

## Keeping on top of records management

Ben Hur asks solicitor Ed Sautter about the importance of records management, an important area for MLROs:

**“We are hearing a lot today about the importance of records management. What is it, and why is it currently so significant?”**

Records management describes the procedure by which an organisation manages the “life cycle” of each of its significant records, from creation, through active use, to archiving and, finally, destruction.

Records management has experienced particularly significant publicity as a result of the well-documented problems that international organisations (including financial institutions) have suffered as a result of their inability to put their hands on, and produce, required records, whether in the context of regulatory investigations and proceedings or civil litigation.

The fact that regulators are ready to make examples of organisations which fail to adhere to their regulatory regimes places heavy emphasis on the ability to demonstrate compliance, with the necessary audit trails. Additionally, failure to observe records keeping requirements is frequently added to lists of regulatory breaches, and is often “low hanging fruit” as far as the regulator is concerned.

The subject is also particularly topical as organisations come to grips with the fact that over 90% of records that they produce are electronic (of which many may never exist in physical form) and are being produced in far greater quantities than when records were largely paper-based.

**“What are the particular requirements that are driving these developments?”**

They are many and varied.

First, there are basic legal requirements (contained in statutes such as the Companies Act and in the tax legislation) which contain requirements as to the retention of identified classes of records. Other legislative requirements are found in health and safety, employment and pensions.

Second, there are various regulatory regimes which require records to be retained. Of particular relevance to those involved in the financial services industry, is SYSC 3.2.20R which requires a regulated organisation to have appropriate systems and controls which includes compliance with obligations concerning records. IPRU - Banks also requires adequate records to be kept. The handbook is peppered with obligations to retain records for specified periods of time; of particular significance to MLROs are the rules concerning the retention of KYC records.

Many are now aware of the records management implications of Sarbanes Oxley. Under SoX, not only are there specific non-destruction rules but also substantive requirements to certify internal control over financial reporting which will mandate the retention of records in order to demonstrate this. Records management also forms part of the Basel 2 capital requirements within the area of operational risk and thus failure to demonstrate good records management practice may have regulatory capital implications.

For those unfortunate enough to become involved in litigation, the amended practice direction to the Civil Procedure Rules which came into force last October, casts a particular spotlight on electronic records by requiring parties to identify, by reference to a detailed shopping list of records, what searches they have, and have not made. The rules contemplate parties exchanging information concerning the architecture of their computer systems, including records management policies, so any policies that are not subjectively reasonable, may well be criticised in Court.

**“What have the English courts said so far about this?”**

There has been very little to date, which suggests that parties are either working things out, or possibly in some cases implicitly agreeing not to turn the heat on each other when it comes to extensive e-disclosure. However, it is probably only a matter of time before a big disclosure dispute, whether the stakes are high enough, comes before a high court judge. By contrast, there are a large number of US cases on e-discovery (as it's called there) and some of those decisions are acting as thought leaders here. For instance, the well known line of Zubulake decisions have laid down a number of principles in this area, including sampling of data from back up tapes, and costs sharing. Further, new US Federal rules on e-discovery will be coming into force at the end of this year; they look quite similar in a number of respects to our rules and it will be interesting to see how the two regimes develop side by side.

In the context of the disclosure of records management policies, to which I referred earlier, there was an interesting, and potentially significant, decision in the English court recently arising out of the tobacco litigation that is currently proceeding in the US. The US government sought (under an international evidence gathering convention) evidence concerning advice given by an English solicitor to BAT on its record management policy. BAT and its lawyers tried to argue that the advice was covered by legal privilege and should not be disclosed, but this argument failed. Given that legal privilege has been under attack on a number of fronts, organisations must clearly exercise due care in this area.

