

# Getting the Right Board and Getting the Most out of Them



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- Participate and ask questions!



# Our Discussion Topics

- Corporate Governance Legal Structure
- ERISA Fiduciary Responsibility
- Role of Board of Directors
- Who Can Serve on an ESOP Board?
- Board Member Interactions
- Special Situations
  - Offers to Sell
  - Executive Compensation
- Best Practices
- Resources
- Contact Information



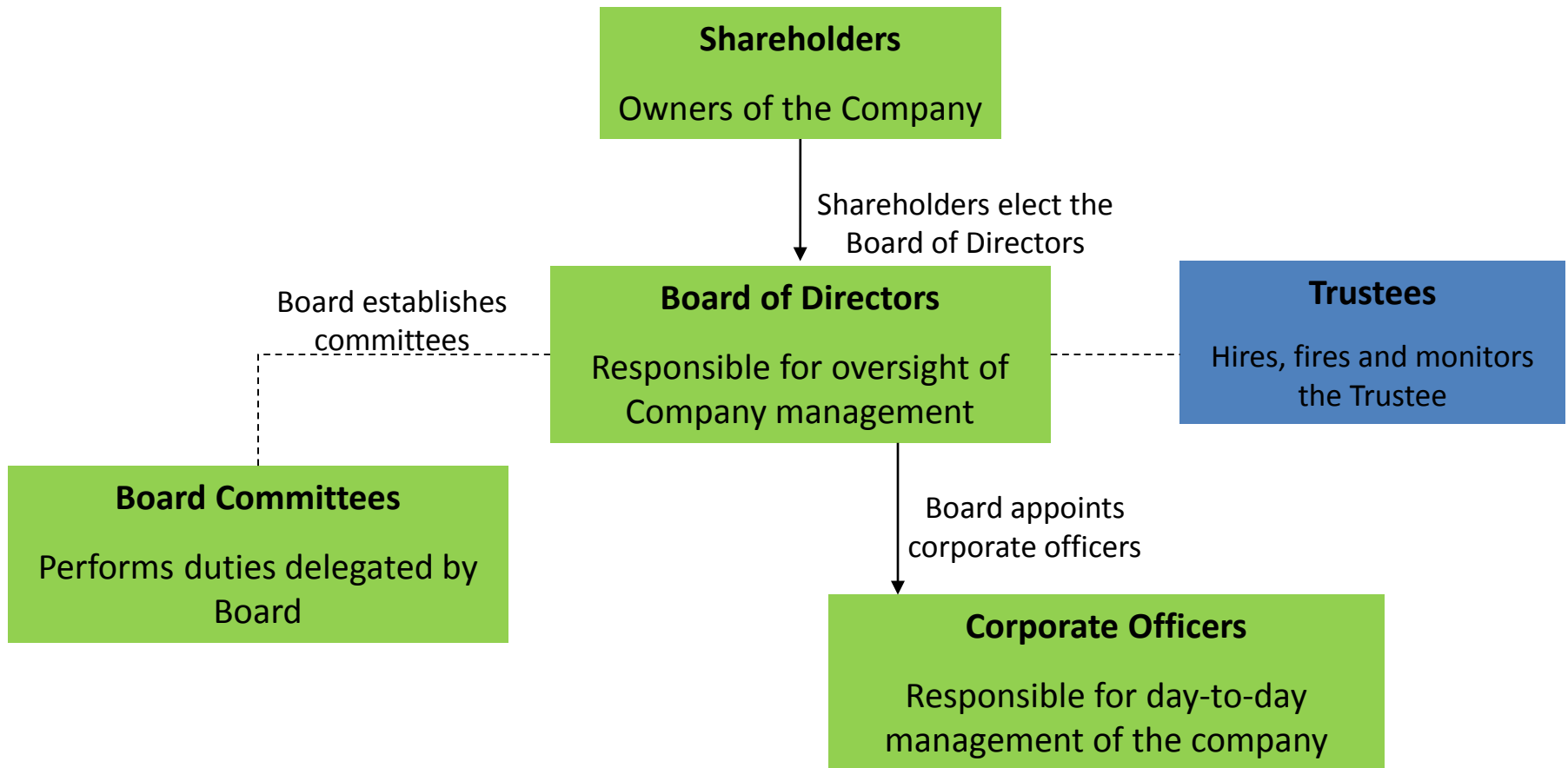
# Corporate Governance Legal Structure

## Who runs an ESOP – owned corporation?

- ESOP trustee and its advisors
- Board of Directors and its advisors
- Officers
- Other Shareholders
- ESOP participants – In cases of “pass-through” voting



# Corporate Governance Legal Structure



# ERISA Fiduciaries

- Named Fiduciary
- ESOP Trustee(s)
- Functional Fiduciary: Anyone who exercises discretionary authority and control over management or disposition of plan assets. Could include:
  - Board of Directors – to extent of appointment power
  - ESOP Administrative Committee
  - Outside advisor – but only if s/he makes the decisions with respect to plan assets



# Role of Board of Directors

- Grow shareholder value
- Set corporate goals, strategy and vision
- Appoint and evaluate CEO
- Advise leadership team
- Determine senior officer compensation
- Establish corporate conduct and standards
- Monitor financial performance and approve projections
- Declare dividends
- Evaluate and approve offers to buy or sell
- Facilitate succession planning



# Role of Board of Directors

In relation to the ESOP...

