

Adviser Guide to Managing Off-Channel Communications

All you need to know about recent enforcement actions, best practices, and tips for strengthening your compliance program.

Recent SEC activity, including SEC exam requests and enforcement actions, have made it clear that recordkeeping rules, especially around Off-Channel Communications and Electronic Communications, remain a top priority for the SEC. Meeting best practices and SEC expectations with respect to these kinds of communications can be particularly challenging for compliance professionals. For instance, the SEC now expects firms to review and archive employee text messages and personal messaging on social media sites. Without proper monitoring and archiving software, as well as supporting policies and procedures, some firms may be caught flat-footed in the instance of an SEC Exam.

Given the SEC's focus on Off-Channel Communications and Electronic Communications, and the complex nature of these kinds of communications, we've developed the following to help guide you in this process:

- Sample SEC Exam Requests
- Recent Enforcement Actions
- Six Tips and Best Practices to Strengthen Your Program

Sample SEC Requests

Below are sample requests from recent SEC Exams. The nature of these questions is more specific and nuanced than past requests. As you review these requests, consider: if you were asked these questions, would you have the tools, processes, and archived communications readily available?

- **Electronic Communications:** Please explain the steps taken by the Adviser to monitor, review, and retain Electronic Communications related to the Adviser's business. Electronic Communications include but are not limited to, email, text messages, messaging apps, instant messages, Bloomberg messaging, and private messaging on social media sites. Please address the following: (1) whether Supervised Persons are permitted to use personal devices for firm business or are permitted to use any form of Electronic Communication other than Adviser email accounts for business purposes; (2) if so, what steps the Adviser takes to approve the use of such personal devices or additional means of Electronic Communications; and (3) what steps the Adviser takes to ensure that Supervised Persons only use approved means of Electronic Communications to conduct firm-related business. Please also explain the Adviser's policies on using Dropbox, Google Drive, and other forms of cloud storage by Supervised Persons.
- **Off-Channel Communications:** Controls and surveillance for "off-channel communications" (ex. messaging services used, "apps", personal device use, etc.), and of which that under securities law and may be required to be recorded.

Recent Enforcement Actions

SEC Fines 11 Firms Over \$88 Million for Recordkeeping Violations

- On September 24, 2024, the SEC [announced charges](#) against 12 firms, comprising broker-dealers, investment advisers, and one dually-registered broker-dealer and investment adviser for widespread and longstanding failures by the firms and their personnel to maintain and preserve electronic communication in violation of recordkeeping provisions of federal securities laws.
- The SEC's investigations into all the firms except for one uncovered pervasive and longstanding use of unapproved communication methods, known as off-channel communications, at these firms.
- The firms were each charged with violating certain recordkeeping provisions of the Securities Exchange Act or the Investment Advisers Act or both.
- Each of the firms was ordered to cease and desist from future violations of the relevant recordkeeping provisions. Ten of the firms also agreed to retain compliance consultants to conduct comprehensive reviews of their policies and procedures relating to retention of electronic communications, among other things.

SEC Charges 12 Municipal Advisers with Recordkeeping Violations

- On September 17, 2024, the SEC [announced charges](#) against 12 municipal advisers for their failure to maintain and keep specific electronic communications. Combined, the firms will pay more than \$1.3 million to settle the charges from the SEC.
- The failures by the firms involved employees at multiple levels of authority.
- The 12 municipal advisers agreed that their actions violated recordkeeping provisions set forth in federal securities laws. They have started improving their policies to address the violations.

SEC Off-Channel Enforcements: Twenty-Six Firms Ordered to Pay More Than \$390 Million in Settlements

- In August 2024, the SEC announced charges against 26 broker-dealers, investment advisers, and dually registered broker-dealers and investment advisers for widespread and longstanding failures by the firms and their personnel to maintain and preserve Electronic Communications.
- The SEC found that, since at least 2019, employees at these firms engaged in "pervasive and longstanding ' off-channel' communications" that their employers, in violation of recordkeeping requirements, largely did not retain.
- The firms admitted that their employees sent and received off-channel communications related to business activities, including messages to clients containing recommendations made or proposed to be made and advice given or proposed to be given.

