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Corporate Board Meeting Minutes, Agendas and Other Written Records: Governance Best Practices

Safeguarding Directors Against Breach of Fiduciary Duty Claims With Effective Document Preparation and Retention Practices

TUESDAY, JUNE 11, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Paul Marcela, President & Managing Director, **Governance Partners Group**, Alpharetta, Ga.

Mark J. Mihanovic, Partner, **McDermott Will & Emery**, Menlo Park, Calif.

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Corporate Board Meeting Minutes, Agendas and other Written Records: Governance Best Practices

Director Fiduciary Duties and Board Minutes; Document Retention

June 11, 2019

Mark Mihanovic
mmihanovic@mwe.com

www.mwe.com

Boston Brussels Chicago Dallas Düsseldorf Frankfurt Houston London Los Angeles Miami Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.
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- Role of Board of Directors
 - Manage business and affairs of corporation
 - Oversight of management and risk and compliance
- Basic fiduciary duties to corporation and its stockholders
 - Duty of loyalty
 - Duty to act solely for the benefit of the corporation and its stockholders when voting on a transaction or other business matter
 - Duty to act without self-interest (not expecting to derive personal benefit from transaction)
 - Issue arises in context of (a) transaction proposed between (i) corporation and (ii) director or entity in which director has ownership interest, (b) prospect of employment with other party or (c) corporate opportunity

- Basic fiduciary duties to corporation and its stockholders (cont.)
 - Duty of care
 - Duty to act in informed and considered manner
 - Review of reasonably available material information
 - Amount of care which an ordinarily prudent person would use in similar circumstances
 - Reasonable reliance on reports and opinions of experts (including financial and legal advisers)

- Business judgment rule provides basic standard of review for duty of care
 - Presumption that directors are acting in good faith and that Board action taken is in the best interests of the corporation and its stockholders
 - Court will not substitute its own business judgement for that of Board of Directors if there is rational business purpose
 - Courts typically focus on process used in decision-making rather than substance of decision

- Business judgment rule provides basic standard of review for duty of care (cont.)
 - Applied to protect directors from liability for mistakes in judgement regarding action taken in good faith and with appropriate care
 - Applied to prevent stoppage of transactions due to questions of judgement
 - Presumption is rebuttable if third party can establish that the Board did not act in informed, careful manner (or breached duty of loyalty)

- Enhanced scrutiny standard of review
 - Certain situations in which business judgement rule will not apply and courts will take closer look at Board's actions for reasonableness
 - Employment of defensive techniques to block take-over proposal by outside party
 - Change-in-control transactions trigger Revlon duties

- Entire fairness standard of review, if business judgment rule presumption is rebutted
 - Burden of proof on Board to show transaction is entirely fair to corporation
 - Entire fairness encompasses procedural fairness/“fair dealing” (as well as substantive fairness/“fair price”)
 - Strictest standard of review of Board actions, granting no deference to Board’s judgement

- Interested transactions
 - Business judgment rule does not apply where the transaction in question involves the self-interest of individual directors
 - Delaware law provides that contracts between the corporation and an interested director shall not be void or voidable, provided:
 - All material facts are known to the entire Board and the transaction is approved by a majority of the disinterested directors or
 - The transaction is fair to the corporation at the time it is approved by the directors

- Other considerations
 - State Corporate Law
 - Delaware General Corporation Law (Section 142)
 - California Corporations Code (Section 1500)
 - Corporate formalities/piercing of corporate veil
 - Subsidiary Board minutes
 - Bylaws, Board Committee Charters and Corporate Governance Guidelines
 - Sarbanes-Oxley
 - Emphasis on greater accountability and disclosure

- Other considerations (cont.)
 - Culture, circumstances and resources of company
 - Conflicts of interest
 - Discussions under attorney-client privilege
 - Executive sessions
 - Utilization of Board Written Consents
 - Auditor review
 - Board minutes vs. drafts or notes
 - Board approval of draft minutes

