CORPORATE GOVERNANCE

Directors' Notes: A Trap for the Unwary?

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"To take notes or not to take notes—that is the question" often asked in corporate board rooms today. As a matter of good governance, it is important that the minutes serve as the single, clear, official record of each in-person or telephonic board and committee meeting. Board materials that are circulated and discussed at the meeting should be part of the official record and either attached to the minutes or maintained in the corporate secretary's files, as appropriate. In connection with significant transactions, board minutes will be reviewed by third parties for diligence purposes and to confirm that all appropriate (and required) actions have been taken. Moreover, these minutes will be scrutinized closely in the event that a decision taken at the board meeting is subsequently challenged in litigation or otherwise. Directors should use caution in creating or retaining any notes, texts or emails that could be considered an unofficial record of a board meeting. Directors' notes and emails are discoverable in litigation and can confuse or even undermine the official account of the meeting in question. Various forms of notes—paper, electronic, and email—raise slightly different issues, all of which directors need to understand in advance of their creation.

Notes on Paper

Note-taking can be a useful and, for some directors, a necessary element of preparation as they review board materials in order to participate in a meeting, particularly one involving complex topics. Important documents that will be discussed during a meeting should generally be provided to directors sufficiently ahead of the meeting so that directors can review them in advance and be ready to ask questions and discuss key points at the meeting. During a meeting, some directors may jot down questions or comments as reminders to make certain that their concerns are addressed before the meeting concludes.

While note-taking can be helpful to some directors, the question becomes what to do with these notes once the meeting has concluded, or once the minutes have been finalized. Many corporate secretaries, as well as outside counsel, discourage any note-taking by directors to minimize the possibility that these notes could create issues at some future time. Directors are often counseled that the length of their deposition in any shareholder litigation will have a direct correlation to the amount of notes they have taken and retained. It is a common practice among many boards to collect all directors' meeting notes (and copies of unneeded meeting materials) at the conclusion of a meeting so that they can be destroyed. Some boards have a policy of note destruction after the minutes have been finalized so that directors who wish to refer to their notes as they review the draft minutes can do so. This practice should be discouraged, as in the event that litigation arises after the meeting and before the notes are destroyed, the notes may need to be preserved and produced. In order to minimize the need to retain notes, in most circumstances, draft minutes should be prepared promptly after the meeting.

Some directors may feel that their notes could protect them in litigation, by demonstrating that they have been diligent and fully engaged during board meetings. However, properly-drafted minutes can serve the same purpose without the risks inherent in retaining meeting notes. In many cases, notes are informal comments or questions in document margins whose import may be easily misinterpreted by others or even misremembered by the author, since litigation may occur months after the event. Moreover, notes taken during a meeting are by nature often incomplete and cryptic. If a director annotates material with a question, but does not then write down the answer, it can appear that an issue was not fully discussed or resolved. Inconsistencies between notes and board-approved minutes can undermine the official record of the meeting and could even cause directors to become adversely positioned against each other in litigation. If a director jots down unrelated notes, such as doodles or a shopping list, these can be used to show that the director lacked diligence and attention to the matter at hand. Similarly, if a director sends numerous emails during a meeting unrelated to the matter at hand (which may be discoverable in litigation), the director may be accused of not being appropriately engaged in the matters addressed at the meeting.

Electronic Notes

There is a growing trend toward electronic delivery of board materials using portals and iPads. This environmentally friendly approach enables immediate, cost-free delivery of

board materials anywhere in the world. Nonetheless, electronic documents create issues of their own, and board portals may not be the panacea that directors and corporate secretaries imagine. Because there is no natural limit to the quantum of materials that can be uploaded to the board portal, some boards will find themselves inundated with documents. Too much in the way of board materials can be as dangerous as too little. Management teams should monitor the quantum of materials to be reviewed prior to each board meeting to make sure that action items have sufficient documentation and that directors are not overwhelmed with information.

The use of electronic board portals can create other headaches for directors and corporate secretaries. Documents that are downloaded to directors' personal computers raise security issues as well as difficulties in ensuring that the documents and related notes are deleted in accordance with company policy. Documents that are not downloadable but are read-only may be difficult or impossible to annotate, making them less useful to directors as they try to prepare for an upcoming meeting. Corporate secretaries should have specific discussions with board members to make sure that the directors are comfortable with the materials provided, that they take appropriate actions to safeguard materials, and that they refrain from creating additional documents discoverable in pending or subsequent litigation. If directors are permitted to annotate their electronic board materials, these annotations should be automatically deleted at the conclusion of the board meeting.

