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The Governance Institute

Guidance note

Minute taking

Contents

Institute of Chartered Secretaries and Administrators

April 2017

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Foreword from Dame Alison Carnwath

I am very pleased to have been asked to provide a foreword to ICSA: The Governance Institute's new guidance on minute taking.

Taking minutes of meetings is administrative good practice. It creates a record of what has been agreed, why and by whom; and of what is to be done, by when and by whom. But it is more than that. As the definitive record of its highest decision-making body, minutes are a key part of the collective history of an organisation. For all these reasons, it is crucial that the quality of those minutes is of the highest standard.

However, there is no one-size fits all solution. Minutes are as individual as the board to which they relate but decisions as to format, style and content should be taken from a position of knowledge of the law and of regulatory and market practice.

This guidance is the product of ICSA's discussions with experienced minute takers, from both corporate and not-for-profit sectors and of the responses to their consultation last year. It therefore provides an up-to-date assessment of market practice and of some of the pitfalls that can face those taking minutes of meetings.

I am most impressed by the number of responses and the evidence that this shows that so many people share my and ICSA's view of the importance of minutes and were willing to share their experience, through ICSA, with others.

Dame Alison Carnwath, DBE FCIS
Chairman
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1 Introduction

Taking minutes of meetings is more than administrative good practice but, for such a basic aspect of the administration of business of all kinds, it is surprising that there is relatively little formal guidance about how the minutes of business meetings might most effectively be taken.

As part of a general update of our guidance for members, ICSA: The Governance Institute has been looking at this area. During our review, we were struck by the changes in practice that have developed over recent years. Board meetings[1] are the highest-level internal decision-making forum of an organisation and the proper purpose of minutes is to provide a formal, long-term internal record of those meetings, for the benefit of the organisation rather than for any third party. The minutes may, however, subsequently become relevant in legal proceedings and are increasingly subject to external scrutiny.

For example, in July 2016 the Treasury Select Committee noted in respect of one company that, 'board and committee minutes were frequently not sufficiently full to provide a definitive record of what happened, and in some cases are missing altogether'.

We sought to understand these changes through questions that we put to a focus group at our annual conference and through a public consultation, issued in May 2016[2], to support our development of revised guidance. We were delighted by the response. More than 100 people attended our conference breakout session and we received 89 responses to our consultation.

It is a great tribute to the importance of good governance that so many people, from so many sectors, were prepared to spend time and trouble in contributing their views. The answers that we received were interesting, illuminating and in some cases slightly surprising. The insight that we gained from them was very helpful, notably in highlighting the similarities and contrasts between minuting in companies, particularly financial services companies and, for example, NHS entities. Respondents to our consultation covered an enormous range of subjects and showed a similar range of practices, to which some of them are, clearly, fiercely committed.

1 Note that although the governing body of an organisation, its members and the governance professional responsible for taking the minutes of its meetings may enjoy a variety of titles, for ease of reference we have referred to that governing body, its members and that person, regardless of sector, as the board, the directors and the company secretary or minute taker throughout this guidance note. We appreciate that this will not be strictly accurate in all cases, but these are simple and well-understood terms, use of which will shorten our text considerably.

2 www.icsa.org.uk/about-us/policy/the-practice-of-minuting-meetings

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Good minuting is a deceptively difficult and time consuming task – more than one respondent to our consultation described it as an art – which is often under-valued, notably by directors. It is far more than an administrative formality. Some experienced minute writers have told us that it takes at least as long, often twice or three times as long, to draft minutes as the meeting itself took.

Some of those with whom we have discussed minuting and others who responded to our consultation favoured a highly prescriptive style of guidance, including asking us to develop standard forms of language, while a number of others wanted to be left to minute as they see fit.

In our view, however, there is no one-size-fits-all approach for minute writing. Context is always important and each chairman and each board will have their own preference for minuting style. We believe that it is up to each individual organisation to decide how best its meetings should be recorded. There is no 'right way' to draft minutes and this guidance should always be seen as principles-based, offering suggestions that may be tailored to each organisation, rather than as prescriptive.

We do, however, believe that it is important that those who are unfamiliar with the minuting of meetings should have guidance as to how issues that they face might be addressed, what the risks of certain practices are and how to avoid some of the pitfalls that they may encounter. That is the purpose of this guidance.

All this may suggest that minute taking is a necessary yet thankless task, but as one respondent to our consultation asked, how many other people in an organisation get their work in front of the board as frequently and consistently as company secretaries?

We are grateful to everyone who shared with us their wisdom and experience gained from minuting literally countless meetings, to those members of ICSA and GC100 who worked with us in focus groups to address specific questions and, in particular, to Colin Passmore at Simmons & Simmons and Carol Shutkever at Herbert Smith Freehills for their guidance and support.

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April 2017

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2 Legal and regulatory framework

Unlike company general meetings, board meetings are almost entirely unregulated by the Companies Act 2006 (the Act). However, there is a specific requirement in the Act to have board minutes. Section 248 states that minutes of board meetings must be taken and kept for at least 10 years (failure to do so is a criminal offence for the directors), and section 249 stipulates that the minutes are evidence of the proceedings at a meeting, unless the contrary is proved.

Minutes of board meetings form part of the company's records under the Act and can be held as hard copies or in electronic format, but must be capable of being reproduced in hard copy form (see sections 1134 and 1135 of the Act). The format of minutes is a decision for individual companies, but a number of respondents to our consultation told us that this decision is confirmed at a board meeting and recorded. This might be a helpful approach.

It is important that consideration is given when preparing the minutes of board meetings to what may be appropriate or necessary, depending on the nature of the business and the circumstances, to demonstrate that the board members have observed their responsibilities to the company and complied with their legal and regulatory duties.

For companies, directors' statutory duties are set out in sections 170-177 of the Act. They cover duties to act within their powers; to promote the success of the company; to exercise independent judgement, reasonable care, skill and diligence; to avoid conflicts of interest, declare any interest in a proposed transaction and not to accept benefits from third parties. The Act imposes potential liabilities for non-compliance on the company and, usually, on every officer in default. All directors and the company secretary are the officers who are potentially liable for any such default.

The Insolvency Act 1986 imposes potentially more serious liabilities which may be incurred by a director personally when a company becomes insolvent and there has been fraudulent or wrongful trading.

Board meetings are an internal matter and therefore the conduct of board meetings is governed by the organisation's constitutional documents. For example, every company must conduct its board meetings in accordance with its articles of association. Companies are free to set their own articles but many companies that have adopted new articles

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since 1 October 2009 will have included in them the provisions set out in the Model Articles prescribed by the Act. Companies with articles adopted before 1 October 2009 are likely to have included the provisions set out in Table A of the Companies Act 1985.

In other sectors there is even less statutory prescription, although we were told that some regulators, notably the Financial Conduct Authority (FCA) and NHS Improvement (formerly Monitor) have sought evidence of challenge in board minutes.

There is considerable sectoral variation and each sector is likely to have its own code of governance or other standards, of which boards should be aware and for which they should have regard:

- Financial services companies will need to be aware of the regulatory requirements and expectations of the FCA and Prudential Regulation Authority (PRA), including in relation to Solvency II, together with the implications of the Senior Managers Regime (SMR) and Senior Insurance Managers Regime (SIMR).
- Many companies will be affected by section 49 of the Pensions Act 1995 (setting out requirements for trustees) and the Occupational Pension Schemes (Scheme Administration) Regulations 1996 (SI 1996/1715) where Regulations 12-14 relate to records and minutes of meetings.
- Listed companies will need to pay attention to provision A.4.3 of the UK Corporate Governance Code[3].
- Charities have the joint Charity Commission and ICSA guidance CC48 on charities and meetings[4] and guidance from the Office of the Scottish Charity Regulator (OSCR), whilst academy trusts also need to bear in mind guidance from the Department for Education and the Education Funding Agency.
- For universities, the Higher Education Code of Governance should be reviewed.
- Local government entities will need to have regard to the Local Government Act 1972(6).
- Public sector organisations are also subject to the Freedom of Information Act 2000.
- In local authorities, it is normal practice for committee minutes to be used to report their activities to the full council rather than by separate report. This can create tension between the need to record the decisions of the meeting and the need for the full council to understand the background to those decisions.
- In the NHS, there is scrutiny from NHS Improvement, the Care Quality Commission and NHS England, with focus on standing orders and conflicts of interest. All of their meetings are held in public, although some sections can be in private.

