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FORCED PRESERVATION: ELECTRONIC EVIDENCE AND THE BUSINESS RECORDS HEARSAY EXCEPTION

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To be admissible under the hearsay rule's business records exception set out in Federal Rule of Evidence 803(6), the record in question must have been "kept in the ordinary course of a regularly conducted business activity." Many electronic records, however, remain in a company's files only because the company had a duty to preserve them once it reasonably anticipated litigation or a government subpoena. The company otherwise typically would have deleted those electronically stored data in the regular operation of its business to make room on its burdened servers. This Article argues that such presumptive deletion undermines the trustworthiness and reliability of a business record, and thus the rationale of Rule 803(6). Courts should therefore focus on the unique elements of the creation and preservation of electronic evidence, and consider whether a company truly kept the record at issue in the course of business, or simply because a duty to preserve required it.

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I. INTRODUCTION

There are some things we cannot throw away. Of course, we have items in our lives that we actually want to keep. But, whether it is an unwanted gift from a spouse's parent or a mattress tag, there seem to be just as many things that, for reasons either implicit or explicit, we simply are not allowed to get rid of. We do not want or use them. We keep them because we have to.

The same can be said for the vast majority of electronic data that companies create every day. Many of these data never would have existed decades ago; if the communication happened at all, today's email chain once might have taken the form of an unrecorded phone call or water cooler conversation. And, according to standard company procedures, many of these same data eventually are deleted to make room on overflowing company servers for the rush of new data. But when a company reasonably anticipates a government investigation or civil litigation, for example, it must stop that automatic deletion and abide by its duty to preserve potentially relevant materials.² This Article addresses whether such preserved materials—particularly emails—can be considered “kept in the course of a regularly conducted business activity” under the business records hearsay exception.³

As one district court has noted, “[t]he touchstone of admissibility under Rule 803(6) is reliability.”⁴ Indeed, a key premise of the business records exception is that records that satisfy the rule's requirements are trustworthy because businesses depend on them to conduct their everyday affairs.⁵ But the extent to which businesses rely on certain records, like emails, is much less clear now than it might have been in the past. Similarly, the exponential increase in contemporary businesses' use of written communications also calls into question the “habits of precision” and “systematic checking” that the 1972 advisory committee notes to Rule 803 cite to justify the business records exception.⁶

Technology is the main reason for this evolution. Because of technological advances like email, mobile devices, and VPN access from a home computer to a business network, employees now create many more work-related communications than in the past. And the vast majority of these electronic written communications are far less formal and “precise” than their hard copy analogues. On the back end, technology is the

² See, e.g., *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422, 431 (S.D.N.Y. 2004); 18 U.S.C. § 1519 (2002) (punishing destruction of documents or other materials in “contemplation” of federal investigation).

³ Fed. R. Evid. 803(6).

⁴ *Giles v. Rhodes*, No. 94 Civ. 6385 (CSH), 2000 U.S. Dist. LEXIS 13980, at *25 (S.D.N.Y. Sept. 27, 2000).

⁵ See generally Fed. R. Evid. 803 advisory committee's note (explaining that business records may possess “unusual reliability” in part because businesses actually rely on them).

⁶ See *id.*

reason why businesses initially preserve many electronic records—in email inboxes, “sent items” folders, and on backup tapes—that they otherwise would have tossed away, or never created in the first place. The problem for many lawyers is that technology is also the reason why these records typically disappear after a relatively short period of time.

The duty to preserve evidence is more important now than ever before because in just about every circumstance a litigator now is working against the clock to prevent his or her client’s electronic records from being deleted. Because businesses create so many records, they typically automatically delete records after a set period of time to preserve space on their servers. This automatic deletion runs headlong into the duty to preserve evidence, which attaches “[o]nce a party reasonably anticipates litigation.”⁷ Thus, one of the first things a lawyer must do when his or her client anticipates litigation is to suspend the client’s “routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”⁸ This duty to preserve evidence prevents the regular deletion of a business’s electronic records so they can be subject to discovery and use at trial.

Many litigants argue that such records are admissible under the Rule 803(6) business records hearsay exception, which, again, is premised on the purported reliability of records created and kept in the course of the business’s affairs. But if a business had no intention of keeping a record, and thus relying on it in the future, then any presumption of its reliability is compromised. The existence of the record in the company’s files in that instance is attributable to litigation activity, not “business activity.” Of course, the proponent of the evidence can offer reasons why the record still might satisfy Rule 803(6)’s requirements, and a different hearsay exception might make the record admissible. Nevertheless, the impact of preservation obligations on the continued existence of “business records” is an important consideration for a more faithful application of the rule.

Unfortunately, no court has addressed the impact of the duty to preserve evidence on Rule 803(6)’s requirements. This is not for lack of opportunity. According to one district court, “[t]he business record exception is one of the hearsay exceptions most discussed by courts when ruling on the admissibility of electronic evidence.”⁹ These decisions “demonstrate a continuum running from cases where the court was very lenient in admitting electronic business records, without demanding analysis, to those in which the court took a very demanding approach and scrupulously analyzed every element of the exception, and excluded evidence when all were not met.”¹⁰ Even the courts that have taken the most demanding approach, however, have not focused on the role of a

⁷ *Zubulake v. UBS Warburg, LLC (Zubulake IV)*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

⁸ *Id.*

⁹ *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 572 (D. Md. 2007).

