

2024 Investment Adviser Compliance Conference

MARCH 6-8 / WASHINGTON, DC

EFFECTIVE STRATEGIES & BEST PRACTICES

Off-Channel Communications

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SEC Recordkeeping Settlements Continue

- As of this time last year, there had been 16 cases regarding the failure to preserve records due to the use of personal devices, text messages, WhatsApp, and personal email accounts
- Since then, the SEC has announced 23 additional settled orders that include broker-dealers, dual registrants and affiliated advisers
 - February 9, 2024: 8 orders with penalties ranging from \$1.25M to \$16M, with one firm that self-reported
 - September 29, 2023: 6 orders with penalties ranging from \$2.5M to \$35M, with one firm that self-reported
 - August 8, 2023: 9 orders with penalties ranging from \$9M to \$125M

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What is the SEC Emphasizing in Its Latest Orders?

Good:

- Cooperation
- Prompt remediation
- Self-reporting

Bad:

- Senior personnel engaging in off-channel communications, including with colleagues, people they supervise & customers
- Multiple years

Any Changes from Prior Orders?

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Key Issues for Advisers

- Capturing books and records investment advisers are required to retain
 - Advisers Act Rule 204-2(a)(7)—Investment advisers must preserve “originals of all written communications received and copies of all written communications sent relating to, among other things, any recommendation made or proposed to be made and any advice given or proposed to be given.”
 - *Guggenheim Securities LLC, et al.*, Feb. 9, 2024: “For example, in one off-channel text exchange between GPIM employees, the employees discussed placement of various orders to purchase or sell securities.”
- Avoiding negative impact on ability to make good investment decisions for clients or communicating with clients
- Drafting policies and procedures under Rule 206(4)-7

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What's Ahead from the SEC?

- **Division of Enforcement:** Stand-alone cases against investment advisers without affiliated brokers?
- **Division of Examinations:** No longer an exam priority
- **Division of Investment Management:** Clarification on the books and records an investment adviser must retain?

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Questions Investment Advisers Are Asking

- What should our policies be?
- What are potential technological solutions?
- Should we self-report if we uncover an issue?

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