

Documenting executive sessions of the board

Should you record what goes on behind closed doors of these very private sessions?

Reasonable minds may differ . . . but yes, it is appropriate to do so.

BY ROBERT B. LAMM

It's been more than a decade since public company boards have had to hold regular "executive sessions" — sessions attended exclusively by non-management directors and, in some cases, others expressly invited by those directors. During that period, executive sessions have become the norm; public companies have routinely disclosed that their boards meet in executive session as an indicator of good governance practices; and CEOs and others in the C-suite may even have overcome their paranoia about what goes on during those sessions.

Despite these developments, there remains

a great deal of uncertainty as to how — and even whether — to document the existence of, discussions held, and actions taken during executive sessions.

Why *not* document executive sessions?

The principal reason is confidentiality. Confidentiality within the organization may provide the strongest basis to resist recording the holding of executive sessions and documenting the discussions or actions taken. A principal goal of executive sessions is to permit the board to discuss sensitive matters outside the presence of management or others. If the holding of executive sessions or references to the discussions held and/or actions taken during executive sessions is spelled out in the minutes, doesn't that vitiate the purpose of holding such sessions in the first place?

Confidentiality outside the organization also raises concerns. Minutes routinely go to all



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sorts of third parties: the company's auditors; its outside counsel; counsel for third parties, such as underwriters and lenders; and even hostile parties, such as in discovery sought by opposing counsel in litigation. If minutes noting the occurrence of executive sessions — much less the discussions held or actions taken

at those sessions — are routinely disseminated to such broad groups, doesn't that further undermine the very purpose of holding executive sessions?

Reasonable men and women may differ, but I would argue that nei-

ther concern — confidentiality inside or outside of the organization — warrants avoiding any mention of executive sessions in minutes. Among other things, the CEO and others in the C-suite certainly know that executive sessions are held, so mentioning them in the minutes seems to be nothing more than stating what they already know.

The same goes for the third parties mentioned above. If there is no mention of executive sessions in minutes, opposing counsel — to say nothing of the more friendly parties noted above — are likely to ask questions and obtain information about executive sessions even when they are not mentioned in the minutes.

Whether minutes should mention the topics discussed in executive sessions, the actions taken, or both, is a more complex matter addressed below. However, on balance, I believe that in many cases some mention is appropriate.

One final introductory comment: In corporate governance, as in many other things, one size does not fit all. The specific facts and circumstances of each case, most notably the matters discussed and actions taken during an executive session, need to be taken into account whenever this issue is raised, and should be discussed with the corporate secretary or other counsel before final decisions are made.

• **First things first: Should the occurrence of executive sessions be noted?** It seems advisable to record that an executive session has taken place. First, as discussed above, there doesn't seem to be an overwhelming reason not to do so. Further, executive sessions are generally part

of the board meeting and should therefore be noted in the minutes of the meeting. Doing so should also create the record necessary to support both required and voluntary disclosures concerning executive sessions (i.e., in the proxy statement or in compliance documents submitted to national securities exchanges).

• **What should the minutes say beyond "The Board met in executive session"?** Some companies say no more than the above in their minutes. Others believe that the minutes should describe the matter(s) discussed during the executive session. Again, one size rarely fits all; however, there is general agreement that in most cases any description should be brief and avoid details. For example, the minutes might say, "During the executive session, the Board discussed management succession planning." This type of memorialization may not be necessary, but it does confirm that the subject in question was discussed, which can be important where the subject is likely to be publicly disclosed, as in a proxy statement that discusses the board's activities with respect to management succession, or in the case of litigation (i.e., to demonstrate that management succession was considered by the board).

• **What if the board takes action during an executive session?** Opinions may differ on this point, but it seems to me that when the board takes action during an executive session, that action needs to be recorded. First, it seems only logical and is arguably required to make a record of actions taken by the board, along with any conditions or terms related to the action in question. In addition, in some cases corporate law requires actions to be in the form of a resolution; how can a resolution be adopted if the underlying action is not reflected in the minutes?

• **Who records the discussions held and actions taken in executive sessions?** This brings us to an issue that often sets the corporate secretary's teeth on edge: directors' notes. Most corporate secretaries (including me) strongly believe that director note taking should be discouraged and, in those rare cases when it's arguably necessary, should be minimal and followed by the destruction of the director's notes. Too many of us have been involved in litigation where a director's notes are cryptic, confusing or — even worse — misleading and create problems where none should exist.

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That said, particularly if the matters discussed and/or actions taken during an executive session are numerous and/or complex, it seems only reasonable for a director to make some notes so that the minutes can properly reflect those discussions and actions. However, some ground rules should be observed:

- If notes are to be taken, the director chairing the executive session should assign responsibility to one director to do so and should instruct the other directors in attendance not to do so.

- As soon as possible following the completion of the executive session, the note-taking director should meet with the corporate secretary (or whoever is drafting the minutes) to advise him or her as to the matters discussed and actions taken, using the notes as a reference.

- Once that debriefing session is completed, the director should destroy his or her notes, or deliver them to the corporate secretary to do so, so that the minutes are the only written record of the discussions and actions in question.

By the way, that's good practice for any notes taken by directors, regardless of whether they relate to an executive session or any other aspect of the minutes or board discussions and actions.

- **Who signs the minutes?** Corporate practices regarding the signing of minutes are all over the lot. My experience is that the person acting as secretary of the meeting — most often, the corporate secretary — signs the minutes. However, I've heard of many other practices, including having minutes signed by the CEO and/or chairman of the board; minutes signed jointly by the corporate secretary and one of those individuals; and not signing minutes at all.

Assuming that my experience is the norm — i.e., that most companies' minutes are signed

by the corporate secretary — there is an issue involved when that officer signs minutes covering a period when he/she was not in the room. There are a number of ways to address this, including the following:

- The director who chairs the executive session can sign the minutes as to that portion of the minutes. This approach can raise logistical concerns about actually obtaining the necessary signature.

- The corporate secretary or secretary of the meeting can recite in the minutes that the portion relating to the executive session is based upon information provided by the director chairing the executive session (naming him or her).

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One size does not fit all

Executive sessions are the norm, and not just for boards. Committees, as well as boards themselves, increasingly hold executive sessions; audit committees routinely meet without members of management present and frequently meet separately with members of the financial reporting team and representatives of the independent auditor; compensation committees meet without members of management in attendance; and so on. The considerations summarized above should be taken into account in documenting committee executive sessions as well as those of the board.

And, last but not least (and at the risk of repeating myself again), remember that one size does not fit all. ■



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