

GROWTH GUIDE

PHASE 2: RAMP-UP

The business world has changed in many respects over the last three years. One of those changes is that investors and regulators have lost faith in the CEOs of corporate America.

Pressured to address the problem, Congress enacted the Sarbanes-Oxley Act of 2002 last July. The act imposes a host of new obligations that carry significant legal consequences to corporate officers, particularly the CEO and CFO, for failure to comply. So how should a CEO of a public company respond?

Be credible.

In this new environment, credibility is king. The CEO and CFO have so much at risk, personally, that assuring the integrity of the company's financial statements will become "Job One," rather than a function delegated to others.

The Sarbanes-Oxley Act attempts to legislate corporate integrity by imposing mandates, such as requiring the top two executives to certify financial reports filed with the SEC and requiring corporations to develop codes of ethics and to develop and attest to the effectiveness of internal controls and procedures.

To bolster these requirements, the act imposes criminal penalties for false certifications and requires the CEO and CFO to repay their bonuses and profits on their stock sales in the event that the financial statements must be restated. Given this environment and these requirements and penalties, top corporate officers must work to create a culture within the corporation that encourages honesty and accuracy of financial and other reporting in order to rebuild credibility.

Watch what you say.

Before the recent corporate scandals and

You're not in **KANSAS** anymore: Sarbanes-Oxley

By Richard Kelber
and Deanne Greco



the enactment of Sarbanes-Oxley, the SEC adopted Regulation FD to promote fair disclosure. The initial response by most public companies was to open up conference calls with analysts to the public and generally distribute information more broadly.

But in the new environment, corporate statements are likely to be viewed with skepticism. Indeed, corporate executives are keenly aware that their statements may be seen as misrepresentations when viewed with hindsight and suspicion. As a result, many companies have stopped giving projections, or "guidance."

At some companies, the liberal use and content of press releases will likely be revisited. And perhaps the format of live conference calls will also change so that corporate officers will no longer place themselves and their companies in legal jeopardy. When preparing disclosure documents and communications, CEOs now need to be concerned about shareholder lawsuits and personal liability as well as the impact on share price.

Find a good auditor.

The collapse of Arthur Andersen and the enhanced professional liability risk have led many accounting firms to sharply curtail, or even forgo, their SEC practices. Indeed, the larger firms are being significantly more selective about the audits that they perform.

The 'wizards' of Enron,
WorldCom and others have made life challenging
for all of corporate America.

> BEST TIPS

The Sarbanes-Oxley Act of 2002 has imposed a number of new obligations on public companies. Here are some things that top executives should keep in mind:

Be credible. Top corporate officers must work to create a culture within the corporation that encourages honesty and accuracy of financial and other reporting.

Find a good auditor. Companies should secure a reputable auditor and provide information aggressively and honestly.

Build a good board. The listing standards for stock exchanges and Nasdaq require a minimum number of "independent" directors, and each company's audit committee must include a "financial expert."

In this environment, a CEO may need to convince an audit team that his or her company is a low risk in order to secure the relationship. And that relationship is vitally important: If the auditor refuses to certify company financials, the consequences are severe.

The bottom line: Secure a reputable auditor and provide information aggressively and proactively.

Build a good board.

Finding good board members has always been a challenge for public companies, especially smaller ones. Recent developments have made this task monumentally more difficult.

The listing standards for the exchanges and Nasdaq require a minimum number of "independent" directors, and each company's audit committee must include a

"financial expert." These individuals may be difficult to locate and recruit.

In addition, the cost of D & O insurance has increased substantially and coverages are being limited. Many companies may not be able to afford (or obtain) such insurance. But without it, good independent directors may be impossible to recruit.

In spite of these challenges, CEOs must build boards of directors that include the appropriate number of independent members.

Clean up your compensation programs.

Many companies have incentive compensation programs based on stock performance or other criteria that may foster behavior intended to maximize payments, such as falsifying or manipulating elements of financial statements, "pumping" the company's stock, or "spinning" disclosures

to achieve positive market reaction.

Although such compensation programs are not illegal, executives and boards should consider establishing plans based on criteria that are not subject to manipulation.

Consider going (or staying) private.

These recent developments have made it more difficult, more expensive and riskier to operate a publicly held company. The consequences to an officer for even marginally inappropriate behavior can include liability to shareholders, civil or criminal fines or jail terms. Given this environment, many expect private companies to seek capital elsewhere and public companies to decide to go private.

We aren't in Kansas anymore. And we're not in the Emerald City, either. The "wizards" of Enron, WorldCom and others have made life challenging for all of corporate America.

> > > Richard Kelber and Deanne Greco



are shareholders at the Minneapolis-based law firm of Moss & Barnett. For additional

information related to responsibilities of directors and officers, call (612) 347-0300 or visit www.moss-barnett.com.

Reprinted with permission from *The Business Journal*. ©2003, all rights reserved.

Reprinted by Scoop ReprintSource 1-800-767-3263