

**RISK MANAGEMENT & CRISIS RESPONSE**

## Building a Proactive Risk Management Program

Increasingly, businesses face a myriad of issues that expose them and their officers and directors to litigation, regulatory, reputational and other risks. It often falls to the general counsel to properly identify, manage and mitigate these risks before they cascade into a crisis. This is a constant challenge, but in-house counsel need not feel alone. Utilizing appropriate resources and deploying them proactively best protects the reputation and long-term viability of any enterprise. By involving lawyers and other experts long before damaging issues arise, general counsel can avoid the type of hurried reaction that can push the problem beyond their control. Developing and implementing a preventative risk identification and management program helps businesses save costs, reduce aggravation and limit exposure, resulting in enhanced value for shareholders and other stakeholders.

When properly adhered to, well-articulated policies, processes and procedures, developed by a multidisciplinary team of experienced experts, are powerful weapons to effectively and cost-efficiently identify, manage and mitigate threats to the enterprise, and the reputations of all those associated with it.

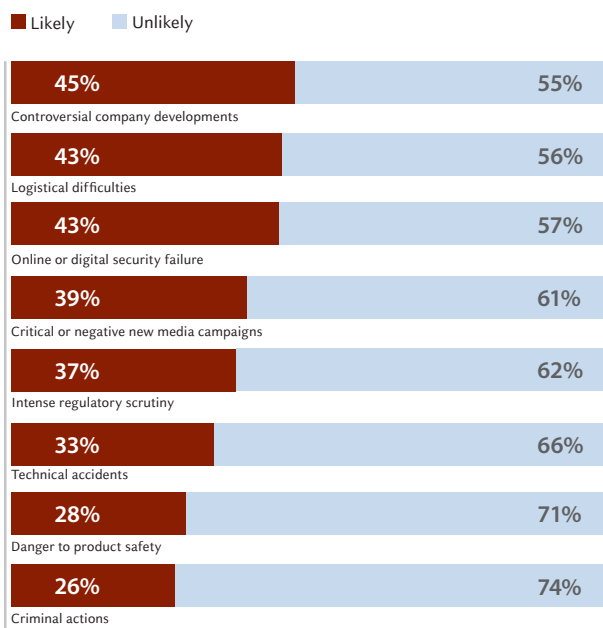
Perhaps most importantly, having a preventative risk management program in place can be of enormous value when something does go wrong. Such a program should make it easier to identify the responsible party, remedy the problem in a cost-effective and efficient way, and position the organization and its leaders as responsible and worthy of trust. By being proactive, the company is likely to reduce panic on the part of stakeholders and limit the impact of any negative publicity by getting ahead of the story. Shareholders, regulators and the public understand that bad things happen; how a company responds is a test of the culture.

In many ways, it is less important to root out all possible issues—which is impossible anyway—than to make sure proper systems and processes are in place. In doing so, it is important to not overlook the human aspect in favor of an overreliance on data and the legal issues.

A Crisis Preparedness Survey conducted in late 2013 reached out to more than 200 business decision-makers to determine the role that anticipating and planning for crises plays in their corporate culture. Half of the respondents were from large enterprise businesses and half were from SME businesses. In addition to gathering information about the respondents' level of crisis preparedness, the survey also provided insight into the types of challenges they expect to encounter and how they intend to deal with them.

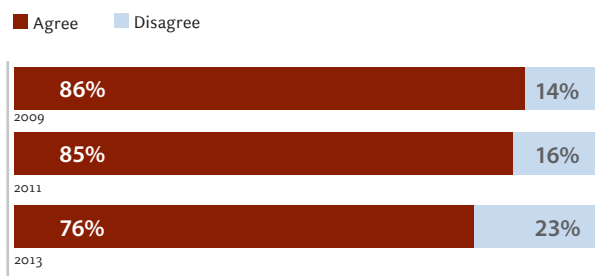
The survey results indicate that the threat of a crisis is one of the top three concerns that keep business decision-makers up at night. In fact, 44% of the respondents reported having experienced a crisis in the past year. Businesses feel exposed to a broad range of risks emanating from both internal and external factors – everything from controversial company developments and logistical difficulties to intense regulatory scrutiny and negative new media campaigns.

