

Securities Class Action: Confidential Witness Checklist

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This checklist discusses best practices for developing a confidential witness (CW) in a securities litigation matter, specifically regarding claims under Section 10(b) of the Exchange Act of 1934 ([15 U.S.C. § 78j\(b\)](#)) (Section 10(b)). The checklist provides guidance related to preparing to contact potential CWs, interviewing potential CWs, drafting a CW memo, confirming the CW's allegations and determining whether to include the CW in the complaint, pleading CWs in the complaint, and following up with CWs post-complaint.

For more information about prosecuting and defending securities class actions generally, see [Exchange Act and Securities Act Litigation Resource Kit](#), [Litigating Securities Class Actions § 1.03](#), and [Liability of Corporate Officers and Directors § 13.05](#).

Overview

The foundation of any successful securities fraud case, specifically one brought under Section 10(b), lies in a rigorous and strategic investigation. At the heart of this process is the development of credible CWs, who can provide critical insight into the alleged misconduct from inside the company. Properly identifying, interviewing, and managing CWs can significantly strengthen the pleading of falsity, scienter, and loss causation—core elements of a Section 10(b) claim. But developing CWs may invite risk if not handled with care, discretion, and full compliance with legal and ethical obligations. Investigative missteps can jeopardize the integrity of the case or compromise a CW's willingness to participate. As such, investigators and securities litigators must adhere to best practices at every stage of the investigation to ensure reliability, consistency, and accuracy. The following checklist provides a comprehensive roadmap for conducting investigations and working with CWs effectively.

Best Practices

- **Assess the case.**

- o Review allegations in any initial complaint, including identifying material misstatements, omissions, and a scheme to defraud investors.
- o Review other publicly available documents, including U.S. Securities and Exchange Commission periodic or current filings or registration statements, call transcripts, analyst reports, company presentations, short seller reports, news accounts and news articles.
- o Create a timeline of key events and the alleged fraud.

- **Understand key elements of the claims (e.g., Section 10(b) claim).** Evaluate the following:

- o **Falsity.** Were the defendants' statements or omissions materially misleading?
- o **Scienter.** Did the defendants make misrepresentations or omissions recklessly or with intent to deceive?
- o **Loss Causation.** What is the causal link between the misrepresentations or omissions and the economic loss suffered by investors?

- **Prepare for contacting potential CWs.** Before contacting potential CWs, investigators should take certain preparatory steps, including the following:

- o Use social media to identify former employees, customers, competitors, industry experts, and third parties in a position to know about the conduct at issue.
- o Create a lead list in a spreadsheet or a database management program.
- o Confirm all potential CWs are not currently employed by any defendant.
- o Identify contact information for potential CWs.

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• **Interview potential CWs.**

o **Pre-interview.** Before conducting interviews, investigators should draft questions and review the areas of inquiry with the litigation team.

o **Interview introduction.** When the interview commences, confirm that the potential CW is not currently employed by any of the defendants and request that all interview participants identify themselves, their position, and their firm, and explain the purpose of the call.

o **Interview questions.** During the interview, ask questions regarding the CW's position, tenure, and knowledge of the conduct at issue, including related to:

- Internal tracking systems, meetings, and other access to relevant information by the defendants
- Internal red flags, concerns, or complaints
- Any relevant interactions with the defendants
- The CW's knowledge of the conduct at issue and the basis for this knowledge
- The CW's knowledge of others who have relevant information and the basis for this knowledge

o **Interview strategy.** During the interview, investigators should:

- Ask open-ended questions rather than leading questions
- Attempt to cross-reference the CW's statements with public filings or statements made by the defendants –and–
- Cross-reference information from other witnesses to look for patterns or corroboration

o **Interview wrap-up.** At the end of the interview, ask the potential CW if they are amenable to follow-up communications and if they have a preferred method of communication to schedule follow-up calls.

o **Interview housekeeping.** Regarding the interview, investigators should:

- Confirm calls are not recorded, as some jurisdictions require consent of both parties –and–
- Preserve all written communications exchanged with the potential CW and any voicemails left by any potential CW

• **Draft the CW memo.** Immediately following the interview (no later than five days after the interview), prepare a written memo that details the information provided by the CW. The memo should:

o Include the CW's position(s), tenure, and any information provided by the CW relating to the conduct at issue –and–

o Be circulated to the litigation team and discussed at case meetings once finalized, where the attorneys will decide whether to include the CW in the complaint

• **Confirm the CW's allegations and determine whether to include the CW in the complaint.** CWs can bolster allegations in a complaint, particularly falsity and scienter. But prior to filing a complaint, allegations must be confirmed, including that investigators should:

o Contact any CW that will be included in the complaint.

o Confirm the information with the CW by phone, video conference, in person, or by whatever method the CW prefers; if the CW prefers to have their statements confirmed by email or mail, provide enough time for review.

o Read the CW's statements verbatim as they appear in the complaint if the confirmation is performed by phone, videoconference, or in-person, and provide the CW an opportunity to make any corrections, clarifications, and edits.

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- o Advise the CW that they will be identified as a "CW" in a complaint (referenced by number, e.g., CW1, CW2) that is being filed on a public docket and explain further that the CW will be described by position, dates of employment, responsibilities, and reporting structure.
 - o Staff the confirmation call with at least one investigator and one attorney on the litigation team.
 - o If the litigation team is unable to recontact the CW, transmit the statements to the CW in advance of filing with sufficient time for the CW to respond, and inform the CW that they will be included as a CW in the complaint and how they will be described in the complaint.
 - o Supplement or revise the complaint with any edits made by the CW, either verbally or in writing.
 - o Prompt an attorney outside of the litigation team to perform a crosscheck, comparing the memos from calls and/or written communications with the CWs to ensure that the statements in the complaint accurately reflect the information provided.
- **Plead CWs under Private Securities Litigation Reform Act (PSLRA) standards.** Under the PSLRA, CWs must be described with sufficient particularity to establish their reliability, including by showing the CW was in a position or role to know the facts attributed. For more information about the PSLRA's requirements, see [*Securities Litigation under the Private Securities Litigation Reform Act \(PSLRA\)*](#).
 - **Follow up with the CWs post-complaint.** After filing the complaint, investigators should:
 - o Send a copy of the filed complaint to all CWs whose statements are included
 - o Maintain contact with the CWs after the filing, including updating relevant contact information –and–
 - o Update the CWs, as appropriate, when the case progresses

Conclusion

Investigating a securities fraud case under Section 10(b) requires meticulous attention to both legal standards and investigative rigor. Developing and managing CWs ethically and effectively is a cornerstone of building a strong case. By following this comprehensive checklist, attorneys and investigators can ensure they approach CW development with the precision, care, and professionalism required to succeed in securities litigation.

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