

Electronic Records as Documentary Evidence Standard – CAN/CGSB 72.34- 2005, What this means to You and Your Organization

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Disclaimer

- This Presentation should not be considered as legal advice and is only provided as a resource and starting reference point for further foundation to trustworthy records and research
- All cited references should be verified and updated with your own counsel

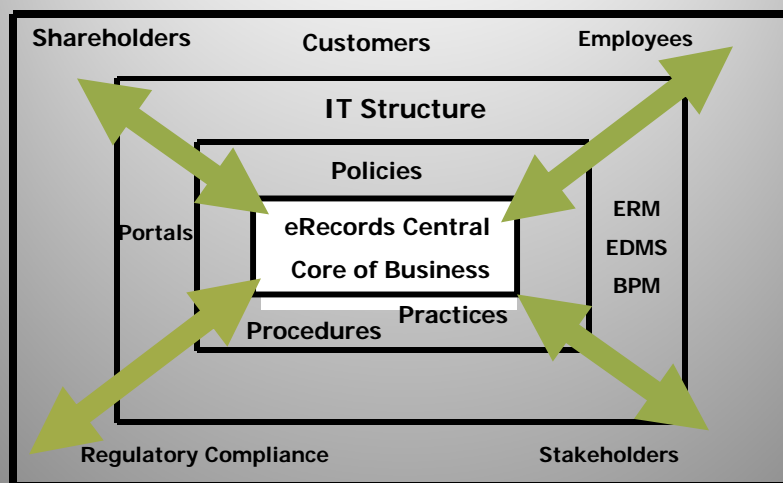


AGENDA

- Understanding the Central Core of eCommerce
- Canada's Evidence Act on: Electronic Documents
- Impact of PIPED Act
- Regulations and Standards
- National Standards
- Main components of National Standards
- Application of Standards
- A Case Study Example
- IT System Integrity Issues
- Approaches to Standards Deployment



eRecords – Central Core of eBusiness Foundation



Admissibility Issues of Electronic Records in Legal Proceedings

- Does Paper = Electronic Record ???



Admissible ???

Prove Integrity, Authenticity, Trust & Reliability of the Electronic Capture Systems and Records



Two Important Assurances from the PIPED Act

1. **Electronic Records are accepted:**

Reliable Computer records including the electronic images (Document images) are equal in law to traditional paper records.

2. **Destruction of original paper records once captured in electronic form:**

Original paper records need not be retained once their electronic form is securely captured with **the exception of specialized laws that may continue to require the retention of original paper records (seek lawyers advice).**



What is Electronic Evidence ? "Definition of Record (Document)"

- A set of recorded information that is recorded or stored on any medium in or by a computer system or other similar device and that can be read, perceived or heard by a person or a computer system or other similar device. It includes a display, printout or other output of that data.

Source: CAN/CGSB 72.34.2005 – Electronic Records as Admissible Evidence and Canada Evidence Act section 31.8



Legal Tests for Acceptable Records

1. "The integrity of the electronic records system;"
2. "Relied upon printouts" of electronic records;
3. "The usual and ordinary course of business;"
4. "The circumstances of the making of the record."



The Relevance of National Standards Sec 31.5 Standards

The following "Standards Rule" was added to the Canada Evidence Act (Sec 31.5) and to most provincial and territorial Evidence Acts:

"Standards may be considered ...for the purpose of determining under any rule of law whether an electronic document is admissible, evidence may be presented [in any legal proceeding] in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored having regard to the type of business, enterprise or endeavour that used, recorded or stored the electronic document and the nature and purpose of the electronic document."



