

Financial Institution Risk Management

SEWARD & KISSEL LLP

April 23, 2026

Anything You Say Can and Will Be Used: Why Process and Privilege Matter in a Crisis

In moments of urgency, the instinct to act quickly is natural—and often necessary. But for regulated financial institutions, the decisions made in the early hours and days of a risk event can have consequences long after the immediate crisis has passed. Investor inquiries, regulatory examinations, enforcement actions, litigation, and internal investigations all share a common reality: what is said, written, and done under pressure is frequently scrutinized later, often in hindsight and often adversarially.

The Value of Readiness Before the Storm

The organizations best positioned to manage risk events are rarely the ones improvising in real time. Instead, they are the firms that have invested in advance planning, clearly defined protocols, and a shared understanding of roles and responsibilities before things go wrong.

A well-designed response framework does more than provide structure—it creates confidence. When leadership and staff know the playbook, the organization can focus less on internal coordination and more on addressing the underlying issue. Responsibilities are already assigned, escalation paths are clear, and expectations are aligned across stakeholders. In short, preparation allows teams to move decisively without losing control.

Importantly and quite often, these protocols are not developed during moments of crisis, but rather built during periods of relative calm, when there is time to think critically, test assumptions, and incorporate lessons learned from prior events.

Why Planning Is Hard—and Why It Pays Off

Establishing a risk-response process requires focus, discipline, and buy-in from a wide range of internal stakeholders. Competing priorities, limited time, and the absence of an immediate threat all conspire against proactive planning. Yet the firms that overcome these hurdles effectively create a form of risk insurance.

For highly regulated financial institutions in particular, timing is often decisive. The identification of an issue, the decision whether to self-report, and the sequencing of communications with employees, investors, and regulators can materially affect outcomes. A thoughtful plan creates breathing room—allowing management and counsel to focus on substance rather than scrambling to agree on process after the fact.

Plans Must Allow for Judgment and Flexibility

No plan survives first contact with a real crisis unchanged. Unexpected facts emerge, circumstances evolve, and judgment calls become unavoidable. Effective protocols recognize this reality. They do not attempt to script every decision; instead, they empower the right people and teams to adapt responsibly when pivots are required.

This is why identifying decision-makers in advance matters as much as defining the process itself. When accountability is clear, necessary adjustments can be made deliberately rather than reactively.

Privilege Is Not Automatic—It Must Be Protected

Attorney-client privilege and work-product protections are among the most critical aspects for institutions navigating risk events. They allow organizations to seek candid legal advice and evaluate options without the constant fear that those deliberations will later be exposed.

But privilege is fragile. It can be compromised unintentionally based on the entities or people included in meetings, copied on emails, or looped into early-stage discussions. In the rush to gather information, affiliated entities, consultants, or external staff may be brought “under the tent” without sufficient thought to how their involvement affects privilege.

This risk is particularly acute in the early phase of an issue, when facts are still developing and communication is most fluid. Advance planning helps mitigate this danger by providing clear guidance on participation, communication channels, and the role of counsel at each stage of a response.

Managing Third-Party Experts Carefully

Risk events frequently require assistance from accountants, analysts, public relations firms, and other specialists. While their expertise can be critical, their involvement introduces additional privilege considerations. To preserve protections, relationships among the institution, outside counsel, and third-parties must be structured thoughtfully and documented properly.

Formalizing these arrangements—rather than addressing them informally in the heat of the moment—helps ensure alignment on what constitutes privileged work product and prevents misunderstandings that could later undermine legal protections.

The Discipline to Pause Before Acting

One of the most difficult—but most valuable—skills in a crisis is the ability to pause. Acting quickly does not have to mean acting impulsively. Taking even a brief moment to step back, consult the established protocol, and engage the right advisors can materially reduce downstream risk.

Regulators, litigators, and enforcement authorities often dissect crisis responses long after the fact. Actions taken with the best of intentions can still be questioned if they appear inconsistent, unstructured, or poorly documented. A known and accepted process provides a defensible framework for decisions made under pressure.

Starting From Strength, Not From Scratch

Ultimately, the goal of advance planning is not rigidity—it is readiness. When a protocol is already in place, organizations are not starting from square one in the midst of a problem. They are starting from a position of shared understanding: the team is identified, the plan is known, and the stakeholders are aligned.

That foundation allows institutions to address risk events more effectively, protect privilege more consistently, and respond with confidence when it matters most. In crisis management, preparation rarely eliminates challenges—but it almost always leads to better outcomes.

* * *

If you have any questions concerning any of these matters, please contact your primary Seward & Kissel attorney or a member of the [Financial Institution Risk Management](#) practice at Seward & Kissel.