

The Practitioner’s Guide to Building Efficient Board and Committee Processes: What Really Needs to Happen Behind the Scenes

Career Development





The efficient functioning of board and committee meetings is a critical aspect of the responsibilities of the general counsel and/or corporate secretary. Investing the time in building best in class board and committee processes yields four primary benefits.

First, it greatly facilitates your directors in meeting their duties and responsibilities in the legal, governance (e.g., bylaws, governance guidelines, charters, etc.), and business areas.

Second, well-organized processes increase your directors' ability to add value to the company through their interactions with other directors and management.

Third, deliberate practices help protect your company, directors, management, and employees, because the result in the boardroom is more thoughtful consideration, evaluation, documentation, and clarity of corporate actions and decisions.

Fourth, efficient board and committee processes assist in strengthening your board's confidence and respect for management by helping directors feel more comfortable that they are effectively using their time, properly performing their duties, and making the maximum contribution to the enterprise.

The intent of this article is not to address either the legal or internal governance requirements for your company's board and committees, but to provide suggestions on ways to engineer your in-house processes to meet these requirements. This is the practitioner's guide to those processes. Although at times this guide is granular, it is intended to ensure understanding and drive consistency.

Before the meetings

Preparation of an annual calendar

The first step in structuring your board processes is to develop an annual calendar. It is very helpful to create a yearly "cadence" for the key issues that your board and its committees will need to address.

It becomes somewhat apparent how to schedule your events when considering the six fundamental roles of the board:

1. Strategy (including the evaluation of risks and M&A);
2. Oversight of performance;
3. Compensation and rewards;
4. Governance;
5. Talent selection, development, and succession planning (with a focus on the CEO position); and
6. Establishing the culture and integrity.

As a starting place, I would argue that you really cannot create a financial plan until you reach an agreement on strategy. So if your company operates on a calendar year, your strategy is best addressed in the August through October time frame and the resulting financial plans/budgets in November and December. Then, the year finishes and your company compiles its actual results.

Thus, February through March is good for reviewing your prior year's final financial results, completing your current year's financial plans/budgets, and addressing rewards/compensation for both last year's performance and next year's objectives.

Governance issues and annual board and director evaluations may be best addressed in conjunction with your shareholder meeting in the March/April time frame. At most companies, it is appropriate to also cover an update on financial performance at every board meeting. You might use the remaining

meeting months (May, June, and July in the above example) to review particular businesses, risks, operations, culture, and succession plans.

Also, keep in mind that you must build flexibility into your annual calendar and your schedule should be subject to revision and change. Too much structure can get in the way of your board's desire to regularly discuss the performance against the strategy and the time-sensitive important business and M&A issues that arise throughout the year.

Each year your board should review and sign off on its annual calendar and the "themes" for its meetings. This is probably best completed in November or December for the upcoming year. Make sure that the annual board calendar incorporates all the activities that the governance documents (e.g., bylaws, committee charters, and governance guidelines) require the board to complete.

Each of your board committees should engage in a similar process and create an annual agenda that reflects all the items they need to cover and appropriate timing. For example, the compensation committee should determine bonus awards early in the year when the previous year's results are available and can be plugged into any bonus plans.

Drive your governance guidelines and relevant items in committee charters into checklists and indicate for each item whether it occurs at each meeting, periodically, annually, or discretionarily. Then track the activity and retain documentation (resolution or minutes) that reflects each item that has occurred as required/scheduled.

Include the checklists and the annual agendas and calendars in each board and committee book throughout the year, so that the board and committees can monitor which required activities have been completed and which remain to be accomplished.

Throughout the year, the board and committees revise their bylaws, guidelines, and charters as necessary. For the necessary revisions that are not time-sensitive, maintain a list of revisions and then in conjunction with the April meeting (which has a focus on governance), conduct a review of these documents, and make any update or revisions necessary or to conform to new approaches or best practices. As part of this process, each committee reviews its charters, advises the Governance Committee of any revisions, which are then recommended by that committee to the full board for approval.

As you develop your long-term calendar for board and committee meetings and call special meetings, be aware and considerate of ethnic and religious holidays. As general counsel and/or corporate secretary, you should have all of these holidays on your calendars (they’re easy to download onto Outlook). Calling a special board meeting and not recognizing it is on Martin Luther King Jr. Day, or a Jewish or another religious holiday can create needless ire from some of your directors.

Board locations and logistics

To the extent your company has subsidiaries, manufacturing operations, or businesses at locations outside of your headquarters location, it may be beneficial to hold board and committee meetings at those sites occasionally. If you conduct meetings at such locations, it can be helpful for you and your directors to tour the facilities and meet with employees. Besides, if you choose to conduct an annual offsite meeting, this may be best done in conjunction with the annual strategy session, which, in my experience, is generally a longer session.

Some companies conduct their succession review as part of the annual strategy session because it is a more extended meeting. Other companies want to ensure their focus on strategy is so targeted and uninterrupted that they both hold this meeting offsite and schedule no other board or committee activities (even no approval of minutes).

Travel and the logistics for your directors must be handled extremely carefully. This is best done either out of the office of the corporate secretary or in close coordination with that office. Although some directors like to arrange their transportation, you simply must know where all your directors are in conjunction with any meeting.



A specific detailed agenda for each meeting, including when and where the committee and board meetings dinners and receptions are scheduled, and all individual flights and transportation data should be created for each director and provided to them before each meeting and before their departure (even if they arrange their travel).

Make sure you keep track of any specific director's personal needs and accommodate them (e.g., food restrictions, snacks, hotel room locations, etc.). Do not make your directors wait to check in or check out — their key should be waiting when they arrive and their room should have been inspected. You do not want them to have to return to the lobby because their room was next to an elevator, the air conditioning was rattling, or the shower stopped working.

Wherever your meetings are held, you need to ensure that all technology works flawlessly. There needs to be ready access and backup for each element of technology (e.g., video conferencing, computers, monitors, printers, projectors, phones, etc.) You simply cannot afford to have something break down and have your directors stuck waiting while you scramble to adjust for it. For directors who desire access to computers, make sure you have them available in a workroom or their rooms for use between meetings.

