

NYSE Regulation
20 Broad Street, 23d Floor
New York, NY 10005
Attention: William Jannace

RE: Comments on the Proposed Joint Guidance Regarding the Review and Supervision of Electronic Communications

Dear Mr. Jannace:

In response to the recently released Joint Guidance, there are additional considerations for the supervision of electronic communications leading to more meaningful methods of review.

These comments and observations are based on experience assisting firms with surveillance and retention efforts as well as the capabilities MessageGate, Inc. delivers to the marketplace as a software provider.

The Joint Guidance suggests utilizing lexicon-based reviews and/or random review as the means to employ for review of correspondence. These methods alone may result in the following problems:

1. False positives

Lexicon-based monitoring approaches are limited due to the binary nature of the rules. Take for example the word “park” and its derivatives. It would certainly be more interesting to identify a discussion regarding parking a security than an address on Park Avenue but the word on its own satisfies a lexicon-based system. Beyond simple word/phrase matching are issues related to patterns or expressions. For example, a Social Security Number contains nine digits as does a CUSIP number. Merely looking for the presence of a nine digit identifier will lead to significant false positives as CUSIP numbers and Social Security Numbers both satisfy the criteria.

2. Duplicate messages

One message can be sent to multiple recipients either via established distribution lists or entry of multiple addresses creating a duplication issue where the same message will appear in the review queue over and over. This occurs when employing either the lexicon or random method given a significant enough count of recipient addresses. As email is used to distribute research, company announcements, promotional material, or other bulk items, duplicate messages present a significant challenge and can reduce reviewer productivity and performance as the relevance of messages is eroded by the number of duplicates in the review process.

3. Burdensome review of internal messages

On average, “internal” message traffic accounts for anywhere from 70-80%¹ of total company volume making the addition of this traffic to the review process burdensome when employing the lexicon or sampling methods alone. Further, internal email is used

¹ MessageGate, Inc. analysis

for many things beyond person to person communication including system alerts and other machine generated traffic.

4. Significant cost of staff and infrastructure

Human supervisory review of electronic correspondence is expensive and time-consuming. Without better tools to focus the efforts and energies of review staff, member firms will need to continually add personnel as volume continues to grow 20-30% CAGR².

Given these challenges related to lexicon and/or random review methods, member firms could utilize technologies designed to ease the review burden and improve overall levels of oversight. Specifically, technologies exist that can:

1. Segment electronic communication flows

Effectively delineating among inbound, outbound, and internal message traffic as well as classifying high-value and low-value correspondence segments electronic communications for easier monitoring, review, and archiving. This segmentation can also separate communication flows into high-value and low-value correspondence focusing the efforts of review personnel and enhancing overall oversight efforts. For example, repackaged publicly available information received by a member firm via email including financial information and company news as well as “opt-in” commercial correspondence on things such as travel and shopping are lower value pieces of correspondence and can be accurately and easily identified for exclusion from review. This “low-value” correspondence can account for up to 25%³ of inbound message traffic.

2. Identify “of interest” or suspect communications

Starting with what may be deemed suspect is an improved approach to review that may be used in addition to lexicon or random review methods. Combining these approaches with contextual attributes and temporal variables provides a more robust framework for accurately detecting outlier or suspect correspondence. Examples include control list enforcement (prohibition from mentioning a company during a certain time period), validation algorithms (calculating the difference between a Social Security Number and a CUSIP), suspect file movement (heavily attachment-laden emails without any text) or the presence/absence of document watermarks or property meta-data in file attachments indicating sensitive or confidential work product.

3. Suppress duplicate messages

By examining unique identifiers on a message, duplicates can be detected, suppressed in the display and even provide reviewers “select all” capabilities whereby the same message occurring repeatedly can be reviewed/released in one step versus the need to examine the same message over and over.

4. Enforce departmental/business unit controls and exceptions

In situations where member firm requirements include usage permissions associated with who can send what where, a departmental or user-based control method can identify these messages when a breach occurs, remove them from the review process altogether, and/or stop them from being released. For example, the information

² Various estimates including those from Gartner Group, Osterman Research & MessageGate, Inc.

³ MessageGate, Inc. analysis

boundaries required by NYSE Rule 472(b)(3) and NASD Rule 2711(b)(3)(A) can be automated by contextual analysis of sender and receiver removing the dependency on the sender to copy legal/compliance. Further, where certain business units, departments, or personnel are not subject to the review requirements they can be excluded from the review queue.

5. Provide selective pre-send review

Moving away from a reactive program is possible by proactively supervising those messages that are deemed to be most of interest. For example, Deutsche Bank lost its role on Hertz Global Holding, Inc.'s initial public offering when unauthorized emails were sent to institutional accounts⁴. The combination of the lexical and temporal elements (i.e., don't discuss this company before this time) could have been used to proactively intercept these messages prior to their release as part of the control/restricted list enforcement process. Key to this approach is to be selective and accurate in determination. This can be further extended to user-based self-review where a message is returned to the sender prior to delivery for confirmation of intent or compliance. Such human-based approaches increase overall compliance awareness, serve as a training tool, and can lead to end-user behavior change.

Thank you for your time and consideration on these matters.

Best regards,

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⁴ Deutsche Bank Loses Hertz IPO Role Because of E-Mails, Bloomberg.com, November 8, 2006