Notable Regulatory Compliances that Demands on Trustworthy Electronic Records Presentment

- **Personal Information Protection and Electronic Documents Act (PIPED Act) (Canada)**
- **Ontario: Red Tape Reduction Act, 1999, c,12 sch. B., in force Jun 30/2000**
- **Alberta Evidence Act, R.S.A 2000, Section 41.1 – 41.8**
- Sarbanes – Oxley Act
- HIPAA (Health Insurance Portability and Accountability Act)
- SEC 17 a-4 (17 CFR 240.17 a-4)
- FDA Part 11 (21 CFR Part 11)
- Electronic Signatures in Global and National Commerce Act (e-Sign Act)
- EU Data Protection Directive (Directive 95/46/EC)
- Data Protection Act (UK)



Notable Standards on Management of Electronic Records

- **Australia** – VERS, Victoria Electronic Records Standard
- **Canada** – CAN/CGSB 72.11.00 Microfilm and Electronic Images as Documentary Evidence
- **Canada** – CAN/CGSB 72.34-2005 Electronic Records as Documentary Evidence
- **ISO 15489** – Records Management Standard
- **UK** - BSI DISC PD 0008 Code of Practice for Legal admissibility of Information Stored under EDMS
- **USA** – DoD 5015.2 Design Criteria For Electronic Records Management Software Application
- **USA – AIIM/ANSI TR 31 -2004** Legal Acceptance of Records Produced By Information Technology Systems



Six Areas of Law applicable to Paper and Electronic Records

1. The laws of evidence applicable to electronic and paper records;
2. National Standards of Canada concerning electronic records;
3. The records requirements of government agencies, such as the Canada Revenue Agency;
4. The electronic commerce legislation;
5. The privacy laws;
6. The guidelines for electronic discovery in legal proceedings.



Different Types of Records - Different Legal Rules

1. Original paper records;
2. Electronic records, *i.e.*, they are created or stored electronically;
3. Microfilmed or imaged records;
4. "Relied upon printouts" of electronic records within the meaning of s. 34.1(6) of the Ontario Evidence Act, and s. 31.2(2) of the Canada Evidence Act, For example;
5. Records created through EDI (electronic data interchange).

