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THE PRIVATE BRIEF · BUSINESS

The Board Consent: What It Is, When You Need One, and the Three You Forgot

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IN BRIEF

- A board consent is a written resolution the directors sign instead of holding a meeting. Under New York Business Corporation Law section 708 it works only if every director signs, and the certificate of incorporation or by-laws can restrict it further.
- Issuing stock or options and electing officers need a board act, at a properly held meeting or by unanimous written consent. Stock option plans for a New York company's people also need shareholder approval, under state law and, for incentive stock options, federal tax law.
- The approvals startups most often skip are the one electing their officers, the one approving each individual option grant, and the catch-all that ratifies whatever got signed between meetings.

Everyone agreed on the call. The new head of engineering gets options, one founder is CEO, and the hosting contract gets signed. Three decisions, no objections, and nothing on paper. A year later a bank, an investor or a buyer asks to see the board approvals, and the company discovers that a conversation is not a corporate act.

This piece is about corporations formed in New York, which are governed by the state's Business Corporation Law. If your company was formed in Delaware or another state, that state's statute controls and you should check its rules rather than assume these.

What a board consent is

A board of directors acts in one of two ways. The default, under section 708 of the Business Corporation Law, is at a meeting: with a quorum present, the vote of a majority of the directors present is the act of the board. The alternative is a written consent, a resolution the directors sign instead of meeting. In New York that alternative works only one way: unless the certificate of incorporation or the by-laws restrict it, the board may act without a meeting if every director consents in writing. There is no majority-vote version for the board. If one director does not sign, the action has not been taken, however clearly everyone agreed.

The statute also says the resolution and the signed consents are filed with the minutes of the board's proceedings.

The document itself is short: a resolution, a signature line for each director, a date. What breaks down is the discipline of collecting every signature before treating a decision as made.

When you actually need board action

Some decisions need a board act under New York law, not just good practice. Here are three that come up in every young company.

Issuing stock or options. Under section 504, shares are issued for consideration (the price, whether money, property or services) that the board fixes, and under section 505 the corporation may issue options to buy shares on the consideration, terms and conditions the board fixes. A founder telling an early hire "you're getting two percent" is not an issuance.

Electing officers. Section 715 says the board may elect or appoint a president, one or more vice presidents, a secretary and a treasurer, and other officers it decides on or the by-laws provide for. The certificate of incorporation can hand some or all of those elections to the shareholders instead.

Adopting a stock option plan. Two sets of rules apply, and both point to the shareholders, not only the board.

- New York's own rule, in section 505(d): for a corporation whose shares are not listed on an exchange, options issued to directors, officers or employees as an incentive must be authorized by a majority of the votes cast at a shareholders' meeting, or be issued under a plan adopted by that kind of shareholder vote. Under section 615, shareholders can act by written consent instead of a meeting, signed by every shareholder entitled to vote unless the certificate of incorporation allows fewer.
- Federal tax law, if the options are meant to be incentive stock options (the kind that can get favorable tax treatment for the employee): Internal Revenue Code section 422(b) and Treasury Regulation section 1.422-2 require the plan to be approved by the shareholders within 12 months before or after the date the board adopts it. Without that approval, options under the plan cannot qualify as incentive stock options.

None of these has to happen at a meeting, but each needs either a properly held meeting recorded in minutes or a written consent signed by everyone whose signature the law requires.

> *If one director does not sign, the action has not been taken, however clearly everyone agreed.*

The three you forgot

Most startups get the obvious approvals done: incorporation, the founders' first shares. The smaller, later ones go missing.

1. The officer election

Someone has used the title CEO in an email signature since the first week, but no board act ever elected anyone to anything. The gap shows up the day a bank, a landlord or an insurer asks who is authorized to sign, and "we all agreed" is not an answer any of them wants.

There is a second trap here. Unless the certificate or by-laws say otherwise, section 715 has officers serve until the board meeting after the next annual meeting of shareholders, and then until a successor is chosen. Electing officers is a yearly item, not a one-time one.

2. The individual grant

Adopting the plan is one decision. Approving each option grant is another, every time: who receives it, how many shares, the vesting schedule, and the exercise price (the price the employee will pay to buy the shares). For an incentive stock option, section 422(b) requires that price to be at least the stock's fair market value at the time the option is granted. For tax purposes, the Treasury regulations treat the grant date as the date the corporation completes the corporate action that makes the offer, not the date an offer letter promised it. An option promised in July and approved in November is measured against the stock's value in November, not July.

3. The ratification

Something got signed between meetings (a lease, a vendor contract, a bank signature card) by an officer who assumed the authority was there. If the board never acted, the fix is a catch-all consent, signed by every director at the next opportunity, ratifying (formally approving after the fact) what already happened. It is unglamorous housekeeping, and it is what keeps a signature from being challenged later by someone with a reason to challenge it.

An illustration

This is a composite, not a client. A two-founder software company incorporates in New York in January, signs its first enterprise customer in April, and hires a head of engineering in July with an offer letter promising options. By September there is no consent electing either founder as an officer, no shareholder-approved plan, no board approval of the July grant, and a hosting contract signed in June by a finance lead nobody ever elected.

None of this was reckless. It is what happens when a small team moves faster than its own paperwork. The clean-up follows a pattern: a board consent electing the officers; shareholder approval of an option plan within the 12-month window; a board consent approving the grant, with the exercise price set at fair market value as of the new approval date and the offer letter squared with it; and a ratification consent for the hosting contract. Each is checked against the minute book (the company's official record of board and shareholder actions) before anything is filed. Keeping that book current as you go, rather than rebuilding it during an investor's review, is the kind of work a general counsel plan is meant to catch on a regular rhythm.

What a consent should say

A board consent that will hold up is specific, not decorative:

1. It states the resolution in full, not by reference to a conversation.
2. It is signed by every director. New York's statute has no majority written consent for the board.
3. Each signature is dated, and the company treats the action as taken only once the last director has signed.
4. It is filed with the minutes, as section 708 requires, rather than left in an inbox.

Where to start

This week, open your minute book or the folder that serves as one. List every officer title in use and every option anyone has been promised, and next to each, write the date of the board act (and, for options, the shareholder approval) that authorized it. Every blank line is a consent to prepare.

This is general information about New York corporate governance, not legal advice about your company. Tax treatment of equity depends on facts beyond this article, so talk to your accountant as well.

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Anthony is the Managing Partner of Clemenza Law Group and serves as general counsel to a wide range of companies and philanthropic organizations. Nearly every essay here began as a real question from a real client: the contract that landed at 4 p.m., the board that meets on Thursday. He writes them the way he would answer you across the table, plainly and with care.