¹⁰ *Id.*

company's duty to preserve electronically stored data on a given record's presence in the company files.

The courts that have most scrutinized the admissibility of electronic evidence, and of emails in particular, under Rule 803(6) have focused on the circumstances of the record's creation. A major issue, for example, has been the employee's motivation in preparing the record. That is, did the employee create the record because he or she thought it was worth doing or because business policy dictated it? One district court summarized the state of the law on this contested issue as follows: "[i]t is not enough that a particular employee regularly makes and keeps the records as his or her own regular practice because it must be the regular practice of the business (*i.e.*, the 'regularly conducted activity') to make and keep the record at issue."¹¹

This analysis traces back to the touchstone issue of "reliability" underlying Rule 803(6). As another district court noted, "[c]ourts admit hearsay statements which are grouped under Fed. R. Evid. 803 because of the supposed reliability of the out of court statements themselves," and "[o]ne guarantee of that reliability is that the record was made in the course of a routine business practice."¹² By contrast, according to one court, "documents that are created solely at the author's discretion raise motivational concerns and lack the reliability and trustworthiness that business records are ordinarily assumed to have."¹³

Regardless of why someone originally created the record, however, none of these cases has discussed the reliability of a record that, but for the litigation, the business would have permanently deleted in the normal course of business. In many cases, the document offered as an admissible business record exists not because it was the employee's practice to keep the record, nor even because it was the business's practice to keep the record. Rather, the business saved the record from automatic deletion only because someone else threatened to sue, which triggered the business's duty to preserve evidence. This non-business reason for keeping a record that the business otherwise would permanently delete undermines the record's reliability and calls into question whether the business kept it in the course of a regularly conducted business activity. No court has addressed this issue, and thus even the most stringent applications of Rule 803(6) have been far too broad.

The overbroad application of the business records exception makes the exception unique in that the government/plaintiff is as responsible for the existence of a given record as the person who originally drafted it. By bringing suit, or even threatening to do so, a litigant can impose on another party a duty to preserve electronically stored

¹¹ *Rambus, Inc. v. Infineon Techs. AG*, 348 F. Supp. 2d 698, 705 (E.D. Va. 2004).

¹² *United States v. Ferber*, 966 F. Supp. 90, 98 (D. Mass. 1997) (citing *United States v. Trenkler*, 61 F.3d 45, 58 (1st Cir. 1995) and *Kassel v. Gannett Co.*, 875 F.2d 935, 945 (1st Cir. 1989)).

¹³ *Westfed Holdings, Inc. v. United States*, 55 Fed. Cl. 544, 566 (2003), *rev'd in part on other grounds*, 407 F.3d 1352 (Fed. Cir. 2005).

materials that most corporate computer systems would otherwise erase. Such records should not be considered to have been “kept in the course of a regularly conducted business activity” when the ordinary operation of that business would be to delete them forever.

This issue is particularly important in white collar actions against individuals, given the government’s typical incentive to advocate for the broadest possible reading of the business records exception. In an action between two companies, each side could benefit from a loose reading of the rule to admit the other side’s harmful emails. In a government action, however, the document production is largely one-sided, although the importance of documents from third parties might impact the equation in certain cases. Often, it is in the government’s interest to pursue a broadly applicable reading of Rule 803(6) because the government has little to lose; such an approach merely sweeps in additional incriminating emails that otherwise might not be admissible. For example, the government could use emails authored by mid-level employees against certain targeted executives.

Part I of this Article provides general background on the business records exception and its underlying rationale that business records are trustworthy and reliable. Part II addresses the Federal Rules’ recognition of the routine deletion of information in the ordinary use of computer systems, and the duty to preserve such materials that attaches in both criminal and civil actions. Part III discusses courts’ application of the business records exception, particularly in the context of emails, and the courts’ limited analysis of the “kept in the course of a regularly conducted business activity” prong of Rule 803(6). Finally, Part IV concludes that a stricter application of the business records exception is necessary based on the text of Rule 803(6) and the inherently diminished reliability of records that a business would automatically delete absent litigation.

