

# Taking **Control** of E-Mail with **Uniform Retention Rules**

Compared to schedule-based retention, the uniform rule approach to e-mail retention is easier to understand, requires less decision-making and interpretation by mailbox owners, and can be implemented quickly with a minimum of employee training, according to this excerpt from *E-Mail Retention and Archiving: Issues and Guidance for Compliance and Discovery*.

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**S**chedule-based retention of e-mail is consistent with half a century of records management practice for other types of written communications, but its practicality is questionable. Given the large quantity of e-mail sent and received by an organization's employees, it is not reasonable to expect that mailbox owners will dedicate a significant portion of each workday to deciding how long individual messages must be kept.

Unless a schedule-based retention decision is made immediately after a message is sent or read, it may not be made at all. Pressured by a heavy workload, a well-intentioned but busy employee is unlikely to set time aside for daily, weekly, bi-weekly, or monthly mailbox cleanup. Mailbox owners need retention rules that are easily implemented with a minimum of labor-intensive decision-making.

## **The Uniform Retention Approach**

As an alternative to schedule-based retention, the uniform rule approach is straightforward.

A single predetermined retention period applies to official copies of most e-mail messages with exceptions for certain messages that need to be retained for a longer or shorter amount of time as determined by legal, operational, or historical considerations.

A message saved on e-mail servers will be deleted automatically, without action by or notification to the mailbox owner, when the uniform predetermined retention period elapses – unless the message has been identified as relevant for pending or ongoing litigation, government investigations, arbitrations, audits, or other legal or quasi-legal proceedings.

Manual deletion at the end of the uniform retention period is required for messages that are saved apart from an e-mail server on local or network drives as well as for messages that are transferred to e-mail archiving systems, records management applications, or other digital repositories. Manual purging is also required for messages that were printed for filing as official copies.

Attachments can be separated from messages at any time and stored apart from the e-mail system. If this is not done, the uniform retention period will apply to attachments, which will be deleted with their associated messages when the uniform retention period elapses.

(Note: If a message merely conveys an attachment that must be kept longer than the uniform retention period, and the attachment is considered the official copy for retention purposes, it should be saved elsewhere – in a content management or records management application, for example – or printed for filing. If a message contains contextual information that is essential to an understanding of the attachment, the message and the attachment should be retained for the same amount of time.)

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## E-mail Retention Rules

To satisfy records management requirements, e-mail retention rules – whether schedule-based or uniform rules-based – must:

- Be legally compliant with recordkeeping laws and regulations to which an organization is subject
- Meet the duty to preserve messages that are relevant for pending or reasonably foreseeable litigation, investigations, audits, or other legal proceedings
- Provide assurance that messages and attachments will be available when needed
- Be reasonable, clear, and practical
- Have broad applicability
- Cover both current and closed accounts

stand. It requires less decision-making and interpretation by mailbox owners, although some effort will be required to identify messages that need to be retained longer than the uniform period, as explained below.

The uniform rule approach can be implemented quickly with a minimum of employee training. It can be applied to an organization's existing accumulation of messages, including messages of former employees. To be effective, however, the uniform rule approach must specify a broadly applicable predetermined retention period. Exceptions must be clearly identified and kept to a minimum.

### Determination of Uniform Retention Period

As defined above, a uniform retention period will be the default for official copies of all messages except those that are specifically designated for longer or shorter retention. A uniform retention period must be long enough to satisfy an organization's legal and operational requirements for most messages.

The longer the uniform retention period, the fewer the required exceptions, as explained below, but more messages will be kept longer than necessary. This can compromise the performance of e-mail servers and client software, and it will require more storage. Longer retention can also increase an organization's discovery burden.

A short uniform retention period will reduce the quantity of messages in user mailboxes, thereby minimizing performance problems and possibly reducing discovery costs, but it will require more exceptions to fully satisfy legal and operational requirements.

Acceptable uniform retention periods for official copies of e-mail messages range broadly from three years to 10 years.

