

The



Opening the door to new ideas

# Chairman's Forum

Newsletter

**Gerrish Smith Tuck, Consultants and Attorneys**

June 2019

We have just passed the longest day of the year and are officially now into summer. With that, we also just completed the hosting of our yearly Community Bank Merger & Acquisition Workshop. The result of that interaction with executives and board members from across the country, including some Chairmen, revealed some continuing questions that Chairmen have about their role in the M&A context. As a result, we set about trying to address some of those questions, and in this month's edition of *The Chairman's Forum Newsletter*, we will provide you some insight into those areas.

In addition, we also address some specific questions we received from a recent Chairman of the Board about general corporate governance practices related to board meetings and similar matters, and we also take a brief look at some regulatory interaction of which Chairmen should be aware.

Please continue to send us your comments and questions, and we hope you find valuable information in this month's *Chairman's Forum Newsletter*. Please let us know how we can continue to help.

Happy Reading!

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## *Chairman's Summary*

- ◆ Do the Chairman's and Director's roles change in an M&A context?
- ◆ Can you turn down an unsolicited offer?
- ◆ How is strategic planning influenced by today's M&A market?
- ◆ Basic questions are sometimes the hardest.
- ◆ Know how and when to respond to your regulator.

## *Do the Chairman's and Director's Roles Change in an M&A Context?*

One of the very basic questions we received in our recent M&A Workshop was whether the role of the Board and, by extension the Chairman, changes in an M&A context. The short answer is, yes, it does. In fact, being in an M&A context/environment subjects the organization to heightened board duties. Therefore, the Chairman of the Board should be aware of those heightened duties and govern how the M&A scenario is handled in order to provide the best protection for the organization. Consider a situation where the Board of Directors seems to want to engage in a quick sale of the organization to a friendly buyer down the street, but the price seems less than what could be generated in a full marketing of the organization. It may be the Chairman of the Board who needs to be the advocate for all shareholders and for maximizing shareholder value across the board. As a result, because of the heightened obligations and duties in

this M&A context, it is possible that more than one potential buyer should be considered.

Likewise, consider the heightened duties that might exist if your community bank holding company is contemplating buying another bank. While buying another organization may certainly have a greater amount of appeal, has the Board, the management and you as Chairman considered alternatively whether engaging in a stock repurchase program, developing a new product or service, or focusing on organizational efficiency might actually produce greater value to all of your stockholders? The point is that fiduciary obligations may not automatically require you to get the best price in a sale or absolutely pursue the strategy that provides one penny more of shareholder value, but heightened expectations may require the consideration of multiple alternatives among various competing strategies.

### ***Can You Turn Down an Unsolicited Offer?***

Of course, the short answer is yes, you can and, in many cases, you should turn down an unsolicited offer. But we are beginning to see more of those types of transactions, and the Chairman certainly has a key role to play. If an unsolicited offer is received, the question of whether you have to take additional steps may depend on whether it is truly an actual “offer.” If your CEO merely mentions that he was talking to a friend of his who is the president of another bank and they mentioned they might want to do a transaction with your bank at some point, that does not really constitute an offer. But, on the other hand, if a potential purchaser puts something in writing, commits to a specific acquisition price, and pursues other formalities, then your organization has the fiduciary responsibility to

actually consider and determine whether the cash or stock that is being offered presents a greater economic value to stockholders than retaining the stock of your organization. The Chairman may also want to ensure that the President and/or CEO of the bank is not directly involved in the negotiations if this type of offer is received since there is the possibility that he or she could be negotiating with their future boss. So the Chairman may have to become the chief negotiator in the transaction rather than the CEO. In essence, the receipt of a formal unsolicited offer forces your organization to accept the offer, reject the offer, or shop the offer. If the Board ultimately decides to reject the offer, you will find that there is little liability associated with making that choice, provided the organization utilized a well-structured process for handling the unsolicited offer and can demonstrate that it has given full consideration to the offer and has a legitimate basis for turning it down. If anyone is interested in an article we wrote a few years ago titled “Unsolicited Offers: From Cocktail Conversation to Firm Offers - When Does an Affirmative Director Duty Arise,” please email us at [psmith@gerrish.com](mailto:psmith@gerrish.com) and we will provide a copy to you.

***Your Strategic Planning Should be Influenced  
by the M&A Market***

Organizations that are the best performers tend to be those that exercise the best corporate governance and who routinely engage in some type of formal strategic planning. We facilitate scores of planning sessions each year for financial institutions of all different sizes in all parts of the country and we can attest to that being almost universally true. But in the current environment, strategic planning will, by necessity, take on a different

approach because the merger and acquisition market, particularly among community banks, is altering the ways in which we look at strategic planning.

