

March of the regulators

Law firms need to prepare for an increase in regulatory investigations.

Greg Wildisen explains why

If one thing can be said about the credit crunch, it is that both politicians and regulators are determined not to let it happen again. As a result, the powers and resources available to financial regulators such as the Financial Services Authority (FSA) and the Serious Fraud Office (SFO) are being significantly enhanced and the indications are that their leaders are more willing than ever to use them.

Speaking to *The Times* in October, Lord Falconer of Thoroton QC predicted that the FSA and the government would be holding enquiries into the causes of the crisis. "What happened was not an act of God. Something caused the near extinction of the financial system and people will want to know why," he said. Meanwhile, the new director of the SFO, Robert Wardle, has promised a change in his organisation's culture to more closely resemble the proactive approach of financial regulators on the other side of the Atlantic.

Additional powers

Even before the credit crunch began, regulators of all kinds were being given additional investigative and punitive powers, most notably the right to mount "dawn raids" given to the Office of Fair Trading (OFT) by the Enterprise Act 2002. This is a scenario that is playing out across the European Union and further afield. Worldwide, regulators are sharpening their axes and the range of sectors affected by proactive regulation—from finance to energy, education to retailing—is growing progressively.

For companies the increased risk of being subjected to a regulatory investigation is an obvious headache, but for their lawyers, regulatory investigations present a serious logistical challenge. While document review in response to a regulator's request may look superficially similar to the discovery stage of litigation, there are some key differences.

First, where the timeframe for completing discovery can be measured in months, if not years, regulatory authorities will usually impose a 30 day deadline to produce documents. Second, where in litigation the scope of the review is usually limited by disclosure rules or by agreement between the parties, regulatory investigations are much more wide-ranging.

Increased documentation

Moreover, recent years have seen an explosion in the sheer number of business documents being produced, thanks not least to the growth of email as the primary method of business communication. So where, in the past, 50,000 documents would have been considered a big review project, now it is not uncommon for reviews to involve more than a million documents. The combination of these three factors means that using tried and trusted manual document review techniques is either going to be crippling expensive or fail to get the job done on time.

Fortunately, the technology involved in document review has moved on and while some degree of manual review is necessary at the end of the process, the key to meeting an investigator's deadline is the use of what are known as "review accelerators". As a rule, the important documents comprise no more than 5% of those subject to the review, and the trick is to identify and categorise these before embarking on the manual stage of the review.

Searches

The first stage of the process is a keyword search. One advantage of the migration of business documents from paper into electronic format is that keyword searching is now almost 100% accurate and can quickly eliminate a large number of irrelevant documents. The remaining document set can then be further refined

by running a de-duplication search and then by using near-duplication, which can identify and group for review very similar documents. More recent search technologies are "meaning-based" and "concept" searches. These use linguistic algorithms to identify the "meaning" of a document by comparing it with a set of specimen documents, enabling reviewers to categorise documents according to their context and content. Concept searching technology aims to find the related documents to an important piece of evidence.

Review systems

Another increasingly useful review technology is the ability of review systems to quickly identify the language that a document is written in. Being able to identify the language of a document and allocate it to reviewers with the appropriate linguistic skills can save significant amounts of time and money, especially in the context of major review exercise.

The end result of using some or all of these processes is a set of documents which have been filtered for relevance and language and organised by category ready for manual review.

If your company or client suspects that it might become the subject of an investigation, it might be wise to run at least a partial review to identify where important evidence might lie in the event of a regulatory enquiry. Nothing is likely to heighten a regulator's suspicions more than being unable to quickly provide relevant information in the course of an investigation.

It has never been more important to get to the heart of an investigation quickly. Being in a position to assist regulators with their enquiries will only help your case. And no matter how effective search technology now is, it will always be preferable to undertake a major document review at your own pace rather than waiting for the investigators to knock on the door. **NLJ**

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