

FiscalNote

 Association of
Corporate Counsel
— NATIONAL CAPITAL REGION —

Leadership in Crisis: How to Persevere when Faced with Challenging Issues

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Agenda

- Today's Crosscurrents
- Defining a Corporate Crisis
- Responding to a Crisis
- Preparing for and Preventing a Crisis
- Q&A



Today's Crosscurrents

- Today, high-profile issues require a broader conception of enterprise risk management.
- Once-routine business decisions are now made against a backdrop of cultural crosscurrents, geopolitical uncertainty, workforce demands, and increasing political polarization.
- Executives are increasingly being pulled into public policy debates.
- Corporate counsel need a well-developed and thoughtful strategy for advising on these decisions – **and set that strategy before the issue is upon them.**





How to Handle Unforeseen Events

A crisis can unfold over the course of a few hours and rapidly generate media attention, litigation, state and federal regulatory inquiries, and—quite often—an invitation to testify before Congress.

Companies need to have a plan in place so they can respond quickly, limit collateral damage, remediate any issues, and tell the company's story effectively.

THINK BROADLY

Defining a Corporate Crisis

Defining a Corporate Crisis: Industrial/Environmental



Classic examples of a crisis are complicated by today's political climate.

Scenario: Toxic chemicals are released from your manufacturing plant. Questions arise about impact on local community.

Scenario: A gas pipeline explosion shuts off power to communities in the dead of winter.



Defining a Corporate Crisis: ESG Issues



Companies' responses to efforts to stay ahead of expectations and regulatory requirements in ESG criteria leave clients facing inquiries from every direction.

Increasing backlash from state attorneys general and congressional committee chairs.

Scenario: Coalition of state AGs threatens to cancel your contracts with state entities.

Scenario: AG inquiry into provision of funding for employees to get abortions out of state.



Defining a Corporate Crisis: China



A bipartisan issue, but unclear what involvement is problematic.

Scenario: The Treasury Department bans a company that handles a key part of your supply chain from receiving U.S. investment.

Scenario: House committee seeks information related to your cooperation with Chinese authorities and protection of users' data.

Scenario: China invades Taiwan – do you cut ties with Chinese manufacturers?

Defining a Corporate Crisis: Whistleblower Allegations



Due to new incentives and press interest whistleblower complaints have exploded in number. Congressional committees are also aggressively investigating based on whistleblower complaints.

Think about “whistleblowers” broadly.

Conduct appropriate due diligence, avoid employment actions, and take other appropriate safeguards.

Scenario: A former employee goes to the SEC with internal documents and allegations of misconduct. A Senator asks for an immediate response. The SEC launches a parallel inquiry.



Congress has Broad Authority to Investigate

“The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad.” *Watkins v. United States*, 354 U.S. 178, 187 (1957).

- “It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.” *Id.*
- “The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.” *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).



Authority Is Not Without Limits

- Power is not unlimited. Must have a valid legislative purpose. *Watkins*, 354 U.S. at 187; *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975).
- Investigation of business interests generally presumed related to legitimate legislative purpose. See, e.g., James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 Am. Crim. L. Rev. 1115, 1123 (2007).



Defining Success – Running an Effective Response Process

1

Open good lines of communication to report the issue to management quickly

2

Assemble the right response team quickly

3

Respond promptly and appropriately, with good advice from external advisors, to provide the best response possible for the Company under the circumstances.

RECOGNIZE. PLAN. ACT.

Responding to a Corporate Crisis



Responding to a Crisis

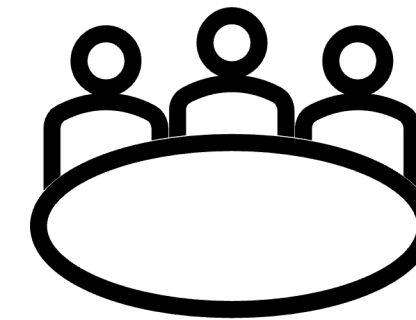
Have a Plan in Place



Be **proactive**. Build a plan that prioritizes:

- detecting and scoping risks
- preventing crippling impacts
- minimizing disruptions
- remediating damage to core assets

Decide Posture with Regulators



Key considerations for **posture** include:

- what posture minimizes legal risk?
- what posture minimizes reputational risk?
- what posture helps maintain credibility?

