

Insights

SEC ENFORCEMENT SWEEP REGARDING OFF-CHANNEL COMMUNICATIONS

Feb 15, 2024

On February 9, 2024 the U.S. Securities and Exchange Commission (the “SEC”) [announced charges](#) against 16 registered investment advisers and broker-dealers for pervasive recordkeeping failures related to off-channel communications—*i.e.*, failure to maintain business texts transmitted on personal devices. The penalties per firm ranged between \$1.25 million and \$16 million. The headline to the SEC’s press release states that self-reporting by one firm resulted in lower penalties.

This sweep reflects the latest efforts from the SEC Division of Enforcement’s Broker-Dealer Off-Channel Communications Initiative (the “*Initiative*”). This Initiative began in 2021 to determine whether broker-dealers (and subsequently registered investment advisers) were properly retaining business-related messages sent and received on personal devices in compliance with recordkeeping requirements. *See, e.g.*, the SEC’s September 2023 [announcement relating to similar settlements](#) with 10 other firms.

The settlements focused on several factors, including that:

- off-channel communications had been occurring for a number of years without recordkeeping;
- personnel at all levels of the organizations, particularly senior management, had engaged in such communications; and
- notwithstanding policies and procedures prohibiting use of off-channel communications, systems to review compliance with these policies were lacking or inadequate.

In addition to monetary fines, the firms were censured, and they agreed to a number of undertakings, including engaging an independent compliance consultant with a broad mandate to:

- review policies and procedures relating to electronic communications, associated training and the framework for addressing non-compliance; and
- assess surveillance programs related to electronic communications, technology solutions to maintain records of these communications and measures to prevent use of unauthorized methods for business communications.

The firms also committed to having their own internal audit departments to review these matters.

Given the SEC's continuing focus on recordkeeping for communications on personal devices, broker-dealers and registered investment advisers should:

- review their policies and procedures related to use of personal devices for communications and preservation of these communications, including the possibility of dedicated internal applications for business texts;
- review training materials and frequency of training on these policies and procedures;
- monitor compliance with these policies and procedures, including periodic specific attestations; and
- engage internal audit departments, if applicable, and independent compliance consultants in the review of these policies and procedures.

In the event a firm perceives potential shortcomings, prompt remedial measures should be undertaken in consultation with counsel.

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