created before the meeting, in the meeting and after the meeting, including drafts of the minutes, *are business records of the company subject to discovery in litigation*. This includes not only hard copies of documents, but also electronic "documents," including e-mails, prepared electronically. The disclosure, discovery, and use of electronic documents in litigation is no different than paper documents despite the fact that the documents may be kept only in an electronic form. *Accordingly, all such documents should be retained and discarded in compliance with the company's approved document retention policy.* (See Section XI, page 25.) A sample retention policy can be found in the Society's member document library.

B. The Meeting Agenda

There is little statutory, regulatory, or case law 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 a final agenda for the board or committee meeting, as well as any significant or substantive discussion of other items related to the performance by the board or committee of its duties.

In preparing for an upcoming meeting, the corporate secretary may refer to the final meeting agenda to prepare an outline, or "skeleton," of the board or committee minutes.³ The skeleton can be very brief, or can be written out and contain information provided to directors in advance that describes a proposed action, with blank space for summaries of the discussion and the final action.

³ 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 fax (or e-mail) copies to any directors participating in the meeting by telephone. Sending copies of proposed resolutions 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.

C. A Minutes Checklist

There are a number of items which corporate secretaries should include in the minutes. The following checklist is a starting point for reference:

- Date and location of meeting
- If 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 absent)
- Recital of quorum being present
- Names of person chairing the meeting and the person taking minutes
- Attendance by management or consultants (names and titles)
- Indication of action taken (e.g., discussion, 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 sensitive issues 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
- Note if executive sessions were held

D. Key Tips

► Because minutes are the official record of what actions were taken, and not taken at the meeting, it's important that minutes list key discussions and resolutions accurately.

► Once minutes have been approved, all draft documents should be discarded in compliance with the company's approved document retention policy.

► Once the minutes are drafted, prior to distribution for comment, review the checklist above to confirm each item is included.

III. Taking the Minutes

A. Methodology

Corporate minutes are the record of what ultimately occurred at a particular meeting of a board or a committee, and not a transcript of everything said or done. In fact, attempting to produce a verbatim transcript, or audio taping a board meeting, are not recommended practices.

As noted, many corporate secretaries find it efficient to edit and add to skeleton minutes prepared before the meeting. This can be done in longhand or shorthand, or entered directly on a computer.

Although corporate secretaries can use lap top computers or tablets, many find that it is easier to control the retention and disclosure of a single paper copy of their notes and, therefore, still write notes in longhand. In addition, data recorded on a computer can be retrieved in litigation and used to impeach directors' testimony or even the 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 or because they find that keyboarding distracts some directors.) Others, however, do use a computer and enter the minutes in near-final form during the meeting. In the end, each individual will adopt the method most comfortable and useful for him or her, and which facilitates compliance with the document retention policy.

Regardless of the method used, it is important always to use care in note-taking, since any notes of the meeting may be discoverable in litigation. Avoid writing personal or irrelevant notes among the meeting notes, and write neatly if using pen and paper—poor handwriting or sloppy shorthand will not exempt notes from discovery. Document retention practices, discussed more fully beginning on page 25, 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.

As indicated above, if a computer is used, deleting a document will not remove it irretrievably from the computer's hard drive nor erase the metadata which, potentially, shows the authors, editors, and reviewers of a particular document, and the work done by each of them on a particular document. Accordingly, special consideration should be given to the retention of documents saved in electronic form.

B. Director Notes

While it is not the primary focus of this publication, the taking and disposition of directors' notes is a matter of concern to many corporate secretaries. Ideally, directors should be advised to refrain from taking notes, that any notes they take belong to the company, and that all such notes will be collected at the end of meetings. This is because individual directors' records do not reflect the official acts of the company and because, if there is more than one official set of the company's records, the company cannot properly control their retention and limits their disclosure to persons entitled to review them. The failure to control documents properly and to limit their disclosure could result in the inadvertent waivers of privileges 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.

