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by Mike Pagani

Ungoverned text messaging exposes your company to significant risk

- » Employee use of text messaging for business purposes is on the rise despite prohibition policies by organizations in the financial services industry and public sector.
- » Recordkeeping and proper supervisory obligations for electronic communications extend to text messaging if the messages contain business-related content.
- » Most organizations in regulated industries still do not have a proper system in place to reliably capture, supervise, and produce employee text messages.
- » Organizations mistakenly implement separate point products and systems for each electronic communication type instead of using a single, comprehensive archiving platform.
- » Text messaging is highly efficient and boosts productivity for employees, but it must be properly governed to keep its use compliant.

Mike Pagani (mpagani@smarsh.com) is Chief Evangelist at Smarsh in Portland, OR.

Let's face it, texting is simple, concise, and supported by virtually every mobile device, operating system, and wireless carrier. This makes it the go-to preference when an employee needs to communicate with their colleagues, customers, or prospects in a time-crunched, always-connected society.



Pagani

In fact, according to the Pew Research Center, 97% of Americans who own smartphones use them to send or receive text messages,¹ demonstrating that mobile messaging is one of the most widely used forms of electronic communications today.

However, even though texting is easy, reliable, and efficient, if it's used for official business communications, it can create tremendous risk for a company.

Text messages can be problematic

When you consider the countless regulatory, legal, and general risk and brand management

challenges that companies must manage today, you might think email and other official communications using social media accounts and corporate websites are the only content types that need to be archived or actively supervised. Although its use by employees for official company business is often prohibited by organizations, the reality is that text messaging does get used and therefore should be governed the same way as all other channels. Sending text messages between mobile devices is now one of the key ways that employees connect with each other and customers, and these records need to be maintained for completeness.

According to the Smarsh 2017 Electronic Communications Compliance Survey Report, one alarming thing is that companies don't give text messaging the same level of recordkeeping attention as other forms of digital communications.² Many don't have an archiving solution in place for the retention and oversight of text messages, which causes problems and significant risk when facing a regulatory examination, an open records

request, an investigation, an e-discovery event, or litigation.

Compliance, Legal, IT, and risk and reputation professionals across a variety of litigious and regulated industries are now realizing that proactively automating the archiving and supervising of text messages is necessary to mitigate the myriad of potential risks that arise, because their records retention and oversight practices are not keeping pace as employee use increases. They need to meet the challenge of accurately identifying specific sources of additional risk with this form of communication as employees use it for business purposes.

Text messaging without proper governance is a major gap that can no longer be ignored.

The following circumstances have organizations worried about recordkeeping challenges related to text messaging.

Searchable and retrievable format

Text messages must be kept in a searchable format that cannot be tampered with, destroyed, or otherwise disposed of by anyone deliberately or accidentally. Text messages must also be produced in a timely manner for e-discovery, public records requests, and regulatory examinations to meet firm deadlines.

Retention issues

A company may operate a tremendous number of mobile devices through contracts with one or more carriers, and erroneously assume text records are being retained by the carriers. However, carriers typically only keep text messages long enough to ensure delivery

to all parties before deleting them from their systems, and they aren't obliged to provide records of them either. The responsibility for retaining and producing requested text messages lies with the organization that creates the records.

Proper oversight

Organizations can no longer say, "we didn't know" as an excuse to avoid archiving and performing proper oversight of text messages. Several well-publicized cases involving text business messages that have been lost, altered,

or mishandled in the public sector, financial services, and other industries have alerted us all to the fact that these types of messages must have proper oversight. The good news is, organizations that aren't yet retaining

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Following email and social media, SMS/text messaging is perceived as the next biggest source of compliance risk by compliance professionals in the financial services industry. The Smarsh 2017 Electronic Communications Compliance Survey Report revealed that when SMS/text messaging is allowed for business communications, nearly half (48%) of firms said they still do not have an archiving/supervision solution in place. In addition, more than two-thirds (67%) of respondents said they are not confident that they could prove the prohibition of text messaging for business purposes is working.

In the public sector, citizens' expectations have changed in relation to government records transparency and accessibility.

Community members and watchdog groups want to be able to readily access information from government organizations and to hold public officials accountable for their decisions. Text-related public records requests are now a lot more common, and people routinely ask for text messages from agencies alongside emails and social media content. Maintaining text records to comply with open records laws means that an organization must be able to easily secure, retain, search, and retrieve those records. Government offices have increasingly faced lawsuits over text messages if they fail to retain and manage them properly.

