The Chairman's Forum Newsletter

Opening the door to new ideas

Gerrish Smith Tuck, Consultants and Attorneys

November 2019

Happy Thanksgiving! As we approach the Thanksgiving season, our firm is certainly thankful for the tremendous support we receive from our clients and friends across the country every year. Over the past 30 days, those of us who have been on the road have literally been from coast to coast meeting with community bankers in their hometowns and in their boardrooms for strategic planning or other matters. As part of that, we truly see the commitment and dedication you bring to the job and we are thankful to be a small part of your ongoing successes.

As a result of some of those recent meetings, we thought it might be appropriate to focus this month's edition of The Chairman's Forum Newsletter on some very practical and substantive discussions we have had with Boards and some ongoing corporate governance best practices to consider from a Chairman or director's position.

We hope you find this information helpful and we look forward to answering your questions and comments. We hope you have a great holiday and have abundant opportunity to spend time with your friends and family.

Happy Reading!

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THE

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NEWSLETTER

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Chairman's Summary

- Is unanimous better than a simple majority?
- Don't forget the duty of "oversight".
- Figuring out your mission, vision and values.
- Beware the "smooth dealer".

Is Unanimous Better Than a Simple Majority?

In running your Board of Directors' meetings, any time there is a vote required isn't it always better to have a unanimous vote rather than a mere majority? Generally speaking, the short answer would be "of course". But, if pushing for a unanimous decision or even holding out until you receive a unanimous decision becomes an impediment to overall organizational process then no, waiting on a unanimous decision is not better.

Keep in mind that Boards of Directors are not required, ethically, legally or otherwise to make decisions only by a unanimous vote all the time. In fact, if you find that all of your votes are always unanimous, perhaps that is an indication you are not promoting enough diversity of thought, background, experience or otherwise in your Board. Some of the least effective Boards we have seen are those that all "go along to get along". So, a little dissent in the Board is not necessarily a bad thing. Far too often, we see Boards that shy away from having fundamental substantive differences in Board meetings for the fear of hurting someone's feelings, disagreeing with the management or other thoughts. But think about the banks that failed during the financial crisis. Don't you think those Boards wish someone, anyone, would have spoken up and suggested perhaps they didn't need to make a particular loan?

Perhaps as dysfunctional as it sounds, dissent and disagreement are signs of a healthy Board of Directors. As long as it doesn't lead to inappropriate behavior or personal problems, we should welcome different business points of view.

Now, all of that being said, what do we do if we have a simple majority of the Board in favor of something, but clearly not unanimous consent? That is where the tough job of the Chairman comes into play. You must be willing to move forward based on the majority decision. However, the dissenters should clearly have their dissent noted in the minutes. Finally, the Chairman must be adamant in the Board rule that, while Board members are welcomed and should, in fact, disagree when they believe it appropriate within the Board meetings, a Board member who is not part of the majority is required by their fiduciary duty to support a majority Board decision outside of the boardroom. If a Board member believes the decision is so incorrect that they could not in good faith support it outside of the boardroom to stockholders and the community, then perhaps the Board member should consider resigning from the Board.

Duty of Oversight?

When we discuss with Chairmen and Boards of Directors their fiduciary duties, we often talk in terms of the two primary legal, fiduciary duties of the duty of care and duty of loyalty. The duty of care suggests that directors are required to adequately inform themselves before they make any important decisions. This means care is taken to evaluate alternatives, consider the consequences, make a financial determination, and weigh everything else in the balance to be fully informed before making organizational decisions. In technical terms, a director is required to act with the amount of care that an ordinarily prudent person would exercise in a similar position under similar circumstances. Most Boards are good at achieving that result.

The second duty is the duty of loyalty which simply requires the Board of Directors to act in a manner that they honestly believe to be in the best interest of the corporation and not their own personal interests. Sometimes this duty can become clouded with consideration of balancing the role of the director versus an individual's role as a stockholder or even the separate role of the Chairman of the Board. For the most part, absent some type of fraud or insider dealing, directors are good at maintaining their duty of loyalty to the organization.

A final duty that often gets overlooked though is the overriding duty of managing the organization generally. This might be viewed as a "duty of oversight" or a "duty of supervision". This implies that, while the Board member is not required to micromanage the organization, nor should he or she, a Board member is required along with the joint obligation of other Board members to have developed a system of internal corporate governance, a system of policies and procedures, a system of internal controls and other mechanisms that fully allow the director to maintain oversight of the company and protect it from internal and external forces that could harm the company and its stockholders. As Chairmen, do not forget this overriding duty of organizational supervision and oversight.

Mission, Vision and Values

At most of the strategic planning sessions that we conduct, there is some discussion of the organization's mission, vision and values. However, our firm is quite unique in the sense that we do not spend an inordinate amount of time on these elements at the actual planning session, require each director to name three adjectives that better describe how they feel about the organization or other "soft" approaches. Rather, we might simply ask for feedback on those items in a questionnaire in advance and briefly discuss them at the meeting. However, we do recognize that many organizations feel a need to further develop those items or to take a deeper dive to really sort through those, update them, revise them or take other steps. We think that can be a valuable tool, but let us provide a recommendation to the Chairmen and to the Board members.

What we found helpful in one client meeting we recently had was that the Board did, in fact, only briefly discuss mission, vision and values. However, based on feedback from the questionnaires, it seemed as though there was a real need to update those and make them consistent with where the organization was moving. So, rather than having the Board develop that task, the Board simply "delivered" to the management team a few key points that it thought were imperative for the overall direction of the organization and allowed a management team that is developed by the CEO to spend time working on a revised mission statement, the CEO developing a new written CEO vision statement and allowing the organization to craft updated value statements that were consistent with the overall strategic plan developed by the Board. So, if you struggle with those types of issues, consider delegating that to the management team, provided it remains consistent with the overall direction set by the Board.

Beware of the Smooth Dealer

Recently, we have had a number of clients relay to us a somewhat similar story (although not tied to a specific individual). The scenario involves the current M&A market where a bank is approached by a third party asking the bank if they might be interested in talking to "ABC" Bank about a potential deal if ABC Bank were willing to make it an offer at a certain price. Typically, that Board or bank might suggest that they were not aware that the other bank was even interested in them, but certainly they would exercise their fiduciary duties and consider any offer made by that bank. This "broker" then goes and talks to the other bank and asks them if they might be willing to purchase the target bank at a particular price if they knew that target bank was available for sale. Again, sometimes that Board might suggest that they were not aware the other bank was even available for sale, but they certainly would like to talk to them about putting the two banks together. As you can see, in those circumstances, neither the prospective buyer nor prospective seller initiated the contact and otherwise would not be interested in doing a deal, but there is a broker in the middle trying to pull two parties together (and thereby earn a fee) when the transaction otherwise might not make any sense for either party. So, be careful of the broker that seems to be trying to do that. If someone approaches you in that regard, simply ask the individual who it is that they represent. It either has to be you or the other party. And if you are not paying them, you need to make that known on the front-end.

Meeting Adjourned

As we approach year-end, it is not time to let up on your governance and oversight of the organization. It is, however, time to step back and be thankful for the blessings we all have, the great benefits we have to be involved in the community banking industry and the tremendous friends and colleagues we have made along the way. At Gerrish Smith Tuck, we are all certainly thankful for your friendship and look forward to continuing those relationships for years to come. We wish all of you and your families a wonderful Thanksgiving.

Until next time,

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