# Ethics At Work

## TO RELEASE OR NOT TO RELEASE?

By Karen A. Warren

Have you ever found yourself in a situation when it wasn't entirely clear if you should put out a press release?

Imagine yourself as the new IRO at a high-tech company about two weeks away from the close of the quarter. If you've been in the high-tech industry, you know that a lot of the revenue for the quarter comes in the last week or two — in fact, the revenue line is often described as resembling a hockey stick. Thus, it's often not clear until the last day or two of the quarter if you have made your numbers.

Your CEO is probably not much different from most CEOs — she is an aggressive marketer of the company, and when it comes to good news, she wants it out. But the CFO has a different perspective on things: He is not only focused on the numbers but has a good sense of what's appropriate to disclose from an ethical standpoint. He's also considered risk-averse.

In addition to gearing up for the quarter close, your company is taking part in a major industry trade show scheduled for the last week of the quarter. Typical of trade shows, there are a number of product-related press releases going out, and the buzz has the potential to signal genuine strength in the business. As the IRO, you believe the company walks a fine line — the potential risk associated with making the quarter versus the promotional aspects of the high-tech trade show in which, by the way, the company has invested millions of dollars to participate.

As you are pondering this predicament, in walks the CEO. She is excited about a deal the company just signed with a major industry player and asks you to draft a press release to go out with the announcements for the trade show. As you do your due diligence, it is apparent that this might be a significant deal for the company — something beyond the typical trade show hype.

After drafting the release, you meet with the CFO. His reaction, which doesn't entirely surprise you, is that no release should go out until the quarterly results are in. He mentions there is a high probability the company will not make its numbers, and the partnership announcement would signal to investors that the business is actually doing better than it really is.

What ensues is a very tough few days for the IRO. The CEO and CFO proceed to debate the issue of whether to put out a press release. They pull you in as the arbitrator, and you find yourself caught between them and what your professional instincts tell you: The release isn't material, but it has the potential to send an inaccurate message to investors. You believe this will hurt the credibility of the company and could result in litigation if you don't make the quarter. Bottom line, it doesn't seem at all ethical to communicate this news to investors without knowing the quarter results. On the other side of the equation, you are trying to forge good relationships with your new bosses, and you don't have enough knowledge about the industry or the business.

The situation comes to a head when the CEO walks into your office, closes the door and says, "I just want the release out." After ranting and raving for the next few minutes, she walks out, slams the door and leaves you holding the press release.

Forgetting the fact that it can be career-limiting to disagree with the CEO, what are you going to do? Where can you get advice? What resources do you have inside and outside the company?

First, think about the legal implications and go talk to your in-house counsel about the timing of this release. From him you learn the disclosure of this partnership doesn't meet the new filing requirements for an 8-K. You discuss what the content of the release implies about the business and the signal it sends to investors.

Counsel suggests that you tell the CEO and CFO not to release the information until you know what the quarter results are — not because it's illegal but because of what it says about the ethics and credibility of the executives. You both agree it's more about not meeting the "smell test" if you have bad news on the quarter.

In addition to legal counsel, fellow IR practitioners — especially those in your industry — are a great resource for ideas and solutions to dilemmas. You also can consult any member of NIRI's Ethics Counsel.

So, how can you resolve this situation? A good compromise would be to pre-release the quarter results within a couple of days of the quarter end, along with announcing the new partnership. This allows the investor to see both the good and the bad news, and make his own decision. IRU

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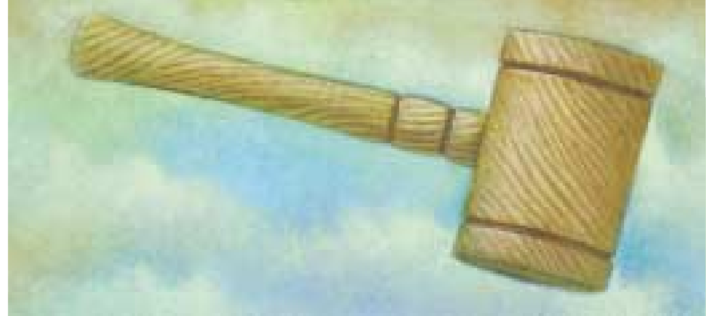
*Editor's note: This bimonthly column is written by members of NIRI's Ethics Counsel. If you have a problem that could benefit from their experience and advice, please contact any member: Jane McCahon, Tim Croasdaile, David Erickson, Jay Gould, Len Griehs or Karen Warren. They are available through the Volunteer Advisory Network at www.niri.org. All communication will be kept confidential.*



## IROs Should Be Watching Disney Trial

IROs should be keeping their eye on a trial that could fundamentally change the laws of corporate governance. The trial, now under way in a courtroom in Georgetown, DE, has the shareholders of the Walt Disney Co. suing the company's directors, including CEO Michael Eisner, for violation of their fiduciary responsibilities.

The shareholders allege that the board failed to properly scrutinize the employment contract of former Disney president Michael Ovitz in 1995. Ovitz was fired by Disney Co. the following year and received a $140 million compensation package, the maximum payout under his contract. Disney counters that that board's actions were fair and reasonable under Delaware's "business judgment" rule that gives executives and directors wide leeway to run their business without fear that courts will second-guess them.

If the court agrees with the Disney shareholders, the precedent could enable shareholders of other companies — even those not incorporated in Delaware — to try to hold directors *personally liable* if they fail to pay proper attention to operational decisions, particularly huge compensation deals. Traditionally, absent personal corruption, directors are almost never held personally liable for their decisions while serving on a company board. Shareholders are seeking $200 million from the Disney board, including Ovitz.

By allowing the case to go forward, the Delaware court may have already had a chilling effect on a corporation's ability to recruit and retain directors. For IROs, the Disney case makes it imperative that their companies have in place proper training programs for board members. These training programs, which are now being offered by outside consulting firms as well as by colleges and universities, include a comprehensive review of governance rules and director responsibilities.

Source: SNL Financial, www.snl.com/irsolutions