

Morgan Lewis

INTERNAL INVESTIGATIONS: BEST PRACTICES

Zane David Memeger, Partner
December 7, 2018



© 2018 Morgan Lewis

Agenda

- When to conduct an internal investigation
- Investigation principles and key considerations
- The investigation team
- The components of an internal investigation
- Voluntary disclosures and the value of cooperation
- Ethical and other issues

Morgan Lewis

2

WHEN TO CONDUCT AN INTERNAL INVESTIGATION

Internal Investigations

- An Internal Investigation is a formal inquiry to determine whether organizational policies, laws, and/or regulations have been violated.
- The alleged misconduct can be:
 - Prompted by Government Inquiry or Raid
 - Discovered through compliance reviews and/or routine audits
 - Reported internally by whistleblowing employees (directly or anonymously)
 - Discovered through customer complaints
 - Reported externally by business partners, vendors, subsidiaries, competitors, civil litigants, or the media
- Additional acts of misconduct can be discovered during an ongoing investigation.
- Internal investigations are often conducted while the company is also trying to manage a crisis.

Morgan Lewis

4

Internal Investigations Are Fact-Gathering Exercises

- Legal advice is only as good as the facts on which it is based.
- Internal investigations are key components to crisis-management plans and are the primary means to address and respond to credible allegations of misconduct.
- Trying to identify the nature of the alleged misconduct and who is implicated.
 - Are there any steps that you need to take to identify the misconduct (e.g., high-level complaint without much detail but merits further investigation)?
 - Is the misconduct unlawful?
 - Is the misconduct ongoing?
 - Does the misconduct involve senior management or officers?
 - Where did the misconduct occur (geographical location)?

Morgan Lewis

5

Internal Investigations Are Fact-Gathering Exercises

- Are there any other issues (consequential or otherwise) related to, or as a result of, the misconduct that you need to consider:
 - Self-reporting to the relevant authorities
 - Other instances of misconduct
 - Disclosure of confidential information
 - Regulatory obligations
 - CIA obligations

Morgan Lewis

6

Benefits of a Properly Conducted Internal Investigation

- Early and accurate assessment of potential legal exposure.
- Identification, discipline, and/or removal of the bad actors.
- Reflection of the company's commitment to ethics/compliance.
- Enhanced credibility with enforcement authorities (e.g., DOJ's new FCPA Corporate Enforcement Policy, Serious Fraud Office Deferred Prosecution Agreements).
- Protection for directors, officers, and/or senior management.
- May be required by law (e.g., SOX).
- Positive reputational impact.

Morgan Lewis

7

INVESTIGATION PRINCIPLES AND KEY CONSIDERATIONS

Investigation Principles

- The following Investigation Principles should always govern the work performed as you determine facts, respond to issues, and deliver a tailored response designed for the client:
 - Confidentiality
 - Integrity and Independence
 - Quality and Clarity
 - Timeliness

Morgan Lewis

9

Key Considerations for Every Investigation

- Understand who will be the ultimate consumer of the investigative work:
 - Senior management and general counsel
 - Board of directors
 - Audit committee
 - Outside auditors
 - DOJ or other government regulators
 - Investors
 - General public

Morgan Lewis

10

Key Considerations for Every Investigation

- Analyze the materiality of the risks involved and the potential liability in all jurisdictions (e.g., civil, criminal, regulatory, reputational).
- Ensure compliance with local laws, regulations, contractual terms, and internal policies including any employment-related policies and procedures, data protection laws, and whistleblower protection.
- Maintain discretion, confidentiality, and privilege. Know the privilege laws in the jurisdiction involved.
- Ensure that every investigation is impartial, independent, fair, and sufficiently rigorous, and is perceived to be of integrity.
- As investigations progress, regularly review potential outcomes and consequences (possible civil, regulatory, or criminal claims; pros and cons of self-reporting; disciplinary actions against employees and potential impact on client's business, contracts, and other civil law obligations).
- Consider all factors relevant to the allegation(s) that you are investigating. Investigations can be multifaceted and must be divided into separate streams of investigation to be appropriately investigated.

