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RECORD RETENTION AND LITIGATION HOLDS FOR FINANCIAL INSTITUTIONS

Lending and Financial Institutions Are Subject to a Variety of Federal and State Laws Governing Record Retention in Almost All Their Activities, from Credit Transactions to Insider Loans. Retention Policies Must Include Provisions for "Holds" When Litigation, Audits, or Government Investigations Are Pending or Reasonably Foreseeable.

By Bruce A. Radke and John B. Thornton*

This article discusses the standards for record retention and provides an overview of the federal laws relating to record retention for the financial services industry. However, given the significant number of such laws, the list cannot be exhaustive in an article of this length. Also, state statutes and regulations necessarily vary from state to state. This article focuses on federal law but also provides certain examples of state law from one state, Illinois. In addition, this article addresses when a financial institution must institute a litigation hold to preserve documents that may be potentially relevant in pending or reasonably foreseeable litigation, audits or government investigations.

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LEGAL STANDARDS FOR RECORD RETENTION POLICIES

A record retention policy formalizes a company's procedures for maintaining and disposing of records received in the ordinary course of business. There are several important considerations in crafting a record retention policy. First, the policy must be tailored to the legitimate business needs of the financial institution to retain certain records. It is important to remember that statutes and regulations provide only minimum legal record retention requirements. Other considerations, including administrative, operational and fiscal requirements, may necessitate extending retention beyond the minimum statutory and regulatory requirements. In general, records should not be retained for periods beyond their usefulness to the

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financial institution or beyond the legal requirements for their retention.

Second, a retention policy must take into account the particular litigation environment faced by the financial institution. A financial institution involved in litigation may rely on a retention policy to demonstrate that a record was legitimately disposed of in accordance with the retention policy. In general, records may be destroyed when done pursuant to a records retention policy that is reasonable and consistently applied.

Courts have declined to sanction parties for disposing of records in accordance with record retention policies.[1] The U.S. Supreme Court in *Arthur Andersen LLP v. United States*,[2] acknowledged the important role that record retention policies play in corporate operations and noted that:

> 'Document retention policies,' which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.

(Internal citations omitted.) *Id.* Citing the *Arthur Andersen* decision, the Seventh Circuit recently has held

1. *See, e.g., Morris v. Union Pac R.R.,* 373 F.3d 896 (8th Cir. 2004) (district court erred in giving adverse inference instruction where defendant erased audiotape in accordance with its standard 90-day retention policy); *Stevenson v. Union Pac. R.R.,* 354 F.3d 739, 747 (8th Cir. 2004) ("Where a routine document retention policy has been followed ... there must be some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth in order to impose the sanction of an adverse inference instruction."); *United States v. Kitsap Physicians Serv.,* 314 F.3d 995, 1001 (9th Cir. 2002) (affirming trial court's finding of no spoliation of evidence where the defendants destroyed records in the normal course of business pursuant to an established retention policy); *Park v. City of Chicago,* 297 F.3d 606, 614-16 (7th Cir. 2002) (affirm-

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ing district court's refusal to issue adverse inference jury instruction where the records were disposed of in good faith pursuant to a routine records expungement policy, despite the plaintiffs' contention that the destruction of certain records violated an EEOC record retention regulation that required the records to be retained for at least one year); *Hynix Semiconductor, Inc. v. Rambus Inc.,* No. C-00-20905 RMW (N.D. Cal. Jan. 4, 2006) (adoption of record retention policy was a "permissible business decision" and policy was not implemented in advance of reasonably foreseeable litigation for the purpose of destroying relevant information).

2. *Arthur Andersen LLP v. United States,* —- U.S. ——, at ——, 125 S.Ct. 2129, 2135, 161 L.Ed.2d 1008, 2005 WL 1262915, at *5 (May 31, 2005).

