

# Regulation

Over the past few years, national and supranational regulatory bodies have become increasingly willing to enforce corporate behavioural standards that, in a way, may have previously been considered intrusive. Contemporary regulatory bodies do not hesitate to prosecute groups of competing companies which meet to discuss market sharing and pricing, nor are they shy of investigating payments by companies to third parties to help secure major contracts. Even the inevitable scrutiny of a corporation's internal controls following "rogue trader" events means that expectations are high for corporate entities and their employees to play by the rules and to take every possible step towards preventing such occurrences. The serious penalties imposed on companies which break the rules mean risk mitigation is vital to prevent heavy fines, substantial legal costs, reputational damage, further civil claims and potential criminal convictions and custodial sentences for some offences.

## Information analysis and distribution

A consistent requirement in all regulatory activities is the constant need for information. Contemporaneous documents need to be provided to the law firm advising the company under investigation, potential witnesses will need to be interviewed, a subset of information will need to go to the regulator and key documents will need to go to the board. Further sets of documents may need to be retrieved and produced in response to follow-on litigation by companies, groups of shareholders or individuals. The challenges of retrieving and managing this information in a timely manner to meet regulatory needs is further compounded by the increasing volumes of data stored electronically in structured or unstructured formats.

## The role of the lawyer

In-house and private practice lawyers assisting with these types of matters often face the burden of becoming the project managers of this complex information retrieval, review and production process. In-house lawyers will be the first port of call when a dawn raid occurs – or an information request is received. They will be inextricably involved in the project from start to finish, providing a central point of contact within the company and communicating with departments from whose staff documents and witness interviews are required. In addition to these responsibilities, in-house lawyers will be faced with coordinating the company's IT involvement, selecting and liaising with external counsel and providing regular updates to the company's senior management and the company board.

Choosing the right external counsel can be vital to effective risk management. They will bring the in-depth expertise and experience needed in dealing with regulatory requests, the specific skills required to conduct witness interviews and the sheer numbers of bodies which are essential to tackle large-scale document reviews. An expert firm will also frequently manage the work of the engaged service providers to efficiently preserve, collect and filter information before it is reviewed, in order to ensure that the processes implemented will deliver results and meet the regulator's expectations.

With the increasing incidence of multi-jurisdictional investigations comes the growing demand by companies to retain external counsel with international offices and local expertise. For instance, a company that operates in the EU but also trades

# Playing



# by the Rules

With the introduction later this year of the Bribery Act, and increased vigilance around competition, lawyers are under pressure to negotiate effectively and respond rapidly to relevant regulatory bodies in order to mitigate risks. **Drew Macaulay** examines why preparation is the key to responding to multi-jurisdictional regulatory investigations

in Brazil and the US may find a request by the EU Commission means they also come under scrutiny by the Brazilian and US competition authorities. A particular course of action in one jurisdiction may impact others with very different regulatory environments, different procedures and penalties. The retention of a law firm with offices in those jurisdictions and experience of working with their respective regulators may significantly improve the company's ability to coordinate the responses and negotiate a favourable outcome.

## Cooperation, speed and accuracy

Regulators are responsive to effective cooperation in an investigation, which is frequently judged by the quality, timeliness and relevance of information provided by the company concerned. For example, if the European Commission advises a company it is under investigation for cartel behaviour and the company is the first to admit wrongdoing and cooperates fully by providing the requisite information, it can expect to have its fine reduced by

up to 50%. However, companies that are unwilling or unable to comply with information requests can be faced with heavy fines.

The speed and accuracy of information delivery are therefore essential. Some software companies claim to be able to assist in this area by searching and processing data faster than ever before, some are even able to provide support at the client's premises – but this may not be enough to guarantee a successful response. This is because the average company, immediately after a dawn raid or receipt of an information request from a regulator, will not be in a position to connect a data-searching appliance to their corporate network and start the retrieval process. Even if the company implements the fastest searching technology available, it will be unrealistic to search an entire corporate network, as well as the contents of every employee's workstation, for potentially relevant documents.

The pragmatic approach is to target the search effort towards those locations where relevant data may exist, for the simple reason that the smaller the set of data searched, the fewer "false

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## Tips – Improving responses to regulators

- 1 Identify expert legal counsel who have the experience and capacity to assist at short notice. In complex multi-jurisdictional matters, firms with local offices and local knowledge may be preferred.
- 2 Spend time understanding how data on the corporate network is stored and organised. If outsourcing is used, contact the relevant company for details on how they would assist in case of an investigation.
- 3 In the event of an investigation, implement a targeted approach to data collection focusing on relevant departments or custodians.
- 4 Consider how employees communicate and store their data – it may not all be accessible via the corporate network and certain documents may be encrypted, in a non-standard format or otherwise difficult for a law firm to review.
- 5 Ensure information requests are met without compromising the privacy laws and other data transfer control measures of the jurisdictions in which the data exists.
- 6 Create a synergy between legal counsel and expert technology consultants, in order to ensure documents are retrieved efficiently in line with regulatory expectations.

positive results”. False positive results are documents that meet the search criteria, but are ultimately found to be irrelevant. The review of these irrelevant documents would take up a significant proportion of the total cost of a review exercise, so there needs to be an ongoing synergy between implementing relevant technology and a solid understanding of potential data locations.

