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BEFORE THEY CALL YOU

Recordkeeping, Sweep Examinations, and the Case for Self-Reporting

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PROGRAM OVERVIEW

Program Roadmap

01

The Off-Channel Communications Sweep: What Happened and Why It Matters

The sweep model, penalty variance, and what the off-channel case study reveals

~12 min

02

What a Well-Documented Compliance Program Actually Looks Like

Written supervisory procedures, annual reviews, and what 'reasonable' supervision requires

~10 min

03

When the Examination Begins: The First Thirty Days

Document request anatomy, privilege management, and who should be in the room

~10 min

04

The Cooperation Decision: Self-Reporting, Remediation, and Credit

The Grewal framework, what self-reporting actually produces, and remediation that moves the needle

~10 min

Before They Call You: Cooperation Is the Whole Ballgame

Calling the regulator before the regulator calls you is the single most consequential decision available to a firm that has identified a compliance problem. It generates the most cooperation credit, produces the most favorable resolutions, and is also the recommendation most clients are instinctively reluctant to follow.

The sweep model, the compliance program, and the examination response are the road. The cooperation decision is the destination.

SECTION 01

The Off-Channel Communications Sweep: What Happened and Why It Matters

01

The sweep model, the penalty range, and the enforcement lessons it produced.

1.1 Scale, Scope, and Why This Sweep Is the Defining Case Study

1

What the Sweep Was

- More than one billion dollars in penalties across more than seventy firms over two years - the largest coordinated recordkeeping enforcement initiative in SEC and FINRA history by total penalty volume
- The sweep targeted failure to preserve business communications under Exchange Act Rules 17a-3 and 17a-4 - the obligation to retain records in a retrievable format
- Firms had adopted encrypted messaging apps and personal device communications faster than their compliance programs could adapt, leaving systematic gaps between what the rules required and what was actually being preserved

2

How It Expanded

- Began with the largest wire houses in 2021–2022; by 2023 had reached regional broker-dealers, municipal advisors, and credit-rating agencies
- In 2024, for the first time, standalone registered investment advisers were swept - a category that had not previously been a primary recordkeeping enforcement target
- The expansion to RIAs signals that no firm is below the threshold of regulatory attention. Size is not a shield. The sweep finds what the compliance program failed to address, not what the firm chose to hide

3

What Made It a Billion-Dollar Event

- The conduct was not fraudulent - it was structural. Virtually every regulated firm had the same gap between firm policy and actual practice
- The recordkeeping obligation is statutory and non-negotiable: business communications must be preserved in a retrievable format on demand. Convenience does not override the rule
- Once the sweep was launched, the question was no longer whether a firm would be examined. It was when - and in what condition their compliance program would be when the document request arrived

1.2 The Penalty Range and What Drove It

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Volume and Seniority

- Penalties ranged from $40,000 to $50 million in a single year - the variation was not random
- Firms with the largest number of non-compliant communications and the most senior people involved received the largest penalties
- A sweep finding involving a compliance officer is different from one involving managing directors and senior partners. Seniority of the violator amplifies the penalty significantly

2

Supervision Failures Were Weighted Heavily

- Firms that could not demonstrate any system for monitoring communications - not just a written policy - fared materially worse than those with documented, if imperfect, supervision programs
- The distinction examiners draw is between a firm that had a problem and a firm that had a problem and was not trying to detect it
- A written policy prohibiting off-channel communications with no evidence of supervisory review or enforcement provided no mitigation in the penalty analysis

3

Cooperation Credit Was Real and Measurable

- Firms that self-reported, produced documents promptly, and demonstrated proactive remediation received meaningfully lower penalties
- In several 2024 actions, firms received no financial penalty because of their cooperation posture. That outcome is not theoretical - it happened
- Two of six credit-rating agencies avoided both higher penalties and the compliance consultant requirement because of their cooperation relative to the sweep cohort

SECTION 02

What a Well-Documented Compliance Program Actually Looks Like

02

The difference between a real program and a paper program - and how examiners tell them apart.

