

# When Process Safety Efforts Fail: The Risks to Corporate Executives

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There are few places on earth more lonely than the space occupied by a corporate executive who is potentially responsible for a process safety mishap resulting in significant injuries to property, the environment and people. Often, support for such executives at that time can be seen by governmental authorities and the public as a failure of the corporation to take responsibility for the consequences of the catastrophic incident. On the other hand, abandoning such individuals in their time of need—particularly as they are subjected to regulatory and criminal investigations and the initiation of civil lawsuits—is seldom in the best interests of the corporation.

The best time to consider these issues is long before the adverse critical incident occurs. Most state laws require indemnification of employees charged with wrongdoing during the course of their employment, as long as those employees are ultimately exonerated. In addition, broad corporate indemnity provisions and directors and officers (D&O) insurance policies are available to protect such employees.

Deciding how broad to make these corporate indemnity protections and the classes of employees to which they should be extended present significant issues for any corporation engaged in business activities with significant risks of catastrophic process safety failures. Whether to maintain flexibility in order to respond to the particulars of any individual incident or whether to decide in advance to “stand behind” (by either agreeing to defend and/or indemnify) all employees involved in such an incident is never an easy decision to make. Given the risks of such incidents to individual corporate executives and the all but inevitable fallout of those risks to their corporate employers, however, consideration of those issues before, rather than after, the critical incident is clearly advisable.

The risk of having criminal liability imposed upon individual corporation executives in the aftermath of process safety failures is increased by the fact that once the immediate process safety response activities are concluded, the “root cause” or other fault based investigations will begin.

In dealing with these investigations, corporate executives must appreciate the significance of what government agencies are involved in the investigative effort. All government agencies have different core constituencies, different statutory powers and different parties with direct influence over the essential character of their investigations.



## Principal Investigators

In the United States, federal and state criminal authorities, the Environmental Protection Agency, Occupational Safety and Health Administration (OSHA) and the Chemical Safety Board are the most likely to be involved in such investigations. In addition, depending on the facts of any particular incident, the Coast Guard, National Transportation Safety Board (NTSB), Food and Drug Administration and other state and federal regulatory agencies may also be involved.

Often, multiple federal and state agencies are involved. In such circumstances, understanding the particulars of the relationship between these agencies can be vital. Even in the absence of a formal memorandum of understanding between the agencies, appreciating the dynamic of how different investigative agencies acquire and share information is crucial to protecting the interests of corporate executives.

To effectively represent the interests of those executives, the different constituencies and statutory focus of investigative agencies must be considered. When OSHA acts as the head of the investigative agencies, labor unions' influence on the investigation may be far different than when the NTSB is involved. In addition, the core competencies of the lead investigative agency can result

in significant differences in substantive results. Thus, the agencies' access to technical expertise and familiarity with the nature of the operations being investigated, will often have a significant impact on the ultimate conclusions drawn by that agency.

Of equal significance, the enforcement powers and protocols of different investigative bodies are vastly different. Some governmental authorities are vested with direct authority to pursue criminal charges while others need to involve other government bodies vested with the power to bring criminal claims. The authority of some agencies to conduct investigations is circumscribed by strict time limitations while others are restricted only by lengthy criminal statutes of limitation. Some agencies can impose civil penalties subject to administrative appeal, while others may pursue such penalties only in highly structured judicial proceedings.

Of perhaps even greater significance than the technical expertise and enforcement powers of particular agencies, the investigative powers of those agencies vary widely. Only some can execute search warrants, issue subpoenas and compel witness testimony. Similarly, a limited number of agencies are authorized to propound written questions or to pursue testimony from witnesses outside of the regulated community.

Moreover, separate from the enforcement and investigative authorities of particular agencies, is the issue of the investigative preferences which the agencies use to exercise that authority. Thus, for example, some agencies require extensive headquarters authorizations with respect to their investigative activities while others do not.

### **Fact-finding Tactics**

With respect to the investigation itself, different agencies follow different procedures with respect to "ambush" or noticed interviews; simultaneous interviews of multiple witnesses; recording of witness interviews; preparation of interview reports or summaries; providing warnings as to witnesses' constitutional rights; permission for participation by non-legal representatives; and sharing witness information with other government agencies. Moreover, the rules governing contact with witnesses represented by counsel and the confidentiality promises given to witnesses, vary from agency to

agency.

