



## Enforcement ramps up recordkeeping probe

*Industry groups warns Gensler on overreach*

Bill Myers | Carl Ayers - 9 hours ago

Nearly two-dozen investment advisers have received inquiries from the SEC's Enforcement Division over their firm's use of apps such as **WhatsApp** as the Commission's books-and-records crackdown widens, *RCW* has learned.

In November, the Division of Enforcement sent questionnaires to at least 20 firms, a source familiar with the ongoing investigation tells *RCW*. Questions center on how firms regulate and monitor third-party communications apps, and how such communications are logged and stored, the source said, speaking on condition of anonymity. The Commission warned the industry a **books-and-records** sweep was coming, shortly after regulators announced an \$125 million settlement with broker-dealer **JP Morgan** (*RCW*, Jan. 28, 2022).

Private fund advisers appear to be regulators' top targets here. Books-and-records were a featured problem of the second-ever risk alert for private fund advisers, issued early last year. Last fall, **Apollo**, **KKR**, **Carlyle** and **TPG** told their investors they were the subject of an SEC investigation over books-and-records problems (*RCW*, Dec. 2, 2022).

*RCW*'s source says the Commission's New York regional office has been the most aggressive in sending out document requests. *RCW* warned you last year that the questions were broader and deeper, and that regulators were targeting individual employees by name to have their phones swept (*RCW*, Feb. 4, 2022).

## Industry resists



Baker

Some industry advocates are organizing resistance against the SEC's crackdown. On Jan. 31, officials from 10 different trade associations signed a **letter** to SEC Chairman **Gary Gensler**. It warned him that the enforcement requests exceed "the scope of the recordkeeping provisions in the Advisers Act" and "raise concerns that the SEC will seek to shoehorn instances of non-compliance by employees of firms with reasonably designed policies and procedures into enforcement violations, and gives rise to serious privacy implications."

Regulators have been asking fund advisers for "*any* off-channel business communications," the groups say. The rules and regulations for advisers are much narrower than the rules and regs for B-Ds, the groups claim. It's "an overly broad interpretation of the narrow recordkeeping requirements" that is "inconsistent with the statutory requirements under the Advisers Act" and "raises policy concerns for advisers' compliance programs and discourages good governance practices by advisers."

Officials from the **Managed Funds Association**, **SIFMA**, the **Chamber of Commerce**, the **American Securities Association**, the **American Investment**

**Council, the Investment Company Institute, the Association for Corporate Growth, the Small Business Investor Alliance and the National Venture Capital Association** signed the letter. Among those who did not sign the letter was the **Investment Adviser Association**. The IAA hasn't responded to *RCW*'s requests for comment.

## In theory...

The groups' theory is intriguing, says **H. Gregory Baker**, chair of **Patterson Belknap**'s securities litigation group. The trouble is it requires a firm willing to risk fighting it in open court.

"There really isn't clear guidance on this because most of the record-keeping enforcement actions have come through settlements," Baker tells *RCW*. "I can clearly understand a broad, industry concern because there is a viable legal defense to what appears to be the SEC's interpretation of the SEC's record-keeping requirements. Minimally, it can offer a pathway to defense in a proceeding."

Baker thinks compliance officers should take a two-step approach here. The first is to focus on prevention. "The prudent thing to do is always take the more conservative approach," he says. "You want to take a broader view of what you think can and should be preserved. Employees shouldn't be communicating about client matters or business matters over text messages, ephemeral apps. Have robust information in place. Make sure everyone's trained."

The second is to understand that even if an exam unearths problems in your firm, remember "it's not really the end of the story," Baker says. "The questions must be asked, 'What were the nature of those communications? Were the employees trained? Did they understand the policies and procedures?' It's not just as simple as saying you can't communicate anything over these off-channel communications. This is more of an institutional, legal defense."

**Editor's note:** Books and records cases are subject to strict liability. Pick up some tips on protecting your firm [here](#).

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