- Implications for directors and their advisers
 - Directors should be informed and well-advised
 - Directors should be deliberative and ask questions
 - Courts look for objective evidence that directors made careful and educated decisions
 - Exercise reasonable diligence in gathering and considering all material information
 - Explore, understand and weigh alternative courses of conduct that may be available
 - Weigh benefits versus harm to corporation and its stockholders when considering specific courses of action

- Implications for directors and their advisers (cont.)
 - Courts look for objective evidence that directors made careful and educated decisions (cont.)
 - Obtain independent expert advice and understand experts' findings and bases therefor
 - Have reasonable basis for believing that information provided to board is reliable
 - Review of relevant documentation (or adequate and accurate summaries thereof)
 - Take time to make informed decisions
 - Consistent recollection of deliberations and decisions by Board members and advisers

- Implications for directors and their advisers (cont.)
 - Importance of disclosure to Board regarding director's self-interest in transaction
 - Be aware that communications among directors are not privileged and are subject to discovery in litigation

- Purposes of Board minutes and how minutes can help
 - A primary purpose of corporate minutes is to preserve an accurate and official record of the proceedings of a Board or Board Committee meeting
 - Establish internal approvals and delegations of authority in Resolutions
 - Presentation of draft minutes for Board to approve
 - Importance of minutes for key Committees such as Audit, Compensation and Corporate Governance Committees
 - Compliance function
 - State Corporation law requirements
 - Securities Exchange Act of 1934, Sarbanes-Oxley, Stock Exchange requirements

- Purposes of Board minutes and how minutes can help (cont.)
 - Evidence of corporate action and compliance for third parties
 - Discoverable
 - Subject to third-party audit
 - Subject to stockholder demand to inspect books and records
 - Liability risk mitigation by reflecting satisfaction of business judgement rule elements
 - Reduced risks of stockholder lawsuits
 - Assume minutes will be obtained by Plaintiffs seeking to use minutes against corporation in litigation

- Purposes of Board minutes and how minutes can help (cont.)
 - Preservation of corporate veil by maintenance of Subsidiary minute books
 - Short-form vs. long-form
 - Length related to importance of Meeting Agenda
 - Not a transcript

- Purposes of Board minutes and how minutes can help (cont.)
 - Well-kept Board minutes
 - Serve as a record of corporate decisions
 - Indicate Board attention and deliberation regarding matters at level commensurate with importance of such matters
 - Indicate sufficient due diligence
 - Provide record of agreements and other documentation and information provided to Board (including in advance of Meeting) and considered by Board
 - Reflect appropriate reliance on outside counsel and other experts
 - Reflect disclosure of director interest in transaction
 - Reflect director dissents and abstentions where appropriate

- Purposes of Board minutes and how minutes can help (cont.)
 - Well-kept Board minutes (cont.)
 - Offer guidance for future Board action
 - Reduce misunderstandings as to intent of Board
 - Serve as source of contemporaneous evidence in regulatory or judicial proceedings
 - Protect attorney-client privilege
 - Can assist in supporting indemnification rights of directors
 - Enhanced credibility and streamlined third-party due diligence process in context of financing or partnership or M&A transaction
 - Can also be a factor in director recruitment and retention efforts

- Purposes of Board minutes and how minutes can help (cont.)
 - Heightened importance for change-in-control transactions
 - Inclusion of financial adviser's business and financial advice regarding selling strategies, price, viability of corporation's projections and prospects
 - Accurate and complete minutes allow Board to assess actions and possible errors (including in relation to inclusion or exclusion of bidders and evolution of financial assumptions used by management and financial adviser)
 - Identification of key factors (including advisers' input) considered by Board in decision-making

- Purposes of Board minutes and how minutes can help (cont.)
 - In Re Family Dollar Stores stockholder litigation
 - Board's decision not to negotiate with a topping bidder found reasonable by court based partly on documentation of Board's process and documentation regarding advice received by Board from financial and legal advisers

