White Paper

A Practical Guide to Financial Services eDiscovery

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Introduction

Financial services organizations face unique eDiscovery challenges. Massive data volumes, expanding collaboration platforms, unapproved messaging applications, and evolving privacy and data localization requirements add significant complexity.

This white paper outlines the challenges and provides practical direction on how to handle obstacles and increase efficiency.

What are Regulatory Considerations for Financial Services eDiscovery?

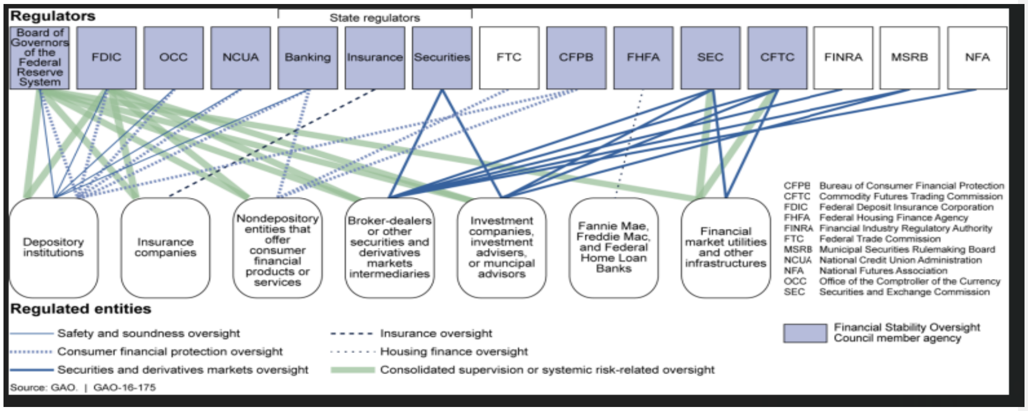
For financial services, eDiscovery is not just tied to litigation. In fact, for many organizations, the cost of regulatory inquiries and investigations can exceed that of eDiscovery litigation spend. As financial institutions expand across products, services, and geographies, regulatory oversight becomes significantly more complex.

The term financial services encompasses a wide range of regulated products, records, formats, and retention requirements, all of which create unique eDiscovery challenges. Regulators and opposing counsel already know what records financial institutions are required to maintain and routinely request them during discovery. If required records are unavailable, inaccessible, or not maintained in the required format or retention period, the consequences can range from regulatory enforcement actions to significant litigation disadvantages. You can end up losing on a record/evidence issue rather than on the merits of the case.

A regulatory fine or settlement will often trigger multiple customer litigations, including class actions. Detailed public announcements and postings on regulator websites of fines and settlement documents provide law firms with a detailed roadmap for class actions. A large regulatory fine can quickly turn into multiple class actions and significant law firm expenses fighting on multiple fronts for years. This is even more prevalent when there is a clear correlation between regulatory compliance failure and negative impact on customers.

The image below is from the U.S. General Accounting Office (GAO) Report representing the US Regulatory agencies with oversight of financial service products and services. The chart shows that international banks must contend with multiple layers of regulatory oversight in play. That, along with overarching requirements for Anti-Money Laundering (AML) regulations, data privacy regulations, and data transfer restrictions in multiple jurisdictions, create an even more complex maze of requirements.