### **“What sort of features should a coherent records management policy have?”**

There is unlikely to be a “one size fits all” solution to an organisation’s records management policy and it would therefore need to be tailored to the characteristics of the particular organisation concerned. The policy will provide guidance on archiving procedures and storage and lay down minimum retention periods for specified classes of records. It will identify procedures and responsibilities for the disposal of records and, importantly, will provide for periodic monitoring and review of the policy and will allocate responsibility to particular individuals for the policy’s implementation and operation. A proper records management policy should also incorporate the ability to suspend disposal of records where litigation or regulatory investigation is anticipated or pending (this is the so-called “hold” process).

It is very important at the outset to gain the support of senior management so that the appropriate resources can be devoted to the project and also to ensure that there is sufficient authority to back the policy. However, it is short sighted to believe that an effective records management policy can simply be imposed from on high. It is important to gain the “buy in” of employees by educating them as to the benefits of good records management.

It is also important to appreciate that to try to impose a policy that is impractical for the business risks wholesale non-observance. In those circumstances one has set standards with which no one complies. Of course, one must not pursue practical solutions at the cost of proper compliance, so there is usually a balance to be struck.

A number of different stakeholders should be involved in the process, including compliance officers, in house and external lawyers, records managers, the IT department, as well as business representatives.

### **“Of course, many organisations operate internationally. What are the implications for records management there?”**

An organisation operating internationally may find itself the subject of a series of differing “local” requirements so far as maintenance of records is concerned. However, a particular set of records requirement rules may have extraterritorial effect; for instance, entity A may be subject to rules or regulations requiring it to disclose records held in jurisdictions B and C on the basis that those records are deemed to be within entity A’s control, even though they are not physically within the jurisdiction in which entity A is incorporated. Such an organisation will therefore need to be sure, so far as possible, that its records management policy addresses potential conflicts like this.

One possible approach is to promulgate a global policy which establishes overriding principles that are capable of implementation throughout the organisation internationally, with local policies addressing the requirements of the various jurisdictions in which the organisation operates.

### **“In all these circumstances, should an organisation simply keep everything?”**

There is, of course, a temptation to do this on the basis that it is the safest course. However, the proliferation of electronic records carries with it the risk that keeping everything will make it more difficult to find the records that one needs, and to find them on a timely basis. Much, of course, depends upon the nature of the request and the sophistication of whatever search engines might be available, but there is a clear risk that by keeping everything one will grow exponentially the size of a “haystack” in which one is searching for the relevant “needles”.

Consequently, an organisation needs to consider carefully the extent to which it can identify and weed out day-to-day records (in particular, but not exclusively, email) which has no ongoing business use or value and which is not subject to any legal or regulatory retention requirements. There are, of course, inherent risks in giving individuals the power to delete records and this might be inappropriate in particularly sensitive areas.

### **“Presumably a records management policy has to operate in the real world?”**

Indeed. There is little point in producing a records management policy which is unworkable in practice and there are potential dangers in setting standards with which employees cannot comply. A records management policy needs to be practicable and reasonable in the circumstances, although of course it must comply with all appropriate legal and regulatory record retention requirements, as well as serving the legitimate needs of the business.

**“Can we expect anything about records management in MiFID?”**

Yes. In a consultation paper due in October, the FSA will set out proposals for recordkeeping. For instance, Article 25 of the directive obliges member states to require investment firms to keep at the disposal of the competent authority for at least 5 years relevant data relating to all transactions of financial instruments that they have carried out and, in the case of transactions carried out on behalf of clients, those records need to contain the information and details of the identity of the client and the information required under the Money Laundering Directive of 1991.

**Presumably records management is not simply about the retention of records?**

That's right. Good practices in the creation of records is also important. The informality of, in particular, email and instant messaging makes it essential employees understand the dangers of these methods of communication. Although they are convenient and speedy, it is very easy to make unguarded statements or to say things out of context, which when being reviewed, possibly some years later, by a court or a regulator do not convey the intended message or create some hostage to fortune.

Your training programme for new and existing staff should always make reference to this area. Are you as an MLRO or Compliance Officer totally happy with your records Management Systems? The larger the institution the more types of records management systems are you familiar with them all?

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