



The Governance
Institute

Consultation

The practice of minuting meetings



May 2016

Consultation:

The practice of minuting meetings

1 Purpose of consultation and invitation to comment

Taking minutes of meetings is administrative good practice. It creates a record of what has been agreed, and by whom; and of what is to be done, by when and by whom.

For such a basic aspect of the administration of business of all kinds, it is surprising that there is little formal guidance about how this might most effectively be done.

As part of a general update of our guidance for members, ICSA: The Governance Institute had been looking at this area. However, this review was given additional impetus by a letter from Andrew Tyrie, Chairman of the Treasury Select Committee, to Simon Osborne, Chief Executive of ICSA, as part of the Treasury Select Committee's review of the report into the failure of HBOS plc. The report noted 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.' Mr. Tyrie went on to ask for ICSA's views on a number of issues around the practice of minuting board meetings.

Whilst we were able to respond to his questions, we were struck by the changes in practice that have developed over time. Traditionally, company board meetings are the internal decision-making forum of the company and the proper purpose of minutes has been as a long-term internal record of those meetings, for the benefit of the board rather than for any third party. Increasingly, however, they are being seen to fulfil additional functions.

When we announced that we would be looking at this issue and asked for volunteers to help us do so we were overwhelmed by the response. More than 100 governance professionals from a variety of sectors indicated their willingness to help and their feedback has shown that there is a variety of practice both across sectors and the industry as a whole. In view of this interest and in view of the pace of development in company secretarial and governance practice, we have decided to seek input from those whose day to day work this is. This will ensure that our guidance on good practice reflects the reality of modern market practice on a cross-sectoral basis.

Consultation: The practice of minuting meetings

We would be very grateful for your comments and responses to the questions that we have posed, and your comments on any other issues relating to the minuting of meetings. We would ask to receive your comments no later than close of business on **Friday 24th June 2016**:

By e-mail to: policy@icsa.org.uk

or

By post to: Policy Team
ICSA: The Governance Institute
Saffron House
6-10 Kirby Street
LONDON
EC1N 8TS

Please 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 respectively throughout this document. We appreciate that this will not be strictly accurate in all cases and apologise to any organisation or individual concerned, but these are simple and well-understood terms, use of which will considerably shorten this consultation document.

Consultation:

The practice of minuting meetings

2. Legal and regulatory framework

Unlike company General Meetings, board meetings are almost entirely unregulated by the Companies Act 2006 (CA 2006). The only references to minutes are under section 248, which requires minutes of board meetings to be taken and kept for at least 10 years, and section 249 which stipulates that the minutes are evidence of the proceedings at the meeting, unless the contrary is proved.

Minutes of board meetings form part of the company's records 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 CA 2006). The decision on which format to use should be confirmed at a board meeting and formally recorded.

For companies, directors' statutory duties are set out in sections 170-177 CA 2006. They cover duties to promote the success of the company; to act within their powers; 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. Much of this legislation 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.

Similar requirements can be assumed under common law in other sectors. It is therefore important that the minutes of board meetings are drafted in such a way as to demonstrate that the board members have observed their responsibilities to the company and complied with their legal and regulatory duties.

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 most companies that adopted new articles since 1 October 2009 will have included the provisions set out in the Model Articles prescribed by the CA 2006 in their articles. Companies with articles adopted before 1 October 2009 will probably have included the provisions set out in Table A of the Companies Act 1985.

Consultation:

The practice of minuting meetings

In other sectors, there is even less statutory prescription, although some regulators, notably the Financial Conduct Authority (FCA) and Monitor have required evidence of challenge in board minutes.

For the FCA, the handbook on Senior Management Arrangements, Systems and Controls provides that (SYSC 4.3A.3R):

'A CRR² firm must ensure that the members of the management body of the firm ...

(6) act with honesty, integrity and independence of mind to effectively assess and challenge the decisions of senior management where necessary and to effectively oversee and monitor management decision-making.'

However, this evidence is not always easy to provide. 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.'

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 tensions between the need to record the decisions of the meeting and the need for the full council to understand the background to those decisions.

Question 1 – What do you believe to be the principal function of meeting minutes?

