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Best Practices for Corporate Secretaries

July 18, 2012

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Today's Presenters



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Today's Topics

- Effective and accurate documentation of corporate action
- Smart use of technology for corporate secretaries
- Proactive attention to matters that affect director and officer liability
- Proper incorporation and qualification
- Shareholder communication
- Appropriate strategies for dealing with nominees and beneficial owners

Effective and Accurate Documentation of Corporate Action

What purpose do minutes serve?

- Future reference for directors
 - Status of process
 - Reasoning of actions
- Future reference for officers
 - What did the Board or a committee authorize?
- Record of due care/fulfilling fiduciary duties
 - See, e.g., Smith v. Van Gorkom (Del. 1985); DGCL §141(e); DGCL §144
- Record of specific action taken/legal record

Tips for good minute-taking

- Minutes should reflect:
 - Agenda reviewed; advance materials provided & reviewed; topics discussed; reports/presentations given; analysis provided; expert advice given; active deliberations & nature of debate; thorough Q&A sessions; directives provided; resolutions adopted/votes
- Reflect both substance and process
- Outline framework of content in advance
- Draft and circulate promptly
- Consider minutes when preparing advance materials & conducting meeting
- Consider how minutes will look if “exposed” in media or court
- Have an(other) attorney review sensitive subjects

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How much discussion should be recorded? When does it become counter-productive?

- More content than in the past
- What subject could be disputed?
- Generally, do not attribute as to debate, Q&A
- Avoid chilling discussion and debate

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What is the secretary's duty with respect to recording comments/reasoning of directors voting in the minority?

- A director's vote against an action can be a defense to liability arising out of the action
 - See, e.g., Frances T. v. Village Green Owners Assn. (Cal. 1996)

Are there tricks to maintaining the attorney-client privilege?

- Who was present for the presentation?
- Who might see the minutes?
- Ideal: Do not reflect in minutes

How should the Secretary handle minutes of executive sessions?

- Was any specific action taken?

Should the Secretary keep a copy of all that the Board sees?

- Can protect the directors
 - See, e.g., DGCL§141(e)

How specific should resolutions be?

- e.g., “direct” vs. “authorize”

How do you address a disagreement about content that arises among directors upon reviewing minutes?

How does the Secretary evidence the integrity of minutes?

- Drafting and finalization process
- Safekeeping and final product

Smart Use of Technology for Corporate Secretaries

What new technology is the Secretary's friend? What are the best developments?

- Board portals (to be discussed)
- Document management
 - Minutes
 - Key corporate documents
- Entity management

Online Portals

What are the advantages or disadvantages to using online portals for corporate records and materials for directors?

■ Advantages

- Ease of storage, retrieval and searching
 - e.g., Smith v. Demeter Energy Corporation (Del. Ch. 2012)
- Ease of communication to directors

■ Disadvantages

- Old habits die hard
- Will directors want a hard copy anyway?
- Will directors review less closely?
- Is security a question?
- Secretary as the Help Desk?

What are the traps in using new technology?

What should be kept on an online portal?

■ Security

- Who can see your materials?
- Who can listen in on your meetings?
 - Compel meeting attendance in person?

**Proactive Attention to Matters That
Affect Director and Officer Liability**

What is the Secretary's role regarding director/officer liability?

- Exculpation, indemnification provisions in governing documents
 - Including at the subsidiary levels
- Encourage attention to process and making a good record of action (see Minutes)
- Ensure there are clear definitions of officer authority
 - Both grants and limitations
 - Including at subsidiaries

What is the Secretary's role regarding director/officer liability?

- Maintenance of D&O coverage
- Keep directors informed
- Regulatory obligations

Should the secretary advise directors against taking notes at board meetings?

Director Orientation / Education

What are the elements of a good director orientation program?

- Directors' duties
 - Including confidentiality
- Industry
- Company
- Shareholders

What materials should directors receive between meetings to stay informed?

Proper Incorporation and Qualification

What is the legal effect / importance of filing organization and qualification documents with the state?

- Existence
- Shareholder rights
- Governance
- Access to courts
- Avoidance of creditor piercing
 - See e.g., GC Quality Lubricants v. Doherty (Ga. App. 2010) and Taylor v. Comm. Credit (Tex. App. 2010)

What are the international equivalents and their effects?

Be wary of using LLCs as subsidiaries

- They may encourage informality
 - Do you have organizational documents?
 - See e.g., Olsen v. Halvorsen (Del. 2009)
 - Have you considered fiduciary duties?
 - Have you considered liability exculpation provisions?

Shareholder Communication

What role should a Corporate Secretary play in communicating with shareholders?

- Public company?
- Private company?

What is the best procedure for maintaining current contact information for shareholders?

- Statutes may be silent about obligations to keep contact information updated or may be outdated about electronic means of communication
- Have a procedure for obtaining shareholder consent to use email

Appropriate Strategies for Dealing With Nominees and Beneficial Owners

Should secretaries ever communicate with beneficial owners?

- Model Business Corporation Act §7.23
- Crown EMAK Partners v. Kurz (Del. 2010)

Questions & Answers

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Mark Your Calendar

- 2012 NDI Checkpoint Sessions
 - August 22, 2012
 - December 5, 2012

- Save the Date! NDI Executive Exchange
 - November 14, 2012 — Chicago, IL — Invitation-only

Thank You

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