### Uniform Retention – 3 Years

A uniform retention period shorter than three years is not recommended. To be considered legally acceptable, an organization's retention practices must be reasonable for the types of records involved and for the circumstances in which the records are used. In records management work, three years has long been regarded as a reasonable minimum retention period where a law or regulation does not mandate a longer period and a shorter period cannot be confirmed as permissible.

There is some basis for this three-year presumption in statutory law: According to the Uniform Preservation of Private Business Records Act (UPPBRA), business records can be discarded after three years unless a longer time period is required by law.

(Note: Although it has been withdrawn by the National Conference of Commissioners on Uniform State Laws, the Uniform Preservation of Private Business Records Act remains

in effect in the following states: Colorado, Georgia, Illinois, Maryland, New Hampshire, North Dakota, Oklahoma, and Texas.)

### ***Uniform Retention – 10 Years***

For many organizations, 10 years is the longest practical time frame for uniform retention of e-mail messages.

After 10 years, the transactions, operations, activities, or other business matters to which e-mail messages relate will likely be concluded,

## **...a seven-year uniform retention period is a reasonable compromise for many organizations**

and other records related to those matters may have been discarded.

Within a 10-year period, most statutes of limitations (prescription periods) for tax audits and civil litigation – including lawsuits related to breaches of contract, personal injuries involving adults, product liability, and employment-related matters for which e-mail messages may be relevant – will have elapsed.

(Note: As a notable exception in the United States, the statute of limitations on contract-related litigation in Kentucky is 15 years. Some other countries have statutes of limitations exceeding 10 years for contract-related litigation and other legal proceedings. The limitations period typically begins when a claim is discovered, but some jurisdictions have a maximum time period for commencement of litigation. In Ontario, for example, the basic limitation period is two years after discovery of a claim, but there is an ultimate limitation period of 15 years for commencement of legal proceedings.)

As discussed in Part 1 [of *E-Mail Retention & Archiving*], 10 years is also the retention period specified by many national commercial codes for business correspondence. This is an important consideration for multinational organizations that want a globally harmonized retention period

for written communications.

After 10 years, it is possible that an organization will have changed its e-mail application, which may pose readability problems for older messages. There is no assurance that messages created by e-mail software in use today will be readable by future e-mail products. Maintaining the usability of large quantities of older messages with obsolete content will likely involve burdensome data migration.

### ***Uniform Retention – 7 Years***

Where three years is considered too short and 10 years too long, a seven-year uniform retention period is a reasonable compromise for many organizations.

A seven-year retention period equals or exceeds the statute of limitations on contract-related litigation, personal injury litigation involving adults, product liability, and employment-related legal proceedings in many jurisdictions. (Note: Seven U.S. states – Illinois, Indiana, Iowa, Louisiana, Rhode Island, West Virginia, and Wyoming – have 10-year statutes of limitations on contract-related litigation. In Montana and Ohio, the statute of limitations is eight years.)

This is an important consideration for e-mail messages that interpret the terms and conditions of contracts, that authorize work to be performed under contract, or that contain significant information about procurement solicitations, monetary transactions, or personnel matters.

A seven-year retention period will also satisfy the operational requirements of most employees, and it exceeds the time period during which tax returns are subject to audit in most countries.

Some jurisdictions, including

many U.S. states (Alaska, Arkansas, California, Delaware, District of Columbia, Florida, Idaho, Kansas, Maryland, Missouri, Nebraska, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, and Virginia) have a five-year statute of limitations for most legal proceedings for which e-mail may be relevant. A five-year uniform retention period for e-mail may be acceptable for organizations that do business principally or exclusively in those jurisdictions, assuming that there are no regulatory or operational considerations that require longer retention.

### ***Uniform Retention – Tiered***

If there is no agreement about a single retention period as the default for e-mail accounts, a tiered solution based on uniform retention concepts is possible. A five-year or seven-year retention period might be the enterprise-wide default, but individual employees could request that their messages be retained for 10 years based on job responsibilities or other demonstrable needs.