Chief Justice Leo Strine of the Delaware Supreme Court has raised additional concerns about online documents and electronic board portals. He observes that it is difficult to focus on materials that, unlike paper documents, are necessarily viewed on a device that contains many other distractions; and at the same time, the online data room can be monitored for access and active use. (Monitoring should be strongly discouraged, and usage should not be tracked, but this information can be automatically generated by the portal without directors' knowledge unless this functionality is fully disabled.) Strine cites an example of a director, on a long flight to a board meeting, opening his computer to review board documents and ending up spending much of his time watching movies, sending emails, and attending to his primary work, rather than focusing on the board materials. If access to an online board portal can be monitored, the log later may reveal that the director spent very little time—potentially even negligently little time—reviewing the materials available. The use of electronic documents and notes should be carefully managed to avoid becoming a trap for the unwary.

Emails

Email is also used to deliver board materials, and directors often communicate with each other and with the company via email, but directors should exercise caution in using email, texts, or similar means (including mobile applications such as Messenger or WhatsApp) for substantive board business. In addition to the security issues inherent in sending emails or messages with confidential information and attachments outside the company, there are also potentially significant discovery issues. After the 2016 *Yahoo!* case in the Delaware Chancery Court, it is clear not only that electronically stored information is explicitly required to be produced in discovery under Delaware law, but

also that if a director uses her own work or personal email account for board materials, those email accounts may be subjected to a highly intrusive search in litigation discovery. Directors should be aware that using these accounts for board business means potentially opening them up to intense and unfriendly scrutiny in litigation.

It can be particularly difficult to implement document destruction policies with respect to email. Often backups are made automatically on one or more servers, of which the director may not even be aware, and these backup copies are subject to discovery as well. Moreover, if a director conducts board business using her external business email, those emails may be subject to routine or litigation-driven searches and reviews relating to that other workplace. Although unrelated to the company on which she serves as a director, these searches could compromise the confidentiality of the company information contained therein and call into question any attorney-client privilege that would have applied.

The asymmetric use of email can also yield a distorted version of events. When emailed concerns are addressed in a subsequent phone call, there remains a record of only the concern and not its resolution, which, years later, may be forgotten or misremembered. It is a wiser practice to raise concerns in person or on the phone rather than with an email or text inquiry. The purpose of this practice is not to subvert discovery but to avoid creating an incomplete and misleading record that may be difficult to defend after the fact.

Consistency and Control

Each board should have a policy regarding directors' notes, draft minutes, and other board documents that best serves that board's specific needs. Policies can and will differ across companies. The key element is to implement a policy consistently, across all directors of a particular company and across time. The company should be able to rely on directors' following the policy systematically and without exception. It will be problematic if, for example, discovery reveals that a director retained notes from every meeting except the one at which a material transaction was approved. Of course, if litigation or an investigation or audit is pending or reasonably foreseeable, directors must preserve all relevant materials, including emails, texts and notes.

Directors should make sure that they will continue to have access to minutes and board materials from the term of their directorship if necessitated by a subsequent litigation or investigation, even one commencing after their directorship has ended. Directors should not maintain their own files of notes and materials for this purpose. The creation of a personal set of documents would increase the risks of inconsistencies and other issues arising that would be to the detriment of both the director and the company.

Directors' notes, if not properly handled, can result in unintentional waivers of privilege and violations of confidentiality obligations. In order to preserve attorney-client privilege where applicable, official minutes indicate that a lawyer was present and simply note the general topic discussed. Directors' notes may not be annotated in the same manner and may contain more detail than is advisable; if these notes are treated carelessly, privilege

may not survive. Similarly, if directors' meeting notes are not destroyed, confidential information reflected in such notes may not be secure.

Conclusion

Directors must prepare carefully for and be actively engaged during board meetings. When they leave the boardroom, it is incumbent upon directors to handle their notes and board materials in a manner that is consistent with board policy and applicable law. Directors should review the board's record retention policy and fully commit to following it. For electronic materials, such as board portals, the retention policy should automatically function to delete notes or other annotations of the materials. The consistent application of a thoughtful and well-tailored policy is in the best interests of the company, the board, and the directors themselves.

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