

MEMO# 35611

February 11, 2024

SEC Continues to Sanction Registrants for Failing to Maintain "Off-Channel" Electronic Communications

[35611]

February 09, 2024

TO: ICI Members

Chief Compliance Officer Committee

Compliance Advisory Committee SUBJECTS: Compliance

Litigation & Enforcement RE: SEC Continues to Sanction Registrants for Failing to Maintain "Off-Channel" Electronic Communications

The SEC's Division of Enforcement has announced that it has sanctioned sixteen registrants for "widespread and long-standing recordkeeping failures" relating to their failure to maintain "off channel" communications sent via text messages.^[1] The respondents in these cases include broker-dealers, dually registered broker-dealers and investment advisors, and investment advisors affiliated with the sanctioned registrants. These cases are a continuation of the Division's focus on sanctioning registrants that fail to maintain off-channel electronic communications. These cases began with the case the SEC filed and settled with a broker-dealer, J.P. Morgan, in December 2021.^[2] In that case, the firm was sanctioned for failing to retain communications sent via What's App. To settle the case, the firm agreed to pay a fine of \$125 million and to comply with undertakings that, in part, required the firm to retain a compliance consultant for at least a two-year period to conduct a comprehensive review of:

- The firm's supervisory, compliance, and other policies and procedures relating to recordkeeping;
- The training the firm provides employees to ensure they are maintaining required records;
- The program the firm uses to surveil communications;
- The technological solutions the firm is implementing to ensure that required records are captured;
- How the firm is capturing required communications on employees' personal devices; and
- How the firm plans to sanction employees who violate its recordkeeping policies and procedures.

The undertakings also require the Audit Committee of the firm's parent company to oversee the consultant's work.

Between the time of the December 2021 J.P. Morgan case and the cases announced today, the SEC has filed several actions against numerous broker-dealers and investment advisers for their failure to maintain all required electronic records. In particular,

- In September 2022, the Enforcement Division announced it had settled cases with sixteen firms. These firms consisted of fifteen broker-dealers and one affiliated adviser. Of these sixteen firms, thirteen were fined \$125 million; two were fined \$50 million; and one was fined \$10 million for a total fine amount of \$1.1 billion. See <https://www.sec.gov/news/press-release/2022-174>;
- In May 2023, two broker-dealers were fined - one was fined \$7.5 million and the other \$15 million. See <https://www.sec.gov/news/press-release/2023-91>;
- In August 2023, the Division announced it had settled cases with eleven firms. Ten of these firms were broker-dealers and one was dually registered as a broker-dealer and investment adviser. These firms settled these cases for amounts ranging from \$9 to \$125 million for a total fine amount of \$289 million. See <https://www.sec.gov/news/press-release/2023-149>; and
- In September 2023, the Commission fined ten firms. Of these, five were broker-dealers, three were dually registered as broker-dealers and investment advisers, and two were investment advisers that were affiliated with the sanctioned registrants. The fines in these cases ranged from \$2.5 million (against a firm that self-reported its violations) to \$35 million. See <https://www.sec.gov/news/press-release/2023-212>.

As with the enforcement action announced today, each of these respondents had to agree to undertakings substantially similar to those in the action against J.P. Morgan and each was ordered to cease and desist from further violations. We understand the Commission will continue to pursue cases related to registrants' failure to maintain required electronic records.

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Notes

[1] See Sixteen Firms to Pay More than \$81 Million Combined to Settle Charges for Widespread Recordkeeping Failures, SEC Press Release No. 2024-18, which is available at: https://www.sec.gov/news/press-release/2024-18?utm_medium=email&utm_source=govdelivery.

[2] See In the Matter of JP Morgan Securities (SEC Administrative Proceeding File No. 3-20681) (Dec. 17, 2021), which is available at: <https://www.sec.gov/files/litigation/admin/2021/34-93807.pdf>.

should not be considered a substitute for, legal advice.