

## The Impact of Regulations on Archiving



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## INTRODUCTION

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*The vast majority of organizations now consider electronic communications a viable and trusted medium for conducting business, such as taking orders, formalizing contracts and discussing sensitive personnel issues.*

Electronic communication has become the critical information backbone of most enterprises. Email has supplanted paper-based and verbal communications as the most critical single element of the corporate communications infrastructure. Fax, while used less often today than email, is a critical communications medium in many organizations, particularly in the medical and legal communities and some parts of the financial services industry, and internationally. Fax is still important because it is more secure than conventional email, as most contracts are still signed and faxed in hard copy rather than digitally, and because fax machines are almost universally available in organizations large and small.

The vast majority of organizations now consider electronic communications a viable and trusted medium for conducting business, such as taking orders, formalizing contracts and discussing sensitive personnel issues. Consequently, corporate email and fax systems now contain a great deal of sensitive information that was once transmitted and stored only through traditional paper-based processes.

As the use and dependence on electronic communications has exploded, so has the governmental and legal scrutiny regarding the storage and retrievability of these communications. Electronic documents are now just as admissible in court, and just as critical for an enterprise to maintain, as are its traditional paper-based records.

*Although enterprises in the financial services and healthcare industries face the most difficult data retention requirements, all enterprises in all industries are required to maintain electronic records.*

What makes this issue more difficult, however, is that the volume of electronic communications is increasing rapidly. Osterman Research has found that message stores in email systems are increasing at an average of more than 30 percent annually and that approximately 60 percent of the critical business information the typical email user requires for his or her job is stored solely within the email system. At the same time, the fax server and Multifunction Product (MFP) industries continue to report strong annual growth in fax communication which is producing millions more electronic documents that must be archived.

### **All Organizations are at Risk**

All enterprises must retain electronic communications—government regulations regarding data retention and court-

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ordered discovery, for example, make little distinction between the admissibility of paper vs. electronic documents or the requirement to produce them when so ordered. Although enterprises in the financial services and healthcare industries face the most difficult data retention requirements, *all* enterprises in *all* industries are required to maintain electronic records. What makes compliance more difficult is that there are literally thousands of requirements for data retention at the local, state, national and international levels, and case law regarding requirements like legal discovery, for example, is still being developed.

*An organization that does not properly manage its records—electronic and otherwise—faces the potential for serious consequences.*

An organization that does not properly manage its records—electronic and otherwise—faces the potential for serious consequences, including heavy fines and, because of regulations like Sarbanes-Oxley and the Health Insurance Portability and Accountability Act (HIPAA), prison time for senior managers who knowingly destroy or falsify records.

For example, Morgan Stanley has been involved in several legal cases surrounding email record storage, the most recent involving a lawsuit in which the verdict may result in a \$1.45 billion payment for failure to provide email messages. Morgan Stanley is not alone in this archiving challenge.

The most prudent course of action for any organization is to deploy systems that can retain all electronic data and make it accessible rapidly when needed. This white paper discusses why doing so is not only a good idea, but a business necessity.

### Overview

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Most of the regulations regarding document retention focus on the retention of records without reference to the medium in which these records are stored or transmitted. A personnel record transmitted from an employee to her supervisor via email, for example, is subject to the same requirements for retention as if the employee had faxed or mailed the information.

*The distinction between email, fax and paper-based media with regard to its admissibility as a "record" in court has essentially disappeared.*

Email and fax have been recognized as acceptable and ordinary means of transmitting and documenting statements of public policy, so the distinction between email, fax and paper-based media with regard to its admissibility as a "record" in court has essentially disappeared. For example, according to the *Federal Rules of Civil Procedure*, electronic documents are now treated no differently than paper-

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based documents. At the state level, the Illinois Supreme Court, for example, ruled in 1995 that the definition of “documents” includes “all retrievable information in computer storage”.