II. BACKGROUND OF THE RULE 803(6) BUSINESS RECORDS HEARSAY EXCEPTION

The Federal Rules of Evidence define “hearsay” as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”¹⁴ One frequently-invoked exception to this rule is Federal Rule of Evidence 803(6), often referred to as the “business records exception.” Under Rule 803(6), the hearsay rule does not exclude from admission into evidence:

[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the

¹⁴ Fed. R. Evid. 801(c).

source of information or the method or circumstances of preparation indicate lack of trustworthiness.¹⁵

Broken into more manageable elements, one district court has stated:

[T]o admit a document under the business records exception to the hearsay rule, the party seeking admission must lay a foundation through the testimony of a “custodian” or other “qualified witness” that: 1) the declarant in the records had knowledge to make accurate statements; 2) the record was made at the time of the event recorded; 3) it was the regular practice of the business to make the record; and 4) the record was kept in the regular course of business.¹⁶

The business records exception is rooted in the view that records that satisfy its requirements generally are trustworthy. They are considered trustworthy because, as one court of appeals has noted, “businesses depend on such records to conduct their own affairs; accordingly, the employees who generate them have a strong motive to be accurate and none to be deceitful.”¹⁷ The 1972 advisory committee notes to Rule 803 likewise describe the rationale underlying the business records exception as:

the element of unusual reliability . . . said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.¹⁸

Today, though, a company’s duty to preserve emails in anticipation of litigation calls into question the reason a document remains in the company’s files, and thus its trustworthiness and reliability.

¹⁵ Fed. R. Evid. 803(6).

¹⁶ *United States v. Adibe*, No. 08-42-JJF, 2009 U.S. Dist. LEXIS 80315, at *4-5 (D. Del. Sept. 3, 2009) (citing *United States v. Console*, 13 F.3d 641, 657 (3d Cir. 1993)).

¹⁷ *Certain Underwriters at Lloyd’s, London v. Sinkovich*, 232 F.3d 200, 205 (4th Cir. 2000) (quoting *United States v. Blackburn*, 992 F.2d 666, 670 (7th Cir.1993)) (noting also that “routine and habitual patterns of creation” contribute to reliability).

¹⁸ Fed. R. Evid. 803 advisory committee’s note; *see also New York v. Microsoft Corp.*, No. 98-1233 (CKK), 2002 U.S. Dist. LEXIS 7683, at *2 (D.D.C. Apr. 12, 2002) (“The justification for this exception is that business records have a high degree of accuracy because the nation’s business demands it, because the records are customarily checked for correctness, and because recordkeepers are trained in habits of precision.”) (quoting *U.S. v. Baker*, 693 F.2d 183, 188 (D.C. Cir. 1982)).

III. THE DUTY TO PRESERVE ELECTRONIC EVIDENCE

Companies are growing more and more dependent on electronically stored data rather than paper records. This increasing reliance on electronic records has created a host of complications for lawyers because companies generally delete these records as a matter of course.¹⁹ Thus, a lawyer must determine exactly when a duty to preserve electronically stored data is triggered.

There is limited case law or statutory law that addresses this issue in the criminal context. The Sarbanes-Oxley Act of 2002 is one rare example; it imposes a duty to preserve records even before the government files an action, when it is merely in “contemplation” of that action.²⁰ A similar principle applies in civil litigation, where the case law is much more developed.

Civil cases addressing electronically stored data preservation generally follow the lead of Judge Shira Scheindlin’s seminal orders in *Zubulake v. UBS Warburg, LLC*.²¹ In that case, equities trader Laura Zubulake sued her former employer, UBS, for, among other things, gender discrimination.²² Numerous discovery issues arose, and Judge Scheindlin comprehensively analyzed such things as when the duty to preserve electronic evidence arises and which party should bear the costs of production associated with various types of electronically stored data.²³ According to Judge Scheindlin, “[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of routine documents.”²⁴ In other cases involving electronically stored data, and in cases involving the preservation of data generally, this is the required practice.²⁵

¹⁹ See generally Fed. R. Civ. P. 37(f) advisory committee’s note (2006) (recodified as Fed. R. Civ. P. 36(e), April 30, 2007) (noting that “[t]he ‘routine operation’ of computer systems includes the alteration and overwriting of information, often without the operator’s specific direction or awareness, a feature with no direct counterpart in hard-copy documents,” and that “[s]uch features are essential to the operation of electronic information systems”).

²⁰ 18 U.S.C. § 1519 (2002).

²¹ *Zubulake v. UBS Warburg LLC (Zubulake I)*, 217 F.R.D. 309 (S.D.N.Y. 2003).

²² *Zubulake v. Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 215 (S.D.N.Y. 2003).

²³ See *Zubulake v. Warburg LLC (Zubulake I)*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003); *Zubulake v. Warburg LLC (Zubulake V)*, 229 F.R.D. 422, 431 (S.D.N.Y. 2004).

²⁴ *Zubulake IV*, 220 F.R.D. at 218.

²⁵ See, e.g., *Nucor Corp. v. Bell*, 251 F.R.D. 191, 195 (D.S.C. 2008) (“[A] party has a duty to preserve evidence during litigation and at any time ‘before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.’”) (quoting *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001)).

Of course, the obligation to preserve documents in the event of impending litigation is not new; this duty existed long before the advent of electronically stored data.²⁶ But a few key elements of data preservation are new. For example, email has made written communication the dominant mode of interaction between most workers, even in informal work situations. Blackberries and instant messaging, which allow workers to communicate even when away from their desks, are just a few of the technological advancements expanding the realm of discoverable written communications. These communications have not simply put into writing the “chit-chat that would be expected to occur on the phone or during a visit to a colleague’s office.”²⁷ They have facilitated, and thereby increased, necessary communications in the course of business. As a result, the number of communications that might be “business records” has grown exponentially.

