



THE

Board Chair Forum

Opening the door to new ideas

NEWSLETTER

Gerrish Smith Tuck, Consultants and Attorneys

November/December 2021

Welcome to the final edition of *The Board Chair Forum Newsletter* for 2021. In this year end edition of *The Board Chair Forum Newsletter*, we continue to look at some emerging issues from recent strategic planning sessions, and we try to provide you some insight and an outlook for 2022.

In particular, you will notice that we believe the role of the Board Chair continues to evolve. We see that trend continuing into 2022 and we point out a few areas where we believe the Board Chair will need to exhibit strong leadership going forward. From the Board Chair's role in continuing to promote organizational relevance, to addressing concerns of the ability to remain independent, embracing change in technology and being on the lookout for emerging regulatory concerns, you will certainly have your hands full in 2022 and beyond! However, we hope the good news is that you have found a trusted partner in our firm to help you navigate the new world in which we find ourselves. We have appreciated the opportunity to work with many of you this past year and look forward to new and renewed relationships in 2022. Wishing all of you a blessed Christmas and a prosperous New Year!

Happy Reading!

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Board Chair's Summary

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Much Work Remains to be Done

There certainly seems to be a recurring theme for the Board Chair role every year and that is that the role becomes more important, more focused, and perhaps harder. We believe that is because the Board Chair role continues to evolve from being merely administrative or ceremonial to being a true fiduciary role which requires a specific skill set and where specific duties and responsibilities exist. In 2021 we have seen that play out in terms of continuing COVID related issues, navigating the merger and acquisition environment, dealing with an aging Board, management and stockholder base, as well as addressing emerging concerns over diversity, inclusion, environmental, social, and governance issues.

We continue to see those areas and others being a focus for the Board Chair and the Board in general throughout 2022. So, stay on your guard, stay educated on current developments and the Board Chair's ever-changing role and you should be able to manage your job appropriately for the continued success and profitability of your Organization.

What is the President's Role in Board Meetings?

Throughout 2021 we have seen multiple different ways in which Boards of Directors function and exercise their fiduciary duties. One of the interesting issues is the role that the President/CEO (if he or she is not the Board Chair) plays in the Board meeting. First, “best” corporate governance suggests that the Board Chair should be an independent outside (non-management) Director. However, the reality is that in many if not most community banks that is not always possible and it is not unusual at all for one individual to hold the roles of Board Chair, Chief Executive Officer and President. From our firm’s perspective, we do not see those combined roles being much of a problem at all for most community banks and most are able to make the combined roles work well. But as an organization grows in size and complexity, it may be appropriate to divide all three of those roles into different individuals. However, there is no magic asset size threshold where that has to occur.

Next, to what extent do you involve your President/CEO in an executive session of a meeting of only the Board of Directors where management is excluded if your President/CEO is also a Board member? In those circumstances the President/CEO certainly has a right to attend the initial executive session as a Board member. But we also think it’s appropriate to hold what we often call the “Executive Executive” session where only outside directors meet and the President/CEO is further excluded even when that President/CEO is also a Board member. However, as we have detailed in previous editions of this newsletter, under no circumstances should any decisions be made at the “Executive Executive” session when a Board member is available to participate but has otherwise been excluded.

Finally, we encountered a recent situation where the bank President/CEO was not even a member of the Board of Directors. That was not an oversight but was intentional on behalf of the Board of Directors not to nominate and elect the current President/CEO to a Board position based on some past problem with a previous President/CEO. That type of arrangement is a bit unusual (and not necessarily one that we recommend) and in some states, and under the National Bank Act for an OCC regulated bank, it is statutorily mandated that the individual designated as the President of the bank serve as a Board member. So, you might want to check your state statutes if you have any type of unusual arrangement in that regard.

Utilize whatever structure is best for your organization but make sure you have well thought out and valid reasons for the structure that you adopt and make sure those reasons are fully communicated to all parties.

Process May be More Important Than Price

We often get asked about the liability of directors when considering a purchase or sale transaction both from an acquiror's standpoint and the standpoint of the target. So, to answer the most typical questions, could a Board of Directors be sued by a stockholder for approving a sale of the bank? Yes. Could a Board of Directors be sued by a stockholder for failure to sell the bank after receiving a viable offer? Yes. Could a Board of Directors be sued for pursuing a purchase of another bank and paying too much? Yes. So, given all of this potential liability (of course we know lawyers can sue for anything) how does a Board protect itself on either side of the potential transaction and avoid liability?

