



Email archiving in the US

The key laws that affect your business

Email is a primary source of documentation for many organizations and it has taken on an increasingly critical role in corporate litigation and court cases.

The need to archive all email correspondence is growing in importance because companies are realizing that being in a position to retrieve an old email could save them thousands of dollars (euros) in legal fees and fines as well as their credibility.

Today, more than ever before, legal and compliance issues are driving the case for email archiving. Email archiving legislation is complex and varies greatly from country to country. Unless companies are well versed in compliance and email compliance law, the various regulations affecting email can be a minefield.

This document provides an overview of the archiving legislation in your country.

Laws regulating archiving and the penalties

The following sets forth a list of certain US federal legislation and regulations as well as rules of certain national securities exchanges which require a broad range of companies to retain certain records, and briefly summarizes these requirements and the penalties for non-compliance.

I. The Securities Exchange Act of 1934 (the “1934 Act”)

The 1934 Act Recordkeeping Rule requires a variety of entities to retain certain records, including every national securities exchange, member thereof, broker or dealer who transacts a business in securities through the medium of any such member, registered securities association, registered broker or dealer, registered municipal securities dealer, registered securities information processor, registered transfer agent, and registered clearing agency and the Municipal Securities Rulemaking Board.¹ Retention requirements under the 1934 Act vary. Transfer agents, for example, are required to retain a variety of the documents they encounter in their day-to-day transactions, and may be required to keep those documents for up to six years or longer, depending on the type of document.² Likewise, members of a national security exchange and most brokers or dealers are required to keep a wide variety of records for six years or more.³ The SEC has the ability to impose fines when records are not produced in a timely manner. For example, in 2002, the SEC fined five firms \$1.65 million each for violation of the SEC’s retention policies and NASD and NYSE retention rules.⁴ The 1934 Act definition of the term “records” is defined broadly and would cover electronic medium such as email.⁵

II. The Commodity Futures Trading Commission (the “CFTC”)

The CFTC requires each futures commission merchant, introducing broker and member of a contract market to keep full, complete, and systematic records, together with all pertinent data and memoranda, of all transactions relating to its business of dealing in commodity futures, commodity options and cash commodities. Each futures commission merchant, introducing broker, and member of a contract market shall retain the required records for five years and produce them for inspection and furnish true and correct information and reports as to the contents or the meaning thereof, when and as requested by an authorized representative of the CFTC or the United States Department of Justice.⁶ The CFTC is authorized to seek penalties for recordkeeping violations which include administrative, civil and criminal sanctions for willful violations. For example, in 2003, the CFTC levied a \$20 million penalty against a company to settle charges for, among other things, failing to produce required records.⁷ Amendments made in 1999 to the CFTC Rules specifically changed the CFTC’s recordkeeping requirements to permit expanded use of electronic storage media.⁸

III. The Sarbanes-Oxley Act (“Sarbanes Oxley”)

Pursuant to Sarbanes-Oxley, when accountants conduct an audit or review of a public reporting company under the 1934 Act, accountants must keep all audit or review workpapers for a period of five years from the end of the fiscal period in which they conduct an audit or review.⁹ Violation of Sarbanes-Oxley record retention rules can lead to fines and imprisonment for up to 20 years.¹⁰ Although the language of Sarbanes-Oxley does not specifically cite retention of emails, undoubtedly the archival of emails would assist in compliance with the rule.

IV. The National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE)

Both the NASD and the NYSE require that their members make and preserve a wide variety of records for no less than six years, in accordance with the SEC Recordkeeping Rules (which, as previously noted, can be construed to include emails).¹¹ NYSE Regulation, the enforcement arm of the NYSE, can impose civil fines for recordkeeping violations. For example, in September, 2006 the NYSE levied a \$2.25 million dollar fine against Wachovia Capital Markets for failure to preserve electronic records.¹² The NASD may also suspend or expel a company from NASD participation.¹³

GFI MailArchiver

GFI MailArchiver is used by thousands of administrators to comply with the various pieces of legislation that cover email archiving. GFI MailArchiver provides a secure central storage for all company email while allowing fast and easy access to old and deleted email if required.

Using the auditing functionality, management can access any email that is requested for eDiscovery/email compliance purposes and provide a guarantee that these emails have not been tampered with – a major requirement in corporate litigation cases.

With GFI MailArchiver, companies can also rest assured that they can:

- Reduce reliance on cumbersome PST files and manage and reduce mailbox quotas on Microsoft Exchange server
- Access and manage all archived email from anywhere in the world using their web browser
- Retrieve old and deleted emails on demand – with full thread and conversation
- Use advanced email search and ‘Saved Search’ capabilities

More information about GFI MailArchiver can be found at <http://www.gfi.com/mailarchiver/>.

¹ 17 C.F.R. § 240.17a-1.

² 240.17Ad.7 17 C.F.R. § 240.17Ad-6 (2008).

³ 17 C.F.R. § 240.17a-3; 17 C.F.R. § 240.17a-4.

⁴ SEC Release No. 46937/ December 3, 2002, Administrative Proceeding File No. 3-10957.

⁵ The Securities Exchange Act of 1934. §3(a)(37).

⁶ 17 C.F.R. § 1.31, 17 C.F.R. § 1.35.

⁷ See CFTC Release: 4765-03, March, 2003.

⁸ 64 Federal Register 28,735 (May 27, 1999)

⁹ Sarbanes Oxley § 802(a).

¹⁰ Sarbanes Oxley § 802(a).

¹¹ 17 C.F.R. § 240.17a-4.

¹² NYSE Regulation, Hearing Board Decision: 06-150, September 2006

¹³ NASD Rule 9552.