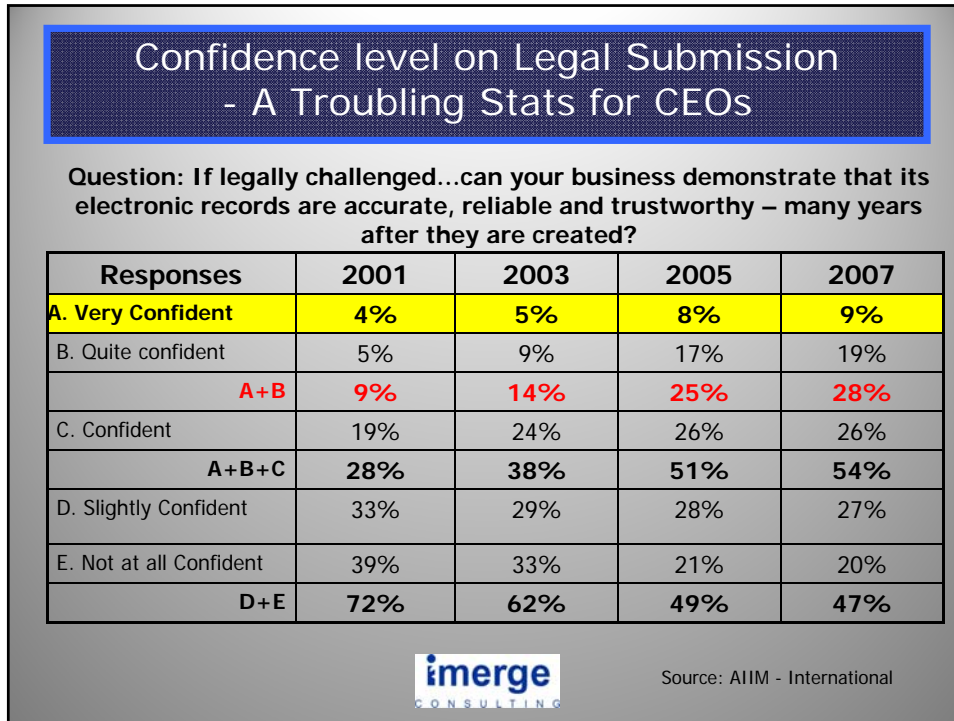



Compliance Tests for the National Standard of Canada,

Electronic Records As Documentary Evidence
CAN/CGSB-72.34-2005

- Using this national standard to show that a records system has the necessary "system integrity" required by the electronic records provisions of the Evidence Acts.
- Section 34.1(8) of the Ontario Evidence Act, and s. 31.5 of the Canada Evidence Act provide for the use of such standards.
- 12 principal groupings of the principles provided by this national standard.





- ### Why Standards Under the Act ?
- Standards makes the Courts consider the reliability of the record-keeping practice
 - Adherence to STANDARDS means good record keeping practices are followed
 - Widely recognized in the industry
 - Compliance to Standards is obligatory - not essential
 - For effective presentation of records - follow industry standards
- 

Legal Effect of the Standard

- The standard is itself not a law, it is a guideline.
- Compliance with the standard is not mandatory.
- Compliance with the standard is a safe harbour, not a guarantee of any legal result.
- The standard is a statement of best practices.
- The Evidence Act says a court “may consider” compliance with the standard



Why businesses need to comply with Electronic Records Standards

1. To maximize the probability of admissibility and weight given to electronic records
2. To stay out of legal trouble
 - Risk of Litigation/Embarrassment
 - Enron, Microsoft, DoD
3. To Prove Compliance with regulations
 - SEC, EPA, PIPEDA, FOIA, HIPAA
4. Because they are forced to
 - Government Mandates/Recommendations
 - USA (DoD), Canada (CAN/CGSB 72.34), UK (PRO), Australia (VERS), EU (MoREQ)
5. To Save \$\$\$
 - Downstream Cost Avoidance
 - Cost of litigation (discovery), cost of major mistakes
6. New opportunities to enhance corporate image



Canada's National Standard on Electronic Images and Records

- CAN/CGSB 72.11.00: Microfilm and Electronic Images as Documentary Evidence (First released in 1993)
- CAN/CGSB 72.34.2005: Electronic Records as Documentary Evidence (New Standard released in 2006)



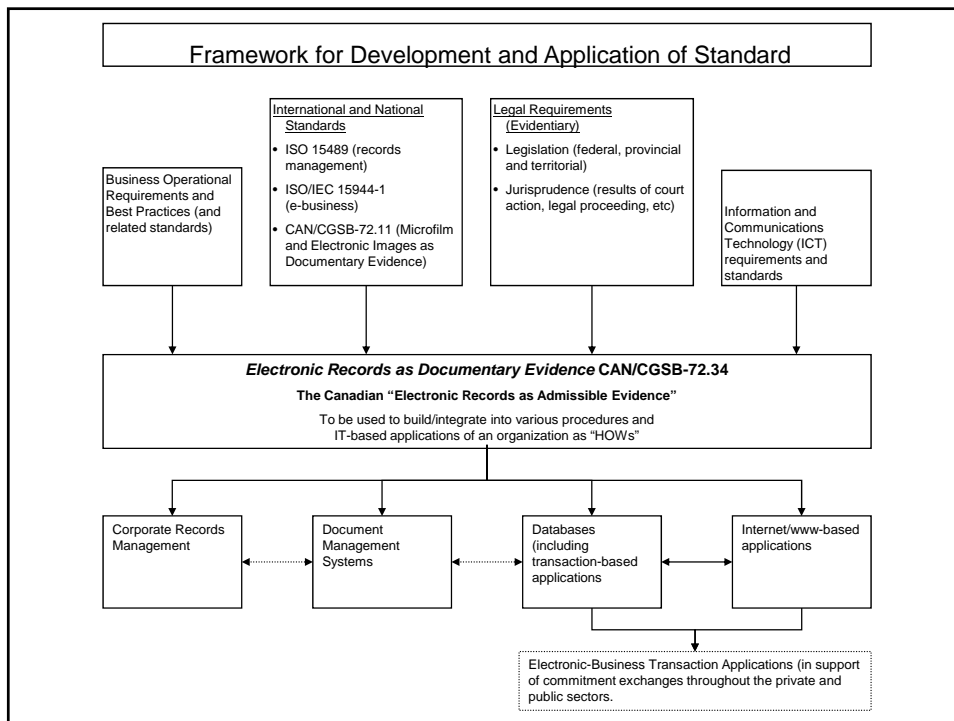
Primary Goal and Objective of e- Evidence Standard