3 A.4.3. Where directors have concerns which cannot be resolved about the running of the company or a proposed action, they should ensure that their concerns are recorded in the board minutes. On resignation, a non-executive director should provide a written statement to the chairman, for circulation to the board, if they have any such concerns.

4 https://www.gov.uk/government/publications/charities-and-meetings-cc48

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Some more complex organisations had specific suggestions which will be important in certain circumstances. These included the need for organisations active in multiple jurisdictions to be aware of the requirements of those other countries. For example, US directors must not discuss business that would breach US sanctions, as a result of which some companies have introduced a 'recusal policy'. Similarly, some offshore companies need to clearly evidence that management and control (the decision-making process) happens in an appropriate place, to avoid adverse implications for their tax status. There may also be specific rules about preventing bribery and the management of conflicts of interest that must be observed. Some specific issues relating to conflicts are discussed in more detail later in this guidance.

All these are important considerations for those affected and will play a part in the decisions that the organisation makes about how its board meetings are structured and minuted. Organisations which are, for the present, unaffected should keep these considerations in mind, as 'regulatory creep' is not uncommon and some of these sectoral requirements may become more widespread in the future.

3 The purpose of meeting minutes

The purpose of minutes is to provide an accurate, impartial and balanced internal record of the business transacted at a meeting.

The degree of detail recorded will depend to a large extent on the needs of the organisation, the sector in which it operates and the requirements of any regulator, and on the working practices of the chairman, the board and the company secretary. As a minimum, however, we would expect minutes to include the key points of discussion, decisions made and, where appropriate, the reasons for them and agreed actions, including a record of any delegated authority to act on behalf of the company. The minutes should be clear, concise and free from any ambiguity as they will serve as a source of contemporaneous evidence in any judicial or regulatory proceedings.

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Minutes may also be used to demonstrate that the directors have fulfilled their statutory duties, in particular by evidencing appropriate challenge in order to hold the executive to account and by showing that issues of risk and both shareholder and stakeholder impact have been properly considered. To an increasing degree, we are seeing minutes being prepared for external as well as internal consumption and focus on this aspect of the role of the board. One respondent to our consultation commented:

> 'It is necessary to include matters which were considered to support the decision made. [We] need to demonstrate due skill and care, directors took advice where necessary and considered all relevant information at the time the decision was made – in order to protect the directors from claims they have not properly discharged their duties.'

Whether any specific reference to directors' duties is needed, or is appropriate, will depend on the nature of the business being conducted and the circumstances as a whole.

Our consultation revealed differences in the focus of minutes according to the type of organisation. For example, a charity or public sector organisation may focus more on ensuring that there is clear accountability visible through the minutes, in some cases having consideration of the fact that the minutes will be in the public domain. Alternatively, a regulated financial services company is more likely to focus on providing evidence of robust decision making, demonstrating that directors undertook their duties and responsibilities in accordance with both statutory and regulatory requirements and gave matters, particularly those relating to risk, appropriate consideration. In this sector in particular, we heard that:

> 'Minutes have become much more fulsome in content, documenting both the decisions and discussion that led to the [decisions]' and that they, 'are used to demonstrate good governance, a robust decision-making process as well as engagement and appropriate challenge.'

In short, the purpose of minutes – and consequently their style, content and structure – will vary, certainly across sectors but also between companies. These differences are not a bad thing, indeed we believe them to be very good; however, variations from common practice, particularly for the relevant type of organisation, should be made on the basis of an informed understanding of the associated risks. A key purpose of this guidance is to help with that thought process.

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4 Responsibility for minutes

The governing body of an organisation is responsible for its management and for ensuring that the organisation is run lawfully. It is ICSA's view that the company secretary is responsible to the chairman for the preparation and retention of minutes; the chairman and the other members of the board are responsible for confirming their accuracy.

As the professional body responsible for encouraging good governance, ICSA has always advocated that organisations appoint a properly qualified individual to take minutes of board meetings. Some organisations are too small to have a separate governance/company secretary role. This is acceptable, provided that the person fulfilling the minute-taking role has the necessary skills. Whilst, naturally, we believe that the ICSA qualification provides the best training for this, it is not essential and in some cases specific sectoral experience may be just as important. Many of the respondents to our consultation took the view that good minute writing is a very specific skill and that some individuals with another professional background might not necessarily have received the same robust training in the law and practice of meetings that someone with specific company secretarial training will have received.

Too often minuting a meeting is left (at short notice) to a junior member of staff without the appropriate experience or training.

Key skills of a good minute taker include being able to:

- listen to multiple voices at the same time and capture both their arguments and tone
- summarise an argument accurately and record decisions taken and action points on which to follow up
- identify which parts of the discussion are material and should be recorded
- have the confidence to ask for clarification where needed
- have the confidence to stand firm when someone asks them to deviate from what they believe to be an accurate record.

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It is not easy to take minutes whilst participating fully in a meeting. We believe that, wherever possible, the company secretary should be supported at the meeting by a suitably skilled minute taker if one with the necessary skills is available. This enables the company secretary to focus on the discussion and contribute as appropriate whilst also ensuring that minutes are appropriately recorded. Such arrangements should be discussed and agreed with the chairman.

4.1 Relationship with the chairman

A key factor affecting the ease of minuting a meeting is how well it is chaired. The quality of papers presented to the meeting is also important.

It is generally a good idea for the person minuting the meeting to discuss with the chairman before the meeting any relevant procedural issues and, perhaps most importantly, how they can best support the chairman. This is also an opportunity to give feedback to the chairman on how he or she can best help the minute taker. For example, many company secretaries find it helpful for the chairman to provide a brief summary of the outcome of discussions, and any decision made, at the end of each item of business, giving directors the opportunity to agree or suggest amendments to that summary. It is the responsibility of the minute taker to request clarification if there is any doubt as to the outcome of discussions or the conclusion reached.

For the avoidance of doubt, it is therefore always in order for the person taking the minutes to seek clarification of any point from the chairman or another director during the meeting and they should always do so if they are not clear what the final decision is. One formula might be:

> 'Excuse me, but just so that I am clear for the minutes…'

Finally, it was suggested to us that minutes, as a board responsibility, should be reviewed as part of the board evaluation process. We agree that this is helpful. Where this suggests that minutes are in need of improvement, new procedures could be adopted or further guidance or training could be provided for the relevant minute taker.

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5 Preparing minutes

We must caveat this section of our guidance with a reminder that it is for organisations to satisfy themselves that their minutes meet their needs and, therefore, they can choose to adopt some, all or none of our recommendations according to their own house style and the regulatory and constitutional requirements to which they are subject.

5.1 Preliminary information

There is some preliminary information that should be included in the rubric of almost all board minutes:

- the company name in full
- the date, time and venue where the meeting was held
- the mechanism by which it was held (i.e. in person, by telephone, etc.)
- the names of those directors and other attendees present, identifying the chairman and secretary, and whether anyone was not present for the whole meeting
- clear distinction between those directors attending in person, those attending remotely (and how they are doing so), those attending as an alternate and those who are not directors but are in attendance at the meeting
- apologies from directors unable to attend.

Other preliminary information suggested to us which may be worth considering includes:

- the company number (especially for subsidiary companies, where there can be a risk of confusion if there is a history of name changes)
- the role, job title and (if applicable) company name of those in attendance
- the location of any directors who are attending the meeting remotely (important for companies that need to demonstrate the whereabouts of management and control for tax reasons)
- the time zone of the meeting start time, if directors are dialling in from other time zones
- whether the meeting is ‘standard’ or ‘ad hoc’ and outside the normal timetable.

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There was also a specific suggestion that the minutes of those meetings that have to be held in two parts should state clearly which is private and which public. Some charities and/or public bodies find it necessary to distinguish between those who have given apologies for the meeting and those who have simply not turned up.

Finally, there was one suggestion which could be recorded in either the preliminary information or the chairman's introduction to the meeting, which is to note the constitutional provision(s) enabling remote attendance at the meeting (or the holding of a telephone or video meeting). This may be important for some organisations.

5.2 Opening of the meeting

The inclusion of what might be described as 'boilerplate' wording, for example regarding quorum and conflicts of interest, is a matter for individual organisations to decide for themselves subject to relevant regulatory or constitutional requirements.

In our consultation, there were a variety of strongly held views on this topic, but they were not consistent. One corporate respondent took us to task for referring to them as boilerplate at all:

> 'These items are not legal boilerplate and are important. The wording of the guidance should be revised.'