Sequential or concurrent committee schedules

In scheduling your committee meetings, the board will need to evaluate whether they should run in parallel or series. It currently appears that most boards run their committee meetings sequentially, but some chose the simultaneous method and the companies I have worked with generally have moved to that approach. There are pros and cons to both approaches and the ultimate best structure may depend upon the number of board members you have and their areas of expertise.

Running the meetings concurrently is more time-efficient and valuable in attracting active CEOs and other executives to the board who may not have the ability to commit to more lengthy meeting schedules.

One downside of running meetings concurrently is that it can be difficult to make committee membership changes. Also, if a director's areas of expertise are in the subject matter of two committees that are running concurrently, then you may not be able to maximize the value of such a director. Besides, it does not allow for directors to attend meetings of committees where they may not be a member. And the CEO will not able to attend all of the committee meetings.

But to minimize this last concern, agendas can be arranged or the meetings can be staggered so that if a topic in which the CEO desires to participate is being addressed during one of the meetings, then the CEO can attend the portion of the meeting for that specific discussion and then move over to the other committee meeting.

Finally, you will need to ensure you have two secretaries or assistant secretaries available to take the minutes and respond to governance questions.

Preparation of board and committee agendas

Once your annual calendars are established at a high level, the real work begins. Two tracks are always occurring in parallel: the processes and activities to prepare for your next board/committee meeting are running at the same time as you are completing the actions and documentation from the previous meeting.

The first step leading up to each board/committee meeting is the development of the agendas consistent with the overall board/committee calendar. The best starting point for these is the "themes" and governance requirements/checklists mentioned above, plus a review against the previous year's agenda.

As mentioned previously, generally at every board meeting, I believe there should be a financial and operational update. Even if you need to bifurcate your board meetings, to conduct the financial update with the full board before the committee meetings can reduce duplication of providing current financial input a committee may need to address a particular topic. It can be beneficial to have the financial update and report on key operational metrics provided before the commencement of any of the committee meetings.

Finally, as you are drafting the agenda, be sure to include any particular topics your CEO feels a need to address, including those raised by the board/committee at previous meetings. The finalized draft agendas should then be provided to your chairman, lead director, CEO, and committee chairs, depending upon your corporate structure, for their review and approval.

After receiving everyone's additions and sign off, your next task should be to notify each individual

who will be presenting or covering items in the agenda about their assigned topic and their deadline for completing the rereading materials so that they may be reviewed, assembled, and provided to the directors.

Preparation of board and committee prereading

Most boards want to have a package of prereading delivered to them one to two weeks before each board/committee meeting. Overloading them with a lot to read over a couple of days just doesn't work.

And boards do not like receiving the materials in dribbles and drabs or newly revised material. It is too hard for busy folks to spend their time trying to collate the materials and determine what is most recent. The use of an online portal can solve for ensuring the most recent material is posted there, but it doesn't solve the irritation of a director who has read an earlier version.

Carefully monitor the overall volume of prereading materials. There is a propensity to have volume growth over time. There can be value on advising your executives the maximum number of pages they are allowed for a committee or the board and then force them to reduce their material to what is relevant. And just adding long articles or appendices that the director "might" find interesting can really irritate directors who feel a need to carefully read any materials provided to them.

The prereading materials contain the agendas, any resolutions, and presentation material. Most executives provide their entire presentation as prereading. At the actual meeting, directors prefer not to hear a regurgitation of what they have read. To solve for this, your presenters can take three approaches:

1. Have a shortened set of "culled down" material that is covered during the meeting;
2. Simply highlight certain items in the prereading and expound on them; or
3. Only highlight key items on the topic and respond to question on the prereading material.

The presentation materials need to be received by the corporate secretary's office with enough lead time to allow for a "legal review." More and more board materials are subject to regulatory inspection or discovery in later litigation or regulatory reviews (e.g., antitrust).

Often executives use terms in their materials that later can be misconstrued or, simply, are not correct. For example, to the extent your company has market power in any market segment, you sure do not want to see words used in presentations about "the market," "market share," or "leverage."

Once in board materials, it can be hard to argue for different definitions. A good business lawyer can review these materials and discuss them with the presenter to ensure they get their intent across but do not create bad documentation while allowing for further amplification verbally with the board, as necessary.

There can be value in providing a cover letter from the CEO for the prereading. In this letter, summarize the agenda and put the various topics in overall context from a strategic schedule or another perspective.

Preparation meetings with chairperson/lead director and committee chairs

Another critical step before each board or committee meeting is to cover with the chair not just the agenda topics, but the materials. You want the chair to understand the presentation and its purpose (e.g., for discussion, for information, for a decision, etc.).

You should intend to prepare the chair and have all of their questions addressed before the meeting — you want your chairs to look sharp and poised. For your committees, this means you need to schedule a premeeting with each committee chair.

Often management is well advised to assign an executive to be the "liaison" with each committee chair: the chief financial officer for your audit committee, chief legal officer for your Governance Committee, chief human resources officer for your compensation committee, and so on. This liaison should either have a meeting or a call with the relevant committee chair or the corporate secretary present to ensure that the agenda and materials are reviewed, understood, and any redirection or changes are made.

These meetings are working sessions and are great opportunities for executives to network and develop relationships with key directors. On complex issues (often in the incentive plan area), it may be beneficial to meet with every committee member before the meeting to ensure that they understand the proposals, that their questions are addressed, and that they have clarity on the items remaining to be discussed during the committee meeting.

Preparation of resolutions and resolution summaries

You should provide every resolution anticipated to be presented in the prereading. Each resolution should have a simple one or two-paragraph summary (which may contain bullet points): what is being asked, and why, in plain English, not legalese.

The summary should be different than the resolution or the "whereas" paragraphs that will be incorporated in the final minutes. For example, if each year the board needs to approve banking resolutions, you can explain why this is, what the resolution does in summary, and what has changed from the previous year. An executive I formally worked with stated:

> *"When you develop these summaries, bring it down to 'ducks and bunnies' — simple, short sentences and clear for the novice, bullets are good — the directors can always ask follow-up questions."*

In my view, the traditional "whereas" paragraphs should be included as a part of all resolutions. This creates the foundation, or purpose, for the action. Also, by providing the "whereas" paragraphs and the resolution in the prereading, you make it clear to your board what will be reflected in the minutes.

