CHAPTER 20

DRAFTING CORPORATE RESOLUTIONS

20.1 The governing bodies of U.S. legal entities act by means of resolutions, which appear in minutes of meetings and—if state law and the entity's organizational documents permit it—in written consents that are adopted as an alternative to holding a meeting.

20.2 This chapter examines how corporate resolutions have traditionally been drafted and how they can be improved. It focuses on written consents, because lawyers in private practice tend to draft consents more often than minutes. The traditional form of written consent contains a number of elements: the title, the introductory clause, recitals, the lead-in, resolutions, the concluding clause, and signature blocks. A consent may also include one or more attachments.

20.3 This topic is, strictly speaking, beyond the scope suggested by the title of this manual, but it's included for three reasons. First, lawyers who draft contracts generally find themselves also drafting corporate resolutions. Second, the usages employed in the traditional form of resolution are analogous to contract usages. And third, aside from the article on which this chapter is based (Kenneth A. Adams, *Legal Usage in Drafting Corporate Resolutions*, Practical Lawyer, Sept. 2002), no meaningful literature on this topic exists.

20.4 Because current usages are so deficient, this chapter recommends significant changes to how written consents are drafted. That the recommended format wouldn't affect meaning should, instead of being an impediment to change, make it easier for lawyers to adopt that format, safe in the knowledge that the resulting improvements in style and readability wouldn't come at the client's expense. To see the effect of the recommended changes, see samples 18 and 19, "before" and "after" versions of a written consent of the board of directors of a Delaware corporation.

THE TITLE

20.5 The title of a consent could be limited simply to *consent*, but invariably drafters also specify, for ease of reference, the governing body and the name of the entity.

20.6 The title usually refers to the consent as a "written consent." It's not strictly necessary to do so—a consent is manifestly written, whether or

not it's described as such in the title—but it serves to highlight that the resolutions were adopted by means of the statutory alternative to vote at a meeting. If a consent is unanimous or is by a sole director or shareholder, drafters usually say so in the title, although they often make the mistake of describing as unanimous a consent by a one-member governing body.

20.7 The clearest layout for the title is to state the entity name at the top, in bold all-capitals, with underneath, in regular all-capitals, *unanimous written consent of*, followed by the governing body in question.

THE LEAD-IN

20.8 Traditionally, consents open with a statement to the effect that the signatories are adopting the resolutions that follow. This statement is analogous to the lead-in of a contract (see 2.145).

20.9 A consent lead-in contains more information than a contract lead-in. For one thing, it states the capacity in which the signatories are signing the consent (as shareholders, directors, or otherwise) and what proportion of the applicable governing body they represent (all of it, a majority, more than two-thirds, or otherwise). Usually it also includes a statement that the signatories are acting by written consent in accordance with a section of whichever state law authorizes that governing body to make decisions by written consent instead of holding a meeting. This is often stated, in the alternative or in addition, as a subtitle between the title and the lead-in, but you don't need to waste space by giving it such prominence, and you certainly don't need to state it twice.

20.10 In the lead-in, drafters also invariably state the defined term for the entity that's the subject of the consent. Given that in consents the focus is on a single entity, it's appropriate to use a generic common noun such as *the Company*. Doing so has the benefit of allowing readers to more readily distinguish that entity from any other entities that might be mentioned.

20.11 The traditional lead-in states that the undersigned *hereby consent to the adoption of the following resolutions*, but it's preferable to have the signatories *resolve as follows*. Because as discussed in 20.19 the best place for recitals is before the lead-in, the lead-in should contain *therefore resolve as follows* if the consent contains recitals.

20.12 There are three reasons for using *resolve as follows*. The first relates to structure: using the verb *resolve* in the lead-in allows you to omit it from the resolutions, which in turn permits you to format the resolutions more efficiently (see 20.20–21). The second relates to brevity: because *resolve* means "to adopt or pass a resolution," *resolve as follows* expresses in three words what the traditional formula uses nine words to convey. The third relates to clarity: the indirection of the traditional formula—requiring consent plus adoption—leads some drafters to think that one must not only consent to adoption of a resolution, but also adopt it, and so use the formula *hereby consent to the adoption of, and hereby adopt, the following resolutions*. This only makes worse an already inferior usage.