There are sound arguments that specifically drawing attention to these matters establishes the formality of the proceedings, has evidential value and serves as a useful reminder to all those present of the relevant requirements.

Much will depend on the individual requirements of the organisation, which may in turn depend on its sector, its legal and regulatory obligations and, perhaps most importantly, on whether it is felt to be a necessary reminder for the directors concerned.

Practice clearly varies between companies and charities or public bodies and, indeed, between companies in different sectors. As a general rule, our consultation suggested that the more formal points, often addressed in boilerplate wording are more often observed by charities or public bodies or in pro-forma wording for a transactional meeting, prepared by lawyers.

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5.2.1 Quorum

Some organisations feel it helpful for the chairman to open the meeting with a statement that the meeting is quorate. This attracted strong views in our consultation, with a minority of respondents believing that it is important, but the majority arguing that it is unnecessary as it can be evidenced by the attendance list. There was a slight bias towards charity or public body respondents preferring to record it. Of course, an inquorate meeting cannot proceed and would be either adjourned or continued on the basis of a discussion.

Our suggestion is that it only need be mentioned if there were a lot of absences or a high quorum requirement, such that there might be doubt. For example, if one or more directors have to absent themselves owing to a conflict of interest. Of course, if the chairman does mention quorum it should be minuted.

Whether or not an organisation feels that it is necessary to refer to quorum in the minutes, it is ICSA's view that it is the responsibility of the company secretary to be aware whether the meeting is quorate at all times, and advise the chairman should this not be the case.

5.2.2 Conflicts of interest

Some board minutes, especially transactional ones produced by external lawyers, include a statement that the members of the board have declared all conflicts of interest. Our consultation found that practice diverges sharply on this issue. It is a generalisation, but probably not an unfair one, to say that charities and public bodies tend to mention this issue at the start of the meeting, typically as a reminder to attendees. Companies, on the other hand, tend to record conflicts of interest only when one is specifically raised at a board meeting by a board member, in which case it is noted under the relevant agenda item, when the conflicts register is circulated or tabled, or where it is necessary to note a change to the register. This may be at least partly because many companies and some public bodies have a procedure for considering, approving and recording conflicts of interest which are kept in a register maintained by the company secretary.

It is up to each individual organisation to decide how to deal with conflicts of interest at board meetings and how these should be minuted.

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For companies, sections 177 and 182 of the Act require directors to disclose their interests and so, usually, do the company's articles of association. These requirements, and any other relevant regulatory requirements relating to conflicts should always be complied with.

Our view is that, unless the sectoral regulator requires otherwise, it is reasonable only to refer to conflicts of interest in the minutes where:

- the chairman or another board member raises the issue, which they might do if there is a perceived risk of a conflict arising
- a potential or actual conflict of interest is declared by one or more of those present
- a conflicts register is circulated, tabled or reviewed as part of the business of the meeting
- it is necessary to amend the conflicts register.

We do not believe that it is necessary for a statement about conflicts of interest to be made at the start of every meeting, although of course if one is, it should be minuted.

Two respondents to our consultation summed up the issue rather well. One said:

> 'It is important to evidence a robust understanding of the duties around conflicts rather than just that they exist', and that repetition of a paragraph at the start of every set of minutes might, 'look to regulators … that the board was being complacent over the issue'. Another: 'Boilerplate wording suggests the matters were not actually considered.'

That said, some public sector organisations take the view that it can be a useful aide-memoire for those that are not familiar with conflict of interest issues. These are a regular theme in Charities Commission inquiry reports and increasingly in academies, especially around conflicts of loyalties where a trustee is appointed or elected by a particular group or body.

See section 5.3.6 for minuting conflicts of interest.

Even where they are not required to do so, many organisations may find it helpful to have a register recording known, considered and approved conflicts of interest, maintained by the company secretary to which reference can be made if necessary.

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5.2.3 Other matters

Some organisations, particularly in the charity and public sectors, find it helpful to include:

- confirmation that the meeting has been duly convened, with appropriate notice given, noting any director claiming not to have received notice or adequate notice, particularly comments that papers have been received late so they have had inadequate time to prepare
- (for legal transactional board minutes) an outline of the purpose of the meeting, including the background to the transaction
- a reminder to directors of their statutory duties
- a reminder that the business of the meeting is confidential, if applicable
- the names of the proposer(s) and seconder(s) of any resolution decided by the board.

We consider that the need to include any of these matters is likely to be the exception rather than the norm, but there can be circumstances where it is appropriate to do so.

Where the meeting has to be held, for legal, regulatory or constitutional reasons in public, it may be helpful for the chairman, at the start of the meeting, to acknowledge members of the public and indicate how, if at all, they may engage with the meeting, (for example, that any public questions will be answered at a particular point of the meeting).

5.3 Style of writing

The company secretary will take notes at board meetings from which they will draft the minutes. Minutes need to be written in such a way that someone who was not present at the meeting can follow the decisions that were made. Minutes can also form part of an external audit and a regulatory review, and may also be used in legal proceedings. When writing minutes, it is important to remember that a formal, permanent record is being created, which will comprise part of the 'corporate memory'. Minutes should give an accurate, balanced, impartial and objective record of the meeting, but they should also be reasonably concise. The importance of accuracy should not be underestimated as the minutes of a meeting become the definitive record of what happened at that meeting and who attended. Courts will rely on them as being conclusive evidence unless proved otherwise.

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Exactly how minutes are written will be a matter of style and practice for the organisation. Our experience is that, often, they will be influenced by the preferred style of the chairman, but there are cases in which the company secretary will need to make a case for a different approach.

Historically, the convention has been that:

- minutes should be written in reported speech, i.e. past tense, and in the conditional mood for future actions (i.e. would and should, rather than will and shall)
- the board has collective responsibility for its decisions therefore the naming of individuals should be avoided wherever possible, although this is not the rule in some specific sectors
- minutes should be sequentially numbered for ease of reference.

5.3.1 Reported speech

Our research has shown that the use of reported, rather than direct, speech is still the overwhelming majority practice. It provides consistently clear, concise minutes which avoid ambiguity. Some organisations do find it an old-fashioned or overly formal style, but our recommendation is to retain it unless there is good reason not to do so.

5.3.2 Level of detail in minutes

This is one of the most contentious issues around the minuting of meetings. Most people would agree that minutes should be neither too long nor too short. They should be detailed enough to confirm that the directors were aware of and have complied with their obligations and duties. However, exactly what this means is open to debate.

The chairman of a meeting has a significant influence on both the conduct of meetings and, very often, on the style of the minutes produced. The chairman has a responsibility under common law to ensure that all entitled to speak at the meeting have the opportunity to have their say, and this must include responsibility to allow adequate time for discussion in order to tease out the issues and to ensure there is sufficient due diligence for transactions. This should be reflected in the minutes.

Once again, this will be a matter for individual organisations to decide, but ICSA's views on the relevant considerations are:

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Minutes should not be a verbatim record. They should summarise the key points of discussion and, especially, key challenges that have been raised, but focus on the decision or, in the case of a committee meeting, any recommendation to the board. A decision of the board should be clearly minuted and the usual wording is 'It was resolved that …' or, for a committee, 'It was agreed that …' It is our view that, whilst there may be some special circumstances where a verbatim record is desirable, this will be an extremely rare exception and, generally, is likely to be a barrier to full and candid discussion. There is also a significant risk that key points would get lost in the detail as the meeting might stray from the subject under discussion or go off at a tangent, perhaps to resolve a misunderstanding. A lot of what is actually said at a board meeting may be irrelevant to the recording of the decisions taken.

Minutes should document the reasons for the decision and include sufficient background information for future reference. This will also be useful for those not at the meeting (for example, a subsequently appointed director reviewing past minutes as part of his or her induction process) to understand why the board has taken the decision that it has. In simple terms, the purpose of minutes is to record what was done, not what was said, but with sufficient context to give assurance that it was done properly and that, where appropriate, the board discussed the key arguments for and against a decision, and any stakeholder impacts. If the board or committee requires action to be taken, the minutes should make clear who has responsibility for the action and the date by which it should be completed where a deadline has been agreed. Minutes should not be discursive and any detail given should be proportionate, striking a balance between detail and brevity that provides a reliable audit trail. The background information will usually be in the board papers.

If board papers are received for noting and no decision is required, then unless there is material discussion that needs to be recorded, minutes should indicate that the relevant report was 'received (or reviewed, if that is what happened) and its contents noted'. It is the practice of a number of organisations to circulate papers for noting in a separate part of the board pack, which we think is a sensible idea, subject to volume, but these papers should be retained with the rest of the board papers.
Some organisations have a policy that papers should not routinely come to the board for 'noting' as the board should be active, requiring decisions or actions.