Email and fax, in and of themselves, are transmission media for content that may or may not be valuable. An email or fax that contains information about an upcoming company picnic, for example, is more or less useless after the date has taken place and typically does not need to be archived. On the other hand, an email or fax that contains a broker's official comments on the financial health of a company or a communication from a senior manager to an external auditor probably will have to be kept for many years because its content constitutes a record of a corporate viewpoint or other noteworthy information. Therefore, it is essential for any archiving system to store only information that is critical for the enterprise to retain on a long-term basis. Doing so allows an enterprise to maintain control over its archiving storage requirements and it speeds the compliance process in the event that information is required to satisfy a regulatory or legal requirement at some future date.

### Archiving Challenges with Manual Fax Documents

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From the perspective of good records management there are additional complicating factors for an organization with regard to fax that do not apply to the same extent to email:

- Fax machines tend to be distributed widely in many organizations and they can be managed completely under IT's radar, meaning records that an organization needs to retain on a long-term basis and in accordance with a defined retention schedule can be dispersed throughout an organization.
- If a fax server is not employed to manage and store faxes, there is no centralized management of incoming and outgoing faxes. This allows critical information to enter or leave an organization with no organized management of this information.
- Fax machines represent a significant vulnerability from the perspective of intellectual property loss—a disgruntled employee, for example, can fax sensitive

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information to a competitor with virtually no record of this transaction having taken place.

- Even with a fax server in place, few organizations have implemented a secure and efficient solution to manage electronic fax documents. Many still print the documents and send them to the records manager.

### **Most Businesses Are Not Archiving Properly**

Multiple Osterman Research surveys clearly demonstrate that the vast majority of organizations do not adequately store electronic records for the appropriate length of time. Some organizations simply delete all old emails and electronic faxes on a set schedule regardless of statutory or contractual requirements, although they do so at their peril. For example, Federal regulations require that some types of critical information about employees be maintained for one year, some require retention for six years, some for 30 years and some indefinitely. Many organizations operate under the mistaken assumption that if they are not in possession of an email or fax record they are immune from the negative consequences of not being able to produce this information when asked to do so during court-order discovery or in a regulatory audit.

Another problem specific to email is that some jurisdictions require the recipient, and not the sender, to handle email properly. This further increases the liability of an organization governed by such requirements since the recipient becomes the legal guardian of the emails it receives, as well as those it generates.

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### **Archiving for Proper Records Management**

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Email and fax have become critical components of the record-keeping requirements for enterprises of all sizes, simply because both are now used to transmit and house records—information that organizations must retain because of statute, legal requirements or best practice.

Consequently, the ability to archive this information and recover specific data from the archive quickly has become a critical component of the records-keeping practices of any organization that uses email or fax to conduct business or transmit important business information.

### **Industries Impacted**

All industries face archiving requirements, although some industries and types of organizations are more heavily

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regulated. Consequently, the distinction between organizations is regulated vs. unregulated, but more heavily regulated vs. less heavily regulated. A summary of key regulatory requirements as they apply to document retention is shown in the following table.

**Summary of Archiving Requirements**

Industry	Key Regulatory Bodies/Statutes	General Requirements
Public companies	Sarbanes-Oxley Act of 2002	Retention of key records that relate to corporate governance, such as communications from company officers to auditors
Financial services	Securities and Exchange Commission (SEC) National Association of Securities Dealers (NASD) New York Stock Exchange	Maintenance schedules for records How records are to be maintained How records of communications with clients are to be maintained and supervised
Healthcare	Health Insurance Portability and Accountability Act (HIPAA) Medicare Conditions of Participation Food and Drug Administration	Maintenance schedules for records Disposition of records Standards for data centers that house records
Government agencies	General Records Schedules from the National Archives and Records Administration Wide range of statutes and other requirements	Each agency develops its own retention policy
Life sciences	21 CFR Part 11	Records retention for information subject to review by the Food and Drug Administration

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## Summary of Archiving Requirements (concluded)

