The Informed Board
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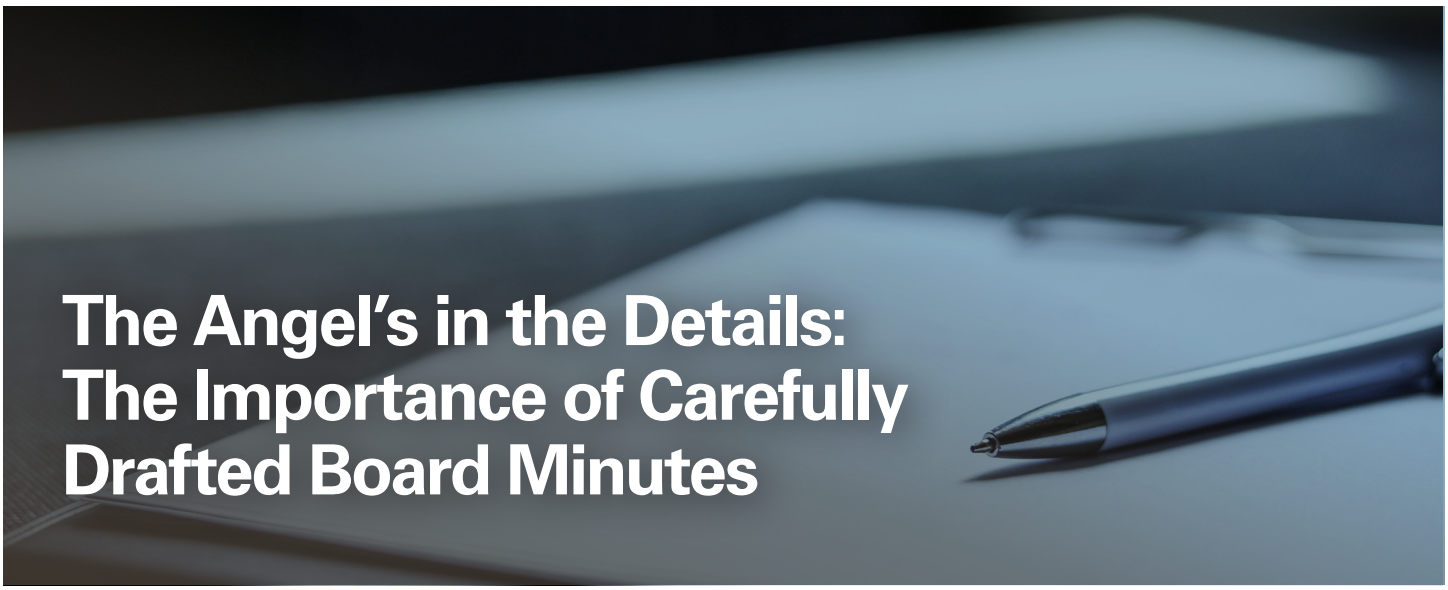
Skadden



The Angel's in the Details: The Importance of Carefully Drafted Board Minutes

- Boards should see minutes as a way to tell how they worked to fulfill their duties to stockholders, capturing a board's deliberations and the reasoning behind its decisions.
- Properly documenting the board's deliberative process takes on heightened significance for "mission-critical matters" such as major deals, oversight of monoline businesses or significant revenue flows, or catastrophic events, where board actions may be the subject of stockholder litigation.
- Well-drafted board minutes can help contain the scope of stockholders' books and records requests and make it easier to win early dismissal of lawsuits.
- To protect against claims that a company's disclosures were misleading, a company's public statements and filings should be consistent with the board minutes.

Board minutes are an essential part of a company's internal record keeping. But they are more than a routine, formal exercise. They also play a pivotal role in stockholder litigation. As a contemporaneous record, plaintiff stockholders will scrutinize minutes when evaluating and pursuing claims against directors and officers, and judges will consider minutes at the pleadings stage. Boards should see minutes as a way to tell how they worked in fulfilling their duties to stockholders.

Minutes of important board meetings, and proxy statements describing them, have become increasingly important in recent years as a result of developments in Delaware law. Courts have sometimes granted stockholders early access to documents beyond formal board materials, such as directors' emails and text messages, where they found that minutes offered too sparse an account of a board's consideration of a particular issue. In addition, if a formal board record is lacking, stockholders may argue that a board breached its duty to oversee and address risk.

By contrast, a sufficiently clear record in the minutes of directors' deliberations and the process by which they reached decisions can position the company to head off intrusive probes of internal records at the outset, help prevent complaints from being filed, and potentially aid in winning early dismissal of suits.

Logistical Drafting Considerations

There is no one-size-fits-all approach to drafting board minutes, but they typically reflect, among other things, formal matters such as the date that the board meeting was noticed or, alternatively, if notice was waived by all directors; who attended the meeting (including executives, employees and any outside advisers) and

how they participated (in person or remotely); as well as when the meeting commenced and adjourned. If the board received presentations, those may also be attached as exhibits.

In some instances, where individual directors make comments or raise questions, good practice is to identify the issues considered, inputs the board received and other details about the discussion generally without a need to detail specific questions or name individual directors.

