

Compliance Requirements for Email Archiving

■ U.S. FINANCIAL SERVICES

There are a variety of U.S. federal government and other regulations that apply to document retention by financial institutions, among which are:

FINRA: Books and Records (Rule 3110)

Advertisements and sales literature must be maintained as part of the firm's records for three years from the date of last use. Correspondence must also be maintained in compliance with applicable FINRA rules and with SEC Rules 17a-3 and 17a-4. Email or instant messaging to the public relating to the firm's business whether generated from the office, home or elsewhere, is subject to these provisions.

SEC 17A-4 & NASD 3010:

- Archived messages must be stored in duplicate
- Storage media must be verified automatically for quality and accuracy
- Archived messages must be date and time-stamped and serialized
- A searchable index of all stored data must be maintained.
- Message indexes must be easily retrievable and downloadable to other media

These rules focus on records retention requirements for communications between broker-dealers and their customers, how retained data is to be stored, the ease of its accessibility, how sampling is to be performed to ensure that communications with clients is supervised, and so forth.

In short, these requirements more or less dictate that organizations in the financial services industry implement a set of archiving procedures and policies that will make compliance with the regulations possible, and that will facilitate regulators' demands for compliance.

SEC Rule 17a-3

Every member of a national securities exchange, including all brokers and dealers, must keep current a variety of books and records that relate to his or her business.

SEC Rule 17a-4

Requires records, including emails, from brokers and dealers be preserved for at least six years, the first two years "in an easily accessible place"; while other records must be retained for at least three years, the first two years "in an easily accessible place".

Amendments to Rules 31a-2 and 204-2

These amendments permit funds and advisers to maintain all of their records in an electronic format, as long as they protect records from "loss, alteration or destruction"; that access to these records is limited only to authorized personnel; and that "electronic copies of non-electronic originals are complete, true, and legible".

NASD 3110

The National Association of Securities Dealers requires under this rule that, "each member shall make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations, and statements of policy promulgated thereunder and with the Rules of this Association and as prescribed by SEC Rule 17a-3. The record keeping format, medium, and retention period shall comply with SEC Rule 17a-4." Other provisions of this rule require that each member maintain a record of written complaints from customers or their representatives, and that all records maintained under this rule are subject to the time and accessibility requirements specified under SEC Rule 17a-4(b).

NASD 2860 (b) (17)

"Every member shall maintain and keep current a separate central log, index or other file for all options-related complaints, through which these complaints can easily be identified and retrieved... Background and financial information of customers who have been approved for options trading shall be maintained at both the branch office servicing the customer's account and the principal supervisory office having jurisdiction over that branch office."

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Sonian, Inc.
100 Crescent Road
Needham, MA 02494
617.958.4000
www.sonian.com

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NYSE Rule 342

This New York Stock Exchange rule requires that “procedures be designed for review of communications between members of the NYSE and the public so that reasonable supervision can be exercised over members’ representatives.” This rule also requires members to create written procedures and policies regarding their communications with the public.

■ OTHER PROVISIONS

Sarbanes-Oxley Act of 2002

The Public Company Accounting Reform and Investor Protection Act, also known as Sarbanes-Oxley, proscribes a number of penalties for altering or destroying corporate data. Key provisions of the Act include:

- Anyone who knowingly alters, falsifies, destroys or otherwise tampers with a document or record can be imprisoned for up to 10 years and/or fined.
- Any accountant or accounting firm that audits a firm governed by the SEC must retain all relevant audit-related documentation for five years following the end of the fiscal period during which the audit or review was finalized.

■ GOVERNMENT AGENCIES

Freedom of Information Action “Sunshine laws” The federal government and nearly all state governments have established “Open Records” laws. The purpose of these laws is to provide a level of transparency to the activities of government agencies and officials to their citizens.

Electronic Signatures Act

The Electronic Signatures in Global and National Commerce Act, which was signed into law in 2000, allows electronically-created contracts to have the same force of law as contracts that are written on paper. According to the Act, any government agency’s record-keeping obligations may be met solely through the maintenance of electronic records if those records accurately “reflect the information set forth in the record, and remain accessible to all persons who are entitled to access, in a format that can be accurately reproduced.”

36 CFR 1220.34

“Agencies must institute adequate records management controls over the maintenance and use of records wherever they are located to ensure that all records, regardless of format or medium, are organized, classified, and described to promote their accessibility, and make them available for use by all appropriate agency staff for their authorized retention period. Agencies must also maintain permanent records in a format that will permit transfer to the National Archives of the United States.”

36 CFR 1220.38

“Agencies must ensure the proper, authorized disposition of their records, regardless of format or medium, so that permanent records are preserved and temporary records no longer of use to an agency are promptly deleted or disposed of in accordance with the approved records schedule when their required retention period expires. As an intermediate step when records are not needed for current day-to-day reference, they may be transferred to a records storage facility.”

44 USC 3101

“The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency’s activities.”

44 USC 3106

“The head of each Federal agency shall notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head that shall come to his attention.”

U.S. Department of Defense Directive 5015.2

“Create, maintain, and preserve information as records, in any media, that document the transaction of business and mission in wartime and peacetime to provide evidence of DoD Component organization, functions, policies, procedures, decisions.”

■ EDUCATIONAL INSTITUTION REQUIREMENTS

Federal Rules of Civil Procedure

All electronic communications must be searchable and easily produced.

Family Education Rights and Privacy Act

Protects the privacy of student education records.

■ HEALTHCARE AND LIFE SCIENCES

HIPAA

HIPAA requires that a wide range of documents, including email messages, be kept for six years. Among the documents that must be maintained for six years are contracts with business associates, all documents related to policies and procedures, communications from patients who wish to modify the information held by a healthcare provider, authorizations and consumer complaints. Also, HIPAA requires that all records about a patient must be retained for two years after a patient’s death.

HIPAA also requires that retained content must be stored in a robust data center that provides minimum guaranteed uptime and very high security, among other requirements.

HIPAA also imposes strict data disposal requirements, including overwriting or physically destroying all magnetic media that is no longer in use or that is given away or sold.

The Medicare Conditions of Participation requires hospitals to retain medical records for five years. Medicare requires that medical records be retained for five years as they relate to radiological and nuclear medicine services, and inpatient and outpatient services, among others. Psychiatric hospitals must also retain a variety of medical records for five years. Further, Medicare and Medicaid reimbursement to rural health clinics requires that these clinics maintain medical records for six years.

The Food and Drug Administration requires that drug makers maintain records of employees’ contact, date of birth, compensation and other information for three years.