C. Dealing with Issues of Content

Depending upon the topics at hand and the personalities of the participants, each board or committee meeting has its own atmosphere, and its outcome can never be fully predicted. But in any meeting, the corporate secretary has the responsibility for deciding what to record and what parts of the discussions are relevant. There is added pressure when a significant transaction, such as a merger, is considered at the meeting, or when any other matters addressed at the meeting becomes the subject of dispute or litigation. In cases like these, the corporate secretary must be alert to 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 when an ever-increasing number of topics can be the subject of litigation or shareholder activism, the corporate secretary must always be alert to the risks associated with board action and, consequently, at the top of his or her “game.”

One other important note is that 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 destroying or filing with the minutes.

Another factor to appreciate, especially in crisis situations, is the difficulty of keeping track at board meetings of all matters being discussed and of various directors’ views on these matters. Complicating the problem may be the fact that multiple “side conversations” may be taking place among directors. It may be advisable for the corporate secretary to check with others as to what was stated, and it may be wise to have more than one person’s impressions considered in these types of situations—*e.g.*, 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 turned over to the corporate secretary afterwards, so that he or she can synthesize the notes into regular minutes, and ensure that they are retained and disposed of in accordance with the company’s policy.

D. Exposure Risk

In drafting minutes, the corporate secretary should always keep in mind the fact that minutes are generally discoverable in litigation and enforcement actions, and therefore, special care should be taken to ensure that they are not only accurate and complete and contain no unnecessary information, but also that they 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. The tax area may create particularly sensitive problems. Privileged matters, such as advice of counsel regarding litigation should likewise be dealt with appropriately. 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’s Discussion and Analysis (MD&A) in periodic filings on Forms 10-Q, 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.*⁴

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. One key lesson to be learned from Caterpillar is that 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.

⁴ SEC Release No. 34-30532, March 31, 1992

What is not recorded in the minutes can also present an exposure risk, since 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, but that does not mean that it was not said, nor that someone will not remember it and has to testify that it *was* said. In such an instance, the fact that a meeting attendee asked for a statement to be omitted from the minutes may demonstrate his or her knowledge that what was said was a problem. Accordingly, corporate secretaries need to 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 of a meeting are, 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 or to interpret a resolution, and if the minutes are, in fact, erroneous, the presumption that the minutes are correct may be rebutted.

E. Choosing Words Carefully

Minutes serve to confirm participants’ common perceptions of and consensus on events that took place at the meeting, and keeping language as clear as possible furthers this goal. The evidentiary function of minutes is particularly well served by simple, unambiguous language, without color or unnecessary adjectives. Care should be taken that descriptive terms are not value judgments, and that the Corporate Secretary remains a neutral recorder of the proceedings. Experienced corporate secretaries usually find it advisable to avoid internal company or industry terminology or usage, unless it is essential to accuracy. Avoiding undefined acronyms also helps facilitate understanding of minutes years later, when the common understanding of particular acronyms may have disappeared. 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.

F. Writing minutes for the executive session

Often times, when directors meet in executive session, without any members of management present, recording 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 discussion 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 in more detail so that the resolution can be accurately recorded.

G. Key Tips

- ▶ Whether minute taking notes are written in long-hand or typed electronically, notes should be taken with care—avoid writing irrelevant notations and personal reminders.
- ▶ Writing minutes takes balance—avoiding a word-for-word transcript, yet incorporating sufficient facts to show evidence of thorough discussions and concisely and accurately recording resolutions.
- ▶ Remember that how you say it, can make a difference.

IV. Style

A. Consistency vs. Flexibility

The style of minutes is determined in large part by the personal preferences of the Chairman of the Board, the Corporate Secretary, other senior officers of the corporation, and the directors, as well as by tradition within the company. Certain forms of minutes may be provided by the corporation's outside counsel and the form of certain resolutions may accommodate requirements of external stakeholders, such as financial institutions. One of the most important points about the style of minutes is that it should remain consistent. Changes in the style or format of the minutes are very noticeable and should be carefully considered in any situation, because changes might appear to be more significant than they really are. Following a consistent approach from one set of minutes to the next—at least per 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 will avert confusion arising from any stylistic variation.