### Prepare, don't spend

Certain corporations will so often be subject to litigation or investigation information requests that they will have developed processes to manage and retrieve their information effectively, and may have invested in dedicated staff and enterprise-wide data management applications that facilitate this process. These companies are, particularly outside the US with its large scale discovery procedures, very firmly in the minority. Software such as that described above is frequently expensive and time-consuming to integrate with existing company systems. Hiring new employees to manage a business's regulatory investigation response will be difficult in an economic climate where businesses are running leaner than ever before, even more so when you consider that the investigation may never happen. Thankfully, the burden of tackling large-scale matters can be eased by steps taken by in-house counsel that do not require capital expenditure – or added headcount.

To make responses to regulatory investigations faster, less expensive and more accurate, a good start is to adequately prepare for the data collection stage. The nature and extent of the data required will depend on the wording of the regulator's information request or, in the case of a dawn raid scenario, the search terms used by the regulator's data collection staff, or the specific employees whose laptops are seized by the regulator. Problems arise, however, when the IT departments do not know where this information is stored for a particular employee, which could lead to significant delay and risk of under-collection.

### Know what you have

A useful exercise in preparation for possible future litigation or investigation is data mapping. At the highest level, data mapping is concerned with the geographical location of the data. Although this may sound simple, due to the speed with which information can now be transmitted and received, corporations no longer need to have their servers located in the offices in which the staff are based. Collection from these servers over a network (in the same way the employees access their own information) is possible, but the speed of collection is very much slower than direct connection, so a good understanding of where the data collection staff should be sent is key to a swift collection.

The company may maintain its own central data centre(s) or use a local outsourced IT services provider for live storage or long-term archiving of their data. This could mean that engagement with third parties is an unavoidable part of the company's response procedure. In such instances, advance consideration of how to obtain large quantities of data from these providers is essential. Issues to consider include identifying who to contact at the service provider and whether the company's data are on dedicated servers or mixed with that of other companies.

Once the geographical data mapping is complete, the next stage involves gaining a better understanding of a firm's data topography. This can be achieved by identifying key storage devices at each location such as servers, back-up systems, user workstations,

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laptops and any archiving systems. The “map” should show for each storage device the employees, often known as custodians, who have access to that device, and which departments they fall under.

With respect to individual custodians, ascertain whether they have separate areas in which to store their own documents such as a network folder, personal workstations or laptops. Other points of consideration include whether employees use removable media such as flash memory sticks or use shared documents that many staff could access. These questions are likely to have fairly detailed responses which vary significantly between custodians and it may not be necessary to attempt to obtain this information from every member of staff.

Care should be taken to ensure the map is extended to include archiving or back-up tape systems. It is essential to document what data is backed up or archived and with what frequency. This will facilitate placing a temporary hold on any scheduled data destruction or back-up tape rotation system in order to preserve potentially relevant data as it was at the time of receiving the regulator’s request.

Once the data mapping exercise is complete, counsel should have a good understanding of the layout of the corporate network and be able to effectively identify the locations to which data collection staff should be sent and the individual servers or other devices from which data should be copied.

### Multi-jurisdictional hurdles

The multinational nature of today’s large corporations can give rise to a need for data collection from different jurisdictions. This means corporations can be faced with complex cross-border data protection and privacy issues. For example, a US Department of Justice information request may require the production of any relevant documents from any jurisdiction, including those that contain personal information. If, for example, the jurisdictions concerned include Germany, then this can give rise to significant legal hurdles, including the EU Data Protection Directive and the requirement to obtain informed consent from individual employees, which may need to be obtained through negotiation between the corporate data protection office and labour union representatives.

Languages are also a key issue. The law firm undertaking the review may need to know in advance which languages are likely to be present, so they can put together a review team containing lawyers proficient in those languages or arrange translation services where required. Some data-searching applications may not function properly with certain languages, particularly those from the Far East, so it is worth verifying whether a prospective

data processing provider has experience of dealing with the languages likely to be present.

### Finding the right data in the digital jungle

With the rise in electronic communication, social networking and mobile technology, finding the right data in the digital jungle needs a fine-tuned eye. Identifying the nature and format of data on the corporate network can be critical to ensure more timely, accurate and less costly investigations. The file format, accessibility and languages present will have a significant impact on the speed and efficiency with which documents can be reviewed. Data types will vary between the very common Microsoft Office and Outlook e-mail formats, to those created by more specialist applications, for example CAD technical drawings and Bloomberg “chat” messages. Would a corporation and its advisers undertaking a review exercise require licences for these applications in order to open these type of documents or can they be safely converted to a common format for review? Standard or custom databases containing accounting information, production or sales records may also need to be queried in order to fully respond to a regulatory request. Given that a database record may not actually contain or link to a specific document, this could pose a difficult question as to what should be given to a regulator.

Accessibility of the documents may also be limited by passwords or other encryption methods. Some passwords from older applications can be cracked using specialist software, but passwords from newer applications and encrypted files are very time-consuming to break. Issues to consider here include whether these passwords can be obtained from the custodians or whether files were created by staff who have since left the company.

### No pain, no gain

When it comes to information gathering, especially in complex, multi-jurisdictional investigation matters, the moral of the story is no pain, no gain. The information-gathering exercise will take a significant amount of time and effort with no apparent, immediate gain. However considering the rise in regulatory investigations and potential penalties, any way of improving a company’s speed and completeness of response to the investigation, which minimises penalties and further investigation, means the investment in time and effort is worth the long-term gain.

**Drew Macaulay** is director of business development for First Advantage Litigation Consulting ([www.fadvlit.com](http://www.fadvlit.com))