



Strategies for RIM Program Compliance with Sarbanes-Oxley

The goal of any publicly traded company, or any other organization that, for whatever reason, views itself as subject to a similar requirement, should be to become compliant with Sarbanes-Oxley

John C. Montaña, J.D., J. Edwin Dietel, J.D., and Cristine S. Martins, J.D.

Editor's Note: *This article is excerpted from The Sarbanes-Oxley Act: Implications for Records Management, by John C. Montaña, J.D., J. Edwin Dietel, J.D., and Cristine S. Martins, J.D., published by ARMA International. Update sidebar provided by John Montaña.*

In its broadest sense, Sarbanes-Oxley compliant means that the organization's accounting practices and accounting system are transparent; that its external financial audits are conducted completely and openly and with arm's length between the auditor and the client; and that its financial statements and audit reports fully and accurately state the company's financial position. The goal of the information management program should be to create the processes, procedures, and records necessary to demonstrate compliance with this standard and to repudiate allegations of

misfeasance or malfeasance. If this goal is achieved, the information management question then becomes an evidentiary one—how does one go about documenting the processes that have been created? Because the Act does not explicitly direct any records management activities on the part of publicly held companies, the corporate records manager cannot simply follow a statutory recipe for information management compliance. Instead, he or she must work backward from the demanded outcomes to develop suitable procedure and practice.

The Act mandates a number of outcomes that demand carefully crafted and rigorously enforced records and information management procedures and practices. Procedures and practices for documenting internal business and compliance processes, procedures, and practices for dealing with investigations or other situations where document production constitutes a part of the compliance mix are included.

The following factors are likely to be important in ensuring Sarbanes-Oxley compliance—certainly gross inadequacy in these areas is likely to lead to problems. They are also factors that may be of interest when conducting a records and information audit, in that any such inadequacies should be identified and corrected. Within each of these broad issues are necessarily subsumed many sub-issues; for

example, within the overall issue of developing or complying with a records retention program are many sub-issues relating to the sufficiency of that program. Those sub-issues are necessarily program- and organization-specific and are thus beyond the scope of this document. Nonetheless, the corporate records manager should carefully consider them when contemplating each of the following strategies.

Strategy One: Set up, Maintain, and Ensure Compliance with a Corporate Records Retention Program

In at least two places,¹ the Act imposes severe penalties on parties who impede investigations and law enforcement through improper destruction of records. In light of recent events, these penalty provisions must be taken seriously. Imposing these penalties does not mean, however, that permanent suspension of a records retention program is either desirable or necessary.

Although the Act offers the potential for very harsh penalties for wrongdoers, those penalties, like most penalties, are subject to limitations of various kinds. Thus, although the Act requires public accountants to maintain audits and audit work papers, authorizes investigations and other proceedings, and permits penalties, the records retention requirements are limited to five² and seven³ years. Causes of

At the Core This article

- ▶ Describes the important factors in ensuring SOX compliance
- ▶ Outlines strategies to implement for a compliant program
- ▶ Emphasizes the importance of a thoughtful, aggressive RIM program to comply with SOX

action created or altered by the Act are subject to their own limitations periods,⁴ or they are governed by pre-existing limitations periods. Thus, as is generally the case, a careful analysis of the risk and compliance envelope permits development of a records retention policy that conforms both to the letter and spirit of the Act, yet still permits the routine disposition of older records whose utility has expired.

Strategy Two: Review the Retention Schedule

Periodic review of an organization's records retention schedule is an accepted part of a well-run RIM program. The Act, and the legal climate surrounding its enactment and enforcement, only add to this imperative. For any organization with periodic review of the schedule built into its program, reviews should henceforth be conducted with the Act and the records management principles arising out of it in mind. The records retention schedule review includes and, as needed, revision of all factors set forth in this section: retention periods, records series, nomenclature, indexing and structure, and overall compliance. For organizations that do not periodically review retention schedules or that do not have a formal records retention program in place, the Act should give new impetus to the acquisition of a program and to its regular review. In the event of allegations of wrongdoing, the records retention program will undoubtedly receive very close scrutiny—the resources expended to ensure that it is sound and legally sufficient will be well spent. In contrast, for any organization undergoing Sarbanes-Oxley-related scrutiny, ad hoc destruction of records in the absence of a formal program, no matter how innocent the motive, invites the most damning of inferences as to reasons.

