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## Minutes of Governance Meetings of Small- and Medium-Sized Private Companies

by Michael Sussman, September 2014

Minutes of governance meetings of small- and medium-sized private firms are important because, among other things, they do the following.

- (a) They are a memory of the firm, and avoid arguments later -- or at least minimize them.
- (b) They record decisions taken, as well as, on occasion, decisions that are not taken, and why.
- (c) They are used by the auditors of the firm to check that the people who are running the firm day-to-day (the "Management") are telling those who are supervising them (the "Board of Directors" or the "Partnership") and the shareholders and other stakeholders (the "Stakeholders") everything material about the company, and that decisions about overall policies are being made at the correct level.
- (d) They ensure that the Board or Partnership is creating the right environment to take on risk.

This article will focus on the minutes. It does not have the scope to go into all of the various elements of running the company, such as the relationship between the Board or Partnership and the Stakeholders. These are, of course, important as well, and you should talk to in-house or local counsel regarding all of the considerations that go into deciding how to run a company.

There is, however, a distinction of which you should be at least aware: that between a Board of Directors and a Partnership. The Board can either oversee the Management, or the Board can actually run the company day-to-day. Where there is separate Management, that Management is not only responsible to the Board but also to the Stakeholders, particularly the shareholders. Where the Board acts as Management, then responsibility to the Stakeholders can be more important. This is also true of the Partnership: most are more like the Board and have responsibility to the Stakeholders. Minutes can be important as a memory tool in all cases, but as the responsibility to the Board or to the Stakeholders, or both, grows, then the need for good minutes also grows.

Finally, the minutes should never be too long, and indeed you need to make sure that no more than what is needed is in the minutes. The lesson of this article is that this may be more than what you think.

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### IMPORTANCE OF MINUTES

The importance of properly kept minutes of Board, Partnership and Committee meetings cannot be overstated. The minutes of the various meetings help ensure that the approach taken meets, among other things, the following criteria.

- (i) **Accountability.** Properly completed minutes can help show accountability to the Board, Partnership, Committees and Stakeholders by detailing decisions taken, as

well as in some cases decisions not taken, and other matters that show accountability.

- (ii) Responsibility. The readiness of the Management, for example, to take on more risk can be presaged by the minutes.
- (iii) Independence. Where independence is needed, the minutes can show that the independent decision-makers are properly involved by, for example, asking the right questions and getting the right answers.
- (iv) Fairness. The decision-making can be shown to be fair and equitable by properly kept minutes.

Of course, these factors are mitigated by various applicable rules. For example, the business judgment rule implies that as a member of the Board, the Partnership, a Committee or Management, your business acumen will be taken into account. You don't need to be right all the time. On the other hand, you do need to avoid conflicts with your interests and the interests of others.

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## STATUTORY DUTIES

If you are a director, there are statutory requirements that might apply (and again you will need to check with your in-house or a local lawyer to know what they are in your jurisdiction). In general they will include:

- To act in good faith, in best interest of company;
- To act with care and diligence;
- To avoid conflicts with your own interests or the interests of third parties; and
- To avoid insolvency.

Whether as an inside or outside Director, or indeed as a Partner or member of a Committee, in general the person will need to show Stakeholders and auditors that he or she:

- Understands the organization;
- Applies the knowledge that he or she brings to the table;
- Assists Management with his or her knowledge and abilities;
- Acts as an auditor, and not as a member of the Management team; and
- Attends and participates in Board (or Partnership or Committee) meetings, and asks the appropriate questions.

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## KEEPING MINUTES

Keeping minutes properly starts with a review of the organizing documents (such as the Articles, Charter and By-Laws) to make sure you are following the rules as established for the entity. This should be relatively quick.

Next, you should decide who should keep the minutes. Of course, the same person does not have to keep the minutes all the time. But some consistency is desirable: if the person changes, then questions will be raised about the various elements that the minutes cover, such as accountability, responsibility, independence and fairness.

You should consider the following persons to keep the minutes.

- (a) Lawyer, such as the General Counsel: The minutes must be kept so as to take into account future readers. Lawyers – whether the General Counsel or a more junior lawyer - will prepare minutes that will take what is discussed and turn it into a carefully summarized version, as well as recording both decisions and the desire to put something off where it is desirable to have a summary of what was said even if no formal decision was taken. A compliance person might work as well, but you should consider carefully whether the person taking and producing the minutes is generally conflicted from that position.
- (b) Non-lawyer professional: These persons might include the Chief Financial Officer or other accountants. These minutes will generally follow more closely decisions actually made because the person may feel less secure covering more territory, but they may also include some items not decided, particularly if a matter has been put up for decision but not passed.
- (c) Non-professional secretary: These are most likely to follow closely decisions actually made.

What should be in the minutes depends on how much oversight there is of the Board or Partnership, or Committees. But at minimum the minutes should include:

- (i) What the meeting is (for example, the Board);
- (ii) Where the meeting takes place and what time it starts (and possibly what time it ends);
- (iii) Who is there, and who is not who should be there, and what role the person is in who is attending or not; and
- (iv) Decisions taken.

You must ask yourself, however, whether these are really enough to meet the various criteria that are set out above. Except in the most simple of cases, the answer is likely to be no. In particular, you need to decide to what extent you include the reasons that decisions are taken. Furthermore, you need to decide whether to include matters voted against as well as the reason why. And finally, matters that do not come for a vote but are discussed in detail may need to be minuted.

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## CONCLUSION

While minutes can be slimmed down to practically nothing, you need to decide whether accountability, responsibility, independence and fairness are served by such limited minutes. While you want to keep the minutes short, minutes that are too short often do not capture the true flavor of the Board. Decisions about who should keep the minutes, and what is to be covered, should be taken carefully. In general, however, you may want to consider slightly more thorough minutes that will include both decisions taken and why, as well as at least major decisions not taken and why.

## FOR MORE INFORMATION

For further insights or to engage us for advice, please feel free to contact us.

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