

**MEMO# 34298**

September 30, 2022

# **SEC Sanctions Investment Adviser for Violations of Advisers Act Recordkeeping Requirements in Connection with Digital Communications Sweep**

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TO: ICI Members  
Chief Compliance Officer Committee  
Technology Committee SUBJECTS: Compliance  
Investment Advisers  
Litigation & Enforcement  
Recordkeeping RE: SEC Sanctions Investment Adviser for Violations of Advisers Act  
Recordkeeping Requirements in Connection with Digital Communications Sweep

Earlier this week, the SEC announced its settlement of enforcement actions against 15 broker-dealers and one investment adviser for failing to comply with recordkeeping requirements to maintain and preserve certain "off-channel communications."[\[1\]](#) These enforcement actions focused on similar communications and recordkeeping violations as an SEC December 2021 action.[\[2\]](#) The order pertaining to the investment adviser (the "Order") found that the investment adviser ("Adviser Respondent") violated Section 204 of the Investment Advisers Act of 1940, as amended, and Rule 204-2(a)(7) thereunder for:

- Failing to preserve adequate records of certain written "off-channel communications;" and
- Failing to reasonably supervise its employees with a view to preventing or detecting such recordkeeping violations.

The Order states that the Adviser Respondent's personnel, as well as personnel of two affiliated broker-dealers (such affiliated broker-dealers, together with the Adviser Respondent, the "Respondents"), communicated internally and externally by personal text messages or other text messaging platforms such as WhatsApp, and that such conduct was widespread throughout the Respondent firms, including at senior levels. The Order states that these communications related to the business of the Respondents but that the

Respondents "did not maintain or preserve the substantial majority of these written communications."[\[3\]](#)

The Order further specifies that, although the Respondents had policies and procedures prohibiting such off-channel communications, the Respondents failed to "implement sufficient monitoring to assure that their recordkeeping and communications policies were being followed," and "dozens" of individuals responsible for supervising and implementing the policies and procedures themselves engaged in such off-channel communications.[\[4\]](#) In addition, the Order states that the Respondents' recordkeeping failures likely deprived the SEC of the opportunity to review these off-channel communications in connection with various investigations.

The SEC staff discovered the off-channel communications at one of the Respondent broker-dealers when the staff requested off-channel communications data from a sampling of around 30 Respondent officers and employees. The Order provides examples of widespread off-channel communications within that broker-dealer Respondent. The Order does not cite specific examples of off-channel communications by Adviser Respondent personnel, noting instead that the Adviser Respondent and the other broker-dealer Respondent acknowledged, based on their own review, that they had similar recordkeeping failures.

The Respondents have agreed to jointly and severally pay a penalty of \$125 million to the SEC. In addition, the Respondents have initiated remedial steps, including clarifying applicable policies, providing training and clear messages to employees, enhancing surveillance protocols for investigating incidents of potential off-channel communications, taking swift employment action for off-channel communications, making significant investments in new technologies to facilitate compliant communications, and hiring a consultant to assist in vetting control upgrades.

Gurbir Grewal, Director of the SEC's Division of Enforcement, stated in the SEC Press Release that the collection of enforcement actions, "both in terms of the firms involved and the size of the penalties ordered[,] underscore[s] the importance of recordkeeping requirements: they're sacrosanct."

In total, the firms implicated in the September 27th orders have agreed to pay combined penalties to the SEC of more than \$1.1 billion,[\[5\]](#) in addition to certain penalties in connection with related CFTC charges.[\[6\]](#)

The SEC Press Release notes that the SEC staff will continue its efforts to enforce recordkeeping compliance and encourages "other broker dealers and asset managers who are subject to similar requirements under the federal securities laws . . . to self-report and self-remediate any deficiencies."[\[7\]](#)

Erica Evans  
Assistant General Counsel

## endnotes

[1] For the order relating to the investment adviser respondent and affiliated broker-dealer respondents, see In the Matter of Deutsche Bank Securities Inc., DWS Investment Management Americas, Inc., and DWS Distributors, Inc., Respondents, SEC Administrative Proceeding File No. 3-21173 (Sept. 27, 2022), which is available at <https://www.sec.gov/litigation/admin/2022/34-95928.pdf>.

Orders pertaining to other broker dealers can be found through the SEC's press release: SEC Charges 16 Wall Street Firms with Widespread Recordkeeping Failures, SEC Press Release No. 2022-174 (Sept. 27, 2022), available at [https://www.sec.gov/news/press-release/2022-174?utm\\_medium=email&utm\\_source=govdelivery](https://www.sec.gov/news/press-release/2022-174?utm_medium=email&utm_source=govdelivery) ("SEC Press Release").

[2] For more information on the prior enforcement action, see ICI Memo to Members 33965: <https://www.ici.org/memo33965>.

[3] Order at 2.

[4] Id.

[5] SEC Press Release.

[6] See CFTC Orders 11 Financial Institutions to Pay Over \$710 Million for Recordkeeping and Supervision Failures for Widespread Use of Unapproved Communication Methods, CFTC Release No. 8599-22 (Sept. 27, 2022), available at <https://www.cftc.gov/PressRoom/PressReleases/8599-22>.

[7] SEC Press Release.