

Corporate Crisis Management
The Role of In-house Counsel

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GARDINER ROBERTS



**Introduction –
 The Compliance Process**

- Prevention and Education
- Compliance Oversight
 - Due Diligence Systems
 - Problem Management and Response
 - Risk and Governance Reporting
 - **Fighting Forest Fires**
 - Management and Recovery



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Key Elements of a Forest Fire

- Relative Economic Scale of Problem
- Potential Scope of Damage
- Depth of Causal Misconduct
- Publicity – The Media Magnifier
- Prosecutorial Risk
- Scale of Threat to Senior Management

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**Our Brand is Crisis:
Typical Forest Fires**
(aka "Special Situations")

a. Definition/Categories

- Liquidity Crises/Financial Distress
- Product Failures/Recalls/Large Litigation
- Integrity Failures/Personnel Misconduct
- Involuntary Control Events (Shareholder Activism)
- Investigations/Prosecutions/Inquiries

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**Our Brand is Crisis:
Typical Forest Fires**
(aka "Special Situations")

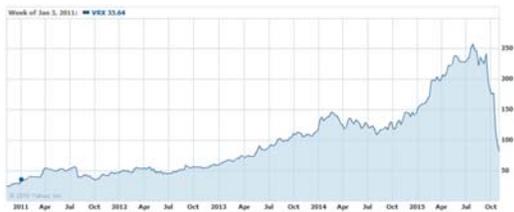
b. Recent Examples:

- *Product Integrity/Recalls* - Volkswagen Emissions Software
- *Data Breaches* - Ashley Madison, Target and other Data Breaches
- *Foreign Corrupt Practices Issues*- From Lockheed to Lavalin
- *HR Issues* - CBC Ghomeshi Affair
- *Public Health & Safety* - Food Drug and Medical Device Failures

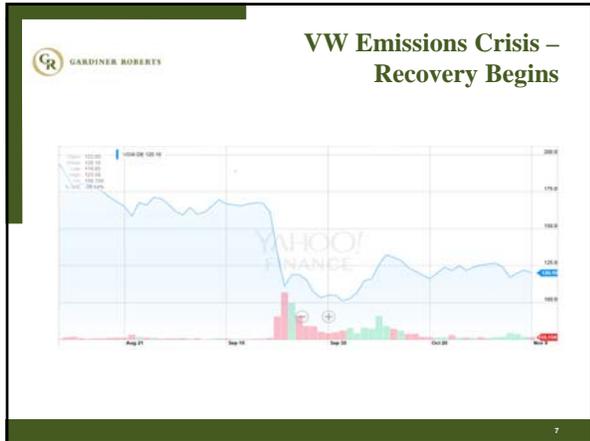
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**Why Does Managing Crisis Matter?
The Valeant Crisis - Free Fall Phase**



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- VW Crisis Response Timeline – The Core of Crisis Response is Legal**
- Sept. 18: The U.S. Environmental Protection Agency says Volkswagen installed software on 482,000 cars that enabled them to cheat on emissions tests. The software reduced nitrogen oxide emissions when the cars were placed on a test stand but then allowed higher emissions and improved engine performance during normal driving.
 - Sept. 22: Volkswagen says about 11 million diesel vehicles worldwide were fitted with the deceptive software. It sets aside 6.5 billion euros (\$7.3 billion) to deal with the costs of the scandal, including expected recalls.
 - Sept. 23: Volkswagen CEO Martin Winterkorn resigns. He takes responsibility for the "irregularities" found by U.S. inspectors, but insists he personally did nothing wrong.

