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Interview

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Corporate Minutes: Best Practices For Corporate Secretaries When Recording Board Meetings

Editor's Note: Ms. Krus is the author of the CORPORATE SECRETARY'S ANSWER BOOK and a partner at Sutherland Asbill & Brennan LLP, Washington, D.C. She serves as the co-practice group leader in the firm's corporate practice group. Ms. Krus counsels public companies on a broad range of corporate and securities matters, such as the Sarbanes-Oxley Act, corporate governance, disclosure, executive compensation, and shareholder matters. She recently answered questions from BNA concerning the role of the corporate secretary in preparing and maintaining the minutes of board meetings.

BNA: How does a corporate secretary determine which items a board or committee needs to act on, and what is the typical process for preparing the agenda for a board or committee meeting?

Krus: Depending on the structure of the board, for example whether the chairman is also the chief executive officer or whether there is a lead director, the corporate secretary would determine who to approach first. If there is a lead director, the corporate secretary would contact that director and find out what the major issues are that the board will be considering at that particular meeting. If it is a regularly scheduled meeting, you usually have a master agenda that will state what needs to be done at that particular meeting. In addition, the agenda would also include a presentation regarding financial information, reporting from committees, as well as regulatory and litigation issues. The corporate secretary would present those issues to the lead director and then also go to the other members of the management team to find out if there is anything else that needs to be presented. The agenda would then be approved by management and the full board—this usually

takes place a couple of days before the information is distributed to the board. If it is a special meeting, obviously it is being called for only one or two issues, so the process would be different. The corporate secretary would discuss the reasons and agenda for meeting with the CEO and/or the lead director for the special meeting.

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BNA: Should the corporate secretary prepare drafts of resolutions that the board will be asked to adopt and provide them to the board members before, or during, the meeting—or are they typically drafted after the board acts?

Krus: It is better to have resolutions prepared in advance and submitted with the board materials so the board members can read through them and understand what is being asked. Now remember, these are draft resolutions—the corporate secretary does not need to worry about tweaks made during the board meeting, which can be reflected in the final resolutions.

One instance where a resolution might be prepared after the meeting is when a special meeting is called quickly—there may need to be a discussion as to what the content of the resolution is and then have it drafted afterwards. There are certainly emergency situations when that may happen, but there is nothing that I am

aware of that would require the exact language of the resolution to have been presented to the board in order to act on it.

BNA: Do many corporations have Web portals for directors where they can access information concerning the company and the board meetings?

Krus: Absolutely. I think the use of Web portals is increasing. Large corporations started using these portals quite awhile ago and there are software and Web hosting companies that can create Web portals for corporations. It is definitely becoming much more common and I think directors are even asking for Web portals if they are not being currently used. One thing I want to point out is that you have to be very careful with Web portals—all of your corporate minutes should not be posted on a non-secure Web site. The company needs to make sure that the Web site is secure, especially if drafts will be posted when comments are solicited. In addition, the documents must be in a format where they cannot be altered once they are on the site. One of the concerns directors have with Web portals is whether the integrity and confidentiality of the documents can be maintained. However, I think it is definitely the way the world is going—I don't think boards are going to go completely paperless, but as far as using the Web portals as a way of directors receiving and accessing information, the portals are definitely being used.

BNA: Do most corporations have assistant secretaries and how do those individuals typically assist the corporate secretary?

Krus: In my experience, it is very common to have assistant secretaries, a couple of them at the company

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level, as well as at the subsidiary level. The reason to have them is that if there is a meeting that comes up and the corporate secretary is not available, the company should have someone available who is capable and understands what they need to do at the meeting to take the minutes, record them, and prepare them correctly. I definitely think it is an extremely good idea to have somebody waiting in the wings as needed.

The minutes should reflect that the board deliberated appropriately to demonstrate due diligence and good care.

BNA: Should corporate secretaries use the “short form” or “long form” of minutes?

Krus: There should be a balanced approach. There are a lot of reports out there that say the minutes should either be very detailed or have a summary description along with the resolutions. A good idea is to figure out the company’s style of minute taking. A new corporate secretary can get a good sense of a corporation by reading the minutes of prior meetings and understanding how they present and organize their information. I do think it is much more appropriate to do a summary of the discussion—there should be enough detail to know what the board considered. The resolutions need to include enough information so as to avoid any of the *Disney* issues. It took them 10 years to get through the litigation because the minutes were not sufficient.

The corporate secretary needs to be very careful about referencing someone as not being in support of a particular resolution. The minutes might be challenged down the line and they are prima facie evidence of what the board discussed. This evidence is the best information the company has about what actions were taken, so the minutes should be clear and concise. I suggest summarizing what the discussion points were. I have seen some minutes where people don’t actually have resolutions and only note that the board acted. I would strongly encourage people to add the resolutions into the minutes when documenting board action.

There is a lot of discussion about what to include in the minutes if the information being presented is privileged. I would say the corporate secretary should include fairly little—it should be noted that a privileged discussion took place, especially in regards to litigation and strategy. The corporate secretary could then prepare a separate memo that is not necessarily incorporated into the minutes, if requested. This way, the privileged information is available if necessary, but it is not a part of the minutes.

Another option is to go into executive session and have a privileged conversation there. This is one of the most difficult issues to address, especially if you are a regulated institution and the government may want to review the company’s information. At the end of the day, the corporate secretary needs to be particularly careful when the board is taking action, especially if you are talking about transactions, mergers and acquisitions, and securities offerings. The minutes should reflect that the board deliberated appropriately to demonstrate due diligence and good care.

BNA: How far in advance are board books available to the board?