Morgan Lewis

11

Immediate Crisis Response: Key Considerations

- Need to isolate the target from the conduct under investigation to ensure that the company is not exposed to continuing liability.
- Suspend or reassign employees as appropriate, taking into account applicable employment laws and the employee's terms and conditions of employment.
- Remove and/or secure any potential, relevant physical and electronic documents within the individuals control, taking into account the applicable privacy laws, including the requirement under the GDPR to produce an impact assessment prior to accessing, collating, and transferring such data.
- Assess whether there are any immediate disclosure obligations, and to whom they should be made.
- Assess whether there are any public statements or filings that need potential clarification to protect interests of the client.
- Evaluate the need to communicate with employees, recognizing that maintaining confidentiality should be the preferable outcome so that an effective internal investigation can be conducted.

Morgan Lewis

12

THE INVESTIGATION TEAM

The Investigation Team

- The team must be independent and uninvolved with the matters under investigation (either directly or by virtue of a management position) and the team must have access to the appropriate resources (legal, accounting, IT, and human resources), as well as relevant subject matter expertise in the impacted business or product area.
- How regulators and enforcers view an investigation will depend on the nature of the allegations, the scope of the conduct, the jurisdiction(s) involved, and the level of inquiry made.
- The integrity of the investigation is of paramount concern, and must appear independent and rigorous to clients and authorities.
- In-House Counsel vs. Outside Counsel.

Morgan Lewis

14

THE COMPONENTS OF AN INTERNAL INVESTIGATION

Framework for Establishing and Protecting Attorney-Client Privilege

- The appropriate client representative (GC, fiduciary, senior manager, etc.) should prepare a memorandum directing in-house or outside counsel to conduct a confidential investigation for purposes of providing legal advice to the company.
- Counsel should confirm in writing that they have received the internal investigation request, along with a brief outline of the direction of the investigation.
- Counsel should advise those working on the investigation in writing that (i) they have been asked to assist with the investigation; (ii) they are to treat all information as privileged and confidential; (iii) they should not discuss their work or findings with others; (iv) they should not make copies of their notes or work papers for sharing with others; and (v) they should mark all investigative notes, reports, documents, and communications, including email correspondence as "Privileged and Confidential."
- Employees assisting with the investigation should be instructed to report to the lawyers directly and not through their usual chain of command.

Morgan Lewis

16

Four-Step Process to Conducting Internal Investigations

1. Development of an Investigative Plan
2. Collection/Review of Evidence
3. Analysis and Reporting
4. Recommendations/Remedial Actions (varies)

Morgan Lewis

17

1. Development of an Investigative Plan

- Develop a plan that outlines the allegations and the scope of the investigation, including how the investigation will address uncovering the facts relating to the investigation.
 - Be sure to identify all players involved in the problematic conduct (e.g., executives, employees, third-party agents, and/or other business partners).
 - Be sure to identify internal control deficiencies that may have contributed to problematic conduct.
 - Be sure to identify the stakeholders and required expertise that must be a part of the investigation team.
- Advantages to developing and memorializing a work plan at the outset:
 - Enables more efficient management and monitoring of tasks.
 - Assists in managing expectations with respect to timing and costs.
 - Aids in a company's ability to defend the investigative process.

Morgan Lewis

18

1. Development of an Investigative Plan

Investigative Plan – Elements and Considerations:

- **Issues.** List the factual and legal issues to be resolved.
- **Restrictions.** Research whether there are any restrictions on internal investigations in the relevant jurisdiction, e.g., data protection laws.
- **Staffing and Timing.** Set forth potential staffing and timing of the tasks to be completed, with the understanding that adjustments may need to be made as the investigation progresses. Ensure the timing of the investigation is in accordance with local legislation [i.e., in some countries the law states that employers have a limited window of time to take disciplinary action against an employee (Poland and France, etc.)].
- **Preservation of Documents and Information – Do No Harm!** Discuss what documents and information need to be preserved and how they will be preserved. Liaise with the client to issue legal holds on relevant email accounts and other relevant files.
- **Privilege.** Discuss whether the investigation is intended to be protected by the attorney-client privilege, work-product protection, or other privileges, and how such protections will be preserved (e.g., segregating opinion work product from fact work product).
- **Business Knowledge.** Develop a good understanding of the client business, the relevant tools used by the client and any processes insofar as they are relevant to the investigation. This is particularly important when the allegations concern controls failings within the client business.

