

New Administration's Stance Could Signal Fewer Off-Channel Enforcement Actions

By Anna Lyudvig - January 29, 2025

There's an increasing recognition that recordkeeping rules relating to communications, may not have kept up with all the changes in ways that people communicate today, according to Christopher Mills, Partner at Sidley.

Earlier this month, the Securities and Exchange Commission (SEC) announced charges against nine investment advisers and three broker-dealers for failures by the firms and their personnel to maintain and preserve electronic communications, in violation of recordkeeping provisions of the federal securities laws.

The firms admitted the facts set forth in their respective SEC orders, acknowledged that their conduct violated recordkeeping provisions of the federal securities laws, agreed to pay combined civil penalties of \$63.1 million, as outlined below, and have begun implementing improvements to their compliance policies and procedures to address these violations.



Christopher Mills

- Blackstone Alternative Credit Advisors LP, together with Blackstone Management Partners L.L.C. and Blackstone Real Estate Advisors L.P., agreed to pay a combined \$12 million penalty;
- Kohlberg Kravis Roberts & Co. L.P. agreed to pay a \$11 million penalty;
- Charles Schwab & Co., Inc. agreed to pay a \$10 million penalty;
- Apollo Capital Management L.P. agreed to pay a \$8.5 million penalty;
- Carlyle Investment Management L.L.C., together with Carlyle Global Credit Investment Management L.L.C., and AlpInvest Partners B.V., agreed to pay a combined \$8.5 million penalty;
- TPG Capital Advisors LLC agreed to pay an \$8.5 million penalty;
- Santander US Capital Markets LLC agreed to pay a \$4 million penalty;
- PJT Partners LP, which self-reported, agreed to pay a \$600,000 penalty

Mills, who advises clients on a comprehensive range of enforcement and compliance issues relating to the federal securities laws, said that the recordkeeping rules are also less flexible than some regulations.

"These settlements show that over the last few years the regulators have not been giving firms the benefit of the doubt on close calls," he said.

"More and more, some Commissioners at the SEC have begun to publicly question that very aggressive approach," he told Traders Magazine.

"With the change in administrations and acting-SEC Chair Uyeda and Commissioner Peirce voting against the most recent wave of off-channel actions, it looks like there may be less of an appetite going forward to bring enforcement actions solely based on these types of recordkeeping issues," he added.

Each of the SEC's investigations uncovered the use of unapproved communication methods, known as off-channel communications, at these firms.

As described in the SEC's orders, the firms admitted that, during the relevant periods, their personnel sent and received off-channel communications that were records required to be maintained under the securities laws.

The failures involved personnel at multiple levels of authority, including supervisors and senior managers.

The firms were each charged with violating certain recordkeeping provisions of the Investment Advisers Act or the Securities Exchange Act. The firms were also each charged with failing to reasonably supervise their personnel with a view to preventing and detecting those violations.



Lara Thyagarajan

According to Mills and his colleague Lara Thyagarajan, Partner in Sidley's New York office, and a member of the global Securities Enforcement and Regulatory practice, these are the latest wave of settlements on these issues.

"The retention of off-channel communications such as text messages, WhatsApp messages and the like have been a significant focus for the SEC, the CFTC, and FINRA since 2021 when the first case was settled. Regulators have ordered billions of dollars in fines in these cases," they said.

Thyagarajan added that one of the major challenges facing the industry is that there isn't any one-size-fits-all approach that will work for every financial services firm.

"The right approach will depend on the firm's business, its practices, and the different platforms or channels its personnel use to communicate with colleagues and others about business," she said.

"All manner of financial services firms have spent millions of dollars and countless hours to enhance their recordkeeping systems and procedures to either address or get ahead of potential issues. That said, the regulators have never provided clear, specific guidance on what type of content in these types of messages triggers the recordkeeping requirements," she added.

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