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Minutes should include allocated actions. We recommend the inclusion of actions in minutes, especially for committees, as they provide evidence of directors discharging duties and effectively challenging management, ensure accountability and that agreed actions are not overlooked. Many respondents maintain a separate actions schedule for details, action owner, deadline, etc. along with status. An updated actions schedule is presented to each meeting as part of the board pack and often discussed under 'matters arising'. However, the company secretary should apply a materiality test before recording actions in the minutes. These should normally focus only on board level actions, not on suggestions to the individual making a presentation or to other management.

Board papers should be retained, but not necessarily retained with the minutes. There will be some circumstances where an organisation will wish to retain a copy of some or all of a board paper with the minutes. Usual practice is for papers to be retained separately – they are not the minutes and do not form part of the minutes – but practice does vary. Some organisations have specific papers initialled by the chairman and included with the minutes; others include copies of items approved by resolution, for example, a bank mandate, or where the board has specifically requested that this be done. In our view, this should not be the norm, however, as it is usually helpful to distinguish between inputs to and outputs from the meeting. All such documents would be included within the board pack. A couple of responses to our consultation provided some useful context on this point. One commented that:

> 'The minutes should stand alone – if the whole paper is attached then it could be construed that the board [is] also resolving to agree with all other statements in the paper', whilst another pointed out that: 'There is a danger that papers written by those who have had insufficient training will use imprecise language and/or too great an amount of detail which then becomes part of the record and/or could cause all sorts of issues.'

On balance it seems sensible to us that all papers be retained with, although not normally as part of, the minutes of the meeting, but this is a matter for individual organisations to decide.

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5.3.3 Naming names

In our research, it became clear that practice is changing in this area, particularly in the corporate sector. Traditionally, individuals were only named in exceptional circumstances but this now seems to be increasingly common in the financial services sector (especially banking) largely due to the SMR and the requirements of the regulator. This appears to be affecting practice in other sectors.

A number of respondents to our consultation and attendees at our roundtables reported that there can be circumstances in which they find it necessary to record individual names so as to demonstrate individual director participation and challenge, particularly where the performance of the director might be scrutinised by the regulator. One asserted that directors and officers need to demonstrate that:

> 'They did all they reasonably could to prevent liability for a breach under SMR and to show they have performed their duties conscientiously. [The] PRA and FCA are using minutes to assist in assessing the effectiveness of individual board members and if they are not mentioned by name this is difficult to achieve.'

In many cases this is at the instigation of the director themselves.

Equally it became clear that the charity and public sectors have very different practice - and always have had – whereby individual contributions are often attributed. In some cases this reflects a regulatory or constitutional requirement, but how and where the minutes are to be made available is also an important consideration.

One helpful observation from a consultation respondent was that:

> 'Naming individuals can and does affect what directors will say', with the potential to, 'inhibit directors from…asking an expert to explain their report in simple terms to check whether they truly understand it themselves.'

Once again this is a matter for individual organisations, but it seems to us that it will normally be appropriate to name individuals who:

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- present a paper or report to the board
- are charged with specific actions or to whom responsibility has been delegated by the board
- have declared a potential or actual conflict of interest or similar
- abstain from a vote or recuse themselves
- request that their name be noted as dissenting from a particular decision
- make a recommendation, provide information or answer a question based on their special expertise on the subject, for example the chief executive or finance director
- are the subject of personnel issues under discussion such as appointments, reappointments or resignations; or of discussions on board effectiveness.

It may, depending on the circumstances, also be appropriate to name individuals who:

- request that their name be noted in a particular minute
- object to or dissent from a decision
- ask a specific question
- make a particularly important or significant comment.

These issues are a matter of judgement and, in the case of doubt, it will be for the chairman to decide. It seems to be common practice, particularly where minuting actions, to refer to individuals, particularly executives, by their title rather than their name. If names are used, each organisation will have its own style, but the convention seems to be Mr/Mrs X rather than using initials or forenames.

There are risks associated with naming individuals, the principal of which is probably that the more this is done, the less the board can be held collectively responsible for its actions. Individuals who object particularly strongly to board decisions do always have the option of resignation. Identifying individuals should be considered in this light and, more often than not, it is the board as a whole that is demonstrating challenge rather than a specific individual.

That said, there is a clear 'direction of travel' here and those responsible for taking minutes must move with the times. It must, however, be remembered that the company secretary acts in the interests of the company, not those of individual directors, and the taking of minutes is no exception.

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5.3.4 Dissent

The overwhelming majority of board decisions are reached by consensus – although note that this does not necessarily mean unanimous agreement, as it may be that one or more directors may not initially agree but are prepared to moderate or compromise on their views, through discussion, in order to reach a conclusion with which all, or nearly all, can agree.

In other cases, particularly in companies or organisations whose constitutions require them to formally vote on proposals, it is likely that decisions will be taken by a simple majority.

Consensus is usually the outcome of constructive discussion, and an inability to reach a consensus may indicate that further consideration and debate is needed and should be encouraged. Some respondents to our consultation saw guiding the meeting towards consensus as a role of the chairman.

However, in exceptional circumstances, where the whole board cannot reach agreement, individual directors may request that their dissenting view be recorded in the minutes. It is normal to comply with such requests.

Even where the individual does not make such a request, the chairman may direct that their dissent is recorded. Where it is the policy of the organisation to use a fuller form of minutes, this may be at the discretion of the minute taker and the fact of their significant disagreement may be treated as sufficient. Other circumstances in which some organisations choose to record dissent include: for protection in relation to future legal challenge/liability; where the dissentient's judgement might be questioned; where it is a matter of conscience; or where the dissent might support reasons for resignation in the future.

The question of how dissent is recorded will be a matter of organisational preference, but whilst we understand the usual practice is to record names, some organisations have indicated that they do not and some that they use job titles for executive directors. Similarly, some have said that they include a note of the specific reason for dissent and others that they do not.

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One suggestion for specimen wording might be:

> 'There was a robust discussion about x, with considerable challenge around a, b, c and d. The board agreed to y, with Mr Z requesting that his dissent be recorded.'

Mr Z's reasons should be covered, among others, under a, b, c and d.

As described in section 6, there should, in ICSA's view, always be an opportunity at the succeeding meeting for directors to correct errors in the draft minutes before they are approved and to ensure that any dissent that they expressed at the preceding meeting is properly recorded. They should not take this as an opportunity to raise dissent for the first time but, if they do, this should be addressed as a new matter arising from the previous meeting and not as an amendment to its minutes. The rewriting of history should not be permitted.

5.3.5 Writing minutes for regulatory oversight

Minutes should reflect the business and sector of the organisation. Larger, more complex companies and those in regulated industries have additional issues to consider and tend to have longer meetings, so the minutes should reflect this. Minutes of board meetings in some sectors such as financial services have become more detailed and prescriptive in recent years due to increased regulatory oversight and the need to demonstrate appropriate participation and challenge by individual directors.

Whilst we agree that minutes should facilitate regulatory oversight, it is our view that they should not be drafted with this primarily in mind; it should be a consideration, where relevant, but not the primary purpose. Minutes are not the only tool for regulatory oversight, but they are part of the regulatory jigsaw and whilst this should not be to the detriment of their primary purpose, those drafting minutes should be mindful of regulatory needs.

Regulators have a variety of powers, which may include the right to request a copy of board minutes and/or to attend the board meeting, but board minutes always give a good clue to the tone of the organisation and there is a good chance that the regulator will exercise any right to read them anyway, even if they are also entitled to attend the board meeting. It is important that those writing minutes for regulated organisations strike an appropriate balance between treating them as forming part of the regulatory

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review, providing evidence of leadership, strong challenge and debate, and allowing them to focus too much on compliance aspects which could result in a tick box approach.

The well-written minutes of an effective board meeting should convey much of the assurance that a regulator needs. We would expect regulators to be highly suspicious of minutes that are obviously written to satisfy them.

As one consultation respondent noted:

> 'To the extent the directors operate in a regulated sector, there will be an obligation on them to comply with and operate within that framework. Doing so will inevitably be reflected in the minutes …[but] there is perhaps a chilling effect here: if the minutes are to be used to satisfy regulators then there is anticipation of those minutes being shared and this may stifle discussion at board level, reducing debate to platitudes. For that reason we would not recommend minutes be offered as a first port of call to demonstrate compliance.'