B. Special Circumstance

Although it is good practice for minutes to be consistent, special circumstances such as an impending merger or acquisition; the approval of stock buy-back plans; or other events that may be considered material for the corporation will often necessitate greater detail—in cases like these, more detail will help demonstrate application of the business judgment rule, and will demonstrate 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 Secretary should state facts rather than trying to draw conclusions from 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 now a fair amount of case law guidance on which matters to include in minutes in order to protect directors. Much of this guidance comes from cases arising out of takeover situations; however, as noted earlier, the number of subjects that can lead to shareholder activism or litigation has grown significantly in recent years, so this guidance may be relevant in many other areas. For example, as a result of Delaware Supreme Court's decision in *Smith v. Van Gorkum*,⁵ in a corporate control battle, most corporate secretaries now make sure that corporate minutes document:

- 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.

⁵ *Smith v. Van Gorkum*, 488 A.2d 858 (Del. 1985)

V. Choosing the Form of Minutes

A. Long and Short Form 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 recent years, in response to various factors—including increased litigation challenging board actions—some practitioners have departed from the short-form model in order to demonstrate that the board has acted appropriately and are eligible for the protections afforded by the “business judgment” rule. The following chart points out some of the advantages and disadvantages of short- vs. long-form minutes.

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 may require more detail for certain kinds of transactions

Long-Form Minutes

Advantages

- Spells out reasons board has taken action and provides evidence of the board’s diligence in dealing with specific matters
- Presents clearer picture of total deliberation process
- More in tune with recent case law 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

B. 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 corporation or that may be challenged, some corporate secretaries find it useful to build a more robust record of diligence by the Board by adding more to the minutes than the short-form method calls for. But at the same time, these secretaries may want to avoid the dangers of the long form, so they compromise by creating a “hybrid” form – fuller disclosure of the action taken on important items, and spare disclosure on the routine. 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, and the corporate secretary should seek to use a “Goldilocks” approach—not too long and not too short, but “just right.”

C. Key Tips

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

VI. Writing Resolutions

A. When are Resolutions Required?

The purpose of a properly drafted resolution is to accurately and completely describe an action by the Board. A clear, concise statement of the action of the board of directors in a formal resolution minimizes ambiguities or misunderstandings, 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 or appropriate action, even if no formal resolution was recorded in the minutes. Also, if the Corporate Secretary is convinced that in the particular circumstances a formal resolution will not be required, he or she may merely indicate in the minutes that after discussion of the matter, the directors decided to take whatever action or make whatever decision was agreed on by them. 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 Secretary is required to furnish evidence 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;
- When the matter pertains to an amendment to either the charter or the by-laws of the corporation;
- When a third party requests that the action taken be evidenced by a formal resolution.

Resolutions are generally drafted by the Corporate Secretary; however, if the matter is of a complex or technical nature, the resolution may be drafted by outside counsel or other persons with knowledge of the form or content required. Also, certain action may require the adoption of resolutions in a form required by a third party. In such a case, the draft resolution would generally be submitted to the third party prior to submission to the board.

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.

B. 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. For many, it is enough to simply say:

"RESOLVED, . . ."

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 recommended. 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 Chairman

The President

Any Executive Vice President

C. Incorporation by Reference

Resolutions frequently refer to indentures, loan agreements, registration statements, prospectuses, contracts and other bulky 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 documents themselves and any supporting papers retained as part of the record of the meeting. Many corporate secretaries prepare resolutions, and clear them with counsel or other third parties, well in advance of the meeting so that they can be included with the materials for the meeting.

D. Key Tips

- Use plain English.
- If the Corporate Secretary is not the General Counsel, make sure the resolutions are approved by the General Counsel before presenting them to the Board.

