

Schulte Roth&Zabel

**Investment Management Regulatory
& Compliance Update — Texts, Chats
and Other Electronic Messaging**

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SEC Electronic Communications Sweep and Recent Examination Experience

- **Background information**
- **Compliance program**
- **Recordkeeping**
- **Security and privacy of information**

SEC Sweep and Exam Requests — Scope

- “Instant messaging”
- “Text/SMS messaging”
- “Third-party applications”
- “Social networks”/“social media”

Today's Challenges

- Firm email
- Personal email
- IM platforms
 - Bloomberg
 - Bespoke systems
- Text messages/iMessage and SMS
- WhatsApp and WeChat
- Confide, Signal, similar “self-destruct” apps

Adviser Retention Obligations — Books and Records Rule (Rule 204-2)

- **Requires preservation of specific categories of records (and mandates their production)**
- **No specific requirement to retain all of an individual's or a firm's electronic communications under the Books and Records Rule**

Adviser Retention Obligations — Books and Records Rule

- Recommendations or advice (Rule 204-2(a)(7))
- Placing or execution of orders (Rule 204-2(a)(7))
- Complaints and responses thereto (Rule 204-2(a)(7))
- Advertisements, investment letters or other communications (Rule 204-2(a)(11))
- Memoranda indicating reasons for certain recommendations (Rule 204-2(a)(11))

Legal Bases — Rule 204A-1

- **If you are a registered investment adviser, you must establish, maintain and enforce a written code of ethics that includes:**
 - A standard of business conduct that you require of your supervised persons, which standard must reflect your fiduciary obligations
 - Provisions requiring your supervised persons to comply with applicable Federal securities laws

Legal Bases — Rule 206(4)-7

- **If you are a registered investment adviser, it is unlawful for you to provide investment advice to clients unless you:**
 - Adopt and implement written policies and procedures reasonably designed to prevent violation, by you and your supervised persons, of the Advisers Act and the rules thereunder

Adviser Retention Obligations

- **“General fiduciary” and “effective supervision” retention requirements**
 - SEC Staff generally expects investment advisers to retain and review emails, business related text message, and instant messages
 - Not uncommon for examination requests for all communications from and to specified individuals for a given period of time

Broker-Dealer Retention Requirements — SEC Rule 17a-4(b)(4)

- Requires broker-dealers to retain “originals of all communications received and copies of all communications sent ... relating to its business as such”
 - No definition provided for “business as such,” but, needless to say, the SEC reads it extremely broadly

Broker-Dealer Retention Requirements

- **FINRA Rule 3110(b)(4) requires members to have specific procedures for reviewing “incoming and outgoing written (including electronic) correspondence”**
- **Reviews of correspondence and internal communications must be conducted by a registered principal and evidenced in writing**

Policies

- Many advisers have “no business over personal email” policies
- Challenge is to address newer, non-captured communication platforms

What Should You Be Doing?

- **Inquiry (and evidence thereof) of non-captured platform use**
 - “Trust, but verify”
- **Surveillance**
- **Policy tailoring**
 - Supplement with training
 - BYOD or two devices?



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Brian T. Daly advises hedge, private equity and real estate fund managers on regulatory, compliance and operational matters. He has extensive experience designing and improving compliance processes and organizational systems and helps clients navigate their initial and ongoing regulatory compliance obligations under the rules and regulations of the Securities and Exchange Commission, the Commodity Futures Trading Commission, and the National Futures Association. Brian also regularly represents clients in enforcement actions, regulatory examinations, trading inquiries, and in seeking no-action or similar relief. Having spent nearly a decade in-house as general counsel and chief compliance officer of several prominent investment management firms, Brian is well-versed in the wide range of legal and business challenges facing investment advisers, commodity pool operators and commodity trading advisers.

Brian is a recognized leader in advising alternative investment fund managers on regulatory and compliance matters and is well-known for his thought leadership in this area. He also regularly represents managers in examinations, investigations, and enforcement actions in both the securities and the commodity futures sectors. *Chambers Global* and *Chambers USA* list Brian as a “leading individual” in investment funds, noting that he is “especially skilled at assisting clients with the development of strategic compliance programs.” Interviewees also praise him for knowing “what it’s like on the ground” and for providing “practical and meaningful advice.” In addition, Brian sits on the New York City Bar Association’s Private Investment Funds Committee, and he is a chair of the Steering Committee for the Managed Funds Association’s CTA/CPO Forum and a member of the CFTC Working Group for the Alternative Investment Management Association. He formerly served as co-chair of the MFA’s General Counsel Forum, its CTA, CPO & Futures Committee, and as a steering committee member of its Investment Advisory Committee. In addition to his legal practice, Brian taught legal ethics at Yale Law School. Brian received his J.D., with distinction, from Stanford Law School.



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Marc E. Elovitz is chair of the firm's Investment Management Regulatory & Compliance Group. He advises hedge funds, private equity funds and real estate funds on compliance with the Investment Advisers Act of 1940 and other federal, state and self-regulatory organization requirements, including establishing compliance programs, registering with the SEC and handling SEC examinations. Marc provides guidance to clients on securities trading matters and represents them in regulatory investigations and enforcement actions, arbitrations and civil litigation. He also regularly leads training sessions for portfolio managers and analysts on complying with insider trading and market manipulation laws.

A member of the American Bar Association's Business and Litigation Sections and the Hedge Funds Subcommittee of the Committee on Federal Securities Regulation, Marc is a frequent speaker at hedge fund industry conferences and seminars. In addition, he co-authors the "Market Manipulation" chapter in the leading treatise, *Federal Securities Exchange Act of 1934* (Matthew Bender) and wrote the chapter on "The Legal Basis of Investment Management in the U.S." for the Oxford University Press book, *The Law of Investment Management*. After graduating with honors from Wesleyan University in 1986, Marc attended New York University School of Law, from which he was awarded his J.D. degree in 1990.



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In his previous role as a Special Assistant U.S. Attorney for the Eastern District of New York in the Business and Securities Fraud section, he prosecuted allegations of securities fraud, insider trading, mail and wire fraud, money laundering and tax offenses. Craig also previously served as senior counsel in the enforcement division of the SEC, where he investigated and prosecuted numerous violations of federal securities laws, including insider trading, accounting fraud, offering fraud, Ponzi schemes and broker-dealer improprieties. Craig started his career as an associate in the business and securities litigation section at a New York-based Am Law 100 firm and also served as a law clerk to the Honorable Lawrence M. McKenna of the U.S. District Court for the Southern District of New York.