

The background of the cover is a light yellow-green color. It is decorated with several stylized, light green leaf motifs that are scattered across the page. These motifs consist of a small stem with two leaves, appearing to float or drift across the background.

# **VALUE-ADDED RECORDS MANAGEMENT**

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**Protecting Corporate Assets, Reducing Business  
Risks, 2nd Edition, Updated and Expanded**

**Karen L. Sampson**

 ***Greenwood***  
PUBLISHING GROUP

# **Value-Added Records Management**

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**Protecting Corporate Assets,  
Reducing Business Risks**

*2nd Edition, Updated and Expanded*

KAREN L. SAMPSON



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# Preface

Every business that has employees, customers, or tax bills has record-keeping requirements. Records and information are an element of a company's infrastructure in that they support and protect the business. As the corporate memory, they trace the path of important business decisions and transactions to show evidence of compliance with laws and government regulations.

How well records and information are managed affects an enterprise and its employees, customers, and other stakeholders. We need information systems to retain and recall essential information at will, at the lowest cost possible. But an explosion of information technologies is now a crisis for top management. Today's office environment is populated with a number of independent information systems, and no single system satisfies the increasingly complex and demanding information needs of today's marketplace.

In our competitive, regulated, and litigious business environment, records and information management is a necessary cost of doing business. This business function is not unlike personnel management or accounting services. Yet not all executives know who in their organization is managing the company's information or how well it is being managed.

The records and information management concept is not new. What is new is the nature of the beast. Our information-intensive society exerts pressure on business to produce and process information faster than ever before. The perception that records and information management is about filing systems and records centers must be laid to rest. Today's

records and information management function is far more sophisticated, as it encompasses multimedia formats and a wide range of related business risks and legal issues.

We continue to clog the arteries of our important information systems with excess and obsolete information. More and more information is created and retained in a variety of information storage formats. Explosive information growth and rapid changes in technologies are sending information beyond the control of even the most well-intentioned business. We have mountains of paper files and computer printouts. Rolls of microfilm and stacks of microfiche are filling boxes and cabinets. Audio and video tapes are hidden away in corners and desk drawers. Computer disks are scattered throughout offices, and tapes are consuming warehouse space.

We need a new way of thinking about our records and information. Instead of focusing our organizational resources on specific information carriers and technologies, we should focus on the content value of our records and information. Records and information are valuable corporate assets in many ways. They may also be a liability. What distinguishes between their existence as an asset and their existence as a liability is the judicious control and protection of business records and information.

Maintaining the right records for the right time and disposing of the right records at the right time is a perpetual and delicate balancing act. When that balance tips to one side or another, worst-case scenarios may be income losses or senseless losses in court proceedings. Basic records and information management practices identify the valuable and legally required records in all media to be retained and protected in order to meet legal and business obligations. Records no longer needed are destroyed to prevent them from becoming a direct drain on revenues or an unnecessary exposure to liabilities. The fewer and better records that are retained are organized and preserved in a manner that protects legal rights, improves efficiencies, reduces costs, and prevents losses.

## **PURPOSE OF THIS BOOK**

This publication is a revised edition of the work by the same name published in 1992. Much of the original publication is timeless in that the records and information management principles presented change little over time. However, the nature of electronic records in the early 1990s was such that little could definitively be said about application of recordkeeping practices to electronic information systems. Since then, the legal status of electronic records, new and changing technologies, and the growing pervasiveness of electronic information systems have contributed to a wealth of useful and practical knowledge about electronic records and information.

The records and information management principles presented in the first edition are timeless, and they apply as much to electronic records as they do to paper and microfilm records. The dominating presence of information technologies in the workplace, the new uses of these technologies, and progress made in defining their legal status warrant this revised edition.

The purpose of this work is to raise levels of awareness regarding the various roles of records and information management in business today. We remain a long way from fully exploiting the opportunities and the benefits that records and information management has to offer. The gap between actual records and information management practice and its potential is widening, much like the gap between new technologies and worker capabilities. Contributing to this gap are new technologies that fragment the information systems of an enterprise. The lack of support from top management also contributes to the gap between actual practice and potential of records and information management.

