



Registered E-mail®

“An Ounce of Prevention is Worth a Pound of Cure!”

As an executive of a company with a service that protects the sender of important e-mail, I am surprised at the apparent lack of concern with this new area of business risk. The RPost® system provides the e-mail user with registered legal proof of the complete electronic business transaction, to successfully defend against a challenge after the fact. New e-commerce statutes have been on the books for roughly four years and have enabled businesses to become more efficient and competitive by replacing paper documents with electronic records. However, while Internet transactions save money, enhance service to customers and make business operations more efficient, they also bring new legal challenges.

Understanding the new legal requirements that result for the electronic statutes and reconciling them with a company's electronic processes can be a daunting task. There are not implementing regulations to walk through the compliance maze – luckily. Instead, through a private industry initiative “the SpeRS project arose out of a desire to provide a reference resource ...to assist...in designing and deploying systems using electronic records and signatures.” If only more business people would familiarize themselves with the *Standards and Procedures for electronic Records and Signatures*, they would both protect themselves and their companies and design better electronic business systems. Otherwise, inadequate e-records systems undermine management's ability to defend successfully against legal and regulatory challenges. Evolving “e-discovery” and admissibility issues also will challenge weak e-records systems and managers.

Just as ATM's have changed our banking experience, the freedom of the Internet, with its phenomenal benefits, has enticed business people to focus on cost-savings at the expense of transaction certainty as once demanded by hard-copy receipts. Perhaps ten years of e-commerce activity, with improved technology that has allayed many security and privacy issues, have convinced even skeptics to communicate shop and conduct business online.

However, unlike paper records that are tangible, complete, readily accessible and defensible, electronic records are intangible, amorphous, without context and usually impossible to authenticate or to re-present. Absent sophisticated electronic record systems, businesses are discovering that management and reporting controls often disappear; employee accountability can be reduced; and critical transaction records are often not retained.

Provisions of electronic law and recent court decisions underscore the need for reliable systems to manage **transaction documentation** and **recordkeeping**. They must be capable of recording, retrieving and authenticating important electronic transactions; i.e. both the content of e-mail and all attachments; and the official time sent and received.

1. Sarbanes-Oxley: Section 103 – maintain audit-related records for up to 7 years.
Section 404 – certify effectiveness of internal controls.
2. SEC: Rule 17a-4 – Broker/Dealer communication preservation.
3. USA Patriot Act, Title III: 31 CFR Part 103 – Anti-Money Laundering regulations.
4. Zubulake V and the Philip Morris cases: Clarify the requirements of preserving e-mail and shed light on the penalties involved. Ignorance of the law is no longer a valid defense; therefore, a company policy of deleting e-mail on a regular basis is not a reasonable defense against a legal challenge. Underscore that important business e-mail must be retained as official record for use in legal defense.

Recent regulatory cautions and a Pew study also speak to e-record retention and retrieval.

1. **Office of the Comptroller of the Currency Advisory Letter 2004-9 (6/9/04) “Electronic Record Keeping.”** – The OCC Advisory Letter highlights issues regarding bank electronic record systems in light of the E-SIGN Act with respect to electronic record keeping systems. The main thrust of the advisory is to highlight the importance of establishing a proper recordkeeping management system for all electronic delivery systems. [Note: while this advisory is directed at national banks, it is relevant for all electronic records systems.] The OCC points out that the E-SIGN statute does not resolve all legal or practical issues relating to electronic records, nor does it guarantee the admissibility of electronic records in litigation. Therefore, the burden is on bank management to consult with legal counsel to ensure that its electronic record retention systems are sufficient to ensure admissibility of e-records in relevant courts. “This is important because the practical effect of having electronic records that are not admissible into evidence in judicial proceedings may be to render the electronic contract or record effectively unenforceable.”
2. **Pew Internet & American Life Project, “Instant Messaging gains a following in the US Workplaces”** – This recent study found that 21% of 53 million American, adult Internet users use “Instant Messaging” at the office. Of concern is the trend towards more business people relying upon IM to shortcut official processes that otherwise would be more appropriate and more importantly, would establish a proper transaction record. In short, IM does not provide a business record for protection.
3. **Federal Deposit Insurance Corporation (FDIC) Financial Institution Letter 84-2004 (7/21/04): “Guidance on Instant Messaging”** – “The risks associated with the use of IM include revealing confidential information over an unsecured delivery channel... IM is vulnerable to denial-of-service attacks, hijacking sessions and legal liability...”

Since legal requirements dealing with electronic transaction records continue to evolve, what were once considered to be state of the art **information systems**, today may offer inadequate protection. True protection comes from a **recordkeeping system** that is capable of storing, retrieving and authenticating original electronic transactions. One must appreciate that a record of what was sent and when, covers only a part of the transaction. Needed to complete the record of a full business transaction, is the capability of proving that the e-mail was received, by whom and at what official time.

Retaining copies of simple e-mail text and standard e-mail “read receipts” is a waste of time as they provide little evidentiary value since their plain text can be altered easily. If content, time, or delivery is challenged in court, this “evidence” will be thrown out. For electronic business transactions, failure to employ e-mail protections and proper record retention systems can result in costly, unfortunate consequences.

With RPost’s Registered E-mail® service, the sender receives a “Registered Receipt™” e-mail that provides them with legally valid and verifiable evidence of the precise e-mail content, attachments and time, sent and received, for any e-mail recipient address, without requiring the recipient to click on anything, download, or do anything differently.

With RPost’s Register Reply™ feature, both the sender and recipient lock-in proof of a back-and-forth e-mail correspondence when the recipient simply replies to the Registered E-mail® message. This does not require any extra software or know-how for the recipient. These Registered Receipt™ e-mails returned to both the sender and recipient become the verifiable, tamper-detectable electronic record of the transaction as submitted by the sender (i.e. the seller) and approved by the recipient (i.e. the buyer) by means of electronic signature. This allows the sender to lock-in terms, prices, delivery dates, AND TIME OF CLOSING THE DEAL with the recipient or purchaser, in a form that will stand up to scrutiny by auditors when timing of booked revenue is scrutinized. This allows for the elimination of sending purchase quotes by e-mail, printing, signing, and returning by fax, courier, or mail.

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