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24 June 2016

Dear Sirs,

The practice of minuting meetings

Introduction

We are the Quoted Companies Alliance, the independent membership organisation that champions the interests of small to mid-size quoted companies. Their individual market capitalisations tend to be below £500m.

The Quoted Companies Alliance is a founder member of European**Issuers**, which represents over 9,000 quoted companies in fourteen European countries.

The Quoted Companies Alliance Corporate Governance Expert Group has examined your proposals and advised on this response. A list of members of the Expert Group is at Appendix A.

Response

We welcome the opportunity to respond to this consultation.

We support the view that meeting minutes should document the proceedings and conclusions reached in a meeting, so that the board can fulfil its duties, as well as serving as a record for corporate memory and demonstrate that a governance and oversight procedure has been followed. Furthermore, we note that it could be useful to reference the Prudential Regulation Authority's (PRA) rules in relation to governance, in particular the Senior Managers Regime (SMR), Senior Insurance Managers Regime (SIMR) and the Fundamental Rules, in the guidance. Equally, the requirements concerning corporate actions, such as the potential liability of persons approving and verifying prospectuses, stated under Section 90 of the Financial Services and Markets Act 2000, should also be specifically referred to in the guidance.

We have responded below in more detail to the specific questions from the point of view of our members, small and mid-size quoted companies.

Responses to specific questions

I. Legal and regulatory framework

Q1 What do you believe to be the principal function of meeting minutes?

We believe that the principal function of meeting minutes is to record the proceedings and conclusions reached in a meeting – as explained in the consultation document – for the benefit of the company in discharging the duties of the board. Furthermore, we believe that the additional functions of meeting minutes are to serve as the record for corporate memory, as well as to demonstrate that a governance and oversight procedure has been followed.

Q2 Are you aware of any other significant legal or regulatory requirements which we should specifically reference in guidance?

We note that it may be useful if the Prudential Regulation Authority's (PRA) rules in relation to governance, in particular the Senior Managers Regime (SMR), Senior Insurance Managers Regime (SIMR) and the Fundamental Rules, are also specifically referred to in the guidance.

We also note the requirements concerning corporate actions, such as the potential liability of persons approving and verifying prospectuses, stated under Section 90 of the Financial Services and Markets Act 2000, should be specifically referred to in the guidance.

II. Responsibility of the production of minutes

Q3 Do you agree with our position? If not, who do you believe should be responsible for the production of minutes?

We agree with ICSA's position. However, we believe that anyone who directors consider sufficiently experienced and competent to produce accurate minutes should be allowed to do so, as is permitted by Part 12, Section 273 (2) (d) of the Companies Act 2006. They may not necessarily be a qualified company secretary, lawyer or accountant. Thus, the final sentence should be rewritten to reflect this. We would suggest the following: "In the alternative, minutes may be prepared by an internal or external person with a legal or accounting qualification (or no relevant qualification) but in such cases it is important that the person preparing the minutes has the necessary relevant experience."

III. Drafting minutes

III.A Preliminary information

Q4 Is there any other preliminary information that you believe should be included in board minutes?

All basic information, such as the full name of the company in question, is properly set out in full and not abbreviated, as well as whether attendees were present by telephone or via videoconference, should be included in the board minutes in the usual way. It is important that the start time of the meeting is recorded. Equally, it can be helpful to include the role, job title and company names of attendees.

Q5 Is it necessary to include legal boilerplate wording regarding the directors having considered conflicts of interest, the meeting being quorate etc.?

These paragraphs, as stated in the consultation paper, are vital to focussing the mind and ensuring that due process is followed. We believe that these provisions are not simply “legal boilerplate” and the language should be revised.

III.B Style of writing

Q6 Is it your view that minutes should be written in ‘reported speech’?

We believe that, provided the minutes are consistent and logically constructed, this could represent an unnecessary level of detail. Furthermore, we also believe that it is common practice for future actions in the conditional mood to be recorded as “resolved that the Company will … “, rather than “would” or “should”.

Q7 What are your views on the recording of individuals’ names? Under what circumstances should this be done?

We believe that, generally, individuals’ names should not be recorded, unless there is a matter where the director has specifically required this, such as for the disclosure of a conflict, where the director has been delegated a specific action point, or where the director needs to record a view that is contrary to the consensus view on an important matter.

III.C Level of detail in minutes

Q8 Should minutes be a verbatim record of the meeting?

We do not believe that minutes should be a verbatim record of the meeting.

Q9 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?

We believe that minutes should document the reasons for the decision and include sufficient background information for future reference. The level of detail should be appropriate to the circumstances and reflect the importance of the decision. Moreover, we consider that a reasonable and proportionate level of detail should be required, particularly when the corporate benefit is not clear. We believe that minutes are not for the benefit of directors who have failed to attend the meeting or who should have considered the matter proposed before the meeting they cannot attend to discuss with other directors. We note that, generally, the reason why the board has made a decision reflects an unnecessary level of detail.