- How inadequate Board minutes can hurt
 - Deny directors a potentially dispositive resource from which to defend conduct or explain full nature of Board decision
 - Plaintiffs and regulators will seek access to Board minutes to bolster their arguments
 - Courts give credence to contents of minutes
 - Cause confusion as to intent of Board or provide roadmap for plaintiffs or regulators by including confusing detail
 - Overly detailed minutes potentially chill future provocative comments or difficult questions from Board members

- How inadequate Board minutes can hurt (cont.)
 - Cause issues or delays with corporation’s auditors
 - Create concern or uncertainty in due diligence process with business or financial partners
 - Disney stockholder derivative litigation
 - Brevity of Compensation Committee minutes and inconsistency of minutes with subsequent recollection of participants played major role in Plaintiffs withstanding Motion to Dismiss and proceeding to long drawn-out litigation
 - Netsmart Technologies case
 - Court critical of Defendant’s “tardy omnibus consideration of meeting minutes”

- How inadequate Board minutes can hurt (cont.)
 - NYSE CEO compensation
 - New York AG fiduciary duty breach allegations largely based on close review of Board and Compensation Committee minutes
 - WorldCom bankruptcy
 - Bankruptcy Examiner criticism of Board and its inattentiveness concerning corporate affairs was based partly on review of corporate minutes and similar records
 - Del Monte Foods case
 - Stockholders won injunction postponing sale of company due in large part to lack of any Board minutes detailing meaningful consideration of another high bidder

- How inadequate Board minutes can hurt (cont.)
 - e-Smart Technologies case
 - Unsigned and non-current Board minutes used as evidence to show that company lacked internal controls and, thus, a grant of summary judgment for the SEC was warranted

■ Consent Agendas

- Consent Agendas bundle items not requiring or meriting independent discussion into one agenda item
 - Any and all documents comprising the Consent Agenda (such as routine reports and Board and Committee meeting minutes) are circulated to directors for review prior to Board meeting
 - The Consent Agenda item is voted on at Board meeting without discussion or debate
- Items on the Consent Agenda may be removed and placed back on the regular agenda for discussion during Board meeting

- Consent Agendas (cont.)

- Benefits of Consent Agenda

- Reduces time spent at Board meetings on redundant or routine agenda items
- Allows more time during Board meeting to be allotted to more controversial or significant agenda items

■ Consent Agendas (cont.)

– Dangers of Consent Agenda

- Potentially suppresses beneficial discussion of items within the Consent Agenda
- Documents circulated beforehand may not be thoroughly reviewed
- Requires that all directors fully understand the proper use of Consent Agendas
- Improper use of the Consent Agenda may result in an important action taken without the Board's informed consent

- Document Retention Policies
 - Should be clear and adhered to consistently
 - Typically includes Schedule charting how long different categories of documents must be kept
 - Corporate and administrative documents
 - Accounting and financial documents
 - Contracts
 - Litigation
 - Tax
 - Employment/Human Resources
 - Public relations

- Document Retention Policies (cont.)
 - Applicable federal regulations and (varying) State and local laws can dictate retention time periods
 - Regulatory landscape applicable to entity
 - Publicly-traded companies
 - Industry
 - Cost of storage

■ E-Mail Retention Policies

- Either included in general Document Retention Policy or separate policy dove-tailing off general Document Retention Policy
- Retention of an e-mail should generally align with retention of documents covering same substance as the e-mail
 - Volume and nature of e-mails sometimes make them difficult to categorize to match general Document Retention Policy
 - Training of employees to move e-mails into proper folders for appropriate categorization or functional software programs should be implemented
 - Technology alternatives
 - Systematic e-mails deletion program

