

**Davis Polk**

# **Conversations in corporate crisis management**

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# Identifying a crisis

01

# Identifying a crisis

## Natural Disasters

The nation's largest energy and utility companies turn to Davis Polk to represent them in regulatory and litigation matters arising out of storms, hurricanes, wildfires and other natural disasters in forums across the nation.

## Mass Torts and High-Profile Incidents

Our litigators routinely represent clients in connection with their response to mass torts and other high-profile incidents, including in mass actions and class actions in state and federal courts nationwide. We regularly work with internal and outside experts on technical issues to guide the business and inform litigation strategy.

## Market Downturn and Industry Crisis

Leading corporations and their directors and officers frequently turn to Davis Polk for strategic advice and representation in high-stakes crisis management situations, litigation, and governmental and internal investigations arising out of market-wide and industry-specific disruptions.

## Cyber Events

Davis Polk's team includes lawyers who have handled data and cyber issues both in private practice and in senior roles at the SEC, allowing us to effectively assist our clients in making disclosure decisions, communicating with regulators and law enforcement, defending civil and regulatory actions, and managing interactions with various vendors, employees, clients, insurers, auditors and the market.

## Insolvency and Restructuring

Our litigators and restructuring lawyers work seamlessly together to provide advice when a crisis requires our clients to think about restructuring strategies for themselves or in connection with their distressed counterparties. As one of the only firms in the world with both a leading debtor-side and lender-side practice, we understand the goals of all stakeholders and develop creative strategies for our clients.

**Before the crisis**

**02**

# Before the crisis

Internal reporting and decision-making

- Identify team of key stakeholders responsible for managing the crisis, reporting within the company, and handling relationships with external parties, including:
  - Public relations firms
  - Regulators/law enforcement
  - Investors/customers
  - External counsel
  - Auditors and insurers
  - Forensic experts
- Establish a reporting structure to communicate relevant information
  - Identify key individuals to be notified within the company, including reporting up to senior management and Board of Directors

# Before the crisis

Preparation and training

## Training

- Implement a company-wide crisis awareness and training program
- The program should cover employees' roles in the event of a crisis and how to report an incident
- Include simulated trainings and table top exercises that address the most likely crises that the company might face

## Crisis Management Steering Committee

- Meet regularly to discuss crisis management strategy and make any necessary revisions to the response plan

## Communications plan

- Develop and implement a communication plan to ensure the company communicates crisis-related matters accurately, consistently, quickly, and effectively
- Constituencies can include employees, customers, clients and regulators

**Breaking crisis**

**03**



# Breaking crisis

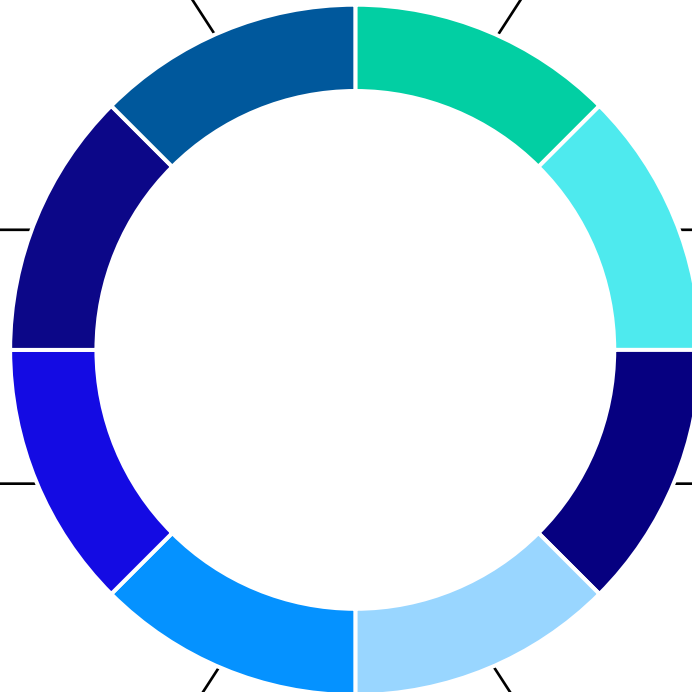
Immediate actions

Analyze and comply with disclosure and notification obligations

Engage outside counsel

Evaluate cause, scope, risk, and mitigation

Issue preservation notice



Execute on communications plan; brief management, board, and key constituencies

Initiate press management

Convene the steering committee and deploy the CRP

Active efforts to preserve privilege and work product protections

# Breaking crisis

## Assessing legal implications

- Determine obligations to notify employees or customers affected
- Determine obligations to inform regulators or the market
- Assess whether contractual obligations exist to inform certain clients, vendors, or business partners
- Examine relevant insurance coverage and obligations to inform insurers
- Understand trading window policies for insider trading issues and decide whether to prevent employees from selling stock
- Begin to prepare for any likely offensive or defensive litigation

# Breaking crisis

Communications plan

## **Execute on pre-existing communications plan (or immediately put a communications plan into effect)**

- Establish and follow the chain of internal communication crisis notification procedures
- Draft Q&A about the incident and determine the appropriate recipients
- Draft talking points and script inserts about the incident for analysts and investors, CEO and Board of Directors, among others
- Notify employees about the incident and instruct employees on what employees should or not say about the matter
- Instruct employees on where to refer public/customer questions

# Breaking crisis

Publicity

**In drafting any media statement or press release, try to avoid the following, if possible:**

- Overpromising as to the effectiveness of the company's remediation efforts
- Blanket denials of knowledge or responsibility for the incident
- Speculate or reach any conclusions that are not yet borne out by a thorough investigation
- Specific promises to provide additional information
- Making overly precise statements that may be quickly outdated requiring further updates or retractions (e.g., # of people affected)
- Inconsistent messaging across different internal and external media platforms
- Inconsistent messaging with different external parties