Another important development relates to *how* businesses keep their records. In the past, there was a level of formality associated with written communications that made it more likely that any written communication subject to preservation in anticipation of litigation would have been retained anyway as part of the business’s affairs. In a general sense, if a communication was important, it was written down. If it was important enough to be written down, it was maintained in the company’s hard copy files. Today, however, electronic communications occur with far more frequency and informality; businesses record them automatically (and at least initially maintain them) upon sending or receipt no matter how “important” these communications are. In essence, communication and saving written material to company files have combined into one act.

This highlights another major difference between today’s document preservation regime and that of the past. In today’s electronic world, there is “routine alteration and deletion of information that attends ordinary use,” something the Advisory Committee Notes to Federal Rule of Civil Procedure 37 describe as a “distinctive feature of computer operations.”²⁸ Now it is common for at least one of the parties in litigation to have an email system that “is programmed with an automatic deletion feature that deletes any email after it has been in existence for sixty days.”²⁹ Even “backup tapes” that capture

²⁶ See, e.g., *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991) (“[T]he obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced.”); *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 551 (D. Minn. 1989) (sanctioning defendant for destroying documents despite knowledge of “impending” class action suit).

²⁷ *Westfed Holdings, Inc. v. United States*, 55 Fed. Cl. 544, 566 (2003), *rev’d in part on other grounds*, 407 F.3d 1352 (Fed. Cir. 2005).

²⁸ Fed. R. Civ. P. 36(f) advisory committee’s note (2006) (recodified as Fed. R. Civ. P. 36(e), April 30, 2007).

²⁹ *Disability Rights Council v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139, 146 (D.D.C. 2007); see also, *Philip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1181 (D. Utah 2009) (“ASUSTeK informs its employees that any email not downloaded to an employee’s

these data may eventually be subjected to deletion in the ordinary course of business.³⁰ So while the company effectively sends everything to the files upon its creation, this overbroad recordkeeping balances itself out over time through the process of automatic deletion—that is, unless a duty to preserve those records attaches because of a threatened subpoena or possible litigation. In that case, the first step of presumptive record keeping is frozen in place, and the balancing out of deletion never happens.

Thus, by the time of trial, the notion that a company truly kept most of its electronic records “in the course of a regularly conducted business activity” is illusory. Companies generally keep electronic records permanently either by physically printing documents and sending them to a document storage facility or through the process of electronic archival. Even if a company implements an email retention policy designed to protect certain email folders from automatic deletion, that pre-set retention policy is rarely, if ever, revised, and often requires users to actually place emails in the correct folders. If the individual/company does not take these steps, many records will eventually delete as a matter of course.³¹

As one district court recently noted, some courts are “content to view electronic business records in the same light as traditional ‘hard copy’ records, and require only a rudimentary foundation.”³² Other courts have engaged in a more “demanding analysis” when applying Rule 803(6).³³ Given that, in an email-driven world, there are now more written communications than ever before, and that businesses now retain these records differently from the past in both the short and long terms, the more rigorous approach seems necessary. However, even courts applying the most demanding analysis have not addressed the impact of the duty to preserve electronically stored data on the application of Rule 803(6).

computer are automatically overwritten to make room for additional email storage on ASUSTeK’s servers.”).

³⁰ See *Zubulake v. UBS Warburg LLC (Zubulake I)*, 217 F.R.D. 309, 314 (“Nightly backup tapes were kept for twenty working days, weekly tapes for one year, and monthly tapes for three years. After the relevant time period elapsed, the tapes were recycled.”).

³¹ The use of the record might impact the analysis of whether it is a business record pursuant to Rule 803(6). For instance, a business may rely on a given type of record in the ordinary course of its business, but only for a relatively short period of time that falls within the window of time prior to automatic deletion. In such a case, even if the record would disappear after a certain number of days, weeks, or months, one might argue that the record satisfies Rule 803(6).

³² *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 574 (D. Md. 2007).

³³ *Id.* at 573.

IV. APPLICATION OF THE BUSINESS RECORDS EXCEPTION

As noted above, “[t]he touchstone of admissibility under Rule 803(6) is reliability.”³⁴ Under certain circumstances, however, the premise of reliability is undermined, and the business records exception does not apply. For example, many cases address the situation where someone created a record in anticipation of litigation. Courts generally have held that such records do not satisfy Rule 803(6) and that, unless another exception applies, they are inadmissible hearsay. In *Echo Acceptance Corp. v. Echosphere Corp.*,³⁵ for example, the Tenth Circuit court affirmed the lower court’s refusal to admit certain letters drafted by lawyers as business records, noting that “[i]t is well established that one who prepares a document in anticipation of litigation is not acting in the regular course of business.”³⁶ According to the court, “motivation of a record’s author is relevant to admissibility.”³⁷ The self-serving motivation of the record preparer undermines the record’s trustworthiness.³⁸

While these cases address the circumstances of the creation of the record at issue, far fewer cases analyze the circumstances of how and why the record was “kept.” As noted above, Rule 803(6) requires that the record be “kept in the course of a regularly conducted business activity.”³⁹ According to one district court, “[t]his requirement reflects the very basic principle that the mere presence of a document . . . in the retained files of a business entity do[es] not by itself qualify that document as a record of regularly

³⁴ *Giles v. Rhodes*, No. 94 Civ. 6385 (CSH), 2000 U.S. Dist. LEXIS 13980, at *25 (S.D.N.Y. Sept. 27, 2000).