- E-Mail Retention Policies (cont.)
 - Same legal and regulatory requirements as applicable to documents generally
 - In litigation context, resources spent in (and costs of) producing e-mails for Discovery will be impacted by the volume and organization of retained e-mails
 - Data storage costs

- Best practices
 - Certain records should be kept indefinitely
 - Organizational documents (such as Charter and Bylaws) with Amendments
 - Copyright, Trademark and Patent registrations
 - Financial statements
 - Certain State and local filings
 - Insurance policies (Auto, General Liability and Umbrella Policies)
 - Records with limited value should be kept for lesser (consistently applied) periods of time (subject to legal retention requirements)
 - Records with little or no long-term value should be kept until no longer needed for reference

- Best practices (cont.)
 - HIPAA compliance
 - Corporate Minute Books
 - Bylaws provisions
 - Should be covered by Document Retention Policy
 - Directors should be informed (and periodically reminded) of Document Retention Policy
 - Notes of directors and other attendees and drafts of Board minutes
 - Retained permanently
 - Use of Intranet

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Corporate Board Meeting Minutes, Agendas

And

Other Written Records

Paul Marcela

President

Governance Partners Group

paul.marcela@governancepg.com

770-815-4445

ROLE OF THE CORPORATE SECRETARY

Every company is required to have a Corporate Secretary under state corporate laws.

- Individual company bylaws typically specify the powers and duties of the Corporate Secretary
- Key responsibilities include ensuring that:
 - Board members have the proper advice and resources to discharge their fiduciary duties to shareholders
 - The minutes of the Board's actions during Board meetings reflect the proper exercise of those fiduciary duties

ROLE OF THE CORPORATE SECRETARY

- In addition to preparing accurate and sufficient minutes of Board and Committee meetings, the Corporate Secretary is also a confidante and resource to the Board and senior management, providing advice on Board responsibilities and logistics
- The Corporate Secretary has emerged as a senior, strategic-level corporate officer who plays a leading role in a company's corporate governance
- Due to growing significance of the role, the Corporate Secretary is often called the Chief Governance Officer

ROLE OF THE CORPORATE SECRETARY

Typical responsibilities of the Corporate Secretary

- Manage all Board and Committee meeting logistics, attend and record minutes of all Board and Committee meetings and facilitate Board communications
- Advise the Board on its roles and responsibilities
- Facilitate the orientation of new Directors
- Maintain key corporate documents and records

ROLE OF THE CORPORATE SECRETARY

- Oversee compliance with state corporate laws and, for public companies, SEC reporting/disclosure requirements and stock exchange listing standards
- Oversee stockholder relations, including stock issuance and transfer operations and stockholder correspondence, and prepare and distribute the annual proxy statement
- Manage the process pertaining to the annual stockholder meeting
- Manage subsidiary corporate governance

ROLE OF THE CORPORATE SECRETARY

- Monitor corporate governance developments and assist the Board in tailoring governance practices to meet the Board's needs and investor expectations
- Serve as a focal point for communication and engagement with the Board, senior management and shareholders on corporate governance issues
- Work closely with a company's Board of Directors, CEO/President, CFO and other senior officers, providing information on Board best practices and tailoring the Board's governance framework to fit the needs of the Company and its Directors

ROLE OF THE CORPORATE SECRETARY

- The Corporate Secretary generally performs managerial responsibilities in the following four categories:
 - Board and Committee Support
 - Executive management collaboration
 - Legal entity governance management
 - Governance program and process development

ROLE OF THE CORPORATE SECRETARY

BOARD AND COMMITTEE SUPPORT

- Shareholder, Board and Committee meetings
- Meeting participation and minutes preparation
- Resolution preparation and presentation
- Board and Committee charters
- Shareholder communications/relations

ROLE OF THE CORPORATE SECRETARY

Board and Committee Meetings Planning and Preparation

- Scheduling
- Agendas
- Materials and presentations
- Liaison to Committees
- Documenting the meetings

