The Case for Compliance:

Not all corporate crises are compliance & ethics crises ----

- Weather-related destruction
- Acts of terrorism
- Political or financial disaster

But many do ----
- FCPA violations
- Insider trading
- Antitrust
- Discriminatory labor practices
Compounding the problem

Even a crisis that doesn’t start out as a compliance crisis may evolve into one because ----

• The internal investigation does not get to root cause and the problem festers – the Toyota recall.

• The company’s communications include misstatements, inadvertent or otherwise – BP and oil spill estimates.

• The company fails to remediate properly or thoroughly – Multiple “toxic” events keep Barclay’s in the headlines.

These types of mistakes are often caused by violations or lapses in compliance policies and procedures.

COMPLIANCE CRISES ARE LIKELY TO HAVE SIGNIFICANT REPUTATIONAL REPERCUSSIONS.
CRISIS MANAGEMENT TEAM – THE CMT – GROUND ZERO FOR DEALING WITH CRISIS

EVERY ORGANIZATION SHOULD DESIGNATE A GROUP OF INDIVIDUALS WHO WILL BE RESPONSIBLE FOR CRISIS PLANNING – ANTICIPATING, RESPONDING AND RESOLVING ISSUES AND EVENTS, GENERALLY UNEXPECTED AND UNDESIRABLE, THAT INEVITABLY OCCUR IN CORPORATIONS.

<table>
<thead>
<tr>
<th>Type of Crisis</th>
<th>1990</th>
<th>2009</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facility Damage</td>
<td>5.5</td>
<td>7.0</td>
<td>8.0</td>
</tr>
<tr>
<td>Casualty Accidents</td>
<td>4.8</td>
<td>11.0</td>
<td>9.0</td>
</tr>
<tr>
<td>Environmental</td>
<td>7.8</td>
<td>2.0</td>
<td>1.0</td>
</tr>
<tr>
<td>Class Action Suits</td>
<td>2.2</td>
<td>7.0</td>
<td>7.0</td>
</tr>
<tr>
<td>Consumer Activism</td>
<td>2.8</td>
<td>9.0</td>
<td>5.0</td>
</tr>
<tr>
<td>Defects &amp; Recalls</td>
<td>5.4</td>
<td>8.0</td>
<td>5.0</td>
</tr>
<tr>
<td>Discrimination</td>
<td>3.3</td>
<td>3.0</td>
<td>3.0</td>
</tr>
<tr>
<td>Executive Dismissal</td>
<td>1.3</td>
<td>1.0</td>
<td>1.0</td>
</tr>
<tr>
<td>Financial Damage</td>
<td>4.2</td>
<td>5.0</td>
<td>8.0</td>
</tr>
<tr>
<td>Hostile Takeover</td>
<td>2.6</td>
<td>9.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Labor Disputes</td>
<td>10.3</td>
<td>8.0</td>
<td>8.0</td>
</tr>
<tr>
<td>Mismanagement</td>
<td>24.1</td>
<td>16.0</td>
<td>11.0</td>
</tr>
<tr>
<td>Sexual Harassment</td>
<td>.4</td>
<td>1.0</td>
<td>2.0</td>
</tr>
<tr>
<td>White Collar Crime</td>
<td>20.4</td>
<td>18.0</td>
<td>19.0</td>
</tr>
<tr>
<td>Workplace Violence</td>
<td>3.8</td>
<td>4.0</td>
<td>10.0</td>
</tr>
</tbody>
</table>

Source: Crisis Management Institute

THE CMT – COMPLIANCE HAS A ROLE

• In a large organization with a sophisticated crisis management process in place Compliance should be a prominent member of the CMT.

• In smaller organizations the Chief Compliance Officer may have to take the lead in developing the CMT.
  • CCO should educate management & the Board stressing the need for preparedness:
    • Best practices compliance cannot guarantee a crisis-free existence
    • Compliance needs to be part of the response – even if the crisis involves a compliance lapse

Crisis Categories Compared 1990 – 2011 (% of total crises each year)
CREATE A MULTI-DISCIPLINARY CRISIS MANAGEMENT TEAM APPROPRIATE FOR THE ORGANIZATION’S SIZE AND PROMINENCE

The CMT should include individuals with skills and experience:

- Senior executive(s) with personal knowledge of and access to the Board
- Senior financial officer
- Investor relations, public relations or communications officer
- General Counsel
- Compliance officer
- Senior employee with deep institutional memory
- Independent director, if there are allegations against management directly

The Crisis Management Team needs a governing document outlining:

- Purpose – Why does the organization need a CMT?
- Scope of Operation – What activities will the CMT undertake and under what circumstances is it activated?
- Composition – How is the CMT to be configured and what are the roles and responsibilities of each member?
- Authority – To whom does the CMT report?
- Leader – The CMT has to appoint one member as its lead

Establish the CMT proactively NOT when a crisis hits.
PLANNING THE RESPONSE

Primary purpose of the CMT is to develop protocols for responding to crises of all kinds.

- One size does not fit all
  - Develop multiple response plans tailored to specific types of crises
    - A good plan attempts to address priorities and concerns of all potential stakeholders
      - Regulators
      - Board
      - Employees
      - Shareholders
      - General Public
      - Suppliers

PLANNING THE RESPONSE

The CMT cannot do it all alone.