If a resolution is brought up in the middle of a meeting, it is good practice for the general counsel or the corporate secretary to write it down and then read it aloud so the full board has clarity on what is passed.

In these rare circumstances, the board or committee in question should also read very carefully that resolution as part of its review and approval of the minutes. In particularly dynamic meetings where proposed board action is being heavily deliberated, reading back the resolution can assist in building consensus.

Since meetings often move fast, a resolution can also be "carried in," with distribution just before the meeting or while it is in progress to allow the board to review what they will pass and what will be reflected in the minutes.

Text/email communications from the general counsel and/or corporate secretary to assistants outside the meeting room can help you prepare such materials with minimal disruption. You must be very discrete or advise the board when you are taking this action, or some directors may see your behavior as an indication of being distracted or disengaged.

Generally, it is good practice to provide some degree of flexibility for management to act in the resolutions. A high degree of specificity should usually be avoided and the resolution can always provide that management will report back to the board or committee (e.g., any nonmaterial exceptions to what is presented). A catchall paragraph like the following, which provides management or a certain level of management authorization to carry out the intent and purpose of the resolution, can be valuable:

> *"FURTHER RESOLVED, that the Chief Executive Officer of the Company, the Executive Vice President and Chief Financial Officer or other appropriate officers of the Company, are hereby authorized to do all acts and to execute and deliver all documents for and on behalf of the Company related to the foregoing and to do all other acts and deliver and execute all other documents that such officers deem necessary or appropriate to carry out the purpose and intent of the foregoing resolutions."*

At times, rather rare in my experience, you will need to capture a board action or direction in the minutes without a resolution. Language like "the board sensed that management should…" or "the board indicated its consent to management's proposal to continue negotiations with…" can capture these decisions.

For resolutions by unanimous consent, make sure you carefully follow the rules of the applicable jurisdiction on the time and manner for obtaining signatures. It is best to be clear when they are effective (this became a big issue in the stock option backdating cases). Also, for important matters, be careful using unanimous consents since one could question if the board effectively deliberated on the issue.

Prepare for any public disclosures

If your company is a public company, certain board and committee actions or resolutions (many from the compensation committee) will require public disclosure when the decision is made, or a resolution is passed. The board and committees should be made aware of this as part of the resolution summary. Thus, for every resolution, you should consider whether the action will require public disclosure.

Some practitioners provide their board and committee members with a listing of the most common decision topics that require public disclosure while noting the catch-all category that significant and comprehensive decisions not listed but affecting the business, its operations, or financials may also require public disclosure.

These disclosure requirements have short time frames and often require interaction with the company's investor and public relations groups. The advantage of such a listing is that it provides

awareness of these rules, which continue to change dramatically, before any action.

Often the board or a committee will ask what the disclosure will look like and what, if any, exhibits will be filed (this is particularly true in executive compensation matters). This should also be anticipated, and a draft disclosure can be attached as part of the resolution summary.

The other likely question you might get if your board or committee takes other actions or takes actions in different ways: what will be the need to disclose or content of the disclosure change. For example, if the decision is made at a later date on a call or by unanimous consent, can the disclosure be included as part of a quarterly or annual filing? These questions need to be anticipated and you should be armed with clear answers.



Board and committee members also need to be aware that nearly every action they and their family take concerning company equity will require some prompt public disclosure whether it is a grant, exercise, purchase, sale, or gift. They also must clearly understand how rules relating to insider trading and transactions with the company apply to their family members. Again, initial and routine communications on these topics will help your board and committee members.

In particular, I suggest you go over the compensation committee agenda and review carefully the actions they have taken after each committee meeting. Some actions, such as equity issuances, will require prompt public disclosure (e.g., Form 3s and 4s). You want to make sure your team is ready and able to complete the tasks authorized and can complete the disclosures in a timely fashion.

For all equity or plan awards where the date of the award can impact the value, make sure that the date is clearly established by the committee (also carefully consider the impact of any existing nonpublic information) and that the committee action and management's later actions are all aligned.

In the M&A context, especially if hostile, the public disclosure landscape is even more demanding

since the board and committee members may have to respond fairly quickly to communications from would-be suitors to avoid market uncertainty. In these situations, you should undoubtedly have a legal and investor relations response team ready to go to provide prompt and decisive advice.

By anticipating public disclosures ahead of time, you will be able to plan your well-reasoned response and provide concise advice that creates confidence in the board room.

Prepare deadlines to assemble materials and stick to them

You should also establish deadlines for the completion of all steps leading up to a board meeting and ensure that those deadlines are met. This is true in part because the addition, deletion, or revision of an item can have implications (e.g., the need to repaginate all agendas and tabs or the need to create a resolution and resolution summary).

You will very likely need the CEO's support for the presenters' material. They all think their material is the most important and can wait until the deadline or even after the deadline. On one hand, I think it is unwise to let the "process" get ahead of time-sensitive material. On the other hand, not everyone has time-sensitive material that needs to be refined up until the last minute.

What I have found is that too much simply comes in too late in the process. If appropriate time is not allowed, a proper review does not occur, and errors (usually simple ones) happen when there is no time for them to be caught. This has occurred more times than I would like to admit, and we have been left driving to the airport to make the final Federal Express pickup in the area.

During the meetings

Chair's agendas

For every board or committee meeting, there should also be a chair's agenda. This agenda is the same as what each board or committee member receives, but also includes annotations (some chairs also want the schedule for the various agenda items to properly manage the time). These chair agendas should be distributed only to the chair, CEO, lead director, general counsel, and corporate secretary.

The annotations should be in a different color (I use red) and in bold if a vote is required. How many times have you heard in your meetings, "Do we need to vote on this?" Your chair will look better if they can promptly answer, versus deferring to the general counsel or the corporate secretary. For each topic, it should be clear to the chair what is going to happen and what action, if any, is necessary.

For example, your chair will look good if, under an item, the annotation simply states,

> *"Mr. Smith will provide an overview of the changes in the committee charter as required by new SEC rules. These changes need to be implemented by year-end. This item is for discussion purposes and will be voted on at the next meeting."*

Your chair then controls the meeting by saying:

"Mr. Smith, can I ask you to now cover potential changes the committee may want to consider for our charter and the reasons why we will need to do so? And for all of you on the committee, we are just going to discuss this now and we will consider it for a vote at our next meeting. Mr. Smith, can you please precede."