ROLE OF THE CORPORATE SECRETARY

EXECUTIVE MANAGEMENT COLLABORATION

- Board and Committee meeting plans and objectives
- Identification of matters for discussion and decision-making
- Board and Committee materials development, delivery and presentation
- Management of D&O indemnification/insurance issues
- Corporate governance aspects of annual reports, financial statement audits/reviews and footnotes and financial press releases

ROLE OF THE CORPORATE SECRETARY

LEGAL ENTITY GOVERNANCE MANAGEMENT

- Subsidiaries, joint ventures and other legal entities
- Global legal entity management/compliance
- Periodic Board meetings of subsidiaries
- Subsidiary corporate minute books
- Third party governance vendor procurement

ROLE OF THE CORPORATE SECRETARY

GOVERNANCE PROGRAM AND PROCESS DEVELOPMENT/IMPLEMENTATION

- Best practices identification and implementation
- Process development and implementation
- Establishment/enhancement of Corporate Secretary operation and practices
- Board and Committee evaluation, resolution approval and delegation of authority process development
- Proxy advisory firm and activist shareholder issue management

ROLE OF THE CORPORATE SECRETARY

IMPORTANCE OF CORPORATE SECRETARY ROLE

- Preserve “corporate veil” to protect shareholder assets from plaintiffs and creditors
 - Risk of “piercing the corporate veil” is reduced when corporate governance is complete, properly documented and transparent
- Fulfill Director & Officer fiduciary duties
 - Risk of shareholder lawsuits is reduced when Board and Committee decision-making is diligently and properly documented

ROLE OF THE CORPORATE SECRETARY

IMPORTANCE OF THE CORPORATE SECRETARY ROLE

- Preparedness for sale, “going public” and financing transactions
 - Due diligence requires demonstration of good governance documentation and internal controls
 - Transaction closings require documentation of transaction authorization, officer signature authority, etc.

ROLE OF THE CORPORATE SECRETARY

IMPORTANCE OF THE CORPORATE SECRETARY ROLE

- Enhance ability to provide requested governance documents
 - Corporations need to adequately respond to requests for high quality corporate documents by lenders and other third parties
- Facilitate financial statement audit requests for corporate governance documentation
 - Minutes of Board and Committee meetings
 - Certified copies of resolutions

ROLE OF THE CORPORATE SECRETARY

CORE COMPETENCIES OF THE CORPORATE SECRETARY

Personal and professional attributes:

- Understanding the company's business thoroughly
- Demonstrating an executive “presence” coupled with solid communications skills
- Being sensitive to the needs of the Chair and other directors

ROLE OF THE CORPORATE SECRETARY

- Being able to provide updates to the Board and executive management regarding corporate governance developments
- Being able to lead and work within a bureaucratic and multi-disciplinary corporate environment to achieve consensus
- Being detail-oriented, flexible and creative
- Maintaining the appropriate perspective and demeanor no matter how pressured a situation might be

ROLE OF THE CORPORATE SECRETARY

“Nuts and Bolts” of the Job

- Coordinating and attending Board and Committee meetings and drafting minutes
- Serving as a liaison between directors, officers, and shareholders
- Directing activities related to the annual shareholders meeting
- Maintaining key corporate documents and records
- Supervising stock transfers
- For public companies, monitoring securities law developments

ROLE OF THE CORPORATE SECRETARY

ADDITIONAL TOPICS

- Advising directors and officers regarding corporate governance topics and trends
- Shareholders and investor relations
- Unclaimed property
- Distinction between Corporate Secretary, Chief Compliance Officer and General Counsel roles

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BOARD AND COMMITTEE MEETING MINUTES