Industry	Key Regulatory Bodies/Statutes	General Requirements
Automotive	Auto Industry Action Group (QS-9000)	Maintenance of quality performance records, internal quality system audits, documents relating to tooling records
Lumber	American Lumber Standards Committee	Maintenance schedules for records
All commercial enterprises	Gramm-Leach-Bliley Act Internal Revenue Service Fair Labor Standards Act Americans with Disabilities Act Occupational Safety and Health Act Title VII of the Civil Rights Act of 1964 Wide range of other statutes and requirements	Maintenance schedules for records How records are maintained

*To some extent, and in many countries, there are records-retention requirements for all organizations that are applicable to email and fax communications.*

### Heavily Regulated Industries

To some extent, and in many countries, there are records-retention requirements for all organizations that are applicable to email and fax communications. However, financial services and healthcare organizations are more heavily regulated with regard to their record retention requirements because there are specific agencies and/or statutes that apply to these organizations.

Organizations in these industries face additional requirements that can be quite difficult to satisfy. For example, brokerage houses must comply with a variety of SEC and NASD requirements that impose specific periods for retention of communications with customers, including requirements that dictate the ease of accessibility to these records for the early part of their storage period. There are

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also requirements that dictate the media on which these records can and cannot be stored.

Complicating the issue, the SEC—for example—can impose significant fines for noncompliance with its regulations. For instance, in 2004 Bank of America Securities was fined \$10 million by the SEC for improper archiving of email records. In 2002, five Wall Street brokerages were fined a total of \$8.65 million for similar violations.

*Because some statutes and other requirements are open to interpretation, regulated companies in this space face significant financial risk of either not complying with the regulations or falling short of their requirements.*

Because some statutes and other requirements are open to interpretation, regulated companies in this space face significant financial risk of either not complying with the regulations or falling short of their requirements. For example, the SEC requires organizations under its purview to maintain records for its “business as such”—exactly what is included in this term is open to significant differences in interpretation.

### **Email Archiving in Less Heavily-regulated Industries**

Among enterprises whose industry-specific data retention requirements are less stringent, there is currently a debate regarding the archiving of emails and other electronic documents. For example, some IT managers within these enterprises believe all content should be archived so corporate knowledge held in email is retained. Other managers believe email should be deleted regularly to reduce the liability that may arise in the event of a lawsuit or government inquiry. Essentially, there are three basic views on the issue of archiving email:

- **Delete all email regularly.** One group believes all email should be deleted on a regular schedule, typically kept no longer than ninety days, so potentially incriminating evidence will not be available during the discovery phase of a legal action or during a government inquiry. Those in this camp find justification for their position in cases in which archived emails have harmed the organizations that kept them, such as the several internal emails written by Microsoft's Bill Gates that were presented as evidence against Microsoft in the U.S. government's legal action against the company. Arguing against this position, others say courts can instruct juries that if a party to a legal action destroys documents, there is a presumption that the documents were damaging to the destroying party.
- **Keep all email for long periods.** Another group believes all emails should:

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- be kept for long periods
- be made accessible via archiving and tracking tools that permit an audit trail to be maintained
- have access to archived content permitted to employees and others for long periods of time

This view is held by those who are a) averse to risk and believe it is better to know about damaging evidence so its harm can be minimized through the application of appropriate legal or other strategies; and b) in support of the extraction of corporate knowledge from information stored in messaging systems.

- **Keep only important email.** A third group believes emails should be categorized with regard to their importance, and some of this information should be kept long-term, while unimportant information should be deleted regularly. Again, this view is held by those who are averse to risk for legal or other reasons and who want to extract corporate knowledge from the messaging system.

An example of the tension that can develop in an organization with regard to its data retention obligations is that of a small-cap investment firm in California. The chief legal counsel in this firm believes all electronic communication should be deleted on a regular basis to limit the firm's liability in the event of a legal action. The company's compliance officer, on the other hand, believes email should be retained for long periods to help the organization maintain compliance with statutory requirements. The compromise the firm has developed is simply to let individual employees decide what they should and should not retain.