- Ensures the integrity of the computer system are reliable and trustworthy for all intended purposes
- Serve as a consolidated set of rules in support of admissibility of electronic records in accordance with federal and provincial evidentiary rules
- Maximizes the admissibility weight
- Defines best practices for Electronic Records Management (ERM) programs
- Provides guidance and framework for compliance
- Building trust on data integrity
- Building confidence and trust in the minds of customer that their records conform to industry standards
- Legal community reliance on established set of rules



Primary Contents of the Standard

- Management Authorization and Accountability
- Documentation (policies and procedures)
- Accuracy of capture
- Reliability (Authenticity, Integrity, Trustworthiness)
- The use of eRecords Management Program
- Classification, Retention and Disposition process
- Security
- Quality Assurance Program
- Audit Trail
- Training



Example: CRA IC05-1 Circular

- Canada Revenue Agency Circular IC05-1 (June 2005), Electronic Record Keeping endorses the following standards:
 1. CAN/CGSB 72.11.00: Microfilm and Electronic Images as Documentary Evidence
 2. CAN/CGSB 72.34,2005: Electronic Records as Documentary Evidence



What has Changed Now?

- Electronic Document/Content Management Systems are critical for compliance
- Information assets (ex: emails, forms, reports, images, web content, office documents, business records etc) are liable in presentment
- Organizations must demonstrate integrity and authenticity of their records management program
- Corporate policies and procedures are questioned
- Organizations must utilize technologies and practices that aid in the overall governance of their business



Meeting National and Global Needs

- Adoption of ISO 15489 - Records Management Standard to meet global application of e-Commerce records
- Conforms to Canadian – Uniform Electronic Evidence Act requirements
- Provincial Evidence Acts follows National Uniform Electronic Evidence Act



Road Map to Integrity, Reliability and Trustworthiness of your System

- Adoption of new governance rules to build confidence and trust in management of electronic records
- Corporate defensible policies
- Redefine IT strategies on management of systems
- Application of industry standards
- Mandate introduction of electronic records management programs
- Encourage programs to adopt new rules
- Application of quality assurance programs
- Monitor by strict audit trails
- Demonstrate trust and integrity of the organization



Some Applications of National Standard

- Canada Revenue Agency – IC05-1 (2005 June)
 - Electronic Record Keeping circular makes references for the Taxpayer to prepare records in accordance with the National Standard titled: CAN/CGSB 72.34 2005, and CAN/CGSB 72.11.99
- GST Memorandum – IC05-1 (2005 June)
 - Electronic Record Keeping circular makes references to CAN/CGSB 72.34 2005 and CAN/CGSB 72.11.99 standards
- Federal Govt Agency - Under study of a Records Management program against the CAN/CGSB 72.34 Standard
- Commercial sectors: established users of CAN/CGSB 72.11.93 and just beginning to understand CAN/CGSB 72.34 standard



A Case Study Example Ryerson University – Criteria Used

- Compliance Requirement
- Elements of Compliance
- Compliance Report Requirements
- Compliance Report Results
- Compliance Report
- Recommendation for Destruction of Documents
- Statutory and Legal References
- Validation of Electronic Records Management Program with Legal Requirements



Compliance Requirements

Compilation of Responses

- Certification by an independent organization that the Ryerson Document Management & Imaging system complies with Canadian General standards Board (CGSB) standards
 - CGSB 72.11-2000 - *Microfilm and Electronic Images as Documentary Evidence*,
 - CAN/CGSB 72.34-2005 - *Electronic Records as Documentary Evidence*.
- Certificate of Image Authorization – statement from senior management that university relies upon electronic record keeping in the “usual and ordinary course of business.”
- Imaging Policy - *Electronic Imaging and Document Management* (May 17, 2006) approved and issued in accordance with university policy.
- Imaging Procedure manual - Formal procedure entitled “Electronic Images Procedure” draft was August 2, 2006. eVida suggestions were incorporated into **Final** approved procedures.



