

## Lessons from Flint: The High Cost of Burying Bad News

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Program Materials are available on [www.dorsey.com](http://www.dorsey.com) at  
<https://www.dorsey.com/newsresources/events/event/2016/11/corporate-counsel-symposium-2016>

1. PowerPoint Presentation
2. *Federal Civil Penalties Going Up, Way Up*, John Marti, Alex Hontos and Benjamin Fee  
Dorsey & Whitney LLP (July 1, 2016)  
<https://www.dorsey.com/newsresources/publications/client-alerts/2016/07/federal-civil-penalties-going-up>
3. *Corporations as Whistleblowers: Leveraging Corporations to Fight Corporate Crime*,  
John R. Marti and Alex Hontos, Pratt's Government Contracting Law Report (March 2016)  
[http://dorsey.com/~media/files/newsresources/publications/2016/03/Leveraging\\_Corp\\_to\\_Fight\\_Corp\\_Crime\\_032016.pdf](http://dorsey.com/~media/files/newsresources/publications/2016/03/Leveraging_Corp_to_Fight_Corp_Crime_032016.pdf)
4. *DOJ, SEC Change "Cooperation Credit" Process, Add Resources to Fight Corruption*,  
J Jackson, Beth Forsythe and David Green, Dorsey & Whitney LLP (November 18, 2015)  
<https://www.dorsey.com/newsresources/publications/client-alerts/2015/11/doj-sec-change-cooperation-credit-fight-corruption>
5. Contact Dorsey's Government Enforcement & Corporate Investigations Practice for  
information on our Domestic Internal Investigations Handbook and Government  
Enforcement Actions Deskbook

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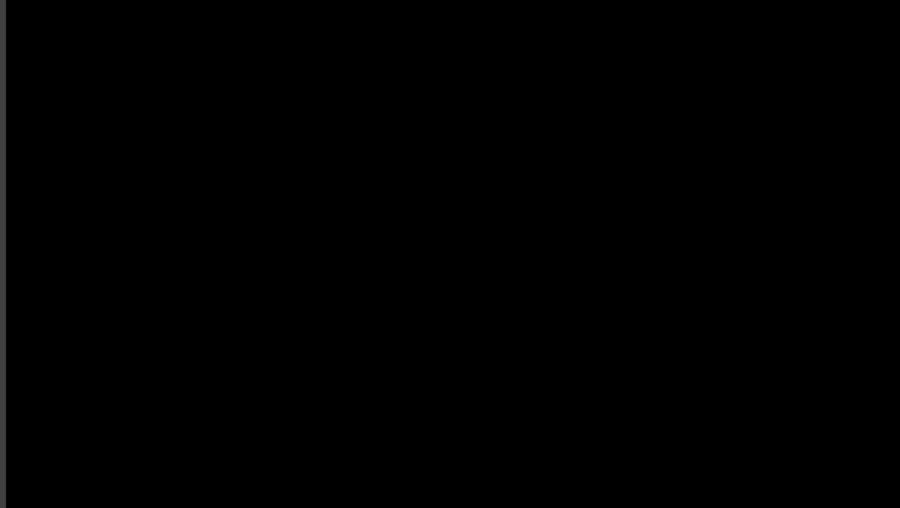
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## Agenda

- **Flint Basics**
- **What Went Wrong? Incentives and Culture**
- **The Initial Response and Maintaining Control**
- **Communicating with Government / Stakeholders**
- **Staying the Course as Facts Change**
- **Key Lessons Learned**

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## Flint Water Crisis – What Happened



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The video documents several of the key events in Flint that could have triggered action by government officials, including:

- Citizen complaints
- The E. coli finding that led to a boil water notice
- The study by the Virginia Tech research team

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## Flint Water Crisis – What Happened

- **2013:** Decision to switch sources, use Flint River in interim
- **2014 – April 25:** Water source switches to Flint River
- **2014 – Summer:** Residents experience stomach problems, hair loss, rashes; complain water smells
- **2014 – August:** E. coli found in water, boil notice issued
- **2014 – October:** GM stops using water due to machine corrosion; residents routinely complaining to city
- **2015 – January:** State starts buying bottled water for employees at government offices
- **2015 – February:** City test shows high lead content in home; DEQ wrongly informs EPA of corrosion control
- **2015 – July:** EPA memo re high lead levels is leaked; DEQ tells residents to “relax”
- **2015 – July/August:** Water is tested, two samples thrown out; health officials learn about spike in blood lead levels
- **2015 – September:** Local pediatrician and Virginia Tech team release results of their own studies showing lead problems
- **2015 – October:** County declares public health emergency, switches back to Detroit water supplier

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### The difference two data points can make

The Michigan Department of Environmental Quality's analysis of Flint's water supply

If the DEQ had **included all of the water samples it took**, federal law would have demanded further steps ...

