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Industry approach on e-mail continues to evolve

It should come as no surprise that e-mail retention continues to be one of the biggest concerns for many firms. With the recent Morgan Stanley fine – the biggest ever against a firm for failing to retain and produce email – it is clear that the SEC will pursue e-mail enforcement cases and will levy heavy fines against firms that stymie investigations through shoddy recordkeeping or e-mail production.

What isn't so clear, though, and what trips up many firms, is how to retain and monitor the data effectively, said Michael Caccese, a partner with Kirkpatrick & Lockhart Nicholson Graham. The SEC guidance on email retention is still pending at the Division of Investment Management, with no word on when it will come out. In the meantime, SEC examiners are requesting e-mail going back years, in some cases, Caccese said. "They (SEC examiners) are going back through firm records and that's what's causing the problem."

Whereas in the past, the SEC typically wanted e-mail from just the top three principals of a firm for certain months, now examiners often ask for specific employee emails, said **Kristina Klein**, director of sales at e-mail retention vendor [ZipLip](#). Examiners are asking for email with particular search words or phrases in them now, as well, she asserts.

Even the expected turnaround time on producing e-mails to the SEC may increase, Klein said. Eventually, the Commission may expect a four-hour turnaround, said Klein, whose company occasionally advises the SEC on the industry's electronic capabilities. The SEC is looking to invest in more forensic testing technology, especially with e-mail, which may lead to greater access by examiners into firm communications, said Paul Johns, vice president of global marketing at Orchestra, an e-mail vendor whose clients are primarily large investment advisers and broker-dealers. "Once the regulators know it's possible, they will begin demanding it," said Johns, whose firm also advises the SEC, NASD and New York Stock Exchange on e-mail issues.

Firms now addressing blogs, personal e-mail.

The good news is that fewer investment advisers have violated compliance rules in e-mail because most adviser employees realize now that their e-mail is being monitored, Klein said. More firms are sensitive now to the problems associated with personal e-mail use, blogs and instant messaging, and are taking steps to ensure such communications are monitored and retained.

One compliance official from a large investment adviser said that his firm requires employees to send only work e-mail through the work account, even though access to personal e-mail isn't blocked as it is at other firms. However, the firm's policy also states that any email message, even one sent via a personal e-mail account, is subject to the firm's regular policies and procedures and legally "belongs" to the firm. "On the one hand, you don't want to be too open ... but you [also] don't want a policy you can't enforce," he said.

"The big thing is Bloomberg," which has instant messaging portals built in, Caccese said. Although Bloomberg offers an automatic backup of messages sent over its terminals, firms must pay extra for that feature, he said. Klein agrees, noting that she has run across

a lot of embarrassing and inappropriate instant messages from Bloomberg terminals, though the messages haven't necessarily been compliance risks.

Regulators are looking more at instant messaging use among broker dealers as a way to make trade orders, and that scrutiny may trickle down to investment advisers as well. Robert Colby, acting director at the SEC's Division of Market Regulation, said that instant messages are "written communications and they have to be cared for as part of the firm's record-keeping requirements."

Blogs have caught on among advisers in the past several months, and instant messaging is being used consistently by hedge funds, according to Steve Uhring, vice president of sales and marketing at vendor LiveOffice. In most cases, the firms want everything kept out of fear that the SEC will request it in examinations down the line, he said. Here are some tips to improve your e-mail retention policies and procedures and monitoring processes:

→ **Give reviewing "privileges" to department managers.** When it comes to e-mail monitoring, the best advice is to work smart instead of hard, Klein said. Many chief compliance officers have precious little time to sit and review e-mail every week. You may want to delegate the task of reviewing employee e-mail to managers. This way, you not only ensure problems are handled at the "local level," but also that the tone of compliance is maintained among the department heads, she said.

→ **Retain e-mail based on the source *and* the content.** Johns said that retaining e-mails based on whether the content of the subject or body contains compliance-related matters can be tricky because of the nuance involved. For example, trying to retain market timing-related email by searching "market" and "timing" in the body could turn up a number of unrelated e-mail messages. But focusing also on the source of the e-mail – a portfolio manager e-mailing a hedge fund partner, for instance – can turn up pertinent e-mail and save time, he asserted.

→ **Focus more on your policies and procedures, and less on technical firewalls.** In some cases, it may be technically impossible to block certain types of e-communications, such as personal e-mail accounts or instant messaging, Klein said. "You could have your IT staff check desktop computers to see if they have public IM set up, but why waste time?" Instead, rely on policies and procedures to ingrain the mentality in employees that all work-related communications need to go through the firm's Web portals.

→ **Consider doing pre-review for selected new employees.** Although it may be onerous, you may want to pre-review e-mails sent out by some new employees to ensure they understand your firms' policies and procedures, Uhring said. This involves reviewing the e-mail after it is sent, while it is held in a queue, but before it is received.

→ **Don't forget to assert attorney-client privilege before you turn over certain records.** Although the SEC has stated that it has a right to inspect nearly all electronic communications, some are protected. But make sure you assert privilege before you turn anything over, said Uhring, who had a client who forgot to do this recently. Once the SEC receives any e-mail, "the cat's out of the bag."

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