Press Coverage | November 2, 2022

Keeping a Record: Managers Must Archive Communications to Avoid SEC Fines

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Jay A. Dubow

Jay Dubow, a partner and co-leader of Troutman Pepper's Securities Investigations + Enforcement Practice Group, is quoted in the November 2, 2022 *FIN News* article, "Keeping a Record: Managers Must Archive Communications to Avoid SEC Fines."

The Securities and Exchange Commission is turning its attention to big investment firms, digging deeper and cracking down on major banks using clandestine or encrypted messaging apps that ensure only the sender and recipient can read communications, said Jay Dubow, a partner at Troutman Pepper who co-leads the firm's Securities Investigations + Enforcement Practice Group, noting that "the key point is being able to archive the communications" to avoid a fine.

"This is a situation that it was clear that the SEC saw this was happening at many firms and as a result they're certainly looking. They're doing examinations of firms, which they do routinely," Dubow said.

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"The SEC requires that brokerage firms and other similar types of firms keep communications relating to investments [for a couple of years]. Certainly, communications with their clients [and] with investors. And if you're using these kinds of other communication devices that don't do that, it creates a problem and by itself is in violation of the Federal Securities Laws," he said.

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"First, they have to check their policies and procedures to make sure that they make it clear to their employees that they cannot use the types of messaging apps to communications that they have found to create problems and issues already by the SEC," he said.

"Then, you have to go through training of your employees and make sure they understand what's in those policies and procedures, and then test [if] they [are] in fact following the policies and procedures because there are times that you can have the best procedures in the world, but if people don't understand them and they are not following them, then it doesn't matter what your policies and procedures are," he continued.

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“I think a lot of it is just communicating with their own employees that they can’t use these types of communication channels that the securities laws require that the communication is being able to be archived in some way. They can’t use these channels, which are in fact designed to not do that. They’re designed in many cases to be ephemeral in a way and not retain any trail, so to speak, of what was discussed or communicated.”

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“It’s really important [for firms] to make sure that their employees are being careful and only using communication apps or communication channels that are approved by the firm,” he said.

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“We do have attorneys who go in and review these policies and procedures for clients to make sure that they are up to date and address these and other issues to keep them in compliance with the Federal Securities Laws. As they evolve, we can also do training for employees, if requested, and they can be large scale-training or [for] smaller groups. We can also help devise plans to test these procedures,” Dubow said. “We also can and have been helping some clients that have had activities that the SEC has concerns with, and when clients are in those positions, we represent them in connection with investigations and help try to mitigate the results of those types of investigations.”

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