TOPICS COVERED

- PURPOSES
- REQUIRED ELEMENTS
- FORM/STYLE
- PROTECTING ATTORNEY-CLIENT PRIVILEGE
- EXECUTIVE SESSIONS
- DRAFT AND REVIEW PROCESS
- REVIEW BY AUDITORS AND REGULATORS
- DESTRUCTION OF DRAFT MINUTES AND DIRECTORS' NOTES AND COPIES
- LIMITING OR ALLOWING ACCESS/COPIES
- METHODS TO STORE AND PRESERVE MINUTES

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PURPOSES

CORPORATE RECORD FUNCTION

- Official historical record of discussions and actions
- Prima facie evidence of the facts recited
- Establish internal approvals and delegations of authority

EVIDENCE OF CORPORATE ACTION FOR THIRD PARTIES

- Discoverable
- Subject to audit by third parties
- Subject to shareholder demand to inspect books and records

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LIABILITY RISK MITIGATION

- Assume that plaintiffs will seek to use minutes in litigation
- Assume minutes will be obtained by plaintiffs counsel via books and records inspection demand
- Record for business judgment rule
- Record of diligence by directors for duty of care
- Document abstentions, dissents and conflicts

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COMPLIANCE FUNCTION

- Evidence of compliance with state corporate law
- For public companies, evidence of compliance with relevant legal requirements such as:
 - Securities Exchange Act of 1934
 - Sarbanes-Oxley Act
 - Stock exchange listing standards

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REQUIRED ELEMENTS

- Date, time and location
- Type of meeting
- Attendance
- Procedure for presentations and resolution consideration
- Use of consent agenda
- Documentation of discussion and deliberation
- Documentation of decisions made and actions taken
- Consideration of follow-up requests
- Documentation of Executive Sessions

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FORM/STYLE: DECIDING ON CONTENT

- The Corporate Secretary has the responsibility for deciding:
 - What aspects of the discussion should be in the record
 - How the discussion will be reflected in the minutes
- The Chair and other Directors may influence style and content

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CONTROL OF CONTENT

- The Corporate Secretary should keep the level of detail appropriate for each particular agenda item
 - Detail should increase with perceived significance or degree of risk
 - Routine items can be recorded with less detail

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CONTROL OF CONTENT

- The Corporate Secretary should use care in referring to and incorporating materials by reference
 - Avoid ambiguous phrases such as “approved as requested”
 - Materials incorporated by reference in the minutes are effectively part of the corporate minutes

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HANDLING DIRECTOR CONFLICTS OF INTEREST

- When a Director has a conflict of interest on a particular issue under discussion by the Board, the minutes:
 - Do not need to describe the nature of the conflict
 - Should reflect that the director abstained from voting on the issue and/or left the meeting while the discussion of the issue took place

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HANDLING DISSENTS

- Dissents are generally rare – most items are approved unanimously
- When there are dissents, the dissenters may insist that the minutes note their names and the fact that they dissented
- The minutes do not need to describe the reasons for the dissent

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FORM OF MINUTES – SHORT FORM

- ADVANTAGES
 - Less risk of misinterpretation in litigation
 - More direct record of actions taken
 - Shorter to draft and read
 - Less revealing to third parties

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FORM OF MINUTES – SHORT FORM

- DISADVANTAGES
 - Does not explain basis for action taken
 - Less detailed record of Directors' care and diligence
 - May not demonstrate that detailed requirements were met

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FORM OF MINUTES – LONG FORM

ADVANTAGES

- More detailed record of Directors' care and diligence
- More detailed description of quality of deliberations and decisions
- More detailed record of management's recommendations and support of Directors' actions
- More detailed historical record for future reference
- Less risk of omitting a key point

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FORM OF MINUTES – LONG FORM

- DISADVANTAGES
 - Greater opportunity for misinterpretation of wording
 - May include extraneous information
 - Less concise

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FORM OF MINUTES - RECOMMENDATION

- ADOPT A HYBRID BETWEEN SHORT FORM AND LONG FORM
 - Use short form for routine matters
 - Use long form for matters that are relatively significant or risky and therefore warrant additional details
- MINUTES SHOULD NEITHER BE A TEMPLATE NOR A TRANSCRIPT
 - They should not contain too much detail but not too little detail either
 - Preparing appropriate minutes is a professional art form