Krus: A bulk of the information that boards act upon is in the board book, which I don’t think a lot of people outside the corporate community understand. The agenda is prepared with all of the supplemental materials or board book materials. Most of the time, the board book is sent out at least a week or so in advance. Often, companies will include in their corporate governance guidelines how far in advance of the meeting they expect to deliver the board materials.

BNA: What would be an example of when a director should refrain from voting on a matter because of a conflict of interest? Also, what would be an example of a situation in which a director should be excused from a meeting during the discussion of a particular item?

Krus: The most common example would be where a director has a business interest in another company that would be affected by some action that the board is considering. I have no problem with the board member participating in the discussion once they have informed the board that they have a conflict. He or she can then provide any useful information on the matter that they have to the other board members. However, when it

comes time to vote, the director should be excused so that (1) the board can use the information in whatever way they deem appropriate, and (2) there can be a separate discussion without the conflicted director in the room.

BNA: How can minutes be maintained in a way that it is easy, for example, to find a resolution that was adopted years earlier?

Krus: I think including an agenda or having a style that consistently reflects the organization of the meeting is one of the best ways to find information in minutes. Providing headings is very useful—you can have the captioned heading, with the discussion and resolution under the same heading—that is the best way I’ve seen it done.

BNA: Should the corporate secretary’s notes and supporting papers from the meetings be retained in addition to the formal minutes?

Krus: Notes should definitely be discarded—the company does not want notes to become a part of the corporate record. Notes are usually more extensive than the actual minutes produced. Once the minutes are approved by counsel and the directors, then the drafts and notes should be destroyed. Supporting materials, such as board books, should be maintained and to the extent necessary, incorporated into the minutes.

From a litigation standpoint, I would strongly discourage making a transcript of the board meeting.

BNA: Should a separate set of minutes be maintained in a secure off-site location?

Krus: Yes, there should be more than one set of minutes. If the corporation uses a Web portal, the documents on the Web portal can be the back-up set. When the supporting material is online, it is my understanding that PDF copies are used once you have final minutes and are used as a historical resource. The electronic copy should be an exact duplicate of what is on paper. Interestingly enough, the Society of Corporate Secretaries and Governance Professionals recently did a survey about having paperless minute books. It overwhelmingly states that people are not comfortable going with paperless minute books. I would

keep a formal set of minutes and a second copy electronically—then the company should be covered. There were a number of situations during 9/11 where companies lost their minutes entirely because they did not have a second set.

I think when you are talking about formal corporate documents, people still tend to use hard copies. Having a paper copy formalizes the process. For example, the process of having the board ratify and then the secretary certify, speaks to the fact that everyone agrees that those are the final minutes. This process demonstrates the formalization of the minutes and that is why people are still more comfortable with paper.

My advice for companies is that it is coming; in some way, shape or form, we are going to have some form of proxy access.

BNA: Are there instances where it would be advisable to make a transcript, or audio or video tape, of a board, committee, or shareholder meeting?

Krus: As for board meetings, absolutely not. The board members need to be comfortable having a free-flowing discussion and asking questions. A board meeting is an interactive process that should not be impeded by recording every piece of information. No individual board member can bind the corporation and since the board acts as a unit, the minutes are a sufficient record of the board meetings. From a litigation standpoint, I would strongly discourage making a transcript of the board meeting. As far as shareholder meet-

ings, those are commonly Webcast. As a result, a transcript is generally available, as is a video. A shareholder meeting is more of a presentation rather than an interactive discussion which is where I would draw the line.

BNA: To what extent is the role of a corporate secretary different when the corporation is a wholly-owned subsidiary?

Krus: It really depends on how the board and the company are structured. Is it the same members of the board as the parent or is it a separate board? How much of their action is taken up at the parent level? If it is a subsidiary acting on their own, it is a lot of what we have already been talking about. If the subsidiary is used more as a structural tool, then commonly in those circumstances you will only have consents. It really depends on the structure.

BNA: As you know, Delaware recently adopted an amendment to its corporation law that permits a board to set a different record date for determining the stockholders entitled to vote at a shareholders' meeting from the record date for determining those stockholders entitled to notice of the meeting. Do you anticipate that this "bifurcated" record date will be utilized very much by corporate boards?

Krus: I think that initially corporations are going to tread on this very lightly. One of the reasons that this was adopted was to minimize "empty voting." This dual-dating system is actually used in Europe. There, they do not have the concept of the streetholders, so when they get a list of shareholders, it includes all of the beneficial holders. In regards to Delaware's bifurcated record date, I have some reservations regarding the mechanics of this dual-record date approach, including how companies will obtain the correct stockholder information for each date.

I am also concerned that companies might feel like they may be biting off more than they can chew when they get to their next year's annual meeting because of the elimination of discretionary broker voting in director elections, proxy access, and the bifurcated record date. The question is should we be doing this more seriatim, or all at once. We have to remember that the whole point of this is to have board members run well-managed profitable companies, not become so bogged down in the corporate governance part that companies suffer in the marketplace.

BNA: What is your view of the recent SEC proposed rules that would permit shareholder proxy access for director nominees?

Krus: My advice for companies is that it is coming; in some way, shape or form, we are going to have some form of proxy access. According to the SEC's proposal, you would have Rule 14a-11, and then you could still have shareholder proposals in addition to the new rule, but there would be limitations. My best understanding is that there would be a minimum requirement so that a company, instead of using the SEC's eligibility, can use a lower level of eligibility. But if the SEC ends up at 1 percent for large institutions, a company could have .5 percent, but could not have 2 percent. There are a lot of mechanics—it is a 250-page proposal that requests comments on over 180 questions with subparts. There are really critical issues here and how it turns out will be interesting.

One of my suggestions would be that if we do not make it an interim or temporary rule, that we monitor the implementation of the rule very closely and have a report due after a year or so to see how the rule is working and how it is affecting the process.