



*The*

# *Chairman's Forum*

*Opening the door to new ideas*

*Newsletter*

*Gerrish Smith Tuck, Consultants and Attorneys*

*January 2017*

Happy New Year! As we start a new calendar year, for many of us it is a time of cleaning out and checking in. We often go through the ritual of cleaning out files, cleaning out our desks or cleaning out our lives. Similarly, we start checking in on where things stand perhaps with last year's resolutions, where we are financially, how close we may be to retirement, and similar factors. Likewise, we often do this in our businesses and it is really an appropriate time for Chairmen to take a full assessment of their Board of Directors, their organization as a whole, and to look to the future on what can be done differently or what things loom on the horizon to improve the organization in 2017.

In this year's first edition of *The Chairman's Forum Newsletter*, we take a look at some of those types of things that would help you tune up your bank, check in on its status and keep things running smoothly. We also look at a few situations we have encountered that may be important for you as Chairmen as we head into the new year. We hope you enjoy this edition and let us know what questions or comments you have or any ways that we can help.

Happy Reading!

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## *Chairman's Summary*

- ◆ Set a course for strategic planning.
- ◆ Refresh your basic corporate documents.
- ◆ Consider an organizational study and/or corporate governance evaluation.
- ◆ ESOP trustees beware.

## *Getting Your Arms Around the Big Picture*

As we head into a new year, as Chairmen you should have the big picture of your organization in mind, knowing what your strategic direction is for the year, understanding the priorities and longer term objectives you hope to achieve, knowing the goals that have been set for the management team to measure your community bank's and holding company's success throughout the year, and other typical strategic initiatives. If you failed to conduct a strategic planning session in the second half of 2016, the start of the year might be an appropriate time to get your arms back around the big picture. For example, as Chairmen, do you think your organization should be looking at M&A transactions in 2017, are you looking for further expansion of lines of business or contraction, do you need to focus on creating liquidity for aging shareholders who want cash? All of those are the

types of big picture strategic questions that can greatly impact your organization throughout the year, and it is better to have a plan to meet them rather than handling them on an ad hoc basis.

For strategic planning purposes, our firm, of course, does scores of formal strategic planning sessions each year for banks of all sizes all across the country. However, you do not necessarily have to have a guy in a suit ride in from out of town to help you facilitate your planning session every year. Some of our clients, for example, might have us facilitate a formal planning session every other year, but, in the in-between years, the bank takes an informal approach to simply getting the Board and senior management together one afternoon in the boardroom to review what has been done in the past, talk about the vision and goals for the coming year, and to make sure everyone is merely on the same page. The important thing as Chairman is not to necessarily get everyone offsite for two days each year, but to ensure that your Board and management team are all pulling in the same direction. An outside facilitator like our firm can certainly help in that regard, but a more informal approach can be beneficial for organizations as well. We encourage you as Chairmen to require your Board and management team to discuss those types of issues each year at least informally.

### ***Corporate Document Basics***

One of the banking “tune-up” items we typically recommend on a periodic basis is to review your corporate organizational documents. This

typically means the Articles of Incorporation/Charter, as well as the Bylaws of both the bank and your holding company. We often find that an organization will decide to move forward with a new transaction, but has not considered whether their corporate documents, which probably have not been reviewed in a while, might not even permit the type of activity they are considering. For example, a bank decides to finally raise some additional capital to take advantage of growth opportunities in the market and to ensure that capital levels remain appropriate given its anticipated asset growth. However, it may get a long way down the road toward the process of selling new shares and then realize that the company has preemptive rights which prohibit the issuance of new shares unless all other shareholders are provided the opportunity to acquire a pro rata portion.

So the idea is to constantly fine-tune and update your corporate documents to ensure that they meet your needs for the coming year in terms of their technical and practical application. This may even include things like the ability of the Board to remove a director, the ability of stockholders to call a special meeting of stockholders, or some other corporate governance procedure. Many times we find that unless a bank and holding company have gone through a check-up and review of their core organizational documents, the institution may not be able to pursue the types of transactions that it desires.

### **Organizational Assessments**

One of the somewhat new and “trendy” undertakings by many banks that seemed to start last year was what we would describe as “organizational

studies.” By this, we mean that organizations may have undertaken a board governance and structure study to look at committee structures, size of the board, board succession techniques, board evaluation processes, or something similar. Additionally, we saw those types of governance and board studies expand to include areas such as an interest rate risk analysis of the organization, a lending function top to bottom review, or something else similar in the nature of a “check-up.” As Chairman of the Board, you probably do not want the bank spending a ton of resources to do an entire organizational review of every aspect of the company, because if things were that bad, you would not be a healthy bank to start with. But an occasional review of various components within the organization such as board structure, the lending function, or something similar may be appropriate. Keep in mind how you might improve any weak links in your chain through those types of reviews and analysis.

### **Renewed Focus on ESOPs**

An issue that we initially highlighted last year was the Department of Labor’s increasing focus on the Trustees of Employee Stock Ownership Plans (ESOPs) which are normally board members, and the interrelation of the fiduciary duty as a Trustee of the ESOP, with typical board service. In particular, in the heightened M&A environment we are experiencing, there seems to be a renewed focus on whether the ESOP Trustees have received separate independent advice as it relates to the fairness of transactions to the ESOP. As a result, when our firm is representing a seller, for example, we will seek out a third party to provide the fairness opinion to the ESOP Trustees. On transactions where we are not otherwise involved, our firm

often is the party that would render this third party fairness opinion related to the ESOP. The notion is that the board members who serve in those dual capacities need to wear separate hats and need to truly advocate on behalf of the ESOP holders to ensure fairness in transactions and otherwise. The Department of Labor seems to be stepping up its focus on that level of independence. Therefore, as Chairmen, it would certainly be a wise move to take extra caution in how the ESOP governs itself, and to seek outside assistance from parties not otherwise tied to a transaction anytime necessary to prevent further problems.

***Exploit Corporate Formalities:  
Use Corporate Formalities to Your Benefit***

Sometimes as Chairmen you may need to exploit your corporate formalities to your benefit. Consider a situation we recently encountered where the bank desired to remove some problem directors at the bank level, but wasn't sure how to do that. However, the Chairman of the Board, whose family owned the majority of the stock of the holding company, agreed that the directors needed to be removed. As a result, we talked through the fact that once the holding company Board of Directors is selected by the shareholders (even if these problem directors are voted onto the holding company board), a simple majority vote of the Board of Directors of the holding company to elect the directors of the bank would be sufficient and the other directors could simply use their majority control of the Board to not re-elect the troublesome directors to the bank board. Likewise, the

Chairman and his family could exercise voting power to not even elect the problem directors to the holding company. So, majority rules still apply in most cases and sometimes you need to exploit that corporate formality to streamline your Board and organization.

### **Meeting Adjourned**

So, we are off and running with tidbits of information, cautions, warning signs, and hopefully, some sound strategic advice to help you and your organizations in 2017. We welcome your calls, questions or comments at any time, and we will look forward to seeing many of you throughout the year. We look forward to helping you.

Until next time,



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and



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