



Opening the door to new ideas

THE

Board Chair Forum

NEWSLETTER

Gerrish Smith Tuck, Consultants and Attorneys

January 2026

Happy New Year and welcome to the Winter weather update edition of The Board Chair Forum Newsletter! It seems in most of the parts of the country we have been traveling recently and even in our hometowns the weather has been less than perfect by encountering snow, rain, freezing rain, ice, sleet, and any other form of wet or frozen precipitation that might be available! But, interestingly, we did find one place with absolutely perfect weather of 75 degrees and bright sunshine - in Marco Island, Florida, where we facilitated the yearly Board Chair Forum, which was the catalyst for this newsletter! So, if you missed it, not only did you miss amazing content, but you also missed the best weather in the country (for at least a few days).

In this year's session (even with 13 cancellations based on inability to travel, including one unnamed representative from our firm) we still had 41 attendees from 20 different states, and the conversation, discussion, and information sharing was robust. In a future edition of the Board Chair Forum Newsletter, we will update some of the key topics and issues that came out of this year's session. However, in this month's edition, we take a slightly different approach.

Because of recent trends in the M&A market, particularly for community banks, we are going to focus on a singular issue in this month's edition and utilize an article we have written in the past to highlight these discussions. The central issue is understanding the Board's obligation if an unsolicited offer is received, a general understanding of the Board's duties in the overall M&A context, and in fact, knowing and better understanding when your fiduciary duties actually arise. Not all discussions are truly an offer. So we will try to unpack a series of different scenarios and questions and hope you find it interesting. If you find yourself in one of these situations and we can be of assistance, please let us know.

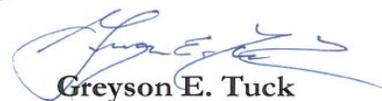
Happy Reading!



Jeffrey C. Gerrish



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Board Chair's Summary

- ◆ *If Someone Discusses a Potential Transaction with a Director, does that Trigger a Fiduciary Duty?*
- ◆ *When is an Offer Not Really an Offer?*
- ◆ *If the Board has Previously Decided to Remain Independent, Why Does It Matter if an Unsolicited Offer is for a Good Price?*
- ◆ *How Can the Board Protect Itself in these Circumstances?*

Unsolicited Offers: From Cocktail Conversation to Firm Offers

When Does an Affirmative Director Duty Arise

At the recent Board Chair Forum, as well as in our private practice, we have been fielding a number of different types of questions that are almost in the nature of “asking for a friend.” It seems banks of all different sizes and all different locations appear to be getting an increased number of truly unsolicited offers. When that occurs, Boards often find themselves struggling for how to appropriately exercise fiduciary duties or wondering if they need to do anything at all, and naturally want to avoid expensive professional fees if they can avoid them. So, there is often quite a bit of confusion over when an actual affirmative legal duty to take certain steps arises. We hope to address some of those below.

Independence and the Core Obligations

Almost all Boards that we come in contact with at the community bank level, generally start off with the idea that, if possible, they want to maintain their independence. We applaud and support that decision. However, most of those organizations also acknowledge their understanding of the core fiduciary duty to at least give some consideration to any viable offer that is presented, notwithstanding their desire to remain independent. Those organizations correctly recognize that there is some legal obligation to ensure you are appropriately fulfilling the role to enhance stockholder value and stakeholder value, and therefore, a true offer likely cannot simply be discarded without some consideration. It really is a question of what to do when an actual offer is presented, but the conflict often comes in when there are different types of expressions of interest or things other than clearly straightforward (and perhaps desired or requested) formal offers. Set forth below are a few thoughts and ideas on how to handle the process and what the Board's true fiduciary obligations are in different scenarios.

We have a good bank, people are always talking to us,

we don't have to do anything, do we?

Questions that often come up among institutions that are frequent targets of unsolicited offers are how to respond to an unsolicited offer when you truly want to remain independent. When does a duty to take action or to notify stockholders arise? While sometimes the answer may be obvious, there are gray areas that may leave a Director wondering, am I supposed to report that to the Board or was that just small talk? Some situations may be disregarded and even forgotten as mere "cocktail conversation," while other types of discussion may require a director to report back to the full Board. The following scenarios mirror situations that typically present themselves in real life and are designed to offer some guidance in making the decision of whether reporting, and further action, is necessary or legally required. Many directors would probably do so under the

idea that it is information all directors should probably have. We even have some clients that adopt a board policy that suggests that anytime an outside third party has discussions with a director about any type of potential transaction, it should be reported to the Board.

The first and most common situation is where you or one of your fellow Directors has some informal discussions with a representative of another institution. During your conversation, that individual makes a comment along the lines of: *“We should consider putting our two banks together.”* In this situation, the Board member really has no obligation to do anything with that information and it is merely what it is, an informal discussion like you might have at a cocktail party, bank conference, etc. There is really not even a duty to report that conversation back to the full Board, though many Directors would probably do so.

***Are they fishing for information, conducting a mass solicitation,
or making a specific offer?***

A trickier situation arises when an individual board member has a more substantive discussion with a representative of another bank, where the other individual says something like: *“Our bank is looking for new markets for growth and our Board thinks your bank and your community would be a good fit for us. Would you and your Board be willing to talk about a possible affiliation of our institutions and, if preliminary talks go well, we might even be happy to provide your bank with a formal written offer.”* With that type of more substantive discussion, the Director who receives that information does have an obligation to report that discussion back to the full Board. However, the Board really has no affirmative duty to take additional steps unless and until there is additional contact by the bank who initiated the discussion.