Executives, professionals, and managers are the leaders and decision-makers who will make a difference regarding how management of our information resources affects a business. They are ultimately responsible for the design and implementation of a records and information management program—and for whether it adds value to an enterprise or becomes a liability.

Many topics touched on in this book, such as privacy, are deserving of more attention, but they are beyond the scope of this work. This book is intended for general information purposes to present an overview of the roles of records and information management in business. Discussions of issues are general in nature and must not be construed as providing legal advice. Any suggestions offered are based on a presumption of working within the law. Neither the author nor the publisher advocates illegal behavior or impropriety. The reader is encouraged to consult with an attorney concerning specific circumstances and legal questions.

## **INFORMATION TECHNOLOGIES**

The number of pages in this book devoted to information technologies may seem inadequate given the overwhelming presence of electronic information and communications systems in business. These technologies are not the focus here primarily because they are simply business tools that create, process, maintain, and distribute business records and information. Although they are an important means to an end, they are not “the” end. The more valued asset is the content of the recorded information. Records retention, regulatory requirements, and litigation apply to all forms of records and information because they are concerned with the content of the records.

Technology is a wonderful thing. We communicate better. We make better decisions faster because we have instant access to more information. The relentless pace of technological changes presents new opportunities, but it also presents new challenges.

This book does not treat information technologies entirely in a positive light. The reasons are simple: Organizations too often embrace information technologies without consideration of short-term and long-term records and information management functions. Businesses create electronic records, they broadcast record content through e-mail and corporate intranets, and they transact business over the Internet with little thought given to recordkeeping requirements.

When records and information management principles are not applied to electronic records systems, organizations face challenges related to those records in litigation, new information security risks, and information systems and media obsolescence. Until a business gains control of its electronic records, those challenges can become a business crisis.

Being critical of information technologies is not a popular position to take in a business climate that is perpetually acquiring new and improved technologies. To satisfy current information needs through electronic information systems without a plan for future records and information needs is shortsighted. Businesses must concern themselves with preserving the organization's assets and rights, complying with the law, preventing harm to the organization, and preserving the corporate memory through a records and information management program.

## **CONTENT OVERVIEW**

This book provides examples of how a comprehensive records and information management program adds value to a business. The foundational records and information management principles presented here are applicable to most sizes and types of business. Most of the scenarios used throughout the book to illustrate specific points are based on actual events and situations. In some scenarios fictitious company names are used to avoid embarrassing the real-world company that is the subject of the scenario. Likewise, fictitious names are used in scenarios that are fictions based in reality.

Each chapter covers different roles of records and information in various business activities. Individual records and information management principles are cited in more than one chapter because they relate to so many different business objectives and activities. Because the records and information management issues discussed in this book are interrelated or interdependent, cross-references are made to relevant chapters as appropriate. The chapter overviews provided here may assist the reader who wishes to study selected chapters.

The first two chapters illustrate the role of records and information in various business activities and situations. Chapter 1, "Guilty Until Proven Innocent," discusses a number of situations in which proper recordkeeping practices are necessary for an organization to defend itself. Chapter 2, "Preservation of Legal Rights and Business Assets," describes several conditions under which proper recordkeeping practices are necessary for a business to preserve its rights and to protect itself from harm or losses.

Chapter 3, "Threats to Sensitive and Valuable Records and Information," summarizes which records are sensitive and valuable and describes the potential threats to their security. Employers are generally on the defense regarding employee health and safety, employment actions, privacy, and employee behavior. An employer has certain rights to protect its business assets and reputation that relate to worker management. Recordkeeping practices related to both of these aspects of employment are covered in Chapter 4, "Employer Rights and Responsibilities."

Chapter 5, "A Day in Court," examines more specifically a company's rights and obligations regarding its records in litigation proceedings. There may be serious consequences for a company with too many records, too few records, or records not considered trustworthy. This chapter offers litigation management and support strategies.

Responsive information systems enable a business to respond quickly to changing business conditions and expectations of a wide range of constituents. Chapter 6, "The Roles of Records in Corporate Change," discusses various roles of records and information in new business ventures, ownership changes, and other business changes. Related information security requirements are described.

