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Leveraging Search Experts And Technology For Targeted Risk Oversight

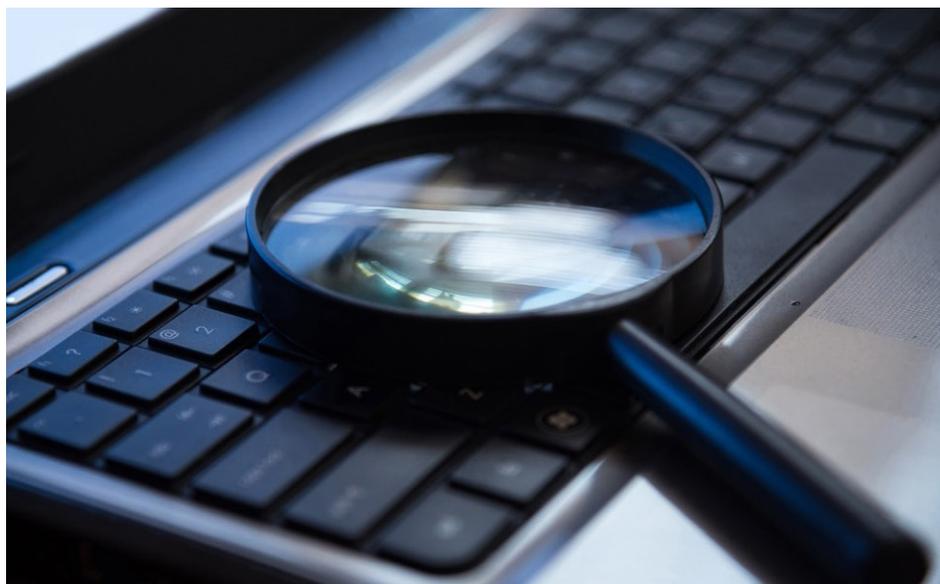
By Matthew Close, Brittany Rogers and John Kihlberg

WHAT BOARDS SHOULD KNOW

Every day, it seems like a new corporate scandal is splashed across the headlines, inevitably leading to questions (and often lawsuits) about who knew what, when. Forced to react, directors often must answer questions about their own engagement and oversight. Would greater board intervention earlier have been appropriate? This question often leads to discussion of the tools available to the board if it wants to test the quality and completeness of the information it may (or may not) be receiving from management.

Risk oversight is a hot button issue, and both investors and boards are paying attention. According to a 2017 survey by PwC, over 40 percent of directors polled responded that they would like their boards to spend additional time and resources on risk assessment and management.¹ Large institutional investors are also focused on risk oversight and risk related topics, with groups like Vanguard identifying risk oversight as one of four key pillars for effective corporate governance.²

Yet the challenge for many boards is deciding if, when and how to scale up their over-



A preliminary micro-investigation can help provide directors with an answer to the question, “do we need to be worried about this?”

sight incrementally in response to rumors, suspicion or isolated reports that might not alone warrant a formal board or audit committee investigation with the attendant costs and disruptions.

Formal investigations, including those undertaken with the assistance of outside counsel, are often exhaustive. As a result, they can be expensive and time-consuming because of the substantial number of documents that are collected and analyzed.³ Some situations obviously call for that level of scrutiny and exhaustiveness.

But what is a board to do if a situation does not appear to warrant a full-scale, outside investigation? Search experts wielding advanced technologies now make it possible to conduct a targeted micro-investigation to identify key documents, tailored to directors' specific concerns.

MICRO-INVESTIGATIONS USING ADVANCED SEARCH CAN PROVIDE VALUABLE INFORMATION

A micro-investigation to identify key documents is a more contained, faster and less

expensive version of a full investigation. It begins with communication between outside counsel and a small team of search experts with knowledge of the subject matter domain, a suite of advanced tools and a methodology that applies linguistics, statistics, data science and logic to the hunt.

Together with counsel, this team can define the concern, identify the population of data needed to evaluate it and efficiently leverage search technologies to identify key documents without substantially burdening management or requiring an army of lawyers to review documents.

This initial and incremental process can be done with or without the creation of a special committee, and it can be an appropriate and useful way for a board or committee to verify and quickly confirm information from management or identify areas where the board wants further information.

