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## CORPORATE LAW UPDATE

### **Corporate Director Fiduciary Duties: Board Minutes and Retention of Notes**

With today's heightened scrutiny of corporate governance issues in businesses at every level, it is pertinent to review some of the basic principles underlying the exercise by corporate directors of their fiduciary duties.

#### **BASIC RULES**

Directors of corporations have fiduciary duties to act in good faith and in a manner that they reasonably believe to be in the best interests of the corporation. Directors may be held individually liable for failure to perform these duties. Courts rely on corporate board minutes to evaluate whether directors have satisfied their fiduciary duties in making specific business decisions. Minutes that do not reflect an adequate deliberative process may give rise to an inference that directors failed to fully consider relevant information.

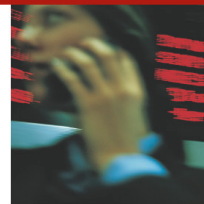
#### **BOARD MINUTES**

Board minutes should contain information such as the date and location of the meeting; the names of directors present, absent and excused; a description of topics discussed; material terms and rationale for any matter approved or disapproved by the board; whether any directors abstained from voting; and the name of the individual responsible for preparing the minutes.

Minutes should show that the board engaged in thoughtful deliberation of each matter but should not provide a verbatim record or attribute specific words or points of view to particular directors. They also should reflect that the board contemplated both sides of each matter (pros and cons, benefits and risks), as well as alternatives to the action proposed. Directors should disclose any conflicts of interest they may have in connection with a decision under consideration, and the minutes should reflect that interested directors abstained from voting. The individual who takes the minutes promptly should prepare and circulate a draft of the minutes for review. Minutes approved by the board should be retained for the life of the corporation. After the board approves the minutes, the corporate secretary should destroy all notes and drafts of the minutes.

#### **RETENTION OF NOTES AND BOARD MATERIALS BY DIRECTORS**

Directors may consider it convenient or a part of the exercise of their fiduciary duties to take and retain personal notes of board meetings. However, personal notes are an inherently imperfect record, as they may contain statements that can be misinterpreted or taken out of context, and they may capture only part of a discussion and not fully reflect the deliberations of the board, depending upon when in the course of the board's discussions the notes were taken.



Personal notes are discoverable in litigation and may be used against directors by disgruntled shareholders. Published case law highlights the pitfalls and risks of directors retaining their notes. Consequently, it would be prudent to restrict directors from taking notes or to require them to return or destroy their notes after the meeting or approval of the minutes. In practice, however, most corporations do not prohibit their directors from taking notes if they believe it will assist them in exercising their fiduciary duties. Directors should be cognizant, though, of the issues raised by note-taking and should be careful about the types of notes they keep, particularly when sensitive matters are discussed by the board.

As a related matter, highly sensitive board materials, such as litigation summaries, should be distributed to directors for review only at the meeting and collected afterward. Some corporations also make these materials available on private, password-secured web sites accessible only to the directors.

#### **FOR MORE INFORMATION**

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