### **Legal Considerations**

Regardless of whether an industry is more or less heavily regulated with regard to its records retention requirements, there are several factors for any enterprise to consider with regard to the importance of email and fax retention<sup>1</sup>:

- **During discovery all records are subject to review.** Without an appropriate archiving system from which emails and faxes can be methodically searched and

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<sup>1</sup> Source: Dr. Lars Davies, CEO of Kalypton Limited and Senior Visiting Fellow at the University of London's Centre for Commercial Law Studies.

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extracted, a court can order that all servers and backup tapes be seized for analysis.

- **Electronic documents are now valid and have legal effect.** Legal and regulatory developments prevent courts from denying legal effect or validity to electronic documents simply because they are in an electronic form. The legal and regulatory controls that apply to paper documents now apply to electronic documents. Parties who rely on or use electronic documents can be liable for their actions and omissions.
- **Courts no longer accept the argument of technical difficulty when dealing with the legal issues surrounding the use of electronic documents.** For example, if an email server runs out of storage capacity and an administrator must delete messages from the server to make room for new content, this is not considered an acceptable defense if a company is asked by a court to provide email messages during a lawsuit. The same would hold for the periodic purging of faxes from a fax server simply to free up disk space.
- **Legal admissibility is now irrelevant when it comes to determining the reliability of evidence.** The focus is now on the evidential weight of evidence. The strength of evidential weight directly determines the reliability of that evidence and the weight the Court will place on that evidence. Without evidential weight, any evidence is of little real use in any dispute and the side with greater evidential weight for material matters generally wins. The legal dispute resolution process works with the evidence put before it—the better one side's evidence, the more likely that side is to win the dispute.
- **Regulatory controls on the retention of documents and information are the main driver for electronic evidential weight.** Every commercial or governmental activity requires the production and retention of a record. Regulatory developments simply call for electronic versions to be retained for as long as their paper-based versions.
- **Electronic archiving imposes additional demands not required in traditional record-keeping.** In the paper-based world, parties can easily point to a particular copy of a document as the 'master' document, or the original. Evidential weight often begins with this particular copy. In

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the electronic world, however, this is far more difficult to do. Copies are not sent but are copied from system to system and the original that existed on a particular laptop or desktop system is not the 'same' copy as that in the archive. Not only must archive systems comply with regulatory controls and retention requirements, but they must also identify the original or 'master' copy, or at least prove the copy on the system is identical to the original copy when that copy was in existence, and that this copy has not been altered since.

- **Information must be tamper proof.** The problem with electronic information is that it is easy to alter, delete or even lose; far easier, in fact, than with paper-based information, as any change or loss can occur without leaving any trace. The problem then is to ensure information is correctly captured and stored to minimize uncertainty over its integrity and existence.
- **Evidential weight is more than document retention.** Evidential weight requires all aspects of an electronic record be retained; including the existence or occurrence, the document itself, any access to the document contents, any attempt to edit or delete the document, and ensuring the document received or created is the document stored. Simply storing a backup or snapshot of a messaging or fax server system is insufficient, as is a system that only archives documents after a period of time, as there is no way to protect against user tampering.
- **If a user cannot prove every document or record has been retained for the correct period, they have not satisfied the evidential weight requirements.** Document and email retention requirements specify the retention period and the storage mechanism. They do not affect evidential rules which are quite separate, but apply in addition to these requirements.
- **Archiving all electronic communication is the smartest course of action for any organization, even if the archived documents are damaging to the company's defense during a legal action.** An organization is better served by understanding the extent of its liability and opting to settle out-of-court rather than have another source produce archived emails or faxes that are damaging to the organization.

