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Managing Data in Response To Regulatory Investigations

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The clear message that corporate America, particularly securities firms, has received as a result of the recent onslaught of regulatory investigations and related class-action litigations is that instant access to data is a critical need.

A subpoena from a state attorney general or federal agency, aside from requiring a response in a short period of time (mutual fund companies that were subpoenaed were given a week), often requests potentially relevant information that can only be found on archive tapes. These, as we all know, are the bane of managing electronic data — particularly e-mail.

The need to provide requested information to a regulatory agency is often not even the most important reason access to information is so critical. The company's duty to report to its board, senior management and shareholders, and its desire to determine whether there is a real problem and, if so, correct it are usually just as vital, if not more so. While other methods of fact-finding, such as employee interviews, provide some insight into the issues, nothing beats quick, easy access to e-mail, electronic documents and other data for getting to the heart of the matter.

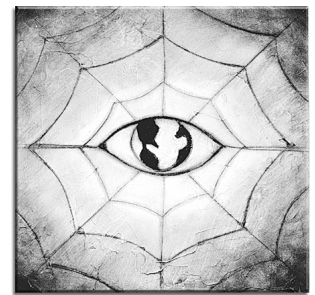
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So, what if there was a way to provide a portal into this information while continuing to address core business functions such as compliance and document/data retention and destruction, and reduce the relative costs along the way? Such a system — an active repository, if you will — is not utopian. In fact, it is currently being designed and implemented by several major corporations.

The larger the corporation, the bigger the problem and the greater the need. It requires support at the highest levels and cooperation between the two groups who tend to come from different worlds — the legal department and the information systems department.

The core functionality of an active repository includes the storage and management of otherwise archived data and the real-time management of live data in a single environment. This environment would feature access through a user-friendly interface with the appropriate security settings and access rights built in. However, once this system is in place, there's much more that should be considered based on the needs of the company.

Visually, the design of the system can be described as a strainer through which designated electronic files or "items" pass into a large, simmering pot. At the point that an electronic file — again, this could be e-mail, user files, instant messaging, or any other file — reaches the strainer, a determination needs to be made based on content as to whether the item needs



to enter the system.

E-mailed newswatches from MSNBC or CNN, for instance, do not need to be maintained. Other criteria consistent with the company's retention policies can be established to immediately reduce the ultimate number of items that need to be stored and managed.

Three Steps

As an item passes through the strainer and enters into the system, three important processes must occur. First, e-mail messages with attachments, and other bundled files (e.g. ZIP files) need to "split apart" so that it can be tracked both as a unique file and as two or more unique files. So, an e-mail message with an attachment is a unique item while the message and the attachment are also unique items. Therefore, three items are entering the system assuming one or more of them do not already exist in the system, which leads to the second process.

Each item should be assigned a hash value, or digital fingerprint, to be used to track it as a unique item so that exact duplicates entering the system subsequently can be discarded or "de-duplicated." However, the existence of these duplicate items and information about them need to be maintained for the purpose of retention.

The date stamp on the original item would be reset to the date of the exact duplicate, but it would not be necessary to place another copy of the file in the system.

Third, the item should be date-stamped and categorized for conformance with the retention policy. For instance, securities firms are required to maintain e-mail for a period of three years assuming, of course, that it is not otherwise related to a pending or active legal or regulatory matter. At the point that the message has been in the system for three years and a day, it should be deleted and removed from the system.

Easier said than done, right? Actually, the main thrust behind active repository is to store and manage files using online and/or near-line storage as opposed to archive tapes. The fundamental problem with archive tapes is that files cannot be removed from the tapes in accordance with a retention policy if any file(s) on the tapes is otherwise subject to production in a legal action. Active repository, particularly with the evolution of storage solutions, allows automatic deletion of items on their expiration dates, thereby conforming to the retention policy and limiting the amount of data that would otherwise be subject to review and production in subsequently filed actions.

The collection of electronic documents from archive tapes, not to mention the processing, review and production of these documents, can often take a large organization weeks, if not months, to accomplish. When decisions need to be made and information disseminated, this delay is unacceptable and can ultimately cost a company millions of dollars in expenses and fines.

Alternatively, documents residing in the active repository are searchable and easier to access. For instance, most productions of electronic documents focus on specific individuals, and then timeframes and key words. The system must allow the query of data in such a fashion and present the results back for review. As documents are reviewed and subjective information about those documents is added to the system, it becomes a tool to help manage the investigation or litigation matter. Furthermore, any document flagged for review automatically has its destruction date suspended until it is reviewed and determined to be irrelevant. Of course, any document deemed relevant is by default not destroyed until such time that an administrator determines it is appropriate to do so.

Electronic data collected as part of the investigative or litigation process is typically sent out to an e-discovery provider, processed in some manner and placed in a third-party (service provider or law firm) system, often a Web-based system, for review by outside counsel. If properly designed, an active repository can be Web-based with the appropriate security settings to allow for access by outside counsel. Electronic documents can then



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be reviewed in this environment and productions made based on subjective information added to the system (e.g. relevance, issue, privilege, etc.). This allows for the company to manage its own data at all stages and to control the costs associated with using multiple service providers.

Beyond the system's use for legal matters, it can be used as a compliance tool to preempt problems that may ultimately lead to a regulatory investigation or legal filing. It can be both a proactive and reactive tool.

Compliance officers routinely review e-mail and other electronic data. However, given the sheer volume of such data, finding an offending message or file is like picking

glass out of sand. While it is a necessary part of the compliance process, certain rules can be established to make the glass jump out. At the time a file passes through the strainer, it can be analyzed by content to determine if it meets any of the predefined compliance standards.

For instance, communications about stocks between certain groups within a brokerage firm can be flagged and pushed out to a compliance officer for review. In fact, the message can be sent to the compliance officer before the designated recipient even receives it. This accomplishes two important goals. First, it allows a compliance officer to review it before any rules are broken so that action can be taken immediately. Second, the file is tracked through the compliance process thereby providing an audit trail that can be retraced if need be.

The Only Catch

An active repository system takes a tremendous commitment by a company: a commitment of time, money, key resources and, above all, to a new way of thinking about data management.

The upfront costs for storage, development, communications and software are significant. For some companies, it could mean an investment of millions of dollars.

But the bigger the company, the higher the stakes. For companies like Bank of America Corp., which recently was fined \$10 million for allegedly failing to produce documents promptly during an Securities and Exchange Commission investigation, the stakes alone have already spiraled into the millions.

As securities firms are learning, time is money and direct access to data saves both.

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