

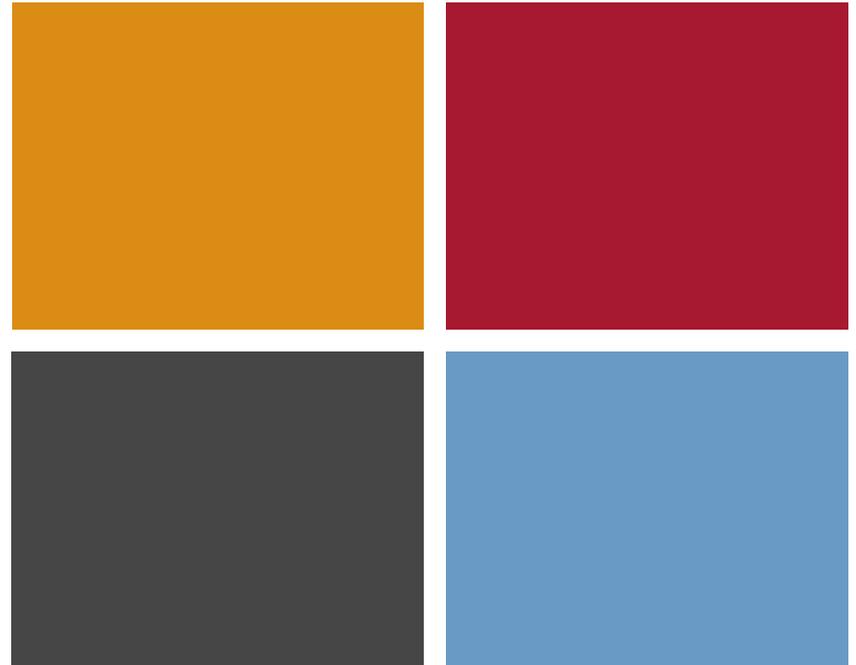


Corporate Law Forum: Corporate Governance Half-Day Conference

# Planning for the Unknown: Preparing Your Board to Handle a Company Crisis

*Presented by Chris Gattuso and Clay Wheeler, Partners at Kilpatrick Townsend, and Jim Van Horn, Vice President, General Counsel & Corporate Secretary of Blumont.*

*Moderated by Ed Olifer, Managing Partner, Washington, D.C. Office of Kilpatrick Townsend.*



# Jim Van Horn

Jim Van Horn is Vice President, General Counsel & Corporate Secretary of Blumont. Jim has over 13 years of experience as in-house counsel specializing in U.S. government contract law. Jim has experience in all aspects of corporate law and licensing as well as U.S. and foreign government contracting including claims and disputes, protests, ethics and compliance investigations, international contracting, teaming and joint venture arrangements, and cost/accounting.



Prior to joining Blumont, Jim was the Associate General Counsel and Corporate Secretary at Aptim Corp (formerly CB&I Federal Services) where he oversaw all legal, contract administration, security, and subcontract/procurement support for the Government Services business line which provided engineering, construction, disaster recovery, environmental, logistics, and base operation support services to the U.S. and foreign governments. Prior to that, he was in-house counsel with Baton Rouge-based, Shaw Group where he provided legal counsel to the federal business line.

Jim graduated, *cum laude*, from the University of Pittsburgh School of Law and is admitted to the Pennsylvania and Virginia bars. He also holds an undergraduate degree in Criminology and a Masters of Business Administration from Indiana University of Pennsylvania.

# Chris Gattuso



Chris Gattuso is a partner in Kilpatrick Townsend’s nationally recognized Financial Institutions Team, focusing her practice on corporate and securities matters, mergers and acquisitions, and financial institution regulatory and transactional matters. She has extensive experience in corporate reorganizations, strategic alliances, joint ventures, and mergers and acquisitions for both public and private companies. Chris regularly advises boards of directors and board committees on corporate governance matters and best practices. She serves as counsel for both issuers and underwriters in public and private offerings of debt and equity securities and counseling clients on disclosure and other requirements under the federal securities laws.

Chris was recognized in 2018 and the four years immediately preceding as a Washington, D.C. “Super Lawyer” in the area of Securities and Corporate Finance by *Super Lawyers* magazine. She was recognized by *The Best Lawyers in America*® in 2018 for Financial Services Regulation Law.

Chris graduated from the University of Baltimore School of Law and is admitted to the District of Columbia and Maryland bars. She also holds an undergraduate degree from King’s College.

# Clay Wheeler



Clay Wheeler is a partner in Kilpatrick Townsend's Government Enforcement & Investigations Team. He is an experienced trial lawyer who handles complex criminal and civil litigation matters. Clay helps clients respond to government enforcement actions that carry potential criminal consequences. He also counsels organizational clients on compliance issues and conducts necessary internal investigations.

