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THE PODIUM / Guest Op-Ed

The Board's Conflicts Process: Time for a Second Look?

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Been paying any attention to the conflicts controversy involving the former SEC General Counsel? You know, the one where the guy made seven separate internal conflicts disclosures, but it wasn't enough to satisfy the Commission's internal watchdog? You remember that one? Well, if you haven't been paying attention to it, you should because it serves as a "head's up" that we may be headed into a brand new conflicts of interest environment. One in which a higher level of attentiveness, disclosure and diligence may become the order of the day for boards.

What? That's a bit of a stretch, you say? That how a federal agency handles its internal conflicts problems has anything to do with how corporate boards handle their own affairs? Well, hold on for a second. Understand that we're operating in a corporate accountability environment, in which officers and directors are increasingly being held responsible for harm committed both to –and by—the corporation. Folks are mad, they're looking for someone to blame, and the boardroom is as good a place as any to go looking for villains. So, if you don't think that corporate governance regulators aren't following this story, and wondering how it applies to their jurisdictions, think again. They are—and maybe they should be, as well.

So, we need to pay attention to what's really at stake in this matter. Not about who is right or who is wrong; about which arguments have merit and which don't. Let's leave those to the process of justice. Rather, boards should focus on the veritable "Big Picture:" what this controversy is telling us about where conflicts of interest scrutiny may be heading...and what boards should be doing about it.

Because, somehow, the old ways might not be enough anymore. It might not be enough that the director is widely admired for his service. That he's totally transparent about his financial interests. That neither he, nor the board chair, nor the compliance officer, saw the potential for conflict. What might matter is that others (including fellow directors and executives) might see it differently, that they might complain, and that the complaint might have wings. And reputations—both individual and corporate—can get tarnished as the mess works its way through.

And just what should boards do in response? Well, kick the tires of its existing conflicts policy, hard. Start with the nomination process. Are we picking nominees who are prone to conflicts? Move to education—what duty of loyalty lessons are we giving our directors? Then turn to disclosure—how

often, how detailed, and with what guidance is it made? How hard, how far, how "creatively" are we looking? Don't forget the actual process of review—who is making the actual "conflicts call," how "independent" are they, what criteria are they using to make decisions? And even when it seems OK to do so, have we the tools and the will to effectively "manage" a conflict without creating more problems? Just when is basic recusal the safe play?

And while you're looking at it, check out the internal reporting requirements of your key legal and compliance executives. Do they contain seeds of what the government might regard as conflicts? Is the compliance officer reporting to the general counsel or CFO, as opposed to another senior officer? Does the general counsel report to the CFO, as opposed to the CEO or COO? Do both the general counsel and the compliance chief have the independent access to the board?

This is not to say that the "conflicts sky is falling;" that the criminalization of conflicts of interest is on the horizon; that your approach to conflicts must be turned upside down. We're not there. But this SEC mess is a gift of sorts, a no-cost prompt to boards to take a close second look at a very important governance policy. Because there's absolutely no "down side" to doing so, and you may be doing your board, and the corporation, a very big favor.

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