All of these factors affect corporate executives' need to protect themselves in the aftermath of significant process safety incidents. An executive who is being investigated by an agency that may search his home or office without notice at any moment, or who may be confronted by investigators who will secretly record his responses to "ambush" interviews needs to be advised of the fact that such events are likely to occur. This is particularly true if the executives believe that they are immune from personal liability because "they were only acting for the benefit of their corporate employer."

Moreover, warning employees of their constitutional rights and their ability to decline to participate in such governmental investigations becomes far more important when a company is faced with a regulatory authority that conducts ambush interviews; executes search warrants; bans non legal advisors; and refuses to record the interview process than would be true in circumstances where a company was faced with a more orderly investigative process.

### **Corporate Complications**

Complicating the civil and criminal exposures of corporate executives can be pre-existing corporate policies requiring investigations (and sometimes disclosure) of the circumstances surrounding all process mishaps. Though such policies are clearly well intentioned, they can seriously compromise post incident efforts to protect corporations and their executives from potential criminal and civil liability.

With respect to both governmental and private investigations, the role of counsel for the corporation or for the individual executive can be crucial. When counsel conducts an investigation to provide legal advice to the board of directors and top management on an issue confronting the corporation, such as a pending lawsuit, there is substantial support for the proposition that the attorney/client privilege and/or work product doctrine protects the confidentiality of the investigation.

The "scope" of corporate attorney/client privilege also needs to be considered in connection with the conduct of internal investigations. Clearly, all corporations consist of, and function through, individual directors, officers, employees and other agents. Different states have

different rules, however, as to the extent to which communication between counsel and particular individuals associated with the corporation are protected by the attorney/client privilege. As such, counsel must be particularly careful to ensure that they know whether their communications with particular individuals will ultimately be covered by the attorney/client privilege under the applicable law.

Of particular concern with respect to any internal corporate investigation is the obligation of counsel to ensure that those who are interviewed by, or at the direction of, counsel are fully aware of their client or non-client status. The American Bar Association's Model Rule of Professional Conduct 1.13(d) requires that "in dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." As such, notwithstanding in-house counsel's often close relationship with particular corporate employees, counsel must be careful to inform those employees that he or she does not represent them individually and that the disclosures of those employees may ultimately be revealed to third parties without their consent. This is a particularly important issue in circumstances where the investigation raises potential criminal concerns.

### **Early and Concentrated Focus**

Dealing with the risks to corporate executives inherent in the aftermath of significant process safety failures requires an early and concentrated focus. That focus must include consideration of possible individual exposure before the issue is raised by the investigating authorities as well as consideration of appropriate executive corporate indemnification and insurance protections.

Liability issues should be considered at the time that critical incidents are reported to regulatory authorities and at the time that spokesmen are selected to make disclosures to the public with respect to the incident.

Moreover, steps should be taken to maximize the protections afforded by the attorney client privilege throughout all governmental and internal investigations and executives should be prepared to respond to investigative techniques such

as the execution of search warrants.

In addition, every critical incident creates the possibility that key adversaries will surface who will attempt to increase the exposure of the corporation and/or its executives to regulatory, civil and criminal liabilities. Every step in the critical incident response effort presents the danger of creating such adversaries. For example, following a catastrophic explosion, promising the local community that the plant will never be reopened may eliminate the danger that the local community will organize an effort to proceed criminally against an “offending” company. However, that very announcement may ensure that union employees concerned about their future job prospects will organize to attempt to impose just such liability upon a corporation or its executives. Every critical incident will present different dangers. In all such circumstances, however, a recognition of whom the company’s key adversaries are, and a plan for dealing with those adversaries is essential.

Finally, when process safety efforts fail and executives are exposed to the dangers outlined in this article, it will be all but impossible to get those executives to properly focus on these exposures. For that reason, the appropriate education and training of corporate executives should take place before—not after—the process safety failure has occurred. ■■

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