



Security Executive Council

RISK MANAGEMENT PORTFOLIO

The Business Response to Misconduct Allegations

Playbook

Third Edition

COMPLIMENTARY SAMPLE
FOR SEC PRACTITIONER COMMUNITY

John D. Thompson, Esq.

THE SEC PROCESS

We walk clients through eight critical steps to reach their goals



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The first step is an assessment of your current environment. What needs improving? What are Security's fixed conditions? What recent changes have impacted Security, such as new business directions, new stakeholders, or a merger or acquisition?



An SEC team made up of former CSOs will engage with you to identify the key risks and determine the continuum of desired outcomes depending on your conditions. We map the solution to your C4R – current circumstances, conditions, culture and resources.



Once we understand the issues and potential barriers, we search our extensive security knowledge base for resources or research data that can be used as a base or to kickstart direction ideas.



Next, our subject matter experts bring their varied experiences and knowledge together to create a plan to help you reach your desired outcome. We call this Collective Knowledge™.



We help determine which other functions the plan should touch and align with. We use the SEC's Unified Risk Oversight™ model to help plan and communicate the value of cross-functional collaboration.



We assist in communicating the value of the project to the business leader accountable for Security's new vision. This in turn assists in communicating the strategy to senior executives from other functions.



Business value metrics are developed for the client team to measure and determine project success for the organization, including key stakeholders.



Last, clients can either take the SEC deliverables and run with them, or we can guide you through the implementation of your plan. At the end of the day, the SEC is here to help you succeed.

The SEC Process Outcome: Security Leader and Program Success

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**COMPLIMENTARY SAMPLE
FOR SEC PRACTITIONER COMMUNITY**

Planning the Investigation

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The objective of an investigation is to get the facts so that a resolution of the complaint and situation can be achieved. At the same time, it is possible that someday a jury or attorneys outside the organization might scrutinize every aspect of any investigation conducted. For example, the organization might have to turn over every note the investigator has taken during the investigation to outside attorneys, and the investigator might have to recount every conversation he or she had involving the investigation. Moreover, someone's job or well-being might depend upon the quality of the investigation. Thus, an investigation is not something that should be done haphazardly or without a clear plan in mind.



Many investigators have declared their embarrassment to me when I have reviewed their investigation file two years after the investigation in preparation for a deposition or trial testimony. The investigator's memory naturally is poor about the investigation because it is years later and numerous investigations have come and gone in the interim period. To make matters worse, the investigator's notes are often cryptic, undated, and virtually useless. What seemed like a perfectly reasonable investigation plan at the time is impossible to decipher later. Because every part of an investigation might later be subject to scrutiny, every part of the investigation should be documented, including the up-front planning process.

The following considerations should help the investigator plan an investigation. This, in turn, should lead to more accurate and complete information obtained and greater legal protection for the organization.

6.1 MINIMIZE WITNESS INTIMIDATION

As the investigator begins thinking about how to conduct the investigation, he or she must confront the possibility that certain witnesses to the investigation might feel intimidated by the alleged wrongdoer, even by the simple fact that the alleged wrongdoer is in the workplace. Even worse, the alleged wrongdoer (and even the complainant) might intimidate, harass, or retaliate against witnesses in an attempt to influence the outcome of the investigation.

It might be necessary to remove the alleged wrongdoer, the complainant or both individuals in order to maximize the information obtainable from other witnesses. On the other hand, removing an employee from the workplace during an investigation is a serious human resources matter. If the investigator believes that removing an employee from the workplace is necessary to remove possible intimidation, he or she should consider consulting with the need-to-know group to obtain a consensus on such an action.¹

6.2 FORM INVESTIGATIVE TEAM AND DIVIDE DUTIES

Interviews often will constitute a major part of the investigation, and it could be a serious mistake to conduct significant interviews one-on-one. If the investigation is legally challenged, the plaintiff inevitably

¹The investigator should arrange the investigation environment so as to minimize even the appearance of intimidation whenever possible.

will contest the accuracy of the interviewer's recollection of the interview. If the organization has two witnesses to interview who have similar recollections, it will be more difficult for the plaintiff to attack the credibility of the investigation.

Moreover, it is extremely difficult to ask intelligent questions, listen closely to the answers, formulate follow-up questions, and take accurate notes all at the same time. A solution would be to have two interviewers, where one interviewer is responsible for the questioning and the other interviewer is responsible for note taking. The note taker also can ask follow-up questions that the primary questioner might miss. This division of responsibility should remain consistent throughout the interview process.

Two interviewers will give you two different perspectives on the situation. Many difficult investigations require tough credibility judgments and it would be valuable to know, for example, that two interviewers have different perspectives on the credibility of a key witness.