The three business risks of text messaging

Now that we have discussed the circumstances that have organizations worried about text message recordkeeping challenges, let's take a closer look at risks and the potential impact they can have on a business.

Legal risk

Text messages can also be requested as part of an e-discovery or litigation event, since texts are often considered relevant, electronically stored information (ESI) within an organization. Many courts compel the production of texts in civil litigation if a mobile device is believed to be the source of relevant text messages—regardless of whether the device and account used is owned by the individual or the business entity.

Although other forms of electronic communication, including email, are relatively straightforward to collect, archive, and extract, text is different. Companies must now figure out how to collect and preserve data from numerous devices, operating systems, and device ownership scenarios. It does not matter if an employee uses a corporate-issued device, a personally owned device, or a combination of the two for business-related texts. All devices and messages they produce are fair

game for discovery in litigation if they contain relevant business communications.

If a company's legal team cannot find, preserve, and produce text data in real time, and respond quickly and completely when asked to search and produce specific text messages for discovery events and litigation, the organization may face legal consequences related to data spoliation, missing records, or failure to produce requested data—not to mention high legal fees.

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Reputational risk

The use of text messaging without the proper monitoring protections in place can also leave a company susceptible to brand problems. Most businesses know the importance of brand reputation, because those with a strong track record tend to attract the best employee talent and are perceived as providing more value to customers. Customers may also be more loyal and likely to recommend a company if it has a trusted reputation.

The supervision of electronic communications is critical for companies that want to find and mitigate any potential reputation risks, even if they aren't directly related to compliance or legal issues. Emails, social media accounts, and corporate websites are often monitored, but text messages must be brought within the compliance perimeter to further reduce risk. Currently, most companies still do not actively monitor business text messages sent and received by their employees despite the increasing usage.

When a company manages its brand by monitoring text messages and other electronic

communications on a regular basis, steps can be taken to quickly assess potential threats and mitigate potential added risks as they occur.

Regulatory risk

In highly regulated industries, text communications need to be retained and supervised. For instance, financial services firms are required by the Securities and Exchange Commission (SEC) and Financial Industry Regulatory Authority (FINRA) to archive and supervise electronic communications used for business purposes, including text messages—and the recent Smarsh survey shows firms are not confident that they can adequately meet those requirements.

Similarly, state governments have seen recent rulings that reinforce how text messages are classified as business records. Essentially, any highly regulated industry that has recordkeeping requirements for business communications must archive electronic messages, no matter what platform they are on—and that includes mobile devices.

Don't get left behind

Archiving, monitoring, and producing text message data needs to become a core part of your overall electronic communications risk-based surveillance preparedness. Organizations of all sizes need to put the right policies in place and implement automated text archiving and supervision systems as soon as possible—before it's too late.

An important component of the chosen solution is the ability to archive employees' text messages directly from mobile carriers for employer-issued devices or use a device-resident application for personally owned, 'bring your own' devices (BYODs) alongside your other electronic communications content. Text messages should be governed the same

way as email, social media, websites, instant messaging, and collaboration platforms—to give compliance, legal, and risk and reputation professionals the ability to supervise and produce these records in one place, with a common user and administration interface. Implementing point products and systems for specific content types leaves gaps and creates separate silos of information. This greatly complicates the process of searching for and producing a complete set of records when the need arises.

When a company has access to these content types with a single comprehensive archiving solution, conversations can be monitored from a broader and more holistic perspective. For instance, conversation threads can be followed easily when a discussion starts on social media, moves to email, and concludes in text messages.

Businesses that recognize the benefits of comprehensive archiving will reap the rewards almost immediately when they implement it to allow their employees to take full advantage of the productivity that text messaging provides while staying compliant and managing the risk. Others that leave text messages out of their electronic communications compliance strategy, or implement multiple point products to try and address it, will lag behind and be playing the odds—at a time when compliance examinations, litigation procedures, and the importance of brand reputation and risk management are more central than ever to business success. It's time to stop ignoring the issue, and take the proper measures to enable your employees to get the full business benefits of using text messaging while making its usage compliant and safe in the process. *

1. Aaron Smith: "U.S. Smartphone Use in 2015" Pew Research Center, April 1, 2015. Available at <http://pewrsr.ch/19JDwMd>.
2. Smarsh report: "The Smarsh 2017 Electronic Communications Compliance Survey Report" Available at <http://bit.ly/2GwhqPE>.