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that "[t]here is nothing wrong with a policy of destroying documents after the point is reached at which there is no good business reason to retain them."[3]

In its seminal decision in *Lewy v. Remington Arms Co., Inc.*,[4] the Eighth Circuit articulated the standards for record retention policies. The court emphasized that the retention periods must be reasonable considering (1) the facts and circumstances surrounding the relevant records (a three-year retention period may be sufficient for standard company correspondence, but insufficient for records relating to consumer complaints); (2) the frequency and magnitude of similar types of lawsuits such that the company should have known not to dispose of the potentially relevant records; and (3) whether the policy was instituted in bad faith to dispose of potentially harmful records that otherwise would be subject to discovery in litigation.[5]

In addition, a record retention policy should take into account relevant statutes of limitations. For example, if a state regulation requires that an employment agreement be maintained for three years following an employee's departure, but that state has a five-year statute of limitations period for breach of contract actions, then the employee agreement should be kept for at least five years because the agreement may be relevant in future litigation with the employee. Moreover, if a financial institution has branches in more than one state, it may choose the longest statute of limitation that may apply to all branches to have a consistent retention policy. A record retention policy that is consistent for all branches is easier to implement and less likely to lead to instances of erroneous and inconsistent record disposition.

The failure to preserve records when under a duty to do so can result in significant regulatory sanctions and fines. For example, a financial institution recently was fined $2.1 million by the SEC for failing to preserve e-mail and other electronic records. Improper record destruction also can lead to severe sanctions in litigation, as illustrated by the *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Inc.* case.[6] There, a $1.4 billion judgment was entered against a financial institution after it had been sanctioned for failing to preserve and produce certain electronic records.

RECORD RETENTION PERIODS FOR FINANCIAL INSTITUTIONS

Both federal and state statutes and regulations contain record retention requirements. Where requirements overlap, the financial institution must use the longer of the two record retention periods. In some instances, there may be federal record retention regulations in an area where a particular state has no corresponding regulation.

Lending Statutes and Regulations

Regulation B (Equal Credit Opportunity Act)

The Equal Credit Opportunity Act (the "ECOA")[7] prohibits financial institutions from discriminating on the basis of age, sex, race, color, religion, marital status, or natural origin with respect to any aspect of a credit transaction.

12 C.F.R. § 202.12(b) provides that a financial institution must retain, in original form or a copy thereof, for a period of 25 months after the institution notifies an applicant of the action taken on an application:

> (i) Any application that it receives, any information required to be obtained concerning characteristics of the applicant to monitor compliance with [the ECOA] ... and any other written or recorded information used in evaluating the application and not returned to the applicant at the applicant's request;
>
> (ii) A copy of the following documents if furnished to the applicant in written form (or, if furnished orally, any notation or memorandum made by the creditor):
>
> (A) The notification of action taken; and
>
> (B) The statement of specific reasons for adverse action; and

3. *Fidelity Nat. Title Ins. Co. of New York v. Intercounty Nat. Title Ins. Co.,* 412 F.3d 747, 750 (7th Cir. 2005).
4. 836 F.2d 1104, 1112 (8th Cir. 1988).
5. *Id.; See also Stevenso.,* 354 F.3d at 746; *Brown v. Sandals Resorts Int'l,* 284 F.3d 949, 955 (8th Cir. 2002) (approving pattern jury instructions that adopted the *Lewy* standards); *United States v. Taber Extrusions L.P.,* No. 4:00C V00 255, 2001 WL 1941318 (E.D. Ark., Dec. 27, 2001) (citing the *Lewy* standards in denying a motion for sanctions where the documents were disposed of in accordance with a records retention policy).
6. 2005 WL 679071 (Fla. Cir. Ct. March 1, 2005) and 2005 WL 674885 (Fla. Cir. Ct. March 23, 2005).
7. 15 USC § 1691, *et seq.*

(iii) Any written statement submitted by the applicant alleging a violation of [the ECOA] or [implementing] regulations.[8]

