

Time for a Review: What Should You Do If...

BY LYNN MCHUGH

Backdated Options Issued:

... You have a strong suspicion that backdated options have been issued at your company, but when you raise the issue with senior management, they appear unwilling to discuss the possibility.

Recommendation:

Under any circumstances, restrict your comments to the facts or to the reasons underlying your suspicions. Set up time with the CEO and/or CFO to explain your concern, and what the ramifications could be if backdating has occurred. If that approach fails, call your company's ethics (whistleblower) hotline with your concern. Don't know the hotline number? Contact your ethics officer, or refer to the corporate governance section of your Web site, where the information is required to be posted.



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Improper Employee Communication Occurs:

... You discover that an investment analyst has been having ongoing conversations about your company with an individual in your sales force who also is a friend of the analyst.

Recommendation:

Approach the salesperson and give a reminder that under the company's communication and disclosure policy a salesperson is not authorized to speak with investors about the firm. (Don't have a policy? Talk to your general counsel about developing one.) Advise the analyst that it is inappropriate to contact employees who are not authorized spokespersons, and that all questions should be directed to the IRO. If the situation persists, tell the salesperson you're taking the issue to management — and then follow through.

Improper Intra-office Communication Occurs:

... Someone senior to your immediate boss comes to you for information or assistance in a manner that makes it very clear that they are trying to bypass your boss. Perhaps they want something done that your supervisor doesn't support, or they want your confidential impressions of the individual.

Recommendation:

Tell the person approaching you that you are uncomfortable having that conversation without your boss's knowledge. If you're told that's not acceptable, you may be forced into an uncomfortable situation — and it may be time to start looking for a new position.

Unfavorable Analyst Recommendation Occurs:

... An analyst has put a sell recommendation on your stock. The CEO is furious and wants the individual cut off from all future analyst communications.

Recommendation:

You know that fair access to corporate information is a basic tenet of investor relations under the NIRI/CFA guidelines (www.niri.org/irresource_pubs/CFAI-NIRIGuidelines.cfm). First, make certain you understand the reason(s) for the recommendation. If it's based on incorrect information or assumptions, follow up with the analyst. If it's solely valuation based, make certain you understand the framework. Find an influential ally in the organization—possibly the CFO or general counsel—who supports your view of fair access, and meet with the CEO to explain that it is considered inappropriate or unethical to “blackball” investment professionals. (In addition, it may be helpful to arm yourself with examples of analyst sell ratings that later became buy ratings.)

Product Launch is Delayed:

... Before leaving on an investor road trip with management, you discover that a scheduled product launch is delayed. While not a material event, your company has a reputation for meeting its launch dates and that knowledge could make investors nervous. Do you talk about the change in your conversations?

Recommendation:

While not a material event, it may still be preferable to disclose the change in a more public format at the appropriate time. If asked specifically about the product launch while in meetings — and you have always discussed the status of such introductions in the past — you may need to respond. A follow-up filing of an 8-K might be warranted, so talk to your SEC counsel immediately following the investor meeting.

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ETHICS AT WORK

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Analysts Perspectives are Inconsistent:

... In speaking with a buy-side analyst, you discover that what a sell-side analyst is saying about your company in private is very different from the published research.

Recommendation:

First, make certain the buy-side analyst is aware of your concern and your plans to speak to the sell-side analyst. Their reaction will determine how strongly you confront the sell-sider. Speak to the sell-side analyst about what you're hearing and get his side of the story. If the explanation is unsatisfactory, and the differences between the published report and the private conversations are significant, speak to his director of research.

Management Miscommunicates Employee Stock Option Policy:

... Your CEO is telling investors that the company requires officers and directors to hold any stock acquired through options exercises, or they are not entitled to any further options grants. You know this is an informal practice at best.

Recommendation:

Advise the CEO that investors are interpreting his comments as company policy and not merely a recommendation, and recommend that perhaps it should be clarified in future discussions. If the reaction is unfavorable or the behavior doesn't change, it's probably time to look for a new position elsewhere.

Management Communicates Non-public Material Information:

... While in an investor meeting your CEO communicates what you believe to be non-public material information, but when you discuss it with her, she insists it's not material and tells you the company will not issue an 8-K or press release about it.

Recommendation:

Speak to your general counsel immediately, relaying verbatim as much of the in-question discussion between the CEO and investor as you possibly can so that counsel can determine whether an inadvertent disclosure took place. If so, an 8-K should be filed. **IRU**

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