Elements of Compliance

- Management Authorization & Accountability
 - Usual & ordinary course of business
 - Approval by senior management
- Documentation
 - Sufficiently detailed procedures manual
 - Evident to all parties and followed – communication, training
- Reliability
 - Authenticity (of records & documents)
 - Integrity (of the electronic system)



Compliance Report Requirements

- **Ryerson Wanted**
 - **Independent** organization to verify compliance with CGSB –eVIDA Group.
 - Organization that understood records management, the legal issues as it pertains to document imaging AND assigned individuals with impeccable qualifications and credentials.
 - Formal Letter of Compliance.
 - Detailed report with GAP analysis and recommendations on areas that MUST be strengthened.



Compliance Report Results

- **eVIDA report contained**
 - eVIDA Letter of Compliance - statement that Ryerson's process of converting financial records under the 170 Systems Markview product met national standards:
 - CGSB 72.11-2000 - *Microfilm and Electronic Images as Documentary Evidence.*
 - CGSB 72.34-2005 - *Electronic Records as Documentary Evidence*
 - Certification statement that analysis was made in comparison with the National Standards of Canada (CGSB standards). The current system was examined with a view to converting paper records to electronic images, and maintaining all electronic images and associated bibliographic and biographical records, as authentic, reliable and accurate records.
 - Detailed analysis report (as of October 31, 2006) with specific areas requiring attention in both our electronic and paper records. Provided recommendations that could further help in maintenance of our process to meet the evidentiary process on the management of records.



Compliance Report (eVIDA Group)

- All conversions from paper to images since inception of the 170 MarkView System subjected to a quality assurance program to verify the acceptable quality of images and recording data in accordance with the requirements of the CGSB national standards.
- For converted paper records, such proof would include evidence that the electronic records have reliably captured their source records. This permits the university to maintain only one set of records (electronic) as the primary source of information and evidence, and allow disposal of paper records once fully captured by the 170 MarkView System.
- IT audit policy to include examination of electronic records as per national standards as a further enforcement of control over the management of records. Introduce audit functions to supplement internal quality assurance procedures to verify process is conducted as per university policy and procedures.
- Records Management (Archive) policies should be altered to reflect new electronic records management practices.
- Key documents (Policy & Procedures) needs to be in place to demonstrate the electronic record system integrity, authenticity of the records, and trustworthiness of your process.
- Scanning operators, AP and other document process review staff trained in regards to "system integrity" requirements of management records.



Ryerson Documentation that Supported the Recommendation for Destruction of Documents

- Electronic Imaging: Certification & Recommendations (March 2007)
- Aird & Berlis Legal Opinion: Legality, Enforceability & Admissibility of Imaged documents (June 2005 – Brooks)
- eVIDA Group Study on the Compliance with National Standards of Canada (December 2006)
- Electronic Records as Audit Evidence memo: Richard C. Kennedy, A/Chief Internal Auditor & Asst. Deputy Minister, Ontario (March 2007),



Overview of Support Documentation
for the Recommendation for Destruction of Documents

Continued

- eVIDA Group - Review of Ryerson Financial Record: Certification of Compliance on eRecords of Financial system (Mark View) measured against CGSB Standards,
- eVIDA Group - Consultant Biographical & Qualifications,
- Imaging Policy
- Imaging Procedures manual
- Certificate of Image authorization by senior Management- "usual & ordinary course of business".
- **IN PROCESS** – Alignment of Records Management & Archives policy