Another problematic situation can arise when the Bank President or the Board Chairman or an individual director receives a letter from another institution that may be somewhat in

the nature of a general solicitation, yet it is unclear. Assume the letter says something like the following: *“ABC Regional Bank Holding Company is constantly seeking growth and expansion opportunities and has identified your institution as a likely candidate for discussions of a possible affiliation. We look forward to discussing these opportunities with you. Please call us at your earliest convenience to arrange a time when we might discuss these matters in more detail.”* The individual receiving that kind of general solicitation letter certainly has an obligation to bring it to the entire Board of Directors for the Board to at least give preliminary consideration to it. However, because the letter is merely in the nature of a general solicitation that might have been sent to dozens of banks, the Board really has no additional or affirmative obligation to take specific steps to contact the person sending the letter, to conduct any independent analysis, and certainly has no additional obligation to report such information to the stockholders. In that situation, the Board should note that it received the letter, note that the Board gave preliminary discussion to it and, assuming the Board has no current desire to sell the institution, the Board may simply take no further action unless and until the other institution makes a more formalized offer.

Wait a minute – I thought we were NOT for sale!

On the other end of the spectrum, perhaps by another organization having preliminary discussions with bank officers or directors, or perhaps simply on a totally “out of the blue” basis, or (perhaps more likely) through contact (or perhaps nagging) of some aggressive investment banker, your bank receives a more formalized letter that says something like the following: *“ABC Bancorporation believes that an affiliation with your institution would produce mutually beneficial results for both entities. After reviewing publicly available financial information in conjunction with surveying relevant aspects of your banking market, the Board of Directors of ABC Bancorporation has authorized me to present to you the following offer for a proposed affiliation of our institutions. ABC Bancorporation will pay to stockholders of your organization cash equal to \$300 per share*

representing an acquisition price of 1.50 times December 31, 2025 book value and 15.5 times 2025 net earnings of your institution. The offer is subject to the execution of a definitive agreement and further due diligence.”

Obviously, that type of formal letter with actual structure and pricing does constitute a formal written offer to your institution and, as such, its receipt formally requires the Board to take certain specific steps. The Board cannot simply consider it briefly at a Board meeting, vote up or down and move on to other business. Notice that both the immediate accepting or declining of the offer without further analysis could both, arguably, be a breach of fiduciary duties. The receipt of that type of formalized offer imposes a fiduciary duty on the Board of Directors to analyze the offer to determine whether it is in the best interest of stockholders and stakeholders, including customers, the community, and employees. That means the Board will need to undertake a financial analysis of comparing the offer and its future impact, to the likely future results of operations of your institution on a status quo basis. For our clients, we typically run the offer through our acquisition models along with running future growth scenarios for the institution to compare, on an apples to apples basis, whether stockholders and stakeholders of the target are better off accepting the offer from the other institution or maintaining their current stock ownership over the long term.

However, even in taking those steps to analyze the offer and determine whether the Board believes the offer is in the best interest of stockholders and stakeholders, the Board does not have a duty to disclose the offer to stockholders at that point. In fact, the Board could go through the complete financial and strategic analysis of whether to accept the offer and, if it ultimately decides to reject the offer, the stockholders really never need to know about it. For some of our clients that are frequent targets that may receive a handful of unsolicited offers throughout the year, the Board has elected to add a statement to the President’s yearly letter to stockholders (or a special targeted letter) that might read similar to the following: *“From time to time, the Board of Directors receives unsolicited offers from other*

institutions. To date, the Board has not found any such offers to be in the best interests of stockholders or stakeholders and has not elected to pursue further discussions with those entities.”

For a non-public company, stockholders need not be informed until a formal definitive agreement is executed between the parties. In that situation, most banks will then send out a letter to their stockholders on the day the formal binding definitive agreement is executed indicating to stockholders that an agreement has been reached with the other institution and that in the coming weeks stockholders will be receiving information to consider, and vote on the proposal. By that time, the Board should have fully analyzed the offer, fully negotiated an agreement with the potential acquiror and have a deal that is truly in the best interest of stockholders and stakeholders so that the response from stockholders is fairly positive.

Meeting Adjourned

As we remain in the midst of a somewhat new and emerging M&A cycle, community banks in particular should continue to remember that there is not an obligation to sell your organization just because the Board may be getting pressure to do so from any of a number of sources (a single large shareholder, institutional investors, an investment banker, etc.) unless a potential offer is so clearly beneficial to your stockholders as opposed to not accepting the deal, that the failure to accept it would be a breach of your fiduciary duties. Otherwise, keep the nuances above in mind and make sure the Board follows an appropriate and detailed process and procedure in ultimately making the decision to accept or reject an offer. That is the best way to ensure the Board has made a fully informed decision, and a decision that the board members honestly believe is in the best interest of the organization. That also helps you avoid liability. We hope this general guidance is helpful, but if you have further questions, please let us know.

Thanks again to all of those who attended the 2026 Board Chair Forum in Marco Island. We hope to see many new faces next year or at our other events around the country in 2026. Reach out to us directly anytime we can help.

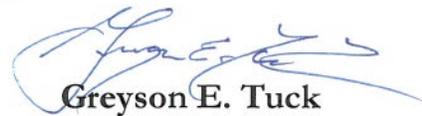
Until next time,



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