Q10 Should minutes include allocated actions with deadlines (where appropriate)?

Yes, we believe that, where a company considers it to be useful, minutes should include allocated actions with deadlines (where appropriate), as it can provide a mechanism for the board to keep abreast of the matters that it has resolved and maintain a record of responsibility for agreed actions. However, we believe companies should be free to create minutes in whatever manner best serves their interests.

Q11 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?

Yes, we believe that, where papers are received for noting, the minutes should indicate simply that the relevant report was received and noted unless there is additional discussion that needs to be recorded. Any reference to a discussion need not be a blow-by-blow account, but merely a note of key observations or points of disagreement.

However, we note that some companies may find it more appropriate for papers to be presented to directors in a separate reading pack, so that board meetings can be focussed on more strategic matters.

Q12 Do you include copies of presentations or other papers presented to the board with the board minutes?

We believe that in general, our members tend to include copies of presentations or other papers presented to the board alongside the board minutes, rather than including them in the minutes themselves: this makes it much more helpful as a record of corporate memory.

Q13 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?

We believe that minutes should be drafted for the benefit of the board. However, if there is a reasonable expectation that third parties (including regulators) will wish to see the minutes, it will be prudent to prepare them in a manner and with content that the third party will expect to see. We note the importance of minutes not being drafted in a defensive manner, with the potentially critical review by a regulator in mind.

Q14 In your opinion, how significant are these risks? What can be done to mitigate them?

We believe that the practice of minute taking under English law reflects the English legal framework and is notably different from the different practices and framework in the US. The English practice supports thorough and diligent minutes to capture the corporate memory and assist a board in understanding how it reaches conclusions. Minutes which do not support the reasoning of the board are deficient in an English context. It is accepted that in a US context, such minutes would create, rather than mitigate, undesired risks. We believe that consideration needs to be given as to the practical interface between these two approached when there are both US personas and US companies within a group structure.

Legal advice which is to attract privilege should be tabled as a board paper prepared by an external advisor stating it is subject to legal professional privilege on its face and the minutes should also make this clear.

Q15 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?

We believe that it is not appropriate that minutes prepared to address legal formalities are prepared in brief form unless there is material discussion which it is necessary to record. We believe that no precedent that suggests that subsidiary companies can have a “governance light” approach: this is contrary to English law.

Q16 How and in what circumstances do you believe dissenting views should be recorded?

We believe that, in general, dissenting views should not be recorded, unless the director requires the dissenting view to be recorded, or that the matter is a fundamental point where a director has felt it appropriate to resign.

Q17 Is it reasonable to say that in the overwhelming majority of cases all board decisions are reached by consensus?

We believe that it is reasonable to say that in the overwhelming majority of cases all board decisions are reached by consensus. We believe that this is the fundamental nature of corporate responsibility: that is, accepting decisions you may not necessarily consider to be the best decision for the benefit of the company and ensuring that decisions can be taken in an effective manner.

Q18 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?

Yes, when the minutes are reviewed at the succeeding meeting of the board, there is always an opportunity for a director to correct errors and indicate dissent if appropriate. We believe that it is best practice for the draft minutes to be circulated promptly after a meeting for comments by those who were present. However, we note that comments are rarely made. In companies, this would generally be done outside of the forum of the subsequent board meeting.

Q19 What are your views on the publication of board minutes?

We believe that board minutes should not be published; they should not be for 'public consumption' (please see our response to Q13 and Q14). We believe that if board minutes were to be published, there would be a substantial risk that they could become a neutralised record, drafted out of fear of what an insurer, litigant or competitor could argue or learn, for example.

Q20 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?

Please see our response to Q19 above: the risks are much greater than those under the Freedom of Information Act (FOIA). FOIA has led to two-tier minute taking which we believe is unhelpful.

Q21 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?

We believe that the holding of unminuted or 'informal' board meetings where decisions are actually made should be discouraged. Although we acknowledge that discussions between directors will inevitably take place outside of the boardroom, we believe that a distinction should be made between these types of peer discussions and the true decision-making that happens in the boardroom. We believe that all directors and non-executive directors (NEDs) should be given an equal opportunity to consider issues under discussion and adequate notice of board meetings, so that no one board member has privileged access to information and/or executive time. We consider that it is important to encourage a structure that evidences the formal recording of decisions reached through email exchanges etc.

III.D Conflicts of interest

Q22 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?

We believe that conflicts of interest should be addressed in board minutes as is currently done. Given the nature of minute taking, there should generally be no need for redaction from the historic record, unless legal professional privilege.

III.E Editing minutes

Q23 Do you agree with this analysis of the process for editing draft minutes? If not, how do you differ?

We believe that prompt comments on the minutes should be encouraged, rather that discouraged, so that all points as stated in the minutes can be interpreted consistently by all members of the board. However, such comments should aim to refine and clarify what took place and not to seek to re-write events.