³⁵ *Echo Acceptance Corp. v. Household Retail Services, Inc.*, 267 F.3d 1068 (10th Cir. 2001).

³⁶ *Id.* at 1091 (quoting *Timberlake Const. Co. v. U.S. Fid. & Guar. Co.*, 71 F.3d 335, 342 (10th Cir. 1995)); see also *Falco v. Alpha Affiliates, Inc.*, No. 97-494 MMS, 2000 U.S. Dist. LEXIS 7480, at *47 (D. Del. Feb. 9, 2000) (noting that “[o]ne of the requirements of Rule 803(6) is that the records be prepared in the ordinary course of business,” and that “[r]ecords that are prepared in anticipation of litigation do not fulfill this requirement”).

³⁷ *Echo Acceptance*, 267 F.3d at 1091.

³⁸ See, e.g., *Thakore v. Univ. Machine, Inc.*, No. 05 C 5262, 2009 U.S. Dist. LEXIS 88895, at *50 (N.D. Ill. Sept. 25, 2009) (“The Seventh Circuit has repeatedly held that reports prepared with an eye toward litigation, even though made in the course of the business’s operations, are not admissible under Rule 803(6).”); see also, e.g., *Giles*, 2000 U.S. Dist. LEXIS 13980, at *25 (“[C]ourts have consistently declined to admit incident reports prepared by prison guards involved in altercations with prisoners because of the self-serving nature of such reports in light of the writer’s inherent motivation to be less than accurate.”).

³⁹ Fed. R. Evid. 803(6).

conducted activity.”⁴⁰ Rather, the particular record “must be kept as part of the usual course of business.”⁴¹ As the Ninth Circuit explained, “a record is considered as having been kept in the regular course of business when it is made pursuant to established procedures for the routine and timely making and preserving of business records, and is relied upon by the business in the performance of its functions.”⁴² But a company cannot rely on a record that it automatically deletes, which calls into question the reliability of such a record in the first place. Where a business keeps a record solely because of impending litigation, and not as part of the everyday operation of that business, the business records exception should not apply.

Today’s preservation issues apply to all electronically stored data, yet for the reasons discussed above, emails in particular are a uniquely modern form of business record and thus represent an even more compelling problem. Among other things, they are written differently, sent differently, and saved differently than their hard copy predecessors. Few cases specifically have addressed the admissibility of emails under the Rule 803(6) business records exception. Those that have generally have focused on the motivation for and content of a given communication. Where, if at all, courts have addressed the reasons why a given business ultimately “maintained” a particular email, they have recognized only two possibilities: it was the employee’s choice or it was the business’s policy to keep it. No case has addressed the possibility that it was the opposing litigant’s decision to keep the email by triggering a duty of preservation.

In *New York v. Microsoft Corp.*, for example, the plaintiffs—numerous state attorneys general—argued that an email written by Rob Glaser of RealNetworks recounting a meeting between him and an employee of defendant Microsoft was admissible as a business record.⁴³ The court held that “[w]hile Mr. Glaser’s email may have been ‘kept in the course’ of RealNetworks[?] regularly conducted business activity, Plaintiffs have not, on the present record, established that it was the ‘regular practice’ of RealNetworks employees to write and maintain such emails.”⁴⁴ Thus, the court declined, “on this sparse record,” to treat the email account of the meeting as “a trustworthy business record.”⁴⁵

⁴⁰ *Rambus, Inc. v. Infineon Techs. AG*, 348 F. Supp. 2d 698, 704 (E.D. Va. 2004) (quotations omitted) (analyzing Federal Rule of Evidence 902(11), but noting that “Rule 902(11) contains the same requirements, and almost the same wording, as Rule 803(6),” and that “decisions explaining the parallel provisions of Rule 803(6) are helpful in resolving [issues under Rule 902(11)]”).

⁴¹ *Id.*

⁴² *United States v. Foster*, 711 F.2d 871, 882 (9th Cir. 1983).

⁴³ *New York v. Microsoft Corp.*, No. 98-1233 (CKK), 2002 U.S. Dist. LEXIS 7683, at *6 (D.D.C. Apr. 12, 2002).

⁴⁴ *Id.* at *9.

⁴⁵ *Id.*

The lack of evidence showing that company employees followed a routine practice of preparing accounts of their meetings formed the underlying basis for the *Microsoft* court's ruling. The court started its analysis of Rule 803(6) with the observation that "[t]he justification for this exception is that business records have a high degree of accuracy because the nation's business demands it, because the records are customarily checked for correctness, and because record keepers are trained in habits of precision."⁴⁶ Absent evidence that RealNetworks had a policy to prepare accounts of meetings like the one in the email at issue, the court questioned whether an isolated account could be considered trustworthy and borne of "precision."

