

E-Mail Discovery

E-Message Retention under US Securities Law

Compliance brief by Benjamin Wright, JD

In the US, securities regulators – such as the Securities and Exchange Commission (SEC) and the National Association of Securities Dealers (NASD) – have for some years required that securities broker/dealers retain records of e-mail and instant message communications. The reason for the requirement is that broker/dealers are highly regulated.

Individual professionals within securities firms are subject to close supervision by managers. Regulatory authorities believe that records of electronic communications are critical to both external monitoring by the authorities themselves and to internal supervision by managers within firms. In other words, good electronic records enable regulatory audit and compliance.

Specifically, broker/dealer firms must retain those e-mail and Internet communications (including inter-office communications) which relate to the firm's "business as such." SEC Rule 17a-4(b)(4), <http://www.law.uc.edu/CCL/34ActRIs/rule17a-4.html>

SEC Rule 17a-4 defines the classes of records that brokers/dealers are required to preserve, as well as how long these records must be stored. It sets reliability standards for the media on which electronic records are stored.

Rule 17a-4(b)(4) and NASD Rule 3110, http://finra.complinet.com/en/displaydisplayhtml?rbid=2403&element_id=3734 - require each firm to preserve for a period of not less than three years (the first two years in an easily accessible place) originals of all communications received and copies of all communications sent by the firm or its employees relating to its business.

NASD Rules 3010 and 3110 require that a securities firm monitor and supervise the external transactions and communications of its professionals.

If an NASD member firm permits instant messaging, it must use an IM platform that enables the firm to monitor, archive, and retrieve message traffic. Further, the firm must supervise the use of instant messaging consistent with the required supervision of e-mail. NASD Rule 03-33 hyperlink, <http://www.advisormail.net/emailcompliance/NASD-03-33.asp>

The SEC, the NASD and the New York Stock Exchange have a history of enforcing record retention rules on securities firms.

For example, August 2004, the SEC fined four firms (Adams Harkness, Inc.; Needham & Company, Inc.; JanneyMontgomery Scott LLC; and Morgan Keegan & Co.,Inc.) for violating the recordkeeping requirements of Rule 17a-4. The firms had failed to record business-related internal e-mail communications.

March 2004, the SEC fined Banc of America Securities \$10 million for its tardy and haphazard compliance with an SEC investigation demanding disclosure of employee e-mails. The fine demonstrated the SEC's serious expectation that firms possess required e-mail records and be able to produce them when demanded. See http://www.boston.com/business/articles/2004/03/11/bank_of_america_fined_record_10m/

Canadian authorities propose to impose similar record retention rules on securities firms in that country. See http://legal-beagle.typepad.com/wrights_legal_beagle/2008/11/canadian-securities-firms---electronic-record-retention.html



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