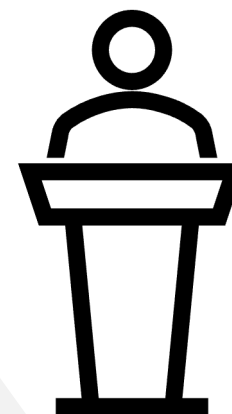


Responding to a Crisis

Speak with One Voice

Speak consistently to all constituencies and **convey facts accurately** by:

- preparing a set of topline talking points and tough Q&A
- establishing clear review channels
- agreeing on a narrative
- not hiding bad facts
- conveying facts and limitations
- Accepting responsibility when warranted
- considering potential impact of public statements in other jurisdictions



Public companies may be required to submit mandatory filings with the U.S. Securities & Exchange Commission. If not rising to the threshold of a mandatory disclosure, companies may still want to consider a voluntary disclosure.



Responding to a Crisis

Remediate Issues Promptly

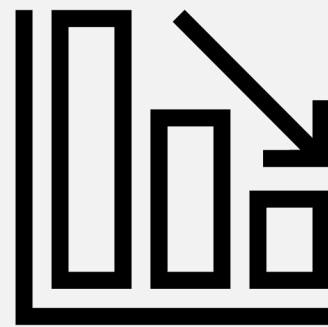
Decide **how to address** whatever harm may have been caused. This involves:

- commitment to finding out what happened
- discovering if there has been wrongdoing
- determining short-term remedial steps
- determining long-term remedial steps



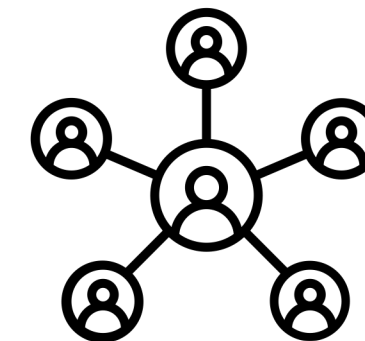
Responding to a Crisis

Minimize Disruptions



Potential for **distraction** is huge. Ensure doing all that needs to be done still allows colleagues to do their work.

Maintain Confidences



Perception can become more important than the crisis itself. Work to:

- maintain and preserve workforce confidence
- maintain and preserve public confidence
- understand the balance between defending the company and regaining public confidence

BE PROACTIVE

Preparing for and Preventing a Crisis



Preventative Steps

Take preventive steps when possible; when you can't prevent, plan ahead

- ❖ Have good, regular communication about your whistleblower hotline or other intake system
- ❖ Encourage folks to raise a hand early and often
- ❖ Implement an ERM program to think more systematically about risks before they arise
- ❖ Conduct employee trainings periodically that cover ethics, cyber security and data handling, anti-harassment
- ❖ Review and be familiar with the requirements of your insurance policies that may apply to various kinds of crises





Developing and Rehearsing the Plan

Make the Plan

During business-as-usual mode, be proactive about your approach to crisis mode. Challenge assumptions by:

- testing cyber security strength
- assessing health and safety of workers and customers
- assessing compliance
- evaluating reliance on partners (business partners, vendors)
- testing internal and external risk protections

Rehearse the Plan

Rehearsals are the only way to identify weaknesses in advance. Periodically reevaluate the plan and ask:

- Have threats evolved?
- Has the company expanded into new areas or businesses?
- What are others in the industry experiencing?
- Are there aspects of the plan that are no longer relevant or could be streamlined?



Early Warning Systems

Form an early warning system to proactively identify and get ahead of potential issues

- ❖ Have internal or external teams monitoring the press, business operations, and other forums that might affect your business's interests
- ❖ Proactively identify and get out in front of potential issues
- ❖ Stay alert to emerging issues and then practice great corporate hygiene
- ❖ Assess your existing activity and policies (as well as recent past activity and statements) to establish an inventory of the issues that may come under review—especially by Congress.
- ❖ Consider creating and maintaining a “top issues list”





Rapid Response Teams

Establish a cross-functional rapid response team

- Utilize a diverse team with varied experience to identify key risks and develop mitigation strategies.
- Ensure there are clear roles and responsibilities.

Legal should lead to preserve attorney-client and/or work product privileges

- Also draw on business leads, Risk professionals, government affairs, communications, Compliance, and other divisions as appropriate.