As much as 50 percent of a company's records may be true liabilities in that they have no financial, operational, or legal value. Keeping valueless records is an unnecessary burden and a senseless exposure to potential liabilities. Indiscriminate disposal of records may have even more serious consequences, however. Chapter 7, "Retention and Disposition," explores a number of business and legal considerations that support records retention decisions.

Computer and microform information systems are increasingly used to speed retrieval and consolidate growing volumes of business records. Guidelines for selecting the most appropriate information carrier are offered in Chapter 8, "Integrating Media Choices for the Ultimate Information System." This chapter also discusses achievement of the highest return on investments in records and information systems through appropriate design and integration of those systems.

The three new chapters in this edition are about electronic records and information and related communications technologies. Technologies that support and document business activities create business records in electronic form. Many of the records and information management princi-

ples that apply to paper and microfilm records must also be applied to electronic records. Chapter 9, "Electronic Records and Information," frankly describes the good, the bad, and the ugly aspects of electronic records and information. Records and information management responses to information technologies challenges are proposed.

Chapter 10, "The Internet," looks at employee access to the Internet and the challenges to document web site contents and business transactions completed over the Internet. Internet-related issues of privacy, intellectual properties, and security will remain unsettled for the next few years.

Chapter 11, "E-Mail," discusses today's status of e-mail systems use and the resulting business risks. Recordkeeping challenges and litigation risks related to e-mail systems are described in this chapter, along with proposed business responses to those risks.

How well—or how poorly—a business manages its records and information has an impact on the bottom line. Chapter 12, "The Bottom Line," suggests ways that a well-designed, comprehensive records and information management program adds value to the organization.

A comprehensive records and information program necessitates interactions among a number of different business functions and organizational structures. Chapter 13, "Organization and Staffing for Records and Information Management," describes the elements of a records and information management program and suggests how a program may be managed within an organization to optimize the benefits of the program.

Chapter 14, "The Challenges Ahead," summarizes records and information management faced by business today and into the future. Few businesses had smoothly functioning paper and microfilm information systems in place before they turned to electronic information technologies. New perspectives, expertise, and tools are necessary to fully exploit the capabilities of records and information management functions.

The components of a vital records program are outlined in Appendix I, "A Vital Records Program." This Appendix lists the records that should be protected as vital to a business and presents methods to protect them from a catastrophic event.

Appendix II, "Records and Information Security Program," suggests methods to prevent or reduce business risks and losses resulting from unauthorized access to or loss of sensitive and valuable records and information.

Appendix III, "High-Performance, Low-Maintenance Records Retention," condenses and updates an issue of *The Records & Retrieval Report* by the same name. It promotes the functional records retention schedule methodology and offers guidelines for development of a records retention program.

Appendix IV, "Records and Information Management Best Practices,"

is intended for use by individual employees who are responsible for records and information in their personal work areas. The basic records and information management practices support improved productivity and compliance with an organization's records retention program.

## LOOKING AHEAD

It is the wise executive who recognizes the roles of records and information management in protecting a business and improving organizational effectiveness. Sometimes only a crisis of crippling litigation, overcrowded facilities, or a devastating fire can make the importance of effective records and information management painfully obvious. To manage records and information as an asset and a resource, rather than a burden, all employees must organize and control all records and information from the time of their origination to their ultimate disposition.

Most companies have some sort of records and information management program for their paper and microfilm documents. Too many companies, though, have not adopted those policies and principles to their electronic records.

Needed for the long term is an enterprise-wide records and information system that is easy to use, easy to manage, and easy to change. Top management, corporate counsel, and the managers of all existing and future information systems must endorse a unified records and information system. No enterprise has developed the perfect records and information management program on the first attempt, although a handful of companies have come close to doing so. The transformation from today's fragmented information systems into a comprehensive records and information management program will evolve over time.

Records and information management today is both simple and complex. An informed and commonsense approach makes the job a little easier. The same foresight and commitment necessary to build a successful business will be necessary to build a records and information program that supports and protects the enterprise. It could make the difference between mere survival and prosperity.



