

Investment Management

December 21, 2018

SEC OCIE Issues Guidance on Recordkeeping Requirements for Electronic Messaging

By **Peter D. Greene, David L. Goret, Scott H. Moss, Benjamin Kozinn, and Joseph S. Hendricks**

On Dec. 14, 2018, the SEC's Office of Compliance Inspections and Examinations (OCIE) published its "Observations from Investment Adviser Examinations Relating to Electronic Messaging" Risk Alert. OCIE's observations focused on whether and to what extent advisers complied with the Books and Records Rule and adopted and implemented policies and procedures as required by the Compliance Rule. To no one's surprise, the key takeaway of the examinations was that use of electronic messaging by advisers is "pervasive," and thus, advisers should implement policies and procedures to monitor and capture electronic communications consistent with certain best practices enumerated by OCIE in the Alert.

In our experience, many registered investment advisers prohibit the use of personal social media and email accounts for business purposes. While prohibiting the use of personal social media and email accounts for business purposes, advisers typically implement (i) training, (ii) limited testing of personal accounts, and (iii) required periodic certifications of adherence covering such prohibition. Where the investment adviser uses social media and email for business purposes, it is typically done through firm-provided, recorded, and monitored email and social media handles. In addition, the use of electronic messaging platforms can be uneven among investment advisers, with digital advisers leading the way in novel uses of electronic messaging platforms for business

purposes. Among different types of investment advisers, many firms do not provide employees with laptops or cellphones, allowing employees to access firm systems from personal devices.

In light of the proliferation of electronic messaging platforms in recent years and the variety of ways in which advisers use these platforms, the SEC has sharpened its focus on the use of electronic messaging as a core element of the compliance programs of registered investment advisers. While electronic messaging presents new and unique challenges to advisers and compliance personnel, the universe of tools, services, and service providers available to oversee electronic messaging has also grown. For that reason, we believe it is incumbent upon compliance professionals to take to heart the OCIE recommendations contained in the Alert and, as with all elements of a modern compliance program, leverage personnel and technology to promote, monitor, and ensure that any permitted use of electronic messaging complies with the requirements of the Advisers Act.

The full text of the Alert can be found [here](#).

Contacts

Please contact either author of this article or any other member of Lowenstein Sandler's Investment Management Group for further information on the matters discussed in this alert. Similarly, we are available to assist you in developing best-in-class policies and compliance programs for your firm in accordance with all applicable rules and regulations and industry standards.

PETER D. GREENE

Partner

T: 646.414.6908

pgreene@lowenstein.com

SCOTT H. MOSS

Partner

T: 646.414.6874

smoss@lowenstein.com

JOSEPH S. HENDRICKS

T: 646.414.6805

jhendricks@lowenstein.com

DAVID L. GORET

Partner

T: 646.414.6837

dgoret@lowenstein.com

BENJAMIN KOZINN

Partner

T: 212.419.5870

bkozinn@lowenstein.com

NEW YORK

PALO ALTO

NEW JERSEY

UTAH

WASHINGTON, D.C.

This Alert has been prepared by Lowenstein Sandler LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. Lowenstein Sandler assumes no responsibility to update the Alert based upon events subsequent to the date of its publication, such as new legislation, regulations and judicial decisions. You should consult with counsel to determine applicable legal requirements in a specific fact situation. Attorney Advertising.