Line up external resources that might be necessary



Privilege Issues

Whether or not a particular communication will be considered protected under the attorney-client privilege is a **fact-based inquiry**. Highlights:

In-House Counsel

- Generally covers advice given in response to requests for legal guidance
- Murkier coverage for business advice
- Know the rules in all the jurisdictions where you operate because they will differ

Third Party Consultants

- Investigative or forensic accounting firms can typically be retained under the direction of outside law firms
- When challenged, courts still make a fact-based inquiry

PR Firms

- Courts have split; must demonstrate legal advice depended upon, or was significantly improved by, the PR agent's role in the attorney-client communication



Privilege Issues re Attorney Work Product

Some courts that have declined attorney-client privilege protection for communications with PR firms have nevertheless granted work product protection for those same materials.

- “A party must show that the document ‘would not have been created in substantially similar form but for the prospect of litigation,’ and that ‘the litigation purpose so permeates any [PR] purpose that the two purposes cannot be discretely separated from the factual nexus as a whole.’” *Stardock Systems, Inc. v. Reiche III*, 2018 WL 6259536, at *3 (N.D. Cal. Nov. 30, 2018) (citation omitted).
- “So long as the role of the consultant is to assist legal counsel in responding to the media the protections of the attorney-client privilege should apply the same as where a corporate employee is tasked with responding to media inquiries.” *In re Abilify (Aripiprazole) Prods. Liab. Litig.*, 2017 U.S. Dist. Lexis 213493, at *25 (N.D. Fla. Dec. 29, 2017).



Privilege and Confidentiality in the US Congress

- Long-standing position of most members of Congress is that common-law privileges, including Attorney-Client privilege, do not apply, although recent caselaw suggests that these privileges may apply.
- Recognition of privilege falls within the discretion of investigating committee.
- May be possible to work with committee to craft productions that do not implicate privilege.
- Congress frequently releases confidential documents produced during an investigation. Document productions should **always be accompanied by confidentiality language** reserving the right to contest the release of confidential and sensitive information pursuant to House or Senate rules.



Information Flows

Ensure that accurate and timely information flows both up and down.
Some situations may warrant **Board** or **special committee** involvement.

Issues

- Create protocols or at least a framework for deciding what merits escalation.

Who to Involve

- Might be the audit committee, but not always. Consider involving outside counsel.

Oversight & Communication

- Need to balance overseeing the players with the need for real-time information.

Ending the Investigation

- Be thorough, but not excessive. Includes overseeing remediation and interaction with government.

Additional Preparation

Speak with one voice and share consistent information across venues

Train on document hygiene and privilege to avoid communications lacking nuance or context

Revisit outreach strategy and cultivate relationships before they are needed





Mock Crisis

Imagine China invades Taiwan. Your company does business with Chinese manufacturers, and you need to make an immediate decision about how to proceed.

What do you do?

A photograph of a chessboard with various pieces. A semi-transparent red rectangle is centered over the board. The word "Questions?" is written in white, italicized font within this rectangle. The background shows a chessboard with a fallen white king and several dark pieces standing. A bright light source creates a bokeh effect in the background.

Questions?



Speaker Biographies



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Alyssa DaCunha is a Partner at WilmerHale and co-chair of the firm's congressional investigations practice. Alyssa's practice focuses on government and internal investigations and crisis management assistance. She has represented major corporations and individuals in congressional, white collar and civil matters, and has extensive experience representing companies facing parallel proceedings. Over the past decade she has prepared dozens of senior executives for congressional testimony.



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Paul Connell is a Partner at WilmerHale and co-chair of the firm's State Attorneys General Practice, where his work spans nearly every conceivable industry sector, including energy, technology, manufacturing, consumer protection and pharmaceuticals. He routinely defends clients both proactively and defensively in high stakes, multi-state investigations and regulatory enforcement matters. Paul previously served as an Assistant United States Attorney in the Western District of Wisconsin and as Wisconsin's Chief Deputy Attorney General and Senior Counsel, where he handled critical incident response on behalf of DOJ and also led the department's public communications team.



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Todd Aman is Senior Vice President, General Counsel & Secretary at FiscalNote. He oversees FiscalNote's legal affairs, including corporate governance, securities compliance, employment law and compensation matters, litigation, financings and other strategic transactions. He also oversees the company's compliance function, including ethics, data privacy and the development and implementation of corporate policies. Before joining FiscalNote, Todd was Associate General Counsel – Corporate and Securities and Assistant Secretary for FLIR Systems, Inc., a publicly-traded international sensor technology company.