Question 2 – Are you aware of any other significant legal or regulatory requirements which we should specifically reference in guidance?

² A UK bank, building society or investment firm that is subject to the EU Credit Requirements Regulation.

Consultation:

The practice of minuting meetings

3 Responsibility for the production of 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 because the first item of business at the succeeding board meeting will usually be to approve the minutes of the last meeting.

As the professional body responsible for encouraging good governance, ICSA has always advocated that organisations appoint a properly qualified company secretary to the role. Sometimes the legal counsel and company secretarial roles are merged, and someone with a legal 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.

Question 3 – Do you agree with our position? If not, who do you believe should be responsible for the production of minutes?

Consultation:

The practice of minuting meetings

4 Drafting minutes

4.1 Preliminary information

All minutes should begin by recording the date, time and venue where the meeting was held, and how it was held (ie in person, by telephone etc.). They should record those directors and other attendees present, and whether any were not present for the whole meeting, together with apologies from directors unable to attend. The list of directors present should demonstrate there was a quorum. The required number of directors for a quorum will be set out in the organisation's constitution.

Question 4 – Is there any other preliminary information that you believe should be included in board minutes?

Question 5 – Is it necessary to include legal boilerplate wording regarding the directors having considered conflicts of interest, the meeting being quorate etc.?

4.2 Style of writing

The company secretary will take notes at board meetings from which they will write up 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 form 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 evidence of what happened at that meeting and who attended. Courts will rely on them as being evidence unless proved otherwise.

Consultation:

The practice of minuting meetings

Historically, the convention has been that:

- Minutes should be written in reported speech, ie 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.

Question 6 – Is it your view that minutes should be written in ‘reported speech’?

Question 7 – What are your views on the recording of individuals’ names? Under what circumstances should this be done?

The chairman of a meeting has the most important 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 for allowing sufficient time for discussion in order to tease out the issues and for ensuring there is sufficient due diligence for transactions. This should be reflected in the minutes.

4.3 Level of detail in minutes

This is one of the most contentious issues around the minuting of meetings. 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 how this might work is open to debate.

There are a number of aspects of minute-taking which could be described as a traditional view:

Minutes should not be a verbatim record. They should document the key points of discussion 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 ...’. Likewise board committees would note ‘It was agreed that ...’

Question 8 – Should minutes be a verbatim record of the meeting?

Consultation: The practice of minuting meetings

Minutes should document the reasons for the decision and include sufficient background information for future reference – or, perhaps, for an absent board member to understand why the board has taken the decision that it has. In simple terms, their purpose is to record what was done, not what was said. If the board or committee require action to be taken, the minutes should make clear who has responsibility for the action and the date by which it should be completed.

Question 9 – Do you agree with the principle that minutes should document the reasons for the decision and include sufficient background information for future reference or for an absent board member to understand why the board has taken the decision that it has? How detailed does this need to be?

Question 10 – Should minutes include allocated actions with deadlines (where appropriate)?

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 and noted’.

Where reference is made to any board papers signed by the chairman a hard copy of those board papers must be retained in addition to the hard copy of the minutes themselves.

Question 11 – Where papers are received for noting should the minutes indicate simply that the relevant report was received and noted unless there is additional discussion that needs to be recorded? If not, how should this be minuted?

Question 12 – Do you include copies of presentations or other papers presented to the board with the board minutes?

Minutes should reflect the business and sector. 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 challenge by individual directors.

Question 13 – Should minutes be drafted in such a way as to facilitate regulatory oversight? If not, how can regulators satisfy themselves that the boards of regulated organisations are operating appropriately?

Consultation: The practice of minuting meetings

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.

Concern has also been expressed about the recording of privileged legal advice and how this may be done to ensure that it remains privileged.

Question 14 – In your opinion, how significant are these risks? What can be done to mitigate them?

In contrast, it has been suggested that minutes of subsidiary companies tend to be minimal and formal, as do minutes prepared by solicitors in relation to, for example, corporate transactions. This is because there is little need for discussion at such meetings as the wider decision will already have been made and the directors are simply formalising the necessary steps and ensuring that they have fulfilled their obligations and duties to the company.

Question 15 – Is it appropriate that minutes prepared to address legal formalities are prepared in brief form unless there is material discussion which it is necessary to record?

