



Meeting regulatory expectations for preserving and monitoring electronic communications

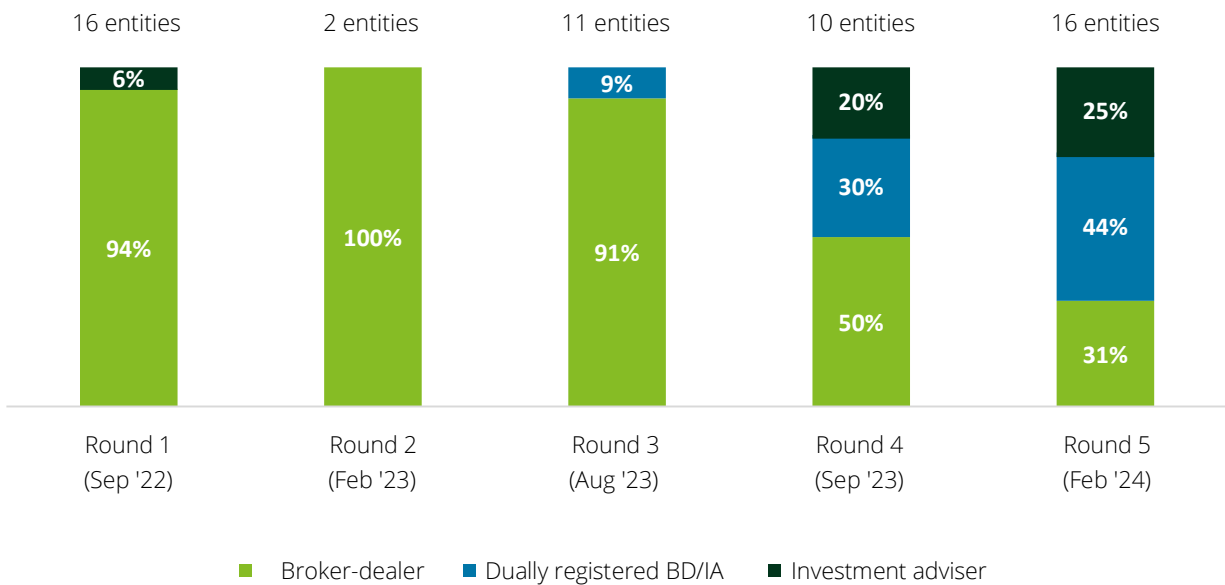
A key challenge across the financial services industry
April 2024

Meeting regulatory expectations for preserving and monitoring electronic communications

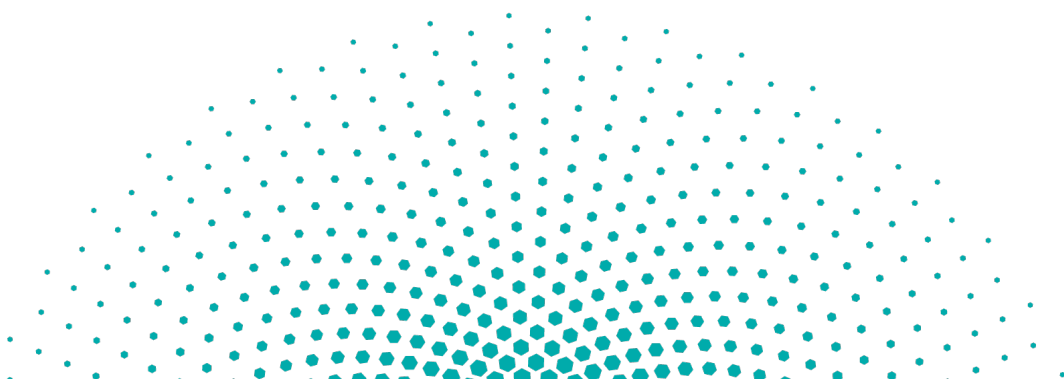
On February 9 and March 19, 2024, the Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) respectively announced the latest round of charges and fines for failures to preserve and maintain electronic communications. The regulators handed out enforcement actions to eight additional financial institutions and \$88 million in fines in aggregate, ranging from \$1.25 million to \$16.5 million per firm.¹ With the latest round, SEC fines now total more than \$1.7 billion, and CFTC fines total more than \$1.1 billion. The charges announced on February 9 were administered to five broker-dealers, seven dually registered broker-dealers and investment advisers, and four investment advisers. As with previous rounds of fines and enforcement actions, the firm that received the smallest fine of \$1.25 million self-reported to the SEC.