#### HOW LIKELY DO YOU THINK IT IS THAT YOUR COMPANY WILL EXPERIENCE EACH OF THESE IN THE NEXT 6-12 MONTHS?\*

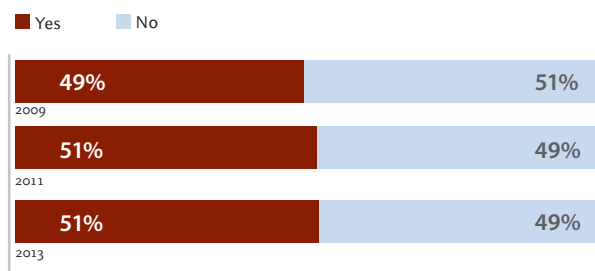


Seeking further information about how prepared companies are to deal with these anticipated crises, the survey revealed that half of the businesses have no crisis plan in place – despite the fact that 75% of respondents agreed that it would be beneficial to have one.

#### TO WHAT EXTENT DO YOU AGREE OR DISAGREE THAT HAVING A CRISIS PLAN IN PLACE WOULD BENEFIT YOUR COMPANY?\*

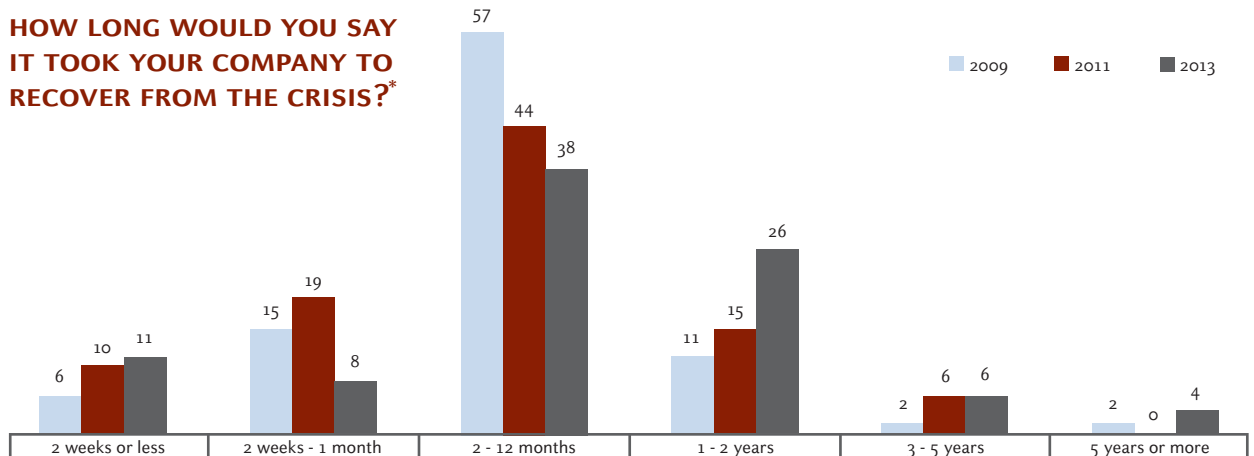


#### DOES YOUR CURRENT COMPANY HAVE A CRISIS MANAGEMENT PLAN?\*



In an effort to quantify the value of having a risk management program, the survey also looked at how long it takes companies to recover after a crisis. The results showed that although 51% of companies recover from crisis within a year, those with a crisis management plan recover more quickly.

Every business is unique and faces distinct challenges. The question, however, is how can general counsel effectively serve the organization by proactively managing and mitigating this wide range of risks with increasingly limited resources. Sensitivities around legal costs have often driven in-house counsel to reach out to a broad number of legal advisors who, more often than not,

**HOW LONG WOULD YOU SAY  
IT TOOK YOUR COMPANY TO  
RECOVER FROM THE CRISIS?\***

price their legal services on a “file by file” basis, a practice which may sacrifice long-term value to the enterprise. In the realm of broader risk management, crisis avoidance and response, it is often beneficial for a general counsel to work with trusted advisors who have a depth of expertise and a clear understanding of the core values and objectives of the business as a whole. Such a team, taking a proactive, holistic and multidisciplinary approach, can best build a preventative risk management program – to the ultimate advantage of the organization. And because “an ounce of prevention is worth a pound of cure,” there’s real benefit—and urgency—in building such a relationship and setting up proactive, preventative programs.

