



THE

Board Chair Forum

NEWSLETTER

Opening the door to new ideas

Gerrish Smith Tuck, Consultants and Attorneys

June 2025

As we begin to roll into the summer months, we are continuing to see quite a bit of board activity around the country. Some of this relates to strategic planning, some of it relates to mid-year annual meetings, and some of it relates to special situations boards are encountering relating to fiduciary duties. In this month's edition of *The Board Chair Forum Newsletter* we take a look at the constant struggle to appropriately determine if board members are appropriately exercising their fiduciary duties, consider other corporate governance best practices for the Board Chair and the Board, and tackle a few other miscellaneous issues we have encountered in recent weeks.

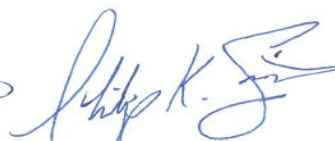
It also looks like the annual Board Chair Forum that we host each year in January in conjunction with the Barret School of Banking, is already sold out for 2026, but your board members might get on the waiting list. Also, if you would have interest in our firm hosting two Board Chair Forum events each year in different parts of the country, we would also welcome your feedback and some recommendations. The Board Chair and directors can never have too much interaction with similarly situated individuals and the organization can never have too much education, so we will keep pushing forward!

We hope you enjoy this month's edition.

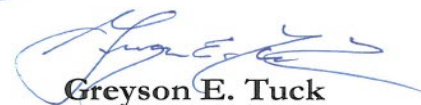
Happy Reading!



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Board Chair's Summary

- ◆ ***What Are Your Fiduciary Duties Really?***
- ◆ ***Continue to Focus on Relevancy***
- ◆ ***Fiduciary Duties and Regulatory Matters***
- ◆ ***To Whom Do You Owe a Duty?***

What Are Your Fiduciary Duties Really?

Most Board Chairs, board members and members of management have heard forever that an organization should practice good corporate governance, and good corporate governance normally occurs when directors, in particular, are appropriately adhering to their fiduciary duties. But occasionally, we need a reminder of what the core fiduciary duties really are. For example, in one recent situation a director was concerned that he possibly could be violating his fiduciary duties as a board member by voting against something that it seemed like all of the other directors were in favor of doing. What do you think about that? The response that we gave is that, if this particular director had an honest and well-founded belief that the action to be taken was not as good as the alternative being proposed by the director, and if that director honestly felt that his alternative was in the best interest of the organization and its shareholders, then the director actually had a fiduciary duty not to agree with the rest of the Board. But, as you can probably see from this simple example, the rest of the board members also had the same fiduciary duty to vote

in the way that they honestly felt was in the best interest of the organization. Interestingly, both parties can appropriately exercise their fiduciary duties as independent members of the same Board by voting in opposite directions. Appropriately exercising your fiduciary duties does not simply mean agreeing with the majority.

In thinking about similar scenarios, it might be important to go back to square one with a reminder of the most basic and fundamental fiduciary duties. The first is the Duty of Care. In most states, there are statutes that require a director to discharge his or her duties with the care that a person in a similar position and in similar circumstances would reasonably believe to be appropriate. Therefore, the Duty of Care requires the director to be adequately informed, to ask appropriate questions, and then, once informed, act with a reasonable amount of care in how they vote or in the actions they take. Clearly, you can see that different directors can each therefore appropriately exercise their Duty of Care even when they disagree on a particular matter.

The second most fundamental duty is the Duty of Loyalty. As the name implies, once the director is fully informed and therefore acts with due care, the director should act in what they honestly and in good faith believe are in the best interests of the corporation, and not in the director's own interest, or in the interest of some third party. Therefore, they are being loyal to the company. Consider, for example, the organization is considering purchasing a piece of property for future expansion purposes. As a result of discussion at a board meeting, a vote on purchasing the property is tabled in order to allow the directors time to go physically view the potential new location. In the interim, before the vote comes back to the Board, one of the directors, through a company he owns, goes out and secures a right of first refusal to acquire the property under the comment that he doesn't want the bank to miss the opportunity to put a new location there, so he has secured the property and will lease it back to the bank for a reasonable fee. We think you can smell what's going on there and you might easily see how that could at least be argued as a violation of the Duty of Loyalty to the organization, where the director appears to be trying to enrich himself.

So even these most fundamental duties sometimes seem to be moving targets based on the circumstances and often based on the intent of the party, but it is appropriate every so often to remind directors of these core duties. If you haven't revisited those issues in a while, it might be a good time for the Board Chair to bring that up for directors.

As an outgrowth from those core duties, there are new and emerging issues that seem to suggest there are even a wider array of core duties, all of which would be subject to interpretation by the courts and the circumstances. Some of these other duties that we believe are really outgrowths of the two core duties, include things like the Duty of Good Faith, the Duty of Candor, and the Duty of Confidentiality. Beyond those technical issues, the Board Chair might even impose his or her own duties on directors such as the duty to show up on time, the duty to be prepared, the duty to ask questions, the duty to be educated on bank matters, or the duty to never eat the last doughnut!

Continue to Focus on Relevancy

As we have harped on in past newsletters, we believe there is a growing acknowledgement of the need to continue to promote organizational relevancy. However, we think this is often more difficult than it may seem. One of the reasons we believe some organizations struggle with relevancy is because the organization keeps measuring relevancy against its same old standard, or it keeps asking the same group (often other board members) if the organization is relevant. For example, there is no need to waste time and money investing in something like an *updated* mobile app if you merely ask other board members how often they use the *existing* app. Similarly, if you only ask your spouse if your clothes look okay, you will get the same answer for 30 years. Try asking your kids or grandkids.

