

Adopting a Comprehensive Records Management Policy for Your Bank

By Charlotte Bahin and Jon Neiditz



In an industry as regulated as financial services, managing vast quantities of documents and records can be an overwhelming task. Not only must staff know which records to keep for differing lengths of time, but many of the records must be produced quickly in response to requests from regulators and other stakeholders. Compliance officers, legal counsel, IT professionals and other members of management at community banks are familiar with the challenges of managing the records that are created by the day to day business of banking.

It is important to review these policies frequently, and a thorough assessment of the policy and procedures is critical in view of recent events. A review of record management, storage, and disposal practices will help mitigate concerns about data security, privacy of customer information, and access to records in the event of a disaster.

An additional reason for conducting a comprehensive review of the policy occurred late in 2006. Effective December 1, 2006, a series of amendments to the Federal Rules of Civil Procedure governing discovery in litigation

became effective. Generally these amendments adapted the discovery rules to better accommodate the role of electronically stored information in court proceedings. However, they are also leading to significant changes in the management of electronic information by community banks.

the operation of the bank. Whether it is the record retention requirements contained in the numerous consumer protection laws or the safety and soundness regulations and guidance, specific retention requirements, including time frames, are identified. Layered on to these federal requirements are any state

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Record Retention

All insured depository institutions have an array of obligations that should be addressed in a comprehensive records retention and management policy. In many instances, these obligations are spelled out in the statutes and regulations that govern every aspect of

laws that may contain applicable and differing standards and time frames. Additional state requirements address a number of operational and organizational areas, including tax, licensing and local business requirements.

Many community banks have adopted enterprise-wide record retention or management policies and have procedures in place

to assist the staff in responding to regulatory inquiries. Further, the policy likely addresses the procedure that will be followed to produce disputed consumer protection disclosures and documents, loan documents, and other relevant records in litigation or threatened litigation.

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not is overly burdensome.

Another requirement of the e-discovery amendments that is changing information management by banks is that in any litigation, banks must have a meeting early in the proceeding with opposing counsel to agree on what electronically stored information will be produced and in what form. This requirement, as much as any, is forcing bank lawyers to become familiar with relevant aspects of the bank's IT infrastructure.

In light of these requirements, here are some steps that community banks should consider taking:

- Determine which sources of electronically stored information are not accessible because of the burden and cost of retrieval. Be prepared to explain the precise cost and burden associated with production of what is "reasonably accessible."

- Be prepared to implement a "legal hold" or a stop on all document destruction relevant to any ongoing or potential litigation or investigation. It is important to establish a process by which those holds are very reliably enforced.

- Educate all employees on the importance of compliance with the document retention policy.

If they are not already, compliance and legal staff should become familiar with areas in which relevant electronically stored information is likely to reside. It is important for all community banks to take an inventory of records retention and management policies and the implementation of the policies. A comprehensive enterprise-wide review may prevent problems from arising in the future. A good time to undertake that review is before any litigation is threatened. The e-discovery amendments provide an impetus for ensuring that a program is in place and that it is being followed. **■**

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In recent years, the necessity of retaining internal audit documents and work papers has been added to the increasingly long list of records that must be not only retained but also easily accessible upon request. Further, the focus on data security and contingency planning have highlighted the importance for all community banks to have plans in place to safe-keep important electronic records and to be able to access them in the event of a disaster. All of these requirements are just pieces of a comprehensive records management program.

Like many of the policies that community banks have adopted over the years, this policy must be risk focused and take the operations, size, and complexity of the institution into account. Senior management must understand and reinforce the importance of the policy and its implementation. The policy must be reviewed on a regular basis to ensure compliance with any changes and to take into account new products and services offered by the bank. As staff is added, training new or reassigned personnel is necessary. Most importantly, this policy, like all other policies, must be followed. The program must be simple and coherent enough to be administrable, particularly given the hundreds of e-mails a day one receives, some of which are records.

Electronic Records Management

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tronic form since the passage of the E-SIGN Act in 2000. The law provides that electronic records can satisfy most legal record retention requirements for contracts and other records (including requirements that a record must be retained in its original form) if it meets certain

- Potential use in litigation;
- Internal and external audits and controls;
- Bank supervision; and
- Compliance and regulatory requirements.

Putting E-Discovery into Perspective

Whether a community bank currently is involved in litigation, the e-discovery amendments may have a significant impact on the operations of the bank. To the extent that the bank maintains documents and communications in electronic format, they will be the focus in any future disputes. Because of the increasing prevalence of the use of e-mail as the predominant form of business correspondence, all companies, including community banks, should be prepared to produce e-mails and to have clear strategies relating to the production of other forms of electronic communications.

An important issue is what electronic documents will have to be produced in discovery and whether they are "reasonably accessible." A party to litigation will have to produce any documents that are reasonably accessible and prove why production of documents that are