The financial institution must also retain, for a similar time, the following records documenting action taken with respect to existing credit accounts:

(i) Any written or recorded information concerning the adverse action; and

(ii) Any written statement submitted by the applicant alleging a violation of [the ECOA] or [implementing] regulations.[9]

Records related to an extension of business credit are subject to shorter retention periods. Section 202.12(b)(5) provides:

> With regard to a business with gross revenues in excess of $1,000,000 in its preceding fiscal year, or an extension of trade credit, credit incident to a factoring agreement or other similar types of business credit, the creditor shall retain records for at least 60 days after notifying the applicant of the action taken. If within that time period the applicant requests in writing the reasons for adverse action or that records be retained, the creditor shall retain records for 12 months.[10]

The financial institution must retain the information beyond 25 months (12 months for business credit) if it has actual notice that it is under investigation, if it is subject to an enforcement proceeding for an alleged violation of the ECOA, or if the financial institution has been served with notice of a civil action. In such cases, the records are to be retained until final disposition of the matter unless otherwise ordered by the court or agency.[11]

Regulation C (Home Mortgage Disclosure Act)

The Home Mortgage Disclosure Act ("HMDA")[12] is intended to provide the public with information and disclosures concerning real estate lending practices. Institutions are required to compile and report real estate loan data by census tract regarding applications for, and originations of, home purchase and home improvement loans.[13]

Institutions located within metropolitan statistical areas are required to maintain a HMDA loan/application register (HMDA-LAR). The HMDA-LAR is to be submitted to the institution's regulatory agency annually. The HMDA-LAR consists of data concerning:

- the race or national origin and gender of the loan applicants;
- the type and amount of the loans;
- origination and purchases of home-purchase and home-improvement loans;
- loan denials;
- withdrawn applications;
- applications that were approved but not accepted; and
- incomplete applications.[14]

The institution must retain each HMDA-LAR for a period of three years.[15] The disclosure statement prepared by the Federal Financial Institutions Examination Counsel must be available to the public for a period of five years.[16]

Bank Secrecy Act

Under the Bank Secrecy Act ("BSA"),[17] a financial institution must maintain records of the issuance or sale of monetary instruments (bank check or draft, cashier's check, money order or traveler's check) involving currency in amounts of $3,000 to $10,000.[18] Such records are to be kept for five years.[19]

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8. 12 C.F.R. § 202.12(b)(1).
9. 12 C.F.R. § 202.12(b)(2).
10. 12 C.F.R. § 202.12(b)(5).
11. 12 C.F.R. § 202.12(b)(5).
12. 12 U.S.C. § 2801, *et seq.*
13. 12 C.F.R. §§ 203.4 and 203.5.
14. *Id.*
15. 12 C.F.R. § 203.5(d).
16. *Id.*
17. 31 U.S.C. § 5311, *et seq.*
18. 31 C.F.R. § 103.29.
19. 31 C.F.R. §§ 103.29(c) and 103.38.

Additionally, the financial institution must maintain a record of each extension of credit in an amount in excess of $10,000 that is not secured by real property for a period of five years.[20] The record must contain the name and address of the person to whom the extension of credit is made, and the amount, nature or purpose, and date of the credit.[21] For a period of five years, the financial institution must maintain a record of any transaction resulting in the transfer of currency or other monetary instruments, funds, checks, investment securities, or credit, of more than $10,000 to or from any person, account, or place outside the United States.[22]

Financial institutions are required to collect certain information in connection with all wire transfers in excess of $3,000.[23] Such information is to be retained for five years.[24] The information to be collected and retained depends upon: (1) the type of financial institution; (2) the role in the wire transfer (originator, intermediary or beneficiary); (3) the amount of the wire transfer; and (4) the relationship of the parties to the transaction with the financial institution.[25]

Records of each customer's taxpayer identification number for each certificate of deposit sold or redeemed, or each deposit or share account opened must also be maintained by banks.[26] Banks are also required to keep a number of specific documents relating to deposit accounts and currency transfers.[27] Such records are to be kept for five years.[28]

Regulation Z (Truth in Lending Act)

The Truth in Lending Act ("TILA")[29] addresses a broad range of credit transactions. It imposes a variety of disclosure requirements intended to ensure that consumers are adequately informed concerning the terms of a credit transaction. The disclosures are also designed to facilitate comparison of the terms of different credit offers.

