

What's Up With WhatsApp and Text Messaging? SEC and FINRA Weigh In

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The SEC requires broker-dealers to maintain originals of all communications received and copies of all communications sent by the broker-dealer relating to its business for three years. The SEC has explained that Rule 17a-4 “serves the important governmental interest of assisting adequate supervision of broker-dealers by the Commission and the SROs” and forms the basis for effective investor protection. See Commission Guidance to Broker-Dealers on the Use of Electronic Storage Media under the Electronic Signatures in Global and National Commerce Act of 2000 With Respect to Rule 17a-4(f), Release No. 34-44238, § III.D.1. It should come as no surprise that the SEC and FINRA recently have focused on the use of unapproved messaging channels ranging from the use of WhatsApp to simple texting on a personal device.

For example, Credit Suisse Group AG disclosed in March 2022 that the SEC was investigating a U.S. subsidiary's alleged use of unapproved messaging channels. HSBC and Goldman Sachs are also being investigated by the SEC for using personal messaging apps to conduct business. And Morgan Stanley recently disclosed that it is expecting to pay \$200 million related to a broad investigation into the use of unapproved personal devices.

In addition, the SEC has already imposed fines against two other broker-dealers in the amounts of \$100,000 and \$125 million, respectively, related to the use of unapproved messaging channels to conduct business.

FINRA has also brought enforcement actions and imposed sanctions in the form of suspensions and fines against registered representatives, personally, for using WhatsApp to conduct securities-related business.

The question does not seem to be whether any particular firm or its members will be investigated for compliance with SEC Rule 17a-4 or FINRA Rule 4511 and the use of messaging platforms such as WhatsApp, Signal, or texts, but when. The question of how to harmonize modern communication practices with record-keeping requirements also comes to the fore. While many broker-dealers have written supervisory procedures prohibiting the use of WhatsApp or personal devices to conduct business, the investigations and enforcement actions mentioned above — as well as everyday life experience — teach that such prohibitions may be unworkable in the long run. Instead, broker-dealers may wish to consider using technology to bridge the gap between the instant-message-centric modes of communication that permeate life in both personal and business contexts and Rule 17a-4 or FINRA Rule 4511.

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