Strategy Three: Establish Records Retention Periods Compliant with the Act

Although the Act does not impose direct recordkeeping requirements on publicly traded companies (and thereby

The ability to produce specific materials may be the difference between success and failure in any Sarbanes-Oxley related legal action.



does not impose upon them any records retention burden), it does impose a retention requirement upon public accountants to maintain audit reports and work papers for either five or seven years. In addition, it contains limitations periods of two⁵ and five⁶ years related to allegations of wrongdoing. In addition, early case law under the Act extends certain preexisting limitations periods under other laws.⁷

These retention requirements and limitations periods serve as the genesis of legal authority permitting establishment of retention periods for records and information related to compliance with the Act.

- They serve as an indication of what Congress considers to be reasonable periods for both retention of records and information and within which to impose liability on parties subject to the Act.
- They serve as indicators of retention periods for outside auditors or others who may be adverse parties or parties required to give evidence in investigations or legal proceedings in the future.
- An organization reviewing its retention schedule should consider which, if any, of these retention periods or limitations might be applicable to its records retention schedule and the records series to which they may be relevant. The appropriate adjustments can then be made to reach an acceptable retention period.

Strategy Four: Establish Policies and Procedures for Litigation and Investigation Holds

In light of the penalty provisions of the Act, no part of the records retention program attains more significance than those policies and procedures dealing with audit, investigation, and litigation holds. As part of its regulatory scheme, the Sarbanes-Oxley Act establishes the Public Company Accounting Oversight Board (PCAOB or Board).⁸ This board is vested with broad power to oversee public accountancy, to set standards for conduct of audits and maintenance of records by public accountants, and generally to oversee and enforce standards for public accountants.

The parties most directly affected by the PCAOB are public accountants and auditors—the ones whom the Board will regulate. However, the Board also has investigatory power over auditing of public companies, in general, and is empowered to

[R]equest the testimony of, and production of any document in the possession of, any other person, including any client of a registered public accounting firm that the Board considers relevant or material to an investigation under this section, with appropriate notice, subject to the needs of the investigation, as permitted under the rules of the Board; and

[P]rovide for procedures to seek issuance by the Commission, in a manner established by the Commission, of a subpoena to require the testimony of, and

production of any document in the possession of, any person, including any client of a registered public accounting firm, that the Board considers relevant or material to an investigation.⁹

A publicly traded company may thus find itself expected or required to respond to an investigation by the PCAOB by producing documents and information related to an audit.

Any organization that has implemented a comprehensive RIM program should already have in place policies and procedures for handling information production demands arising out of government investigations, litigation, and other legal or adversarial situations. For organizations that do not have such procedures in place, the Act provides additional impetus for their development and adoption. Even for those organizations that already have such policies and procedures in force, the Act forces a reexamination of their efficacy.

- The act grants authority to demand testimony, documents, and information as part of an “investigation,” potentially well in advance of the institution of any formal proceeding such as a lawsuit. Do existing procedures, including litigation holds on document destruction, accommodate this demand?
- Are existing procedures procedurally sound and as foolproof as possible?
- Is staff training and awareness sufficient to produce the high degree of accuracy and timeliness demanded?

In view of the many recent allegations of improper records management, including illegal shredding, any hold policy must be both theoretically sound and implemented with perfect or near perfect accuracy—even the most innocent errors in this area are likely to be viewed with suspicion. Deficiencies in any phase of this area indicate a need to revise existing policies and procedures and to implement training to reinforce and implement those changes.

- Policies and procedures should clearly indicate that legitimate holds on records purging include not only

SOX Program Requires Clarity, Consistency, Transparency

Increasingly, the specter of spoliation hangs over the head of any organization that finds itself in court. The success of spoliation allegations brought in a series of high-profile cases has increased scrutiny on records management practices, and more than ever before, attorneys have become both sophisticated in their tactics and aggressive in pursuing potential spoliation.

In the realm of Sarbanes-Oxley Act (SOX) compliance, this issue looms large. Many of the most prominent cases have involved financial improprieties of the sort contemplated by SOX, and SOX itself gives only the vaguest guidance about what is “right” by way of record management – creating a fertile breeding ground for potential spoliation allegations. What is a corporation to do in the face of this landscape?