The concern is that simply looking in a mirror or asking your fellow colleagues may result in a constant belief you are relevant, but sometimes you need to ask other groups (your younger employees, your customers, etc.). As one Board Chair rightly put it to us when discussing the fact that his organization had somewhat failed to realize they were not

really that relevant, his comment was that it seems his organization was “trying to sell encyclopedias to teenagers.” We thought that was a pretty good analogy. In essence, the bank had continued to do the same things because they continued to ask the same group if they wanted any change, but they never asked different groups. For our younger readers, please ask someone over 50 what an encyclopedia is and how to use it! Define relevancy in a way that is meaningful to your organization.

Fiduciary Duties and Regulatory Matters

As a further extension of overall fiduciary duties, we have recently encountered a number of interesting situations where a Board of Directors may unfortunately have to deal with some downgrades from a recent exam, and the whole question of the appropriate exercise of the Board’s fiduciary duties when dealing with adverse exam findings comes into play. Accordingly, because we are often called on to serve as special counsel to organizations dealing with adverse regulatory findings, we thought we would pass along a few key points for Boards that face these situations in the hopes that you never have to use this advice.

The primary point in dealing with adverse exam findings and the possibility of a regulatory enforcement action goes back to the first article of this newsletter regarding the duty to be fully informed. That duty means fully understanding what your options are, as well. Keep in mind that practically all financial institutions and their boards at some point in the lifecycle of the organization experience some type of downgrades, if nothing else, just as a result of changing economic cycles. An adverse exam, or even the suggestion of a regulatory enforcement action, is not necessarily the end of the world. Importantly, rather than immediately having a negative reaction with the belief that the regulators may not know what they are talking about, exercising your fiduciary duties as a director should first prompt you to have an open mind to the criticisms that are being offered (even though those criticisms are often aimed at the Board itself), and see if there are true findings that could help improve the organization through corrective action.

However, just because an examiner makes a particular finding and suggests a corrective course of action (through some type of enforcement action or otherwise), does not mean that the board members should always simply acquiesce and do exactly what the regulators are suggesting. Again, an appropriate exercise of your fiduciary duties requires a further investigation and determination on whether the examiners have it right, and if any type of corrective action suggested is the most appropriate outcome. Conducting that analysis might further require you in the exercise of fiduciary duties to seek outside expertise.

In the face of a proposed enforcement action, it is important to be fully informed of the differences between formal enforcement actions (such as a Consent Order) and informal enforcement actions (such as a Memorandum of Understanding or Board Resolution). There are material differences between those that might shape how board members respond and react. If you would like further information on the distinctions between the types of enforcement actions and alternative responses, please let us know and we will send you appropriate information.

Most importantly, if an enforcement action is recommended to the Board or presented to a Board by a regulatory agency, we believe, in the exercise of your fiduciary duties, that it is incumbent upon the Board to closely scrutinize the language of the enforcement action and to negotiate terms with which the organization can comply. Arguably, it is a breach of your fiduciary duties to sign something knowing there is no way it can be accomplished. For example, if an enforcement action were to require a bank to increase capital to 9% within 60 days, the Board generally should not sign that type of enforcement action if there is no way it can accomplish the request.

So, as it relates to exercising fiduciary duties, many circumstances require a uniqueness of your approach. Sometimes an appropriate exercise of fiduciary duties means affirmatively taking certain steps. However, in other instances, appropriately exercising fiduciary duties means refraining from taking certain steps, even if other parties are asking you to do so.

To Whom Do You Owe a Duty?

One of the interesting legal questions in a director exercising fiduciary duties is trying to answer the question, “To whom do you owe your duties?” The short answer, of course, is that you owe your fiduciary duties to the organization, and by extension, to the shareholders. But we have seen some interesting nuances on that play out in real life. What if you are a director of the bank but not a director of the holding company? If the holding company itself, through its Board of Directors, directs the bank directors to do something, then is the bank director in the exercise of his or her fiduciary duties to the shareholder (the holding company) required to carry out that request (assuming it is not illegal, immoral, unethical, etc.)? We have also often heard, somewhat incorrectly, that board members have a fiduciary duty to shareholders, but they have an enhanced duty to minority stockholders or to small groups of stockholders. However, that is not really accurate. There is an ethical obligation to treat minority stockholders in a fair manner and not in an unjust manner compared to the majority shareholders, but in terms of exercising overall fiduciary duties, it is arguable that the board members have a fiduciary duty to the will and wishes of the majority of the shareholders, not merely to some small faction of the shareholders. Therefore, again, this whole idea of exercising your duties as a director can be a bit nuanced and not so much black and white, so continue to be careful and diligent in how you go about your job, and seek outside assistance when needed.


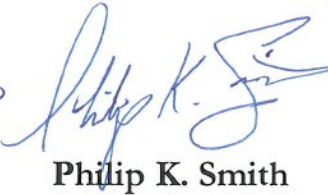
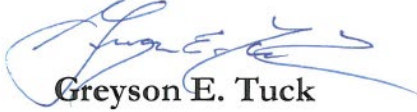
Meeting Adjourned

One final question for this newsletter. Are you required to have a Chairman of the Board? You would generally think so, but, in many instances (depending on your corporate documents or state law) there is no actual requirement that one individual be selected as the Board Chair. We do have clients that have not elected a Board Chair and simply allow bank management to organize and call board meetings, and then simply govern by majority rule of the Board as a whole. We think that process might still work for smaller

organizations but there is probably a time at which you outgrow that and need a bit of a greater level of formality in your board governance. If you happen to be one of those organizations that does not really have a formal Board Chair appointed, you are not alone, but best corporate governance practice would suggest having a Lead Director, at a minimum, if not titled as Board Chair, to help govern meetings and act in circumstances when it is not appropriate for management to do so.

So, maintain your relevance, maintain your fiduciary duties, and let us know anytime we can help.

Until next time,

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