*An inability to satisfy compliance requirements—whether or not this compliance is imposed by a government regulatory agency or a legal action—can be damaging to an organization, both financially and otherwise.*

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### **The Risks of Noncompliance**

An inability to satisfy compliance requirements—whether or not this compliance is imposed by a government regulatory agency or a legal action—can be damaging to an organization, both financially and otherwise. For example:

- As mentioned earlier, five Wall Street brokerage houses—Deutsche Bank, Goldman Sachs, Morgan Stanley, Salomon Smith Barney and U.S. Bancorp—were fined a total of \$8.65 million by the SEC in December 2002 because these firms did not retain certain emails for SEC-mandated retention periods and for other infractions of SEC rules. The SEC investigation that culminated in these fines arose as part of a larger investigation into potential conflicts of interest between the research and investment banking operations at various brokerage firms.
- Also, as mentioned earlier, Bank of America Securities was fined \$10 million for its failure to adequately maintain email records in a manner that satisfied the SEC.
- In *Proctor & Gamble Company v. Haugen* (an independent distributor of Amway products), Proctor & Gamble was fined for destroying email-based records. Proctor & Gamble did not preserve or search for emails relevant to this case that were written by five individuals and was fined \$10,000 for its failure to do so.
- In *Applied Telematics, Inc. v. Sprint*, Sprint was charged with destroying evidence because it continued to recycle its backup tapes even after the legal proceeding brought by Applied Telematics had commenced. The data Applied Telematics asked Sprint to produce included routing plans housed in Sprint's internal databases. Although there was no allegation that Sprint had intentionally destroyed this data, the Court found that Sprint should have modified its normal backup procedures in order to preserve the data after Applied Telematics had requested it.
- In *Anti-Monopoly, Inc. v. Hasbro, Inc.*, the Court ruled that a defendant who is required to produce documents during the discovery phase of a legal action can also be compelled to bear the costs of designing a mechanism for extracting the information from its computer-based files.

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- Related to the above case is *Zubulake v. UBS Warburg*, in which the judge ruled that a new standard should be established for evaluating whether the plaintiff or the defendant bears the cost of electronic discovery. This ruling has become the “gold standard” for legal discovery because the judge in this case took a decidedly pro-plaintiff approach, meaning that organizations may be more likely to be charged for the costs of electronic discovery where the plaintiff can demonstrate this discovery would yield information of sufficient importance to a case.

To date, most fines imposed by regulatory agencies and decisions by courts have been relatively insignificant as a percentage of revenues generated by offending firms. However, these actions, we believe, are “a shot across the bow” and are intended to serve as a warning for firms to more carefully archive their email, faxes and all other electronic content. We expect court rulings and SEC judgments against firms for violations of Sarbanes-Oxley will be significant and will become major drivers for retention over the next two years. HIPAA violations will also become critical drivers for data retention and possibly more important than Sarbanes-Oxley because of the serious consequences for sharing patients’ medical information.

*The Sarbanes-Oxley Act imposes major financial and criminal penalties for failure to properly maintain records of all types.*

### **Sarbanes-Oxley**

The ultimate intent of Congress and the Courts with regard to records retention requirements may be signaled by legislation like the Sarbanes-Oxley Act. This Act imposes major financial and criminal penalties for failure to properly maintain records of all types. The passage of the Act was prompted by the failure of several high profile accounting firms and their clients to adequately maintain proper records and the subsequent crisis in investor confidence these failures created. Sarbanes-Oxley imposes new federal oversight provisions on public companies and those who maintain their accounting records, including the creation of an oversight board, restrictions on the types of services firms can provide and stringent processes governing internal corporate controls—including enhanced records management. At present, public companies with market capitalization of more than \$75 million are subject to the Act, but all public companies will be subject to the Act as of July 2006.

Sarbanes-Oxley is important not only for companies that are directly subject to its provisions, but it is also important for

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non-covered companies as well. For example, a private company with aspirations of one day being acquired by a public company must maintain compliance with the Act in order to be an attractive acquisition target in the future. Non-U.S. companies that operate in the United States must comply with the Act. Further, some companies that are subject to Sarbanes-Oxley will do business only with companies that comply with the Act.

Sarbanes-Oxley follows the passage of the Gramm-Leach-Bliley Act of 1999 (GLBA), which also imposes stricter records management requirements on organizations. GLBA also carries substantial liability for organizations, since organizations that share their customers' financial information, such as credit card numbers, can face serious consequences.