It’s worth bearing in mind that being right and appearing to be right are not necessarily the same thing. Judges and juries are not commonly familiar with the complexities and inherent difficulties of records management in large organizations and are thus in a position to be swayed when allegations of spoliation appear to be bolstered by what are characterized as improper practice in the way records are handled.

The first goal of any SOX-based records management program should, of course, always be that of ensuring meaningful and good-faith compliance with the law and with whatever duties arise from that law. Beyond that, consideration should also be given to appearance – such trivial things as whimsical project names (remember “Predator” and “Death Star”?) take on a sinister caste when viewed in the context of rapacious business tactics by laymen. It’s worth examining the language used to describe a program or explain its rationale with a view to eliminating inflammatory or confusing language. Potentially inflammatory language accomplishes nothing, and provides an opponent with a nice sound bite in court.

On an even more mundane level, every inconsistency in the way records are maintained and produced for a lawsuit is likely to be carefully scrutinized for its spoliation value. Every e-mail missing from a thread, every backup tape that turns up in the bottom of a closet, offers the opportunity to raise questions. The answer to this is consistency – whatever is ordained by way of records management, let it be implemented consistently. To the extent that these things are avoided, so too is the opportunity for an opponent to argue that they are evidence of wrongful motivations in a program.

Since the goal of a records management program is to answer questions rather than raise them, the overall goal of SOX compliance should, in this context, be clarity, consistency, and transparency – clarity of purpose and of rationale, consistency of implementation, and transparency of motivation and of operation. To the extent that these are present in a SOX records program, that program is far more likely to support the overall goal of the corporate SOX initiative and SOX itself – increasing the confidence of regulators and the public in the company’s motivations and competence.

Retention periods for audit complaint documentation should be set to no less than the audit materials to which they apply.



filed lawsuits and formal regulatory actions, but investigations by competent authorities such as the Board, or if need be, even mere public allegations of impropriety.

- Records and information personnel should be familiarized with the requirements of the Act and the need to respond accurately and rapidly to information demands imposed by the PCAOB or other competent authorities in accordance with the Act. If policies or procedures have been amended, personnel should be familiarized with changes.

Strategy Five: Reexamine File Plans, Indexing, Data Structures, and Nomenclature

Data structures have considerable significance in compliance with the act. Even the most complete documentation loses value if it cannot be located when needed. Given the climate of suspicion that was the impetus for the act, delays in production of legitimately demanded records and information are highly undesirable. Opponents are prepared to assume bad motive for the delay and willing to push for sanctions if not satisfied as to the reasons for it. Therefore, along with a retention schedule review, a review of the file plan, indexing, and other data structures used to manage the company's records may be in order. Issues to consider may include the following:

- Are the kinds of records and information likely to be demanded by the PCAOB, such as audit background

and back-up material, internal and external audit-related correspondence, and audit-related accounting and financial information, sufficiently well-identified and segregated within the organization's records scheme to enable them to be easily identified and produced?

- Are personnel sufficiently trained and informed to permit them both to implement the above and to understand the value and urgency of both the appearance and substance of full compliance and disclosure?
- Is material provided to an outside auditor maintained as a records series? The company's file plan, indexing scheme, or other records and information structure should be reexamined in light of the demands of the Act and the PCAOB. A common point of dispute in many high-profile cases revolves around precisely what information was provided to the outside auditor, and it is likely to be a continuing issue. If this material is not now maintained as a formal records series, consideration should be given to implementing this procedure.
- Is audit-related correspondence and other related material managed as a records series? Consideration should be given to the formal management of audit-related correspondence and other related material if it is not already being done. For all such materials, the file plan or index should be adjusted and suitable

records series developed.

- How are records series managed? Records series definitions should clearly and inclusively indicate the material covered, and, if necessary, physical segregation of some material as a discrete document set should be considered.
- Is electronic information properly managed? If the information is maintained electronically and managed by means of a software tool, appropriate index pointers should be created to ensure that the full document set can be located.

In all these cases, structural changes to the organization's records system should be made bearing in mind that Sarbanes-Oxley related investigations or lawsuits may require production of large amounts of very specific material to support a certification, financial statement, or other public statement as to the organization's finances. Any such change should be designed to enhance the organization's ability to provide this material quickly, efficiently, and thoroughly. The ability to produce specific materials may be the difference between success and failure in any Sarbanes-Oxley related legal action.