Board and committee books

Most boards and committees have a historical practice on how their meeting materials are assembled. Generally, they are accustomed to the format, and it is difficult to change. I have seen boards and committees that receive materials in a binder clip, a spiral-bound book, a three-ring binder, and now via electronic delivery.

For better or worse, due to the backgrounds of many board members, hard copies of documents may still be desired by a few. The good news is that even if hard copies are used by some, electronic delivery will increasingly be used by others.

Whatever process you use for the substantive materials, it is beneficial to be able to make changes and insertions up to the last minute. Electronic delivery is great for this, and if a hard copy is used, a three-ring binder provides a lot of flexibility.

Books (now online) contain a title page, the agenda (with the items numbered), numbered tabs with the material underneath them, the charter checklist or status (if a committee), the charter (if a committee), and the annual schedule (when areas are going to be covered). Some boards like to have the CEO's objectives included as a part of every board package as well.

For any items in a board or committee book where the presentation is not self-explanatory, provide a cover page, in a standard format, explaining why it is being presented, what the material is, and what action the board or committee will be taking.

For example, if the board self-evaluation is the agenda item, the cover page will indicate why we are doing it, how it has been done in the past, attach the form to be used, summarize the process for distribution, collect other relevant input, and finally outline how and when the board or committee will discuss. Also, for any executive or outside presenter who is new to the board or committee, include a one-page bio of them, preferably with a small photo.

Materials at the meetings

Many companies use projected presentations or hand out presentations at meetings. Generally, the use of projection is preferred, as it allows the executive to manage the presentation. Presentations that are handed out are often being read by the directors during the meeting; they frequently flip ahead in the presentation, making it hard for them to read and listen at the same time.

To the extent that hard copies are still used, companies have mixed processes on whether they ask prereading materials to be brought to the board meeting by directors or whether new identical materials are provided to the directors at the actual board and committee meetings. The advantage of asking the director to bring the materials is that it allows them to be collected at the end of the meeting.

On the other hand, one advantage of providing a duplicate copy at the board or committee meeting is

that it allows for any last-minute changes to be incorporated (but then you need to make this very clear). I guess that as technology continues to advance and directors become more technology savvy, all materials will be distributed in advance over a network.



Thus, the hard copies will only exist in the board or committee room — and they may even be on a computer or iPad screen at that location as well. One final advantage of having binders for directors in the room in advance is that it allows for the proper placement of the chair, directors, and management around the table. But I have used "name tents" to accomplish the same purpose.

To encourage the movement to electronic delivery of materials, some companies have provided all their directors with iPads with the board app loaded. This has increased the number of directors who use this product. However, keep in mind that some materials, such as financial data and spreadsheets, can be difficult to flip back-and-forth on a computer screen.

Regardless of how materials are distributed, it is a best practice that no directors maintain any hard copies of materials (other than key reference materials to be discussed later). The official record should be maintained by the corporate secretary. In any later discovery, it becomes tedious if the company has to work through directors' files of previous board materials.

Also, a good way for directors to take notes on the materials is to use yellow stickies. They can pull them off as they ask any questions and those left on the table for the corporate secretary to collect as they exit, are clean copies.

For clarity, boards have created a process where only the company maintains copies of these materials (i.e., the materials are left on the table when they leave or mailed back to us for a telephonic meeting) unless they are specifically advised by a director that they are retaining a particular document for reference.

Legal support at meetings

I have seen board and committee meetings staffed with just the general counsel who acts as the corporate secretary, and board and committee meetings staffed with multiple legal employees. Generally, it is preferable — if the board and committee are comfortable with it — to have an attorney (normally the general counsel) and another note-taker both present. It is simply difficult to take notes and be prepared to answer legal or governance questions at the same time. If the general counsel is explaining a legal issue a legal, it is almost impossible for this individual to record notes of the matter and the questions raised while at the same time presenting.

It makes sense to have a representative from the legal department attend every board and committee meeting. I only have outside counsel attend on those rare occasions when they are presenting on a matter or it is necessary to have expertise beyond what is available in our legal department.

Each of the committees can have an attorney who "owns" the legal responsibility for that committee and the general counsel owns the board and Governance Committee responsibilities. I have assigned committee ownership responsibilities to high-potential direct reports to the general counsel, generally with expertise in the areas addressed by their respective committee, as it provides them exposure to the board and committees, which is beneficial for their experience and succession development.

Their role in these meetings is as legal counsel to the committee. These attorneys are also associate secretaries who can take minutes at the meetings in the event the corporate secretary cannot attend the meeting. The team trains all minute-taking personnel on the consistent approach to minute-taking and all draft minutes are reviewed by the general counsel and corporate secretary before they are finalized to ensure consistency.

Committee reports and notes

When a committee meeting is concluded — time to hustle. It is helpful to provide the committee chair with notes for the reports they will make to the other directors at the full board meeting. It is difficult for the chair to take notes while they are busy keeping the agenda progressing, listening, contributing to the discussion, and ensuring it is properly completed.

The corporate secretary can help them if, within several minutes (or hours depending on circumstances) after the meeting, they provide notes to the chair detailing what happened and what they may need to request the board to do. This also assists from a governance perspective because it allows the corporate secretary to ensure the items that need to be reported to the board are covered and that the chair does not inadvertently miss them in their report.

These chair notes should be 14-point font or larger, clear, concise bullets with a highlighted color if the committee is making a recommendation to the board for a vote on a particular item. My view is that if the chairs prefer, they can just read these notes and they will sound like normal conversation (thus, no acronyms, "wherefores," etc.)

These notes also help the corporate secretary ensure that he or she can properly document in the minutes what the report covered (e.g., that the Compensation Committee received input from its independent compensation consultant who opined that the executives' recommended compensation was reasonable and consistent with benchmark practices).

The chair's reports also serve another purpose. They become the skeletal structure, together with the

resolutions, to form the committee minutes. Also, they are the starting point for that part of the board minutes where the committee report is made. With this skeletal meeting structure in place, the corporate secretary simply needs to add content from the presentations and the areas of discussion and questions. More on minutes later in this guide.