ELECTRONIC DOCUMENTS EXPEDITE INVESTIGATIONS

Many contemporary documents and business communications are available

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electronically and, in fact, sometimes never make it to paper. Although this may result in cumbersome data volume, this is can be of benefit to counsel, as electronic data populations can be interrogated by search experts using myriad tools and methods that could never be applied to paper documents. Electronic records are multi-dimensional and offer prospective insights via their metadata, body text and headers and footers; search experts, informed by counsel's knowledge of the case particulars, can leverage all dimensions of electronic records to client advantage.

A micro-investigation will likely begin with a targeted collection of data from specific individuals and data sources. The right steps applied to data early in the process — such as setting indexing parameters, virtual de-duplication techniques, email chain analysis and metadata determinations — can both reduce and enhance the data population in an effort to leave rich pools of information for search experts to address.

Taking advantage of various dimensions of the data, experts can pare down the collected data by targeting specific aspects for inclusion or exclusion. For example, search experts armed with the right technology are able to target the textual content of emails (what or who is being talked about) instead of the email headers that indicate who is doing the communicating, thus identifying instances where someone is being talked about without the search returning every email he or she wrote or received. The ability to quickly conduct precision-focused searches helps to eliminate over-capture that is otherwise present with more blunt approaches, saving time and money.

LINGUISTIC SEARCH CAN PROVIDE VALUABLE CLUES

Electronic data collections can tell stories in several ways, including by the patterns of communication between or among specific individuals. Certain clusters of recipients, especially in conjunction with dates, times and density of communications, could be revelatory in a micro-investigation.

More often, however, it is the content that tells the tale. Subject matter references may be easy to identify (yes, x and y spoke about this particular event or transaction), but potentially suspicious behavior is sometimes

revealed by language in surprising ways. The expert use of search, with linguistics at its core, takes into consideration the way human beings actually express themselves. The presence (and sometimes absence) of certain terms in a document may signal that something is amiss, as can an unusual recurrence of certain analogies (why are x and y always making sports comparisons?). Feelings can often be discerned by the application of sentiment filters to detect emotional content in documents. Such filters have been shown to be effective at capturing indications of concern, worry, surprise and secrecy that escape more traditional subject matter-based review methods due to the nuanced and potentially sparse language involved. When there is a suspicion that wrongdoing occurred with full knowledge of certain actors, search experts can also incorporate so-called "obligation words" into searches such as "should" or "shouldn't" or "supposed to." While these terms are too broad on their own to be helpful, when paired strategically with searches that target key concepts, interesting documents often surface.

MICRO-INVESTIGATIONS USING SEARCH CAN SURFACE ISSUES BEFORE IT'S TOO LATE

In many directors' minds, the only other alternative to a formal investigation is relying on internal resources to assess a potential challenge. Relying on management reports may minimize cost and business disruption, but it can also be second-guessed later if information proves to be incomplete or inaccurate. Management is busy and may not have full information on a particular subject. They are also trusting that the appropriate stakeholders are part of the reporting process. If a key player or data set is excluded, even without malice or ill intent, the information presented may be skewed or simply incomplete. The board may not be in a position to know that all of its bases are covered.

Strategic search, in the hands of experts with advanced technology and knowledge of the matter, can be a powerful, pre-emptive weapon. With just a few attorneys directing search experts in an investigation of small collections of data, a preliminary micro-investigation has the power to provide directors with an answer to the question, "do I need to be worried about this?" Directors can sleep

better at night having assessed whether a more thorough investigation is needed and potentially getting to the root of the issue before their company is in the headlines for the wrong reasons. Possession of critical facts early in the process can make all the difference in gaining the insights necessary for strategic planning and time-sensitive decisions in these situations.

¹PwC, 2017 Annual Corporate Directors Survey.

²Vanguard, 2017 Annual Report, Investment Stewardship.

³See Samuel Rubinfeld, Costly Corporate Investigations Have No Natural End-Point, Wall St. J., Oct. 10, 2017.



Matthew Close is a partner of O'Melveny & Myers LLP. He represents corporations, directors, executives and financial advisors in securities, derivative, corporate governance and fiduciary duty litigation, as well as in government and special committee investigations.



Brittany Rogers is a counsel at O'Melveny & Myers LLP's Los Angeles office. She represents corporations, directors, executives and financial advisors in securities, derivative, corporate governance and fiduciary duty litigation, as well as in government and special committee investigations.



John Kihlberg is a senior director at H5, where he leads expert teams in the deployment of sophisticated technologies that enable clients to efficiently identify key and responsive documents within large data collections.