The board has collective responsibility for its decisions and so care should be taken to ensure that views expressed during discussion are not attributed to individual directors. However, in exceptional circumstances, where agreement by the whole board cannot be reached, individual directors may request that their dissenting view be recorded in the minutes. Any such request should be complied with.

Question 16 – How and in what circumstances do you believe dissenting views should be recorded?

Question 17 – Is it reasonable to say that in the overwhelming majority of cases all board decisions are reached by consensus?

Question 18 – When the minutes are reviewed at the succeeding meeting of the board, is there always an opportunity for a director to correct errors and indicate dissent if appropriate?

Consultation:

The practice of minuting meetings

Some organisations such as public bodies and regulators choose 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.

Question 19 – What are your views on the publication of board minutes?

Question 20 – Do you believe that there are risks associated with publication and, if so, what might these be? Are these the same risks as those associated with responding to Freedom of Information requests and, if not, what are the differences?

Question 21 - Should the holding of unminuted or 'informal' board meetings where decisions are actually made be discouraged? If so, how can this more effectively be done?

4.4 Conflicts of interest

Some transactions involving the company and a director might give rise to a conflict between the interests of the company and the personal interests 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 company but, generally, the director should declare any personal interest before the matter is discussed. In certain circumstances a director will need to recuse themselves from discussion and decisions on such matters. There are also certain circumstances when 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 that the director in question was not present for the relevant discussion.

Question 22 – How do you believe conflicts of interest should be addressed in board minutes? Should minutes be redacted when circulated to a conflicted director or, as a director, are they entitled to receive full minutes?

Consultation:

The practice of minuting meetings

4.5 Editing minutes

If minutes are well written there should be little need for editing by the directors. Apart from the company secretary, the biggest influence on the style and content of minutes is the chairman; it is important, however, that the content of minutes are acceptable to all directors. Amendments to draft minutes around matters of style and content are acceptable, provided all the key points of discussion and the decisions or recommendations are recorded. It is also acceptable to allow an executive who has made a technical presentation to the board to comment on the minute relating to that section, provided that their suggestions do not conflict with the company secretary's contemporaneous notes, which should always take precedence. Under no circumstances should a director or anyone else be permitted to insert points not made at the meeting, or to delete those that were.

Once the minutes have been approved by the whole board, they should not be amended. If, exceptionally, an error is discovered at a later date, the error should be agreed and minuted at a subsequent meeting and reference to this amendment should be noted on the original minutes.

Question 23 – Do you agree with this analysis of the process for editing draft minutes? If not, how do you differ?

Question 24 – How do you deal with material events that arise between the board meeting and the review of minutes? Might these be noted in parentheses, for example?

Consultation:

The practice of minuting meetings

5 Access to minutes

Minutes of board meeting are internal records of the company and, as such, shareholders have no legal right to see board minutes. However, as noted above, some organisations such as regulatory bodies now publish minutes of board meetings and associated papers on their websites. Careful consideration should be given to a decision to publish details of internal matters in this way and consideration should be given to the potential impact on this important decision-making function within the organisation.

Auditors sometimes request to see board minutes as part of their audit inspection. Some companies will allow this, others only allow the audit partner to read the minutes, and others will only allow them to see specific minutes.

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

Question 25 – How do you deal with requests from auditors to review board minutes?

Question 26 – How do you deal with requests from regulators to review board minutes?

Question 27 – Is there anyone else to whom you would grant access to board minutes, other than pursuant to a Court Order?

Consultation:

The practice of minuting meetings

6 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 understood that any such notes would be 'discoverable' or disclosable in the context of any future litigation.

More recently some company secretaries began recording board meetings in order to clarify the nuances of a debate over controversial discussions and also to provide a continuous record of discussions when a company secretary is required to participate in discussions at a board meeting and/or leave the room during the course of the meeting. The difficulty of participating in a meeting and also taking minutes is acknowledged but a solution might be to have a deputy or other minute taker attend the meetings to allow the company secretary to participate freely.

Question 28 – How long do you retain your notes of meetings, and why?

Question 29 – What are your views on the recording of board meetings?

Question 30 – How long should such recordings be retained?

