

E-mail And Document Retention For Investment Advisers

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Why Care About E-mail Compliance?

- **Perlman vs. Morgan Stanley**
- **Zubulake v. UBS**
- **SEC, NASD and NYSE vs. Deutsche Bank Securities, Inc., Goldman, Sachs & Co., Morgan Stanley & Co., Inc., Salomon Smith Barney, Inc., and U.S. Bancorp Piper Jaffrey Inc.**
- **SEC: “This will be the year of zero tolerance.”**

Examinations

❖ Entitled to review all E-mail

- Retained by adviser
- Instant messages

Examinations

- ❖ **Excludes E-mail that fall under the attorney client privilege**
 - **But may ask to see a privileged E-mail log**
 - **Advice: create policies and procedures mandating that only privileged E-mail were excluded**

Examinations

❖ Requests for E-mail will:

- Vary from examination to examination
 - Depend on the size of the adviser
 - Number of employees, etc.

Examinations

❖ Requests may include:

- All E-mail for a specific time period
- All E-mail for certain employees
- Certain categories of E-mail
- Certain “Hot Topics”

Examinations

❖ Scope of Rule 204-2

- Applies to the communications among the adviser's employees

Examinations

❖ Production requirement

- Within 24 hours of receipt of a request

Compliance

- ❖ **Permitted to maintain records electronically if:**
 - **Establish and maintain procedures**
 - **To safeguard the records from loss, alteration, or destruction**
 - **To limit access to the records to authorized personnel**
 - **To ensure that electronic copies of non-electronic originals are complete, true, and legible**

Compliance

❖ Preparing an E-mail retention policy

- 2 methods
 - Retain all
 - Retain some and delete rest

Compliance

❖ **If the latter, need system in place, requiring:**

- **Designate responsible supervisor**
- **Refrain from using outside E-mail network**
- **Identify and preserve records**

Compliance

Need system in place, requiring (contd.):

- **System describes how E-mail is identified**
- **Deletion and disposal maintains confidentiality**
- **Training**
- **Annual review**

Compliance (Whichever Retention System)

❖ Policies and practices should include:

- Remote location storage
- Limited access
- Maintaining employee E-mail
- Publicizing lack of privacy rights

Compliance

Policies and practices should include (contd.):

- **CCO review and evidence of that review**
- **Monitoring for unusual activity, complaints, etc.**

Compliance

❖ Types of E-mail advisers must maintain:

- E-mail between employee and public regarding advisory business
- Advertising E-mail
- Order execution E-mail between trader and manager

Compliance

Types of E-mail advisers must maintain (contd.):

- **E-mail related to the execution of securities transactions**
- **E-mail complaint**
- **E-mail between compliance department and manager regarding complaints**

Compliance

Types of E-mail advisers must maintain (contd.):

- **E-mail sent to clients discussing proposed trades**
- **E-mail between adviser and custodian regarding disbursing adviser's management fee**

Compliance

❖ E-mail programs:

- AdvisorMail
- Global Relay's Record Keeper
- iLumin Software Services' Open Text and Veritas
- Microsoft's Outlook

Compliance

❖ Concern:

- If no central location, may require use of a separate server

Compliance

❖ WORM

- Write Once, Read Many
- Not required by the SEC

Next Frontier

❖ **The following can result in a required record subject to Rule 204-2 if you create a hard copy/e-copy and save and/or maintain it:**

- **Voicemail**
- **iPods**
- **Instant messages**

Questions



Thank You

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