Since the initial orders issued by the SEC and CFTC to a large bank in December 2021, there have been five subsequent rounds of orders issued. Looking at these five rounds across time, regulators have moved from an initial focus primarily on the broker-dealer arms of tier 1 banks to a focus across financial services, including investment advisers, dual registrants and broker-dealers at wealth and investment managers, insurance companies, and tier 2 banks. As seen in figure 1, the first three rounds targeted primarily broker-dealers, and the sweep in rounds 4 and 5 has transitioned sharply to target investment advisers and dual registrants as well. Furthermore, while the parent companies of entities in the first three rounds were primarily large banks, a significant portion of the parent companies targeted in rounds 4 and 5 have included insurance companies as well as wealth and investment managers.

Figure 1: Percentage of firms fined by entity type



Source: Deloitte analysis of SEC (sec.gov) and CFTC (cftc.gov) enforcement actions as of March 19, 2024.



Further, as the regulatory sweep continues, other government agencies have also begun to focus on compliance with electronic communication preservation, including the US Department of Justice (DOJ), which announced changes to its evaluation of corporate compliance programs in March 2023 to include guidance on electronic communications preservation.

The widening focus of the regulatory sweep and the additional focus of the DOJ are important developments to consider. Firms of all sizes across financial services—including investment and wealth managers, insurance companies, and banks—may wish to assess the electronic communications recordkeeping and monitoring programs. Given the DOJ's guidance, as part of such an assessment, firms also may want to consider casting a wider net around populations subject to electronic communication surveillance recordkeeping requirements and include employees, agnostic of regulatory registration requirements.

Here are some specific efforts that firms may want to consider as part of an assessment to advance their electronic communications programs and prepare for a potential regulatory exam or investigation.

1. Assess electronic communications policies, procedures, and practices:

- a. Review internal policies, procedures, and training, and identify gaps in compliance as well as opportunities for enhancement. As part of these efforts, firms may also consider implementing stricter ramifications for noncompliance to help drive a culture of compliance.
- b. Evaluate the use of BYOD (bring your own device) vs. firm-issued devices. Many firms are now either moving away from BYOD policies or implementing new technologies to more effectively capture and surveil business communications on BYOD devices.
- c. Understand a firm's risk profile around the potential use of off-channel communications by polling employees to understand the electronic communication channels that they are using or would like to use. When asking about historic use, firms are considering offering an amnesty period for the polling to obtain insightful results.
- d. Enhance monitoring and surveillance testing capabilities across a firm's enhanced programs, which includes trend analysis and use of artificial intelligence (AI) to, among other things, promptly identify emerging issues as well as benchmark communications and identify outlier practices that may indicate noncompliance.
- e. Assess the governance model, including reporting and escalation protocols, and identify areas for enhancing the centralized governance structure around a firm's electronic communications compliance program.
- f. Assess investigations and disciplinary processes for potential off-channel electronic communications violations to ensure a well-documented process that incorporates consistency of application, reporting, and documentation and that aligns to the governance model and tone at the top.

2. Conduct analyses on historical electronic communications:

- a. Perform lookback collections to capture historical mobile messages and to determine the prevalence of off-channel communications. These lookbacks may be coupled with a regulatory approach chosen to either correct historic failures or attempt to prove off-channel communications are not pervasive.
- b. Run enhanced lexicons, natural language processing, and AI models on previously surveilled data to determine if new off-channel communications indicators create additional alerts to review and investigate.

3. Identify opportunities to enhance capture, retention, and monitoring/surveillance technologies:

- a. Evaluate and identify enhancement opportunities in the current technology infrastructure for electronic communications recordkeeping and monitoring, including 1) enhanced solutions to capture communications from mobile applications; and 2) automated surveillance modules that leverage AI, machine learning, and analytics capabilities to detect issues and instances of noncompliance.

The above efforts can both enhance a firm's communications recordkeeping and monitoring program as well as potentially help mitigate the risk of misconduct and the reputational and financial impact of a regulatory investigation.

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Endnotes

1. Deloitte analysis of SEC ([sec.gov](https://www.sec.gov)) and CFTC ([cftc.gov](https://www.cftc.gov)) enforcement actions as of March 19, 2024.



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