It is also the case that evidence for regulators is not always easy to provide, even if the minutes are detailed. For example, in 2011, the FCA's guidance *Governance in retail firms – feedback from Winter 2010 seminars* reported that:

> 'There was extensive discussion about the difficulties firms face in showing the FSA how they provide effective challenge of decisions at Board level. Participants noted that challenge often occurs outside formal Board discussions. They said Board minutes were only one indicator of challenge, but the FSA focused too much on minutes. The Panel acknowledged the concern and said that we do not require word for word minutes, but suggested that a firm (as well as the regulator) needed minutes that show why a decision has been made. The Panel noted that supervisors seek evidence of robust decision-making and they agreed that supervisors should look at a range of elements to build up a picture, including sub-board committee meetings, informal discussions between executives and non-executives, the quality of Board papers and other information, and its processes and controls.'

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5.3.6 Minuting conflicts of interest

See section 5.2.2 for guidance where conflicts of interest are recorded at the start of the meeting.

Some transactions involving the company and a director might give rise to a conflict between the interests of the company and the personal or other interests or duties of the director. An example is where the company is agreeing a director's service contract. The director has a duty to the company to get the best contractual terms for the company but this conflicts with his or her personal interest in obtaining favourable terms.

Conflict of interest rules apply to protect the organisation but, generally, the director should declare any interest before the matter is discussed. Depending on the circumstances, and taking into account the relevant provisions in the organisation's constitution and applicable regulatory requirements, a director may be required, or may choose, to recuse themselves from discussion and decisions on these matters.

There can also be circumstances in which an individual director may need to ensure they do not participate in discussion of a sensitive matter that conflicts with other obligations due to their nationality or country of residence. In such circumstances they may be committing a criminal or regulatory offence in their home country if they participate in the discussion. In any conflicts of interest situation it is important that the minutes note, if applicable, that the director in question was not present for, or did not contribute to, the relevant discussion.

Organisations will need to address any conflicts of interest, bearing in mind any specific legal, regulatory or constitutional requirements that apply in their case, as well as their own preferred practice.

Once again this is a matter for individual organisations, but it seems to us that the following arrangements will, more often than not, be appropriate:

- the director should be identified in the minutes
- the nature of the conflict, the decision as to whether or not the director should attend the section of the meeting in which he/she is conflicted and any other action taken by the board to address the conflict should be recorded in the minutes

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- whether or not the director concerned leaves the room, the minutes should make it clear that he/she took no part in that section of the meeting and, where applicable, could confirm that the meeting remained quorate.

Having conflicts of interest on the board agenda can help to ensure that this issue is kept front of mind, but can be seen as unnecessary bureaucracy. Some organisations take a formal resolution to approve such conflicts at the start of the meeting.

The question of whether a director who is not permitted to participate in a decision because of a conflict should remain at the meeting, but take no part in the discussion of the conflicted issue, or leave the room, is (unless there are specific requirements in the constitution or applicable regulation) one for a decision by the chairman, supported by the company secretary, or the board as a whole, and will depend on the individual circumstances or the policy of the organisation.

One route is for the board to form a committee of its unconflicted members, which can hold minuted meetings in the normal way, with those meetings then being reported back to the main board.

See section 6.4 for the treatment of conflicts of interest in draft and approved minutes.

5.3.7 Minutes of subsidiary board or transactional meetings

Our experience is that minutes of many small, non-trading subsidiary companies are relatively minimal and formal, as are minutes prepared by lawyers in relation to, for example, corporate transactions. This is because there may be less need for discussion at such meetings where, in many cases, the wider decision will already have been made and recorded in the minutes of a previous board meeting, so that the directors are simply formalising the necessary steps and ensuring that they have fulfilled their obligations and duties to the company.

Any discussion that does take place must be recorded appropriately and, in the case of a subsidiary board, the directors should be careful as to the interests of which company

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they are promoting. Where a subsidiary company is a material or trading subsidiary, it is likely that its minutes will be at least as full as those of the parent – there is no 'governance-lite' for subsidiary companies. This is particularly important for global regulated organisations, where regulatory requirements and accounting rules differ by country and it is the responsibility of the subsidiary board members to ensure that 'their' company meets local legal and regulatory requirements. It is critical that the minutes of the subsidiary board reflect, where appropriate, actions taken by the parent and the corresponding actions taken by the subsidiary board in the interests of the subsidiary company.

Transactional meetings will often be based around pro-forma minutes provided by lawyers or by the company secretary in advance of the meeting. Whilst pro-forma draft minutes provide a good basis for dealing with legal formalities, often at the end of a process, they remain, in a legal sense, board minutes of the company and should be consistent with the style and tone used in other minutes. They should, therefore, follow the essential principle of recording the rationale for decisions being taken. Often, the detail underlying these decisions has been discussed at previous meetings and will be fully covered in the minutes of those meetings.

In these cases and in cases where an administrative arrangement is being made, for example opening a new banking relationship or signing authority, the text of the resolution may be mandated by legal agreement or by a third party.

Phrasing such as:

> 'In order to execute the decision to x made at the board meeting on y, it was necessary to z' - can be very useful.

The important point is that the board meeting should be held and not fabricated.

Any pro-forma minutes should be supplemented as necessary to include any substantial discussions that do take place as it is the directors' responsibility, supported by the company secretary, to ensure that they fully understand what they are being asked to do.

It is therefore important that pro-forma minutes, especially where drafted from precedents, are reviewed by the company secretary to ensure that they are fit for purpose, reflect what actually happened at the meeting and do not include unnecessary 'boilerplate' or overly complicated drafting.

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It is sometimes necessary, for administrative reasons, for a single meeting to be arranged where a group of people are, in various combinations, directors of several subsidiary companies, all of which need to discuss the same issue – for example to approve some action of the parent. Different organisations will deal with this situation in a range of ways, but one way in which this could be managed is for all to take part in any discussion and then the chairman or company secretary to ask each individual board to confirm its consent to the proposed resolution(s). The minutes can then be prepared for each company's meeting, with different attendees and individuals 'in attendance' and any company specific issues dealt with only in that company's board minutes. This creates some administrative complexity for the company secretary, and there is a need to ensure that any conflicts of interest are borne in mind, but is an efficient use of time for those attending.

Some organisations, especially those with a large number of subsidiary boards/ committees, find it helpful to ensure a consistent approach across all boards and committees by using a minute-taking policy or style guide to set the house style and conventions. This can be approved by the board and would cover most of the issues discussed in this guidance. One of the major challenges reported to us by less experienced minute takers was the variation in preferred styles between senior colleagues in the same team.

5.3.8 Other content issues

- **US issues.** A concern has been expressed by a number of companies with US listings, whose minutes are consequently examined by their US lawyers, that there is a risk of minutes being included in a discovery process and so excessive detail could leave the organisation vulnerable to legal challenge in the future. US practice is for minutes to be very brief for this reason.

  This is an issue that will apply only to a minority of UK organisations and specific issues relating to US practice are outside the scope of this guidance. It is, however, one of those areas requiring the minute taker to have the necessary skill to understand what should be included and what should be omitted. They should be

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aware of the risks of the legal discovery process and ensure that the minutes are drafted accordingly. Our view is that providing a little more detail around why a decision was made can demonstrate, if necessary, that, although a decision might turn out to have been the wrong one, it was made in good faith and after a proper examination of the issue.

Similarly, and perhaps applicable to more companies, US directors must not discuss business relating to countries subject to US sanctions and have particular needs around conflicts of interest. Some companies have therefore introduced a 'Recusal Policy' and at least one sends minutes direct to that director's lawyer, marked 'Attorney/Client Privileged'.

- **Legal professional privilege.** Concern has also been expressed about the recording of privileged legal advice and how this may be done to ensure that it remains privileged. Considerable skill is required in drafting these minutes, and some organisations have taken the prudent route that privileged advice itself should not generally be recorded in the minutes, although it might be recorded that advice was received.

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Colin Passmore, Senior Partner of Simmons and Simmons LLP has kindly provided the following information, for which we are grateful:

Simmons & Simmons

1. Under English law, a client is entitled to discuss and to use its privileged advice without losing the privilege.

2. This means the discussion can be minuted and in so far as the discussion reveals what the advice is, the minutes will be privileged.

3. Good practice suggests that the minutes of that discussion should be clearly separated from the rest of the minutes – perhaps in an annex marked: "Privileged and Confidential", so that in times to come a reviewer of the minutes will be quickly alerted (one hopes) to the protected status of the annex.

