

COMPLIANCE WATCH: Firms Ponder When To Weed Out Archives

By Jerry A. DiColo
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NEW YORK (Dow Jones)--When it comes to companies' vast electronic archives, there is a heated debate on the best time to hit delete.

Securities and Exchange Commission regulations allow broker-dealers to destroy electronic records - including emails and other documents - after three years. A growing number of firms, however, find themselves in a quandary about whether to keep information longer than required.

Liability questions are the main consideration. Firms are finding there is disagreement among their compliance officers and lawyers about the best time to clean house.

Compliance technology vendors say they're seeing a range of time periods for keeping electronic data. Some firms are holding onto archives for several years, while others are keeping it indefinitely in archives and on backup tapes.

Companies - specifically people in corporate records offices - worry that by deleting the data, they lose documents they might need to defend themselves in future litigation, says Brian Babineau, an email archiving analyst with Enterprise Strategy Group. That's led some firms to lean toward keeping more records beyond the three-year requirement.

"The motives are pretty simple: Fear, mostly led by corporate counsel, that deleting any business records could come back to haunt them in the future - when either trying to defend against litigation or support a claim against them somehow," Babineau says.

Marie-Charlotte Patterson of records-management company AXS One agrees, saying nobody wants to be responsible for pushing the "big red button" that deletes all data, in case it is needed later. Another concern: By disposing of records, companies might overlook something and leave traces of

data in hard-to-find places, Babineau says. This could leave them vulnerable to repercussions should a judge later learn that they didn't provide records that they had - even if the firms didn't know they had them.

Ronald Perelman's much-publicized lawsuit against Morgan Stanley in 2005 illustrates this possibility: The firm initially told a judge that it didn't have certain email archives, but later it found the records on backup tapes. The result was an angry judge and a losing verdict.

Patterson says that other people within a firm can't always agree. Some groups within firms, such as sales, want records of all their emails for client-management purposes, and see a business need to keep the data longer. A firm's lawyers, on the other hand, worry about the liabilities that exist if the data isn't destroyed.

Patterson says settling on a definitive position on what to keep for how long should be the goal. "An organization needs [top management] to cut through all the departments and say, 'This is our corporate policy,'" she says.

Attorneys representing firms in litigation or arbitration claims don't hesitate about drawing the line at the three-year requirement.

"The advice I provide my clients is to retain the document for a period of time consistent with SEC rules and regulations, and at that point in time discard the document," says Robert Herskovits, an attorney with Gusrae, Kaplan, Bruno & Nusbaum who represents firms in regulatory matters.

But questions do arise when determining what information will be considered pertinent in pending litigation or arbitration cases. It's not always easy to figure that out, lawyers say.

"Let's say there's an arbitration or regulatory investigation dealing with a rep who allegedly did something bad," says Brian Rubin, a lawyer with Sutherland Asbill & Brennan who works with

midsize and large firms. "The regulators or the claimants may ask for emails that in an initial look may have seemed unrelated. So it would be hard to draw a line."

Confusion often arises because different parts of the firms aren't working together to create a comprehensive system, says Don Montgomery, vice president of marketing for Akonix, which specializes in monitoring instant messages.

"It really is either ignorance of what the requirements are," he says, "or sort of a helpless feeling of not being able to sort out the regulations."

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