Blogs
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How Many “Executive Officers” Should a Company Have?

Over the years, I've written a number of times about the process that in-house counsel periodically goes through to benchmark how many "executive officers" a company has against its peers. Although the "executive officer" determination is an internal factual analysis, it's natural for companies to periodically benchmark how many executive officers their company has compared to its peers.

It can provide comfort that you're applying the definition correctly. It can help with human capital management. You don't want some of your senior officers wondering why they aren't granted "executive officer" status while officers they consider peers at other companies have such a lofty designation. Although senior officers shouldn't want that designation as I explained in **this blog**.

The Uncommon Case Where the Facts Raise the Issue

The reality is that it's fairly rare for the question to arise as to whether someone should be considered an executive officer. Exchange Act Rule 3b-7 defines "executive officer" as a company's president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the company. The key is digging into what is someone's actual duties; titles themselves are not determinative. So you must analyze the facts.

Note that the definition of officer in Rule 16a-1(f) encompasses all of the persons included in Rule 3b-7's definition of "executive officer," with a difference being that Rule 16a-1(f) specifically includes the principal financial officer and the principal accounting officer. As a result, the list of executive officers required to be included in the Form 10-K should be the same as your Section 16 officers - with the pretty rare exception of the chief accounting officer, who might not be considered an executive officer under your facts - but who is considered a Section 16 officer.

So when might your facts raise a question for you to newly consider someone as an "executive officer" that might not be so obvious? When someone emerges as one of the top three highest paid after the CEO and CFO (and thus possibly a "Named Executive Officer," which would require detailed compensation data to be disclosed for that person).

When that happens, you'll need to analyze whether that person is a significant policymaker. Sometimes they are; sometimes they aren't. Sometimes it's a bit hard to tell. You'll want to look at your peers and see if they have a similar situation – that might help give you comfort as you make a decision one way or the other.

Bringing Your Company More in Line With Your Peers

More often, you'll run into a situation where your company is noticeably lagging your peers in terms of the number of "executive officers" that you're listing in the 10-K. As more and more people earn the title of "Chief" something or other within companies, more people are being listed as executive officers at some companies.

So a company might suddenly be facing a deficit that it wants to narrow. It might decide to tab some officers as executive officers even though they might not normally trip the "significant policy-making" threshold.

Don't do this lightly. Once you tell someone that they're considered an "executive officer," it's difficult to switch gears a few years later and tell them that they're not. That can hurt some feelings.

Similarly, it's far easier to signal to the market that you now have more executive officers than you had last year – than signal the converse, that you now have less. You can reduce the number of executive officers to be more in line with your peers – and perhaps that's what you tell investors and analysts if they ask – but it's still a little awkward to talk about compared to adding to your list.

Bear in mind that you don't want a large group of executive officers if there needn't be according to the SEC's rules. The administration of the Section 16 reporting becomes more of a hassle than it needs to be. And another downside is that financial websites pick up additional trades made by your insiders – because it has a larger group now - and it looks like the company has more insider trading being conducted by executive officers than its peer companies.

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