20.13 Using the verb *resolve* in the lead-in raises the question whether for a written consent to be effective the signatories must *consent* to resolutions rather than simply *resolve*. But once one has stated that the signatories are acting by written consent, nothing in the relevant state laws requires that one use the verb *consent*. For example, section 228 of the Delaware General Corporation Law, which governs shareholders acting by consent instead of holding a meeting, simply requires that a consent "set forth the action taken without a meeting." There's no reason why that can't be accomplished by having the shareholders *resolve as follows*.

20.14 Many drafters would state that the signatories *do hereby resolve*. For two reasons, this is less than ideal. First, *do* used as an auxiliary in this manner is an archaism (see 3.23). Second, as discussed in 3.17, *hereby* is best omitted in language of agreement, and *resolve as follows* is analogous to language of agreement.

20.15 Another lead-in redundancy is a statement—often long-winded—that the resolutions were adopted as though at a meeting. This is implicit in the fact that the signatories are acting by written consent, and anyone with any questions as to the effect of a written consent can check the cited section of the applicable state statute.

20.16 Drafters sometimes double-space the lead-in, as well as the concluding clause, presumably with a view to distinguishing them from the resolutions. It's inefficient and distracting to do so.

RECITALS

20.17 A consent will often contain, after the lead-in, paragraphs beginning with *whereas* in all capitals that explain the background to the resolutions. Such paragraphs are analogous to the recitals that routinely precede a contract lead-in (see 2.115), so it's appropriate to use the term "recitals" to describe them. (They're also referred to collectively as the "preamble.")

20.18 Using *whereas* in recitals, whether in contracts or consents, is archaic (see 2.128). One can readily distinguish recitals from resolutions without using *whereas* to signpost them.

20.19 A more interesting issue is where in consents you should place recitals. In contracts they're placed before the lead-in, but in the traditional form of consent they invariably follow it. Since the preferred form of lead-in and, as discussed in 20.21, the preferred form of resolution don't permit any intervening language, this requires that recitals be placed before the lead-in rather than after. This unorthodox approach is acceptable, even preferable, because it's consistent with contract usage. And it is a little anomalous to place recitals after the lead-in: the lead-in refers to the resolutions that follow, but recitals aren't resolutions.

RESOLUTIONS

Where to Place the Verb "Resolve"

20.20 It has long been standard practice to introduce each recital with *resolved*, generally in all capitals. In this context, *resolved*, which is a truncated version of *it is resolved that*, constitutes language of performance (see 3.19). (If a consent contains recitals, drafters often begin the first resolution with *it is therefore resolved*. And if there is more than one resolution, some drafters begin the second and subsequent resolutions with *it is further resolved*.) Legal usage should be consistent with standard English unless there are compelling reasons why it should not (see the introduction); this stilted and archaic use of *resolved* couldn't be confused with standard English.

20.21 There are two alternatives. One is to use, in each recital, language of agreement that is less archaic, but your options would essentially be limited to introducing each recital with *it is resolved that*. This wouldn't represent much of an improvement. A more effective solution is to modify the lead-in by having the signatories *resolve as follows* rather than, say, *adopt the following resolutions*, and to eliminate *resolved* from each resolution and instead phrase it as a *that*-clause. The result is resolutions that are clearer, more economical, and more consistent with standard English.

20.22 *That*-clauses aren't sentences, so each resolution should end with a semicolon. Tack *and* onto the penultimate resolution and end the final resolution with a period. *That*-clauses aren't paragraphs either, so are best broken out as tabulated clauses (see 4.34), but with bullet points rather than enumeration, since little would be gained by numbering each resolution.

Factual Resolutions

20.23 Viewed from a grammar perspective, a resolution consists of a *that*-clause functioning as an object. Two main categories of verbs precede such *that*-clauses, namely "factual" verbs and "suasive" verbs. Factual verbs such as *certify*, *claim*, and *declare* introduce factual information, whereas suasive verbs such as *beg*, *recommend*, and *urge* imply an intention to bring about some change in the future. Some verbs, such as *insist*, can be both factual (*I insisted that I was right*) and suasive (*I insisted that he apologize*), and in the context of corporate resolutions *resolve* can be both factual and suasive. For purposes of the following discussion, the terms "factual resolution" and "suasive resolution" are used to describe those resolutions in which *resolve* is used as a factual and a suasive verb, respectively.