Most committee chairs like their reports as soon as possible after the meeting. For some boards, I have created a draft before the meeting based upon what I knew would be discussed and then made handwritten revisions or insertions on what occurred. As I walk out of the meeting, I have provided this to an assistant. With these insertions, one more review, a quick printout, and it was good to go to the Committee Chair.

If the board meeting is not until the next day, I hand the chair their report at the dinner, but always have two extra copies with me the next day so I can follow along to ensure the requisite matters are reported and voted on and in case the notes get misplaced by the chair.

At one company where I worked, our committee meetings were held in one day, with a board dinner with the CEO and then full board meetings the next morning until noon. To improve time management and provide the board the opportunity to discuss the issues not delegated to the committees and at their allotted times, we further streamlined the committee report process with the following methods.

After the completion of all the committee meetings and chair reports (usually over the board dinner time), the team would deliver to all the board members the chair reports of all the committee meetings. Then during the time of the committee reports at the full board meeting in the morning, the committees could answer any questions, and only present the issues where the committee was asking for a full board vote.

We encouraged the committee chairs to be comfortable if no questions were asked. I found this reduced committee report time by greater than 75 percent and gave the board more time to address the issues it felt were most important.

Executive sessions

Boards tend to have two types of "executive sessions." One type is with independent directors and the CEO alone and the second type is with only independent directors. An executive session with the CEO or limited management should usually be attended by the general counsel and/or the corporate secretary.

Often important issues are discussed and decided, and they simply need to be properly documented. An executive session with only the independent directors also needs to be documented. The independent chair or lead director should advise the general counsel or corporate secretary of the general topics covered so that they can be included in the minutes. You should keep in mind, under most bylaws, resolutions cannot be passed without the full board being invited, so the CEO may need to reenter the discussions for a vote.

Some independent directors prefer their executive session to be at the commencement of the board meeting so that that they are not faced with the time crunch that usually happens between the end of the board meetings with management (which simply runs over most of the time) and travel plans.

Other independent directors prefer their executive session to be at the end of the board meeting so

that that they can discuss issues that were presented to the full board. However, a session at the end of the board meeting can present a problem for management if the directors come to a conclusion or decision that will not work or does not make sense, then leave the premises with the chair or lead director explaining to the CEO the problematic decision.

If the executive session is before the board meeting and the chair or lead director report to management on it, there is time to adjust or refine decisions. No surprise — I prefer they have their executive session before the board meeting. Regardless, the pros and cons of both approaches should be discussed with the chair, CEO, and lead director. Everyone should agree to a reasoned process.

Some boards meet in executive sessions with both the CEO, who may also be the chair, and also independently at each board meeting (I have found that both of these sessions can be effectively conducted over the board dinner — although the CEO and I then miss dessert). During the portions where the CEO meets with the board, the general counsel is the only other management present and takes the minutes. For the sessions with only the independent directors, the lead director solicits agenda items in advance from the independent directors and leads the discussion.



Some committees like to have their own "executive sessions" with a particular company executive or firm. The Audit Committee should have sessions alone with the key control functions, including the external auditors, the chief financial officer, general counsel, chief compliance officer, chief risk officer, or internal auditor. Other committees may also choose to hold meetings with just a particular executive relating to the matters in their areas of responsibility.

At each Audit Committee meeting, the committee meets in separate executive sessions with each of the leaders of the key control functions: chief risk officer, chief financial officer, general auditor, chief compliance officer, and general counsel. They also meet separately with external auditors at each in-person meeting. They do not typically meet in executive session during the interim telephone conferences throughout the year. The corporate secretary and general counsel are not present in

these sessions with the control functions (other than the general counsel's session with the Audit Committee) and the chair of the committee advises the corporate secretary of any substantive items to be included in the minutes.

Human resources committees also may meet several times per year in an executive session with the external independent compensation consultant. All committees should hold executive sessions at the end of their meetings — teleconference or in-person. The corporate secretary and general counsel are not present in these sessions, and the chair of the committee advises the corporate secretary of any substantive items to be included in the minutes.

Between meetings

Since most boards meet approximately every other month, there can be significant value in providing a short update between meetings on progress against key metrics and another significant activity. This can be accomplished by a letter from the CEO to the full board.

In addition, it is my view the board should never read or see something major about the company in any media outlet first, without being advised by the company — and it often needs to be put in context. This correspondence can go to the full board from the CEO or relevant executive (e.g., from the general counsel if it pertains to a litigation matter.)

After the meetings

Action items from meetings

When the board or committee meetings are over, assemble the key players involved — the executive liaisons to the committees, the corporate secretary, and any attorneys supporting the various committees — and create an "action items" list. The action items can be from questions and can range from simple "Why do we have this logo on our notepaper" to complex "How do I defer my compensation?"

Another type of action item could be that during the discussion a committee decided they would like a presentation at their next meeting on topic X. These action items are intended for management — assign each person to be responsible for them and a due date. They should not be made part of any official record but noted simply to assist management in remembering and monitoring what the board or committee has requested.

Minutes and minutes drafting

Simplistically, boards and committees make their decisions through resolutions. Thus, minutes need to reflect the process to get to those decisions and not the decisions themselves. To do this, minutes should reflect the matters considered in enough detail to reflect the topics covered and the processes to get to any resolutions.

There is a dividing line between "considerations going into a vote or resolution" and "other chatter." Be expansive about the information considered (not "relied upon," but "considered") by the board in reaching a decision (often it’s also good to include a catch-all like "among other things"). However, all of the other discourse that occurs in the normal course of discussion should be addressed in a relatively perfunctory manner (e.g., "The board then addressed XYZ topic and the various strategic,

operational, and risk factors to be considered in connection with XYZ."

The minutes must support that the board and committees are complying with their duty of care and duty of loyalty. To the extent a director has a conflict issue and is not involved in the discussion or recused themselves for any votes, this should be documented. Make sure all the staff taking minutes have a consistent approach and philosophy.

Generally, the minutes for a two-hour committee meeting can be handled in two single-space pages (excluding the "whereas" and resolutions, the attendees, and other formatting). Likewise, minutes for a half-day board meeting can usually be completed in three to five pages (excluding the previously referenced material). Headings and sections that track the agenda items are valuable since they facilitate searches for prior content or actions.

