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Trump's Company Is Hiring an Ethics Adviser. Should Yours?

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One of the unanticipated side effects of the intensive focus on the President's personal conflicts issues is increased interest in the creation of a new "chief ethics officer" position. Some corporations may find assigning oversight of ethical obligations to a dedicated corporate executive or outside adviser to be an effective strategy for addressing business conduct. Yet the wisdom and practicality of creating such a separate executive position requires careful and dispassionate board-level review, in consultation with general counsel.

The ethical conduct of a corporation, and of its officers and directors, are grounded in principles of corporate responsibility and in Sarbanes-era concepts of ethical codes. For example, Securities and Exchange Commission rules have long required public companies to disclose whether they have adopted specific codes of ethics for their senior financial officers, as well as for their chief executive officers, and to make public those codes of ethics.

New York Stock Exchange and Nasdaq listing requirements obligate listed companies to adopt business conduct and ethics policies that in certain respects may exceed the SEC rules. In addition, many non-public and nonprofit companies have adopted similar codes of ethics,



Donald Trump.

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seeking to apply Sarbanes principles wherever appropriate.

Corporate ethical codes are also consistent with compliance program effectiveness standards and guidelines established by the Federal Sentencing Guidelines and the Department of Justice's Principles of Federal Prosecution of Business Organizations, respectively.

In addition, some industries are mandated (or otherwise encouraged) by federal regulation to adopt codes of business ethics and compliance. A leading example is the Department of Health and Human Services' compliance program guidance for the

hospital industry. This guidance recommends the adoption of a code of conduct that sets forth the organization's commitment to legal compliance and articulates its ethical and legal operating principles.

Historically, individual executive responsibility for the interpretation and enforcement of organizational codes of conduct and ethics has varied widely. In most large corporations, the question is not *whether* to assign ethics oversight to a particular officer, but rather *to which* officer the responsibility should be assigned.

The debate over internal executive responsibility for corporate ethics

has long been sharp. Compliance officers claim it as a logical extension of their duties, while general counsel point to the rules of professional responsibility and to the academic reports that specifically mandate lawyer responsibility for advising clients on ethics matters.

All of this is now coming to the forefront, in connection with the efforts of the President and many of his Cabinet members to divest control of their respective business holdings and reduce the risk of conflict of interest and other ethical concerns.

For example, The Trump Organization recently hired a prominent attorney to serve as its outside ethics adviser, particularly in connection with the newly-created walls intended to separate the President from Trump family business interests. In addition, The Trump Organization reassigned an existing corporate official to serve as chief compliance officer, with responsibility for monitoring internal conflicts. At the same time, the White House appointed an internal adviser (serving under the White House Counsel) with responsibility for monitoring ethics concerns of the President and White House advisers.

Documents prepared by the President's outside counsel in connection with his divestiture plan suggest that the new internal ethics and compliance function will be responsible for ensuring that The Trump Organization is "not taking any actions that actually exploit, or even could be perceived as exploiting, the office of the presidency." The responsibilities of the outside ethics adviser would include giving written approval for any deals or actions that could "potentially raise ethics or conflicts of interest issues."

The significant media attention to these developments could prompt

a new, if subtle, push within companies to create similar ethics positions. This is especially so given the intense public focus on conflicts and ethics during the recent transition process. Many companies, sensitive to corporate responsibility, could envision the appointment of a discrete ethics adviser, either internal or external, as a material demonstration of corporate good faith. (All of this is taking place against the backdrop of the 15th anniversary of the enactment of the Sarbanes-Oxley Act on July 30 of this year.)

But the board of directors should view such a potential appointment with constructive skepticism.

There is no broadly accepted portfolio for the role of a separate ethics officer, nor understanding of how such a role might encroach on the existing duties of the general counsel or the chief compliance officer. In addition, there is no general agreement on the qualifications for such a position, even though the evaluation of conflicts of interest and interpretation of federal ethical guidelines usually requires legal training.

Designating a singular executive with responsibility for ethics and conflicts monitoring may be perceived as a bold public commitment to corporate responsibility. It may serve to underscore at all organizational levels leadership's commitment to ethical behavior. Yet it risks confusing the existing distinctions among internal gatekeepers, as they relate to matters of legal compliance, conflicts of interest and the organization's operational and financial ethics. This is particularly the case for organizations that have long-established mechanisms for the interpretation and enforcement of these matters (e.g., through the general counsel and/or the chief compliance officer).



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Applying additional resources to the analysis and enforcement of organizational rules of ethics is rarely a waste of corporate assets. But creating a new organizational position of ethics officer can, without consideration of its hierarchical impact, create substantial confusion and distraction. Boards should thus pause before treating the related actions of the Trump Organization and of the White House as a governance corporate best practice, as meritorious as those actions may otherwise be.

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