PERFORMATIVE RESOLUTIONS

20.24 Factual resolutions can be divided into two categories. One category is those factual resolutions that accomplish an action when the consent is signed and as such constitute language of performance. By means of performative resolutions, a governing body can fill a vacancy, select a consultant, or take any number of other actions. Here's an example: *that*

the Company hereby engages Acme Accountants LLP to act as its independent auditors.

20.25 The most common performative resolutions are those that authorize an action or authorize someone to do something and those that direct someone to do something. For example, a board of directors might resolve *that each of the officers of Acme is hereby authorized to execute and deliver the Merger Agreement*. In the following discussion, such resolutions are termed "performative resolutions."

20.26 Drafters often in the same resolution direct *and* authorize someone to do something, but if Acme's board of directors directs Smith to sign an agreement, then by definition Smith is authorized to do so—in a resolution stating that Smith *is hereby authorized and directed*, the word *authorized* is redundant. (You can use suasive resolutions as an alternative to directing language; see 20.34–35.)

20.27 Also commonplace are performative resolutions that ratify an action, in other words approve it after the fact. A resolution might state that an action is *ratified, confirmed, approved, and adopted*; just *ratified* is sufficient. (Regarding redundancy in strings of words, see 1.42.)

20.28 It's standard advice that you should use the active voice (see 3.10), but performative resolutions are generally phrased in the passive voice. In the case of directing or authorizing resolutions, it would be pedantic to require the active voice, as in *that the undersigned hereby authorize Acme*: who is doing the authorizing or directing is never in question, and using the active voice would make this kind of resolution less concise. In the case of ratifying resolutions, which voice is preferable is a function of whether the statement of what is being ratified is succinct. If it requires a couple of lines or more, you might want to use the active voice (*that the undersigned hereby ratify*), because the passive voice would result in the verb being rather awkwardly tacked on at the end.

20.29 Just as it's appropriate to use *hereby* in language of performance in contracts (see 3.20), it's also appropriate to use *hereby* in performative resolutions. In a resolution stating *that each of the officers of Acme is hereby authorized to execute and deliver the Merger Agreement*, the word *hereby* serves to make it clear that it's through the resolution that the officers derive their authority.

OTHER FACTUAL RESOLUTIONS

20.30 The other category of factual resolutions consists of resolutions that don't accomplish an action. There are three kinds:

20.31 First, those resolutions that reflect a value judgment made by the signatories—for example, *that it is in the best interests of Acme to enter into the Merger Agreement*. Such resolutions are analogous to statements that, in a contract, would be included in the recitals.

20.32 Second, those resolutions that state facts—for example, a resolution that, after authorizing Acme to issue certain shares, states that upon issuance *the Shares will be validly issued, fully paid, and nonassessable shares of Acme*

common stock. Such resolutions are analogous to statements of fact in a contract, which are a form of language of declaration (see 3.273).

20.33 And third, those resolutions that reflect rules implemented by the signatories—for example, *that the fiscal year of the Corporation ends on December 31 of each year*. Such resolutions are analogous to language of policy (see 3.240).

Suasive Resolutions

20.34 A suasive resolution allows consent signatories to express that they intend a specified action to take place in the future. When a suasive verb is followed by a *that*-clause, as is the case in suasive resolutions, standard usage requires that one use in the *that*-clause either the putative *should* (We demanded that she *should* leave) or the mandative subjunctive mood (We demanded that she *leave*). A third possibility, using the indicative mood (We demanded that she *leaves*), is largely restricted to British English. The putative *should* is appropriate if you are referring to another person over whom you have no control, but it doesn't make sense for purposes of corporate resolutions. Consequently, the mandative subjunctive is the best option for U.S. drafters. A resolution *that Acme issue to Jones 1,000 shares of Series A preferred stock* represents a clear expression of intent. The verb *issue* is in the mandative subjunctive (the indicative would be *issues*). Because suasive resolutions don't serve to memorialize an action that's concurrent with the signing of the consent, you shouldn't use *hereby* with suasive resolutions.