4. There is one qualification to the above: the actual business decision (if any) taken as a consequence of the deliberations around the privileged advice will not be privileged. For example: "The Board decided in consequence of its discussions with its legal advisers that it would sanction litigation against X or authorise the purchase of Company Y" is not privileged.

Colin Passmore
Senior Partner
Simmons & Simmons LLP

In the event of any doubt as to how the privileged advice should be treated, an organisation should seek professional advice.

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- **Offshore companies.** Some offshore companies need to clearly evidence that management and control (the decision-making process) happens in an appropriate place, to avoid adverse implications for their tax status. It is important that the minutes are clear on this point.

- **'Not for the minutes'.** Those who attend meetings regularly are likely to have heard someone make a comment preceded or followed by the expression 'not for the minutes'. A purist view is that if matters are not for the minutes, then they should not be discussed at the meeting, but in the real world this phrase is only too familiar and that reality should be accepted.

- **'Nil return' points.** Some organisations will make a point of recording negatives, for example that the contents of a paper were noted 'and there were no material issues for the board to consider', which they believe will satisfy a regulatory obligation. Our view is that, unless the paper is being approved, or there is a clear statutory or regulatory requirement to do so, this should be avoided. It is reasonable to assume that if there was a material issue for the board to consider, the board would have done so, in which case it would have been minuted.

- **Tips for practitioners.** Responses to our consultation highlighted a number of issues, and many experienced company secretaries drew upon their experience to suggest matters for inclusion in this guidance. Many of these have been covered elsewhere, but there were a few suggestions of ideas that people have found work well for them, which we considered it worth including (in no particular order):
  - it can be helpful to record any breaks or interruptions to the meeting and the time when the meeting closes
  - it can be helpful for the minutes to state whether or not there was a paper for each agenda item. If so, identify that document and whether it was circulated in advance or tabled at the meeting
  - it may be helpful for the chairman to draw attention to any pre-meeting comments received from board members, especially those unable to attend. If possible, these should have been circulated to all attendees in advance of the meeting
  - the use of acronyms and jargon (unless clearly defined) should be avoided
  - bold capitalisation of key words such as APPROVED, DECIDED, RESOLVED, NOTED, ACCEPTED, AGREED, etc. can be helpful in quickly reviewing minutes

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- each item should show whether the directors agreed/resolved/noted/received the item
- use of the formula 'key points discussed by the directors included' followed by a bulleted list makes it clear that they discussed the topic and key issues without necessarily going into them all in detail (or all of the issues covered).

6 Draft minutes

Once the minutes have been drafted, they should be circulated to attendees. This should be done as promptly as possible after the meeting. Some organisations have a timetable in which this must happen, examples quoted to us ranged from two days to a week.

Most organisations have a process whereby the draft minutes are agreed with the chairman before circulation to others.

We recommend that, until they have been formally approved by the board, draft minutes should be clearly marked 'draft'.

6.1 Editing draft minutes

This is an area where practice varies widely. The process for editing draft minutes cannot be prescribed in detail as it will, rightly, vary between companies. As previously noted, many organisations have an agreed process in place which may define how this happens. We think that it is helpful for the process to be agreed and recorded. This will help the company secretary in those circumstances where they are put under pressure to produce minutes that they do not believe to be accurate. As one respondent to our consultation commented:

> 'Circumstances in which a chair or director has had the influence to prevail upon a secretary to amend minutes have been documented in various places. We can envisage circumstances in which a secretary's role, with the wrong chairman in place, could become very uncomfortable. In order to mitigate against this, we would recommend agreeing a process by which minutes are taken, reviewed and circulated. This process should be documented and agreed between all of the directors, and any exceptions to the process will need to be justified to the board.'

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In our opinion, it should be for the company secretary, in discussion with the chairman, to decide to whom the draft minutes should be submitted for technical review and whether their suggestions should be adopted.

The company secretary may pass sections of the minutes recording a technical presentation or other technical matter to the relevant executive(s) for comment before submitting the draft to the chairman for review.

If minutes are well written there may be little need for editing by the directors, but that is not to say that such editing is a bad thing, or that it should be discouraged. It is, of course, absolutely right that the board and others in attendance provide input to the editing process once the company secretary has provided a draft and rewording may help with clarity. The central issue is to ensure that the organisation's permanent record of the meeting is as correct, and as useful, as it may be.

One response to our consultation was particularly detailed, and we feel it worth quoting at length:

> 'The inference that the need for editing implies that the minutes were not well drafted is not one that we share. There is a world of difference between poorly drafted minutes where the secretary has not understood what has gone on at the meeting and the careful editing of a well drafted set of minutes by board members. This goes to the very heart of the responsibility for accuracy of the minutes, which clearly rests with the board/committee in question and is a matter of judgement that will often give rise to debate and differences of opinion.
>
> Minute writing is an art. Whilst for routine meetings, minimal changes to the minutes should be the norm, it is not realistic to expect minutes always to be 'right first time', particularly when dealing with highly sensitive or complex business matters in the course of a lengthy board meeting. Opinion will often vary on how certain points should be expressed; this may simply be a matter of emphasis or nuance, but getting this right is important particularly if the minutes will be shared with a regulator or third party. Editing by board members who are ultimately responsible for the accuracy should not be regarded as a failing on the part of the person drafting the minutes, but a sign that responsibilities are understood and taken seriously.

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> With the primary aim being to ensure completeness and accuracy, a review of technical content by specialist functions or executives is a good discipline and should not be discouraged. It goes without saying that any conflict with the company secretary's notes would need to be explored. In the event of conflicting views on the draft minutes, the chairman should be the final arbiter.'

We agree with this view. The final point is particularly important: the company secretary's contemporaneous notes should be treated as a prime source, but it is always possible that they are not entirely correct, especially around a technical operational matter. That said, it is also important to guard against attempts to 'rewrite history'. As one respondent to our consultation commented:

> 'Sometimes directors try to include (or remove) content to make themselves look better or to add detail to a point they made. The company secretary needs to have sufficient authority to resist these changes and for that needs the support of the chairman.'

6.2 Post-meeting developments and amendments

Practice varies for dealing with amendments to the minutes as a result of information coming to light between the board meeting and the circulation of the minutes.

It is not normally appropriate to alter the original minute – that is a matter of record of what was said or agreed at the meeting. Some organisations will incorporate some sort of clearly identified 'post-meeting note', flagged by parentheses or italics or both; others prefer to deal with the issue in the discussion of the minutes at the next meeting, when an amendment can be made, the company secretary's note incorporated or the issue picked up under 'matters arising' as appropriate. Any of these options seems a reasonable approach and it will be a matter of organisational choice, which may vary according to circumstances.

Our consultation responses revealed a degree of caution about the addition of post-meeting notes – either stating they thought it should not be done at all, or only in very exceptional circumstances. They were right to do so, as the minutes are a contemporaneous record of the events of the meeting and should not be re-engineered to reflect post-meeting events. However, equally, the key issue with minutes is that they

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are an accurate record and the correction of an erroneous piece of information quoted at the meeting may be appropriate.

This will always be a matter of choice for any organisation, but one possible solution might be as follows:

- Up to the point of approval, minor typographical errors may be corrected by the company secretary, and minor corrections made at approval stage. More significant corrections could be made in 'matters arising' at the meeting at which the minutes come for approval, particularly if the nature of the error was such as to cause the board to alter its decision, rather than amending the original minutes. In such a case, the logic is that the unamended minutes are a true record of the meeting, but a matter (discovery of the error) has since arisen.
- After approval, minor typographical errors may be corrected by the company secretary, but any other corrections must be made in 'matters arising' at the succeeding meeting.

Wherever a correction is made in 'matters arising' the suggestion of one of our respondents that a manuscript cross-reference be made on the signed copy of the minutes to the subsequent correction, is a very sensible one.

6.3 Approval of draft minutes

It is the practice of virtually all organisations for the minutes of a meeting to be approved or otherwise at the succeeding meeting. This is not a legal requirement, however, and an organisation may choose to approve minutes in some other way. For example, where meetings are infrequent, it may be appropriate for the finalisation of minutes to be expedited through the use of email or other technology. However, even where this is the case, it would seem reasonable for the approval of the minutes to be ratified at the succeeding board meeting.