VII. Noting Reports, Dissents, Approvals, etc.

A. Reports

On occasion, if a report made or given to the directors is especially important and not too lengthy, or if it perhaps contains some crucial financial or other 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 and others within the company. In addition, a copy of the incorporated document should be made available to anyone who, subsequent to approval of the minutes, is given the opportunity to read the minutes.

Secretaries should exercise great 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 are also ratified in their entirety unless explained 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. Another approach when numerous reports are presented is to mention that the Board reviewed and discussed a report and provide the name of the report as well as the title of each section or slide heading (for PowerPoint slides).

B. Committee Reports

The manner in which board minutes have dealt with reports on meetings of board committees has evolved in recent years. In the past, board minutes frequently contained little or no detail concerning committee reports, other than matters requiring board action. However, in recent years, because of the increasing importance of committees under the Sarbanes-Oxley Act and otherwise, more and more companies 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 when numerous reports are presented 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 (for PowerPoint slides).

C. Dissents

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.

D. 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 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. 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. In addition, depending upon the nature of the subject, it may 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.

E. Seconders

The names of proposers and seconders of board and committee resolutions are generally omitted in the minutes.

F. Informal Approvals

When no vote is taken on a certain question and the Chairman 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.

G. Key Tips

► If the Board requests that a report be made an official part of the minutes, make sure it is attached 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.)

VIII. Committee Minutes

A. Points to Remember

Minutes of meetings of board committees may provide greater specificity than board minutes, since committees typically carry out more focused reviews of matters within their areas of responsibility than does the board as a whole. Nonetheless, committee minutes are also discoverable, and should be written with the understanding that they may 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, many companies have implemented the practice of submitting all committee minutes to the full board for information. 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 placed upon 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, like the board, have exercised sound business judgment and their diligent exercise of the discretion granted to them by the board. To that end, minutes of committee meetings should identify reports and other materials considered and state the activities conducted.

In addition, the minutes of all three major board committees need to 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 all of the key committees share these common characteristics, some particular issues for the minutes of each committee are discussed below.

1. Compensation Committee

The Compensation Committee deals with perhaps the most sensitive issues of all—who gets paid what and who among officers is performing well. As a result, Compensation Committee minutes have traditionally been kept under lock and key. However, with executive compensation under continually increasing scrutiny by the SEC and the plaintiffs' bar alike, 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, using sound business judgment, and that appropriate decision-making processes are employed. Further, as shown by the Disney case (*In re: The Walt Disney Company Derivative Litigation* C.A. No. 15452), decisions as to termination arrangements must be similarly documented. At the same time, compensation committees routinely consider confidential information about senior individuals; consequently, the person responsible for drafting minutes of compensation committee meetings must perform a delicate balancing act in which appropriately detailed minutes do not overwhelm valid 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 that committee actions are consistent with CD&A requirements and the compensation report in the company's proxy statement.

2. Audit Committee

As a result of various factors—including the Sarbanes-Oxley Act and related regulations as well as securities exchange listing standards—the audit committee is arguably the most important committee in a public company and is often perceived as the guarantor of the company’s financial reporting and internal controls. This can create challenges for a corporation experiencing financial reporting, internal control or related issues, particularly if those issues occur—as they can—despite appropriate audit committee oversight. Thus, the minutes of the audit committee not only need to make clear that the committee has adequately performed its responsibilities under its charter, they also need to clearly evidence the committee’s role as overseers and monitors, and not just as preparers of the financial statements or just as managers responsible for day-to-day internal control matters.

3. Nominating or Corporate Governance Committee

As noted above with respect to the compensation and audit committees, regulation and exchange listing standards have significantly expanded the responsibilities of this 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. 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, 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.

B. The Corporate Secretary’s Role in Committee Meetings

The skills and experience that enable the Corporate Secretary to keep the minutes of board meetings also qualify the Corporate Secretary to act as Secretary of committee meetings. The Corporate Secretary should bring a comprehensive, uniform approach to the style and content of minutes and a special capacity for facilitating information flow among committee members and between a committee and the board. But in some companies, the Secretary to one or more committees is a person other than 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 he or she should work with the person designated to take notes and write the minutes of the committee’s meetings to ensure consistency in approach.