20.35 Instead of suasive resolutions, you could use factual resolutions (or, more specifically, performative resolutions) to express an intention to bring about change in the future. For example, as an alternative to the resolution stated immediately above, you could resolve *that Acme is hereby directed to issue to Jones 1,000 shares of Series A preferred stock*. This formulation is equally effective, but a little less economical.

20.36 More often than not, drafters have a board of directors resolve that each officer of the corporation *be, and hereby is, authorized*. (Some drafters insist on expending a few additional words to convey the same meaning by having the board resolve that the officers of the corporation *be, and each of them hereby is, authorized*.) This bizarre usage has *resolve* acting as both a factual and a suasive verb: *be authorized* is in the mandative subjunctive and is consistent with use of *resolve* as a suasive verb; *is authorized* is in the indicative and is consistent with use of *resolve* as a factual verb. This results in an inherent contradiction: if you are, by means of a performative resolution, conferring authority on someone, it makes no sense in that same resolution to use suasive language to convey an intention to authorize that person at some time in the future. You should use only performative resolutions to confer authority. Drafters also use this inappropriate dual structure with directing and ratifying performative resolutions, and the same analysis applies.

Don't Use Language of Obligation

20.37 Don't use *shall* or the other main verb of language of obligation, *must* (see chapter 3), in resolutions, as resolutions don't serve to impose obligations. Drafters nevertheless often use *shall* in policy resolutions—for example, "the fiscal year of the Corporation *shall end* [read *ends*] on December 31 of each year." In addition, *shall* is often used to express future time, even when standard usage would require use of the present tense—for example, "all such expenses as the officers of the Company *shall determine* [read *determine*] to be necessary or appropriate." (See 3.336.)

THE CONCLUDING CLAUSE

20.38 After the resolutions and before the signatures is a statement as to when the consent is being signed. By analogy to contracts, one can refer to this statement as the "concluding clause."

Wording

20.39 Most concluding clauses use some variation on the following format: *IN WITNESS WHEREOF, the undersigned have duly executed this Unanimous Written Consent on the 3rd day of February, 2013.* This format has a number of shortcomings:

- *IN WITNESS WHEREOF*, like *WHEREAS*, is archaic (see 5.22).
- *The undersigned* is sufficiently cumbersome that this is one context where it's better to use the passive voice and exclude the *by*-agent (*the undersigned*) (see 3.13).
- *Execute* is jargon; *sign* is simpler (see 5.9–13).
- It seems odd to have the signatories assert in the concluding clause that they have signed the consent, given that the signature blocks don't precede that assertion, but follow it. Instead of the present perfect (*has been signed*), use the present progressive (*is being signed*). (See 5.15–16 for a discussion of this issue with respect to the concluding clause of contracts.)
- A consent is not enhanced by having signatories affirm that they are *duly* signing it (in other words, signing it in accordance with legal requirements), as opposed to simply signing it.
- Nothing is gained by reiterating that the consent is unanimous and written. And you don't need to use a capital *C* in *consent*, as it refers to a category of document rather than the title of a work (see 17.21).
- The format the *3rd day of February, 2013* is a long-winded and old-fashioned way to express dates (see 2.30).

20.40 Given these objections, the recommended form of concluding clause is as follows: *This consent is being signed on February 3, 2013.*

What Date to Use

20.41 Section 228(c) of the Delaware General Corporation Law requires that every written consent "bear the date of signature of each stockholder or member who signs the consent." The date of a consent is significant because a consent is effective only if no later than 60 days after the date of the earliest dated consent a number of consents sufficient to take the corporate action in question have been delivered to the company. Use of an *as of* date (see 2.33) or a preprinted date other than the date of signing is inconsistent with section 228(c), in that giving a consent a date later than the date it was actually signed could serve to circumvent the 60-day time limit.

20.42 This was confirmed by the holding of the Delaware Court of Chancery in *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129 (Del. Ch. 2003). In this case, the plaintiff claimed that a consent signed by certain shareholders was invalid because the shareholders hadn't dated the consent—instead, each consent bore the same preprinted date. The defendants argued that because there was no question that the consents had been delivered within the 60-day period, how the consents were dated was of no significance.