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Statutory & Legal References

- Canada Revenue Agency (CRA) – Keeping Records (Canada - RC4409),
- Books & Records Retention/Destruction (Canada – IC78-10R3),
- CGSB 72-11-93 Microfilm & Electronic Images as Documentary Evidence
- CGSB 72-34-2005 Electronic Records as Documentary Evidence
- Personal Information Protection & Electronic Documents Act (PIPEDA – Canada Bill C6)
- Evidence Act (Ontario)
- Canada Evidence Act (Canada)
- Electronic Commerce Act (Ontario – Bill 88 2000)
- Records disposition Authority No. 96/023 – Records Relating to Electronic Imaging,
- Archives Ontario – Information Bulletin #6 Electronic Records systems – Recorded Information Management (RIM) Requirements.



Avoiding the Consequences of *Failure to Comply*

- An inability to take advantage of the two purposes for which the electronic record provisions of the Evidence Acts were created:
 - (a) electronically-produced records are to have equal status in law to original paper records
 - (b) original paper records can be disposed of once their electronic form is stored in a secure records management environment.
- A failure to comply with the National Standards of Canada (particularly *Electronic Records As Documentary Evidence* CAN/CGSB-72.34-2005) will make compliance with the legal tests for acceptable records much more difficult.
- One's records might not be acceptable to the taxing authorities of government such as the Canada Revenue Agency



Avoiding the Consequences of *Failure to Comply*

(continued)

- The unavailability of essential evidence for important litigation.
- An institution's failure to have its records accepted as evidence may quickly result in its records being challenged in many more legal proceedings, which may cripple its ability to enforce the legal foundation upon which it exists.
- An inability to comply with its own records management bylaws or similar policies, with the consequences of such failure.
- Being in the embarrassing position of requiring records from other institutions and persons that comply with the laws and national standards for records and information management, but not being able to do so oneself.



Email

the Electronic "Smoking Gun" of Casualness

- Email, almost always a casual, informal mode of communication, nevertheless creates a record that is more often than not a business record, and is therefore subject to all laws, policies, and procedures applicable to business and government records.

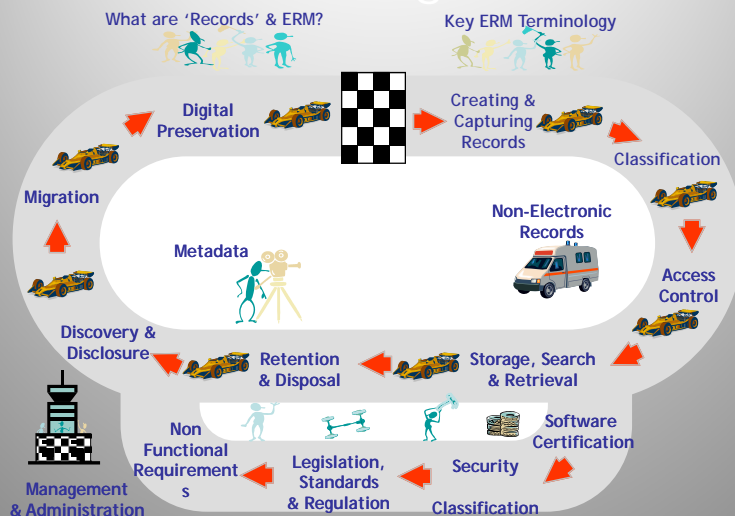


Electronic Records Management Program

- Foundation for managing complex world of electronic records over their life cycle
- Assists in defining proper file classifications
- Controls records retention and destruction criteria
- Provides audit trails
- Provides litigation tool in validating electronic records change-of-evidence
- A requirement for DoD 5015.2 certification
- Must be made part of the business culture supported by policies and processes