C. 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 three major board committees should reflect that the committees have carried out their responsibility as outlined in the committee charters and in applicable SEC regulations and exchange listing standards.
- ▶ Committee minutes should reflect a comprehensive, uniform approach to style and content.

IX. Reviewing and Finalizing Minutes

A. Reviewing Drafts

Every Corporate Secretary needs to take certain actions following a board or committee meeting. Among other matters, certified resolutions may be required immediately for the closing of a financing; notices to stock exchanges regarding dividend declarations or stock splits must be issued promptly; letters to newly elected directors and officers explaining their obligations or restrictions must be prepared, Form 3s must be filed promptly with the Securities and Exchange Commission, other staff members require confirmation of action taken by the board, and the meeting minutes must be drafted.

Various organizations have different procedures for reviewing drafts of minutes. It is common practice for them to be reviewed initially by the General Counsel (if that is a person other than the Corporate Secretary) and possibly the Chief Financial Officer. Once their comments are incorporated, the minutes should be circulated to a broader group of management, possibly (but not necessarily) including all others who made presentations at the meeting, and then to the Chief Executive Officer. At that point, the minutes should be distributed to the full board, although some companies send them to the Chairperson (if other than the CEO) or the lead or presiding director before full board distribution. It is a good idea to have the General Counsel make the final review to make sure that suggested revisions from all others are appropriate.

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. Substantially the same process should be followed for meetings of the board committees.

Increasingly, the Corporate Secretary is asked to produce draft minutes of the board and committees as promptly as possible after their meetings are over, to ensure that memories of the matters discussed and actions taken at the meeting are fresh when the minutes are reviewed. The pressure to produce minutes promptly can be even greater when a company is involved in merger or acquisition activity, or takes any action that may become subject to litigation—times when there is increased interest in the deliberations of the board and the written record of its meetings.

B. Retention of Drafts

Because a Corporate Secretary's minute-keeping practices could become an important issue in litigation, it is wise for the Corporate Secretary to develop, well in advance of a significant non-routine meeting, 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 not appearing in the minutes themselves. Among the elements of such a policy could be:

- An established sequential order for review of the drafted 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 meeting, 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. Remember that backup materials on computers, servers or other electronic devices are also subject to discovery and care should be taken to ensure that all electronic copies are deleted (including backup copies) and overwritten on hard drives.

Well-established procedures for the routine retention and destruction of drafts of minutes and related documents are critical, both in the ordinary conduct of the business and in periods of heightened litigation risk. A regular review process for examining minutes should be followed, to make sure that drafts are not only distributed to the right parties, but also in the right order, to avoid the problem of multiple versions of minutes in circulation.

C. Formal Review and Approval of Minutes

Following the completion of the review process (including the distribution of draft minutes to the full board), it is the usual 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, however, because of the evidentiary value of the minutes and 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.

D. Circulating Committee Meeting Minutes

Many corporate secretaries furnish minutes of meetings of all committee meetings to all members of the board of directors. This practice serves at least two principal purposes. First, it keeps members of the board updated on the activities of each of the board's committees, more fully than from the oral reports heard at board meetings. Directors have an oversight responsibility with respect to board 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. Secondly, considerable time is saved at meetings of the full board; committee chairpersons are not required to elaborate in detail concerning committee activities but rather can simply present a brief summary or a recapitulation to the board and then respond to questions. As noted above, some companies are also including committee agendas to the full board as well.