Potential Stockholder Challenges

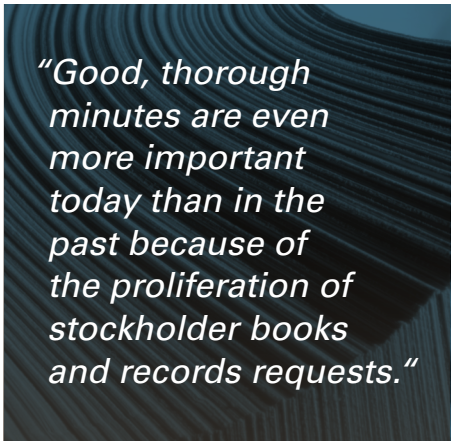
When drafting board minutes, keep in mind that there can be several types of stockholder challenges to board action or inaction of a Delaware public company. The board should expect such challenges, whether in the form of a books and records demand, derivative or direct litigation, or demands that the company pursue litigation. Here are the most common issues raised by stockholders, and how good minutes can be helpful in defending against legal challenges:

Delegation to a committee. If a board determines that a committee would be helpful to oversee an investigation or transaction, whether to avoid a potential conflict or allow for more agility and speed with a smaller group, it is best to document the decision with board resolutions. The minutes may (i) explain why the board concluded it was in the company's best interest to enlist a committee and (ii) specify the committee's mandate and scope of authority. For example, it may be helpful to explain whether the committee has full authority (like a special committee weighing a transaction where there is a potential conflict of interest for other board members), or whether the committee will make a recommendation for full board approval.

Oversight. When the board is deliberating about significant issues, including those that Delaware courts have deemed "mission-critical," the board's process and actions should be adequately captured to reflect its oversight. This may include documenting how it received and considered the input of management and advisers, as well as a discussion of a board's consideration and decision regarding risks and mitigation of those.

Director independence and conflicts. Directors and officers may complete questionnaires on a regular basis as well as in a specific context, like a transaction, to evaluate their independence and to identify potential conflicts of interest. Certain disclosures, particularly ones that might pose a potential conflict, may warrant board-level consideration. The minutes should reflect this deliberation and subsequent determinations.

Other conflicts. Where there is a potential conflict regarding any matter, the board should weigh whether that should be disclosed and document that consideration in the minutes. For example, stockholders commonly challenge a board's choice of advisers — particularly financial firms assisting on transactions. A board may require disclosure



of potential adviser conflicts, and consider those before retaining an adviser. It may also insist on updates if any additional material conflicts arise. It is important that the minutes clearly document this process and any conflict considerations. Not all conflicts are fatal, particularly if understood and appropriately considered and addressed (if appropriate), but failing to identify and consider conflicts can be problematic.

Deal processes. Just as it is important to document the board's deliberation regarding significant issues, it is critical to make a record of the board's process when selling the company. Boards should receive regular updates about the sale process, including any important communications (or lack thereof) with bidders. For a significant M&A transaction, the record should reflect a thorough, board-centric process, even if — as is generally perfectly appropriate and typical — the CEO is leading negotiations.

It is common to use code names when discussing M&A deal counterparties even in the official record, as other parties may end up seeing the board's minutes.

Disclosure claims. The company's public statements and publicly filed documents should reflect what actually happened at the board. Accordingly, when preparing public filings, care should be given to reviewing board materials and minutes. If there are discrepancies, stockholders may allege that the company's disclosures were incomplete or misleading.

Potential disclosure violations take on heightened significance in the deal context. If a stockholder successfully alleges a disclosure deficiency, directors may not benefit from the protections of two important Delaware decisions, *Corwin* and *MFW*. Under *Corwin*, a transaction approved by fully informed, uncoerced stockholders, not involving a controlling stockholder, is protected by the business judgment rule, which shields directors from liability if they acted in good faith and followed proper procedures.

MFW and later cases that follow also apply the business judgment rule to controlling-stockholder "squeeze out" mergers if certain conditions are satisfied. One condition is that there was a fully informed vote of minority stockholders. Accordingly, when drafting the disclosure document, the board minutes should be used as a guide so that the documents track each other and accurately reflect the board's deliberations and actions so the board may receive the benefits of Corwin and *MFW* in any litigation down the road.

Protecting Privilege

It is important to ensure that the fact that legal advice was given to the board is reflected in the minutes at least at a high level, but boards need to guard against waiving the attorney-client privilege. Although privileged information is typically redacted when minutes are produced

to plaintiff stockholders, legal advice may at some point become an issue in litigation if the board asserts that it relied on that advice.

To protect privileged information from disclosure, minutes reflecting legal advice should be characterized as an outside attorney or in-house counsel "providing legal advice" about a matter as opposed to "advising the board" to take a certain action, because advice from a lawyer that is not legal in substance — say, advice on business strategy — potentially may not be protected by the privilege. See our April 13, 2021, *Informed Board* article "Just Between You and Us: The 10 Most Common Client Misconceptions About the Attorney-Client Privilege."

The Increase in Books and Records Demands Makes Board Minutes All the More Important

Good, thorough minutes are even more important today than in the past because of the proliferation of stockholder books and records requests. Several developments in Delaware law have given stockholders and their counsel strong incentives to make those demands before taking other legal steps. As a result, many Delaware companies find themselves deluged with those requests, which can furnish stockholders with ammunition for litigation. See our June 1, 2022, *Informed Board* article, "In the Name of the Company: When Stockholders Interfere in the Boardroom."

By observing careful practices regarding minutes, companies can make it more likely that the courts will not allow access to books and records beyond formal documents such as minutes, thereby limiting the material that can be used in complaints. Moreover, at the pleadings stage, companies may point the court to portions of minutes to rebut the inference given to plaintiffs' allegations, or to demonstrate "cherry picking" or inaccuracies in the plaintiffs' characterizations that create a false picture of the board's process.

In sum, prepared carefully, minutes tell the board's side of the story to stockholders and courts.

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