

Personal Devices and Messaging Platforms in the Workplace: Tips, Tactics and Best Practices for In-House Counsel

Article By:

Seth D. DuCharme

David A. Shargel

Britt Cass Steckman

Margaret B. Beasley

Federal regulators have cracked down on the use of texts messages and messaging platforms for business communications, using their broad authority to root out record retention violations, resulting in significant fines and sanctions. In 2022 alone, the Securities and Exchange Commission charged 15 broker dealers and one affiliated investment advisor with widespread and longstanding failures by employees to maintain and preserve their communications from 2018 to 2021. In August 2023, both the SEC and the Commodity Futures Trading Commission hit another 11 brokerage firms for a total of \$550 million in fines, and one month later the SEC fined five more broker dealers with combined penalties of \$79 million.

While the financial services sector is the first to face enforcement actions, other sectors could feel an impact too. The Federal Energy Regulatory Commission, for instance, has reporting requirements and enforcement authority for violations of certain preservation obligations related to ensuring market transparency. While FERC has yet to focus on off-channel communications, traders and compliance personnel should take steps now should they find themselves the

target of a government investigation.

Moreover, the enforcement action need not relate specifically to the use of off-channel communications. Enforcement matters on other subjects regularly implicate use of mobile devices, and a record-keeping violation could easily manifest from an unrelated investigation.

If your company finds itself facing an enforcement action related to the use of off-channel communication, here are some best practices to follow to help ensure you have everything regulators might need and expect.

1. Create a Culture of Compliance.

Using WhatsApp and Signal often feels like you're talking "off-the-record" to your co-workers. Because messaging apps are easier and more convenient than email, users tend to let their guard down. Regulators know this, which is why your company's compliance practices need to evolve.

You can foster a culture of compliance by enforcing rules at the very top of the organization. Employees, no matter how senior, should face discipline if they aren't following your company's communications policies, or if they are actively instructing co-workers or reports to go off-channel to services like WhatsApp or Signal.

Practical Tips

- **Establish a clear policy on off-channel communications.**

2. Communicate Honestly.

Employees should be encouraged to come forward if they inadvertently violate a policy in good faith. They should also be aware that sending a message to move the conversation "offline" could trigger additional scrutiny. Regulators will also notice and raise suspicions if there's a communications gap during a period when a trader was busy and should've left a record of messages.

Open and honest internal communication is essential for any business to function properly. While notifying employees that their electronic messaging records are being monitored and preserved could have a “chilling” effect, it’s likely they will adapt to passive surveillance of their communications.

Practical Tips

Enhance New Technologies for

Developing technology could help address the use of off-channel communications in the workplace. For example, several software products have already been introduced to help preserve work-related messages, with more on the horizon. WhatsApp, for example, has introduced an enterprise version that archives messages, while some apps allow for separate accounts for work applications. Mobile device management software could also be used to ensure compliance with company and regulatory obligations.

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National Law Review, Volume XIII, Number 292

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