E. Circulating Minutes Outside the Company

Although it may sometimes be desirable or appropriate for third parties to review minutes, many corporate secretaries follow a policy not to allow final copies of minutes to be provided to anyone outside the company. This may be important in preserving the attorney-client privilege or the regulatory privilege applicable to some industries. Outside counsel or auditors are frequently granted on-site access to review minutes retained by the company – or even copies of the minutes—but care must still be taken to avoid a waiver of privileges and the disclosure of private business information. This is because for some documents, and some disclosures, once a privilege or a right of privacy is waived, it may be waived as to all parties and forever. To protect attorney-client privileged information, note in the minutes all portions of meetings where attorney-client privileged information is discussed and that such discussions occurred in the presence of counsel. Consideration should also be given to whether the privileged portion of minutes should be separated in a confidential document.

F. 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 and to request authority to make the change.

G. Signing the Minutes

Although it is customary, the Corporate Secretary is not always the person who signs the minutes, or the only person who signs. It may be the company's practice for the Chairman to also sign the minutes, or indeed minutes may not be signed at all. But 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 time of signing the minutes may also vary from company to company. In some situations, the minutes are signed as soon as drafted by the Corporate Secretary, and in others, after comments have been received by the Secretary from management and incorporated in a revised draft (thus prior to being sent to the directors in these two instances). 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.

H. Certification by the Secretary

Often the Corporate Secretary is 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.

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 search through the minutes to ensure that no modifications, amendments, or rescissions have been made. Whether the resolution is included in the body of the certificate or attached to the certificate is a matter of style and may be influenced by the length of the resolution and the purpose for which the certificate is intended.

I. Key Tips

- ▶ Well-established procedures for the routine retention and destruction of drafts of minutes and related documents are critical, both in the ordinary conduct of the business and in periods of heightened litigation risk.
- ▶ Ensure that appropriate care is taken with respect to the distribution of minutes to avoid a waiver of a privilege or the disclosure of private business information.

X. Storing Minutes

A. Points to Remember

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, help promote consistency and may avoid inadvertent waiver of attorney-client privilege or a failure to document a particular action.

Practical issues related to storing minutes books should abide by a company's document retention policies and disaster recovery plans. After developing a comprehensive disaster recovery plan, the company should address its policies for document retention. The Corporate Secretary should establish or have significant input into the establishment of document retention standards for the company's minutes and other board related materials.

B. Minute Books and Meeting Files

Traditionally, minutes have been maintained in minute books that were relatively sturdy and could withstand frequent use. Minutes of the board and minutes of board committees were kept in separate minute books to facilitate research, and an alternative practice was to file together in the same book minutes of all meetings that occurred on the same day. Today, however, especially after the events of September 11, 2001, in which some New York City corporations lost their minute books, many companies have reexamined their storage procedures and facilities and their disaster recovery plans, and are storing and filing minutes and records both in hard copy and electronically. For very old records, some companies are scanning minutes and storing them electronically for ease of accessibility. Others have put their minutes on microfiche or microfilm. Another option would be 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 which includes 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. Companies have also started storing these materials electronically.

Organizing meeting files in a consistent format can also help counsel, auditors, or the Corporate Secretary's staff review the files when necessary. This kind of organization applies also to electronic filing systems.

C. Intranets

As companies begin to use secure intranets to disseminate and archive board materials, including meeting materials, minutes, and other reference materials which may be used by directors and staff for meetings, consideration should be made to conventional record-keeping or technology-based board support systems, all of which should abide by the company's record retention policy and disaster recovery plans.

D. Indexing the Minutes

Since minutes are now often created and stored electronically, it has become easier to quickly find information, because of built-in electronic search functions. An additional step may be an index of matters considered and action taken at all meetings of the board and its committees. This is a helpful tool for the Corporate Secretary and management since it saves valuable time. This index, usually kept on a computer database, may be particularly useful for keeping track of standing resolutions or resolutions of general authority. To be fully effective, an index system should include the following components:

- A continuously uniform pattern of assignment of primary and secondary (cross reference) subjects;
- Adequate cross references, since resolutions and other decisions taken by the board usually have a specific context but relate to other matters;
- A basic procedure for selecting and recording the primary and cross reference subjects to ensure continuity in the maintenance of the system as personnel change, and to ensure that all cross references to a particular item are located at the time of any rescinding action; and
- Verification of the indexing work to prevent inadequate and incomplete indexing.