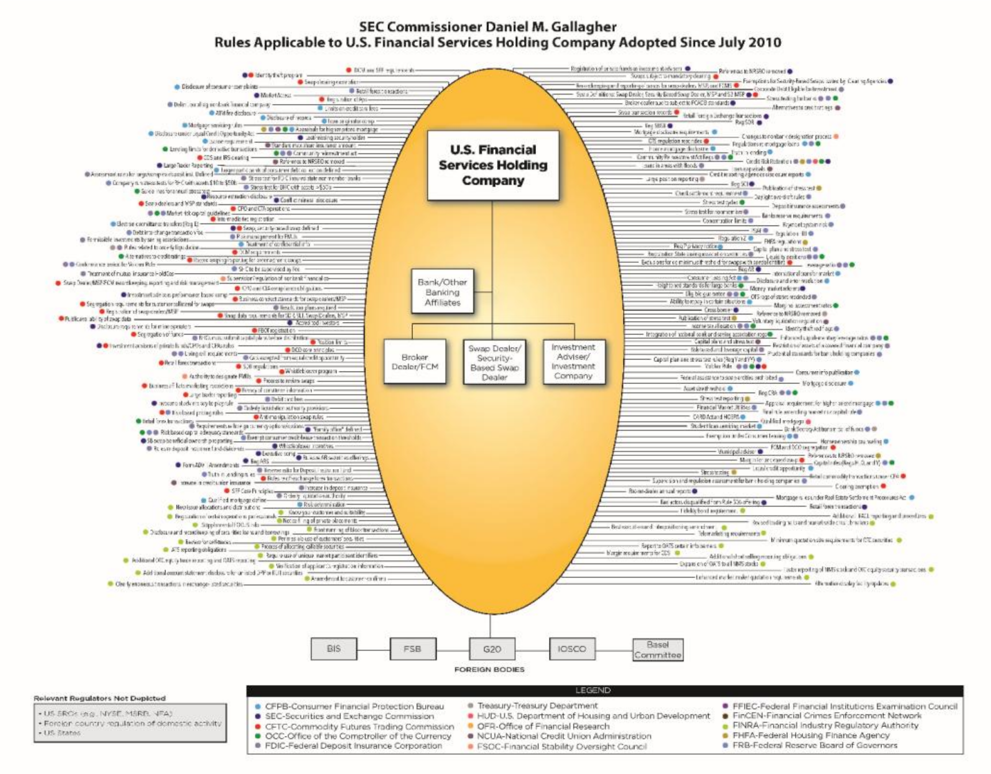
Chart: Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework



[Source: | Congress.gov | Library of Congress]

A Deeper Dive into Financial Services eDiscovery Regulatory Requirements

Let's look a little closer at financial services companies through the prism of all the potentially applicable rules that they must comply with. Below is a "Regulatory Quilt" image from a U.S. Securities and Exchange publication that can be completely overwhelming and hard to navigate. For most of these rules, there are underlying record requirements that must be maintained to ensure compliance with the rules or regulations. The required document types, formats, and retention periods are publicly defined. This enables opposing counsel to make highly targeted and expansive discovery requests.



SEC.gov | Crazy Quilt Chart of Regulation

Types of Regulatory Actions Necessitating eDiscovery

Due to the many regulatory rules and guidelines for financial services organizations, there are several typical regulatory actions that lead to the need for eDiscovery. These include:

- Routine Inquiries – FINRA, SEC, CFTC send these out weekly. Big banks and brokers get thousands a year.
- Scheduled Exams – Some are scheduled months or quarters in advance. Some even annually.
- Surprise Exams – For example, “We are coming to your corporate office next Tuesday, and this is what we want available day one.”
- Investigations (Topic Specific and Street wide) – Deep investigations into specific products and/or services that can last months or even a year or more.

And finally, Regulatory actions rarely end with the regulator. Public settlements often trigger customer litigation, including class actions, creating additional discovery obligations and legal costs.

Constantly Shifting and Changing Regulations

Regulatory changes are often announced 12-18 months before they take effect, depending on their complexity. Roughly 6-9 months after the effective date, regulators start inquiries to test compliance. During these periods, it can be beneficial and cost effective to document the process and procedures developed to comply with a new or changing regulation. Also identify key documents to be created and/or reports used internally to review compliance.

This documentation becomes a valuable playbook for records management and eDiscovery to provide to regulators, demonstrating an organization’s efficient process design and ongoing compliance.

Differences Between Litigation and Regulatory Phases of Discovery and Helpful Tips

Discovery Governance

In Litigation, in the U.S., the Federal Rules of Civil Procedure (FRCP) and state rules of civil procedure dictate the discovery process.

In Regulatory discovery, the individual agency's or regulator's specific rules, laws, and deadlines dictate the process. Examples include the SEC, DOJ, and FTC.

Here are some basic parameters to keep in mind for eDiscovery for financial services.

Discovery Data Mapping

Effective data mapping is the foundation of defensible, efficient eDiscovery. Without it, organizations face higher costs, longer response times, and greater regulatory risk. Key elements include:

A map that reflects all major data types, both structured and unstructured
For highly regulated financial institutions, a data map that has direct linkage to corporate record retention schedules, as well as alignment to specific regulatory required retention periods for applicable records.

A strong relationship between Legal and Compliance is essential, as the Compliance team will be responsible for responding to Regulators on some of the multiple inquiries that are received on a regular basis.

Discovery Negotiating

Litigation discovery negotiating and communications are done mostly via email, official notifications, phone calls and motions. Regulatory discovery discussions are often conducted face-to-face in real time, with SEC, FINRA, and OCC regulatory teams sitting in your offices during significant portions of the inquiry/investigation. For large financial services organizations, the regulators may even have full-time offices in corporate offices.