It is my view that minutes should indicate the following:

- The date and location of the meeting;
- Who is in attendance and what their titles are (while also reflecting when people leave or join);

- If the meeting or any participants were in-person or on the phone;
- The presentations made;
- Summary of areas of questions that were asked and answered and notes that a discussion and deliberations occurred; and
- A clear indication of actions taken and opposing or abstaining members (if relevant).

It is generally best to not reflect the board "unanimously voted to" do something (what do you write if the vote is not unanimous?). However, at times the fact that a vote was not unanimous or that a certain director voted against or abstained is requested or is relevant (e.g., to address conflict or duty of loyalty concern). In these cases, that information needs to be documented. For the executive session, the corporate secretary should ask what matters were covered to be reflected in the minutes.

What should not be included in your minutes are things like which director asked which question (again, unless documentation is requested or the particular questioner is relevant to the question). It is my view that it is better to reflect that the "board" or "committee" asked a question and perhaps indicate the topics of those questions and that "management responded," but not the substance of the response.

Remember you are documenting the process not the detailed substance. It is simply impossible to list every question and only significant areas of questions need to be reflected. You can document such an exchange in the following manner: "The board asked Mr. Smith numerous questions throughout his presentation to which Mr. Smith and Ms. Jones responded." Also, catchalls at the end such as, “The board then engaged management in a discussion of the substance of Mr. Smith's presentation," can be a good way to capture a discussion.

Lastly, noting that, the board discussed and deliberated the action to be taken" can be helpful as well. Avoid adjectives or language that makes value judgments. It is better to avoid specific numbers, percentages, or equations, but to reflect them as approximates.

Finally, you should avoid making commitments in the minutes to further action. Way too often things change between meetings, and if there is an indication that management will come back in the next

meeting with X and it does not do so, your note in the minutes creates an implied and unanswered question of why not.

The "shell" for the board minutes can be drafted by assistants by inserting the resolutions and the presentation headings of the slides presented under the various topics. Key points can be pulled off the various slides and worked into the minutes. For example, you could write,

> *"Next, Ms. Smith discussed [take the heading off the PowerPoint page] and summarized, among other matters [take the three or four key bullets off the PowerPoint page]."*

The financial report could indicate that the chief financial officer “reviewed with the board, among other things, the company’s revenues, expenses, and income, indicating how this had changed from the previous quarter and year.” There is no need to reference the numbers, if any element on the balance sheet has gone up or down or if the results are on or off-target/plan.

The shells for committee minutes can be developed from committee resolutions and the committee chair's summaries. Since the items that were important enough to be reported to the board were contained in the chair's summaries, clearly, they should be included in the committee minutes.

Because compensation decisions have heightened scrutiny, I have several additional suggestions in this area. I suggest that you reflect the processes, consideration, questions, and discussion (not necessarily the substance, but how it was occurring) for the elements of executive compensation, bonuses, bonus plans, short- and long-term incentive plans, option awards, executive change in control or other agreements, including the key provisions.

You want to document that the committee was aware of, considered, and discussed with its independent consultant these key elements. The final decisions on numbers or agreements can be attached as exhibits — you do not want to indicate that they approved the recommendation and there was no clarity as to what it was.

Also, when a bonus pool is established, it is best to reflect the dollar value as compared to having it calculated outside the room by management (you simply do not want to be to later figure out adjustments that were or were not made). The minutes should reflect the opinions of the independent compensation consultant.

The board in its business judgment can rely on experts. When that reliance is important, make sure it is documented. You always want to have the minutes reflect that the independent compensation expert "advised the committee that the proposals are reasonable and consistent with benchmark practices."

Another area of heightened scrutiny is transactions. For transactions, again, if there are outside experts present such as outside counsel or investment bankers, you want to reflect what they "opine" so the board can rely on it.

For large transactions, it is usually best to note the actions taken by the board as well as information on the prior meetings that led up to the decision so that it is clear the board carefully evaluated and considered the matter. I find it is often best to also document alternatives, the risks, and benefits of the transaction, exit strategies, and other major factors that were considered.



Keep in mind that all presentations to the board on major transactions are subject to antitrust document production and review by the government and need to be developed with that scenario in mind.

Finally, significant matters (e.g., a change in strategy, a major new product offering, a significant new contract, or other critical matters) will benefit from additional documentation of the process and factors considered, "among others," leading up to the decision.

Any portions of the minutes that are attorney-client privileged are best to be designated as such. But keep in mind, with this practice it will be hard to protect other areas that are not so designated, so draft with that in mind. It is amazing to me how many parties end up seeing minutes — whether it is auditors (internal and independent), regulators, or experts, so you need to draft with an expanded audience in mind.

And for transactions or other confidential discussions, you need to make sure as you provide the minutes to third parties that doing so is consistent with any non-disclosure agreements the company has entered into. Auditors typically review minutes and you need to provide a redacted version to them to maintain the attorney-client privilege or comply with any non-disclosure provisions. This may result in you need to meet with your audit partner to verbally cover the general type of area that is privileged, while no substance is provided.

Finally, all minutes should be drafted with the view that they may be published in the *New York Times* or turned over to plaintiffs' attorneys or prosecutors. My overall advice is to be careful. Finally, if it is consistent with the company's document retention program, all notes are taken to develop the minutes no longer need to be retained after the final documents are created.

I know it is a "pain," but it is best to begin work on the minutes right after the meeting, while the discussion is fresh in your mind. Generally, an assistant can provide very complete shells of the minutes to the corporate secretary. The corporate secretary can then work in more detail from their

notes. Often, I simply circle portions or bullets in my copy of the presentation which the presenter focused on, so I can work those in.

It is good practice that once a good draft is prepared, you should cut out the various pieces in which the presenters' sections are documented and send the draft text to them for comment and review. All minutes should be reviewed by the general counsel again before they are finalized and just before they are mailed for board or committee approval.

Sometimes even from the time of the first draft to the date of the mailing, you will note a revision that needs to be made. Never change a board resolution or minutes after they are adopted, regardless of what you think is an improvement or better reflects what the board or committee intended.

