LAW OFFICES

SILVER, FREEDMAN & TAFF, L.L.P.

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

3299 K STREET, N.W., SUITE 100
WASHINGTON, D.C. 20007
PHONE: (202) 295-4500
FAX: (202) 337-5502 or (202) 337-5503
WWW.SFTLAW.COM

BOARD AND BOARD COMMITTEE MINUTES

The goal of having well-drafted minutes of board and board committee meetings is not new – but the notion of what constitutes "well-drafted" may have changed. Traditionally, many boards and board committees have subscribed to the view that minutes should be "bare-boned," with the idea being that the less said, the better, from a director liability standpoint. Recent cases have suggested, however, that more detail may actually provide better protection to the board and/or committee. Indeed, in a 2004 decision from the U.S. District Court in Delaware, the court cited from a portion of the plaintiff's complaint which focused on what was not in the minutes – namely, any record of the board having discussed a critical matter. The following are suggestions with regard to the preparation of board and board committee minutes:

Circulate Draft Minutes Promptly. It is fairly typical for draft minutes to be circulated to the board or committee members shortly before their next meeting. Depending on how much time passes between meetings, it may be better to distribute the draft minutes to the directors promptly after the board or committee meeting to which they relate. In a recent Delaware Chancery Court decision, Vice Chancellor Leo Strine condemned the common practice of providing board and committee meeting minutes to directors for approval after a substantial lapse of time (several months in the case in question), stating that this practice is "to state the obvious, not confidence-inspiring."

Minutes Should be Reasonably Detailed. Minutes should be written in a reasonably detailed manner, sufficient to reflect the substance of the discussions at the meeting. As a general matter, reports and other documents provided to directors before or at the meeting should be referred to in the minutes, and copies should either be kept with the meeting records or annexed to the minutes. In some cases, the minutes should note significant discussions among directors or between directors and management that occurred prior to the meeting in order to develop a more complete record of the board's deliberations.

Final Minutes Should be Safeguarded. Once board and committee minutes have been approved, their integrity should be safeguarded, and they should not be altered in any manner without the express approval of the board or committee duly noted in its minutes.

Ensure Minutes Are Sole Record of Meeting – Limit or Prohibit Note Taking. In our view, it is best if directors do not take any notes during meetings, leaving this responsibility to the secretary of the meeting (whose notes should be destroyed promptly after the final minutes of the meeting have been approved by the board or the committee). We believe this represents the prevailing recommended best practice with respect to this matter. Ideally, the approved minutes will be the sole record of the meeting. Minutes can be undercut, however, by individual director notes of the meeting that are unclear or wrong, or that contain

commentary which could be used against the company, the board and/or the particular director in litigation or a governmental investigation.

If directors do take notes during the meeting, then the notes should be collected at the end of the meeting and destroyed promptly thereafter. This also applies to copies of materials handed out to directors at the meeting on which directors have written notes. A policy of collecting and destroying all materials handed out at the meeting would avoid the possibility that you might inadvertently miss copies on which notes have been written. If this approach is taken, at least one copy of each handout should be retained as a record of the information provided to directors.

If directors insist on taking notes and retaining them after the meeting for the purpose of assuring themselves of the accuracy of the minutes, then the notes should be destroyed promptly after the minutes have been approved. One way in which this might be implemented would be for the secretary to retain the notes until the minutes are approved, making the notes available to the director upon his or her request. While you could have the director responsible for destroying his or her own notes promptly following the approval of the minutes, this would be difficult to police.

Perhaps the most important aspect of any policy with regard to these matters is that it be followed consistently. And, of course, no document should be destroyed where litigation or a governmental investigation regarding the same or a related subject matter has commenced or is reasonably anticipated. Doing so could result in civil sanctions and/or severe criminal penalties.

* * *

For further information, please contact Craig M. Scheer at (202) 295-4525 or cscheer@sftlaw.com.

For over 30 years, Silver, Freedman & Taff, L.L.P. has represented financial institutions and other companies nationwide in connection with 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.