We do not mean to imply that strategic planning has to lead to a sale of the organization; quite the contrary. But because there is so much merger and acquisition activity currently occurring, a Chairman of the Board fully engaging his directors should ask, at least once a year, whether the organization ought to be looking to expand by buying other organizations that are available, or whether your own organization should consider a sale. Often, the answer on the sale side is a resounding “NO!” If that is the case, which we hope it is, then the second, more difficult question is “How?” How do we maintain our independence, what steps should we be taking, how do we fight off an unsolicited offer? The point is that the current acquisition market is effecting all organizations, including those merely trying to maintain their independence, because you need a response for your stockholders as to why you are not looking to make an acquisition to expand the organization and, likewise, some stockholders are going to want to know why you haven’t tried to get them the best value possible by selling the organization. Shape your strategic planning to address those questions rather than having them forced upon you by stockholders.

### ***New Chairmen Sometimes Ask the Best Questions***

We recently received an inquiry from an individual who was assuming her new role as Chairman of the Board. By taking on this new role, it was refreshing to have her reach out to us with some very basic and fundamental questions that, in essence, revolve around the question of,

“Why is my Board handling things this way?” It is often wonderful to have a fresh perspective on why things have always been done the way they are. In this case, the Chairman was asking a very straightforward question of why there were so many things that had to be approved every month as part of their standard agenda. In fact, she questioned whether all of these items actually had to be subject to a director vote and formally approved, or whether it was true that some of these items are merely for review and acceptance or acknowledgement. As you might suspect, when you take a critical look at some of those typical agenda items, there is truly no need to formally approve things, but rather they are a discussion point for directors. Of course, this leads to the further questioning of why certain things remain on the agenda. In fact, one of our clients recently discovered that the reason they were discussing a particular item at every board meeting is because it was somewhat mandated by the regulators back in the 1980’s when they were under an enforcement action, and they have just constantly been doing it ever since.

Keep in mind that a board meeting is solely for the purpose of allowing the directors to exercise their fiduciary duties in terms of governing the organization. If you are going through countless approvals, reviewing documents and considering topics on the agenda merely because you always have, but there seems to be no current applicability to why it is being done, do not hesitate to make a change to streamline the process, eliminate items, or even to add new items that may be relevant for helping you evaluate the bank’s health in the current environment. Ask the simple question of why you are doing things a certain way, and if you do not get a really good answer, consider making a change.

## ***Know How and When to Respond to Your Regulator***

Recently, we were involved in a situation where a client was not exactly seeing eye-to-eye with its primary federal regulator. Without revealing the confidences of the specific circumstance, it basically involved the bank believing that some things should be viewed and interpreted in a particular fashion because, in the bank's view, the federal regulator had already confirmed to the bank it would be interpreted that way. However, when the federal regulator got to the point of putting something in writing with regard to that issue, the language being utilized by the regulator did not seem to match the bank's interpretation nor what they believe the regulator had told them previously. The bank considered a host of different possible responses, including no response at all and merely acquiescing to their regulator. However, this seemed to be a case where the regulatory agency's position was not fully supportable. As a result, even though the federal regulator was holding its ground, the bank indicated that they might not be willing to go along with the federal regulator's interpretation but would review things and be back in touch. In essence, the bank backed away from a potential confrontation without necessarily giving ground on its arguments.

After a few days passed with no commentary from either side, the organization decided that the best approach was to stand their ground, but to not necessarily be confrontational with their regulator. Rather, they asked the federal regulator to reconsider its position and outlined for the regulator, in writing, several key points of why the bank felt the regulator should reconsider its position and adopt the position of the bank. To the credit of

the federal regulator, they agreed with the bank's position upon reconsideration and the result was a better outcome for the bank, better confidence by the bank in their regulator who agreed to stand by an earlier interpretation they had given to the bank, and a more speedy resolution to the problem which benefits not only the regulator, but the bank and its stockholders as well. As Chairman, be mindful that there are times to acquiesce to regulatory requests (no matter how senseless they may seem) and there are also times when the organization needs to stand its ground.

### **Meeting Adjourned**

There is still a lot going on in community banking circles across the country and still a lot for Chairmen to be focused on and new lessons to learn every day. We hope *The Chairman's Forum Newsletter* provides a resource to you as a vital part of your continuing education, and anytime we can answer questions for you, do not hesitate to reach out to us.

Continue to enjoy your summer and let us know if we can help.

Until next time,



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