8 Do you have any other suggestions?

Question 31 – Do you have any other observations on the minuting of meetings which might be helpful?

Consultation: The practice of minuting meetings

8 Next steps

We would be very grateful for your comments and responses to the questions that we have posed, and your comments on any other issues relating to the minuting of meetings. We would ask to receive your comments no later than close of business on **Friday 24th June**:

By e-mail to: policy@icsa.org.uk

or

By post to: Policy Team
ICSA: The Governance Institute
Saffron House
6-10 Kirby Street
LONDON
EC1N 8TS

Once these comments have been received, we will review them and it is our intention to publish revised guidance once this has been done.

Thank you very much for your help with this project.



PETER SWABEY, FCIS
Policy and Research Director
ICSA: The Governance Institute

Consultation:

The practice of minuting meetings

List of questions

What do you believe to be the principal function of meeting minutes?

Are you aware of any other significant legal or regulatory requirements which we should specifically reference in guidance?

Do you agree with our position? If not, who do you believe should be responsible for the production of minutes?

Is there any other preliminary information that you believe should be included in board minutes?

Is it necessary to include legal boilerplate wording regarding the directors having considered conflicts of interest, the meeting being quorate etc.?

Is it your view that minutes should be written in 'reported speech'?

What are your views on the recording of individuals' names? Under what circumstances should this be done?

Should minutes be a verbatim record of the meeting?

Do you agree with the principle that minutes should document the reasons for the decision and include sufficient background information for future reference or for an absent board member to understand why the board has taken the decision that it has? How detailed does this need to be?

Should minutes include allocated actions with deadlines (where appropriate)?

Where papers are received for noting should the minutes indicate simply that the relevant report was received and noted unless there is additional discussion that needs to be recorded? If not, how should this be minuted?

Do you include copies of presentations or other papers presented to the board with the board minutes?

Should minutes be drafted in such a way as to facilitate regulatory oversight? If not, how can regulators satisfy themselves that the boards of regulated organisations are operating appropriately?

In your opinion, how significant are these risks? What can be done to mitigate them?

Is it appropriate that minutes prepared to address legal formalities are prepared in brief form unless there is material discussion which it is necessary to record?

How and in what circumstances do you believe dissenting views should be recorded?

Is it reasonable to say that in the overwhelming majority of cases all board decisions are reached by consensus?

When the minutes are reviewed at the succeeding meeting of the board, is there always an opportunity for a director to correct errors and indicate dissent if appropriate?

What are your views on the publication of board minutes?

Do you believe that there are risks associated with publication and, if so, what might these be? Are these the same risks as those associated with responding to Freedom of Information requests and, if not, what are the differences?

Should the holding of unminuted or 'informal' board meetings where decisions are actually made be discouraged? If so, how can this more effectively be done?

How do you believe conflicts of interest should be addressed in board minutes?

Should minutes be redacted when circulated to a conflicted director or, as a director, are they entitled to receive full minutes?

Do you agree with this analysis of the process for editing draft minutes? If not, how do you differ?

How do you deal with material events that arise between the board meeting and the review of minutes? Might these be noted in parentheses, for example?

How do you deal with requests from auditors to review board minutes?

How do you deal with requests from regulators to review board minutes?

Is there anyone else to whom you would grant access to board minutes, other than pursuant to a Court Order?

How long do you retain your notes of meetings, and why?

What are your views on the recording of board meetings?

How long should such recordings be retained?

Do you have any other observations on the minuting of meetings which might be helpful?



The Governance
Institute

ICSA is the chartered membership and qualifying body for professionals working in governance, risk and compliance, including company secretaries.

We seek to develop the skills, effectiveness and profile of people working in governance roles at all levels and in all sectors through:

- A portfolio of respected qualifications
- Authoritative publications and technical guidance
- Breakfast briefings, training courses and national conferences
- CPD and networking events
- Research and advice
- Board evaluation services
- Market-leading entity management and board portal software.

Consultation documents are prepared by the ICSA policy team to support the work of company secretaries and other governance professionals working in the business and not-for-profit sectors, and in NHS trusts.

ICSA: The Governance Institute
Saffron House, 6–10 Kirby Street London
EC1N 8EQ

May 2016