Q24 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?

We consider that if material events that arise between the board meeting and the review of minutes, it is generally helpful to note these in parentheses, so that the minutes can be better understood through the lens of supervening events.

IV. Access to minutes

Q25 How do you deal with requests from auditors to review board minutes?

We believe that, as part of a high quality audit and as long as the board is satisfied with the request, auditors should review minutes.

Q26 How do you deal with requests from regulators to review board minutes?

It is important to understand the basis upon which the request is made; each request should then be considered by the Chairman and/or the Chief Executive on its merits. Where a regulator is provided access, it will be important to emphasise that the primary purpose of the minutes is to record the proceedings and conclusions reached in a board meeting.

Q27 Is there anyone else to whom you would grant access to board minutes, other than pursuant to a Court Order?

Generally, there is no-one else to whom we would grant access to board minutes, other than pursuant to a Court Order.

V. Retention of company secretary's notes of meetings

Q28 How long do you retain your notes of meetings, and why?

It is general practice among our members to retain notes of meetings until the minutes have been finalised.

Q29 What are your views on the recording of board meetings?

Board meetings should be able to be recorded if that reflects the wishes of the board. This can assist in the production of minutes, particularly where the meeting is to consider/debate rather than conclude. This also assists the secretary to focus minute taking on the key points and come back to points of finer detail. However we note that recording board meetings could, in some cases, stifle debate and discussion. Thus, all board members should have trust and confidence in the company secretary in retaining and deleting recordings when appropriate.

Q30 How long should such recordings be retained?

We believe that, once the recording has served the purpose of the company secretary, the recording should be deleted. We believe there would be no benefit in having the recording available to be considered against the board minutes by a third party.

VI. Do you have any other suggestions?

Q31 Do you have any other observations on the minuting of meetings which might be helpful?

We have a number of other observations on the minuting of meetings that we feel might be helpful:

Page 2: We believe that the opening sentence should be reworded as follows: "Taking good minutes of meetings is both administrative good practice and a legal responsibility."

Whilst it is appreciated that the ICSA paper has been produced in response to the letter from Andrew Tyrie, we believe that this reference should be reconsidered, as it constrains the document itself and may make it appear reactive.

We think that the reference to "additional functions" of minutes should be expanded to explain what these may be.

Page 4: We believe that the opening wording should simply state that the Companies Act 2006 places a clear requirement on directors to maintain minutes for at least ten years and confirms that the minutes are evidence of the proceedings, unless the contrary is proved. We believe that the opening paragraph should be expanded to say that ensuring proper minutes are taken is part of the way in which directors discharge their general duties under the Companies Act 2006 and discharge their responsibilities under the articles of association of the company.

Page 5: Evidence of challenge: as a general comment, the FCA requirement of this is misleading – perhaps the word "appropriate" needs to be added as challenge for challenge's sake should not be encouraged.

If you would like to discuss any of the responses in more detail, we would be happy to attend a meeting.

Yours faithfully,

Tim Ward
Chief Executive

APPENDIX A

Quoted Companies Alliance Corporate Governance Expert Group

Edward Craft (Chairman)	**Wedlake Bell LLP**
Colin Jones (Deputy Chairman)	UHY Hacker Young
Nathan Leclercq	Aviva Investors
Jonathan Compton David Isherwood	BDO LLP
Kalina Lazarova	BMO Global Asset Management (EMEA)
Nick Graves	Burges Salmon
David Hicks	Charles Russell Speechlys LLP
David Fuller	CLS Holdings PLC
Nicholas Stretch	CMS Cameron McKenna LLP
Louis Cooper	Crowe Clark Whitehill LLP
Nick Gibbon	DAC Beachcroft LLP
Tracy Gordon	Deloitte LLP
Melanie Wadsworth	Faegre Baker Daniels LLP
Rob Burdett	FIT Remuneration Consultants
Richie Clark	Fox Williams LLP
Michael Brown	Henderson Global Investors
Will Pomroy	Hermes Investment Management Limited
Alexandra Hockenhull	Hockenhull Investor Relations
Julie Stanbrook Bernard Wall	Hogan Lovells International LLP
Darshan Patel Niall Pearson	Hybridan LLP
Peter Swabey	ICSA
Jayne Meacham Carmen Stevens	Jordans Limited
Eric Dodd	KBC Advanced Technologies PLC
Darius Lewington Jane Mayfield	LexisNexis
Anthony Carey	Mazars LLP
Peter Fitzwilliam	Mission Marketing Group (The) PLC
Cliff Weight	MM & K Limited
Caroline Newsholme	Nabarro LLP
Jo Chattle Julie Keefe	Norton Rose Fulbright LLP
Amanda Cantwell	Practical Law Company Limited
Susan Fadil Philip Patterson	PricewaterhouseCoopers LLP
Dalia Joseph Marc Marrero	Stifel
Kevin Kissane	Vernalis PLC
Edward Beale	Western Selection Plc