The TILA requires financial institutions to retain records evidencing compliance with the disclosure provision of the act and involves the materials that must be provided to the consumer at the time of the credit application or solicitation. Consumers obtaining charge card accounts must receive disclosures identifying the annual percentage rate, various fees, minimum finance charges; and any grace period provided.[30]

Financial institutions must also provide the consumer with a periodic statement that includes the previous balance of the account, identification of transactions, the amount of the finance charge, and the billing dispute address.[31] Certain types of credit plans secured by the consumer's home require the lender to disclose the following: that the consumer's home could be lost in the event of default, payment terms, and an itemization of fees.[32] The lending institution must provide disclosures concerning variable interest-rate adjustment at least once each year during which an interest-rate adjustment is implemented without an accompanying payment change, and at least 25, but no more than 120, calendar days before payment at a new level is due.[33]

12 C.F.R. § 225.25 provides that creditors shall retain evidence of compliance with the TILA for two years after disclosures are required to be made or acts are required to be taken.[34] However, the relevant administrative agencies may require creditors to keep records for a longer period if necessary to carry out their enforcement responsibilities.[35]

Real Estate Settlement Procedures Act

The Real Estate Settlement Procedures Act ("RESPA")[36] requires that institutions provide consumers with specific information concerning credit transactions involving federally related mortgage loans. RESPA requires that a number of disclosures be provided to the consumer prior to settlement.

20. 31 C.F.R. §§ 103.33(a) and 103.38.
21. 31 C.F.R. §§ 103.33(a).
22. 31 C.F.R. §§ 103.33(b) and 103.38.
23. 31 C.F.R. §§ 103.33(e), (f), and (g).
24. 31 C.F.R. §§ 103.38.
25. 31 C.F.R. §§ 103.33(e), (f), and (g).
26. 31 C.F.R. § 103.34(a).
27. 31 C.F.R. § 103.34(b).
28. 31 C.F.R. § 103.38.
29. 15 U.S.C. § 1601, *et seq.*
30. 12 C.F.R. § 226.5a.
31. 12 C.F.R. § 226.7.
32. 12 C.F.R. § 226.5b.
33. 12 C.F.R. § 226.20(c).
34. 12 C.F.R. § 226.25(a).
35. 12 C.F.R. § 226.25(a).
36. 12 U.S.C. § 2600, *et seq.*

A Uniform Settlement Statement (HUD-1 or HUD-1A) sets forth settlement charges in connection with either the purchase or the refinancing (or other subordinate lien transaction) of family residential property. 24 C.F.R. § 3500.10(e) provides:

> The lender shall retain each completed HUD-1 or HUD-1A and related documents for five years after settlement, unless the lender disposes of its interest in the mortgage and does not service the mortgage. In that case, the lender shall provide its copy of the HUD-1 or HUD-1A to the owner or servicer of the mortgage as a part of the transfer of the loan file. Such owner or servicer shall retain the HUD-1 or HUD-1A for the remainder of the five-year period.[37]

Records relating to RESPA's prohibition against kickbacks and unearned fees must be kept for five years from the date of execution.[38] Likewise, records required under 24 C.F.R. § 3500.15 involving "affiliated business arrangements"[39] are to be retained for five years from the date of execution.[40] Financial institutions servicing loans covered by RESPA must keep records reflecting the handling of each borrower's escrow account for a period of at least five years after the institution has last serviced the escrow account.[41]