6.3 ESTABLISH THE TIME FRAME FOR THE INVESTIGATION

Many times, the organization can avoid liability for wrongs committed by its employees, even supervisory employees, if management takes quick and appropriate action to remedy the situation. Thus, it is always desirable to conduct the investigation promptly after becoming aware of the issue.² Impress upon others the need to investigate and resolve the issue quickly and obtain the cooperation necessary to have interviewees available. Of course, if the investigation becomes more complicated than anticipated or unanticipated delays occur, extend the deadline if necessary to do a complete investigation.

6.4 CONFIRMATORY MEMORANDUM

The investigator must determine whether to provide the complainant with a confirmatory memorandum. This is frequently desirable when the complainant raises a verbal complaint. The memorandum serves a

²The definition of promptly, of course, depends upon the situation. A victim of harassment might claim that an investigation that took 3 days is too long. On the other hand, if the investigation does not directly involve the complainant's well-being, a much longer time frame might be justifiable.

variety of purposes. Most importantly, it provides the complainant with a clear understanding of the expectations that the organization has for him or her during the investigation. A letter to the complainant should include the following items:


1. A statement confirming the issues that the complainant has raised.
2. A list of all facts provided by the complainant.
3. A request that the complainant add, delete, or correct the facts summarized and a confidential means to provide this information.
4. A statement identifying the investigator(s) and confirming that the complainant has agreed the investigator(s) will be fair and objective. If the identity of the investigator(s) was not previously known to the complainant, the letter should include a statement that the complainant finds the investigator(s) to be fair and objective unless the complainant indicates otherwise.
5. The anticipated time frame of the investigation and the method and timing of feedback from the investigator(s).
6. A statement that the complainant's cooperation and participation in the investigation is required.
7. A statement that the complainant should not discuss this matter further (other than with the investigator(s)) while the investigation is being conducted, particularly within the organization.
8. A statement of the consequences of the complainant's failure to follow these instructions. The consequences will depend upon whether the complainant is an employee or third party.

Note: An example of such a confirmation letter is contained in Appendix B.

6.5 OBTAIN RELEVANT DOCUMENTS

In many investigations, there is a paper trail that provides important information for the investigation. The documents the investigator reviews will answer many questions, raise many other important questions that the investigator will want to ask, identify individuals that the investigator will want to interview, and so on. The following is

a checklist of internal documents that the investigator should consider obtaining:



Checklist 2 . Obtaining documents

- Personnel files**
- Telephone records**
- Expense account records**
- Personnel information on computer**
- Appointment calendars**
- Time cards**
- Building entrance/exit records**
- Computer/word processing disks (and hard drive memory)**
- Electronic mail records**
- Voice mail records**

This is just a sample. The investigator must create a checklist of types of documents potentially relevant to the investigation as part of the planning process—all interviewees should be asked for all possible relevant documents.

Before obtaining any information or documents that an employee might claim are private, contact legal counsel. For example, employees might claim that the organization has no right to obtain information found in their computer, computer disks, voice mail, electronic mail, briefcase, desk, file cabinets, and so on.

Information and other documents might exist outside of the organization that are relevant to the investigation. Obtaining such information could pose significant legal risk, and the investigator should not do so without consulting legal counsel. The following are examples of external information that might be available and relevant to your investigation:

- Commercially available computerized databases
- Public record checks
- Customer or vendor information

6.6 SPECIAL INVESTIGATIVE TECHNIQUES

With respect to many investigations, gathering relevant documents and interviewing relevant individuals will be the extent of the investigation conducted. Sequentially, the investigator should review the relevant documents obtained from the organization and then plan for the interview process. Therefore, the remainder of this section discusses planning for the interview process. However, there are certain times when special investigative techniques beyond mere interviews are appropriate. *These are almost always investigative techniques that have a high legal risk and never should be discussed or implemented without legal counsel.* In fact, many of these techniques should require high-level approval before they may be utilized, including the following:

- Internal audit
- Physical investigation (e.g., fingerprint, handwriting, voice analysis)
- Physical surveillance
- Polygraphs
- Searches of organization or private property
- Electronic monitoring or surveillance

6.7 DETERMINE WHO TO INTERVIEW

This list will grow and change during the course of the investigation, but at the outset the investigator should create an initial list of whom to interview. Be over inclusive rather than under inclusive when making this list. If there is any doubt about whether an individual might have relevant information for the investigation, include that individual on the list. To do otherwise will open the investigation to challenge as incomplete or biased. Often, the investigator will want to interview an entire department or work unit.

For example, if an employee alleges workplace harassment, the investigator will want to know if anyone else in the workplace has witnessed anything relevant to proving or disproving this allegation or has experienced similar harassment. A proven and successful investigative strategy for interviewing numerous employees in a large group is to select a cross section from the organization. This strategy also allows for specific individuals to be interviewed while appearing to be a part of the general cross section.

