

## **Review Directors' Meeting Materials To Ensure Consistent Disclosure**

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**Subtle costs, harder on the little guy.** Many of the costs of complying with the Sarbanes-Oxley Act are obvious: direct, out-of-pocket expenses for the increased accounting fees, higher premiums for D&O insurance, and increases in fees paid to board members. Issuers struggle more with the less quantifiable costs. Securities and corporate transactions attorney Marc Morgenstern examines how issuers disclose an increase in the time that management spends on compliance tasks, a rise in the number of in-house accountants and staff, or the costs of having directors devote their time to liability avoidance rather than value enhancement. The new rules necessitate having more sophisticated personnel to ensure fast-but-accurate disclosure. Costs are higher because more professional advisors are needed to prepare for board meetings and document the actions taken by the directors. For the small, fast-growing public company, business is often unpredictable, and minor changes in financial results could be material when viewed as a percentage of revenue, yet smaller issuers generally have fewer internal professional resources on which to rely. The costs of compliance also represent a higher proportion of their revenues.

**Well-packed board packets.** The significant change in the level of the directors' responsibilities under Sarbanes-Oxley has exacerbated the need to prepare carefully for board meetings. Board members' meeting packets should contain any recent SEC filings and press releases, especially those with forward-looking statements, as well as board and committee minutes and updated company projections. The packet materials must be carefully drafted, cautions the author, so that it neither overstates nor understates the risks facing the company. Individuals who understand the company's disclosure obligations should be involved in the preparation of board packages. Clearly differentiate management forecasts from hypothetical analyses of future results. If the documents included in the meeting packet are written in absolutes, immediate disclosure may be required, even though a more detailed description of the questionable situation would show that disclosure was premature. Plaintiffs could use packet documents to show that the company was aware of an issue at the time the documentation was prepared. This information might also be used in SEC enforcement actions to show a failure to disclose material information.

**Match up corporate disclosures.** By examining the company charter, bylaws, and industry comparison information, the company's disclosure team can assess whether the financial results differ so significantly from the industry standard that they should be discussed. The team should scan the board packets to ensure that material risks described in the documents are disclosed in the MD&A section of the company's SEC filings. Have the directors and corporate counsel consider how the information discussed at the board meeting relates to the company's existing disclosures, to determine if additional disclosure is required. Minutes of board meetings must support any disclosure decisions that are made. The author also reminds directors that they cannot trade in the company's stock based on any material, nonpublic information contained in their packets.