Another serious liability for organizations is California Senate Bill 1386 (SB1386), which requires organizations to notify its California-based customers of the release of sensitive data like Social Security numbers or financial information. The risk associated with violation of SB1386 entails not only the cost of informing California residents and maintaining controls to ensure the integrity of archived data, but also loss of reputation in the event of a breach of the law.

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### **What Do You Need for Good Records Archival?**

For retention of email-based or fax server-based records, simple tape backups, the traditional method for backing up the systems, are not an effective method for ensuring regulatory or legal requirements can be met, nor are these backups an effective method for gaining access to the wealth of content housed in the typical enterprise's email or fax server system. Further, backups are much more difficult to manage than a properly implemented archiving system, they require more IT involvement, and—in the case of email—they can create much longer email downtime in the event of a server crash or other technical problem. Plus, having to satisfy a regulatory or court order by recovering needed information from backup tapes is an extremely disruptive and time-consuming—not to mention expensive—process for IT staff.

The wisest decision for any organization that relies on an email system as a key part of its communications infrastructure is to deploy an archiving system. For fax-based communications, it is critical that an organization deploy a

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centralized fax server management system that can archive fax communications, control the distribution of these documents and maintain adequate capabilities to recover documents if and when necessary.

An appropriately managed archiving system, whether for email, fax or any other electronic document, will ideally have all of the following characteristics:

- **Indexing of all content.** This is critical to find information in the archive efficiently and to satisfy regulatory and discovery requirements in a timely fashion.
- **No requirement for user involvement.** The archiving process should require little or no user involvement, thereby increasing productivity for end-users, eliminating user errors and ensuring information is captured in the archive.
- **End-user access to the archive.** Because IT staff members cannot always satisfy all of the requests to recover old content, allowing end-users such as compliance officers or corporate counsel to access this information themselves can significantly reduce the workload for IT staff and make archived information more usable. In many cases, it is important to allow all users in an organization to recover their own email and fax communications from the archive for knowledge management purposes.
- **Protection of archived data from tampering.** A key requirement of many content management regulations imposed by the government is for archived data to be tamper-proof. Also, if content from the archive is accessed, the system will ideally provide an audit trail of who accessed the content and when it was accessed.
- **Flexible storage media options.** Because different regulations may require the use of different types of storage media, it is important for any archiving solution to provide flexibility in the type of media in which the archive is stored, including magnetic, tape and optical.
- **Enforcement of corporate data retention policies.** A key provision of many data retention requirements is that content must be retained for a minimum period, but not kept longer than a maximum period proscribed by statute. Automated destruction of records at the end of

*The wisest decision for any organization is to deploy an electronic archiving system for all its communications.*

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their useful life can help to minimize an organization's liability over the long term.

- **Archiving only required communications.** Many organizations may be interested only in archiving specific mailboxes, messages from specific domains, or messages from specific email addresses. This limits the content of the archive only to messages and other content that the organization deems necessary, rather than creating an archive of unnecessary content which might include spam, advertisements, informal employee communications, newsletters, and the like.

*All records—whether on paper, in email or transmitted and stored via fax—must be retained for periods that are defined by statute, legal requirements or best practice.*

### Conclusion

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Records retention is an important requirement for any organization, regardless of its size or the industry in which it operates. All records—whether on paper, in email or transmitted and stored via fax—must be retained for periods that are defined by statute, legal requirements or best practice. Complicating the issue, an increasing proportion of records are transmitted and stored electronically, often replacing more traditional paper-based processes and archival systems. A failure to adequately preserve and manage records can lead to serious consequences, including loss of reputation, substantial fines and, in some cases, prison sentences for corporate directors who knowingly mismanage records. Further, the number of regulations and requirements regarding records retention is increasing and both courts and regulators are becoming increasingly stringent in their demands for the proper archival of records.

The wisest course of action for any organization, therefore, is to implement a system that can capture, index and archive all electronic communications and make this information available when and where needed. The benefits of doing so far outweigh the risk of not being proactive in this regard.

# The Impact of Regulations on Archiving

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