... but the **exclusion of two high-lead samples** put the city's water supply below the threshold for mandatory action.

#### LEAD LEVELS IN WATER SAMPLES



#### PERCENTAGE OF SAMPLES EXCEEDING 15 PPB



FIVETHIRTYEIGHT

SOURCE: MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY  
Graphic used with permission from FiveThirtyEight 2016

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## What Went Wrong?

- **Incentives: What may cause an employee to bury bad news?**
  - Self-interest: Fear of termination, hide responsibility
  - Trying to do the right thing / rationalization
  - Devotion to organization / corporate culture
  - Quid pro quo: promotion, bonus, illicit payment, etc.
  - Explicit mandate of boss(es)
- **Culture: What are the organization's first principles, and how are conflicts between them resolved?**
  - Public health and safety
  - Profitability (or low spend, for government organization)
  - Added challenge in state government: governor is the boss, and may have higher aspirations that cloud judgment
- **How do leaders effectively communicate first principles?**

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## The Initial Response: Maintaining Control of the Investigation

- **There is a window at the beginning of an investigation to establish credibility as an independent investigator**
- **Requires early identification of issues, quick progress on investigation, and communication**
- **Must actively build trust with stakeholders**
  - Employees
  - Customers
  - Business partners (lenders, investors, suppliers)
  - Government
- **Non-legal aspects**

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## The heavy toll paid for Flint crisis

- Public health crisis – permanent damage to children
- Congress votes to spend \$270MM to aid Flint residents
- Tens of millions of dollars to switch back to Detroit
- 9 former state employees have been indicted for misconduct, willful neglect of duty
  - Flint utilities manager (cooperating)
  - 5 from Department of Environmental Quality (DEQ)
  - 3 from Department of Health and Human Services (DHHS)
- As of 10/10/16, Governor Snyder's legal fees are estimated at \$3,400,000 (\$2MM criminal, \$1.4MM civil) – all paid by Michigan taxpayers
- Flint residents sue state, EPA

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## Communicating with Government and Stakeholders

- Trust is the key
- Initial disclosure and presentation sets the tone for the relationship
- Deciding when to disclose
  - Not too early (must know enough facts to answer questions)
  - Not too late (perception of deception)
- Deciding what to disclose
- Be able to articulate a proposed plan for the government to approve

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### **Principles of Federal Prosecution of Business Organizations**

“In conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target”:

- nature and seriousness of offense (risk of harm to the public, prosecutorial priorities);
- pervasiveness of wrongdoing within the corporation;
- history of similar misconduct (criminal, civil, regulatory enforcement actions);
- willingness to cooperate in the investigation of its employees and operations;
- existence and effectiveness of a compliance program;
- timely and voluntary disclosure of wrongdoing;
- remedial actions, including any efforts to
  - implement an effective corporate compliance program or to improve an existing one,
  - replace responsible management,
  - discipline or terminate wrongdoers,
  - pay restitution, and
  - cooperate with the relevant government agencies;
- collateral consequences (e.g., disproportionate harm to shareholders, pension holders, employees);
- adequacy of remedies such as civil or regulatory enforcement actions; and
- adequacy of prosecution of individuals responsible for the malfeasance,

United States Attorneys Manual 9-28.300

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### **Staying the Course as Facts Change**

- **Don't overreact – not all smoke indicates a fire**
- **Don't underreact – investigations that look small and start in-house may easily go sideways**
- **The art of knowing when to bring in outside counsel**
  - Executives' actions are implicated
  - Allegations indicate systemic issue
    - Ability to maintain independence
    - Capacity to handle investigation of that scope
  - Serious possibility of public/government reporting
  - Desire to show how seriously organization is taking this
  - “It just feels serious” – don't ignore your gut
- **Multiple investigations of various issues by multiple forces**
  - Determine who is the primary government point person
- **Privilege Issues**

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# Key Lessons

- **Culture**
- **Control**
- **Constant Reevaluation**
- **Credibility**
- **Communication**