According to the court, "the complete lack of information regarding the composition and maintenance of such emails invokes the final clause of Rule 803(6), which permits exclusion of the evidence where 'the method or circumstances of preparation indicate a lack of trustworthiness.'"⁴⁷ Supporting this statement, the court added in a parenthetical that "[a]bsence of routineness raises a lack of motivation to be accurate."⁴⁸ Thus, the court focused on the content of the email itself, and on the supposed lack of trustworthiness of a record prepared at the employee's discretion.

The *Microsoft* court's conclusion that Glaser's email was "kept" in the course of business appears to beg the question. Certainly, there is no analysis of whether this was true, as opposed to a logical inference taken from the existence of the email in his company's files. In any event, the court rejected the argument that the email was a business record. Nevertheless, its detailed consideration of the "trustworthiness" of that and other emails appears incomplete because the court focused mainly on how and why someone created each record. According to the court, "[p]laintiffs have not established the requisite foundation that the multiple authors of these emails each composed their portion of the document in the course of regularly conducted business activity and that it was the regular practice of RealNetworks to compose such email correspondence."⁴⁹ But the more basic question of why the records were kept might have provided resolution for this issue without any need for analyzing the specific content of each email. Where litigants seek to introduce numerous emails as business records, such an approach could more efficiently (and correctly) decide the admissibility issue.

As in *Microsoft*, the court in *Westfed Holdings, Inc. v. United States* questioned the reliability of emails created at an employee's discretion.⁵⁰ There, the Court of Federal Claims set out, in an "Evidence Appendix," the substance of its oral orders on

⁴⁶ *Id.* at *8 (quotations omitted).

⁴⁷ *Id.* (quoting Fed. R. Evid. 803(6)).

⁴⁸ *Id.* (quoting advisory committee's note to Fed. R. Evid. 803(6)).

⁴⁹ *New York v. Microsoft Corp.*, No. 98-1233 (CKK), 2002 U.S. Dist. LEXIS 7683, at *19 (D.D.C. Apr. 12, 2002); *see also id.* ("Moreover, the multiple authors and forwarded nature of this series of emails undercuts the reliability of the information contained therein.").

⁵⁰ 55 Fed. Cl. 544, 566 (Ct. of Fed. Claims 2003), *rev'd in part on other grounds*, 407 F.3d 1352 (Fed. Cir. 2005).

various exhibits.⁵¹ In the section of that appendix addressing “E-mails, Non-recurring Letters and Internal Memoranda,” the court noted that “documents that are created solely at the author’s discretion raise motivational concerns and lack the reliability and trustworthiness that business records are ordinarily assumed to have.”⁵² According to the court, “e-mails recounting telephone or hallway conversations or offering curbside opinions are too informal to satisfy the business records exception to hearsay.”⁵³ They “do not have the formality of business purpose that appears to have been contemplated by Fed. R. Evid. 803(6),” and the court thus ruled them inadmissible “because of their casual nature and because of the lack of obligation regularly to record meeting impressions or conversations.”⁵⁴ Once again, the court’s application of Rule 803(6) to emails hinged almost exclusively on the circumstances of the records’ creation.

The district court in *United States v. Ferber* also refused to admit certain emails as business records under Rule 803(6) largely due to concerns about the reliability of the emails that were not routinely prepared as part of the business’s operations.⁵⁵ In that opinion, the court considered the admissibility of an email from a Merrill Lynch employee to his superior in which he recounted a conversation with financial advisor/investment banker Mark Ferber where Ferber “inculcated himself.”⁵⁶ The government first argued that the email message was admissible as a business record pursuant to Rule 803(6).⁵⁷ The court rejected this argument.⁵⁸ As a threshold matter, the court noted that “[c]ourts admit hearsay statements which are grouped under Fed. R. Evid. 803 because of the supposed reliability of the out of court statements themselves.”⁵⁹ The court then added that “[o]ne guarantee of that reliability is that the record was made in the course of a routine business practice.”⁶⁰

⁵¹ *Id.* at 563.

⁵² *Id.* at 566.

⁵³ *Id.*

⁵⁴ *Id.*; see also *The Monotype Corp. PLC v. International Typeface Corp.*, 43 F.3d 443, 450 (9th Cir. 1994) (“E-mail is an ongoing electronic message and retrieval system whereas an electronic inventory recording system is a regular, systematic function of a bookkeeper prepared in the course of business.”).

⁵⁵ *United States v. Ferber*, 966 F. Supp. 90, 98 (D. Mass. 1997).