2.1 Written Supervisory Procedures: Specific, Not Generic

1

What a Defensible WSP Requires

- Must address specific communications platforms by name - including platforms the firm prohibits - and must set out the supervisory review process for each approved platform
- Generic language prohibiting "unauthorized communications channels" without identifying those channels provides no protection in a sweep examination
- The supervisory review process in the WSP must be implemented in practice and documented. An examiner will ask to see records of supervisory reviews, not just the policy that says reviews will occur
- WSPs must be reviewed and updated at least annually with documentation of the update process

2

Annual Compliance Review Documentation

- The SEC's 2024 rule now requires RIAs to document annual compliance reviews in writing - a contemporaneous record examiners will request
- The review must cover all compliance program areas, produce written findings, and describe corrective actions taken or planned
- A review that skips recordkeeping because "we've never had a problem there" is itself a deficiency
- Timing matters: documentation must be contemporaneous with the review. A memo with a creation date three weeks after the initial document request will not generate cooperation credit

3

What 'Reasonable' Supervision Actually Requires

- A reasonable program includes: a documented inventory of approved platforms; a periodic review process for a sample of communications; a documented response process for policy violations; and evidence the response was followed
- The testing dimension is the most frequently missing step. Writing a policy and training employees satisfies the first two steps. Periodically testing whether the policy is being followed - and documenting the testing - is the step most firms skip
- Escalation procedures must specify what a reviewer does when they find a violation, who they report to, and what the firm does in response

2.2 The Technology Challenge and What Actually Solves It

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The Fundamental Problem

- The communications platforms employees prefer - because they are faster, more convenient, and more familiar - are precisely the ones that create recordkeeping gaps
- The compliance program must grapple with this reality. A policy that prohibits platforms employees continue to use, with no enforcement or testing, describes a paper program that an examiner will identify as such
- The gap between written policy and actual practice is what the sweep found everywhere. The programs that held up were the ones where the gap had been closed operationally, not just described in writing

2

Technology That Solves vs. Policy That Prohibits

- Firms that deployed compliant archiving solutions for approved messaging platforms - capturing and preserving communications from firm-managed channels - are in a materially better position than firms that rely solely on prohibition
- The bring-your-own-device question remains unsettled. The two defensible positions: prohibit business use of personal devices and document enforcement of that prohibition, or deploy a mobile device management solution that captures business communications from personal devices
- AI-powered communications monitoring tools are now being marketed to compliance departments. They are worth understanding but are not a substitute for the documented supervision program that regulators actually examine

3

What the Examiner Is Assessing

- The completeness and organization of the examination response signals the quality of the firm's underlying compliance function - before any substantive analysis begins
- What a firm cannot produce is itself informative. Missing suitability records, absent supervisory review documentation, and undocumented compensation arrangements are findings
- Firms that have built real programs - with documented testing, technology solutions, and evidence of supervisory follow-through - face a fundamentally different examination experience than firms that have policies but not programs

SECTION 03

When the Examination Begins: The First Thirty Days

03

The decisions made in the first thirty days set a trajectory that is difficult to reverse.

3.1 The Initial Document Request as a Diagnostic Tool

1

What the Request Tells You

- A broad, categorical initial request - covering all communications over a defined period across all platforms - typically signals the early stage of a sweep where the regulator is mapping the landscape
- A narrow, specifically targeted request - asking for communications between named individuals on specific platforms over a defined period - typically signals that the regulator already has information from another source: a complainant, a whistleblower, or documents produced by another firm in the sweep
- Experienced outside counsel reads the scope of the initial request as a signal about where the examination is already focused, not as a definition of its limits

2

Privilege and the Examination Response

- Communications between outside counsel and the firm are generally privileged. Communications between in-house compliance personnel and businesspeople frequently are not - even if in-house counsel is copied
- The fact that a communication relates to a legal matter does not make it privileged; the primary purpose must be legal advice
- Inadvertent privilege waivers are a consistent source of downstream problems. Producing a document that refers to privileged communications can waive privilege over a broader category of related materials
- The review process for examination productions must include a privilege screen, not just a responsiveness review

3

Who Is in the Room and Who Should Not Be

- Businesspeople are almost always the wrong primary point of contact with examiners. They have detailed knowledge, they want to help, and they frequently say things that are accurate from a business perspective but damaging from a regulatory perspective
- Examination interviews are not depositions - no right to object, no transcript, no real-time ability to correct the record. Witness preparation requires the same rigor as deposition preparation
- Senior executives who insist on being present during interviews create avoidable risk. Their presence signals that the firm views the examination as high-stakes - which escalates a routine examination into a focused investigation

3.2 Cycle Examination vs. Sweep Examination

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Cycle Examination

- A periodic review of the firm's overall compliance program. The initial document request is broad; the examination team is looking for general compliance program quality
- The most important outcome is a manageable deficiency letter rather than escalation to a focused investigation
- The strategic question: demonstrate compliance program quality across the board, respond promptly and completely, and avoid conduct that converts a routine review into a targeted inquiry

2

Cause-Based Examination

- Triggered by a specific complaint, referral, or red flag. The initial document request is narrower and more targeted
- The examination team already believes they know what they are going to find. The strategic question in the first thirty days is about controlling the scope of the inquiry, not demonstrating general program quality
- Outside counsel's first task is understanding what the regulator already knows - before producing a single document

3

Sweep Examination

- The most challenging type because the firm cannot control - or reliably know - what examiners are finding at the thirty other firms being examined simultaneously
- The standards being applied are being developed in real time across the sweep cohort. The firm's relative position within the cohort affects the outcome as much as its absolute compliance level does
- Treating a sweep examination the same way as a cycle examination is a mistake. The cooperation decision becomes more important, not less, because the penalty range is being set by what peers are doing

SECTION 04

The Cooperation Decision: Self-Reporting, Remediation, and Credit

04

The hardest question in this area of practice - and the one that determines how the matter resolves.