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CONSISTENCY

- **FORMAT AND STYLE SHOULD BE THE SAME FOR ALL MEETINGS OF THE BOARD AND ALL COMMITTEES**
 - Avoids having to explain variations of wording, content or level of detail among similar situations
 - Consistent agenda and minute format and style is less confusing to Directors
 - Requires coordination if different individuals act as the Secretary at various meetings

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STYLE SUGGESTIONS

- USE “BUSINESS FRIENDLY” ENGLISH, NOT “LEGALESE”
- CREATE A NEUTRAL RECORD OF BOARD AND COMMITTEE DECISION-MAKING
- BE ACCURATE AND CLEAR
- DEFINE ACRONYMS AND USE THEM CONSISTENTLY
- USE CAREFUL, CLEAR AND CONSISTENT WORDING
- BE CONSISTENT IN STYLE AND DEGREE OF CONTENT

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STYLE SUGGESTIONS

- DO NOT TRY TO BE ENTERTAINING
- DO NOT USE COMPANY OR INDUSTRY JARGON
- DO NOT USE UNNECESSARY ADJECTIVES OR QUALIFIERS
- DO NOT ADD COMMENTARY OR VALUE JUDGMENTS

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PROTECTING ATTORNEY-CLIENT PRIVILEGE

- Note in the minutes all portions of meetings where attorney-client privileged information is discussed
- Note that those discussions occurred in the presence of legal counsel – identify the attorneys by name and who they represent
- Avoid discussion of the substance of legal advice
- Accurately record meeting attendees so that the minutes reflect when “outsiders” were at the meeting
- Consider whether to separate privileged portion of the minutes in a separate confidential document

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EXECUTIVE SESSIONS

- The minutes should reflect that an executive session was held and who was present
- It is not essential to describe the substance of the discussion that took place; care should be taken to ensure that the topics discussed are only described generally, if at all
- Directors may sometimes wish to have the minutes record the substance of the discussion; the minutes can be kept by the lead Director or someone identified to assume that role

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DRAFT AND REVIEW PROCESS – REFLECTING DECISIONS

- It is advisable to note that a decision was reached even if no formal action was approved or a vote taken
- It is important to reflect decisions to show adherence to the business judgment rule
- Informal approvals may be reflected in the minutes by using wording such as:
 - The directors concurred with management's recommendations
 - The directors indicated their support

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PROCESS – OUTLINING THE MINUTES

- Standing Agendas
 - Compare committee charters to agenda
 - Ensure regulatory items are covered
- Meeting agenda
 - Description
 - Note if approval item
 - Presenter
 - Materials

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RESOLUTIONS

- Resolutions constitute the official approvals of the Board
- Detailed resolutions should be given to Directors in advance of the meeting at which they will be considered
- If permitted by state law and bylaws:
 - Resolutions may be approved using a unanimous written consent in lieu of a meeting
 - Consents may be delivered electronically
- Minutes do not need to reflect the names of Directors making motions and seconds

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CIRCUMSTANCES REQUIRING RESOLUTION

- Not all Board actions require a resolution
- Resolutions are needed when:
 - They are required by statute or the articles or bylaws
 - The Company needs to furnish evidence of formal corporate action to a third party (e.g. a bank or transaction counter-party)
 - The Company needs to demonstrate the formal establishment of authority and delegation of responsibilities

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CIRCUMSTANCES REQUIRING A RESOLUTION

- The Board is going to declare a dividend
- The Board is going to authorize a transaction that exceeds management's pre-established authority limits
- The articles of incorporation or the bylaws are going to be amended