20.43 The court disagreed. It noted that under section 228(c), for a consent to be valid it has to bear the date of signature of each shareholder. The court also noted that although in this case it might be possible to determine whether the consents had been delivered within the 60-day limit, that would not always be the case, so the date requirement must be strictly enforced. The court refused to dismiss the plaintiff's claim.

20.44 The court suggested that there were two potential problems with the way the consents in question were dated. First, each signature was not individually dated. (The court stated that "The defendants do not dispute that the signers did not individually date their Consents.") And second, the one date that was on the consent was preprinted.

20.45 But as a matter of semantics, you should be able to satisfy the section 228(c) requirement that a consent "bear the date of signature" by having one date on the consent, as long as it's the date when all shareholders signed. Furthermore, as long as it's the actual date of signing, a date that's preprinted shouldn't be any less satisfactory than a handwritten date. But not using a preprinted date would reduce the risk of anyone's questioning whether the date on a consent was the date it was signed.

20.46 Note that if shareholders sign a consent on different dates and two or more of them sign the same piece of paper, you would need to include a separate date for each signature line. But if they sign counterpart copies, you could make do with the one date at the bottom, with a blank day, or day and month, or day and month and year, that each signatory would fill in by hand.

Counterparts

20.47 Many consents include, as part of the concluding clause or as a separate paragraph preceding it, a statement that the consent may be signed in

two or more counterparts that together constitute "one and the same" consent. Such statements are unnecessary—even absent such a statement a consent with counterpart signatures would be effective unless the entity's organizational documents prohibit counterpart signatures. Nothing in the Delaware General Corporation Law brings into question the effectiveness of counterpart signatures to written consents. Stating that one can validly deliver counterpart signature pages by fax is also unnecessary, at least in Delaware, given that section 228(d)(2) of the Delaware General Corporation Law provides that a fax copy of a consent is as effective as an original.

THE SIGNATURE BLOCKS

20.48 Each signature block consists of a signatory's name accompanied by a signature line. The conventions used are essentially the same as those used for contract signature blocks (see 5.24), except that when all signatories are individuals, it's appropriate to state each signatory's name in initial capitals rather than all capitals.

ATTACHMENTS

20.49 When in a consent a governing body authorizes or directs an entity to enter into an agreement, or ratifies entry into an agreement, a copy of the agreement is often attached to the consent as an exhibit. If the consent authorizes or directs entry into the agreement, the exhibit could be the final form of the agreement, but often it's a draft, in which case the consent will usually authorize entry into the agreement in the form attached together with such changes as are acceptable to the officers or one or more named officers.

20.50 But it's best to avoid attaching contracts to consents, as doing so generally results in an unnecessarily bulky and cluttered minute book. Instead, if the document that would have been attached is a draft, you can identify it by referring to the date that it was distributed to the governing body in question (whether by e-mail or otherwise), and retain, or make sure the company retains, a set of those drafts in files.

20.51 When a consent authorizes officers to negotiate any changes to an approved draft that are acceptable to them, the consent will often state that execution and delivery of the agreement containing any such changes will serve as conclusive evidence that those changes were acceptable to the officers. Presumably the intention is to prevent any after-the-fact debate as to whether a particular change had in fact been accepted by the officers, as opposed to having been overlooked. Sometimes such consents refer to execution and delivery serving as conclusive evidence of approval of those changes by the governing body adopting the consent. That's a mistake, as the consent doesn't require the governing body to approve any changes.

A SAMPLE WRITTEN CONSENT, "BEFORE" AND "AFTER"

20.52 To give a sense of the overall effect of the approaches recommended in this chapter, samples 18 and 19 represent "before" and "after" versions of a simple written consent of the board of directors of a Delaware corporation. The "before" version incorporates many widely accepted usages; the "after" version is the result of revising the "before" version in accordance with recommendations contained in this chapter and other more general recommendations contained elsewhere in this manual.

SAMPLE 18 ■ "BEFORE" VERSION OF WRITTEN CONSENT

UNANIMOUS WRITTEN CONSENT
OF
THE BOARD OF DIRECTORS
OF
ACME TECHNOLOGIES, INC.

