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STAY TUNED...
to New Rules & Regs

By Hank Boerner

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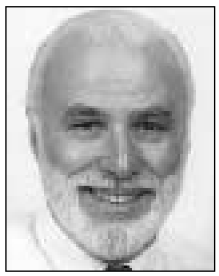
Stay Tuned … to New Rules & Regs

By Hank Boerner

Rules, rules, rules — it seems as if life is always full of rules! If you are an IRO for a domestic, New York Stock Exchange-listed company, you know your company must play by the listing rules. Beginning sometime later this year, when the SEC finally approves a package of *new* corporate governance rules (proposed by NYSE), your professional life could become more complicated.



Hank Boerner

As part of your company's agreement to list securities for public offering on the "Big Board," you must comply with a comprehensive set of rules. These rules have real and perceived power behind them, especially when enforced: *Think of what it would mean to your company to be "delisted" for rule infractions!*

Over the years, the NYSE rule-making process has been robust. Acting in front of SEC, the Exchange has moved with the times to adopt rules that address current issues. The NYSE Listing Company Manual now has nine sections with enormous details for corporate management guidance. The general requirements include size/volume criteria for listing; selection of corporate financial standards; approval of SEC registration under the 1934 Act; interim earnings reporting; distribution of shareholder materials; providing notice to the Exchange for certain actions of events; and, more recently, acceptance of corporate governance standards as defined by the NYSE.

Stay tuned … to Upgraded CorpGov Standards

As part of the ongoing *Corporate Governance Revolution* we've been defining for you in *Stay Tuned,* these standards are being dramatically redefined. It is important that IROs — as well as members of the board and senior management team — review the proposed rules and plan for their rapid adoption and implementation within the company, pending imminent SEC approval. Many of the NYSE corpgov rules speak directly to board structure, operation and governance. But it doesn't end there.

Current NYSE Standards for Boards

In recent years, the NYSE has set governance standards including requirements for boards to set policies for audit committees; election of all board candidates as a class, with certain exceptions; rules governing related party transactions; purchases of company stock by directors and officers; and rules of the road for board operations and governance.

The NYSE board created a Corporate Accountability and Listing Standards Committee to study existing listing standards, review various proposals for corporate governance reform and, in its words, to "enhance the accountability, integrity and transparency of listed companies."

The committee's recommendations were approved by the full board and submitted to the SEC for approval. Since then, the proposals have been slightly amended while awaiting approval. They will soon be considered "regulated" requirements for your company if you trade on the NYSE.

Get Ready for:

- Approval of employee stock option plans by shareholder vote. (Exceptions: employment-inducement options, plans that came in with acquired or merged companies and tax-qualified plans, including 401(k)s. The SEC approved this rule in June.)
- Director independence. The majority of directors must be independent and meet strict definitions. Certain "controlled companies" will be exempt from this rule.
- Compensation caps for independent directors.
- Three committees of the board — audit, nominating and compensation — to be mandated, all with independent directors as members.
- A requirement that independent board members meet regularly without executive members present.
- Certain types of confidential internal communication with non-management directors.

◗ The CEO's compensation to be determined by the compensation committee of the board, which can also make recommendations for other executive compensation as well as awards under incentive compensation and equity-based plans.

◗ The audit committee to be made up of only independent directors (at least three), each of whom must be "financially literate" (the board decides the characteristics of this definition "in their business judgment"); one member must have accounting or related financial management expertise.

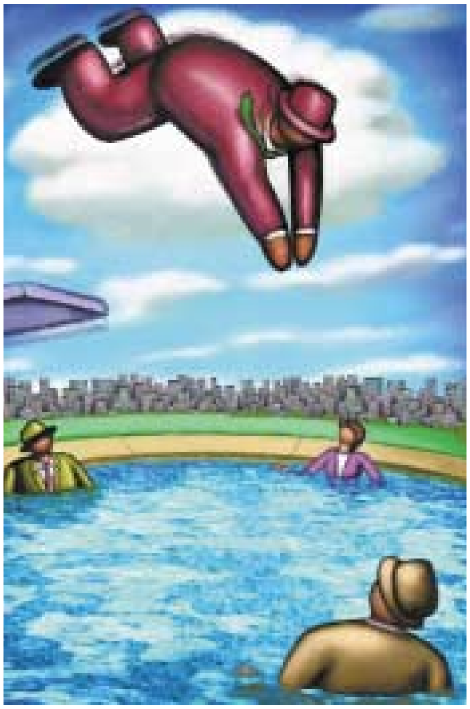
◗ NYSE audit committee rules to address certain provisions of SOX (Section 301), some of which were included in the NYSE's original proposals before SOX was passed by Congress. This committee will appoint, remove, compensate and oversee the outside auditors and other independent advisers (such as lawyers, actuaries, compensation consultants, etc.) as deemed necessary.

◗ The audit committee to establish a process for reviewing and approving the company's accounting and internal transactions (no more "managers hiding bad news" through opaque or misleading practices or transactions that hide the true condition of the company). Also, review and approval of the company's internal risk management processes and internal controls will be the responsibility of this committee. (Each listed company must also have an internal audit function, not presently required.)

◗ Each company to be required to adopt a Code of Business Conduct and Ethics to address conflicts of interest, confidentiality, fair dealing, use of company assets, regulatory compliance, reporting of unethical behavior (internal) and other types of behavior.

When does all this begin to apply to your company? The clock starts ticking when the SEC approves the rules and after they are published in the *Federal Register*. If you are a foreign private issuer, for the immediate future you may be able to follow your home country's rules.

From time of approval, listed domestic companies will have 18 months to comply with the new rules on director independence. Classified boards must disappear within 30 months. Deadlines will apply to creation of and/or compliance with rules by audit, nominating and compensation committees (particularly membership requirements). Note that certain provisions of SOX require adoption of some of the NYSE's new rules by January 2004 or October 2004.



If your company is an IPO listing on the NYSE, you will have 24 months to comply with the independence rules; this also applies to companies coming to the NYSE from another exchange.

But there is a very short, six-month timetable for compliance with other key provisions:

◗ The board must begin to schedule meetings without executive directors present.

◗ Duties must be spelled out and charters adopted for the three key committees — nominating, compensation and audit.

◗ Corporate governance guidelines must be clearly spelled out for the board.

◗ The Code of Conduct and Ethics must be adopted by the board.

◗ The CEO notification of the NYSE (of lapses in compliance with material issues involved) begins.

Ironically, when former NYSE Chairman Dick Grasso announced the proposed rules in June 2002, he noted that "there is a public trust that needs to be reconnected" and the corporate governance listing rules were the effort needed to rebuild trust.

You can check details of the Listed Company Manual online at www.nyse.com.

Time will tell if the new rules will build investor trust. The NYSE rules are certain to create future headlines — the Exchange as part of SEC approval got permission to publicly reprimand companies that abuse the rules, which could ultimately lead to delisting.

Next time: A look at the Nasdaq exchange rules — some of which have already been approved. IRU

Hank Boerner is managing director-NY for Rowan & Blewitt, an issue and crisis management firm serving corporate clients. The views expressed are his own. Thanks to the law firm of Fried, Frank, Harris, Shriver and Jacobson for updated information.