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## Guilty Until Proven Innocent

No matter how diligently a business tries to identify, understand, and comply with the law, inevitably it will experience some type of government investigation or litigation during its lifetime. In today's litigating society, attorneys are kept busy filing claims and defending their clients against claims involving other businesses, the government, and individuals.

After the explosion of lawsuits, the costs of insuring against them are skyrocketing, along with the jury awards. The expenses and losses related to litigation and government investigation have traditionally been viewed as a cost of doing business. Many businesses settle disputes out of court—even when innocent of the charges—to avoid the high litigation time and expense and to reduce the risks of damaged reputation or adverse ruling.

Criminal penalties and the prospect of imprisonment are relatively new incentives to anticipate the need for a proper defense against any criminal charges. Under Federal Sentencing Guidelines, lesser fines will apply if a firm establishes and enforces procedures aimed at being in compliance with federal laws. So it behooves a corporation to implement a crime prevention program. Documentation of such a program can be used to support a defense.

Government interest in business is expressed through statutes, regulations, and various rules and procedures established to protect the public interest and to assess taxes. Government requirements to routinely report information are an effort to monitor business activities for com-

pliance with the law. The Internal Revenue Service (IRS), Environmental Protection Agency (EPA), and Occupational Health and Safety Administration (OSHA) are among the numerous government agencies intent on monitoring business in the areas of

- environment
- health and safety
- securities
- financial services
- consumer protection

Proper recordkeeping is one of many ways for a business to work within the law to protect itself. Recordkeeping can achieve compliance with the law, demonstrate that compliance, and enable a company to avoid unnecessary charges. Failure to generate and retain required records could lead to government fines and sanctions.

Not every business today is fully aware of the role of records in various business conduct issues or its legal responsibilities and rights regarding records and information. As a result, most businesses do not do much in terms of records management until they are hit with a major lawsuit or government investigation. By then, it may be too costly and time-consuming to correct past neglect—and it is often too late for protection in that particular instance.

The Federal Aviation Administration (FAA) cannot afford to have inspectors for every plane, so it is incumbent upon air carriers to demonstrate through records what aircraft inspections and maintenance activities are performed. When one discount airline did not have its maintenance records readily available for FAA inspection, the airline's fleet was grounded until the company could catch up on its paperwork. The airline never recovered from the grounding and had to shut down for good.

Any business is vulnerable to claims or charges, even when they have no validity. Current and accurate documentation can minimize the expense and burden of a defense. Regardless of whether a government requirement exists to create and maintain certain records, a business should maintain records in order to show compliance with a law and to help prevent unnecessary charges and claims against the business.

As the world prepared to avoid possible chaos from computer systems failures on January 1, 2000, massive amounts of time and expense went into Year 2000 (Y2K) projects. Businesses documented their risk and impact analyses, Y2K project efforts, and system tests. In the event that something did go wrong with a

system, this documentation was retained to defend against any claims filed by contracting organizations, shareholders, regulators, customers, or others.

## ENVIRONMENTAL ISSUES

Business conduct issues that are of sensitivity to the public, such as claims of environmental violations, often place a company in a position of being guilty until proven innocent. As in cases involving the word of one person against another, proper recordkeeping may be critical in this uphill battle.

Environmental affairs have traditionally been a priority for manufacturers. Today, environmental issues must be considered in product development, packaging, and marketing throughout many other industries.

Any business that uses chemicals or discharges contaminated water and air into the environment is vulnerable to charges of environmental violations. Toxic substances are common in cleaning agents, copy machines, refrigeration equipment, batteries, insulating materials, and more. The toxic substances list from various environmental regulations includes more than 200 pollutants.

The regulations are not always clear, and the knowledge regarding hazardous and toxic materials is not always adequate. In response, government recordkeeping requirements are proliferating in an attempt to develop appropriate controls through more data.