The Servicing Disclosure Statement and Applicant Acknowledgment informs the consumer:

- whether the servicing of the loan will be assigned, sold, or transferred to any other person at any time while the loan is outstanding; and

- of the percentages of mortgage servicing loans originated by the institution in each calendar year for which servicing has been assigned, sold, or transferred for that calendar year.[42]

Under 24 C.F.R. § 3500.21(c)(3), the signed Applicant Acknowledgments must be retained for a period of five years after the date of settlement as part of the loan file for every settled loan. There is no requirement for retention of Applicant Acknowledgments if the loan is not settled.[43]

In addition, institutions are required to provide consumers with a good-faith estimate of the amount of or range of charges for the specific settlement services that the consumer is likely to incur in connection with the mortgage loan.[44] The regulations do not specifically require institutions to retain a copy of the good-faith estimate that must be provided to the consumer under RESPA. However, the reference to "related documents" made in 24 C.F.R. 3500.10(e) could include these estimates. Institutions should consider retaining these documents, in addition to the HUD-1 and HUD-IA, to avoid challenges.

Regulation M (Consumer Leasing Act)

The Consumer Leasing Act ("CLA")[45] requires that lessees of personal property be supplied with information that will enable the lessees to compare the terms of different leases. 12 C.F.R. § 213.8 provides that a lessor shall retain evidence of compliance with the requirements imposed by the CLA for a period of not less than two years after the date disclosures are required or an action is required to be taken.[46]

Regulation BB (Community Reinvestment Act)

The Community Reinvestment Act ("CRA")[47] is designed to evaluate a financial institution's efforts to service the lending needs in its delineated community by using the institution's loan data to identify the entities and areas to which the institution has or has not extended credit. Documents required to be maintained by the CRA (the financial institution's CRA disclosure statement and

37. 24 C.F.R. § 3500.10(e).
38. 24 C.F.R. § 3500.14(h).
39. An "affiliated business arrangement" is defined as "the relationship among business entities where one entity has effective control over the other by virtue of a partnership or other agreement or is under common control with the other by a third entity or where an entity is a corporation related to another corporation as parent to subsidiary by an identity of stock ownership." 24 C.F.R. § 3500.15(c)(2).
40. 24 C.F.R. § 3500.15(d).
41. 24 C.F.R. § 3500.17(l).
42. 24 C.F.R. § 3500.21.
43. 24 C.F.R. § 3500.21(c)(3).
44. 24 C.F.R. § 3500.7.
45. 15 U.S.C. § 1667, *et seq.*
46. 12 C.F.R. § 213.8.
47. 12 U.S.C. § 2901, *et seq.*

CRA file)[48] are amended on a regular basis, and generally only the most recent version must be retained. However, under 12 C.F.R. § 228.43, institutions must retain written public comments and the HMDA disclosure statement for each of the past two years in their CRA file.[49]

National Credit Union Administration

The National Credit Union Administration governs the lending practices of federal credit unions, which are specifically prohibited from relying upon real estate appraisals that are based upon consideration of discriminatory factors. The retention period for records required under this regulation are essentially the same as those provided for under Regulation B: 25 months, measured from the time the applicant has received notice from the federal credit union of the action taken on the real estate loan application.[50]

Flood Disaster Protection Act

Under the Flood Disaster Protection Act,[51] Standard Flood Hazard Determination Forms, in either hard copy or electronic form, are to be retained for the period of time that the bank owns the loan.[52] A written notice shall be provided to the borrower when a savings association makes, increases, extends, or renews a loan secured by a building or a mobile home located, or to be located, in a special flood hazard area. The savings association shall retain a record of the receipt of the notices by the borrower for the period of time the savings association owns the loan.[53]

38 I.A.C. § 1075.430 Maintenance of Records (Illinois)

Illinois savings banks are to retain all loan applications and supporting documentation for the life of the loan, whether or not the loan is secured by real estate. Illinois banks are to retain rejected loan applications for 36 months following such rejection. Illinois savings banks must maintain all loan registers permanently.[54]

Retention of Records for Deposit Accounts and Bank Administration

Regulation DD (Truth in Savings Act)

The regulations governing record retention under the Truth in Savings Act ("TISA")[55] are set forth in 12 C.F.R. Part 230. The TISA provides comprehensive guidelines governing consumer savings accounts, including requirements concerning the calculation and disclosure of interest payments made to depositors.

