4 Reasons Why You Don’t Want to Be Deemed an “Executive Officer”

Over the years, I've talked to a number of company executives who think they want to be deemed an "executive officer" for purposes of the company's SEC's filing. I always say in response, "you don't." They argue that "Sally is an executive officer listed in our annual report. And I'm just as important as her!" Maybe dude, but you don't want to be listed in that report. Trust me.

This is an area where hurt feelings can be real. It might even push an officer to start looking for a new job. But the silver lining of not being named an executive officer is that you avoid a bevy of possible pain points that emanate from being tabbed as one for SEC filing purposes.

Let me start with a little legalese. There are two different definitions of "executive officer." One for purposes of being listed in the annual report – the Form 10-K or the glossy annual report (as incorporated by reference into the 10-K). That's due to Exchange Act Rule 3b-7.

Then there is the definition for Section 16, the Form 4s, Form 5s – here's the real burdensome consequence of being named an executive officer. That's due to Rule 16a-1(f). Rule 16a-1(f) encompasses all of the persons included in Rule 3b-7's definition of "executive officer" – with the only significant difference being that the relevant Section 16 rule specifically includes the principal financial officer and the principal accounting officer, neither of whom are specifically referenced in Rule 3b-7.

The result is that the two lists of officers – one from Rule 3b-7 and one from Rule 16a-1(f) are almost always identical – with an occasional exception for a chief accounting officer, who might not be considered an executive officer for the 10-K - but who's always considered a Section 16 officer. But that only occasionally happens (eg. a controller who is consider the PAO but not an "executive officer"); the PAO typically is an executive officer for 10-K purposes.

Here are 4 reasons why you don't want to be deemed an executive officer:

1. **Section 16 reporting** – Even though someone in the company is going to help you file your Forms 3, 4 and 5 for you, it's a real hassle to continuously report your stock ownership in the company. And if there is a filing failure, the consequences harm the officer, not the person in the company who made the SEC filing on the executive officer's behalf.

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2. **Public can view your ownership** - Not only is the actual reporting a hassle, but the public gets insight into how much wealth you have – at least, the slice of ownership in the company you work for.

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3. **Section 16 liability** – Even worse than the hassle of reporting and having that information out there is the risk that you violate Section 16(b) with a short-swing trade within six months and are forced to disgorge the profits. Being sued is no fun – and Section 16(b) is a strict liability statute.

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4. **Insider trading policies** – You may find yourself barred from trading in your company's stock for most of the year when you become an executive officer, as most companies have insider trading policies that include blackout periods that apply automatically to Section 16 officers.

As permitted by the rules, some companies decide to provide the Part III Form 10-K disclosures by incorporating them by reference from their glossy annual reports - or from their proxies. For those companies that have long prepared glossy annual reports, they tend to put the executive officer bios in the glossy annual report. But for those companies that don't prepare a glossy annual report - or they prepare just a minimalist wrap - they tend to include their executive officer bios in the proxy.

One quick technicality to note: thanks to a technical update to Regulation S-K Item 401 a few years ago, the requirement to include the officer bios in the proxy can be dispensed with *only if* the officer bios are included in Part I of Form 10-K, under the caption "Information About Our Executive Officers."

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