Should Everything Be for the Record?

Board meeting minutes, or lack thereof, are causing legal issues.

BY DOUG RAYMOND

The minimalist approach to recording boardroom discussions is attracting criticism, but that doesn't mean everything at every meeting should be documented.

In practice, approaches range from reciting only the bare bones of board actions and decisions, to creating a veritable transcript of the entire meeting, including all reports and discussions. Under the corporate law of Delaware and most other jurisdictions, the job of the corporate secretary is "to record the proceedings of the meetings of the stockholders and directors in a book to be kept for that purpose."

But what should the record say?

This is a key question, particularly for public companies where directors have a heightened concern about litigation. In the Chancery Court decision *In re Netsmart Technologies, Inc. Shareholders Litigation*, the board of a company considering a sale of control had failed to prepare detailed minutes of the meeting held to consider whether to accept the acquisition proposal. Following the board's acceptance, shareholders brought claims against the board for its alleged failure to explore adequately alternatives to the transaction. Moreover, the court blocked the transaction, based in part on the absence of evidence that the board had engaged in serious discussions about these alternatives. The court explained that it might have reached a different result if the board had kept better minutes of its deliberations and had timely approved them, noting that the failure to do so was, "to state the obvious, not confidence-inspiring."

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In another case, involving the Disney Company's decisions to hire and later fire a top executive, shareholders claimed the directors had violated their fiduciary duties by failing to sufficiently deliberate before taking these steps. The minutes of the relevant meetings did not include discussions of the key terms of the executive's employment and severance package, and also failed to address the valuation of major portions of the compensation package. Although Disney ultimately prevailed, it suffered a protracted, expensive, and very public legal battle to do so, which, the court explained, could have been avoided if the minutes had been sufficiently detailed.

The heightened awareness and risk of litigation, as well as of high profile government investigations, has led some boards — particularly of public companies — to record everything that happens at a meeting. This not only requires significant effort on the part of the corporate secretary, it also requires the directors to review the copious minutes to ensure the comments and discussions are sufficiently recorded. While this level of detail may be appropriate in the context of a change in chief executive or a potential sale of the company, this exercise is at best tedious. And,

ironically, any gap in the detailed coverage becomes more difficult to explain when the minutes otherwise resemble a transcript.

The more sensible approach is to tailor the degree of detail to the significance of the matter being considered. The corporate secretary should first consider which agenda items require board action. Less detail is generally appropriate where the board is not taking action; however, even where no action is taken, if the matters being discussed are particularly important or out of the ordinary, more detail is generally appropriate. For example, even if the directors are not being asked to take action, more detail should ordinarily accompany a discussion about new business risks than would be typical for ordinary quarterly reporting, particularly if the new risks are likely to find their way into the company's risk factor disclosures in its securities filings.

A similar principle applies when the board takes action. For example, the minutes should be more detailed for discussions concerning significant actions such as a recapitalization or merger, or the compensation arrangements for the new chief executive officer. On the other hand, discussions about the regular quarterly dividend need not be particularly detailed.

Other issues should be included when appropriate. If, for example, the board is seeking legal advice, and the attorney-client privilege is available, the minutes should note the existence of the discussion and when the "outsiders" left the meeting, and should specify the counsel advising the board.

Consider also whether the minutes may be of interest to a skeptical shareholder, lawyer, or investigator. In these situations, the secretary may want to consult with experienced counsel about how to frame the board discussion as well as how to report it.

Additionally, the corporate secretary should be aware of how the minutes of multiple meetings fit together as a whole. In general, discussions of similar importance should be recorded at a similar level of detail across all meetings.

Keeping proper minutes can pay significant dividends, and that can be done without overburdening the corporate secretary. They help boards stay informed on past discussions, create a roadmap for future deliberations and, when done properly, provide contemporaneous documentation that can short circuit shareholders' unfounded claims. As with so much in the arena of good governance, a thoughtful, common-sense approach is always better than following a script or someone else's template. And the discussion about what the minutes should include may even improve the board's deliberations. ■

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