

Perspectives

Meeting Regulatory Expectations for Preserving and Monitoring Electronic Communications

A Key Challenge Across the Financial Services Industry

September 30, 2022

On September 27, 2022, the Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) each announced charges and fines against 11 financial institutions, inclusive of multiple broker-dealer affiliates and one investment adviser affiliate, for failures to comply with recordkeeping, supervision and monitoring regulations for business communications conducted outside permitted channels, including communications conducted on personal devices, text messaging and apps.^{1,2} The enforcement actions and fines, which total over \$1.8B in the aggregate and range from \$16M to \$225M for each financial institution, are in addition to an aggregate of \$200M in fines announced by the regulators in December 2021.

And there is good reason to believe that the fines and enforcement actions will not end here. Indeed, both regulators are continuing to investigate firms' electronic communications recordkeeping and monitoring programs. With the SEC's announcement, Sanjay Wadhwa, the SEC's Deputy Director of Enforcement, stated that "the staff will continue its efforts to enforce compliance with the Commission's essential recordkeeping requirements."¹ And CFTC Chairman Rostin Behnam stated, "as demonstrated today, the Commission will vigorously pursue registrants who fail to comply with their core regulatory obligations and hold them accountable."²

Furthermore, both regulators are encouraging financial services firms to review their record preservation practices; consider enhancing policies and procedures, including how firms review, investigate and discipline violations; and self-report and self-remediate deficiencies before the regulators identify them. The SEC's Wadhwa addressed registrants directly, stating "the time is now to bolster your record retention processes and to fix issues that could result in similar future misconduct by firm personnel."¹ And Gurbir S. Grewal, Director of the SEC's Division of Enforcement, stated "other broker dealers and asset managers who are subject to similar requirements under the federal securities laws would be well-served to self-report and self-remediate any deficiencies."¹

Given the size of the fines and the heightened focus of the SEC and CFTC, firms across financial services—including asset managers, insurance companies and banks—may wish to assess their electronic communications recordkeeping and monitoring programs and prepare for a potential regulatory exam or investigation.

Here are some specific efforts that firms may want to consider as part of their assessment and preparation efforts:

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 non-compliance 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 moving away from BYOD in part or full in an effort to better capture mobile communications.
- 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 and/or would like to use. When asking about historic use, firms are considering offering an amnesty period for the polling in an attempt to obtain insightful results.
- d. Enhance monitoring and surveillance testing capabilities across their enhanced programs that includes trending analysis and use of artificial intelligence in an effort to, among other things, promptly identify broad based issues.
- e. Assess the governance model, including reporting and escalation protocols and identify areas for enhancing 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/or 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 (NLP) and artificial intelligence (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 non-compliance.

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 reputational and financial impact of a regulatory investigation. For additional perspective on the above or for more information on Deloitte Risk & Financial Advisory's electronic communications practice, please reach out to a member of our team set out below or email us at Ecomms@deloitte.com. And for more information about our regulatory remediation practice generally, please [visit the practice's web site](#).

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