Blogs
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Public Chatter

Should Non-CEOs Serve as Directors? Six Best Practices to Consider

An increasing number of public boards are inviting non-CEO officers and executives to serve as public company directors. Is this a good idea to look beyond a proven CEO for a director? And, is it a good idea for the invited executive's employer to allow that person to serve? My experience has been - Yes! - to both, so long as both the inviting board and the to-be-director's employer follow a number of best practices for executive service. The "Why's" include: - This is a superb way to increase diversity on boards, whether it be age, race or gender. - A healthy focus on preventing over-boarding means that CEOs and former CEOs should be serving on fewer boards. - The growth in SPACs - even if the trend towards the use of deSPACs to go public continues to slow - is generating a need for in effect two boards: one for the SPAC that is a public entity in search of a target, and then the second restructured de-SPAC board that oversees the ongoing public company. When an invitation to join a board comes in, typically from a recruiter, it can present a career opportunity for the executive. If the officer is able to successfully balance an existing job and the new board responsibilities, a board seat can provide insights into how another organization is run - as well as help develop a whole new way of thinking. Serving on a board can help officers look beyond their own organizations, sharpening a broader, more strategic perspective. But that same opportunity poses a sometimes challenging decision for the invited executive's employer: is the value to the executive worth the risk of distraction, not to mention broader exposure of a valued star employee - who may then be lured away? Part of serving on a board is developing relationships with fellow directors, who all have their own relationships with organizations who have talent needs. While there is no "one-size-fits-all" answer, here are six best practices that I have observed that may help both invited executives and employers analyze their situation: **1. Conflicts & Related Party Transactions:** Before anything else, ask - does the company making the invitation somehow raise the prospect of a risk of a conflict of interest - or even the appearance of one? Or might there be material related party transactions involved? This requires some homework and careful thought: the invited officer will need to learn the strategic goals of the inviting company - and consider if these now (or may in the future) overlap with and conflict the current employer's interests. Even if the two companies are not competitors, could they enter into a related party transaction down the road that may need to be disclosed in either company's proxy? Even seemingly innocuous disclosure could be considered a negative from an ISS, Glass Lewis or investor point of view. Also consider reputational issues of the company who is offering the board seat, and whether they could negatively impact the employer.

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2. Assess Committee Obligations & Expected Time Commitment: What will be the time commitment of a board seat? And is putting in that time practical from the standpoint of the amount of time the executive is expected to put in for her employer? Consider both the expected hours commitment - and the reality of periodic "crunch" times that pop up during the inevitable crises that arise. There may be some executive roles – a CFO for some companies – who would be hard-pressed to appropriately deal with an M&A transaction or serious investigation in their role as a director without interfering with that officer's responsibilities during earnings season, for example. Yet a Chief HR Officer, Chief Technology Officer, Chief Legal Officer or Chief Sustainability Officer, with the right staff support, may be able to juggle both.

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3. Limit on Board Service: Companies should plan to apply a limit of one outside public board - generally thought of as the limit for a CEO - to apply to other officers as well. It is typically not practical to have a full-time job responsibility and simultaneously tackle the responsibilities of more than a single board seat. Most investors will view it the same way. With only slight modification, the existing framework and policies in most corporate governance guidelines can be used to consider limit service by non-CEO officers on outside boards.

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4. Pre-Approval: A company should have a process or checklist for pre-approval for non-CEOs to serve on

outside boards. It will vary by company but the approval process may require approval by one or more of: - The invited Executive's direct supervisor - CEO - The entire board, Nominating & Governance or Compensation Committee (or the Audit Committee if the invited executive is the CFO) - General Counsel / CLO, who should conduct a close examination of the possible impact of the new board on answers made by that executive in the next year's D&O questionnaire

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5. Monitoring Compensation: The executive's employer may want to track, as part of the annual compensation process, both the amount of time the executive has spent - and the compensation received by that executive - in their role as a director for that other company. For example, when I have chaired a non-profit board, in the annual review of the CEO, we try to track the compensation that the non-profit's CEO earns from service on a public company board. We would generally prefer that the non-profit CEO not make substantially more from outside board service than from the CEO's full-time job at the non-profit. [The non-profit board's concern is that excessive compensation from outside board service, which has the potential - with equity grants - to be highly remunerative, could naturally distract even a dedicated executive from the needs of the non-profit.]

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6. Annual Performance Review: Don't forget to monitor the executive's outside board service as part of that executive's annual performance review. Is the time commitment as expected? Are there tangible training benefits that can be pointed to?

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