The quick answer to the questions above might be to say that the organizations must make sure the price is correct. However, it's really impossible to know if the price is "correct" except when viewing it in hindsight based on the future performance of the combined organizations. Therefore, what is arguably equally as important as the price in a transaction is the process that both the buyer and seller go through in arriving at the price. For example, was a comprehensive due diligence performed? Was your Board represented by sophisticated counsel in negotiating the transaction? Did your Board request an independent fairness opinion? Did your Board keep shareholder value in mind but also consider other appropriate alternatives that arguably might be better for your community? Did your Board engage in a deliberative process where Board members were given the opportunity to fully investigate opportunities, ask questions, request other data, etc.?

In most cases, if a Board of either a buyer or a seller can answer those questions in a positive way which demonstrates the organized and deliberative process that was undertaken, then even if a price paid or received turns out to be less than desirable when viewing it in hindsight, most courts will not go back and second guess a Board's decision and find fault even if the decision ultimately proves less than beneficial. So, in this hectic M&A environment from a Board Chair standpoint, ensure that you are focused on something more than just price and really focus on the process that is being undertaken by your Board to consider the opportunity at

hand. And, of course, utilize an outside firm specializing in legal and consulting advice for financial institutions. If you need a recommendation let us know!

More Information for Year-End Planning

Throughout several of our newsletters this year, we have discussed the mechanics of good practices and bad practices in connection with strategic planning. We hope that what we've conveyed through that is that there is no one particular way that works for every organization and you need to do what is best for your institution. That was highlighted to us just in the past few weeks where we've had experiences where one organization basically had the entire Board conduct strategic planning without any management members and on another occasion the entire management team met with almost no Board members.

In a textbook answer you would want your Board and management both involved at some level even if that is not during the same meeting. So, as you look forward into 2022 for strategic planning, try to set aside specific time for both your Board to conduct planning (perhaps it's not a two-day event offsite somewhere if your Board is not accustomed to engaging in the strategic planning process, but a few designated hours in the Board room) as well as setting aside time for your management team to focus on the more tactical and operational aspects to implement strategies. Again, you might not want a third of your management team all out of the Bank for three or four days but having designated times or specific work groups assigned to work on goals and action plans can be helpful. Once again, the point is to simply do what is best for your organization or to use an outside facilitator to help you find the process that works best for your organization rather than simply following what everyone else does.

Why Do You Have Brakes?

Why does your vehicle have brakes? That was a question posed by the Technology and Risk Officer of an organization at a recent meeting we attended. Of course, the answer almost all of us immediately would say is something like "to help you stop the car". But think about it from an almost opposite viewpoint. Really the point of having brakes on a car is to allow you to go substantially faster than you could if you had no brakes at all.

If you want to tie that analogy into the work of the Board Chair and the Directors as a team, put it in the context of Enterprise Risk Management and overall assessment of risk by the Board. In a similar fashion, the role of an appropriate enterprise risk management program is not to slow down the organization and keep it from doing certain things but, rather, an appropriate Enterprise Risk Management program allows the organization to take on more risk, run the Bank “faster” and manage risk appropriately.

It's a pretty good analogy. You want to have your Board and management focused on establishing appropriate parameters for organizational risk, not to necessarily limit what can be done but to establish tolerances and procedures that help you go as “fast” or take on as much risk, as your Board desires. So, reconsider how your Board views risk.

Meeting Adjourned

Well, it looks like we made it through another year with all of its ups and downs and unpredictability. As we hope you are looking forward into 2022, we wanted to give you a last-minute reminder about the actual open forum discussion we hold in January each year styled as the Board Chair Forum. It will be held January 13-14, 2022 at the Ritz Carlton in Naples, Florida. As of this writing, there may still be a few slots left before the hotel is at its absolute maximum capacity and the room block has expired. But if you are interested in attending, please let us know as soon as possible or you may register at <https://barretbatnking.org/landings/community-banking-board-chair-forum/> and perhaps the hotel may be able to still provide the designated room rate. We are going to have a relatively large group this year with representation from all different parts of the country and different size organizations so we are looking forward to seeing everyone and we are hoping the weather in Naples will cooperate! As many of you know, this will be a gathering of the Chair position, and other Directors and Officers from Boards of community banks across the country and normally is a lively and interesting discussion facilitated by our firm. In addition, if you would like to use that time to “bend our ear” on any issues your Organization is facing in 2022, we would be happy to try to arrange a time to chat briefly with you.

There are many positive things to look forward to in 2022 and being able to be of service to you and your Organization would certainly be at the top of our list so please let us know any time we can be of assistance. Wishing all of you joyous Christmas blessings!

Until next time and the next year,



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