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EXECUTIVE SESSIONS OF DIRECTORS

What is an executive session of directors?

It is a meeting attended solely by outside or independent directors without the presence of management.

Are executive sessions required?

Yes, for companies listed on the New York Stock Exchange ("NYSE"), the NASDAQ Stock Market ("NASDAQ") and the American Stock Exchange ("AMEX"). NYSE rules require the non-management directors to meet at regularly scheduled executive sessions, and provide that if any non-management director is not independent, the independent directors must meet in executive session at least once a year. NASDAQ and AMEX rules require the independent directors to meet at regularly scheduled executive sessions.

How often is "regularly?"

Neither the NYSE nor the NASDAQ rules say how often the executive sessions must occur, but regular quarterly or at least semi-annual meetings (with additional sessions as needed) would probably be sufficient. AMEX rules require a minimum of one executive session per year.

Who should preside over the executive sessions?

There is no requirement here - the sessions could be led by a non-executive chairman or lead independent director, or by the chairman

of the nominating/corporate governance committee. Alternatively, the presiding director for these sessions could be rotated among the chairmen of the board committees. An NYSE-listed company must disclose in its annual proxy statement the name of the presiding director or, if the same individual is not the presiding director at every executive session, the procedure by which the presiding director for each session is determined.

What should be discussed during executive sessions and who should set the agendas?

There is no limit on the topics that can be discussed during executive sessions. Obviously, it would at a minimum include matters that involve the CEO and any other inside directors. This might include management performance evaluations, executive succession and other items that call for a robust discussion by the independent directors. However, simply re-hashing discussions already held or to be held at the full board level is probably not productive or appropriate.

The agenda for each executive session would typically be set by the director who is to lead the session.

To what extent do the directors meeting in executive session have authority to make binding decisions?

Generally none. The independent directors might arrive at a consensus on a particular matter, but it must be brought before the full

board to take action on the matter. By contrast, board committees do have authority to make binding decisions, if such authority is delegated to them by the full board.

Should minutes of executive sessions be taken?

Yes, but they should be limited in detail. In part, this may be by practical necessity, since the corporate secretary should probably not be present at the meeting. Also, the independent directors may not want management to know the full details of what was discussed during the executive sessions. Plus, as noted above, the independent directors meeting in executive session generally cannot take any action which binds the board.

How much feedback from the executive sessions should be given to management?

Obviously not all the details, as this would defeat the purpose of having the sessions. It certainly would be appropriate, however, for at least the CEO to be provided with a summary of the items discussed, particularly where they involve matters which the directors believe require management attention and/or future action. This summary should be given to the CEO either before all of the non-management/independent directors at the conclusion of the executive session or before the full board at its next meeting.

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For over 30 years, Silver, Freedman & Taff, L.L.P. has represented financial institutions and other companies nationwide on initial public offerings and other capital raising transactions, mergers and acquisitions, regulatory and enforcement issues, tax and compensation matters, and corporate governance matters. With attorneys who previously served with the federal banking and thrift regulators as well as the Securities and Exchange Commission, Silver, Freedman & Taff, L.L.P. provides a full array of legal services to financial institutions and other companies.

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