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The SEC's Recent Off-Channel Communications Settlements Create More Uncertainty: Morgan Lewis

Since December 2021, the US Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) have been conducting a sweep of Wall Street's "off-channel" communications—such as text messages, iMessages, WhatsApp messages—sent and received by employees of registered entities using their personal devices. Despite more than 80 SEC-settled orders in the off-channel space (and nearly as many with the CFTC), the path to compliance for broker-dealers, investment advisers, and other financial institutions is still far from clear and numerous questions remain.

BACKGROUND

The SEC's sweep first focused on the largest broker-dealers, then quickly expanded in scope. Over the last four years, more than 100 entities have settled off-channel recordkeeping charges, including broker-dealers, dually registered broker-dealer/investment advisers, standalone investment advisers, credit ratings agencies, and municipal advisors.

These firms have been charged with, among other things, violations of the recordkeeping rules promulgated under the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940. [1] Until recently, the settlements have included civil penalties ranging from five to nine figures (with nearly all in the many millions). The vast majority of settling respondents have also been required to retain independent compliance consultants (ICC) for multiyear engagements, a further significant expense. Additionally, in nearly all the settlements to date, the respondents were required to admit to the alleged conduct—typically a rarity in SEC settlements.

Continue reading.

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