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6.4 Treatment of conflicts of interest in draft and approved minutes

In section 5.3.6 we discussed the issue of recording conflicts of interest at the meeting. There is a separate question of whether the conflicted director can review or access the minutes.

Some would argue that the conflicted individual is a director of the company and should therefore have access to all the board minutes; others would argue that the individual should not have access to the section of the minutes for which he or she was conflicted and that they should be redacted accordingly. The practicalities of this can be complicated.

Practice varies widely between organisations. The responses to our consultation demonstrated this very clearly. We received 38 responses which said that the minutes should not be redacted, 22 which said that they should, 15 which said that 'it depends' and 14 which didn't answer the question. Those saying that minutes should not be redacted generally took the view that the director has responsibilities as a member of the board and so it is inappropriate that he or she be restricted from access to the full minutes. Some respondents who took this view noted that the minutes would be drafted to address any sensitivities and the very pragmatic point was made that multiple sets of minutes, redacted to reflect the conflicts of various directors would create an excessive administrative burden. Those who felt that minutes should be redacted generally focused on situations of commercial conflict or of the discussion of service contracts. There were some respondents that produce a separate set of 'private' minutes. Another took the view that the director is entitled to know the decision, but not any detail of the discussion. There was a strong bias towards redaction from larger companies, particularly those in the financial services sector.

Timing may also be a consideration. For example, if a transaction has been announced, there may be no reason why the previously conflicted director cannot see the full minutes.

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One legal expert who responded to our consultation commented that:

> 'Although the situation would depend on the specific facts we believe it likely that if a director had a genuine conflict of interest they would have no legal entitlement to receive that part of the minutes notwithstanding their general entitlement to board minutes. If nothing else they would have difficulty demonstrating that they were acting for proper purposes.'

Whether access should be permitted will depend on the circumstances, including the nature of the conflict, any terms of the approval of that conflict, the organisation's constitution and any relevant regulation. The board will need to take a view on a case-by-case basis.

6.5 Audio recording board meetings

Our experience is that the practice of audio (with or without visual) recording of board meetings remains uncommon. There were 78 responses to our consultation question, of which only eight favoured the recording of board meetings. There were 51 against the idea and 19 were neutral or felt that it should only be done in specific circumstances.

Although the majority of respondents oppose recording board meetings, there are supporters and critics of the approach across all sectors. Several of the same negatives and positives were highlighted by respondents from across the spectrum with the most common being that it was felt that it might stifle debate. This was raised by a third of those against the idea, especially as it would be necessary to seek consent from those recorded. One respondent was particularly concerned that it might:

> 'Stifle discussion or drive discussion outside of the meeting. In a regulated environment, the Regulator will ask for recordings as soon as they know they are made'. This is because it 'creates an alternative form of record of the meeting, which risks inconsistency with the primary written minute.'

Other concerns included that the recording might fall into the wrong hands and that any recording could be disclosable in future litigation.

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On the positive side, there were those who felt that recording would improve the accuracy of minutes as misheard or misunderstood points could be clarified easily and one respondent felt that it would help with poor boardroom acoustics. Exactly the same points were argued from the opposite side – that comments from quietly-spoken individuals or those furthest from the microphone and nuances of tone or body language might be missed.

We believe that the secretary has a responsibility to understand the subject matter of the meeting sufficiently to take meaningful minutes.

In some sectors, recording is already standard. As one of our respondents commented:

> 'Until recently it was seen as poor practice to take audio recordings of council meetings, and to retain them, because they represented an alternative record of proceedings where the minutes should be final. The advent of audio and video webcasting, and the right of the public to record meetings using their own equipment, has rendered this point moot.'

7 Access to minutes

7.1 Access for auditors, regulators and other authorised third parties

Minutes of board meetings are internal records of the organisation and, as such, many organisations, particularly in the corporate sector, treat them as confidential.

However, there is sometimes a need to give third parties access to board minutes. One suggestion was that any section of the minutes, which should not be released can be marked so that when they are prepared for external review redaction is simple.

In some regulated sectors, the regulator will request copies of board minutes.

It is normal practice to give the auditor access to board minutes where requested (and directors have a duty under the Act to provide auditors with all relevant information

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for their audit). It is also usual to give access to a regulator, if requested, although this is more likely to be assessed on a case-by-case basis, dependent on the regulator and their authority and the nature of the request. In some organisations, access will only be permitted subject to explicit board approval.

In practice, there are a variety of ways in which third party access can be granted:

- providing full, unrestricted access
- restricting access to particular people – e.g. senior audit partner only
- emphasising confidentiality
- view-only access (either by requiring inspection in person and note-taking only, or by protecting electronic documents)
- providing access only to board minutes that have been altered or redacted, typically by removing:
  - items about the appointment and performance of other professional advisers
  - commercially sensitive or confidential items that are outside the scope of the audit.

On a practical level, a number of different approaches are taken to granting access to the minutes:

- electronically – i.e. by email, password protected PDF, etc.
- on-site (unspecified whether this is soft or hard copy review)
- access to the hard copy minute book
- link to a password protected portal – e.g. Blueprint or similar.

There are other bodies to which an organisation might choose to give access to board minutes. This is less common, and a matter of individual discretion which the organisation should decide on a case by case basis, but examples of which we have heard include:

- internal functions – e.g. risk/compliance
- external lawyers
- funders/lenders
- other external/professional advisors
- acquirers in M&A context
- parent company/key shareholders
- directors

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- as requested under Freedom of Information Act – redacted if necessary
- in response to specific requests from staff – extracts only
- board evaluator
- standards verification teams – e.g. ISO
- HMRC
- Competition and Markets Authority
- Parliamentary Select Committee.

7.2 Publishing minutes

Some organisations such as public bodies and regulators choose – or are obliged – to provide complete transparency over their board meetings by publishing board papers and minutes on their websites. However, it has been suggested that this level of transparency might result in the board meetings ceasing to be the decision-making body for the organisation, with confidential or 'water cooler' meetings held separately from board meetings to discuss matters and agree a position, before the matter is 'discussed' by the board and made public.

In a similar vein, a number of organisations, particularly in the public sector have an obligation to respond to Freedom of Information requests, which may require the publication of minutes.

This is an area in which we found a sharp divergence between the corporate responses and those of some public sector entities, with the former firmly against publication and the latter largely in favour. To some extent, the public sector view may be swayed by the fact that a number of organisations are required to publish minutes by their constitutions or other relevant regulations, but in the corporate sector board meetings and their minutes are seen as a private matter.

Arguments in favour of publication tended to emphasise transparency and openness, and at least one respondent saw this as a more modern approach. However, there was a very strong opposing view that, in addition to the issues of commercial sensitivity and confidentiality associated with publishing minutes, publication would actually undermine transparency by impeding open discussion in board meetings and by adversely affecting

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the quality of the minutes. It would create a risk that significant decisions would be taken outside the board meeting and that minutes would be written with publication in mind. As one respondent commented:

> 'My experience of reading minutes published by public bodies and regulators suggests that they are very circumspectly written, but not so much so as to be of no value at all.'

Another noted that:

> 'Minutes should be kept confidential to avoid "theatre" mentality. If members know the minutes will be published, they are much less likely to speak openly and honestly in the meeting.'

And a third that:

> 'Our minutes will often contain commercially confidential information. If we had to publish minutes we would be likely to need to omit this from the minutes, thereby making the minutes less useful for the board and the organisation.'

Some organisations have expressed concern about breaching data protection requirements and others that particular directors in sensitive industries may be victimised by activists for their views or actions.

Where there are legislative or regulatory requirements for board minutes to be published, that must, of course, be done. However, where there are no such requirements, it seems to us that the disadvantages are likely to outweigh the advantages, although individual organisations are free to make their own decision based on their own circumstances.

7.3 Freedom of Information Act (FOIA) requests

There are important differences, too, between the level of risk associated with the publication of minutes and response to requests under the FOIA. This is because requests under FOIA are generally more limited in impact – either because the information requested is more specific and exemptions apply to what must be provided, or because it

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is being provided to a limited audience rather than being published on a website available worldwide.

As one respondent commented:

> 'The Freedom of Information Act contains a number of exemptions, including for information of a commercially sensitive nature and this allows for redactions to minutes to take place before they are released. The information is provided to a specified individual in response to a particular request with the company controlling in what form it is sent (e.g. complete or redacted), this is very different to, say, publishing minutes on a website and having no idea by whom or how often or when information is accessed.'

