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Off-Channel Communications

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On January 13, 2025, the U.S. Securities and Exchange Commission (the “SEC”) announced the latest settlements in its ongoing off-channel communications enforcement initiative, fining 12 SEC-registered broker-dealers and investment advisers, including several large private equity firms, for failing to maintain and preserve off-channel communications as required by federal securities laws.¹

Similar to prior settlements in this initiative, the SEC staff (the “Staff”) found, and each firm admitted to:

- persistent, widespread use of unapproved communications methods by employees, including supervisory personnel;
- failures to preserve communications that constituted required business records due to employees using unapproved communications methods on business and / or personal devices;
- inadequate compliance policies and procedures; and
- failures to reasonably supervise personnel with a view to preventing and detecting these types of violations.

The firms agreed to pay civil penalties ranging from \$600,000 (for a broker-dealer that self-reported violations) to \$12 million. In total, the SEC has settled charges as part of the off-channel communications initiative with approximately 70 SEC-registered broker-dealers and investment advisers and imposed more than \$625 million in civil penalties in the last year,² and with more than 100 firms resulting in more than \$2 billion in civil penalties since 2021.³

In addition to monetary penalties, each firm was ordered to cease and desist from future violations of the relevant recordkeeping provisions, was censured, and agreed to have its internal audit function conduct a comprehensive review and assessment of its communications practices and related compliance and recordkeeping policies and procedures.⁴

These settlements were the last on this topic issued under the direction of former SEC Chairman Gensler. While it remains to be seen how the incoming Trump Administration will impact further Staff efforts with respect to this initiative, we expect the Staff to continue to scrutinize off-channel communications practices and procedures, particularly given the Staff's view that industry failures in this area hamper the SEC's ability to carry out its regulatory functions and investigate federal securities laws violations. In addition, we expect new off-channel communications "best practices" for financial services firms, including private fund advisers, to emerge as firms subject to settlement undertakings adopt policy and procedure changes and technology tools. As a result, we recommend you contact the Kirkland regulatory attorneys with whom you regularly work to discuss your firm's communications practices and surveillance and recordkeeping procedures, and potential enhancements thereto.

Regulatory Background

Both broker-dealer and investment adviser regulatory regimes (Exchange Act Rules 17a-3 and 17a-4 and Advisers Act Rule 204-2, respectively) require firms to make and keep current specific books and records related to their businesses, and to maintain such records in a specified manner for a specified time.

Advisers Act Rule 204-2's requirements for SEC-registered investment advisers with respect to written (including electronic) communications are narrower than the rules for SEC-registered broker-dealers. SEC-registered investment advisers need only retain written communications falling within enumerated categories (e.g., relating to any recommendation or advice given or proposed to be given) and certain disseminated communications (e.g., advertisements), but SEC-registered broker-dealers must keep all written communications relating to their "business as such."

The distinctions between the regulatory regimes, however, have little practical effect on the Staff's ability to bring cases against SEC-registered investment advisers. First, the Staff's position is that it can examine all of a firm's records regardless of whether the records are required to be kept. Second, the Staff focuses on both recordkeeping violations and violations of policies and procedures, and SEC-registered investment advisers must adopt policies and procedures reasonably designed to prevent violations related to the failure to accurately create and maintain required records (and protect against their untimely destruction).⁵ Finally, similar to SEC-registered broker-dealers, the Staff can charge SEC-registered investment advisers with failing to reasonably supervise their employees.

Key Findings from Off-Channel Communications Settlements

In general, the firms charged as part of this initiative had adopted policies permitting communications only through approved methods and requiring communications to be monitored and archived and conducted training for all employees on communications and recordkeeping policies. Furthermore, they had advised employees that using unapproved electronic communications methods, including on their personal devices, was prohibited, and they should not use personal email, chats, or text-messaging applications for business purposes, or forward work-related communications to their personal devices.

The Staff found, however, that despite these policies and training efforts, employees were using unapproved methods for business communications and therefore:

- compliance policies and procedures failed to reflect the firm's practices regarding the use of off-channel communications, including text messaging, instant messaging, messaging apps and chat tools;
- recordkeeping policies and procedures failed to reflect the firm's practices relating to retention of off-channel communications;
- firms failed to maintain or preserve the written communications for the requisite periods of time required by the recordkeeping rules;
- compliance surveillance of off-channel communications was either completely lacking or insufficiently tailored and risk-based;
- supervisors responsible for preventing misconduct routinely conducted business communications using unapproved methods; and / or
- inadequate enforcement of compliance policies and procedures related to electronic communications.

Recommended Next Steps

Depending on your current practices, recommended next steps will vary but might include taking one or more of the following actions:

- reviewing your electronic communications policies and procedures to determine whether to make any proactive updates;
- providing clear messaging to your employees from senior management regarding the use of unauthorized communications channels;
- conducting additional training on your electronic communications policies to reinforce the requirement to use authorized communications channels;
- enhancing surveillance protocols for identifying and investigating incidents of potential off-channel communications, including procedures for monitoring employee personal devices when they can be used for business communications; and
- investing in new technologies to facilitate compliant communications.