# Breaking crisis

Preserving privilege protections

- Include lawyers in all aspects of the response for purposes of providing legal advice to the company during the crisis
- Ensure that response plan implementation and internal investigation are being managed and directed by lawyers
- Exercise caution when communicating with the company's experts who are gathering information for the lawyers conducting the investigation

# Breaking crisis

Document and evidence Preservation

**Companies should work with internal and external counsel to develop a legal hold notice plan that is:**

- broad enough to cover documents and information relevant to the investigation;
- clear enough that recipients know what documents and information need to be preserved and how they should be preserved; and
- distributed widely enough to cover all employees who could be reasonably expected to maintain control over such documents

**Failure to effectively attempt to preserve documents and data can lead to allegations of obstruction of justice or spoliation in the context of civil litigation**

# Breaking crisis

## External counsel

- External counsel can bring an independent perspective and credibility with regulatory agencies to bear on behalf of a company
- External counsel can also help structure an investigation so as to maximize the protection of attorney-client privilege
- Hire outside counsel for resources, reputation, and expertise
- Understand the issues for which external counsel is or may be needed:
  - Internal investigation
  - Regulatory investigations/enforcement
  - Criminal defense
  - Civil litigation defense
  - Counsel to directors and officers
  - Corporate governance
  - Restructuring or transactional advice

# Short-term priorities

04



# Short-term priorities

## Internal investigation

- Internal investigations are important for a number of reasons:
  - Developing an understanding of all facts relevant to a crisis
  - Identifying key documents and witnesses relevant to the crisis and preserving those documents and the recollection of those witnesses
  - Providing the company with the information it needs to present the facts of the crisis in the best possible light to the public or regulators
  - Identifying areas of focus for the company on a going-forward basis
- Role of the Board and other key leaders in internal investigations
  - Board members and key leaders should evaluate the quality of the company's internal investigation
  - Board members and key leaders should evaluate the company's process for involving the board in investigations and regulatory matters to ensure the right matters are escalated to the board
  - Boards should be proactive

# Short-term priorities (cont.)

## Internal investigations

- Features of successful internal investigations:
  - Companies often use internal investigations to establish a cooperation mode with prosecutors and regulators
  - Prosecutors and regulators often rely on companies' reports of internal investigations to gain an understanding of the facts surrounding a crisis (especially when the internal investigation is independent and conducted by external counsel)
  - External counsel can provide an independent perspective when gathering and assessing facts and can dispassionately and effectively interview witnesses and identify key documents
  - From time to time, external counsel can bring in third parties (e.g., forensic accountants) to assist in the investigation; in many jurisdictions, the third party's work is also covered by attorney-client privilege so long as the third party is being directed by external counsel

# Short-term priorities

## Personnel issues

- Know the warning signs
- Ongoing improper conduct should be stopped as soon as possible
- Consider whether suspension, reassignment, or termination of employees involved in the underlying conduct is warranted
- Consult with the HR/employment group, and possibly outside employment counsel, before making employment-related decisions
- Where an active investigation exists, consider whether law enforcement should be consulted or informed of employment actions in advance

# Longer-term priorities

05

# Longer-term priorities

## Civil lawsuits

- Litigation is the norm
  - Claims by injured plaintiffs
  - Derivative claims
  - Securities claims
- Recognize the tension in crisis communications:
  - In traditional crisis management, litigation risk drove firms to minimize bad facts and say as little as possible
  - Changes in the media and political landscape mean the scale has shifted in favor of getting the bad facts out and taking your lumps early
- Court approval required for class action settlements
  - Court must find that the settlement is fair, reasonable, and adequate to class members
  - Class actions can be difficult to settle quickly

# Longer-term priorities (cont.)

## Civil lawsuits

- Early decisions by company may impact defenses in subsequent civil litigation
  - Company's efforts to remediate or compensate affected parties may be used as evidence of liability
  - Public release of detailed investigative findings may give rise to discovery of internal investigation
  - Be wary of potential conflicts/inconsistencies between consulting expert supporting internal investigation and testifying expert in civil litigation
  - Privilege waiver to government authorities may waive privilege for purposes of civil litigation
- Be aware of tension between responding to regulators early in the investigation and preserving data and evidence for later civil litigation

# Longer-term priorities

Working with congress

- Elected officials are becoming increasingly aggressive questioning and pursuing executives
  - Congressional scrutiny is not limited to the hearing room: Members of Congress have begun writing letters to boards of directors informing the board of the Members' desired crisis remediation
  - Congressional subpoenas and investigations are increasingly more common
  - State officials (including regulators) also active
- Changing media landscape has caused congressional hearings to grow more contentious and corporate testimony to be more widely disseminated
  - Corporate witnesses must be vigilant of optics and substance of testimony
- Executives communicating with Congress must frame their communications to manage litigation risk but also recognize the instant news cycle

# Longer-term priorities

## Whistleblowers

- How to respond to whistleblowers
  - Treat complaints seriously, treat whistleblowers with respect
  - Inform employees of anti-retaliation policies
  - Carefully consider whether to disclose name of whistleblower to other employees
  - Do not discourage whistleblowers from reporting or suggest they wait until the end of the 120-day lookback period to report
  - Do not threaten to enforce a confidentiality agreement
  - Do not promise the whistleblower full access to the investigation progress
  - Carefully consider and record any adverse employment actions taken against the whistleblower and reasons for such action; include HR in those decisions



# Longer-term priorities

Disclosure to third parties

- At each stage of the investigation, reassess whether disclosure to third parties (customers, auditors, regulators, the market, etc.) is required or warranted
- Consider whether previous representations made to auditors or regulators remain accurate, and whether updated disclosures are appropriate in light of facts uncovered by the investigation