Pursuant to Section 141(f) of the General Corporation Law of the State of Delaware

The undersigned, constituting all the members of the Board of Directors of Acme Technologies, Inc., a Delaware corporation (the "Company"), acting by written consent in lieu of a meeting pursuant to section 141(f) of the General Corporation Law of the State of Delaware, hereby consent to the adoption of the following resolutions as though adopted at a meeting duly called and held with a quorum being present and acting throughout:

WHEREAS, on January 21, 2013, the Company entered into a letter of intent with Dynamic Research, Inc. ("Dynamic"), a company developing global-positioning-satellite technologies, to purchase preferred stock representing a 35% ownership interest in Dynamic; and

WHEREAS, the Company has investigated Dynamic's operations, technologies and corporate governance and has not uncovered any information to indicate that the Company should not consummate this transaction;

NOW, THEREFORE, IT IS RESOLVED, that the Company's execution of the letter of intent be, and it hereby is, ratified;

RESOLVED, the Company be, and hereby is, authorized and directed to enter into and to perform its obligations under the Preferred Stock Purchase Agreement between the Company and Dynamic substantially in the form attached hereto as Appendix A, and those ancillary agreements provided for therein to which the Company is a party, each with such changes, if any, as shall be acceptable to the officers of the Company in their sole discretion, execution and delivery of those documents by the Company to be conclusive evidence of the approval of Board of Directors of the Company; and

RESOLVED, that the officers of the Company be, and each of them hereby is, hereby authorized to execute and deliver on behalf of the Company all such further documents, certificates, and instruments, to take on behalf of the Company all such further actions, and to pay on behalf of the Company all such expenses as the officers of the Company shall determine to be necessary or desirable in order to carry out the foregoing resolutions, the execution and delivery of any such documents, certificates, and instruments, the taking of any such actions, and the payment of any such expenses to be conclusive evidence of the approval of the Board of Directors of the Company.

This Unanimous Written Consent may be executed in two or more counterparts, each of which shall be deemed an original instrument, but all such counterparts shall together constitute for all purposes one and the same instrument.

IN WITNESS WHEREOF, the undersigned have duly executed this Unanimous Written Consent on the 18th day of February, 2013.

____
John Doe

____
Robert Roe

____
Jane Doe

SAMPLE 19 ■ "AFTER" VERSION OF WRITTEN CONSENT

ACME TECHNOLOGIES, INC.

UNANIMOUS WRITTEN CONSENT OF
THE BOARD OF DIRECTORS

On January 21, 2013, Acme Technologies, Inc., a Delaware corporation (the **"Company"**), entered into a letter of intent with Dynamic Research, Inc. (**"Dynamic"**), a company developing global-positioning-satellite technologies, to purchase preferred stock representing a 35% ownership interest in Dynamic.

The Company has investigated Dynamic's operations, technologies, and corporate governance and has not uncovered any information to indicate that the Company should not consummate this transaction.

The undersigned, constituting all the members of the Company's board of directors and acting by written consent in lieu of a meeting in accordance with section 141(f) of the Delaware General Corporation Law, therefore resolve as follows:

- that the Company's execution and delivery of the letter of intent is hereby ratified;
- that the Company enter into and perform its obligations under the preferred stock purchase agreement between the Company and Dynamic substantially in the form distributed to Company board members by e-mail on January 14, 2013, and those ancillary agreements provided for therein to which the Company is a party, each with such changes, if any, as are acceptable to the officers of the Company in their sole discretion, execution and delivery of those documents by the Company to be conclusive evidence of that acceptability; and
- that each of the officers of the Company is hereby authorized to sign on behalf of the Company all such further documents, certificates, and instruments, to take on behalf of the Company all such further actions, and to pay on behalf of the Company all such expenses that the officers of the Company determine to be necessary or desirable to carry out the foregoing resolutions, the execution and delivery of any such documents, certificates, and instruments, the taking of any such actions, and the payment of any such expenses to be conclusive evidence of that determination.

This consent is being signed on February 18, 2013.

____
John Doe

____
Robert Roe

____
Jane Doe