


**FINDING THE RIGHT PORT IN THE STORM:
Crisis Management Strategies
in the United States**

June 2010

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Crises Arise Quietly.....

- **Blood-Thinning Drug Under Suspicion**
March 1, 2008
- **4 Killed In Fiery Santee Auto Crash Believed Identified**
August 28, 2009
- **Eleven workers missing after Gulf oil rig explosion**
April 21, 2010

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...But then can soon become deafening.

- **Drug Tied to China Had Contaminant, F.D.A. Says**
March 6, 2008
- **U.S. launches criminal probe into runaway cars' safety**
SEC also looking into executive behavior as Capitol Hill hearings begin
Feb 22, 2010
- **Government, BP spar over size of oil leak**
May 31, 2010
- **Why BP Was Unprepared for the Big Spill**
June 13, 2010


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The Challenge for Companies

- Crises Have Wide Ranging Consequences
 - Legal
 - Marketplace
 - Legislative/Regulatory
 - Stakeholders

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Preparing for Crises Before They Occur

- Identification of Risks & Vulnerabilities
- Audit and Analysis
- Create Crisis Management Plan
- Response Preparedness
- Rehearse, Reflect, Revise, Repeat

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The Five Keys to Effective Crisis Management

- Anticipate & Prepare
- Understand Ramifications
- Address with Urgency
- Seek Resolution
- Learn and Revise

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Crisis Communications – First Steps

- Crises can rise quickly or slowly grow if left unaddressed - Handle with care and urgency
- Media reports are the signal flare of a crisis alerting a wide range of audiences - pay attention because others are
- Review available media resources and add/develop/improve needed capabilities
- Prepare game plans, players, & materials early for rapid deployment
- Things will change - understand this fact & communicate it early and often

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Communication Goals in a Crisis

- Quick, Clear, Accurate, & Consistent
- Assure public of proper response & prioritize public safety
- Anticipate, clarify and frame developments
- Facts, figures, & frankness combat rumors, conjecture, & fear
- Stress corrective actions & provide evidence

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Criminal & Government Enforcement

- U.S. prosecutors do regularly investigate foreign and international companies and **executives**
- U.S. prosecutors tend to want to “look” at the facts underlying any major incident or big news story
- U.S. has mutual treaties with most countries (including Japan) to obtain evidence and compel individuals to be extradited to the U.S.
- Assume that U.S. prosecutors are coordinating with foreign law enforcement and executions of searches may happen simultaneously across countries
- Extra-territorial reach of a U.S. prosecution can be based on a very small link to the U.S. – for example: one email, one phone call, one meeting, or one transfer of money into or out of the U.S.
- Worth recalling how wire transfers work – nearly all U.S. and foreign banks clear their wires through New York

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Criminal & Government Enforcement

Most active areas currently of criminal prosecution of foreign companies and executives:

- Antitrust – price fixing and allocations of market share
- Off-label marketing of pharmaceuticals – affects foreign pharma companies when they sell any product in the U.S. market
- Foreign corruption – bribes and payments to foreign government officials
- Fraud against investors – even if most of the investors are outside the U.S.
- Safety breaches – tainted food and impaired products

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Criminal & Government Enforcement

As part of a company's preparations for a crisis, best to include contingencies and preparations for the possibility of criminal enforcement by U.S. prosecutors

- Have a protocol in place for grand jury or other government subpoenas or searches
- Hire criminal counsel in the U.S. to handle even subpoena responses – can be the start of something much larger
- After notice of a subpoena or search, be sure that emails and documents are retained
- Involve top management early
- Think of the criminal prosecutors as an important audience of the company's press responses during a crisis
- Appreciate that things can move *very quickly* in a U.S. based criminal investigation, and the U.S. criminal defense counsel will need answers quickly
- Good planning with the involvement of U.S. counsel ahead of time is worthwhile
- Remember – “Rehearse, Reflect, Revise, Repeat”


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Criminal & Government Enforcement

- Example
 - Hired by a foreign pharmaceutical company when there was “some indication” that the U.S. prosecutors were looking at the company
 - CEO was ready to travel to the U.S.
 - We learned later that if he had come, he would have been arrested upon arrival at the airport
 - Remaining in the foreign country, allowed more leverage in negotiations with the U.S. prosecutors – able to use the difficulties in extradition as a bargaining chip
 - Coming to the U.S. would have lessened our ability to negotiate a good resolution
 - Final result: criminal charges were dropped against the CEO, the company paid a modest fine, and the company entered a guilty plea to a lesser charge
 - Lesson learned: communicate with criminal counsel as soon as the company even “thinks” there might be some investigation underway


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Government Investigations

- More than 80 investigative public hearings held in Congress in 2009 – many stem from crisis
- Dozens of similar federal inquiries
- Issues range from AIG bailout to mortgage fraud to text prices
- For each public hearing, there are dozens of other inquiries without fanfare
- Costs to respondents can be immense

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Key Elements for Success in Government Investigations

- Know the client's goals & objectives
- Have the right team in place
- Understand the multiple challenges & their ramifications
- Understand the inquiry and investigators' objectives
- Develop coordinated strategies & objectives to address the investigation & protect clients' interests

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Federal & Congressional Investigations Goals & Services

- *Protect client's legal rights*
- *Address issues raised by investigators*
- *Limit exposure to additional legal challenges*

- Evaluation of Initial Requests
- Intelligence Gathering on Investigative Agency
- Witness & Hearing Preparation
- Testimony and Related Materials Development
- Develop Public Positioning to Protect Client's Business Reputation
- Message Development Aligned with Legal Strategy and Objectives

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Foley's Representative Areas of Experience

- Section 29 Energy Tax Credits
- Major League Baseball's Performance Enhancing Investigation
- Corporate Stock Options
- Deceptive & Abusive Marketing
- Nursing Home Operations
- CMS Accreditation
- Non Profit Status of Hospitals
- Alleged Stark Act Violations
- Drug & Medical Device Company Gifts
- Deferred Prosecution Agreements

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“Not a friend around to help me..”

- “It is near-impossible for a company to win the battle for hearts and minds when trouble strikes; the best it can do is not lose too disastrously.”

John Gapper
Financial Times
June 24, 2010

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