Depository institutions must retain evidence of compliance with TISA for a minimum of two years after the date disclosures are required to be made or action is required to be taken.[56] The retention period may be extended in the event that enforcement proceedings are initiated against the institution.[57]

Regulation CC (Availability of Funds and Collection of Checks)

Regulation CC governs the time frames in which financial institutions may process checking transactions and provide consumers with access to their funds on deposit.[58] Financial institutions must retain records evidencing compliance with Regulation CC for a minimum of two years.[59] If a bank has actual notice that it is being investigated, is subject to an enforcement proceeding, or has been served with notice of an action filed, the bank must retain the records pertaining to the action or proceeding pending final disposition of the matter.[60]

Regulation E (Electronic Funds Transfer Act)

Regulation E establishes the rights, liabilities, and responsibilities of parties to electronic funds transfer (EFT) systems such as automated teller machine transactions, telephone bill payment services, point-of-sale terminal transfers, and preauthorized transfers from consumer accounts (*i.e.*, direct deposit).[61] In general, lending institutions are required to provide consumers with disclosures

48. 12 C.F.R. §§ 563e. 42 and 563e.43.
49. 12 C.F.R. § 228.43(b).
50. 12 C.F.R. § 701.31(c)(5).
51. 42 U.S.C. § 4001, *et seq*.
52. 12 C.F.R. § 572.6(b).
53. 12 C.F.R. § 572.9(d).
54. Ill. Admin. Code tit. 38 § 1075.430.
55. 12 U.S.C. § 4301, *et seq*.
56. 12 C.F.R. § 230.9(c).
57. *Id*.
58. 12 C.F.R. § 229.
59. 12 C.F.R. § 229.21(g).
60. *Id*.
61. 12 C.F.R. § 205.

that identify the terms and conditions of the EFT services and specific transactions.

Records that are evidence of compliance with Regulation E are to be kept for two years from the date the disclosures are to be made. The retention period can be extended with actual notice of an investigation or enforcement proceeding concerning an alleged violation. In that case, records are to be maintained until final disposition of the matter.[62]

Regulation O (Loans to Bank Executive Officers, Directors, and Principal Shareholders)

Regulation O imposes limitations upon a bank's ability to extend credit to identified insiders.[63] The regulation applies to any extension of credit by any federally insured bank to any executive officer, director, or principal shareholder of the bank, of its parent company or of any other subsidiary of its parent company. Regulation O requires that annual surveys and records of all loans to bank insiders be retained for three years.[64]

Regulation S, Subpart B (Funds Transfers and Transmittals of Funds)

Subpart B to Regulation S requires financial institutions to maintain records of domestic and international funds transfers if it is determined that such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.[65] Separate but similar regulations apply to funds transfers by banks and transmittals of funds by non-bank financial institutions.[66] 12 C.F.R. § 219.24 provides that all records that are required to be retained by this regulation shall be retained for five years.[67]

38 I.A.C. § 1075 Maintenance of Corporate Books and Records (Illinois)

The Illinois Administrative Code provides record retention periods with regard to the access of the state banking commissioner to bank subsidiaries' and holding companies' books and records,[68] annual audits of corporate books and records by an independent licensed public accountant,[69] and general maintenance of corporate books and records.[70] For all three types of records, the retention period is seven years.