AIIM - Racing Track for a Good ERM Program



Approaches to Adoption of the Standard

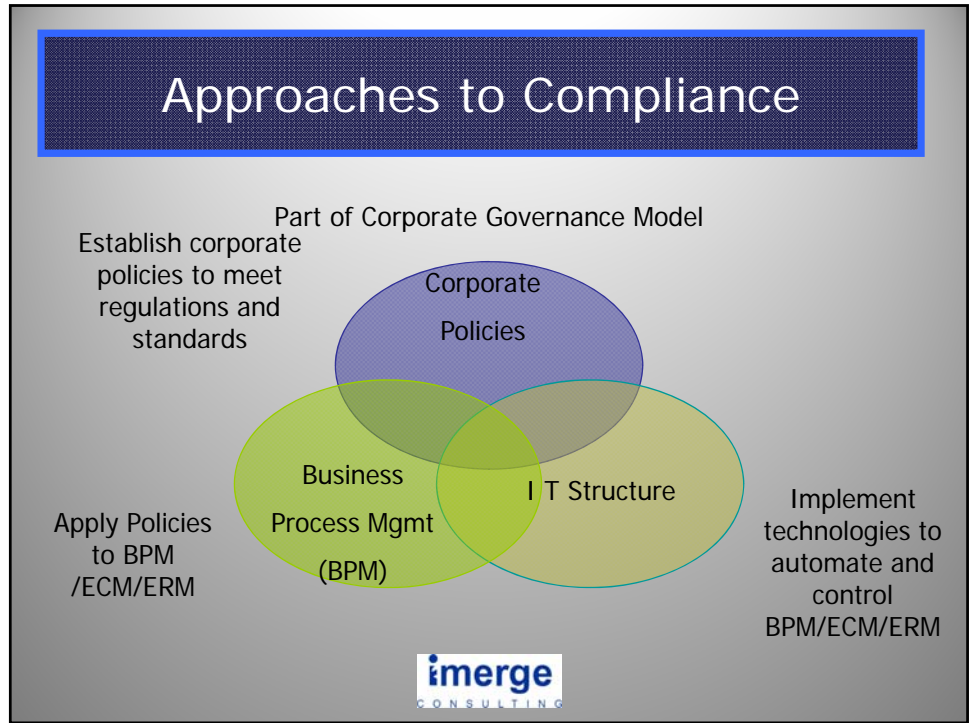
- Make management aware of the need to adopt standard for evidentiary requirements
- Make it a part of your new initiative (e.g.: RFP releases etc.,)
- For existing systems: review compliance to the Standard. Vendors may need to demonstrate that their system conforms to the Standard.
- If required, call on external sources to place procedures to comply.
- Develop your own internal procedures and system to conform to the standard.
- Develop internal communication and training program.



Evidence Standard: Corporate Impact

- Part of Corporate Governance mandate
 - policy development
 - Incorporate process to manage eRecords in accordance with compliance rules
- Compliance and Risk Management
 - ensure stakeholders interest and reduce corporate risk
- Legal department
 - evidentiary and Authenticity process
- IT department
 - meeting industry standards requirement
- Privacy
 - management of records and retention as per Privacy rules





Summary

- e-Records need extra care and control
- Compliance is mandatory and in force
- Most of the Federal agencies and Provincial Govt have now enforced new regulation on treatment of electronic records
- Standard is needed by the User community to prove the authenticity, reliability and integrity of e-System and e-Records
- Severe penalties are now in force
- Seek opportunities to claim adherence to governance rules to enhance corporate image
- It is a GLOBAL requirement to act quickly to meet growing demands of e-Commerce



Thank You

- Further information
 - Electronic Records Management Survey
 - www.aiim.org
 - www.arma.org
 - www.cohasset.com
 - Standard CAN/CGSB 72.34- 2005
 - www.scc.ca
 - www.pwgsc.gc.ca/cgsb
 - http://www.techstreet.com/cgi-bin/detail?product_id=1252845
 - Uniform Electronic Evidence Act
 - www.law.ualberta.ca/alri/ulc/current/eeeact.htm
 - Vigi Gurushanta
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