**THE PROBLEM UNRAVELS**

In today’s connected environment, many legal problems are not contained within a single discipline. Consider the following hypothetical example:

A company’s CEO receives an anonymous “whistleblower” letter containing a complaint that an employee has been discriminated against and repeatedly verbally abused by the employee’s direct superior, the company’s CFO.

The CEO makes informal enquiries of the CFO, who convinces the CEO that it is simply a case of “sour grapes.” No further steps are taken. Later, the company receives a second complaint from the same employee, but this time criticizing the manner in which the company handled the original complaint, and threatening to go to the media alleging a cover-up. Now, the CEO consults with the Chairman of the Board, who calls for a formal enquiry, using an investigation team, arm’s length of management. That investigative team discovers that the employee’s original complaint stemmed from arguments he and the CFO had about the financial reporting process, and learns that a number of those reporting to the CFO have been pressured into misreporting certain expenses.

At this point, it is apparent that the personnel difficulty is actually much more complicated, with regulatory, human resources, financial, governance and reputational consequences. When ultimately made public, share value will inevitably decline and shareholder litigation, and even proxy challenges, are possible. Regulatory, and even possibly criminal, consequences loom. Today’s legal and regulatory environment ensures that matters are rarely as simple as they appear at

first blush, particularly from the centre of a potential storm; seemingly internal issues can magnify to become complex, multidisciplinary problems, particularly if they are not handled appropriately and effectively.

### **PREVENTATIVE RISK MANAGEMENT TO THE RESCUE**

Effective general counsel ensure that internal and external legal service providers sufficiently understand and are suitably aligned with the interests and needs of the business. Regulators, judges and members of the general public have a reasonable expectation that people, companies, businesses and their counsel have done, and will continue to do, the right thing. And being perceived as a “good corporate citizen” is crucial to maintaining and enhancing reputations and credibility, both of the enterprise and the individuals who run it. Despite these facts, most companies could do better at enterprise risk management, as evidenced by the number of “crises” that take place—and the number of crisis management firms.

There may be a number of reasons for this. Compliance and proactive crisis prevention are often seen as unrecoverable costs, and for many companies, it is easier to find budget for litigation or other remediation than to make a capital expenditure on a program with a hard-to-quantify return on investment. Such a program also requires building a team of experts and developing a real partnership between the general counsel, chief compliance officer, IT, outside counsel and other valued advisors. This calls for significant time and financial commitment, which in the absence of a tangible “crisis,” often gets pushed down an ever-changing list of priorities.

The deferral of such an initiative, however, could be short-sighted: having an appropriate team in place ensures companies can identify risks at the earliest possible stage, provide an independent view of the key issues, implement a process to manage risk, and develop a stress test in preparation for a crisis. In short, preventative risk management is designed to identify and mitigate risks—from any number of areas—in order to avoid unexpected expenses down the line.

The following are some of the specific benefits of a preventative risk management program:

- **See risks that are not apparent.** Many of the real risks facing an organization cannot be gleaned from a textbook. A comprehensive preventative risk management program leverages a team of experts to identify and provide a deeper understanding of all types of risks.
- **Provide insights and support to the Board of Directors.** Board members may find it difficult to identify risks outside their areas of expertise and experience. Providing resources and advisory services to the Board and its committees charged with risk management will make them better able to discharge their duties.
- **Get credit for cooperation.** Many regulatory agencies have policies where they “give credit” to companies under investigation for having a compliance or a risk prevention program in place. While it is impossible to avoid risk and the manifestation of risk into potential problems, regulators want to see that an event is not due to a systemic breakdown and that the company has measures in place—such as proper leadership, training and certification—to prevent such activity.

- **Build a better defense to class-actions.** Plaintiffs in class actions and other downstream litigation often rely on their ability to convince triers of fact that the defendants have been negligent. This is harder to prove when the company can point to a preventative risk mitigation program that is in place to minimize these risks.
- **Reduce business liability.** Regulators and shareholders increasingly view litigation risk as a business liability. Reducing litigation risk upfront makes the company a more attractive investment.
- **Frame regulatory issues.** Preventative risk management programs provide greater insight into insurance, indemnity and liability issues and allow the company to better focus and structure its inquiry.