4.1 The “Grewal” Cooperation Framework: A Real Roadmap

1

The Five Principles

- Self-policing with appropriate safeguards: build a compliance program genuinely designed to detect violations - with updated policies, technologically current monitoring, and a culture that surfaces rather than suppresses compliance problems
- Self-reporting without delay: report to the relevant regulator promptly - before completing an internal investigation, before being certain the violation occurred, and before the regulator has shown up independently
- Proactive and timely remediation: address the violation before being directed to do so - discipline involved employees, update training, adopt new technology, and hire compliance personnel as needed

2

Cooperation That Goes Beyond the Minimum

- Above-and-beyond cooperation: go beyond the minimum required response - flag and explain documents, identify key witnesses, facilitate interviews, and present findings from internal investigations to the examination team
- Early, often, and substantive collaboration: engage with enforcement staff directly, provide regular updates on the internal investigation, and do not use cooperation as a tactical tool to delay or limit the regulator's inquiry
- Cooperation that is calibrated to appear cooperative while minimizing disclosure does not generate cooperation credit. Examiners have seen every version of performed cooperation, and the distinction is visible

3

What the Framework Has Produced in Practice

- In a 2024 sweep of eleven institutional investment managers, two firms received no financial penalty because of timely self-reporting, cooperation, and remediation. The other nine paid penalties ranging from hundreds of thousands to millions of dollars
- Two of six credit-rating agencies in the off-channel sweep received substantially lower penalties and avoided the compliance consultant requirement - a significant additional cost - because of their cooperation posture
- The compliance consultant requirement is worth understanding independently: when required as part of a resolution, the cost is significant, the process is intrusive, and the firm loses meaningful control over its compliance program

4.2 Self-Reporting and Creditable Remediation

1

The Self-Reporting Question

- The most difficult aspect of the cooperation framework: advising a client to call the SEC or FINRA before being certain a violation occurred, and before the regulator has any indication a problem exists
- Self-reporting generates the most significant cooperation credit available - in several 2024 sweep actions, firms that self-reported received no financial penalty at all.
- The threshold for self-reporting is not **certainty** - it is credible evidence that a violation may have occurred. Certainty is not a shelter.
- Self-reporting is not appropriate in every situation. When the scope is unknown, there are genuine questions about whether a violation occurred, or where early disclosure would prejudice proceedings

2

Remediation That Moves the Needle

- **Creditable** remediation: clawing back executive bonus compensation; disciplining or terminating employees directly involved; updating training programs in a documented, verifiable way; adopting new technology; hiring compliance personnel specifically designed to prevent recurrence
- **Non-creditable** remediation: policy updates that duplicate existing policies; training already scheduled for other reasons; personnel changes that would have occurred regardless of the examination
- Timing matters as much as substance: remediation **completed before** the deficiency letter is issued generates more credit than remediation completed during settlement negotiations

3

The Practical Challenge

- Advising a client to report a potential violation when the internal investigation is still ongoing, the scope is unknown, and the client is understandably reluctant to draw regulatory attention to a problem they have not yet fully understood
- That conversation requires both technical knowledge of the cooperation framework and a frank assessment of the realistic alternatives - including what the matter will look like if the examination arrives before the report is made
- The client that understands the cooperation framework early - before any examination begins - is in a fundamentally different position from the client that learns it during settlement negotiations

Three Things to Take Away

1

The sweep model has changed the risk calculus. Your client's exposure is a category risk, not just a firm-specific risk. The compliance program you build - or fail to build - before the examination arrives determines the outcome as much as the conduct itself.

2

The first thirty days of an examination are not administrative - they are strategic. Who is in the room, how documents are organized and produced, and how the privilege analysis is managed sets a trajectory that is genuinely difficult to reverse.

3

The cooperation framework is real, it requires institutional commitment, and it is not a performance. Firms that received no penalty in 2024 sweep actions cooperated substantively - they reported early, terminated employees, and rebuilt programs before being directed to do so.