

## Some Practical Guidance for Handling a Crisis

A crisis can arise from any number of sources, external or internal and may be beyond your ability to prevent or control. Thus, while it is always important to take appropriate actions to avoid crises, it is also prudent to prepare for how best to respond to one when it occurs. We have prepared some practical guidance for handling a crisis for your consideration.

It is important for you to be prepared for the following:

- Being caught off guard
- Lacking sufficient information about the nature, extent, implications and ramifications of the crisis
- Being surprised by the rapid pace of events
- Wanting to get control over events and to resolve matters promptly

### **What to do when a crisis occurs?**

First, don't panic. Take a deep breath and think.

Second, get your key management team together including portfolio management, operational, legal, accounting, sales, marketing, shareholder servicing, media relations, and other areas that are impacted by the crisis, which might be of assistance in getting the facts, or in resolving it. Take charge and select a key senior executive to lead the crisis team. Working in close concert with any experts that may be retained, they should promptly identify the facts, the issues and potential solutions. Consider having a member of the legal team keep an accurate record of all meetings and all actions taken. Identify any imminent disclosure or filing deadlines or public appearances that may have to be reconsidered to avoid incomplete or selective disclosures or awkward responses until you know all the facts.

Third, quickly obtain the facts as best as they are currently known and seek to identify and appreciate their ramifications.

- Identify any "material non-public information" issues
- Identify any areas that must immediately be addressed, such as: impact on
  - Pricing and Net Asset Value ("NAV") determination
  - Public disclosures, especially in prospectuses and other materials
  - Need to make public disclosures under securities laws, listing requirements, etc.
  - Need to take employment action, e.g., placing certain personnel on administrative leave, whistle blower considerations
  - Need for document preservation and/or "litigation hold" to ensure relevant documents, including in electronic form, are preserved

# Morgan Lewis

**Fourth**, consider immediately retaining experts (and who should be retaining them). In addition to providing particular expertise that may be crucial in a crisis, they help free up existing staff so they can focus on everything else that needs to be done. Some potential experts to be considered are:

- Recognized law firm other than Fund or Adviser's regular counsel which will have credibility with Fund Boards, regulators, and others to conduct the investigation and provide competent and timely advice about:
  - Privilege issues
  - Key legal issues and their ramifications
  - Insurance coverage and notice issues
  - Potential options for resolving issues
  - Handling regulatory inquiries
- Recognized accounting firm other than Fund or Adviser's auditors to conduct any forensic reviews
- Media or communications firm to manage communications and press inquiries
- Document management utility to collate and manage documents and prepare, with counsel, for potential regulatory inquiries and litigation

**Fifth**, identify and timely notify key affected parties, such as:

- Fund Boards and their counsel
- Regulators: Note that, depending on the nature of the crisis there may be a requirement that regulators be notified. For example, see Section 33 of the Investment Company Act of 1940 and FINRA Rule 4530. Consider possible requirements to notify the National Futures Association, Commodity Futures Trading Commission, banking, insurance and other regulators as well as foreign regulators
- Internal and external legal, compliance and accounting areas
- Shareholder servicing areas and other areas that may be receiving inquiries from shareholders and the public
- Dealers and other key partners who may themselves be affected or have clients that are affected by the crisis
- Parent company, affiliates and subsidiaries that may have disclosure or other obligations arising from the crisis
- Insurers which may have notice requirements to preserve claim coverage

**Sixth**, along with communications experts and legal counsel, consider the use of differing media (such as dedicated phone lines, web sites and the like) to manage communications with the public and key stakeholders.

**Seventh**, be very sensitive to all the legal issues surrounding the crisis. Such as:

- Selective Disclosure Issues (Regulation FD and the like)
- Fiduciary responsibilities
- Investment Advisers Act of 1940 Anti-Fraud provisions (Section 206 (1), (2), and (4) and Rule 206(4)-8 )
- Disclosures previously made about what you might or would consider or do that might be applicable to present circumstances
- Securities Act of 1933 and Securities Exchange Act of 1934 issues (i.e. 10b-5)
- Notification requirements and other implications under corporate arrangements (lending agreements, etc) investment management agreements, etc.

# Morgan Lewis

Eighth, don't forget the states! As was seen during the market timing scandals, the states can have a very influential role in resolving a crisis.

## What to do beforehand?

Now, as you review all of these items you should consider what you can do beforehand. Here are a few thoughts:

- Create and maintain a master list of key internal and external contacts including their office, home and cell phone numbers and e-mail addresses (including some key outside experts that might be retained in the event of a crisis)
- Compile a summary of the key legal, regulatory and other arrangements that may be relevant to a crisis (such as those that impact communications with the public, selective disclosure issues, filing requirements and the like)
- Develop standard confidentiality and non-disclosure agreements for use during a crisis

## Further Questions

If you have any questions or would like more information on the issues discussed, please contact either of the following Morgan Lewis attorneys:

### New York

Andrew J. "Buddy" Donohue	212.309.6160	<a href="mailto:adonohue@morganlewis.com">adonohue@morganlewis.com</a>
Anne C. Flannery	212.309.6370	<a href="mailto:aflannery@morganlewis.com">aflannery@morganlewis.com</a>

## About Morgan, Lewis & Bockius LLP

With 22 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labor and employment, regulatory and intellectual property legal services to clients of all sizes—from global Fortune 100 companies to just-conceived startups—across all major industries. Our international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—nearly 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at [www.morganlewis.com](http://www.morganlewis.com).