Strategy Six: Use Clearly Understood Nomenclature

One of the most common failings of a file plan or indexing scheme is poor nomenclature. Under the best of circumstances, poor nomenclature significantly impairs the ability of users to find needed information, and very poor naming and indexing conventions may render these tools useless. In the climate surrounding the Act, these failings may also take on more sinister overtones. For example, obscure naming conventions may be taken as an attempt to conceal information behind meaningless jargon, and clever but meaningless names for data objects, projects, or other listed items may be suggestive of sharp practice.¹⁰ Therefore, unclear and unhelpful names for records series, files, and other data objects should be revised to improve clarity. Also, descriptive but commonplace ter-

minology should be considered instead of unhelpful and potentially inflammatory terminology for files or other data objects. Transparency is the goal of Sarbanes-Oxley. This transparency should also be reflected in any nomenclature that seeks to be responsive to Sarbanes-Oxley.

Strategy Seven: Document the Certification and Complaint Processes

The Act mandates or implies two new business processes, with whatever information management burdens they entail. Corporate executives must now certify financial statements, and they may be penalized quite severely for knowingly making a false certification.¹¹ Audit committees must establish procedures for the receipt, retention, and treatment of complaints regarding accounting, internal accounting controls, or auditing matters.¹²

In the case of executive certifications, explicit mention is not made of required records and information, nor is any retention period stated. Nonetheless, due diligence of some sort is clearly, if not explicitly, required of executives making the certification. In view of their personal liabilities for very severe penalties,¹³ they are likely to view a well-documented process with a well-defined, thoroughly vetted, and well-maintained documentation trail as highly desirable. Consideration should therefore be given to formal development of such a process and to the documentation trail necessary to implement it and to subsequently prove both the process and its proper execution. As with other compliance-related data objects, this documentation should be entered into the records and information management system and records retention schedule, and it should be indexed and otherwise managed in conformance with the consideration discussed in this section.

In the case of audit committee complaint documentation, the need for formal management is obvious. The provision is clearly an attempt to avoid the repetition of instances in which whistleblowers were ignored or punished, and any information subject to this provision will be scrutinized very closely in any investi-

gation. In view of this scrutiny, accounting and audit complaint documentation should be carefully segregated and clearly identified in all records management schedules, file plans, or indexes. Retention periods for audit complaint documentation should be set to no less than the audit materials to which they apply.

In both cases, Sarbanes-Oxley itself is silent as to any such paper trail. As a result, any organization faced with Sarbanes-Oxley compliance is provided

some leeway—self-developed documentation standards may, if reasonable, be as good as any other. The organization should nonetheless give thorough consideration as to how it might prove the adequacy of any certification or process it might undertake pursuant to Sarbanes-Oxley and to the records and information set necessary to prove that adequacy. That set should become a formal part of the records and information management program. ■

John C. Montaña, J.D. is a records management and legal consultant, and he is currently a principal of Cunningham & Montaña, Inc., of Reston, Virginia, and of Montaña & Associates, Inc. of Landenberg, Pennsylvania. He can be reached at johnmontana@qwestinternet.net.

J. Edwin Dietel, J.D. is a senior consultant for Records Engineering, LLC of Reston, Virginia. He has authored two other books and more than 50 articles on leadership, management, and records, information, and knowledge management. He can be contacted at endjed@aol.com.

Cristine S. Martins, J.D., has worked in the field of records and information management for the past decade. Presently, she heads her own records and information management consulting firm based in New York. She can be reached at cris@crismartins.com.

Endnotes

¹ §§ 802 and 1102.

² § 802.

³ § 103.

⁴ §§ 306, 804.

⁵ § 306, dealing with director or officer violation of blackout period violations.

⁶ § 804, dealing with fraud in contravention of securities laws.

⁷ See Appendix B of this publication, [*The Sarbanes-Oxley Act: Implications for Records Management*] *Roberts v. Dean Witter Reynolds, Inc.*, n/k/a Morgan Stanley DW, Inc., 2003 WL 1936116 (M.D.Fla.), March 31, 2003, concerning the inferred intent to the Act to extend limitations under old law to permit recovery for wrongdoing committed prior to passage of the Act.

⁸ See generally, §§ 102 through 109.

⁹ § 105.

¹⁰ See, e.g., Enron Corporation, which engaged in partnerships with names such as “Raptor” and “Jedi II.”

¹¹ § 906.

¹² § 301.

¹³ Up to 20 years’ imprisonment and fines of up to \$5,000,000.