Morgan Lewis

19

1. Development of an Investigative Plan

Investigative Plan – Elements and Considerations (cont'd):

- **Investigative Steps.** List the documents you intend to gather/review and the interviews you intend to conduct.
- **Experts.** Determine whether outside experts (forensic accountants, data collection experts, etc.) are needed.
- **Communication.** Determine how you intend to update the client.
- **Work Product.** List the written work product you intend to produce and how it will be organized/labeled.
- **Reporting.** Discuss how you intend to report the investigation findings.
- **Initial Intentions of the Client.** The client may have a view on the desired outcome from the outset of the investigation. This knowledge may help focus the investigation or manage the client's expectation if the desired outcome is unlikely to be achieved.

Morgan Lewis

20

2. Collection/Review of Evidence

Three Principal Types of Evidence

- 1) **Documentary** –
 - **Electronic:** computer hard drives (work and personal), shared network drives/folders, email programs, instant messaging programs, databases, portable storage devices, mobile phones, personal digital assistants, etc.
 - **Paper:** Custodial files including documents of an informal nature (diaries, desk calendars, appointment books, etc.)
 - **Other:** physical items (e.g., a gun)
- 2) **Testimonial** – statements from witnesses (e.g., interviews).
- 3) **Expert** – while rare, expert testimony may be helpful.

Morgan Lewis

21

2. Collection/Review of Evidence

Testimony/Interviews:

- Allow the interviewee to share their personal account at first (as applicable to the facts of the case). They may become more comfortable during this part of the interview to share information that may be relevant.
- “W” questions – who, what, where, when, why (and how).
- Do not reveal what others have said.
- “Watergate” question – anything not asked? Aware of impropriety?
- Instructions at end (do not destroy documents, do not discuss the interview, collect documents, etc.).
- Summarize – to ensure that you and the interviewee are aligned on what has been shared at key points of the interview.
- Memorialize interviews.

Morgan Lewis

22

3. Analysis and Reporting

Analysis

- Objectively and fairly assess the facts when making your factual findings.
 - Should include good and bad facts—be objective and fair.
- Apply those facts to the relevant law or policy issues.
- Conclusions.

Morgan Lewis

23

3. Analysis and Reporting

Reporting

- Work from the end product: outline and draft your report as an early step in the investigation.
- Ultimately, reports vary depending on the nature of the investigation and the preferences of the client.
 - Detailed memorandum
 - Summary conclusion
 - PowerPoint presentation
 - Oral report

Morgan Lewis

24

3. Analysis and Reporting

Reporting – Components of a Written Report:

- I. Circumstances prompting investigation
- II. Investigation conducted (e.g., documents gathered and reviewed, witnesses interviewed, use of forensic accountants)
- III. Factual findings
- IV. Analysis
 - a. Relevant law/policy
 - b. Application of facts to law/policy
- V. Recommendations (usually discussed orally with the client)
 - a. Employee discipline, other remedial measures
 - b. Policy enhancements
 - c. Self-reporting

Morgan Lewis

25

4. Recommendations/Remedial Actions

- Clients expect that outside counsel will make observations and be able to make recommendations
 - Must be considered at the outset of the investigation (be alert to potential pitfalls and challenges)
 - Usually want to make initial recommendations to the client orally (i.e., early case assessment subject to further investigation)
 - Examples:
 - Disciplining/terminating employees
 - Revising/enhancing policies
 - Implementing new internal controls
 - Firing vendors or other third parties
 - Conducting training
 - Self-reporting to regulators
 - Making public disclosures