⁵⁶ *Id.* at 98.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

In *Ferber*, however, “while it may have been [the Merrill Lynch employee’s] routine business practice to make such records, there was no sufficient evidence that Merrill Lynch required such records to be maintained.”⁶¹ According to the court, “[t]his was fatal to the government’s proffer” of the email as a business record “because, in order for a document to be admitted as a business record, there must be some evidence of a business duty to make and regularly maintain records of this type.”⁶² Because the Merrill Lynch employee “was under no business duty to make and maintain these E-mail messages, and the evidence failed to show that Merrill Lynch itself followed such a routine,” the particular email at issue “did not qualify as a business record pursuant to Fed. R. Evid. 803(6).”⁶³ “Were it otherwise,” wrote the court, “virtually any document found in the files of a business which pertained in any way to the functioning of that business would be admitted willy-nilly as a business record. This is not the law.”⁶⁴

Perhaps because the *Ferber* court decided to admit the Merrill Lynch email as a present sense impression under Rule 803(1),⁶⁵ thus rendering the discussion of Rule 803(6) dicta, the court’s analysis of the business records exception is somewhat nebulous. The court did not list the elements necessary to satisfy the business records exception, and it is unclear what particular element or elements it was referring to in its analysis of whether the Merrill Lynch employee was under a business duty to “make and maintain” the emails at issue. The reference to “maintain” might have been a reference to Rule 803(6)’s requirement that the record be “kept in the course of a regularly conducted business activity.”⁶⁶ Even if it was, the court did not discuss any non-business reasons why the emails might have been maintained—for example, the attachment of a duty to preserve rather than employee choice or corporate policy. However, based on the court’s statement that “[o]ne guarantee of that reliability is that the record was *made* in the course of a routine business practice,”⁶⁷ it is more likely that the court was not focused on the “kept” prong of Rule 803(6) at all. Rather, as in *Microsoft*, the *Ferber* court mainly seemed to want to distinguish a record that an employee simply decided to create from one that corporate policy dictated that he or she create.

Indeed, that is how the district court in *Rambus, Inc. v. Infineon Technologies AG*⁶⁸ interpreted the *Ferber* court’s holding. In *Rambus*, the plaintiff claimed that certain

⁶¹ *United States v. Ferber*, 966 F. Supp. 90, 98 (D. Mass. 1997).

⁶² *Id.*

⁶³ *Id.* at 99.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Fed. R. Evid. 803(6).

⁶⁷ *Ferber*, 966 F. Supp. at 98 (emphasis added).

⁶⁸ 348 F. Supp. 2d 698 (E.D. Va. 2004).

documents were business records under Rule 803(6) and “offered purportedly authenticating declarations under Rule 902(11) in an effort to have them admitted.”⁶⁹ The court noted that “Rule 902(11) contains the same requirements, and almost the same wording, as Rule 803(6),” and thus that “decisions explaining the parallel provisions of Rule 803(6) are helpful in resolving the issues here presented.”⁷⁰ *Ferber* was one such decision on which the *Rambus* court relied to interpret Rule 902(11).⁷¹ The *Rambus* court cited the case when holding that “it is not enough that a particular employee regularly makes and keeps the records as his or her own regular practice because it must be the regular practice of the business (*e.g.* the ‘regularly conducted activity’) to make and keep the record at issue.”⁷² According to the court, “that an employee ‘routinely’ takes meeting notes and keeps them, is quite different than whether a company policy directs the employee to do so.”⁷³

This discussion puts into focus the crux of *Ferber*’s ruling on the business records exception. At its core, *Ferber*, like the few other cases that analyze the applicability of the business records exception to emails, focused on why someone *created* the record at issue—that is, whether the record was the product of an employee’s discretion or of corporate policy. What the case did not do, and indeed what no case appears to have done, was approach the issue from a higher level of abstraction and discuss why the document *remained* in existence at the time of litigation.

Of course, it is possible that the emails at issue in these cases were not subject to automatic deletion, or that for whatever reason their continued existence at the time of litigation was due to business reasons rather than to a preservation duty in anticipation of litigation. It is noteworthy, though, that the few cases to provide a detailed discussion of whether emails are business records have not mentioned preservation obligations at all. One can easily see how a court might assume that a record that is present in a business’s files was “kept in the course of a regularly conducted business activity,” and thus advance to the next element in Rule 803(6) regarding why the record was made. But this

⁶⁹ *Id.* at 700. *See generally* Fed. R. Evid. 902(11) (providing that, in lieu of live testimony, one may establish the foundation for admissibility of a business record by submitting a declaration of a custodian or other qualified person that the record (A) was made at or near the time of the occurrence of the matters, or from information transmitted by, a person with knowledge; (B) was kept in the course of the regularly conducted activity; and (C) was made by the regularly conducted activity as a regular practice).

⁷⁰ *Id.* at 701.; *see generally id.* (noting that “the Advisory Committee Notes to Rule 803 respecting the 2000 amendments . . . explain that Rule 902(11) ‘provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses’”) (quoting advisory committee’s note to Fed. R. Evid. 803(6)).

⁷¹ *Id.* at 706.

⁷² *Id.* at 705.

⁷³ *Id.* at 705-06.

key prong of Rule 803(6) requires more scrutiny in light of the role that preservation obligations play in the continued existence of most electronic records.