Prior to joining Kilpatrick Townsend, Clay served as an Assistant United States Attorney for the Eastern District of North Carolina and Chief of its Economic Crimes Section. Clay is a Senior Lecturing Fellow at Duke Law School where he co-teaches a course on the role of the federal prosecutor.

Clay was recognized in *The Best Lawyers in America*® in 2016 and 2017 for Securities Litigation and was named a "Future Litigation Star" among North Carolina attorneys in 2013, 2014, 2015, and 2016 by the *Benchmark Litigation* guide.

Clay graduated from the Duke University School of Law and is admitted to the North Carolina and California bars. He also holds an undergraduate degree from Williams College.

## Ed Olifer



Ed Olifer is the Managing Partner of Kilpatrick Townsend's Washington, D.C. office and a member of the firm's nationally recognized Financial Institutions Team. He concentrates his practice on securities and capital formation transactions, SEC disclosure compliance, mergers and acquisitions, and corporate governance advice in complex situations. He frequently counsels boards of directors on myriad sensitive legal-related and other strategic decisions that impact their businesses and constituents.

Mr. Olifer is a graduate of Virginia Tech, and earned his J.D., with a specialization in corporate and securities law, from George Mason University Antonin Scalia Law School.

# Pre-Crisis Assessment

- Does the company have a crisis management plan?
  - If no crisis management plan, need to complete broad risk assessments to ascertain company's weaknesses as well as possible disasters they could face.
- Does the company have crisis-prevention training and has it tested its risk management policies and business continuity plans?

# In-House Counsel Responsibilities Pre-Crisis and in a Crisis

- Advising the Board / Board Committees on governance matters
- Risk assessment – current and future
  - Legal, compliance, and enterprise
- Development of a crisis management plan
- Lead interaction with regulators and key players on crisis management team
- Internal communications and coordination
- Coordination and oversight of outside experts

# Board Responsibilities in a Crisis

- The Board of Directors of a Company has a duty to monitor, which includes the duty to have “information and reporting systems” in place to provide the Board and executive management with “timely and accurate information.” *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959,970 (Del. Ch. 1996)
- Directors must exercise “good faith” in dealing with actual or potential violations of law or policy. *Stone v. Ritter*, 911 A.2d 363 (Del. 2006)

# Crisis Response Overview

- Activate a Flexible but Succinct Crisis Plan
- Assess Type of Crisis: Internal or External
- Assemble the Team
- Communicate with Constituents
- Conduct a Post-Crisis Assessment

# Activate Crisis Plan

- Implementation of plan will be situation-specific – triage the risks
  - Preservation and documentation
  - Liability risk
  - Regulatory risk
  - Organizational risk
  - Brand / Reputational risk
  - Risk mitigation
- Enforce predefined roles (but keep an open mind)
  - General Counsel
  - Management
  - Board / Board Committees
  - Data Retention Team
  - Public Relations
  - Outside Experts
- Enforce command and control
  - GC is responsible to the company, but may be in charge of execution and content
  - Public Relations
  - Monitor internal and external social media!
  - Strategically examine / satisfy disclosure obligations (prior, current, future)

# Assemble the Response Team

Competent, multi-disciplinary, and collaborative.



In-House



Corporate  
Governance



Risk  
Management/  
Mitigation



Litigation and  
Investigations

# Communications with Key Constituents: The Ideal Timeline

- Immediately
  - Management
  - Board
  - Insurance Carriers
- During the internal investigation (if applicable)
  - Law Enforcement and/or Regulators
  - Auditors
  - Key Business Partners
- When investigation is complete
  - Law Enforcement / Regulators / Congress / State Authorities
  - Organization at Large
  - Public / Press
  - Shareholders / Other Stakeholders / Financial Analysts
  - Customers / Clients / Lenders / Key Vendors

# Communications – Important Considerations

- Key crisis issues for discussion / disclosure
- Message – Speak with one voice
- Method
- Privilege / Confidentiality
- Controls
- Use of outside experts

# Internal Communications

- Identify the lines of communication within the organization regarding facts related to the crisis
  - Employee interest in fixing the problem can lead to competing collections of information
- How can they be simplified and/or managed?
- By whom?

# Internal Investigations

- Purposes of the internal investigation
  - Gathering facts so that key decisions can be made, including but not limited to discipline
  - Identifying weaknesses in the company's compliance program
  - Satisfying regulatory obligations and supporting government action
  - Identifying additional misconduct
- How will the internal investigation be structured?
  - Who will manage the investigation – one of the most important decisions to be made in a crisis
    - Advantages of having a Board committee manage the investigation
    - Disadvantages
  - Use of outside counsel
  - Preserving privilege

# Post-Crisis Assessment

- What does the crisis say about the company's compliance program and information and control systems?
- How is the company's response to the crisis consistent with the company's culture and values?
- Does the company have an understanding of what actions within its control caused the crisis?
- Has the company remediated those causes and the effects of the crisis?



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