This is another issue where organisations will need to come to their own decision, and we do not feel it appropriate to give guidance. The Information Commissioner already provides detailed guidance for those organisations which are obliged to publish minutes and those seeking to do so voluntarily should, in our view, seek specific legal advice.

7.4 Unminuted or 'informal' board meetings

One of the most commonly raised concerns about giving the public access to board meetings or minutes has been that this may have a tendency to drive discussion 'underground' with more board level decisions being made outside board meetings and the board simply rubber-stamping these decisions.

The point was made to us very strongly during our research that there is a clear difference between meetings that are board meetings in every respect other than the title and lack of proper process, and informal pre-meetings between board members and/or committee chairmen to discuss agendas and prepare for upcoming board meetings. There is nothing at all wrong with these latter meetings. They are often very helpful, indeed we believe that a pre-meeting between the chairman and the company secretary is an important part of the arrangements for the smooth-running of board meetings. Our concern is more about informal meetings where decisions which are the proper purview of board meetings are actually made, following which the full board discussion might be curtailed or stage-managed.

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It is a legal requirement that minutes are taken of board meetings and we believe that this should be treated as extending to any meeting at which significant decisions are taken. Some organisations go further. As one person commented in response to our consultation:

> 'The chairman should be encouraging a climate where directors all trust each other to arrive at the optimal decision for the organisation in a properly convened, quorate board meeting, without subsets of them having previously discussed the matters concerned to an advanced stage.'

8 Retention of minutes

The Act requires that corporate board minutes be retained for at least ten years. Our experience is that in many cases they are retained for much longer – and our recommendation has always been that they be retained for the life of the organisation. This may be required in any event, in particular for minutes prepared before the Act came into force as there was no time limit under the Companies Act 1985. The organisation's constitution may also include a provision about the retention of documents. The minutes should obviously be stored securely, and a PDF copy of the signed hard copy of the minutes can be used to act as a back-up (for each other).

However, practice around the retention of the company secretary's own notes of the meeting is much less clear cut.

8.1 Retention of company secretary's notes of meetings

It is usual practice for company secretaries to keep their written notes of board meetings until the final version of the minutes are formally approved at a subsequent board meeting.

Some company secretaries keep their written notes indefinitely but it should be clearly understood that any such notes could be 'discoverable' or disclosable in the context of any future litigation.

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Roughly two-thirds of the company secretaries who took part in our research destroy their notes once the minutes have been approved, usually at the succeeding meeting, on the basis that the approved minutes form the legal record of the meeting and, as one respondent to our consultation expressed it, 'only one version of the truth is required'.

Some destroy them as soon as they have been written up, but where notes are retained for longer, some have specific time-frames for retention. Our consultation responses revealed these ranging from three months after approval to twenty years or permanently. Others depend on the occurrence of particular events, for example until the completion of the next audit. Note also that some companies have policies around document destruction and it may be necessary to get these specifically amended to permit destruction of such notes.

A number of justifications were put forward for retaining notes after the approval of the minutes, typically around referring back to details. One consultation respondent noted that:

> 'It's not unknown for directors who were present at the meeting to want to look back on what was actually said as opposed to minuted.'

Discussion of the risks associated with discovery also begged the question of what to do with draft minutes or directors' notes. One consultation respondent commented:

> 'As a result of the SMR and the SIMR, some [Senior Managers] may want to keep their own notes from board and committee meetings as evidence that they have taken reasonable steps against their prescribed responsibilities. This practice will need to be carefully managed as it could potentially lead to issues if there were any conflicts between the formal minutes and the personal notes of those senior managers.'

It is for each company to set its own process in this regard, but the important thing in our view is that this be done with a recognition of the issues. One respondent told us that:

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> 'I have never given very much thought to this area... I may well review my practice as a result of this question.'

On balance we recommend that the notes should be retained until the minutes are approved, but then promptly destroyed. The risks associated with disclosure or discovery requirements outweigh the benefits.

One final observation was that it is important to consider what the secretary includes in their notes – especially if they are to be retained after the minutes have been approved – as they will be disclosable.

8.2 Retention of recordings

As we noted in section 6.5, some company secretaries have adopted the practice of audio recording board meetings.

We would suggest that the retention period for these recordings will be a function of the purpose of the recording. Where it is an aide-memoire for the company secretary then it would seem sensible for it to be destroyed once the minutes have been approved. If the primary purpose of recording is transparency, for example where audio-visual recording or live streaming is used, typically in the public sector, they may be retained for a longer period or permanently.

9 Summary of key points

- The purpose of minutes is to provide an accurate, impartial and balanced internal record of the business transacted at a meeting.

- Good minuting is a deceptively difficult and time consuming task which is often under-valued, notably by directors and senior executives who are not board members. It is far more than an administrative formality.

- It can take at least as long, often twice or three times as long, to draft minutes as the meeting itself took.

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- There is no one-size fits all approach for minute writing and no 'right way' to draft minutes. Context is always important and each chairman and each board will have their own preference for minuting style. It is up to each individual organisation to decide how best its meetings should be recorded.

- The degree of detail recorded will depend to a large extent on the needs of the organisation, the sector in which it operates, the requirements of any regulator and the working practices of the chairman, the board and the company secretary. As a minimum, however, we would expect minutes to include the key points of discussion and key challenges that have been raised, decisions made and, where appropriate, the reasons for them and agreed actions, including a record of any delegated authority to act on behalf of the company. The minutes should be clear, concise and free from any ambiguity as they will serve as a source of contemporaneous evidence in any judicial or regulatory proceedings.

- Minutes may also be used to demonstrate that the directors have fulfilled their statutory duties, in particular by evidencing appropriate challenge in order to hold the executive to account and by showing that issues of risk and both shareholder and stakeholder impact have been properly considered. Minutes should facilitate regulatory oversight, but this is not their primary purpose. Nonetheless, those drafting minutes should be mindful of regulatory needs. The well-written minutes of an effective board meeting should convey all the assurance that a regulator needs.

- The company secretary is responsible to the chairman for the preparation and retention of minutes; the chairman and the other members of the board are responsible for confirming their accuracy.

- Organisations should always employ a properly qualified individual to take minutes of board meetings; who has the necessary skills. Too often minuting a meeting is left (at short notice) to a junior member of staff without the appropriate experience or training. Key skills of a good minute taker include being able to:
  – listen to multiple voices at the same time and capture both their arguments and tone
  – summarise an argument accurately and record decisions taken and action points on which to follow up
  – identify which parts of the discussion are material and should be recorded
  – have the confidence to ask for clarification of any point from the chairman or

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another director during the meeting (and they should always do so if they are not clear what the final decision is)
  - have the confidence to stand firm when someone asks them to deviate from what they believe to be an accurate record.

- Wherever possible, the company secretary should be supported at the meeting by a suitably skilled minute taker.

- It is generally a good idea for the company secretary to discuss with the chairman before the meeting any relevant procedural issues and, perhaps most importantly, how they can best support the chairman.

- It may be helpful to develop a minute-taking policy or style guide to set the house style and conventions. This could be approved by the board.

- Minutes are normally written in 'reported speech' style in the past tense; they should not be a verbatim record of the meeting.

- Minutes should document the reasons for the decision and include sufficient background information for future reference – or, perhaps, for someone not at the meeting to understand why the board has taken the decision that it has. In simple terms, they should record what was done, not what was said but with sufficient context to give assurance that it was done properly.

- Individual contributions should not normally be attributed by name, but this will be appropriate in some cases, particularly where this reflects key discussion points and certainly in the event of formal dissent.

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- If board papers are received for noting and no decision is required then, unless there is material discussion that needs to be recorded, minutes should indicate that the relevant report was 'received (or reviewed, if that is what happened) and its contents noted'.

- Draft minutes should be clearly marked as such and amendments to the draft minutes should be thought of as 'enhancements' rather than 'corrections'.

- The audio recording of board meetings or the publication of board minutes is not, generally, recommended. Any such recording should be deleted once the minutes have been approved.

- Great care should be taken with the company secretary's notes of the meeting, both in terms of content and retention. We recommend that they are destroyed once the minutes to which they relate have been approved.

- Minutes, as a board responsibility, should be included as part of the board evaluation process.

- The ICSA guidance includes detailed discussion of the usual preliminary information, including quorum and the treatment of conflicts of interest; the style of writing; dealing with dissent in the minutes; when it might be appropriate to name individuals; and the level of detail appropriate in minutes. It also addresses the approval of minutes; the treatment of post-meeting developments; and to whom minutes should be made available.

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April 2017

Institute of Chartered Secretaries and Administrators