1. See SEC press release dated January 13, 2025, *Twelve Firms to Pay More Than \$63 Million Combined to Settle SEC's Charges for Recordkeeping Failures*, available at: <https://www.sec.gov/newsroom/press-releases/2025-6>. The press release contains links to the settlement orders. ↪

2. See the following SEC press releases and related settlement orders for details: *Eleven Firms to Pay More Than \$88 Million Combined to Settle SEC's Charges for Widespread Recordkeeping Failures*, dated September 24, 2004, available at <https://www.sec.gov/newsroom/press-releases/2024-144>; *Advisory Firm Atom Investors, Charged with Recordkeeping Violations, Avoids Civil Penalty Because of Self-Reporting, Substantial Cooperation, and Prompt Remediation*, dated September 23, 2024, available at <https://www.sec.gov/newsroom/press-releases/2024-143>; *Twenty-Six Firms to Pay More Than \$390 Million Combined to Settle SEC's Charges for Widespread Recordkeeping Failures*, dated August 14, 2024, available at <https://www.sec.gov/newsroom/press-releases/2024-98>; *SEC Charges Advisory Firm Senvest Management with Recordkeeping and Other Failures*, dated April 3, 2024, available at <https://www.sec.gov/newsroom/press-releases/2024-44>; and *Sixteen Firms to Pay More Than \$81 Million Combined to Settle Charges for Widespread Recordkeeping Failures*, dated February 9, 2024, available at <https://www.sec.gov/newsroom/press-releases/2024-18>. ↪

3. See *SEC Announces Enforcement Results for Fiscal Year 2024*, dated November 22, 2024, available at <https://www.sec.gov/newsroom/press-releases/2024-186>. ↪

4. The ability to use an internal audit function to conduct the comprehensive review and assessment represents a deviation from prior initiative settlement orders, the majority of which required firms to retain third-party compliance consultants. The scope of the undertakings, however, are substantially similar and include a review and assessment of: a firm's supervisory, compliance and other policies and procedures related to electronic communications; training of personnel; surveillance program measures and routines to ensure personal devices are used properly; new technological solutions employed to meet record requirements, including tracking of employee

uptake of new solutions; measures implemented to prevent unauthorized communications methods and their efficacy; and frameworks adopted to address non-compliance by firm employees. ↩

5. See [Advisers Act Rule 206\(4\)-7 \(the Compliance Rule\)](#). ↩

Related Professionals

Norm Champ, P.C.

Partner / New York

Scott A. Moehrke, P.C.

Partner / Chicago

Michael Chu

Partner / Chicago

Matthew Cohen, P.C.

Partner / Bay Area – San Francisco / Los Angeles – Century City

Melissa S. Gainor

Partner / Washington, D.C.

Phil Vincent Giglio

Partner / Austin

Nicholas A. Hemmingsen

Partner / Chicago

Xiao-Hong Jing

Partner / New York

Daniel Kahl

Partner / Washington, D.C.

Olga Kamensky

Partner / New York

Jennifer Kim-Gagne

Partner / Washington, D.C.

Nancy L. Kowalczyk

Partner / Chicago

Radhika Kshatriya

Partner / Los Angeles – Century City

Mac M. Laban

Partner / Washington, D.C.

Leland Langston

Partner / Los Angeles – Century City

Alpa Patel, P.C.

Partner / Washington, D.C.

Eric L. Perelman

Partner / New York

Christopher Pristouris

Partner / New York

Noah Qiao

Partner / New York

John T. Reinert

Partner / Chicago

Jasmina H. Resic

Partner / Chicago

Nabil Sabki, P.C.

Partner / Chicago

Reed T. Schuster

Partner / Austin / Chicago

Josh Westerholm, P.C.

Partner / Chicago

Jina K. Yun

Partner / Chicago

Bob Allen, P.C.

Partner / New York

Zachary S. Brez, P.C.

Partner / New York

Nicole M. Cleminshaw

Partner / Washington, D.C.

Kyle M. DeYoung

Partner / Washington, D.C.

Alexander James Gelski

Partner / New York

Asheesh Goel, P.C.

Partner / Chicago / Washington, D.C.

Jacquelyn M. Kasulis, P.C.

Partner / New York

Allison Lullo

Partner / New York

Sarah S. Mallett

Partner / Dallas

Lee A. Mayberry

Partner / Washington, D.C.

Kim B. Nemirow, P.C.

Partner / Chicago

William F. Osberghaus, Jr.

Partner / Washington, D.C.

Nader H. Salehi, P.C.

Partner / Washington, D.C. / New York

Sunil Sheno

Partner / Chicago

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Suggested Reading

- 07 January 2025 Kirkland AIM Private Fund Manager U.S. SEC / CFTC Compliance: 2025 Key Dates
- 07 August 2024 Kirkland AIM Private Fund Sponsor Pay-to-Play Restrictions for Upcoming U.S. Election Cycle
- 05 June 2024 Kirkland AIM Fifth Circuit Strikes Down Private Fund Adviser Rules

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