6.8 INTERVIEW LOCATION

The location of interviews can be the key to their success or failure. The need for confidentiality might necessitate conducting interviews away from the organization. Employees might be less candid with the interviewer if they believe that other employees are aware that they are being interviewed. Similarly, if employees can provide information anonymously there is less opportunity for others to pressure them into changing their story and less opportunity for retaliation against them. Ask witnesses if they are comfortable with the location of the interview and move the interview to another location if a witness indicates that he or she is not comfortable.

If the investigator is going to interview individuals away from the organization's facilities, never interview one-on-one in a hotel room or a private home. All one-on-one interviews away from the organization's facility (which should occur only rarely) should take place in a public place like a business office. Otherwise, the investigator might needlessly subject himself or herself to false claims of inappropriate conduct that would be difficult to disprove.

6.9 INTERVIEW ORDER

Correctly ordering the sequence of interviews can improve the efficiency and quality of any investigation. Do not order interviews based simply upon the availability of the interviewees. In the context of a harassment claim, for example, it is often best to interview the alleged victim first, the alleged harasser next and then potential witnesses. In other contexts, it is often best to interview first a management-level employee who can provide an overview of the situation, a history of the parties involved, a sense as to what might have happened, and so on. The order of interviews will depend upon the unique facts of each investigation.

6.10 PREPARE OPENING AND CLOSING COMMENTS

For each interview, the investigator will want to have a set of opening comments and instructions, further discussed below. Similarly, the investigator will want to have a set of closing comments and instructions.



This is the part of the interview that is "canned" and not really dependent upon what any particular individual says. Therefore, there is no excuse for being unprepared or "missing" a particular point. For example, I once had a witness claim that she was being retaliated against after an interview. When asked why she did not immediately report the retaliation, her answer was that she didn't know that she should and didn't know to whom to report it. If true, the investigator was at fault for not providing this information to her as part of the "canned" opening and closing comments.

6.11 PREPARE A SET OF WRITTEN QUESTIONS

This has several advantages. First, it will require the investigator to think carefully in advance about what information is needed, how best to elicit information from each individual, and how to protect the confidentiality of parties. Second, it will permit the investigator to organize the interview and develop a logical sequence for questions. Third, it enables the investigator to ask precisely the same questions to multiple individuals and ensures that the investigator will not forget asking certain questions.

The investigator must be careful, however, not to be so tied to an outline that he or she fails to ask necessary follow-up questions, or explore something identified by a witness that was not in the outline.³

6.12 MULTIPLE INTERVIEWS

It is a rare investigation that resolves all questions after interviewing witnesses only once. First, the investigator will frequently learn new information later in the investigation process that he or she will need to discuss with previously interviewed individuals. Second, multiple interviews are an excellent way to assess credibility. Challenging an individual with contrary information, asking the same question in a slightly different way or asking about information learned since your first interview of the individual can give a better assessment of the credibility of that individual.

³In reviewing investigative interviews after the fact, the most common failing is not to follow up on answers that the interviewee gives. Often, the interviewee's answers are unresponsive, partial, or vague. The skilled interviewer recognizes the unresponsiveness and asks follow-up questions until the question is answered completely.

Occasionally, the investigator might want to involve different interviewers to conduct a second round of interviews. This is appropriate if the first set of interviewers might have missed or been unable to obtain some critical information, or if it provides a valuable new perspective on the situation or if they possess different investigative skills, and so on. This approach also has drawbacks, such as creating more potential organization witnesses in any subsequent litigation. Do not adopt this approach without consulting with legal counsel.

There may be situations that call for simultaneous interviews of individuals, ensuring that the individuals do not have the opportunity to contact each other prior to the interview. This situation can be addressed either by having the first interviewee remain in a room with a witness until the second interview starts or by having simultaneous interviews by qualified investigators.

6.13 WRITTEN STATEMENTS

Written statements minimize the opportunity for interviewees to dispute the investigator's recollection of the interview or change their story. Statements also are a highly persuasive form of evidence. Many plaintiff lawyers have backed off when shown statements of several individuals refuting their client's story. Consult with legal counsel about this decision. If the investigator decides to take statements, see the section below on how to do this.

6.14 TAKING NOTES

If the investigation is later challenged legally, the organization will be asked to defend the fairness and quality of the investigative process. The plaintiff will argue that the organization came to the wrong result because the investigator did a poor investigation. The investigation will be more legally defensible if the organization can demonstrate that the investigator *planned* the investigation process, that the investigator considered each of the issues discussed in this section, and that the investigator had rational reasons for following or not following the suggestions contained in this section. As always, contemporaneous notes about how the investigation was planned will be more accurate and credible to a jury or judge than oral testimony at a later point.

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