In addition to recordkeeping requirements are information disclosure requirements regarding hazardous materials and environmental problems, including the following:

- OSHA's Hazard Communication Standard and the states' workers-right-to-know laws require that workers be informed of hazardous materials.
- The Securities and Exchange Commission (SEC) requires public companies to disclose any potential and quantifiable financial liabilities regarding environmental obligations.

Individuals found to willingly and knowingly pollute are held personally responsible for environmental damages, and criminal charges may result in fines and prison sentences.

Liability for hazardous waste cleanup can fall on both past and present landowners.

In a landmark Maryland case, a bank foreclosed on a property worth \$350,000. Before all was said and done, the bank eventually had to pay \$550,000 for an environmental cleanup of the property.

The Comprehensive Environmental Response, Compensation, and Li-

ability Act (CERCLA), commonly known as Superfund, is a program to clean up hazardous-waste sites. Under the program's joint and several liability system, parties who have, in the past or in the present, dumped waste at the site may be liable for the cleanup costs.

One corporation used its records to limit its financial obligations for cleanup of a Superfund site. Those records showed that it disposed of only a small fraction of what was found at the site.

Ignorance of the law or ignorance of contamination is no excuse.

The House of Good Intentions hired a painting contractor to sandblast old paint from a two-story tank. Neither the contractor nor the contracting company tested the old paint to see if it contained lead—which, in fact, it did. The contractor disposed of a large volume of the waste in a nonhazardous-waste dump, and failed to clean up all the paint chips at the site. Eventually contaminants leached into the soil and into ground water. Although the contracting company is liable for the cleanup, the firm is relying on the terms of its agreement with the contractor to force the contractor to share responsibility for dumping the toxic waste at the landfill.

Lenders, insurance companies, and others now demand environmental assessments. The environmental services industry has grown dramatically in response to demands for environmental audits. The resulting data and records of an environmental assessment attest to a company's efforts and good faith. The Department of Justice has attempted to reassure companies that they will not be criminally prosecuted if a violation revealed in an audit is reported to the proper regulatory authorities and is corrected in a reasonable time period.

In addition to maintaining environmental assessment records, companies must record or report to regulatory agencies information about hazardous substances, such as:

- logs of toxic materials
- monitoring of air emissions and ground and surface water quality
- compliance with air, water, and waste permits
- accident prevention procedures
- incident reports
- efforts to eliminate or reduce emissions
- remediation and reclamation activities

Accurate and complete environmental recordkeeping is no guarantee against charges of violations. Records of good faith efforts are, however, better than no records at all.

## PRODUCT LIABILITY AND PERSONAL INJURY

As new laws, regulations, and court decisions favor the consumer, the scope of consumer responsibility narrows and corporate liability broadens. Headlines about successful claims contribute to the growing number of claims initiated by individuals against business. It is lucrative to sue when an impersonal corporation or insurance company with deep pockets can be compelled to pay.

Although appeals courts tend to reduce large jury awards, the large number of multimillion-dollar jury verdicts is a sign of a rising tide against business. Plaintiffs are asking not only for damages to compensate for losses but also for punitive damages.

Most cases are settled out of court to avoid suffering losses in a trial and the expense of an appeal. The fear of civil liability also has high costs to the U.S. economy. Innovation and research may be stifled, and foreign competitiveness may be reduced along with the workforce. Products are withdrawn from the market because of prohibitive insurance costs or because insurance cannot be bought at any price. Prices are raised to cover the cost to modify production methods and materials.

There are no clear standards for well-intentioned companies to follow and thus be assured they will not be sued—no matter how exemplary their behavior. A company in compliance with government standards has no guarantee against adverse judgments and jury awards.

One couple sued a major retailer and several suppliers for injuries suffered when they used an outdoor cooking grill indoors. They claimed that the warnings on the grill against the product's use indoors should have been written in larger letters. Rather than go through the expense of court and risks of a jury sympathetic to the injured plaintiffs, the defendants settled for \$4.8 million.

A new strategy of plaintiff attorneys is to file claims against multiple defendants. After a plane crash, the airline and its manufacturer and suppliers may become defendants. Or when a driver kills someone in an auto accident, the auto manufacturer, auto parts suppliers, city maintenance department, and others may be dragged into the suit as defendants. Litigators often rely on these secondary defendants to settle more quickly than the primary target and to offer up damning evidence against the primary target.