Alternatively, e-mail sent and received by certain types of employees identified by job title or category – clerical employees, for example, who are unlikely to have many official copies or messages with mission-critical content – might be retained for three years while messages of management-level employees are retained for a longer period of time – seven or 10 years, for example. This tiered approach should be approached with caution. It will complicate the implementation of retention rules, and there are likely to be many requests for inclusion in the category with the longest uniform retention period.

The foregoing discussion applies to official copies of e-mail messages. An organization may prefer a shorter uniform retention period – one to three years, for example—for other copies of e-mail messages, with the provision that such copies can and should

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be discarded at an earlier time if no longer needed.

Special retention rules for duplicate messages are not required in organizations that have implemented an e-mail archiving system with single-instance storage. As explained in Part 3 [of *E-Mail Retention and Archiving*], such systems consolidate all copies of a given message. There is no storage

cult to implement and enforce where e-mail messages are stored apart from e-mail servers or other designated repositories, such as the e-mail archiving systems discussed in Part 3 [of *E-Mail Retention and Archiving*]. Consequently, saving e-mail messages as external files on network or local drives should be forbidden unless the messages must be retained for longer

## Like other records, e-mail messages are subject to legal holds

or performance penalty for retaining multiple copies.

E-mail of terminated employees should be subject to the same uniform retention rules as messages of active employees. Where messages of former employees are considered official copies, they must be kept for the uniform retention period. Other copies can be deleted at any time following termination of employment.

Uniform retention rules are diffi-

cult to implement and enforce where e-mail messages are stored apart from e-mail servers or other designated repositories, such as the e-mail archiving systems discussed in Part 3 [of *E-Mail Retention and Archiving*]. Consequently, saving e-mail messages as external files on network or local drives should be forbidden unless the messages must be retained for longer

than the uniform retention period, as discussed below, and no other repository has been designated for message retention. External e-mail files that pre-date implementation of a uniform e-mail retention rule should be reviewed for expired retention periods when personal computers are due for replacement. Messages with elapsed retention periods must be deleted manually.

## Messages to Be Retained Longer than the Uniform Period

The uniform retention rules described above can be applied to most e-mail, but exceptions must be made for certain messages that require longer retention in order to fully satisfy an organization's legal and operational requirements and for permanent preservation of e-mail of historical value. For such messages, uniform retention rules must be supplemented by schedule-based retention decisions. Examples include the following.

**E-mail that contains valuable, unique information about significant policies, decisions, financial matters, legal issues, or regulatory matters.** Many retention schedules specify long-term or permanent preservation for written communications of this type. The holder of the official copy must determine whether a message falls into this category, but this determination should be used sparingly.

The mere fact that an e-mail mes-



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sage deals with a significant policy, decision, issue, or other matter does not mean that it must be kept longer than the uniform retention period. To be considered an exception to the uniform retention rule, the e-mail message must contain information that is: (a) significant, (b) not documented elsewhere, and (c) likely to be consulted longer than the uniform retention period.

Thus, an exception to the uniform retention rule is required for an e-mail message that contains a definitive interpretation or clarification of an organization's policy regarding employee leaves of absence. That message will be retained permanently or for a specified number of years after the policy to which it pertains is superseded. A message that merely asks a question about or comments on such a policy does not warrant an exception to the uniform retention rule.

Similarly, a pharmaceutical company or financial services company will require long retention or perma-

nent preservation of certain e-mail messages sent to or received from regulatory agencies, especially where such messages contain regulatory interpretations that are not documented in other records; but intra-company messages that merely comment on such interpretations may not warrant an exception to the uniform retention rule.

**E-mail that interprets, clarifies, or amends contracts, legal agreements, or purchase orders that are in effect for multiple years.** As discussed above, the minimum acceptable retention period for messages related to contracts and agreements is typically determined – or, at least, strongly influenced – by applicable statutes of limitations for civil litigation in the jurisdictions for which the messages are relevant.