- Adopt, amend and terminate ESOP
- Appoint and monitor ESOP trustee
- Direct trustee per ESOP documents
- Appoint ESOP Administration Committee
- Approve ESOP contributions, distributions and dividends
- Evaluate repurchase obligation
- Understand ESOP valuation





# Who Can Serve on Board of Directors?

- What do the bylaws say?
  - Number of board members
  - Who may serve
  - How elected
- How do state corporate statutes influence board structure?
- Internal vs. external board members...or a mix?
- What competencies are needed on the board?
- What do the regulatory agencies and courts think about the issue?
- Conflict issues – Mainly with internal trustees
- What do we see? Real life examples and stories.



# Board Member Interactions

- What do the bylaws say?
  - Formal meetings
  - Committee meetings
  - Informal discussions
- Interaction with management team
- Interaction with professionals offering services to company
  - CPA/Audit firm
  - Legal counsel
- Interaction with employees
- What do we see? Real life examples and stories.



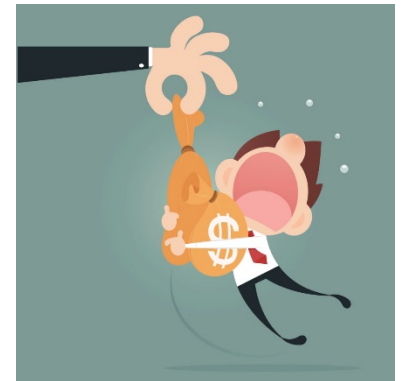
# Offers to Sell

- Board decision to sell
- State law requirements to consider
- Price must be fair to shareholder(s) – Maximize value
- Communicate with trustee – when?
- Engage advisors to help – Appoint special fiduciary?
- Asset sale vs. Stock sale – tax considerations & liability
- Fair process
- Impact on all stakeholders
- OK to have policy not to sell?
- Potential conflicts of interest



# Executive Compensation

- Executive Compensation typically set by Board
- Outside compensation studies may be appropriate
- Board Should have a compensation committee comprised of outside directors to approve compensation
- Potential conflict issues for a person wearing multiple hats (board member, officer, selling shareholder, internal trustee)
- Issues around compensation of outside directors
- Excessive compensation can dilute participant ESOP value



# Best Practices

- Abide by bylaws, corporate legal documents, state corporate law, etc.
- Independent directors on board
- Compensation and Nomination Committees of Board staffed by independent board members
- Productive board meetings
- Informed Board members & trustee
- Freedom for Board, Officers & Trustee to carry out fiduciary duties
- Open communication between Board, Officers & Trustee
- Effective use of outside advisors



# Documentation!

- Keep records for at least as long as required by law
- Keep formal board and shareholder meeting minutes, including board committee minutes
- Document discussions and meetings regarding corporate and ESOP actions
- Retain all important ESOP documents (plan document, trust document, engagements, transaction documents, TPA records, etc.)



# Additional Fiduciary Information



# Corporate Fiduciary Standards

## Duties under applicable state laws

- Duty of Care
- Duty of Loyalty
- Court presumes Board actions were informed, made in good faith & made in honest belief they were in best interests of the company & shareholders

## Business Judgment Rule

- Burden of proof upon shareholders if challenging Board actions





# ERISA Fiduciary Standards

- ERISA fiduciaries must act:
  - Solely in the interest of plan participants and beneficiaries
  - For the exclusive purpose of providing benefits to participants and beneficiaries
  - With the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matter would use in the conduct of an enterprise of like characters and with like aims
  - In conformance with the Plan and Trust documents, as long as the documents are consistent with ERISA

\*Note the Board Actions that affect the Company's operations and assets (even in 100% ESOP – owned Company) are generally not subject to ERISA\*



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Merri is a Sr. V.P. with First Bankers Trust Services she has over 40 years experience in Employee Benefits services. Merri's past work experience includes work as a senior trust officer with SunTrust Bank, Employee Benefits Consultant with Wyatt Company, Benefits Manager with Jonathon Corporation, an ESOP company and Team Leader and Senior Benefits Consultant with the National Automobile Dealers Association. She works on ESOP transactions (initial, second-stage, redemptions, loan refinancing, M&A, etc.) and provides ongoing trust services once the ESOP is established. Her clients range in size from the small to very large, and from the very basic in structure to the more complex. She speaks regularly at local, regional and national ESOP events. She is a past Chairperson for the Administrative Advisory Committee of The ESOP Association, former Board of Governors member for the National ESOP Association and current Board of Trustees member for the Employee Ownership Foundation. Merri has been with First Bankers since 2002.



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GreatBanc Trust Co. is the largest and longest serving institutional ESOP trustee with headquarters in Lisle, IL. We offer full service transactional and ongoing ESOP trust services to public and private ESOP companies across the U.S. Our ESOP professionals average over 20 years of experience in the industry.



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# The ESOP Association

National Conference  
Washington, DC  
May 2019



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