The Food and Drug Administration (FDA) and the Federal Trade Commission (FTC) have numerous regulations intended to protect the consumer. When a manufacturer makes claims about its product, such as "low cholesterol" or "environmentally safe," it must be prepared to show through research, testing, and other documentation that those claims are true. Before a new drug may be sold to the public, drug manufacturers

must have documentation from research and development and clinical trials to prove that the drug is safe for consumption.

The FDA also has an interest in tracking controlled substances. Drug distribution records are necessary for recalls, such as when Tylenol capsules were recalled after some were found to be contaminated.

In one court settlement, a drug company agreed to pay a fine of \$600,000 as a result of its poor recordkeeping on the delivery of product samples to physicians. Sales personnel who delivered the controlled substances in question failed to record accurately and completely the registration numbers of samples distributed. Because the company had already paid fines for other recordkeeping violations during the previous decade, the government ordered the company to stop the practice of sales representatives' hand-delivering the samples. In the event of further violations, the company will be ordered to pay an additional \$500,000.

In addition to records required by government agencies, other records may be necessary in a defense against product liability or personal injury claims. These records may include

- product and material testing results
- production quality control documentation
- equipment and vehicle inspections and maintenance records
- corporate policies and compliance audits

In recent years victims of workplace violence are suing property owners—and winning. Although there is pressure to settle to avoid a trial, an organization may prevail when it has a security program and sound documentation of that program. Among security program documentation records are

- policy and guidelines
- compliance audits
- employee hiring and disciplinary practices
- security inspections
- accurate and complete incident reports created as soon as possible after the incident

As with environmental issues, records of good faith efforts may be better than no records at all for product liability and personal injury claims. However, older documents may be taken out of context, misinterpreted, and used against a defendant.

Manville Corporation, formerly Johns Manville, manufactured asbestos products. After many years of meeting heavy demands for fire-retarding materials in public

and government facilities, Manville was the target of liability claims totaling billions of dollars as people developed asbestosis, a lung disease caused by exposure to asbestos.

Over the years, the company failed to implement its records retention program, so older documents that could legally have been destroyed years before the lawsuits began had not been destroyed. Sources close to the case note that many of the records involved in the court proceedings—records dating back to the 1930s—were used by opposing parties to create an impression that Manville knew or should have known that asbestos was hazardous.

To avoid complete ruin of the business, the manufacturer filed Chapter 11 bankruptcy to protect itself from creditors until the claims could be resolved. (The company emerged from reorganization in 1988 as Manville Corporation.) Under the court settlement, Manville initially paid \$2.5 billion into a trust fund to cover the claims of current and future victims, and it now operates a warehouse of 16 million pages of documents open for inspection by future claimants.

(Chapters 5, “A Day in Court,” and 7, “Retention and Disposition,” provide more detail on how records retention and destruction practices affect litigation.)

Release of proprietary information during the discovery process or court proceedings may also be hazardous to the health of a company. Once proprietary information becomes a part of the public record, the company forfeits future protection of the information as a trade secret. In addition, that information will be readily available to any future claimants.

A business has a right to request nondisclosure or limited disclosure of its trade secrets and other confidential information. However, there is a strong presumption of the public’s right to know about potential hazards in product liability and environmental claims, so court records are generally made public. When such a disclosure would be too costly to even the most innocent of companies, that defendant may settle the lawsuit out of court.

In the first of many product liability lawsuits expected to go to trial, a defendant company requested that its product development records be protected from public view by sealing the court documents. The request was denied. Rather than risk public disclosure of as many as 8,000 pages of proprietary information, the manufacturer offered a settlement the plaintiff could not refuse. Other than the plaintiff’s agreement not to disclose any of the thousands of documents exchanged by the parties, the terms of the settlement were undisclosed. The company thus retains the confidentiality of its proprietary information, and the risk and costs of similar suits in the future are reduced.

(See Chapter 5, “A Day in Court,” and Appendix II, “Records and Information Security Program,” for more information on the discovery process and protective orders.)



