

CONSIDERATION OF BUSINESS RECORDS

There are business records *[identify those records if other records were admitted into evidence]* **which were admitted as documentary evidence in this case which will go to the jury room with you. You may consider these records and give them such weight as you determine they deserve. In doing so, consider:**

First: Whether the entry, writing, or record was made in good faith;

Second: Whether it was made in the regular course of business;

Third: Whether the information or data contained in the exhibit was recorded or documented before the beginning of this criminal proceeding; and

Fourth: Whether it was the regular course of business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter;

Fifth: Any other evidence that bears on the reliability of the record.

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NOTES:

1. **Statutory requirement.** In a criminal proceeding where the judge admits a business record under G.L. c. 233, § 78, the questions of fact serving as a basis of admissibility must be submitted to the jury. See G.L. c. 233, § 78; *Commonwealth v. Zeininger*, 459 Mass. 775, 782 n.12 (2011); *Commonwealth v. Reyes*, 19 Mass. App. Ct. 1017, 1019 (1985). The jury's role, unlike that of the judge, is to weigh the evidence rather than to determine its admissibility. *Commonwealth v. Andre*, 484 Mass. 403 (2020).

2. **Requiring presence of a witness.** The trial judge may, as a condition to admissibility of business records, require that the party offering the business records into evidence call a witness who has personal knowledge of the facts stated in the record. See G.L. c. 233, § 78; *Burns v. Combined Ins. Co. of Am.*, 6 Mass. App. Ct. 86, 92 (1978). Such a witness may be necessary to establish the foundation required to find that a document constitutes a business record. See *Commonwealth v. Gray*, 80 Mass. App. Ct. 98, 101 (2011). See Massachusetts Guide to Evidence § 803(6)(A) and notes following.

3. **Role of the jury.** The jury is to be instructed to evaluate what weight to accord business records that have been admitted in evidence. It is not the jury's role to redetermine admissibility. *Commonwealth v. Andre*, 484 Mass. 403 (2020).

4. **Documents prepared for trial.** It is not the format of the exhibit that must be made prior the beginning of the criminal proceeding, but the recording of underlying data or information that must be recorded prior thereto. *Commonwealth v. Andre*, 484 Mass. 403 (2020).