- VW Crisis Response Timeline – The Core of Crisis Response is Legal**
- Sept. 25: Volkswagen appoints Matthias Mueller, the head of the group's Porsche unit, as the new CEO.
 - Sept. 28: German prosecutors open an investigation to establish what role former CEO Winterkorn had in the scandal. Winterkorn is not charged or suspected of wrongdoing, but is named in the investigation because under German law it is not possible to bring charges against a company, only individuals.
 - Sept. 29: Volkswagen says it has commissioned an external investigation by U.S. law firm Jones Day.
 - Oct. 1: Volkswagen names Hans Dieter Poetsch, its chief financial officer, as the new board chairman. The move had been planned since before the crisis but raises concerns about the ability of longtime insiders to get to the bottom of the matter.



VW Crisis Response Timeline – The Core of Crisis Response is Legal

- Separately, Volkswagen says it has dropped a shift a week at one engine factory and imposed a temporary hiring freeze at its financial services division.
- Oct. 2: Volkswagen starts offering customers online checks to see if their cars are affected.
- Oct. 6: CEO Mueller announces review of all investment spending.
- Oct. 7: CEO Mueller says the recall of cars with the emissions-rigging software should start in January and that Volkswagen aims to fix them all by the end of next year.
- Oct. 8: Volkswagen's top U.S. executive, Michael Horn, testifies to Congress, apologizing for the scandal.

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VW Crisis Response Timeline – The Core of Crisis Response is Legal

- Oct. 15: Germany orders recall of all Volkswagen cars with the test-cheating software. By European Union rules, Germany's move means that all 8 million such cars are obliged to be recalled across the 28-country bloc.
- Oct. 28: Volkswagen reports a loss of 1.67 billion euros (\$1.83 billion) in the third quarter after booking a charge of 6.7 billion euros to cover the costs of recalls connected to the scandal.
- Nov. 2: The Environmental Protection Agency and the California Air Resources Board say Volkswagen also installed the cheating software on thousands of Audi, Porsche and VW cars with six-cylinder diesel engines. The previous revelations of cheating involved four-cylinder diesels in smaller cars. Volkswagen rejects the new allegation.

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VW Crisis Response Timeline – The Core of Crisis Response is Legal

- Nov. 3: Volkswagen says it had understated carbon dioxide emissions for 800,000 cars. The development could cost the company another 2 billion euros (\$2.2 billion).

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- Trends in Corporate Crisis**
- Increasing Frequency
 - Increasing Magnitude
 - Why?
 - Corporate branding increasingly tied to social consciousness
 - Internet decentralized access to information
 - Social media accelerates and magnifies publicity and ability to organize
 - “Legalization” of business has elevated importance of regulation, compliance, governance and litigation in business processes

- Key Steps in Corporate Crisis Response - In House Counsel’s Role**
- Discovery and internal reporting
 - Formation of the Crisis Team - and the Crisis Division of the Company
 - External reporting and public disclosure
 - PR and Reputational Management
 - Damage assessment
 - Insurance reporting and coverage
 - Liability control and mitigation
 - Investigations
 - Regulatory compliance exposures/criminal exposures
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- A red fire extinguisher with a black handle and hose, and a white letter 'F' on its side, is positioned to the right of the list.

Key Steps in Corporate Crisis Response - In House Counsel's Role

- Corporate Governance aspects
- Documentary integrity
- Long term recovery perspective
- Corporate Social Responsibility/the Duty to Find Solutions
- Post crisis systems for reporting and issue management
- Ethical Responsibilities

The legal responsibility of the company and its directors, officers and employees is a thread that runs through all of the above.



How Can In-house Counsel Prepare in Advance to be Effective During a Crisis?

- Company legal and risk personnel should work in partnership to identify the highest risk areas in the business (frequency, damage, threat, potential responses, insurance)
- Think through potential crises and the steps that would be involved in responding
- Track crisis experience in competitors and other industries and the effectiveness of corporate responses.
- Build links to the external crisis management market.
- Study what insurers do - their brand is crisis too.

Discussion of Sample Crisis Scenarios

What would you do when senior management calls?

- Product Integrity Crisis Example
- Liquidity Crisis Example
- HR Crisis Example

Questions?