SEC Files First Charges Against Standalone Investment Adviser for Off-Channel Communications and Recordkeeping Violations

- On April 3, 2024, the SEC announced a \$6.5 million penalty against Senvest Management, LLC, a New York-based private fund manager, which had employees at various levels of the organization using texting platforms and other unretained, electronic means of communication.
- There were "numerous" messages that were required to be retained under the Adviser's Act, including internal business communications between employees.
- The order stated that Senvest policies and procedures allowed the firm to access and review personal devices of employees to determine if off-channel communication was being used, but the firm never accessed personal devices to implement such policies and procedures.
- The SEC noted that "at least three senior Senvest officers had their personal devices set to automatically delete messages after 30 days" and seemed to indicate that auto-delete settings were an additional factor when determining punishment for off-channel communication.

Several Companies Fined for Off-Channel Communications and Recordkeeping Violations

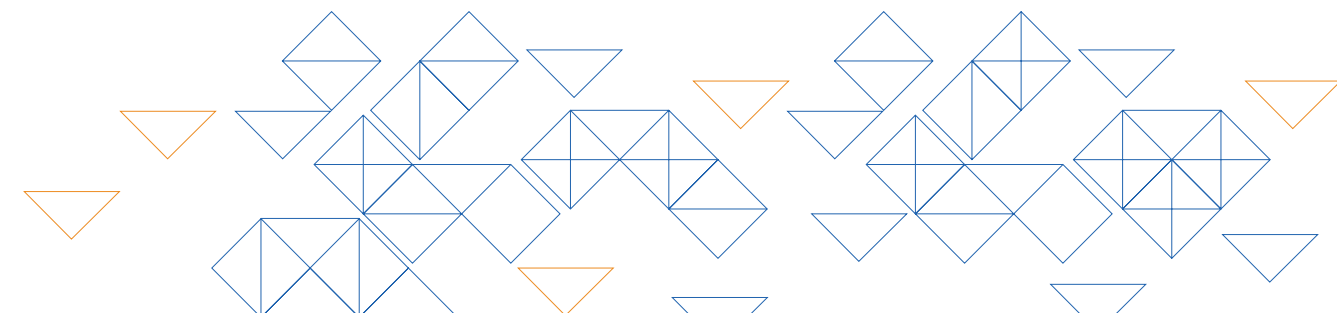
- In February 2024, the SEC announced charges against five broker-dealers, seven dual registrants, and four advisers for recordkeeping violations related to Electronic Communications. The firms agreed to pay a combined \$81 million in civil penalties, according to the SEC's press release.
- The four investment advisers admitted that their employees sent and received off-channel communications about investment recommendations and advice. The firms violated securities laws by failing to retain most of these communications. The SEC found that employees at multiple levels of authority were involved in the off-channel communications, "including supervisors and senior managers."
- The SEC noted that the firms charged had "widespread and longstanding failures" in complying with recordkeeping requirements involving "employees at multiple levels of authority, including supervisors and senior managers."

Six Key Tips and Best Practices to Strengthen Your Program

Firms should consider the following tips to make sure your compliance program meets current SEC expectations and industry best practices:

- **Review your policies and procedures** to make sure your firm maintains a list of approved communication platforms and procedures for retaining communications from those platforms. Ensure it addresses text messages, messaging apps, and social media messaging, among others.
- **Conduct regular employee training** on the use of approved communications platforms.
- **Implement employee certifications** to allow employees to review policies and procedures in place and attest that they adhere to them.
- **Ensure communication on approved platforms is archived, documented, and reviewed** to ensure accuracy.
- **Implement a testing program** to review approved communication platforms and check for any potential violations. Consider looking for trends in email communication, noting significant increases or decreases in an approved or other trends that may indicate violations. Include "text" in your keyword search.
- **Regularly check your archiving platform.** In September 2024, Apple released its iOS software update, which has caused issues with some text archiving platforms, resulting in messages sent through certain carriers not being archived as expected. Contact your archiving platform vendor to determine if you may be affected by this change, and to ensure you do not have any gaps in message archiving.

Questions? We're here to help. Contact us at fairviewinvest.com or email info@fairviewinvest.com to speak with a regulatory expert.



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