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. Storing a set of minutes on a full-text database may eliminate problems created by possible inconsistent cross-referencing.

Minutes are not the only meeting papers which can be made more accessible by indexing. Consideration should also be given to indexing documents incorporated by reference in the minutes and exhibits thereto. In addition, many companies maintain an abstract or index of resolutions adopted by the board to facilitate searches for board pronouncements on various subjects with respect to certified copies of resolutions that are frequently requested.

There are as many different types of indexing procedures as there are methods for filing correspondence. The right solution depends on the circumstances and custom of the company.

XI. Retention of Minutes and Other Board Materials

A. Creating a Policy

It is the responsibility of the Corporate Secretary to establish a retention policy for material related to board and committee meetings and this should be incorporated into the company'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, if any.

A retention policy should establish criteria for determining what materials are subject to it, 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 used by the company are updated, the permanent records of the company are also updated, or are archived in a way that allows their economical and expeditious retrieval.

B. 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 kept, 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 company's document retention policy will depend upon the kinds of records kept. A company'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. The decision as to whether a particular kind of document is to be retained in the future will probably be influenced by whether the document has been consistently retained in the past, or whether there will be continuity between the cumulative past retention and future retention.

C. A Recap

As we have seen, 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 minutes drafting to be subject to retention policy; any notes should be destroyed as soon as the minutes are approved to reflect the policy that minutes, when subjected to the review and approval process, are to be the only record of the meeting.

D. Additional Concerns

While the selection of the means of retention is important, such considerations will not differ from those applicable to other important corporate documents and records. Additional guidelines can be found on the websites of the Federal Emergency Management Agency (FEMA) and The National Archives and Records Administration.

E. 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, 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, both in the ordinary conduct of the business and in periods of heightened litigation risk.
- ▶ Ensure that appropriate care is taken with respect to the distribution of minutes to avoid a waiver of a privilege or the disclosure of private business information.

Main Resource

Society of Corporate Secretaries & Governance Professionals website. The Society's website houses many documents essential to the office of the Corporate Secretary. Examples include samples of meeting agendas and long and short minutes. In addition, the Society Huddle on Society Connect is a member community that facilitates inquiry and the exchange of ideas and best practices about any topic, including corporate minutes.

Additional Resources

Groves, Sylvia. *AAA+Minutes—The three must-do fundamentals and hundreds of practice tips for writing minutes that protect your organization and its directors*. Published by Governance Studio.
<http://www.governancestudio.ca/shop/>

Corporate Board Minutes: A Director's Guide. Published by National Association of Corporate Directors (NACD). 2013. www.NACDonline.org

Sardell, William. *Encyclopedia of Corporate Meetings, Minutes, and Resolutions*, 3rd Edition. Prentice-Hall, 1986.

Benson, Delores Dochterman. *The Art of Taking Minutes*. AmazonEncore. 2011.

Vesey, E. Norman. "Reflections on *Smith v. Van Gorkom*." *The Corporate Board*. September/October 2001: 18-23.

National Archives and Records Administration: <http://www.archives.gov/>

Federal Emergency Management Agency: <http://www.fema.gov/>

Selected Cases

In re Staples, Inc. Shareholders Litigation., C.A. No. 18784

Grace Bros. v. UniHolding Corp., C.A. No. 17612

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

In re The Walt Disney Company Derivative Litigation, C.A. No. 15452

Special Thanks

The Society would like to thank the following for their assistance in updating this document.

Faraz Choudhry
UnitedHealth Group Incorporated

Linda Kennedy
UNS Energy Corporation

Denise Kuprionis
The Governance Solutions Group, LLC

Cindy Nigbur
Thrivent Financial for Lutherans

Dannette Smith
UnitedHealth Group Incorporated and Chair, Corporate Practices Committee