V. CONCLUSION

Today, there are exponentially more written communications between workers than ever before. A duty to preserve electronic records means the scale of document productions has exploded, and will continue to grow. The document production in a large case even twenty years ago might only have filled a conference room's worth of boxes. Now, companies commonly produce millions of pages of documents in response to a government subpoena or civil document request. Of course, a duty to preserve materials in anticipation of a government subpoena or litigation existed before email became the main form of workplace communication. But too little attention has been paid to exactly why businesses keep the records they have.

The increased number of materials preserved and produced in a given matter has brought many more records within the possible scope of the Rule 803(6) business records hearsay exception. In the hard copy age, however, the existence of workplace correspondence in the company's files was more meaningful than it is today. It was much easier to infer from their mere presence in the company files that records demonstrated the reliability and trustworthiness of documents prepared and relied upon by the business in the ordinary course of its affairs. In the electronic age, the existence of a business record in the company files, even if someone created the record in the regular course of the company's business, might mean very little. The act of sending or receiving an email puts it in the company's files as a matter of course, having nothing to do with the particular business activity *per se*. Once the duty to preserve attaches, the company cannot throw these records away, even though that would have been its typical practice.

Thus, there is a very real question of whether an email in the business's files at the time of litigation was actually "kept in the course of a regularly conducted *business* activity."⁷⁴ Millions of emails that the company otherwise would have deleted in the ordinary course of its business now might be kept only in anticipation of litigation. Even as server storage space grows, or more records can be housed "in the cloud,"⁷⁵ the issue will remain as to why exactly a given record remains in the business's files. Is it because the business wanted or needed to use that record? Or is it simply the result of a preservation obligation or technological happenstance?

⁷⁴ Fed. R. Evid. 803(6) (emphasis added).

⁷⁵ J. Bonasia, *Compliance in Cloud an Unsolved Problem*, Investor's Business Daily, Dec. 7, 2009, at A06 available at <http://www.investors.com/NewsAndAnalysis/Article.aspx?id=514453> ("Cloud computing is a much-hyped yet often misunderstood tech trend" that "involves remotely hosted services for data processing, storage and delivery" in which "[u]sers access their software and data from the amorphous cloud through a Web browser.").

Because it suits them, the government and other litigants often would like to avoid this analysis and to sweep into evidence as many documents as possible under the umbrella of “business records.” Broad admissibility makes their lives easier, providing a fully loaded quiver from which they can pull individual helpful documents as the circumstances dictate at trial. But this serves little purpose other than to accommodate lawyers’ extreme desire to hedge, to put off limiting their options as long as possible out of fear that that choice someday might be proven wrong. Courts should force parties to demonstrate the admissibility of each document they seek to admit into evidence. They should not permit Rule 803(6) to function as some sort of evidentiary safe-harbor for any document pulled from the business’s files.

So far, even the courts that have engaged in the most comprehensive analyses of whether emails are admissible business records have not addressed why those emails existed for the court’s consideration in the first place. These courts typically have focused on the reasons why someone created a given email, and distinguished records the employee made and kept at his or her discretion from those that the employee created and kept pursuant to business policy.⁷⁶ But a business’s presumptive deletion of a record would seem much more likely to undercut its reliability and trustworthiness than the mere fact that an employee independently thought a work-related record was necessary to create and keep.

Because the duty to preserve evidence now plays such a fundamental role in the continued existence of certain records, the “kept in the course of a regularly conducted business activity” prong of Rule 803(6) requires a more complex analysis than it once did. Indeed, it seems much more difficult today to show that an electronic record that a business typically would delete after a period of time actually was made “pursuant to established procedures for the . . . *preserving* of business records,” and was “*relied upon* by the business in the performance of its functions.”⁷⁷ Given that “[t]he touchstone of admissibility under Rule 803(6) is reliability,”⁷⁸ courts at the very least should consider how reliable a record really is when the business’s typical practice would be to delete it as a matter of course.

In conclusion, technology has not just changed how we communicate with one another; it has changed how we keep and throw away those communications. That does not mean that every preserved record fails to satisfy Rule 803(6)’s requirements. But courts must scrutinize the special circumstances that exist in today’s electronic age to make sure that the proffered document does in fact fully satisfy the rule.

⁷⁶ See, e.g., *Rambus, Inc. v. Infineon Techs. AG*, 348 F. Supp. 2d 698, 705 (E.D. Va. 2004); *New York v. Microsoft Corp.*, No. 98-1233 (CKK), 2002 U.S. Dist. LEXIS 7683, at *9 (D.D.C. Apr. 12, 2002); *United States v. Ferber*, 966 F. Supp. 90, 98 (D. Mass. 1997).

⁷⁷ *United States v. Wells*, 262 F.3d 455, 463 n.8 (5th Cir. 2001) (emphasis added).

⁷⁸ *Giles v. Rhodes*, No. 94 Civ. 6385 (CSH), 2000 U.S. Dist. LEXIS 13980, at *21 (S.D.N.Y. Sept. 27, 2000).