LITIGATION HOLDS

Developing and implementing a retention policy that maintains records for the minimum retention periods required by law is a first, but not the last, step. A well-designed record retention policy should also take into account the possibility of litigation. When a financial institution is involved in litigation or reasonably expects that litigation may occur, it must put a "litigation hold" on all documents that are relevant to that litigation. A litigation hold, also known as a "preservation order" or "hold order," is a process used by financial institutions and other companies to advise their employees of pending or anticipated litigation and of their obligation to preserve relevant records and to suspend their normal records-destruction policies as they relate to potentially relevant records.

Several recent court decisions demonstrate the severe sanctions companies face for destroying documents during litigation and underscore the need to implement and comply with litigation holds. For example, in *Zubulake v. UBS Warburg, LLC*,[71] the court ruled that a party must take affirmative steps to preserve documents, including: (1) issuing a litigation hold at the outset of the litigation or whenever litigation is reasonably anticipated such that all sources of discoverable information are identified and retained; (2) communicating the litigation hold directly to all key employees; (3) repeating the litigation hold instructions; (4) monitoring compliance with the litigation hold; and (5) instructing all employees to produce potentially relevant documents in their files.[72]

62. 12 C.F.R. § 205.13(b).
63. 12 C.F.R. § 215.
64. 12 C.F.R. §§ 215.8 and 215.22(d).
65. 12 C.F.R. § 219.23.
66. 31 C.F.R. § 103.33.
67. 12 C.F.R. § 219.24.

68. Ill. Admin. Code tit. 38 § 1075.1285.
69. Ill. Admin. Code tit. 38 § 1075.1290.
70. Ill. Admin. Code tit. 38 § 1075.1295.
71. 229 F.R.D. 422 (S.D.N.Y. 2004).
72. *Id.*, at 439 *See also United States v. Philip Morris USA Inc.*, 2004 U.S. Dist. LEXIS 13580 (D.D.C., July 21, 2004) (sanctioning defendant $2.75 million for violating a court order to preserve potentially relevant documents where defendant routinely destroyed e-mails and other electronic records while the

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Developing, implementing and managing an effective litigation hold as part of a company's overall record retention policy is therefore essential. An effective record retention policy minimizes the records retained to the minimum required to meet a financial institution's legal requirements and operational needs. As a result, financial institutions significantly reduce the inconvenience and expense involved in responding to discovery requests in litigation. A record retention policy that includes a litigation hold component also is an invaluable tool to demonstrate a financial institution's good faith and reasonable efforts to comply with its discovery obligations.

Proactive coordination and planning among corporate counsel, outside counsel and IT/IS personnel are necessary to design and implement a litigation hold that is ready to respond effectively when needed. An effective litigation hold should include:

- An enterprise-wide record retention policy that includes a litigation hold component to allow for the immediate suspension of the disposition of hardcopy and electronic records, including e-mail, that may be potentially relevant in pending or reasonably anticipated litigation;

- The identity of employees to be notified of the litigation hold, a standard notice and an acknowledgement procedure for affected employees;

- Specific steps and assignments for preserving back-up tapes, archiving e-mails, and, if necessary, notifying third-party vendors;

- A method for monitoring compliance with any litigation hold in effect;

- Periodic follow-ups with company employees to reiterate the litigation hold instructions, and procedures for notifying new employees of the litigation hold; and

- A procedure for rescinding the litigation hold, notifying necessary third-party vendors, and restoring the record retention schedule for disposition of records.

CONCLUSION

Retention of records demonstrating compliance with federal and state regulations coupled with adequate litigation hold procedures are essential for lending and financial institutions. The failure to implement a legally compliant record retention policy and litigation hold procedures may expose financial institutions to significant risk. ■

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action was pending); *Broccoli v. Echostar Communications, Corp.*, 229 F.R.D. 506, 510-13 (D. Mary. 2005) (sanctioning employer for spoliation of evidence due to its failure to suspend its normal, automatic e-mail and data deletion policy despite being placed on notice of potential litigation).