### WHEN ALL ELSE FAILS – PLANNING FOR A CRISIS

Even the best preventative risk management programs will not root out all threats, so companies should remain prepared for a matter that can evolve into an unforeseen crisis at any time.

The following are key steps to managing a potential crisis:

1. **Identify the actual problem.** While this seems obvious, it is not always simple to understand what the real issue is. Many times, the quickest path is to find the origin (e.g., whistleblower, regulator, press, litigant) and work from there.
2. **Report.** Board members, like executives and shareholders, do not want to be blindsided. Make sure to report to the Board early in the process. Not only does this provide some defensibility, it also includes the Board in the decision-making process, which can minimize impact for all stakeholders.
3. **Understand the risks and potential consequences.** Even a seemingly simple issue can create any number of downstream risks. It is crucial to gain a quick understanding of the impact on the company, including regulatory compliance, reputation, potential lawsuits, finances, and customer and supplier relationships.
4. **Leverage your experts.** In most instances the company should immediately retain outside counsel, but any number of additional steps should be considered. Is an internal investigation necessary? How should the press be handled? Has the Board been made aware? Does the audit committee need to be involved? Will the company have to restate financials? To what extent do regulators need to be informed? Should steps be taken to isolate the specific bad actors (or their superiors)? These questions, among others, should be asked and answered by the general counsel, the Board of Directors and senior management as well as the company's outside counsel and other experts.
5. **Investigate, report, act.** Don't hide—or hide from—a crucial issue. Be sure to uncover what happened, keep all stakeholders informed as required, and take action to solve the problem and ensure it does not reoccur.

## IMPLEMENTING PREVENTATIVE RISK MANAGEMENT

To ensure you're covering all the bases, put together a team that includes subject matter experts from a wide array of areas. Use the skill sets of lawyers and other problem-solvers to fill gaps before issues arise. A good approach is to identify individuals who have responded to these types of problems before and "redeploy" them onto the team to help build a proactive program. Proactive risk assessments and informal audits should be designed by people with direct experience.

It is also important to take a multidisciplinary approach. Make sure you have the appropriate degrees of substantive expertise (e.g., employment, securities, fraud) as well as personnel with knowledge of a variety of disciplines, including finance, public relations, law, human resources, business, and those with experience negotiating with regulators. This will position your team to both identify potential risks and mitigate and/or manage them.

General counsel discover that it takes considerable time and effort to recruit individual specialists in each affected or potentially affected area and effectively integrate them into a cohesive team on an ongoing basis. Many corporate clients recognize value in engaging a "point person" responsible for composing the team, developing the processes, and identifying and implementing the right technology. Such a leader should have regulatory and risk management experience and ideally have been inside the government. He or she should also be a subject matter expert in at least one substantive area and have experience dealing with them all. Ideally, this point person should have set up similar programs previously, and have some infrastructure for doing so, perhaps by leveraging the array of expertise at his or her own law firm. Should you go for an outside point person, it may make sense to explore a variety of billing models, as this type of work may be better suited to a predictable flat fee rather than a more typical hourly arrangement.

\* Information provided by the 2013 *Crisis Survey*—Burson-Marsteller  
<http://burson-marsteller.eu/wp-content/uploads/2013/11/2013-BM-EMEA-Crisis-survey-results.pdf>

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### ABOUT OSLER, HOSKIN & HARCOURT LLP:

Osler is a leading business law firm practising nationally and internationally from offices across Canada and in New York. Our clients include industry and business leaders in all segments of the market and at various stages in the growth of their businesses. Led by Practice Chair Lawrence E. Ritchie, Osler's **Risk Management and Crisis Response** team draws on the experience of national specialists across a broad range of expertise and offers innovative cross-disciplinary solutions to proactively prevent and, when necessary, respond to legal, regulatory and third party threats and related challenges. For more insights on risk management and crisis response visit our blog at [www.riskandcrisismanagement.com](http://www.riskandcrisismanagement.com), or contact Lawrence Ritchie directly:



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