Discovery Scope

Litigation often focuses on a specific timeframe and a limited number of "custodians" with relevant data involved in the dispute. The broader the number or types of underlying issues, breadth of services, and the number of customers all contribute to expanded discovery scope.

For financial services eDiscovery, scope is often much broader, potentially spanning a longer period and involving more custodians to ensure a complete regulatory response. The scope can be more focused if it is a “street sweep” focused on a specific area of compliance. It can also expand significantly when examining compliance with broader regulatory requirements affecting many areas (Anti-Money Laundering, Know Your Customer, specific product record keeping, etc.).

Speed of Regulatory Response

The timeline for litigation vs regulatory inquires discovery is significantly different.

Litigation generally allows more time between the initial dispute and full discovery than regulatory investigations.

The time between a regulatory notice of an inquiry and starting production can be a few weeks. The regulatory notice will often include an initial documentation request, as well as the date the regulator will arrive in person. Some documentation will be requested on day one of the regulatory team’s arrival on site. In these instances, discovery will start within a day or two of receiving the inquiry/investigation notice. Having an established and well-communicated internal process for intake of regulatory inquiries and accurate and speedy assignment to the proper compliance and/or Legal team is critical, as every day counts in the first two weeks.

Cross-Border Data Transfer

Cross-border data transfer can be a challenge in both litigation and regulatory matters for global financial institutions. The controls and process may be almost the same, but how the other side reacts can be different. Opposing legal counsel may ask for data they know has privacy and data transfer issues and, due to the adversarial nature of the relationship, may want to make it a sticking point. A regulator will often be more open to partnering when you present your efforts to comply with said regulation and provide as much data as you can and comply with jurisdictional laws and regulations.

Commented [C1]: Suggest tightening this sentence: "A regulator will often be more open to partnering when you demonstrate efforts to comply with the regulation, provide as much data as you can, and comply with jurisdictional laws and regulations." (Fixes "will many times be" and the repeated "comply with... and comply with.")

A high-level best practice cross-border data process for both litigation and regulatory matters would include the following:

Legal/Discovery Operations should perform a preliminary assessment to determine whether the requested discovery may involve data, custodians, systems, or legal entities located in more than one country or jurisdiction.

If the initial assessment indicates that cross-border data may be implicated, legal and compliance should conduct a cross-border risk assessment to identify potentially relevant jurisdictions, data types, and privacy or regulatory risks. Matters confirmed to involve cross-border considerations are designated as cross-border discovery and should be handled in accordance with a standardized, repeatable process.

Following designation, identify relevant record types, custodians, and systems. Business stakeholders and Discovery teams work with IT, Compliance, and Data Owners to inventory record types, identify custodians and associated legal entities, and determine physical and logical system locations.
Create a detailed data flow map documenting how data moves between systems, including upstream and downstream systems, cross-border transfers, remote access points, and any third-party processors. This data flow map then helps to support the legal analysis, risk assessment, and audit readiness.

Legal and Compliance should conduct a jurisdiction-specific legal and regulatory analysis to identify applicable data privacy laws, regulatory authorities, and record retention requirements. Legal determines restrictions on data collection, processing, transfer, review location, storage, and identifies required safeguards.

Based on this analysis, the Discovery team, in coordination with Legal, should define a narrowly tailored discovery scope applying data minimization principles. Custodians, record types, date ranges, and system sources are limited to the minimum necessary to meet discovery objectives.
Document a formal cross-border discovery workflow, describing data collection, processing, filtering, review, security controls, and cross-border transfer mechanisms. Qualified legal counsel should review and approve the discovery scope, data flow map, and workflow before any data collection begins.

How to Best Interact with Opposing Counsel and Regulators with Regard to eDiscovery

With litigation eDiscovery for financial services firms and most companies, exchanges are adversarial and a constant battle beginning to end, with one side pushing for as much data as they can get and the other pushing just as hard to limit data production to the smallest amount possible. The negotiation continues throughout discovery, including individual custodians and number, date range of relevant documents, types of structured and unstructured data potentially responsive, search terms to be applied, privilege logs, and shifts to all the above as the litigation proceeds through the EDRM.

In regulatory matters, it is a different relationship. The regulator has oversight and responsibility to ensure regulations are being followed for specific products and services. Therefore, discovery for regulatory purposes has a different perspective and a different type of interaction. A financial institution has an obligation to comply and even help the regulator obtain the information they need as quickly and accurately as possible. This can also help the financial institution reduce legal discovery expenses, but only if they can target responsive data quickly and provide the data the regulator needs to determine compliance. With onsite teams, or even during longer investigations, it can be very beneficial to develop trust with the regulators by being forthright and proactive in helping them identify the data they need as quickly as possible. Even in scenarios where noncompliance is the final decision, cooperation can benefit the institution in the long run.