## **BUSINESS ORGANIZATION AND FINANCE MANAGEMENT**

Recordkeeping regarding financial and other transactions is a necessity for good business management. Laws and regulations applicable to specific industries and business transactions also necessitate good record-keeping.

Accounting records and financial statements primarily serve business management functions. They are also needed for audits for information disclosure or review by

- federal contract compliance managers
- tax and other government agencies
- regulatory commissions
- shareholders
- lending institutions and other creditors

The records to be reviewed in a financial audit may vary from one type of audit to another. Auditors may request anything from invoices and shipping receipts to sales journals and general ledgers. In order to identify any future obligations or debt restrictions, they may also request legal documents that affect the transactions being examined.

Publicly traded companies must provide audited financial statements and other information to the SEC. The SEC regulations and state securities laws are aimed at providing the public with accurate and full disclosure about securities through registration statements, prospectuses, and other information disclosures. Foreign branches of Wall Street firms are not exempt from securities laws. They must set up their recordkeeping to comply with laws of the United States and other countries.

Industries with a history of inaccurate records have become targets for government reforms. The credit-reporting industry, for example, came under fire for sloppy recordkeeping practices that lead to errors in consumer credit files.

Information accuracy requirements also exist in the area of taxes. Generally, an organization is guilty until proven innocent as far as the IRS and other tax authorities are concerned. But complete and accurate records are what proved one manufacturer innocent.

A worldwide heavy equipment manufacturer faced claims by the IRS that it owed additional taxes for an eight-year period. Because the company's retention requirement for those records had not yet expired, the company had records for those years. The records demonstrated not only that the company did not owe taxes but also that it was, in fact, due a refund of \$350 million. The company is now going back to fifty states to recover additional tax refunds.

The taxpayer has the burden of proof that the claims made on the return are accurate. The IRS and other tax agencies do not generally define which records must be maintained to support the information reported on tax returns. Supporting documentation for federal and state income tax returns may, however, include

- employee payments and tax-withholding records
- proof of tax payments
- 1099 forms and support documentation
- fixed asset records
- product inventory records
- sales transactions, journals, and tax payments
- check registers

Many other regulatory agencies do not always state that certain records must be created or maintained. Nonetheless, the absence of those records may result in a loss of rights, such as the right to a defense.

The FTC has established time requirements for shipment of mail-order merchandise to buyers. When the seller has no records that show compliance with the regulation, the FTC may presume failure to comply with the time requirement.

When the Justice Department investigates companies for possible price-fixing, the following records are often needed for the investigation:

- pricing documents of recent years
- expense account documents
- telephone records
- e-mail messages
- sales representative and executive diaries and calendars
- market studies

Detailed records may also be necessary in the event of antitrust investigations. The Department of Justice or the FTC reviews potential mergers, acquisitions, or strategic alliances for possible antitrust violations. SEC requirements may also be applicable if securities or stock transactions are involved. Antitrust violations, not to be taken lightly, may result in any of the following:

- liability for treble damages
- fines or prison sentences

- court or government supervision of operations
- divestiture of stock or assets or other business relationships

Once a charge is made, the target company will rely heavily on its records to show its innocence.

Important decisions that may affect competitive relationships, agreements with suppliers or distributors, and proposed acquisitions or mergers must be documented. Such documentation may include

- contacts with competitors, customers, and distributors
- participation in specific events
- formal agreements
- rationale for an acquisition, merger, or strategic alliance
- explanation of how injury to competition is avoided

It is best to make a record of compliance before—not after—being sued or investigated.

## **RECORDKEEPING NECESSITIES**

Organizations create and maintain records primarily to meet their own business needs, but litigation risks and government regulations also compel creation of complete and accurate records. Laws and regulations have a greater impact on business today than they did twenty years ago, and they are in a constant state of change. Regulations tend to grow fastest in newly regulated industries and in activities that may affect the public welfare or individual rights.

Thousands of federal, state, and local recordkeeping requirements are stated in laws and regulations. Which of those requirements apply to an organization depends on the type of industry and the jurisdictions in which the business operates. The consequences of failure to comply with the law can be serious indeed.