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DRAFTING RESOLUTIONS

- Resolutions can be complicated in nature and should be:
 - Carefully drafted
 - Drafted or reviewed in advance by the Corporate Secretary or other corporate governance professionals
 - Reviewed in advance by the CEO, CFO and potentially third parties that may be requiring a particular resolution
 - Drafted in a straight forward manner with the use of “business friendly” language
- Preambles and recitals can help explain the context and basis for resolutions, but they are not necessary

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PROCESS OF PREPARING MINUTES

- Minutes should not be transcripts of the meetings
- Meetings should not be audio or video taped
- Only the Corporate Secretary should be taking the minutes
- The Corporate Secretary should keep separate notes to keep track of post meeting follow-up items
- The Corporate Secretary should be careful to ensure that the finalized minutes constitute the only record of the meetings

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REVIEWING DRAFT MINUTES

- A draft of the minutes should be prepared by the Corporate Secretary immediately after the meeting and it should be clearly marked as “DRAFT”
- The Corporate Secretary should circulate draft minutes for review by:
 - Chair of the Board and relevant Committee Chairs
 - CEO, CFO and legal counsel
 - Presenters and other attendees
 - Relevant internal and external experts (being careful not to waive any attorney-client privilege)

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APPROVAL OF MINUTES

- Send to Directors for review
 - Circulate committee minutes to all Directors
 - Keep a record of proposed changes and comments
- Approve the minutes at the next regular meeting of the Board
- The Corporate Secretary should sign the final version of the minutes after approval
- Post-approval corrections can be made by the Corporate Secretary if minor, technical or ministerial
- Significant changes should be approved by the Board or the relevant Committee

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AUDITOR AND REGULATOR REVIEW OF MINUTES

- Auditors review minutes regularly in connection with financial statement audits and reviews
- Regulators, including tax authorities, occasionally review minutes as part of audits or investigations
- Auditors and regulators are customarily allowed to review approved minutes but usually not to copy them

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DESTRUCTION OF DRAFT MINUTES

- All notes and drafts (including electronic versions) should be promptly destroyed upon approval and signature of final minutes
- Destruction and retention must be consistent with document retention and destruction policy
- Pending litigation or government investigations may limit ability to destroy notes and drafts
- Follow a consistent procedure and use care to ensure that all electronic copies are deleted and overwritten on hard drives
- Consider use of Board portals

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DIRECTORS' NOTES AND COPIES

- Immediately after a Board meeting, collect all documents that were distributed to the Directors for the meeting, including binder contents, and destroy them
- Use of board portals by Directors makes this process very efficient and effective
 - Documents are distributed to Directors via portals
 - Directors review and make notes electronically via the portals
 - Board portal content can be wiped clean within a specified amount of time following a meeting

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LIMITING OR ALLOWING ACCESS TO MINUTES

- Directors can always have access to meeting minutes – they can be archived on a Board portal
- Executive officers can be granted access to meeting minutes by the CEO or the Corporate Secretary
- Legal Department employees can have access to minutes if applicable to specific legal counseling projects
- External Auditors and Internal Audit Department can be allowed to review but not copy minutes

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METHODS TO STORE AND PRESERVE MINUTES

- Once the minutes are signed, the Corporate Secretary should file the final minutes and related materials in the corporate record
- Minutes and documents incorporated by reference should be filed in the corporate minute book
- Supporting materials should be filed separately
- Companies are increasingly keeping final documents on intranets or extranets designed to electronically maintain these types of records in secure form
- Paper records should be kept in fire-proof and water-proof facilities
- Electronic and paper back-up copies should be kept at separate sites

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KEY POINTERS

- Organize the minutes before the meeting starts
- Anticipate and coordinate meeting procedures
- Control unofficial meeting notes
- Draft and finalize minutes promptly
- Retain final versions of minutes securely
- Comply with the Company's document retention policy

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*Delivering Excellence in Managed
Corporate Governance Services!*

Paul Marcela
President

770-815-4445
paul.marcela@governancepg.com

www.governancepg.com