Legal/Litigation Privilege and Regulatory Privilege

This somewhat unique scenario in financial services requires the balancing of regulators' right to know and traditional attorney-client privilege, and the regulatory privilege of documents provided to a regulator during exams.

As we all know, attorney-client privilege is a legal principle that protects confidential communication between a client and their attorney, ensuring that these discussions remain private and cannot be disclosed without the client's consent. This may be done to show cooperation with regulators that have leeway in fines and settlement when the financial institution shows full cooperation. In this scenario, it is the financial institution's privilege to waive, and it is their decision.

While a regulator may acknowledge and accept privilege on documents, a financial institution may waive privilege on documents during examinations and/or inquiries. According to the ABA, "Bank examinations are integral to the government's supervision of the banking industry; they are meant to assess an institution's financial health and/or its compliance with applicable laws and regulations. Bank examination privilege comes into play when a party to a lawsuit seeks copies of such records for evidence at trial, but the privilege is a federal rule that shields examination records, to an extent, in federal litigation."

The privilege here belongs to regulators, not the financial institution. Therefore, in a lawsuit, when a party asks a bank to turn over confidential examination records, the bank should promptly reach out to the regulator that conducted the examination. If the regulator asserts the privilege, one of two things may happen next. First, the bank's adversary may back down. Second, the bank's adversary may ask the court to override the regulator's decision.

Top 5 Best Practices for Litigation / Regulatory Discovery for Financial Services

Here's a helpful wrap up of what we have seen create the best outcomes when it comes to eDiscovery for financial organizations:

1. Have organized up-to-date data maps of all key systems and records. Include corporate record retention periods by records type, by systems, and reference applicable regulatory requirements or by specific regulations. This type of detailed data map will be an excellent foundation for efficient discovery in both litigation and regulatory inquiries.

2. Leverage the compliance team in both litigation and regulatory Investigations. They are often experts on the controls developed to meet regulatory requirements, and can help conduct employee training on compliance procedures, and investigate when a compliance issue arises.

3. Be prepared for the speed of regulatory investigations. Consider a designated team that can focus 100% on regulatory inquiries and investigations. Have designated resources in compliance, records management, HR, and IT ready and willing to assist with urgent needs for accurate and timely analysis, identification and collection.

4. If you have data transfer issues across borders, ensure you have counsel approved data flows prior to moving data across borders, and/or systems.

5. Working with opposing counsel or a regulator requires very different demeanors. Treating a regulator with an adversarial approach will almost always be detrimental to the investigation and possible size of fines. Demonstrate proactive cooperation by helping regulators identify relevant information efficiently. Proactive cooperation will often influence a reduction in the size of fine and/or settlement.

Conclusion

Successfully navigating eDiscovery requires a planned, standardized approach that combines industry expertise, knowledge of best-in-class workflows, and advanced technology.

As regulatory scrutiny, data volumes, and communication channels continue to expand, financial institutions need an eDiscovery strategy that is repeatable, defensible, and scalable. Success depends on combining strong governance, cross-functional collaboration, proven workflows, and technology that enables teams to respond quickly without sacrificing quality or compliance.

Organizations that establish these foundations will be better positioned to manage litigation and regulatory inquiries efficiently while reducing cost, risk, and operational disruption.

For more information on how Integreon helps corporate legal departments at financial services companies improve efficiency, create capacity for higher-value work and control spend, visit us at Integreon.com and set a time to meet with one of our experts.

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Robert joined Integreon in 2017 as Senior Director. Leveraging his many years of practical and tactical experience solving complex discovery related challenges, Robert is a subject matter expert for eDiscovery as well as financial services clients and helps lead the subpoena processing compliance services line at Integreon. Integreon has reacted to client needs to address this growing challenge for many companies in financial services, insurance, telecom, and internet service provider industries.

Prior to joining Integreon, Robert worked for Bank of America for 25 years in eDiscovery and regulatory investigation leadership positions. While there, he was responsible for handling end-to-end eDiscovery work to comply with regulatory and court demands.

Robert is also engaged in two industry working groups focused on the rewrite of the Information Governance Reference Model (IGRM) and the Collection Phase rewrite of the Electronic Discovery Reference Model (EDRM.)

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