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ELECTRONIC DISCOVERY & INFORMATION GOVERNANCE

Tip of the Month

Strategies for the Preservation and Production of Audio Recordings

Scenario

A large financial institution that is a major participant in the swaps market instituted an audio data retention policy to conform with newly enacted regulatory requirements which required swaps dealers to keep a record, for one year, of all oral communications concerning quotes, solicitations, bids, offers, instructions, trading and prices that lead to the execution of a swap, whether communicated by telephone, voicemail, mobile device or other digital or electronic media. As required by the regulations, the company records, retains, time-stamps and indexes terabytes of oral communications from a variety of devices used by hundreds of employees who are involved in swaps trading activities. The company's legal department has been tasked with identifying and minimizing the risks associated with compliance with these new regulations.

Preservation and Discovery of Audio Recordings

The creation, retention and production of audio recordings is compulsory in certain regulatory contexts. For instance, the Securities and Exchange Commission ("SEC"), the Commodity Futures Trading Commission ("CFTC") and certain other regulatory entities require that certain oral communications—e.g., telephone and "squawk box" conversations—be recorded and maintained for certain individuals such as Broker Dealers (SEC) or Registrants (CFTC).

These requirements permit regulators to review such data under a variety of scenarios. One scenario is a routine regulatory examination, during which regulators analyze whether a registered entity's operations are compliant with applicable regulations—e.g., is the regulated entity in fact recording and maintaining audio files as required by applicable regulations. Regulators also investigate possible regulatory violations, and in such investigations, the content of the audio recordings themselves will be of primary importance. As a practical matter, regulated entities often strive to comply with requests for audio data in order to cooperate with investigations and because such requests are often already narrowly tailored to one or two individuals over a short period of time.

However, once created and maintained for regulatory or other purposes, audio recordings may be discoverable in civil litigation or subject to discovery in the context of criminal investigations. In the criminal context, in addition to the usual investigative powers of criminal prosecutors, certain regulations explicitly require registered entities to permit the Department of Justice to have access to all daily trading records.

In the civil context, electronically stored information ("ESI") is discoverable under Federal Rule of Civil Procedure 34 if it is "stored in any medium" from which it can be obtained "either directly or,

if necessary, after translation … into a reasonably usable form." Audio recordings are, thus, treated under the Rules like any other medium, such as email, and may be considered discoverable ESI. Further, requests for audio data in civil discovery are likely, at least initially, to be coextensive with document requests and are, therefore, likely to cover many custodians over a long period of time. In such cases, compliance may be unduly burdensome.

Federal Rule of Civil Procedure 26 protects a party from being forced to produce ESI from sources that that are "not reasonably accessible because of undue burden or cost." However, there has been little explicit guidance from the courts on the degree to which this rule may apply to requests for large amounts of audio data.

In other ESI contexts, courts have crafted novel approaches to balance discovery rights against burden and cost concerns, rather than preclude discovery entirely. For example, although courts typically rule that requests for production from email backup tapes impose an undue burden, some courts have allowed restoration of a limited set of backup tapes, at shared or shifted cost, where emails from the relevant period have not been retained. Given that certain audio recordings are required to be created and maintained for the purpose of production to regulators, a court could presume them to be reasonably accessible, and expect such regulated entities to maintain audio in a manner that provides for ready access.

Strategies and Best Practices

As a threshold matter, it is important to know what audio data is being recorded and how long it is being maintained. Typical examples of sources of audio data include:

- Recorded telephone lines: Telephone lines are most often recorded because it is either required for regulatory purposes or desired for business purposes. For instance, a company's call center may record customer service calls for training and quality control purposes.
- Recorded "squawk boxes": Squawk boxes are intercom systems used by financial professionals to broadcast offers, bids and other market information to traders and other market participants.
- Voicemail: Voicemail from work or personal cell phones or landlines is a common source of audio data.

The collection, processing, review and production of such sources of audio files have the potential to be costly and time consuming. However, there may be ways to attempt to narrow such broad requests—through negotiations with counterparties or by conducting preliminary discovery—that are likely to satisfy the regulator or the Court and help reduce the costs and burdens involved.

- Conducting witness interviews and at least a limited review of written communications prior to processing audio data may help narrow the individuals and date ranges at issue. Preliminary investigation also can help educate the parties on how best to refine search terms and limit the sources of audio that need to be searched. For instance, when relevant, squawk boxes can account for a large percentage of the total amount of data in an audio review. This is, in part, because squawk boxes typically record 24 hours a day, seven days a week. One way to limit the amount of squawk box data to be processed is to obtain agreement from the regulator or opposing counsel to process only data recorded during work hours.
- The majority of audio is recorded and maintained pursuant to regulatory requirements and its retention serves no business purpose. As such, there is seldom any reason to maintain audio data beyond the regulatory requirements. The company's retention policies should be reviewed and tailored to meet applicable regulatory requirements and careful thought

should be given to whether any audio data should be maintained beyond those requirements, with appropriate consideration given to the existence of any litigation holds that might require further retention.

- Certain e-discovery vendors have the capability to process audio data in ways that render that data searchable (either through speech-to-text or phonetic search methodologies), which can further aid in limiting the amount of audio that would need to be reviewed in order to respond to a request. Counsel should consider identifying vendors with the requisite capabilities if audio data needs to be reviewed and produced.
- Counsel should also consider instituting a protocol for collecting audio data. Consideration can also be given to whether existing and future litigation hold letters should specifically identify audio data sources on company-issued and personal devices as among the categories of documents and data to be retained, both to ensure that clear instruction is given and to document compliance with preservation obligations.

In conclusion, companies may face the prospect of reviewing and producing audio data in the regulatory, criminal and civil litigation contexts. Couple that possibility with the broad regulatory retention requirements and companies have ample reason to ensure they have appropriate systems in place to help effectively and efficiently comply with requests for audio data.

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