Other issues

Director compensation

Director compensation is an important area to focus on. These are your most important clients; you need 100 percent accuracy and professionalism and you must provide a sound basis for all actions. Your independent compensation consultant needs to opine that the nature and amount of compensation are reasonable and consistent with benchmark practices (i.e., this must be reflected in the minutes).

You should provide your directors with clarity around all of the elements of both their and executive compensation and how they are handled, including retainer, board and committee fees, chair/lead directors' fees, reimbursements, benefits, equity awards, etc.

I do not believe the director and executive compensation is human resources or payroll function, but one that should be driven out of the office of the general counsel or corporate secretary. The need to be accurate, know when events occur, and understand the interrelationship with disclosures is simply too important to be handled in the same way as employee compensation.

The questions directors have relating to their compensation need to be promptly and accurately addressed and should not be delegated to functions that are unfamiliar with the director compensation plans and the associated legal and reporting obligations.

Finally, during times of heightened board activity, it may be necessary to hold additional unscheduled meetings or calls. The office of the corporate secretary, unlike human resources or payroll, will be aware that directors may need to be compensated (depending on if you pay by individual meetings) for these additional meetings or expenses.

Board and director evaluations

Good governance, and some exchange rules, dictates that the board and committees evaluate the effectiveness of the board and its committees at least annually. The Governance Committee and the board should discuss in advance the purpose of the evaluation and the methodology by which it intends to the objectives. If a third party or survey is used, there should be a discussion on the confidentiality of any input or responses. A large part of the focus of these evaluations generally is on the board and committee processes.

The most often used approaches to conduct theses evaluations are:

1. Third-party interviews, facilitation, or surveys;
2. Some form of internal (by the board or the secretary's office) interviews;
3. An internal written survey; or
4. Some combination of these.

If third a party facilitator is used, they can be valuable leading the discussion of the issues raised with the board or committees. The process most often employed is the annual written survey.

Whatever process is used, the company should carefully consider what questions are asked and what documents are being created, by who and the requirement to retain documents and document the process.

Some companies have chosen to analyze by attorneys to allow for the argument that some or all of the information is privileged — an argument that may be hard to make concerning all the information. Other companies have developed the survey notes, but after the discussion simply document the process and any key action items in the minutes.

The approach I have seen most often is the annual written evaluation with questions and a rating for each with additional comments at the bottom. These can be anonymously aggregated by the secretary's office and if the same questions are used, it provides for a comparison year over year. It also creates a foundation for a discussion at the board and committee level on performance and effectiveness and allows for action items to be developed form improvement.

In addition to overall board and committee evaluations, there is an ongoing trend for a formal individual director or "360" evaluations by the Governance Committee. Factors that are considered include attendance, preparation, and value of the contribution. I have found it valuable to work with the Governance Committee to spend the time to clearly articulate the list of evaluation criteria for their directors.

Again, these individual evaluations can be conducted through a third party, internal interviews, or some form of a survey instrument. If a third party is used, they can provide anonymous feedback to individual directors on areas for improvement or can advise the lead director or chair of the Governance Committee of this information to allow them to deliver the feedback. However, the information is acquired, it should be provided to the directors to allow for improvement.

An effective approach requires a formal director evaluation to be process conducted by the Governance Committee when a director is up for re-election (on a staggered board this may be on a two to the four-year basis, or in the alternative, all directors can be done annually or on some periodic schedule).

As part of the evaluation process, the chair of the committee on which the director serves (e.g., the lead director does this for the chairs) can solicit feedback from the other committee members and then give the Governance Committee an oral evaluation of the director based upon this feedback. Members on the Governance Committee being evaluated should exit the portion of the meeting where they are discussed.

The chairs can be provided with a form to use that covers the evaluation criteria for directors and structures their questions and notes. As notes, this information needs not to be retained, if consistent

with the retention policy.

It is beneficial to request each director being evaluated to complete a self-evaluation that allows them with an opportunity to highlight and identify their strengths, contributions, and areas of expertise. As part of this self-evaluation, it can be appropriate to provide the Governance Committee with the events/seminars the director has attended to stay "current" with the roles and responsibilities of a director.



I have found it valuable for the Governance Committee to maintain a grid and discuss on an annual basis, after the corporate strategy session, the experience/skills/attributes the company should have in our mix of directors to assist in executing the strategy.

These criteria can change over time (e.g., current or former CEO, CFO, industry expertise, financial expertise, marketing, technology, international public policy, regulatory experience, diversity, etc.), and it is important to regularly match the directors up against these factors to consider current and future needs.

The National Association of Corporate Directors (NACD) provides surveys and interviews for both board/committee and peer evaluations to its members on an a-la-carte basis. They also provide a tool that is used to work with the board to develop a skills matrix and measure the directors' skills against this matrix. I have not yet used this service, but it is a good alternative if nothing is currently in place and it does create a good starting foundation.

Again, if individual evaluations are desired, it is best for the full board to endorse the process in the abstract with the hope of reducing emotional or ego issues as the process plays out.

And some companies have created transition programs or a *director emeritus* type program that can be offered to directors who are not asked to stand for reelection. Such a position should be structured to have no "legal" status and it is best to have agreed well in advance what the status means and

what, if any, compensation is provided.

It is also valuable to consider, in advance, what areas require a director to submit their resignation for consideration by the Governance Committee and/or board and incorporate these in the governance guidelines. Most often these triggers include a change in responsibilities in their current job; some exclude ordinary retirement and some do not)

Think about whether an indictment or even involvement in a regulatory investigation or civil proceeding should trigger such a requirement. It is much easier to have considered this in the abstract than to ask a director for their resignation after a criminal proceeding has commenced and an argument develops on whether they are being proven guilty when they should be presumed innocent.

Director resources

Other materials, governance binder, and online services

Over my 40 years of working, I have found directors like to have key contact information and meeting schedules at their fingertips. The team creates small printed pamphlets that are about 4x8 inches in size that can easily be kept in a briefcase.

These pamphlets contain the board and committee schedules, committee memberships, and board and executive contact information, including email addresses, cell phone numbers, and vacation property contacts.

A similar one-page laminate (front and back) with contact information is also provided to all directors and executive management. Make sure you put a date on the first page of these and update them at least annually.

