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## E-mail And Document Retention For Investment Advisers

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**Shaheen, Novoselsky, Staat, Filipowski & Eccleston, P.C.**

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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."**

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## Examinations

**❖ Entitled to review all E-mail**

- **Retained by adviser**
- **Instant messages**

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## 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

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## Examinations

❖ **Requests for E-mail will:**

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

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## 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"

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## Examinations

❖ **Scope of Rule 204-2**

- **Applies to the communications among the adviser's employees**

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## Examinations

❖ **Production requirement**

- **Within 24 hours of receipt of a request**

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## 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**

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## Compliance

❖ **Preparing an E-mail retention policy**

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

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## Compliance

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

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

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## Compliance

Need system in place, requiring (contd.):

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

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**Compliance**  
**(Whichever Retention System)**

❖ **Policies and practices should include:**

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

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**Compliance**  
Policies and practices should include (contd.):

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

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**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**

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### 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**

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### 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**

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### Compliance

❖ **E-mail programs:**

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

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## Compliance

❖ **Concern:**

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

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## Compliance

❖ **WORM**

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

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## 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

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# Questions

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# Thank You

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