Most statutes and regulations stipulate or imply recordkeeping requirements. Certain records are created and maintained in order to comply with a law or regulation to do so. Other records are created to document a company's compliance with a law or regulation.

Stated or implied recordkeeping requirements may address

- record creation
- acceptable media form(s) of a record
- storage conditions
- record preservation

- information reporting or disclosure
- information security
- retention and destruction

Mandating good recordkeeping are litigation, stricter enforcement of laws, and hefty fines, penalties, and prison sentences. Regulated businesses and those businesses more likely to be involved in litigation will have more extensive recordkeeping requirements than do other businesses. But any organization may need to make its records available for congressional hearings on a product, service, or business practice; review, audit, or investigation by regulatory agencies; and civil or criminal proceedings.

Accurate and timely recordkeeping provides a trail of evidence showing regular patterns of activities to support a company's case. The following general business and recordkeeping practices may help reduce the risk of being sued or help persuade a plaintiff to drop a lawsuit:

- creating contemporaneous notes on meetings and phone calls
- confirming agreements in writing
- documenting internal audits of compliance with regulations and corporate policy
- writing only what you are willing to read aloud in court or to see blown up as a trial exhibit.

Also an important means to compliance with laws and regulations are corporate policies and procedures, developed in consultation with legal counsel. Policies and their documentation may be especially useful in showing good-faith efforts and compliance with various laws.

To avoid violations of software copyright law, The House of Good Intentions has a corporate policy regarding compliance with software licensing agreements. Audits of software on computers and networks are conducted at regular intervals to ensure enforcement of this corporate policy.

Corporate policies on privacy of employee and customer private information are the object of more attention today as lawsuits filed against companies for invasion of privacy are increasing. It is estimated that companies paid more than \$60 million to settle privacy violation lawsuits in the 1990s. Privacy policies regarding employee and customer information must be recorded and distributed, and the efforts to enforce those policies must be documented to support a defense.

A records and information management policy and standard practices also contribute to compliance with the law.

If an employee commits a crime using a company's computer network, the employer may be subject to charges under Federal Sentencing Guidelines. Evidence of an employee Internet access policy and an electronic communications security program will be needed to demonstrate efforts to prevent criminal actions by employees. (See Chapter 10, "The Internet," for more on risks related to the security of computer networks.)

Records and information management program documentation may also prove beneficial in a court proceeding when the opposing party demands evidence of a formal records management program. (See Chapter 5, "A Day in Court," and Chapter 7, "Retention and Disposition," for more on the potential consequences when such evidence is nonexistent.)

The legal consequences of not having an adequate records and information management program are becoming more costly, and an increasing number of government agencies require a program in some form.

A business has an obligation to its shareholders, employees, and other stakeholders to support and defend its claims in civil or criminal proceedings. Proper recordkeeping may prevent or minimize the risk of losses in court proceedings or government investigation. When a business does not maintain and protect the right records, the result may be the loss of the right to a proper defense, as discussed in this chapter, or the loss of the right to file a claim, as discussed in the next chapter, "Preservation of Legal Rights and Business Assets."

## Preservation of Legal Rights and Business Assets

Business records and information are valuable corporate assets to be guarded much like cash and property. They are tools to achieve business objectives and to prevent losses. Indeed, every business has both a right and a responsibility to preserve and protect its legal rights and business assets.

As discussed in Chapter 1, a business must maintain and preserve records necessary to defend itself. An organization will also want to create and protect records in order to

- protect revenues and future income
- analyze business risks
- reduce or eliminate exposure to risk
- file a claim or prosecute criminal actions

An enterprise relies on its own and others' records and information to analyze, reduce, and eliminate business risks that may relate to new ventures, business alliances, losses in court proceedings, or a loss of business to a competitor or a disaster. Records also help protect assets and revenues, as well as the legal right to file a claim or to prosecute another party.

### **LEGAL RIGHTS AND OBLIGATIONS**

The security of records and information may be necessary to comply with statutes, regulations, and contract or licensing agreements. These