I have also provided all board members with a "board binder" — I call it a credenza book. For that reason, I make it a bit fancier than other materials — a leather three-ring with the company logo and the director's name embossed on it. I update the entire contents every year. (No way I want my board to get a package of inserts and have to figure out where to put them.) This book can always be available anywhere online in a board portal with updates incorporated in it.

Simplistically, the credenza book allows a director to reach out and quickly have access to the key information they need about the company. The contents of the credenza book include:

- The meeting calendar (with two years’ worth of dates);
- Director contact information;
- Director biographies;
- Executive officer contact information;
- Executive officer biographies;
- Bylaws;
- Corporate governance guidelines;
- Committee charters;
- Committee memberships;
- Director classes and retirement dates;
- Duties of the lead director;
- Board compensation;

- Deferred compensation materials;
- Matching gift forms;
- Expense reimbursement forms;
- The form director indemnification agreement;
- A D&O coverage summary;
- Delegations of authority (who can sign for what);
- Code of conduct;
- Key company policies;
- The subsidiary organization structure;
- Key analyst reports;
- A terms and acronyms glossary;
- The company mission statement;
- A calendar of continuing education programs;
- Key legal memoranda on generic important governance topics, such as obligations of confidentiality, retention of documents, and responsibilities concerning benefit plans; and
- The summary of the approach to the maintenance of board and committee materials by the directors.

I also include with the credenza book the most recent copy of The Corporate Director's Guidebook published by the American Bar Association. This is an excellent resource book; it's not too lengthy and it's written in plain English. Section two entitled "Joining a Board of Directors" provides many valuable pointers for new, or existing directors. And sections three and four on oversight, responsibilities, rights, and duties of a director are a great read for the entire board.

All industries and companies use numerous acronyms. Keep in mind that your directors only assemble for meetings several times a year and that they have differing levels of familiarity with your industry and your company.

Do not assume they know your acronyms and in all presentations and minutes clearly define them when first used. It can be helpful to prepare an acronyms definition list that is generated by reviewing all the materials provided to the directors — so it continues to grow over time. This list is provided to directors as part of their materials at every meeting.

Board portals and e-delivery

Many companies, maybe most, have now moved to the online delivery of board meeting materials. This allows for the distribution of prereading, maintenance of board and committee minutes, and all of the key information documents that are contained in the directors' manual.

Several outside vendors can provide this service with high confidentiality and at a rather reasonable price. I have used both the Diligent services and BoardVantage. Whether you use these platforms these or others, use whichever you feel is more user-friendly for your board. All the materials in the board binder are online at this site, as are committee and board materials (current and historic) with the ability to "search."

Keep in mind if you go to an online system, you should carefully consider how materials are maintained or deleted in a way that is both consistent with the company retention policy and also best protects the company from retaining unnecessary materials. These online services can use technology to enforce the non-retention of materials consistent with the company's policies.

Finally, make sure you understand and are comfortable with how the system "really" handles this information, including questions such as:

- Can erased materials be recreated?
- Are revisions maintained?
- Are other metadata maintained?
- Is access to the materials tracked?

In this new "e" era you should discuss with the board how they want notices and materials delivered to them electronically. Keep in mind if you send it to a personal home computer or handheld device, which may share spouse, family, or other personal information, it can be subject to review in litigation discovery. To avoid this, I believe that all substantive communication should go through a board portal system to not contaminate their own personal or family computers.

Finally, in keeping with your overall director document retention plan, think through what materials you give to the directors to take with them. If you are using an online board service, most of the data will be available to them by accessing that resource.

New director orientation, director education calendar, and continuing education

For new directors, it is valuable to provide an orientation session. This session should address both the board operations and the substantive issues of the company. A complete day is generally necessary for such an orientation.

The intent is for the session to be a small informal interactive conversation with the leaders of the business. It provides the directors with an understanding of the processes and allows them to learn about the business and meet key executives.

I start with the overall governance overview presented by the general counsel and the corporate secretary. I have a created a slide deck that covers the major issues, but in essence it is a walkthrough of the topics in the directors' credenza book, including schedules, travel, governance guidelines, charters, how compensation is managed, company policies, indemnification, D&O insurance, retention of materials, online resources, and more. I also provide a legal overview of a director's responsibilities and duties and how my team will assist the director in meeting their obligations. Summarize the structure of the company and its subsidiaries and how that governance is handled. Finally, provide an overview of the various control functions. In our current world, this includes an overview by the chief compliance officer, internal auditor, and the chief risk officer.

The second major segment is an overview of the company strategy. Generally, materials from the most recent company strategy session provide the foundation for this presentation which is made by the individual or team responsible for developing the company strategy.

The third segment is a focus on the financial results of the company and its key subsidiaries. The CFO outlines past performance and future expectations. It is then valuable to have the leaders of the major business units provide an overview of their business, markets, products, strategies, challenges, opportunities, and business and financial plans.

To the extent, there are key components to business planes (e.g., tax strategy, public policy strategy, technology, M&A), I have also provided a foundation on these areas with the director. On occasions, teams have also provided background on such topics to all directors in the form of a webinar.

Monthly, my team prepares a calendar that lists all relevant continuing education classes and seminars occurring throughout the year and includes the updated version in each board book. Directors can also access a copy via the online site. I want to make it as easy as possible for directors to attend these events. Keeping with this theme, reimburse them for the cost of attending any such programs. Also, to the extent a director assumes new responsibilities, such as the chair of the committee, point out programs that may be particularly relevant to their new areas of responsibility.

Some companies also bring in speakers on topics of interest to directors, such as new issues trends in governance. Again, groups like NACD provide speakers, at a cost, on these topics. We have not done this regularly but have conducted such sessions on topics relevant to other matters or governance processes being considered by the board.

Feedback and “best practices”

Make sure you are always looping back to the CEO and the directors on how your team is doing. You want to know what is working well and what can be improved. In particular, push your independent directors rather hard on this. You work for just one company, while many of them are on several boards. They see things that you do not, and sharing that knowledge can help improve your processes. Also, meet with other corporate secretaries (National Association of Corporate Secretaries and other similar groups can be valuable) and general counsel. Ask them what works well for them. Continuously learn and improve.

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