Morgan Lewis

26

VOLUNTARY DISCLOSURES AND THE VALUE OF COOPERATION

Current DOJ Position Post-Yates Memo

- Reinforcement and modification of DOJ's policy on corporate wrongdoing and individual accountability.
- Commitment to self-disclosure, demonstrated by the expansion of the FCPA disclosure policy.
 - Goal: increase number of voluntary disclosures and allow DOJ to enforce against culpable individuals.
- Compliance programs should be specifically tailored to a company and should evolve over time.
- Companies must be aware of new risks that arise and adapt to them.
 - New risk examples: growth, business operation expansion, going public.
- DOJ does not have an evaluation formula for compliance programs, but looks to each company's individual circumstances.
 - "Filip Factors": Principles of Federal Prosecution of Business Organizations instructs DOJ to look to whether the compliance program is appropriately and effectively implemented, and not a mere "paper program."
- "No piling on" policy: discourages inflicting multiple penalties from different enforcement agencies by encouraging coordination in investigations.

Morgan Lewis

28

DOJ's Formal FCPA Enforcement Policy (November 2017)

- "Presumption of Non-Prosecution" where companies "voluntarily self-report [FCPA] issue, cooperate fully with prosecutors, and identify and remediate the root causes and gaps in compliance controls that led to the problem."
- Companies must identify the individuals responsible for the misconduct and must pay to DOJ (or a relevant regulator like the SEC) all disgorgement, forfeiture, and restitution resulting from the misconduct to receive non-prosecution treatment.
- The presumption of non-prosecution may not apply where "aggravating circumstances" are present (e.g., recidivist status, executive management involvement in misconduct, significant profit generated by misconduct, and/or misconduct pervasive throughout company).
- Sets forth hallmarks of an effective compliance program, including but not limited to fostering a culture of compliance; employing experienced compliance counsel; dedicating sufficient resources to compliance; continuing risk assessments and monitoring; and ensuring compliance personnel have appropriate access to management and the board.

Morgan Lewis

29

Voluntary Disclosures

- When a company satisfies the standards of voluntary self-disclosure, full cooperation, and timely and appropriate remediation, there will be a presumption that the Department will resolve the company's case through a declination. That presumption may be overcome only if there are aggravating circumstances related to the nature and seriousness of the offense, or if the offender is a criminal recidivist.
- If a company voluntarily discloses wrongdoing and satisfies all other requirements, but aggravating circumstances compel an enforcement action, the Department will recommend a 50% reduction off the low end of the Sentencing Guidelines fine range.

Morgan Lewis

30

ETHICAL AND OTHER ISSUES

Ethical and Other Issues

- Potential for conflict of interest in internal investigations
 - Company's interest may not align with those of the employee
 - Must provide clear *Upjohn* warnings about whom you represent, who possesses the privilege, and the purpose of the interview (gathering facts to provide legal advice to the client)
 - Responding to "Do I need a lawyer?"
 - For further advice, consult the ABA White Collar Crime Committee's 2009 report: "*Upjohn* Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees"
- Neutral fact-finding vs. advocacy
 - Cannot advocate by bending the facts—credibility matters

Morgan Lewis

32

Ethical and Other Issues

- If the company chooses to make a voluntary disclosure or, in the alternative, receives a subpoena, a warrant, or the like from a government enforcement or regulatory authority, the investigation team should rely on the expertise of lawyers in the relevant jurisdiction for all communications with and/or responses to requests from such authorities.
- If information comes to light that individuals providing instruction to the investigation team or participating in the investigation have potential exposure, be prepared to address and elevate the issue to maintain integrity of the investigation.
- Ability to stand by findings and recommendations is dependent on the access provided by the client, so one must always consider position carefully when the client wants to affirmatively use report outside the company with investors, the public, or regulatory and enforcement authorities.

Morgan Lewis

33

Presenter



Zane Memeger
Morgan Lewis
Partner, Philadelphia
+1.215.963.5750
zane.memeger@
morganlewis.com

Morgan Lewis

34

THANK YOU

© 2018 Morgan, Lewis & Bockius LLP
© 2018 Morgan, Lewis & Bockius LLC
© 2018 Morgan, Lewis & Bockius UK LLP
Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC238707 and is a law firm authorized and regulated by the Solicitors Regulation Authority. The SRA authorization number is 619476.

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP in Hong Kong. Morgan, Lewis & Bockius operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong and a regulated foreign law firm operating in accordance with LSA 2 Framework.
This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.

Morgan Lewis

35