The retention period for such messages should begin upon termination of or final payment on the contract, legal agreement, or purchase order to which the message pertains. For mes-

sages related to multi-year contracts and agreements, a uniform retention period cannot satisfy that requirement where the uniform retention period for a given message will elapse before the contract or agreement terminates.

Even a 10-year uniform retention period may not be long enough for multi-year contracts in jurisdictions with long statutes of limitations for civil litigation. This exception to the uniform retention rule must be reserved for messages that contain significant interpretations, clarifications, or amendments for contracts, legal agreements, or purchase orders. (Note: As a complicating factor, some contracts and agreements, including those scheduled for termination by the current year, are subject to repeated extensions or renewals.)

Messages that merely comment on such matters are excluded. Messages that pertain to contracts, legal agreements, or purchase orders that terminate on or before the end of one

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fiscal year will be subject to the uniform retention period, provided that it equals or exceeds applicable statutes of limitations.

**E-mail that contains valuable, unique information about an organization's major projects, programs, initiatives, and events.** According to most retention schedules, important project-related records,

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including written communications, must be kept for a specified number of years after completion or other termination of the project, which may be many years after the project begins.

Messages that contain important, unique information about a construction project, a drug development project, or a scientific research project may require multi-decade retention. A subset of project-related messages may warrant permanent preservation for historical or other scholarly reasons.

The same retention practices apply to messages that contain valuable information about programs, initiatives, and events. Thus, long or permanent retention may be warranted for e-mail related to an acquisition or divestiture handled by an investment bank, a community outreach program initiated by a corporation, a research symposium sponsored by a medical school, or an exhibition curated by a museum. Mailbox owners must determine whether a message or attachment falls into this category.

As discussed above, the e-mail message or attachment must contain information that is: (a) significant, (b) not documented elsewhere, and (c) likely to be consulted longer than the uniform retention period. Thus, a message that contains a definitive interpretation or clarification of a government program's purpose or an engineering project's scope of

work warrants an exception to the uniform retention period. A message that merely asks a question about or comments on some aspect of a program or project does not.

**Certain messages that deal with employment matters in general or with personnel issues related to specific employees.** This category applies to employment-re-

lated messages that are equivalent to correspondence or other written communications which, if printed, would be included in an employee's official personnel file maintained by a human resources department, in a grievance file maintained by a labor relations department, or in another established file.

E-mail messages in this category may deal with assigned duties, performance evaluations, compensation, investigations, reprimands or other disciplinary actions, leaves of absence, workplace illnesses or injuries, contract negotiations, complaints about working conditions, or other matters.

In most organizations, personnel files, including significant communications contained therein, are retained for a specified number of years after termination of employment. Files related to complaints, grievances, disciplinary actions, or other labor relations matters are typically retained for a specified number of years after all issues are resolved.

Depending on the uniform retention rule and the duration of employment, e-mail messages of this type

may be eligible for destruction before the retention period for related employee records elapses. An exception to the uniform retention rule is required to prevent this from occurring. Exceptions are not required for e-mail messages that merely confirm a meeting, acknowledge receipt of documents, or otherwise deal with routine employment matters.

**E-mail relevant for legal matters.** Like other records, e-mail messages are subject to legal holds. A blanket exception to the uniform retention period must be applied to messages that are considered relevant for litigation, government investigations, arbitrations, audits, or other legal or quasi-legal proceedings, as determined by an organization's general counsel or other legal authority. The uniform retention period for such messages is suspended until the matters to which they pertain are fully resolved and resumption of regular retention practices is authorized.

### Summary

With the uniform retention approach, a single predetermined retention period applies to official copies of most e-mail messages with exceptions for certain messages to be retained for a longer or shorter amount of time as specified by organizational policy.

Compared to schedule-based retention, the uniform rule approach to e-mail retention is easier to understand, requires less decision-making and interpretation by mailbox owners, and can be implemented quickly with a minimum of employee training. **END**

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