

Future of Off-Channel Communications in Financial Services

Trends, Challenges, and Solutions



“Can we just be done with off-channel enforcement now?”

This was a question posed by a senior member of a major law firm to a regulator at a recent SIFMA conference.¹

He continued, “Can’t we all just stop text messaging?” referencing SEC Enforcement Head Gurbir Grewal, who stated that enforcement actions are producing the intended result of changing firm behavior.²

The contrast in the two questions — asked by a single person — provides a good snapshot of where the industry stands now, two years into the regulatory focus on the use of unapproved communications tools: wildly divergent views on even the basic root cause of the issue.

The reality is that people will not just stop using text messaging. However, the problem doesn’t lie with text messaging, WhatsApp, or any other technology. It’s about behavior. The ongoing discussions and search for best practices in the industry highlights that it remains embedded in many parts of the industry as a reality of how business has always been done.

In this brief, you’ll learn:

- **How enforcement actions are driving change across the financial services industry**
- **What proactive steps firms are taking to address this challenge, including new policy updates, training and technologies**
- **How the regulatory landscape and scrutiny over off-channel communications is expected to continue evolving in the year ahead**

1. SIFMA AML 2024

2. Sun, Mengqi. “SEC Top Enforcer Says Tougher Penalties Are Working.” *Wall Street Journal*, December 2023.

Have enforcement actions been effective in changing behavior?

The short answer is a qualified “yes.” Firms are now aware. The qualified aspect is that we continue to hear examples of firms that view the use of unapproved tools as a part of doing business, particularly with personal mobile devices. Businesses will not be deterred if that is how they engage with their most important clients. However, the [decrease in average settlement sizes](#) since January 2024 is having an impact.

Sanjay Wadhwa, Deputy Director, Division of Enforcement at the SEC, recently noted several of the factors the agency considers when assessing what penalty to recommend in each action, including:³

- **Size of the firm:** The size and revenue of the firm are reviewed to ensure the penalty is “adequate to serve as a deterrent against future violations”
- **The scope of the violations:** How many individuals were involved in using unapproved channels
- **A firms’ efforts to comply with recordkeeping obligations and prevent off-channel communications:** This includes timely adoption of technology and other solutions
- **Precedent:** The SEC has now issued 40 settled orders since December 2021 and these are taken into consideration
- **Self-reporting:** Self-reporting is “the most significant factor” when it comes to the size of the penalty amounts, according to Wadhwa
- **Cooperation:** Even firms that do not self report can receive credit based their cooperation during an investigation

While none of the regulators have offered a step-by-step roadmap toward the highly prized “cooperation credit,” firms appear to be paying close attention to the language in settlement letters, resulting in smaller fines. Many of these letters outline that the involved firm take steps that include proactive inspection, self-reporting, and remediating gaps in compliance controls.

3. Wadhwa, Sanjay, Deputy Director, Division of Enforcement.
Remarks at SEC Speaks 2024, April 2024

What did firms do in 2023 to improve visibility into this topic?

Many firms have implemented changes in policy, procedures, and training programs. That has included expanding processes to evaluate new tools for potential risks and evaluating existing supporting tools as they deploy new features and capabilities, such as Microsoft's launch of Co-Pilot, which is embedded into Teams and other M365 tools.

That challenge with existing tools is frequently raised as a top concern; technology providers continue adding new features and capabilities into collaborative and conferencing platforms such as whiteboards, break-out rooms, and voice and video recording.

Books and records requirements don't call out individual communications features. It's more important that firms capture, archive and index any sort of business-related communications. This is true regardless of whether that message resides in the cloud, contains interactive content, or consists of persistent chats, voice, video, whiteboards or other collaborative capabilities.

Some rationalization of communications tools is happening, driven by incremental risk and increasing pressures on financial services firms to cut costs. There are examples where firms have chosen to 'turn off-channel on' by examining:

- How an unsupported tool is currently being used
- What benefit is being produced to the business, either in the form of client satisfaction or internal productivity
- Whether a reliable means of capturing that technology currently exists in the market

Some tools, like ephemeral messaging apps like Snapchat, may never be suited for purpose. However, many can be leveraged to yield a complete and accurate historical record as required under SEC 17a-4 and other requirements.

What do we expect to happen next?

This challenge is far from over. As we've said many times, compliance gaps never disappear. They only move to the next technology that emerges.

What results is a perpetual game of whack-a-mole, where the job of compliance moves to the next target. Newer modalities of collaborative platforms, such as Microsoft Teams and Zoom, will likely be the source of future regulatory action.

What also appears inevitable is that the topic will not be the exclusive domain of financial services regulators. The Department of Justice stated that they will examine [corporate compliance programs](#) to assess how firms address this topic. This means that the impact of off-channel communications on e-discovery and non-regulatory-driven investigations is likely only the first large case away from becoming a reality.

What remains for firms are more complex questions regarding changes in oversight practices.

For some, that means continuing to tune lexicons past their high false positive rates toward greater effectiveness in spotting the leading indicators that off-channel activities may be happening. For others, this will mean continued acceleration in using large language models specifically built and designed to uncover patterns and behaviors while addressing the regulatory explainability requirements from FINRA and the SEC.

What lies ahead is the continued search for best practices. Smarsh will continue the dialog with firms and industry influencers to spot emerging practices that will help the industry come closer to a collective understanding of the risks of off-channel communications, and the most effective approaches to protect their businesses.



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