

INTERACTIVE SCENARIOS EDITION
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Internal Investigations: *Digging Deeper*


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Agenda

- During our last installment on November 6, 2018, we discussed general internal investigation strategies.
- Today, we will work together through a number of interactive scenarios aimed at “digging deeper” into internal investigations.



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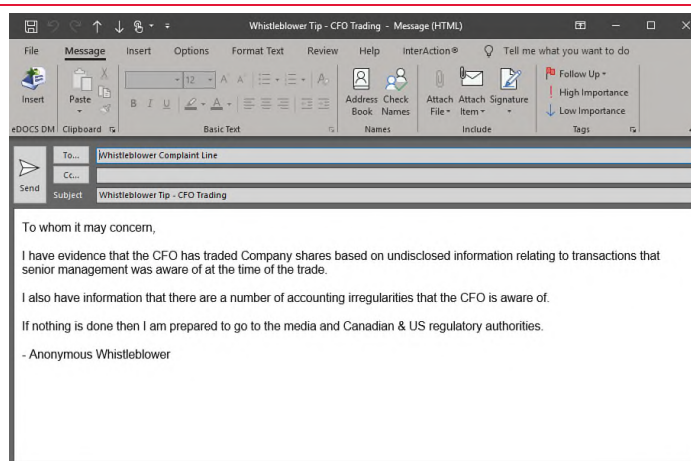
Triage and Investigation Structure



- You are in-house counsel for a publicly traded, rapidly growing Calgary company (the “**Company**”). You share responsibility with the CFO and a Board member for receiving and responding to whistleblower complaints. All whistleblower complaints are received through the Company’s whistleblower system.
- The Company’s whistleblower system receives an anonymous and vague whistleblower complaint.

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Triage and Investigation Structure



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Triage and Investigation Structure

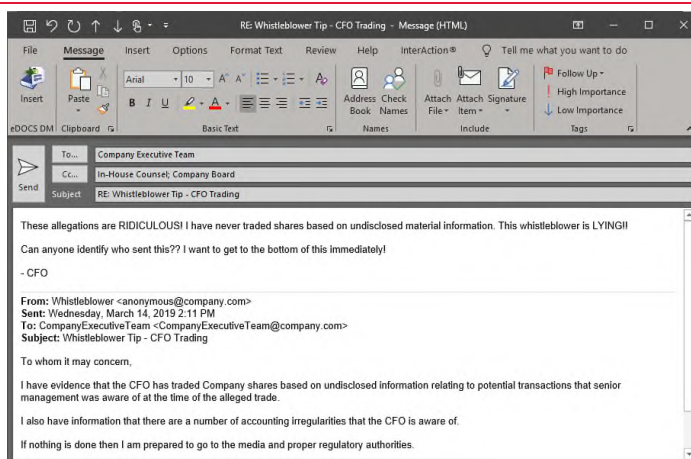


- Prior to having an opportunity to discuss or respond to the complaint, you and the Board member are immediately CC'd on an email from the CFO to the Company's executive team.



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Triage and Investigation Structure



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QUESTIONS

- Do you think this warrants an investigation? If so, who should direct it?
- Are there any steps that should be taken right away?
- How do you respond to the CFO?
- Do any other issues/considerations arise?

DISCUSSION TIME: 10 MINUTES



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Retaliation

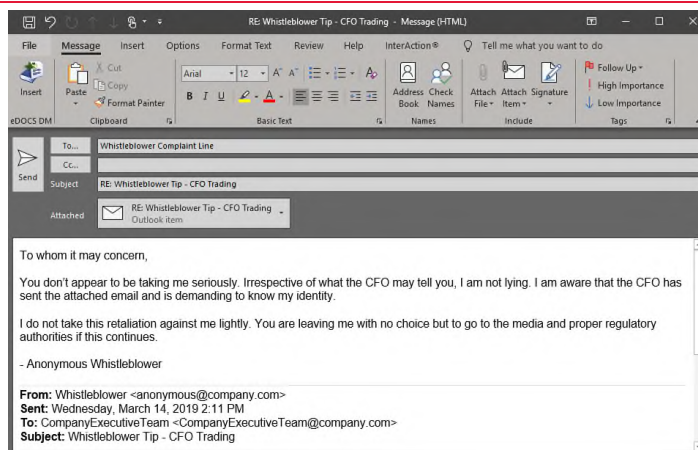


- Later that day and before the Company can respond to the original complaint, the whistleblower sends a follow-up email.



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Retaliation



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Retaliation



- The Board committee wants to know if one of its executives leaked confidential information to the whistleblower.
- The Board suggests independently tasking the Company's internal IT Department with reviewing email records and circulating relevant emails to the Board committee.

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QUESTIONS



- What are the risks associated with retaliating against whistleblowers?
- Does this change how you assess the whistleblower complaint?
- What advice do you give the Board committee about the request to have IT investigate?
- Do any other issues/considerations arise?

DISCUSSION TIME: 10 MINUTES



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Witness Interviews and Independent Counsel



- The Company is now 2 months into a formal investigation respecting the allegations. As part of the investigation, external counsel has engaged forensic accountants to assist with document collection. As part of the document collection process, forensic accountants advise that they have collected approximately 2 million potentially relevant records, which will take external counsel approximately 6 months to review.
- The Board committee has asked whether it is necessary to review the documents and suggests only moving forward with the investigation interviews. The Board committee also suggests that the number of interviews should be limited to save on costs. For the same reason, the Board committee suggests audio recording interviews in order to ensure that only one lawyer is required for each interview.
- While populating the list of potential interviewees, it is determined that the former Controller may have key information. Up until 6 months ago, the Controller reported to the CFO but was let go as part of a restructuring. The severance agreement does not include an ongoing duty of cooperation.
- Finally, the CFO has been emailing you directly for updates respecting: (i) the investigation; (ii) her personal exposure; and (iii) the indemnity arrangement between her and the Company. She also asks if the Company will be engaging independent counsel on her behalf.



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QUESTIONS



- What advice do you give about the document review?
- What advice do you give regarding the timing and number of interviews?
- What are some key considerations when conducting witness interviews?
- What do you think about the Board's suggestion of recording interviews? Does this impact privilege considerations?
- How do you respond to the CFO?
- What considerations arise about independent counsel for employees?
- What advice do you give about interviewing ex-employees?
- Do any other issues/considerations arise?

DISCUSSION TIME: 10 MINUTES

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Self-Reporting



- During your interview with the Controller, he informs that the CFO is also aware of "accounting irregularities" involving payments from the Company's Business Manager to South African government officials. The Controller further informs that the CFO told him that the payments "are all part of doing business in South Africa", and that the Audit Committee was aware of the payments. You report this matter to the same Board committee. The Chairman of the Board committee raises the recent news reports about Remediation Agreements and asks you whether the Company should report the "accounting irregularities" to the RCMP.

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QUESTIONS



- What, if anything, should be done about these allegations?
- What are the main issues/considerations when determining whether to self-report?
- Would you recommend self-reporting?
- Do any other issues/considerations arise?

DISCUSSION TIME: 10 MINUTES