

MEMO# 35676

April 11, 2024

SEC Charges Stand-Alone Advisory Firm with Recordkeeping Violations for Off-Channel Communications

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TO: ICI Members SUBJECTS: Compliance
Litigation & Enforcement RE: SEC Charges Stand-Alone Advisory Firm with Recordkeeping Violations for Off-Channel Communications

On April 3, 2024, the Securities and Exchange Commission announced that it settled charges against a registered investment adviser for failures to maintain and preserve certain electronic communications and enforce its code of ethics.[\[1\]](#) The adviser agreed to pay a \$6.5 million penalty and implement improvements to its compliance policies and procedures to settle with the Commission.[\[2\]](#) Notably, this is the first SEC enforcement action concerning off-channel communications against a stand-alone adviser with no ties to a broker-dealer. The adviser's settlement undertakings are similar to those in other SEC off-channel communication settlement orders, both in terms of penalty size and remedial effort requirements.[\[3\]](#)

The SEC's Findings

Recordkeeping Failures

According to the SEC Order, from at least January 2019 through December 2021, the adviser's employees sent and received thousands of business-related messages using off-channel communications. For example, three senior officers and a managing director used personal devices to send and receive thousands of text messages related to firm business, including recommendations and advice about securities. Furthermore, the adviser did not access employees' personal devices to assess compliance with the firm's communication policies and did not monitor, collect, retain, or preserve these off-channel communications, as its policies and procedures required.

Potential Compromise and Delay of Commission Matters

By failing to maintain and preserve required records relating to its business, the adviser likely deprived the Commission of these off-channel communications in response to the

Commission's requests and subpoenas during the time period.

Pre-Clearance Policy Violations

Certain adviser employees also failed to adhere to provisions of the firm's code of ethics requiring them to obtain pre-clearance for all securities transactions in their personal accounts. In addition, the adviser's supervisors failed to ensure that certain required personal-trading reviews were timely conducted in compliance with the firm's pre-clearance policy. In one quarter in 2020, for example, a managing director effected numerous securities transactions in a personal account without pre-clearance, including transactions in a security owned by an adviser-managed fund.

Settlement

In settling, the adviser admitted to the facts set forth in the SEC Order, agreed to pay a \$6.5 million penalty, acknowledged that it violated, and agreed to cease and desist from violating relevant federal securities laws,^[4] and was censured by the Commission.^[5]

Remedial Efforts

The adviser also agreed to retain a compliance consultant to, among other things, conduct comprehensive reviews of its policies and procedures relating to the retention of electronic communications found on personal devices and the framework for addressing employee non-compliance with those policies and procedures. The compliance consultant will report findings and recommendations to the adviser and the Commission, and the adviser will adopt all recommendations contained in the report, with certain exceptions.

Kenneth Fang
Associate General Counsel

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Legal Intern

Notes

^[1] See In the Matter of Senvest Management, SEC Administrative Proceeding File No. 3-21900 (Apr. 3, 2024) ("SEC Order"), available at <https://www.sec.gov/files/litigation/admin/2024/ia-6581.pdf>; see also SEC Charges Advisory Firm Senvest Management with Recordkeeping and Other Failures (Apr. 3, 2024), available at <https://www.sec.gov/news/press-release/2024-44>. "Off-channel communications" refer to the use of various communications platforms that fall outside an investment adviser's official recordkeeping channels.

^[2] SEC Order at 9.

^[3] Compare with In the Matter of HSBC Securities (USA) Inc., SEC Administrative Proceeding File No. 3-21408 (May 11, 2023), available at <https://www.sec.gov/files/litigation/admin/2023/34-97476.pdf> and In the Matter of Fifth Third Securities, Inc., SEC Administrative Proceeding File No. 3-21765 (Sept. 29, 2023), available at <https://www.sec.gov/files/litigation/admin/2023/34-98627.pdf>. See also Sanjay Wadhwa, Deputy Director, Division of Enforcement, SEC, Remarks at the Practicing Law

Institute's The SEC Speaks In 2024 (Apr. 3, 2024), available at <https://www.sec.gov/news/speech/sanjay-wadhwa-sec-speaks-2024-04032024> (noting that the size of recordkeeping violation penalties in recent years has ranged from \$2.5 million to \$125 million).

[4] SEC Order at 2 ("[The adviser] violated Sections 204, 204A, and 206(4) of the [Investment Advisers Act of 1940] and Rules 204-2(a)(7), 204A-1, and 206(4)-7 thereunder. . . . [the adviser] failed reasonably to supervise its employees within the meaning of Section 203(e)(6) of the Advisers Act.").

[5] Id. at 9.

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