- “Who ya gonna call?” -- Prepare lists with contact information of members of the CMT and different subject matter experts, internal & external, to support your various crisis response plans, e.g.
  - FCPA – Internal Audit, outside forensic accountants
  - Market manipulation and other trading violations – Regulatory, IT, independent data analytics providers
  - Data breach – IT, Marketing, external privacy experts
  - Communications
  - Shareholder relations
PLANNING THE RESPONSE

Practice makes perfect.

• Don’t assume you have it right – Conduct scenario testing to confirm that protocols are flexible and adequate.

• Get smart about crisis management
  
  o Review your corporate history
    ▪ How has the organization responded to a crisis in the past?
    ▪ Lessons learned?

  o Review other corporation’s histories of crisis management
    ▪ Consider the good, the bad and the ugly
    ▪ Understand what worked, what didn’t, and why

Planning the Response

CMT - Letting People Know

Once the CMT has been established its existence and purpose should be communicated to the organization. Do not wait until a crisis occurs to introduce the CMT:

• To management ---Lets them know that there is a structure in place with guidelines and protocols

• To employees ---Reassures them that crises will be dealt with in a systematic and transparent manner

• To the Board ---Provides a central point of contact for information as the crisis unfolds and remediation begins
PLANNING THE RESPONSE

When the Crisis Hits

While the CMT should have a designated chair to oversee the periodic review and refresh of its protocols, at the time of a crisis the CMT should select a CMT lead who will be responsible for oversight of all activities related to the crisis, such as:

- All communications – internal & external
- The internal investigation
- The selection of special advisors ---public relations personnel, subject matter experts, legal authorities, etc.
- The remediation plan

PLANNING THE RESPONSE

When the Crisis Hits

- Expect regulatory action
  - Be prepared for a call from the regulators
  - Consider proactively contacting regulators when feasible
- Expect private litigation
  - Whatever the crisis, there is apt to be a victim or an alleged victim
  - Outside litigation counsel should be informed as soon as possible
- Expect public scrutiny
  - Media and the general public -- friends and foes alike -- will have a view of the crisis
INVESTIGATION

Most crises, particularly compliance crises, require a thorough and objective investigation to establish the facts surrounding the event -- the what, who, when and how --- of the crisis.

The CMT needs to be involved to some degree in every aspect of the investigation including:

- The formulation of an investigative plan
- The selection of the investigative team and designation of a lead investigator
- The decision whether or not to use outside counsel
- Establishing and maintaining privilege and work product protections
- Documentation
- Daily or frequent investigation briefings
- Communication of the purpose and progress of the investigation --- to the Board, to regulators, to employees

INVESTIGATION

The CMT and senior management must convey to the organization

- Everyone must cooperate fully with the internal investigation and any outside/regulatory investigations
- Retaliation for cooperation will not be tolerated at any level
- The organization is a part of the solution whatever that solution may be
- Fairness in investigations gives support to compliance

Senior management can reinforce this message through actions like offering a period of amnesty to employees who come forward with information, even self-incriminating, e.g. Siemens
INVESTIGATION

Stopping short of identifying root cause and addressing it head-on often exacerbates a bad situation.

• Satisfying the regulators may not go deep enough -- e.g., You remove the trader, pay the fine but don't change the underlying system of controls.

• Satisfying the Board may not go deep enough -- e.g., You resolve the crisis in a vacuum without looking for patterns, lulling the Board into a false sense of security.

• Satisfying shareholders may not go deep enough -- e.g., You put the crisis behind you -- the stock price is back at pre-market levels -- but your culture hasn't improved and your employees know it.

COMMUNICATION – BEFORE, DURING AND AFTER

The CMT, working with its internal and external experts, should be the clearinghouse for all crisis communication to ensure that communications are:

• Accurate
• Timely
• Consistent
• Appropriate to the audience
• Able to withstand 20/20 hindsight review
• Lessons learned
• Compliance v. Legal/HR
COMMUNICATION – BEFORE, DURING AND AFTER

During a crisis there should be daily communication among the members of the CMT as well as frequent communications with all constituencies. Information needs to be updated, reviewed and processed in real-time.

In addition to the usual suspects (the Board, shareholders, press, employees), do not forget communications with:

- Lenders and debt investors
- Rating agencies
- Financial analysts
- Vendors

REMEDIATION – IT’S NEVER TOO EARLY TO START

Initiating remediation in response to a crisis can have immediate benefits:

- Can help firms avoid prosecution in instances where the crisis involves potential criminality
- Can help firms obtain reduced fines from regulators
- Can reduce the likelihood of the appointment of a monitor
- Can be an opportunity to show stakeholders, particularly employees, that you are serious about fixing the problem
- Can be a way to jump-start the organization on the way to a best practices ethics & compliance program
WHERE IS THE TROUBLE?

- Outsized problems from undersized units
- Irrational comfort with risk
- The Pluto theory of compliance – Incentives
- Risk analysis for resources allocation
- Training fatigue
- Tone all over (where the top is – depends upon where you are)
- Confidence to speak up and ask questions
- Investigations
  - More Than You Think
  - Dangers
  - Building Respect for Results

Dumping Grounds
Consistent policies and legacy policies
Support functions need to understand their critical contributions
Vendors need to understand their critical contributions
  - Code of conduct