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Critical Early Steps Regarding ESI After Receiving Reasonable Notice of Litigation or an Investigation

Scenario

Class-action litigation is filed against an airplane manufacturer alleging that its engines are defective because they are unreasonably susceptible to stalling during flight. Upon receiving the complaint, in-house counsel meets with relevant business people and identifies a wide variety of categories of electronically stored information ("ESI") that may be relevant to the matter.

The Critical Early Steps With Regard To ESI

Upon notice of pending or reasonably anticipated litigation, an organization has an obligation to take reasonable and proportionate steps within a reasonable time frame to preserve relevant and discoverable materials, documents and ESI. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case, and generally evolves as the case progresses and more information about the issues and the relevant evidence becomes available. Common early steps include the following:

Implement a Legal Hold

Implementing a legal hold is a multi-step process. An initial determination must be made as to the scope of the hold, both in terms of which individuals are likely to have relevant evidence based on what is then known about the case and what materials, documents and ESI should be subject to the hold. Because timeliness is also important, it is advisable for organizations to proactively develop a process and pre-approved templates for these steps before specific disputes arise.

Identify Key Personnel to Receive the Legal Hold

Determining which individuals within the organization should receive the hold can be difficult and it is unrealistic to expect that the initial list will be exhaustive. Seeking perfection or near perfection comes at the cost of delay. It generally will be better to show that a legal hold was distributed within days, or weeks, and covered a reasonable but imperfect list of individuals and types of evidence, and was expanded as investigation continued, than to assert that the initial list was perfect but was issued only after months of investigation. Organizations that experience a significant amount of litigation often invest in software that facilitates, manages and tracks the issuance of legal holds, including links into personnel databases. Departed employees and those who will leave the organization as the case progresses present special challenges. Reasonable steps should be put in place to safeguard their paper and electronic documents from being lost after their departure. An organization's legal hold program can minimize this risk by requiring responsible employees to determine if a departing employee is subject to a legal hold as part of

the routine exit procedure.

Identify Key Document Types

The organization should also determine the types of potentially responsive information to be preserved. This may include, among other things, tangible things, hard copy documents, active electronic files, e-mails, backup systems or archives, and data on laptops, PDAs, or cell phones. This may also include sources of ESI that are *outside* the control of the directly involved individuals, such as corporate databases, shared files, online document depositories, offline data stored in network shares, portable storage media and corporate electronic archives. These sources of documents and ESI often will be identified only after some interviews and other investigation. It is often IT professionals whose active involvement will be needed to preserve such sources of ESI.

Suspend Routine Deletion of Documents if Necessary

Consider whether any routine electronic data operations need to be suspended or altered. The nature of electronic information systems is that data contained within them is routinely and automatically updated or overwritten or purged in the ordinary course of business. Some of this cannot reasonably be avoided, such as the routine updating of various metadata. However, some automatic functions, such as automated e-mail deletion processes or space limits imposed on e-mail users, might need to be lifted for individuals on legal hold.

Content of the Legal Hold Notice

The legal hold notice should spell out in reasonable detail, based on the information that is reasonably available to counsel at the time, what is expected of the recipients. This includes identifying relevant subject matters, suggesting types of ESI to be considered, providing any necessary instructions on how to comply, and providing contact information for a knowledgeable person on the litigation team who can answer questions about the legal hold.

It is a good practice to document the steps taken to implement a legal hold. It may be as important to be able to recall and explain the timely and reasonable steps that were taken to preserve evidence as it is to have taken those steps.

Important Follow-Up Steps

As important as the issuance of a timely and reasonable legal hold notice is the subsequent “affirmative steps” that are taken toward implementing an effective legal hold process. Such steps often will include:

- *Determine the existence and location of any non-standard ESI and archived material.* If the company has relevant and discoverable voicemail, text messages, or other non-standard ESI, consider whether it can and should be preserved. If so, work with the appropriate IT or administrative personnel to do so. Certain archived data, including any older tapes or other media containing system wide backup data, may fall into this category. This must be tempered by proportionality -- balancing the burdens with the ultimate benefits of preservation.

- *Determine if ESI relates to third party agents, including the need to preserve and collect data in the custody*

of such agents. Under US federal law – and the laws of most US states – a party is required to preserve responsive information within its “control,” which may include data in the physical possession of third parties. If the organization has the legal right to data in the possession of such a third party there may be an obligation to take steps to preserve, collect and produce it.

- *Determine if ESI relates to data maintained outside of the United States and consider local rules regarding the collection and review of such data.* Given the impact of globalization and cross-border ownership, it is not uncommon for information sought in discovery in US proceedings, including ESI, to be located outside the United States. Access to such information is complicated by the unique and differing perspectives of foreign jurisdictions toward the disclosure of such information. Consider the potential discoverability of such foreign data and that privacy laws may complicate or prevent compliance with discovery of foreign data in US litigation.

Effectively managing legal holds in large companies with substantial litigation dockets can be complex and involves significant risk. The process will go more smoothly and risk will be better managed where the company has proactively developed an effective program and adopted technology to help with the process. This can make the difference between defending a case on its merits or fighting primarily about alleged spoliation.

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